

v. ARNOLD.

GENERAL EXCHANGE INSURANCE CORPORATION v. ARNOLD.

4-7118

174 S. W. 2d 543

Opinion delivered October 18, 1943.

1. AUTOMOBILES.—Where Mrs. L was driving her husband's car and a collision occurred and in making a settlement for the damages the evidence was conflicting as to whether she told the other party that she did not own the car and was not settling for the damage to it, the recitals in the release which she executed with other evidence were sufficient to support the finding that she did, in fact, settle the property damage.
2. BAILMENTS.—Where Mrs. L was driving her husband's car as a gratuitous bailee without beneficial interest in the property the right of action for injury to the car sustained in a collision was in the husband as general owner and not in the driver as special owner.
3. AUTOMOBILES—PRINCIPAL AND AGENT.—While a presumption of agency arises from proof of permissive use of the husband's car by his wife, that presumption disappears in the face of evidence that the husband was not present and took no part in operation of the car at the time of the accident.
4. AUTOMOBILES—RIGHT OF ACTION FOR DAMAGES SUSTAINED IN COLLISION.—Where Mrs. L who was driving her husband's car as a gratuitous bailee when a collision occurred collected the damage to her husband's car with no showing of agency authorizing her to do so except the permissive use thereof, the husband's right to recover the damage to the car was not defeated by her attempted release.

Appeal from Pulaski Circuit Court, Second Division;
Lawrence C. Auten, Judge; reversed.

House, Moses & Holmes and *Eugene R. Warren*, for
appellant.

SMITH, J. This cause was tried in the court below upon an agreed statement of facts, the salient recitals being to the following effect.

Mrs. V. W. Lund, Jr., drove an automobile owned by her husband from Little Rock to Memphis, and while so driving a collision occurred with a truck owned by N. E. Arnold, doing business as the National Moving Company. The negligence of the truck driver caused the collision. Mr. Lund was not present at the time.

v. ARNOLD.

Persons, who had given a mortgage upon it to Earl. The railroad company paid Persons the value of the horse. Earl, the mortgagee, sued the railroad company for the value of the horse and recovered judgment, which was reversed upon appeal to this court, it being held that the mortgagor in possession of the horse might sue and recover its value and that payment to the mortgagor precluded the mortgagee from suing, this upon the theory that the mortgagor occupied the position of bailee with a special ownership which entitled him to accept payment.

Here, Mrs. Lund was a bailee, but she was a mere gratuitous bailee, without other interest in the automobile, and we think the case is controlled by the opinion of this court in the case of *Pierce Oil Company v. Taylor*, 147 Ark. 100, 227 S. W. 420. That case is cited in the notes to the text appearing in the chapter on Bailments in 8 C. J. S., § 56, p. 372, as authority for that text, which reads as follows: "In the case of a gratuitous bailee without beneficial interest in the property, the right of action for its injury or destruction is in the bailor as general owner and not in the bailee as special owner; and, in any event, the fact that a bailee might have sued as special owner for the benefit of his bailor does not preclude the latter, where the bailee did not sue, from maintaining such an action after the death of the bailee."

In this *Pierce Oil Company* case, the facts were that the administrator's intestate lost her life through a fire caused by the negligence of the oil company, and the administrator recovered judgment for damages on that account. The intestate had on her person a sum of money belonging to her husband, who became the administrator of her estate. A second suit was brought by the husband on his own account for the recovery of a sum equal to the amount of money destroyed on the intestate's person, which she carried for safekeeping, at the request of her husband. The judgment in favor of the husband, as administrator, which had been paid, was pleaded in bar of the suit brought for his individual benefit. The contention was made that the intestate had a special ownership of the money destroyed, and that the right of

v. ARNOLD.

fact that it was in her possession. In vol. 9, part 2, of Blashfield's Cyclopedia of Automobile Law and Practice, Permanent Edition, there appears at § 6063 a discussion of the presumptive agency of the husband or wife, arising out of the fact that one spouse was driving the other's car. It was there said: "It has been held that, in the absence of a statute making it so, and in the absence of the application of the family purpose doctrine, agency for the other in the use of an automobile belonging to a husband or wife is not inferred merely from the marital relation, and that the husband may use his wife's automobile in connection with his own occupation without being presumed to be the wife's agent in the use of it."

We have no such statute, and we have expressly repudiated what is known as the family purpose doctrine in relation to driving an automobile. See *Johnson v. Newman*, 168 Ark. 836, 271 S. W. 705, and cases there cited. The third headnote to the case just cited reads as follows: "Master and Servant—Respondeat Superior Doctrine.—While the 'family purpose' and imputed negligence doctrines and the husband's common-law liability for his wife's torts are not recognized in Arkansas, the doctrine of *respondeat superior* still obtains, so that one permitting his wife or another to drive his car while occupied by him is responsible for negligence of such driver as his agent."

In the § 6063 above quoted, some cases are cited to the effect that a presumption of agency arises from proof of the permissive use of the husband's car by his wife, but other cases are cited which hold that this presumption of agency disappears in the face of evidence that the husband was not present and took no part in operating the car at the time of the accident.

Here, the record is that in the absence of the husband, the wife settled and collected the damage to her husband's car with no showing of agency authorizing her to do so, except the permissive use of the car as a gratuitous bailee. The husband's right to recover the damage to his car was not thus defeated, and the judgment of

ARK.]

229

the court below will be reversed and judgment rendered here for appellant for \$250, the amount of the damage stipulated.
