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Automobiles--Family Purpose Doctrine--Consent of Owner

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One should by all means realize that not all aspects of contracts made by telephone are governed by the law of the place where the acceptance is spoken. The courts have consistently held that if the question concerns the performance of the contract, then the laws of the place of performance are applicable,¹⁸ which is in accord with the conflict of laws rule.

The writer believes the principle case stands for the correct rule to be applied as to contract formation. It is significant that only a month after the *Linn* case was decided, the same question arose in California, and the identical principle was once again affirmed.¹⁹ Kentucky has also gone along with the majority in accepting this principle.²⁰ Since the *Adams* case is such an established authority, it is only reasonable for all other modes of communication to be treated consistently with this historic precedent if we are to achieve a uniform system.

William M. Dishman, Jr.

AUTOMOBILES—FAMILY PURPOSE DOCTRINE—CONSENT OF OWNER—A twenty-year old son asked his mother for permission to use the family-owned car which was registered in her name. She refused permission because she might need the car in order to visit her doctor. The son took the car anyway and a friend went with him. After eating dinner at the friend's house, they were "riding around" later in the afternoon when an accident occurred. There was testimony by persons living in the community that the son was frequently seen driving the car. The trial court ruled as a matter of law that defendant mother was liable under the Family Purpose Doctrine for the negligence of her son even though he was operating the family car without permission. She appealed, claiming that consent to the use of the car is an essential element of the Family Purpose Doctrine. *Held*: affirmed. The court reasoned that where a family automobile is customarily available for use by a child for his normal pursuits on reasonably frequent oc-

¹⁸ *Cardon v. Hampton*, 21 Ala. App. 438, 109 So. 176 (1926); *Bank of Yolo v. Sperry Flour Co.*, supra note 4; see Restatement, Conflict of Laws § 358 (1934) which provides that:

The duty for the performance of which a party to contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to:

- a. The manner of performance;
- b. The time and locality of performance;
- c. The person or persons by whom or to whom performance shall be rendered;
- d. The sufficiency of performance;
- e. Excuse for non-performance.

¹⁹ *Wilson v. Scannavino*, 324 Pac.2d 350 (Cal. 1958).

²⁰ *Trinity Universal Ins. Co. v. Mills*, supra note 4.

casions, and when permission for its use has been denied as a matter of family convenience or economic or social policy, the mere fact that permission for a particular trip has been refused will not bar the imposition of liability under the Family Purpose Doctrine. To hold otherwise would destroy the purpose of the doctrine. *First-City Bank & Trust Co. v. Doggett*, 316 S.W.2d 225 (Ky. 1958).

This comment will be directed to the question of whether the defendant parent's consent to the use of a family purpose automobile is a necessary prerequisite to liability. It is the writer's contention that the Kentucky Court of Appeals in the instant case virtually eliminated this generally accepted prerequisite to liability.

Previously the criteria for the imposition of liability under the Family Purpose Doctrine in Kentucky had been twofold:

1. Whether the car was purchased and operated for general family use.
2. Whether the young person in charge of the car had the actual or implied consent of the owner.¹

Early Kentucky decisions rationalized the doctrine in terms of principal-agent relationship. Reasoning along these lines in an early decision, this court stated:

The Family Purpose Doctrine is founded on the relationship of principal and agent; the theory being that if one maintains an automobile or other vehicle for the general use, pleasure and convenience of members of his family, and it is being used by one of them for that purpose when an accident occurs, the one so using the machine will be deemed the agent of the owner and to have been operating the car under the owner's authority, which may be either express or implied.²

However, in *Richardson v. True* the Kentucky Court recognized a new basis for the Family Purpose Doctrine:

The Family Purpose Doctrine is firmly established in this jurisdiction. It has been said the doctrine is based upon the implied relationship of principal and agent and is applied in those cases where a person maintains an automobile for the use and pleasure of other members of the family. But the doctrine is based on humanitarian principles designed to protect the public generally and has resulted from recognition of the fact that in most cases an infant does not have sufficient property in his own right to indemnify one who may suffer from his negligent acts.³

Recognizing a policy rationalization for the Family Purpose Doctrine enabled the Kentucky Court in *Turner v. Hall's Adm'x.*⁴ to expand the doctrine to hold the father liable for the negligence of an un-

¹ *Turner v. Hall's Adm'x.*, 252 S.W.2d 30, 32 (Ky. 1952).

² *Steele v. Age's Adm'x.*, 233 Ky. 714, 716, 26 S.W.2d 563, 564 (1930).

³ 259 S.W.2d 70, 71 (Ky. 1953).

⁴ 252 S.W.2d 30 (Ky. 1952).

authorized driver to whom his son had turned over operation of the car, even though the father had given him specific instructions not to allow anyone else to operate the car. If the court had reasoned along strict principal and agent lines, such a result could not have been reached because there was no consent of the parent to a third party's operation.⁵ These same policy considerations enabled the court in the instant case to make a further change in the criteria for the imposition of the doctrine:

As we view it, the controlling question in any case will be whether the automobile is in fact a "family" automobile, in the sense that the various members of the family have normal usage of it. If it is a family automobile, then the fact that the use on a particular occasion is without permission or in violation of instructions will not bar recovery against the parent who owns or controls the automobile. If it has been a family automobile, but the contention is that it ceased to be one, then there must be evidence other than mere statements of intent to show its status actually did change. Of course if it never was a family automobile, then liability could not arise from a surreptitious use by some member of the family. In practically every case, the facts as to actual usage will control.⁶

The writer believes the above language substantiates his earlier contention that the court has virtually eliminated the consent aspect of the previous twofold basis for determination of liability. By this decision the court has indicated that if there is a general consent to the use of an automobile by members of the family, the mere fact that there may be an attempt to deny use of the car on a particular occasion does not preclude application of the doctrine. Such a result was inevitable in view of the court's previous position in the *Turner* case.

A substantial majority of the jurisdictions recognizing the Family Purpose Doctrine still rationalize it on the basis of principal and agent.⁷ However, the Kentucky Court is not alone in recognizing the policy considerations inherent in the doctrine.⁸ The social justice of the more liberal interpretation is apparent. The chief reason why some courts have declined to extend the doctrine to borderline cases is that on the facts of the case they could not spell out the relationship of principal

⁵ The writer recognizes that other courts have held the parent liable in similar situations without placing strong emphasis on the policy considerations. In *Eagon v. Woolard*, 122 W. Va. 565, 11 S.E.2d 257 (1940), the West Virginia Court imposed liability on a parent for the negligent operation of a family automobile by the son's friend. The court reasoned that the automobile was still under the supervision and control of the son. Other courts have been able to reach the same result by applying the doctrine to one standing in loco parentis.

⁶ *First-City Bank Trust Co. v. Doggett*, 316 S.W.2d 225, 230 (Ky. 1958).

⁷ See, e.g., *Wieck v. Blessin*, 165 Neb. 282, 85 N.W.2d 628 (1957); *Vaughn v. Booker*, 217 N. C. 479, 8 S.E.2d 603 (1940); *Long v. Tomlin*, 22 Tenn. App. 607, 125 S.W.2d 171 (1938); *Trice v. Bridgewater*, 125 Tex. 75, 81 S.W.2d 63 (1935).

⁸ See, e.g., *Durso v. A. D. Cozzolino, Inc.*, 128 Conn. 24, 20 A.2d 392 (1941).

and agent. In many of these cases public policy and social justice would dictate liability. But, at the common law, the principal-agent relationship must necessarily be established before the rule of respondeat superior is applicable.

Such a result is exemplified by a recent decision handed down by a United States District Court of North Carolina.⁹ In that case a son was using an automobile with the express consent of his mother when an accident occurred. There was no express consent by his father, but there was evidence that the father knew the son did occasionally drive the car. The court held this evidence insufficient to establish that use by the son was permissive or in pursuit of a purpose for which the parent provided the car. Therefore the son was not acting within the implied scope of agency necessary for invoking the Family Purpose Doctrine. This court further stated:

The legal reasoning behind the rule is that when one provides and maintains a car for the use, convenience and pleasure of a member of his family, he constitutes that member his agent, and when the member so uses it he is acting within the scope of such agency.¹⁰

This reasoning forced the North Carolina District Court to reach a result believed by the writer to be contrary to general public policy. In contrast, recognition of public policy as the true legal basis of the Family Purpose Doctrine has enabled the Kentucky Court to take a more liberal view in applying the doctrine to impose liability. As the Kentucky Court said in the *Turner* case, "The purpose of this doctrine would be destroyed entirely if a father could relieve himself of responsibility by specific instructions known only to himself and his son."¹¹

Charles E. English

INCOME TAX—ACCELERATION OF DEPRECIATION ON A RACEHORSE—Petitioner purchased a racehorse, "Baby Jeanne," in August 1948 for \$9,000. In 1949 she partially bowed a tendon and was placed on a farm in Kentucky from April to October, 1949. During 1950 "Baby Jeanne" raced 19 times and placed twice. On October 14, 1950, she bowed a tendon completely and, *as a racehorse*, had no value. The petitioner sold "Baby Jeanne" for \$1,000 in December, 1950. Using the straight line method, the petitioner had taken depreciation of \$1,500 (\$375 in 1948 and \$1,125 in 1949). In 1950 the petitioner claimed depreciation of \$6,500 (cost of \$9,000 less depreciation

⁹ *Cronenberg v. United States*, 123 F. Supp. 693, 704 (E.D.N.C. 1954).

¹⁰ *Ibid.*

¹¹ *Turner v. Hall's Adm'x.*, 252 S.W.2d 30, 32 (Ky. 1952).