acted with authority, and the petition does not state a cause of action against them in the absence of allegations setting forth facts to the effect that they acted without authority. *Kennedy & Parsons* v. *Lander Dairy Co.*, 36 Wyo. 58, 252 Pac. 1036 (1924); *Eisinger* v. *E. J. Murphy Co.*, 48 App. D.C. 476, 52 App. D.C. 197, 285 F. 921 (1922); *Jump* v. *Sparling*, supra. The view thus adopted by the Supreme Court of Ohio is supported by the great weight of authority in this country. Brannan's Negotiable Instruments Law, 256 (5th Ed., 1932).

The court further held that the words, "I, we, or either of us, promise," etc., do not change the import of the instrument so as to make the agents personally liable. *Williams* v. *Harris*, 198 Ill. 501, 64 N.E. 988 (1902); *New England Electric Co.* v. *Shook*, supra; *Kilpatrick* v. *Plummer*, supra. The dissenting opinion, which was based entirely on this point, took the opposite view, holding that these words, appearing in four vital places in the body of the note, undoubtedly imposed personal liability on the agents. The same position was taken in the case of *Huron County Banking Co.* v. *The Oberlin Co.*, 19 O.C.C.N.S. 151 (1911). Where the intention to bind the corporation is as aparent as it is in the principal case, it would seem that the view taken by the majority of the court is the better one, being more in accord with modern principles and authority. The fact that the agents did not place such a word as "by" or "per" before their signatures was also held to be immaterial. Accord: *Aungst* v. *Creque*, supra. Contra: *Briel* v. *Exchange National Bank*, supra.

A discussion and a list of decisions concerning the law in Ohio on this question before the enactment of the present statute are contained in 1 O.Jur. 718. As to the admissibility of parol evidence to show who was actually intended to be bound by the instrument see 1 O.Jur. 722; Brannan's Negotiable Instruments Law, 263 (5th Ed., 1932).

ARCH. R. HICKS, JR.

## RESPONDEAT SUPERIOR — TORT LIABILITY OF PRINCIPAL FOR NEGLIGENCE OF AGENT HIRED FOR SINGLE UNDERTAKING

The defendant, an undertaker, contracted to supply transportation for a funeral party. Plaintiff, one of the party, was injured because of the negligent operation of the car by the driver. The defendant hired the car and the driver from a livery service to augment his facilities for handling the funeral. The trial court directed a verdict for the defendant. The Court of Appeals affirmed the trial court. Held, the jury should have been asked to determine whether the negligent driver was

the special servant of the defendant or the servant of an independent contractor. Also, the jury should have been instructed to find whether or not the defendant, by his contract to transport the funeral party, assumed a duty of care to each member of the party. Judgment of the Court of Appeals reversed. *Sack* v. *A. R. Nunn & Son et al.*, 129 Ohio St. 128, 1 Ohio Op. 447 (1934).

The Supreme Court, in its opinion, based its holding on two theories, each of which was developed sufficiently to hold the defendant liable: One, that the driver was the special servant of the defendant; the other, that the defendant, by his contract to transport the funeral, assumed a duty of care to each member of the funeral party. *John H. Radel Co.* v. *Borches*, 147 Ky. 506, 39 L.R.A. (N.S.) 227, 145 S.W. 155 (1912); *Mahany* v. *Kansas City Railways Co.*, 254 S.W. 16 (Mo., 1923). This note is restricted to the problems incidental to a finding of liability on the first theory.

The question of the relation between the defendant and the negligent subordinate is controlling, and is answered only after a consideration of several factors. *Restatement of Agency*, Section 220, page 483. In Ohio the right of the defendant to control the negligent subordinate is the vital factor in determining the relation between the defendant and the actual tortfeasor. *Toledo Stove Co.* v. *Reep*, 18 O.C.C. 58, 9 O.C.D. 467, 23 L.N.S. 379 (1898); *Tiffin* v. *McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194 (1878).

The mode of payment is another factor bearing on the relation, and is relevant to the right to control. In the case at bar the defendant paid a price for the unit, the car and the driver. While this fact is evidence of the relation of independent contractor, it is not controlling. *Schickling* v. *The Post Publishing Co.*, 115 Ohio St. 589, 115 N.E. 143, 22 O.A. 318, 5 Abs. 29 (1926); *Minor* v. *Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L.R.A. (N.S.) 1178 (1913).

The selection of the particular servant whose negligence caused the accident was denied the defendant. The right to control the servant, essential to the relation of master and servant, ordinarily does not exist in the absence of the right to select the servant. *Babbit* v. *Say, Admr.*, 120 Ohio St. 177, 165 N.E. 721, 280 L.R. 589, 7 Abs. 190 (1929); *James Carmen et al.* v. *Steubenville & Indiana R.R.Co.*, 4 Ohio St. 399 (1854).

Furnishing a worker and equipment for the defendant, as was done in the case at bar, is evidence favoring the relation of independent contractor, but is not conclusive proof. *Tiffin* v. *McCormack*, supra; *Standard Millwork Co.* v. *Bick*, 14 O.C.C. (N.S.) 425, 23 C.D. 26 (1911).

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