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Evidence--Admissibility of a Son's Admissions Against His Father

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EVIDENCE—ADMISSIBILITY OF A SON'S ADMISSIONS AGAINST HIS FATHER.—Action was brought against a father for personal injuries sustained by reason of the alleged negligent operation of the family automobile by the defendant's infant son. The plaintiff offered in evidence a statement of the son, made to a bystander about fifteen or twenty minutes after the accident, to the effect that he had been travelling forty-five miles per hour when he passed a point about one-eighth of a mile from the scene of the collision. *Held,* that the evidence was properly admitted as a part of the *res gestae,* and as an admission of an agent, binding on his principal. *Ambrose* v. *Young,* 130 S. E. 810 (W. Va. 1925).

The second ground of the court's opinion presents a new angle of a doctrine which is itself of comparatively recent origin in West Virginia. In *Jones* v. *Cook,* 90 W. Va. 710, 121 S. E. 828, it was decided that a *paterfamilias* is liable to third persons for injuries caused by the wrongful operation of the family automobile by members of the family for whose pleasure and convenience the car was provided. The ground assigned for the decision was that in furthering the purposes of the owner by operating the car for pleasure, the members of his family became his agents or servants. That decision was followed in *Aggleson* v. *Kendall,* 29 W. Va. 138, 114 S. E. 454, and is re-affirmed in the principal case. Considerable doubt of the correctness of such a doctrine, on grounds of agency, has been expressed. See the dissenting opinion of Poffenbarger, P., in *Jones* v. *Cook, supra; Doran* v. *Thomsen,* 76 N. J. L. 754, 71 Atl. 296; *Van Blaricon* v. *Dodgson,* 220 N. Y. 111, 115 N. E. 443. Commentators have justified the conclusion reached in such cases, not on principles of master and servant, but (more properly, it would seem) on grounds of practical public necessity. 8 JOUR. AM. BAR ASSN., 359; 33 YALE L. J. 780; 38 HARV. L. REV. 513. Our court apparently had this consideration in mind when it said in *Jones* v. *Cook,* "This doctrine puts the financial responsibility of the owner behind the automobile while it is being used by a member of the family (who is likely to be financially irresponsible) * * * * "; and also when, in the same case, it quoted with approval this passage from *King* v. *Smythe,* 140 Tenn. 217, 204 S. W. 296, "If an instru-

mentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained * * * * . An automobile cannot be compared with golf sticks or other small articles bought for the pleasure of the family". The welfare of the public in an automobile age probably demands some such doctrine as that; but does it demand that all the incidents of agency attach as between father and family, so that the father will be liable not only for what the son does with the automobile, but also for what he says about it? Carried to its ultimate conclusion, the agency relationship probably requires that result. Will it also require that our courts entertain suits by fathers against their sons when third persons whom the sons have injured have recovered against the principal? *Memphis, etc. Ry. Co.* v. *Greer,* 87 Tenn. 698, 11 S. W. 931. Or that a son may recover against his father when the latter has negligently furnished an unsafe automobile as an appliance for the achievement of family pleasure? *Bertha Zinc Co.* v. *Martin's Admr.,* 93 Va. 791, 22 S. E. 869. Very cogent considerations of public policy would make these results undesirable. I. SCHOULER, DOMESTIC RELATIONS §691. While the symmetry of our law probably demands that an agent for one purpose be an agent for all purposes, the "dictates of natural justice" might perhaps be better obeyed without that perfect degree of consistency. Having deemed the son an agent for the purpose of giving the aggrieved third person a worth-while party defendant, would it not be well to stop there and require the parties to adjust their differences, such as questions as to the admissibility of evidence, on other grounds? It seems that at least the scope of the driver's authority ought to be carefully limited so as not to include statements affecting paternal liability, but in nowise connected with the family pleasure, comfort, or convenience. There is ample authority for such a limitation, even in cases where the agency was created by contract, and not by family relationship. *Boston, etc. Ry. Co.* v. *Ordway,* 140 Mass. 510, 5 N. E. 627; *Vicksburg, etc. Ry. Co.* v. *O'Brien,* 119 U. S. 99, 7 Sup. Ct. 118, 30 L. ed 299.

In admitting hearsay evidence on the grounds of agency, the Virginia court has been careful to require that the agent making the admission be doing the sort of thing he was employed to do, both with regard to the time of admission and its subject matter. *Lynchburg Telephone Co.* v. *Booker*, 103 Va. 594, 50 S. E. 148. As to the admissibility of the evidence in question as a part of the *res gestae*, or better as a Spontaneous Exclamation, see 25 W. VA. L. QUAR. 341, and authorities there cited.

—J. E. W.