

employee relationship and contravening its rules in indulging in the joint activity of riding, the parties enter into a new relationship, which may be termed a driver-guest relationship. The driving of the car has become just as much the affair of the driver-guest relationship as of the driver-employer relationship. Therefore, the guest, being injured in the course of the activity of his relationship as a result of the negligence of the other party, has no grounds for setting the cost of the injury at the door of a third person whose business rules he is helping break merely because the activity was also in the course of that third person's business. Practically, the distinction suggested is amply justified. Express orders from the employer to the driver will usually be sufficient to eliminate known trespassers. But the fact that an invitee relationship exists between the driver and his passenger demonstrates that such orders have been futile. The employer then has no control except the threat of discharge, and, since such unauthorized invitations are extremely common, employers are loath to make this threat. The validity of the theory will be tested if a case arises in which an unauthorized invitee is injured through the negligence of a servant other than the one who extended the invitation. The employer should be held responsible.

This argument, however, rests upon a knowledge in the passenger that the rules of the employer-driver relationship are being broken. In the usual case the driver will not have authority to invite guests, and the courts have created a presumption to that effect, at least for trucks. *O'Leary v. Fash*, 245 Mass. 123, 140 N.E. 282 (1923); *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 Pac. 491 (1917). But where the invitation is within the actual authority of the driver, the rules are not being broken, and where it is within the apparent authority, the passenger will reasonably suppose that they are not. In either event the trip has ceased to be a joint transgression upon the rights of the employer, the passenger has become a licensee, and the employer should be held upon the familiar principle of *respondeat superior*. *Barry v. N.Y.C. & H.R.R.R.Co.*, 92 N.Y. 289 (1883). In the principal case actual authority to carry passengers could be deduced from the acquiescence of the employer in previous invitations in spite of the express rule to the contrary; apparent authority, from the passenger's point of view, arose out of his observation of such previous acts. Under the theory here expressed the court was correct in insisting upon the immunity of the employer unless there was actual or apparent authority for the invitation.

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Agency—*Respondeat Superior*—Liability of Employer to Wife of Servant for Injuries Caused by Servant's Negligence—[Minnesota].—The defendant, a used car dealer, invited the plaintiff and her husband to test a car offered for sale by him. The plaintiff was injured as a result of her husband's negligent driving. A Minnesota statute provides that any person operating a motor vehicle with the consent of the owner is deemed an agent of the owner in case of accident. 3 Mason's Minn. Stat. § 2720-104 (supp. 1934). The wife sued the owner as the principal of her negligent husband. Held, the disability of the plaintiff to sue her husband did not bar an action against the principal of her husband. *Miller v. Tyrholm & Co.*, 265 N.W. 324 (Minn. 1936).

The purpose of the statute was to afford protection against financially irresponsible drivers. Since passengers are often acquainted with the skill and resources of the driver and can protect themselves by declining to ride, the statute might have been construed as protecting only pedestrians, who cannot effectively protect themselves. Three con-

siderations make this interpretation untenable: (1) the difficulty of determining the extent of the knowledge of a given passenger; (2) previous Minnesota decisions extending the protection of the family automobile doctrine to the automobile guest (*Nicol v. Geiller*, 188 Minn. 69, 247 N.W. 8 (1933)); (3) the use of agency language in the statute.

By construing the statute as it did the court raised the problem of whether, under the doctrine of *respondeat superior*, a master may be held liable even though the servant is immune. With the exception of cases involving a marital relationship between the servant and his victim, no case has been found where the master has been held liable despite the servant's immunity. The cases in which the master has been held liable although his servant had the benefit of a covenant not to sue are not in point. But see *Schubert v. Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 43 (1928). These cases merely hold that a release of the agent from admitted liability does not immunize the master. The requirement that the agent must be liable before *respondeat superior* will operate generally has a practical justification. When the servant's negligence renders the master liable to a stranger, the servant will be liable to the master. Consequently, the imposition of liability upon the master when the agent is not liable would collide with whatever policy produced the agent's immunity. Although aware of this inconsistency the majority of courts, following the *Schubert* case, have imposed liability upon the master when faced with the problem of the instant case. *Poulin v. Graham*, 102 Vt. 307, 149 Atl. 698 (1929); *Chase v. New Hampshire Material Corp.*, 111 Conn. 277, 150 Atl. 107 (1930). *Contra*, *Emerson v. Western Seed Co.*, 116 Neb. 180, 216 N.W. 297 (1927); *Sacknoff v. Sacknoff*, 131 Me. 280, 161 Atl. 669 (1932). These courts argue that the immunity of the agent, being merely "procedural," does not extend to the master who must therefore answer for the "wrong" of the agent. See *Schubert v. Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 43 (1928). Cf. *Kingman v. Frank*, 33 Hun (N.Y.) 471 (1884) (creditor may garnish debt owed by wife to husband for services even though husband's claim is not enforceable against the wife); *Mertz v. Mertz*, 3 N.E. (2d) 597 (N.Y. 1936) (wife negligently injured by her husband in state A which allows tort actions between husband and wife, denied recovery against husband in state B which does not permit such actions). But the view that there is a procedural disability arising out of the marital relationship is inconsistent with decisions that a married woman may sue her husband for invasion of her separate property rights (*Wood v. Wood*, 83 N.Y. 575 (1881); 3 Vernier, American Family Laws 271 (1935)); as well as with decisions that after divorce a wife has no action for injuries committed during coverture. *Abbott v. Abbott*, 67 Me. 304 (1877); *Strom v. Strom*, 98 Minn. 427, 107 N.W. 1047 (1906). This view is also inconsistent with the vanishing notion that husband and wife are a single entity. See Madden, Persons and Domestic Relations 145 (1931). If husband and wife are one legal person, it is arguable that a husband who negligently injures his wife has no more committed a wrong than if he had negligently injured himself. Liability may also be imposed by resort to the identity notion. If the employee's acts are deemed to be those of the employer, the latter would be liable without regard to any personal immunity in the former. See *Schubert v. Schubert Wagon Co.*, 249 N.Y. 253, 257, 164 N.E. 42, 43 (1928). But whatever the theoretical justification, since the principal who responds for the agent's act has an action against him, the plaintiff is permitted to do indirectly what she cannot do directly—impose ultimate liability upon the agent-husband. See *Emerson v. Western Seed Co.*, 116 Neb. 180, 184, 216 N.W. 297, 298 (1927). This is inconsistent with the notion that permitting

tort actions between husband and wife will disturb domestic relations. But see McCurdy, *Torts between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1033 (1930). Courts convinced that the antiquated rule of immunity between husband and wife is no longer justifiable may indirectly limit its operation by imposing liability upon the master.

Bankruptcy—Quo Warranto—Possession of State Court Receiver Obtained before the Four Month Period—[Federal].—The Britson Manufacturing Company, a South Dakota corporation, carried on the major part of its business in Nebraska. In 1921 a group of minority stockholders brought a dissolution proceeding in a federal district court in Nebraska, alleging that the corporation was formed to defraud its stockholders. The court thereupon appointed a receiver to take possession of all the assets of the corporation. Although the circuit court of appeals reversed the decision of the district court and subsequently issued two successive writs of mandamus, the district court failed to order the receiver to return the property in his possession to the corporation. *Britson v. Close*, 280 Fed. 297 (C.C.A. 8th 1921); *Britson v. Woodrough*, 284 Fed. 484 (C.C.A. 8th 1922); *id.*, 289 Fed. 1020 (C.C.A. 8th 1923). In 1923 the Nebraska attorney-general instituted quo warranto proceedings to oust the Britson Company from doing business as a foreign corporation in Nebraska. In 1926 the Nebraska supreme court appointed trustees to take possession of the corporation's Nebraska assets, distribute them to the corporation's creditors, and, if the corporation were still solvent, return the balance "to those thereto entitled." *State ex rel. Atty-Gen'l v. Britson*, 114 Neb. 341, 207 N.W. 664 (1926). The state court trustees' efforts to obtain this property from the federal receiver culminated in his intervention in the hearing on the receiver's report, upon which the circuit court revised its mandate and ordered the receiver to turn over the assets in his possession to the state court trustees rather than to the corporation. *Britson Mfg. Co. v. Close*, 25 F. (2d) 794 (C.C.A. 8th 1928). The assets were actually transferred in September, 1929, after the corporation's creditors had filed a petition in bankruptcy against the corporation in August.

The trustee in bankruptcy, Engebretson, made several abortive attempts to obtain the property from the state court trustees before 1933, at which time he unsuccessfully resorted to a summary proceeding in the bankruptcy court. *Marcell v. Engebretson*, 74 F. (2d) 93 (C.C.A. 1934); *cert. denied*, 296 U.S. 579 (1934). The present action is a plenary suit in equity in which Engebretson as plaintiff claimed: (1) that the previous decision determined only that the state court trustees had more than a colorable claim; (2) that the defendants do not hold the property adversely to the corporation; (3) that therefore, as trustee in bankruptcy, he is entitled to this property as property in the constructive possession of the bankrupt. *Held*, the retention of this property by the federal receiver until after the petition in bankruptcy had been filed was wrongful; therefore, these assets were in the constructive possession of the state court trustees from the time of their appointment. This possession being adverse to the corporation and having commenced more than four months before the filing of the petition, the state court acquired jurisdiction to administer these assets free from interference by other courts. *Engebretson v. Marcell*, 84 F. (2d) 315 (C.C.A. 8th 1936), *cert. denied*, Sup. Ct. Serv. 809, no. 210 (Oct. 12, 1936).

Liens obtained by creditors more than four months before the filing of a petition in bankruptcy are not voidable under section 67f of the Bankruptcy Act. 30 Stat. 544,