Master and Servant—Loan of Servant to Third Person—Liability for Negligent Injuries to Strangers by the Servant

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ployee who had the use of a motorcycle for business during the day and who drove it home at night with the employer's permission was held not to be acting within the scope of his employment on his way home from work. It is arguable that where as here the servant is free to use the car for his own purposes, such use is not incidental to the employment. Had the servant been headed for the "frolic" from the place of business instead of going home, surely the defendant would not have been liable.

W. G. W.

MASTER AND SERVANT — LOAN OF SERVANT TO THIRD PERSON — LIABILITY FOR NEGLIGENT INJURIES TO STRANGERS BY THE SERVANT. — The defendant coal company was supplied with electric power by the Appalachian Power Company whose transformer was situated upon the defendant’s land. The power company had given a key to the transformer station to H, defendant’s chief electrician hired and paid by the defendant. A fire broke out in a store three miles away from the transformer, and as a result of the fire a wire leading to it was burned down blowing a fuse at the transformer causing the lights to die in the defendant’s “coal camp.” Defendant’s assistant superintendent ordered H to replace the fuse. Upon the replacement electricity again circulated through the fallen line. Plaintiff’s decedent, in aiding at the fire, became entangled with the wire and was electrocuted. Held, that the defendant was liable for H’s negligence in replacing the fuse. Craft v. Pocahontas Coal Corporation.¹

In arriving at a decision there are many difficulties in cases which involve more than one employer. The rule is well estab-

Reinoehl, 120 Pa. Super. 235, 182 Atl. 120 (1935) (where the salesman stopped for supper on his way back to the place of business); Buckley v. Harkens, 114 Wash. 468, 195 Pac. 250 (1921) (where the company paid the expenses of the salesman’s car).


² "An act of kindness on the part of the employer under such circumstances, while it may create a spirit of loyalty in the relationship existing between the employee and the master, cannot be construed to operate as a continuance of the relationship during a period where, under the law and the facts, such relationship has actually been suspended." Bloom v. Krueger, 182 Wis. 29, 32, 195 N. W. 851 (1923). Where the employee used the master’s car to go home to lunch, with permission of the master, RESTATEMENT, AGENCY (1938) § 229, a comment on the rule of the section says: "If, however, such acts [furnishing an employee with a car] are for the personal convenience of the employees and are merely permitted by the master in order to make the employment more desirable, the acts are not within the scope of employment." Id. at 511.

¹ 190 S. E. 687 (W. Va. 1937).
lished that a general servant may be lent or hired by his master to another party for some special purpose so as to become, as to that service, the servant of the other. But when it is necessary to determine how that relation is created so as to shift the liability to the "special master" the problem becomes quite perplexing. In many cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose the power of control.

It has uniformly been held that if the general master seeks to escape liability he must show that his relation with the servant was suspended, for the time being, and a new relation created between the servant and the third party. The fact that one party has not actually exercised control should not be allowed to mislead, for the criterion is who has the right to control.

It is not sufficient, in order to relieve the general master of liability, that the servant is partially under the control of the third person, but the new relation must carry with it full and exclusive control, leaving the general master without right to interfere.

But all this gives rise to the crucial questions where is the right of control vested, and how can one determine that such an

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absolute surrender has been made? It has been suggested that the enigma may sometimes be solved by finding which of the two possible masters was bound to perform the work in which the employee was engaged at the time.\(^8\) But it is quickly discerned that this test is not infallible even though useful under certain circumstances, for it has been held that a servant paid and employed by one person may, for the time being, be the servant of another in a particular transaction even though the general master may be interested in the work.\(^9\) And this last statement seems to be borne out by the present case.\(^{10}\) But in any circumstances the test of whose work is being done is quite helpful in leading to a determination of the party in whom the ultimate right of control is vested. It is submitted that the premier criterion for determination of the party upon whom the liability will rest is whether the act done is so far under the control of the third party that he may, at any time, stop it or continue it, and may determine the way it shall be done, not merely in reference to the result to be reached, but in reference to the manner of reaching the result.\(^{11}\) What acts constitute such control have not been spelled out by the courts, but it has been clearly settled that the fact that the third party points out the work to be done by the servant is not sufficient to take him out of the control of the general master, nor will the mere giving of signals to start and stop operate to make such a change.\(^{12}\) The fact that control has been divided does not raise the inference that the right of absolute control has been surrendered, but there is a presumption that the right continues in the general master, and the burden is upon him to prove that it has been completely re-


\(^9\) Higgins v. Western Union, 156 N. Y. 75, 50 N. E. 500 (1898); Wylle v. Palmer, 137 N. Y. 248, 33 N. E. 281 (1893).

\(^{10}\) In the present case it might be found that both the defendant and the power company were interested in keeping the current circulating through the community by the fact that the defendant regularly employed an electrician to remedy defects in electrical equipment which would include the blowing of this fuse.


linquished. However, the proposition that there may be a shifting of liability with the relinquishment of the right of exclusive control does not alter the remaining fact that there may be two or more masters of the same servant at the same time for the same act. Where such is the case the weight of authority seems to point that there may be joint and several liability upon such joint masters for the negligent injuries to strangers caused by that servant.

H. G. W.

**NEGOTIABLE INSTRUMENTS — USURY — LACES. —** In 1925 P, for a loan of $10,000 from the Mortgage Security Corporation of America, gave sixteen six per cent notes and seven subordinate non-interest bearing notes covering certain fees for guaranteeing the notes, obtaining the guarantee of another surety company, and for servicing. Both series of notes were secured by a deed of trust on the property which was improved by the money borrowed. P made payments for almost eight years which paid the semi-annual interest to all note holders and retired all the notes but six which were of the principal series. These six notes were then in the hands of defendants, holders in due course. Both guarantors of the notes had become insolvent. P, having defaulted, brought this suit to enjoin the apprehended sale of the property under the deed of trust and to purge the loan of usury. The lower court found that the sum evidenced by the subordinate notes with the exception of a few small items was in fact usurious interest charged and gave a decree against the mortgage company (insolvent) for the amount of the usury and interest, dismissing the suit as to the other defendants. On appeal, affirmed. Held, one justice dissenting, that the principal and subordinate notes all having been given for one consideration are all tainted with usury; that although the defense of usury is applicable against a holder in due course, P is

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