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Automobiles--The Family Purpose Doctrine in Kentucky

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In conclusion it may be noted that at the present time the various privileges and disqualifications surrounding the testimony of husband and wife are being diminished with surprising rapidity by frequent code amendments and by judicial decisions. An entire abolition of these privileges and disqualifications, of doubtful benefit, should be effected. This will probably come about in time through judicial decisions since flexibility and capacity for growth are the peculiar boasts of the common law. Sutherland, J., aptly puts it when he says, "the fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth". And reason dictates that a rule of evidence, at one time thought indispensable to an expedient ascertainment of the truth, should yield to the experience of a new generation, if that experience justifies the conclusion that the old rule is fallacious.

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AUTOMOBILES—THE FAMILY PURPOSE DOCTRINE IN KENTUCKY.

The Kentucky court has uniformly upheld the family purpose doctrine from the beginning of its adjudication in this state, either by actual decision or by dictum. *Stowe* v. *Morris*, 147 Ky. 388, 144 S. W. 52 (1912); *Miller* v. *Weck*, 186 Ky. 552, 217 S. W. 904 (1920); *Holland* v. *Goode*, 188 Ky. 525, 222 S. W. 950 (1920); *Doss* v. *Monticello Electric Light and Power Co. & Myers*, 193 Ky. 499, 236 S. W. 1046 (1922); *Sale* v. *Atkins*, 206 Ky. 224, 267 S. W. 223 (1924); *Thixton* v. *Palmer*, 210 Ky. 838, 276 S. W. 971 (1925); *Rauckhorst* v. *Kraut*, 216 Ky. 323, 287 S. W. 895 (1926); *Kennedy* v. *Wolf*, 221 Ky. 111, 298 S. W. 188 (1927); *Bradley* v. *Schmidt*, 223 Ky. 784, 4 S. W. (2d) 703 (1928); *Malcolm* v. *Nunn*, 226 Ky. 225, 10 S. W. (2d) 817 (1928); *Euster* v. *Vogel*, 227 Ky. 735, 13 S. W. (2d) 1028 (1929); *Steel* v. *Age's Adm'x*, 233 Ky. 714, 26 S. W. (2d) 563 (1930); *Marsee* v. *Bates*, 235 Ky. 60, 29 S. W. (2d) 632 (1930); *Wallace* v. *Hall*, 235 Ky. 749, 32 S. W. (2d) 324 (1930); *Craghead* v. *Hafele's Adm'x*, 236 Ky. 250, 32 S. W. (2d) 324 (1930); *United States Fidelity & Guaranty Co.* v. *Hall*, 237 Ky. 393, 35 S. W. (2d) 550 (1931); *Myer's Adm'x* v. *Brown*, 250 Ky. 64, 61 S. W. (2d) 1052 (1933). The doctrine places liability on the owner of an automobile, which is purchased and maintained for the pleasure of his, or her family for negligent injuries inflicted by the vehicle while it is being used by some member with his consent, express or implied, on the theory that it is the owner's business to furnish pleasure for the family. The court has based its decisions mainly on the principal and agent, and master and servant theory. *Stowe* v. *Morris*, supra; *Rauckhorst* v. *Kraut*, supra; *Myer's Adm'x* v. *Brown*, supra. It is preferable to support the doctrine on the relationship of master and servant, rather than on that of principal and agent, since a principal is liable only for torts (expressly or impliedly) authorized, while a master is liable for all torts committed by the servant, while engaged within the

scope of the master's employment. Salmond on Torts p. 93. However, the status of master and servant does not exist unless one of the family is employed in the owner's business. It cannot be seriously contended that it is the father's business or employment to furnish his family with an automobile for their convenience and pleasure, because it is not looked upon as a necessary. *Tanzer* v. *Read*, 145 N. Y. Supp. 708 (1914). The word "business" generally indicates that the one engaged expects to receive some benefit, financial or otherwise, even though a person may be a servant without agreement for compensation. *Spencer* v. *Fisher*, 184 Cal. 209, 193 Pac. 255 (1920). It can hardly be said that it is the father's business to furnish his son such pleasures as driving at a reckless speed over a dangerous road, or while intoxicated. A case contra to the doctrine explodes this idea with this sly bit of sarcastic humor, "If son took his best girl riding, prima facie it was father's little outing by proxy." *Watkins* v. *Clark*, 103 Kan. 629, 176 Pac. 131 (1918). Master and servant implies a control exercised and an authority given and in force at the time the injury occurs. It would scarcely cover a tort where a member of the family is using the car solely for his own pleasure at the time since an agency for the sole benefit of the servant is unknown to the law. *Jones* v. *Cooke*, 90 W. Va. 710, 111 S. E. 828 (1922). The relation of parent and child alone is not enough to create a master and servant status, or to make the parent liable for the child's torts committed without his authority or consent. *Linville* v. *Nissen*, 162 N. C. 95, 77 S. E. 1096 (1913); *Stowe* v. *Morris*, supra; *Doss* v. *Monticello Electric Light & Power Co. & Myers*, supra; *Sale* v. *Atkins*, supra. Although the child may be doing the type of act usually performed by a chauffeur in driving the car containing other members of the family, yet, where he is doing it for his own pleasure and not at the owner's request or direction, he does not thereby become a servant in the true sense of the word. The conclusion, therefore must be reached that the owner is simply making a gift of the use of the automobile to one of his family, and that a bailor and bailee relation, only, exists. It is a well known principle of law that the negligence of the bailee cannot be attributed to the bailor. *Outrepalik* v. *Phelps*, 73 Colo. 433, 216 Pac. 541 (1923). Certainly this was the law before the automobile became a widely used source of locomotion. *Baker* v. *Haldeman*, 24 Mo. 219 (1857); *Edwards* v. *Crump*, 13 Kan. 348 (1874); *Moon* v. *Towers*, 8 C. B. (N. S.) 611 (1860). The automobile has not been regarded as an inherently dangerous instrument, so as to cause the owner to be liable as an insurer, since it plays such an integral part in our daily economic life. *Boes* v. *Howell*, 24 N. M. 142, 173 Pac. 966 (1918) *Tyler* v. *Stephan*, 163 Ky. 770, 174 S. W. 790 (1915); *Stowe* v. *Morris*, supra; *Bradley* v. *Schmidt*, supra. The automobile, being a lawful means of travel, is not a nuisance per se. *Hartley* v. *Miller*, 165 Mich. 115, 130 N. W. 336 (1911); *Blair* v. *Broadwater*, 121 Va. 301, 193 S. E. (1917); *Chicago* v. *Banker*, 112 Ill. App. 94; *Guskins* v. *Hancock*, 156 N. C. 56. The ele-

ments of an estoppel are not present, although one court refers to it as a basis of liability. *Hays* v. *Hogan*, 200 S. W. 286 (1912).

One possible ground remains. This is public policy. This ground, it is admitted, should be availed of only where no other logical theory presents itself on which to rest liability, and weighty reasons exist for its utilization. It is submitted that an infringement of an important and necessary right will go unremedied, if this basis is not recognized, since many of the state tribunals refuse rightly to place liability on the master and servant relation. The frequent accidents, which occur on account of the negligent operation of a parent's car by a member of his family, who is likely to be financially irresponsible, should be given a considerable amount of thought in coming to a decision on this point. Practically, an uncollectible judgment is an empty form, and constitutes a valueless remedy for the evil. While an automobile is not dangerous per se, its potential danger in the hands of a careless driver, especially a member of the family who has permission to use the car at his own pleasure, should have an important bearing on the result. *Crittendon* v. *Murphy*, 36 Cal. App. 803, 173 Pac. 595 (1918). Likewise the family purpose doctrine puts the financial responsibility of the owner behind the car, and relieves the injured party from the difficult task of meeting the owner's claim that at the time of the accident the car was not being used for his pleasure or business. It also protects the injured person as fully as if the owner were driving the car himself, thus achieving justice in his case. For these reasons, it seems to the writer that the advantages to be gained completely outweigh any disadvantages that might accrue from its adoption. And public policy has been used in other branches of the law. For instance, the courts have refused to apply the ordinary rules of contract in insurance cases upon the basis of this theory. Likewise the writer is not without eminent authority for his contention in the case of the family car, even though many of the cases do lip service to the empty phrases of *respondeat superior*, and *qui facit per alium facit per se* without attempting to probe into the reasons underlying them. *King* v. *Smythe*, 140 Tenn. 217, 204 S. W. 296 (1916); *Hutchins* v. *Haffner*, 63 Colo. 355, 167 Pac. 966 (1917); *Goss* v. *Williams*, 196 N. C. 213, 145 S. E. 169 (1928); *Graham* v. *Page*, 300 Ill. 40, 132 N. E. 817 (1921). This ground of liability was enunciated in Kentucky in the case of *Kennedy* v. *Wolf*, supra.

One important reason that is advanced for failure to adopt the purpose doctrine is that if a remedy is to be given it should come by way of legislative enactment. *Van Blaricom* v. *Dodgson*, 220 N. Y. 111, 115 N. E. 443 (1917). The American Law Institute takes this view in refusing to incorporate the doctrine in its Restatement of Agency. Explanatory Note on Agency, Tentative Draft No. 5, Section 463, Comment (c). Yet in the quarter century that this problem has been before the courts only ten states have passed any legislation whatever on the subject. 26 Mich. Law Rev. 689. In many cases the remedy

given is inadequate, because the statutes impose only limited liability, such as allowing a lien on the owner's car. Likewise these statutes have been subjected to a narrow judicial construction in many instances. Also some of the statutes passed have been declared unconstitutional, because of the faulty manner in which they were drawn. In many states where insurance is compulsory, no remedy exists such as is comprehended by the family purpose doctrine, because an insurance company is not usually liable unless the owner of the machine is liable personally. Thus it is readily seen that the remedy by legislation was and is, at the present day, generally unfitted to handle the situation. The courts, therefore, should grant relief in these cases until substantial and adequate laws are passed throughout the country.

If the adoption of the family purpose doctrine is to be put on such a ground as public policy, it must be limited strictly and narrowly so as to grant relief in only those situations which the courts intended, from the beginning, to alleviate. These four requisites must then be present in order to pin liability under the doctrine: (1) The person sued must be the owner of the car. *Holland* v. *Goode*, supra; *Doss* v. *Monticello Electric Light and Power Co. & Myers*, supra; *Marsee* v. *Bates*, supra. (2) The automobile must be kept for family use. *Euster* v. *Vogel*, supra. However, it may be a pleasure car even though used at other times for business purposes. *Watson* v. *Burley*, 105 W. Va., 416, 143 S. E. 95 (1928); *Bradley* v. *Schmidt*, supra. (3) The vehicle must be used with the owner's consent at the time of the accident. *Sale* v. *Atkins*, supra. (4) A family relationship must exist wherein the driver of the automobile is dependent, either legally or morally, on the owner. Thus, a parent should be liable for the negligent accidents of a minor unemancipated son or daughter. *Thixton* v. *Palmer*, supra; *Steel* v. *Age's Adm'x*, supra; *Wallace* v. *Hall*, supra. Likewise, a husband should be liable for an injury caused by his spouse. *Marsee* v. *Bates*, supra. Reciprocally, if a wife is the owner of the car she should be financially responsible for the tort of her husband, although Kentucky holds otherwise. *Kennedy* v. *Wolf*, supra. She, also, should be liable for the accident of her minor child, even though her husband is living. *Steel* v. *Age's Adm'x*, supra; *Wallace* v. *Hall*, supra. Kentucky adheres to the correct doctrine when it refuses to hold an owner for the negligent operation of the family car by an adult child. He, in reality, is no longer a member of the family, since there is no duty, legal or moral, to support him. *Rauckhorst* v. *Kraut*, supra; *Bradley* v. *Schmidt*, supra; *Malcolm* v. *Nunn*, supra; *Craghead* v. *Hafele's Adm'x*, supra; *United States Fidelity and Guaranty Co.* v. *Hall*, supra. However, the doctrine should extend to include a minor stepchild. *Jones* v. *Cook*, 90 W. Va. 710, 111 S. E. 828 (1922). But it should not include a relative outside the parent and child relation. *Tullis* v. *Blue*, 216 Ala. 577, 164 So. 185 (1927), or an employee. *Mogle*

v. *A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832 (1919), although one case allows recovery in this instance. *Smart* v. *Bissonette*, 106 Conn. 447, 138 Atl. 365 A son or daughter, owning the automobile, should not be liable under the family purpose doctrine when other members of the family are in control of it. *Hall* v. *Scott*, 231 Ill. App. 494 (1923). However, a parent should be responsible for the negligent driving of a person, authorized by his minor child, or spouse, to drive on the theory of imputed agency. *Thixton* v. *Palmer*, supra; *Cohen* v. *Borgenecht*, 144 N. Y. Supp. 399 (1913). The doctrine should apply whether the member of the family is alone. *Miller* v. *Weck*, supra, or driving other members of the family. *Stowe* v. *Morris*, supra. It should include injuries both to person and to property. *Thixton* v. *Palmer*, supra; *Steel* v. *Age's Adm'x*, supra; *Wallace* v. *Hall*, supra.

In summary, it may be stated that the doctrine has filled a long felt need, and should continue to be followed until ample legislation has taken its place. Since it can be supported only on public policy and convenience it should be limited so as only to supply a remedy for those evils it was brought forward to eradicate. Therefore, it should be extended with caution and with trepidation, and should apply solely to injuries caused by the family automobile.

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DAMAGES—LIQUIDATED DAMAGES OR PENALTY—IN CONTRACTS FOR SALE OF GOODS TO BE MANUFACTURED BY SELLER.

A contract for sale of flour providing liquidated damages in case of the buyer's failure to furnish shipping instructions, on the basis of one cent per day per barrel of flour from date of sale to date of termination as expense for carrying plus 20 cents per barrel as cost of selling, and plus or minus amount of difference between market value of wheat on date of sale, and date of termination, times 4.6 times the number of barrels of flour, was held valid and enforceable, where it was shown that because of fluctuation in price of wheat it was necessary in order to stabilize the business to purchase sufficient wheat to fill an order for flour at the time the order was taken. *Quaile & Co.* v. *William Kelly Milling Co.* 184 Ark. 717, 43 S. W. (2d) 369, 79 A. L. R. 183 (1931). The court said: "The general rule is that contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties. But agreements to pay fixed sums, plainly without relation to any probable damage which may follow a breach, will not be enforced. *Kothe, Trustee*, v. *R. C. Taylor Trust*, 280 U. S. 224, 50 S. Ct. 142, 72 L. Ed., 832 and *Robins* v. *Plant*, 174 Ark. 639, 297 S. W. 1027, 59 A. L. R. 1128." The courts that have been called upon to interpret such stipulations for payment of a designated sum, in case of breach of a contract for the sale of goods to be manufactured, have without exception held