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of the courts. *Patton v. United States, supra; Belt v. United States, supra;* see *Commonwealth v. Rowe, supra.*

The principal case admits that the right of jury trial is not guaranteed to the state. Then, as the dissent points out, how can a waiver deprive the prosecution of that which it has never possessed? Furthermore, in following *People v. Fisher, supra,* the historical conception that the jury is a privilege which can be waived is accepted. These concessions are not logically compatible with the conclusion that the prosecution can prevent waiver. The real basis of the decision seems to be the conviction that it is to the interest of the state to preserve the rights of its individual citizens by not allowing the accused, alone, to entrust his life to the judgment of a single person. N. P., '34.

MASTER AND SERVANT—INJURY OUTSIDE SCOPE OF EMPLOYMENT.—By distinguishing between the capacity of a servant acting in the course of his master's employment and that in which he acts when in the exercise of a public right valuable to himself as a facility for gaining a livelihood, the defendant was held not liable for the act of a messenger boy who, for the purpose of effecting the defendant's business, dashed out of the defendant's establishment and negligently collided with a pedestrian on the sidewalk. *Ritchey v. Western Union Telegraph Co.* (Mo. App. 1931) 31 S. W. (2d) 628. A directed verdict ordered for defendant by the trial court was upheld by the appellate court.

The case is interesting in presenting the view that a master's vicarious liability under the rule of *respondeat superior* will not result from an act performed by the servant in a method or manner incident to his rights as a public citizen. That the injury results from an act done to effectuate the master's purpose becomes only of secondary importance. It is clear that when the employee acts for his own independent purpose, the master will not be liable. *Coates v. Auto Sales Co.* (1928) 106 W. Va. 380, 145 S. E. 644; *Dennes v. Jefferson Meat Market* (1929) 228 Ky. 164, 14 S. W. (2d) 408; *Martin v. Greensboro-Fayetteville Bus Line* (1929) 197 N. C. 720, 150 S. E. 501. But there is a manifest difference between the situation of an employee acting for an entirely independent purpose of his own and that when he acts in reference to the master's purpose. *Guitar v. Wheeler* (Tex. 1931) 36 S. W. (2d) 325; *Lee v. Nathan* (1924) 67 Cal. App. 111, 226 Pac. 970. When the employee used an automobile on the public streets for the furtherance of the employer's business, the fact that the employee used the street under his public right was not considered by the court in the determination of the question of whether the act was performed in the course of the employment. *Edwards v. Earnest* (1922) 208 Ala. 539, 94 So. 593; *Ricketts v. Thos. Tilling, Limited* (1915) 1 K. B. 644; *Riley v. Standard Oil of New York* (1921) 231 N. Y. 301, 132 N. E. 97, 22 A. L. R. 1382.

The decisions rendered under the Workmen's Compensation Acts of the various states dealing with the somewhat analogous problem of accidents arising out of the course of the employment indicate a holding contrary to

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that of the principal case. Thus where an employee's work required that he cross a street to mail letters, an injury resulting in the act was held one rising out of the course of the employment. *Globe Indem. Co. v. Indus. Acc. Comm. of Cal.* (1918) 36 Cal. App. 280, 171 Pac. 1088, 16 N. C. C. A. 907, 2 W. C. L. J. 31; so where an errand boy was injured while delivering checks for the employer. *Chicago Packing Co. v. Industrial Board* (1918) 282 Ill. 497, 118 N. E. 727. The Missouri decisions are in accord. The defendant was held liable when the servant was injured while going to call on a customer. *Wahlig v. Krenning-Schlapp Grocer Co.* (Mo. 1930) 29 S. W. (2d) 128, and the same result was reached in *Howes v. Stark Bros. Nurseries & Orchard Co.* (Mo. 1930) 22 S. W. 839 where a servant was injured while on his way to take a bus home after completing his work.

These cases of course, are not directly pertinent since the issue is not one of vicarious liability of the employer, but one of direct liability under a duty imposed by statute. Their significance lies in the disregard of the question as to the capacity of the employee in reference to the particular act by which he was injured. To the extent that the phrase "in the course of employment" is interpreted without regard to the fact that the employee might well have been involved in the same situation while acting on his own business and in his own private right, there is an inconsistency between the cases noted above and the principal case.

To determine what the course of employment is, in order to ascertain the employer's liability either to a third person for the negligent act of the servant, or to the servant himself, under the Compensation Acts, the essential fact is whether the act was intended for and did effect the ultimate purpose of the employment. To preclude the vicarious liability of the master because a servant makes use of the public right, to which use the master gives the original impetus, would unduly narrow the operation of the rule of *respondeat superior*. *La Bella v. Southwestern Bell Telephone Co.* (Mo. App. 1930) 24 S. W. (2d) 1072; *Cochran v. Michels* (W. Va. 1931) 157 S. E. 173. *Schedwig v. McDermott* (Cal. App. 1931) 298 Pac. 107. Undoubtedly many cases may be found in which the doctrine of *respondeat superior* has been applied so as to render the master liable, when on closer examination, it might be made clear that the servant was acting in a manner or method open to him as a member of the public. Yet it could not be asserted with a degree of plausibility that the decisions in those cases should be, and might have been altered, by the distinction made in the principal case.

The inference that a court may draw from an act which a servant performs on a public street must be restricted to the actual evidence produced tending to show for whose purpose and enjoyment the act was committed. *Orr v. Thompson Coal Co.* (Ill. 1920) 219 Ill. App. 116. *Kyle v. Postal Telegraph-Cable Co.* (1925) 118 Kan. 300, 235 Pac. 116. Certainly the facts of the principal case raised a sufficient presumption that the messenger was acting to execute some purpose or activity of the master so that the case should have been presented to the jury on the issue of fact. L. S., '33.

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