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## Judicial Technique in Using the Agency Relation

Thomas P. Hardman

*West Virginia University College of Law*

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# WEST VIRGINIA LAW QUARTERLY

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## JUDICIAL TECHNIQUE IN USING THE AGENCY RELATION

THOMAS P. HARDMAN

A generation ago Mr. Justice Holmes said in effect that the fundamental rule of agency, *respondeat superior*, does not rest on a rational basis;<sup>1</sup> and he learnedly elaborated the historical explanation, rather than justification, that *respondeat superior* in its modern form is the evolution of an ancient rule which imposed liability upon the heads of families for the acts of their slaves. However the historicity of that may be,<sup>2</sup> the legal world of today is insisting upon a justification, rather than explanation, of everything legal. By way of reaction from the historical jurisprudence and legal fundamentalism of the last generation a

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\* Professor of Law West Virginia University.

<sup>1</sup>HOLMES, Agency, 4 HARV. L. REV. 345; (1891) 5 HARV. L. REV. 1; (1891), "must be explained by some cause not manifest to common sense alone." But see Stone, J., in *Gleason v. Seaboard Air Line Ry. Co.*, 278 U. S. 349, 356 (1929) (Holmes, J., concurring.)

<sup>2</sup>By the early common law it seems that a principal was not responsible for the acts of his agents which he had neither commanded nor ratified. See POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW (2d ed.) 533 (1898.) As to the historicity of the Holmes theory see Wigmore, "Responsibility for Tortious Acts: Its History," 7 HARV. L. REV. 315, 383, 441 (1894.) The rule imposing vicarious responsibility was definitely established in *Brucker v. Fromont*, 6 T. R. 659 (1796), and, though much criticized, obtains to some extent in most civilized countries. See BATY, VICARIOUS LIABILITY, c. IX (1916.)

scientific rationalism is now in fashion.<sup>3</sup> As a result commentators have variously rationalized *respondeat superior* without securing a general acceptance of any definite rationale.<sup>4</sup> But whatever its rationale the rule definitely presupposes an agency relation, and how shall we rationalize what we may call the judicial technique in using this relation?

In the adjudication of cases according to law<sup>5</sup> the courts use certain devices, mostly so-called "rules".<sup>6</sup> But the law is not merely the aggregate of these "rules";<sup>7</sup> it is more nearly the technique of the courts<sup>8</sup> in using these "rules" (and other devices); it is the prophecy, based on this

<sup>3</sup> See WIGMORE AND KOCOUREK, *RATIONAL BASIS OF LEGAL INSTITUTIONS*, XIX, XX (1923.) In fact Mr. Justice Holmes has long since abandoned the historical school of jurisprudence. See Pound, "Judge Holmes's Contributions to the Science of Law," 34 *HARV. L. REV.* 449, 450 (1921.) *Of* Pound, "Mechanical Jurisprudence," 8 *COL. L. REV.* 605 (1908).

<sup>4</sup> Perhaps the prevailing vogue is the so-called entrepreneur theory which is briefly explained in note 23 *infra*. As to this theory see Smith, "Frolic and Detour," 23 *COL. L. REV.* 444, 716, (1923), TIFFANY, *AGENCY* (Powell's 2d ed. 1924) 100-105; Douglas, "Vicarious Liability and Administration of Risk," 38 *YALE L. J.* 584, 720 (1929). Most of the numerous cases in point do not clearly articulate any particular rationale. But see *Standard Oil Co. v. Anderson*, 212 U. S. 215, 220-222 (1908); *Braxton v. Mendelson*, 233 N. Y. 122, 135 N. E. 198 (1922); *Franks v. Carpenter*, 192 Iowa 1308, 186 N. W. 647 (1922).

<sup>5</sup> As to the distinction between "justice according to law" and "justice without law" see Pound, "Justice According to Law," 13 *COL. L. REV.* 690 (1913).

<sup>6</sup> The word "rules" is herein used in the sense in which the courts generally use it, namely as including legal "rules," "principles" and "standards". As to the distinction between these and also as to legal "conceptions" see POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW*, 115 *et seq.* (1922). But for present purposes to draw these distinctions would only serve to encumber. It should be remembered however that the judicial process may include the use of other things than "rules," such as "inherited instincts, traditional beliefs, acquired convictions", as to which see CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>7</sup> It is usual however to say that law is an aggregate of rules. See POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* (3d ed. 1911) 17, 18; SALMOND, *JURISPRUDENCE* (7th ed. 1924) §5.

<sup>8</sup> And other law-administering tribunals.

technique, of what the courts<sup>9</sup> will do with these tools.<sup>10</sup> Professor Green has recently rationalized this technique in a number of non-agency situations;<sup>11</sup> and it is the purpose of this study to attempt to rationalize some aspects of this technique in cases in which it is sought to hold a defendant *relationally* responsible for the conduct of his vicarius, *i. e.*, some one undertaking a service for him.<sup>12</sup> In such cases, according to this method of approach and adjudication, a rationalization of the judicial process would seem to involve the following determinations (except that if any of these determinations should be in the negative the judicial process would generally end there):

I. Is the claim of the plaintiff such a want or interest as the judicial tribunals will secure against injury by anyone?

II. If so, is there any legal device—any agency or allied relation between the defendant and the actor—any rule arising out of the relation—designed to secure such interest by making such a defendant relationally responsible? If not, shall such a device be judicially created?<sup>13</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> Compare POUND, *THE SPIRIT OF THE COMMON LAW* 1 (1921): "The common law... is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules." Mr. Justice Holmes, "The Path of the Law," 10 *HARV. L. REV.* 457, 461 (1897): "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Green, "The Duty Problem in Negligence Cases," 28 *COL. L. REV.* 1014, 1015 (1928): "The power of passing judgment through formal political agencies for securing social control... the power which operates through rules."

<sup>11</sup> GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927). Professor Green has incidentally included some agency cases, but he has discussed them from a non-agency point of view.

<sup>12</sup> The word "vicarius" is herein used as including any person who "acts" for another and, in one class of cases, as including any person who serves another though the muscular movements of such person are not his acts in the legal sense. As hereinafter indicated, the phrase "relational liability" is used to include any liability which arises out of some relation as distinguished from a liability based on a personal breach of duty.

<sup>13</sup> Such a judicially created device is the recently created family-purpose "relation" and rule, hereinafter discussed. *Of.* Beach, J., in *Wolf v. Sulik*, 93 *Conn.* 431, 435-437, 106 *Atl.* 443 (1919); Poffenbarger, J., in *Jones v. Cook*, 90 *W. Va.* 710, 717, 111 *S. E.* 828 (1922). That the courts do judicially create see Corbin, "The Law and the Judges," 3 *YALE REV.* 234; (*N. S.* 1914). (*A. L. C.*) *Comments*, 27 *YALE L. J.* 668 (1918).

The further inquiries referred to in the accompanying footnote,<sup>14</sup> fall outside the scope of this study. In fact only one phase of these two determinations can be adequately discussed within the limits of this article. Therefore the first of these two will be disposed of very briefly for the reason that it is equally applicable to non-agency cases.

### I.

In determining whether a person is relationally responsible for the acts of a vicarius the courts generally start with the inquiry whether the actor is an agent or a so-called independent contractor. But to start thus is not to start at the beginning.

The subject-matter of all law is interests,<sup>15</sup> *i. e.*, the wants, claims or desires of an individual or of a group. But the law does not attempt to secure all such interests against injury even though the injury is done by the defendant in person. As an eminent English judge has said on this point:<sup>16</sup>

"It is to the protection of . . . material interests that the law chiefly attends . . . . [Injuries to some interests] the law does not pretend to redress."

Hence rationally the first inquiry should be whether the plaintiff's claim is a legally secured interest, *i. e.*, such an interest as the law-administering tribunals will protect against injury by any one; for if there is no such interest, there can be no problem of vicarious responsibility.

To illustrate: A, in the course of doing something for another, "negligently" frightens T but does not physically touch T. The nervous shock to T is serious. Is the person acted for relationally responsible for this act of his vicarius which admittedly injures T's interest? Though the

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<sup>14</sup> Inquiries: iii, as to the limits of the security afforded by the "rule" if there is such a rule; iv, as to whether there is a violation of this rule; v, as to whether the violation caused the injury to the plaintiff's interest; vi, as to whether there are any defences; vii, as to the quantum of damages. As to these inquiries see, generally, GREEN, *op cit. supra* n. 11, at 2 *et seq.*

<sup>15</sup> See POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 79 *et seq.* (3d ed. 1920); POUND, *A THEORY OF SOCIAL INTERESTS* (1920), XV. Publications of the American Sociological Society 16; GREEN, *op. cit. supra* n. 11.

<sup>16</sup> Lord Wensleydale in *Lynch v. Knight*, 9 H. L. C. 577, 598 (1861).

Roman law imposed a liability in such cases,<sup>17</sup> and justifiably so, the judicial tribunals in many common-law jurisdictions would not protect T's interest, even if the defendant had personally committed the wrong complained of;<sup>18</sup> for, to many common-law courts, it has not seemed socially desirable to use the force of politically organized society to secure such interests. Hence the first inquiry in any legal controversy is whether the plaintiff's claim is the sort of interest that the law-administering tribunals will secure, *i. e.*, whether the plaintiff's interest, when balanced with the other interests involved in the case, is sufficiently important to justify the use of the force of politically organized society in order to protect it.

## II.

If the claim is such an interest, the next rational inquiry is whether there is any legal device—any agency or allied relation between the actor and the defendant—any rule arising out of the relation—designed to secure such interest by making the defendant relationally responsible?

But in order to create background for a criticism of the judicial technique and in order to delineate agency as an integral part of the larger legal picture, it is first desirable to sketch a relational outline of agency and allied consensual-vicarious relations; for, as the writer will attempt to show, there is a legal and rational convergence of such relations in that what we may call the *sui generis* inter-relational distinctions are based primarily on the type of control,<sup>19</sup> or non-control, of the principal or other person

<sup>17</sup> See GAIUS, INST. 3, 220; JUSTINIAN, INST. 4, 4, 1; BUCKLAND, ROMAN LAW (1921), 584-585; Radin, "Fundamental Concepts of the Roman Law," 12 CAL. L. REV. 481, 486-487 (1924).

<sup>18</sup> See *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896); *Spade v. Lynn & Boston Ry.*, 168 Mass. 285, 47 N. E. 88 (1897); *Chesapeake & O. Ry. Co., v. Tinsley*, 116 Va. 600, 82 S. E. 732 (1914); *Nuckles v. Tennessee, etc., Co.*, 155 Tenn. 611, 299 S. W. 775 (1927). But see *Lambert v. Brewster*, 97 W. Va. 124, 125 S. E. 244 (1924); *Hambrook v. Stokes Bros.*, (1925) 1 K. B. 141, annotated: (1925) 34 YALE L. J. 554. See Parry, *Nervous Shock as a Cause of Action in Tort*, 41 L. QUAR. REV. 297 (1925).

<sup>19</sup> "Control," as herein used, may be actual or potential. Moreover "control" is such an indefinite concept that though it is almost invariably used by the courts as such it seems desirable to distinguish between types of control.

acted for over the agent or other vicarius.

Apart from special relations, *e. g.*, partnerships, joint stock companies and trusts as such,<sup>20</sup> when one person consensually serves another the person so serving may be:

- (1) A completely uncontrolled accommodator,
- (2) A completely controlled human machine, or
- (3) A person between these extremes who may be
  - (i) a so-called "independent contractor" or
  - (ii) an agent.

In all such situations the one so serving another may be called a vicarius and any relation arising from such consensual-vicarious service we may call a consensual-vicarious relation. When any of these relations, *e. g.*, the relation of principal and agent, is established, certain legal consequences generally flow from such relation more or less independently of the will of the parties.<sup>21</sup> If the relation is the agency relation as hereinafter defined, one legal consequence is *respondeat superior*. The vicarious responsibility, if any, so arising out of the particular relation may be called a relational responsibility to distinguish it from legal responsibility based on personal breach of duty. And in general the extent of this relational responsibility, if any, depends *primarily*, it is believed, upon the extent to which the person acted for may control the vicarious conduct of the actor. It is true that the "control" or, more accurately, types of control which the courts use may have no such function under another, and perhaps a better, method of approach.<sup>22</sup> And it is true, as advocates of the entrepreneur theory assert, that control is not the only

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<sup>20</sup> A trustee as such is not an agent. *Everett v. Drew*, 129 Mass. 150 (1880); *Chaffee v. Rutland R. Co.*, 53 Vt. 345 (1881). But, as we shall see, he may be an agent and the *cestui que trust* may be a principal and liable as such, where the *cestui que trust* retains the requisite control. See further Douglas, *op cit. supra* n. 4 at 720 *et seq.*; GILMORE, PARTNERSHIP (1911) §9.

<sup>21</sup> Cf. POUND, *op. cit. supra* n. 10; "The common-law lawyer . . . . . thinks of the relation of principal and agent and of powers, rights, duties and liabilities, not as willed by the parties but as incident to and involved in the relation."

<sup>22</sup> For another rational and valuable method of approach see Douglas, *op. cit. supra* n. 4.

factor in fixing vicarious responsibility.<sup>23</sup> But is it true, as a leading entrepreneurist states, that "control" is not an essential of such relational responsibility?<sup>24</sup> At any rate, under the method of approach which the courts almost invariably employ, "control", as herein analyzed, plays a rational and a leading role. This is outlined in the accompanying footnote.<sup>25</sup>

### I. "UNCONTROLLED" VICARIOUS SERVICE

At one extreme of such consensual-vicarious relations we have what may be called accommodation. The best illustrative case which has been found is a recent California

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<sup>23</sup>As to other factors see Douglas, *op. cit. supra* n. 4. See Smith *op. cit. supra* n. 4 at 456, where the entrepreneur theory is thus summarized: "It is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few." Therefore such losses should be cast upon the principal, the entrepreneur, for he is normally in a more strategic position than the agent to spread or distribute such losses.

<sup>24</sup>TIFFANY *op. cit. supra* n. 4 at 100-104.

<sup>25</sup>Outline:

i. "Uncontrolled" Vicarious Service

a. Accommodation

Fact situation: the person acted for may not control the vicarius either (1) as to the manner of accomplishing the undertaking or (2) as to the result of the undertaking. No relational responsibility. Not an agency relation.

b. So-called Independent Contractor Employment.

Fact situation: the person acted for may not control the vicarius as to (1) the manner of accomplishing the undertaking but may as to (2) the result of the undertaking. Logically this employment should be called *single-controlled* service, but the courts commonly treat it as "uncontrolled" employment. Also the limited liability of the employer for the acts of such a vicarius is not a relational responsibility as it is based primarily on the employer's breach of duty. Hence the inclusion here. Not an agency relation.

ii. Completely Controlled Vicarious Service

Mechanical Employment.

Fact situation: the employer may control the vicarius (1) as to the manner of accomplishing the undertaking and (2) as to the result of the undertaking. And (3) the employer supplies the "will". No "act" by the vicarius. Complete control, and "vicarious" liability commensurate with such control. Not an agency relation.

iii. Double-Controlled Vicarious Service

Agency.

Fact situation: the person acted for may control the "acts" of the vicarius (1) as to the manner of accomplishing the undertaking and (2) (to some extent at least) as to the result of the undertaking. Relational responsibility commensurate with such control.

decision.<sup>26</sup> In that case one Nixon, while driving with Fiske, was arrested for speeding. During the detention of Nixon, Fiske with Nixon's consent undertook to go to the central police station for Nixon in order to secure Nixon's release.<sup>27</sup> On this trip Fiske negligently drove the car over the plaintiff, thus injuring the plaintiff's legally protected interest in his physical integrity. Nixon was sued. In holding that Nixon was not liable for the negligence of the vicarius in the course of doing such a consensual-vicarious service the court said:<sup>28</sup>

"It is clear that . . . . . [Fiske] undertook what he did in order to be of assistance to Nixon in his difficulty and as an act of friendship from one man to another. The doctrine of *respondeat superior* sought here to be invoked by the appellants must necessarily be based upon a relationship between two parties by which one has the legal right to direct the activities of the other and the latter the legal duty to submit to such direction. Such a relationship did not exist in the case at bar. If Fiske, after undertaking his mission, had abandoned it and left his friend in the lurch, he would have been guilty of no breach of legal duty although undoubtedly guilty of a most reprehensible breach of moral duty. In this case there was no such relation as that of master and servant, of principal and agent, or employer and employe. In the performance of his errand, Fiske was at liberty to proceed to its performance in any way he chose, and was not amenable to the direction of Nixon."

The theory seems to be that, where the understanding of the parties is that the person acted for may not control the vicarius either (1) as to the manner of accomplishing the undertaking or (2) as to the result of the undertaking, then, though the injured interest of the plaintiff is an interest which the law-administering tribunals will secure against injury done by one in person, there is no legal rule

<sup>26</sup> *Stoddard et al. v. Fiske et al.*, 170 Pac. 663 (Cal. App. 1917).

<sup>27</sup> Whether the undertaking was at Nixon's request is not clear.

<sup>28</sup> At 664-665. Italics ours.

or other device designed to protect such interest by making the person so acted for relationally responsible. The fact basis of this non-liability seems to be, largely at least, that by virtue of having no control over the vicarious conduct of the actor the person so acted for is not in a strategic position to prevent the losses incident to such vicarious acts.<sup>29</sup> Therefore as he is not personally culpable, it is not socially desirable that he should be saddled with the loss. Hence in purely consensual-vicarious relations it would seem that, if the service is a mere uncontrolled act of courtesy or accommodation and no more, there is no agency relation<sup>30</sup> and therefore *respondeat superior* is inapplicable. Accordingly, as the Fiske Case indicates, it is immaterial whether such accommodator is a volunteer or an invitee. In either case he is not an agent (including "servant"), and, without more, the person acted for incurs no relational responsibility.<sup>31</sup> This does not mean that a person so acted for may not incur liability, other than relational liability, for the acts of such uncontrolled vicarius, as where such actor, with the consent of the person acted for, creates a nuisance on the latter's premises.<sup>32</sup> But that is not relational liability, for that liability does not arise out of the consensual-vicarious relation but is based on the fact that the nuisance exists on the premises under such circumstances that, whoever created the nuisance, there is toward certain persons a legal duty on the part of the owner of the premises to abate it.

Much like this relation is that consensual-vicarious relation which, with considerable inaccuracy, is generally

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<sup>29</sup> Cf. Douglas, *op. cit. supra* n. 4, as to the respective functions of "risk avoidance, risk prevention, risk shifting and risk distribution", in determining whether a person should incur vicarious liability.

<sup>30</sup> Fisher v. Johnson, 238 Ill. App. 25, 30 (1925). See THE AMERICAN LAW INSTITUTE, AGENCY, RESTATEMENT No. 1, §2 (1926). The cases are legion in which it is said or assumed that such lack of control prevents the formation of the agency relation. Cf. Fish v. Kelly, 17 Com. Bench (N. S.) 194 (1864). And see Woodrum v. Price, 104 W. Va. 382, 389, 140 S. E. 346 (1927).

<sup>31</sup> If the car were a so-called "family automobile" and Fiske were in the position of a so-called "member of the family," then, as we shall see, a different result might be reached in some jurisdictions.

<sup>32</sup> See Sturges v. Society, 130 Mass. 414, 415 (1881), a case of an independent contractor but the principle is the same.

called "independent-contractor" employment. As to this class of vicarious acts the Agency Restatement provides as follows:<sup>33</sup>

"An independent contractor is a person who undertakes to execute certain work or to accomplish a stipulated result for another, under such circumstances that the right of control of the doing of the work, and of the forces and agencies employed in doing it, is in the contractor."

From this provision it is apparent that the person so acted for cannot control the acts of the vicarius as to most matters connected with the vicarious undertaking. By virtue of such non-control the person so acted for is normally not in an advantageous position to prevent the losses incident to such vicarious acts.<sup>34</sup> Therefore just as in the case of accommodation, there arises out of this relation the legal rule that an employer is not *relationally* liable for the acts of an "independent contractor".<sup>35</sup> It is true that so-called "independent"-contractor employment is not fully "independent" of control on the part of the employer. In reality such employment is a single-controlled vicarious service,<sup>36</sup> for the employer retains a variable control over the so-called independent contractor with respect to one class of matters, namely, the *result* of the undertaking.<sup>37</sup> And it is true that, in addition to other liability, the employer incurs a liability for such acts of his independent contractor as (1) necessarily effect an *unlawful result*<sup>38</sup> or (2) will probably effect an *unlawful result* if precautions

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<sup>33</sup> AMERICAN LAW INSTITUTE, AGENCY, RESTATEMENT No. 1, §6 (1926).

<sup>34</sup> As to the function of "risk (loss) prevention" in insulating the independent contractor see Douglas, *op. cit. supra* n. 4, at 504 *et seq.*

<sup>35</sup> *Reedie v. London, etc., Ry. Co.*, 4 Ex. 244 (1849); *Klar v. Erie R. Co.*, 118 Oh. St. 612, 162 N. E. 793 (1928). See MEEHEM, AGENCY (2d ed. 1914) §§ 1917-1920, citing numerous cases.

<sup>36</sup> See n. 25, *supra*.

<sup>37</sup> *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077 (1893); *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411 (1895); *Giroud v. Stryker Transp. Co.*, 140 Atl. 305 (N. J. 1928).

<sup>38</sup> *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767 (1853); *Weinman v. De Palma*, 232 U. S. 571 (1914).

are not taken by the employer.<sup>39</sup> But for reasons appearing in the accompanying footnote it is believed that this and other exceptional liability of such an employer is not a relational liability as it is based, primarily at least, on the employer's personal breach of duty.<sup>40</sup>

## ii. COMPLETELY CONTROLLED VICARIOUS SERVICE

At the opposite extreme of consensual-vicarious relations we have what may be called completely controlled vicarious service. In differentiating this class of employment a distinction should be made between an act and a movement which is not an act in the legal sense. "An act", says Mr.

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<sup>39</sup> *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32 (1893); *Trump v. Bluefield, etc., Co.*, 99 W. Va. 425, 129 S. E. 309 (1925); *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579, 213 N. W. 966 (1927), annotated: 37 *YALE L. J.* 113 (1927).

<sup>40</sup> It would seem to be indisputable that, when one has employed an independent contractor to do something which will necessarily cause an unlawful result, he has thereby personally committed a breach of duty to third persons. Where however the employment will not necessarily effect an unlawful result but is so dangerous that it will probably effect an unlawful result unless precautions are taken by the employer, it may be plausibly argued that the injury is due to the unlawful *manner* in which the vicarius is accomplishing a result which could be lawfully accomplished, and that (as the employer has no control as to the manner of such action) therefore in such cases the employer is relationally liable for the acts of a vicarious over which he has no control. If this argument is tenable, this class of cases would constitute an exception to the writer's position that control plays a rational and leading role in fixing vicarious liability as such. It is believed however that when one by any device exposes third persons to such a high probability of harm, he thereby comes under a duty to such third persons and that he cannot escape that duty by delegating performance thereof to another, whether an agent or a so-called independent contractor. See *Neyman v. Pincus*, 267 Pac. 805, 809, (Mont. 1928); *Wight v. H. C. Christman Co.*, 244 Mich. 208, 221 N. W. 314 (1928).

Analogously, as to other exceptional liability of such employers. For example, such employers seem to be liable for the negligence of independent contractors who, when employed, are known by the employer to be incompetent. See *Lawrence v. Shipman*, 39 Conn. 586 (1873). But obviously thus to expose third persons to such a high probability of harm is a personal breach of duty and the resultant responsibility of the employer is based primarily on his own culpability and not merely on the culpability of his vicarius.

Similarly, where such an employer has resumed possession and control of the premises and the injury results from the condition in which they are maintained. As to this see *Sturgis v. Society*, 130 Mass. 414 (1881); *McCrorey v. Thomas*, 109 Va. 373, 63 S. E. 1011 (1909); *Hickman v. Toole*, 35 Ga. App 697, 134 S. E. 635 (1926).

Justice Holmes,<sup>41</sup> "is a muscular contraction, and something more . . . . The contraction of the muscles must be willed." If the vicarius, though controlled as to result and manner of action, exercises his own will in making the muscular movement he is in the legal sense an agent even though he is allowed no discretion as to manner of action or as to results to be accomplished. It is true that the judicial technique commonly involves a different treatment. Reflecting this judicial usage Mechem on Agency says<sup>42</sup> that "where one person, in the presence and by the express direction of another, serves as an aid in performing some purely ministerial or mechanical part,—such as signing the other's name . . . . .,—of an act which that other is engaged in performing and to which he brings his own volition, judgment and determination in all matters which concern the essence of the transaction, the act is regarded in law as the direct and personal act of the latter."

Such assertions are believed to be unsound. If a muscular movement of a vicarius is willed by him there is in the legal sense an act by the vicarius and if the other essentials of agency are present, the actor is legally an agent and in general the *sui generis* agency doctrines may apply just as if he were an agent of the highest rank.<sup>43</sup> Where however the movement of a vicarius is not willed by him but by the person for whom the movement is made, then, quite apart from the agency doctrine of *qui facit per alium facit per se*, the movement of the vicarius is in legal contemplation the act of the person supplying the will, and there is, normally at least, complete vicarious liability. The vicarius so used is a mere human machine functioning only as willed by the other.<sup>44</sup> Legally the act is, in general, the same as if an inanimate machine had been employed. Such service is admittedly not true agency.

But in Mr. Mechem's case of a person directed by another to sign such other's name and to sign in the presence of such other, the person so signing is in the legal sense con-

<sup>41</sup> HOLMES, THE COMMON LAW 54 (1881).

<sup>42</sup> MECHEM, *op. cit. supra* n. 35, §63.

<sup>43</sup> Cf. Seavey, "The Rationale of Agency," 29 YALE L. J. 859 (1920).

<sup>44</sup> See n. 12, *supra*.

sensually doing an act for another and in so acting owes to that other the ordinary duties of an agent, *e. g.*, the duty of obedience and the duty of loyalty. It is true, as Mr. Mechem argues, that such an employe' without having authority under seal may sign an instrument which must be under seal and yet bind the employer.<sup>45</sup> But this does not prove Mr. Mechem's proposition that "these are not cases of agency, in the ordinary sense, at all".<sup>46</sup> It only proves that in such cases there are qualifications of the over-technical doctrine that authority of an agent to execute a document necessarily under seal must be conferred by instrument under seal. Such person then is an agent and the vicarious liability of the principal, though different in extent, is not different in kind from what it would be if the agent were allowed a discretion.<sup>47</sup>

Where the movement of the vicarius is not willed by him, not only is the relation not agency but the relation is not necessarily consensual. If the will of the vicarius is coerced by the person whose "act" the movement is, the relation is not consensual and therefore does not belong in this study. But if the person whose "act" the movement is simply supplies all the will without coercing the consent of the vicarius, as where the vicarius is, with his consent, "hypnotized" or, without the exercise of his will, is otherwise consensually utilized by another, the relation, though consensual-vicarious, is not an agency relation, for in the legal sense the only act is that of the person supplying the will. In other words, in the case of completely controlled vicarious service there is a rule designed to secure the legally recognized interests of third persons when injured by the defendant's human machine, but it is not a relational rule as it is, in the legal sense, based on the defendant's own acts.

### III. DOUBLE-CONTROLLED VICARIOUS SERVICE: AGENCY

Between these two extremes is the consensual-vicarious

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<sup>45</sup> See, *e. g.*, *Gardner v. Gardner*, 5 Cush. 483 (Mass. 1850), and *Storv, Agency* §51 (1863).

<sup>46</sup> *MECHEM, op. cit. supra* n. 35. at p. 161.

<sup>47</sup> *Cf. Seavey, op. cit. supra* n. 43.

relation where the understanding of the parties is that the person acted for may control the actor not only (1) as to the manner of accomplishing the undertaking but also (2) (to some extent at least) as to the result of the undertaking.<sup>48</sup> This control we may call double control. Properly speaking, this type of control is a *sine qua non* to *respondet superior* as a rule of relational responsibility though the judicial technique in using this rule is commonly otherwise as to one class of cases hereinafter explained.<sup>49</sup>

In passing it may be parenthetically observed that herein all vicarious acts are called service, whether they are done by an "agent" or by a so-called "servant"<sup>50</sup> who is really an agent.<sup>51</sup> In this class of service then, as the person acted for, whether principal or so-called "master", has control over the manner in which the vicarius acts and, to some extent at least, over the result to be accomplished, it is a legal consequence peculiarly incident to this relation that the person so acted for is, within the scope of the undertaking, liable for the unlawful manner of accomplishing the undertaking as well as for the unlawful results of the undertaking.<sup>52</sup> This is due, largely at least, to the fact that by virtue of having such double control the person so acted for, the entrepreneur, is in a strategic position to prevent and perhaps to distribute the losses incident to

<sup>48</sup> See *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518, 523 (1889).

<sup>49</sup> Namely, the so-called "family-automobile" cases; but those cases are hereinafter differentiated.

<sup>50</sup> See *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S. E. 276 (1923) as to the alleged distinction between "agent" and "servant."

<sup>51</sup> See *Brown v. German-American Title, etc., Co.*, 174 Pa. 443, 451, 34 A 335 (1896): "In legal essence there is no difference between the relation of master and servant and that of principal and agent, the terms 'servant' and 'agent' being fundamentally interchangeable, and the distinction between them being evidential only." The cases and commentators however usually attempt to make a distinction. See, e. g., *MECHEM op. cit. supra* n. 35, §§36-39.

<sup>52</sup> *Brucker v. Fromont*, *supra* n. 2; *Wilton v. Middlesex R. Co.*, 107 Mass. 108 (1871); *Cosgrove v. Ogden*, 49 N. Y. 255 (1872); *Gleason v. Seaboard Air Line Ry. Co.*, *supra* n. 1, annotated: 38 *YALE L. J.* 827 (1929). See generally, Laski, "The Basis of Vicarious Liability," 26 *YALE L. J.* 105 (1916).

such vicarious undertakings.<sup>53</sup>

A leading advocate of the entrepreneur theory says that there are four indicia of the entrepreneur, *viz.*, (1) "control", (2) ownership (legal or equitable) of the property used in the vicarious undertaking, (3) the chance to share the profits, if any, to be derived from the enterprise and (4) the chance to share the losses, if any, that may result from the undertaking.<sup>54</sup> Accordingly this writer says that he who has "a majority of these attributes" is the entrepreneur and as such is vicariously liable.<sup>55</sup> It follows that, if one has all these indicia except "control", he is the entrepreneur and is relationally responsible for the acts of a vicarius committed within the scope of the undertaking. But however desirable this conclusion may be, the cases do not support the theory to this extent.<sup>56</sup> When a person though sharing in indicia (2), (3) and (4) does not have, actually or potentially, what the writer has called double control, the vicarius, if he is either an "agent" or an "independent contractor", is an "independent contractor"<sup>57</sup> and, as we have seen, the exceptional liability of an employer for the acts of an "independent contractor" is not a *relational liability*.<sup>58</sup> It would seem then that, subject to an explanation hereinafter made, double control is a *sine qua non to respondeat superior* as a rule of relational responsibility.<sup>59</sup>

Another leading advocate of the entrepreneur theory

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<sup>53</sup> There is no consensus of opinion as to the rational basis of *respondat superior*. And that problem as such cannot be fully discussed in this article. See Douglas, *op. cit. supra* n. 4, as to the functions of "risk prevention," "risk shifting" and "risk distribution" (and also as to "risk avoidance") in fixing vicarious liability.

<sup>54</sup> TIFFANY *op. cit. supra* n. 4, at 100-104. See 20 COL. L. REV. 333 (1920)

<sup>55</sup> *Ibid.*

<sup>56</sup> *E. g.*, in *McNamara v. Leipsig*, 227 N. Y. 291, 125 N. E. 244 (1919), which has been relied upon to show that "control" is immaterial or not essential. 20 COL. L. REV. 333, 335, 336 (1920), the court declared that the person held responsible had "control". And this conclusion seems consistent with the facts, though much can be said to the contrary. See also *Billig v. Southern Pac. Co.*, 189 Cal. 477, 209 Pac. 241 (1922).

<sup>57</sup> See THE AMERICAN LAW INSTITUTE, AGENCY RESTATEMENT No. 1, §6, quoted at n. 33 *supra*.

<sup>58</sup> See n. 40, *supra*.

<sup>59</sup> An apparent exception to this statement is the so-called family-purpose doctrine, hereinafter explained.

asserts<sup>60</sup> that the law in fixing the limits of vicarious liability draws some distinctions which do not rest even partly on differences in "control". Thus the law holds one relationally responsible for the unauthorized torts of an agent while the agent is on a so-called "detour"<sup>61</sup> but not while the so-called "agent" is on a "frolic" of his own.<sup>62</sup> Accordingly it has been said by this entrepreneurist that the person acted for has just as much "control" or rather just as little "control" in the one case as in the other and that therefore "control" does not justify the distinction between "frolic" and "detour".<sup>63</sup> But as to such anti-control argument the following reply may be made.

Preliminarily it must not be understood that "control" is a mere magical concept which can be used as a panacea for all agency and allied ills. We have progressed beyond that stage of legal development when a jurisprudence of conceptions reigned.<sup>64</sup> We must not rely unduly on a mere "language" technique; we must rely more on a "judging" technique;<sup>65</sup> we must rationalize the judicial technique in using the more or less unarticulated connotations of control, departure, detour and the like,—the various devices with which judgments are made. Now, when an agent is on a so-called detour, *i. e.*, is doing what he undertook to do but is doing it in a round-about way (a bad way but nevertheless *a way*), the agency relation still exists and that relation, as well as its fundamental rule, is based primarily on double control though secondarily other factors,<sup>66</sup> either singly or in combination, may play more or less important roles. But when the so-called "agent" is on a "frolic" of his own he is really not an agent.<sup>67</sup> He has suspended the

<sup>60</sup> Smith, *op. cit. supra* n. 4.

<sup>61</sup> Ritchie *v.* Waller, 63 Conn. 155, 28 Atl. 29 (1893); Dunne *et al v.* Hely *et al.*, 140 Atl. 327 (N. J. 1928).

<sup>62</sup> Joel *v.* Morrison, 6 C. & P. 501 (1834) is the classic authority on this point. See also Groatz *v.* Day, 81 N. H. 417, 128 Atl. 334 (1925).

<sup>63</sup> Smith, *op. cit. supra* n. 4, at 455.

<sup>64</sup> See Ewart, Waiver Distributed, (1917), iii-vi (Foreword by Roscoe Pound). Cf. Cardozo, J., in Hynes *v.* New York Central R. R. Co., 231 N. Y. 229, 235-236, 131 N. E. 898 (1921).

<sup>65</sup> Cf. Green, *op. cit. supra* n. 10, at 1016 *et seq.*

<sup>66</sup> Hereinafter indicated.

<sup>67</sup> Cardozo, J., speaking for the court in Fiocco *v.* Carver *et al.*, 234 N. Y. 219, 137 N. E. 309 (1922), says that during such departure the actor has "broken" and "suspended" the agency "relation."

agency relation. As Mr. Justice Holmes has said:<sup>68</sup> "No free man is servant [agent] all the time". And when he who should be acting as an agent goes on a frolic of his own, *i. e.*, wholly *departs* from what he undertook to do, he *to the extent of, and during, such departure* renounces the double control and resumes his status as a non-agent. For such renunciation he may of course be liable to his principal or *quondam* principal. But until the agency relation is, in the language of Judge Cardozo, <sup>69</sup>"re-established", *e. g.*, by timely return to what we may call the proper route, there can of course be no relational responsibility, for *respondeat superior* arises out of the agency relation. It is the renunciation of double control (with the resultant suspension of the agency relation) that plays the leading role in holding that there is no relational responsibility. By virtue of such renounced control the *quondam* principal or entrepreneur is normally a somewhat less effective loss preventer.<sup>70</sup> During such departure the business done is hardly his. It is therefore socially undesirable to saddle his business with such loss.

The so-called volunteer cases aptly illustrate all classes of consensual-vicarious relations. Thus when one volunteers to act for another and that other consents to such undertaking the other is or is not relationally liable for the torts committed within the scope of the undertaking depending primarily upon the type of control or lack of control over the vicarious conduct of the actor. Normally in

<sup>68</sup> Holmes, "Agency," 5 HARV. L. REV. 1, 16 (1891).

<sup>69</sup> Cardozo, J., speaking for the court in *Fiocco v. Carver et al.*, *supra* n. 67, refers to this re-establishment as the "resumption of a relation which has been broken and suspended." See, accord, *Orris v. Tolerton & Warfield Co.*, 201 Ia. 1344, 207 N. W. 265 (1926).

<sup>70</sup> It may be thought that, in this respect, there is no distinction between frolic and detour and that therefore the difference in results between frolic and detour must be justified on other grounds. See Douglas, *op. cit. supra* n. 4. But in the generality of cases (and rules must be formulated for the generality of cases) may we not say that when an agent is on a detour—accomplishing an undertaking in a round about way—he has not fully renounced the control of the person acted for, but that when one who should be acting as agent has completely departed from his undertaking for another he has, to a greater degree at least, renounced the control of that other. To some extent are not rules for the guidance of the conduct of the vicarius normally less effective in cases of departure than in cases of mere detour?

case of volunteers the control, if any, is double control, though a volunteer might be an uncontrolled volunteer or a completely controlled volunteer, which we have already considered. The Fiske Case<sup>71</sup>, sufficiently illustrates the relational legal consequence in case of uncontrolled volunteers. The well known case of *Hill v. Morey*<sup>72</sup> will suffice as an illustration of a volunteer under double control. There the defendant was repairing a fence. A neighbor who happened to be present, without any request from the defendant, began to assist the defendant. In so assisting, the neighbor cut a tree on the plaintiff's land. The defendant had impliedly consented to this assistance and the defendant had assumed a "control", for he cautioned the neighbor to be careful not to cut trees standing upon the plaintiff's land, and to such assumption of control the neighbor silently consented. This control by the person acted for applied to (1) the result of the undertaking, in that trees were to be cut and (2) the manner of accomplishing the undertaking, in that the cutting was to be "careful" etc. Thus the objectively judged understanding of the parties<sup>73</sup> was that the defendant had assumed a double control over the acts of the vicarius. And therefore the court correctly held that the agency [master-and-servant] relation existed and that the defendant, the entrepreneur, had incurred a relational liability commensurate with the assumed control and with the consequent ability of the entrepreneur to prevent and perhaps to distribute the loss encountered.<sup>74</sup>

In *Hill v. Morey*<sup>75</sup> the volunteer's act was one of mere courtesy by a friend, just as in the Fiske Case,<sup>76</sup> and the only primary factual difference between the two cases (which justifiably reach contrary conclusions) is that in *Hill v. Morey* the objectively judged understanding of the parties was that the person so acted for held a double con-

<sup>71</sup> Stoddard *et al.* v. Fiske *et al.*, *supra* n. 26.

<sup>72</sup> 26 Vt. 178 (1854).

<sup>73</sup> As to the objective test see Holmes, J., in *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747 (1888); WIGMORE, EVIDENCE (2d ed. 1923) §2466.

<sup>74</sup> See n. 53 *supra*.

<sup>75</sup> *Supra* n. 72.

<sup>76</sup> *Supra* n. 26.

trol over the volunteer, whereas in the Fiske Case the understanding was that there was to be no control over the vicarius. Therefore in *Hill v. Morey* the volunteer was an agent *pro hac vice* and in the Fiske Case he was an uncontrolled accommodator, a non-agent.

Sometimes what the writer has called double control may, as to the result to be accomplished by the vicarius, be a very limited control. Thus the fact situation may be such that, as to the manner of action, the actor is fully subject to the control of the person acted for, but that, as to the result of the undertaking, the actor may do what he likes so long, of course, as it is for the other. But even here there is a limited control as to result, because the result is to be "for the other" or it is not vicarious action. Hence agency involves at least some control as to the result of the undertaking.<sup>77</sup>

The influence of this type of control in fixing vicarious responsibility is further shown by the fact that a special relation which as such is not an agency relation may become also an agency relation when the person acted for holds a double control over the actor.<sup>78</sup> For present purposes this is sufficiently illustrated by the fact that, though the relation of trustee and *cestui que trust* is not as such an agency relation,<sup>79</sup> nevertheless it is also an agency relation (the trustee is an agent in addition to being trustee, and the *cestui que trust* is also a principal, and *respondeat superior* is applicable) when the *cestui que trust*, in addition to his limited normal control, has control as to the manner of accomplishing the purposes of the trust, *i. e.*, has double control.<sup>80</sup> It is by virtue of this type of control

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<sup>77</sup> *Railroad Co. v. Hanning*, 15 Wall. (U. S.) 649, 657 (1872); *Singer Manufacturing Co. v. Rahn*, *supra* n. 48 at 523; *Chisholm's Case*, 238 Mass. 412, 419, 420, 131 N. E. 161 (1921).

<sup>78</sup> See, *e. g.*, *Geary etc., R. Co. v. Rolph*, 189 Cal. 59, 207, Pac. 539 (1922); 1 COOK, CORPORATIONS (8th ed. 1923) §§ 249, 253.

<sup>79</sup> *Taylor v. Davis*, 110 U. S. 330, 334, 335 (1884); *Farlardeau v. Boston Art Students' Assoc.*, 182 Mass. 405, 65 N. E. 797 (1903). See MEHEM, *op cit. supra* n. 35, at §§42, 43.

<sup>80</sup> See Sweet, "Trusteeship and Agency," 8 L. QUAB. REV. 220 (1892); Scott, "Liabilities Incurred in the Administration of Trusts," 28 HARV. L. REV. 725, 736, 737 (1915).

that such a *cestui que trust*, as entrepreneur, is, like other principals, normally in a strategic position to prevent and perhaps to distribute losses incident to the vicarious undertaking so that it is socially desirable to hold him relationally responsible for such losses.

Suppose however that for lack of double control or for other reason the consensual relation is not an agency relation and that there is no legally recognized relation between the defendant and the actor, and no rule arising out of the situation designed to secure the plaintiff's legally protected interest by making the defendant relationally responsible. The question then arises whether such a relation and rule shall be judicially created; for it must be admitted (whether we like to do so or not) that today the courts do judicially legislate,<sup>81</sup> interstitially,<sup>82</sup> if not otherwise. By way of illustration and by way of differentiation, just a word should be said about a relation which in the judicial technique is commonly used as if it were agency but which is not agency. For want of a better name we may call it the "family-purpose" relation. It is much like agency, being a consensual quasi-vicarious relation which, in many jurisdictions, arises when an automobile is operated as a "family car" by a member of the family or by a person in the position of a member of the family, such member not being the owner of the car but using it with the consent of the owner.<sup>83</sup> Clearly the relation is not agency, because the action is not vicarious (the person so using the car is not acting for another) and because there may not be the requisite double control. Is there then any rule arising out of this relation designed to secure the legally protected interests of third persons by

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<sup>81</sup> See Corbin, *op. cit. supra* n. 13; Judge Pound, "Some Recent Phases of the Evolution of Case Law," 31 *YALE L. J.* 361 (1922).

<sup>82</sup> See Mr. Justice Holmes in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917): "Judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." See also CARDOZO, *op. cit. supra* n. 6, at 113 *et seq.*, and CARDOZO, *THE GROWTH OF THE LAW* (1924).

<sup>83</sup> *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020 (1913); *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296 (1918); *Johnson v. Evans*, 141 Minn. 356, 170 N. W. 220 (1919); *Ambrose v. Young*, 100 W. Va. 452, 130 S. E. 810 (1925) are examples. But all jurisdictions do not accept the family-automobile doctrine. See, *e. g.*, *McGowan v. Longwood*, 242 Mass. 337, 136 N. E. 72 (1922); *Smith v. Callahan*, 144 Atl. 46 (Del. 1928). See, collecting and discussing cases, Latin, "Vicarious Liability and the Family Automobile," 26 *MICH. L. REV.* 846 (1928).

making the owner relationally responsible for the acts of such other? Only a few years ago there was no such rule.<sup>84</sup> But more recently many courts have judicially created such a rule<sup>85</sup> and they generally call it a rule of agency.<sup>86</sup> It is a limited *qui-facit-per-auto-facit-per-se* doctrine<sup>87</sup> applicable to so-called family-purpose automobiles, though doubtless it would, within limits, be applicable to family-purpose aeroplanes.

When then does this family-purpose relation arise? Two very recent decisions interestingly illustrate the judicial technique in this respect. In one case<sup>88</sup> X gave his established housekeeper a general permission to use his car as a family automobile. In so using the car the housekeeper negligently drove it into another car which was thereby forced against a third person who was rightfully on the sidewalk. Is X relationally responsible for this tort of his housekeeper? Such housekeeper—just as in the other recent case<sup>89</sup> an adult son living with his father and partly dependent on his father—is, as a practical matter, a member of the family and financially dependent upon the head of the family, the owner of the car. Now, the plaintiff's claim is admittedly a legally protected interest. And, as a practical matter, the only way the law can normally secure such an interest in such cases is to hold the only person who is financially responsible, the owner of the car.<sup>90</sup> When one so launches such a semi-dangerous instrumentality and thereby subjects third persons to such a high probability of

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<sup>84</sup> See *Doran v. Thompson*, 76 N. J. L. 754, 71 Atl. 296 (1908); *Parker v. Wilson*, 179 Ala. 361, 60 So. 150 (1912).

<sup>85</sup> In addition to the cases cited *supra* n. 83 see, e. g., *Foster v. Farra*, 117 Ore. 286, 243 Pac. 778 (1926); *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928).

<sup>86</sup> See e. g., *Stickney v. Epstein*, 100 Conn. 170, 123 Atl. 1 (1923), commented upon in (1924) 33 YALE L. P. 780.

<sup>87</sup> Cf. Notes 28 HARV. L. REV. 91, 93 (1924).

<sup>88</sup> *Smart v. Bissonette*, 106 Conn. 447, 138 Atl. 365 (1927).

<sup>89</sup> *Watson v. Burley*, 143 S. E. 95 (W. Va. 1928.)

<sup>90</sup> It is interesting to note how this conclusion compares with the famous historical theory, advanced by Mr. Justice Holmes, that *respondeat superior* "is in fact, the survival from ancient times of doctrines which in their earlier form embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since." See Holmes, *op. cit. supra* n. 1. But it is believed that the family-purpose doctrine is a *sui generis* rule arising out of a special relation.

harm from a member of his family who is, as a rule, financially irresponsible,<sup>91</sup> it is socially desirable that such owner should, within limits, be liable for such probable harm,<sup>92</sup> especially since, by means of insurance or otherwise, he is today in an advantageous position to distribute (or shift) such losses. Hence, in many jurisdictions there arises out of this relation the non-agency rule that, when a motor-driven conveyance is being used, not by the owner but with the consent of the owner and by a person who is a member of the family or in the position of a member of the family, the owner is, within the limits of the rule,<sup>93</sup> relationally liable for the negligent operation of such conveyance.

These cases admirably illustrate the distinction between what Dean Pound has aptly called "law in books" and "law in action".<sup>94</sup> The law in books is that one is not relationally responsible for such acts unless there is agency. But in many jurisdictions the law in action is otherwise—the judicial technique in using the "agency" relation is such that there is, within limits,<sup>95</sup> a relational responsibility, though there is no agency, if there is the allied family-purpose relation.

What then is the agency relation? The Restatement answers this question thus:<sup>96</sup> "The relation of Agency is the consensual relation existing between two persons by virtue of which one of them is to act for and in behalf of

<sup>91</sup> Cf. *Jones v. Cook*, *supra* n. 13.

<sup>92</sup> The doctrine is much like the dangerous instrumentality doctrine which is also a non-agency doctrine. In fact such liability is sometimes based on the dangerous instrumentality doctrine. See *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). As to the dangerous instrumentality doctrine see Horack, "The Dangerous Instrument Doctrine," 26 *YALE L. J.* 224 (1917).

<sup>93</sup> After it has been determined that there is a rule designed to secure an interest, the next inquiry is whether the loss encountered comes within the zone of security afforded by the rule. But such inquiry does not come within the scope of this article. The limits are not the same in all jurisdictions that adopt the rule. As to the limits of the family-purpose rule see *Raukhorst v. Kraut*, 216 Ky. 323, 237 S. W. 895 (1926); *O'Keefe v. Fitzgerald*, 106 Conn. 294, 137 Atl. 858 (1927).

<sup>94</sup> See Pound, "Law in Books and Law in Action," 44 *AM. L. REV.* 12 (1910).

<sup>95</sup> See n. 93 *supra*.

<sup>96</sup> *THE AMERICAN LAW INSTITUTE*, (1926) *AGENCY*, RESTATEMENT No. 7 §2. Italics ours.

the other and *subject to his control*". This is the usual language technique.<sup>97</sup> But, as has already been indicated, a so-called independent contractor is a person acting for another and "subject to his control" with respect to one class of matters.<sup>98</sup> Such control then may, with different legal results, be either single control or double control, or even other control. Therefore it would seem that a definition of agency which uses and does not define this legally ancipitous word is a definition which needs further defining. In fact we may say with Professor Green<sup>99</sup> that "defining is largely a mirage. Define a term of one word into a dozen and we are immediately called on for a definition of these other words". And yet in adjudicating any agency case the judicial technique normally involves the use of a definition of the agency relation. Therefore in order that we may be able to use or to prophesy how the courts will use this device, we must acquire and, as well as we can, articulate the technique of its use. Accordingly it is suggested that, as a working device, this legal relation may be articulated somewhat as follows: The agency relation is the relation which exists when one competent<sup>100</sup> person consensually undertakes a service for another and subject to a control of that other both with respect to the result of the undertaking and with respect to the manner of accomplishing the undertaking.<sup>101</sup>

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<sup>97</sup> See, e. g., Seavey, *op. cit. supra* n. 43, at 368; *Beasley v. Whitehurst*, 147 S. E. 194 (Va. 1929).

<sup>98</sup> See *Hughes v. Ry. Co.*, 39 Oh. St. 461 (1883); *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139 (1898); *Gulf Refining Co. v. Wilkinson*, 94 Fla. 114 So. 503 (1927); *Bojarski v. M. F. Howlett, Inc.*, 291 Pa. 485, 140 Atl. 664, 544 (1928).

<sup>99</sup> GREEN *op. cit. supra* n. 11, at 3 in the footnote.

<sup>100</sup> Though the competency of a person to be either an agent or a principal is not a problem within the scope of this study, it should be noted in passing that some persons are incompetent to create the relation of principal and agent. For example, children so very young that they could not, in the legal sense, even voidably do an act, obviously could not, by mere consensual arrangement, create a true agency relation. See *Howe v. Central Vt. Ry. Co.*, 91 Vt. 485, 101 Atl. 45 (1917) (a child of two and a half years held incompetent).

<sup>101</sup> *Cf. Khoury v. Edison Electric Illuminating Co.*, 164 N. E. 77, 78 (Mass. 1928).