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Automobiles--The Family Purpose Doctrine--Liability of Owner for Negligent Operation by Guest of Son

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thought to be entertainable only by a court of general jurisdiction; yet it would seem reasonable that, since the statute provides that the commissioner of accounts shall determine "the amount of the respective shares of the legatees and distributees,"[11] the commissioner could incidentally construe the will to the extent of determining what parties were legatees and distributees.

If the intent of the statutory provisions was to furnish a modern and expeditious means for the settlement of decedents' estates, such intent can only be fulfilled by holding that county courts and commissioners of accounts, in passing on matters affecting the final settlement of decedents' estates, as an indispensable incident of that duty are empowered to exercise certain incidental judicial powers, in order that such settlement of the estate may be made final so that personal representatives and their bondsmen may be discharged from their legal duties and be released from their conditional obligations. The exercise of such incidental judicial powers by probate courts and their statutory adjunct would continue to be subject, of course, to the chancery and appellate jurisdiction of circuit courts.

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AUTOMOBILES — THE FAMILY PURPOSE DOCTRINE — LIABILITY OF OWNER FOR NEGLIGENT OPERATION BY GUEST OF SON. — *D* permitted *B*, his son, to operate the family car. *B* in turn, requested *X*, his guest, to drive, who, by his negligence, caused injury to *P*, a passenger and guest therein. *P* alleged that *B* was the agent of *D* and that, when *X* was requested and permitted by *B* to operate the automobile, *X* became the agent of both D and B, by reason whereof liability for the injuries sustained by *P* attached to *D*. *Held*, on demurrer, that *P's* declaration states a cause of action against *D* under the family purpose doctrine. *Eagon v. Woolard.*[1]

The holding in the principal case is a startling extension of the family purpose doctrine beyond its early application. The doctrine arose as a rule of convenience rather than as a logical rule of law. Early the courts recognized the automobile as a dangerous instrumentality and the resulting necessity for fixing liabliity upon one financially responsible. To accomplish this desirable result the courts distorted the principles of agency law into the family

[11] W. VA. CODE (Michie, 1937) c. 44, art. 2, § 1.

[1] 11 S. E. (2d) 275 (W. Va. 1940).

purpose doctrine, predicating liability upon the fiction that the son's pleasure was the father's business.[2]

Since the doctrine is based upon a fiction of law and the automobile is no longer considered a dangerous instrumentality, a great majority of the courts of the land have abandoned the doctrine and now base liability wholly upon the true agency relationship.[3] Further, recognizing the weakness of the doctrine, the courts have not extended the rule to include instrumentalities other than the automobile.[4]

The West Virginia court, in the principal case, recognized the family purpose doctrine as being firmly established in this state and further said that it would be a narrow construction to refuse to extend the doctrine to include the situation here presented. As mentioned above, it has been abandoned in many strong jurisdictions. Moreover, in those states which adhere to the doctrine there is a division of authority as to the advisability of its extension to include the guest of the son within the scope of the rule.[5] It is

[2] Jones v. Cook, 90 W. Va. 710, 111 S. E. 828 (1922); Appleman, *Special Phases of the Family Purpose Doctrine* (1936) 14 TENN. L. REV. 307; HARPER, TORTS (1933) § 283; MECHEM, AGENCY (1923) § 515. See also the instant case which recognizes the fiction.

[3] Hackley v. Robey, 170 Va. 55, 195 S. E. 689 (1938), commented on in (1938) 24 VA. L. REV. 931, which also collects cases; MECHEM, AGENCY § 515; Arkin v. Page, 287 Ill. 420, 123 N. E. 30 (1919); McGowan v. Longwood, 242 Mass. 337, 136 N. E. 72 (1922); Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917); Elms v. Flick, 100 Ohio St. 186, 126 N. E. 66 (1919); Piquet v. Wazelle, 288 Pa. 463, 136 Atl. 787 (1927). But see Stickney v. Epstein, 100 Conn. 170, 123 Atl. 1 (1923); Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091 (1914); Jones v. Cook, 90 W. Va. 710, 111 S. E. 828 (1922). However, ". . . the tendency to return to strict agency principles has been particularly noticeable in recent years", (1938) 24 Va. L. Rev. 931, 937.

[4] Felcyn v. Gamble, 185 Minn. 357, 241 N. W. 37, 79 A. L. R. 1159 (1932). It is interesting to note that the Minnesota court in Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091 (1914), extended the family purpose doctrine to include the situation in the principal case, yet, in the Felcyn case, the court refused to include motorboats within the doctrine on the ground that the motorboat was not a dangerous instrumentality. Today the West Virginia court, and courts generally, recognize the automobile as no longer being such an instrumentality.

[5] Van Ordsel, J., speaking for the court in Turoff v. Burch, 50 F. (2d) 986, 988 (D. C. 1931), said: "We think that the extension of the 'family purpose' doctrine of liability for the negligence of third persons who have been placed in the operation of the car by the member of the family using it and without the knowledge, permission or direction of the owner is not warranted by the great weight of authority. . . "; Samples v. Shaw, 47 Ga. App. 337, 170 S. E. 389 (1933); Wilde v. Pearson, 140 Minn. 394, 168 N. W. 582 (1918); Appleman, *supra* n. 2, at 307; Armstrong v. Sellers, 182 Ala. 582, 62 So. 28 (1913). But see Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650 (1927); Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091 (1914); Thixton v. Palmer, 210 Ky. 838, 276 S. W. 971 (1925); Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928); Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25 (1919).

further submitted that the cases allowing the extension may be distinguished on agency principles.[6]

The disposition of the instant case being on demurrer, it seems that the court could have adhered more strictly to the agency principles of management and control, which it articulates, rather than applying an extended doctrine of vicarious liability in sustaining the declaration. Nevertheless, in apparently allowing this extension, the court has followed the weight of authority in those jurisdictions committed to the family purpose doctrine.

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CRIMINAL LAW — INDICTMENT — STATUTORY SHORT FORM. — *D* was charged and convicted of statutory rape[1] under the statutory short-form indictment which failed to allege the age of the accused and the previous chastity of the prosecutrix. *Held,* that the indictment is demurrable although drawn in the form prescribed by statute.[2] *State v. Ray.*[3]

This case suggests that a limitation is placed upon the legislature as to what extent the common law indictment may be shortened and still protect the constitutional rights of the accused. Many courts of this country followed precedent, established at common law, of lengthy and technical indictments[4] in which justice was

[6] In Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650 (1927), the relationship of master and servant was established on common law principles in that the servant was present and acquiesced in the negligent act and, moreover, was negligent in placing control in the hands of an incompetent person. In Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091 (1914), the daughter, although not personally operating the car, had not relinquished control over it. In Schreder v. Litchy, 190 Minn. 264, 251 N. W. 513 (1933), there was evidence of direct authority in the servant to select a third person to operate the car. In Thixton v. Palmer, 210 Ky. 838, 276 S. W. 971 (1925), the case was based on the theory of constructive identity, *i.e.,* the negligence of the guest driver was the negligence of the member of the family present. The case of Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928), presents the situation of the driver proceeding at a high rate of speed with the acquiescence of the member of the family present. In Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25 (1919), the court indulges in an extensive discussion of the principles of agency and observes that the declaration would only permit recovery under the doctrine of constructive identity, yet the court cites the leading family purpose extension cases.

[1] W. VA. CODE (Michie, 1937) c. 61, art. 2, § 15.
[2] *Id.* at c. 62, art. 9, § 7.
[3] 7 S. E. (2d) 654 (W. Va. 1940).
[4] Marsh v. State, 3 Ala. App. 80, 57 So. 387 (1912); State v. Harris, 3 Harr. 559 (Del. 1841); State v. Shelledy, 8 Iowa 477 (1859); Lemons v. State, 4 W. Va. 755 (1870).