that if the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care to so control the conduct of the third person as to prevent him from so conducting himself as to create an unreasonable risk of harm to others.[13]

Although there have been a few cases wherein the owner-passenger was considered to be a guest in his own automobile, and was not charged with the contributory negligence of his driver,[14] it is nevertheless difficult to envision how an owner, being present, could usually be considered to have surrendered this right to control his own vehicle. Since this right is an incident of ownership, a previous contractual surrender of control seems to be necessary to bar the imputation of the contributory negligence of the driver to the owner,[15] and such a case in actuality, would be very rare.

The effect of this doctrine seems, however, to have been somewhat muted in cases in which the passenger is co-owner with the driver of the vehicle.[16] The courts have generally refused to impute the contributory negligence of the driver to the co-owner passenger, perceptibly adopting the reasoning that parties having equal legal title to a motor vehicle cannot be permitted to contend for the wheel in moving traffic, and therefore, the imputation of negligence to the joint-owner present upon the theory of equal legal right to domination or control is untenable.[17] It is interesting to note, however, that one jurisdiction in which this distinctive reasoning in regards to co-ownership was expounded, refused to apply the same logic in the case of joint-adventurers.[18] "Are we then to conclude that joint-adventurers who also have an equal legal right to control of a vehicle are expected to contend for the wheel?"[19] In addition, in the majority of cases involving an owner-passenger who is the wife of the driver, the courts have refused to impute the contributory negligence of the husband to the wife, relying on the obvious legal fiction that the husband is still the head of the family, and is therefore assumed to be in complete control of the car.[20]

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13 RESTATEMENT, TORTS § 318 (1934).

14 Williamson v. Fitzgerald, 116 Cal. App. 19, 2 P.2d 201 (1931) (owner, requested to furnish her vehicle for a pleasure trip, turned the keys over to the driver who assumed complete control); Hathaway v. Mathews, 85 Cal. App. 31, 258 Pac. 712 (1927) (owner riding as guest of driver to whom she had loaned the car); Hartley v. Miller, 165 Mich. 115, 130 N.W. 336 (1911) (owner-passenger invited to accompany driver and others on a pleasure trip in her own car); Gorman v. Bratka, 139 Neb. 718, 298 N.W. 691 (1941) (plaintiff owner-passenger purchased the car for his daughter's use and never had driven it; daughter driving at time of accident).

15 Mendolia v. White, 313 Mass. 318, 47 N.E.2d 294 (1943); 5 BLASHFIELD, CYCLOPEDIA OF AUTO. LAW & PRACTICE § 2930 (1954).

16 Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958), 9 DRAKE L. REV. 48 (1959); Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Blevins v. Phillips, 218 Ore. 121, 343 P.2d 1110 (1959); Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (Sup. Ct. 1941).

17 Jenks v. Veeder Contracting Co., *supra*, note 16.

18 Stelling v. Public Lumber Supply Co., 3 App. Div. 2d 713, 159 N.Y.S.2d 459 (2d Dept. 1957).

19 Comment, 11 SYRACUSE L. REV. 314, 316 (1960).

20 Southern R.R. v. Priester, 289 Fed. 945 (4th Cir. 1923); Watkins v. Overland Motor Freight Co., 325 Pa. 312, 188 Atl. 848 (1937); Klein v. Klein, 311 Pa. 217, 166 Atl. 790 (1933); Rodgers v. Saxton, 305 Pa. 479, 481, 158 Atl. 166, 168 (1931) ("The husband is still the head of the family, and when he is at the wheel of the car, even with his wife present, the presumption is that he is in control of

In summary, it is probably safe to assume that in the future, the contributory negligence of the driver will be imputed to the owner-passenger in all but a few rare cases in Iowa. The doctrine of *Phillips v. Foster* certainly seems to be a harsh legal rule in view of the practical fact that in most cases the owner is powerless to control any sudden action by the driver. The rule even seems paradoxical when one considers the admonitions of one fluent jurist, who warns; "Any attempted exercise of the right to control by wresting the wheel from the driver would be foolhardy. Equally menacing to the driver's efficient operation of the machine are raucous reproaches, strident denunciations, or even persistent unctuous admonitions from the back seat . . . in the long run, the greater safety lies in letting the driver alone."[21]

PATRICK WALTER BRICK (June 1963)

FAMILY LAW—Duty of parent to support an adult child.

A natural child of full age, married, and the mother of several children was committed to the county hospital as an indigent person in 1930. The child's mother was 77 years old, a widow, and supporting herself as a charwoman at the time of her daughter's commitment. The mother was declared mentally incompetent in 1955 and became a patient in a private hospital. In 1957 the mother's estate received $300,000 in settlement of a contest relative to the purported will of another daughter. The State of Michigan and the County of Wayne brought actions against the mother's estate for reimbursement of expenditures for the daily care, support, and maintenance of the indigent natural daughter. The Probate Court found the mother's estate not liable for the expenditures before receipt of the $300,000, but was reversed by the Circuit Court. The estate appealed. *Held,* reversed. Ability on the part of the parent or her estate to support her adult child at the time services were rendered to the child as an indigent, is a condition precedent to liability to reimburse the county or state. In re *Van Etten's Estate,* 357 Mich. 206, 98 N.W.2d 499 (1959).

The duty of a parent to support an adult afflicted[1] child may arise in several ways. Some jurisdictions have held that at common law there was a duty to support an adult child who was incapable, either mentally or phys-

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the car, and, in the absence of evidence to the contrary, he is solely responsible for its operation.").

[21] Sherman v. Korff, 353 Mich. 387, 388, 91 N.W.2d 485, 487 (1958).

[1] For present terminology see: Iowa Laws ch. 152 (1959). The word "insane" has been changed to "mentally ill" and the word "feeble-minded" to "mentally retarded" throughout the Iowa Code.

ically, of supporting itself.[2] Other jurisdictions have conditioned liability upon the child being incapable of self-support at the time of reaching majority.[3] Still others have held that the duty to support a child terminates upon the child reaching majority even though it may be incapable of supporting itself at that time.[4] By the common law of Scotland a parent was bound to provide for an indigent adult child, but in England such a duty was not imposed upon the parent.[5] The situation in England was modified by statute in 1601.[6] With the exception of one case,[7] Iowa has consistently held that there is no common-law duty upon the parent to support an adult child,[8] even if it is incapable of supporting itself at the time of reaching majority.[9]

As in England, many jurisdictions have adopted statutes dealing with the problem of support of indigent adult children. In Iowa several different statutes may be applicable. These include statutes directly dealing with support of the insane, those relating to support of the poor, and the uniform support of dependents law.[10] In addition, a parent may also be held contractually liable for the support of an adult child.[11].

Support of the insane received early attention by the Iowa legislature [12] and the original act remained virtually unchanged until 1939.[13] In applying

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[2] Plaster v. Plaster, 47 Ill. 290 (1868); Freestate v. Freestate, 244 Ill. App. 166 (1927).

[3] Crain v. Mallone, 130 Ky. 125, 113 S.W. 67, 22 L.R.A. (n.s.) 1165, 13 Am.St.Rep. 355 (1908); Borchert v. Borchert, 185 Md. 586, 45 A.2d 463, 162 A.L.R. 1078 (1946); Commonwealth v. Ulrick, 32 Pa. County Ct. 283 (1905); Rowell v. Town of Vershire, 62 Vt. 405, 19 Atl. 990, 8 L.R.A. 708 (1890).

[4] Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322 (1901); Humboldt County v. Biegger, 232 Iowa 494, 4 N.W.2d 422 (1942); In re Northcutt, 81 Ore. 646, 148 Pac. 1133 (1915); Moss v. Moss, 163 Wash. 444, 1 P.2d 916 (1931).

[5] Coldingham Parish Council v. Smith, [1918] 2 K.B. 90.

[6] Relief of the Poor, 43 Eliz., ch. 2, § 7 (1601).

[7] Davis v. Davis, 246 Iowa 262, 67 N.W.2d 566 (1954).

[8] Iowa County v. Amana Society, 214 Iowa 893, 243 N.W. 299 (1932); Wright County v. Hagen, 210 Iowa 795, 231 N.W. 298 (1930); Lyons v. Lyons, 195 Iowa 1183, 193 N.W. 444 (1923); Speedling v. Worth County, 68 Iowa 152, 26 N.W. 50 (1885); Monroe County v. Teller, 51 Iowa 670, 672, 2 N.W. 533, 534, (1879) (" . . . A father is not legally bound to support his adult child at common law, nor under the statutes of this State . . . "); 1924 Op. Atty. Gen. 316.

[9] Humboldt County v. Biegger, 232 Iowa 494, 4 N.W.2d 422 (1942).

[10] Iowa Code ch. 230 (1958) (support of the insane); ch. 252 (support of the poor); ch. 252A (uniform support of dependents law; the scope of this chapter is discussed at length in Davis v. Davis, 246 Iowa 262, 67 N.W.2d 566 [1954]).

[11] Dunham v. Dunham, 189 Iowa 802, 178 N.W. 551 (1920) (arising from separation agreement carried into a divorce decree). For a general discussion of contractual liability see Annot., 1 A.L.R.2d 916 (1948).

[12] Iowa Laws ch. 161, § 18 (1860). For subsequent history see Iowa Code Ann. § 230.15 (1949).

The provisions for support of the insane are by reference made applicable to the support of persons with various other afflictions. Parents may be held liable in such cases to the same extent as if their children were insane. See: Iowa Code §222.42 (1958) (preliminary costs of commitment of feeble-minded); §223.16 (care and maintenance of epileptic and feeble-minded patients at Woodward or Glenwood; however, § 223.20 of the Code limits liability to 75% of expense if patient is over 21 and under 31, to 50% if over 31 and under 50, and treatment is free if patient is over 50); § 225A.14 (criminal sexual psychopaths); §224.2 (alcoholics or drug addicts; see 1938 Op. Atty. Gen. 93); § 255.26 (patients receiving treatment or hospital care as indigents; see 1934 Op. Atty. Gen. 26); § 271.15 (tubercular patients except those who qualify as indigents under § 254.8 of the Code; see Woodbury County v. Harbeck, 224 Iowa 1142, 278 N.W. 918 [1938], and 1938 Op. Atty. Gen. 97).

[13] Iowa Laws ch. 98, § 1 (1939) ("Persons legally liable for the support of an insane or idiotic person shall include the spouse, father, mother, and adult children

the early statutes, the Court held that they created no duty beyond that already existing at common law[14] and that their purpose was to extend liability to the estates of those persons already liable during their lifetimes.[15] It was believed that the state was a benevolent protector of the insane[16] and if the county failed in its duty of providing for them, a father could recover his expenses in maintaining an adult insane child from the county.[17] Since the 1939 enactment, a parent is liable for the support and maintenance of an adult insane child.[18] Liability of the parent was not retroactive but began on June 2, 1939, the effective date of the act.[19] The extent of liability imposed is "all sums advanced by the county."[20] The obligation arising is an ordinary debt and there is no statutory lien imposed on the parent.[20½] Collection is made like any other debt, *i. e.*, by action, judgment, and execution if necessary.[21] The insane person, his parents, and certain other persons[22] are all jointly and severally held liable to the county, and the board of supervisors determines which debtor the county will pursue.[23] Present ability is not a condition precedent to the parent's liability in Iowa, and therefore, in a situation similar to the principal case, the parent's estate could be held liable. However, the county board of supervisors may make no demand upon those liable, or may compromise the claim, if it is deemed to be in the best interests of the

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of such insane or idiotic person, and any person, firm, or corporation bound by contract hereafter made for support.")

[14] Iowa County v. Amana Society, 214 Iowa 893, 243 N.W. 299 (1932); Jones County v. Norton, 91 Iowa 680, 60 N.W. 200 (1894); Monroe County v. Teller, 51 Iowa 670, 2 N.W. 533 (1879).

[15] Jones County v. Norton, 91 Iowa 680, 60 N.W. 200 (1894).

[16] County of Delaware v. McDonald, 46 Iowa 170, 171 (1877) ("The State reaches out its strong arm and makes the insane its wards regardless of the care which they may receive at home, or the wishes of those upon whom they are dependent for support.").

[17] Speedling v. Worth County, 68 Iowa 152, 26 N.W. 50 (1885).

[18] Michel v. State Board of Social Welfare, 245 Iowa 961, 65 N.W.2d 89 (1954); Humboldt County v. Biegger, 232 Iowa 494, 4 N.W.2d 422 (1942); 1944 Op. Atty. Gen. 48.

[19] 1944 Op. Atty. Gen. 48.

[20] Iowa Code § 230.15 (1958). Apparently no liability is created against the parents during their lifetimes for care and maintenance of a child in a county or private hospital or home, although their estates are liable. But see: Iowa Code §§ 230.15, 230.18 (1958).

Parents are liable only for sums advanced by the county to the state for care and maintenance in a state institution. This does not include the preliminary costs of commitment of an insane child. See: Iowa Code §§ 230.1, 230.8 (1958); 1948 Op. Atty. Gen. 189; 1930 Op. Atty. Gen. 75; 1904 Op. Atty. Gen. 267.

[20½] See Iowa Code § 230.25 (1958).

[21] In re Estate of Wagner, 226 Iowa 667, 284 N.W. 485 (1939); Clay County v. Meyers, 159 Iowa 745, 140 N.W. 889 (1913); Gressly v. Hamilton County, 136 Iowa 722, 114 N.W. 191 (1907); Fayette County v. Hancock, 83 Iowa 694, 49 N.W. 1040 (1891); Thode v. Spofford, 65 Iowa 294, 17 N.W. 561, 21 N.W. 647 (1884).

The parent's liability is to the county and arises when the county makes its quarterly payment to the state. The account as between the parent and the county is an open running account. There is a statute of limitations of five years which begins to run from the date of the last payment of the county to the state. See Scott County v. Townsley, 174 Iowa 192, 156 N.W. 291 (1916); Cedar County v. Sagar, 90 Iowa 11, 57 N.W. 634 (1894); 1930 Op. Atty. Gen. 174. *But cf.*, Harrison County v. Dunn, 84 Iowa 328, 51 N.W. 155 (1892); Washington County v. Mahaska County, 47 Iowa 57 (1877).

[22] Iowa Code § 230.15 (1958) (" . . . spouse, father, mother, and adult children, . . . and any person, firm, or corporation bound by contract . . . ").

[23] 1948 Op. Atty. Gen. 124.

county.[24]

Another separate source of liability arises from the child's economic condition, because of provision for support of the poor.[25] In the past there has been some confusion as to the respective scope of operation of insane and pauper statutes.[26] An application for assistance to the township trustees is a condition precedent to any parental liability under the pauper statutes.[27] The township trustees have discretion in determining whether the applicant is a pauper and entitled to assistance.[28] The trustees' decision is "quasi-judicial"[29] in nature and when made in good faith and without abuse of discretion is not subject to review.[30] A person need not be completely destitute and without property to qualify,[31] but must be incapable, either mentally or physically, of earning a living. It is not sufficient that he is capable, but unable to support himself or his family.[32] The county can make payments and then proceed against the parents or it can obtain an order of support first.[33] Sufficient ability is a condition precedent to the parent's liability under support of the poor provisions and the burden of proof is on the county to establish it. The parent has the right to a jury trial in an attempt to impose liability.[34] The county may waive its rights against one person and proceed against another,[35] and the board of supervisors has the power to compromise a claim.[36] No liens arise until liability has been placed by judgment.[37] A parent

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24 Plymouth County v. Koehler, 221 Iowa 1022, 267 N.W. 106 (1936). See IOWA CODE §§ 230.15, 230.17 (1958).

25 IOWA CODE ch. 252 (1958).

26 *E.g.*, 1930 OP. ATTY. GEN. 356.

27 Cherokee County v. Smith, 219 Iowa 490, 258 N.W. 182 (1935) (application may be verbal and informal); Cherokee County v. Woodbury County, 212 Iowa 682, 237 N.W. 454 (1931) (application must be made in county of legal settlement of the pauper); Wright County v. Hagan, 210 Iowa 795, 231 N.W. 298 (1930); Bremer County v. Schroeder, 200 Iowa 1285, 206 N.W. 303 (1925) (application made by former employer); Hamilton County v. Hollis, 141 Iowa 477, 119 N.W. 978 (1909) (application made by doctor); Clay County v. Palo Alto County, 82 Iowa 626, 48 N.W. 1053 (1891) (verbal application by friend). Generally, see IOWA CODE § 252.2 (1958).

28 In re Estate of Frentress, 249 Iowa 783, 89 N.W.2d 367 (1958); Polk County v. Owen, 187 Iowa 220, 174 N.W. 99 (1919); Hamilton County v. Hollis, 141 Iowa 477, 119 N.W. 978 (1909); Hardin County v. Wright County, 67 Iowa 127, 24 N.W. 754 (1885); Jasper County v. Osborn, 59 Iowa 208, 13 N.W. 104 (1882); Armstrong v. Tama County, 34 Iowa 309 (1872).

29 Armstrong v. Tama County, 34 Iowa 309 (1872).

30 Cherokee County v. Smith, 219 Iowa 490, 258 N.W. 182 (1935) (overseer of the poor, when one is appointed, has the same powers as the township trustees); Hardin County v. Wright County, 67 Iowa 127, 24 N.W. 754 (1885).

31 See cases cited in note 28 *supra*.

32 Monroe County v. Abegglen, 129 Iowa 53, 105 N.W. 350 (1905).

33 Bremer County v. Schroeder, 200 Iowa 1285, 206 N.W. 303 (1925); Hamilton County v. Hollis, 141 Iowa 477, 119 N.W. 978 (1909); Boone County v. Ruhl, 9 Iowa 276 (1859). Generally, see IOWA CODE §§ 252.2, 252.6-.9 (1958).

34 Cherokee County v. Smith, 219 Iowa 490, 258 N.W. 182 (1935); Hamilton County v. Hollis, 141 Iowa 477, 119 N.W. 978 (1909) (parent liable for actual expenses paid out by the county and for reasonable value of support provided in a county home or elsewhere); Boone County v. Ruhl, 9 Iowa 276 (1859).

35 Jasper County v. Osborn, 59 Iowa 208, 13 N.W. 104 (1882).

36 1946 OP. ATTY. GEN. 36.

37 In re Estate of Frentress, 249 Iowa 783, 89 N.W.2d 367 (1958). A special limitation on recovery requires that action for collection be brought within two years of the date of payment of the expenses. It is not an open running account. See IOWA CODE § 252.13 (1958); Bremer County v. Schroeder, 200 Iowa 1285, 206 N.W. 303 (1925).

may be held liable for the support of an insane adult child under these provisions if the child is a pauper and the requisite procedural steps are taken.[38] Such a procedure could be of importance in situations where it is sought to hold the parents liable for the care of an insane child in a county or private home or hospital.[39]

Under present Iowa law, the duty of a parent to support his adult children may arise in several ways. It is probable that when faced with the situation the county will be the claimant. There is little home of escape from the burden unless the parent is completely unable to contribute to the child's support or some procedural defect can be discovered.

J. ROBERT HARD (June 1963)

FAMILY LAW—The elements of a common-law marriage.

Plaintiff and defendant lived together for about seventeen years. During this time they continuously held themselves out as husband and wife, lived together openly as such, borrowed money and signed notes using the same last name, purchased real estate and took title as husband and wife in joint tenancy, signed mortgages and acknowledged themselves to be husband and wife in joint tenancy. Furthermore, the public considered them as husband and wife. In 1955, the couple moved from Nebraska to Iowa where they continued to hold themselves out as husband and wife in the same manner as they had in Nebraska. They moved back to Nebraska and she then sued for divorce. *Held,* As common law marriages cannot be created under Nebraska law, Nebraska would consider their relationship to be a valid common law marriage only if it were such under Iowa law. The court found no evidence of a present agreement to became husband and wife after the parties moved to Iowa to overcome the presumption of a continuing meretricious relation in Nebraska; therefore, there was no valid common law marriage under Iowa law. *Ropken v. Ropken,* 169 Neb. 352, 99 N.W. 2d 480 (1959).

One of the earliest cases establishing the validity of common law marriages in the United States is a New York decision in 1809.[1] At least twenty jurisdictions have at one time or another recognized common law marriages, but today no more than fourteen do.[2] The recognizing states hold that the

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[38] 1938 OP. ATTY. GEN. 785.
[39] See note 20, *supra.*

[1] Fenton v. Reed, 4 Johns R. 52, 4 Am. Dec. 244 (N.Y. 1809).
[2] Hoage v. Murch Bros. Constr. Co. 60 App. D.C. 218, 50 F.2d 983 (1931); Barnett v. Barnett, 262 Ala. 655, 80 So.2d 262 (1955); Graham v. Graham, 130 Colo. 225, 274 P.2d 605 (1954); Budd v. J. Y. Gooch Co., Inc., 157 Fla. 716, 27 So.2d 72 (1946); Drawdy v. Hesters, 130 Ga. 161, 60 S.E. 451 (1908); Huff v. Huff, 20 Idaho 450, 118 Pac. 1080 (1911); *In re* Estate of Wittick, 164 Iowa 485, 145 N.W. 913 (1914); Shorten v. Judd, 60 Kan. 73, 55 Pac. 286 (1898); Welch v. All Persons, 78 Mont. 370, 254 Pac. 179 (1927); Umbenhower v. Labus, 85 Ohio St. 238, 97 N.E. 832 (1912); Hughes v. Kano, 68 Okla. 203, 173 Pac. 447 (1918); Holgate v. United Electric Rys. Co., 47 R. I. 337, 133 Atl. 243 (1926); Rutledge v. Tunno, 69 S.C. 400, 48 S.E. 297 (1904); Edelstein v. Brown, 100 Tex. 403, 100 S.W. 129 (1907).