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Respondeat Superior: The "No Riders" Problem

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owned the whole and conveyed to himself and the other. The court simply considered the former case a stronger one for holding that the four unities do exist. But it seems obvious that it is not a stronger case if it is conceived as one of simultaneous cross conveyances.

As to the objection that clear intention to create a joint tenancy with survivorship does not govern the legal operation of the deed, the court said that "there appears to be a trend away from strict adherence to common law technicalities." And the court went on to say:

> "The modern view appears to be the more sensible and logical: that is where the intention is clear and unequivocal, permit to be done directly, that which could be done indirectly. This would make effectual the interest which the parties by their conveyance intended to create, without regard to those technicalities descending from the feudal period."[34]

This is the real basis for the court's decision and the only one on which it can stand, since the attempt to reconcile the case with the common-law principles is futile.

It is reiterated that the court's desire to give effect to the grantor's intention is commendable, but if a serious contravention of common-law rules is thereby entailed, the advantage would be outweighed by the disadvantages. However, a just result can be attained in the case without violating doctrines of the common law by applying principle (1) above: the undivided half interest of each devolves upon both *as* joint tenants at one and the same time. This justly disposes of the problem without severe violence to common-law principles, and at the same time gives effect to the intention of the grantor.

WILLIAM RICE

RESPONDEAT SUPERIOR. THE "NO RIDERS" PROBLEM

A master is usually held liable for the injuries caused to others by the tortious conduct of his servants when they are acting within the scope of their employment.[1] This doctrine of respondeat superior, which originated about the beginning of the eighteenth century[2] is one of the few relics remaining from the earliest rule governing tortious conduct, which imposed on a man absolute liability for all injuries caused by himself, his family, his servants or even his inanimate prop-

[34] *Supra,* note 1 at 997.

[1] RESTATEMENT, AGENCY sec. 219 (1) (1933).
[2] TIFFANY, AGENCY 99 (2d ed. 1924).

erty[3] The principle of respondeat superior basically imposes upon one person liability for another's wrong and for this reason it has been vigorously attacked as entailing liability without fault.[4] Despite such censure, however, the doctrine continues to be recognized by the courts, although there is a tendency to restrict as much as possible the hardships which it places upon the employer. As Mr. Mechem states, quoting from Wood's Treatise on Master and Servant:

> "'The doctrine holding a master liable for the wrongful acts of his servant is in direct antagonism with that broader doctrine, that every person shall be held to answer for his own wrongs; therefore it is regarded with much jealously by the courts, and is circumscribed into as narrow limits as is consistent with the true interests of society.'"[5]

The controlling factor in determining the master's liability for the tortious act of his servant is whether the servant at the time was acting within the scope or course of his employment.[6] This is usually a question of fact,[7] but the courts have held certain acts or conduct of the servant to be outside the course of his employment as a matter of law One situation where the scope of employment becomes a question of law is where the master places a vehicle in the control of his servant, who, without authority to do so, allows a stranger to ride. The question in such cases is whether the employee is acting within the scope of his employment in relation to the rider, so as to render the employer liable to the invitee if he is injured by the tortious acts of the employee while the employee is on his master's business.

It is the purpose of this note to review briefly several of the numerous cases which have involved this "No Riders" problem and the effect of those decisions upon the doctrine of respondeat superior in Kentucky

In a recent Kentucky case[8] an employee of a transfer company, without authority to do so, allowed the plaintiff, a boy of seventeen, to ride with him while he was making a delivery with the company's truck. In the process of unloading,[9] the plaintiff was injured and recovered a judgment against the transfer company On appeal the

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[3] *Ibid. See* WIGMORE, *Responsibility for Tortious Acts*, 7 HARV. L. REV. 315 (1893).

[4] MECHEM, AGENCY 326 n. 72 (3d ed. 1923).

[5] *Ibid.*

[6] *Id.* at 351.

[7] *Id.* at 352.

[8] Pinson Transfer Co. v. Music, 239 S. W 2d 477 (Ky. 1951).

[9] The court disposed of the question which arose from the fact that the plaintiff was not merely riding in the truck but was helping unload it, by holding that it made no difference as the driver had no authority to procure help and the employer had no knowledge that the drivers engaged such help.

court reversed the judgment of the lower court, holding that it was error to deny the defendant's motion for a peremptory instruction at the close of the plaintiff's evidence.[10] The court adopted the rule that the employer is not responsible for injuries to a person permitted to ride by an employee, who has no authority to extend such invitations, unless the injuries are inflicted by tortious conduct of the employee after he discovers the unauthorized rider in a position of peril. This is but another way of stating the rule of law governing the "No Riders" problem which was adopted by the Kentucky Court in the leading case of *Slusher* v *Hubble*,[11] where the court quoted with approval from Corpus Juris:

> "It is very generally held that a servant has no implied authority to invite or permit a third person to ride on a horse or vehicle in his charge and if, in so doing, the invitee sustains injuries through the negligence of the servant, the master will not be liable, as the servant is not acting within the scope of his authority. In these circumstances, the master owes no duty to the invitee who is a trespasser except to see that he is not wilfully or wantonly injured."[12]

Although these cases represent slightly different rules in that one protects the unauthorized rider from negligent conduct after he is discovered in a position of peril, while the other protects him from wilful and wanton misconduct at any time, it is apparent that both of these rules logically follow from the finding that the rider is a trespasser. Once the rider is considered to be a trespasser, then a duty arises to protect him, not only from wilful and wanton misconduct, but also from negligent acts after he is discovered in a position of peril.[13]

In an early Kentucky case[14] it had been decided that an unauthorized invitee of an employee was a trespasser to the employer and consequently entitled to the same degree of protection as a trespasser. In several later cases, however, no mention of that rule was made and it simply was held that an employee in inviting another to go with him was not acting within the scope of his employment and for that reason the employer was not liable for the injuries sustained by the invitee as a result of the employee's conduct.[15]

Thus we have presented two possible solutions to the problem: (1)

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[10] The court also reversed the decision because of erroneous instructions given to the jury by the lower court.

[11] 254 Ky. 595, 72 S.W 2d 39 (1934).

[12] 39 C. J. 1304 (1925).

[13] PROSSER, TORTS 613 (1941).

[14] Kentucky Central R. R. Co. v. Gastineau's Adm'r., 83 Ky. 119 (1885).

[15] Wigginton Studio, Inc., v. Reuter's Adm'r., 254 Ky. 128, 71 S.W 2d 14 (1934); Electric Bakeries v. Stacy's Adm'r., 252 Ky. 20, 66 S.W 2d 70 (1933); Williams Adm'r. v. Portsmouth By-Product Coke Co., 213 Ky. 96, 280 S.W 479 (1926); Armstrong's Adm'r. v. Sumne & Ratterman Co., 211 Ky. 750, 278 S.W 111 (1925); Corrigan v. Hunter, 139 Ky. 315, 122 S.W 131 (1909).

the invitee can be treated as a trespasser to the employer who owes him a duty to protect him as a trespasser; or (2) the liability of the employer being limited to injuries inflicted in the course of employment, and, the act of inviting others to ride not being in the course of employment, the employer is not liable even for the wilful or wanton acts of his employee which caused injury to the invitee. Let us examine further these two possible solutions.

The leading case in which the employer was held liable to the unauthorized rider for the wilful and wanton misconduct of his employee is *Higbee Co.* v *Jackson.*[16] In that case the court reasoned that as the employee had no authority to allow others to ride, the invitee was in fact a trespasser and entitled to the protection owed to a trespasser and since the employee's wilful and wanton acts were committed in the handling of the truck in the course of the master's business they were acts for which the master was liable. The court maintained that any other rule would place the invitee in a worse position if he asks the driver for permission to ride than if he heedlessly jumps on and rides without permission. The persuasive reasoning of this case had a substantial effect on the development of the law which governed the "No Riders" problem and it soon became the rule which was followed in many jurisdictions.[17]

The fact that the decision in the *Higbee* case was adopted in most jurisdictions as a satisfactory solution to the problem is not as important as the fact that the rule which the case promulgated was expressly overruled by the same court within 10 years.[18] In the latter case the court held that the employer was not liable to the unauthorized rider for wrongful conduct of his employee even though such conduct might be classified as wilful and wanton. The court admitted that the rider was an invitee of the employee and a trespasser of the employer, however, being a trespasser to the employer imposed only a personal duty not to wilfully injure him. The wilful, reckless, and wanton misconduct of the employee, who was not acting within the course of his employment in relation to the invitee, could not make his employer liable by such conduct.

It is submitted that this latter expression of opinion by the Ohio court is the soundest solution to this problem. In determining whether or not the courts should impose liability on the employer in such situations it is necessary to keep in mind several factors: (1) the employer has as a general rule expressly forbidden the employee to

[16] 101 Ohio St. 75, 128 N.E. 61 (1920).

[17] Bobos v. Krey Packing Co., 317 Mo. 108, 296 S.W 157 (1927); Zavodnick v. A. Rose & Son, 297 Pa. 86, 146 Atl. 455 (1929); See the extensive annotation in 14 A.L.R. 145 (1921); 39 C.J. 1304 (1925).

[18] Union Gas & Electric Co. v. Crouch, 123 Ohio St. 81, 174 N.E. 6 (1930).

allow others to ride;[19] (2) the rider usually has notice, through "No Riders" signs or common knowledge, that the driver has no authority to allow him to ride; (3) the injured rider will have an action against the driver so he is not left without redress;[20] and (4) last, but by far the most important, is the fact that the whole doctrine of respondeat superior places liability on one individual for the wrongs committed by another and such a doctrine should be applied with caution and circumspection.

The problem which has been discussed in this note is indeed very difficult. It would be impossible to say categorically that either one of the solutions is wrong, for both can be supported by reason and authority It is clear, however, that the solution adopted and followed by the Kentucky court, in its latest decisions, is that the employer will be liable for the injuries inflicted upon the rider by his employee when they are of such a character as would render one liable to a trespasser.

ROBERT C. MOFFIT

RIGHT OF PRIVACY COLLECTION CASES – LETTER OF CREDITOR TO DEBTOR'S EMPLOYER

In the recent case of *Voneye* v *Turner*,[1] the Kentucky Court of Appeals was confronted with a question arising from the actions of a zealous creditor in his attempt to collect a debt. The court held that the creditor could write to the debtor s employer requesting his assistance in the collection of the debt without making himself liable in an action for the invasion of the debtor s right of privacy

It is the purpose of this note to present the current position of the courts on the question of the right of privacy in the process of debt collection, and the extent to which the courts have held certain methods employed by creditors to be invasions of the individual's right of privacy Although this note will not cover all acts which con-

[19] The fact that the act was forbidden does not of itself relieve the master of liability but it should be considered in determining the scope of employment. Smith v. Munch, 65 Minn. 256, 68 N.W 19 (1896); Limpus v. London Omnibus Co., 1 H. & C. 526, 158 Eng. Rep. 993 (Ex. 1862); TIFFANY, AGENCY 109 (2d ed. 1924).

[20] The lack of financial responsibility of the servant is usually stated as the reason for supporting the doctrine of respondeat superior. MECHEM, AGENCY 328 (3d 1923). However it would seem that this consideration should not be as controlling today as it was when this doctrine originated, for employees today are financially much stronger than were the slaves and servants of the eighteenth century

[1] 314 Ky. — 240 S.W 2d 588 (1951).