Michigan Law Review

Volume 19 | Issue 5

1921

Note and Comment

Albert G. Guetz

Edson R. Sunderland
University of Michigan Law School

Herman A. August
University of Michigan Law School

Edwin C. Goddard
University of Michigan Law School

Paul W. Gordon
University of Michigan Law School

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 50 CENTS PER NUMBER

NOTE AND COMMENT

DECLARATORY JUDGMENTS.—The widespread interest in this new form of remedial instrument, which was somewhat dashed by the recent decision of the Michigan Supreme Court in *Anway* v. *Grand Rapids Ry.* Co. (1920), 211 Mich. 592, holding declaratory relief to be non-judicial and outside the constitutional power of courts (19 MICH. LAW REV. 86), has been revived by the action of the legislature of Kansas in enacting a declaratory judgment statute almost identical with the Michigan act. This was done with full knowledge of the decision in the *Anway* case, and inasmuch as it is well known that some of the judges of the Supreme Court of Kansas have taken an active interest in advocating this reform, it is fair to assume that the act is likely to escape the constitutional guillotine. The English judges have for two generations or more been the chief proponents of English procedural reform, and nothing would be more universally welcomed in this country than the generous participation and leadership of our high judges in the efforts of the public to make the administration of justice more responsive to social needs.

The new Kansas act, known as the Hegler-Harvey Bill, was signed by

the governor on February 17, 1921, to become almost immediately operative. The text of the act, which may be compared with the Michigan act (Pub. Acts, 1920, No. 150), printed in full in 17 MICHIGAN LAW REVIEW 688, is as follows:

AN ACT Relating to Declaratory Judgments.

Be It Enacted by the Legislature of the State of Kansas:

SECTION 1. In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

SECTION 2. Declaratory judgments may be obtained and reviewed as other judgments, according to the code of civil procedure.

SECTION 3. Further relief based on a declaratory judgment may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaration of right to show cause why further relief should not be granted forthwith.

SECTION 4. When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

SECTION 5. The parties to a proceeding to obtain a declaratory judgment may stipulate with reference to the allowance of costs, and in the absence of such stipulation the court may make such an award of costs as may seem equitable and just.

SECTION 6. This act is declared to be remedial; its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor; and it is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.

SECTION 7. This act shall take effect on publication in the official state paper.

This act in terms confines the power of making binding declarations of rights to "actual controversies," a limitation which is doubtless inherent and upon which the English courts have always acted in administering this remedy. It expressly includes "statutes, municipal ordinances and other governmental regulations" among the subjects for declaratory interpretation, which is probably an improvement upon the Michigan act, which included them only by implication, as the English rules do. And it makes clearly specific

its purpose to enable parties to know their legal rights without requiring, as the law has heretofore generally required, the commission or threat of a wrongful act as a condition precedent to judicial action. E. R. S.

ADMIRALTY RULE OF "CARE, CURE AND WAGES" AS APPLIED TO THE GREAT LAKES.—It has been the rule in admiralty law from ancient times that the vessel and her owners are liable in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure and to his wages, but to no further compensation as damages unless the ship was unseaworthy or there was neglect in furnishing care and cure. LAWS OF WISBY, Article 18; RULES OF OLERON, Article VI; LAWS OF THE HANSE TOWNS, Article 39; MARINE ORDINANCES, LOUIS XIV, Bk. III. Title 4, Article 11; 2 Pet. Admiralty Decisions; *The Osceola*, 189 U. S. 158; *The Troop*, 118 Fed. 769.

Questions have arisen, however, as to the extent of the liability for maintenance and cure and as to how long after the injury the sailor is entitled to payment of wages. It is settled that "cure" does not mean complete restoration or healing, but refers rather to care and attention. In *Nevitt* v. *Clarke*, Olcott 316 (Fed. Cas. No. 10,138), it was held that the privilege of being cured continues no longer than the right to wages under the contract in the particular case. In *The Ben Flint*, 1 Abb U. S. 126, the claim to be cured at the expense of the ship is held to be applicable to seamen employed on the lakes and navigable rivers within the United States. A point long in dispute has been the question of wages due the seaman after the injury. This now appears definitely decided as to the Great Lakes in cases where there enters no element of unseaworthiness, and where the seaman ships for a certain voyage. In *Great Lakes Steamship Company* v. *Geiger* (Circuit Court of Appeals, Sixth Circuit), decided November 5, 1919, reported in 261 Federal Reporter, at page 275, a seaman, after signing regular articles, shipped at a Lake Erie port for a round trip to the head of Lake Superior and return. During the voyage, while aiding in closing the hatches, libelant's finger was caught in the operating mechanism and so crushed that it had to be amputated. There was no question of unseaworthiness, the sole cause of the accident being the negligence of other members of the crew. Care and cure were furnished at the expense of the steamer and his wages were paid to the end of the voyage, that is, until the return of the steamer to Lake Erie. Libelant claimed wages and maintenance for the entire period he was disabled, about three months. The question on appeal was whether libelant was entitled to allowance for wages after the end of the voyage and whether interest should be allowed.

After deciding that the injury here was maritime and within the jurisdiction of admiralty, and reiterating the general rule of care, cure and wages, the court considered the earlier cases on the subject and seemed to qualify to some extent the rule of duration of care and cure set forth in *Nevitt* v. *Clarke*, *supra*, in cases where either it had been commenced and is in a course of favorable termination or the ship had not given due attention to the seaman's necessities, or the case had been improperly treated; at any

rate, the appellate court upheld the district court's award for maintenance for the period libelant was disabled, thirteen weeks at $10 per week, saying the award was proper and that libelant was entitled to interest thereon from the time its payment was due. As to wages, the court found that libelant's shipment contract did not extend beyond the termination of the voyage and limited his wages to the end of the voyage, saying they did not decide what the rule would be had the contract of employment extended beyond the end of the voyage.

ALBERT G. GOETZ

Detroit, Michigan.

BRINGING THIRD PARTIES INTO ACTIONS AT LAW—SET-OFF AGAINST THE ASSIGNOR.—It frequently happens, in an action by an assignee, that the defendant wishes to use as a cross-action a claim against the assignor. This results in no difficulty unless the amount of the set-off against the assignor is greater than the claim of the plaintiff, or unless the cross-action calls for a specific remedy against the assigner in addition to its defensive effect upon the plaintiff's demand. In each of these cases we have a three-sided controversy. In the first, the set-off operates against the plaintiff to the extent of his claim and against the assignor for the balance. In the second, the cross-action operates against the plaintiff and his assignor in ways which may be quite variously different. If the assignor can be brought into the controversy, it can be wholly determined in a single action; otherwise two or more actions are necessary.

In *State ex rel. Alaska Pacific Navigation Co.* v. *Superior Court* (Wash., 1920), 194 Pac. 412, there was an example of the first of these two cases. The plaintiff was assignee of an account solely for collection and claimed no beneficial interest in it. The defendant had a cross-demand against the assignor arising out of the same contract which produced the account sued upon, and this cross-demand exceeded the amount of the plaintiff's claim. It was obvious that the defendant could not get a judgment for a balance in his favor against the plaintiff, but that this could be obtained, if at all, only against the assignor. Under a familiar statute providing that where a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in, the defendant asked that the action be stayed until the assignor should be brought in. Refusal to make this order was affirmed on appeal, the court holding that this statute referred to necessary parties in the technical sense of that term, and in an action at law, where the defendant makes use of a legal counterclaim, no third party can be necessary.

The point of interest in this decision is not so much whether it is right on authority as whether it can be justified on broad principles of procedural policy. It brings up several interesting questions affecting the nature of actions and the relation of parties thereto, and illustrates the extreme antipathy with which professional conservatism meets proposals for even the most natural and simple changes in judicial administration.

1. We have here a three-sided legal controversy. The common law

was in theory wedded to the idea of a two-sided controversy as the essential condition for judicial action. One plaintiff or a unified group of joint plaintiffs must sue a single defendant or a unified group of joint defendants. This principle lies at the foundation of the whole scheme of parties in common law actions. In the case of two plaintiffs, if their interests are several they cannot bring a single action to enforce their rights, thus developing a three-sided controversy, but each must bring a separate two-sided action. GOULD ON PLEADING, Ch. IV, Sec. 53. In case of two defendants, if their liability is several, each must be a sole defendant in a separate two-sided action, and both cannot be joined in a three-sided controversy. 30 CYC. 120.

If this doctrine of unity of parties is based on the idea of preserving singleness in the issue, the effort is vain, because by the use of numerous counts and pleas many issues may arise in a single action. If it is based on the supposed impossibility of splitting up a judgment so as to determine a controversy with more than two sides, it may be answered that the common law did in fact tolerate judgments which determined legal relations among three or more parties. In *Seymour* v. *Richardson Fueling Co.* (1903), 205 Ill. 77, the court quotes many common-law authorities in support of the proposition that while the general rule is that the judgment must be a unit as to all the defendants in assumpsit, yet "if one defendant pleads matter which goes to his personal discharge, such as bankruptcy, or to his personal disability to contract, such as infancy, or any other matter which does not go to the nature of the writ," judgment may be rendered for such defendant and against the rest. So, where two or more are charged with a joint tort, one may be found guilty and another acquitted, as the evidence may require. 1 CHITTY ON PLEADING, *74. And even in the case of joint plaintiffs, where they are united through a common interest, one may obtain a judgment in his favor while another fails. 15 STAND. ENCYC. OF PROCEDURE, 81. In all these cases the judgment does in fact determine a controversy with three or more sides.

It must be concluded, therefore, that three-sided controversies have forced themselves within the jurisdiction of common law courts, and that the fact that in the principal case the presence of the assignor would complicate the issues and call for a judgment settling a triangular controversy, is no justification *in principle* for the decision.

2. In the principal case the third party sought to be brought in was not involved in the original action, but in a cross-action. In so far as this cross-action operated as a defense, thus corresponding to the common law recoupment, it was fully available to the defendant without the presence of a third party. But if it was to be used at its full value, resulting in a judgment for the balance in defendant's favor, the assignor had to be before the court.

Now, in such case, in order to prevent obvious injustice, the usual rules of common law procedure cannot be permitted to operate. One of two things must be done. Either the third party must be allowed to come into the case, and the liability apportioned between the assignee and assignor, which is contrary to orthodox practice; or the defendant must be authorized

to split his cause of action and use part of it to extinguish the plaintiff's demand and the balance as a separate claim against the assignor, to be asserted in a separate suit, which is also contrary to the orthodox rule, which prohibits splitting a cause of action. From the standpoint of convenience it is clear that bringing in the third party, when it can be done, is the better method. The common law, however, with its technical distrust of simplicity, chose the other method. Confronted by a dilemma which inevitably called for the sacrifice of traditional conventions in one direction or the other, the single action with three parties was passed by in favor of two separate actions each with two parties, on the two portions of the split demand. *Hennell* v. *Fairlamb* (1800), 3 Esp. 104; 1 CORPUS JURIS, 1111.

The principal case is therefore in harmony with the common law solution, but no reason exists *in principle* why courts should not, in the exercise of common law powers, allow either solution as the occasion requires. The courts were forced, in this situation, to do something on their own authority, without statutory aid, and they assumed jurisdiction. If they had power to adopt one plan, there was equal power to adopt the other. Why should all subsequent courts continue to follow the accidental lead of that original choice of a remedial alternative?

3. The usual American counterclaim statute does not expressly authorize a cross-demand which involves new parties, is commonly construed to carry no implied authority to plead such a demand, and often forbids it in terms. SUNDERLAND, CASES ON CODE PLEADING, 356-364; *Taylor* v. *Matteson* (1893), 86 Wis. 113. A very few have provided expressly for bringing in new parties. Kansas St., 1909, Secs. 5692, 5694. The most striking development in this field has been the new CIVIL PRACTICE ACT adopted in New York in 1920, Sec. 271, which contains the following provision:

> "Where a defendant sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall set forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants in such cross-action. When any such person is not a party to the action he shall be summoned to appear by being served with a copy of the answer. A person not a party to the action who is so served with an answer becomes a defendant in the action as if he had been served with the summons."

Under the English practice it has long been customary to bring in third parties on counterclaims—ORDER 21, rule 12; and several British provinces have similar rules. Nova Scotia, JUD. ACT, 1920, Sec. 18(3), and ORDER 21, rule 11; Ontario, JUD. ACT, Rule 113. The principal case is a good illustration of the utility of such a provision, which would, in this instance, have allowed the whole controversy to be settled in a single action. The English practice provides a safeguard against the inconvenient use of the privilege of bringing in third parties, by permitting the third party, when summoned, to show cause why the claim should be prosecuted by a separate suit, and the judge may make such order as may be just. ORDER 21, rule 15.

4. The effort made in the principal case on the part of the defendant to secure an order bringing in the assignor under the general statute authorizing new parties who are necessary to a complete determination of the controversy, was doomed to failure under the commonly accepted interpretation of that statute. It has been held to apply only to equitable causes of action or cross-demands. *Chapman* v. *Forbes* (1890), 123 N. Y. 538. In the principal case the court distinguished *State ex rel. Adjustment Co.* v. *Superior Court*, 67 Wash. 355, on the ground that there the counterclaim was not a mere money demand against the assignee, but an equitable defense calling for affirmative relief. Another case where the assignor was brought in on a counterclaim pleaded against the assignee is *Gildersleeve* v. *Burrows* (1873), 24 Ohio St. 264, where the counterclaim was an equitable set-off. To be sure, the statute contains no express restriction to equitable actions and cross-demands, but the inevitable tendency to limit the scope of procedural innovations has fixed this implied restriction.

5. The whole question of third parties coming into actions at law has received a broad and generous stimulus in England and some of the British dominions through rules authorizing so-called Third Party Procedure, whereby any defendant entitled to contribution or indemnity over against any other person not a party to the action may by leave of court bring such party in, and thereby have the whole controversy, including the indemnity or contribution, settled in a single action. England, Order 16, rule 48. The practice is widely employed and has demonstrated its great utility.

6. It is apparent that the principal case, while rightly decided under the current authorities, exhibits the very low state of procedural development from which we suffer in this country, and suggests the need of both a more progressive attitude on the part of our courts and a more enlightened legislative policy. E. R. S.

"The Family Automobile"—Liability of Owner for its Negligent Use by a Member of His Family.—The advent of the "family automobile" has brought with it the question as to the liability of an owner of a machine, which he buys for the pleasure and convenience of his family, for injuries resulting from the negligent use thereof by a member of his family, with his consent. A recent case, *Spence* v. *Fisher* (Cal., 1920), 193 Pac. 255, reflects the confusion and divergence of opinion upon what has become known as the "family purpose" doctrine of liability.

Of course, it is universally admitted that the mere fact of ownership does not make a father liable for the negligent acts of his child in the use of the car. Nor does the mere relationship of parent and child make the former liable *per se*. *Erlick* v. *Heis*, 193 Ala. 669, 69 So. 530. It is substantially agreed that the father is liable if the child is acting as his actual agent in driving the machine. *Morrison* v. *Clark*, 14 Ala. App. 323, 70 So. 200. And in accordance with the general principles of agency, he is not liable if the child steps out of his position as agent by making a deviation from his father's business for his own pleasure. *Jennings* v. *Okin*, 88 N. J. L. 659.

Atl. 249. Thus, also, he is not liable if the child has taken the car against his command. *Johnston* v. *Cornelius*, 193 Mich. 115, 159 N. W. 318.

At this point the divergence of opinion begins, and it seems to the writer that at the root of this seemingly irreconcilable conflict upon this doctrine of imputed negligence lies the failure to classify the various cases according to their fundamental facts. In practically all of the cases in this field the facts involve the purchase and maintenance by the head of the family of a machine for the pleasure, use and convenience of the family, the express or implied consent to its use by any member of the family, a subsequent negligent use by one of the family, and a resulting injury to a third party, for which suit is brought against the head of the family. Behind this skeleton of facts lie other facts that form the basis of a classification that helps one make his way through what has been called a "trackless forest of cases."

First, there are the cases where the child, most often a son, is the family chauffeur, where the father is the registered owner of the car, but the son is the only licensed driver in the family. In such plainly there is a patent relationship of principal and agent or master and worker, in which, by the application of the doctrine of respondeat superior, the father can be held liable for the negligent acts of his appointed driver. In this class are *Smith* v. *Jordan*, 211 Mass. 269, 97 N. E. 761: *Daily* v. *Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Bourne* v. *Whitman*, 209 Mass. 155, 95 N. E. 404; and *Lewis* v. *Steele*, 52 Mont. 300, 157 Pac. 575, all often cited as upholding a much broader doctrine of liability.

Second, there are the cases where the negligent member of the family is driving members of the family, either at the express command of the father or in obedience to an implied request to drive them about. In such cases the machine is being used for the purpose for which the *pater familias* purchased and maintained it: the pleasure nd convenience of his family At the time of the accident manifestly the child is the agent of his father, carrying out the purposes of his father, as much as if the owner had hired a third person outside the family to act as chauffeur. *McNeal* v. *McKain*, 33 Okla. 449, 126 Pac. 742 (driving sister); *Lemke* v. *Ady* (Ia., 1916), 155 N. W. 1011 (driving mother).

Third, there are the cases where the child, granted permission to use the machine for his own purposes, at the time of the accident is driving alone or with persons other than members of his family. It is in this last class alone that the real conflict of opinion arises. Some courts have adopted the "family purpose" doctrine in its full scope, and have unqualifiedly applied it even where the child was driving for his own purpose, on the theory that the car at the time of the accident was being used for the purpose or business for which it was kept, and that the person operating it, therefore, was acting as the owner's agent or servant in using it. *Birch* v. *Abercrombie*, 74 Wash. 486, 133 Pac. 1020; *Benton* v. *Regeser*, 20 Ariz. 273, 179 Pac. 966; *Plasch* v. *Fass* (Minn., 1919), 174 N. W. 438 (wife was driving for own pleasure while husband was out of the state). On the other hand, other courts have squarely rejected this doctrine of liability on the ground that the view asserting liability strains the logic of the situation and unwarrant-

edly stretches the principles of agency. *Spence* v. *Fisher, supra; Doran* v. *Thomsen,* 76 N. J. L. 754, 71 Atl. 296; *Arkin* v. *Page* (Ill., 1919), 123 N. E. 30; *Van Blaricom* v. *Dodgson,* 220 N. Y. 111, 115 N. E. 443; *Watkins* v. *Clark,* 103 Kan. 629, 176 Pac. 131.

The view upholding liability in this last class of cases is founded upon what has been called the "somewhat attenuated" theory that a minor in amusing himself is acting as agent in his father's behalf. A parent, these tribunals argue, owes a duty of furnishing recreation and pleasure to his children, and when they employ themselves in pursuit of such recreation and amusement they become his agents. Burch, J., in *Watkins* v. *Clark, supra,* waxes sarcastic over this theory.

"So," he points out, "if daughter took her friend riding she might think she was out merely for her own pleasure; but she was mistaken; she was conducting father's 'business' as his 'agent.' * * * If son took his best girl riding, *prima facie* it was father's little outing by proxy, and if any accident happened, *prima facie* father was liable."

As the New York Court of Appeals said in *Van Blaricom* v. *Dodgson, supra,* holding the father liable for the negligent acts of his child while the latter was using the family car for his own convenience or pleasure, while engaged exclusively on a mission of his own, is certainly "an advanced proposition in the law of principal and agent," presenting "a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship."

"The doctrine that the pleasure of the family in its utmost detail is the business of the father has no firm foundation in reason or common sense. In theory it overlooks well-settled principles of law; in practice it would interdict the father's generosity and his reasonable care for the pleasure or even the well-being of his children by imposing a universal responsibility for their acts." *Parker* v. *Wilson,* 179 Ala. 361, 60 So. 150.

The tribunals asserting universal liability really base the creation of the relation of master and servant, which they read into the facts, upon the purpose which the parent had in mind in purchasing the car and in permitting the family to use it. This proposition plainly ignores an essential element in the creation of that status as to third persons; such use must be in furtherance of, and not apart from, the master's service and control. It fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. *Doran* v. *Thomsen, supra.* The purpose of the parent in buying the car cannot of itself create the relationship contended for. *Hays* v. *Hogan,* 273 Mo. 1, 200 S. W. 286, reversing 180 Mo. App. 237, 165 S. W. 1125.

Weighing the arguments of the two lines of cases, the better reason seems to be with those which deny liability when the child is out for a "spin" of his own. The trend of the latest decisions is towards this view. The argument that the pleasure and recreation of the family is the father's business, carried to its logical conclusion, would make the father absolutely liable for every tort of every member of the family while such member is seeking his own pleasure. If the doctrine is sound, *Arkin* v. *Page, supra,* points out,

it ought to be equally applicable where the thing used is a bicycle, horse, gun, golf-clubs, etc. Yet, it is very probable that even the courts upholding this view would deny the existence of a master and servant relationship upon which to base liability in cases involving these. It is interesting to note that the liability of a father has been denied in the case of a horse being driven by his son. *Maddox* v. *Brown*, 71 Me. 432.

A close examination of the reasoning of the courts which accept this proposition, which is seemingly contradictory on its very face, asserting, as it does, that a person who is wholly and exclusively engaged in the prosecution of his own concerns is, nevertheless, engaged as agent in doing something for someone else, shows that, in truth, there runs through practically all of the cases an under-current of the idea, that because an automobile is more dangerous when carelessly used than most other family agencies there should be an extension of the established doctrine of agency to safeguard its use.

In *Birch* v. *Abercrombie, supra*, the court said: "Any other view would set a premium upon the failure of an owner to employ a competent chauffeur to drive a car kept for the use of the members of the family. The adoption of a doctrine so callously technical would be little short of calamitous."

King v. *Smythe*, 142 Tenn. 217, 204 S. W. 296, denies that an automobile is such a dangerous agency, *per se*, as to make its owner liable universally, yet it admits that it holds a father liable for its negligent use by his son because of "the dangerous character of automobiles."

Adopt this view of the nature of the automobile and, as one judge put it, you change the old maxim to read, "*Qui facit per auto facit per se.*" The difficulty is that practically every court which has passed on the question squarely has repudiated any such doctrine that an automobile is within the rule making the owner of an inherently dangerous instrumentality liable for the use thereof by any person. *Tyler* v. *Stephen*, 163 Ky. 770, 174 S. W. 790; *Premier Motor Mfg. Co.* v. *Tilford*, 61 Ind. App. 164, 111 N. E. 645. But see *Southern Oil Co.* v. *Anderson*, *infra*.

One of two alternatives faces the court: either they must, considering the great increase in the number of "family cars" and their resulting negligent use by reckless young drivers on crowded streets, desert their old ideas on the danger of the automobile, and henceforth recognize it as an instrumentality within the rule whereby owners of dangerous agencies are held liable for their use by any person (except in cases of independent acts or acts of God); or the legislatures of the several states must come to their aid with statutes fixing the liability of the owners. The attenuated agency theory will not stand.

A most recent case dealing with the negligent use of an automobile owned by a corporation while being driven by one of its agents goes exhaustively into the history of automobile accidents in the United States in the past few years, and shows that the time has come to recognize the machine as an inherently dangerous agency. *Southern Oil Co.* v. *Anderson* (Fla., 1920), 86 So. 629. It is submitted that liability established on such ground is far more reasonable than on the agency theory.

Yet it seems that, after all, it is not the ferocity of the automobile that is to be feared, but the ferocity of those who drive them. Considering that the vehicle is one that in the hands of reckless drivers spreads over the land the maimed and dead until, as one court put it, "it has belittled the cruelties of the car of Juggernaut," considering that parents who entrust such agencies in the hands of reckless minors should in all justice be liable for injuries inflicted by them, and taking into account the undoubted practical considerations in favor of the doctrine of *respondeat superior*, since it puts the financial responsibility of the owner, who can insure himself, behind the car while it is being used by a member of the family, who is likely to be financially irresponsible, it seems liability should fall on the parent. Admitting the rule to be fair, it must be created by legislative enactment, not by a judicial distortion of the principles of agency.

For a discussion of such statutes, see 19 MICH. L. REV. 333, and 6 CORNELL LAW QUART. 187, where the writers adopt opposite views as to the validity of a Michigan statute. H. A. A.

PUBLIC UTILITY RATES—STATE POWER OVER MUNICIPALITY.—Under constitutional authority, a city gave its consent to the construction of a street railway on condition, among other things, that the company enter into a contract fixing rates of fare. The company asked of the Public Service Commission an order raising the rates so fixed, on the ground that the contract rates had become unreasonable. *Held*, that while the contract rates may be binding as between the parties to the contract, they have no binding force when in conflict with rates fixed by a state commission in the manner prescribed by the statute. *City of Scranton* v. *Public Service Com.* (Pa., June, 1920), 110 Atl. 775.

It has often been suggested that power to fix rates is one of the police powers of sovereignty that is never to be presumed to be given up unless it is clear beyond doubt. 18 MICH. L. REV. 806, 19 *ib.* 112; *Richmond* v. *C. & P. Tel. Co.* (Va., 1920), 105 S. E. 127; *Hoyne* v. *Elevated Co.* (Ill., 1920), 120 N. E. 587. In *Charleston* v. *Pub. Serv. Com* (W. Va., 1920), 103 S. E. 673, the court distinguishes between matters of proprietary right in which a sovereign state may permit a municipality to make an inviolable contract and those phases of police power relating to public safety, health, and morals. It has been intimated that the power to fix permanent rates may be considered to be a power which cannot be surrendered by the state *Chicago Rys. Co.* v. *Chicago*, 292 Ill. 190 (1920); *Niagara Falls* v. *Pub. Serv. Com.* (N. Y., 1920), 128 N. E. 247; *Camden* v. *Arkansas C. & P. Co.* (Ark., 1920), 224 S. W. 444. Municipalities and companies are conclusively presumed to know this when they become parties to a contract, and therefore to know "that the sovereign police power of the state to modify its terms would be supreme whenever the general well-being of the public so required," as the court puts it in the instant case. But cf. *Ottumwa Co.* v. *Ottumwa* (Ia., 1920), 178 N. W. 905. But this is a rule that should work both ways. If the state in its sovereignty can raise the rates in favor of the utility, then equally in proper case it should be able to lower contract rates in favor of the public.

If this is a sovereign power which cannot be surrendered, then the state should be able to change rates contracted for with the state itself, as well as those made by its consent by contract to which the municipality is a party. Under such a provision as that of the Constitution of Pennsylvania—"The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state"—other provisions of franchises should be subject to the same rule, and the extent of such power in the state to change franchise or contract provisions would be bounded only by the definition of police power. This seems good sense and good law, but it is capable of extension to many cases that have been treated as contract matters only, though involving matters very closely touching the "general well-being of the state." This gets entirely away from the doubtful position that a municipality in making such contracts is an agent of the state, and the state as principal may consent to a change in the contract made by the agent, even though the agent has to pay the price. There is no true contract situation of agency there. 18 MICH. L. REV. 806.

The company, it would seem, is bound by the limitations of the contract until the state consents to a change, and till then cannot charge more than the maximum rates agreed to in the franchise, even though it can operate at those rates only at a loss. The public, however, cannot compel operation at a loss. The company may quit. *Charleston-Isle of Palms Traction Co.* v. *Shealy*, 266 Fed. 406 (June, 1920). Not much has been said about the rights of a city which has consented to the use of its streets on a contract fixing fares at a certain price. But if the state may release the company from its agreement as to price, can the company insist on its right to stand on the other terms of the contract with the city? It would seem that if the city was granted the power to give or withhold its consent, it should have the power to withdraw such consent when the company no longer lives up to the terms on which it was given. It was so held in *Meridian L. & R Co.* v. *Meridian*, 265 Fed. 765 (May, 1920). In this case it seemed the city had no authority to contract as to the rates, and still the court said if the company enjoyed the privilege it must assume the burdens on which they were granted, and a court could not grant relief, though it would bring disaster on the company to refuse. The court intimated that the legislature could grant higher fares, but if the constitution gives the city control over consent to occupy the streets, how does the legislature have power to nullify the conditions on which the consent was given, and yet prevent the city from withdrawing its consent? Few cases recognize any rights in the city as against the legislative act raising rates, even though the city is bound by its part of the contract. *Pub. Serv. Com.* v. *Girton* (Ind., 1920), 128 N. E. 690; *Richmond* v. *C. & P. Tel. Co* (Va., 1920), 105 S. E. 127.

Cases continue to appear in which cities assume to fix a permanent price for service when no such power has been conferred upon them. See *Ottumwa R. & L. Co.* v. *Ottumwa* (Ia., 1920), 178 N. W. 905, which does not agree to the doctrine that a contract for a permanent rate infringes sovereignty; *Warsaw* v. *Pavilion Nat. Gas Co.*, 182 N. Y. S. 173, which holds that no con-

tract can defeat legitimate governmental authority; *People ex rel. Ry. Co.* v. *Pub. Serv. Com.*, 183 N. Y. S. 473, involving a rate in city limits for a railroad which was not a street railway.

Emergency increases in rates are justified in some cases in these troublous after-war times. *La Crosse* v *Railroad Com.* (Wis., 1920), 178 N. W. 867. The general discontent aroused by raising of rates by commissions has led some legislatures to withhold from commissions power over rates fixed by contract with a municipality. MICHIGAN ACTS 1919, 753; *Mobile v. Mobile Electric Co.* (Ala., 1920), 84 So. 816; *Richmond* v. *C. & P. Tel. Co.* (Va., 1920), 105 S. E. 127, though in New York the restriction is limited to franchises and contracts subsisting when the amendment to the act was passed. *New York City* v. *Nixon* (N. Y., 1920), 128 N. E. 245; *Niagara Falls* v. *Pub. Serv. Com., ib.* 247; *People ex rel. Garrison* v. *Nixon, ib.* 255. In most cases there is no such limitation on the power of the commission to increase rates. *Pub. Serv. Com.* v. *Girton* (Ind., 1920), 128 N. E. 690; *Hoyne* v. *Chicago & O. P. E. Co.* (Ill., 1920), 128 N. E. 587. A so-called Home Rule Charter provision in the constitution does not prevent legislative control of rates. *Detroit* v. *Mich. R. Com.* (Mich., 1920), 177 N. W. 306. This power of commissions over rates has recently been exercised more often in cases where the contracting parties were the company and the municipality, but it is equally applicable to rates fixed in a contract between a public utility and an individual. *Rutland R. L. & P. Co.* v. *Burditt Bros.* (Vt., 1920), 111 Atl. 582, citing, among others, the leading case of *Union Dry Goods Co.* v. *Ga. Pub. Serv. Corp.*, 142 S. E. 841, aff., 248 U. S. 372; *Pub. Utilities Com.* v. *Wichita R. & L. Co.*, 268 Fed. 37 (Kan., 1920); *Ohio & Colorado, etc., Co.* v. *Public Utilities Com.* (Colo., 1920), 187 Pac. 1082. E. C. G.

RIGHT OF TORT FEASOR TO INDEMNITY AND EXONERATION.—In cases where a municipality has been called upon to respond in damages because of its legal duty to keep sidewalks free from obstructions, but where the obstruction was caused by the negligence of a third person, it is clearly established by a long line of decisions that the municipality may recover against the person whose negligence was the real cause of the injury. See a review of the cases in note in L. R. A. 1916 F. 86.

These indemnity actions seem to be in the nature of quasi contractual actions, and the theory upon which they are based is much the same as that in the cases where a surety is allowed contribution from his co-sureties. That this right of contribution in suretyship cases is not based upon any true contractual relationship, either express or implied, is clearly shown by the case of *Deering* v. *Winchelsea*, 2 B. & P. 270, where it was held that the right of contribution among sureties exists even in cases where the obligations of the several sureties are evidenced by separate bonds, as well as where they are bound in the same instrument. And in *Norton* v. *Coons*, 6 N. Y. 33, it was held that the right to have contribution exists, though the sureties became such at different times and without each other's knowledge.

In the cases where a municipality brings an indemnity action against a negligent landowner, the courts do not state very clearly what the theory of

the action is, some of them going so far as to say that it is immaterial what theory the action is based upon. But it seems clearly to be quasi contractual in its nature. The quasi contract is based upon the concurrent liability of the city and the landowner. The injured party may sue the landowner whose negligence was responsible for the injury, he may join the city as a co-defendant, or he may sue the city alone, and in any event there will be a recovery. But the landowner is primarily liable, since it was his negligence which caused the injury. When the city is compelled to respond in damages to the injured party, the landowner is thereby released from the tort liability, and to that extent has been enriched at the expense of the city. This enrichment creates a duty binding upon him to indemnify the city for anything it has had to pay out because of his negligence. And this duty is clearly of a quasi contractual nature. See WOODWARD ON QUASI CONTRACTS, Section 258.

An entirely different, and somewhat novel, situation was presented in a recent Missouri decision. *City of Springfield* v. *Clement* (Aug., 1920), 225 S. W. 120. In that case a landowner had negligently permitted water spouts on his building to remain in leaky condition, so as to cause a formation of ice on the sidewalk, resulting in the injury of a pedestrian. The injured party sued the city and recovered. Before that suit was brought, however, the owner of the building died, and his estate was fully administered. After judgment had been recovered by the injured party against the city, this indemnity action was brought against the heirs of the landowner, their liability being predicated upon assets devised to them by the decedent. In allowing a recovery the court said: "We do not think it material as to a scientific classification of the plaintiff's cause of action. It is sufficient to know that the relationship between this plaintiff and Milligan to Miss Abbott's cause of action and to each other was and is such that the plaintiff is entitled to recover indemnity for having to pay the Abbott judgment. It is not material whether such relationship was brought about by an express contract, an implied contract, or an obligation imposed by law."

Although this decision reached a just result, it is difficult to find a logical justification for it. The court distinctly said that it was immaterial what the theory of the action was, but such a position seems untenable. It might, indeed, be very material in some cases to determine what theory the action is based upon. The action unquestionably does not sound in tort, although that was contended for by the defendants. If it did, it is conceded that the action could not survive the death of the landowner. But there is also a distinct difficulty in establishing a quasi contractual relationship such as we have in the ordinary indemnity suit. For here the landowner was released from his tort liability, not by the payment of the judgment by the city, but by his death, which occurred before the action had been brought against the city. It is difficult to make out a duty of the landowner to the city at the time of his death. And yet, unless there was some duty resting upon him before his death, this decision cannot be justified on any logical basis. It would be merely a peremptory decision in favor of the city. But is it not possible to establish such a duty by relating it back to the original negligent acts, or omission to act, of the landowner? This, indeed, seems

to be the only logical solution of the difficulty. On such a theory the owner of the building, by his negligence, comes immediately under a duty to exonerate the city, to save the city harmless. This duty will survive his death.

While this duty does not seem to fit into any of the more familiar legal categories, either tort, contract, or quasi contract, that fact raises no vital objection. There could be no doubt as to the power of a legislature to impose such a duty. See *City of Rochester* v. *Campbell*, 8 N. Y. Supp. 252. That being so, it is not juridicially impossible to conceive of such a duty based solely upon principles of equity. Such an equitable duty upon the landowner is closely analogous to the equitable duty of a principal to exonerate his surety, a duty which is related to, but distinct from, the duty to reimburse after payment by the surety. See extensive note in L. R. A. 1918 C, 10. See also a very interesting analysis by Mr. Street in his work on the FOUNDATION OF LEGAL LIABILITIES, Vol. 2, page 236. P. W. G.