Agency--Distinction Between "Within the Course of Employment" and "Within the Scope of Employment"

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charities as having become unworthy of the property. Hence by T's will the beneficiaries got a defeasible title to the property. Now as the only way the contingency can arise is by W expressly saying that she deems the charities unworthy, and as she did not so state in her will that they were, no power arises for her to execute, hence only her own property passes by her will.

It has been held that a contrary intention will not be implied from that fact that the testator may have been in doubt as to the amount of the income, which the property passing under the will, would produce. So in the principal case the fact that T made certain small legacies on the condition of the value of the estate not falling below $100,000 did not show a contrary intention not to exercise the power. The court properly suggested that probably T had in mind that at that time the fluctuations of the value of the property and was not referring to his own small estate he had apart from that under the power.

Harry Porter Dies.

AGENCY—DISTINCTION BETWEEN "WITHIN THE COURSE OF EMPLOYMENT" AND "WITHIN THE SCOPE OF EMPLOYMENT"

One is faced with a somewhat confusing problem when trying to differentiate, both in point of fact and in point of law, between the terms, "within the course of employment" and "within the scope of employment." Text-writers on agency and the courts in their decisions are pleased to use first one and then the other, until a student or even a practitioner who is confronted with an agency problem, is ultimately baffled as to the exact meaning and application of the two terms as tests of the master's liability for the torts of his agent. In volume two, section 1879 of Mechem's work on Agency, Mr. Mechem selects the phrase "within the course of his employment" and uses it to mean and include, admittedly for the want of a better term, the separate and distinct meanings of the two phrases, "within the course of his employment" and "within the scope of his employment". The meaning of the words in the former phrase is as that of those in the

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20 Garman v. Glass, 197 Pa. 101, 64 Atl. 923 (1900). G devised property to his wife for life, with remainder to others, with provision that, if they should not be obedient to her, he revokes the devise to them and empowers her to devise the property. The court said that there must be an affirmative decision and declaration of their disobedience, to entitle her to exercise the power, and it is not shown by a devise by her of the "residue" of her property; and until determination that the contingency on which the power may be exercised had arisen. This is true notwithstanding a statute embodying the Massachusetts rule. The court said that the statute does not apply.

latter—something felt but not easily explained. When speaking of an act occurring in the course of employment one thinks of an act done by the servant during the time embraced by the terms of his employment, and within the area either expressly or impliedly denoted by those terms. But when one thinks of acts done within the scope of employment, he thinks of acts which come probably within the bounds of the course of employment, but which acts may or may not be authorized by the master, either expressly or impliedly. This is the distinction that Mechem makes or seems to make; however, in spite of this, he fuses the two terms. They are not fusible, each being independent of the other as to meaning.

In the American Law Institute Restatement of the Law of Agency the compilers choose to make the term “scope of employment” all-comprehensive, as Mechem does the term “course of employment.” To quote from the Restatement:

1. Conduct of a servant is within the scope of employment if, but only if:
   
   (a) It is of the kind he is employed to perform;
   (b) It occurs substantially within the authorized time and space limits; and
   (c) It is actuated, at least in part, by a purpose to serve the master.

2. It is a question of fact, depending upon the extent of departure, whether or not an act, as performed in its setting of time and place, is so different in kind from that authorized, or has so little relation to the employment, that it is not within its scope.

Section (a) obviously would seem to mean “if it is within the scope of employment”. Naturally the servant would only be employed to do what he was authorized to do and vice versa. If a servant does an act which he is neither expressly nor impliedly authorized to do, he is without the scope of employment, by the great majority of cases. Yet if the act is within the time and space limits of the employment, it is the writer’s firm conviction that the servant would be acting within the course of employment. It is difficult to see how, if an act is within the course of employment, but without the scope of employment, that act can be described by one term which embodies the full meaning of both the above terms.

Section (b) seems to mean “if it is within the course of employment.” In a recent Kentucky case it is said “that to render the master liable for the agent’s torts, they must have been committed while carrying out the master’s business, and the tort of a servant is ‘within the course of his employment’ where the servant performing

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1 Restatement, Agency (1934), Sec. 228.
it is endeavoring to promote his master's business within the scope of actual or apparent authority conferred on him for that purpose; but, if he steps aside from the master's business for however short a time to do acts not connected with such business relation, he is not acting 'within the course of his employment.'" The Kentucky decision, as can be seen, conforms with Mr. Mechem in holding that the servant was not acting in the course of his employment when he did unauthorized acts, even though those acts occurred within the time and space limits of his employment. Logically an act occurring within these limits should be held to have occurred within the course of employment, which is, in effect, the theme the writer is endeavoring to develop. This is the same as saying that "line of employment" and "course of employment" are the same; and that would seem to be the logical conclusion both from a grammatical and a factual standpoint.

Only two Kentucky cases seem to make any distinction at all between the phrases.4

There is dictum in an Illinois case5 which, at first blush, would seem to rebut the whole proposition which is here presented. "An employee cannot be acting within the scope of his employment unless he is acting in the course of his employment". The foregoing seems to indicate that the one is collateral with the other. But reverse this sentence—"an employee cannot be acting within the course of his employment unless he is acting within the scope of his employment." The fallacy may at once be observed. Again the question arises—how can the test be possibly applied in its present form? We will discuss two cases and then see what impression they leave in regard to the reversed statement of the above quoted dictum. In a fairly recent Mississippi case,6 as well as in many others,7 is found the proposition that the master is not liable for acts done by the servants outside the scope of employment. We will judge from the facts in the Mississippi case whether the defendant's servant was acting in the course of his employment. The plaintiff was in the depot of the defendant to assist her father in getting aboard a train. In broad daylight the baggage master exposed his private parts to the plaintiff and proceeded to urinate on her clothes and her person, before she could remove herself. In the appellate court judgment was given for the defendant company, giving the rule that "the master is not liable for the acts of the servant when done outside the scope of his employment, and not in furtherance of the master's business, unless such act be directed to be done or ratified by the master". In the case cited supra, note 5,

4 Cinn., N. O. & T. P. Ry. Co. v. Rue, 142 Ky. 694, 134 S. W. 1144 (1911); Smith v. Dawson, 206 Ky. 107, 266 S. W. 926 (1924).
5 Orr v. Thompson Coal Co., 219 Ill. App. 116, 120 (1920). (This case holds that course of employment is a triple test and relates to time, place, and workmen's conduct.)
It was laid down that the primary test to determine the master's liability for the negligent act of his servant is whether the act was within the scope of his employment or whether the servant was at the time of the act at liberty from the service of his master and not engaged in doing his master's business, but was pursuing his own interests exclusively. In this case was not the servant acting within the time limits and the space limits of his employment, and was he not in the direct line of his employment if he was in the defendant's baggage car and moving out of the depot with the train? That seems to be the correct conclusion. But the master can hardly have authorized the act and the court stated that he did not by saying that the act was without the scope of employment. It must be said that in this case the servant was acting within the course of employment but without the scope of employment. In a Minnesota case it was held that the employer was not liable for slander by the employee in the course of his employment. The case is the perfect illustration. The slander is stated to have been uttered in the course of employment. Can the master have authorized expressly or impliedly this slander? The slander is said to have been uttered with a view to furtherance of the employer's business, and for a purpose not personal to himself by the servant. This, however, cannot even remotely be classified as implied authority on the part of the employer. In support of this proposition we return to the case cited supra, note 5, which holds that the master is liable for the servant's acts within the scope of employment and the limits of implied authority however erroneous, mistaken, or malicious, but not for acts beyond such limit, unless expressly authorized or subsequently adopted and ratified. Many state decisions support this holding.

Returning to the statement made in the Illinois case that "an employee cannot be acting within the scope of his employment unless he is acting in the course of his employment", let it be said that there is probably a fallacy, although, beyond the discussion of a single case, we will not attempt to conclusively decide that point. A Kentucky case holds that where a servant rode home on his master's motorcycle, which he was authorized during the day to use, and injured plaintiff, the master was not liable. We must grant that the plaintiff was acting outside the course of his employment. The day's work was over and the servant was conceivably far away from the area he traveled on the machine while carrying out his master's business. Hence, he was out of the time and space limits prescribed by his employment.

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d. (Master is civilly liable for torts of the servant done in the course of his employment.) Paiewonsky v. Joffe, 101 N. J. L. 521, 129.
But might he not have been in the scope of his authority? His master may have expressly authorized him to ride the machine home; or he may have ratified impliedly by saying nothing about it, after several repetitions by the servant. Of course, these propositions prove nothing, unsupported by proof, but they tend to uphold the theory that a servant's employment should be composed of two unrelated and non-collateral legal concepts, i.e., "course of employment" and "scope of employment", and that, as tests for the master's liability for the torts of his servant, they must be applied separately, as the master may be liable under one test and not liable under the other. And, if the master may be liable under one test and not under the other, it is illogical to apply singly a test which, according to the texts cited in the beginning, seeks to fuse the two concepts.

In one case the street railway company was held liable for the tort of the servant, which in no wise, impliedly or expressly or by subsequent ratification, could be held to be authorized. The servant was driving the car on its tracks and saw the plaintiff's dog on the said tracks in plenty of time to stop. He did not stop but maliciously increased the car's speed and ran over the dog. The master was held liable on the ground that he had placed the servant in such position that he could commit this malicious act. This clearly is liability for an act occurring in the course of employment, but without the scope of employment. Another series of cases held the railway company liable where the engineer of its locomotive maliciously blew his whistle and scared the horses of the plaintiff. This liability was based on the placing in the hands of the servant a dangerous instrumentality. No authority could be implied here, and the act did occur in the course of employment. It may be safely declared that the master would not have been liable if the engineer had, after working hours, sneaked out the locomotive and committed the said tort. Hence, here, "course of employment" was the test.

In an article by Roy Moreland on Workmen's Compensation Acts is found the proposition that "in course of employment" refers to the time, place and circumstances under which the act occurred. A Kentucky case also contains this definition. Nothing could be found in either the Law Journal article or the Kentucky case intimating that the term "in course of employment" had any reference to "scope of employment", as to acts authorized, either expressly or impliedly. While the article and the case dealt with the term in relation to lia-


12 Columbus Ry. Co. v. Woolfolk, 128 Ga. 631, 58 S. E. 152 (1907).
13 Toledo, Etc., R. Co. v. Harmon, 47 Ill. 298 (1868); Chicago, Etc., R. Co. v. Dickson, 63 Ill. 151 (1872); Regan v. Reed, 96 Ill. App. 460 (1901); Billman v. R. Company, 76 Ind. 166, 40 Am. Rep. 259 (1881). (There is a negligible list of contra cases.)


bility of the master to the servant himself, there is no apparent rea-
son for changing the meaning of the term to include scope of em-
ployment, when dealing with the liability of the master to a third per-
son for the tort of the servant.

From the foregoing we have seen that the two factors determin-
ing the liability of the master for the torts of his servant are sev-
erable in meaning and operation, one from the other, and cannot prop-
erly be applied to a set of facts in a singular form. The said set of
facts may fall within one term and without the other. Both tests may
apply to some cases. In others the master may be liable for acts oc-
curring in the course of employment but without the scope of employ-
ment; in still others he may be liable for acts occurring within the
scope of employment but without the course of employment, of
course, as in the motorcycle case, where one test applies the other
may be implied. The court might argue that since the authority was
extended to include the servant's ride home, the time and space
limits of the employment might also be implied to extend that far.
This would admit of the application of Mr. Mechem's single test. To
a careful thinker such reasoning must appear untenable. The mas-
ter's liability is not being contested in this case, but only that it
should be based on the double test. His liability is based on his sub-
sequent ratification, using for the moment the illustrative hypothesis
set forth above, and on that alone.

A standardization of terminology in treating this particular sub-
ject would not go amiss. The tests for the liability of the master for
the torts of his servant which have been separately treated herein
should be separately stated and separately applied to the cases as they
come up. Such a course would undoubtedly result in clarification of
the subject for the student.

HOWARD H. WHITEHEAD.

EQUITY—MUTUALITY AS A BASIS FOR EQUITABLE RELIEF

A testator bequeathed his estate, consisting of corporate stock, to
his wife. One half thereof was to go to his mother, sister and broth-
ers should his wife marry again. Thereafter the widow contracted to
sell the stock; and upon the purchaser's refusal to perform she brought
suit for specific performance of the contract. The court granted spe-
cific performance without stating the ground upon which it was
given.¹

Assuming that the widow had the right to sell the stock, upon
which ground was the remedy given, mutuality of remedy or the in-
adequacy of the remedy at law? The court's silence does not obviate
the uncertainty of its view. The question remains, will the Ken-
tucky courts grant specific performance to one party of the contract