

McCUNE GILL, LL.B., Washington University, 1904, who contributes *The Rule against Perpetuities As It Affects Contingent Future Interests in Missouri* is the author of *Real Property in Missouri, Missouri Titles* and numerous articles dealing with Missouri property law.

---

## Notes

### MISSOURI AND THE "FAMILY AUTOMOBILE"

The recent trend whereby the family automobile has tended to become a necessity rather than a luxury seems to have elevated it to a place of importance in life second only to the family home, which the law has long so zealously guarded. The prodigious growth in the number of machines together with their increased size, weight and speed has added alarmingly to the ever increasing toll of traffic deaths. Accompanying this remarkable increase in the number of machines has been an even more rapid growth in the number of drivers. Recognizing the continuously rising rate of accidents, due not only to incompetency of the drivers, but to a multitude of other reasons as well, the various state legislatures and municipalities have sought ways and means to remedy an alarming situation. It is not the purpose of this article to consider the devious methods proposed to prevent the injuries arising from such accidents, but rather to consider, from the standpoint of Missouri, legal responsibility for the economic toll which is taken.

There is of course no difficulty in holding the driver owner liable for his torts. The real difficulty lies in the situation whereby the head of the family purchases an automobile and the various members of the family drive it. As a general rule the individual members, other than the head of the family, are themselves financially irresponsible and thus if the head of the family cannot be held liable the injured person is without recompense. It is a well established tort proposition that, nothing else appearing, no one is responsible for the act or omission of another.<sup>1</sup> The increasing complexity of our social, economic, and industrial life, however, resulted in the development of the doctrine "respondeat superior" which makes the principal subject to liability for injuries caused by the tortious conduct of his servant or agent when acting "within the scope of his employment."<sup>2</sup>

---

<sup>1</sup> Sherman & Redfield, *Negligence* (6th ed. 1913) s. 144.

<sup>2</sup> *Funk v. Fulton Iron Works Co.* (1925) 311 Mo. 77, 277 S. W. 566; *Hardeman v. Williams* (1907) 150 Ala. 415, 43 So. 726, 10 L. R. A. (N. S.) 653; *Hall v. Smith* (1824) 2 Bing. 156, 9 E. C. L. 357; As to a test of what is the "course of his employment" see *Garretzen v. Duenckel* (1872) 50 Mo. 104, 11 Am. Rep. 405.

And this applies as well to the owner of an automobile as to any other situation of principal and agent or master and servant.<sup>3</sup>

Recognizing the ever increasing financial destruction by the modern automobile the legislatures in the various states have clearly and definitely extended the tort liability of the owner of a family automobile beyond that originally imposed upon him by strict common law rules. Nor has it been limited to legislative enactment. Though many decisions contain statements that an automobile is not an inherently dangerous instrumentality, *per se*,<sup>4</sup> still many of the courts have, by judicial decision, greatly increased the tort liability of the automobilist. And in accord with this development many courts have, in connection with liability for acts of members of the family, evolved what is known as the "family purpose" doctrine.<sup>5</sup> This doctrine holds that when an automobile is purchased and maintained for the pleasure of, and use by, members of the family, the owner is liable for injuries inflicted while it is so being used by them for their own

---

<sup>3</sup> *Stickney v. Epstein* (1923) 100 Conn. 170, 123 Atl. 1; *Nicholas v. Kelley* (1911) 159 Mo. App. 20, 139 S. W. 248, held that when an auto is operated by a servant within the scope of his employment and about his master's business, the master is deemed as operating it and is himself liable for the servant's negligence. But where the servant uses the master's automobile for his own personal affairs, or beyond the scope of his authority, the master is not liable. See, *Anderson v. Nagel* (1924) 214 Mo. App. 134, 259 S. W. 858. And in *Wrightsmen v. Glidewell* (1922) 210 Mo. App. 367, 239 S. W. 574, it was said that the test for determining whether a master is liable for injuries inflicted by his auto when being driven by his servant is whether the servant at the time of the accident was engaged in the furtherance of the master's business concerning which he was employed.

<sup>4</sup> *Michael v. Pulliam* (1919, Mo. App.) 215 S. W. 763, where it was said, l. c. 764, "an automobile is not a 'dangerous instrumentality' in the sense that the owner thereof would be liable for allowing another to use it on the public highway in such other's service or pleasure." See also, *Cunningham v. Castle* (1908) 127 App. Div. 580, 111 N. Y. S. 1057; *Danforth v. Fisher* (1908) 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93.

<sup>5</sup> See Note, 88 A. L. R. 602. "The so-called family purpose doctrine, which is applied in auto cases, originated in the desire of the courts as a matter of justice or supposed necessity, to charge one who had purchased a car for the use of his family, with responsibility for injury or damage resulting from its negligent operation by a member of his family. It was quite generally recognized that liability could not be based on the doctrine of master and servant, or principal and agent, as it had been previously applied. Owing, however, to the multitude of cases and to the seeming injustice in allowing one so to purchase a car, turn it over to a member of his family, and thus make possible injury or damage to an innocent person, the principles of master and servant and principal and agent were stretched by some courts in some jurisdictions, beyond their former limits, to include the so-called family purpose doctrine whereunder liability is imposed where none before existed."

The following courts have expressly or impliedly adopted the family purpose doctrine: *Benton v. Regeser* (1919) 20 Ariz. 273, 179 Pac. 966; *Boyd v. Close* (1927) 82 Colo. 150, 257 Pac. 1079; *O'Keefe v. Fitzgerald* (1927) 106 Conn. 294, 137 Atl. 858, this case limits its application in

pleasure. This is on the theory that the car was being used for the purpose or business for which it was kept and that therefore the person operating it was acting as the owner's agent or servant in using it. Thus the courts have all generally recognized that a relation of agency must be present, but in their solution of this problem they are in irreconcilable conflict. The most forward looking seem to have recognized the existence of a very vital problem growing out of the negligent operation of the automobile, and have thus developed the "family purpose" doctrine. On the other hand the conservative courts cling tenaciously to the old established rules of tort liability and agency and have felt reluctant to extend the doctrine of "respondeat superior" unless there is clearly present a relation of master and servant.<sup>6</sup>

It was a general rule at common law that a father was not, on the mere ground of parental relationship, liable for the torts of a minor child; an infant was liable for his own torts.<sup>7</sup> It is

---

Conn. in that the driver must have general authority to use the car; Griffin v. Russell (1915) 144 Ga. 275, 87 S. E. 10, L. R. A. 1916 F, 216, Ann. Cas. 1917 D, 994; Gates v. Mader (1925) 316 Ill. 313; Baldwin v. Parsons (1922) 193 Iowa 75, 186 N. W. 665, this case also holds that the plaintiff must show consent on the part of the head of the family; Miller v. Weck (1920) 186 Ky. 552, 217 S. W. 904; Johnson v. Schuler (1922) 152 Minn. 137, 188 N. W. 271; Lynch v. Dobson (1922) 108 Neb. 632, 188 N. W. 227; Watts v. Lefler (1925) 190 N. C. 722, 130 S. E. 630; Boes v. Howell (1918) 24 N. M. 142, 173 Pac. 966, L. R. A. 1918 F, 288; Ulman v. Lindeman (1919) 44 N. D. 36, 176 N. W. 25, 10 A. L. R. 1440; Foster v. Farra (1926) 117 Ore. 286, 243 Pac. 778; Mooney v. Gilreath (1923) 124 S. C. 1, 117 S. E. 296; King v. Smythe (1918) 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918 F, 293, which is a leading case; Birch v. Abercrombie (1913) 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59, perhaps the leading case; Aggelson v. Kendall (1922) 92 W. Va. 138, 114 S. E. 454.

<sup>6</sup> The following courts seem to have expressly or impliedly refused to adopt the family purpose doctrine: Norton v. Hall (1921) 149 Ark. 428, 19 A. L. R. 384, 232 S. W. 934; Spence v. Fisher (1920) 184 Cal. 209, 193 Pac. 255, 14 A. L. R. 1083; Smith v. Callahan (1928) 34 Del. 129, 144 Atl. 46, 64 A. L. R. 830; Thompson v. Kansas City R. Co. (1923) 113 Kan. 74, 213 Pac. 633; Protz v. Cloutier (1920) 119 Me. 203, 110 Atl. 353, 10 A. L. R. 1434; Myers v. Shipley (1922) 140 Md. 380, 216 Atl. 645, 20 A. L. R. 1460; McGowan v. Longwood (1922) 242 Mass. 337, 136 N. E. 72, 23 A. L. R. 617; Clawson v. Schroeder (1922) 63 Mont. 488, 208 Pac. 924; Doran v. Thomsen (1908) 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677, a leading case; Van Blaricom v. Dodgson (1917) 220 N. Y. 114, 115 N. E. 443, L. R. A. 1917 F, 363, also a leading case; Elms v. Flick (1919) 100 Ohio St. 186, 126 N. E. 66; Stumpf v. Montgomery (1924) 101 Okla. 257, 226 Pac. 65, 32 A. L. R. 1490; Piquet v. Wazelle (1927) 288 Pa. 463, 136 Atl. 787; Landry v. Richmond (1924) 45 R. I. 504, 124 Atl. 263, 32 A. L. R. 1500; McFarlane v. Winter (1915) 47 Utah 593, 155 Pac. 437, L. R. A. 1916 D, 618; Blair v. Broadwater (1917) 121 Va. 301, 93 S. E. 632, L. R. A. 1918 A, 1011; Papke v. Haerle (1926) 189 Wis. 156, 207 N. W. 261.

<sup>7</sup> Baker v. Haldeman (1857) 24 Mo. 219, 69 Am. Dec. 430; Arkin v. Page (1919) 287 Ill. 420, 123 N. E. 20, 5 A. L. R. 216.

this common law view which has made it so difficult for the courts to hold the father liable for injury done by the family automobile. Though even at common law the operation of this general rule was avoided by proof that at the time when the injury was inflicted the child was employed by the father in the capacity of a servant or agent.<sup>8</sup> This would seem to give rise to two classes of cases in so far as the family automobile is concerned. The first would be those in which the negligent member of the family was driving either at the express command of the father or in obedience to an implied request. Included in this class would be those instances in which the owner himself could not drive, and hence the member of the family was really acting as a chauffeur. The second class would be those in which the car was being used primarily for the pleasure of the child alone and in which he was either driving alone or with persons other than members of the family. The first class should not tend to raise any practical difficulty as there the driver is carrying out an express or implied command of his master.<sup>9</sup> He is unquestionably acting as the agent or servant of the owner in carrying out the purposes for which the car was bought, as much as if the owner had hired a person outside of the family to act as chauffeur. The second however is where the real difficulty, and the resulting conflict, arises. As the child is definitely using the car for pleasures of his own one must stretch the string tying the situation to the doctrine of master and servant nigh on to the breaking point. Still, since many courts have so regarded its elasticity, one must seek an explanation.

One reason for the father's liability which might be advanced is that, technically speaking, he has control over his children, and as such he owes them a duty of furnishing recreation and pleasure, and in the furtherance of this they are acting in his behalf.<sup>10</sup> But from a very practical viewpoint such control is

---

<sup>8</sup> *Dunks v. Grey* (1880) 3 Fed. 862; *Linville v. Nisson* (1913) 162 N. C. 95, 77 S. E. 1096.

<sup>9</sup> *Cutts v. Davison* (1916, Mo. App.), 184 S. W. 921. The defendant telephoned to have his son meet him at the railroad station. Enroute, while driving defendant's car, the son injured the plaintiff. Held, sufficient evidence to show the son was the defendant's servant. *Smith v. Jordan* (1912) 211 Mass. 269, 97 N. E. 761. The son was the only one who drove the car. Defendant's wife had permission to use it whenever she pleased, the son acting as chauffeur. At the time of the accident the son was transporting the mother at her request. This evidence was held to be sufficient for the jury to determine that the automobile was being operated upon the business of the defendant under his authority.

<sup>10</sup> A very sarcastic criticism of this view is set forth by Burch, J. in *Watkins v. Clark* (1918) 103 Kans. 629, 176 Pac. 131. He says, "So, if daughter took her friend riding she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent' . . . . If son took his best girl riding, *prima facie*, it was father's little outing by proxy, and if an accident happened, *prima facie* father was liable."

rather unimportant, perhaps under the modern relationship even nonexistent; and the courts generally, whether following the family purpose doctrine or not, have held to be immaterial the question of consent or the fact that the child is *sui juris*, and thus legally under the parent's control.<sup>10a</sup> Undoubtedly an underlying factor influencing the courts' decisions is that the child ordinarily has no financial responsibility; but this is probably true in the majority of tort cases and the courts of law rarely involve themselves in the practical issue as to whether or not a defendant is judgment proof. It seems that the best basis for a decision holding the owner liable is the "dangerous instrumentality" doctrine. One who allows a dangerous instrument to get into the hands of a child, or an incompetent person has been held to be liable for injuries resulting thereby.<sup>11</sup> The difficulty in this view is that the courts have practically unanimously held that an automobile as such is not a dangerous instrumentality.<sup>12</sup> Still in the hands of a minor, especially when the child is either too young to handle the car, or too weak physically to drive it, an automobile tends to become a dangerous agency.<sup>13</sup> Thus there is negligence on the part of the father in allowing the child to drive, and for such negligence the father should be liable. Missouri tended to recognize this in *Roark v. Stone*, *infra*,<sup>14</sup> although a further element, in that it involved a violation of a Missouri

<sup>10a</sup> However some of the courts following the family purpose doctrine have limited its application to cases where the child had consent, whether express or implied, to use the car; though general authority was held sufficient. See footnote 5, *supra*, *O'Keefe v. Fitzgerald* (Conn.), *Baldwin v. Parsons* (Iowa), *Miller v. Weck* (Ky.), *Johnson v. Schuler* (Minn.).

<sup>11</sup> *Charlton v. Jackson* (1914) 183 Mo. App. 613, 167 S. W. 670; *Johnson v. Glidden* (1898) 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795. This is true in all cases where a master and servant relationship is present, the courts agreeing that when the employer places in the hands and under the control of his employee an instrumentality of exceptionally dangerous character, he is bound to take exceptional precautions to prevent an injury being done thereby. *Dougherty v. Chicago, etc. R. Co.* (1908) 137 Iowa 257, 114 N. W. 902, 126 A. S. R. 282, 14 L. R. A. (N. S.) 590.

<sup>12</sup> See footnote 4, *supra*. A contra view was expressed in *Southern Cotton Oil Co. v. Anderson* (1920) 80 Fla. 441, 86 So. 629, 16 A. L. R. 255. This case held that in view of the increasing number of automobile accidents the time has come to recognize the automobile as an inherently dangerous agency. See also on this general subject the leading case of *McPherson v. Buick Automobile Co.* (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916 C, 440, L. R. A. 1916 F, 696.

<sup>13</sup> *Elliott v. Harding* (1923) 107 Ohio St. 501, 140 N. E. 338, 36 A. L. R. 1128, where it was said that while an automobile is not a dangerous instrument *per se*, it may become such if operated by one who is unskilled in its use; and where the owner intrusts such a machine to an inexperienced or incompetent person, liability for damages may arise. Accord, see *Robertson v. Aldridge* (1923) 185 N. C. 292, 116 S. E. 742.

<sup>14</sup> See footnote 56.

statute, was also present. And in *King v. Smythe*<sup>15</sup> the Tennessee Supreme Court recognized such a doctrine, saying,

“as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb, and must be operated with care.”

In the final analysis it really becomes a question of social policy and the issue is whether or not established rules of law should be changed to fit changing social conditions. In discussing the social and economic effects of a refusal to hold the owner liable the courts have often indirectly admitted that these elements have influenced them in declaring that a master and servant relationship does exist. The father does have control of the car and can prescribe conditions for its use. Those following the “family purpose” doctrine seem to feel that someone should be financially responsible for the injury which is done, and when an instrumentality of this kind is placed in the hands of his family by a father, for the family’s pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner be liable for its negligent operation. As said in *King v. Smythe*, supra.

“If owners of automobiles are made to understand that they will be held liable for injury to person and property occasioned by their negligent operation by infants and others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities.”

These courts tend first to decide that the owner should be liable, and then, having come to this conclusion, they proceed to find that an agency relationship exists, as it was the purpose of the father in purchasing the car to provide for the pleasure of the family, and when it is thus used it is used for his purposes. Thus, it being “about his business,” he is liable under the doctrine of “respondeat superior.” An excellent argument against the family car doctrine is presented by the New York Court of Appeals in *Van Blaricom v. Dodgson*,<sup>15a</sup> where it is clearly pointed out how contradictory are the two propositions, viz., that a person who is wholly and exclusively engaged in the prosecution of his own pleasure is nevertheless engaged as an agent in doing some-

---

<sup>15</sup> (1918) 140 Tenn. 225, 204 S. W. 296, L. R. A. 1918 F, 293.

<sup>15a</sup> (1917) 220 N. Y. 114, 115 N. E. 443, L. R. A. 1917, F, 363.

thing for someone else. It presents as the real question whether or not, as a matter of common sense and practical experience, a parent who maintains an article for family use makes the members of the family his agents thereby. And *Doran v. Thomsen*<sup>15b</sup> carries the argument to a *reductio ad absurdum*, asking, "should a father in keeping a set of golf sticks make his son his agent thereby?" The New York court argues that rules of agency are not formulated to fit particular circumstances, but are believed to be constant and not variable to supposed exigencies of some particular situation. "If, contrary to ordinary rules, the owner ought to be responsible for the carelessness of everyone whom he permits to use his car in the latter's business, that liability ought to be sought by legislation as a condition of issuing a license rather than by some new and anomolous slant applied by the courts to the principles of agency." Perhaps after all it is best to place the duty upon the legislature, but strong courts have held upon both sides of the question and the decisions seem to be about evenly divided.<sup>16</sup>

The question seems to have been first presented in Missouri to the Kansas City Court of Appeals. In *Dailey v. Maxwell*<sup>17</sup> the court reaffirmed the old common law rule of agency (*viz.*, that the agent must be acting within the scope of his authority to make the principal liable) but it went on to hold that the pleasure of their children is the business of the parents, and thus "in running the car with the consent of his father, and within the scope of family uses, Earnest was the agent and servant of his father."<sup>18</sup> Hence the father was held liable for the negligence of his son. Two years later the same court reiterated its stand and held to be immaterial the fact that the member of the family was *sui juris* so long as he was still such a member of the immediate family.<sup>19</sup> Relying on these two cases,

<sup>15b</sup> (1908) 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335.

<sup>16</sup> See footnotes 5 and 6, *supra*. Michigan has enacted such a statute, Comp. Laws Mich. 1929., § 4648, providing ". . . The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle . . . . The owner shall not be liable, however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge. It shall be presumed that such motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of said injury by his or her father, mother, brother, sister, son, daughter or other immediate member of the family. . . ."

<sup>17</sup> (1911) 152 Mo. App. 415, 133 S. W. 351. In this case the son was the only one in the family who drove the car. However, at the time of the accident he was using it expressly for his own pleasure, as he was taking some of his friends out riding.

<sup>18</sup> *Ibid.*, l. c. Mo. 427, l. c. S. W., 354.

<sup>19</sup> *Marshall v. Taylor* (1913) 168 Mo. App. 240, 153 S. W. 527. Here the son was using the car for his own pleasure, *viz.*, to ride downtown. The only difference between this case and the prior case was that in this decision the son was twenty-one, and the court held this to be immaterial.

in *Hays v. Hogan*<sup>20</sup> the Springfield Court of Appeals held the father liable for the negligent acts of his son while driving the family car for his own pleasure. In denying a rehearing<sup>21</sup> the court held it to be prima facie evidence in favor of the plaintiff to show merely that the defendant father was the owner of the car, and that the burden was upon the father to prove that the son was operating the car without consent.

However, recognizing that such a view was a radical departure from the old common law doctrines of master and servant, a motion to transfer the case to the Supreme Court of Missouri was sustained,<sup>22</sup> and in 1917 the highest court of the state gave its opinion and laid down what is today the controlling view in Missouri.<sup>23</sup> With no express reference to the "family purpose" doctrine the court definitely overruled these three appellate cases and the decisions of the courts which expressly have followed the "family purpose" doctrine, holding,<sup>24</sup>

" . . . the mere ownership of an auto purchased by a father for use and pleasure of himself and family does not render him liable in damages to a third person for injuries sustained thereby, through the negligence of a minor son, while operating the same on a public highway, in furtherance of his own business or pleasure; and the fact that he had the father's special or general permission to so use the car is wholly immaterial."

Repeating that there must be present the relation of master and servant, and that such servant or agent must be acting within the scope of the master's business, or acting for the master at the time, the court clung tenaciously to the old agency rules holding that mere ownership for a family purpose was insufficient to create such a relationship. This case, subsequently regarded as the leading case on this question, seems clearly to have placed Missouri as taking a stand against the "family purpose" doctrine.<sup>25</sup> And, repeating its stand, in *Bolman v. Bullene*<sup>26</sup> the Supreme Court held that a father was not liable for the negli-

---

<sup>20</sup> (1914) 180 Mo. App. 237, 165 S. W. 1125. Here also the son was sui juris, and he used the car to take a friend for a pleasure trip in the country.

<sup>21</sup> *Ibid.*, 180 Mo. App. 254, 165 S. W. 1130.

<sup>22</sup> *Ibid.*, 180 Mo. App. 259, 165 S. W. 1132.

<sup>23</sup> *Hays v. Hogan* (1917) 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C, 715.

<sup>24</sup> *Ibid.*, l. c. Mo. 24, l. c. S. W. 292.

<sup>25</sup> It has so been classified. See 64 A. L. R. 844, 852, 856. See also 88 A. L. R. 602, wherein is cited a Missouri case holding the owner liable and failing to adequately point out that it was clearly decided on an agency theory.

<sup>26</sup> (1918) 200 S. W. 1068. The son-in-law went beyond the scope of authority granted to him, using the car contra to the express permission granted.



gence of a member of his family, a son-in-law, irrespective of consent, if at the time of the accident the negligent party was using the car for his own purposes and not about the business of the owner.

The decisions of the Supreme Court being controlling it was not long before the Appellate Courts fell in line with the decision rendered in *Hays v. Hogan*, supra. In 1918 the Kansas City Court of Appeals,<sup>27</sup> holding itself bound by this decision, held that a husband was not liable for his wife's negligence in driving the family car while taking her relatives for a pleasure trip, it being a purpose of her own.<sup>28</sup> A year later the St. Louis Court of Appeals<sup>29</sup> held that the father was not liable for the acts of his daughter in using the family car, even though with permission, for the furtherance of her own pleasure, the court expressly saying,<sup>30</sup>

"Irrespective of the result reached in other jurisdictions, it is no longer open to question in this State that the ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render him liable for damages to a third person injured through the negligence of a member of his family while operating the automobile in furtherance of that member's own pleasure. . . ."

And in 1920 the Springfield Court of Appeals<sup>31</sup> also fell in line holding that the plaintiff must show that the son was on some mission for the father, and that, at the time of the accident, he was acting within the scope of that duty. Thus Missouri has refused to hold the owner of the family automobile liable when the son was taking a pleasure ride with his own friends;<sup>32</sup> or when he drove for his own purposes beyond the permission granted to him;<sup>33</sup> or deviated from the direct route home in order to 'make a date';<sup>34</sup> or when the wife was driving her own relatives,<sup>35</sup> or merely driving for her own pleasure;<sup>36</sup> or when

<sup>27</sup> *Mast v. Hirsh*, 199 Mo. App. 1, 202 S. W. 275.

<sup>28</sup> The "family purpose" doctrine has in some cases been applied where the car, kept for family purposes, was being used by the owner's spouse at the time of the accident. In this situation too the courts are divided on the question of the liability of the owner.

<sup>29</sup> *Bright v. Thacher* (1919) 202 Mo. App. 301, 215 S. W. 788.

<sup>30</sup> *Ibid.*, 1. c. Mo., 312, 1. c. S. W., 791.

<sup>31</sup> *Mayes v. Fields*, 217 S. W. 589. The son took the car without permission, which was ordinarily required, and used it in furtherance of his own pleasures.

<sup>32</sup> Footnote 23, supra.

<sup>33</sup> Footnote 26, supra.

<sup>34</sup> *Kibble v. Lamar* (1933) 227 Mo. App. 620, 54 S. W. (2d) 427.

<sup>35</sup> Footnote 27, supra.

<sup>36</sup> *Drake v. Rowan* (1925) 216 Mo. App. 663, 272 S. W. 101.

the son or daughter was expressly using the car in furtherance of his or her own pleasure.<sup>37</sup>

In *Mount v. Naert*,<sup>38</sup> with the father's express consent, the son took his two sisters to a dance. The Supreme Court held the son was not the father's agent, and hence the father was not liable for the son's tort. Ragland, J., raised a dissenting voice, but as he gave no opinion no significance may be attached to it. It seems that this decision might be subjected to a bit of criticism, regardless of one's view toward the "family purpose" doctrine. In taking members of the family to their destination, with the express consent of the father, it would seem that the son was carrying out a purpose of his father and as such was his father's agent. However under a very strict view no doubt the son would be regarded merely as an agent of the sisters and the father in his status of head of the family would not be involved.

The St. Louis Court of Appeals seems to have made the farthest advance toward a liberalization of the agency view, perhaps unconsciously influenced by the practical situation in St. Louis where the automobile without doubt presents a grave and harassing problem. In *Curtis v. Harrison*<sup>39</sup> the minor son drove the father's automobile to school so that he might come home early and take his mother to another destination. This was held to be sufficient evidence as against a demurrer to warrant a reasonable man in inferring that the son was acting for the father in driving the car, so that the father could be held liable for his negligence. A year later a case arose in which the agency was more evident and thus there was less difficulty in holding the owner liable.<sup>40</sup> In this case the defendant's sister drove the car and admissions of the defendant (though denied by him at the trial) to the effect that she took him to business school and was calling for him at the time of the injury were allowed. The court clearly recognized the doctrine of *Hays v. Hogan*, and subsequent cases, but held that the testimony was sufficient to make out a *prima facie* case for the plaintiff, as tending to show that the defendant's sister was at the time acting as the agent of and about the business of the defendant. And in 1927 it made another decision which would seem to lesson the harshness of the rule.<sup>41</sup> Holding that the son was acting for the purposes of the father, the father was held liable for the son's negligence. The son used the family car to get to and from high school, and this was held sufficient to create

---

<sup>37</sup> *Keim v. Blackburn* (1926, Mo.) 280 S. W. 1046; *Buskie v. Januchowsky* (1920, Mo. App.) 218 S. W. 696; footnote 31, *supra*.

<sup>38</sup> (1923, Mo.) 253 S. W. 966.

<sup>39</sup> (1923) 263 S. W. 474.

<sup>40</sup> *Kilcoyne v. Metz* (1924) 258 S. W. 4.

<sup>41</sup> *Mebas v. Werkmeister* (1927) 221 Mo. App. 173, 299 S. W. 601.

an agency relationship, as going to school was "being about his father's business." The point was raised that the son used the car to get home earlier in order to aid his father in his gardening business, but this was not deemed particularly important by the court. It held that the facts did not come within the doctrine of *Hays v. Hogan* as in going to school the boy was undoubtedly carrying out the instructions, and duty, of his father.

A liberalization of the rule laid down in *Hays v. Hogan* may, as a matter of practical effect, ultimately result from the view taken as to the amount of evidence necessary to present the question of agency to the jury. In an early case<sup>42</sup> it was held that proof that the auto belonged to the defendant and was being operated by the defendant's regularly employed chauffeur was *prima facie* showing that the chauffeur was acting within the scope of his employment, though such a presumption was clearly rebuttable and might be overcome by the defendant's evidence, as it was in this case. It has been said that this is a mere rule of procedure and may be put to flight by an unequivocal showing on the part of the owner that the car was not driven by the defendant or by his servant acting within the scope of his employment.<sup>43</sup> It is not a harsh rule to put this burden upon the defendant as he and the driver are the only ones with knowledge as to the exact relationship and limits of authority of the driver. Thus it would be incumbent upon the owner to show the true relationship and to bring in facts strong enough to destroy the presumption. And, relying on *Barz v. Fleischmann Yeast Co.*,<sup>44</sup> the St. Louis Court of Appeals held that proof of ownership of the defendant's automobile was sufficient to take the case to the jury and to sustain a verdict against the owner under the doctrine of "respondeat superior."<sup>45</sup> Further, in *Murphy v. Loeffler*,<sup>46</sup> the Supreme Court said,

"But, it is our view that, without any abatement of the rule of the law laid down in the foregoing cases, (cases cited

<sup>42</sup> *Guthrie v. Holmes* (1917) 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918, D, 1123. Evidence that at one o'clock the owner told the chauffeur to deliver two friends of the owner at their destinations, and then to go straight home, overcame the presumption, as the accident took place at seven-thirty P. M.

<sup>43</sup> *Murphy v. Tumbrink* (1930, Mo. App.) 25 S. W. (2d) 133.

<sup>44</sup> (1925) 308 Mo. 288, 271 S. W. 361. This case announced that proof of ownership of an automobile makes a *prima facie* case for the plaintiff against the owner. However it involved a commercial delivery car, and not a family pleasure car.

<sup>45</sup> *Edwards v. Rubin* (1928, Mo. App.) 2 S. W. (2d) 205; accord, *McCarter v. Burger* (1928, Mo. App.) 6 S. W. (2d) 978, in which case the defendant was the father-in-law of the driver; *Hampe v. Versen* (1930) 294 Mo. App. 1144, 32 S. W. (2d) 793, the issue here being whether or not the wife was engaged in the husband's business. It was held that proof of ownership makes a *prima facie* case for the plaintiff, and a mere denial by the defendant is not sufficient. He must produce evidence in rebuttal.

previously in this article, ed. note) it was for the jury to determine in this case whether, at the time and place of the accident Loeffler, Jr. was in the performance of a duty imposed by Loeffler, Sr., and that the jury rightly settled this issue of fact."

Unfortunately though the court went on to say,<sup>47</sup>

"In reaching the conclusions stated, we do not take the view of respondent that the doctrine announced in *Hays v. Hogan*, supra, has been greatly liberalized in the more recent case of *Barz v. Fleischmann Yeast Co.*, . . . Nor should the opinion in the instant case be interpreted as an approval of certain recent appellate court decisions holding with respect to family pleasure automobiles, upon the authority of *Barz v. Yeast Company*, supra, that proof of ownership is sufficient to charge the head of the family with responsibility for the management of the car by a member of the family, and that the truth of the evidence purporting to disprove the inference of agency created by ownership is for the jury."<sup>48</sup>

Fitzsimmons, C., whose opinion was adopted by the Court, very definitely pointed out that the decision was grounded upon the fundamental principles of common law agency, and that the liability did not arise out of the relation of parent and child but was based upon the relation of principal and agent or upon that of master and servant, being governed by the rules applicable to such relations. This case therefore seems to check the appellate decisions which had tended to allow the jury to determine the master and servant relationship, i. e., not merely to determine the facts, but also to determine the status of the legal relationship arising thereby. Though in *Kaley v. Huntley*<sup>49</sup> the Court said,

". . . true, presumptions should not have been authorized. . . . However, in the case at bar there was substantial factual proof, in addition to mere ownership, and from such substantial proof the relation of principal and agent was properly deducible. The fact alone of ownership, upon which a procedural inference or rebuttable presumption might arise,

---

*Benson v. Smith* (1931, K. C. App.), 38 S. W. (2d) 743, held that the question of the son's agency was for the jury and the showing of ownership by the plaintiff shifts the burden of evidence to the defendant.

<sup>46</sup> (1931) 327 Mo. 1244, 39 S. W. (2d) 550, l. c. Mo. 1253, l. c. S. W. 554; as to the facts, see p. 230, *infra*.

<sup>47</sup> *Ibid.*, l. c. Mo. 1254, l. c. S. W. 555.

<sup>48</sup> The appellate decisions referred to are those cited in footnote 45, supra.

<sup>49</sup> (1933) 333 Mo. 771, 777, 63 S. W. (2d) 21, 24.

and be sufficient to take the case to the jury in the absence of evidence in rebuttal thereof, was in the instant case supplemented by circumstances of probative value."

The doctrine thereby arising would seem to be that while mere ownership in itself is insufficient to put to the jury the issue of agency, yet proof of the defendant's ownership plus some slight substantial evidence is sufficient to cause the relationship to become a jury question. Thus in *Kaley v. Huntley*, supra, the fact that the father was also in the car furnished that evidence. And in *Joyce v. Biring*<sup>50</sup> evidence as to defendant shopkeeper's admission that he had sent his son with the auto to deliver shoes was held sufficient to take to the jury the question of the son's agency. And an earlier case in accord held that evidence showing that when the defendant's daughter injured the plaintiff she was driving to get apples for the family gave rise to a jury question as to the agency relationship.<sup>51</sup>

In *Murphy v. Loeffler*, supra, the Court held the owner of the family car liable for the negligence of his son occurring when the son was returning for his parents to take them home, after having used the car for his own pleasures. And, as previously pointed out, this was held sufficient to present to the jury the issue of agency. Since at the time he was returning for the benefit of his parents, by express command, it seems there should be no great difficulty in finding an agency relationship under these facts. The only difficulty presented in a case of this kind is that arising under the rules of agency when the agent deviates from his shortest and most direct route to his point of destination.<sup>52</sup>

Cases arising under the first class, supra page 221, have been decided in Missouri on the basis of joint or mutual enterprise. Thus when the owner was in the car, though it was actually

---

<sup>50</sup> (1931) 226 Mo. App. 102, 43 S. W. (2d) 845.

<sup>51</sup> *Llywelyn v. Lowe* (1922, Mo. App.) 239 S. W. 535.

<sup>52</sup> *Fiocco v. Carver* (1922) 234 N. Y. 219, 137 N. E. 309. The difficulty arises when one attempts to decide at just what period of time the agent is again acting within the scope of his employment, i. e., when he re-enters the employment. Perhaps the best rule to apply would be that "change of mind, if bona fide and expressed by some unequivocal physical action" results in a re-entry. See *Cable v. Johnson* (1933, Mo. App.), 63 S. W. (2d) 433, which held that where a servant taking his master's automobile to perform services for the master deviates temporarily from the path of duty, he may be considered as having returned to the master's service when he reaches a point on the return trip where the original mission might have reasonably required the servant to be. In the present case, after having delivered his friends, when the son headed back to the house in order to call for his parents and take them home he was then acting for his parents and as their agent. The Court pointed out that it was one o'clock in the morning and at a time when the parent's themselves had the greatest need of the use of their car.

being driven by another, he was held liable for injuries caused by the driver on the theory that he and the driver were engaged in a mutual enterprise.<sup>53</sup> And evidence that the defendant who was riding in the automobile admitted ownership was held to raise a presumption that the driver was acting for the owner.<sup>54</sup> And the facts in *Kaley v. Huntley*, supra, were quite similar as there too the defendant owner was riding in the car at the time of the accident. In such cases the law imputes the negligence of the driver to the owner. While it is true that the negligence of the driver of an automobile is not ordinarily imputable to a mere guest or passenger who is riding in the automobile, but who has no authority or control, either over the auto or over the driver, yet the negligence of such driver is imputable and attributable to the owner who is personally present.<sup>55</sup> "The theory behind this rule is that the relation of principal and agent, or of master and servant, exists between the owner and the driver of the auto, and that the owner, being personally present in the auto at the time, and having the control and authority of a principal or master, is responsible for, and bound by, the negligence of his agent or servant." As previously pointed out it does not seem that there should be any difficulty in such situations as the driver is really acting in the scope of a chauffeur's employment.

A still different type of case has been presented when the owner allows the member of the family to drive in violation of some statutory law. Thus in *Roark v. Stone*<sup>56</sup> the Springfield Court of Appeals held the father liable for his negligence in allowing his son, who was under sixteen, to drive in violation of the statute regulating the age of the driver.

Thus it seems evident that though, as pointed out in *Mebas v. Werkmeister*, supra,<sup>57</sup> Missouri has not by name disowned the "family purpose" doctrine, still it has clearly repudiated it and has restricted itself to the common law principles of agency. This was explicitly stated in *Murphy v. Loeffler*, supra. Under the present status of decisions the question ever present in the minds of the Missouri Courts is whether or not the acts of the member of the family driving the car at the time of the accident constituted "going on the father's business." If the driver is using the car for personal activities alone the owner is not liable. And they are supported in this view not only by numerous court

---

<sup>53</sup> *Roland v. Anderson* (1926, Mo. App.) 282 S. W. 752. In this case a third party, defendant's mother, held actual title to the car, but the court found that the defendant was the "real owner," as the car was purchased for him and used exclusively by him.

<sup>54</sup> *Brucker v. Gambaro* (1928, Mo.) 9 S. W. (2d) 918.

<sup>55</sup> *Smith v. Wells* (1930) 326 Mo. 525, 31 S. W. (2d) 1014, 1 c. Mo. 547, and cases there cited.

<sup>56</sup> (1930, Mo. App.) 30 S. W. (2d) 647.

<sup>57</sup> Footnote 41, supra, 1 c. Mo. 179, 180.

decisions but also by the very able group of men constituting the American Law Institute. In their Restatement of Agency<sup>58</sup> they lay down a rule that "a master is liable for harm caused by the use of instrumentalities entrusted by him to a servant only if they are used within the scope of employment," and note (c) to this section applies this to a car purchased by the head of a family for general family use. The language there is very much in accord with the position of the Missouri courts and they hold it to be "a question of fact in each case whether or not the member of the family driving the car is at the time in any real sense on the business of the head of the family as distinguished from his own personal affairs."

Whether Missouri will seek to broaden the scope of the definition of the "father's business" remains to be seen. *Mebas v. Werkmeister*, supra, seems to express a liberal view, though in the light of modern educational requirements it seems fairly easy to hold that it is the father's business to send his children to school, and providing a means of transportation is merely a means to that end. Purely from a standpoint of social policy it does seem advisable to broaden the scope of the "father's business." But still, as pointed out in *Van Blaricom v. Dodgson*, supra,<sup>59</sup> it may be best to leave this to the legislature. Perhaps the solution might be found in the compulsory insurance statutes which have found their way into some of the states. If drivers, as well as merely owners were required to carry insurance the practical difficulty of financial irresponsibility would be done away with, and again the only issue would be, "did the driver commit a tort for which he is liable?"

A further question which might be raised is, what effect, if any, will the present driver's license laws recently enacted in the St. Louis Metropolitan areas have upon the views of the Missouri Courts. Every driver is required to have a driver's license. Let us suppose that a father knowingly allows his son to use his car when the son has no driver's license. Could it not be held that in so allowing the son to violate the law he was himself primarily negligent, and thus liable for his son's negligence, perhaps under the doctrine expressed in *Roark v. Stone*, supra? Massachusetts has adhered to the rule to the effect that an automobile operated upon the highway without being registered, as required by statute, is an outlaw and a nuisance, and that one permitting the operation of such unregistered automobile is re-

---

<sup>58</sup> Section 238, note c. It is also interesting to note that the strong eastern courts located in States in which the traffic problem is a very serious one refuse to follow the "family purpose" doctrine and abide by the well formulated rules of agency. Among these states are Mass., New York, Pennsylvania, Rhode Island, New Jersey and Ohio. See footnote 6, supra.

<sup>59</sup> See page 7, supra.

sponsible for injuries caused thereby, even though it is at the moment being used in the business and pleasure of another.<sup>60</sup> And thus with respect to an unlicensed operator they have relied on the principle that violation of a criminal statute is evidence of negligence, and have held that it was for the jury to say whether the father should have anticipated that his son's operation of the automobile would, in reasonable probability, be negligent.<sup>61</sup> However, the weight of authority seems to be contra holding to the effect that the fact that the driver was not licensed, as required by statute, will not charge the owner or operator with liability for injury or damage caused by its operation on the highway, where the failure to obtain a license had no causal connection with the injury or damage.<sup>62</sup> This was well expressed in a California case which held that the parents' violation of a statute in permitting their child to drive without an operator's license, could not of itself be made the basis of a claim against them, there being no evidence causally to connect the fact of absence of a license with the injuries sustained by the plaintiff.<sup>63</sup> New York seems to be in accord with this view, though in *Austin v. Rochester Folding Box Co.*,<sup>64</sup> they did say that employing an unlicensed chauffeur was at least prima facie evidence of negligence, which might be overcome by subsequent evidence as to his competency. Both Massachusetts and New York, in accord with Missouri, fail to recognize the family purpose doctrine, and both have had rather successful experience with driver's license laws. The two states being quite in conflict, as to the effect upon the owner's liability by allowing one to drive his car without a driver's license, it is impossible to draw any conclusions as to the future attitude in Missouri based upon these decisions. Missouri has held that the fact that the operator had no license, as required by law, will not bar recovery by him.<sup>65</sup> But this too

---

<sup>60</sup> *Murray v. Indursky* (1929) 266 Mass. 220, 165 N. E. 91; *Emeneau v. Doyle* (1933) 282 Mass. 280, 184 N. E. 720.

<sup>61</sup> *Gordan v. Bedard* (1929) 265 Mass. 408, 142 N. E. 374. In this case the court took note of a statutory provision to the effect that no person should allow a motor vehicle owned by him or under his control to be operated by any person who has no legal right to do so. They refused to direct a verdict for the defendant. And *Kenyon v. Hathaway* (1931) 274 Mass., 47, 174 N. E. 463, 73 A. L. R. 156, held, that the fact that the defendant's automobile was being driven by an unlicensed driver should be taken into consideration as bearing on the question of his negligence.

<sup>62</sup> *Dervin v. Frenier* (1917) 91 Vt. 398, 100 Atl. 760; *Gilman v. Railway* (1919) 93 Vt. 340, 107 Atl. 122, 16 A. L. R. 1102 (note).

<sup>63</sup> *Arrelano v. Jorgenson* (1921) 52 Cal. App. 622, 199 Pac. 855.

<sup>64</sup> (1920) 111 Misc. 292, 181 N. Y. S. 275.

<sup>65</sup> *Dixon v. Boeving* (1919, Mo. App.) 208 S. W. 279; *Stack v. General Baking Co.* (1920, Mo.) 223 S. W. 89. See also *Faust v. Mill Co.* (1929, Mo. App.), 20 S. W. (2d) 918. In this case an allegation that the defendant's chauffeur had no license was held to be wholly irrelevant, since it had no



does not seem to be of great aid. Though in view of these cases it perhaps might be said that Missouri seems to be in accord with the majority view and will thus hold to be immaterial, in cases involving drivers' licenses, the fact that the driver had no license, unless a casual connection with the accident can be shown.

It does seem, however, that if the purpose of such ordinances is to be fully carried out the father should be held liable if he knowingly permits a member of his family to use his car when they do not have a driver's license. The purpose seems to be to deny the use of the streets to negligent and incompetent drivers, and such can only properly be carried out by strict enforcement of the rules. Wilfully and knowingly becoming a party to the violation of such a statute might well constitute such negligence as is by the direct sequence of events the proximate cause of any damage that may be sustained by another, when the other elements of actionable negligence are established.

PHILIP A. MAXEINER, '36.

---

## LIABILITY OF A PARENT CORPORATION FOR THE DEBTS OF ITS SUBSIDIARY

### I.

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of individuals are considered the same, and may *act as a single individual* . . . . By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, *like one immortal being*." This is the now classic definition of a corporation by John Marshall in the Dartmouth College Case.<sup>1</sup> To those who do not have a fairly good idea of the nature of a corporation before they read it, this so-called definition is probably unintelligible. But to those lawyers and students of law who have become accustomed to the legal fictions in which the reasoning of courts is so often enshrouded, it expresses that very old concept of a corporation as something separate and distinct from the persons composing it, as something with an individuality and personality of its own.

---

causal connection with the accident. This case held that the fact that such chauffeur was negligent or incompetent must still be proven by the plaintiff.

<sup>1</sup> 4 Wheat. 513, 4 L. Ed. 629.