

that the statute would have commenced to run from the date of judgment in the suit for personal injuries and not from the time of the injury, it can be seen that the court is following the rule that a statute limiting an action for death is not to run from the time of the injury. It is to run from the time of death if at that time there remains a legal liability to the injured party. R. L. W., '29.

MASTER AND SERVANT—INJURY TO THIRD PERSON—PRESUMPTION OF AGENCY AND AUTHORITY.—In personal injury action, proof of ownership of defendant's passenger automobile driven by another *held* sufficient to take the case to the jury and to sustain a verdict against the owner under the doctrine of *respondent superior*. *Edwards v. Rubin*, 2 S. W. (2d) 205 (Mo. App. 1928).

The common law rule is that the burden of proof rests on the plaintiff to show that the driver was the agent of the owner and that he was acting within the scope of his employment. The effect upon the rule of the instant case, where it was shown that the car was in fact owned by the defendant, is to raise presumption of agency and authority. This does not mean that the burden of proof is shifted to the defendant, but merely that a *prima facie* case has been made out and that the defendant has the burden of going forward with the evidence. It is similar to the familiar doctrine of *res ipsa loquitur*, applied in other tort actions. The doctrine of the principal case was applied in the English case of *Joyce v. Capell*, 8 Car. & P. 370 (1838), in which Lord Denman says, "If the barge was on hire that will be for the defendants to show. The barge being the barge of the defendants, there is *prima facie* evidence that the barge-man was their servant till they explain it."

The general American doctrine is in accord with the instant case. *West v. Kern*, 88 Ore. 247, L. R. A. 1918D 920; *Mahan v. Walker*, 97 N. J. L. 304; *Baker v. Mashee*, 20 Ariz. 201. The presumptions continue until there is substantial evidence to the contrary. *Orlando v. Pioneer Barber Towel Supply Co.*, 239 N. Y. 342. There are at least twenty states that recognize this rule. Additional citations can be found in 42 A. L. R. 900; Huddy on Automobiles, 8th ed., 930; and Shearman and Redfield on Negligence, Sec. 158. A few American jurisdictions will not follow this rule to the full extent, but demand that the agency be shown before the presumption of authority will be raised. *Hayes v. Hogan*, 273 Mo. 1; *Stumpf v. Montgomery*, 101 Okla. 257, 32 A. L. R. 1490, following the Hayes case, *supra*. In refusing to raise both presumptions, the court in *Hayes v. Hogan* relied on the proposition that the presumption that the driver was acting within the scope of his employment is based upon the previous presumption of agency, whereas a presumption should properly be based upon a fact. The case of *Hayes v. Hogan*, *supra*, seems to have been overruled in this respect by the later case of *Barz v. Fleischmann Yeast Co.*, 308 Mo. 288, the latest case from the Missouri Supreme Court on this point. There is another group of cases holding that no presumption is raised at all, but that the plaintiff must prove both that the driver was the agent of the defendant and also that he was acting within the scope of his employment. *Trombly v. Stevens-Dureuya Co.*, 206 Mass. 516; *Tice v. Crowder*, 119 Kan. 494. Other citations can be obtained from Huddy on Automobiles, p. 933.

The reason for the rule in the principal case is very fully explained in *Baker v. Mashee*, 20 Ariz. 201: "When an owner's car is being driven by another, that fact is presumably within the knowledge of the owner and he can readily show that the vehicle was not being driven for him, if such is the fact. If the vehicle has been stolen and is being driven by the thief or if it has been loaned or hired out to the driver, who is using it for his own business or for his own pleasure, the owner is in the best situation to prove the fact. One who is damaged, either in person or in property by an automobile, negligently operated by some person other than the owner is usually without information as to the relation between the driver and the owner. If he be required to make affirmative proof of the

relation, he might never be able to do so, however just and meritorious a case he might have on account of the negligent operation of the vehicle."

The trial court in the principal case seemed disturbed by the fact that heretofore in Missouri the presumption had only been applied to trucks, while here a passenger vehicle was involved. The St. Louis Court of Appeals said that it can see no substantial difference between trucks and passenger vehicles in this respect, and that the rule should apply equally to both. It reached the same conclusion in *Jacobson v. Beffa*, 282 S. W. 161. This search has disclosed only one court which makes such a distinction. Pennsylvania courts will raise the presumptions when the vehicle is a truck, but refuse to do so when passenger vehicles are involved. *Sieber v. Russ Bros. Ice Cream Co.*, 276 Pa. 340 and cases there cited. It seems to the writer that the reason given in *Baker v. Mashee*, *supra*, applies to both trucks and passenger vehicles with equal force. There is the same necessity for the rule in both cases, and the Missouri court seems justified in extending it to include passenger vehicles.

R. B. S. '30.

NEGLIGENCE—LIABILITY OF CONTRACTOR—USING PUBLIC STREET.—Defendant was engaged in the construction of a building abutting on a public street and had erected a shed over the sidewalk in accordance with provisions of the building code leaving unguarded steps leading to the roof of the shed which were used in building operations. Plaintiff, a young boy, fell off of the top of the steps while playing on the structure. The accident would probably not have occurred had a railing been constructed on the steps. A watchman who was employed to keep children off was absent. *Held*, since use of a sidewalk was not unlawful and not inherently dangerous, the contractor was under no affirmative duty to make the place entirely safe for children or to protect them against ordinary hazards of boyhood. *O'Callaghan v. Commonwealth Engineering Corp.*, 159 N. E. 884, (N. Y., 1928).

The court went on the theory that the steps and absence of railing created no danger which caused injury to any pedestrian, that no invitation, express or implied, was held out to the public to climb the steps, and that the defendant was under no duty to exercise care so that the steps might be rendered safe for any person who chose to use them without invitation or permission.

Where the highway is obstructed under license, the person responsible therefore is chargeable only with ordinary care to see that the obstruction does not cause injury to persons lawfully using the highway. *Stockton Automobile Co. v. Confer*, 154 Cal. 402, 97 Pac. 881. One constructing a building adjacent to a sidewalk owes to pedestrians the duty of exercising care for their protection. *Holmquist v. C. L. Gray Constr. Co.*, 169 Iowa 502, 151 N. W. 828. Accordingly it would seem that the defendant is not liable for injuries sustained in the course of ordinary boyhood play when the structure itself is neither inherently dangerous nor an attractive nuisance. The decisions seem to indicate that it is a question for the jury as to whether or not a structure is dangerous, and, in the absence of a finding that it is dangerous, liability attaches only on proof of negligence. *R. G. Lassiter & Co. v. Grimstead*, 132 S. E. 709, (Va.); *Soricro v. Pennsylvania R. Co.*, 86 N. J. L. 642, 92 Atl. 604. Contractors doing work in or adjacent to public ways are not made insurers of the safety of children playing in the vicinity. In accord with the principal case is *Reilly v. Barber Asphalt Paving Co.*, 155 App. Div. 108, 140 N. Y. S. 16, in which a small boy went to the edge of the sidewalk and was severely burned when he fell into hot asphalt. The court held defendant not negligent in not having a guard stationed at that place.

It would seem, therefore, that the court was correct in holding the defendant under no affirmative duty to make the structure entirely safe for trespassing children under the circumstances of the case.

W. V. W., '30.