NOTES AND COMMENTS

AGENCY

Right of an Assistant to Recover Damages for the Negligence of the Servant

The Cloverdale Dairy Co. forbid their employees to hire assistants, or to permit outsiders to ride upon their trucks, upon which they had painted "no riders" signs. One of their drivers, without their knowledge, employed one Briggs, a minor, to assist him in deliveries. The evidence showed that Briggs always got on the truck away from the company's premises, and always left when the company made its route inspection. Briggs was injured through the negligence of the driver, and he brought a tort action against the Dairy Co. in the Common Pleas Court of Belmont County. The trial court excluded evidence tending to show plaintiff had knowledge of the defendant's rules. Judgment was rendered for the plaintiff. The Court of Appeals affirmed the judgment. The Supreme Court held the exclusion of evidence reversible error, in that the trial court's ruling did not allow defendant opportunity to show whether plaintiff was the servant of the company or of the driver. This, it held, should have been submitted to the jury, and the case was reversed and remanded. *The Cloverdale Dairy Co.* v. *Briggs, Infant,* 131 Ohio St. 261, 2 N.E. (2d) 592, Ohio Bar, June 8, 1936 (1936).

According to agency theory, an assistant can hold the master liable when the servant had authority, express or implied in fact, to seek aid in his work. *Cooper* v. *Lowery,* 4 Ga. App. 120, 60 S.E. 1015 (1908); *Bayne* v. *Billings,* 30 R.I. 53, 73 Atl. 625 (1909); *White* v. *Levi & Co.,* 137 Ga. 269, 73 S.E. 376 (1911); *Potter* v. *Golden Rule Grocery Co.,* 169 Tenn. 240, 84 S.W. (2d) 364 (1935).

Such authority may be implied when an emergency arises that makes it necessary in the employer's interest that his employee have temporary assistance. *Pennsylvania Co.* v. *Gallagher,* 40 Ohio St. 637, 48 Am. Rep. 689 (1884); *Hollidge* v. *Duncan,* 199 Mass. 121, 85 N.E. 186, 17 L.R.A. (N.S.) 982 (1908); *Sloan* v. *Central Iowa R. Co.,* 62 Iowa 728, 16 N.W. 331 (1883); *L. & N. R. Co.* v. *Ginley,* 100 Tenn. 472, 45 S.W. 348 (1897); Mechem, Agency, Sec. 306. Where the work is arduous but is purely manual and requires no skill or dis-

cretion, the power to appoint a subservant may be implied. *Levin* v. *City of Omaha*, 102 Nebr. 328, 167 N.W. 214 (1918); *Williams* v. *Wood*, 16 Md. 220 (1860); *Eldridge* v. *Holway*, 18 Ill. 446 (1857).

In the Brigg's case, the employment of the servant did not carry with it any express authority to hire an assistant and the evidence would seem to reveal none of the elements necessary to imply an authority. In such instances, it has been held that the servant is but the servant of the servant and not of the master; and some courts have said that the assistant cannot recover from the master for any injury resulting from the unauthorized hiring by the servant. *James* v. *Muelhlebach*, 34 Mo. App. 512, (1889); *Looney* v. *Bingham Dairy Co.*, 75 Utah, 53, 282 Pac. 1030, 73 A.L.R. 427 (1929); *Raible* v. *Hygienic Ice & Refrigerating Co.*, 119 N.Y.S. 138, 134 App. Div. 705 (1909); *Driscoll* v. *Scanlon*, 165 Mass. 348, 43 N.E. 100 (1896).

The only other agency theory which might plausibly be advanced on the plaintiff's behalf is that of estoppel. If the defendant placed his servant in such a position that he had the apparent authority to hire an assistant, and if the plaintiff, dealing with the servant, reasonably relied upon this apparent authority, the employer might justly be estopped from denying his liability. In the principal case, however, the plaintiff cannot avail himself of this theory, as it appears from the admitted evidence that the assistant actually knew there was no authority to appoint a sub-servant.

Discarding the agency theory for the moment, one might regard the plaintiff as a mere third person. If the plaintiff had been the guest of the servant, who was driving the master's car in the course of business, and who had no authority to extend such invitation, the master would not be liable to the guest even if the servant were wantonly and wilfully negligent. *Union Gas & Electric Co.* v. *Crouch*, 123 Ohio St. 81, 174 N.E. 6, 33 Ohio L. Rep. 441, 74 A.L.R. 160 (1930).

If it could be said that the plaintiff assisted with the work, deriving no benefit to himself, that is, was a mere volunteer, the courts have held the assistant stands sufficiently in the relation of a servant to preclude recovery from the master under the fellow-servant doctrine. *Mayton* v. *Railroad*, 63 Tex. 77, 51 Am. Rep. 637 (1885); *New Orleans R. R. Co.* v. *Harrison*, 48 Miss. 112, 12 Am. Rep. 356 (1873); *Osborne* v. *Knox & Lincoln R. R.*, 68 Me. 49, 28 Am. Rep. 16 (1877); *Flower* v. *Penn. R. R. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251 (1871).

Ohio courts, however, hold a mere volunteer not a servant of the master, but consider him in the same position as a trespasser, and as such, he can recover from the master only for injury wilfully and

wantonly inflicted by the servant. *General R. Signal Co.* v. *Valois*, 25 Ohio C.C. (N.S.) 423, 35 Ohio C.D. 302 (1909); *Lake Shore & M. S. R. Co.* v. *Duer*, 21 Ohio C.C. 512, 11 Ohio C.D. 761 (1901); *Cleveland Terminal & Valley R. R. Co.* v. *Marsh*, 63 Ohio St. 236, 58 N.E. 821, 52 L.R.A. 142, 9 Am. Neg. Rep. 167, 44 Bull. 343 (1900); *Ohm* v. *Miller*, 31 Ohio App. 446, 167 N.E. 482 (1928).

But where the assistant, at the request of a servant having no authority to seek such aid, serves some purpose of his own, as well as assisting in the work of the master, he is not a mere volunteer, but neither is he a servant of the master. He is considered on the premises by sufferance of the master and as such is entitled to be protected against the negligence of the owner of the premises or his servants. *Cleveland Terminal & Valley R. R. Co.* v. *Marsh, supra; McIntyre Street Railway Co.* v. *Bolton*, 43 Ohio St. 224, 1 N.E. 335, 54 Am. Rep. 803 (1885); *Delivery Co.* v. *Callachan*, 9 Ohio App. 65, 31 Ohio C.A. 345 (1917); *General R. Signal Co.* v. *Valois, supra.*

The facts in the principal case might conceivably be brought under this latter doctrine, as the plaintiff served both his own purpose and that of the master. Following the Marsh case, *supra*, the assistant could thus recover, not on the basis that he was a servant, but on the ground that he was a third person to whom the master was liable for the negligence of his servants.

As to the ruling on the exclusion of evidence, if the trial court's decision was based on the authority implied in fact of the driver to appoint an assistant, the court was correct in excluding evidence that Briggs had knowledge of the rules of the company, as this would be irrelevant; and the Supreme Court erred in its reversal of the decision. In view of that evidence which was admitted this theory would seem untenable, however, as against the weight of evidence. If recovery was allowed on the basis of apparent authority to hire an assistant, which authority was relied on, so as to create an estoppel, the Supreme Court was correct in holding the exclusion of the evidence to be reversible error as this evidence would have helped disprove the essential element of reliance. Finally, if judgment was rendered for the plaintiff on the ground that he was a third person, the decision of the trial court should have been sustained.

Unfortunately, the opinion of the Supreme Court cites no authority and gives no indication of which view was adopted. Since the reversal can only be supported on the theory of estoppel, this would seem the most plausible explanation of its ruling. HELEN BLANK.