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Notes on Recent Cases

William L. Travis

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NOTES ON RECENT CASES

ADMINISTRATION, SETTLEMENT AND DISTRIBUTION—Fraudulent Transfers Recovered by Trustee Are for Benefit of All Creditors.— Upon the rendition of a decree in favor of a trustee in a suit to set aside a fraudulent conveyance, the property inures not only to the benefit of the unsecured creditors existing at the time of the transfer and who, in the absence of bankruptcy would have been authorized to attack the conveyance, but to all of the creditors having provable claims, including those whose claims accrued subsequent to the transfers. *Mullen v. Warner* (C. C. A., 4th Cir.), 7 Am. B. R. (N. S.) 93.

AUTOMOBILES.—Guest Not Objecting to Speed is Not Entitled to Recover for Injuries.—Plaintiff sought damages for injuries sustained while riding as a guest in the front seat of an automobile owned and driven by the defendant who upset as he attempted to make a turn. Defendant was driving at a fast and unlawful speed and did not slow down for the corner. Plaintiff did not object to the manner and speed at which the latter operated the car, but rather, as he testified, was satisfied with the way defendant was driving. The alleged liability of defendant is based on his conduct in handling the car. *Held*, a guest of an automobile owner sitting in the front seat and making no objection to the unlawful speed at which the car is driven is barred from recovery by his own concurring negligence. *Wagen Bauer v. Schwinn*. (Pa. 1926.) 131 Atl. 689. A guest must use ordinary and reasonable care under the circumstances or be open to a charge of contributory negligence. *Parramore v. Denver Ry. Co.*; 5 Fed. (2d) 912.; *Atwood vs. Utah Co.* 44 Utah 366, 140 P. 137; *White v. Portland Co.* 84 (Ore.) 643, Pac. 1005. In some jurisdictions a guest is required to *look* and *listen* with prudence. *Noble v. Chi. M. & St. P. Ry.* 298 Fed. 381. Greater care should not be required. Mr. Justice Cardozo looks with great disfavor upon the rule which requires a guest to exercise more than ordinary care. Active vigilance, suggestions, and remonstrances are “unnatural and completely unrelated to the realities of life” because men

are inclined more or less to rely upon the driver of the car and are reluctant to interfere with the hand at the wheel. See 35 *Harv. Law. Rev.* 121. Back seat driving and harassing advice to one in operation of a car should be discouraged. Much advice and many suggestions are not conducive to its good management. *Brubaker v. Iowa Co.* (Wisc.) 183 N. W. 690, 18 A. L. R. 303. But if the occupant sees the driver is driving at an excessive rate of speed, or in violation of the law, reasonable care would require that the passenger protest. *Brubaker v. Iowa*, (*Supra*). *Sharp v. Sproat*. 111 Kan. 735, 208 P. 613, 26 A. L. R. 1421. If the guest fails to protest, he acquiesces in the reckless driving and is guilty of contributing to his own injury, precluding recovery. *Carter v. Philinger*. 142 Md. 365, 120 A. 378. Where a guest who had been riding in an automobile driven at a fast rate or speed, had the opportunity, but failed to get out of the car, he was not deemed to have been guilty of contributory negligence. *Munson v. Rupker*. (Ind.) 148 N. E. 169. See 1 NOTRE DAME LAWYER 61 for discussion of the duty of an operator of an automobile to his guest.

EASEMENTS.—Reference in Deed to Lot Number and Bounding Street Does Not Give An Easement in All Ways Shown on Plan as Matter of Law.—“G” owned a tract of twenty acres, in Lynn, which he had surveyed and a plan made. This plan as recorded, showed three streets running in an elliptical curve, in an east-west direction, converging at both the east and west extremities of the tract, and from the point where they converged on the eastern extremity there was a road, to which the ways connected, leading to the main highway. On the west end of the tract there was no outlet to a highway, there being a lake around which the streets curved and joined at a common point. The plaintiffs bought their lots adjoining the northernmost street on the eastern half. The street was named in their deeds as one of the boundaries of their lots. This street was laid out and constructed as far as their lots adjoined. In none of plaintiffs’ deeds was there any easement or right of way expressly granted to the purchasers, nor any stipulation that the ways should be kept open. Shortly following the sale to plaintiffs their grantor conveyed all that remained of the tract to the Pride of Lynn Cemetery Corporation, “with all right, title, and interest therein subject to the rights of others.” From the Lynn

Cemetery Corporation, the defendant bought the land it now owns, west of plaintiffs', with a right of way over the street in question, and the street below it, to the highway. By a new plan which accompanied the deed to defendants it appeared that the conveyance included that section of the street in question which by the old plat ran through their purchase. Plaintiffs' lots are situated east of defendant's land, between his land and the highway, so that access to the public road does not necessitate their passing over that section of the so-called street in question, included in the grant to defendant. When the latter built a fence inclosing the section of the road running through his tract, plaintiffs objected, contending that since their deeds referred to this street by name as a boundary of their lots, they acquired a right of way over the full length of the street as it appeared in the old plan. The defendant answered that considering the deeds, the plan, and the attending circumstances together there appeared no expression of a right of way in plaintiffs over any part of the former's grant. *Held*, plaintiffs under the state of facts acquired no right of way over the section of the so-called street running through defendant's tract, as delineated in the plan, but not marked out, used, or constructed. *Wellwood v. Havrah Mishna Anshi Sphard Cemetery Corp.* (Mass. 1926) 150 N. E. 203. In delivering the opinion of the court, Sanderson, J. said, "A plan referred to in a deed becomes a part of the contract so far as may be necessary to aid in the identification of the lots and to determine the rights intended to be conveyed. The mere reference in a deed does not as a matter of law give the grantee an easement in all the ways shown thereon; nor prevent the grantor from making changes therein not inconsistent with the rights of the grantee. In the absence of an express grant, where land is conveyed by reference to a plan, having numerous lots bounding on different ways, a grant by implication of an onerous servitude upon other land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed unless such is clearly the intention of the parties. 'A reference to a plan in a deed, although accompanied by its use for description or bounds, does not result in the conveyance of rights not necessary for the enjoyment of the premises, in the absence of an intent appearing to that effect.' *Prentiss v. Gloucester*,

236 Mass. 36, 52; 127 N. E. 796, 799. In cases where it has been held that the grant of a lot bounding on a way as shown on a plan estopped the grantor and those claiming under him from denying the existence of the way for its entire length in either direction, it will usually appear that the way referred to was in use or actually staked out on the land. In the case at bar the way delineated on the plan leading west from plaintiffs' lands had not been marked out or used as such, and it leads directly to no public way. The plaintiffs have not proved a grant by implication." In accord with the principal case, favoring the rule that a reference to a plat laying out a tract of land does not necessarily give every purchaser an easement over every street laid out in the plan may be cited: *State v. Hamilton*, (Tenn.) 70 S. W. 619; *Underwood v. Stuyvesant* (N. Y.) 10 Am. D. 215; Easements, 19 C. J. Sec. 130, P. 931 (Citing also, Jones, Easements Sec. 247). The authorities are not entirely harmonious as to whether one receiving a conveyance of land described with reference to a plat acquires a right of way over, or rather, corresponding to, every street which, though non-existent, appears on the plat. Some cases are to the effect that, while the grantee is not restricted to such supposed streets as are actually adjacent to his land, he acquires rights only in such as are reasonably necessary for convenient accesses to and exits from the land conveyed, and that the grantor is not, as against him, estopped to deny the existence of streets appearing on the plat which he would not ordinarily have occasion to use for such purpose. *Tiffany, Real Property*. (2nd) Sec. 366, p. 1322. Many courts, contrary to the principal case, state the rule to be that where reference is made to a map or plan, every purchaser takes all privileges, advantages, and easements, represented on the plat. *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883; *Fisher v. Beard*, 32 Ia. 346; *Dubuque v. Maloney*, 9 Ia. 450, 74 Am. D. 358; *Adair v. Spellman* (Ga.) 79 S. E. 589; *Highland Co. v. Avondale Co.* (Ala.) 56 S. 716; *Danielson v. Sykes* (Cal.) 109 Pac. 87, 28 L. N. S. 1024; *Schneider v. Jacob*, (Ky.) 5 S. W. 350; *Collins v. Land Co.* (N. C.) 39 S. E. 21; *Thaxter v. Turner* (R. I.) 24 Atl. 829; *Edwards v. Moundsville Co.* (Va.) 48 S. E. 754; *Bartlet v. Bangor*, 67 Me. 460-cited in footnote, Easements, 19 C. J. Sec. 130; *Tiffany, Real Prop.* (2nd) Vol. II Sec. 366

p. 1319. A great many of the above cases apply, or rather misapply, the principle that by marking out streets and parks there is a dedication, by which the grantee derives his easement, when the plat is recorded. As between the grantor and grantee, however, in the event there is no acceptance of the dedication these decisions must look to other reasons upon which to base their rule. The grantee must have a right independent of the right of the public, and such a right is found upheld in a number of courts which apply the doctrine of *estoppel by representation*, i. e.; an easement is vested in the grantee who has been induced to buy believing in the existence of streets and public places as delineated on the plat. See Tiffany, *supra* P. 1320 *et seq.* W. L. T.

HUSBAND AND WIFE.—Liability of husband for injury to wife.—Defendant's wife, while riding with her husband, was injured when he fell asleep and ran into a tree. She sued him for personal injuries. *Held*, the wife could maintain an action in tort against her husband for personal injuries resulting from his negligence. *Bushnell v. Bushnell*, (Conn. 1925) 131 Atl. 43. The court came to their decision by following the precedent established in *Brown v. Brown*, 86 Conn. 42, 89A. 898, 52 L. R. A. N. S. 185, Ann. Cas. 1915D, 70. In the *Brown* case the wife was allowed recovery for a wilful assault and battery and false imprisonment. In that case the court found the right of the wife to sue, *not* in any express statutory provision, but in a statute preserving the legal identity of the spouse. The principle case, by carrying the reasoning a step further, permits recovery for a negligent injury.

At common law, owing to the identity of spouses, and as a matter of policy, husband and wife were not liable for torts committed by one against the other. *Thompson v. Thompson*, (U. S.) 218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180, 30 L. R. A. N. S. 1153, 21 Ann. Cas. 921. Nor could the wife recover against a third person who aided her husband. *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27. Nor could a divorced wife recover for torts committed against her during coverture. *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 72 Am. S. R. 387, 6 L. R. A. N. S. 191. The rights of a wife have been altered considerably by statutory law and the courts are not in harmony in interpreting the construction of such statutes. It is generally held that a statute conferring upon a wife the right to sue must expressly provide a right of action against a husband.

Thompson v. Thompson, *supra*; *Peters v. Peters*, 156 Calif. 32, 103 Pac. 219, 23 L. R. A. N. S. 699; *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, Am. S. R. 3, 6 L. R. A. N. S. 191; *Keister v. Keister*, 123 Va. 157, 96 S. E. 315, 1 A. L. R. 439. Other courts do not require that the statute expressly give the right. *Gilman v. Gilman* 78 N. H. 4, 95 A. 657, L. R. A. 1916B 907. It has also been held that where a statute does not expressly confer the right of action against her husband but the purpose of the statute is to preserve the identity of the wife during coverture it confers on her the right. *Fiedeer v. Fiedeer*, 42 Okl. 124, 140 Pac. 1022, 52 L. R. A. N. S. 189. *Brown v. Brown*, *supra*, and the principal case of *Bushnell v. Bushnell*. Where the wife is given the rights of a *feme sole* by statute, she has the right to maintain an action against her husband. *Fitzpatrick v. Owens* 124 Ark. 167, 187 S. W. 460, L. R. A. 1917B 774, Ann. Cas. 1918C, 772. In the *Thompson* case, *supra*, the court, construing a statute of the District of Columbia providing that married women may sue for torts committed against them as fully and freely as though unmarried, denied the wife recovery for assault and battery committed upon her by her husband. Under the Georgia statute a wife cannot maintain an action against her husband for operating an automobile. *Heyman v. Heyman* 92 S. E. 25. Under the Missouri "Married Women's Act" neither spouse can sue the other for negligence. *Shewalter v. Wood* 183 S. W. 1127 - cited in *Schouler, Domestic Relations* 6th ed. Vol. I p. 673.

Contrary to the principal case is the stand taken by the Minnesota courts. *Woltman v. Woltman* 153 Minn. 217, 189 N. W. 1022; *Strom v. Strom*, *supra*. The reason given is that the purpose of such a statute—practically identical to that in Connecticut—is to place the husband and wife upon an equality as to the right to bring actions in tort, conferring upon her the same right as her husband and no more. Since the husband is unable to sue his wife for personal tort, they maintain that the statute gives her no such right against him. See *Woltman v. Woltman*, *supra*, discussing *Drake v. Drake*, 145 Minn. 388, 177 N. W. 624, 9 A. L. R. 1064. By comparison, the view taken by the Minnesota courts creates an impression of sounder construction. Courts are reluctant to permit the tranquility of the home to be destroyed. Moreover, judicial legislation is a vicious thing which ought to be discouraged. See MICH. LAW. REV. (April 1926) p. 618, 619, for discussion of the merits of the Connecticut rule.

W. L. T.