Washington Law Review

Volume 5 | Issue 1

1-1-1930

Recent Cases

L. P. M.

with the respondent's assignor, Perry E. Joy The question arises whether the respondent would have any standing as party plaintiff and whether the Remington Cash Register Co., Inc., the apparent owner of the cash register according to the written contract, should be the party plaintiff in an action for *quantum meruit.*

The principle involved in this decision would seem to enhance the "uncertainties of litigation," if the prevailing party may expect the appellate court to send back the case for retrial piece-meal upon any possible form of action, which an incomplete record may suggest.

The Bar may be interested in the court's interpretation of the Rules regulating procedure and practice as placing the appellate court perhaps somewhat beyond the old-fashioned notion of a court of review, as exercising a voluntary regulatory function in the procedure of a particular case. E. B. HERALD.

RECENT CASES

ELECTION OF REMEDIES—ACTS CONSTITUTING ELECTION—INEFFECTIVENESS OF REMEDY—MISTAKE. Plaintiff was mortgagee of a valid chattel mortgage on A's lumber. A later became financially involved and delivered the lumber to defendant along with other assets. Plaintiff sued defendant in the first action on contract, on the theory that defendant had promised to pay the chattel mortgage. Judgment was entered dismissing that action on the ground that defendant did not assume and agree to pay the mortgage. Now plaintiff brings this action alleging conversion and defendant pleaded the former action as a defense. *Held* for the plaintiff. The first choice of remedy was merely a mistake and did not constitute such an election of remedies as to prevent the maintenance of this second action. *Spokane Security Finance Co. v. Crowley Lumber Co.*, 150 Wash. 559, 274 Pac. 102 (1929).

Election of remedies has been defined as the adoption of one of two or more coexisting remedies, inconsistent with each other, with the effect of precluding a resort to the others. 20 C. J. 3; *Phillips v. Rooker* 134 Tenn. 457, 184 S. W 12 (1916). It is also well settled that two or more inconsistent remedies must coexist for the doctrine of election of remedies to apply. Consequently, where the suitor has, in the first action, mistaken his remedy and adopted a mode of redress incompatible with the facts of his case, he is still free to elect and proceed anew. *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (n. s.) 144 and note (1906) *Zimmerman v. Robinson*, 128 Iowa 72, 102 N. W 814 (1905) 20 C. J. 21, 22 L. R. A. (n. s.) 1153, note. Washington has followed this rule of mistake of remedy in several cases, making the statement that there is no election of remedy when there is a good defense to the remedy chosen. *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713 (1909) *Roy v. Vaughn*, 100 Wash. 345, 170 Pac. 1019 (1918) *Harris v. Northwest Motor Co.*, 116 Wash. 412, 199 Pac. 992 (1922) *Warren v. Sheane Auto Co.*, 118 Wash. 213, 203 Pac. 372 (1922); *Godefroy v. Reilly*, 146 Wash. 257, 262 Pac. 639 (1928) *In re Pulver*, 146 Wash. 597, 264 Pac. 406 (1928)

The doctrine of election of remedies is often confused with that of choice of substantive rights. The former is not a rule of substantive law, but is merely a rule of procedure of judicial administration for the purpose

of protecting parties from vexatious litigation, and, like the statute of limitations, is somewhat arbitrary But since all procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs, it must never become more important than the purpose which it seeks to accomplish. A wrong move or mistake in the method of seeking relief from the courts ought not to furnish protection for a wrongful act. The test for the election of a remedy should be the efficacy of the remedy chosen, and if as a matter of fact or law, it subsequently develops that the remedy chosen did not in fact exist, the suitor should then be free to prosecute the correct remedy

Although it is often stated that the difficulty is not with the rule, but with its application to the facts as they are presened in a particular case (see *Capital City Bank v. Hilson*, 59 Fla. 215, 6 So. 189, 1912), it seems clear that the rule of mistake of remedy should apply in the principal case. It was determined by the trial court that the first action was futile because of inability to establish assumed facts essential to the existence of the remedy then pursued, therefore, the remedy there chosen was not available to the plaintiff and it was merely a mistake. Although the defendant has been inconvenienced by being required to defend two actions, that is slight injury compared to the penalty which would be inflicted upon the plaintiff if he were held to have forfeited a just and meritorious claim by his first mistake. L. P. M.

JOINT ADVENTURERS—NEGLIGENCE OF DRIVER OF VEHICLE NOT IMPUTABLE TO INVITEE—WHAT CONSTITUTES JOINT ADVENTURE. Two student football players, setting out to engage in their afternoon practice, discovered they had both left their locker keys at home. One, the driver of the car, offered to take the other, the plaintiff, with him while he went after his key, saying he would drive past plaintiff's home so he also could get his key. In the collision with defendant's stage which followed, plaintiff was injured and seeks to recover in spite of the contributory negligence of his companion, who was driving. The question is whether the doctrine of joint enterprise is applicable so as to defeat recovery. *Held*: Plaintiff was an invitee of driver rather than one engaged in joint adventure with him. *Rosentrom v. North Bend Stage Line*, 54 Wash. Dec. 18, 280 Pac. 932 (1929).

The court recognizes that no very certain rule as to joint adventures has been laid down, saying: "There must be an agreement to enter into an undertaking in the objects or purposes of which the parties to the agreement have a community of interest and a common purpose in its performance. Necessarily, the agreement pre-supposed that each of the parties has an equal right to a voice in the manner of its performance, and an equal right of control over agencies used in its performance."

The effect of the doctrine of joint enterprise is to impute the negligence of the driver to the occupant, a general doctrine which, though adopted in early days, *Thorogood v. Bryan*, 8 C. B. 115, 18 L. J. C. P 336 (1849), has since been repudiated by both English and American courts. *The Bernina*, 13 App. Cas. 1, 58 L. T. 423 (1897) *Koplitz v. City of St. Paul*, 86 Minn. 373, 90 N. W 794, 58 L. R. A. 74 (1902) *Cathey v. Seattle Electric Co.*, 58 Wash. 176, 108 Pac. 443 (1910) *Allen v. Walla Walla Valley R. Co.*, 96 Wash. 397, 165 Pac. 99 (1917) *Fujise et al. v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 107 Pac. 317 (1910) 45 C. J. 1029. In allowing this seeming exception in the case of so-called joint enterprises, the courts generally held that only where the occupant is in such a position that he has a right, express or implied, to exercise control over the driver in his management of the vehicle, does such relationship exist as will justify imputing the negligence of the driver to the occupant. *Cotton v. Willmar Sioux Falls Ry. Co.*, 99 Minn. 366, 109 N. W 835, 8 L. R. A., (n. s.) 643 (1906) 29 Cyc. 543. It is not sufficient that the occupant determine the destination or route. *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 Pac. 385 (1917)

Nor is a common purpose alone sufficient. *Barnes v. Marcus*, 96 Ia. 675, 65 N. W. 984 (1896) *Myers vs. Southern Pac. Co.*, 63 Cal. App. 164, 218 Pac. 284 (1923). Circumstances must be such as to show that the occupant and the driver in common had such control and direction of the auto as to be practically in the joint or common possession of it. *Pope v. Halpern*, 193 Cal. 168, 223 Pac. 470 (1924). This joint power to control resembles closely the partnership relationship, and in the opinions of some courts it is necessary that circumstances indicate the existence of at least a quasi-partnership relationship, before there is held to be a joint enterprise. *Robison v. Oregon-Wash. R. & N. Co.*, 90 Ore. 490, 176 Pac. 594 (1919). *Hajsek v. Chicago, etc., R. Co.*, 68 Neb. 539, 94 N. W 609 (1903). In an Illinois case the court directly states that in order to impute negligence the parties must stand in such relationship of privity that the maxim *Qui facit per alium facit per se* applies. *Nonn v. Chicago City Ry. C.*, 232 Ill. 378, 83 N. E. 924 (1908). And see *Wilson v. Puget Sound Electric Co.*, 52 Wash. 522, 101 Pac. 50 (1909) *Allen v. Walla Walla Ry., supra.*

It is unfortunate that some courts are approaching the question of so-called joint enterprise as if it were a wholly novel problem. The fundamental underlying principle, just as in numerous other situations called by a different name, is that of agency, the essential element in which is control. See *Wilson v. Puget Sound Electric Co., supra, Cathey v. Seattle Electric Co., supra, Allen v. Walla Walla Valley Ry., supra.* The necessity exists in this state, as in others, to clearly define what is meant by joint enterprise, since the rule, if vaguely defined or loosely applied, has a marked tendency to revert to the repudiated doctrine of imputing negligence. See, for example, *Hurley v. Spokane*, 126 Wash. 213, 217 Pac. 1004 (1923), a case difficult to defend even under the principle hesitatingly stated in the instant case. And see *Jensen v. Chicago, M. & St. P Ry.*, 133 Wash. 208, 233 Pac. 635 (1925), in which joint contribution to expense of a trip to attend a prize-fight seems to have been deemed the determining factor—a result that seems doubtful because they had no control over the management of the vehicle itself, no more than if they had jointly hired a taxicab for the same purpose, in which case the driver's negligence would not be imputed. *Wilson v. Puget Sound Electric Ry.*, 52 Wash. 522, 101 Pac. 50 (1909) *Field v. Spokane, Portland & Seattle Ry Co.*, 64 Wash. 445, 117 Pac. 228. The last cited case brings out clearly that the necessary consequence of imputing negligence is not merely to preclude the party to whom it is imputed from recovering against the third party wrongdoer, but renders him liable to suit by the third party on account of the negligence of party whose negligence has been imputed to him. This fact alone should cause a court to be highly critical of the facts before it will hold that the passenger had such control of the manner in which the vehicle was driven that the passenger is liable to third party for the driver's negligence. The principal case has attempted to lay down a few principles, but it is well to re-emphasize the vital point—there must be an express or implied right to direct the movement of the vehicle employed to carry out the joint venture. *Robison v. Oregon-Wash. R. & Nav. Co., supra, Pope v. Halpern, supra.* See generally on the rule of joint enterprise in Washington. 1 WASHINGTON LAW REVIEW 113. H. R. M.

AUTOMOBILES—CONTRIBUTARY NEGLIGENCE—LACK OF SUFFICIENT SUPPLY OF GASOLINE. Plaintiff stalled his car on the highway for want of gas and while walking up the road to get gasoline was struck by the defendant, who was driving negligently. *Held:* Plaintiff was contributorily negligent as a matter of law in operating the truck in a condition to become stalled for want of sufficient gasoline supply. *Keller v. Breneman*, 53 Wash. Dec. 120, 279 Pac. 588 (1929).

This is rather a novel decision and interesting as a possible extension of the contributory negligence doctrine to meet changing methods in transportation.

In order that one may be guilty of contributory negligence it is essential that he act or fail to act with knowledge and appreciation, actual or imputed, of the danger of injury which his conduct involves. *Bauer v. Tougaw*, 128 Wash. 654, 224 Pac. 20 (1924). Knowledge or appreciation of danger is not imputed where under the same or similar circumstances an ordinary prudent person would not have known or appreciated the danger. *Gentzkow v. Portland R. Co.*, 54 Ore. 114, 102 Pac. 614, 135 Am. S. R. 821 (1909) To forget is not negligence unless it amounts to a failure to exercise ordinary care for one's safety. *Kitsap County Transportation Co. v. Harvey*, 15 Fed (2d) 156, 48 A. L. R. 1420 (1926). "The prudent man is not the man who never forgets." *Britch v. Sheldon*, 94 Vt. 235, 110 Atl. 7 (1920).

It is true that situations might perhaps arise where running out of gas would be contributory negligence. It would seem, however, that the principal case is an unfortunate decision in view of the fact that the court lays down its conclusion as a general rule of law in the following words: "It is a want of care (reasonable care) to permit it to stall for want of a sufficient supply of gasoline." Aside from the fact that quoted language states the rule too strongly and makes the operator an insurer with respect to his gasoline supply and guilty of negligence as a matter of law (and the court squarely held the latter, although certainly in most cases it ought to be a question for the jury) it is difficult to agree with the result that the insufficient gasoline in his truck was the proximate cause of plaintiff's injury while he was walking after gasoline as a pedestrian—at least, that it was so as a matter of law. J. F

DAMAGES—GROUNDS—MENTAL SUFFERING. The plaintiff brought an action against the defendant corporation and its manager for the unwarranted exclusion of the plaintiff from participating in the finals of an amateur moving-picture contest conducted by the defendant. Offers to the public were published in the newspaper, and a prize was to be given to the winner. The plaintiff had won the right to participate in the finals and was refused admittance by the defendant's manager. *Held*: Plaintiff cannot recover since this action was prosecuted upon the theory that the plaintiff has suffered mental distress, and not upon the theory of breach of contract; and the plaintiff has failed to show physical violence which is necessary to her case. *Stiles v. Pantages Theatre Co.*, 52 Wash. Dec. 418, 279 Pac. 112 (1929).

It is undoubtedly the prevailing rule that if there is to be a recovery for mental suffering alone, there must be actual physical contact, or the act causing the suffering must be a wilful act. *McCarthy v. Boston Electric R. Co.*, 223 Mass. 568, 112 N. E. 235 (1916) *Gatzow v. Buening*, 106 Wis. 1, 81 N. W 1003 (1900) *Whitsel v. Watts*, 98 Kans. 508, 159 Pac. 401 (1916) *St. Louis R. Co. v. Keiffer* 48 Okl. 434, 150 Pac. 1026 (1915) *Turner v. Great Northern R. Co.*, 15 Wash. 231, 46 Pac. 243 (1896) *O'Meara v. Russell*, 90 Wash. 557, 156 Pac. 550 (1916) *Barnes v. Bickle*, 111 *Wash.* 133, 189 Pac. 988 (1920). Where the act causing the mental distress is a wilful act on the part of the defendant, a recovery may be had even though there was no actual physical invasion. *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299 (1925) It would seem that in the principal case the conduct of the defendants was wilful, and therefore a recovery should have been allowed. However, the court has held that in order to be a wilful act, there must be a malicious element present. And so it has been held that damages may be recovered for mental suffering for the wrongful burial of the plaintiff's child. *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172 (1907). Also where the defendant unlawfully entered the plaintiff's premises, although there was no actual physical contact. *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436 (1913) In these two cases the malicious element which the court discusses in the principal case seems to be present.

Possibly if the plaintiff had prosecuted her action on the theory that she was entitled to damages, not for mental suffering, but for the loss of

her chance to win the prize, she might have been successful. *Chaplin v. Hicks*, 2 K. B. 786 (1911) 3 Williston on Contracts, sec. 1346; 24 Harv. L. Rev. 579. In the case cited a recovery for substantial, and not merely nominal, damages was sustained against a defendant who contracted to choose from fifty women who should be selected by the readers of a newspaper, twelve to be members of his theatrical company. He failed to give notice to the plaintiff, who was one of the fifty, so that she might present herself for the final selection.

FALSE IMPRISONMENT—ARREST WITHOUT A WARRANT OF ONE INTOXICATED IN HOME. Plaintiff's brother complained to the police that certain persons were furnishing plaintiff moonshine whisky in order to make him sign over his property. Officers thereupon accompanied the brother to plaintiff's home where, after attempting an entry by a window, they induced plaintiff to open the door. He was in an intoxicated condition and they persuaded him to accompany them under the pretense that they were taking him to a hospital for medical attention. Instead he was lodged in jail without booking by order of the defendant police captain. *Held*: It is an unlawful arrest as a matter of the law, of an intoxicated person where he is taken in his home without a warrant and purely on the request of another. *Ulvestad v. Dolphin*, 52 Wash. Dec. 383, 278 Pac. 681 (1929).

It is well settled that a policeman may arrest without a warrant any person he reasonably believes guilty of a felony, *State v. Hughlett*, 124 Wash. 366, 214 Pac. 841 (1923) *Nolon v. Jones*, 200 Ala. 577, 76 So. 935 (1917) or anyone committing a public offense or breach of peace in his presence, *Pavish v. Myers*, 129 Wash. 605, 255 Pac. 633 (1824) *Elam v. National Surety Co.*, 201 Ky. 704, 255 S. W 1039 (1923). But before he can arrest for a misdemeanor without a warrant the offense must be committed in his presence; *State v. Hughlett, supra, State v. Pluth*, 157 Minn. 145, 195 N. W 789 (1923) and he must have personal knowledge of the offense and not act merely on the information of a third party. *Ex parte Rhodes*, 202 Ala. 68, 79 So. 462, 1 A. L. R. 568 (1918). That an officer has power to arrest without a warrant one who is intoxicated on the street is unquestionable. *Cunniff v. Beecher*, 84 Hun. 137, 32 N. Y. Supp. 1067 (1895) In the case of a dwelling house, however, an officer is not justified in entering without a warrant to make arrests therein, even though he has reasonable grounds to believe it disorderly. *Buck v. Knott*, 20 Ala. App. 316, 101 So. 811 (1924). He may not break in to observe for himself any misdemeanor committed therein. *Adair v. Williams*, 24 Ariz. 422, 210 Pac. 853, 26 A. L. R. 278 (1922). The exceptional case of entry into a house without a warrant has occurred on complaint of a wife that the drunken husband was threatening the family. *State v. Stouderman*, 6 La. Ann. 286 (1851).

W J. P.