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The Tennessee Statutory Presumption of Agency by the Operation of a Motor Vehicle

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jurisdictional amount requirement is satisfied by the value of plaintiff's interest and the defendant's interest is either not considered[35] or else is admittedly of insufficient value,[36] and (2) where the jurisdictional amount requirement is not satisfied by the value of either party's interest.[37] On the other hand, there are outstanding cases where jurisdiction was upheld, either in spite of the admission that plaintiff's interest was of insufficient value,[38] or without consideration of plaintiff's interest.[39]

The conclusion to be drawn is that in any type of action in which it may reasonably be asserted that the actual matter in controversy is something more than the bald right upon which plaintiff bases his prayer for relief, the courts will probably not be inclined to deny jurisdiction merely because that right is of slight pecuniary value. Indeed, with regard to federal question cases, it has been suggested that the amount requirement ought to be abolished altogether.[40] Certainly the courts have adequately demonstrated that they are not going to submit wholeheartedly to the plaintiff-viewpoint rule without an express command from the Supreme Court.

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THE TENNESSEE STATUTORY PRESUMPTION OF AGENCY BY THE OPERATION OF A MOTOR VEHICLE

I. INTRODUCTION

In cases involving the negligent operation of a vehicle by a person not the owner plaintiffs have experienced extreme difficulty in proving that a master-servant relationship existed between the driver and the owner at the time of the accident so as to render the owner liable under the doctrine of respondeat superior.[1] It is frequently of the utmost importance to a plaintiff

35. Purcell v. Summers, 126 F.2d 390 (4th Cir. 1942); Cappetta v. Atlantic Refining Co., 12 F. Supp. 89 (D. Conn. 1935).

36. Glenwood Light Co. v. Mutual Light Co., 239 U.S. 121, 36 Sup. Ct. 30, 60 L. Ed. 174 (1915); John B. Kelly, Inc. v. Lehigh Nav. Coal Co., 151 F.2d 743 (3rd Cir. 1945).

37. Central Mexico Light Co. v. Munch, 116 F.2d 85 (2d Cir. 1940); Marcus Brown Holding Co. v. Pollak, 272 Fed. 137 (S.D.N.Y. 1920).

38. Ridder Bros., Inc. v. Blethen, 142 F.2d 395 (9th Cir. 1944); Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604 (10th Cir. 1940); Ross v. Southern Ry., 20 F. Supp. 556 (W.D.S.C. 1937); Armstrong v. Townsend, 8 F. Supp. 953 (S.D. Ind. 1934).

39. Sterl v. Sears, 88 F. Supp. 431 (N.D. Texas 1950); Griffith v. Enochs, 43 F. Supp. 352 (W.D. La. 1942).

40. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROB. 216, 225 (1948).

1. Besides the theory of respondeat superior, liability has also been predicated in appropriate cases on the owner's negligence by entrusting the vehicle to one he knew or should have known was incompetent, reckless, or careless. See Robertson v. Aldridge, 185 N.C. 292, 116 S.E. 742 (1923); Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926); Note, 36 A.L.R. 1137, 1148 (1925); Nixson, *Changing Rules of Liability in Automobile Accident Litigation,* 3 LAW & CONTEMP. PROB. 476 (1936). Liability has further been grounded on the family purpose doctrine, King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918); the dangerous instrumentality doctrine, Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255 (1920); and on various statutory extensions of an owner's liability, Note, 21 MINN. L. REV. 823 (1937).

to prove that this relationship did exist, because in a large number of cases it is the owner of the vehicle, not the driver, who is financially responsible. A large majority of the courts came to recognize the empirical proposition that proof of ownership of a motor vehicle involved in an accident is sufficient to raise a prima facie case that the owner is liable under respondeat superior.[2] A minority of the courts held that proof of ownership alone, without further evidence tending to prove a master-servant relationship, was insufficient to create a presumption that the person operating the vehicle at the time of the accident was the servant of the owner.[3] The Tennessee court aligned itself with the minority view by holding that a prima facie case of the master-servant relationship is not established until the plaintiff produces evidence showing not only that the defendant was owner of the vehicle but that it was driven by a person generally employed as a servant and was being operated under conditions resembling those which normally attend its use in the master's business.[4] The Tennessee court seems to reason that even though it may be legitimate to presume from the fact of ownership that a master-servant relationship existed between the driver and the owner of a vehicle, it is not permissible to then presume from this master-servant relationship that the driver was acting within the scope of his employment.[5] In order to surmount the evidentiary difficulties created by the common law doctrine of respondeat

2. See, *e.g.*, Rooks v. Swift & Co., 210 Ala. 364, 98 So. 16 (1923); Terry Dairy Co. v. Parker, 144 Ark. 401, 223 S. W. 6 (1920); Dowling v. Nicholson, 101 Fla. 672, 135 So. 288 (1931); Landry v. Oversen, 187 Iowa 284, 174 N.W. 255 (1919); Ahlberg v. Griggs, 158 Minn. 11, 196 N.W. 652 (1924); Miller v. Service & Sales, 149 Ore. 11, 38 P.2d 995, 96 A.L.R. 628 (1934); Jones v. Cook, 90 W.Va. 710, 111 S.E. 828 (1922); Notes, 25 N.C.L. REV. 491 (1947), 74 A.L.R. 951 (1931).

3. See, *e.g.*, Middletown Trust Co. v. Bregman, 118 Conn. 651, 174 Atl. 67 (1934); Tice v. Crowder, 119 Kan. 494, 240 Pac. 964, 42 A.L.R. 893 (1925); Spencer v. Fisel, 254 Ky. 503, 71 S.W.2d 955 (1934); Bourgeois v. Mississippi School Supply Co., 170 Miss. 310, 155 So. 209 (1934) (evidence that driver was owner's truck driver held sufficient further proof); Monaghan v. Standard Motor Co., 96 Mont. 165, 29 P.2d 378 (1934) (evidence that driver was general employee of owner held sufficient further proof); Freeman v. Dalton, 183 N.C. 538, 111 S.E. 863 (1922); Sobolvitz v. Lubric Oil Co., 107 Ohio St. 204, 140 N.E. 634 (1923); Stumpf v. Montgomery, 101 Okla. 257, 226 Pac. 65, 32 A.L.R. 1490 (1924).

4. Davis v. Auto Tire & Vulcanizing Co., 141 Tenn. 527, 213 S.W. 914 (1919); Frank v. Wright, 140 Tenn. 535, 205 S.W. 434 (1917); Core v. Resha, 140 Tenn. 408, 204 S.W. 1149 (1917); Western Union Telegraph Co. v. Lamb, 140 Tenn. 107, 203 S.W. 752 (1918); Goodman v. Wilson, 129 Tenn. 464, 166 S.W. 752 (1914); Good v. Tennessee Coach Co., 30 Tenn. App. 575, 209 S.W.2d 41 (M.S. 1947).

5. The rationale of the Tennessee courts rests on the general rule that one presumption or inference cannot be based on another, or on each other. See, *e.g.*, North Memphis Savings Bank v. Union Bridge & Const. Co., 138 Tenn. 161, 196 S.W. 492 (1917); East Tenn. & Western N.C. R.R. v. Lindamood, 111 Tenn. 457, 78 S.W. 99 (1903); General Outdoor Advertising Co. v. Coley, 23 Tenn. App. 292, 131 S.W.2d 305 (W.S. 1938); Umstattd v. Metropolitan Life Ins. Co., 21 Tenn. App. 312, 110 S.W.2d 342 (E.S. 1937); Nashville, C. & St. L. Ry. v. Sutton, 21 Tenn. App. 31, 104 S.W.2d 834 (M.S. 1936); Gulf Ref. Co. v. Frazier, 19 Tenn. App. 76, 83 S.W.2d 285 (M.S. 1934); Nashville Gas & Heating Co. v. Phillips, 17 Tenn. App. 648, 69 S.W.2d 914 (M.S. 1933); Note, 95 A.L.R. 162 (1935). Some cases contain language to the effect that a fact may be inferred from circumstantial evidence and such fact may be the basis for a further inference to the ultimate or sought-for fact. Good v. Tennessee Coach Co., 30 Tenn. App. 575, 209 S.W.2d 41 (M.S. 1947); Adamant Stone & Roofing Co. v. Vaughn, 7 Tenn. App. 170, 178 (M.S. 1927); Note, 25 N.C.L. REV. 491 (1947).

superior, some states have enacted statutes declaring that the owner of a vehicle shall be liable in civil damages for its negligent operation.[6] Other states, taking a more indirect approach, have passed acts which provided that the driver of a negligently operated vehicle shall be deemed to be the agent of the owner of the vehicle.[7] By the passage of the following two Acts the Tennessee Legislature sought to overcome the evidentiary burden which had been imposed by the rule of the Tennessee Supreme Court:

> "2701. In all actions for injury to persons and/or to property caused by the negligent operation or use of any automobile, auto truck, motorcycle, or other motor propelled vehicle within this state, proof of ownership of such vehicle, shall be prima facie evidence that said vehicle at the time of the cause of action sued on was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which said injury or cause of action arose.
>
> "2702. Proof of the registration of said motor propelled vehicle in the name of any person, shall be prima facie evidence of ownership of said motor propelled vehicle by the person in whose name said vehicle is registered; and such proof of registration shall likewise be prima facie evidence that said vehicle was then and there being operated by the owner or by the owner's servant for the owner's use and benefit and within the course and scope of his employment."[8]

II. Scope of the Presumption

The statute in its present form was first construed in *Racy Cream Co. v. Walden*,[9] where the court held the phrase "shall likewise" in section 2702 to mean that either proof of ownership, or proof of registration, was sufficient to raise a presumption, and that it was not the intent of the legislature to modify the Act of 1921 by the Act of 1923. The court recognized the ambiguous nature of the word "authority," that it may mean only permission, but the court decided that the context of section 2701 indicated it was used

6. *E.g.*, "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." Cal. Vehicle Code § 402(a) (1943). "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, expressed or implied, of such owner . . . ." N. Y. Veh. & Traffic Law § 59.

7. *E.g.*, "Whenever any motor vehicle . . . shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, expressed or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof." Minn. Stat. Ann. § 170.54 (1946). "Whenever any motor vehicle shall be used, operated . . . upon any public highway of this state with the consent of the owner . . . the operator thereof . . . shall, in case of accident, be deemed to be the agent of the owner. . . ." R.I. Pub. Laws 1940, c. 867 § 10. Brodsky, *Motor Vehicle Owners' Statutory Vicarious Liability in Rhode Island*, 19 B.U.L. Rev. 448 (1939); Note, 13 St. Johns L. Rev. 362 (1939).

8. Tenn. Code Ann. §§ 2701, 2702 (Williams 1934). Section 2701 *in toto*, and § 2702 down to the semicolon, were taken from Tenn. Pub. Acts 1921, c. 162. The remainder of § 2702 is from Tenn. Pub. Acts 1923, c. 59.

9. 1 Tenn. App. 653 (E.S. 1925).

to mean "direction or supervision, signifying control of subordinate agency."[10] This construction appears quite correct, for words in a statute should be given their ordinary and generally accepted meaning without a forced or subtle construction.[11] Moreover, when a statute is amended it should thereafter be construed as if the amendment had always been a part of the original act.[12] The amendatory statute incorporates itself into the amended act and the two become one statute.[13]

The construction placed upon these two sections by the *Racy* case was apparently followed until *Woodfin v. Insel*[14] was decided. In that case ownership of the vehicle in question was conceded by the defendant, but whether the driver was acting in the scope of his employment at the time of the accident was vigorously disputed. The plaintiff claimed the benefit of the presumption contained in section 2701 (proof of ownership), but no evidence of the car being registered in the defendant's name was introduced.[15] Without mentioning the *Racy* case, the court in one sweeping statement declared that since section 2701 was in derogation of the common law,[16] it must be strictly construed and its application limited to those instances where there was only proof of registration and no proof of agency.[17] No attempt was made by the court to rationalize its use of the foregoing canon of statutory construction, to the exclusion of all others,[18] in view of the fact that the statute is remedial in nature and procedural in effect.[19]

10. Racy Cream Co. v. Walden, 1 Tenn. App. 653, 669 (E.S. 1925); Palmer v. State, 47 Tenn. 82 (1869); State v. Smith, 24 Tenn. 394 (1844); Scholze v. Scholze, 2 Tenn. App. 80 (M.S. 1925).

11. Tobin v. Estes, 168 Tenn. 403, 79 S.W.2d 550 (1935); Hedges v. Shipp, 166 Tenn. 451, 62 S.W.2d 49 (1933); Cherokee Brick Co. v. Bishop, 156 Tenn. 168, 299 S.W. 770 (1927); Partee v. Memphis Concrete Pipe Co., 155 Tenn. 441, 295 S.W. 68 (1927); Hickman v. Wright, 141 Tenn. 412, 210 S.W. 447 (1918); Dwyer v. Progressive Bldg. & Loan Ass'n, 20 Tenn. App. 16, 94 S.W.2d 725 (W.S. 1935).

12. Stonega Coke & Coal Co. v. Southern Steel Co., 123 Tenn. 428, 131 S.W. 988 (1910).

13. Armstrong v. City of South Fulton, 169 Tenn. 54, 82 S.W.2d 862 (1935); State v. Oliver, 162 Tenn. 100, 35 S.W.2d 396 (1931).

14. 13 Tenn. App. 493 (M.S. 1931).

15. It was not actually material in this case that the plaintiff had relied on proof of ownership to establish a presumption, because the rebutting evidence introduced by the defendant of the nonexistence of a master-servant relationship would have dissipated a presumption based on proof of registration. See in this regard McMahan v. Tucker, 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948); See note 37 *infra*, and text corresponding thereto.

16. Linder v. Metropolitan Life Ins. Co., 148 Tenn. 236, 255 S.W. 43 (1923); Hand v. Cole, 88 Tenn. 400, 12 S.W. 922 (1890); Wingfield v. Crosby, 45 Tenn. 241 (1867); Hearn v. Ewin, 43 Tenn. 399 (1866). But the rule should not apply when it would tend to impair the remedial nature of a statute. Stem v. Nashville Interurban Ry., 142 Tenn. 494, 221 S.W. 192 (1919). See for general discussion, Fordham and Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950); Llewellyn, *Remarks on the Theory of Appellate Decision, and the Rules or Canons About How Statutes are Construed* 3 VAND. L. REV. 395 (1950); Note, 3 VAND. L. REV. 586 (1950).

17. Woodfin v. Insel, 13 Tenn. App. 493, 496 (M.S. 1931).

18. *Cf.* O. H. May Co. v. Anderson, 156 Tenn. 216, 300 S.W. 12 (1927) (all rules for statutory construction should be considered); Graves v. Illinois C.Ry., 126 Tenn. 148, 148 S.W. 239 (1912) (statute in conflict with common law, statute prevails).

19. Stiner v. Powells Valley Hardware Co., 168 Tenn. 99, 75 S.W.2d 406 (1934).

The judicial interpretation of the two sections made by the *Woodfin* case was repeated by later decisions, and in *East Tennessee and Western North Carolina Motor Transportation Co. v. Brooks*[20] the holding was finally consecrated in a Supreme Court opinion. There it was held that section 2701 did not obviate the necessity of the plaintiff proving that a master-servant relationship existed between the defendant and the negligent driver of a vehicle, but only made proof of ownership the basis of a presumption that the vehicle was being used with the owner's permission at the time of the accident. According to the court, section 2702 was passed to remedy this effect of section 2701... The court did not explain why the legislature had passed an Act the only effect of which was to create a presumption that a vehicle was being used with the owner's permission. How could such a presumption materially aid a plaintiff in proving an owner of a vehicle liable under respondeat superior? It seems the court in determining the intent of the legislature would have been justified in imputing some knowledge of the law of agency to the legislature. Apparently section 2701 is completely emasculated by this judicial pronouncement that proof of registration is absolutely necessary to raise the statutory presumption. Thus, in view of the doctrine of stare decisis, it seems that the requirement of proof of registration is now the law in regard to both sections.

The construction placed on the statute as amended has led to some rather incongruous consequences. In *Maysay v. Hickman*[21] the plaintiff was injured by the negligent operation of a truck driven by an employee of a partnership which was composed of two members. The partner who actually owned the truck was sued, but the other partner in whose name the truck was registered was not sued. The court held that no statutory presumption was raised, because the proof did not show registration in the name of the defendant. The same anomalous result was reached in the subsequent case of *English v. George Cole Motor Co.*,[22] which involved a "hit and run" accident. All the evidence the plaintiff had was the testimony of a bystander who wrote down the license tag number from the fleeing automobile, but unfortunately it showed the car was registered in the name of its prior owner who had sold the car to the defendant before the accident. There was no proof identifying the driver. Would not the plaintiff's rights in each of these instances have been afforded greater protection, and a more just disposition made of each case, had proof of ownership been sufficient to compel the defendant to produce at least some evidence negating the plaintiff's respondeat superior allegations? A rectification of this situation was attempted by the court

20. 173 Tenn. 542, 121 S.W.2d 559 (1938).
21. 20 Tenn. App. 262, 97 S.W.2d 662 (E.S. 1936).
22. 21 Tenn. App. 408, 111 S.W.2d 386 (M.S. 1937).

on two occasions when it used the concepts of estoppel[23] and apparent agency[24] as devices for precluding the registered owner from denying his ownership of the vehicle. Subsequent cases indicate that these methods have been rigidly limited to their particular facts,[25] and it is perhaps improbable they will be used in future cases involving different factual situations.

III. PROCEDURAL EFFECT OF THE PRESUMPTION OF SECTION 2702

In all the cases in which an analysis of the presumption[26] created by the two sections was undertaken, it has been classified as a rebuttable presumption having only the procedural effect of shifting the burden of producing evidence.[27] The burden of proof (risk of nonpersuasion) remains at all times with the plaintiff, or with him who alleges the affirmative of an issue.[28] In *Wright v. Bridges*[29] the court held that proof of registration establishes the basic fact from which the fact of agency is to be presumed. Where the plaintiff shows registration of the vehicle in the name of the defendant and the latter does not controvert the fact of agency thus presumed, the plaintiff

23. In United States Fidelity & Guaranty Co. v. Allen, 158 Tenn. 504, 14 S.W.2d 724 (1929) the defendant had sold the vehicle to another prior to the accident without changing the registration as then required by TENN. CODE ANN. § 1154 (Williams 1934) (later repealed by Tenn. Pub. Acts 1935, c. 55, § 18) and the court denied the registered owner the right to disclaim responsibility.

24. Several ice companies set up a dummy corporation in McCoy v. Willis, 177 Tenn. 36, 145 S.W.2d 1020 (1940) to escape paying more than one privilege tax to do business, and the ice trucks were registered in the corporate name. The court held the corporation was an apparent agent of the defendant ice company thereby rendering the latter liable.

25. Biggert v. Memphis Power & Light Co., 168 Tenn. 638, 80 S.W.2d 90 (1935) (failure of former owner to remove license plates and report sale held not proximate cause of accident); Callis v. Capitol Chevrolet, 26 Tenn. App. 309, 171 S.W.2d 828 (1943) (conditional vendor not liable for negligence of vendee in absence of proof of agency). In the latter case it is stated the court intended to limit United States Fidelity & Guaranty Co. v. Allen, 158 Tenn. 504, 14 S.W.2d 724 (1929) to the facts of that case.

26. "In judicial opinions it [a presumption] is often used . . . as loosely as in casual conversation. Even when talking in technical terms the courts are in disagreement both as to definition and as to legal result. Consequently it is difficult to interpret or to classify the precedents." Morgan, *Further Observations on Presumptions,* 16 So. CALIF. L. REV. 245 (1943).

27. Curtis v. Kyte, 21 Tenn. App. 115, 106 S.W.2d 234 (M.S. 1937) (§ 2702 does not dispense with necessity of alleging master-servant relationship); Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618 (M.S. 1932); Emert v. Wilkerson, 7 Tenn. App. 269 (E.S. 1928). The same position is taken in other states; see Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 N.E. 897 (1908); Guild v. Metropolitan Life Ins. Co., 303 Ill. App. 509, 25 N.E.2d 558 (1940); North v. Jones, 53 Ind. App. 203, 100 N.E. 84 (1912); Shoemaker v. Johnson, 200 Mo. App. 209, 204 S.W. 962 (1918); Savage v. Rhode Island Co., 28 R.I. 391, 67 Atl. 633 (1907).

28. For a general discussion of the subject see Chicago Stock Yards Co. v. Comm'r, 129 F.2d 937, 948 (1st Cir. 1942); State v. Pike, 49 N.H. 399 (1870); Leask v. Hoagland, 205 N.Y. 171, 98 N.E. 395 (1912); Rock Island Plow Co. v. Balderson, 26 S.D. 399, 128 N.W. 482 (1910); Field v. Gordon, 30 Tenn. App. 110, 203 S.W.2d 934 (W.S. 1947); Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof,* 68 U. OF PA. L. REV. 307 (1920). "[T]he sole effect of every presumption shall be to place upon the opponent the burden of persuading the trier of fact of the nonexistence of the presumed fact." Morgan and Maguire, *Looking Backward and Forward at Evidence,* 50 HARV. L. REV. 909, 913 (1937).

29. 16 Tenn. App. 576, 65 S.W.2d 265 (M.S. 1933).

is entitled to a directed verdict in his favor.[30] But if the defendant introduces evidence that the master-servant relationship did not in fact exist, the plaintiff must then introduce evidence to the contrary or suffer an adverse ruling on a motion by the defendant for a directed verdict.[31]

In the leading case of *Southern Motors Inc. v. Morton*[32] the court made a thorough analysis of this statutory presumption, and carefully explained its application. The court stated that the presumption is to be distinguished from one that is logically drawn from certain proven facts. Such a presumption is evidence and remains in the case.[33] However, the presumption created by section 2702 is not evidentiary and cannot be weighed with or against other direct or circumstantial evidence for the reason that the presumed fact of agency is not a logical deduction from the basic fact of registration. Hence, when the defendant introduces any credible evidence tending to prove the nonexistence of a master-servant relationship, the presumption disappears and is no longer available to support a verdict.[34] The court explained, however, that if the defendant's rebutting evidence is contradicted, or otherwise discredited, the trial judge must send the case to the jury for them to decide according to the preponderance of proof.[35] It further stated that since the presumption operates primarily on the power of the trial judge, it is not a proper factor to be considered by the jury in any event. An instruction to the jury regarding the presumption is prejudicial error.[36]

30. Fulmer v. Jennings, 24 Tenn. App. 635, 148 S.W.2d 39 (M.S. 1940); Long v. Tomlin, 22 Tenn. App. 607, 125 S.W.2d 171 (M.S. 1938).

31. Hodges v. West, 8 Tenn. App. 307 (M.S. 1928). Compare the following contrary view: "If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing. And if the judicial desire for the result expressed in the presumption is buttressed by either the demands of procedural convenience or is in accord with the usual balance of probability, it is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect. . . . The conclusion then is that most presumptions should, where applicable at all, continue to operate unless and until the evidence persuades the trier [of fact] at least that the non-existence of the presumed fact is as probable as its existence. This would not interfere with the accepted dogma prohibiting the shifting of the burden of persuasion." Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 82, 83 (1933).

32. 25 Tenn. App. 204, 154 S.W.2d 801 (W.S. 1941).

33. See also H. G. Hill Co. v. Squires, 25 Tenn. App. 164, 153 S.W.2d 425 (E.S. 1941) (an inference or presumption from certain proven circumstances is of a higher character than a legal presumption existing solely for procedural purposes, and is not destroyed *ipso facto* by contrary evidence); Berretta v. American Casualty Co., 181 Tenn. 118, 178 S.W.2d 753 (1944); Elliott v. Williamson, 79 Tenn. 38 (1883).

34. See also Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (W.S. 1945); Card v. Commercial Casualty Ins. Co., 20 Tenn. App. 132, 95 S.W.2d 1281 (M.S. 1936); Woody v. Ball, 5 Tenn. App. 300 (E.S. 1927); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291 (1927); Note, 8 N.C.L. REV. 298 (1930).

35. See also Green v. Powell, 22 Tenn. App. 481, 124 S.W.2d 269 (E.S. 1938); Welch v. Young, 11 Tenn. App. 431 (M.S. 1930); Williams v. Bass, 8 Tenn. App. 482 (M.S. 1928); Note, 5 A.L.R.2d 196 (1949).

36. See also McMahan v. Tucker, 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948); Worth v. Worth, 48 Wyo. 441, 49 P.2d 649, 103 A.L.R. 107 (1935). For a general discussion of how courts exercise control over juries, see Farley, *Instructions to Juries — Their Role in the Judicial Process*, 42 YALE L.J. 194 (1932).

The quantum of proof which the defendant must adduce to negate the statutory presumption was not clearly settled until *McMahan v. Tucker*[37] definitely resolved the question. Theretofore it was said the presumption was not overcome until the defendant offered "positive uncontradicted indisputable proof."[38] The court in the *McMahan* case stated this rule had been modified so that upon the introduction of *any* credible evidence by the defendant the statutory presumption disappears.[39] The rule as modified appears to be sound for two reasons: (1) it is a realistic view of the substantive evidence appearing in the record during the various stages of a trial; (2) it affords a workable guide which can be readily applied by trial judges. When the plaintiff rests his case, having introduced only proof of registration, there is actually no evidence in the record supporting recovery under the doctrine of respondeat superior. But for section 2702, there would be a directed verdict against the plaintiff, because there is no logical relationship between the basic fact of registration and the presumed fact. Proof of registration *per se* does not tend sufficiently to prove that the driver was operating the vehicle for the owner's benefit at the *very* time of the accident. Therefore, if the defendant produces any evidence whatsoever, it becomes the first evidence in the record on the point; and if the plaintiff does nothing more, the defendant receives a directed verdict in his favor.[40]

Suppose, in addition to submitting proof of registration, the plaintiff introduces evidence which either directly or circumstantially tends to prove a master-servant relationship. Would *any* rebutting evidence on the subject, with the plaintiff not adducing any further proof, entitle the defendant to a directed verdict? The answer is no. This situation was dealt with in *McConnell v. Jones*[41] where the plaintiff not only invoked section 2702 but also introduced circumstantial evidence tending to prove the owner liable under respondeat superior. The court held that the statutory presumption was dissipated by the rebutting testimony of the defendant's witnesses, but that it was not sufficient to overcome the circumstantial evidence previously presented by the plaintiff so as to permit the trial judge to take the issue

37. 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948).

38. Williams v. Bass, 8 Tenn. App. 482, 490 (M.S. 1928).

39. Compare the Massachusetts statute which states that "In all actions to recover damages for injuries to the person or to property or for the death of a person, arising out of an accident or collision in which a motor vehicle was involved, evidence that at the time of such accident or collision it was registered in the name of the defendant as owner shall be prima facie evidence that it was being operated by and under the control of a person for whose conduct the defendant was legally responsible, and absence of such responsibility shall be an affirmative defence to be set up in the answer and proved by the defendant." MASS. ANN. LAWS c. 231, § 85A (1933). Also see, Arrigo v. Lindquist, 324 Mass. 278, 85 N.E.2d 782 (1949), 29 B.U.L. REV. 551 (1949); Thomas v. Meyer Store, 268 Mass. 587, 589, 168 N.E. 178 (1929), 4 U. OF CIN. L. REV. 89 (1930).

40. Greer v. McKee, 13 Tenn. App. 625 (W.S. 1931); Woody v. Ball, 5 Tenn. App. 300 (E.S. 1927). *Contra:* D'Aleria v. Shirey, 286 Fed. 523 (9th Cir. 1923); Dowdell v. Beasley, 17 Ala. App. 100, 82 So. 40 (1919); Crain v. Sumida, 59 Cal. App. 590, 211 Pac. 479 (1922); Gallagher v. Gunn, 16 Ga. App. 600, 85 S.E. 930 (1915); Purdy v. Sherman, 74 Wash. 309, 133 Pac. 440 (1913).

41. 228 S.W.2d 117 (Tenn. App. M.S. 1949).

from the jury. On the contrary, the conflicting evidence was such as to raise a material question of fact for the jury to decide.[42] In instances where the defendant offers no rebutting evidence, the language which the court used seems to indicate that the introduction of evidence by the plaintiff would not preclude him from relying on the statutory presumption should his evidence not tend sufficiently to prove a master-servant relationship.[43]

After the defendant has introduced some evidence tending to prove nonliability under respondeat superior, how may the plaintiff avoid a directed verdict? This may obviously be accomplished by coming forward with evidence which disputes the evidence presented by the defendant in rebutting the statutory presumption. A more troublesome problem is created, however, when the plaintiff does not introduce extrinsic evidence but only attempts on cross-examination to expose inconsistencies in the testimony of the defendant's witnesses or attacks their veracity. The court, in *Gouldener v. Brittain*,[44] held that the defendant should have a directed verdict unless the plaintiff's evidence is of "a substantial nature tending to discredit"[45] the defendant's witnesses. Where the contradictions in the testimony of the defendant's witnesses are either colorable or reconcilable, the defendant is entitled to a directed verdict. Clearly, then, a jury question is made in this instance only when the plaintiff places either the defendant's evidence or the veracity of his witnesses sufficiently in dispute.

IV. Conclusion

If the conclusions expressed herein are correct, the Tennessee Legislature apparently intended that a presumption of agency should be raised upon proof of ownership and that proof of registration should likewise raise the same presumption. This intent could be given its true effect if the two sections were changed to read as follows:

> 2701. In all actions for injury to persons and/or to property caused by the negligent operation or use of any automobile, auto truck, motorcycle, or other motor propelled vehicle within this state, proof of ownership of such vehicle, shall be prima facie evidence that said vehicle at the time of the cause of action sued on was then and there being operated by the owner or by the owner's servant for the owner's use and benefit and within the course and scope of his employment in the transaction out of which said injury or cause of action arose.

42. Bry-Block Mercantile Co. v. Byrd, 4 Tenn. App. 178 (W.S. 1926).

43. In *res ipsa loquitur* cases some courts have held that by submitting specific evidence of negligence the plaintiff waives reliance on the doctrine. Heffter v. Northern States Power Co., 173 Minn. 215, 217 N.W. 102 (1927); Baldwin v. Smitherman, 171 N.C. 772, 88 S.E. 854 (1916); Anderson v. Northern Pac. Ry., 88 Wash. 139, 152 Pac. 1001 (1915); Prosser, Torts 306 (1941). This view, however, is not followed by the Tennessee court.

44. 173 Tenn. 32, 114 S.W.2d 783 (1937).

45. Frank v. Wright, 140 Tenn. 535, 542, 205 S.W. 434 (1917); McMahan v. Tucker, 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948); Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618, 627 (M.S. 1932).

> 2702. Proof of the registration of said motor propelled vehicle in the name of any person shall likewise be prima facie evidence that said vehicle was then and there being operated by the person in whose name the vehicle was registered or by his servant for his use and benefit and within the course and scope of the employment.

Repealing or amending the foregoing sections to provide that proof of ownership shall raise a rebuttable presumption, with proof of registration being only another method of raising a presumption of agency, will not solve the real problem, which is the appalling economic and human waste resulting from the daily massacre on our highways.[46] To the detriment of our national well-being much of this loss goes uncompensated[47] because in many instances the meritorious claims of deserving victims are all too often defeated by their inability to obtain sufficient evidence to prove that a driver was acting on his master's business at the *very* time of the accident. The driver, whether acting for another or not, is frequently judgment proof. The concept of respondeat superior is apparently ill-suited to accomplish the desired result in this modern day and age of rapid transportation. It seems that our law must achieve a greater degree of realism so as to effect a closer correspondence between the law and present conditions. The present Motor Vehicle Financial Responsibility Act in Tennessee is a start in the right direction.[48] It has been suggested that some form of a compulsory insurance program, analogous to the workmen's compensation laws, will probably be the ultimate solution.[49]

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46. In 1948 there were 8,200,000 automobile accidents in the United States with fatalities numbering 32,000. National Safety Council, Accident Facts 40 (1949); The Nashville Tennessean, Oct. 8, 1950, § E, p. 10, col. 7 (property damage in motor vehicle accidents averages $800,000,000 annually).

47. Corstvet, *The Uncompensated Accident and Its Consequences*, 3 LAW & CONTEMP. PROB. 466 (1936); Hogan and Stubbs, *The Sociological and Legal Problem of the Uncompensated Motor Victim*, 11 ROCKY MT. L. REV. 12 (1938).

48. TENN. CODE ANN. § 2715.36 (Williams Supp. 1949); Note, 21 TENN. L. REV. 341 (1950). Forty-two states including the District of Columbia have financial responsibility laws with only Arkansas, Louisiana, Mississippi, Nevada, South Carolina and Texas not having such a law. The basic scheme leaves all drivers free to operate their vehicles without liability insurance until they are involved in an accident in which personal injury or property damage above a certain minimum amount occurred. The owner must then prove he is financially responsible to pay judgment up to a certain amount—usually for accidents arising in the future. Such proof ordinarily means procuring liability insurance. Failure to give such proof leads to revocatoin of driver's license or motor vehicle registration. Braun, *The Financial Responsibility Law*, 3 LAW & CONTEMP. PROB. 505 (1936); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300, 307 (1950) (contains statutory citations of those states which have a financial responsibility law).

49. In Massachusetts an applicant for motor vehicle registration must present a certificate of insurance, or be subject to fine or imprisonment if found guilty of driving without insurance. MASS. ANN. LAWS c. 90, § 34 A-J; c. 175, § 113 A-G (1946). Elsbree and Roberts, *Compulsory Insurance Against Motor Vehicle Accidents*, 76 U. OF PA. L. REV. 690 (1928); Carman, *Is a Motor Vehicle Accident Compensation Act Advisable?* 4 MINN. L. REV. 1 (1919); Rollins, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392 (1919).