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During the period covered by this Survey several cases have raised rather interesting points for consideration under the law of agency. On one occasion the Tennessee Supreme Court declined the opportunity of joining the ranks of the majority of states in moving toward a more modern rule on employer's liability with respect to an employee's child injured negligently by the employee. In this and other decisions, the courts have followed Tennessee precedent rather closely, with the result that there are few changes in the law of agency.

I. Liability of the Principal to Third Parties

In *Smith v. Henson*,[1] tort suits against the master by Smith as next friend of an injured minor child and as administrator of the estate of a deceased minor child were barred because the negligence involved was that of the servant-mother.[2] The mother was employed for general housework, and on the particular occasion was to drive defendant to work, return to his home, and wash his car. The home was located on a steep hill, and she parked the car on the inclined driveway. Later the car rolled down the drive and struck her two minor children, killing the girl and injuring the boy. The trial court sustained demurrers to both suits. In affirming, the supreme court held that the declaration stated no act of proximate negligence by defendant which would make him liable and that if he were liable at all, it would be because of the negligence of the servant-mother under the doctrine of respondeat superior.[3] With respect to the injured minor child the court, denying liability, restated the Tennessee rule, saying:

> It has also long been the rule in this State that a minor may not recover damages against a principal because of the negligent acts of the parent of

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1. 381 S.W.2d 892 (Tenn. 1964).

2. The action was brought under the Tennessee wrongful death statute. Tenn. Code Ann. § 20-607 (1956).

3. "We agree that the rule in Teunessee is that the master (Henson in this case) is liable for the negligent act of his servant (Mrs. Kendrick), solely upon the doctrine of respondeat superior." 381 S.W.2d at 897.

a minor, which parent at the time was acting as the agent of the principal.[4]

The action brought by the administrator for the dead child was also barred, since the mother would be the beneficiary of any damages, profiting thereby from her own negligence.[5]

Tennessee thus continues to retain the old rule that liability of the master for torts of the servant is entirely derivative and rests solely upon the doctrine of respondeat superior. The master is not liable unless the servant is liable,[6] and whatever personal immunity the servant enjoys extends to the master.[7] This has been held even where the master is guilty of independent negligence himself.[8] This is in sharp contrast to the modern and majority view, permitting recovery from the master for torts of the servant acting in the course of his employment, despite the servant's personal immunity.[9]

The special relationship between a sheriff and his deputy has given rise to a variety of cases in which torts of the deputy have been imputed to the sheriff and his surety. Though both sheriff and deputy are employees or officials of the county government, there is sometimes a relationship which seems to be that of master-servant, or principal-agent. The sheriff is generally held for the deputy's acts by virtue of office, but not for those done under color of office. While the deputy's torts are not ordinarily imputed to the sheriff under the general rules of respondeat superior,[10] the grounds on which liability is imputed vary, and there is much confusion. A well-reasoned opinion in *Waters v. Bates*,[11] clears the picture somewhat for Tennessee. In this case Waters and her husband sued the deputy, the sheriff and his surety for injuries she sustained when the deputy negligently drove his patrol car into her car while on duty. The jury found for plaintiffs,

4. *Id.* at 897.

5. The court cites with approval Bamberger v. Citizens' St. Ry., 95 Tenn. 18, 37, 31 S.W. 163, 168 (1895), where it was said: "The underlying principle in the whole matter is that no one shall profit by his own negligence, and to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not do so in his own right, would defeat this underlying principle by a mere change of form, when the entire recovery, in either event, goes to him alone."

6. A. B. Loveman Co. v. Bayless, 128 Tenn. 307, 160 S.W. 841 (1913).

7. Stewart v. Craig, 208 Tenn. 212, 344 S.W.2d 761 (1961); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932).

8. Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945). *But see* Jenkins v. General Cab Co., 175 Tenn. 409, 135 S.W.2d 448 (1940), holding a cab company liable for an assault on a passenger by passenger's husband, the cab's driver, on the ground that a common carrier has a non-delegable duty to carry passengers safely.

9. Kowaleski v. Kowaleski, 227 Ore. 45, 361 P.2d 64 (1961); RESTATEMENT (SECOND), AGENCY § 217(b)(ii) (1959).

10. 1 MECHEM, AGENCY § 1502 (2d ed. 1914).

11. 227 F. Supp. 462 (E.D. Tenn. 1964).

but a motion for judgment notwithstanding the verdict was sustained. The court adopted the test used in *Ivy v. Osborne*,[12] where it was said:

> In order to carry liability to the principal, the act of the deputy must be by virtue of the office, and in interpreting this rule it is held that, in order for a deputy's act to have that character, it must be done in an attempt to serve or execute a process, or under a statute giving him the right to arrest without a warrant, and if he acts otherwise, he is doing so as an individual.[13]

Cases subsequent to *Ivy* have tended to muddy the waters somewhat, in that they rely on *Ivy* but extend the rule to include failure to perform an official duty to a prisoner by mistreating him,[14] and firing upon and killing a fleeing misdemeanant prior to the making of a lawful arrest.[15] In *Jones v. State*,[16] where death resulted when the deputy shot out the tire of a fleeing car in the course of making an arrest for the commission of a misdemeanor, the court said: "The Court of Appeals' final conclusion is correct upon the theory (1) that the said Deputies were acting officially, and *that the Sheriff ratified the wrongful act*; (2) the Sheriff assigned them an official car to patrol the highways of Knox County, and there is material evidence that they were so acting."[17] This case and the later case of *State ex rel. Coffelt v. Hartford Accident & Indemnity Co.*,[18] while citing *Ivy*, speak of the imputation of liability to the sheriff and his surety in terms of agency. The court in the *Waters* case rejects this view, returning, in effect, to the rather narrow test put forth in *Ivy*.[19]

One other case is treated in this section, partially because it arose from a master-servant relationship, and partly because it fits really nowhere else in the present survey. In *Dispeker v. New Southern Hotel Co.*,[20] the Supreme Court of Tennessee decided that theft of a guest's car from a hotel's unattended lot by an off duty employee would support an action ex contractu for breach of a bailment contract, regardless of negligence. The facts are substantially less interesting than

12. 152 Tenn. 470, 279 S.W. 384 (1926).
13. *Id.* at 473, 279 S.W. at 384.
14. State *ex rel.* Morris v. National Sur. Co., 162 Tenn. 547, 39 S.W.2d 581 (1931).
15. State *ex rel.* Blanchard v. Fisher, 193 Tenn. 147, 245 S.W.2d 179 (1951).
16. 194 Tenn. 534, 253 S.W.2d 740 (1952).
17. *Id.* at 540, 253 S.W.2d at 742.
18. 44 Tenn. App. 405, 314 S.W.2d 161 (M.S. 1958).
19. "[N]owhere have the Tennessee cases defined virtue of office in terms synonymous with 'scope of employment' as those terms are used in the law of agency. Nowhere yet has the case of *Ivy v. Osborne* been cited except with full approval. In the *Ivy* case the Court stated: 'The Tennessee courts follow the rule last stated, upon the reasoning that the deputy acts in lieu of the sheriff and in his name, and representing the sheriff officially, *and not as an agent*, the authority of the deputy is limited to official acts.'" *Supra* note 11, at 467 (Emphasis added.)
20. 373 S.W.2d 897 (Tenn. App. W.S. 1963), *cert. denied*, 373 S.W.2d 904 (1963).

the holding. Dispeker stopped overnight at defendant hotel, turning her car over to Govan, defendant's employee, to park in the hotel's lot. Later, off duty, Govan took the car and wrecked it. In the lower court the chancellor, dismissing the bill, held that "the common law rule making an innkeeper practically an insurer of the property of its guests is not applicable since the automobile was outside the inn in an open, unattended parking lot."[21] The relationship was one of bailment for hire, said the court, finding no negligence on the part of the hotel and thus no liability. No bill of exceptions was filed, but an appeal on the technical record was perfected. The Court of Appeals, Western Section, reversed the chancellor, holding that the automobile was *infra hospitium*, and that defendant's "responsibility and liability continued up to and including the time when Fred Govan, even though off duty, returned to the parking lot, took the car out, and wrecked it."[22] Since no bill of exceptions was filed, the issue of negligence was settled in defendant's favor. In denying *certiorari*, the supreme court did not deem it necessary to reach the question whether an auto parked in an open unattended lot was *infra hospitium*, but held that, irrespective of negligence, the hotel was liable for breach of the bailment by something "quite analagous to misdelivery."[23]

It is elementary that when an article is bailed, a contract, express or implied, arises for its safekeeping and return.[24] Liability for damage to the bailed article or for inability to deliver it is usually predicated on negligence or failure to exercise due care,[25] unless the bailed article is *infra hospitium* in which case the bailee is virtually an insurer. But liability for misdelivery is uniformly imposed.[26] The court in the instant case, imposing liability, says:

> It was only through defendant's unfortunate choice of employee that the automobile was damaged. Thus, when the automobile was turned over to Govan, then off-duty, an act quite analagous to misdelivery took place, imposing absolute liability upon the bailee for the loss or damage occasioned thereby. Therefore, we hold that the defendant hotel is liable for misdelivery and the law will not inquire whether it did so in good faith or through negligence or otherwise.[27]

Strictly speaking, one wonders if the automobile was "turned over

21. *Id.* at 899 (quoting decree of Chancery Court of Madison County, Tennessee).
22. *Id.* at 903.
23. Dispeker v. New So. Hotel Co., 373 S.W.2d 904, 910 (1963).
24. 8 AM. JUR. 2d *Bailments* § 2 (1963).
25. Kallish v. Meyer Hotel Co., 182 Tenn. 29, 184 S.W.2d 45 (1944); see Sewell v. Mountain View Hotel, Inc., 45 Tenn. App. 604, 325 S.W.2d 626 (E.S. 1959); Andrew Jackson Hotel, Inc., v. Platt, 19 Tenn. App. 360, 89 S.W.2d 179 (M.S. 1935).
26. 8 AM. JUR. 2d *Bailments* § 167 (1963). The court quotes this section and relies on it. See Colyar v. Taylor, 41 Tenn. 372 (1860) (holding misdelivery a conversion).
27. Dispeker v. New So. Hotel Co., *supra* note 23.

to Govan, then off-duty." It will remain for future decisions to indicate whether liability for "misdelivery" will be imposed where the car is taken by someone other than an off-duty employee.

II. Liability of Principal to Agent

Slesinger v. Glatt,[28] was a suit in chancery to recover a real estate brokerage commission. Glatt had listed a piece of property for sale with Slesinger, who had previously leased the property to Sunray for her. The lease was still in effect and granted Sunray the right to purchase the land within thirty days of notice than an offer acceptable to Glatt had been made, at the price offered. Over a period of several months Slesinger presented unacceptable offers to buy the property, and in July 1961, he produced a signed offer to buy at an acceptable figure. Glatt notified Sunray which bought the property at that figure. Slesinger sued to recover his brokerage commission. The Court of Appeals, Western Section, reversed the chancellor, holding that the broker was entitled to his commission under two theories: (1) that there was a contract to pay the commission if complainant procured a purchaser, which he did; and (2) that complainant was entitled to the commission under the principle of services rendered or quantum meruit.

Generally a broker is entitled to his commission when he produces a buyer ready, willing and able to buy.[29] Obviously, if the agreement was to pay the commission upon production of such an individual regardless of whether the owner sold to him, defendant would be liable in this case for the commission since the contract would have been fulfilled. The case most nearly in point, though not cited, is *Brown v. Beeson*,[30] where defendant was conditionally bound not to sell land to his cotenants. An independent buyer acceptable to the owner was produced by the broker, following which cotenants exercised their right to purchase. The court held the commission due.[31]

28. 373 S.W.2d 220 (Tenn. App. W.S. 1962).

29. Mechem, Agency § 560 (4th ed. 1952).

30. 31 Tenn. App. 602, 218 S.W.2d 997 (E.S. 1948).

31. "Defendant was already conditionally bound to sell to the cotenants. In that event, and as it turned out, no sale could be made to complainant's client or due to his efforts. From defendant's standpoint the primary purpose of the contract was to boost the price of the property by forcing the cotenants to pay more or, if they refused to pay more, by selling to a third party at a higher price. Doubtless realizing that a broker would not be interested in working up a sale only to lose it by having the cotenants match the offer of his client, it was clearly stated in the original letter that in that event it would be considered that Complainant would be entitled to commission. . . . When complainant . . . produced a bona fide bid and defendant sold to the cotenants at the price bid, complainant, under the terms of the contract, became entitled to commission." *Id.* at 606-08, 218 S.W.2d at 999-1000.

Under the theory of quantum meruit the court is again on sound ground in awarding a recovery. If the party giving the performance reasonably expects to be paid, if he confers a benefit on the recipient of the performance, and if he was not a volunteer, then he has a claim in quasi-contract.[32] Under the facts in the instant case Slesinger clearly conferred a benefit on Glatt, and he was not a volunteer. It seems likely that he also expected to be paid.

Quantum meruit was also the basis for an agent's claim against the principal in *Kennon v. Commercial Standard Insurance Co.*[33] The agent was engaged to investigate a workmen's compensation claim; he submitted a statement for more than 3,000 dollars. The principal contested the amount as excessive and refused to pay. At trial, four experts set the worth of his service at 350 dollars, 500 dollars, 700 dollars and 1035.53 dollars. The chancellor hearing the cause on deposition[34] awarded complainant 2500 dollars. On appeal, the judgment was decreased to 1500 dollars, the court fixing the amount by averaging the figures entered in testimony with complainant's own figure, and getting 1118.33 dollars, then arbitrarily raising this to 1500 dollars.[35]

Generally, in the absence of an agreed compensation, the agent is entitled to the fair value or reasonable worth of his services.[36] In deciding the value, expert opinion may certainly be used.[37] It then becomes a question of evidence as to what is reasonable. In the instant case, the average of the figures submitted by the disinterested experts was 646.34 dollars. Complainant's evidence must have been strong indeed to support an award two and a half times that amount.

32. 1 WILLISTON, CONTRACTS §§ 3, 3A (3d ed. 1957); RESTATEMENT (SECOND), AGENCY § 448 (1959). See Hartman, *Contracts—1961 Tennessee Survey*, 14 VAND. L. REV. 1196, 1198 (1961).

33. 376 S.W.2d 703 (Tenn. App. W.S. 1963).

34. The court of appeals, citing cases recognizing the weight to which a chancellor's conclusions, based on hearing witnesses face to face, was entitled, said: "In the instant cause the case was heard on depositions, and while that rule applies as stated, that we do give great weight to the Chancellor's opinion, certainly it does not apply with that strictness of a case heard before the Chancellor on oral testimony where he does see the witnesses face to face." *Id.* at 711.

35. "Should we take the total sum arrived at by the four experts plus the figure arrived at by the complainant, and add them we would. . . . average $1118.33. We are not willing to fix the services of complainant at such amount, but we do conclude that the value of the services when giving reasonable consideration to the estimates fixed by these experts and to their testimony in an effort to arrive at a figure which is fair and equitable for the services of complainant, taking into consideration that he is the one that performed the service and that some greater weight should be given his testimony than could be attributed to either one of the four experts standing alone, we feel his services should be fixed at $1500.00 . . . ." *Id.* at 712.

36. 3 AM. JUR. 2d *Agency* § 248 (1963); RESTATEMENT (SECOND), AGENCY § 443 (1959).

37. MECHEM, AGENCY § 545 (4th ed. 1952).

McCall v. Oldenburg[38] presented the question of duration of an implied contract of hire. Complainants were manufacturers' representatives representing principals in the "soft goods" business. In 1957, they hired defendant Oldenburg to develop a "hardgoods" division, the oral agreement being to pay him a certain sum per month and half of all commissions of the division. As the division grew it became necessary to add to it defendant Shomaker and later defendant Deakins. Retainers were paid the new men by complainants and Oldenburg monthly, travel expenses throughout being borne by the individual defendants. During April and early May of 1963 defendants conferred with complainants about a suggested revision of percentages to be paid them, but nothing came of the discussion. On May 13, 1963, defendants submitted a formal plan for revision, requesting a reply by a certain time. When the answer was not forthcoming, they formally dissociated themselves from complainants. The case arose over commissions earned prior to May 13 but not received until later; the complainants contended that defendant's share had been forfeited by virtue of the termination of employment without a month's notice.

The case turned on the indefiniteness of the hiring. The English rule is that an indefinite hiring is one for a year,[39] while in the United States, generally, an indefinite hiring is one at the will of both parties and terminable at any time.[40] Various factors tend to indicate whether the hiring is really for a term or is actually indefinite. Periodic compensation tends to indicate a definite period of employment, and a number of Tennessee cases have dealt with this problem. *Delzell v. Pope*,[41] the most recent Tennessee case directly in point, found an implied contract of hiring for a year in circumstances where there was an annual salary, complainant had already been an employee for several years, and where he was expected to develop and carry out a program running through the year. The court in that case stated the rule that a hiring at a certain price per month or year "is a hiring for that period, provided there are no circumstances to the contrary."[42] The instant case is essentially within the limits of *Delzell*, sharpening the rule somewhat by finding no definite term even where monthly retainers were paid. Intention of the parties, evidenced by all the circumstances, appears to control the duration of an implied contract of hiring in Tennessee.

38. 382 S.W.2d 537 (Tenn. App. E.S. 1964).
39. See Annot., 100 A.L.R. 834 (1936); Annot., 11 A.L.R. 469 (1921).
40. Combs v. Standard Oil Co., 166 Tenn. 88, 59 S.W.2d 525 (1933); Godson v. MacFadden, 162 Tenn. 528, 39 S.W.2d 287 (1931); Savage v. Spur Distributing Co., 22 Tenn. App. 27, 228 S.W.2d 122 (M.S. 1949).
41. 200 Tenn. 641, 294 S.W.2d 690 (1955).
42. *Id.* at 651, 294 S.W.2d at 694.

III. LIABILITY OF AGENT TO PRINCIPAL

In *Gay & Taylor, Inc. v. American Casualty Co.*,[43] the principal sought to recover from its agent, an independent lay adjustment firm, the amount of a default judgment entered against its insured as a result of the adjuster's negligent failure to forward to the plaintiff's attorney the claim file upon which the defense would have been made. The trial court awarded the plaintiff insurance company the amount it had been charged in the default judgment previously entered against its insured. In modifying the decision, the court of appeals held that the agent adjustment firm had indeed been negligent in failing to forward the file, that the negligence had resulted in the default judgment having been entered against plaintiff's insured, but that since it was clear that had the file been forwarded, the insured would have had no meritorious defense to the suit, no greater damage to plaintiff had been sustained as a result of defendant's negligence. While the decision probably could have been supported under ordinary rules of agency,[44] the facts are so close to those normally found in attorney-client cases that the court analogized extensively. Generally, an attorney is liable to his client for negligence only when the client can prove that he suffered actual damages proximately caused by this negligence.[45] Awarding a nominal sum for breach of contract the court said: "We are of the opinion, therefore, that there is no evidence in the record in the present case that the admitted misconduct of the defendant was followed by any actual loss or damage to the plaintiff, and that the entry of the 10,500 dollar judgment by the trial court was error."[46]

43. 381 S.W.2d 304 (Tenn. App. E.S. 1963).
44. See 35 AM. JUR. *Master & Servant* § 20 (1941).
45. RESTATEMENT (SECOND), AGENCY § 379, comment *b*, § 401 (1959). Maryland Cas. Co. v. Price, 231 Fed. 397 (4th Cir. 1916); Masters v. Dunstan, 256 N.C. 520, 124 S.E.2d 574 (1962); Collier v. Pulliam, 81 Tenn. 114 (1884).
46. 381 S.W.2d at 307.