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Agency

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cludes equitable remedies, and the writ must be dismissed where an adequate ordinary remedy through injunction exists.⁴⁸

Injunctive relief will not be entertained⁴⁹ where an aggrieved party has a statutory appeal available to him.⁵⁰

MAURICE S. CULP

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As in past years, the bulk of the cases in the agency area concern real estate brokers, and the majority of cases in the tort, or master-servant field, come from the trucking and construction industries. Most of the cases involved familiar rules of substantive law¹ or the application of rules of evidence or procedure,² and are mentioned in the footnotes below. Only four cases are worthy of additional comment.

Master and Servant

In *Travelers Fire Insurance v. Freeman*,³ the defendant corporation kept five automobiles for business use. The corporate master had no garage facilities for overnight storage and the only street parking facilities were adjacent to the plant in an undesirable neighborhood. To avoid the expense of using a public garage, and to avoid the risk of having the cars stripped while parked on the street, the employer made a regular practice of having the cars taken home for the night by the salesmen-drivers, who kept them in their own garages. The accident happened while a driver was driving to work in the morning. The court of appeals reversed a decision of the trial court and held that as a matter of law, the driver was not in the course of his employment. The dissenting opinion admitted that in this case the motive of the driver was probably personal, i.e., to get a car for his use during the evening, but pointed out that from the viewpoint of the employer, the primary purpose of the trip was to benefit the master and the benefit to the employee was incidental.

The case of *Smith v. Mass. Bonding Co.*⁴ also raises the question of control over the servant's activities, but here the question was which of two masters had control and was therefore liable under *respondeat su-*

⁴⁸ *State v. Rockwell*, 167 Ohio St. 15, 145 N.E.2d 665 (1957).

⁴⁹ *Shaner v. Bahns*, 141 N.E.2d 303 (Ohio Ct. App. 1956).

⁵⁰ The petition sought an injunction against the county commissioners and the county engineer from taking further action concerning the removal of an advertising sign from the plaintiff's property. OHIO REV. CODE, § 307.56, authorizes an appeal to the common pleas court by any person aggrieved by a decision of the board of county commissioners.

perior. An independent contractor leased a tractor and driver to a truck carrier who used the tractor and driver to haul a trailer under the carrier's I.C.C. permit. If the accident had happened while on the direct route, it is clear that both the independent contractor and the carrier would be liable for the driver's negligence.⁵ In this case, the tractor broke down, and, acting under the instructions of the independent contractor, the driver parked the trailer and drove back to the contractor's garage for repairs. The accident happened on the way to the garage, and the victim of the driver's negligence recovered from the independent contractor. The contractor sued both his liability insurer and the liability insurer of the carrier. The court held that the carrier's insurance company was not liable, as the tractor owner had temporarily re-asserted control, and, therefore, the carrier would not have been liable to the injured party. It would seem that the answer ought to be the same even if the accident had happened on the direct route and even if the carrier were liable to the injured person. The carrier is liable to the injured person, not because he has control, but because of a legislative policy which forbids a permit-holding carrier to sub-contract an essential part of its operations in an area where torts are common. But control is still exercised by the independent contractor, and as between the contractor and the carrier, primary liability ought to rest on the former.⁶

¹ *Substantive Law*: *Bauman v. Worley*, 166 Ohio St. 471, 143 N.E. 2d 820 (1957) (real estate broker as procuring cause of sale-effect of later sale at lower price); *Falls v. Kamping*, 144 N.E. 2d 894 (Ohio Ct. App. 1957) (broker can't recover commission unless licensed and burden is on his principal to prove he was not licensed); *Wolf v. Hyman*, 143 N.E.2d 633 (Ohio Ct. App. 1957) (real estate salesman not entitled to commission on sale effected after his authority from broker terminated); *Kelly v. Ford Motor Company*, 139 N.E. 2d 99 (Ohio Ct. App. 1957) (land owner did not reserve control over operations of subcontractors so as to be liable for injuries sustained by employee); *Logsdon v. Main-Nottingham Investment Company*, 141 N.E. 2d 216 (Ohio Ct. App. 1956) (application of apparent authority doctrine); *Hinsche v. Alter*, 145 N.E. 2d 368 (Ohio C.P. 1957) (hospitals are not immune from liability for torts of servants, but churches are); *Curry v. Big Bear Store Co.*, 142 N.E. 2d 684 (Ohio C.P. 1956) (master liable for defamation of servant, but not liable for punitive damages absent express authorization or ratification); *American Transit Lines v. Smith*, 246 F. 2d 86 (6th Cir. 1957) (applying Ohio law, court held truck carrier liable for tort of driver of leased truck, where trip finished but carrier had first call on driver's subsequent service).

² *Procedure*: *Arnold v. Grimmeissen*, 143 N.E. 2d 615 (Ohio Ct. App. 1957) (out of court statements of servant are not admissible to prove he acted in course of employment); *Tipton v. Fleet Maintenance Co.*, 142 N.E. 2d 882 (Ohio C.P. 1957) (substituted service could be made on non-resident defendant who did not own or operate truck, where truck was operated in Ohio by a servant of defendant).

³ 145 N.E. 2d 217 (Ohio Ct. App. 1957).

⁴ 142 N.E. 2d 307 (Ohio C.P. 1957).

⁵ *Duncan v. Evans*, 134 Ohio St. 486, 17 N.E. 2d 913 (1938).

⁶ *Globe Indemnity Co. v. Schmitt*, 142 Ohio St. 595, 53 N.E. 2d 790 (1944).

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Authority of Agent

There is some confusion in the cases as to the authority of one spouse to act for another. It seems clear that no agency arises from the fact of marriage alone, except for the "agency of necessity" concept found in section 3103.03 of the Ohio Revised Code, which properly speaking is not agency at all, but a substantive rule of domestic relations law. It is also apparent that various forms of implied and apparent authority will arise from the fact of a normal marriage, and the tendency in recent years has been to shift the burden of proof in this situation and presume that each spouse is the agent of the other in the purchase of household supplies. A recent court of appeals case is a good illustration of this broad authority. The wife owned a lot and built the family home on it. The negotiations for the building permit were carried on by the husband, apparently with the knowledge of the wife. The court held that she was bound by the agreement of the husband that certain architectural standards would be complied with.⁷

Liability of the Agent on the Contract

A recent case raises the difficult question of the liability of an agent on a written contract. The basic rule of interpretation is to look at the body of the contract to determine whether or not the agent is adding his personal liability to that of the principal. Where the body of the instrument contains no such indication, as is the case with the typical negotiable instrument, the court must rely on the signature. The two common situations are as follows:

- (1) The contract is executed by Roe and the signature reads:

"John Doe
Richard Roe"

In this situation the universal rule is that Roe is personally liable and that parol evidence is not admissible to show that Roe signed only as the agent of Doe and that this was understood by the parties.⁸

- (2) The signature reads:

"The X Company
John Doe, President"

⁷ *West Hill Colony, Inc. v. Sauerwein*, 138 N.E. 2d 403 (Ohio Ct. App. 1956). The Code specifically provides that in this situation, the wife would be liable on the building contract where the contract is made by the husband. OHIO REV. CODE § 1311.10.

⁸ *Higgins v. Senior*, 8 M. and W. 834 (Eng. Exchequer, 1841).