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COMMENTS

EFFECT OF VERDICT FOR EMPLOYEE IN JOINT ACTION AGAINST EMPLOYER AND EMPLOYEE

The recent decision in the case of *Moffett v. McCurry,*[1] decided by a full bench of the Court of Appeals of Georgia, brings to mind the question presented by this comment. That is, what is the effect of a verdict in favor of the employee in a joint action against the employer and employee?

In considering this problem, there are actually two different answers, both of which are followed by a majority of the jurisdictions in the United States. And these two solutions are not inconsistent, but are rather in harmony, one applying under one situation of facts and the other under a different situation of facts.

The first rule is that where the negligence upon which the action against the employer is based is purely derivative, falling under what is commonly known as the doctrine of respondeat superior, a verdict exonerating the employee but holding the employer liable cannot be the basis of a judgment against the employer, but must be set aside. This is upon the theory that the sole basis of liability of the employer is the negligence or wrongdoing of the employee imputed to the employer under the doctrine of respondeat superior and the acquittal of the employee of no wrongdoing conclusively negatives liability of the employer. The verdict in favor of the employee, determining in effect that he was not guilty of negligence, necessarily amounts to a finding that the employer was free from negligence, and a verdict against the employer after finding in favor of the employee would be inconsistent and illogical.[2]

It will be seen later in this discussion that a few courts refused to apply this logically-appealing theory at one time in their history, but it always represented the opinion of an overwhelming majority of the courts of the United States. Today its acceptance has become almost unanimous, contrary authority in a number of former minority jurisdictions having been expressly overruled.

The other answer to the question put forth in the beginning of this paper applies when the facts under which the master is sued are found to be different. If the joint action against the employer and employee is based, not on the negligence of this employee alone, but rather on the negligence of the master individually or the negligence of another employee not joined,

1. 84 Ga. App. 853, 67 S.E.2d 807 (1951).
2. 35 AM. JUR. 962, *Master and Servant,* § 534. 57 C.J.S. 421, *Master and Servant,* § 619b.

a verdict for the employee joined in the action would not in itself be inconsistent with a verdict against the employer. The jury could very properly find in such a situation that the injuries of the plaintiff were a result, not of the negligence of the employee joined in the action, but of the negligence of the master himself or of another servant; and the master would, of course, be held liable under the doctrine or respondeat superior for the results of the negligence of *another* of his servants.[3]

Therefore, the answer as to which rule will apply as to the employer's liability when a verdict is returned for the employee turns on a question of fact. Was the injury a result of this employee's negligence alone? If so, the first principle mentioned will apply in practically every case. If not, the second principle will always apply.

The examination of this problem in closer detail requires consideration of two distinctly separate questions, one a question of law and one a question of fact. The question of law will make up the bulk of this comment. It involves a study of the cases from the majority jurisdictions and also from those jurisdictions which have at one time refused to follow the first majority rule discussed herein, which holds that where the negligence of the employer is solely derivative and based on respondeat superior, a verdict for the employee means that the employer cannot be held liable. The question of fact, on the other hand, involves a determination of just when the courts will say that the facts are such that the second rule should apply rather than the first, and the master can be held liable while the particular servant joined is relieved of liability.

The Georgia case mentioned in the introduction to this comment falls under the latter question and will be discussed later. As to the former question, Georgia has always followed the majority rule. In the early landmark case of *Southern Railway Company v. Harbin*[4] the court made this plain:

> In an action against a railway company and its servant, to recover damages for the homicide of the plaintiff's son solely in consequence of the servant's misfeasance, where a verdict is returned finding the servant not liable but finding in favor of the plaintiff against the railway company, such verdict should be set aside and a new trial granted.

Other Georgia cases, where this proposition has been followed, are numerous and convince the writer that once a court in Georgia decides that the master's negligence is derived through respondeat superior solely from the negligence of the

3. *Ibid.*
4. 135 Ga. 122, 68 S.E. 1103 (1910).

servant joined, the law of the *Harbin* case will control.[5]

The decisions applying this principle are quite numerous and there have been some excellent annotations involving this point.[6]

One of the earliest cases laying down the principle was *Montfort v. Hughes,*[7] decided by the Court of Common Pleas for the City and County of New York in 1854. Sarah Montfort was suing James Hughes and two others for injuries occasioned by the actions of Wild, servant of Hughes and the other party, both of whom were not present when the injuries occurred. The court said:

> If he (the servant) was not guilty of negligence, no one of the defendants was responsible to the plaintiff . . . To acquit him and inquire further whether the plaintiff should have judgment against his masters was utterly contradictory . . . [8]

Another of the leading cases on this point is *Doremus v. Root,*[9] decided by the Washington Supreme Court in 1901. In this case Doremus sued Root, the conductor, and the Oregon Railroad and Navigation Company for alleged injuries caused by Root's negligence. The jury decided against the company but was silent as to the conductor, and the court ruled that this was a verdict in his favor.

This ruling itself might be the subject of further study, but it will not be considered in this paper. Also involved are questions concerning procedure: whether there should be a new trial as to both defendants, whether the case should be remanded and a final judgment entered in favor of the employer, and many others. However, this paper is not concerned with procedure, but simply whether the courts have allowed a verdict for the employee and against the employer to stand. The overwhelming majority do not allow such a verdict to stand; what they do procedurally when they reverse will not be examined in this brief study.

To continue, the Washington court said that such a verdict could not be the basis of a judgment against the company. If the employee who caused the injury was free from liability therefor, his employer must also be free from liability. To the

5. See Salmon v. Southern Ry. Co., 137 Ga. 636, 73 S.E. 1062 (1912); Southern Ry. Co. v. Davenport, 39 Ga. App 645, 148 S.E. 171 (1929); Roadway Express v. McBroom, 61 Ga. App. 223, 6 S.E.2d 460 (1939); Southern Ry. Co. v. Nix, 62 Ga. App. 119, 8 S.E.2d 409 (1940); Kalil v. Spivey, 70 Ga. App. 84, 27 S.E.2d 475 (1943); Dixie Ohio Express Co. v. Poston, 170 F.2d 446 (5th Cir. 1948).
6. See Notes, 9 Ann. Cas. 660 (1908), 21 Ann. Cas. 1013 (1911), 54 L.R.A. 649 (1902), 9 L.R.A. (N.S.) 880 (1907), 30 L.R.A. (N.S.) 404 (1911), L.R.A. 1917E, 1029, 78 A.L.R. 365 (1932), 16 A.L.R.2d 969 (1951).
7. 3 E. D. Smith 591 (N.Y. 1854).
8. *Id.* at 594.
9. 23 Wash. 710, 63 Pac. 572 (1901).

same effect are the holdings in six other leading railway cases.[10]

This rule has not been limited in its application to verdicts in actions against railroads and their employees, although it must be admitted that most of the early cases where it developed were these type cases, as demonstrated above. As a practical explanation, it was natural for the law to develop from railroad litigation, since the railroads greatly antedated motor transport carriers and automobiles, which have today become the cases in which many verdicts such as this are returned.

Other factual situations in which the majority rule has been applied are very numerous[11] and the following cases constitute a sampling selected practically at random, the only conscious direction being toward as much variety as possible. In the cases cited it must be remembered that the procedural results vary from new trial to reversal with order for final judgment for the employer. However, this comment is not directed toward the procedural question, but rather toward the substantive holdings of the following cases cited: that a verdict for an employee and against an employer derivatively liable under respondeat superior will not be allowed to stand.

Indiana: Suit against servant and blasting company for injuries caused by negligence of servant in "shooting" of a gas well by nitroglycerin.[12]

Tennessee: Suit against servants (president and superintendent) and mercantile corporation for false imprisonment, assault and battery, and slander by servants.[13]

Virginia: Suit against driver-employee and sight-seeing corporation for injuries resulting from collision of bus driven by individual employee with an automobile.[14]

Illinois: Suit against instructor-manager-employee and flying school corporation for wrongful death resulting from flight with instructor.[15]

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10. New Orleans & N. R. Co. v. Jopes, 142 U.S. 18, 12 S.Ct. 109, 35 L. Ed. 919 (1891); Stevick v. Northern Pac. Ry. Co., 39 Wash. 501, 81 Pac. 999 (1905); McGinnis v. Chicago, R. I. & P. R. Co., 200 Mo. 347, 98 S.W. 590 (1906); Hobbs v. Illinois C. R. Co., 171 Iowa 624, 152 N.W. 40 (1915); Williams v. Hines, 80 Fla. 690, 86 So. 695 (1920); Willy v. Atchison, T. & S. F. Ry. Co., 115 Colo. 306, 172 P.2d 958 (1946).
11. See AMERICAN DIGEST SYSTEM: *Master and Servant, Key Number* 333; *Automobiles*, Key Numbers 247 and 248.
12. Indiana Nitroglycerine & T. Co. v. Lippencott Glass Co., 165 Ind. 361, 75 N.E. 649 (1905).
13. D. B. Loveman Co. v. Bayless, 128 Tenn. 307, 160 S.W. 841 (1913).
14. Monumental Motor Tours v. Eaton, 184 Va. 311, 35 S.E.2d 105 (1945).
15. Rogina v. Midwest Flying Service, 325 Ill. App. 588, 60 N.E.2d 663 (1945).

Missouri: Suit against driver-employee and delivery company for injuries in accident with truck driven by employee.[16]

Minnesota: Suit against driver-employee and bus company for injuries to passenger resulting from negligence of driver.[17]

Oklahoma: Suit against servant and utility company for personal injuries caused by negligent act of servant in repairing burners of gas furnace.[18]

California: Suit against servant and telephone company for personal injury resulting from negligence of servant.[19]

New York: A very similar New York case involving the same principle was *Bourcier v. Peryor*,[20] a suit for personal injuries against the driver of an automobile and the owner, the only negligence being that of the driver. A verdict against the owner and for the driver was set aside.

Having examined a broad sampling of cases from jurisdictions applying the majority rule, we turn to a consideration of those jurisdictions which have excepted.

Illinois Cent. R. Co. v. Murphy's Adm'r.,[21] decided by the Court of Appeals of Kentucky in 1906, was the case most frequently cited as representing the law of the minority until it was reversed. This decision, as did the early decisions applying the majority rule, arose out of an action against a railroad and the engineer-employee. The verdict was against the railroad and silent as to the engineer, thereby relieving him from liability. On appeal, the judgment was affirmed in this oft-quoted language of minority decisions and annotations:

> It does not follow that the same verdict need have been rendered against the company and its engineer. We can think of cases where possibly the engineer ought to be held to the stricter account, and vice versa; but let that be as it may, if the plaintiff is entitled to his verdict against two tortfeasors, but the jury are able to agree only as to one of them, and gives a verdict accordingly, we know of no law that prevents the plaintiff from having at least what the jury has given him. If he failed to get the verdict against another also liable, *the plaintiff may be aggrieved, but not the defendant* [Italics supplied].[22]

The above statement expresses the feeling of most courts which have refused to follow the majority rule. Without deny-

16. Berger v. Podolsky Bros., 360 Mo. 239, 227 S.W.2d 695 (1950).
17. Begin v. Liederbach Bus Co., 167 Minn. 84, 208 N.W. 546 (1926).
18. Consolidated Gas Utilities Co. v. Beatie, 167 Okla. 71, 27 P.2d 813 (1933).
19. Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875 (1908).
20. 293 N.Y. 806, 59 N.E.2d 175 (1944).
21. 123 Ky. 787, 97 S.W. 729 (1906).
22. *Id.*, 97 S.W. at 732.

ing their illogical position in allowing the person derivatively liable to be held responsible while releasing the person primarily liable, they have adopted a view which is most advantageous to the plaintiff and disastrous to the defendant master. In actual practice, the master is undoubtedly the person who bears the brunt of the damage in nine cases out of ten, but at least he ought to have the protection of a requirement that the jury find the servant negligent before holding him to answer. Kentucky continued to follow the rule laid down above in a number of decisions.[23] So fixed had this rule become in Kentucky practice that it was determined in one opinion that "the question may be treated as at rest"[24] and in another that it was "our final conclusion."[25]

However, as is so often true, especially in the field of law, no conclusions are final and no questions are ever completely at rest. Therefore, in another Illinois Central Railroad case thirty years later, in which the verdict below was the same as in the *Murphy* case, we find the Kentucky Court of Appeals, perhaps in response to the argument of more persuasive and logical defense counsel, speaking thusly:

> The rule [of the *Murphy* case] was based on the theory that the master and servant were joint tortfeasors. The theory, of course, was erroneous. The master's liability rests upon the doctrine of respondeat superior, and, unless negligence on the part of the servant is shown, a recovery against the master cannot be had.[26]

With this decision Kentucky came into line with the majority and has consistently followed the majority rule since that date.[27]

The Supreme Court of Montana followed the reasoning of the *Murphy* case in 1911 in the case of *Verlinda v. Stone & Webster Eng. Co.*[28] The action was for injuries suffered by one servant in construction of a dam due to the negligence of a fellow servant, and the verdict was against the company and silent as to the servant sued jointly, thereby relieving him of liability. The court, while recognizing the majority rule and

23. See Broadway Coal Mining Co. v. Robinson, 150 Ky. 707, 150 S.W. 1000 (1912); Weil v. Hagan, 166 Ky. 750, 179 S.W. 835 (1915); J. I. Case Threshing Mach. Co. v. Haynes, 178 Ky. 644, 199 S.W. 786 (1918); Myers' Adm'x v. Brown, 250 Ky. 64, 61 S.W.2d 1052 (1933); Nashville, C. & St. L. Ry. v. Byars, 252 Ky. 507, 67 S.W.2d 497 (1933).
24. *Id.*, 179 S.W. at 836.
25. *Id.*, 67 S.W.2d at 498.
26. Illinois Cent. R. Co. v. Applegate's Adm'x, 268 Ky. 458, 105 S.W.2d 153 1936).
27. See Blue Valley Creamery Co. v. Cronimus, 270 Ky. 496, 110 S.W.2d 286 (1937); Louisville & N. R. Co. v. Farney, 295 Ky. 8, 172 S.W.2d 656 (1943); Dillion v. Harkeroad, 295 Ky. 308, 174 S.W.2d 419 (1943); Lyons v. Great Atlantic & Pacific Tea Co., 301 Ky. 827, 193 S.W.2d 450 (1946).
28. 44 Mont. 223, 119 Pac. 573 (1911).

citing *Doremus v. Root*, expressed a preference for the decision in the *Murphy* case:

> The conclusions reached by jurors are sometimes inexplicable. Often they arbitrarily find against one party and in favor of another without any apparent reason; but, if the evidence justifies the verdict as to the party held, there is no reason why it should not be deemed good as to him, notwithstanding there is no finding as to the other.
>
> It seems to us that the better rule is that, if the evidence is such that the jury might have found against both the master and the servant, the plaintiff should not be denied his recovery against the master because the jury were unable to agree upon a verdict against the servant, or arbitrarily disregarded the evidence tending to show negligence on the part of the servant.[29]

This decision was followed in Montana in the cases of *Melzner v. Raven Copper Co.*[30] and *DeSandro v. Missoula Light and Water Co.*[31] However, only eleven years after the *Verlinda* case, the Montana court rejected its reasoning in the decision of *Lowney v. Butte Electric Ry. Co.*[32] It was there decided that the language of the *Verlinda* case and those following it was dicta, and the decisions could be distinguished. Thereafter, Montana became an adherent of the majority rule, holding that "a verdict exonerating the conductor while finding against the company is inconsistent."[33]

Thus far we have seen two courts, which at one time followed the minority rule in no uncertain terms, unequivocally depart from their earlier holdings.

In Texas the result is not so clear, and it can probably be said that Texas is still in the minority camp. In the early case of *Gulf, C. & S. F. Ry. Co. v. James*,[34] the court apparently followed what we have called the minority rule, but seemed to indicate that its application would be limited to "that class of torts characterized by the existence of a wrongful intent, as distinguished from torts arising from negligence."[35] The action was for malicious prosecution, and the defendants were the railroad and its manager and assistant. A verdict being returned against the railroad and silent as to the co-defendants, the court allowed it to stand, saying:

> It may be admitted, we think, that for the reason assigned the verdict is not altogether consistent, and it may be said to be contradictory; but it does not follow that this alone will be sufficient to impair or destroy the validity . . . [36]

Then the court applied the limitation mentioned above.

29. *Id.*, 119 Pac. at 578.
30. 47 Mont. 351, 132 Pac. 553 (1913).
31. 48 Mont. 226, 136 Pac. 711 (1913).
32. 61 Mont. 497, 204 Pac. 485 (1922).
33. *Ibid.*
34. 73 Tex. 12, 10 S.W. 744 (1889).
35. *Id.*, 10 S.W. at 746.
36. *Ibid.*

However, this limitation was completely overlooked by the Texas Court of Civil Appeals in the case of *Texas & P. Ry. Co. v. Huber.*[37] This was an action against the railroad and engineer for wrongful death caused by the engineer's negligence, and the jury found for the servant and against the company. Consider this headnote in the *Huber* opinion:

> In an action against a railway company and its engineer for the death of a pedestrian struck by an engine, the jury found a verdict in favor of the engineer and against the railway company. Held that, though the verdict had the appearance of being based on contradictory findings because of a finding in favor of the engineer whose act constituted the negligence complained of, the verdict against the company would not be disturbed.[38]

Apparently the court just decided to disregard the jury's plain verdict exonerating the engineer and rely on the verdict against the railroad as indicating a finding of negligence, even though the person responsible was released.

A fairly recent case resulting in the same decision held:

> In an action for injuries to customer slipping on floor of store, brought against both store owner and porter, who allegedly applied floor dressing, fact that no judgment was rendered against porter did not establish that porter was not guilty of negligence in applying floor dressing, so as to have required trial court to render judgment in favor of store owner.[39]

The language quoted previously from the *Huber* case was also included in the opinion, indicating apparently that the minority rule will still be applied in Texas.

The state of Idaho must also be counted among the minority jurisdictions in view of the decision in *Strickfaden v. Green Creek Highway Dist.*,[40] which has been followed consistently by the Idaho courts. The case involved for the most part many technical municipal-corporation-law problems, and the master-servant question was mentioned only at the very end of the opinion. However, the sweeping language of the opinion embraces and adopts with approval the minority decisions already mentioned in the states of Kentucky, Montana and Texas. Having sued the Highway District and the director for injuries resulting from negligence arising under the director's control, the verdict was against the district only. On appeal, the court affirmed in this language:

> The verdict of a jury can only be set aside on appeal for want of substantial evidence to support that particular verdict, and not because the verdict may seem inconsistent with another verdict, or because another verdict is wrong, or some other party has been

37. 95 S.W. 568 (Tex. Civ. App. 1906).
38. *Id.*, 95 S.W. at 570.
39. S. H. Kress & Co. v. Hall, 154 S.W.2d 278 (Tex. Civ. App. 1941).
40. 42 Idaho 738, 248 Pac. 456 (1926).

discharged or exonerated. It would be a subversion of the ends of justice to allow a defendant to complain of a just judgment against it—one supported by the overwhelming weight of evidence—because its joint tortfeasor was not also held. Again, if it be contended by appellant that the verdicts are inconsistent, and one of them is therefore capricious, or the result of prejudice, what more reason is there for believing that the caprice or prejudice was directed against the appellant than to suppose that it was directed in favor of Dasenbrock and against respondent?[41]

The fallacy of the court's reasoning lies in the mistaken assumption that the master and servant are *joint* tortfeasors, even where the liability of the master is based solely on the negligence of the servant joined. But this error was not perceived, and again in the case of *Judd v. Oregon Short Line Ry. Co.*[42] the same mistake was repeated. The railroad and engineer were sued jointly, and the verdict was for one dollar against the engineer and $15,720 against the railroad. The court said:

Appellant assigns as error the action of the court in submitting to the jury two forms of verdict in favor of the plaintiffs and in receiving from the jury separate verdicts in favor of the plaintiffs and against defendants; one against the defendant Clinkingbeard for one dollar, and the other against the railroad company for $15,720. Clinkingbeard did not appeal. The railroad company appealed, and inter alia urges that the verdicts are inconsistent and "make fish of one and fowl of the other."

The defendants were sued as joint tortfeasors. Clinkingbeard was the engineer operating the locomotive and for that purpose, of course, was the agent of the railroad company. Although the jury found that the engineer was guilty of negligence, it is not at all surprising if they concluded that, since what he was doing was for the master and could not profit him in any way beyond his wages, it would be only fair for his employer to pay whatever damages had resulted from the negligent acts committed. This objection affords no grounds for disturbing a verdict returned against either of the tortfeasors.[43]

Two recent Federal decisions applying Idaho law confirm the fact that Idaho is still one of the very few state not following the majority rule.[44]

As to South Carolina, there also appears to be some indication in early opinions that their courts would apply the minority rule. The case of *Gardner v. Southern Ry. Co.*[45] has been cited as being in point. It was held:

Where, in an action for personal injuries, the complaint alleges that plaintiff was injured by the willful tort and negligence of the master and of a servant, it is error to charge that there must be a verdict for defendants if the jury found that the servant was not guilty of negligence.[46]

41. *Id.*, 248 Pac. at 465.
42. 55 Idaho 461, 44 P.2d 291 (1935).
43. *Id.* 44 P.2d at 298.
44. R. J. Reynolds Tobacco Co. v. Newby, 153 F.2d 819 (9th Cir. 1946); Browder v. Cook, 59 F. Supp. 675 (D. Idaho 1945).
45. 65 S.C. 341, 43 S.E. 816 (1903).
46. *Ibid.*

However, it is the writer's opinion that this case is to be distinguished from the minority holdings in that the court emphasized that the suit was based on two counts, the first charging a willful tort and the second charging negligence; and the court made it quite clear that the error in the charge lay only in the fact that it precluded the plaintiff's recovery for a willful tort which could have been committed by either defendant. Impliedly the charge would have been correct in a negligence action only.

A somewhat stronger case supporting the position that South Carolina is in the minority is the case of *Carson v. Southern Ry. Co.*[47] The language of the court appears to be very much in this direction:

> One may be taken and the other left . . . We do not think that a verdict in favor of the servants turns the master loose thereby.[48]

But this language must be considered in the light of the cause of action. It was a suit by a railroad employee for personal injuries and alleged a joint and several tort, caused by the defective couplers used by the railroad and negligence of fellow servants. Under those circumstances it was right for the court to rule that it was a matter for the jury to decide whose negligence caused the injury and a verdict for the servants joined as defendants and against the railroad would not be inconsistant. This case was affirmed by the Supreme Court of the United States.[49]

Two South Carolina cases which are undoubtedly in accord with the minority holding holding are *Bedenbaugh v. Southern Ry. Co.*[50] and *Ruddell v. Seaboard Air Line Ry.*[51] In both of these the servant was released and the master held liable; and the opinions cite the *Gardner* and *Carson* decisions as being controlling, without recognizing the distinguishing factors which led to those decisions.

Although the above two decisions are definitely minority holdings, South Carolina courts did not continue in this direction. In the case of *Sparks v. Atlantic Coast Line R. Co.*[52] they reversed the lower court and applied the majority rule. The action was for wrongful death against the railroad and the conductor who threw the passenger off the train, and the verdict was for the conductor and against the railroad. On appeal,

47. 68 S.C. 55, 46 S.E. 525 (1903).
48. *Id.*, 46 S.E. at 536.
49. Southern R. Co. v. Carson, 194 U.S. 136, 24 S.Ct. 609, 48 L. Ed. 907 (1904).
50. 69 S.C. 1, 48 S.E. 53 (1904).
51. 75 S.C. 290, 55 S.E. 528 (1906).
52. 104 S.C. 266, 88 S.E. 739 (1916).

counsel for the plaintiff referred to the above four decisions as authority, but the court said that the essence of those decisions was that there were other operating agencies of the principal than the servant sued as joint tortfeasor, and that is a factor which will be considered shortly. The distinction must always be made between cases where the only liability of the master is based solely on the negligence of the servant joined in the action, and those cases where the master can be held liable on additional grounds, either his own negligence or the negligence of other servants not joined. South Carolina has consistently followed the majority rule in later decisions, but has been most careful in first determining that the case was one in which the master was liable only through the negligence of the servant joined.[53]

This determination of the factual question leads to a consideration of the cases applying the second principle mentioned in the beginning of this comment, that a verdict against the master alone will not be set aside where there are grounds for holding him liable other than the alleged negligence of the servant joined.

But before considering this second main topic it is suggested that the reader examine two rather unique cases which come under the first principle.

First is the Mississippi case of *St. Louis & S. F. Ry. Co. v. Sanderson.*[54] Here the conductor shot and killed a passenger, and his widow sued the railroad and the conductor. The verdict was against the railroad only, and on appeal this was affirmed. The court relied heavily on a Mississippi statute which states that "one of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights in the case."[55] This decision is peculair to the state of Mississippi.

The second and final case[56] considered in this part of the comment should serve as an example of what not to do in trying a case. At the trial the attorney for the defendant (who was be-

53. See Johnson v. Atlantic Coast Line R. Co., 142 S.C. 125, 140 S.E. 443 (1927); Mullikin v. Southern Bleachery & Print Works, 184 S.C. 449, 192 S.E. 665 (1937); Carter v. Atlantic Coast Line R. Co., 194 S.C. 494, 10 S.E.2d 17 (1940).

54. 99 Miss. 148, 54 So. 885 (1911).

55. MISS. CODE ANN. § 1988 (1942).

56. Jentick v. Pacific Gas & Electric Co., 18 Cal.2d 117, 114 P.2d 343 (1941).

ing sued for injuries in a gas explosion caused solely by the negligence of his servants) had this to say:

> Now, before the jury is sent back, I would like to ask the court to instruct the jury that it is not necessary to find a verdict against the individuals Parkhurst and English in order to render a verdict against the defendant Pacific Gas and Electric Company.[57]

After counsel's request, the judge so charged and it took the jury only five minutes to return a verdict against the company and for the employees. On appeal, the gas company got some new lawyers and urged that the case be reversed due to the inconsistency of the verdict. The Supreme Court of California agreed with the contention but refused to reverse on the doctrine of "invited error."

As to the second principle, the question is purely one of fact. A verdict for the servant is a determination that he has not been negligent in the matters charged to him, but this is certainly no reason for relieving the master of liability if the jury can find from the facts other acts than those committed by the servant joined on which to base negligence of the master. If the facts are such that the master himself could have been negligent or the master had imputed to him the alleged negligence of another servant not joined, the master can be held liable separately since his negligence was not based solely on the acts of the employee who was exonerated by the verdict.[58]

This in effect is what the Georgia Court of Appeals decided in the case of *Moffett v. McCurry,* mentioned in the opening paragraph. The suit was for damages resulting from an accident between plaintiff's car and the defendant's parked truck after dark. The plaintiff joined the driver, his helper, the carrier and the insurance company. The acts of negligence alleged were (a) parking on the highway, (b) failure to display clearance lights, (c) parking so that the truck extended across the center line, (d) failure to have rear reflectors, and (e) failure to have a red light mounted on the rear of the truck.[59] After a charge in which the lower court told the jury in effect that it could find against the carrier and insurance company and for the driver and helper, the jury returned just such a verdict. On appeal this was held not to be error since the owner could have been independently negligent in particulars (d) and (e) listed above.

Judge Felton wrote a strong dissent in which he contended that the charge constituted reversible error. He reasoned that

57. *Id.*, 114 P.2d at 344.
58. See Note 2, *supra.*
59. 67 S.E.2d at 811.

if the owners were guilty of negligence in failing to have rear reflectors and lights, the drivers were also identically negligent, saying:

> If there were lights and reflectors on the truck as to one party, there had to be lights and reflectors on it as to all parties . . . There is no act of negligence alleged in this case, whether involving the owner under the rule of respondeat superior, or whether charging the owner and drivers with identical and coincidental acts of negligence, of which the owner could be found guilty by the jury without their also being required to find identical or similar negligence on the part of the drivers.[60]

It is the writer's opinion that the dissent certainly presents the more appealing view from the standpoint of pure logic and reason. The charge of the lower court was an unwarranted instruction in view of the acts of negligence charged, and this error should have required a reversal on the part of the Court of Appeals. This seems to be a case where the law of the *Harbin* case should have been controlling.

Other cases in Georgia which, on their facts, the courts have found not to fall under the control of the *Harbin* case appear to be on somewhat firmer ground than the *Moffett* case. In *Finley v. Southern Ry. Co.*[61] Judge Russell pointed out quite clearly that a verdict for a yardmaster and against the railroad would be perfectly proper where "the defendant company, as a tortfeasor, though sued jointly with Hagar and Turner (yardmasters), might be liable for the negligence of some employee other than they, if, as is alleged in the petition, the negligence of the engineer contributed to the injury."[62]

Another Georgia case which aptly presents the second majority rule is *Southern Ry. v. Garland.*[63] Here a wrongful death action was brought against the railroad, its engineer, and its fireman, and the jury's verdict was aginst the railroad alone. Since the petition alleged separate acts of negligence on the part of the railroad in not having a watchman or warning signal at a dangerous crossing, in addition to negligence of the engineer and fireman in the operation of the train, the verdict was allowed to stand. The court refused to read into the verdict anything not there, and said that under the evidence such a finding was not improper and would not be distrubed.

A recent Georgia case illustrating this principle is *Reliable Transfer Co. v. Gabriel.*[64] It is recommended that this case be examined closely in the state reports, for it is very complicated

60. 67 S.E.2d at 818.
61. 5 Ga. App. 722, 64 S.E. 312 (1909).
62. *Id.*, 64 S.E. at 315.
63. 76 Ga. App. 729, 47 S.E.2d 93 (1948).
64. 84 Ga. App. 54, 65 S.E.2d 679 (1951).

on its facts and consists of four different cases and cross-actions. For present purposes the syllabus by the court is adequate:

> Where a suit for damages on account of personal injuries is brought against a master and his servant, which suit is not based entirely upon the alleged negligence of the servant within the scope of his employment, which would be imputable to the master, but there is other negligence on the part of the master charged and supported by the evidence, and there is a verdict and judgment against the master but not against the servant, who is a party to the action, such verdict and judgment is not void because the jury did not also find that the servant was negligent as charged or because the jury found that the servant was not negligent.[65]

The "other negligence" separately charged to the master lay in permitting its driver to operate for a longer continuous period than that allowed under the rules of the Georgia Public Service Commission.

In turning to other jurisdictions, the reader is reminded that a number of South Carolina cases applying this second rule when the facts indicated independent negligence attributable to the master have already been noted.[66]

A typical case is that of *Allen v. Southern Ry. Co.*,[67] decided in 1950. The separate negligence charged against the railroad was very similar to that mentioned in the *Garland* case above, being the failure to keep the crossing in good repair and erect the proper signs. A judgment based on a verdict against the railroad and for the engineer was affirmed.

This principle has been applied with such complete unanimity throughout the various jurisdictions in the United States that a brief mention of a few cases will amply suffice to illustrate its meaning.

In two West Virginia cases[68] judgments holding the master liable while exonerating the servant were affimed since the court found in each case the master was negligent independent of the actions of his servant, in that the injury was a result of violation of a preemptory and non-delegable statutory duty. The involved question of what constitutes violation of a non-delegable duty cannot be discussed in this paper. Suffice it to say that such a violation constitutes independent negligence on the master's part.

The Supreme Court of Alabama had occasion to apply the second majority rule in a fairly recent railroad case.[69] Suit for wrongful death caused by permitting a passenger to board the

65. *Id.*, 65 S.E.2d at 681.
66. Cases cited Note 53, *supra*.
67. 218 S.C. 63, 61 S.E.2d 660 (1950).
68. Wills v. Montfair Gas Coal Co., 104 W.Va. 12, 138 S.E. 749 (1927); Humphrey v. Virginian Ry. Co., ... W.Va. ......, 54 S.E.2d 204 (1948).
69. Louisville & N. R. Co. v. Maddox, 236 Ala. 594, 183 So. 849 (1938).

wrong train was brought against the railroad and the conductor, and the verdict exonerated the conductor and held the railroad. On appeal this was affirmed since there was evidence to show that a flagman, not the conductor, negligently mis-directed the passenger onto the wrong train, and the master was liable for this other servant's actions.

To the same effect was a holding of the Minnesota court in an action against a railroad and the engineer who was absolved.[70] There was evidence on the trial tending to show negligence on the part of the fireman, and the court charged that "if either the engineer, McManus, or his fireman were negligent that would constitute negligence on the part of the defendant company, but McManus was liable only for his own negligence."[71] The charge was held to be correct, and the jury's verdict was properly responsive to it.[72]

A California case[73] presents a striking factual situation in which the servant's acquittal gave no relief to the employer.

> Little need be said concerning the claim that the verdict in favor of Blanche Mason is so inconsistent with the verdict against defendant that it cannot be permitted to stand. This rule has been invoked where the negligence of the employee is the sole and primary cause of the injury because he alone committed the negligent act. In such a case the liability of the employer is secondary and he is held accountable solely because of his employee's wrong. Under such circumstances the verdict in favor of the employee is inconsistent with the verdict against the employer. . . . Here it was brought out in the evidence offered by defendant that Mrs. Mason was not the only employee charged with the duty of keeping the floor clear and free from obstructions. According to her testimony there were about 160 sales girls charged with the same duty. The jury might have concluded that one or more of the sales girls and not Mrs. Mason breached this duty. Under these facts there was no inconsistency in the verdict, as the primary cause of the injury was not necessarily the negligence of Mrs. Mason but might have been the negligence of another employee.[74]

In sustaining a verdict against the truck owner but not the driver for damages, the Supreme Court of Pennsylvania relied heavily on the fact that under the pleadings and proof it was possible for the jury to find that the accident was caused, not by any negligence of the driver in the operation of the truck, but by that of the employer in not having the signal lights in working condition.[75] With such a device on the truck, the driver was justified in relying upon it and not employing

70. Webster v. Chicago, St. P., M. & O. Ry. Co., 119 Minn. 72, 137 N.W. 168 (1912).
71. *Id.*, 137 N.W. at 169.
72. For a very similar case see Stokes v. Wabash R. Co., 355 Mo. 502, 197 S.W.2d 304 (1946).
73. Wills v. J. J. Newberry Co., 43 Cal. App. 2d 595, 111 P.2d 346 (1941).
74. *Id.*, 111 P.2d at 349.
75. East Broad Top Transit Co. v. Flood, 326 Pa. 353, 192 Atl. 401 (1937).

other means of indicating his intention to turn when the accident happened.

This brief survey of cases applying the second majority rule demonstrates that the courts will not fail to sustain a verdict against the master if there is any negligence attributable to him other than the alleged negligence of the servant who is discharged.

On the other hand, it is suggested that where the master is liable only derivately through negligence attributed to him by respondeat superior, logic demands that a verdict holding him liable and absolving the servant charged with negligence be stricken down. Its inconsistency is rationally repugnant, and such has been the decision of the great majority of American jurisdictions.

CUBBEDGE SNOW, JR.