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Judgment in Favor of Servant as Bar to an Action Against Master for Same Tort--Criticism of the Kentucky Rule

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JUDGMENT IN FAVOR OF SERVANT AS BAR TO AN ACTION AGAINST MASTER FOR SAME TORT—CRITICISM OF THE KENTUCKY RULE.

The question involved here is whether or not, where an action against a servant for negligence or other tort has resulted in favor of the servant, such verdict and judgment may be pleaded in bar of an action brought later and based on the same negligence against the master. This question is not strictly one of estoppel, nor one of res adjudicata, although the doctrine of res adjudicata must be invoked in order to plead the former judgment in bar. The real principle is based upon the limitations inherent in the theory of respondeat superior, namely, that if the master is sought to be charged for the tort of his servant, it must be determined that the servant actually committed the tort and if it be found, or if the jury decide that he was not culpable, the master could not be held liable, because his responsibility arises only by implication of law, based on a tort committed by his servant.

The principle, therefore, is exactly the same in all those cases in which both master and servant are sued jointly for the servant's tort, and the jury in its verdict exonerates the servant but seeks to hold the master. It is immaterial whether the master and servant are sued in the same action and the servant exonerated by the jury, or whether the servant is sued separately and a verdict and judgment rendered in his favor. In either case the reasoning is exactly the same, the same principle is applicable, and in either case the master should not thereafter be held.

The rule that, when master and servant are sued jointly, the master is not liable where the verdict is favorable to the servant, is established by an overwhelming weight of authority in every jurisdiction except Kentucky. The cases sustaining the principle are so numerous that we shall be content with the statements of the rule as found in a few of the text annotations and leading cases.

In 9 Annotated Cases, at page 606, it is said:

> "In an action by a third person against a master and his servant, for the damages resulting from the servant's negligent act, where the master's liability is dependent solely upon the doctrine of respondeat superior, a discharge of the servant from personal liability precludes any recovery against the master, as it is in effect a finding that the servant was not guilty of negligence."

Another authoritative text states broadly that "the cases very generally sustain the rule that a verdict exonerating the servant in an action brought against the master and servant, for personal injuries caused solely by the misfeasance of the servant, requires an acquittal of the master also."[1] It is here carefully noted that there is a great distinction between the cases which are based wholly upon respondeat superior, and where the only negligence is the negligence of the serv-

[1] 30 L. R. A. (N. S.) 404.

ant and those cases where there is some personal, independent negligence on the part of the master. Here, of course, the master is a joint tort feasor and a verdict in favor of the servant could not free the master from liability. Perhaps the leading case upon this question is one which originated in the state of Washington.[2] In this case the railroad company and its servant were sued jointly for personal injuries sustained by reason of the servant's negligence. The jury brought in a verdict against the railroad company alone. The court construed this verdict to be one in favor of the servant and held that the servant could not be thus exonerated, saying:

> "From the principle that there can be no liability on the part of an employer for the act of his employee in which he took no part, if the employee is free from liability, it follows that a judgment in favor of the employee in an action brought against him for an injury caused by such an act is a bar to a recovery against the employer in an action brought against him for the same cause of action."

It is to be noted, however, that in this case, although the master and servant were sued jointly, the court says plainly that a judgment in favor of the employee would be a bar to any action against the master.

There are numerous cases in almost every jurisdiction upholding and affirming this doctrine.[3] Should the reader be interested in further examination of these cases, he will find a few of the many recent cases, from widely separated jurisdictions, cited below in footnote three. In a careful examination of this question it will be found, that in some of the old cases arising in South Carolina, Montana, Mississippi, Texas, and Arkansas the courts have followed that which is known to us as the minority rule. However, at the time of this writing the rule in these states is in accord with the great weight of authority.[4]

Thus, with such an overwhelming amount of recognized authority against the minority rule, it is somewhat strange that we find it firmly entrenched in Kentucky, where there is a long line of cases holding that exoneration of the servant does not release the master, *a fortiori*, that a suit against a servant resulting in a verdict and judgment for

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[2] Doremus v. Root, 23 Wash. 710, 63 Pac. 572 (1901).

[3] Griffin v. Bozeman, — Ala. —, 173 So. 857 (1937); Ayer v. Chicago Ry. Co., 187 Minn. 169, 244 N. W. 681 (1932); Beck v. Moll, — Mo. —, 102 S. W. (2d) 671 (1937); Barton v. Bee Line, 238 App. Div. 501, 265 N. Y. S. 284 (1933); Shell Petroleum Corp. v. Wilson, 173 Okla. 355, 65 P. (2d) 180 (1937); Chapman Lumber Co. v. Minn.-S. C. Land and Lumber Co., 183 S. C. 31, 190 S. E. 117 (1937).

[4] St. L. and S. F. Ry. Co. v. Sanderson, 99 Miss. 148, 54 So. 885 (1911); Lowney v. Butte Electric Ry. Co., 61 Mont. 497, 204 Pac. 485 (1922); Cherry v. Singer Sewing Mach. Co., 165 S. C. 451, 164 S. E. 126 (1932); Union Painless Dentist v. Guerra, 234 S. W. 688 (Tex. Civ. App., 1921).

him would not be a bar to a subsequent suit for the same negligent act against the master.[5]

It is almost incredible that such an illogical rule as this should be in force in any jurisdiction, but in Kentucky the same principle was given effect recently in the case of *Nashville C. & St. L. Ry. Co.* v. *Byars*.[6] It is here said that the court still intended to adhere to the so-called Kentucky-minority rule and practically tells all litigants not to raise this question again, saying: "Whatever the rule may be in other jurisdictions, it may now be regarded our final conclusion is stated in *Myer's Admx.* v. *Brown*."

A scathing criticism of this rule and of the Kentucky cases is found in one of our leading texts in which it is said of the Kentucky rule:

> "This rule is illogical, since in cases where the servant's negligence is the sole cause of the accident the liability of the master is derivative and based upon the doctrine of respondeat superior. None of the Kentucky cases state any reason for this rule. But all cite and apparently follow Illinois C. Ry. Co. v. Murphy (supra), which is the first case to announce this rule in Kentucky, and which states the reason for the rule in the following language: 'If the plaintiff is entitled to his verdict against two tort feasors, but the jury is able to agree as to only one of them, and give a verdict accordingly, we know of no law that prevents the plaintiff from having at least what the jury has given him. If he failed to get the verdict against another also liable, the plaintiff may be aggrieved, but not the defendant.' "[7]

The criticisms of the decisions which have been rendered by the Kentucky courts, we earnestly believe, are justly presented. In view of the Kentucky court's failure to give any sound reasons for upholding the minority view, and in view of the fact that Kentucky is the only jurisdiction in the United States which does uphold the minority view of the question heretofore presented, we can see no reason why such an absurd solution should be handed down. And it is our sincere hope that the high court of Kentucky will see their long-standing error and change it at the first opportunity.

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[5] Illinois Central Ry. Co. v. Murphy, 123 Ky. 787, 97 S. W. 729 (1906); Chesapeake & Ohio Ry. Co. v. Booth, 149 Ky. 245, 148 S. W. 61 (1912); Broadway Coal Mining Co. v. Robinson, 150 Ky. 707, 150 S. W. 1000 (1912); Illinois Central Ry. Co. v. Outland, 160 Ky. 714, 170 S. W. 48 (1914); Weil v. Hagan, 166 Ky. 750, 179 S. W. 835 (1915); J. J. Case Threshing Mach. Co. v. Haynes, 178 Ky. 644, 199 S. W. 786 (1918); Myer's Admx. v. Brown, 250 Ky. 64, 61 S. W. (2d) 1053 (1933).

[6] 252 Ky. 507, 67 S. W. (2d) 497 (1934).

[7] L. R. A. 1917 E, p. 1031.