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Effect of "No Riders" Instructions

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MASTER AND SERVANT

EFFECT OF "NO RIDER'S" INSTRUCTIONS

Plaintiff's intestate was killed while riding in defendant's truck as a guest of defendant's servant. Defendant company had promulgated rules prohibiting riders. Judgment for plaintiff on finding an implied waiver of rules and that death resulted from servant's gross negligence and unlawful acts while operating the truck within the scope of employment. Held: Reversed. The evidence was insufficient to support finding of an implied waiver. *Monroe Motor Express v. Jackson*, 38 S.E. (2d) 863 (Ga. App. 1946).

The principal case presents the question of whether a master owes a legal duty to the unauthorized invitees of a servant truck driver. No duty is created where the servant's act of driving is not in furtherance of the master's business. And this is true, regardless of the presence or absence of authority to invite third persons.¹ But a master does owe a duty where scope of employment and authority to invite third persons are co-existent.² In the principal case, the servant's tortious driving was in furtherance of the master's ends, but authority to invite third persons to ride was

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1. See *Craig v. Tucker*, 264 Ill. App. 521 (1932) where principal was held not liable for injuries sustained by authorized guest when agent drove vehicle in pursuit of personal pleasure. A different result might obtain in jurisdictions having an "imputed negligence" statute. In this respect, see *Goodwin v. Goodwin*, 5 Cal. App.(2d) 644, 43 P.(2d) 223 (1935), construing the "guest" statute with a statute imputing negligence of drive to owner of vehicle.

To complete the picture of the interplay of authority and scope of employment, see *Robertson v. Armour Co.*, 129 Me. 501, 152 Atl. 407 (1930), holding master not liable to unauthorized guest of servant for servant's negligence while driving truck for personal ends.

2. *Bummer v. Liberty Laundry Co.*, 48 Cal. App. 648, 120 P.(2d) 672 (1941); *Radutz v. Tribune Co.*, 293 Ill. App. 315, 12 N.E.(2d) 224 (1938); *Petit v. Swift and Co.*, 203 Minn. 270, 281 N.W. 44 (1938); *Krull v. Triangle Dairy*, 59 Ohio App. 107, 17 N.E.(2d) 291 (1935); *Eisenhower v. Hall Motor Transit Co.*, 351 Pa. 200, 40 A.(2d) 458 (1945).

absent. It is frankly conceded by the Georgia court that the operation of the vehicle was within the scope of employment. The implication of the court's holding is that therefore the master owes no duty, conditional or absolute, to the servant's guest. This seems clearly erroneous. The reasoning is violative of the fundamental concept that a master is liable for the torts of his servant committed within the scope of employment. Generally, the courts that have found an absence of duty on the part of the master have held that the rider has no right to infer that the servant may transport guests.³ They conclude that with respect to the rider, the servant never returns to the scope of employment after extending the unauthorized invitation.⁴ As a basis for denying liability the logic seems fallacious. When the driver resumes his journey after the invitation, he is again in his master's employment, doing his master's business.⁵ He cannot be consistently within and without his employment at one and the same time.⁶ Similarly, it is difficult to see that the absence of a right to infer authority should completely negate the master's duty to the servant's guest. A more logical approach is to reason that the legal relationship cre-

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3. For example, it is said that the rider "should know of this obvious lack of authority from the position the man holds and the character of his employment," *Reis v. Mosebach*, 33 Pa. 412, 12 A.(2d) 37,39. In *Dempsey v. Test*, 98 Ind. App. 533, 184 N.E. 909 (1934), the appellate court cited with approval, p. 541,542, the language of the Massachusetts court in *O'Leary v. Fash*, 245 Mass. 123, 140 N.E. 282,283,284 (1934) as follows: "It is an obvious consequence of the principal's conduct in hiring a man to drive a truck in the delivery of freight that the public have no right to infer and do not understand the principal to confer upon such a driver the authority to transport guests. . . . So far as concerns the plaintiff and her presence in his truck it is in law a matter of indifference to the defendant whether the driver of the truck exercised due care or was grossly negligent or was guilty of wanton or reckless conduct." See also *Thomas v. Magnolia Petroleum Co.*, 177 Ark. 963, 9 S.W.(2d) 1 (1928) and *Greerson v. Bailey*, 167 Ga. 638, 146 S.E. 490 (1929). In the latter case, the court pointed out that in allowing the rider to remain, the servant was acting without the scope of his employment. This reasoning, it is submitted, overlooks the factor which proximately causes the injury—that being the act of driving which is in furtherance of the object of employment.
 4. See n. 3, *supra*.
 5. *Kuharski v. Somers Motor Lines, Inc.*, 43 A.(2d) 777 (Conn. 1945).
 6. This is not a case involving the question of incidental negligence such as a servant smoking in non-hazardous surroundings. Here the very act complained of was the one for which the servant was hired, that is, the driving of the vehicle.

ated between the master and the servant's unauthorized guest is that of chattel owner-trespasser. The duty then arising in the master through his servant, is to refrain from recklessly or wantonly injuring the trespasser.⁷

The effect of "guest" statutes in determining the extent of the master's duty remains to be considered. Where the servant's invitation is authorized, the nature of the master's duty is conditioned by the statute. This is dependent, however, upon a determination of the rider's status.⁸ Where the master receives some material benefit from the rider's presence on the vehicle, the rider's status is not that of a guest.⁹ Where, as in the principal case, the invitation is unauthorized, the "guest" statute should have no direct effect on the nature

7. *Jewell Tea Co., Inc. v. Sklivis*, 231 Ala. 490, 165 So. 824 (1936); *Kuharski v. Somers Motor Lines, Inc.*, 43 A.(2d) 777 (Conn. 1945); *Bobos v. Krey Packing Co.*, 217 Mo. 108, 296 S.W. 157; *Barall Food Stores v. Bennett*, 194 Okla. 508, 153 P.(2d) 106 (1944).

8. As to what constitutes a guest under the Indiana "Guest" state, See *Liberty Mut. Ins. Co. v. Stitzer*, 220 Ind. 180, 41 N.E.(2d) 133 (1942); *Albert McGann Securities Co., Inc. v. Coen*, 114 Ind. App. 60, 48 N.E. (2d) 58 (1943); *Swinney v. Roler*, 113 Ind. App. 367, 47 N.E.(2d) 846 (1943); *Lee Bros., Inc. v. Jones*, 114 Ind. App. 688, 54 N.E.(2d) 108 (1944). It is to be noted that throughout these cases runs the concept of present material gain to the host as the determinative factor of whether the invitee becomes a passenger to whom a higher duty is owed rather than a guest under the statute.

At common law the duty owed the guest was that of reasonable care. See *Munson v. Rupker*, 96 Ind. App. 15, 148 N.E. 169 (1925) decided prior to the passage of the "guest" statute. See also *Deskins v. Warden*, 122 W. Va. 644, 12 S.E.(2d) 47 (1940). As for the application of respondeat superior to the guest situation prior to the "Guest" statute, see *Willi v. Shaefer Hitchcock*, 53 Idaho 367, 25 P. (2d) 167 (1933).

Subsequent to the enactment of the "Guest" statute, the duty owed by a principal to his guest riding with the principal's agent was dependent on more culpable conduct on the part of the servant. *Brummer v. Libert Laundry Co.*, 48 Cal. App. 648, 120 P.(2d) 672 (1941); *Denton v. Midwest Dairy Products Corporation*, 284 Ill. 279, 1 N.E.(2d) 807 (1936); *Jay v. Holman*, 106 Ind. App. 413, 20 N.E.(2d) 656 (1939). For the same result where the effect of the guest statute has been reached through judicial decision, see *Wilder v. Steel Products Co.*, 57 Ga. App. 255, 195 S.E. 226 (1938).

9. See *Krull v. Triangle Dairy*, 59 Ohio App. 107, 17 N.E.(2d) 291 (1935) and *Radutz v. Tribune Co.*, 293 Ill. App. 315, 12 N.E.(2d) 224 (1938), where the rider was aboard the vehicle to render assistance to the driver and the effect of the "guest" statute on his right to recover was not considered. It would seem, in such instances, that the master is receiving "consideration" from the rider's presence on the vehicle and the rider has the status of passenger rather than of guest.

of the master's duty. The resultant legal relationship created between the master and rider is not that of host-guest.¹⁰ In some instances, the degree of the servant's tort necessary to make the master liable would be the same regardless of whether there was authority to extend the invitation.¹¹

PATENTS

CONSENT DECREES AND RES JUDICATA

In a suit for infringement of a patent, the defendants raised the issue of patent validity. An earlier suit between the same parties for infringement of the same patent resulted in a consent decree in plaintiff's favor. Held: The consent decree did not estop defendants from questioning the validity of the patent in this suit. The patent is invalid.¹ *Addressograph-Multigraph Corp. v. Cooper et al.*, 156 F.(2d) 483 (C.C.A. 2nd, 1946).²

Although a consent decree has been interpreted to be but a contract between the parties,³ the federal rule now

10. *Thomas v. Southern Lumber Co.*, 181 S.W.(2d) 111 (Tex. Civ. App. 1944); *Lassiter v. Shell Oil Co.*, 188 Wash. 371, 62 P. (2d) 1096 (1944).
11. In *Thomas v. Southern Lumber Co.*, supra n.10, the court said, p. 115: ". . . the legal duty which the owner or operator owes a gratuitous guest is practically the same as that which the owner of real property used for private purposes owes to a mere licensee. Hence it appears immaterial in this case from the standpoint of Hammon's (the employer's) liability for the torts of Frederick (the driver) whether Nolan Thomas (the rider) be regarded as a trespasser, licensee, or guest in the truck because the test of liability would be practically the same in either of these contingencies."

A problem of privilege might arise in those jurisdictions where the duty owed to a gratuitous guest by the driver differs from that owed to a trespasser by the master. If the duty owed by the driver to his guest were less than that owed to a trespasser by the master, would the driver's non-liability under the statute cloak the master with immunity? *O'Leary v. Fash*, 245 Mass. 123, 140 N.E. 282 (1923), in observing that the rights of the trespasser-guest to recover against the master should be no higher than his rights against the host-driver would seem to answer the question in the affirmative. *Richard's v. Parker*, 19 Tenn. App 645, 93 S.W.(2d) 639 (1935), indicates that the guest of the principal is entitled to no greater rights against the agent than against the principal under the "guest" statute. It would seem logical that the converse should be true.

1. Clark, J., dissenting. Majority opinion by Woodbury, Swan, J.J.
2. This is in affirmance of the district court. *Addressograph-Multigraph Corp. v. Cooper et al.*, 60 F. Supp. 697 (S.D.N.Y. 1946).
3. *Hodgson v. Vroom*, 266 Fed. 267 (C.C.A. 2nd, 1920); 3 *Freeman, Judgments* (5th Ed. 1925) §1350.