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Recent Decisions

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he were to shoot and kill some one he would not be guilty of murder because being incapable of a criminal intent, he is not criminally responsible. The same principle is ordinarily applicable where insanity is set-up as a defense. If an insane person does an act which would be a crime if committed by a sane person, but because of insanity he is unable to distinguish between right and wrong he has, in the eyes of the law, no criminal intent, hence is not criminally responsible and is not guilty of the alleged crime.

RECENT DECISIONS

CONSTITUTIONAL LAW—JURISDICTION OF COURTS—LEGISLATURE POWERLESS TO LIMIT OR CONTROL EQUITY JURISDICTION.—The recent case of *Burnham v. Bennison*, 236 N. W. 745 (Neb. 1931), holds that, since the Nebraska Constitution expressly confers equity jurisdiction upon its district courts, it is beyond the power of the legislature to limit or control that jurisdiction. The suit was brought in the district court by the beneficiaries of a testamentary trust against the trustees to establish their identity as beneficiaries and their right to a trust fund of $10,000, while the estate was still in process of administration in the probate court. The lower court sustained a demurrer to their petition, and the beneficiaries appealed to the Supreme Court of Nebraska, where the judgment of the lower court was reversed. It seems to have been contended by the defendant trustees in the lower court that, since the legislature had committed to the probate court jurisdiction over the probate of wills and the administration of estates of deceased persons, the district court was deprived of jurisdiction until after administration was complete. The Supreme Court rejected this contention entirely for the reason that the Nebraska Constitution having clothed the district courts with "both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide," the legislature had no power either to limit or control such equity jurisdiction.

The question arose in a peculiar way. George W. Mattingly died testate on April 17, 1924, a resident of Butler county, Nebraska; his will was admitted to probate on August 7, 1924, and remained in full force. The residuary clause of the will provided in part: "The rest, residue and remainder of my estate, real and personal, wheresoever situated, I give, devise and bequeath to C. W. Bennison and I. T. McCaskey, as trustees, upon the following trusts: (a) that my said trustees shall pay to Joseph Mattingly, a son of a half-brother of my father, the sum of $10,000 on condition that in the event that the said Mattingly is living at my death and appears and makes due proof of his identity to my said trustees within one year after my death; and if the said Joseph Mattingly is dead or fails to appear then and in that event such payment shall be made to his children, if any he has, on condition and in the event that his child or children appear and make due proof to the said trustees of their relationship *within two years after my death;* and if the said Joseph Mattingly fails to appear and make such proof within one year and if also his child or children fail to so appear and make proof of their relationship within two years after my death, then the provisions of this paragraph made shall lapse and be null and void . . . . (c) My said trustees shall, during the term of said trust, cumulate the

net income of said estate *until the two year period after my death has elapsed* and my said trustees are then directed to assign, transfer and set over to C. W. Bennison and I. T. McCaskey, of David City, Nebraska, in equal shares, the rest, residue and remainder of the property remaining in the hands of said trustees to vest in said C. W. Bennison and I. T. McCaskey the absolute title thereto; my intention being to give, devise and bequeath to said C. W. Bennison and I. T. McCaskey all of such residue absolutely and unconditionally." (Italics supplied.)

It was alleged in the plaintiffs petition that the Joseph Mattingly referred to in this will, died on March 19, 1919, leaving surviving him as his sole and only children the plaintiffs in the suit; that within the two year period after the death of the testator, the plaintiffs appeared before the trustees and tendered competent evidence and proof of the death of their father, Joseph Mattingly, and of their relationship to him, identifying their father as the Joseph Mattingly named in the will, but that the trustees wholly failed to accept, receive or hear said evidence, and failed to determine the facts established thereby; and that on the last day of the two-year period, the plaintiffs filed their petition in the district court. Before proceeding to determine whether the district court had jurisdiction while the estate was still pending administration in the probate court, the Supreme Court made this observation: "When the evidence and proof were tendered within the two-year period, it was the plain duty of the trustees to hear the same and proceed as contemplated by the testator. It is also quite apparent that, as the trustees named, under the terms of the will, should as individuals succeed to the bequest provided for Joseph Mattingly or his children in the event the latter failed to comply with the expressed condition within two years, their personal interests as individuals are inevitably in conflict with, and antagonistic to, their duties as trustees. In a sense, in view of the situation, these trustees are of necessity required to sit in judgment on their own case."

Then, passing to the question of the jurisdiction of the district court, the Supreme Court said: "It may be said that, by the terms of the Constitution, district courts in Nebraska are vested with 'chancery and common law jurisdiction.' CONST. ART. 5 § 9. This we have construed as vesting district courts with *equity* jurisdiction which they may exercise without legislative enactment. Matteson v. Creighton University, 105 Neb. 219, 179 N. W. 1009. Indeed, this court is committed to the view that, not only is equity jurisdiction conferred by the terms of the Constitution, but as thus conferred it is beyond the power of the legislature to limit or control. That, while the legislature may grant such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them. Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792. One of the well recognized grounds of equity jurisdiction thus conferred on, and available in, courts of this state, by virtue of this constitutional provision, is the supervision of the administration of trusts. Matteson v. Creighton University, 105 Neb. 219, 179 N. W. 1009; Gotchall v. Gotchall, 98 Neb. 730, 154 N. W. 243."

The Supreme Court then points out that, for a period of more than six and a half years, the trustees have not accorded the plaintiffs, as beneficiaries of the trust, the opportunity to appear and make proof of their relationship, and holds that the lower court erred in sustaining the demurrer *ore tenus* to the petition, directing that the demurrer be overruled with leave to the parties to file amended and supplemental pleadings, "to the end that all matters in issue may be determined and justice administered without unnecessary delay."

William M. Cain.

University of Notre Dame, College of Law.

NEGLIGENCE—IMPUTED CONTRIBUTORY NEGLIGENCE OF PARENTS OR GUARDIANS OF INFANTS.—The parents of M brought suit against the defendants for damages suffered because of the death of their seven year old son. It appeared that the defendants, Southwestern Gas & Electric Co., supplied electricity to a substation owned and operated by the other defendants, Shreveport Railways Co., located in Shreveport, Louisiana. The land, on which the substation was situated, was only partly occupied by the latter and the remainder, which was vacant, was often used as a playground by the children of the neighborhood. The plaintiff's house and lot are adjacent to the defendant's property. The rear of the plaintiff's lot, on which a garage is located, is immediately adjoining that part of the defendant's property, on which the substation is situated, so that the garage and the five-foot wire mesh fence that incloses the substation are separated by only a few inches. There was some doubt as to whether M climbed the fence or jumped into the inclosure from his father's garage. A meter reader, employee of the Shreveport Gas & Electric Co., who found M fatally burned in the inclosure, testified that he told the mother of M that the latter was in the inclosure, she however not recollecting the incident at the time of the trial. The court, in discussing the liability of the Shreveport Railway Co., said that the doctrine of imputed negligence, on part of guardians of a child of tender years, to prevent recovery for injuries to child, does not prevail in Louisiana. *McDonald et ux. v. Southwestern Gas & Electric Co. et al.*, 136 So. 169 (La. 1931).

In the principal case the negligence of the parents was said to consist in omitting to protect the child from negligence of a third person. In questions arising similarly as in this case the courts have not all been harmonious as to the application of the doctrine of imputed negligence.

In 1839 the Supreme Court of New York, in *Hartfield v. Roper,* 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, 12 Am. Neg. Cas. 293, announced the doctrine of vicarious or imputable negligence, and the rule has been followed by the courts of New York and some other states. The doctrine is founded upon the assumption, that, since the child is *non sui juris,* the parent is the keeper of, and agent for, the child, and the maxim *qui facit per alium, facit per se* is applied. The child, in the case of *Hartfield v. Roper,* was two years old. He was injured while sitting on a country highway by the sleigh and team of horses of the defendant. The court held that there was no negligence on the part of the plaintiff because of his tender age, but recovery was defeated by imputing to the child the negligence of the parents,—negligence in omitting to protect the child from the negligent acts of third persons. The doctrine, as laid down in *Hartfield v. Roper,* constitutes the minority rule and is followed by the courts of Delaware, Maine, Maryland, and Massachusetts. *Kyne v. Wilmington & N. R. Co.*, 8 Houst. 185, 14 Atl. 922 (1888); *O'Brien v. McGlinchy,* 68 Me. 522 (1878); *Baltimore City Pass R. Co. v. McDonell,* 43 Md. 534 (1875); *Lynch v. Smith,* 104 Mass. 52, 6 Am. Rep. 188 (1870); however, the later cases seem to modify, somewhat, the rule of *Hartfield v. Roper.* In *McGarry v. Loomis,* 63 N. Y. 104, 20 Am. Rep. 510 (1875), the court said: "It is in cases where the child has done or omitted something which would be regarded in an adult as negligent, that the conduct of the parents, in respect to the degree of care exercised over the child, becomes material, and the reason is that negligence cannot be imputed to the child except through the parents; but when the child has done no negligent act the conduct of the parent may be regarded as too remote." *Accord: Serano v. New York Cent. Co. & H. R. R. Co.,* 188 N. Y. 156, 80 N. E. 1024 (1907); *Sullivan v. Chadwick,* 236 Mass. 130, 127 N. E. 632 (1920). "But parents are holden only to the exercise of reasonable care. And what is reasonable care depends upon the facts and circumstances, and sometimes in part, even upon the financial condition of the family. No exact rule can be laid down." *Morgan v. Aroostook*

Valley R. Co., 115 Me. 171, 98 Atl. 628 (1916). As to the question of when a child is *sui juris* or not, "The standard of age at which a child is chargeable with parental negligence cannot be absolutely fixed, although within certain limits it may be approximately determined." *Grant v. Bangor Ry. & Electric Co.*, 109 Me. 133, 83 Atl. 121 (1912). Where the age of the child admits of no doubt as to its capacity to avoid danger, the court will decide this as a matter of law. *McGarry v. Loomis, supra.* On the other hand when there is some doubt as to whether the child is *sui juris* then it is a question to be submitted to the jury. *Louisville N. A. & C. Ry. Co. v. Sears*, 11 Ind. App. 654, 38 N. E. 837 (1894); *Central R. Banking Co. v. Ryler*, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634 (1891); *Stone v. Drydock E. B. & B. Ry. Co.* 115 N. Y. 104, 21 N. E. 712 (1889); *Houston & T. C. Ry. Co. v. Simpson*, 60 Tex. 103 (1883).

In most jurisdictions the negligence of the parents or custodians in omitting to protect the child against the negligence of a third person is not imputed to the child so as to bar recovery by him from such third person. Those courts, disaffirming the doctrine of imputed negligence, attack the reasoning of the courts, upholding it, in the manner as followed in the language of the court in *South Covington & C. St. Ry. Co. v. Herklotz*, 104 Ky. 400, 47 S. W. 265, (1898), which said: "Of course it is essential to the recovery in any case that negligence on the part of the defendant be shown. But when that is proven in a suit by the child, the parent's negligence is no defence, because it is regarded not as proximate, but as a remote cause of injury. And the reason lies in the irresponsibility of the child, who, itself, being incapable of negligence, cannot authorize it in another. It is not correct to say that the parent is the agent of the child, for the latter cannot appoint an agent. The law confides the care and custody of a child *non sui juris* to the parent; but, if this duty be not performed, the fault is the parent's and not the child's. There is no principle then, in our opinion, upon which the fault of the parent can be imputed to the child. To do so is to deny the child the protection of the law . . . . Now this new doctrine of imputed negligence whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of common law as anything possible to be suggested. The law never took a child's property because his father was poor, or shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian to it. But by the new doctrine, after a child has suffered damages, which confessedly are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one making the contribution." *Accord*: *Clover Creamery Co. v. Diehl*, 63 So. 196 (Ala. 1913); *Denver City Tramway Co. v. Brown*, 57 Col. 484, 143 Pac. 364 (1914); *Bronson v. The Town of Southbury, Conn.*, 37 Conn. 199 (1870); *Williams v. Jones*, 106 S. E. 616 (Ga. 1921); *Heldmair v. Taman*, 188 Ill. App. 283, 58 N. E. 960 (1900); *Indianapolis St. Ry. Co. v. Bordenchecker*, 33 Ind. App. 138, 70 N. E. 995 (1903); *Fink v. Des Moines*, 115 Iowa 641, 89 N. W. 28 (1902); *Danna v. Monroe* 129 La. 138, 55 So. 741 (1911); *Westbrook v. Mobile & O. R. Co.*, 66 Miss. 560, 14 Am. St. Rep. 587, 6 So. 321 (1889); *Neff v. Cameron*, 213 Mo. 350, 18 L. R. A. (N. S.) 320, 127 Am. St. Rep. 606, 111 S. W. 1139 (1908); *Flaherty v. Butte Electric Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416 (1910); *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623 (1884); *Berry v. Lake Erie & W. R. Co.*, 70 Fed. 679 (1895); *Markey v. Consolidated Traction Co.*, 65 N. J. L. 82, 46 Atl. 573 (1900); *Bottoms v. Railroad Co.*, 114 N. C. 699, 19 S. E. 730 (1894).

Heretofore all the cases that have been referred to are those wherein the negligence of the parent or custodian, as to whether it constituted a defence or not, to an action by a child, was the negligence in omitting to protect the child against the negligence of third persons, or, in other words, permitting the child to go astray without the proper care or attention when the child was incapable of rendering it, itself. Now, then, comes up a closely correlated question,—the question as to the right of a child to recover, where, at the time of the injury, the child was in the immediate custody of the parent or custodian and the parent or custodian were guilty of contributory negligence. As in the former case so now in this instance most of the courts refuse to follow the doctrine of imputed negligence. *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318 (1907); *Brennan v. Minnesota D. & W. Ry. Co.*, 130 Minn. 314, L. R. A. 1915 F, 11, 153 N. W. 611 (1915); *St. Clair St. Ry Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519 (1885); *Winters v. Kansas City Cable Ry. Co.*, 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591, 6 L. R. A. 536 (1889); *St. Louis I. M. & S. Ry. Co. v. Rexroad*, 59 Ark. 180, 26 S. W. 1037 (1894); *Ohio & M. Ry. Co. v. Stratton*, 78 Ill. 88 (1875); *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899 (1891). There are cases which bar recovery by the child in the case where the child was in the immediate custody of the parent and the latter was guilty of contributory negligence but they proceed on a different principle. Thus where a father took passage, with his son, aged about ten years, upon a train of cars, being assured that the train would stop at a certain station, and when the whistle was sounded for such station, he and his son went out of the coach upon the platform, and stepped down on the steps, and, being burdened with luggage, stepped off the train before it stopped and the son was thrown upon the station platform, and from there fell under the wheels of the cars, where he received such an injury as to cause the loss of both legs, it was *held*, that no recovery could be had against the company. The court said: "Conceding it to be a correct principle, the negligence of the parent or guardian, having in charge a child of tender years, would not excuse the carrier from using all the means in its power to prevent the injury, still if the negligence of the former was the proximate cause of injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier upon no just principle can be held responsible." *Ohio & Miss. Ry. Co. v. Stratton*, 78 Ill. 88 (1875). *Accord*: *Stillson v. Hannibal & St. Joseph Railroad Co.*, 67 Mo. 671 (1878).

On the other hand the courts of the minority view are more prone to apply the rule of imputed negligence in the case where the child was injured while in the custody of a parent or a guardian and the parent or guardian were guilty of contributory negligence. *Gallagher v. Johnson*, 130 N. E. 174 (Mass. 1921); *Holly v. Boston Gaslight Co.*, 8 Gray 123, 69 Am. Dec. 233 (1857); *Blossom Oil & Cotton Co. v. Poteet*, 136 S. W. 432, 35 L. R. A. (N. S.) 449 (Tex. 1911); *Levine v. Metropolitan Str. Ry. Co.*, 177 N. Y. 523, 69 N. E. 1125 (1903); *Lifschitz v. Dry Dock E. B. & B. R. Co.*, 73 N. Y. S. 888, 67 App. Div. 602 (1902); *Wallace v. John A. Casey Co.*, 116 N. Y. S. 394, 132 App. Div. 35 (1909). An interesting case is *Hennesey v. Brooklyn City Ry. Co.*, 6 App. Div. 206, 39 N. Y. S. 805, (1896), wherein it appeared that the plaintiff, an infant twenty-one months old, was riding with her father and mother in a phaeton, the father driving, and the mother holding the plaintiff in her lap. The father negligently drove on to the crossing of the defendant railroad and the infant was injured. It was held that the negligence of the father was not imputable to the infant, and that her mother being free from contributory negligence, the plaintiff was entitled to recover. Mr. Justice Cullen, in writing the opinion of the court, said: "In this case the child, while in the law subject to the paramount guardianship of the father, was in the immediate custody of the mother. Its extreme

youth rendered it necessary that someone must have not merely legal control, but also actual personal possession of the child. Here that person was the mother, who held the child in her arms. It should for the purposes of this action, be deemed as in her immediate custody, not as in the custody of both parents, or of the father alone. The attention or care at the time was to be bestowed on it, from its helpless condition because it was an infant and not an adult, was to proceed from the mother. The care that the father was to exercise, he was to exercise whether the plaintiff was *non sui juris* or an adult, whether it was his child or a stranger's. The mother's negligence was therefore, properly to be attributed to the child, but not that of the father." That case had not, however, been considered by the Court of Appeals of New York. A case exactly in point, in all practical respects, but which disapproves the decision and the reasoning, is *Delaware L. & W. Ry. Co. v. Devore,* 52 C. C. A. 77, 114 Fed. 155 (1902).

"The parent's care ought to be a shield to protect but the want of it ought not to be used as a sword to impair or destroy, the right of an infant to recover for injuries inflicted by a wrongdoer." *Berry v. Lake Erie & W. R. Co.,* 70 Fed. 679 (1895).

Thaddeus J. Morawski.

PARENT AND CHILD—ACTION BETWEEN PARENT AND CHILD.—The plaintiff, an unemancipated girl of sixteen, residing with her father, the defendant, was injured in an automobile accident while a passenger in her father's car. She sued him for damages due to the negligent operation of the car. The lower court overruled the defendant's demurrer to the declaration and certified to the Supreme Court of Appeals the question of the sufficiency of the declaration, especially on the question as to whether an unemancipated infant is entitled to maintain an action against her father for an injury due to negligence. The Appellate Court gave a negative answer, stating that the basis of the rule that an unemancipated infant is not entitled to maintain a tort action against his parent, "Lies in the very vital interest which society has in preserving harmony in domestic relations, and in not permitting families to be torn asunder by suits for damages by petulant, insolent, or ungrateful children against their parents for real or fancied grievances. It is deemed better that an occasional wrong should go unrequited than that family life should be subjected to the disrupting effects of such suits." *Securo v. Securo,* 156 S. E. 750 (W. Va. 1931).

At Common law it was well established that a minor, unemancipated child was not entitled to maintain a tort action against his parents. COOLEY ON TORTS, 3d ed., 492 (1906).

This rule has been held to be analogous to that where either spouse is forbidden to sue the other for torts committed during coverture. *Abbott v. Abbott,* 67 Me. 304, 31 A. L. R. 1139 (1877). In that case a man and woman married and during coverture the wife became insane. The husband, with the aid of three other men who were also named defendants in the action, forcefully placed her in an insane asylum. The court in its decision stated the rule to be: "A wife cannot maintain an action against her husband for a tort committed during coverture."

But where statutes have removed the fiction of legal identity of husband and wife, it is held that she is entitled to sue him for an assault committed on her person during coverture. *Gilman v. Gilman,* 195 Atl. 657 (N. H. 1915). Such actions would be as disruptive of the family peace as actions between parent and child. So if the family peace argument does not hold as to actions between

husband and wife, it may be strongly contended that it should not hold in actions by a child brought against his parents.

The law never has denied a child the right to maintain an action against his parents, or any person in *loci parentis,* for breaches of a legal duty owing to the child. *Small v. Morrison,* 118 S. E. 12 (N. C. 1923). The English courts have held that a child's property rights would be upheld as against his parents or persons in *loci parentis. Morgan v. Morgan,* 1 Atk. 489 (1737). While relief was usually obtained in equity, it was not because the infant was personally incapacitated to sue elsewhere.

As to the right to maintain a suit against his parents for a personal injury, the great weight of American authority is against the right. The reason, as given by the courts for its disallowance, is that to allow its existence would be disruptive of the family peace.

Where the parental relation has been abandoned, either expressly or impliedly, the disability to sue incident to the family relation, no longer exists. Thus, where a parent, in his relation with his unemancipated child, treats the child as though the parental relation has been abandoned, the child may maintain an action for injury caused by the parent. *Dunlap v. Dunlap,* 150 Atl. 905 (N. H. 1930).

"The father who brutally assaults his son or outrages his daughter ought not to be heard to plead his parenthood and the peace of the family as an answer to an action seeking compensation for the wrong. The relation is rightly fortified by certain rules. Outside that relation, the rules are inapplicable; and any attempt to apply them leads to irrational and unjust results." *Dunlap v. Dunlap, supra.* A decision supporting this statement has not been specifically made, but, in *Matarese v. Matarese,* 131 Atl. 198, 42 A. L. R. 1360 (R. I. 1925), it is suggested that there may be liability for malicious acts whereby the substance of the family relation has been destroyed.

Parental abandonment should be implied in the case of malicious injuries. Such acts are in no way referable to the parental status, and they indicate its abandonment more clearly than words. The argument that, while the parent's wrong is justly considered an abandonment of his right to immunity, yet the public interest, in behalf of which the immunity is asserted, still persists and demands the continuance of the immunity, should not be heard for the reason that the ideal sought to be maintained has been destroyed by the action of the parent.

Either parent has the right to inflict reasonable and moderate chastisement on the child for the punishment of faults or disobedience and the enforcement of parental authority. In case this right is abused and punishment, brutal and unreasonable, is given the child, the parent is amenable to the criminal law, but the child has no civil remedy against the parent for personal injuries inflicted, so long as the relation of parent and child continues. *People v. Green,* 119 N. W. 1087 (Mich. 1909).

The authority of the parent to chastise the child may be delegated but the liability of the parent attaches in case of unreasonable and brutal punishment. *Rowe v. Rugg,* 91 N. W. 903 (Iowa 1902).

In conclusion we may then say: Such immunity as the parent may have from suit by the minor child for personal tort arises from a disability to sue, and not from lack of violated duty. This disability is not absolute. It is imposed for the protection of family control and harmony, and exists only where a suit or the prospect of a suit might disturb the family relations. Stated from the viewpoint of the parent, it is a privilege, but only a qualified one. It is not an answer to a suit for an intentional injury, maliciously inflicted. It does not apply to an emancipated child, or to a case where liability in fact has been transferred to a third person.

George W. Vander Vennet.

MASTER AND SERVANT—AUTOMOBILES—TRIAL.—The case of *Schweinhaut, Trustee in Bankruptcy of the Wardman Park Taxicab Company, v. Flaherty,* 49 Fed. (2d) 533 (1931), is interesting in many respects. The case was begun in the Supreme Court of the District of Columbia and from there was appealed to the Court of Appeals of the District of Columbia. In the latter court it was *held* that the owner of a taxicab company was liable for one of their driver's negligence while the driver was transporting a friend free and in violation of the company's rules. The facts of this case can be stated quite briefly. The Wardman Park Taxicab Company maintained two exclusive stands or concessions for their cabs in the front of two large hotel buildings in the city of Washington. When their cabs were not carrying passengers the drivers were expected to be at one or the other of these stands. No regular place was fixed for the drivers to procure their meals but they were told by company officials to use as little mileage as possible and not to go out of their way for this purpose. One of the drivers for this company, pursuant to a previous arrangement, met a female friend while at one of the stands and invited her to go with him for his supper after which he drove her home free of charge, going several blocks out of his way to do so. While driving the woman to her home, the taxicab struck a pedestrian who brought this action against the owner of the taxicab company.

The taxicab company asserted non-liability for the driver's negligence. The jury found a verdict for the plaintiff and a judgment was accordingly entered from which the defendant appealed. The judgment of the lower court was affirmed, the appellate court *holding* that, under the circumstances stated, the owner of the taxicab was liable for the driver's negligence, because, an automobile in the crowded traffic conditions existing in the large cities is potentially a dangerous instrumentality, the use of which results in fatalities approaching those of modern warfare. The court added: "In these circumstances it seems to us the duty of the court to indulge no subtle reasoning in extending the doctrine of non-liability to the owner of such an instrumentality who, in his search of gain and profit places one of these in irresponsible hands, but rather to require of him such supervision of his servant as will avoid disobedience to and disregard of his rules, or, failing so to do, when injury occurs to a stranger, to shoulder the responsibility.".

Associate Justice Groner, who wrote the opinion, does not stand alone in his reasoning. However, while he pictures a strong case against the taxicab company he does so in violation of a doctrine of agency called that of *respondeat superior.* Corpus Juris sets forth the doctrine in the following terms: "A master is liable for injury to persons or property resulting from the acts of his servants done within the scope of his employment and in the master's services." 39 C. J. 1279. The master is not liable for every tort the servant might commit. "Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and an act of the servant not done in the execution of the services for which he was engaged cannot be regarded as an act of the master, and no liability attaches to him by reason of such act under the doctrine of *respondeat superior.*" 39 C. J. 1280. Certainly this doctrine should have been given some consideration. However, the fact that the cab company used automobiles which are dangerous instrumentalities, they are not only responsible for the making of rules that will make them safe upon the public highways but they are also responsible for the hiring of competent drivers and the reasonable means of enforcing these rules upon their drivers. If competent drivers are not hired, and if reasonable means are not employed by the company to see that their rules of safety are enforced upon their drivers then I would say the cab company was liable and that the opinion here stated was just.