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Automobiles-Gratuitous Bailee-Imputed Negligence

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RECENT CASE NOTES

AUTOMOBILES—GRATUITOUS BAALEE—IMPUTED NEGLIGENCE—The defendant was operating his automobile at an unlawful rate of speed and attempted to make a left turn in violation of the traffic code, thereby colliding with plaintiff's automobile which was being operated by plaintiff's wife. Plaintiff brings this action to recover for the damages to his automobile. The defendant sets up the contributory negligence of the plaintiff's wife by way of defense. *Held*: Such contributory negligence will not be imputed to the plaintiff so as to bar his recovery. *Lee v. Layton*, Appellate Court of Indiana, August 1, 1924, 167 N. E. 540.

The weight of authority and modern tendency is that the contributory negligence of a bailee is not imputable to the bailor, where the subject of the bailment is damaged by a third person. *Lloyd v. Northern Pacific R. Co.*, 107 Wash. 57; *Sea Ins. Co. v. Vicksburg, S. & P. R. Co.*, 159 Fed. 676; *New York, L. I. & W. R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338. The early cases, however, held that the bailee's negligence was imputable to the bailor; and that the bailor could only recover, where on the same facts the bailee might recover. *Illinois Central R. Co. v. Sims*, 77 Miss. 325; *Texas and P. R. Co. v. Tankersly*, 63 Tex. 57. *Weltz v. Indianapolis and V. R. Co.*, 105 Ind. 55, is often cited in support of this minority view, 17 L. R. A. (N. S.) 926; 6 A. L. R. 316; 45 C. J. 1027; but the Appellate Court, in their opinion in the principal case, attempt to distinguish it from the principal case.

The marriage relation in itself raises no presumption of agency, *Debenham v. Mellon*, L. R. 6 A. C. 24; and in the absence of such a relation in fact, the doctrine of imputable negligence is inapplicable; that is, negligence will not be imputed by reason of the marriage relation. *The Louisville, N. A. & C. R. Co. v. Creek*, 130 Ind. 139.

Under the facts of the present case the husband would clearly be liable for damages caused by the wife in a jurisdiction which adopts the family automobile doctrine. *Plasch v. Fass*, 144 Minn. 48; *Birch v. Abercrombie*, 74 Wash. 486. Therefore it would seem that the majority rule as to imputable negligence should be inapplicable in a jurisdiction which recognizes the family automobile doctrine, because to hold the husband liable for damages caused by the bailee and not make him subject to the defense of the bailee's conduct, would be inconsistent. However, Indiana has repudiated the family automobile doctrine. *Smith v. Weaver*, 73 Ind. App. 350; *McGran v. Cromwell*, 86 Ind. App. 107. Therefore the present decision appears to be both correct and consistent.

J. A. B.