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CASE NOTES

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DOMESTIC RELATIONS — Conflict of Laws — Marriage of First Cousins. — Appellee and decedent, first cousins and residents of Arizona, were married in New Mexico, where such marriage is valid. They returned to Arizona, and continued to reside there until decedent's death. Appellee, first in order of preference under Arizona law, petitioned for letters of administration, and appellant, son of decedent by a former marriage, also filed application for letters of administration and filed objections to appointment of appellee on the ground that she was not the lawful widow of decedent. The trial court ordered letters to be issued to appellee. On appeal, HELD: Reversed with directions to vacate the order appointing appellee and to appoint appellant. Under Arizona statute, marriages by parties of designated degrees of consanguinity are "incestuous and void"; therefore, marriage between first cousins who are residents of and intend to live in Arizona are void even though solemnized in a state where such marriage is not prohibited by law. *In Re Mortenson's Estate,* 83 Ariz. 87, 316 P. 2d 1106 (1957).

Prohibition of marriage of persons in direct lineal consanguinity was established by Church Canon in early Christendom and by statute in Roman Law. 35 AM. JUR., *Marriage* § 140 (1941). English law, after the Reformation, confined the concept to the Levitical degrees of relationship defined in the Holy Scripture. *The Queen v. Brighton,* 1 Best & Smith 447, 121 Eng. Rep. 782, 12 Eng. Rul. Cas. 738 (1861). Today, statutory provisions prohibiting the marriage of parties of various degrees of consanguinity are found in all American jurisdictions, but only a little more than half of them prohibit marriage of first cousins. 1 VERNIER, AMERICAN FAMILY LAW § 38 (1931); CODE OF LAWS OF SOUTH CAROLINA, 1952 § 20-1. Whether incestuous marriages are void or merely voidable depends on the interpretation of local statutes by the courts. *Meisenhelder v. Chicago & N. W. Ry. Co.,* 170 Minn. 317, 213 N. W. 32, 51 A. L. R. 1408 (1927); *Woodward v. Blake,* 38 N. D. 38, 164 N. W. 156, L. R. A. 1918A 88 (1917). In the absence of express contrary statutory declaration, the prevailing view is that such incestuous marriages are

merely voidable and are valid unless annulled during the lifetime of the parties. *Fensterwald v. Burk,* 129 Md. 131, 98 Atl. 358, 3 A. L. R. 1562 (1916); *Bennett v. Bennett,* 195 S. C. 1, 10 S. E. 2d 23 (1940). Although a statute may contain the word "void" in its provisions, some courts interpret it to mean "voidable" where legislative intent, determined by construction, indicates that it should be so interpreted. *Harrison v. State,* 22 Md. 468, 85 Am. Dec. 658 (1864); *Hall v. Baylous,* 109 W. Va. 1, 153 S. E. 293 (1930). Some states hold that, although incestuous marriages are null and void in law, they are valid for all purposes until nullity is decreed, *Johnson v. Landefeld,* 138 Fla. 511, 189 So. 666 (1939); *Walker v. Walker,* 54 Ohio L. Abst. 153, 84 N. E. 2d 258 (1948); however, a majority of the jurisdictions consider such marriages as absolutely void, *Arado v. Arado,* 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28 (1917), and require no court decree of nullity since they are void *ab initio. Sutton v. Leib,* 199 F. 2d 163 (7th Cir. 1952); 1 VERNIER, AMERICAN FAMILY LAW § 38 (1931). A marriage void *ab initio* may be attacked in any court proceeding, whether the question arises directly or collaterally, *Simpson v. Neeley,* 221 S. W. 2d 303 (Tex. Civ. App. 1949); *Re Gregorson,* 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C 697, Ann. Cas. 1912D 1124 (1911), notwithstanding the death of either or both of the parties. *Osoinach v. Watkins,* 235 Ala. 564, 180 So. 577, 117 A. L. R. 179 (1938); *Bowers v. Bowers,* 10 Rich. Eq. 551 (S. C. 1858). Although the *validity* of a marriage is generally determined by the law of the place where it is contracted, 5 R. C. L., *Conflict of Laws* §§ 74-76; *McConnell v. McConnell,* 99 F. Supp. 493 (D. C. D. C. 1951); 35 AM. JUR., *Marriage* § 167 (1941), each state has the right to determine the marital *status* of its citizens under its laws. *Everly v. Baumil,* 209 S. C. 287, 39 S. E. 2d 905 (1946); 35 AM. JUR., *Marriage* § 168 (1941). Marriages valid where celebrated are usually valid everywhere, except those contrary to laws of nature and those which the law has declared invalid on grounds of public policy. *Meisenhelder v. Chicago & N. W. Ry. Co., supra; Osoinach v. Watkins, supra;* RESTATEMENT, CONFLICT OF LAWS § 132 (1934).

Although variations among the states in the degree of consanguinity prohibited by statute are minor, that of first cousins is one of considerable controversy. The major difficulty, however, is whether prohibited marriages are void or merely

voidable. Only a few states are silent, as South Carolina is, on the question as far as statutory law is concerned. The instant case is in line with the view of the majority of states in holding incestuous marriages void by statute. Under the guise of prohibiting acts abhorrent to the nature of civilized man and preventing deterioration of the race by the production of degenerate and deficient offspring, jurisdictions embracing the majority view often overlook the fact that innocent children are cast into bastardy and deprived of legal rights. On the other hand, jurisdictions declaring incestuous marriages merely voidable give rise to the peculiar existence of valid marriages in which the parties are subject to action for incest. A few legislatures have provided an equitable solution to the problem by enacting statutes making such marriages void *ab initio*, but making offspring of void marriages legitimate.

R. D. BATES.

DOMESTIC RELATIONS — Parent and Child — Effect in Divorce Proceeding of an Antenuptial Agreement Regarding the Religious Training of Children. — A couple contemplating marriage entered into a contract whereby they agreed that the children of the marriage should be reared in the Roman Catholic religion of the husband. In an action for divorce instituted by the wife, a Protestant, the trial court struck from the defendant's answer the antenuptial contract and those allegations which sought to enforce the provisions of the contract relating to the religious training of the children. The divorce and custody of the children were granted to the wife. On appeal, HELD: Affirmed. Parents cannot by contract relating to the religious training of their children restrict the discretion of the court in awarding custody, and the court may disregard entirely any such contract. *Stanton v. Stanton*, 213 Ga. 545, 100 S. E. 2d 289 (1957).

At English common law the rights of the father to the custody and education of his children were paramount, and no mere agreement as to the religious education of children between father and mother before marriage was binding as a legal contract. *In re Nevin*, 2 Ch. 299 (1891); *In re Agar-Ellis*, 24 Ch. D. 317 (1883); *Andrews v. Salt*, L. R. 8 Ch. App. 622 (1873). No damages could be recovered for a breach of the contract in a court of law, and it could not be enforced

by a suit for specific performance in equity. *Andrews v. Salt, supra.* The modern American tendency to equalize the rights of the two parents as to their children has led to enactment in a number of jurisdictions of statutes by which mother and father are declared to be joint guardians of their children with equal rights of custody and control. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 31-51, *Powell v. Powell,* 231 S. C. 283, 98 S. E. 2d 764 (1957); 39 AM. JUR., *Parent and Child* § 9 (1942). Therefore, in awarding the custody of children, the paramount consideration must be their physical, moral and spiritual welfare and their best interests, to which technical legal rights of the parties must yield. *Koon v. Koon,* 203 S. C. 556, 28 S. E. 2d 89 (1943); *Graydon v. Graydon,* 150 S. C. 117, 147 S. E. 749 (1929); *In re Butcher's Estate,* 266 Pa. 479, 109 Atl. 683 (1920); SCHOULER, DIVORCE MANUAL § 296 (1944). Generally, American courts have held that the parent receiving custody is not bound by a previous contract, the right of custody carrying with it as an incident the right as well as the duty to direct a child's education, religious and secular. *McLaughlin v. McLaughlin,* 20 Conn. Sup. 278, 132 A. 2d 420 (1957); *Brewer v. Cary,* 148 Mo. App. 193, 127 S. W. 685 (1910); *Boerger v. Boerger,* 26 N. J. Super. 90, 97 A. 2d 419 (1953). In refusing to enforce these antenuptial agreements courts have utilized a variety of reasons, among them being that equity does not have jurisdiction where statutory provisions exist for the determination of the care and custody of children. *Dumais v. Dumais,* 152 Me. 24, 122 A. 2d 322 (1956); *Brewer v. Cary, supra.* Also, such an agreement may be against public policy, in that a parent should not be held to bind himself conclusively to relinquish control over his children's religious education. *Hernandez et al. v. Thomas,* 50 Fla. 522, 39 So. 641, 2 L. R. A. 203 (1905); *Brewer v. Cary, supra.* Finally, some courts will not make a determination as to differences in religious belief, on the ground that enforcement would violate the freedom of religion provisions of the First Amendment of the Federal Constitution as made applicable to state actions by the Fourteenth Amendment. *Lynch v. Uhlenhopp,* ___ Iowa ___, 78 N. W. 2d 491 (1956) (dictum) (see dissenting opinion); *Denton v. James,* 107 Kan. 729, 193 Pac. 307, 12 A. L. R. 1146 (1920). *But see Magee v. O'Neill,* 19 S. C. 170, 186 (1882). The doctrine of estoppel will not be employed to enforce the agree-

ment. *Boerger v. Boerger, supra. But see Ramon v. Ramon,* 34 N. Y. S. 2d 100 (1942). However, there are statements from highly authoritative sources to the effect that such antenuptial agreements are enforceable. WILLISTON, CONTRACTS § 1744a n. 3 (1938) states: "Agreements between parents relating to the religious training of their children are generally upheld. See Denton v. James, 107 Kan. 729, 193 Pac. 307, 12 A. L. R. 1146; *In re* Butcher's Estate, 266 Pa. 479, 109 Atl. 683; . . ." And in extending enforceability to a contract between a mother and a third person, the Court of Appeals in *Weinberger v. Van Hessen,* 260 N. Y. 294, 183 N. E. 429 (1932) said: "Agreements between parents for a particular sort of religious upbringing have generally been held valid in this country. See 29 HARV. L. REV. 485; *Denton v. James,* 107 Kan. 729. . . . " It is doubtful, however, that the cases relied upon either by Williston or by the Court of Appeals in *Weinberger v. Van Hessen* support their propositions. Each seems to be authority for the contrary position that the contracts are unenforceable. See Pfeffer, *Religion in the Upbringing of Children,* 35 B. U. L. REV. 333, 360 (1955). A few courts have expressed the view that in fixing custody they will give no consideration to religion whatsoever, but will, and necessarily must, decide the controversy as if that factor were completely absent. *Describes v. Wilmer,* 69 Ala. 25 (1881); *Jones v. Bowman,* 13 Wyo. 79, 77 Pac. 439 (1904). Other courts have recognized that religion is an important component of a child's best interests and should be given consideration, but it does not control the court in its determination of the right of custody. *Cooper v. Hinrichs,* 10 Ill. 269, 140 N. E. 2d 293, 297 (1957); *Winter v. Winter,* 184 Iowa 85, 166 N. W. 274 (1918); *Donahue v. Donahue,* 147 N. J. Eq. 701, 61 A. 2d 243 (1948). Therefore, for one reason or another, the authorities are almost unanimous in refusing to accord legal effect to agreements seeking to control the religious education of children. *Boerger v. Boerger, supra;* Friedman, *The Parental Right to Control the Religious Education of a Child,* 29 HARV. L. REV. 489, 492 (1916).

The problem of the legal enforceability of antenuptial agreements regarding the religious education of children is of special importance to a Catholic contemplating marriage with a Protestant. The general rule in divorce actions prohibits the parents by agreement from binding the court so far as to

prevent it from taking into consideration the temporal well-being of the child when making awards as to custody. The courts undoubtedly would recognize that the right of custody includes the privilege of dictating the religious teachings which the child shall subsequently receive. Presumably, if enforcement of the agreement would not prejudice the child's welfare it might be enforceable. However, as a practical matter, it would appear improbable that equity would enforce a suit for specific performance. Even assuming the contract to be valid, it would be virtually impossible to assess damages in an action at law for breach of the contract. (*Quaere*: If valid, would an action lie to recover damages for mental suffering alone? See RESTATEMENT, CONTRACTS § 341 [1933]). Conceivably, to specifically enforce the agreement against the parent who receives custody of minor children in a divorce action would be self-defeating, the effect being to erect a religious barrier between child and parent, thereby destroying the temporal happiness that the custody award was designed to insure for the child. Although the problem has not as yet arisen in South Carolina, as a matter of general policy it would seem likely that its courts would refuse enforcement of antenuptial contracts as such, deciding each case on the basis of what would best serve the child's general welfare.

VICTOR S. EVANS.

UNEMPLOYMENT COMPENSATION — Rights to Compensation — Pregnant Employee. — Claimant, an employee of appellant, and a member of the union representing the workers of appellant company, requested, and was granted a six months leave of absence in accordance with a collective bargaining agreement between appellant and the union. Claimant was four months pregnant when the leave period began. The agreement provided that "female employees, in case of maternity, shall have the right to six (6) months leave of absence as they may choose." In addition to this, there were other provisions which protected the employee's seniority rights during her absence, and if additional time was required at the end of the six month period, the employee could acquire it for one month at a time upon presentation to appellant of a physician's certificate indicating that such additional time was necessary. Should the doctor rule that claimant was fit to return to work

and she failed to do so, under the agreement, she would lose all seniority. When claimant's leave period began she expected the birth of her child to be on or about October 4, 1955, and it was on this expectation that the leave of absence was granted; however, the child was not born until November 22, 1955. Three weeks after the birth, claimant notified appellant that she was ready to return to work, but she was refused work by appellant. Claimant then filed her claim for unemployment compensation, but was refused these benefits by the referee who asserted that claimant's unemployment was voluntary and without good cause under the Pennsylvania Unemployment Compensation Laws. The Unemployment Compensation Board of Review reversed the referee's decision. HELD: Affirmed. The facts do not show that claimant was unemployed voluntarily and without good cause or through any fault of her own. When claimant acted in good faith in her attempt to re-establish the employer-employee relationship, she fulfilled the statutory requirements; therefore, claimant was entitled to unemployment compensation benefits. *E. W. Twitchell, Inc. v. Unemployment Compensation Board of Review,* 184 Pa. Super. 518, 135 A. 2d 824 (1957).

All rights which may be acquired with respect to unemployment compensation are founded on statutes, rather than the common law. *Beeland Wholesale Co. v. Kaufman,* 234 Ala. 249, 174 So. 516 (1937); *National Tunnel & Mines Co. v. Industrial Commission,* 99 Utah 39, 102 P. 2d 508 (1940). Only those workers who meet the statutory requirements and conditions are allowed benefits of unemployment compensation. *Battaglia v. Board of Review of Employment Sec. of Dept. of Labor & Industry,* 14 N. J. Super. 24, 81 A. 2d 186 (1951); *Copeland v. Oklahoma Employment Sec. Commission,* 197 Okl. 429, 172 P. 2d 420 (1946). The eligibility or qualification of a claimant for unemployment compensation does not ordinarily depend on his economic needs, *Copeland v. Oklahoma Employment Sec. Commission, supra; Keystone Min. Co. v. Unemployment Compensation Board of Review,* 167 Pa. Super. 256, 75 A. 2d 3 (1950); *W. U. Tel. Co. v. Texas Employment Commission,* 243 S. W. 2d 217 (Tex. Civ. App.), *writ of error dismissed,* 150 Tex. 513, 243 S. W. 2d 154 (1954), and though the claimant must be "unemployed" within the meaning of the statutes, as the term is used and defined therein, *Battaglia v. Board of Review of Division of Employment Sec. of Dept.*

of Labor & Industry, supra; Urbach v. Unemployment Compensation Board of Review, 169 Pa. Super. 569, 83 A. 2d 392 (1951), his unemployment may be sufficient to entitle him to unemployment compensation benefits if such unemployment is total or partial in its nature. *Phillips v. Michigan Unemployment Compensation Commission,* 323 Mich. 188, 35 N. W. 2d 237 (1948); *Homer Laughlin China Co. v. Hix,* 128 W. Va. 613, 37 S. E. 2d 649 (1946). The primary purpose of unemployment compensation benefits is to provide relief to those employees who are involuntarily unemployed. *Unemployment Comp. Comm. v. Willis Barber & Beauty Shop,* 219 N. C. 709, 15 S. E. 2d 4 (1941); *Sinclair Refining Co. v. Unemployment Compensation Commission,* 189 Va. 692, 54 S. E. 2d 72 (1949); *Moorman Mfg. Co. v. Industrial Commission,* 241 Wis. 200, 5 N. W. 2d 743 (1942). Unemployment compensation benefits are generally extended only to those who become unemployed through no fault of their own. *Bedwell v. Review Board of Ind. Employ. Sec. Div.,* 119 Ind. App. 607, 88 N. E. 2d 916 (1949); *Wolf's v. Iowa Employment Sec. Commission,* 244 Iowa 999, 59 N. W. 2d 216 (1953); *Pramco, Inc. v. Unemployment Compensation Board of Review,* ___ Pa. Super. ___, 138 A. 2d 210 (1958). Employees who leave their work voluntarily are generally disqualified from receiving unemployment compensation funds, and such disqualification may be entirely or in some cases for a waiting period. *Moulton v. Iowa Employment Sec. Commission,* 239 Iowa 1161, 34 N. W. 2d 211 (1948); *Moen v. Director of Div. of Employment Sec.,* 324 Mass. 246, 85 N. E. 2d 779, 8 A. L. R. 2d 429 (1949). Involuntary unemployment, as required by some state statutes as a condition of eligibility for benefits, has been held not to embrace situations where one becomes unemployed because of sickness or change in personal circumstances. *Celanese Corp. of America v. Bartlett,* 200 Md. 397, 90 A. 2d 208 (1952); *Judson Mills v. South Carolina Unemployment Compensation Commission,* 204 S. C. 37, 28 S. E. 2d 535 (1943); *State v. Hix,* 132 W. Va. 516, 54 S. E. 2d 198 (1949). Under some statutes, a worker is eligible for benefits where his unemployment is voluntary but with good or "just" cause. *Intertown Corp. v. Appeal Board of Mich. Unemployment Comp. Commission,* 238 Mich. 363, 43 N. W. 2d 888 (1950); *Hoffstot v. Unemployment Compensation Board of Review,* 164 Pa. Super. 43, 63 A. 2d 355 (1949); *Bliley Elec. Co. v.*

Unemployment Compensation Board of Review, 158 Pa. Super. 548, 45 A. 2d 898, 903 (1946). Where good cause is shown, even though the unemployment was voluntary, it will be classified as involuntary under these statutes, and benefits may be granted. *Raffety v. Iowa Employment Sec. Commission,* 247 Iowa 896, 76 N. W. 2d 787 (1956); *Bliley Electric Co. v. Unemployment Compensation Board of Review, supra.* Good faith is an essential element of good cause. *Dwight Mfg. Co. v. Long,* 36 Ala. App. 387, 56 So. 2d 685 (1952); *Erie Resistor Corp. v. Unemployment Compensation Board of Review,* 172 Pa. Super. 430, 94 A. 2d 367 (1953); *Flannick v. Unemployment Compensation Board of Review,* 168 Pa. Super. 606, 82 A. 2d 671 (1951). It has been held that a worker who quits work due to pregnancy is disqualified for benefits where the statute disqualified workers who voluntarily left their work without good cause attributable to the employer. *Moulton v. Iowa Employment Sec. Commission,* 239 Iowa 1161, 34 N. W. 2d 211 (1948). The same result was also reached under a statute which disqualified workers who left their employment voluntarily without good cause, but which did not expressly require that the good cause be attributable to the employer or the employment. *John Morrell & Co. v. Unemployment Compensation Commission,* 69 S. D. 618, 13 N. W. 2d 498 (1944). However, some statutes expressly provide for unemployment compensation benefits to pregnant workers who quit work because of pregnancy. *Alabama Mills v. Carnley,* 35 Ala. App. 46, 44 So. 2d 622, 14 A. L. R. 2d 1301, *cert. denied,* 253 Ala. 426, 44 So. 2d 627 (1950); *Auger v. Administrator, Unemployment Compensation Act,* 19 Conn. Super. 184, 110 A. 2d 645 (1954). When a pregnant worker leaves her employment, and the leaving can be construed as a temporary leave of absence, she should apply for a leave of absence, or manifest her intention not to leave the labor force in some other manner. *Schwartz v. Unemployment Compensation Board of Review,* 169 Pa. Super. 620, 84 A. 2d 364 (1951); *Flannick v. Unemployment Compensation Board of Review,* 168 Pa. Super. 606, 82 A. 2d 671 (1951). In the final analysis, the question of what is good cause must be determined in the light of the facts of each particular case, and the standard for making such a determination is the standard of reasonableness as applied to the average man or woman. *Department of Industrial Relations v. Mann,* 35 Ala. App. 505, 50 So. 2d

780, *cert. stricken,* 255 Ala. 201, 50 So. 2d 786 (1950); *Vancheri v. Unemployment Compensation Board of Review,* 177 Pa. Super. 553, 112 A. 2d 433 (1955). Where collective bargaining agreements contain provisions for leaves of absence for pregnant workers, such agreements are not always determinative of the employee's right to unemployment compensation benefits when such employee cannot regain her employment status at the expiration of the leave period and/or has acted in good faith. *Auger v. Administrator, Unemployment Compensation Act,* 19 Conn. Super. 184, 110 A. 2d 645 (1954); *Myerson v. Board of Review,* 43 N. J. Super. 196, 128 A. 2d 15 (1957).

Generally, under the various state statutes, a woman who quits work because of pregnancy is disqualified for unemployment compensation benefits. However, there is an increasing amount of authority to the contrary. Since all of the states have their own unemployment compensation laws, and since they all differ in some degree as to who may become eligible for benefits, it is difficult to determine just when and how a pregnant worker may become eligible for benefits. Each case must be decided in the light of the facts and circumstances surrounding that particular case. There is no clear-cut rule of law to be applied. Pregnant workers present a peculiar problem in the administering of unemployment benefits, and the instant case is a good illustration showing why all factors concerning the employer-employee relationship must be dealt with in reaching the correct result. Logically, any statutory presumption that a pregnant worker is not entitled to benefits should be rebuttable, rather than conclusive. In the instant case there was the presumption that the worker was not entitled to benefits because of the provisions of the state's unemployment compensation statute which did not allow benefits to pregnant workers generally. However, this presumption was rebutted and benefits allowed on the ground that the emphasis embodied in the collective bargaining agreement was on seniority rights of the employee, rather than on any rights which the employee might be entitled to under the socially designed unemployment program. Since the claimant acted in good faith in her attempt to return to work, she qualified for benefits under the statute. The fact that she left work because of pregnancy was immaterial in so far as her eligibility was concerned. Claimant's establishment of good faith

and availability for work placed her in the same category as any other worker who quit work voluntarily with good cause.

ALLEN LEVERN RAY.

TORTS — Imputed Contributory Negligence — Bailor-Bailee. — Action by the owner of an automobile for damages to his car which was being driven at the time of the accident by his employee, wherein the driver of the other automobile counterclaimed for damages to his automobile and for personal injuries. The lower court found that plaintiff's employee was neither his servant nor agent at the time of the accident as he was not acting within the scope of his employment, and further found that the drivers of both automobiles were negligent. The lower court directed a verdict against both parties. On appeal, plaintiff alleged that the lower court was in error in holding that he could not recover for damages to his automobile because of his employee's contributory negligence. HELD: Reversed. Since the employee was neither servant nor agent of plaintiff car owner at the time of the accident, their relationship was that of bailor-bailee, and the contributory negligence of the bailee is not imputable to the bailor in an action by the bailor for damages to his automobile against a negligent third party. *Howle v. McDaniel,* 232 S. C. 125, 101 S. E. 2d 255 (1957).

The doctrine of imputed negligence whereby one party is charged with the negligence of another is generally regarded as having arisen in England in 1849 in the case of *Thorogood v. Bryan,* 8 C. B. 115, 137 Eng. Rep. 452 (1849), and remained the law of England until 1888, when it was finally discarded by the House of Lords. *Mills et al. v. Armstrong,* L. R. 13 App. Cas. 1 (1888). During this period the doctrine was adopted in various jurisdictions in this country which specifically cited *Thorogood v. Bryan, supra,* as the basis for their decisions. *Illinois Cent. R. Co. v. Sims,* 77 Miss. 325, 27 So. 527, 49 L. R. A. 323 (1900); *Lockhart v. Lichtenthaler,* 46 Pa. 151 (1863); *Prideaux v. City of Mineral Point,* 43 Wisc. 513 (1878). Except in special relationships, most courts have now repudiated the doctrine of imputed negligence so that the recognized common law rule in the United States today is that in situations involving damages occasioned by the negligent driver of an automobile and the negligence of a third person, the negligence of the driver will not be imputed to the owner

of the automobile or to a party riding in the vehicle to prevent his recovery against that third person, or to make him responsible for the driver's negligence. *Little v. Hackett,* 116 U. S. 366 (1886); *Bricker v. Green,* 313 Mich. 218, 21 N. W. 2d 105 (1946). Where it appears that the driver was at the time of the accident acting as the servant or agent of the owner, the undisputed rule is that the negligence of such driver will be imputed to the owner to hold him liable for damages to the person or property of a third party, *Holder v. Haynes,* 193 S. C. 176, 7 S. E. 2d 833 (1940); *McFaddin v. Anderson Motor Co.,* 121 S. C. 407, 114 S. E. 402 (1922), and that where the third party has also been negligent, the driver's contributory negligence will be imputed to the owner to prevent his recovery for damages to his own automobile. *Watts v. Safeway Cab & Storage Co.,* 193 Ark. 413, 100 S. W. 2d 965 (1937); *Ballou v. Fitzpatrick,* 283 Mass. 336, 186 N. E. 668 (1933). Where a bailor has in some way been negligent himself he will be held liable for injuries to a third party that occur as a result of such negligence, *Saunders v. Prue,* 235 Mo. App. 1245, 151 S. W. 2d 478 (1941); *Kantola v. Lovell Auto Co.,* 157 Ore. 534, 72 P. 2d 61 (1937), and where a plaintiff's negligence is a proximate contributing cause of a collision, it will be a bar to his recovery from a defendant who has been negligent. *Rogers v. Cox,* 75 A. 2d 776 (D. C. 1950); *Winfrey v. Witherspoon's Inc.,* 260 Ala. 371, 71 So. 2d 37 (1954). Many jurisdictions, although South Carolina is not among them, have statutes which impute to the owner of an automobile the negligence of the person driving it with his knowledge or consent, so as to hold the owner responsible for any damages which are caused to a third person by his automobile through the negligence of such driver, but most of them make no reference to imputing such negligence to the owner in any effort by him to recover against a negligent third party. D. C. CODE 1940, s. 40-401; I. C. A. 321.493; M. S. A. 170.04. Some of these jurisdictions will impute to the owner the contributory negligence of the driver so as to bar his recovery from the negligent third party for damages to his automobile, *National Trucking & Storage Co. v. Driscoll,* 64 A. 2d 304 (D. C. 1949); *Di Leo v. Du Montier,* 195 So. 74 (La. 1940), while others will not prevent the owner from recovering from such third person because of the contributory negligence of his driver. *Stuart v. Pilgrim,* 247 Iowa 709, 74

N. W. 2d 212 (1956); *Christenson v. Hennepin Transportation Co.*, 215 Minn. 394, 10 N. W. 2d 406, 147 A. L. R. 945 (1943); *Mills v. Gabriel*, 259 App. Div. 60, 18 N. Y. S. 2d 78 (1940). The common law rule, which South Carolina follows in absence of statute, is that the contributory negligence of the bailee is not imputable to the bailor in an action by the bailor for damages to his automobile against a negligent third party. *Lloyd v. Northern Pacific Railway Co.*, 107 Wash. 57, 181 Pac. 29, 6 A. L. R. 307 (1919); *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, 38 Atl. 828 (1897); *Rogers v. Saxton*, 305 Pa. 479, 158 Atl. 166, 80 A. L. R. 280 (1931).

The view taken by our Supreme Court in the instant case is clearly in accord with that of the majority of the courts in this country today. The theory in the early bailor-bailee cases was that the bailor was responsible for the bailee's negligence on the ground that he had a right to control even if he did not exercise it, and therefore, was chargeable with the bailee's negligence. However, the doctrine of imputing the contributory negligence of a driver to an owner where the latter's so-called "right to control" stemmed merely from the particular relationship of bailor-bailee has been almost universally rejected. Many authorities today further urge that the doctrine of imputed negligence should be abandoned in its entirety, even in such special relationships where it is still applied as in the principal-agent and master-servant situations. Lessler, *Imputed Negligence*, 25 CONN. BAR JOURNAL 30 (1951). It seems illogical to hold that, although a bailee is personally liable to a bailor for damages occasioned by his negligence in operating the bailor's car, the very same negligence which contributes to the bailor's injury could be imputed to the bailor in an action against a third party for injuries arising out of such third party's negligence. The correct view should be, as was held in the present case, that only one's own negligence should operate as a bar to recovery against such third party.

HARVEY G. SANDERS, JR.

A RECENT GIFT

The Law Library of the University of South Carolina has just received, through Ex-Governor James F. Byrnes, a copy of one of the earlier compilations of the South Carolina Statutes popularly known as *Grimke's Public Laws*. This volume was presented to the Law Library by Mr. David Lawrence, Editor of *U. S. News and World Report,* and includes all of the public laws of South Carolina from its establishment as a British province down through the year 1790. Included in the volume are such "statutes of Great Britain as were made of force by the Act of Assembly of 1712", as well as such other statutes "as before enacted or declared to be of force in this State, either virtually or expressly". The volume also contains the Constitution of the United States with amendments and "the newly adopted Constitution of the State of South Carolina".

Grimke's Public Laws is the third compilation of early statute law published in South Carolina. The first such collection of laws was published in London in 1704 and is popularly referred to as the "Folio Laws". The second statutory compilation was published in 1736 in Charleston and edited by Nicholas Trott, an Englishman and one of the earlier Chief Justices of South Carolina.

Judge John Faucheraud Grimke, the editor of this volume, was born December 16, 1752, and died August 9, 1819. He was elected a Judge of the Courts of Law in 1783 and was Speaker of the House of Representatives in 1785-86. At that time there was no prohibition against a Judge being a member of the Legislature as well as the Judiciary. It appears that he received his legal education at Westminster and "was one of a number of young Americans in London who petitioned George III against those measures which infringed upon the rights of the Colonists . . . ". He was noted for his habit of stern rule which probably dated back to his service as a Lt. Colonel of artillery during the Revolution. An attempt was made to impeach Judge Grimke in 1811 at which time he was defended by Daniel E. Huger, who speaking of Judge Grimke stated, "Mr. Speaker, I have not spoken more than half an hour for the honorable and venerable gentleman be-

fore you without tiring, when he for us, without tiring, fought seven years". The articles of impeachment failed to pass.

Not only is this volume valued as a rare book but it also has practical value for researchers in early South Carolina legal history. The Law Library is indeed fortunate to receive this valuable addition to its holdings.

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