RECENT CASES

Agency—Negligence—Liability of Employer for Negligence of Employee to Unauthorized Invitee of the Employee—[Federal].—The defendant employer furnished a car for its traveling salesman who invited the plaintiff to ride with him contrary to express order. The salesman had previously carried other passengers to the knowledge of both plaintiff and defendant. The plaintiff was injured by the salesman's negligence. A verdict was directed for the defendant by the trial court. On appeal, *held*, the defendant is liable if the salesman had actual or apparent authority to carry passengers, a question of fact for the jury. Reversed. *De Parcq v. Liggett and Meyers Tobacco Co.*, 81 F. (2d) 777 (C.C.A. 8th 1936).

A property owner is usually responsible for the injuries caused to a known trespasser by his affirmative negligent acts or those of his employee in the scope of his employment. *Herrick v. Wixom*, 121 Mich. 384, 80 N.W. 117 (1899); *Hepfel v. St. Paul, M. & M. Ry. Co.*, 49 Minn. 263, 51 N.W. 1049 (1892); Peaslee, Duty to Seen Trespassers, 27 Harv. L. Rev. 403 (1914). At first glance a passenger in an automobile through the unauthorized invitation of the owner's driver seems at least a trespasser with respect to the owner. By analogy, therefore, since the driving of the automobile is admittedly within the scope of the driver's employment and the driver knows of the passenger's presence, it has been strongly urged that the employer is responsible for injuries caused the passenger by the employee's negligent driving. *Kalmich v. White*, 95 Conn. 568, 111 Atl. 845 (1920); 21 Col. L. Rev. 78 (1921); Berry, Automobiles § 1214 (4th ed. 1924). In spite of this forceful analogy, however, the tendency of courts in recent years has been to deny the liability of car owners unless the very invitation of the driver was within the scope of his actual or apparent authority. *Zampella v. Fitzhenry*, 97 N.J.L. 517, 117 Atl. 711 (1922); *Psota v. Long Island R.R. Co.*, 246 N.Y. 388, 159 N.E. 180 (1927); *Collins v. Noll Baking and Ice Cream Co.*, 226 Ill. App. 124 (1922). See 62 A.L.R. 1167 (1929). It was sought to explain these decisions on two grounds. (1) Since the invitation was beyond the driver's authority, the whole carrying was beyond his authority and the injury did not arise out of an act within the scope of his employment. *Zampella v. Fitzhenry*, 97 N.J.L. 517, 117 Atl. 711 (1922). (2) In accepting the invitation the passenger assumed the risk of injury resulting from the ride. See *Driscoll v. Scanlon*, 165 Mass. 348, 43 N.E. 100 (1896). The first of these is insufficient because it was the negligent driving which caused the injury, not the invitation, and this driving was within the scope of the driver's employment. The "carrying" has two facets, the driving and the presence of the passenger. Of these only the former is the *cause* of the injury, the latter being merely a but-for condition. 21 Col. L. Rev. 78, note 12 (1921). The second explains nothing by itself because assumption of risk means voluntarily putting one's self in a position of peril, irrespective of intent to assume responsibility for possible injury. *Adolff v. Columbia Pretzel & Baking Co.*, 100 Mo. App. 199, 73 S.W. 321 (1903). In this respect the trespasser and unauthorized invitee are indistinguishable. A more rational justification of the decisions, related to the two suggested but different, is this: By disregarding the employer-

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.

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-