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Notes on Recent Missouri Cases

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, Collected Legal Essays, p. 269.

NOTES ON RECENT MISSOURI CASES

MASTER AND SERVANT—BORROWED SERVANT. *Karguth v. Donk Bros. Coal and Coke Co.*[1] Recently there have been several decisions by Missouri appellate courts involving the much litigated question of a "borrowed servant."

The following cases affirmed the action of trial courts in holding the *general* master of the servant responsible for the servant's conduct.

In *Burke v. Shaw Transfer Co.*[2] the defendant sent two of their taxicabs with drivers to a funeral at the request of the undertaking firm of D. W. Newcomer's Sons. One of the drivers negligently injured a passenger on the return trip from the cementery. The defendant charged the undertaking firm for the use of the taxicabs with driver and it was the undertaker in charge of the funeral who directed the plaintiff to enter the taxicab. The judgment for plaintiff was affirmed by the Kansas

1. (1923) 253 S. W. 367.

2. (1922) 243 S. W. 449, 211 Mo. App. 353.

City Court of Appeals on the theory that the driver "was engaged in the business of his employer."[3]

In *Scherer v. Bryant*[4] the plaintiff as servant of the R. W. Hodge Company was engaged in banding an armature for defendants. In order that plaintiff might accomplish his task it was necessary for an engine to revolve the armature. The engine was operated by engineers of defendants who instructed their engineers to operate the engine on this occasion under the directions of the employes of the R. W. Hodge Company. The plaintiff was injured by the action of these engineers. The trial court directed a verdict for defendants apparently on the theory that the engineers were at the time in question employes of the R. W. Hodge Company. But the trial court granted a new trial and this action met the approval of the Missouri Supreme Court which stated: "The question is usually one for the jury and is so in this case."

Alexander v. Publishing Co.[5] is of the same general nature as the two decisions above set forth.

The following cases affirmed the action of trial courts in holding the *special* master of the servant responsible for the conduct of the servant.

Grothmann v. Hermann, et al.[6] is very similar to *Burke v. Shaw Transfer Co., supra.* The defendant Hermann was an undertaker who had charge of and conducted a funeral. He did not have sufficient limousines and hired some with chauffeurs from the Donnelly Undertaking Company and the Wacker-Helderle Undertaking Company. The plaintiff while attempting to enter a limousine of the Donnelly company in the cemetery had her fingers injured by the action of a chauffeur of the Wacher-Helderle Company slamming a front door of the limousine plaintiff was entering. The St. Louis Court of Appeals sustained the action of the trial court in setting aside the involuntary nonsuit as to defendant Hermann. The court stated that the chauffeur was under the control of and doing the work of Hermann.

3. What did Arnold J., mean by this statement: "In the case at bar there is evidence which tends to show joint control"? The defendant and the undertaking firm were not in a joint operation. Compare *Garven v. C. R. I. & P. Ry. Co.* (1903) 100 Mo. App. 617, 75 S. W. 193.

The case reached the Missouri Supreme Court on certiorari but the writ was quashed. The Supreme Court ruled that the question whether the driver had changed masters was one of fact for the jury. *State ex rel. v. Trimble* (1923) 250 S. W. 384.

4. (1918) 273 Mo. 596, 201 S. W. 900.

5. (1917) 197 Mo. App. 601, 198 S. W. 467. *Hurlbut v. Wabash Ry. Co.* (1895) 130 Mo. 657, 31 S. W. 1051 is a case where the general master was held liable to the servant, though the latter was working more particularly for the special master at the time.

6. (1922) 241 S. W. 461.

The foregoing opinion quoted with approval from *Simmons v. Murray and Cudahy Packing Company.*[7] The company hired the use of three trucks and three drivers from Murray during certain parts of the day to take their employes to and from work. One employe had a finger mashed when the driver of one truck suddenly backed the truck against a trolley post. The judgment of the trial court was in favor of the plaintiff against the packing company but also in favor of Murray. The packing company appealed but the judgment against it (the special master) was affirmed. The theory of the Kansas City Court of Appeals was that the question whose servant was the driver was one for the jury. The reasons given seem to have been (1) that the contract between Murray and the company was oral and (2) that there was a dispute about the facts. However, there seems to have been no material dispute concerning anything except the legal rule applicable to the facts.

Karguth v. Donk Bros. Coal & Coke Co.[8] presents about the same sort of a case. The defendant operated about eighteen teams and wagons of their own. Other persons were given the opportunity of hauling for defendant when orders were heavy and consequently they would go to defendant's premises and wait for their opportunity. Cora Maas and Henry McGinnis operated a wagon and team and sometimes purchased coal from defendant for delivery to their customers. At other times they would haul for defendant. On the occasion in question (while hauling a load of coal for defendant to a customer of defendant) their driver negligently injured plaintiff. The jury returned a verdict against defendant (the *special* master). The trial court sustained a motion for a new trial. The Supreme Court of Missouri directed the trial court to reinstate the verdict of the jury.

In *Holloway v. Schield*[9] the trial court directed a verdict in favor of defendant Schield but later set aside the order and granted plaintiff a new trial. The latter action of the trial court was affirmed. In other words, the Supreme Court of Missouri ruled that the liability of the *special* master (Schield) was a question for a jury. The general master (Fisk) had a garage where Schield kept his automobile. Schield would drive by the garage and have an employe of Fisk accompany him to the Buckingham Hotel (where Schield lived) and then the employe would drive the automobile back to the garage. It was upon such a return trip that an employe of Fisk negligently injured the plaintiff. Fisk testified, however, that before Schield made an arrangement with him he made it clear to Schield that the employe engaged in delivering or returning the automobile would be Schield's employe for the time being and that Schield would take the risk of his conduct.

7. (1921) 234 S. W. 1009, 209 Mo. App. 248.

8. (1923) 253 S. W. 367.

9. (1922) 243 S. W. 163, 294 Mo. 512.

Winkleblock v. Great Western Mfg. Co.[10] and *Hilsdorf v. City of St. Louis, et al.*[11] are illustrations of the same point of view.

Healy et al. v. Range Co.[12] is not a clearcut case where an appellate court reversed the action of a trial court allowing a recovery from the *general* master because it is stated that the general master "had not even loaned its servants." But this was conceded for argument and thus it may be said that the decision illustrates the fact that it is still possible for a trial court to make an error in submitting to a jury the question of the responsibility for a servant's conduct where there is both a general and a special master. In the particular case the defendant brought an action of replevin and a constable was commanded to take a cooking stove from plaintiff and deliver it to defendant. At request of the constable the defendant sent two servants to plaintiff's house to get the stove. The constable had to break into the house. Then he put the servants to work detaching the stove. The plaintiff protested and one of the servants committed assault and battery upon her. The Kansas City Court of Appeals ruled that the servants were the servants of the constable and not those of the defendant in the particular transaction.

Likewise *Garvin v. C. R. I. & P. Ry. Co.*[13] is not a case where judgment against the *general* master was entirely disapproved. A new trial was ordered because the trial court failed to submit an instruction that directed the jury to consider whether the *special* master was the master in control and therefore responsible. The point to be emphasized is that the court considered the problem to be one for the jury.

But *Smith v. St. L. & S. F. Ry. Co.*[14] is a case where the Missouri Supreme Court by a three to two vote decided that the trial court erred in failing to give an instruction asked by defendant (the *general* master) "virtually withdrawing the case from the jury." The decision turned very largely, if not entirely, upon the construction of a written contract between the *general* and *special* masters. It is generally said that the construction of a written instrument belongs to the court.[15]

The problem concerning "borrowed servants" arose in England but in the earlier cases, at least, there was no disposition to hold that it should be solved by juries. In *Laugher v. Pointer*[16] the trial judge directed a nonsuit and later a rule for a new trial was discharged by an

10. (1916) 187 S. W. 95.

11. (1869) 45 Mo. App. 94, 100 Am. Dec. 352. *Usher v. Telegraph Co.* (1906) 122 Mo. App. 98, 98 S. W. 84, seems not to be a case of a "borrowed servant" but rather a case where a servant had two masters. See *Wills v. Railroad* (1908) 133 Mo. App. 625, 113 S. W. 713.

12. (1912) 161 Mo. App. 483, 143 S. W. 549.

13. (1903) 100 Mo. App. 617, 75 S. W. 193.

14. (1885) 85 Mo. 418, 55 Am. Rep. 380.

15. Wigmore on Evidence, sec. 2556.

16. (1826) 5 B. & C. 547, 8 D. & R. 556.

equally divided court. In *Quarman v. Burnett*[17] Maule, B., permitted the jury to render a verdict for plaintiff but the appellate court made absolute a rule for entering a nonsuit. Thus in both cases the effort to hold the *special* master failed. *Murphy v. Caralli*[18] resulted in a directed nonsuit and the rule for a new trial was discharged. Thus the plaintiff failed in his attempt to recover against the *general* master. The trial court in *Murray v. Currie*[19] entered a consent verdict for plaintiff but upon appeal a rule was made absolute to enter a nonsuit. Defendant was the *general* master of the servant who injured plaintiff. In *Rourke v. White Moss Colliery Co.*[20] a verdict was obtained by plaintiff against defendant, the *general* master; but the Common Pleas Division ordered judgment to be entered for the defendants and this judgment was affirmed by the Court of Appeals.

These cases stand in sharp contrast with the prevalent attitude in Missouri and the United States generally of declaring that the problem is one of fact for the decision of a jury. The attitude of the English courts apparently has been to follow the doctrine that if the facts are undisputed the problem is one for the court even though the relationship is established by oral testimony. This legal principle has been stated to be the law in Missouri[21] but seemsto be ignored frequently.[22]

The present state of the law in Missouri seems to be that an appellate court will uphold the action of a trial court if the latter submits the problem to a jury or decides that it should have done so. Only two or three cases to the contrary have been discovered and they are not recent decisions. The present tendency seems to be against the idea that the problem should be decided by a court without the assistance of a jury even though there is no substantial dispute of fact.

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17. (1840) 6 M. & W. 499.
18. (1864) 3 H. & C. 462.
19. (1870) L. R. 6 C. P. 24.
20. (1877) 2 C. P. D. 205.
21. *Kipp v. Oyster* (1908) 133 Mo. App. 711, 716, 114 S. W. 538.
22. See, for instance, *Simmons v. Murray, et al.* (1921) 234 S. W. 1009, 209 Mo. App. 248, where there seems to be no material dispute as to the facts. Compare *Laugher v. Pointer* (1826) 5 B. & C. 547, 8 D. & R. 556.
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