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During 1954, the Washington Supreme Court filed 240 opinions. Of this number, 133 decisions of the superior courts were affirmed, 58 were reversed, 31 were affirmed or reversed in part or modified in some respect, and 2 appeals were dismissed. There were 16 original proceedings. In the survey following, 41 of the opinions were considered to be of sufficient importance or interest to warrant extended textual treatment. Brief summaries of 35 others appear at the end of the appropriate heading, and 9 have been cited in the footnotes. The cases are treated under one or more of 19 appropriate headings: Agency, Constitutional Law, Contracts, Corporations, Creditors' Rights, Criminal Law, Damages, Domestic Relations, Equity, Evidence, Labor Law, Municipal Corporations, Practice and Procedure, Property, Sales, Taxation, Torts, Wills and Estates, and Workmen's Compensation. Fields in which there were no cases believed worthy of note are: Administrative Law, Admiralty, Conflicts, Insurance, Legal Profession, Legislation, Negotiable Instruments, Partnerships, Public Utilities, Security Transactions, Social Security, and Trusts. —*Ed.*

AGENCY

Scope of Employment—Presumption. Washington decisions announce and adhere to the rule that if an employee drives his employer's car, a presumption arises that he is acting within the scope of his em-

ployment.[1] This presumption[2] is, of course, rebuttable, and evidence introduced by the owner of the car may, as a matter of law, overcome the presumption.[3] The evidence, to have such force, must meet a requirement calling for "uncontradicted, unimpeached, clear, and convincing testimony."[4] If the testimony is of such degree and character, and is not met by countervailing evidence on the part of the plaintiff, the case must be dismissed upon motion for a directed verdict.[5] If, on the other hand, the trial court determines that the evidence has not attained the degree and character required for the purpose of a directed verdict, the case should be submitted to the jury to be decided by it on all the evidence then before the court.[6]

In *Barnett v. Inland Motor Freight*[7] the issue before the court was whether, at the time of an automobile accident caused by the negligence of an employee driving his employer's automobile, the employee was operating the automobile in the course of his employment. The issue was decided in the affirmative, and the question on appeal was whether defendant's motion for a directed verdict after the close of all the evidence should have been sustained. The Supreme Court reversed the judgment for plaintiff, and remanded the cause for the entry of a judgment of dismissal of the action. In the light of previous decisions, the *Barnett* case raises some doubt as to the degree of evidence which will be sufficient to overcome the presumption of agency arising from ownership of a vehicle concerned in an accident.

The Barnetts were injured when an automobile in which they were riding collided with the defendant's automobile negligently operated by its employee. The accident occurred on a week-end when the em-

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[1] Murray v. Kauffman, 197 Wash. 469, 85 P.2d 1061 (1938); Griffin v. Smith 132 Wash. 624, 232 Pac. 929 (1925); Bradley v. Savidge, 13 Wn.2d 28, 123 P.2d 780 (1942); Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.2d 39 (1933). (an admission of ownership by the defendant raised a "double presumption" not only that the vehicle was driven by an employee of the defendant, but also that such person was acting within the scope of his employment at the time of the accident). McMullen v. Warren Motor Co., 174 Wash. 454, 25 P.2d 99 (1933). *Contra,* Singer v. Metz, 107 Wash. 562, 182 Pac. 614 (1919), (an admission both of ownership of the car and the presence of the driver in the defendant's employ at the time of the collision did not shift or put any burden of proof on the defendant).

[2] This presumption is one of fact: it gives rise to a procedural rule which aids the plaintiff in making out a prima facie case; it does not have the force of evidence and disappears entirely from the case when overcome by competent evidence to the contrary. For a detailed historical discussion of presumptions, see Bradley v. Savidge, *supra* note 1.

[3] Murray v. Kauffman, *supra* note 1; Mitchell v. Nalley's, Inc., 163 Wash. 183, 300 Pac. 526 (1931); Davis v. Browne, 20 Wn.2d 219, 147 P.2d 263 (1944).

[4] Bradley v. Savidge, *supra* note 1.

[5] *Ibid.*

[6] *Ibid.*

[7] 44 Wn.2d 619, 269 P.2d 592 (1954).

ployee, a freight solicitor with rather general duties, was returning from a lake where he had gone to test-sight his deer rifle. The employee was anticipating a deer-hunting trip with the defendant's customers or prospective customers, and for this reason had made the trip, accompanied by his wife and children, to test-sight the rifle. In order to sustain the verdict for plaintiffs, the Supreme Court stated it would have to conclude that the evidence justified the drawing of inferences of fact of sufficient probative value to warrant a finding that, at the time the accident occurred, the employee was acting in the course and scope of his employment, rather than being on a private mission solely personal to himself and his family, and that such inferences are of such legal sufficiency that it can be said plaintiffs sustained their burden of proof. It was held that plaintiff's had not sustained the burden of proof because the evidence failed to show a reasonable relationship between what the employee was doing at the time of the happening of the event upon which liability was based and the character of his employment.

Two facts remain apparent in the *Barnett* case: (1) the defendant's employee was driving the defendant's automobile when the accident occurred, and (2) the employee was returning from a trip made at least in part for the purpose of serving his employer's business. Yet the presumption of agency was held successfully rebutted by evidence which, under the rule of *Bradley v. Savidge*,[8] had to be "unimpeached, uncontradicted, clear, and convincing." The reversal and dismissal of the action necessitated a finding that reasonable men could not possibly contend that an agency relationship could have existed.

In *Carmin v. Port of Seattle*[9] a very similar set of facts was presented, except there was no presumption of agency involved. There the employee was also a business solicitor, and his employment likewise covered a wide range of activities. At the time of the automobile accident involved in the case, the employee was en route to his home to see a Mr. Beach, who was both a social and business acquaintance, about matters not directly concerning the employer. The hour was long after the employer's business offices had closed for the day. The court held that the question of whether the employee was within the scope of his employment was for the jury because of the wide ranging, intangible nature of the employee's activities. The *Barnett* case is striking when compared with the *Carmin* case in so far as there seems to be less reason in the latter case than there is in the former for finding a reasonable

[8] *Supra* note 6.
[9] 10 Wn.2d 139, 116 P.2d 338 (1941).

relationship between the employee's injury-causing act and the character of his employment. This is even more apparent when note is taken that the employee in the *Carmin* case owned the car he was driving when the accident occurred.

It would seem that a rule stated in the *Restatement of Agency*,[10] and applied in *Forsberg v. Tevis*[11] and in substance in *McMullen v. Warren Motor Co.*,[12] might well have been applied in the *Barnett* case. The rule is as follows:

> The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service . . .[13]

If we consider the nature of the employee's employment in the *Barnett* case with its wide range of activities and no set hours of work, together with his purpose in driving to the lake and back being in part, at least, to test-sight a deer rifle used for business purposes, might it not be said that reasonable men could differ on the question of whether or not an agency relationship existed at the time of the accident?

An answer in the affirmative is indicated by the case of *Poundstone v. Whitney*[14] where the court stated: ". . . the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized or indirectly contributed to the furtherance of the business of the employer." This statement is quoted and approved in *Smith v. Eldridge Motors*.[15] In this latter case it was stated that "it is not necessary to prove that the employee was engaged in executing any particular business of his principal, it being sufficient to show that he was acting within the general scope of his employment."[16] If it may plausibly be argued that test-sighting a deer rifle used for business purposes at least indirectly contributed to the furtherance of the business of the employer in the *Barnett* case, then it might well be inferred that the trip to the

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[10] 1 RESTATEMENT, AGENCY 530 (1933).
[11] 191 Wash. 355, 71 P.2d 358 (1937).
[12] *Supra* note 1.
[13] *See* Ryan v. Farrell, 208 Cal. 200, 280 Pac. 945 (1929), quoted in Murray v. Kauffman, *supra* note 1, where the Supreme Court of California states: "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master."
[14] 189 Wash. 494, 65 P.2d 1261 (1937).
[15] 199 Wash. 10, 90 P.2d 257 (1939).
[16] Quoting 5 BLASHFIELD CYC. OF AUTOMOBILE LAW 144, § 3014 (1934).

lake and back, made partly for the purpose of test-sighting the rifle, was within the course and scope of the employee's employment. If this inference is reasonable, then the question of agency relationship in the *Barnett* case was for the jury and not for the court to decide.[17]

Also, if the inference is reasonable, then was the presumption of agency arising initially in the *Barnett* case overcome by clear and convincing countervailing evidence? Most of defendant's countervailing evidence was introduced to indicate the employee's trip to the lake was merely a family outing. Nevertheless, it was clearly apparent that another purpose, a business one, was to test-sight a deer rifle. As has been shown, the fact that an act has a dual purpose, one being private, will not prevent its being held within the actor's scope of employment. Even if the presumption of agency was held to have been overcome, the inference of agency, from the nature of the employee's employment and the purpose for which the lake trip was made, remained, which normally would be sufficient to take the case to the jury. In the *Barnett* case the court speaks of its "liberal" policy of sustaining decisions in cases of this type. Probably the case stands best for the conservative view that liability should not be extended to an employer for the negligent act of his employee where the relationship between the act and the scope of the employment is at best remote or indirect.

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Broker's Right to a Commission. *Feeley v. Mullikin*, 44 Wn.2d 680, 269 P.2d 828 (1954), was an action by a broker for a commission on the sale of an apartment house lease and furnishings. The defendants had sold the property to a purchaser procured by plaintiff, consumating the sale through a second broker to whom a commission was paid. The second broker aided in financing the purchase, an opportunity the plaintiff was not given. The trial court found for plaintiff on grounds that defendant's action constituted bad faith, and thereby could not defeat plaintiff's right to a commission. The Supreme Court affirmed, holding that since plaintiff was deprived of the opportunity to consumate the sale, he was, as between him and defendants, the procuring cause of the sale and thus entitled to a commission.

CONSTITUTIONAL LAW

Right to Counsel and Due Process in Criminal Cases. The Washington court has held in a six to three decision that there was no denial of the right to counsel and due process where the defendant went to trial for incest two days after pleading and five days after arrest, the defendant and his court-appointed counsel having agreed to the early

[17] *See* Buckley v. Harkens, 114 Wash. 468, 195 Pac. 250 (1921); Smith v. Eldridge Motors, *supra* note 15; Carmin v. Port of Seattle, *supra* note 9.