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# NOTES AND COMMENTS

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## Agency

### INJURIES TO WIFE AS RESULT OF HUSBAND'S NEGLIGENCE — LIABILITY OF HUSBAND'S EMPLOYER — SCOPE OF EM- PLOYMENT.

The Appellate Court in the case of *The Metropolitan Life Insurance Co. v. Huff*, 48 Ohio App. 412, 16 Abs. 540 (1933) was recently forced to choose which one of two much debated paths to travel. For, as it pointed out in its decision, there was as yet no precedent to be found in Ohio cases. Here a wife, with the consent of her husband's employer, was riding in the employer's automobile which the husband was driving while in the course of his employment making collections. As a result of the husband's negligence and without any contributory negligence on her part, the wife was injured in an accident. She sued the employer for damages received and was allowed to recover. The Court based the employer's liability on the ground of a breach of duty owed the plaintiff, which duty's assertion did not depend upon the relationship of the employer's agent and the party injured. This case has been subsequently reversed upon other grounds immaterial to our discussion. *Metropolitan Life Insurance Co. v. Huff*, 128 Ohio St. 469, 191 N.E. 761, 2 Ohio Op. 23 (1934).

Although there are relatively few decisions on this question, the majority of the earlier cases refused to allow recovery on facts similar to those in the principal case. In *Maine v. James Maine and Sons Co.* 198 Iowa 1278, 201 N.W. 20, 37 A.L.R. 161 (1924), the plaintiff was injured while riding in a company car with her husband, the secretary and general manager of the firm, due to his careless driving. The court disallowed the claim on the grounds that since the plaintiff could not sue her husband at common law, there was no basis for any recovery against the company on the theory of respondeat superior. Furthermore, "If recovery may be had by the wife against the employer, and he in turn may recover against the husband, the family wealth remains the same, except as diminished by the expenses of litigation. It would seem that to permit a recovery against the employer results simply in counten-

ancing an encircling movement where a frontal attack upon the husband is inhibited.”

In *Doremus v. Root*, 23 Wash. 710, 54 L.R.A. 649 (1901) it is said, “The act of an employee even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable, because he committed the act which caused the injury; while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master’s business. The primary liability to answer for such an act therefore rests upon the employee and when the employer is compelled to answer in damages therefore, he can recover over against the employee.”

The Supreme Court of the United States took a similar attitude in the case of the *New Orleans and N.E.R.R. Co. v. Jopes*, 142 U.S. 18, 12 Su. Ct. 109, 35 L.E. 919 (1891). A comparatively recent case declared: “Suits between spouses should be confined as heretofore to those having contractual elements or where there is direct statutory authorization, and suits by a spouse against third persons grounded upon the tort of the other spouse, and without contractual elements, fall in the same category.” *Emerson v. Western Seed and Irrigation Co.*, 116 Neb. 180, 216 N.W. 297 (1927).

These cases have, however, been severely criticized in numerous articles, notes, and comments. 38 Harv. Law Rev. 824 (1925); 25 Col. L. Rev. 377 (1925); 9 Minn. Law Rev. 485 (1925); 3 Wis. L. Rev. 188 (1925); and 23 Ill. L. Rev. 174 (1928).

The more recent cases disclose that the courts are no longer adhering to the doctrines asserted by the earlier decisions. Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, in a forceful opinion in the case of *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42, 64 A.L.R. 293 (1928) said: “A trespass, negligent or willful upon the person of a wife does not cease to be a trespass though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity. The trespass may be a crime for which even a husband may be punished, but whether criminal or not, unlawful it remains. As well might one argue that an employer commanding a husband to commit a battery on a wife, might justify the command by the victim’s disability. The em-

ployer must answer for the damage, whether there is trespass by direct command, or trespass incidental to the business committed to the servant's keeping. In each case the maxim governs that he who acts through another, acts by himself." In accord is *Poulin v. Graham* 102 Vt. 307, 147 Atl. 698 (1929): "The right to sue a husband's master is not foreclosed because the wife cannot sue her husband for negligence. The right to proceed against the master is in no sense subordinate or secondary to the right against the servant. It is primary and independent."

Upon facts similar to those in *Poulin v. Graham* a recovery was allowed in the case of *Sidney Chase v. New Haven Waste Material Corp.* 111 Conn. 377, 150 Atl. 107 (1930), where an unemancipated child was allowed to recover from his father's master. The court there decided that "the master's responsibility for the negligence of his servant is bottomed upon a rule of public policy and social justice and rests on the broad ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged in his business and within the scope of their authority. The master's duty is in no sense derivative from the servant's liability."

A recent Wisconsin case has in reality anticipated the view adopted in the principal case, "Though in the state of Ohio, in the jurisdiction of which the cause of action arose and by the laws of which it must be governed, a wife may not sue her husband for a tort committed upon her by him, the question as to whether she may nevertheless sue her husband's employer for injuries sustained by reason of her husband's negligence while acting in the service of such employer not having been decided in such state, is determined in the affirmative, in accordance with what is concluded to be the sounder reasoning of the cases in other jurisdictions; the wrongful act of the husband to his wife does not cease to be wrongful merely because the wife may not recover damages from him" *Hensel v. Hensel Yellow Cab Co.*, 209 Wis. 489, 245 N.W. 159 (1932).

The motive behind the refusal of the courts to countenance a tort action by a wife against her husband was an endeavor to promote domestic tranquility, and not to affect relationships with third parties. "The doctrine rests not only on the ground of the merged existence, but also on account of the unflattering spectacle presented by husband and wife seeking pecuniary compensation from one another for personal wrongs" Eversley, *Domestic Relations*, p. 240 (1925). The wisdom of extending this rule in a way such as was never intended, so as to bar recovery of the wife against third parties where a tortious injury actually

exists, is certainly questionable. To say that the act of the servant was lawful because committed against his wife would be to pervert the meaning and effect of the disability. The chief bone of contention, it seems, has been whether the liability of the master is primary or secondary, derivative or non-derivative. Less emphasis should be placed on this phase of the controversy, and more careful thought given to the broad and general principles behind the employer's liability. He has been held responsible because it has been found desirable that those injuries incidental to carrying on an enterprise be made a part of the cost of operation. Tiffany, Agency, p. 100, 2nd Ed. (1924). Are there any practical reasons that necessitate a different result here? It is believed not. It may be argued that the servant in driving for the defendant, was engaged in the project of earning a living for himself and his wife, and that the project should bear its costs of operation. But such a rule, if carried to its logical conclusion, would disable any one dependent for support on the negligent employee from suing the employer for injuries. If we can apply the analogy of a contract and say that the transaction was between the injured party and the principal, thus regarding the agent husband as a mere conduit, it is difficult to see why a personal disability existing between husband and wife (*inter se*) should be allowed to defeat the wife's right to recover.

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#### LIABILITY OF AGENT ON SIGNATURE MADE IN BEHALF OF CORPORATION — NEGOTIABLE INSTRUMENTS

The plaintiff company held two promissory notes, reading, "I, we, or either of us, promise to pay," etc., and signed, "Central Freightways, Inc., John L. Cannon, Jr., Treas., Lyman H. Treadway, V. P." The plaintiff brought an action on these notes against the agents whose signatures appeared thereon. The defendants demurred to the petition on the ground that it did not state a cause of action against the agents. The demurrer was sustained and plaintiff appealed. Held, that, under Section 8125, Ohio General Code, the individual signers are not personally liable. Weygandt, C. J., dissented. *Cannon, Jr. v. Miller Rubber Co.*, 128 Ohio St. 72, 190 N.E. 210, 39 O.L.R. 656, 40 Bull. 145 (1934).

The statute above referred to, being identical with Section 20 of the Uniform Negotiable Instruments Law, provides that "When the instrument contains or a person adds to his signature words indicating