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"My keenest interest is excited, not by what are called great questions and great cases but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law."—MR. JUSTICE HOLMES, Collected Legal Essays, p. 269.

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NOTES ON RECENT CASES

CONSTITUTIONAL LAW—TAXATION OF GOVERNMENTAL INSTRUMENTALITIES—Taxation of Profits Arising from the Sale of State or Municipal Bonds.—*Willcuts v. Bunn.*[1]

In 1919 and 1920, plaintiff purchased certain bonds issued by various counties and cities in the state of Minnesota. In 1924, he sold these bonds at a profit, upon which the Commissioner of Internal Revenue levied an income tax. Plaintiff paid the tax, under protest, and claimed a refund on the ground that the tax was illegal. His claim was rejected, and he brought suit to recover the tax money. The District Court held that the tax was invalid.[2] The Circuit Court of Appeals affirmed the judgment of the District Court,[3] but on appeal to the United States Supreme Court, the tax was held to be valid.

In order to adequately discuss the problem involved in levying an income tax upon the profits arising from the sale of state and municipal bonds, certain well established principles must be considered. It is well settled that the Federal government cannot tax the agents or instrumentalities of the state.[4] This is true although there is no express constitutional provision against such taxation. Although both the state and Federal governments exist within the same territorial limits, each is separate and distinct and acts independently of the other, so that the operations of one

1. 51 S. Ct. 125 (1931).
2. Bunn v. Willcuts, 29 Fed. (2nd) 132 (D. C. 1928).
3. Willcuts v. Bunn, 35 Fed. (2nd) 29 (C. C.A. 1929).
4. Ambrosini v. United States, 187 U. S. 1, 23 S. Ct. 1, 47 L. Ed. 49 (1902); United States v. Railroad Company, 17 Wall. 322 (1872); Collector v. Day, 11 Wall. 113, 20L. Ed. 122 (1870).

should not be interfered with by the exercise of the taxing power of the other. The rule rests upon the law of self preservation. If the tax levied by the Federal government is to be held invalid it must interfere in some substantial way with the powers of the state.[5] It cannot be said that every person who uses his property or derives a profit in his dealings with the state thereby secures himself immunity from taxation on the theory that he or his property is an instrumentality of the state within the meaning of the general rule.[6]

It is also a well established principle that the Federal government cannot tax bonds issued by the state or its subdivisions[7] or the interest arising therefrom,[8] and also that the state cannot tax bonds issued by the Federal government[9] or the interest arising from such bonds.[10] A tax upon the bonds of one government, or a tax upon the interest arising from the bonds, which is considered the same as a tax upon the bonds themselves, impedes the exercise of the borrowing power of the government, and, for that reason is invalid. Such a tax constitutes a burden upon the operations of the government, which, if carried far enough, might prove destructive.

It has been definitely decided, however, that a state, in levying an inheritance tax, may lawfully measure the amount of the tax by considering the value of Federal securities as a part of the estate,[11] and the Federal government, in levying an estate tax, may tax the value of state and municipal bonds as part of the estate,[12] Of course, an inheritance tax is not analogous to a tax upon the bonds themselves or a tax upon the income from the bonds, because the former is a tax upon the privilege of transmission or succession, and not a direct tax, whereas the latter is a tax upon the property itself.

With the foregoing principles in mind, the question presented is: May the Federal government levy an income tax upon the profits arising from the sale of state or municipal bonds, or is such a tax within the general rule already stated that the Federal government cannot tax the state's agents or instrumentalities? The District Court and Circuit Court of Appeals decided that the latter was true and hence that the tax was invalid. Those two courts were of the opinion that such a tax was an interference in a substantial degree with the exercise of the borrowing power of the state. Their theory was that in the performance of its governmental functions, the state requires money; that such money is procured by offering for sale to the investing public the bonds or obligations of the state; that a tax on the bonds themselves or their interest makes them less attractive on the market; and that, if the public knew that the gain to be realized from the sale of such bonds was subject to a Federal tax, it would tend to discourage the purchase of such securities, rendering them less salable, and would, therefore, cause a reduction in the selling price of the bonds, thus materially interfering with the borrowing power of the state. The United States Supreme Court, in an opinion handed down by Mr. Chief Justice Hughes, reached a contrary result, and held the tax valid, thus holding that there was no substantial interference with the exercise of any power of the state.

It would seem that the decision reached by the Supreme Court is the better reasoning. Of course, it must be conceded that the difference between the taxation of in-

5. Metcalf and Eddy v. Mitchell, 269, U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926).

6. *Ibid* at 522, 523.

7. National Life Ins. Co. v. U. S., 277 U. S. 508 (1928); Mercantile Bank v. New York, 121 U. S. 138, 75 S. Ct. 826, 30L. Ed. 895 (1886).

8. Pollock v. Farmers Loan and Trust Co., 157 U. S. 429, 15 S. Ct. 673, 39L. Ed. 759 (1894).

9. Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571, 51 L. Ed.. 901 (1907).

10. Macallen v. Massachusetts, 279 U. S. 620 (1929).

11. Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829, 44 L. Ed. 998 (1900).

12. Greiner v. Lewellyn, 258 U. S. 384, 42 S. Ct. 324, 66 L. Ed. 676 (1922).

terest from bonds and the taxation of the profits arising from the sale of the bonds is largely a question of degree. But there seems to be sufficient distinction to hold that, in the one case, the tax is invalid, and, in the other case, the tax is valid. After the bonds have been issued by the state or its subdivision, and sold on the market, their sale by a purchaser is a transaction which is distinct from, and entirely unconnected with, the contract made by the state in the bonds themselves, and the profits from such sales are in a different category from the interest which is paid upon them. The tax upon the bonds themselves or the interest is a tax which falls upon the owner merely by virtue of his ownership of the bonds, whereas a tax upon the profits is in the nature of an excise, resulting from the combination of several factors, which includes, not alone the original investment of capital, but also a certain amount of business ability on the part of the purchaser. It cannot be contended, therefore, that such a tax is a tax upon the obligations of the state. Neither can it be contended that the owner of the bonds in making the purchase and sale is acting as an instrumentality or agent of the state. It is not a transaction made on behalf of the state. On the contrary, the owner of the bonds disposes of them a the most favorable time in order to advance his own personal gain. He is not discharging any duty which rests upon the state; neither is he exercising a power which belongs to the state. He is merely acting for and on behalf of himself in the conduct of an ordinary business transaction.

Since such a tax as the one in question is not a tax upon the obligations of the state, and since the owner of the bonds, in making the sale, is not an instrumentality or agent of the state, can it be reasonably contended that the tax substantially interferes with the exercise of the borrowing power of the state? It would seem that this question should be answered in the negative. To show that there was not such an interference, the Supreme Court argued that uniform and long established practice indicated that neither the Federal Government nor the states have found a tax on the profits of the sales of their securities to be a burden on their power to borrow money; that such profits are included within the meaning of "gains, profits, and income"; and that such has been the construction placed upon the words by administrative authorities. The Court further said that no state had yet complained of the tax as burdening the exercise of its power.[13] It is, of course, a mere matter of speculation as to what effect the prospect of such a tax would have upon the investing public. At the trial of the principal case, no actual consequences were shown, but the court said it was a matter of common knowledge that bonds were purchased for profit, and that it was a mere matter of conjecture as to the influence which the tax in question would have upon the purchaser. That conjecture might be either way, and conjecture, in itself, as to an unfavorable influence is certainly not sufficient to establish that substantial impediment to the borrowing power of the state which is necessary to invalidate the tax under the principles heretofore discussed. Before the tax should be held invalid, there should be a real burden imposed upon the state, and not one which is merely speculative. Even conceding that there may possibly be some injury to the borrowing power of the state, it still is of such negligible amount as not to bring the case within the general rule that the Federal Government cannot tax the state or its instrumentalities.

J. W. P.

13. In this connection, it is interesting to note that the states of New York and Massachusetts appeared before the court in defense of the tax. In all probability, their purpose was to secure the reciprocal right of taxing the profits arising from the sale of Federal securities, but even so, their appearance was a concession, or at least an indication, that taxation of profits arising from the sale of the bonds of the state would not burden its borrowing power.

CONSTITUTIONAL LAW—

BUSINESS AFFECTED WITH A PUBLIC INTEREST—Limitation of Insurance Agents' Commissions. *O'Gorman & Young v. Hartford Ins. Co., O'Gorman & Young v. Phoenix Assur. Co., Ltd.*[1]

Separate actions were brought by O'Gorman & Young, a domestic insurance corporation licensed as an insurance broker, against the Hartford Insurance Company and against the Phoenix Assurance Company, Limited, both being licensed foreign fire insurance companies, to recover a balance for services alleged to be due. In each case, the services performed were those of local agents at Newark, New Jersey, after the effective date of the following statute: "In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State [New Jersey] to . . . allow . . . any commission . . . in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor . . . to allow, any commission . . . to any person for acting as its local agent in respect to any class of such insurance, in excess of that . . . allowed to any one of its local agents on such risks in this State."[2] In the one case, there was a contract made prior to the effective date of the above statute to pay 25% of the premiums. In the other, there was a contract, consummated after that date, to pay a reasonable value for such services. In the latter case, it was alleged that 25% is a reasonable value for such services. In each the complaint alleged that 20% had been paid. The defense, under the statute, in each case, was that local agents within the state were paid only 20%. By the statute, as 20% was all that was paid to some of the local agents in the state, 20% would be the limit demandable for services of that nature. The United States Supreme Court, in sustaining the defense, held that the statute was no denial of due process.

In dealing with the constitutionality of the statute in quesion, it is necessary to keep in mind that the right to contract freely has been held to be one of the incidents of liberty provided for in the Fourteenth Amendment,[3] an infringement of which is to be guarded against. This right, however, is not absolute.[4] It is subject to being interfered with by the legitimate exercise of the states' police power.[5]

A state, in the exercise of this power, by reasonable legislation, may regulate and control businesses which are affected with public use or interest. In the decision

1. 51 S. Ct. 130 (1930).

2. N. J. Laws 1928, c. 128, p. 258.

3. *Liggett Co. v. Baldridge*, 278 U. S. 105, 111, 49 S. Ct. 57, 73 L. Ed. 204 (1928); *Ribnik v. McBride*. 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A.L.R. 1327 (1927); *Adkins v. Children's Hospital*, 261 U. S. 525, 545, 546, 43 S. Ct. 394, 397, 67 L. Ed. 785, 24 A.L.R. 1238 (1923); *Tyson & Bro. v. Banton*, 273 U. S. 418, 434, 47 S. Ct. 426, 71 L. Ed. 718, 58 A.L.R. 1236 (1926); *Wolff Co. v. Industrial Court*, 262 U. S. 522, 43, S. Ct. 630, L. Ed. 1103, 27 A.L.R. 1280 (1922); *Meyer v. Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1043, 29 A.L.R. 1446 (1922); *Truax v. Corrigan*, 257 U. S. 312, 338, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921); *Adams v. Tanner*, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336, L.R.A. 1917 F, 1163, Ann Cas. 1917 D, 973 (1916); *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L.R.A. 1917 E, 938, Ann. Cas. 1918 A, 1024 (1916); *Coppage v. Kansas*, 236 U. S. 1, 14, 35 S. Ct. 240, 59 L. Ed. 441, L.R.A. 1915, C. 960 (1914); *Adair v. United States*, 208 U. S. 161, 174, 175, 28 S. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764 (1907); *Allger v. Louisiana*, 165 U. S. 578, 589, 17 S. Ct. 427, 41 L. Ed. 832, 835 (1897).

4. *Atlantic Coast Line Ry Co. v. Goldsboro*, 232 U. S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); *New York Ry. Co. v. Bristol*, 151 U. S. 567, 14 S. Ct. 437, 38 L. Ed. 269 (1894).

5. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (1876). Here the interference with the freedom of contract was upheld where the owner had impressed his business with a public interest.

of *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas,*[6] Mr. Chief Justice Taft said:

> "In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

In other words, the state may interfere to a certain extent with such a business when the interest of the public demands it. In regard to this control, the legislature necessarily has a large discretion, not only as to what the interest requires, but as to the manner of guarding these interests as well. Without such control, the owner of such property could compel the public to yield to his own terms or forego the use.

Mr. Chief Justice Taft, in the Kansas Industrial Court case, divided businesses affected with such an interest into three groups:

> "1. Those which are carried on under the authority of a public grant of privilege which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities. 2. Certain occupations regarded as exceptional, the public interest attaching to which, recognized from the earliest times, has survived the period of arbitrary parliamental or colonial legislation for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills . . . 3. Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them."

It is not difficult to say that insurance companies involve a public interest within the third category. As is necessary by their very nature, they are immense organizations. In much the same way as are the common carriers and public utilities, they are controlled by powerful financial interests. A great part of the country's wealth subject to destruction is protected by insurance. Their efficiency and solvency are, therefore, of public concern.

The case of *German Alliance Insurance Co. v. Lewis*[7] is the leading case in the United States laying down the rule that insurance companies are affected with a public interest and that as such they may invoke and require governmental supervision. This question is no longer an open one in most states. The same conclusions is almost universal in state court holdings.[8]

6. 262 U. S. 522, 43 S. Ct. 630 (1922).

7. 233, U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011 (1913).

8. *State ex rel. Mackey v. Hyde,* 315 Mo. 681, 286 S. W. 363 (1926); *State ex rel Waterworth v. Harty,* 278 Mo. 685, 213 S. W. 443 (1919); *Nalley v. Home Ins. Co.,* 250 Mo. 452, 157 S. W. 769 (1913); *Swinney v. Connecticut Fire Ins. Co.* 8 S. W. (2d) 1090 (Mo. App. 1928); *Carr v. Union Mut. Fire Ins. Co.,* 28 Mo. App. 215 (1887); *Mutual Relief Ass'n v. Parker,* 287 S. W. 199 (Ark. 1926); *Firemen's Ins. Co. of Newark, N. J., v. Davis,* 130 Ark. 576, 198 S. W. 127 (1917); *Ex parte Carlson,* 262 P. 792 (Cal. App. 1928); *Continental Life Ins. & Investment Co. v. Hattabaugh,* 21 Idaho 285, 121 P. 81 (1912); *Integrity Mut. Ins. Co., v. Boys,* 293 Ill. 307, 127 N. E. 748 (1920); *People v. Continental Beneficial Ass'n,* 204 Ill. App. 501, 510, (1917); *Glidden Co. v. Retail Hardware Mut. Fire Ins. Co. of Minn.,* 233 N. W. 310 (Minn. 1931); *Strand v. Barbers' Life Ins. Co. of Lincoln,* 213 N. W. 349 (Nebr. 1927); *Berstein v. New Amsterdam Casualty Co.,* 238 N. Y. S. 313, 135 Misc. Rep. 352 (1930); *State v. Conn,* 115 Ohio St. 607, 155 N. E. 138 (1927);

Although the principle be universally recognized, the precise difficulty presented here is in determining the limits of this control. In answering the principal question at issue,[9] whether an insurance company's private character precludes the regulation in question, it is necessary to weigh against the vague "due process" clause the nature of the insurance business, its extent and importance, its relation to the life, health, and welfare of the public, the existence or possible existence of monopolization, the chance of oppression, the light in which it has been regarded by the public, and the fact that legislatures of various states have stepped in and restrained the unlimited exercise of such business.

As to this last element to be weighed, in the opinion of the *German Alliance Insurance Co. v. Lewis,*[10] Mr. Justice McKenna said:

> "Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause."

The principal contention advanced for opposing the constitutionality of this regulation is that up to this case, the extreme limit to which the United States Supreme Court has ever been willing to go is to hold that because of the public interest involved, reasonable rates for issuing fire insurance policies may be established by statutes.

As indicated by Mr. Justice Brandeis, in delivering the opinion in the principal case, in addition to that finding, the United States Supreme Court has held that the states may go so far as to regulate the relations of those who are engaged in that business. In the case of *La Tourette v. McMaster,*[11] the United States Supreme Court held that the states' powers over insurance companies extends to its agents and is best executed when they are residents of the state. The Court in that case upheld as constitutional a South Carolina act entitled "An act to provide for licensing of insurance brokers" which provided, among other conditions, that only such persons may be licensed as are residents of the state and have been licensed insurance agents of the state for at least two years.

That the states may likewise regulate the relations of those engaged in the business was held in *Stipcich v. Metropolitan Life Insurance Co.*[12] The Court there upheld as constitutional the Oregon statute which, in effect, provides that in the application of insurance, the persons who solicit and procure applications for insurance are to be regarded in all matters relating to such applications as the agents of the company, and not of the applicants, regardless of any provision in the policy to the contrary.

The case of *German Alliance Insurance Co. v. Lewis*[13] determined as law that the states may regulate the rates of insurance. It is thought to reasonably follow from

Metropolitan Life Ins. Co. v. Lillard, 248 P. 84 (Okla. 1926); *Herbung v. Lee,* 269 P. 236 (Oregon, 1928); *Munhall v. Travelers' Ins. Co.,* 150A. 645 (Pa. 1930); *Continental Ins. Co. v. Fishback,* 282 P. 44 (Wash. 1929); *State v. Fowler,* 220 N. W. 534 (Wis. 1928).

9. It should be noted that the problem raised by this statute is really two-fold. First, it raises the question, with which this note is principally concerned, of whether legislation resulting in regulation of insurance agents' commissions is harmonious with a proper observance of the "due process" clause. Incidental to that problem, and subordinate to it, it raises the question as to whether the particular means resorted to in New Jersey is constitutional.

10. *Supra,* note 7, 233 U. S. I. c. 412.

11. 248 U. S. 465, 39 S. Ct. 160, 63 L. Ed. 362 (1918).

12. 277 U. S. 311, 320, 48 S. Ct. 512, 72 L. Ed. 895 (1927).

13. Case cited, *supra,* note 7.

that holding that the state may also regulate insurance companies in the manner involved in the statute of New Jersey by regulating the commissions due their agents. The remuneration of the insurance agent, being a percentage of the premiums, is directly related to the rate charged. An unreasonable commission may affect the public in one of two ways, both of which justify the invoking of governmental regulation. The commission may be so large as to materially affect the adequacy of the rate charged the insured. Excessive commissions may result in unreasonably high rate levels. On the other hand, they may, through an attempt to comply with rate regulations, impair the solvency of the company. When one considers that the insurance companies are the machinery for distributing inevitable losses to a great portion of the nation's wealth on the public, then it is self-evident that their financial stability must be zealously guarded.

Again, lack of a uniform scale of commissions may encourage unfair discrimination among policy holders by facilitating rebating. This practice has led to the almost uniform passing of statutes forbidding rebating in all forms of insurance.[14] Recognizing that a large and increasing portion of the wealth of the country is protected by fire insurance, and that fire insurance agents have been, and probably will continue, to discriminate in favor of some and against other applicants, it is desirable to secure, as far as possible, to all persons, equality in the burdens of, as well as in the benefits from such insurance. As to applicants of the same class and equal risk, there should be no difference of premiums paid as well as there should be no difference of dividends and benefits received. The public interest should be held paramount to contentions that private management has been interfered with.

Assuming the constitutionality of a statute fixing the percentage of such commissions, which seems proper, in determining whether the statute in question is constitutional,[15] it is necessary to consider a further question. Does the provision to the effect that one can recover nothing in excess of the rate allowed another local agent in the same class of insurance, although relying upon a contract fair upon its face calling for more, conflict with the Fourteenth Amendment? It must be conceded that it does not follow from the holding that the states may control insurance rates that they may control every agreement having a possible relation thereto. The mere right to regulate a business does not empower the states to trespass on private management.[16] It is contended that the provision goes beyond a mere regulation of the fire insurance business and interferes with the private rights of insurance companies to conduct their own private affairs. As underlying circumstances may condition the constitutionality of an act, the prescribed method must be presumed to be reasonable until the contrary is made to appear.[17] As there was nothing shown in the facts and the argu-

14. Ala., Code 1907, Section 4579; Ill., Hurd's Rev. St. 1913, c. 73, section 27; Ind., Burn's Ann. St. 1914, section 4706f; Miss., Code 1906, section 2600; N. J. Laws 1928, c. 128, p. 257; N. Y., Insurance Law (Consol. Laws 1909, c. 28) section 89; Ohio, section 1, 90 Ohio Laws, p. 345; Tenn., Thompson's Shannon's Code, section 3312; Texas, Rev. St. 1911, article 4954; Wash., Laws 1911, p. 195, section 33; Wis., St. 1898, section 1955.

15. See note 9.

16. *Adams v. Tanner, supra,* note 3; *Truax v. Corrigan, supra,* note 3; *Tyson & Bro. v. Banton, supra,* note 3.

17. *Wampler v. Lecompte,* 282 U. S. 172, 51 S. Ct. 92, 75 L. Ed. 121, (1931); *Rast v. Van Denman & Lewis Co.,* 240 U. S. 342, 357, 36 S. Ct. 370, 60 L. Ed. 679, L.R.A. 1917A, 421 Ann. Cas. 1917B, 455 (1915); *Chicago Dock Co. v. Fraley,* 228 U. S. 680, 687, 33 S. Ct. 715, 57 L. Ed. 1022 (1912); *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 79, 83, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912 C, 160 (1910); *Powell v. Pennsylvania,* 127 U. S. 678, 685, 8 S. Ct. 992, 1257, 32 L. Ed. 253 (1887); *Close v. Glenwood Cemetery,* 107 U. S. 466, 475, 2 S. Ct. 267, 27 L. Ed. 408 (1882).

ments of the case that evils, such as this provision was meant to remedy, do not exist in New Jersey in regard to fire insurance companies, there is nothing to overcome that presumption. From the fact that the New Jersey Legislature has so acted and that the constitutionality of its action was upheld by the highest court of New Jersey, it is easy to conclude that such evils do exist in that state.[18]

The determination of this case seems to carry the doctrine of a business affected with a public interest somewhat further than the Court has been willing to go in the past and appears to indicate a more liberal approach to the problem than has obtained in recent years.[19]

B. H.

LIABILITY OF A PARENT OWNER OF AN AUTOMOBILE.—*Roark v. Stone.*[1]

The defendant's minor son, under sixteen years of age, was driving his father's automobile to school when, due to negligent driving, he collided with the plaintiff's car driven by the plaintiff. There was evidence that the father had bought the car for family use, and that the son was accustomed to driving it. The plaintiff contended that the owner of a motor vehicle who intrusts it into the hands of an incompetent driver, or to a person deemed incompetent under the statute on account of lack of age, is liable for injuries resulting from such driver's negligence. The Springfield Court of Appeals affirmed a judgment in favor of the plaintiff against both the father and the son, predicating the father's liability upon the statute which provides that it is unlawful for any minor under the age of sixteen to operate a motor vehicle on the highways.[2]

The particular point has never been passed upon before in this state, and the court based its opinion chiefly upon the result reached by a Nebraska court,[3] which said, concerning the Nebraska statute[4] prohibiting minors under sixteen years of age from operating a motor vehicle: "The clear and unmistakable intent of the Legislature in enacting the Nebraska statute under consideration was to protect persons and property from the injury and damage that experience had shown were more likely to be occasioned by the driving of motor vehicles by persons under sixteen years of age, than would be occasioned by the driving of motor vehicles by persons of more mature judgment; and when a person wilfully permits his minor child, under sixteen years of age, to drive his automobile upon the public highways, in direct violation of this statute, such permission and such violation of the statute constitutes in him such negligence as is by the direct sequence of events the proximate cause of any damage that may be sustained by another to his person or property when the other elements of actionable negligence are established." This is practically the result of the instant case. The Nebraska court has, in effect, said that the violation of the statute by the father was negligence *per se.* In support of the Nebraska doctrine the Missouri court said: "If the statute prohibiting the use of a motor vehicle by a minor under sixteen years of age is to have any effect whatever, the father who knowingly permits such

18. *Dominion Hotel v. Arizona,* 249 U. S. 265, 268, 39 S. Ct. 273, 63 L. Ed. 597 (1918); *Bunting v. Oregon,* 243 U. S. 426 438, 37 S. Ct. 435, 61 L. Ed. 830, Ann Cas. 1918A. 1043 (1916); *Price v. Illinois,* 238 U. S. 446, 452, 35 S. Ct. 892, 59 L. Ed. 1400 (1914).

19. *Cf. Adams v. Tanner,* 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336 (1917); *Tyson & Bro. v. Banton,* 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718 (1927); *Ribnik v. McBride,* 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913 (1928); *Williams v. Standard Oil Co.,* 278 U. S. 235, 48 S. Ct. 115, 73 L. Ed. 287 (1929).

1. 30 S. W. (2nd) 647 (Mo. App. 1930).

2. Mo. REV. STAT. (1929) sec. 7783 (i).

3. Walker v. Klopp, 99 Neb. 794, 157 N. W. 962 (1916).

4. NEB. COMP. STAT. (1922) sec. 8391.

violation of the law, and whose negligence in so doing makes it possible for the child to cause an injury, must be held liable on account of such negligent act."[5]

Absent statute a parent is not liable as such for the torts of his minor children, whether those torts are wilful or negligent.[6] He is liable only on the same grounds that he would be liable for the wrong of any other person, as, that he directed or ratified the act, or took the benefit of it, or that the child was at the time acting as his servant or agent.[7] The relation of parent and child is a peculiar one,[8] and, although the relation contemplates control by the parents, it does not mean that there is absolute direction, as is the case in a true master and servant relationship. And it can hardly be said that a parent by permitting his minor son to operate the automobile can anticipate that an injury will result. Common experience is to the contrary.

Although there is no common law liability placed upon the parent as such for the torts of his minor child, the courts have created a liability in the parent for automobile injuries on one of three theories independent of statutory provisions. The three doctrines of liability are, the strict agency doctrine, the family purpose doctrine, and the doctrine of liability for the use of dangerous instrumentalities.[9]

To invoke the agency doctrine of *respondeat superior* as applies to a master and servant, agent and principal, or employee and employer relationship, it must appear

5. *Supra* note 1, l. c. 649.

6. Mount v. Naert, 253 S. W. 966 (Mo. 1923); Bolman v. Bullene, 200 S. W. 1068 (Mo. 1918); Hays v. Hogan, 273 Mo. 1, 200 S. W. 286 (1917); Needles v. Burk, 81 Mo. 569, 51 Am. Rep. 251 (1884); Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381 (1868); Baker v. Haldeman, 24 Mo. 219, 69 Am. Dec. 430 (1857); Sartin v. Saling, 21 Mo. 387 (1855); Curtis v. Harrison, 253 S. W. 474 (Mo. App. 1923); Llywelyn v. Lowe, 239 S. W. 535 (Mo. App. 1922); Buskie v. Januchowsky, 218 S. W. 696 (Mo. App. 1920); Mays v. Fields, 217 S. W. 589 (Mo. App. 1920); Bright v. Thatcher, 202 Mo. App. 301, 215 S. W. 788 (1919); Bassett v. Riley, 131 Mo. App. 676, 111 S. W. 596 (1908); Lamb v. Davidson, 69 Mo. App. 107 (1897). And see Mast v. Hirsch, 199 Mo. App. 1, 202 S. W. 275 (1918); Charlton v. Jackson, 183 Mo. App. 613, 167 S. W. 670 (1914); (1900) 74 Am. St. Rep. 801, note; Parker v. Wilson 179 Ala. 361, 60 So. 150 (1912). But see Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351 (1911). Under the Civil Law a parent is liable as such for the torts of his minor children. Doumeing v. Haydel, 9 La. *446 (1835); Hagerty v. Powers, 66 Cal. 368, 5 Pac, 622, 56 Am. St. Rep. 101 (1885); 2 POTHIER, OBLIGATIONS (3rd ed. 1853) 34. See note (1914) 5 U. OF MO. BULL. LAW SER. 30 (commenting on Hays v. Hogan).

For dangerous weapons see cases 29 Cyc. 1666. Parent is not liable for child's slander out of his presence. Pauley's Guardian v. Draine, 9 Ky. L. 693, 6 S. W. 329 (1888). Statute expressly provides that neither parent nor child shall be liable for the torts of the other as such. OKLA. COMP. LAWS (1909) sec. 4914; McNeal v. McKain, 33 Okla. 449, 126 Pac. 742 (1912).

7. THROCKMORTON'S COOLEY ON TORTS (1930) 104. See Charlton v. Jackson; Paul v. Hummel; Bassett v. Riley; Baker v. Haldeman, all *supra* note 6; SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) sec. 777. If parent pays for damage caused by minor son he is not entitled to recover the money. Needles v. Burke, *supra* note 6. And see Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134 (1916).

8. If parent knows of vicious propensities of child, or incompetency, he is liable. Baker v. Haldeman; Charlton v. Jackson, both *supra* note 6; Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013 (1901); Palm v. Ivorson, 117 Ill. App. 535 (1901); Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933 (1898). Parent is bound to exercise his parental authority. Haverson v. Nokker, 60 Wis. 511, 19 N. W. 382 (1884). Family law is that the father is entitled to minor child's wages, and there is no legal sanction for assertion of a greater right by the father against the child. Command is given the father for maintenance and discipline. The relation of master and servant invariably arises out of a contract, express or implied. Liability devolves upon the master on the idea that he controls the manner of performance. The ordinary principles of master and servant have no application to permissive use by a minor child. Parker v. Wilson, *supra* note 6. But see Paul v. Hummel, *supra* note 6.

9. See a discussion by Prof. Lattin, *Vicarious Liability and the Family Automobile,* (1927) 26 MICH. L. REV. 846; McCall, *The Family Automobile,* (1929) 8 N.C.L. REV. 256.

that the son driving the automobile was not only the agent of his father, but also that he was at the time of the accident acting within the delegated scope of his employment in futherance of the interests and business of his father.[10] A child driving a motor vehicle to and from school can hardly be said to be concerned with the business of his father.[11] An agency involves more than a mere involuntary subjugation of the agent to his master's will as is found in the parent and child relationship.[12] The doctrine of *respondeat superior* is not applicable to the facts in this case. The son cannot be said to be discharging any duty of his parent simply because the parent permitted him to drive the automobile to school.[13] The court in the instant case made no pretense of basing liability upon agency principles.

The second theory upon which some courts have predicated liability on the parent for his minor child's negligence in driving the family automobile is the "family purpose doctrine." This doctrine of parent liability has received much favor in many courts as being a true agency doctrine.[14] As a matter of logic and fact, the family purpose doctrine is diametrically opposed to the true principles of agency.[15] Stated briefly, the family purpose doctrine is that the father, by purchasing an automobile for general family use, and placing it at the disposal of his family, for pleasure purposes, makes the pleasure of his family his business, and any member of his family driving the machine with his consent, express or implied, is the father's agent or servant.[16] The family purpose doctrine reaches a very desirable result in most cases on policy by placing the liability for automobile accidents, which are not uncommon, upon responsible shoulders. By application of this doctrine to the instant case the court

10. *Supra* note 6. O'Malley v. Construction Co. 255 Mo. 386, 164 S. W. 565 (1914); Walker v. Ry., 121 Mo. 575, 26 S. W. 360 (1894); Garretzen v. Duenkel, 50 Mo. 104, 11 Am. Rep. 405 (1872); Sturgis v. Ry., 228 S. W. 861 (Mo. App. 1921); Fleischman v. Ice & Fuel Co., 148 Mo. App. 117, 127 S. W. 660 (1910); Evans v. Dyke Auto Co., 121 Mo. App. 226, 101 S. W. 1132 (1906); Johnson v. City of St. Joseph, 96 Mo. App. 663, 71 S. W. 106 (1902); Perry v. McLaughlin, 287 Pac. 354 (Cal. 1930). Master is not liable for acts of his servant outside the scope of his employment, with or without master's permission. Core v. Resha, 140 Tenn. 408, 204 S. W. 1149 (1918).

11. But see Mebas v. Werkmeister, 299 S. W. 601 (Mo. App. 1927).

12. Parker v. Wilson, *supra* note 6.

13. Daughter sixteen permitted to use family car to get a pair of her own shoes from repair shop was held to be an agent of the father. The court, however, favored the family purpose doctrine. Graham v. Page, 300 Ill. 40, 132, N. E. 817 (1921). It is a question for the jury whether the minor son driving family car to school was agent of father. Curtis v. Harris, *supra* note 6. Minor son seventeen who habitually drove family car to and from school was held to be an agent of his father in the commendable undertaking to school the boy above the compulsory age of fourteen. Mebas v. Werkmeister, *supra* note 11. Son seventeen was held to be an agent of father in taking father's car to buy himself a hat with money furnished by the father since it is father's duty to provide clothing. Kichefsky v. Wiatrzykowsky, 210 N. W. 679 (Wis. 1926). Minor son driving car furnished by parent for his health was held to be the agent of his parent. Fox v. Cahorowsky, 66 Pa. Super. Ct. 221 (1917).

14. Marshal v. Taylor, 168 Mo. App. 240, 153 S. W. 527 (1913); Daily v. Maxwell, *supra* note 6: *cf.* Myers v. Shipley, 140 Md. 380, 116 Atl. 645 (1922).

15. See Watkins v. Clark, 103 Kan. 629 (1918); Mast v Hirsch, *supra* note 6; (1914) 5 U. OF MO. BULL. LAW SER. 30.

16. "The doctrine contended for amounts to this: The pleasure of the family in its utmost detail is the business of the father." Parker v. Wilson, *supra* note 6, l.c. 368. The family purpose doctrine involves five elements: (1) general or special property in the family car in the parent; (2) car furnished by parent for family use; (3) family relation between the driver and the owner of the car; (4) permissive use; and (5) accident while car being used for one of the permissive uses intended. Lattin, *op. cit. supra* note 9, at 857.

would have reached the same result as it did under the statute.[17] The objections to this doctrine as a rule of law are readily apparent,[18] and have been recognized by a great many courts.[19] The Missouri Supreme Court in the case of *Hays v. Hogan*,[20] after a careful review of all of the authorities, expressly denied the family purpose doctrine, because it places an unnatural liability on the owner of an automobile.[21] The effect of the instant case is to create a result not unlike the family purpose doctrine, at least as far as it concerns the liability of a parent who permits his minor child under the age of sixteen to drive his car. It is apparent that the tendency in many states is to shift the liability, or to place the extreme responsibility upon the owner of the motor vehicle.

The third theory upon which the father's liability for his minor son's negligent driving may be placed is the liability of one owning a known dangerous instrumentality which he surrenders to another's control.[22] If the motor car were a dangerous instrumentality *per se*[23] there would be no difficulty in justifying the result of this case, since the legislature has deemed the minor under sixteen years of age incompetent as a matter of law to operate a motor vehicle on the public highways. But it has

17. Under the family purpose doctrine the parent is liable for any permissive use by a member of his family. In the instant case the minor son driving had his father's permission to use the automobile in going to and from school.

18. "It bases the creation of a master and servant relation upon the purpose which the parent had in mind in acquiring ownership of the vehicle, and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in furtherance of, and not apart from, the master's service and control, and 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. Thompson, 76 N. J. L. 754, 762, 71 Atl. 296 (1908). "As applied to the case in hand it means that the son in pursuit of his own pleasure with an automobile owned by his father, was engaged in the business of his father. But the doctrine, we think, has no firm foundation in reason or common sense." Parker v. Wilson, *supra* note 6. 179 Ala., l.c. 368 *et seq.*

19. See cases cited in Hays v. Hogan, *supra* note 6.

20. *Supra* note 6.

21. Parker v. Wilson, *supra* note 6. The rule in Hays v. Hogan, *supra* note 6, was held not to apply where a minor son seventeen habitually drove the family automobile to and from school. Mebas v. Werkmeister, *supra* note 11. But despite conflicts in the courts the rule of Hays v. Hogan was held to apply. Curtis v. Harrison, *supra* note 6.

22. The owner converts his automobile into a dangerous instrumentality when he intrusts it into the hands of an incompetent driver. Lang Floral Co. v. Sheridan, 245 S. W. 467 (Tex. Civ. App. 1922). The four elements necessary for liability of the owner of a dangerous instrumentality are: (1) permission to use; (2) incompetency of the one using; (3) owner's knowledge of the incompetency; (4) negligence of the one using is the proximate cause of the injury. Jones v. Harris, 122 Wash. 69, 210 Pac. 22 (1922). An automobile is not a dangerous instrumentality when intelligently managed. The owner should know the qualifications of his driver. Stapleton v. Brewing Co., 198 Mich. 170, 164 N. W. 520 (1917). The automobile is not a dangerous instrumentality unless it is in the hands of an incompetent operator. Rush v. McDonnell, 214 Ala. 47, 106 So. 175 (1925). Liability attaches to the owner where he intrusts the dangerous potentialities of an automobile to an inexperienced child or servant; the owner is negligent in so intrusting. Parker v. Wilson, *supra* note 6. Incompetency of the driver converts an automobile into a dangerous instrumentality and the owner is liable for intrusting to incompetent hands. Gardner v. Solomon, 200 Ala. 115, 75 So. 621 (1917).

23. An automobile is a peculiarly dangerous instrumentality. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). For the nature of a dangerous instrumentality see Barmore v. Ry Co., 85 Miss. 426, 38 So. 210 (1904); Horack, *The Dangerous Instrument Doctrine* (1917) 26 Yale L. J. 224. An automobile is not dangerous *per se*. Core v. Resha *supra* note 10. The legislature has recognized that the automobile is a dangerous instrumentality. Seleine v. Wisner, 200 Iowa 1389, 206 N. W. 130 (1915).

been settled in Missouri that an automobile is not dangerous *per se*[24] unless materially defective.[25]

The principal criticism of this case comes from the court's construction of the statute, following the construction given by the Nebraska court to a Nebraska statute.[26] The court's construction in the instant case appears to go beyond necessity and to amount to judicial legislation.[27] The court ruled that the father was guilty of violating the statute by permitting his son to operate his automobile on the highway; that the violation of the statute was negligence; and that such negligence made it possible for the child to cause the injury complained of. Accepting as a rule of law that violation of such a statute may be negligence *per se*,[28] the problem is whether the

24. Michael v. Pulliem, 215 S. W. 763 (Mo. App. 1919) (per Woodson, C. J. and Graves, J., who sat in Hays v. Hogan, *supra* note 6); Evans v. Dyke Auto Co., *supra* note 10. "The automobile is not of itself necessarily a dangerous agency, like an animal ferae naturae, so that it cannot be driven on the highways, nor is it a Juggernaut, purposely constructed to crush out the lives of men, but by reason of its great weight and the power with which it may be propelled, it becomes exceedingly dangerous unless the highest degree of care and caution is used by the driver." Jackson v. So. Bell Telephone C., 281 M. 358, 371, 219 S. W. 655 (1920) (The court was influenced by the statute which required the highest degree of care in driving a motor vehicle, LAWS 1911, p. 330, subsec. 9; repealed by LAWS 1917, p. 404, sec. 1; and re-enacted by LAWS 1921 (Ex. Ses.), p. 91, sec. 19). See note (1920) 18 U. OF MO. BULL. LAW SER. 48. An automobile is a highly dangerous piece of machinery. Meenach v. Crawford, 187 S. W. 879, 883 (Mo. 1916); Ex Parte Kneedler, 243 Mo. 632, 147 S. W. 983 (1912); Hall v. Compton, 130 Mo. App. 681, 108 S. W. 1122 (1908); McFern v. Gardiner, 121 Mo. App. 1, 97 S. W. 972 (1906). An automobile carelessly driven is a dangerous instrumentality. Daily v. Maxwell, *supra* note 6; HUDDY, AUTOMOBILES (4th ed. 1916) sec. 30; 28 Cyc. 25.

25. Texas Co. v. Veloz, 162 S. W. 377 (Tex. Civ. App. 1913); 1 THOMPSON, NEGLIGENCE (2nd ed. 1901) sec. 533.

26. Walker v. Klopp, *supra* note 3.

27. The statute in question in the instant case is part of that general chapter of the statutes entitled Motor Vehicles, which was enacted to be "exclusively controlling on * * * regulation, operation * * * their use on the public highways * * * and on the regulation of traffic on the highways of this state." This chapter is merely a regulatory provision in the exercise of the police power, designating the proper way to handle motor vehicles. The chapter is extensive and should be construed to contain all of the provisions intended by the legislature. MO. REV. STAT. (1929) sec. 7758.

28. "The violation of a valid and applicable city ordinance restricting the speed of trains is negligence *per se*, and substantial evidence of such violation plus like evidence of a casual connection between such negligence and an injury is sufficient to sustain a verdict against the violator, all issues being properly submitted, unless contributory negligence appears as a matter of law." Hunt v. St. Louis & S. F. R. Co. 262, 271, 275, 171 S. W. 64 (1914).

The violation of a statute is either: (1) negligence *per se;* (2) only evidence of negligence; or (3) prima facie evidence of negligence. The proper intent of the legislature is carried out if the violation is regarded as negligence *per se*. To say the violation of a statute is evidence of negligence, is to submit to the jury when and to what extent it is reasonable to break the law. Thayer, *Public Wrong and Private Action,* (1913) 27 HARV. L. REV. 317; (1915) 8 U. OF MO. BULL. LAW SER. 46.

Propuolenis v. Goebel Construction Co., 279 Mo. 358, 213 S. W. 792 (1919). (Failure of duty imposed by statute is negligence *per se,* and it is not necessary to allege particular acts of negligence; otherwise the statute would be of no effect). "It may be said, then, that it was a rule of law in this state, at the time of the trial, that violation of a reasonable ordinance regulation of speed was negligence *per se*. That doctrine, somewhat shaken at one time, but never exploded may now be taken as so buttressed by both reason and authority to withstand any but legislative assault." Stotler v. Ry., 200 Mo. 107, 121, 98 S. W. 509 (1906) (per Lamb, C. J.); Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648 (1905); Dahlstrom v. Ry., 108 Mo. 525, 18 S. W. 919 (1891); Gratiot v. Ry., 16 S. W. 384 (Mo. 1891); Dickinson v. Ry., 104 Mo. 491, 16 S. W. 381 (1891) Wilkins v. Ry., 101 Mo. 93, 13 S. W. 893 (1890); Murray v. Ry., 101 Mo. 236, 13 S. W. 817 (1890); Kellny v. Ry., 101 Mo. 67, 13 S. W. 806 (1890). Everyone on the street has a right to presume the ordinance will be obeyed. Schlereth v. Ry.,

Missouri statute properly relates to a parent who owns an automobile and permits his son to drive it, so as to establish negligence on the part of the parent.

In the field of automobile liability there are, in general, five types of statutes[29] enacted by the various state legislatures. These five types which serve roughly to group the various statutes are: (1) statutes which create a lien on the motor vehicle involved in an accident to secure satisfaction for the damages sustained;[30] (2) statutes which prohibit minor children under a certain age from driving, and which, in addition, provide that no owner shall permit such a minor to operate his motor vehicle on the highways;[31] (3) statutes which impose direct liability upon the owner of a motor vehicle for any injuries caused by negligent driving where he consented to the driving;[32] (4) statutes which require every owner of a motor vehicle to take out some

96, Mo. 509, 10 S. W. 66 (1888); Eswin v. Ry., 96 Mo. 290, 9 S. W. 577 (1888); Keim v Ry., 90 Mo. 314, 2 S. W. 427 (1886); Bergman v. Ry., 1 S. W. (Mo.) 384 (1886); Karle v. Ry., 55 Mo. 476 (1874); Lenz v. Siebert, 259 S. W. 829 (Mo. App. 1924); Ashby v. Elsberry Gravel Co., 99 Mo. App. 178, 73 S. W. 229 (1903). Skinner v. Stifel, 55 Mo. App. 9 (1893). The rule of ordinary care finds no application where there is a statutory provision. Lilly v. State of W. Va., 29 F. (2d) 61 (1928). It is negligence *per se* for a child under sixteen to operate a motor vehicle in violation of a statute prohibiting a minor under sixteen from so doing. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134 (1916); note (1907) 5 L.R.A. (N.S.) 187 *Cf*: Durant v. Lexington Mining Co., 97 Mo. 62 (1888). Maher v. Railway, 64 Mo. 267 (1876). But see Henderson v. Ry., 248 S. W. 987 (Mo. App. 1923), *aff'd.*, 314 Mo. 414, 284 S. W. 788 (1926); Barret v. Delano, 174 S. W. 181 (Mo. 1915); Voelker Products Co. v. Ry., 170 S. W. 332 (Mo. 1914).

29. The classification is made for the convenience of discussion, and it is not pretended to be exhaustive. For a discussion of the Louisiana Statute which makes the parent civilly liable for his child's torts see Maloney v. Goelz, 12 La. Ann. 31, 124 So. 606 (1929).

30. TENN. LAWS 1905, c. 173, sec. 5 ("* * * there shall be created a lien on the motor vehicle injuring for any and all damages the court may award, whether the driver is the owner, chauffeur, agent, employee, servant, or any other person using the motor vehicle for loan, hire, or otherwise.") Held not to create any new personal liability, but was simply a lien against the automobile. Core v. Resha, *supra* note 10. ACTS S. C. 1912 (27 ST. AT LARGE, p. 737) ("* * * injury by a motor vehicle driven in violation of law, or negligently and carelessly creates a lien on the motor vehicle next in priority to a lien for taxes, and the party injured may attach the motor vehicle, * * * except when the car is stolen under lock from a locked building.") Statute declared constitutional under police power. Makes no difference whether the owner consented to the driving or not, since the statute is notice to all the world. An owner parts with possession of his automobile at his own peril. Merchant's and Planter's Bank v. Brigman, 106 S. C. 362, 91 S. E. 332 (1916).

31. N. C. LAWS 1923, c. 202, sec. 1, p. 514 (Any person who, being owner or in charge of any motor vehicle, authorizes or knowingly permits a person under sixteen years of age to operate such motor vehicle along any public highway or street in the state shall be guilty of a misdemeanor). ALA. ACTS 1911, sec. 22 p. 634, ALA. CIV. CODE (1923) sec. 6268 ("***and any person allowing any such vehicle to be operated by any person under the age of sixteen years of age unless accompanied by such adult shall be punished by a fine, etc.") Rush v McDonnell, *supra* note 22. Statute construed to make such minor conclusively incompetent to drive. Paschall v. Sharp, 215 Ala. 304, 110 So. 387 (1925). For the Nebraska statute see *supra* note 4. See a discussion of a similar statute in Kansas in Burrell v. Horchem, 117 Kan. 678, 232 Pac. 1042 (1926). PA. LAWS 1919, No. 283, sec. 3, p. 678, provides that no person under the gae of sixteen shall be licensed to operate a motor vehicle, and that no owner or custodian of a motor vehicle shall permit any person under the age of sixteen to operate such a vehicle. Laubach v. Colley, 283 Pa. 366, 129 Atl. 88 (1925). As amended, PA. LAWS 1925, No. 160, sec. 9, p. 276, provides that the owner or one having control of the motor vehicle who causes or permits such motor vehicle to be operated contrary to the provisions of the statute shall be deemed equally guilty of a misdemeanor with the operator for any violation thereof.

32. IOWA CODE (1924) sec. 5026 ("* * *the owner of a motor vehicle shall be liable for any negligence of one operating the vehicle with his consent.") Maine v Maine Co., 198 Iowa 1278, 201 S. W. 20, 37 A.L.R. 161 (1924); *cf.* Seleine v. Wisner, *supra* note 23 (Coverture prevented working of statute). For the amended Pennsylvania statute see *supra*

sort of liability insurance before he is permitted to drive;[33] (5) statutes which merely limit the age at which a person may operate a motor vehicle, and which do not in any way by their terms apply to the owner of the motor vehicle.[34] It will be seen that these types of statutes differ materially in their applications and in the results reached under them. It will be observed also that the law in each particular state prior to the enactment of a particular statute varied materially between the states,[35] and should have some effect on the construction which is put on the particular statute.

The general question to ask in any case is, what was the intention of the legislature in passing the particular law.[36] In general it may seem that the purpose of the statutes is to place the liability for automobile accidents upon the shoulders of the owner who is more likely to be a responsible person and more able to satisfy the liability. There can be no doubt of such an intent in the lien statutes. The legislature has expressly provided in those statutes that the motor vehicle involved shall be attached by a lien to secure satisfaction of the damages.[37] In the second type of statutes, the legislature has provided not only the age limit, but also has expressly added that "no owner, manufacturer or dealer shall permit a minor to operate his motor vehicle."[38] Concerning the Nebraska statute, the Nebraska court said that the clear and unmistakable intent of the legislature was to protect persons from injury likely to be occasioned by minor drivers, and if a parent permitted his minor son to operate his car he was guilty of a violation of the statute, such as amounted to negligence *per se*.[39] In that case both the parent and the child were guilty of a viola-

note 31. The Michigan statutes have undergone peculiar developments, influenced both by the legislature and the court. The original statute placed an absolute liability on the owner of a motor vehicle except when operated by a thief. This statute was declared unconstitutional, and following, the legislature passed two other statutes, each lessening the liability. MICH. PUB. ACTS (1909) Act 318 sec. 10, subd. 3; Daugherty v. Thomas, 174 Mich. 444, 134 N. W. 468 (1913); MICH. COMP. LAWS (Cahill, 1915) sec. 4825; Hawkins v. Ermatinger, 211 Mich. 578, 179 N. W. 249 (1920); Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69 (1928). MICH. COMP. LAWS (1929) sec. 4648.

33. Notes (1930) 69 A.L.R. 397; (1925) 39 A.L.R. 1028.

34. WIS. STAT. (1927) sec. 8508, provides that no person under the age of sixteen, unless accompanied by an adult, shall operate any motor vehicle on any highway of the state. N. C. CONS. STAT. ANN. (1919) sec. 2614, provides that no person shall operate a motor vehicle upon the public highways of the state who is under the age of sixteen. Taylor v. Stewart, *supra* note 28, Linville v. Nissen, 162 N. C. 96, 77 S. E. 1096 (1913) (Liability under the statute arises from the parent's own negligence, and not the imputed negligence of the child). KY. ST. SUPP. (1918) sec. 2739 g 30 provides: "It shall be unlawful for any one under the age of sixteen unless accompanied by a parent, guardian, or someone over the age of twenty-one, who accompanies with the consent of the parent or guardian, to operate a motor vehicle on the highways." Doss v. Monticello Elec. Co., 193 Ky. 499, 236 S. W. 1046 (1922).

35. Following is a classification suggested by Prof. Lattin as to whether the states follow the family purpose doctrine, the strict agency doctrine or some other principle affecting the liability of a parent owner of an automobile. This classification is independent of statutory provisions.

The Family Purpose Doctrine: Ariz., Colo., Conn., Ga., Ill., Iowa, Ky., Minn., Neb., Nev., N. M., N. C., N. D., Ore., S. C., Tenn., Texas, Wash., and W. Va.

The Strict Agency Doctrine: Ala., Ark., Cal., Del., Ind., Kan., Me., Md., Mass., Mich., Mo., Mont., N. J., N. Y., Ohio, Okla., Pa., R. I., Utah, Va., Wis., and Alberta.

Civil Law Liability: La.

Dangerous Instrumentality: Fla.

Doubtful: N. H., Idaho, S. D., Vt., Wyo., D. C., and Miss. Lattin, *op. cit. supra* note 9.

36. The legislature intends only what it says in the statute. Home Ins. Co. v. Wickham, 281 Mo. 300, 219 S. W 961 (1920); State ex rel Knisely v. Holtcamp, 181 S. W. (Mo.) 1007 (1915); Clark v. K. C., St. L. & C. R. Co. 219 Mo. 524, 118 S. W. 40 (1913).

37. *Supra* note 30.

38. *Supra* note 31.

39. *Supra* note 3.

tion of the express prohibitions of the statute. The Nebraska court was no doubt correct in construing the legislative intent thus, and in applying the statute to the case. In the third type of statutes the legislatures, in varying terms, have said that the owner of the motor vehicle shall be liable in damages in any case of permissive use,[40] whether by a minor or an adult. Since these statutes expressly and directly place the liability, there is no problem of construction for the courts. The fourth type of statute simply provides that any one seeking to register his motor vehicle for permission to operate it must first provide security for damages in case of an accident,[41] payable to anyone who suffers injuries from the driving of the car either by the owner or by a third party who has the owner's permission to operate the vehicle. The legislatures in enacting that law very definitely put an anticipatory liability upon the owner of the automobile. The fifth type of statute appears to be nothing more than a mere police regulation. Some of these statutes merely provide that no person under a certain age shall operate a motor vehicle on the highways unless accompanied by an adult.[42] No provision is made in these statutes concerning the owner's duties, nor concerning restrictions placed upon him. Some of the courts have read into this type of statute a prohibition aimed against the parent of a minor.[43] Since these statutes make no mention of parent liability, it is necessary for the court to look elsewhere to find a liability.[44] It is difficult to read into this particular type of statute the legislature's purpose to place responsibility for an accident on the owner of a motor vehicle which happens to be driven with his consent.

In enforcing a duly enacted statute the courts are justified in construing the intent of the legislature in passing the law. This construction must be had from the terms of the statute itself in the face of existing rules of law. Where a statute changes existing rules of law, the court should very carefully limit the change to the extent the legislature intended.[45] The intent of the legislature is indisputable in the first four types of statutes listed above. In the fifth type of statute, under which the Missouri statute may be said to fall, there is some room for construction by the court. However, in those states where the family purpose doctrine is well established, such a statute does not change the existing law. There the court should have no difficulty in construing the meaning of the statute. There is already a liability on the parent regardless of the age of the driver if he is a member of the immediate family. But some states which avowedly deny the family purpose doctrine, and limit liability to a

40. *Supra* note 32.

41. *Supra* note 33.

42. *Supra* note 34.

43. Taylor v. Stewart, *supra* note 28; Linville v. Nissen, *supra* note 34 (The statute provided that no person shall operate a motor vehicle upon the highways of the state who is under the age of sixteen). N. C. CONS. STAT. ANN. (1919) sec. 2614. It should be noted that the statute was since changed to directly prohibit an owner from permitting a minor to operate his automobile. *Supra* note 31. Doss v. Monticello Elec. Co., *supra* note 34 (where the family purpose doctrine was considered in connection with the statute). Laubach v. Colley, *supra* note 31 (The statute provided that no person, whether owner or not, under the age of sixteen shall operate a motor vehicle upon any public highway in the commonwealth). A statute which merely prohibited a minor under sixteen from operating a motor vehicle was construed as making such minor conclusively incompetent to drive, so his parents are liable if they permit him to drive. Paschall v. Sharp, *supra* note 34.

44. The court is forced to consider liabilty on the common law principles prevailing prior to the enactment of the statute.

See E. R. Thayer, *Judicial Legislation,* (1891) 5 HARV. L. REV. 172, 199 et seq. "I recognize without hesitation that judges do and must legislate, but they can do so only interstitailly; they are confined from molar to molecular motions. A common law judge could not say, 'I think the doctrine of consideration is a bit of historical nonsense, and I will not enforce it in my court.'" Southern Pacific Co. v. Jensen, (per Holmes, J.) 244 U. S. 205, 221 (1917).

strict agency relation, have interpreted this type of statute to place definite liability on the parent who permits his minor child to drive the family car.[46] The court in the instant case is apparently willing to adopt that interpretation, even in the face of a settled rule of law that the family purpose doctrine has no application in this state. In each case of a statute similar to the Missouri statute the legislature has declared it unlawful for the minor to operate the car on the highways. In each case the legislature has prescribed a penalty for violation of the terms of the statute. It is undisputed that the operator himself will be liable for his negligence in operating the motor vehicle. But no provision is made in the Missouri statute for either the parent of the minor operating the vehicle in violation of the statute or for an owner other than the parent. In some of the statutes it is provided that a parent or other adult must accompany the minor to make the driving lawful.[47] The Missouri statute does not even make that provision. The Missouri statute provides in plain and unequivocal terms that: "No person under the age of sixteen (16) years shall operate a motor vehicle on the highways of this state."[48] The penalty provided for a violation of this provision is punishment by fine of from five to five hundred dollars, or imprisonment in the county jail not exceeding two years, or both, such fine and imprisonment.[49] No one would contend that this penalty should be enforced against the parent.

The court in the instant case flatly applied a familiar rule of law that violation of a statute is negligence *per se*. There can be no justification in this by referring to statutes of an entirely different type wherein the legislature has very definitely placed a liability upon the parent. If the Missouri legislature had intended a liability similar to that found in the Nebraska case, it could easily have included a clause defining the liability and its extent.

The result of this case, if not the reasoning, might be justified by accepting the plaintiff's contention definitely that the statute declares the minor child incompetent as a matter of law, so that the parent in permitting an incompetent driver to operate his motor vehicle thereby converts it into a dangerous instrumentality and becomes responsible for all negligence.[50] This contention is no more than an exception to the well established rule that an automobile is not an inherently dangerous instrumentality. The owner must know of the incompetency, and the negligence of the driver must result from that incompetency. Such a doctrine reasons backwards and denies the dangerous character of the automobile while affirming it. It is not clear that the court adopted this rule. This doctrine is readily justifiable where the statute has placed a prohibition on the parent, for then the owner is negligent *by the statute* if he surrenders his vehicle to one deemed incompetent under the statute. It is doubtful if even this doctrine can properly be applied under the Missouri statute.

No doubt the court in the instant case was concerned with the futility of a judgment against the minor son. The court may have been looking harder for satisfaction than for fault when it said that to give any effect whatever to the statute the father must be held liable. But there is nothing in the wording of this statute interpreted in the instant case, nor in the application of such a statute to existing common law principles in Missouri to show that the legislature intended to establish negligence on the part of a parent who owns an automobile, merely from the fact that he permitted his minor child to drive the automobile.

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46. *Supra* note 43.
47. *Supra* note 34.
48. Mo. REV. STAT. (1929) sec. 7783 (i).
49. Mo. REV. STAT. sec. 7784 (d).
50. Lang Floral Co. v. Sheridan, *supra* note 22; notes (1925) 36 A.L.R. 1138, 1152; 42 C. J. 1078; TORTS RESTATEMENT (Am. L. Inst. 1929) sec. 184b. But see Allen v. Coglizer, 208 S. W. 102 (Mo. App. 1919).