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AGENCY—1959 TENNESSEE SURVEY

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I. LIABILITY OF MASTER TO SERVANT

A. Common Law

Several decisions of the Tennessee and sixth federal circuit appellate courts during the survey period dealt with the nature and scope of duties owing by master to servant. A prefatory review of applicable common law principles should aid understanding of these cases.

Broadly categorized, the master's common law obligations to his servant are fivefold. (1) To afford a reasonably safe place to work.[1] The servant must be protected from dangers known to the master or those which might have been discovered by the exercise of reasonable diligence. If the danger is known or patently obvious and appreciated by the servant, he may be found to have assumed the risk.[2] (2) To initially furnish reasonably safe appliances, tools and implements. Supplying instruments known to be dangerous to the user or other servants, or which could have been so known by reasonable inspection, constitutes a breach of the master's duty. Again, the servant may assume the risk of obvious defects.[3] (3) As an alternative to the first-

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1. Moore Coal Co. v. Brown, 166 Tenn. 516, 64 S.W.2d 3 (1933); Casey-Hedges Co. v. Gates, 139 Tenn. 282, 201 S.W. 760 (1917); Griffin & Son v. Parker, 129 Tenn. 446, 164 S.W. 1142 (1914); Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S.W. 62 (1905); Virginia Iron Co. v. Hamilton, 107 Tenn. 705, 65 S.W. 401 (1901); Duncan v. Dickie Rector Lumber Co., 31 Tenn. App. 155, 212 S.W.2d 908 (1948).

2. *E.g.*, Cincinnati, N.O. & T.P. Ry. v. Brown, 158 Tenn. 75, 12 S.W.2d 381 (1928); Acme Box Co. v. Gregory, 119 Tenn. 537, 105 S.W. 350 (1907); Iron Co. v. Pace, 101 Tenn. 476, 48 S.W. 232 (1898); Tennessee Cent. Ry. v. Shacklett, 24 Tenn. App. 563, 147 S.W.2d 1054 (1940); Nashville, C. & St. L. Ry. v. Pollard, 14 Tenn. App. 388 (1931). A fuller discussion of the doctrine of assumption of the risk is had below.

3. See generally, Jessie v. Chattanooga Golf & Country Club, 173 Tenn. 536, 121 S.W. 557 (1938); Memphis St. Ry. v. Stockton, 143 Tenn. 201, 226 S.W. 1107 (1920); Carey Roofing & Mfg. Co. v. Black, 129 Tenn. 30, 164 S.W. 1183

mentioned obligation, the master must warn the servant of the risks of unsafe conditions or dangers, existing or impending, of which the former knows or should discover by the exercise of proper care, and which he should realize that the servant may not discover by the exercise of due care.[4] Warning may not be required where the danger is obvious.[5] (4) To provide a suitable number of competent fellow servants.[6] (5) Where the nature of the work demands it, the master may be under an obligation to promulgate and enforce safety regulations for the conduct of employees.[7] In fulfilling these responsibilities, the master must conduct his business in the light of knowledge which he has, and of that which is attributable to him because of superior attainments.[8] He may be under a duty to know the human nature of his servants, and to foresee the probable occurrence of sporadic negligent acts.[9] The standard imposed upon the master is one of reasonable care—he is not an insurer.[10]

The above obligations are commonly denominated "absolute," "continuing," and "nondelegable." That is, they may be delegated to another, but liability for improper conduct of the delegatee continues with the master.[11]

(1913); Virginia Iron Co. v. Hamilton, 107 Tenn. 705, 65 S.W. 401 (1901); Morriss Bros. v. Bowers, 105 Tenn. 59, 58 S.W. 328 (1900); Guthrie v. Louisville & N. R.R., 79 Tenn. 372 (1883). See also 4 VAND. L. REV. 372 (1951).

4. RESTATEMENT (SECOND), AGENCY § 492 (1958) provides that the master has no duty to use care to make conditions safe if he warns the servant of the dangers, except (a) where required by statute; (b) where the servant is not himself free to choose; (c) where it is understood that the master is to assume the risk. If the servant is of a class who would normally know the conditions, or if he represents himself as one who would discover the defects, then the master is under no duty to warn him unless the master knows that in spite of appearances the servant is unfamiliar with the conditions and will not realize the risks. For a unique case presenting the question of the employer's duty to warn employees of danger, see Union Carbide & Carbon Corp. v. Stapleton, 237 F.2d 229 (6th Cir. 1956), and comment, O'Neal, *Agency —1957 Tennessee Survey,* 10 VAND. L. REV. 972, 977 (1957). See also Pierce v. United States, 142 F.Supp. 721 (E.D. Tenn. 1955); Moon v. Chattanooga, 10 Tenn. App. 82 (1929).

5. MECHEM, OUTLINES OF AGENCY §§ 581-82 (4th ed. 1952).

6. See, *e.g.,* Southern Ry. v. Welch, 247 F.2d 340 (6th Cir. 1957), and comment, Hayes, *Agency—1958 Tennessee Survey,* 11 VAND. L. REV. 1168, 1172 (1958).

7. PROSSER, TORTS §§ 67-69 (2d ed. 1955).

8. RESTATEMENT (SECOND), AGENCY § 495 (1958).

9. *Id.* § 493.

10. For good general discussions of the principles set forth in the above textual paragraph see MECHEM, OUTLINES OF AGENCY § 578 (4th ed. 1952); PROSSER, TORTS §§ 67-69 (2d ed. 1955); RESTATEMENT (SECOND), AGENCY § 492 (1958).

11. Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S.W. 62 (1905); Guthrie v. Louisville & N. R.R., 79 Tenn. 372 (1883); MECHEM, OUTLINES OF AGENCY § 585 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY § 492 (1958). This principle is a complement to the fellow servant rule, discussed more fully below. Though a master is not, under common law principles, liable for the negligent act of a fellow servant which injures another servant, this is generally so only when the fellow servant is negligent in the performance of acts not involving a violation of the master's nondelegable duties. As to

By accepted doctrine, these duties are not confined to the precise period during which services are actually rendered but exist while the servant can properly be said to be acting within the scope or course of his employment, actual or "constructive." A servant in a place or vehicle in the control of the master, in which he is then required to be by reason of his employment or which has been provided for use incidental to his employment, is due the above duties. Travel to and from employment may be within the scope.[12]

A master who has met these obligations is not rendered liable by injuries to a servant resulting from risks "incident to the business" —those which result from no fault of the master but from the very nature of the thing to be done.[13] However, the line of demarcation between such a risk and one involving a breach of the master's duty is indeed delicate.

Turning to the recent decisions, in *Overstreet v. Norman*,[14] a 51 year-old woman was employed by defendant as a "bean picker." Transportation was afforded her in defendant's pick-up truck. Plaintiff rode in the bed of the truck, some four feet above ground. Upon arrival at the field, an unknown party placed a bean hamper at the rear of the truck for use as a step. As plantiff stepped down, the hamper turned, she fell and suffered injuries. She sought recovery, alleging a breach of common law duty by her employer proximately resulting in her injuries;[15] specifically, that defendant was negligent in failing to provide her with a safe place to work and safe appliances by not providing steps for alighting from the truck. Two of the common law trinity of masters' defenses were interposed by defendant— that plaintiff had assumed the risk; and that the negligence, if any, was that of a fellow servant for which defendant was not responsible. There was a jury verdict for plaintiff for $200.00.[16] On appeal, this was affirmed by the middle section of the court of appeals. In a logical, well-reasoned opinion, Judge Felts adhered to the general principles set out above. He felt that since defendant was transporting plaintiff to her place of work in his truck, she was at that time "constructively" in his employment and was thus owed a duty of

these, the master is generally responsible for the injurious acts of both himself and the fellow servant. In short, a servant performing the nondelegable duties of a master is not a fellow servant within the meaning of that rule. See Virginia Iron Co. v. Hamilton, 107 Tenn. 705, 65 S.W. 401 (1901).

12. RESTATEMENT (SECOND), AGENCY § 497 (1958).

13. See MECHEM, OUTLINES OF AGENCY § 576 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY § 499 (1958).

14. 314 S.W.2d 47 (Tenn. App. M.S. 1957). See also the survey of *Torts*, this issue, 12 VAND L. REV. 1350 (1959).

15. Coverage under Workmen's Compensation was not alleged. TENN. CODE ANN. § 50-906 (1956) provides that "The Workmen's Compensation Law shall not apply to: (c) . . . farm or agriculture laborers and employers thereof."

16. And for her husband for approximately $800.00 for loss of consortium.

due care though she had not commenced work at the moment of injury; this duty encompassed the furnishing of safe means for alighting from the truck; and, the duty being nondelegable, the fact that the act of negligence in placing the hamper may have been that of a fellow servant did not relieve defendant of responsibility.

The question of whether plaintiff had assumed the risk presented little difficulty. The preferred statement of that doctrine is:

> In the absence of a statute or an agreement to the contrary, a master is not liable to a servant for harm caused by the unsafe conditions of the employment, if the servant, *with knowledge of the facts and understanding of the risks,* voluntarily enters or continues in the employment.[17] (Emphasis added.)

Of course, if the risk is an obvious one, the servant may be held to have known it.[18] It should be noted that this doctrine rests upon a subjective state of mind, as contrasted with the objective test used to determine if the plaintiff was contributorily negligent.[19]

Applying these principles, it seems entirely sound to conclude that plaintiff could be found not to have known and appreciated the dangers inherent in stepping on the hamper; thus, the jury conclusion that she had not assumed the risk seems properly substainable.

Similar problems were discussed in *Armour & Co., Inc. v. Mitchell,*[20] by the Sixth Circuit Court of Appeals. One Mitchell was employed to "bone meat" for defendant Armour. His work necessitated that he remain in a "cooler room" where the temperatures ranged from 29 to 38 degrees, to be near a freezer room in which the temperature was 10 degrees below zero and from which cold air circulated about his feet, and to pass between the cooler room and an outside platform to assist in unloading trucks. Bronchitis and congestion of the lungs were the cumulative effects of these exposures. In an action predicated upon the theory of breach of duty by the master in failing to furnish a safe place to work, Armour defended on the grounds of assumption of risk, contributory negligence, and the bar of the Tennessee one-year statute of limitations.[21] The jury found for plaintiff for $12,000.00. In a per curiam opinion, the federal court stated that it could not be held

17. RESTATEMENT (SECOND), AGENCY § 521 (1958). See also Moon v. Chattanooga, 10 Tenn. App. 82 (1929).

18. Cincinnati, N.O. & T.P. Ry. v. Brown, 158 Tenn. 75, 12 S.W.2d 381 (1928).

19. If a reasonably prudent servant would have learned the facts, appreciated the risks and acted accordingly, his negligence proximately contributing to his injury may bar his recovery. Assumption of the risk however can only be invoked when the servant subjectively knew and appreciated the risks. See generally PROSSER, TORTS, § 68 (2d ed. 1955); RESTATEMENT (SECOND), AGENCY § 525 (1958). Sometimes the distinction between the two doctrines is not clearly drawn. See Urmann v. City of Nashville, 311 S.W.2d 618 (Tenn. App. M.S. 1957).

20. 262 F.2d 580 (6th Cir. 1958).

21. TENN. CODE ANN. § 28-304 (1956).

as a matter of law that plaintiff either knew and appreciated the dangers of his employment so as to have assumed the risk by continuing work under these conditions; or, that a reasonably prudent person in plaintiff's position would have acted differently, so as to constitute his acts as contributory negligence. Thus, these questions being properly for the triers of fact, the jury verdict was affirmed.[22] The result seems both theoretically sound and socially desirable.

As for the statute of limitations, the tort was deemed a continuing one as to which the statute did not begin to run while the negligence continued or until termination of employment. This accords with Tennessee doctrine in similar cases.[23]

Though decided upon other principles of law,[24] *Williams v. McElhaney*[25] contained some interesting comments upon the fellow servant rule as a defense to the master. Generally stated, that doctrine relieves a master from liability to the servant if the former has not been negligent in the selection of his servants and the plaintiff-servant, acting in the course of his employment or in connection therewith, is injured solely by a fellow servant who is performing acts not in violation of the master's nondelegable duties.[26] Fellow servants within the rule are those employed by a common master in the same household or a single enterprise and who are so related in their work that, because of proximity or otherwise, there is a special risk of harm to one of them if the other is negligent.[27] Though similarity of work is not the controlling test, the fact that two servants are engaged in a common employment and thrown into frequent contact with each other is a

22. Had plaintiff been found to have assumed the risk, the fact that he may have been forced to continue his employment under such conditions out of economic necessity is, by orthodox dogma, of no moment. The authorities generally agree that in such a situation the servant cannot plead economic pressure or coercion as an excusing factor, nor is the fact that the servant is obeying specific orders of the master of any avail except as it bears upon the question of realization of the risk. See MECHEM, OUTLINES OF AGENCY § 595 (4th ed. 1952); PROSSER, TORTS, § 68 (2d ed. 1955); RESTATEMENT (SECOND), AGENCY § 523 (1958).

23. See, *e.g.*, Hercules Powder Co. v. Bannister, 171 F.2d 262 (6th Cir. 1948); Goodall Co. v. Sartin, 141 F.2d 427 (6th Cir. 1944); Steiner v. Spencer, 24 Tenn. App. 389, 145 S.W.2d 547 (1940). See also Hutton, *Statute of Limitations and Radiation Injury*, 23 TENN. L. REV. 278, 282 (1954).

24. For a full discussion of this case and the main points raised therein, see the survey article on *Contracts*, this issue, 12 VAND. L. REV. 1110 (1959).

25. 315 S.W.2d 106 (Tenn. 1958).

26. Maness v. Clinchfield Coal Corp., 128 Tenn. 143, 162 S.W. 1105 (1913); Nashville, C. & St. L. Ry. v. Handman, 81 Tenn. 423 (1884); Fox v. Sandford, 36 Tenn. 36 (1856); MCKINNEY, FELLOW SERVANTS 1-23 (1896); RESTATEMENT (SECOND), AGENCY § 474 (1958). See the discussion in footnote 11, *supra*, as to the relationship between the concept of the master's nondelegable duties and the fellow servant rule. The *Restatement* further provides that the fellow servant rule does not operate to relieve the master if the servant was coerced or deceived into serving or was too young to appreciate the risks, or was employed in violation of statute.

27. MECHEM, OUTLINES OF AGENCY § 589 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY §§ 475-78 (1958).

significant factor in determining the relationship.[28] Tennessee follows the minority restriction that the rule does not apply when the negligence is that of a vice principal or a superior servant, *i.e.*, one who is charged by the master with the performance of his common law duties towards the plaintiff-servant.[29]

These principles were reiterated by Justice Burnett of the supreme court in the *Williams* case. He deemed it "entirely inferable" that the rule did not apply where the plaintiff, employed as a carpenter, was knocked from a truck by overhanging wires due to the negligent driving of another servant of defendant, an ordinary laborer. Primary emphasis was placed upon the fact that the two servants were not engaged in a common employment and their contact with each other was infrequent and unnecessary.

B. Statutory Modifications

It is common knowledge that such statutes as employer's liability and workmen's compensation acts have abolished or modified the common law defenses available to the master in many such cases. Therefore, the essential issue often becomes the extent to which a statute is applicable. In *Cincinnati, N.O. & T.P. R.R. v. Underwood*,[30] a question was presented as to coverage under the Federal Employer's Liability Act.[31] There, plaintiff Underwood suffered skin irritations from being near or in contact with creosote and other chemicals used on railroad ties. After unsuccessful medical treatment, this developed into contact dermatitis. Knowing of the plaintiff's condition, the railroad required him to return to work under the same conditions without any protective clothing or other safety devices to protect him against renewal and aggravation of his injuries. In a suit under the act, the jury awarded Underwood $18,000.00 in damages. This was affirmed by the federal court of appeals. It was deemed settled law that coverage under the act is not limited to injuries resulting from accidents, but includes occupational diseases such as silicosis and contact dermatitis.[32] The defendant breached its duty to furnish a safe

28. See, *e.g.*, Louisville & N. R.R. v. Dillard, 114 Tenn. 240, 86 S.W. 313 (1904).

29. See Marshall v. South Pittsburgh Lumber & Coal Co., 164 Tenn. 267, 47 S.W.2d 553 (1931); Allen v. Chamberlain, 134 Tenn. 438, 183 S.W. 1034 (1915); Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S.W. 62 (1905); Louisville & N. R.R. v. Dillard, 114 Tenn. 240, 86 S.W. 313 (1904); Ohio River & C. Ry. v. Edwards, 111 Tenn. 31, 76 S.W. 897 (1903); Chattanooga Elec. Ry. v. Lawson, 101 Tenn. 406, 47 S.W. 489 (1898); Allen v. Goodwin, 92 Tenn. 385, 21 S.W. 760 (1893); Urmann v. Nashville, 311 S.W.2d 618 (Tenn. App. M.S. 1957); Pikeville Fuel Co. v. Marsh, 34 Tenn. App. 82, 232 S.W. 2d 789 (1948); 4 VAND. L. REV. 713 (1951).

30. 262 F.2d 375 (6th Cir. 1958).

31. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1952).

32. *E.g.*, Urie v. Thompson, 337 U.S. 163 (1949) (silicosis); Young v. Pennsylvania R.R., 197 F.2d 727 (2d Cir. 1952) (contact dermatitis).

place to work and proper equipment.[33] Although the opinion does not indicate the nature of the defenses raised by the railroad, assumption of the risk by the plaintiff is no longer a defense to the employer in such a suit.[34] And, though contributory negligence of the plaintiff could result in a diminution of damages recoverable by him on a comparative negligence basis,[35] the Supreme Court of the United States has recently indicated its strong convictions that such issues should be tried by the jury,[36] and a jury verdict should be upheld if there is any substantial evidence to support it.

II. RESPONDEAT SUPERIOR

A. Servant and Subservant

The case of *Doane Agricultural Service v. Coleman*,[37] decided by the federal appellate court, presents some extremely interesting questions of agency law. The opinion evokes discussion of the principles of respondeat superior, subagency and subservice, and the distinctions between independent contractors and servants. The complex factual situation will be set out in some detail before analysis is attempted.

Hughes, the owner of a stock farm, entered into a contract with Doane Agricultural Service, a corporation, for management of the farm operations. By this agreement, Doane was given the right to hire and fire all employees and to supervise their work; to collect all revenues and pay all expenses; to determine all matters of crop growth, soil conservation, soil and crop rotation and similar problems; to make plans for the maintenance, repair and removal of buildings, subject to approval by the owner, Hughes. Doane was to receive a monthly fee. Wages of employees were to be paid out of the farm's bank account by checks drawn by an employee of Doane. Doane was obliged to report periodically upon the progress of the work and condition of the farm. The overall plan of operation was to be submitted to Hughes for his approval. The contract further provided that it was not to be the whole agreement between the parties but was to serve only as a broad general outline of their understandings.

Guarr was the farm manager. It was found that he had been em-

33. See Thurmer v. Southern Ry., 293 S.W.2d 600 (Tenn. App. E.S. 1956); O'Neal, *Agency—1957 Tennessee Survey*, 10 VAND. L. REV. 973, 976 (1957). Also, Southern Ry. v. Welch, 247 F.2d 340 (6th Cir. 1957).

34. 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1952). See Thomas v. Union Ry., 216 F.2d 18 (6th Cir. 1954).

35. 35 Stat. 66 (1908), 45 U.S.C. § 53 (1952).

36. Rodgers v. Missouri Pac. R.R., 352 U.S. 500 (1956). See also Osborne v. Nashville, 182 Tenn. 197, 185 S.W.2d 510 (1944); LaFollette Coal, Iron & Ry. Co. v. Minton, 117 Tenn. 415, 101 S.W. 178 (1906) (questions of negligence and contributory negligence are for the jury unless evidence is susceptible of only one fair inference).

37. 254 F.2d 40 (6th Cir. 1958).

ployed by Doane and this subsequently approved by Hughes. Mitchell was a farm hand who had been originally employed by Hughes and retained by Doane.

Guarr contracted with one Blaylock, an independent contractor,[38] to bale hay; the latter's employee, Coleman, was sent to perform the job. While Coleman was on a tractor engaged in baling, Guarr decided that the bales were not being properly formed and ordered Coleman to make adjustments and Mitchell, a man inexperienced in tractor operation, to run the machine. Coleman complied and while making the necessary mechanical adjustments suffered the loss of his right arm. Though there was some dispute as to how this came about, the jury found that this was through the negligence of Mitchell, apparently in failing to disengage the tractor clutch at the proper time.

Upon these facts, Coleman sought recovery both from Doane on the theory that it was responsible for the negligence of Guarr and Mitchell and from Hughes alleging him to be responsible for the acts of Doane and its employees "under the law of agency."[39] Hughes and Doane defended on the grounds of contributory negligence, assumption of risk, and that Coleman's injury was caused by the negligence of a fellow servant. There was a jury verdict for Coleman which on appeal was affirmed.

The defenses raised may be disposed of in short fashion. The fellow servant rule is not applicable. Coleman was an employee of Blaylock, the independent contractor, while Guarr and Mitchell were the servants of either Doane or Hughes or both. There was no common master.[40] There was no indication that Blaylock had any control whatsoever over Mitchell. And it seems reasonable to conclude that Coleman had no actual knowledge or appreciation of the risk of injury since he had requested Mitchell to disengage the clutch on the machine and had no indication that Mitchell would not comply with this request. Therefore, Coleman could be found not to have assumed the risk. As for contributory negligence, there was evidence to support the jury verdict that Coleman had not been lacking in due care.

More difficult questions are presented by the attempt to resolve the interrelationship of the parties. Under what theories of agency can Hughes, Doane, or both be deemed liable to the injured third party, Coleman?

First, as to the relationship of Doane to Guarr and Mitchell. Doane employed them to perform services on the farm. Their physical conduct was subject to a right of control possessed by Doane. The rela-

38. This fact was not in dispute.
39. Instant case at 42.
40. See discussion of the fellow servant rule above in connection with the *Williams* case.

tionship of master and servant is applicable.[41] By principles settled for over 250 years, the doctrine of respondeat superior would render Doane liable for the torts of Guarr and Mitchell committed within their course of employment.[42] The acts of the latter were of the nature which they were employed to perform, they occurred within authorized time and space limits, and they were actuated by a purpose to serve the master. They seem clearly within the scope of employment.[43] Thus, nothing else appearing, it seems quite correct to hold Doane liable to Coleman under the doctrine of respondeat superior.

Of what effect is the agreement between Hughes and Doane? If it created the relationship of principal-independent contractor, orthodox doctrine has it that the principal, Hughes, would not be liable to third persons for harm resulting from the conduct of the independent contractor, Doane, or its servants.[44] On the other hand, if the relationship created be said to be that of master and servant[45] two questions arise: (1) conceding Guarr and Mitchell to be servants of Doane, can Hughes as master of Doane be responsible to Coleman for their acts? (2) if so, can Doane also be held? The court gave an affirmative answer to both questions. As will be pointed out, such a result seems theoretically sound only if the following line of reasoning is employed: Doane was the servant of Hughes; Guarr and Mitchell were subservants, whose tortious acts within the scope of their employment bind both Doane and Hughes under the doctrine of respondeat superior. Assuming the

41. RESTATEMENT (SECOND), AGENCY § 2 (1958) provides: "A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." See also MECHEM, OUTLINES OF AGENCY § 13 (4th ed. 1952). It is settled in Tennessee that this right to control physical actions is the primary factor creating the relationship of master and servant. See Barker v. Curtis, 199 Tenn. 413, 287 S.W.2d 43 (1955); D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897 (1947); Mayberry v. Bon Air Chem. Co., 160 Tenn. 459, 26 S.W.2d 148 (1929); Gulf Ref. Co. v. Huffman & Weakley, 155 Tenn. 580, 297 S.W. 199 (1927); Finley v. Keisling, 151 Tenn. 464, 270 S.W. 629 (1924).

42. See Howard v. Haven, 198 Tenn. 572, 281 S.W.2d 480 (1954); National Life & Acc. Ins. Co. v. Morrison, 179 Tenn. 29, 162 S.W.2d 501 (1941); FERSON, PRINCIPLES OF AGENCY § 25 (1954); MECHEM, OUTLINES OF AGENCY § 349 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY §§ 216, 219. See also Comment, 24 TENN. L. REV. 241 (1956).

43. For a discussion of the concept "scope of employment," see RESTATEMENT (SECOND), AGENCY §§ 228-29 (1958). See also Southern Ry. v. Jones, 228 F.2d 203 (6th Cir. 1955); Anderson v. Covert, 193 Tenn. 238, 245 S.W.2d 770 (1952); Terry v. Burford, 131 Tenn. 451, 468, 175 S.W. 538 (1914); 22 TENN. L. REV. 558 (1952); 12 TENN. L. REV. 305 (1934).

44. FERSON, PRINCIPLES OF AGENCY § 34 (1954); RESTATEMENT (SECOND), AGENCY §§ 2, 250 (1958); Harper, *The Basis of the Immunity of an Employer of an Independent Contractor,* 10 IND. L.J. 494, 499 (1935). See also National Life & Acc. Ins. Co. v. Morrison, 179 Tenn. 29, 162 S.W.2d 501 (1941); Knight v. Hawkins, 26 Tenn. App. 448, 173 S.W.2d 163 (1941).

45. That a corporation such as Doane might properly be designated a "servant," see RESTATEMENT (SECOND), AGENCY § 14(m) and Explanatory Notes thereto.

soundness of the ultimate result, inquiry will be made as to whether the facts support the above rationale.

An independent contractor is one who contracts to do something for another but who is not subject to the right of control by that other with respect to his physical conduct in the performance of the undertaking, as is a servant. Unlike the servant, the independent contractor is engaged in an enterprise of his own. Recalling the provisions of the above contract and the "practical construction" thereof by the parties, the following factors tend to indicate that Doane was an independent contractor: Doane had rather broad supervisory powers as to hiring and firing of employees, supervision of work, collection of revenues and making of disbursements, and in dealing with crops. This indicates freedom from the control of Hughes. Too, Doane was engaged in the distinct business of farm management and could be considered a specialist which operated without detailed supervision. The composite operation of Doane would seem to require certain precise skills. There was no agreement that the work could not be delegated by Doane.

Conversely, certain factors weigh towards the designation of Doane as a servant. For example, Hughes specifically reserved the right to control decisions as to maintenance, repair and removal of buildings by requiring that Doane report back to him as to such undertakings; Doane was required to make periodic reports as to the progress of the work and condition of the farm; and the overall plan of operation was subject to Hughes' approval. The fact that the contract was, by its terms, not the complete agreement between the parties would tend to indicate the retention of certain powers by Hughes. Though the facts are unclear as to which party supplied the instrumentalities of work, the locus was the farm of Hughes. That the period of employment and termination thereof were left unsettled indicates a reservation of power in Hughes to terminate the employment at any time. The fact that Doane was to be paid on a monthly basis lends some further support to the servant classification. And the work could be deemed part of a regular business of Hughes. Certainly, employment was in one specific area.[46]

46. For general discussion of the concept independent contractor and the distinction between that status and servant, see FERSON, PRINCIPLES OF AGENCY § 39 (1954); MECHEM, OUTLINES OF AGENCY §§ 427-31 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY §§ 2, 220 (1958); O'Neal, *Agency—1956 Tennessee Survey*, 9 VAND. L. REV. 918, 922 (1956); Ferson, *Agency—1954 Tennessee Survey*, 7 VAND. L. REV. 749, 752 (1954). See also Bowaters So. Paper Co. v. Brown, 253 F.2d 631 (6th Cir. 1958); Bush Bros. v. Hickey, 223 F.2d 425 (6th Cir. 1955); Terry v. Memphis Stone & Gravel Co., 222 F.2d 652 (6th Cir. 1955); Kamarad v. Parkes, 201 Tenn. 566, 300 S.W.2d 922 (1957); Barker v. Curtis, 199 Tenn. 413, 287 S.W.2d 43 (1955); Weeks v. McConnell, 196 Tenn. 110, 264 S.W.2d 573 (1953); Brademeyer v. Chickasaw Bldg. Co., 190 Tenn. 239, 229 S.W.2d 323 (1950); D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 206

The general view is that the triers of fact are to consider and balance such factors and determine the nature of the relationship. As the circumstances of this case clearly demonstrate, such questions are not susceptible of automatic, slide rule type treatment. The process is more complex. By finding Hughes liable to Coleman, the triers to be theoretically sound must have found their mental scales more heavily weighted towards designation of Hughes as master of Doane. The facts are capable of supporting such a conclusion, and if the precarious assumption is made that the jury employed the above rationale in arriving at the result, it seems a proper one.

Determination of the relationship of Guarr and Mitchell to Hughes necessitates a consideration of the principles of subagency and subservice. This area of agency is much confused, both in Tennessee and elsewhere. Only in the second edition of the *Restatement of Agency,* published in 1958, did the American Law Institute discuss the concept of subservice. In the opinion of the writer, the *Restatement* (Second) presents a clear and accurate analysis of these principles, and its viewpoint is adopted and relied upon in the ensuing discussion.

When an agent is authorized to appoint someone to act solely on account of the principal and thereafter the appointee is not to be the representative of the agent but the principal, the sounder view is that the relationship of *subagency* is *not* created, although this term is commonly and confusingly misapplied.[47] In such a situation, the appointing agent would not be responsible for the acts of the appointee. Rather, the relationship of principal and agent exists between the principal and the appointee, and the usual results of that relationship flow therefrom. However, if the appointing agent is to perform an act, and may do so either by himself or through another, and the appointee of the agent is doing the act both on account of the principal and as agent of the appointing agent, then the appointee *is* properly designated a *subagent.*[48] A subagent by this definition may bind the principal in his relationships with third parties as if the agent had performed the act; and since the subagent is also the agent of the appointing agent, he may also bind the latter by acts within the scope of his employment which adversely affect third parties.[49] If the sub-

S.W.2d 897 (1947); Chapman v. Evans, 37 Tenn. App. 166, 261 S.W.2d 132 (1953).

47. The Tennessee cases, though somewhat unclear, tend to misapply the term in this manner. See, *e.g.,* Strong v. Stewart & Bros., 56 Tenn. 108, 148 (1872) ("[T]he agent is not responsible for the acts or omissions of the substitute [subagent], but the subagent would himself be directly responsible to the principal . . . ."); Campbell & Co. v. Reeves & Breman, 40 Tenn. 226 (1859); Armstrong v. Bowman, 21 Tenn. App. 673, 115 S.W.2d 229 (1937).

48. RESTATEMENT (SECOND), AGENCY § 5 (1958) and Explanatory Notes thereto. See also MECHEM, OUTLINES OF AGENCY § 79 (4th ed. 1952).

49. RESTATEMENT (SECOND), AGENCY §§ 142, 362 (1958).

agent is also under the control of the agent and the principal as to his physical conduct, he can then be denominated a servant as to the agent and a subservant as to the principal, both of whom would then be masters. Though some conceptual difficulty arises out of such a designation when the "control" test is confronted (how can two masters control the same act of one person at the same time?), the *Restatement* (Second) provides for such a classification in the following language:

> 5(e). The situations in which there may be a subservant relation are relatively rare but may exist where a person is paid by the piece or job and is allowed by the master to select assistants at his own expense, it being understood that the servant is to direct the conduct of the subservant who is to be subject also to the superior power of control which the master may exercise. If this superior control is not exercised, both the master and the servant are liable to third persons for torts of the subservant within the scope of employment for which the servant is indemnitor to the master. For this purpose, both are masters of the subservant.
>
> 5(f). A subservant committing a tort in the scope of employment subjects both his employer and the latter's master to liability, his employer having a right of indemnity against him and a duty of indemnity in favor of the master of both of them.[50]

Applying these principles to the facts, it is felt that the result reached is consistent only with the designation of Guarr and Mitchell as servants of Doane and subservants of Hughes. Although there is a deviation from the principles of 5(e) above to the extent that Doane was not paid "by the piece or job," and did not select these assistants "at his own expense," these factors seem not to be mandatory, but serve only as indicia of the relationship. The court concerned itself primarily with the control reserved by Hughes and Doane, and this seems to be the basic test.

While no issue is taken with the ultimate result reached by the court, it is submitted that the above is the only proper rationale upon which liability of both Hughes and Doane to Coleman can be predicated. Unfortunately, the court beclouds its logic by the use of ambignous and imprecise language. One faced with a similar problem would not be assisted to any great degree by knowing that Doane was held liable because "a principal does for himself what he does through another,"[51] or that Hughes was responsible "under the law of agency."[52] Too, the court contradicted itself on one point. Doane had urged the principle that "an agent has no responsibility for the acts

50. See also *id.* §§ 362, 406; MECHEM, OUTLINES OF AGENCY § 444 (4th ed. 1952); Seavey, *Subagents and Subservants,* 68 HARV. L. REV. 658 (1955).

51. Instant case at 43, citing Gulf Refining Co. v. Huffman & Weakley, 155 Tenn. 580, 297 S.W. 199 (1927).

52. Instant case at 42.

of subagents."[53] As has been mentioned, this is incorrect if the relationship of subagency, properly defined, is present. However, to circumvent Doane's contention, the court stated that *since* Guarr and Mitchell were *not subagents,* then both Hughes and Doane could be held. But the court righted (and contradicted) itself near the end of the opinion when it stated:

> Our views are supported by Sec. 362 of the Restatement of the Law of Agency: "An agent is liable to third persons for the conduct of sub-agents and of his servants under the same conditions which make a principal liable for the conduct of an agent or servant." In its comment under that section the American Law Institute states:
> (a) "For some purposes, a sub-agent is an agent of the principal, since he acts on the principal's accoumt and is subject to his ultimate control in the performance of acts done for him. He is also, however, an agent of the agent and subjects the latter to liability within the sphere of activity in which he is authorized to act in accordance with the rules dealing with the liability of the principal for the conduct of an agent stated in Sec. 212-219.
> "(b) An agent employing a servant upon the principal's affairs is subject to the liability for the conduct of such a servant to the same extent as is any master."[54]

One moral to be learned from this case has been admirably expressed by the eminent Professor Seavey:

> Words are the tools of lawyers. They should be clean and polished. Ambiguity makes them ineffective to convey the intended thought. Unfortunately, the literature of agency is filled with terms which are used in a variety of senses.[55]

It is imperative that opinions in this complicated and confusing area of the law of agency be expressed in taut and precise language. In the present opinion the court has failed in this.

B. Sheriff's Liability for Acts of Deputies

In *State ex rel. Coffelt v. Hartford Acc. & Indem. Co.,*[56] a sheriff and his sureties were sued for compensatory and punitive damages resulting from the infliction of gunshot wounds upon plaintiff's minor son by two deputies as the boy was fleeing from an arrest attempted for a breach of peace threatened in the presence of the deputies. Two questions relating to the law of agency were presented: (1) Can a sheriff be vicariously liable for the wrongful acts of his deputies? (2) If so, may he be made to respond in punitive as well as compensatory

53. *Id.* at 44.
54. *Id.* at 45.
55. RESTATEMENT (SECOND), AGENCY, Explanatory Notes § 5 (1958).
56. 314 S.W.2d 161 (Tenn. App. M.S. 1958). See also the survey of *Torts,* this issue, 12 VAND. L. REV. 1350 (1959).

damages? Felts, J., speaking for the middle section of the court of appeals, answered both questions affirmatively.

As to both propositions, the Tennessee law seems well-settled and requires little comment. A sheriff may be held liable for injuries to third persons arising from the misconduct of his deputies in the course of their official duties "under the law of agency."[57] Several Tennessee cases have stated that this common law principle applies only where the acts of the deputies were "by virtue of the office" and not merely "under color of office."[58] Judge Felts said that this distinction is immaterial and that the sheriff's liability may be predicated upon either basis wherever section 8-1920 of the Tennessee Code[59] is applicable. That section provides:

> Every official bond executed under this Code is obligatory on the principal and sureties thereon—
>
> . . . .
>
> (3) For the use and benefit of every person who is injured, *as well by any wrongful act committed under color of his office* as by the failure to perform, or the improper or neglectful performance, of the duties imposed by law. (Emphasis added.)

His position is supported by two previous opinions of the middle section.[60] However, it should be noted that the most recent pronouncement of the supreme court relating to this point leaves it somewhat unclear as to whether this interpretation is completely accepted.[61] In any event, the distinction was not controlling, the acts of the deputies in shooting at the fleeing misdemeanant being deemed *virtute officii.*

As to the second question, several Tennessee cases have held that in a proper case a principal may be made to respond in punitive damages for the wrongful acts of his agent "done with a bad motive and in disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct."[62]

57. Criticism of the imprecision inherent in this vague phrase is had in the textual discussion of the *Coleman* case. Principal Tennessee cases discussing the sheriff's liability are Jones v. State for Use of Coffey, 194, Tenn. 534, 253 S.W.2d 740 (1952); State *ex rel.* Blanchard v. Fisher, 193 Tenn. 147, 245 S.W.2d 179 (1951); Stephens v. Hinds, 183 Tenn. 652, 194 S.W.2d 483 (1946); Ivy v. Osborne, 152 Tenn. 470, 279 S.W. 384 (1925). See also 22 TENN. L. REV. 1074 (1953); Comment, 21 TENN. L. REV. 306, 312 (1950).

58. *E.g.,* the *Fisher* and *Ivy* cases, supra note 57.

59. TENN. CODE ANN. § 8-1920 (1956).

60. Marable v. State *ex rel.* Wackernie, 32 Tenn. App. 238, 222 S.W.2d 234 (1949); State *ex rel.* Harbin v. Dunn, 39 Tenn. App. 190, 282 S.W.2d 203 (1943) (Felts, J.).

61. In Jones v. State for Use of Coffey, 194 Tenn. 534, 539, 253 S.W.2d 740 (1952), the Supreme Court indicates that the common law distinctions between acts "by virtue of the office" and acts "under color of office" is applicable except "in certain cases" where the sheriff and his sureties would be liable if the deputy was acting "under color of office." No amplification of the nature of these "certain cases" was had.

62. Knoxville Traction Co. v. Lane, 103 Tenn. 376, 389, 53 S.W. 557 (1899). For a discussion of the situations where the master may be liable in punitive

III. CREATION OF AGENCY RELATIONSHIP

Province v. Mitchell[63] contained one proposition of agency law. When defendant's house burned her insurer sent an adjuster to investigate the damage. Upon the adjuster's request made in the presence of defendant, plaintiff contractor began repair work upon the house and later submitted an estimate of the cost of repairs prior to completion. This estimate was made the substantial basis of the insurer's settlement with defendant. Defendant thereafter refused to pay plaintiff the estimated amount for the work done, offering to pay only the reasonable value of plaintiff's services, which was some $400.00 less. Plaintiff sued to recover the larger amount alleging among other things that the actions of the adjuster constituted him the agent of the defendant in this matter and that his approval of plaintiff's estimate followed by the settlement with defendant amounted to a promise to pay plaintiff such amount, upon which defendant was bound. This contention was rejected, the western section of the court of appeals stating without citation of authority that the adjuster was the agent of the insurance company and was not rendered otherwise by the above circumstances.

The conclusion seems correct. There appear to have been no dealings between defendant and the adjuster which would manifest an intent that the latter was to act in behalf of the insured or subject to her control in negotiating with the plaintiff. Rather, the adjuster seems clearly to have been acting in behalf of the insurer which had a substantial interest in the matter. The adjuster was in nowise subject to the will of defendant in so dealing and no element of fiduciary relationship between the insured and the adjuster can be perceived.[64]

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damages for the servant's act, see Earley v. Roadway Express, 106 F.Supp. 958 (E.D. Tenn. 1952). See also on this point the interesting discussion in Noel, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1350 (1959).

63. 312 S.W.2d 861 (Tenn. App. W.S. 1958).

64. See general discussion in RESTATEMENT (SECOND), AGENCY § 1 (1958). TENN. CODE ANN. § 56-705 (1956), which constitutes solicitors of insurance the agents of the insurer and not the insured, *with the exception of fire insurance brokers*, is not pertinent. The thrust of that section is concerned with representations at the time of application as between solicitors and applicants. It is not concerned with the acts of one clearly employed by the insurance company to act in its behalf, such as the adjuster here.