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Torts--Infants--Right of Action in Negligence Permitted by Unemancipated Infant Against His Unemancipated Brother

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could be argued that conditions in a federal enclave, particularly a military post, are completely foreign to civil authorities, and should be the responsibility of the federal government. Since a state statute is being interpreted, general policy considerations must fall to state policies. Certainly one policy of a state is to conserve its funds—to use them only when the interests of its taxpayers can be served. The decision of the Colorado court is contrary to this policy.

CONCLUSION

In view of (1) the number of cases in which residents of ceded areas have been denied rights common to residents of the state in which the area is located, on both federal and non-federal grounds, (2) the adoption of specific provisions to effectuate a contrary policy found necessary in other states, (3) the absence of an avowed state policy which would be served by a strict geographical definition of the words "in the county," and (4) the unreasonableness of imputing an intent to the Colorado legislature to spend state money for persons not otherwise subject to its laws, it is submitted that the Colorado court erred in its interpretation of the statute in question.

Burke B. Terrell

TORTS—INFANTS—RIGHT OF ACTION IN NEGLIGENCE PERMITTED BY UNEMANCIPATED INFANT AGAINST HIS UNEMANCIPATED BROTHER—Plaintiff, a thirteen-year-old infant, was injured in a collision with another car while riding in a car owned and operated by his seventeen-year-old brother. An action was filed by plaintiff's next friend against the drivers of both vehicles as co-defendants. The plaintiff alleged that the gross negligence of his brother and the ordinary negligence of the other driver were the proximate causes of his injuries. The defendant-brother moved to dismiss on the ground that there can be no recovery in a tort action between unemancipated infant brothers. The circuit court continued the case against the co-defendant, but dismissed the action against the brother. From this ruling, the plaintiff appealed. *Held*: Reversed and remanded. An unemancipated infant can maintain an action against his unemancipated infant brother to recover damages for personal injuries resulting from the latter's negligence. *Midkiff v. Midkiff*, 113 S.E.2d 875 (Va. 1960).

The defendant argued that there is a common-law immunity barring recovery in such actions. The court answered by stating that it could find no cases supporting the defendant's argument, but to the contrary, that it is well settled that an infant is liable for his

torts, and that even if there were such an immunity there is no sound reason for its continuance.[1]

The question of immunity in tort actions between unemancipated infants of the same family was first discussed in *Munsert v. Farmers Mut. Auto. Ins. Co.*,[2] decided in 1938. In that case, the Wisconsin court held that the father of a deceased infant could properly maintain a wrongful death action against the deceased's infant brother. Since the wrongful death statute made a right of action in the deceased, had he lived, a prerequisite for an action by his representative, the court's decision necessarily denies the existence of an immunity between unemancipated infants of the same family.[3] A year later the issue was directly presented in the landmark case of *Rozell v. Rozell*,[4] where it was held that an unemancipated infant could maintain a tort action against his unemancipated sister for damage for personal injuries.

When the problem arose in the *Rozell* case, the question was—and still is—whether immunity should be created, and not whether there is an existing immunity to be rejected. One might contend that an immunity in personal injury actions between brothers and sisters should be created because of the analogous common-law decisions recognizing immunities between husband and wife and parent and child. But there is no historical common-law background of legal unity between unemancipated children as there is between husband and wife. Nor is there the threatened disturbance of parental discipline which has been the primary common-law reason for maintaining an immunity between parent and child. Therefore, the analogy to the husband-and-wife or to the parent-and-child cases fails because the historical reasons for the immunity in those cases are not present in an action between unemancipated children of the same family. Even these established immunities have recently been rejected in some jurisdictions.[5]

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[1] Midkiff v. Midkiff, 113 S.E.2d 875, 877 (Va. 1960). One might speculate as to why there was no earlier litigation involving this specific problem. The tendency of members of a family to settle their non-property problems out of court contributed to this lack of litigation. The uncertainty created by the history of the other intra-family immunities, *i.e.*, between parent and child and between husband and wife, is another reason. The most important reason was the absence of automobile liability insurance. Without this insurance, there seems to be no practical reason for minors of the same family to sue one another. Liability insurance, attended by the greater use of the automobile, should contribute to an increase in the volume of this litigation. See 27 Geo. L. J. 643, 644 (1939).

[2] 229 Wis. 581, — 281 N.W. 671, 673 (1938).

[3] Beilke v. Knasch, 207 Wis. 490, 242 N.W. 176 (1932).

[4] 281 N.Y. 106, 22 N.E.2d 254 (1939).

[5] *E.g.*, Harlan Nat'l Bank, Adm'r v. Gross, — S.W.2d—, (Ky. 1961) (parent-child); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (husband-wife).

Several other arguments supporting immunity have been advanced, the most frequent are the following: (1) that immunity is in accord with the public policy of protecting domestic tranquility and maintaining the family unit;[6] (2) that immunity is necessary for the prevention of fraud and collusion;[7] and (3) that the courts should wait for legislation before approving actions between unemancipated children of the same family.[8]

The first argument, that the immunity protects domestic tranquility, was rejected by Judge Traynor, speaking for the Supreme Court of California in *Emery v. Emery*,[9] as merely a "speculative assumption," since granting immunity between unemancipated brothers and sisters would not necessarily guarantee domestic tranquility. He reasoned that an uncompensated injury was as likely to interfere with domestic tranquility as a personal injury action between unemancipated children. The domestic tranquility argument is further weakened by the availability of liability insurance. Domestic tranquility will hardly be disturbed by an action which allows an injured child to reach insurance proceeds. If such insurance is not available, the choice of means to insure family harmony is best left within the family.

The second argument, that the immunity prevents fraud and collusion, has also been rejected.[10] Even if it is legitimate to fear fraud or collusion, the courts should be able to ferret it out, as they must in many other situations.[11] The fact that the question has been considered in only six cases[12] may indicate that there is an absence of fraud and collusion.[13]

The third argument, that the courts should await appropriate legislation, misconceives the problem, because the basic assumption that an immunity exists is fallacious. Since the courts are being asked to create, not to destroy immunity, it is clearly within the province of the court's function to allow the action without prior legislative

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[6] Rozell v. Rozell, 281 N.Y. 106, –, 22 N.E.2d 254, 255 (1939); Midkiff v. Midkiff, 113 S.E.2d 875, 876 (Va. 1960).

[7] Emery v. Emery, 45 Cal.2d 421, –, 289 P.2d 218, 224 (1955); Rozell v. Rozell, 281 N.Y. 106, –, 22 N.E.2d 254, 257 (1939).

[8] Rozell v. Rozell, 281 N.Y. 106, –, 22 N.E.2d 254, 257 (1939).

[9] 45 Cal. 2d 421, –, 289 P.2d 218, 224 (1955).

[10] Emery v. Emery, 45 Cal. 2d 421, –, 289 P.2d 218, 224 (1955).

[11] Rozell v. Rozell, 281 N.Y. 106, –, 22 N.E.2d 354, 257 (1939); 38 Mich. L. Rev. 743, 745 (1940).

[12] Emery v. Emery, 45 Cal. 2d 421, 289, P. 2d 218 (1955); Becker v. Riech, 19 Misc. 2d 104, 188 N.Y.S. 2d 724 (1959); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939); Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A. 2d 426 (1948); Midkiff v. Midkiff, 113 S.W. 2d 875 (Va. 1960); Munsert v. Farmers Mut. Auto. Ins. Co., 229 Wis. 581, 281 N.W. 671 (1938). See also Prosser, Torts § 101, at 677 (2d ed. 1955); 52 Am. Jur. *Torts* § 97 pp. 439, 440 (1944).

[13] See Miller v. Monser, 228 Minn. 400, –, 37 N.W.2d 543, 546 (1949).

approval. Even if the immunity ever existed, as the New York court reasoned in the *Rozell* case, "it is not necessarily the function of a court to refuse to declare a rule of conduct until the economic and social order of the day forces its declaration by the state."[14] This is sound reasoning in light of the history of our judicial system in which the courts have seldom waited for legislative action on matters that could be solved by the courts themselves. Courts are always subject to legislative command, but they do not have to wait for it.

When the problem arises in those jurisdictions which have not yet decided the question, it is probable that disposition favorable to suit will be made as it has so far in every jurisdiction which has considered it. Reason and justice point in this direction.[15]

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TRUST ADMINISTRATION—PRINCIPAL AND INCOME—ALLOCATION OF INCOME FROM PROPERTIES DISPOSED OF BY THE EXECUTOR TO THE INCOME BENEFICIARY—Testatrix, leaving a probate estate of $480,000, provided for payments of taxes, debts, legacies, and expenses out of her "general estate" in items I-V of her will. In item VI she bequeathed to a trustee "all the rest, residue and remainder" of her estate in two equal trusts for the benefit of her niece and nephew. During the administration period $3,500 was earned on properties which were subsequently disposed of by the executor to cover debts, taxes, legacies and other administrative costs. Unable to determine whether this particular income should be allocated to the income beneficiaries or added to corpus, the executor instituted an action for declaration of rights to the specified income. The trial court found for the income beneficiaries. *Held*: Affirmed. Absent a contrary manifestation of intent, the income beneficiary of the residuary trust is entitled to the whole income derived from the residuary estate,

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[14] Rozell v. Rozell, 281 N.Y. 106, —, 22 N.E.2d 254, 257 (1939).

[15] If the problem should arise in Kentucky, the *Rozell* doctrine should be accepted. This would be a natural development in the favorable climate created by Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953), which held that a wife could sue her husband for damages for personal injuries. Before that case, Kentucky was one of the great majority of courts which steadfastly followed the common-law rule of husband-wife immunity. The remaining intra-family immunity, parent-child, has just recently been stricken down in Kentucky. Harlan Nat'l Bank, Adm'r v. Gross, —S.W.2d—, (Ky. 1961), overruling Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954). It is hoped that Kentucky will continue the liberalizing trend in family-relationship cases by following the unanimous line of decisions rejecting the creation of an immunity between unemancipated minors of the same family.