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Scope of Employment:

In the case of *McKinnon v. Michaud*,[1] it appeared that Mrs. McKinnon was in the business of distributing petroleum products wholesale. Her servant, Nickson, made delivery of gasoline to a service station, put the nozzle from his truck into the retailer's tank and then carelessly allowed the tank to overflow. Nickson then enhanced the danger by throwing water on the gasoline with the result that it splashed onto an open stove and caused an extensive fire that damaged the plaintiff. Mrs. McKinnon was held liable. The court did not decide whether Nickson's act of throwing water on the gasoline was or was not within the scope of his employment. His carelessness in allowing the tank to overflow was taken to be the primary and proximate cause of the injury. That act was clearly within the scope of Nickson's employment.

Two earlier Tennessee decisions are recalled and distinguished in Judge Anderson's opinion. One was the case of *Kelly v. Louisiana Oil Refining Co.*[2] In this case it appeared that a servant of the defendant Oil Company was in the act of telephoning the company office from a store where he had made a delivery of gasoline. While telephoning, he was smoking and threw away a lighted match. The match ignited plaintiff's clothing and caused injury. It was held that the servant's act of smoking and throwing away the match was not in the scope of his employment. The company therefore was not liable.

The other case referred to and distinguished was *Shuck v. Carney.*[3] In this case it appeared that the defendant Shuck operated a garage. Reynolds, a servant of the defendant, was engaged in getting plaintiff's car out of a ditch where it had skidded and overturned. Gasoline had been spilled on the ground. Reynolds struck a match to light a cigarette and then dropped the match on the ground where it ignited the gasoline with the result that plaintiff's automobile was badly damaged. The defendant was held not liable.

These two cases that were referred to and distingnished are interesting illustrations of the fact that a servant can be doing acts outside his employment and at the very same time be doing other acts that are within his employment. These two cases are clearly distinguishable from the *McKinnon* case in this: spilling the gasoline was clearly

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1. 260 S.W.2d 721 (Tenn. App. W.S. 1953).
2. 167 Tenn. 101, 66 S.W.2d 997 (1934).
3. 22 Tenn. App. 125, 118 S.W.2d 896 (W.S. 1938).

within the scope of Nickson's employment, but the acts of smoking and throwing down matches in the other two cases were clearly outside the scope of the employment of the respective servants.

The case of *Lumbermen's Mutual Casualty Co. v. Dedmon*[4] was a suit brought by the widow of William Dedmon to recover under the Workmen's Compensation Law for the injury to and death of Mr. Dedmon. The question was whether the injury and death of Dedmon arose out of and in the course of his employment.

Dedmon was a lumber inspector. He had gone to Morristown on the business of his employer. It was his duty to inspect lumber at a lumber yard in Morristown during 7 or 8 hours of each day. It was his further duty to proceed in his automobile to a hotel where, during the evening he was expected to write reports and to be available for telephone calls. On the evening of the accident Dedmon drove part way from the lumber yard, where he had been working, to the hotel. He then parked his car on the right side of the street and walked to a service station on the left side of the street to display and discuss some fishing equipment. While walking back to his car he was struck by an automobile and killed. The trial judge held that Dedmon's accident came within the terms of the statute. But the Supreme Court, in an opinion written by Justice Tomlinson, held that Dedmon, at the time and place he was struck, was on a personal mission, and so there could be no recovery from his injury and death under the Workmen's Compensation Act. The view taken by the Supreme Court is summed up in this passage from Judge Tomlinson's opinion: "It is true that the deviation was slight insofar as distance is concerned, but in making such deviation Mr. Dedmon exposed himself to a hazard in no way connected with his employment." The court bolsters its opinion by pertinent citations. One is the Tennessee case of *Toombs v. Liberty Mutual Ins. Co.*[5] In that case it was held that a night watchman who went to a nearby restaurant to get food, and who was struck while returning to his job was not entitled to compensation under the Act. Another is an Indiana case, In re *Betts*[6], where the facts were much like the *Dedmon* case. In this Indiana case a servant of a tinner, who had been riding in his master's wagon toward a job, got out of the wagon, while the horse was being watered, and walked across the street to get tobacco for himself. He was struck and killed by a passing automobile. His family was not allowed to recover under the Act.

Servant Exonerated: Master Held.

The case of *Olson v. Sharpe*[7] presents this paradox: A workman who backed a truck over the plaintiff was not negligent and yet a

4. 264 S.W.2d 567 (Tenn. 1951).
5. 173 Tenn. 38, 114 S.W.2d 785 (1938).
6. 66 Ind. App. 484, 118 N.E. 551 (1918).
7. 259 S.W.2d 867 (Tenn. App. E.S. 1953).

remote employer was deemed to be negligent and so liable to the plaintiff. The paradox is explained when the facts are stated more at length. They are these: The Bridges Paving Company had a paving contract. That company engaged the Moran Trucking Company to hand hot asphalt from the mixer to the paving operation. A man, by name of Phillips, was engaged by the Moran Company to furnish four trucks with drivers to assist in the operation. Sharp was employed by Phillips to drive one of the trucks.

On the day of the accident the plaintiff, an engineer, as part of his work, was inspecting a curb inlet and stood with his back to the truck that ran him down. Sharp was backing a truck loaded with 7½ tons of asphalt up grade. From the left door of his cab he watched and could see for 25 or 30 feet where his left wheels were going. He could not see where his right wheels were going. None of the parties involved provided a flagman or watchman in connection with the backing operations of trucks. Drills and other machinery in the area were making a great deal of noise. Sharp backing his truck at the rate of 5 or 6 miles per hour struck the plaintiff and injured him grievously.

The jury found that Sharp violated no duty to persons in the area. The court accepted the verdict as determinative and Sharp was exonerated. But the Bridges Paving Company was held for not providing a flagman or watchman to guard against accidents such as befell the plaintiff. The exoneration of Sharp is consistent with holding the Bridges Company when it is remembered that the Bridges Company is not held as master of Sharp. The doctrine of *respondeat superior* has nothing to do with the case.

The court reconciles the decision in this case with *D. B. Loveman Co. v. Bayless*[8]: "In that case the Court stated the general rule to be that when the master is sued solely for injuries resulting from the act of his servants, being liable for their conduct only under the doctrine of respondeat superior, a verdict, permitted to stand in favor of the servants, entitles the master to a discharge from such claimed liability." But continued the court in that case "If the evidence shows liability of the master on grounds other than the misconduct of his servants, he may be held, notwithstanding a verdict in favor of the servant."[9] In this case of *Olson v. Sharp,* the Bridges Company is probably not even the master of Sharp. At any rate their liability is not predicated on the doctrine of *respondeat superior.*

Servants: Independent Contractors.

Two recent cases raised an oft recurring and vexatious question, *viz.,* were the respective workers that were involved servants or inde-

8. 128 Tenn. 307, 160 S.W. 841 (1913).
9. 259 S.W.2d at 871.

pendent contractors? It may not be amiss to note why the status of these workers was important.

There are two ways of getting a job done. The person who wants it done can do it himself by his own efforts, management and hired help; or he can bargain with someone else for the desired result. When he hires personal services and retains the management of the enterprise he is called a "master," the person hired is called a "servant," and the master is liable for what the servant does in the master's behalf. But when one bargains for a given result he does not then become a master, the person bargained with is called an independent contractor, and he does not act in behalf of the employer.[10] The well known doctrine of *respondeat superior* does not apply in this latter situation.[11]

The worker's status is important in another connection. He gets the benefit of Workmen's Compensation Acts if he is a servant, but not if he is an independent contractor.[12]

The case of *Chapman v. Evans*[13] grew out of an accident wherein the plaintiffs were injured by a truck being driven by Evans. It appeared that Evans had been hired by Wall, the owner of the truck. It appeared, too, that Wall had an agreement with the Warren Brothers Roads Co. to do hauling for it. On the day of the accident Evans, driving Wall's truck, had made a delivery of some asphalt for the Warren Company and was on his way home when the accident happened. The plaintiff brought suit against Evans, Wall and the Warren Company. The trial court dismissed the suit as against the Warren Company and the Court of Appeals sustained the dismissal with one of the three judges dissenting. Judge Howell, who wrote the majority opinion, accepted the "control test" as crucial in determining the status of Evans with reference to the Warren Company. That is, did the Warren Company have a right to control Evans as to the manner of doing his job? The majority of the court felt so strongly that Wall, and not the Warren Company, had this right to control that they sustained the dismissal of the suit against the Warren Company.

Judge Felts, in his dissenting opinion, emphasized that "In determining whether one employed to do work for another is a servant or an independent contractor, the test 'always is whether the party for whom the work was being done had the right of control in the doing of that work.' " And, he continued, "Where employment appears, the presumption is that the one doing work for another is a servant." It seemed to Judge Felts from the facts of the case that Evans was a

10. The word "employer" is here used in a sense that includes one who bargains for a result as well as one who hires services.
11. HARPER, TORTS § 292 (1933).
12. Ewing v. Vaughn, 169 F.2d 837 (4th Cir. 1948); Benson v. Social Security Board, 172 F.2d 682 (10th Cir. 1949).
13. 261 S.W.2d 132 (Tenn. App. M.S. 1953).

servant of the Warren Company. At any rate the question was, in his opinion, one for the jury. He accordingly believed that the judgments of dismissal were wrong.

The significant thing is that both the majority and the minority opinions accepted the control test as crucial in determining the status of Evans.

The case of *Weeks v. McConnell*[14] was a suit by McConnell to recover under the Workmen's Compensation Act for injuries he received in connection with his work. The claim was resisted on the theory that McConnell was an independent contractor.

It appeared that Weeks was a contractor in the business of building residences for sale. McConnell was a paper hanger. McConnell hung paper for Weeks. He was paid $1.00 a roll for his work, furnished his own tools, worked and quit at such hours as he pleased and took no directions from Weeks. "Nothing was said as to the right of Weeks to discharge McConnell at any time it might please Weeks to do so." McConnell recovered in the trial court. Weeks appealed, and, says Justice Tomlinson, "thereby presents for decision by this Court a border line question." The Supreme Court upheld the judgment for McConnell.

The court, in coming to its decision, invokes the control test. Says Justice Tomlinson, "The question is whether the right to so control existed. If so, the status of McConnell was that of a servant." So far the opinion is conventional. But, later in the opinion, the Justice makes a good point that is generally neglected, *viz.*, the ability of the employer to terminate the employment at will. "The rule in this state" says the Justice, "is that the legal right of an employer to terminate the employment at any time is 'considered as a strong circumstance tending to show the subserviency of the employee' and 'that no single fact is more conclusive perhaps' that the status of the parties is that of master and servant." The relation of that passage to the right of control will be discussed in the next paragraph.

It is assumed that a master has a right to control the doings of his servant. Putting the same idea another way, it is assumed that the servant is under a duty to obey his master. Whence comes this duty of the servant? It could be provided for in a contract between the master and servant. But in most instances no such right is expressly contracted for. Indeed there need not be any contract in the sense that the master undertakes to hire, or the servant, to work. One who accepts the services of a volunteer *ipso facto* is liable for unlawful acts of the volunteer in the rendition of the services.[15] This right to con-

14. 264 S.W.2d 573 (Tenn. 1954).
15. Hill v. Morey, 26 Vt. 178 (1854); Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327 (Tex. Civ. App. 1949).

trol seems to exist only if and so long as the services are received. Since no one is obliged to accept the services of another he can elect to take them on any condition he chooses to impose. Can it not be reasonably implied that services are accepted on condition that the master has a right to control the doings of the servant? The legal right of an employer to terminate the employment of a worker may be a more reliable and basic test than the control test.

It should be noted, too, that the right to control is only a test. It is not a basis for the master and servant relationship. The worker is not a servant because the master has a right to control him. It is the reverse. He is subject to control because he is a servant. The right of the master to control is not the basic cause on which the status of the worker depends. That status depends on whether services are given and received. The right to control is an incident. It is much used as a test, but it is not a fact that fixes the worker's status.

Agent as Fiduciary

It is well settled that an agent is a fiduciary in relation to his principal just as a trustee is a fiduciary in relation to his *cestui que trust.* The case of *Bell v. Gailey*[16] illustrates that proposition. Mrs. Bell, the plaintiff, was an aged and rather illiterate person. One of the defendants, Jones, was a real estate broker and was also in the loan business. Mrs. Bell, through Jones, procured a loan of $302.00 by mortgaging her home. Later, Mrs. Bell called upon Jones to sell the property for her. After some negotiation, Jones contracted to buy the property for $1,140.00. Mrs. Bell in said contract agreed to convey the property to Jones, or his nominee. Jones then arranged a sale of the property to Gailey for $2,500.00. A deed was made by Mrs. Bell to Gailey. The purchase money notes were discounted, with the net result that Jones received $1,800.00 after buying the property from his principal, Mrs. Bell, for $1,140.00 The chancellor awarded to Mrs. Bell $500.00 in a decree against Jones. The Court of Appeals affirmed the award. The opinion, written by Judge Anderson, is well supported by other Tennessee cases, particularly *McNeill v. Dobson-Bainbridge Realty Co.*[17] and *Wilson v. Hayes.*[18]

16. 260 S.W.2d 300 (Tenn. App. W.S. 1951).
17. 184 Tenn. 99, 195 S.W.2d 625 (1946).
18. 29 Tenn. App. 49, 193 S.W.2d 107 (Wis. 1946).