

Master and Servant--"Lent" Servant--Independent Contractor-- Tests of Liability

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separate sale, but upon whether or not the act of republication was a conscious, independent one. The individual who sends the same letter to different persons does so consciously and intentionally, so that new causes of action would arise, whereas, in the case of a newspaper no conscious intent arises unless and until it intentionally "re-publishes" the article. In each case it is the conscious act which determines.¹⁶ Here there was nothing active on the part of the defendant. Rather, its conduct would appear to be passive in character and does not indicate a conscious intent to induce the public or any individual to read the alleged libel. It was, at most, a gratuitous courtesy which was extended only after a third party had made a request therefor.

F. D. M.

MASTER AND SERVANT—"LENT" SERVANT—INDEPENDENT CONTRACTOR—TESTS OF LIABILITY.—Defendant's predecessor assigned part of his work of obtaining subscriptions for magazines to an independent contractor. By a written contract the latter assumed the cost and responsibility of transporting crews of young women to various territories to carry on the work. An employee of defendant's predecessor was sent to the independent contractor as the said predecessor's representative to go about with the crew and instruct them in salesmanship. The independent contractor gave said employee a place in his crew car on condition that he drive it. Plaintiffs were injured because of this employee's negligent driving and brought this action for personal injuries. Upon appeal from a judgment of the district court dismissing the complaint, *held*, affirmed. Where the performance of the contract of an independent contractor expressly includes the work performed by a "lent" servant, the independent contractor when he has control of such servant is the special employer and is liable for his tortious acts.

Under the doctrine of *respondeat superior* a master is liable for the torts of his servant committed in the scope and course of his employment.¹ But where two alleged masters are involved, as where the services of one's employee are utilized by an independent contractor, or where the servant is temporarily employed by a special master, it is often difficult to determine which of the masters is liable. The fact that the master sought to be charged paid the employee's wages,²

¹⁶ SEELMAN, LAW OF LIBEL AND SLANDER (1933) § 130.

¹ Wylie v. Palmer, 137 N. Y. 248, 33 N. E. 381 (1893); EDGAR AND EDGAR, LAW OF TORTS (3d ed. 1936) 76.

² Irolla v. City of New York, 155 Misc. 908, 280 N. Y. Supp. 873 (1935).

and was the original hirer,³ with the power to discharge⁴ is no criterion. In some cases the courts have imposed liability on the person whose business the employee was engaged in at the time the tort was committed.⁵ But this test is not all inclusive since often an employee may be engaged in doing the work of two masters, or if engaged in the work of one, be under the control of another.⁶

The most widely accepted test for determining liability is: who has the right of control over the servant at the time the tort was committed?⁷ In order to apply this test one must decide just what constitutes control. The mere reservation of the rights by an employer or lender to supervise the work of an employee, or to guide the development of construction, to plan and oversee, or to discharge unfit servants or reject improper materials, has been held not to be such a reservation of a right to control as to make him liable.⁸ Such rights are often reserved merely as assurances that the work will be done to his satisfaction and according to the contract. The fact that the borrower suggests or directs what and where the work shall be done has also been held an insufficient manifestation of such a power of control

³ Hence employment agencies who furnish employees for another's business, are not liable for the torts committed by the "lent" servants. *Haskell v. Boston Dist. Messenger Co.*, 190 Mass. 189, 76 N. E. 215 (1906).

⁴ But see *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17, 19 (1898) (where the court, emphasizing the "power to discharge test", said: " * * * the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists."). But clearly, there must be a distinction between a general power to discharge from a general employment and a limited power to discharge as from a special employment. See *MECHEM, LAW OF AGENCY* (2d ed. 1914) § 1863.

⁵ In the vehicle cases the liveryman is treated as an independent contractor whose business the hired driver or chauffeur is furthering. Instant case at 12; *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922 (1902); *Kellog v. Church Foundation*, 203 N. Y. 191, 96 N. E. 406 (1911); *McNamara v. Leipzig*, 227 N. Y. 291, 125 N. E. 244 (1919); *Braxton v. Mendelson*, 233 N. Y. 122, 135 N. E. 198 (1922); *Charles v. Barrett*, 233 N. Y. 127, 135 N. E. 199 (1922). But *cf. Schmedes v. Defaa*, 153 App. Div. 819, 138 N. Y. Supp. 931 (1st Dept. 1912), *rev'd*, 214 N. Y. 675, 108 N. E. 1107 (1915); *Hartell v. Simonson*, 218 N. Y. 345, 113 N. E. 255 (1916).

For non-vehicle cases where the lender was held liable see: *McCormac v. Al. G. Barnes Shows Co.*, 215 Cal. 685, 12 P. (2d) 630 (1932) (where a trainer of an elephant was sent to a motion picture company); *Ledvinka v. Home Ins. Co.*, 139 Md. 434, 115 Atl. 596 (1921) (servants sent by dealer to teach purchaser to drive); *Wright Steam Engine Works v. Lawrence Cement Co.*, 167 N. Y. 440, 60 N. E. 739 (1901) (where vendor sent mechanic to purchaser).

⁶ *Denton v. Yazoo & M. V. R. R.*, 284 U. S. 305, 52 Sup. Ct. 141 (1932); see *MECHEM, op. cit. supra* note 4, § 1860.

⁷ 39 C. J. (1925) 1275, § 1462.

⁸ See cases cited *supra*, note 5.

⁹ Instant case at 13: "The employer of the most independent of 'independent contractors' has an interest in the prosecution of the work, but is not the kind of interest intended * * * by the phrase 'furthering the business of the general employer'." *Casey v. Davis & Furrier Mach. Co.*, 209 N. Y. 34, 102 N. E. 523 (1913); *Ahbol v. Harden Contracting Co.*, 241 App. Div. 764, 270 N. Y. Supp. 515, *aff'd*, 265 N. Y. 564, 193 N. E. 322 (2d Dept. 1934).

or of such interference as to hold the borrower liable.¹⁰ If control be the test of liability, it would seem that it must be broader, and more complete; and the power to direct must be more extensive and minute. Thus it appears that the general master must relinquish control in order to be absolved of responsibility; control must actually vest with the borrower.¹¹ Once there is a surrender of the control, the relationship between the original master and servant (which is the source whence liability flows) is suspended.¹² However, even in such a case the master will be held liable if he has sent an incompetent servant, knowing of his unfitness.¹³

The question as to who has dominant control is one of fact to be determined by the jury.¹⁴ Mere division of control does not raise the presumption of surrender of control.¹⁵ But there is a presumption that the general employer is liable and it rests upon him to show that, as to the particular work in question, the servant had been lent and was performing only the borrower's work, or that he was not the defendant's servant at all.¹⁶ It has been suggested that in the vehicle cases the question of liability has been made to depend upon the ownership of the vehicle.¹⁷ But this is by no means decisive, for owner-

¹⁰ EDGAR AND EDGAR, *op. cit. supra* note 1, at 79: " * * * otherwise every passenger in a taxi would be liable for the torts of the driver." The hiring of a carriage and driver or a truck and chauffeur and indicating the destination or making suggestions is not tantamount to assumption of control or responsibility for the acts of the servant because the owner is deemed to have directed the driver to obey the reasonable requests of the customer. MECHEM, *op. cit. supra* note 4, § 1863.

¹¹ See note 13, *infra*. The right of control rather than the power of control is determinative. Linneham v. Rollins, 137 Mass. 123, 125 (1884) (This is " * * * because it is possession of the right of interference, the right of control that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly."). Moss v. Chronicle Pub. Co., 201 Cal. 610, 258 Pac. 88 (1927); Bartolomeo v. Bennett Constr. Co., 245 N. Y. 66, 156 N. E. 98 (1927).

¹² Irwin v. Klein, 271 N. Y. 477, 3 N. E. (2d) 601 (1936); Donovan v. Laing Constr. Syn. Co., 1 Q. B. 629 (1893).

For cases where control had been surrendered so that the borrower was held liable see: Olive v. Whitney Marble Co., 103 N. Y. 292, 8 N. E. 552 (1886); Wylie v. Palmer, 137 N. Y. 248, 33 N. E. 387 (1893); Higgins v. Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500 (1898); McCarthy v. McCabe, 131 App. Div. 396, 115 N. Y. Supp. 829 (3d Dept. 1909); Van Deusen v. Ruhlz-Pike Eng. & Constr. Co., 238 App. Div. 178, 264 N. Y. Supp. 395 (3d Dept. 1933); Blassi v. Western Union Tel. Co., 118 Misc. 436, 194 N. Y. Supp. 429 (1922).

¹³ BURDICK, THE LAW OF TORTS (4th ed. 1926) 172; LABBAT, MASTER AND SERVANT (2d ed. 1913) § 61.

¹⁴ Ryciak v. N. Y. Overseas Co., 206 App. Div. 781 (2d Dept. 1923); MECHEM, *op. cit. supra* note 4, § 1864.

¹⁵ Charles v. Barrett, 233 N. Y. 127, 135 N. E. 199 (1922); Bartolomeo v. Bennett Constr. Co., 245 N. Y. 66, 156 N. E. 98 (1927); Irwin v. Klein, 271 N. Y. 477, 3 N. E. (2d) 601 (1936).

¹⁶ Instant case at 12; Bartolomeo v. Bennett Constr. Co., 245 N. Y. 66, 156 N. E. 98 (1927). But see BURDICK, *op. cit. supra* note 14, at 173.

¹⁷ See instant case at 12; Delory v. Blodgett, 185 Mass. 126, 69 N. E. 1078 (1904); LABBAT, *op. cit. supra* note 13, § 53; (1927) 2 ST. JOHN'S L. REV. 72.

ship of an instrumentality merely tends to indicate that the driver furnished with the vehicle is in the owner's employ; and the borrower will be held liable if it can be shown that the driver in the general employment of the owner was really engaged in furthering the borrower's business and that the borrower had control of the manner of performance.¹⁸

It cannot be said that even the control test is an infallible one. The elements of each case must be taken into consideration. Where, however, it is clear that control by the defendant was coupled with performance for the defendant and in defendant's business (as in the instant case) the result is certain.¹⁹ The only difficulty lies in the application of the rule to a particular set of facts.

S. M. S.

PRACTICE AND PROCEDURE—SPLITTING CAUSES OF ACTION—MISTAKE OF LAW—MISTAKE OF FACT.—Plaintiff, Superintendent of Banks, seeks to recover assessments levied under Section 113a of the N. Y. Banking Law against defendants as stockholders of the Bank of United States. Defendants, prior to the closing of the bank, were the owners of 326 and 10 shares of stock respectively. Shortly prior to the closing they sold 325 and 2 shares respectively to X.¹ Final entries in the stock ledger were made after the closing of the bank. In the first action, plaintiff sued and recovered the assessments upon the shares remaining in defendants' names, to wit, one share and eight shares. Relying on the case of *Broderick v. Aaron*, plaintiff now seeks to recover for the shares sold by the defendants claiming that they were not relieved of their liabilities for assessments because the transfer on the stock ledger had been completed before the closing of the bank. *Held*, complaint dismissed. The liability of a stockholder for

¹⁸ If so he becomes the borrower's servant. See note 12, *supra*.

¹⁹ Thus, the instant case falls within the rule of *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252 (1909) ("If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished."); *cf.* the dissenting opinion of Loughlin and Miller, JJ., in *Schmedes v. Defaa*, 153 App. Div. 819, 138 N. Y. Supp. 931 (1st Dept. 1912); *Robbins Dry Dock and Repair Co. v. Navigazione Libera Triestina*, 154 Misc. 788, 279 N. Y. Supp. 257 (1931). It is submitted that in the case of the independent contractor who carries on his own work by his own means and methods, and therefore controls the manner of the performance of the work of his employees, it is sufficient to show that the employee was engaged in his business or in business contemplated or incidental to the contract. *Higgins v. West Union Tel. Co.*, 156 N. Y. 75, 50 N. E. 500 (1898); *Chapin-Owen Co. v. Yeoman*, 232 App. Div. 560, 250 N. Y. Supp. 95 (4th Dept. 1931).

¹ The statement of facts erroneously states the number of eight shares sold by this defendant.