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Loaning of Servants

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(7) The day the defendant made the payment of £100,000 to the plaintiff, the plaintiff forwarded to his mother in Paris a check for £22,000.

Bearing in mind these circumstances, consider the view taken in the Russell case:

> "It is true Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent thus obtained to be sufficient to fix the rights of the parties. 'Necessitous men,' says the Lord Chancellor in Vernon *v.* Bethell, 2 Eden, 113, 'are not, truly speaking, free men, but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.'" [5]

It might, in passing, be mentioned that the authority of the Russell case has been uniformly recognized and reiterated.[6] It might not be unreasonable to add that had the suit been brought in Pennsylvania (defendant's domicil) or Great Britain (where the contract was made), a different result could possibly have been expected.[7] Then, too, might not the New York decision have been otherwise but for what later appeared to be tactical errors on the part of plaintiff's counsel in the proof of his case? But, nevertheless, with the Supreme Court of our country maintaining a contrary view,[8] with the equities in behalf of the plaintiff more compelling than those in the Russell case, can it be said that the present decision accords with those high standards of sound and progressive legal development which have been established by the New York Court in its decisions of recent years?

E. M.

LOANING OF SERVANTS.

In a case recently decided by the New York Court of Appeals, there was again presented the question of fixing the responsibility for

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[5] *Ibid.*

[6] Whitcomb *v.* Sutherland, 18 Ill. 579 (1857); Fort *v.* Colby, 165 Iowa 103, 144 N. W. 393 (1913); Hull *v.* Burr, 58 Fla. 471, 50 So. 754 (1909); Collins *v.* Denny Clay Co., 41 Wash. 143, 82 Pac. 1012 (1905); Gibbons *v.* Joseph Gibbons, C. M. Co., 37 Colo. 103, 86 Pac. 94 (1906); Murray *v.* Butte-Monitor T. M. Co., 41 Mont. 458, 110. Pac. 497 (1910); Wagg *v.* Herbert, 215 U. S. 546, 552 (1910).

[7] See Pomeroy's Equity Jurisprudence, 4th ed., Vol. 3, pp. 1192-1196, and cases there cited.

[8] Russell *v.* Southard, *supra,* note 3; Wagg *v.* Herbert, *supra,* note 6.

the tortious acts of a servant having both a general and a special employer.

In this case,[1] plaintiff's deceased was in the general employ of the Powers Kennedy Company, which used in its excavation work, a steam shovel furnished by the defendant. A *per diem* charge was made for the use of this shovel and for the services of an engineer and a fireman, previously hired by, and in the employ of, the defendant. One morning while the deceased was at work on a ledge nearby, the shovel suddenly began operating and struck him a blow which caused his death. The question involved was the liability for the negligent act of those operating the machine. The trial judge dismissed the complaint holding that the steam shovel was operated not by the defendant but by Powers Kennedy Company, and therefore, the men operating the machine were the servants of Powers Kennedy Company rather than of the defendant. The Court of Appeals held that in absence of proof that it had surrendered control it must be presumed the defendant's power of control continued and therefore it was liable for the acts of the engineer.

Two theories as to the fixing of legal liability in situations similar to the one here presented have received judicial support.

The first is that the special property acquired in the chattel by the hirer constitutes him the master of the persons sent by the owner to supply the human agency necessary to make the chattel effective for the purpose contemplated by the contracting parties.[2]

The second theory, and the one which has been established by an overwhelming weight of authority, is that a servant sent to take charge of a chattel owned by his master, while it is placed at the disposal of another for the performance of a given piece of work, is presumed to remain the servant of his general employer, and that special circumstances in addition to the mere fact of the hiring of the chattel must be proven in order to overcome this presumption.[3] Ordinarily no one fact is decisive; the payment of wages, the right to hire or discharge, the power to direct, any or all, may be considered as a test.[4]

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[1] Bartolomeo *v.* Bennet Construction Co., 245 N. Y. 66, 156 N. E. 98 (1927). See annotations 37 L. R. A. 71 (1897); 7 Ann. Cases 100 (1906); 14 Ann Cases 731 (1907); Ann. Cases 1913 B, 912.

[2] Laugher *v.* Pointer, 5 Barn. & C. 567 (1826).

[3] Delory *v.* Blodgett, 185 Mass. 126, 69 N. E. 1078 (1904); Boroughf *v.* Schmidt, 259 S. W. 881 (Mo. 1924); Billig *v.* Southern P. Co., 189 Cal. 477, 209 Pac. 241 (1922).

[4] Schweitzer *v.* Thompson & N. Co., 229 N. Y. 97, 127 N. E. 904 (1920).

"It is sometimes said that the right to discharge is the con-

The actual fact is that the employee in most cases is engaged both in the business of his regular employer and in that of his alleged special employer, viz., the hirer. But even in this situation the responsibility is placed upon the general employer. This view is upheld in the case of Charles *v.* Barrett, etc.,[5] in which one *S.* who was in the trucking business supplied the defendant with a driver and van. The defendant did all the work of loading and unloading, but between departure and destination, the truck remained without interference or supervision in charge of the chauffeur. While so engaged, it struck and killed the plaintiff's son. Negligence was not disputed. The question involved was whether the defendant was answerable for the wrong. Cardozo, J., held, "We think the truck and driver were in the service of the general employer. There was no such change of masters as would relieve *S.* of liability if the driver of the van had broken open the seals on the truck and stolen the contents. By the same token, there was no such change as to release him from liability for other torts committed in the conduct of the enterprise."

No person can be said to be the master unless the work that is being done is carried on under his will and control, in its varied details and at all times. The liability flows from the relation of master and servant, a relation incident to which is the power to select the servant, direct him in the execution of the duties of his employment, discharge him if found to be incompetent, and the duty so to control his acts that no injury may be done to third persons.

A significant statement of the rule is that made by Mr. Justice Moody in Standard Oil Co. *v.* Anderson,[6]

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trolling factor in determining who is the master of the loaned servant; but the mere fact that the party hiring the truck with the chauffeur could control the selection of the chauffeur by telling the owner of the truck not to send certain people is not equivalent to authority to discharge, and not, therefore, a fact implying the relationship of master and servant between the chauffeur and the hirer."

Cattini *v.* American R'y Exp. Co., 202 A. D. 336, aff'd 234 N. Y. 585, 138 N. E. 456 (1922).

Authority of the lessee of the hired trucks to suspend or discharge the chauffeurs from their work whenever dissatisfied with the manner in which they were performing it, does not make the lessee the master *ad hoc* of the chauffeurs furnished if it still remained optional with the general employer to discharge them from his general employment.

[5] 233 N. Y. 127, 135 N. E. 199 (1922); Sheppard *v.* Jacobs, 204 Mass. 110, 90 N. E. 392 (1910); McNamara *v.* Leipzig, 227 N. Y. 291, 125 N. E. 244 (1919); Schweitzer *v.* Thompson *supra,* note 4; Wagner *v.* Motor, etc., Corp., 234 N. Y. 31, 136 N. E. 229 (1923); Hanrahan *v.* N. Y. Edison, 212 App. Div. (N. Y.) 295 (1925).

[6] 212 U. S. 215, 221 (1909); Chi., Rock Island & Pac. R'y *v.* Bond, 240 U. S. 449 (1916); Central R. R. of N. J. *v.* DeBusley, 261 Fed. 561 (C. C. A. 3rd, 1919).

"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who are capable of performing such work nor is willing to take such persons into his general service. He may then enter into an agreement with another. 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. But on the other hand, one may prefer to enter into an agreement with another that the other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control over them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are his servants for the time being. In the second case, he who agrees to furnish the completed work through servants over whom he *retains control* is responsible for their negligence in the conduct of it, because though it is done for the ultimate benefit of the other, it is still, in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestions as to the details or the necessary co-operation, where the work furnished is part of a larger undertaking."

The following cases are illustrative of those basing the test of relationship on the control over the servant, the master who had the right to direct being responsible for any negligence of the servant:

Donovan *v.* Laing Construction Syn. Co. in the English Court of Appeals,[7] where the defendants contracted to lend to a firm, engaged in loading a ship at their wharf, a crane, with a man to run it. He received directions from the firm or its servants as to the working of the crane and the defendants had *no control* in the matter. The plaintiff, a servant of the wharfingers, was struck by the crane, and injured, by reason of the negligence of the operator. He based his claim on the ground that the negligence was the act of the defendants' servant. The court held: though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with power of controlling him in the work in which he was engaged, they were not liable for his negligence while so employed;

[7] 1 Q. B. 629 (1893). See also Johnson *v.* Lindsay & Co., Appeal Cases 371 (1891); Sadler *v.* Henlock, 4 El. & Bl. 570 (1885).

McNamara *v.* Leipzig,[8] where a garage company by a written agreement rented an automobile with a chauffeur to defendant for a certain time and for a designated sum, to convey defendant wherever he desired to go; the company to pay all the expenses of the maintenance and operation of the car and to provide insurance protecting the defendant from all liability by reason of accident. The chauffeur negligently ran over a pedestrian. It was held that the chauffeur was not the servant of the defendant. The defendant had no authority, management or control over the automobile or as to the manner in which it should be driven, his orders merely stating the work which the company had arranged to do;

Peach *v.* Bruno,[9] where it was held that the defendant who had hired a horse, wagon and driver to carry merchandise from place to place as directed by the defendant's servant, who accompanied the driver for that purpose alone, was, as a matter of law, not answerable for the driver's negligence.

A leading case on the subject and one that is continuously cited and followed in all jurisdictions is that of

Rourke *v.* Moss Colliery Co.[10] The defendants, owners of a colliery, had begun to sink a pit or shaft, and had erected, and employed men to drive, a steam engine near the mouth of the shaft. After doing some work on the shaft they entered into an agreement with one *W.* to carry on the work for them; *W.* to find all the labor necessary, and the defendants to provide and place at his disposal and under his *control* the necessary engine power, ropes, etc., together with the engineer who was paid by the defendants. The plaintiff, one of the men employed and paid by *W.*, while working at the bottom of the shaft, was injured through the negligence of the engineer. The Court of Appeals held: though the engineer was the general servant of the defendant, yet, because he was under the orders and *control* of *W.* and not of defendants, they, therefore, were not liable for his negligence.

The payment of wages can be sometimes used as a criterion but, as a test, is often unreliable. The mere fact that the general employer continues to pay the wages of a servant lent by him will not make him liable for the servant's acts, where control has, for the

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[8] *Supra,* note 5.

[9] 224 Mass. 447, 113 N. E. 279 (1916); Coughlan *v.* Cambridge, 166 Mass. 268, 44 N. E. 218 (1896); Samuelian *v.* American Tool Co., 168 Mass. 12, 46 N. E. 98 (1897). See also cases cited in Sheppard *v.* Jacobs, *supra,* note 5.

[10] Common Pleas Div. 205 (1877).

time being, been surrendered.[11] On the other hand, the relation of master and servant may exist though the servant receive no compensation from the general employer. In Laugher *v.* Pointer,[12] Littledale, J., thus disposed of the contention that the fact of the coachman's looking to the hirer of the horses for his compensation was inconsistent with the theory that he remained the servant of the livery stable keeper during the continuance of the bailment, "It is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but, that was only gratuity. It is the same case with servants at hotels. When there is a great deal of business they frequently receive no wages from the owner of the hotel, and trust entirely to what they receive from the guests, and yet, they are not the less the servants of the hotel keeper; they are not servants upon wages, but servants upon expectation of gratuities."

In the application of these principles to the hiring of a carriage and driver, to be used for the conveyance of the hirer from place to place, it has been held almost universally that in the care and management of the horse and vehicle, the driver does not become the servant of the hirer, but remains subject to the *control* of his general employer, and that therefore, the hirer is not liable for the negligence of the driver.[13] As Mr. Justice Holmes has said,[14] "* * * the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign,—as the master sometimes was called in the old books."[15] Thus a person who hired a public hack and gave the driver *directions* as to the place to which he wished to be conveyed, but exercised *no other control* over the conduct of the driver, was permitted to recover for personal

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[11] Rourke *v.* White Moss. Colliery Co., *supra,* note 10; Dithemer *v.* Rogers, 66 How. Pr. (N. Y.) 35 (1883).

[12] *Supra,* note 2.

[13] Driscoll *v.* Towle, 181 Mass. 416, 63 N. E. 922 (1902); Huff *v.* Ford, 126 Mass. 24 (1878); Quarmen *v.* Burnett, 6 Mees. & W. 499 (1845); Jones *v.* Corp. of Liverpool, 14 Q. B. D. 890 (1885); Lewis *v.* Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548 (1900); Little *v.* Hackett, 116 U. S. 366 (1886); Joslin *v.* Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887 (1883); Stewart *v.* Cal. Imp. Co., 131 Cal. 125, 63 Pac. 177 (1901); Frerker *v.* Nicholson, 41 Col. 12, 92 Pac. 224 (1907). See also notes 13 L. R. A. (N. S.) 1123 (1907); 25 L. R. A. (N. S.) 33 (1909); 38 L. R. A. (N. S.) 973 (1911); L. R. A. 1918 E, 121.

[14] Driscoll *v.* Towle, *supra,* note 13.

[15] See also Dutton *v.* Amesbury Nat'l Bank, 181 Mass. 154, 63 N. E. 405 (1902).

injuries sustained in a railway collision for which the hack driver was largely responsible.[16]

From a consideration of the "carriage cases" (and they are truly representative of all cases where liability is sought to be predicated upon the giving of directions) it might be said that the decisions are but declarative of the fact that the hiring of a conveyance and driver and the indication of destination and route are not tantamount to the assumption of control over, and responsibility for, the acts of the servant.[17]

It might be mentioned that to establish the fact that the servant of one has transferred his services to another *pro hac vice,* it must appear that he has assented to such transfer expressly or impliedly. No one can transfer the services of his servant to another without the servant's consent. It must appear further that the servant has, in fact, entered upon the service and submitted himself to the direction and control of the new master. His assent may be established by direct proof or by circumstances justifying the inference of such assent.[18]

The true solution of the question of liability for the tortious acts of a transferred servant would appear to lie in determining which party had the right to *control* the servant's acts. In its narrower, or rather limited sense, control could be determined by the answer to "Who had the authoritative direction of the servant as to the work to be done, and how and where to do it?" In its broader sense, the sense properly applicable in cases of this nature, control should be determined not only by the answer to the question of authoritative direction but also by appropriately considering, in connection therewith, the answers to the complementary questions, "Who hired the servant; who could properly discharge him; to whom did he look for wages?"

S. E.

STRIKES AND PICKETING: RIGHT OF LABOR UNION TO INDUCE BREACH OF CONTRACT—Until the recent decision in the Exchange

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[16] Little *v.* Hackett, *supra,* note 13.

[17] The rule of the "carriage cases" is applicable to the hiring of an automobile; Sheppard *v.* Jacobs, *supra,* note 9; Wallace *v.* Keystone Auto Co., 239 Pa. St. 110, 86 Atl. 699 (1913); Gerretsin *v.* Rambler Garage Co., 149 Wisc. 528, 136 N. W. 186 (1912).

[18] Delaware, etc., Co. *v.* Hardy, 59 N. J. L. 35, 34 Atl. 986 (1896); Mo., etc., R. R. Co. *v.* Ferch, 18 Tex. Civ. App. 46, 44 S. W. 317 (1898).