Vanderbilt Law Review

Volume 11
Issue 4 *Issue 4 - A Symposium on Motor Carriers*

Article 11

10-1958

Agency--1958 Tennessee Survey

Edward R. Hayes

AGENCY—1958 TENNESSEE SURVEY

EDWARD R. HAYES*

Establishing that Tortfeasor is a Servant of Defendant: Negligent operation of motor vehicles probably is the most prolific source of tort liability today. Within this area an important cause of litigation has been negligent operation by someone other than the owner of the vehicle. The initial common law approach to such cases was to hold the owner responsible if he himself were negligent, as by entrusting his car to a known incompetent driver, or if the negligent driver were the owner's servant acting within the course and scope of his employment.[1] In most other instances where the car was operated with the owner's consent, the owner was a bailor, the operator a bailee, and a bailor usually is not responsible for his bailee's negligence.[2] One court held the owner liable in these circumstances by calling the auto a dangerous instrumentality;[3] a number of courts using the "family-purpose" doctrine were able to hold a parent-owner responsible for negligence of his child-driver in situations which otherwise would have been labelled bailment.[4] By legislation the legal basis for owner-liability has been further extended. Typical of the approach adopted by a number of states is the so-called owner-liability statute, which makes the owner responsible for negligent operation of his car whenever it was driven with his consent at the time.[5] Courts interpreting such statutes have been troubled with the question whether their effect is to create an agency relationship between the owner and the consent driver.[6] Tennessee's statutory approach is different. Under Tennessee law, proof of registration of a motor vehicle in the name of any person is "prima facie evidence that said vehicle was then and there being operated by the owner or by the owner's servant for the

* Professor of Law, Drake University; Visiting Professor of Law, Vanderbilt University, 1957-58.

1. BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2911 (1954).

2. *Id.* § 2915; see also Hill v. Harrill, 310 S.W.2d 169 (Tenn. 1958); PROSSER, TORTS 513 (2d ed. 1955).

3. Koger v. Hollahan, 144 Fla. 779, 198 So. 685, 131 A.L.R. 886 (1940); MECHEM, OUTLINES OF AGENCY § 472 (4th ed. 1952).

4. *Id.* §§ 473-75.

5. BLASHFIELD, *op. cit. supra* note 1, §§ 2912, 2916; MECHEM, *op. cit. supra* note 3 § 476.

6. At first the Iowa statute was held to create an agency relationship between the owner and the permissive user. Secured Finance Co. v. Chicago, R.I. & P. Ry., 207 Iowa 1105, 224 N.W. 88, 61 A.L.R. 855 (1929). In 1956 this holding was reversed; as a result the owner would not be barred from recovering for damage to his car even though the permissive user was contributorily negligent. Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956). See MECHEM, *op. cit. supra* note 3 § 477; Griemann, *Owner-Liability and Contributory Negligence—"Pilgrim's" Progress?*, 5 DRAKE L. REV. 127 (1957).

owner's use and benefit and within the course and scope of his employment."[7] Two cases involved interpretation and application of this statute.

In *Smith v. Phillips*[8] a pick-up truck, registered in defendant's name, and driven by one of two Negroes who admittedly were employees of defendant, collided with plaintiff's truck. The owner's defense against liability was that of the servants' frolic, without authority, in violation of express instructions. One Negro testified he had used the truck on an errand for his employer, returned it, then taken it again to go for a beer and to visit a girl friend. Evidence that he had pleaded guilty to a charge of using the truck without defendant's permission was not permitted to go to the jury. The testimony of defendant, his wife, and the Negro, contained many contradictory statements, and some statements were contradicted by testimony from state troopers. The trial court charged the jury that the statutory prima facie case of respondeat superior, based on proof of registration, could be overcome by testimony as to the actual facts; but if the witnesses' testimony as to the actual facts was so contradictory that the jury disbelieved their statements as to use and scope of employment, the prima facie case made out by virtue of the statute remained. The jury's verdict was for plaintiff. The trial court's charge as to the effect of the statute in these circumstances was held proper by the court of appeals, which considered the defense testimony sufficiently impeached to prevent destruction of the statutory "presumption of agency."

In *Hill v. Harrill*[9] the injured plaintiff was attempting to recover from a car dealer-owner for the negligent driving of a prospective purchaser. The prospect, a minor, had been allowed to take the car home overnight to show it to his mother, whose consent to any purchase was thought necessary. His testimony was that after showing his mother the car, he started to drive it to town to get the opinion of a mechanic there as to its condition—the collision occurred on the trip to town. At the time the car carried dealer plates, which under Tennessee Code section 59-414 a dealer could shift from one vehicle to another without registering either, and which the statute authorized to be used for business purposes including transporting, testing and demonstrating. The trial court instructed the jury that the effect of this statute was to make the prospect, driving to demonstrate the car bearing dealer plates to himself, an agent of the dealer; if the jury found the minor was a prospective purchaser demonstrating the car to himself at the time of the collision, the dealer was liable. Again

7. TENN. CODE ANN. § 59-1038 (1956); see BLASHFIELD, *op. cit. supra* note 1 §§ 2912, 2916; MECHEM, *op. cit. supra* note 3 §§ 478-79.
8. 309 S.W.2d 382 (Tenn. App. W.D. 1956), *cert. denied*, April 1, 1957.
9. 310 S.W.2d 169 (Tenn. 1958).

verdict was for plaintiff. The court of appeals reversed, holding that the dealer plate statute was not intended to create an agency relation; but it remanded for new trial on the theory that the jury could find for plaintiff under the "prima facie agency" provision. This action was reversed by the supreme court. The court agreed that nothing in section 59-414 showed a legislative intent to make a prospective purchaser a servant of the dealer while demonstrating to himself. But it disagreed with the conclusion that the prima facie case under section 59-1038 had not been rebutted, and as a result dismissed the case as to the dealer. The court's reasoning is that one merely demonstrating a car to himself does not thereby become an agent of the owner, at common law; and where the proof is undisputed that this is what was being done, the prima facie effect of the statute has been completely rebutted, so no question remains for the jury.[10]

From the evidence in *Hill v. Harrill,* it would seem that the only thing the prospect could have been doing for the dealer was demonstrating the car to himself, and therefore it may be proper not to instruct the jury regarding section 59-1038. But if he could be performing other services and the jury might disbelieve his testimony that he was not, or impeaching evidence was present, *Smith v. Phillips* indicates that instruction as to the prima facie effect of registration is proper.[11]

The third case in which an attempt was made to hold a master responsible for conduct of his servants arose from an incident during the sixth inning of an exciting ball game between the Nashville Vols and the Chattanooga Lookouts. Plaintiff, Luttrell, was at bat for Chattanooga. He thought the Nashville pitcher deliberately threw some "dusters" apparently, as the first three pitches, all balls, barely missed him and he had to dodge. When the fourth pitch hit him on the seat of the pants, Luttrell says he started to throw his bat at the pitcher, but held up enough for it to go in another direction. Averill, the Vol catcher, apparently had previously made no hostile gestures, but at this point without warning he hit Luttrell with his fist, from the side, knocking Luttrell down and out and causing some fractures. A melee followed, which was quelled by police intervention and Averill's ejection from the game and arrest. Luttrell sued Averill and the Nashville club for assault. The club moved for directed verdict,

10. The court points out that TENN. CODE ANN. § 59-1038 is not an owner-liability (or "permissive user") statute, and that such a statute could overcome plaintiff's difficulties. 310 S.W.2d at 175. If the Tennessee legislature should adopt such a statute, it should be so drafted as to avoid interpretation problems of the sort referred to in note 6, *supra.*

11. Apparently some courts would hold that in every case the truth of the rebutting testimony is for the jury, and so the jury should always be instructed on the prima facie case created by the statute; this has been criticized. MECHEM, *op. cit. supra* note 3 §§ 478-79.

arguing that Averill's actions were not shown to be within the scope of his employment and the prosecution or furtherance of the club's business. The trial court refused to grant this motion, and plaintiff won a jury verdict against both defendants, which was reversed, as to the club, by the court of appeals.[12] It held there was no evidence that Averill's act was other than a wilful independent act, and therefore the trial court should have directed a verdict in favor of the employer. It cited several cases in support, among them a Georgia case in which a baseball player left the field to assault a spectator in the stands.[13]

While this decision is in line with a number of cases that have refused to hold a master responsible for the unauthorized intentional torts of his servant, there is an increasing tendency (not noted by the opinion) to allow recovery under some circumstances.[14] *The Restatement of Agency,* section 245 states:

> A master who authorizes a servant to perform acts which involve the use of force against persons or things, or which are of such a nature that they are not uncommonly accompanied by the use of force, is subject to liability for a trespass to such persons or things caused by the servant's unprivileged use of force exerted for the purpose of accomplishing a result within the scope of employment.

At present the *Restatement* is being revised, and alternative methods for dealing with this problem are being considered. One, apparently favored, would substitute the following language for the present section 245:

> A master is liable for the intended tortious harm by a servant to the person or things of another, although the conduct is unauthorized, if it is not unexpectable in view of the duties of the servant.[15]

The proposed comment to this section concludes: "The tendency of the appellate courts has been to allow triers of fact considerable discretion in finding a connection between the employment and the blow."[16]

The other proposal is to add to the present section 245 a second statement, as follows:

> A master employing servants whose position brings them into argumentative contacts with others may be found liable for batteries naturally arising out of and resulting from such arguments.[17]

---

12. Averill v. Luttrell, 311 S.W.2d 812 (Tenn. App. E.S. 1957), *cert. denied,* Feb. 6, 1958. At about the time this was written plaintiff, Luttrell, became a player on the Vol team, and thus an employee of the successful defendant.
13. Atlanta Baseball Co. v. Lawrence, 38 Ga. App. 497, 144 S.E. 351 (1928).
14. MECHEM, *op. cit. supra* note 3 §§ 394-403.
15. RESTATEMENT, AGENCY 2d, 256 (Tent. Draft No. 4, 1956).
16. *Id.* at 257.
17. *Id.* at 258.

There may be less likelihood that a baseball player will leave the field to assault a spectator than that he will commit an assault on a rival player during the course of a game. The court's opinion appears to have given no consideration to this possibility, or to ideas such as are expressed in the proposed revision of the *Restatement;*[18] however, had consideration been given, the same result might have been reached.

Duties of Employer to Employee: There were two cases in which an employee sought recovery from his employer for injuries allegedly received on the job. One raises questions of the extent of the employer's duty; both involve employer defenses utilizing the traditional common-law argument of assumption of risk or contributory negligence.

Southern Railway Co. v. Welch[19] was a FELA[20] action which had reached the Sixth Circuit Court of Appeals. Plaintiff, a machine-grinder operator who smoothed off sharp burrs from the ends of reclaimed rails, suffered a ruptured disc which he claimed was caused by his employer's negligence in failing to supply assistance to move the rails on which he worked. The evidence showed that ordinarily plaintiff's was a one-man job, but that if the rails had excessive grit, tar or other substances on them they were more difficult to handle, and that customarily an extra man would be assigned to help plaintiff move such rails, apparently without request. The court said the employer has a nondelegable duty of providing sufficient help for the task assigned to the employee. Apparently the failure of the employee to ask for such help is not contributory negligence, and according to the court assumption of risk cannot be asserted as a defense in a FELA case.[21] No Tennessee cases were cited.

In *Urmann v. Nashville*[22] there was no question that the employer's duty to his employee had been breached. Plaintiff, an employee of the city's street maintenance department, required to ride to the job in the back of a city truck driven by his crew foreman, was sitting on a plank across the truck bed and, because of the load of sand and tools in the truck, was dangling his feet outside the bed. When the truck unexpectedly made a turn, at a high rate of speed, the foreman

18. In none of the cases discussed in this article did the opinions cite the RESTATEMENT OF AGENCY, or any text on Agency, such as MECHEM, OUTLINES OF AGENCY.

19. 247 F.2d 340 (6th Cir. 1957).

20. Federal Employers' Liability Act, 35 STAT. 65, 45 U.S.C. §§ 51-60 (1952).

21. The Act, since amendment in 1939, has abolished the defense of assumption of risk. 53 STAT. 1404, 45 U.S.C. § 54 (1952). Contributory negligence can only diminish the injured employee's recovery. 35 STAT. 66, 45 U.S.C. § 53 (1952). See MECHEM, *op. cit. supra* note 3 § 599.

22. 311 S.W.2d 618 (Tenn. App. M.S. 1957), *cert. denied,* Feb. 6, 1958.

having made no signal, plaintiff was thrown off and injured. The question before the court was whether the city's motion for directed verdict, on the grounds that plaintiff had assumed the risk or been contributorily negligent, or that the negligence of the driver was that of a fellow servant, should have been sustained. The trial court's action in sustaining the motion was reversed. The court of appeals suggests that assumption of the risk and contributory negligence may be the same thing,[23] in this situation, and that plaintiff did assume such risks as were involved in the ordinary hazards of his position but it was a jury question whether he had assumed the risk of the foreman's negligent driving. Apparently the court would have held he had assumed that risk if the foreman customarily drove as he did when plaintiff's accident occurred, and plaintiff knew that was the case.[24] The lower court also was considered to have erred in holding that the foreman's negligence was that of a fellow servant. This result is reached by concluding that the foreman was a vice principal, rather than a fellow servant. Several earlier Tennessee cases had called formen vice principals, and refused to apply the fellow servant rule,[25] but in *Allen v. Chamberlain*,[26] where a railroad section foreman was called a vice principal his negligence in operating the brakes on a hand car was considered to be that of a fellow servant. This case was distinguished on the theory that it involved a joint operation of the hand car by the foreman and his crew, while in *Urmann's* case the foreman was in complete control of the truck as well as driving; also in *Allen* the crew were proceeding to a wreck at the direct order of a company official, while in *Urmann* there was no evidence of a direct order from a superior for the crew to go to the particular destination to which the foreman was proceeding.[27]

Authority and Apparent Authority: The *Agency* article in the 1957 Survey issue[28] discussed *Lowe v. Wright*,[29] which in part involved the

23. *Id.* at 625.

24. ". . . in the case at bar, there is no evidence in the record that the foreman, Gilbert, driver of the truck, ever, at any time before, negligently drove around a corner at a dangerous speed, or at such speed as to throw a workman off the truck, or that it might reasonably have been anticipated that he would do so, although it was testified that he always drove the truck, and the plaintiff had been working there for about a year with him." *Id.* at 626.

25. Chattanooga Electric Ry. v. Lawson, 101 Tenn. 406, 47 S.W. 489 (1898). In State v. Ohio River & C.R.R. v. Edwards, 111 Tenn. 31, 76 S.W. 897 (1903), the court said that calling a person "foreman" would not of itself indicate he was a vice-principal, and it was necessary to ascertain his authority to direct subordinates.

26. 134 Tenn. 438, 183 S.W. 1034 (1915).

27. Isn't it likely that the decision to repair certain streets was made by someone other than the foreman? Perhaps, though, he would have some control over the order in which certain jobs were undertaken.

28. O'Neal, *Agency—1957 Tennessee Survey*, 10 VAND. L. REV. 973, 979-80 (1957).

29. 292 S.W.2d 413 (Tenn. App. M.S. 1956).

power of a real estate agent to bind the owner of real estate by entering into a contract of sale and executing a deed to the property. In that case the owners filed a bill to cancel and remove the deed given by the agent as a cloud on their title, on the ground that he, Parrish, had forged the deed. Defendant objected because he had given Parrish a check payable to the owners for the bulk of the purchase price and the owners had cashed the check. However, Parrish had misled them to believe that the check proceeds were his, and the check payable to them only so they could satisfy certain debts he owed them; as a result, after cashing the check they had given Parrish a check for the difference between its face and what they thought he owed them. The court refused to cancel the deed unless plaintiffs repaid to defendant the amount of his check payable to them. In that case the court pointed out that to authorize an agent to execute a deed in the name of another as principal, the authority to do so must be by deed or by writing of equal formality with a deed; but the authority of an agent to enter into a binding contract to sell land in the name of his principal need not be in writing.[30]

Lowe v. Wright now has a sequel in *Lowe v. Robin*.[31] The latter case was an action against the notary public who notarized the deed involved in the first case, and against the surety on his bond, for the losses suffered as a consequence of the other decision. Parrish had told plaintiffs he knew a notary who was familiar with their signatures and that it would not be necessary for them to acknowledge their deeds before the notary. Several lots of plaintiffs' subdivision had been sold, with one plaintiff or the other signing the names of both to deeds to which Parrish thereafter had the notary affix his seal. There is some suggestion in the court's opinion that plaintiffs' conduct amounted to ratification of Parrish's action, but the decision appears primarily to deny recovery to the plaintiffs for the reason that plaintiffs' loss is the result of their own negligence in taking Wright's check to them from Parrish and giving Parrish a check in return. The opinion again discusses the authority of an agent to bind his principal on a contract to convey real estate where the agent's authority to execute a deed in the principal's name fails to comply with formalities required by statute. The relevance of this discussion to the notary's liability is not made thoroughly clear; perhaps it is intended to suggest that as plaintiff would have been bound to convey the property because Parrish had authority to enter into a contract to convey, the notary's improper actions were not a cause of plaintiffs' loss.

30. O'Neal, *Agency—1957 Tennessee Survey*, 10 VAND. L. REV. 973, 980. The court cited TENN. CODE ANN. § 64-503 (1956); Cain v. Heard, 41 Tenn. 163, 166 (1860); Farris & Hampton v. Martin, 29 Tenn. 495, 498 (1850); Smith v. Dickinson, 25 Tenn. 261, 262 (1845).

31. 310 S.W.2d 161 (Tenn. 1958).

While the authority of an insurance agent to make certain statements which became binding on his principal might have been an issue in *Curfman v. Prudential Insurance Company of America*,[32] the court apparently assumed he had that authority and that the question before it was the effect of the statements. The policies involved were four small industrial life policies (face value around $790), in which the named beneficiary was deceased's executor or administrator. However, each policy had a "facility of payment" clause in which Prudential reserved the right to pay the proceeds to blood or marital relatives. The battle for the proceeds was between insured's children by his first wife and the second wife, who divorced insured in 1950 after 31 years of marriage. The second wife had taken out the policies, paid all the premiums on them, and they were in her possession at all times prior to the trial. She testified that from time to time (when the policies were taken out and afterwards, including such occasions as while insured was in prison, and after their divorce) Prudential's agent who collected the weekly premiums from her assured her that she would receive the proceeds of the policy. The chancellor held that the proceeds were payable to the administrator of insured's estate (one of the children), but he was reversed on the theory that the agent's statements amounted to an election by the company to exercise its alternative right to pay the "wife" under the facility of payment clause—provided she kept the policy in force. As noted above, the opinion does not discuss the authority of this agent to bind the company by his statements; supporting cases cited by the court are to the point whether such election may be made.[33]

Real Estate Agent's Right to Commission: Only one case involving a right to commission appeared.[34] It is unusual in that the agent, with whom the seller had listed the property, attempted to collect his commission from the buyer, defendant, rather than from the seller. Although the buyer had asked the agent to obtain a price quotation and a plat, he submitted his offer directly to the seller. He denied knowledge that the property had been listed with the agent. An outsider had told the buyer that he understood plaintiff was seller's agent and that the purchase should be made through him; plaintiff claimed defendant also knew he was expected to assume obligation for the commission. Plaintiff admitted the buyer never agreed to do this, but argues that under the circumstances his silence amounted to acceptance. The chancellor's judgment for plaintiff was reversed by the

32. 308 S.W.2d 429 (Tenn. App. M.S. 1957), *cert. denied*, Dec. 6, 1957.

33. While some courts agree with this approach, others have held the agent's statements to be in excess of his authority. 2 APPLEMAN, INSURANCE LAW AND PRACTICE § 1168 (1941).

34. Smith v. Murray, 311 S.W.2d 591 (Tenn. 1958).

court of appeals, which dismissed the case. The dismissal, challenged by certiorari, was upheld by the supreme court, which held that no contract had resulted, and as the agent could not show any reliance by him to his injury, there was no basis for application of the doctrine of estoppel.

Effect of Election to proceed separately against Agent and Principal: In some circumstances both agent and principal may be parties to a contract with a third person, who can recover from either for a breach of the contract. If action is brought against only one, either agent or principal, when (if ever) is the other released from liability? Although there have been suggestions that bringing the action against one amounts to an election to hold only that one,[35] and a number of decisions hold that obtaining a judgment against one is such an election (some on the theory that the cause of action merges into the judgment),[36] a widely accepted view today treats only a satisfaction of the judgment as terminating the liability of both agent and principal.[37] What rule is applicable to tort cases? Will an action against the negligent servant be a binding election not to sue the responsible master, and vice versa (or a judgment, or only satisfaction)? In *Williams v. Pritchard*[38] defendant, the negligent driver, was an employee of the Tennessee Fish and Game Commission. His negligence apparently occurred in the course of and within the scope of his employment. Plaintiff began an action against defendant; subsequently

35. Walston v. R. B. Whitley & Co., 226 N.C. 537, 39 S.E.2d 375 (1946); Barrell v. Newby, 127 Fed. 656 (7th Cir. 1904). Several other cases are listed in Merrill, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?*, 12 NEB. L. BULL. 100, 101 n. 4 (1933).

36. See discussion in Merrill, *supra* note 35, at 101-103. The Restatement adopts this view, although the Reporter and his advisers thought it unfair. RESTATEMENT, AGENCY § 210, and Comment. A note to § 210, in RESTATEMENT 2D, AGENCY 146 (Tentative Draft No. 4, 1956), is of the opinion that Merrill's viewpoint may be good but more states adopt the view that obtaining judgment is an election.

37. Mechem supports this position. MECHEM, *op. cit. supra* note 3 § 336. So does Merrill. See, in addition to his article referred to in note 35, his poetic discussion of subsequent developments. Merrill, *Election (Undisclosed Agency) Revisited*, 34 NEB. L. REV. 613 (1955). The Tennessee view is unclear. Initially it took the position that obtaining judgment was election. Phillips v. Rooker, 134 Tenn. 457, 184 S.W. 12, 13-14 (1916). But in a recent case a Tennessee Court of Appeals refused to treat a judgment as an election, because it concluded that the reason for that rule was to prevent double recovery against the principal, one by the third party on his claim and the other by the agent for indemnification. The court therefore held that where the agent was barred from recovery against the principal because of fraudulent conduct toward the principal, a third party's unsatisfied judgment against the agent would not bar judgment against the principal. Hill v. Hill, 34 Tenn. App. 617, 241 S.W.2d 865, 870 (E.S. 1951). As Merrill points out, if the rationale is true, as the agent could not be entitled to indemnification from the principal until he had satisfied the judgment against him, no election should be recognized until judgment against him had been satisfied. Merrill, *Election (Undisclosed Agency) Revisited*, 34 NEB. L. REV. 613, 615 (1955).

38. 306 S.W.2d 46 (Tenn. App. E.S. 1957), *cert. denied*, Oct. 4, 1957.

a claim against the state was filed with the state board of claims. Defendant then argued that the filing of the claim was a binding election by plaintiff which precluded him from maintaining an action against defendant. The court of appeals upheld the verdict for plaintiff; it distinguished several Tennessee cases[39] cited by defendant as involving problems of an ex contractu nature, and stated:

> Defendant cites no authority holding that in tort actions separate suits may not be maintained against the principal and agent. We have found none. . . .[40]

Whose employee? This question becomes acute in two typical situations. In one the servant, at the time he is injured or his negligence causes injury to another, has been directed by his regular employer to perform and he is performing services for someone else—often referred to as the "borrowed servant" situation. In the other, the servant's services have a direct relation to the person alleged to be his employer but it is contended that those services were performed immediately for someone else who is an independent contractor in relation to the alleged employer. The latter situation is illustrated by the case of *Bowaters Southern Paper Co. v. Brown.*[41] Brown, the plaintiff servant, had been injured as the result of negligence chargeable to Bowaters, and sued the company. Bowaters' defense was that it was Brown's employer, and that Brown's remedies were limited to those provided in the Tennessee Workmen's Compensation Law. Brown contended that Bowaters was not his employer, because he had been hired by and was working for a construction company which, under written contract, was engaged in making certain changes in the mechanical system in Bowaters' plant. The trial court found practically all the classic symptoms of an independent contractor,[42] and accordingly rejected the tendered defense. In affirming, several Tennessee cases are cited as in accord,[43] and the case seems to present no unusual deviation from the normal pattern.[44]

39. Phillips v. Rooker, 134 Tenn. 457, 184 S.W. 12 (1916); Kendrick v. Moss, 104 Tenn. 376, 58 S.W. 127 (1900).
40. 306 S.W.2d at 49.
41. 253 F.2d 631 (6th Cir. 1958).
42. The contractor was engaged in the mechanical contracting business, had its own tools and equipment, could and did perform the work in its own manner, use its own labor, operate with its own supervisors and foremen, hire and discharge its own men (such as Brown), and was paid for the entire job rather than on a time basis.
43. Conasauga River Lumber Co. v. Wade, 221 F.2d 312, 315 (6th Cir. 1955) (a case arising in Tennessee); Barker v. Curtis, 199 Tenn. 413, 287 S.W.2d 43, 45 (1956).
44. MECHEM, op. cit. *supra* note 3 §§ 427-431; RESTATEMENT, AGENCY § 2(3).