

The doctrine of respondeat superior applied to this case is founded on considerations of public policy. The rationale is that one who voluntarily substitutes another in his place to act for him should be responsible for those acts, which, had there been no substitution, would have been his own acts, or would not have occurred. *Higbee Co. v. Jackson*, 101 Ohio St. 75, 128 N.E. 61, 14 A.L.R. 131 (1920). The defendant, as an individual, could not possibly conduct his business single handed. The nature of his enterprise required concerted action by several drivers. Under modern conditions it seems more in accord with economic actualities to say that one who desires the profits incidental to conducting business by representatives should bear the responsibility for the acts of those representatives.

WARREN RICHMOND.

SCOPE OF EMPLOYMENT — PRINCIPLE'S LIABILITY FOR NEGLIGENCE OF COMMISSION SALESMAN.

The driver of an automobile was employed by the defendant as salesman for new and used cars. He was to report each day at 8:30 a. m. and was to be paid on a commission basis. The salesman could use his own judgment as to approaching prospective customers. He was to have one hour for lunch and was permitted to go where he wished for it. On the day in question the driver went home for lunch and the employer, defendant, furnished him an automobile for that purpose. While the employee was returning in order to demonstrate an automobile to a customer he injured the plaintiff. The lower court held for the plaintiff upon a general verdict. This was affirmed by the Court of Appeals for Hamilton County. The reasoning of this court was that since the employee was to return to the salesroom to secure a demonstrator, and then go to the customer and demonstrate the car, this was in itself controlling as indicating that the employee was in the scope of his employment. In this case the court emphasized the element of control. *The E. S. Gahagen Co. v. Smith*, 48 Ohio App. 290, 1 Ohio Op. 430, 194 N.E. 26, 18 Abs. 366 (1934).

It is well established that the employer is liable to third persons for acts of his agent when done in the scope of his employment. *Henshaw v. Noble*, 7 Ohio St. 226 (1857); *Clark v. Frey*, 8 Ohio St. 358, 72 Am. Dec., 590 (1858); *Pickens v. Diecher*, 21 Ohio St. 212 (1871); *Passenger R. Co. v. Young*, 21 Ohio St. 518 (1871).

The principle question arising in all of these cases is whether the employee was acting within the scope of his employment at the time of

the injury. Many courts place the emphasis on the control which the employer exercises over his employee. *Clark v. Frey*, supra; *Higbee Co. v. Jackson*, 101 Ohio St. 75, 14 A.L.R. 131, 128 N.E. 61, 20 NCCA 144 (1920); *Curran v. Earl C. Anthony*, 77 Cal. App. 462, 247 P. 236 (1925); *Aisenberg v. Adams Co.*, 95 Conn. 419, 111 A. 591 (1920); *Mitchell's Case*, 121 Me., 455, 118 A. 287, 33 A.L.R. 1447 (1922); *Messmer v. Bell and Coggeshall Co.*, 133 Ky. 19, 117 S.W. 346 (1909). In *Root v. Shadbolt and Middleton*, 195 Iowa 1225, 193 N.W. 634 (1923) the court held that the test of the power to control was in itself conclusive. Some courts make a distinction between general control and control of details, holding that only in the latter instance is the employee acting in the scope of employment. *Barton v. Studebaker*, 46 Cal. App. 707, 189 P. 1025 (1920); *Page v. Appanoose County*, 184 Iowa 498, 168 N.W. 916 (1918); *Gay v. Railroad*, 148 N.C. 336, 62 S.E. 436 (1908); *Boyd v. Mahone*, 142 Va. 690, 128 S.E. 259, 262 (1925); Restatement of Agency, Vol. 1, Sec. 14; Mechem on Agency, Vol. 2, Sec. 1863, 2nd Ed.; See also 14 R.C.L. 67 for a list of cases emphasizing and applying the control test. Other courts inquire into the motive of the employee to see whether the motive for the furtherance of the employer's business dominates over his personal motive. *Railway Co. v. Little*, 67 Ohio St. 91, 65 N.E. 861 (1902); *The Nelson Business College Co. v. Lyod*, 60 Ohio St. 448, 54 N.E. 471 (1899); *Riley v. Standard Oil Co. of N. Y.*, 231 N.Y. 301, 132 N.E. 97 (1921); *McCarthy v. Timmins*, 178 Mass. 378, 59 N.E. 1038 86 Ann St. Rep. 490 (1900); Restatement of Agency, Sec. 236. A third point of emphasis employed by some courts is that of space. When the employee deviates from his regular route, the courts vary as to the place or zone within which the employee can be said to be in the scope of his employment. *Stewart v. Whitford*, 22 C.C. (N.S.) 585, 30 C.D. 652-C.J.N. (1915); *Railway Express Agency v. Lewis*, 156 Va. 800, 159 S.E. 188 (1931); *Clawson v. Pierce-Arrow Motor Car Co.*, 231 N.Y. 273, 131 N.E. 914 (1921); *Hartnett v. Gryzmish*, 218 Mass. 258, 105 N.E. 988 (1914); Restatement of Agency, Sec. 237. And finally when a chattel is involved some courts attach significance to ownership, as to whether the employer or employee owns the chattel. *The White Oak Coal Co. v. Rivow*, 88 Ohio St. 18, 102 N.E. 302 (1913). Usually, if the employer gives his consent for the use of the automobile and the employee is using it for his own use the owner is liable. However, if no consent is given and the employee uses it for his own use the employer is not liable because the employee is considered without the scope of employment. 22 A.L.R. 1397; 45 A.L.R.

477; 50 A.L.R. 1450. It will be noted that the emphasis in the principle case was placed upon the control element.

NOAH J. KERN

Appeal and Error

MOTION TO CERTIFY — EFFECT OF OVERRULING MOTION — STARE DECISIS.

“The refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an adjudication of the question by this court as an established precedent for future cases.” This unequivocal language was used by the Supreme Court of the State of Ohio in the recent case of *Village of Brewster v. Hill*. The circumstances of the controversy calling forth this statement were that the capacity of a town to contract under Article VIII, section 6 of the Ohio Constitution was challenged by Hill, a taxpayer. The case of *Nicol v. Tolhurst, Village of Amherst* (unreported), decided by the Court of Appeals of Lorain County in a pro forma opinion, was similar factually, and that court had decided in favor of the Village. Counsel for the Village of Brewster cited the Amherst case as authority for his position, since a motion to certify had been overruled by the Supreme Court. The Court, however, held in favor of Hill and against the Village. We may take it, then, as an indisputable fact that overruling a motion to certify is not an affirmance. *Village of Brewster v. Hill*, 128 Ohio St. 343, 190 N.E. 766, 40 O.L.B. 66 (1934).

At first blush, it would seem that this situation is highly contradictory; two cases similar factually, yet having two opposing decisions upon the question involved. In fact, however, there is no ambiguity. In reference to the law of Ohio generally, the Supreme Court has spoken, and their word is the law. It would be well, however, for the lawyer to keep the Amherst case in mind when before the Court of Appeals of Lorain County.

A further instance of this principle is found in the words of Judge Jones in *The Cleveland Railroad Co. v. Masterson*, 126 Ohio St. 42, 183 N.E. 873, 37 O.L.R. 337, 42 A.L.R. 15 (1932). “Various cases involving the application of the ‘last clear chance’ rule have, from time to time, appeared on the motion docket of the court, and in such cases this court has generally given its sanction to the rule in *Erie Railroad Co. v. McCormick, Adm’rs*, 69 Ohio St. 45. A recent case knocking at our doors for certification was *Ross v. Hocking Valley Railroad Co.*,