

12-1936

Master and Servant-Termination of Relations After Discharge

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

(1936) "Master and Servant-Termination of Relations After Discharge," *Indiana Law Journal*: Vol. 12: Iss. 2, Article 9.
Available at: <http://www.repository.law.indiana.edu/ilj/vol12/iss2/9>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

MASTER AND SERVANT—TERMINATION OF RELATION AFTER DISCHARGE.—Plaintiff, an employee, having been laid off, had checked his tools and had been

561, *Edison v. Edison Polyform Co.* (1907), 73 N. J. Eq. 136, 67 Atl. 392; "cartoon characters," *Fisher v. Star Pub. Co.* (1921), 231 N. Y. 414, 132 N. E. 133, "the writer's interest in letters of no literary value," *Gee v. Pritchard* (1818), 2 Swans. 403, 36 Eng. Rep. 670; "business advantage protected, where there was nothing in the case to show an actual threat of injury to property but the court implied it," *Beck v. Ry. Teamsters* (1898), 118 Mich. Rep. 497, 77 N. W. 13.

For further references, see: Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harv. L. R. 640; Fordham, *Self Determination of Equity*, 30 Ill. L. R. 716, *Extension of Equitable Jurisdiction beyond Protection of Property Rights*, 34 Harv. L. R. 407.

¹⁰ *Dixon v. Holden* (1869), 7 Eq. Cas. 488 (Eng.), *Shoemaker v. The South Bend Spark Arrester Co.* (1893), 135 Ind. 471, 35 N. E. 280; *Emack v. Kane* (1888), 34 Fed. 46, *Nat'l Life Ins. Co. v. Myers* (1908), 140 Ill. App. 392; *American Mercury v. Chase* (1926), 13 F (2d) 224.

¹¹ *Denver etc. Exchange Inc. v. McKinzie* (1930), 87 Colo. 379, 287 P. 868, *Renner Brewing Co. v. Rolland* (1917), 96 Ohio St. 432, 118 N. E. 118: The result reached in these cases and the Indiana case seems to be in accord with the great weight of authority on the point involved, 60 A. L. R. 285, however, there is an interesting Utah case which is contra, *Clover Leaf Dairy Co. v. Van Gerven* (1928), 269 P. 1020, where the court denied relief, saying in substance that "owners of trade-marked bottles, who permit them to go into possession of customers without any attempt to hold the customers responsible for their return, permitting the return of bottles unmarked or marked with the trade-mark of others, cannot enjoin their use by rival merchants without showing that they have not a like number of bottles of such merchants in their possession." See 60 A. L. R. 281.

¹² Colorado Statutes, sec. 3078, 1930 (C. L.), Ohio General Code, ss. 13169, 13169-1, 13169-2, 13169-3 These statutes pertain to the "Registration and Use of Bottles, Trademarks and Tradenames."

¹³ 1933 Burns' Ann. St. sec. 66-101, ff.

¹⁴ Note 6, supra.

¹⁵ Note 6, supra.

¹⁶ See, Fordham, *The Self Determination of Equity*, 30 Ill. L. R. 716.

told by someone in the employment office to return the next day to receive his pay. He was injured on the following day while en route to the factory to collect his wages. Held, he could not recover under the Workmen's Compensation Act, as the provisions of the statute were not applicable, the employment relation having terminated.¹

As the provisions of the Workman's Compensation Act apply only where an employment relation exists,² the court very properly first considered the question whether such a relation still continued. In finding that there was no employment relation, the court stated, "When appellant received the notice that the employment was terminated and he had checked his tools and turned in his badge, he was no longer subject to the orders of his master and the relationship of master and servant ceased to exist."

The relation of master and servant does not necessarily cease with the discharge of the employee, as might be gathered from the opinion of the court in the principal case. Even the case upon which the court relied holds that, "the period of the relationship covers a reasonable interval of time for the employee to get his pay and to leave the premises."³ Thus, it has been held that where an employee was discharged and, having asked for his identification tag, was assaulted, his injury occurred in the course of the employment relation.⁴ Also, where the employee was injured in a coal mine while gathering up his tools after he had been discharged, it was held that the employment relation still existed.⁵ Although the courts seem to agree that a discharge does not necessarily operate then and there to end the relation of master and servant, when presented with facts similar to those in the principal case, they reach unharmonious results as to the existence of the employment relation.

Where the employee has been discharged and later, according to instructions, comes back for his wages, the English courts take the position that the employment relation is still in existence, and if the injury arises out of and in the course of the employment the injury is compensable.⁶ The theory of this position seems to be that in spite of the discharge, there is an implied provision that the employment will include going to receive wages on the appointed day.

In the only exactly similar case that has arisen in this country the New York Supreme Court held that once the employee after discharge had left the premises without receiving his pay, the only relation that exists between the former employer and employee is one of creditor and debtor.⁷ In this case the New York court reversed a holding of the Industrial Board that

¹ *Forman v. Chrysler Corporation* (1936), — Ind. App. —, 2 N. E. (2d) 806.

² *Board of Commissioners of Wells County v. Merritt* (1924), 81 Ind. App. 488, 143 N. E. 711.

³ *Olson v. Hulbert-Sherman Hotel Co.* (1924), 210 App. Div. 537, 206 N. Y. S. 427.

⁴ *Zygmuntowicz v. American Steel Wire Co. of New Jersey* (1922), 240 Mass. 421, 134 N. E. 385.

⁵ *Mitchell v. Consolidated Coal Co.* (1923), 195 Iowa 415, 192 N. W. 145.

⁶ *Riley v. William Holland & Sons Ltd.* (1911), 1 K. B. 1029, 4 B. W. C. C. 155..

⁷ *Olson v. Hulbert-Sherman Hotel Co.* (1924), 210 App. Div. 537, 206 N. Y. S. 427.

returning to get wages was incidental to the employment. The New York rule seems to be the exact antithesis of the English rule. The principal case follows the New York rule.

If in the principal case the court had not adopted a rather narrow construction of a statute which by the weight of authority is to be liberally construed,⁸ and had found that the employment relation still continued, it would have been presented with the problem of whether or not that injury arose out of and in the course of the employment. O. E. G.

ACTION AGAINST PARTNERSHIP IN FIRM NAME—EFFECT OF GENERAL DENIAL.—

The plaintiff brought an action for money had and received against a partnership, designating the defendants as "— Thompson whose christian name is unknown, and — McKinnon whose christian name is unknown, doing business under the style and firm name of Thompson and McKinnon." Service of process was made upon the office manager of the partnership of Thompson and McKinnon in the description of the above caption. After a filing and then a withdrawal of a special and limited appearance by fourteen named and designated parties to quash the summons, the defendants answered in general denial in the manner of the above caption. Evidence was excluded of the death of a Mr. Thompson which occurred more than four years before this cause of action accrued. From a verdict and judgment for the plaintiff against the defendant named as above, the defendant appealed. Held, that the judgment was contrary to law in that the individual partners were not sufficient designatèd, and that it was reversible error to have excluded the above evidence; new trial granted.¹

The well known common law rule that a partnership cannot be sued in the firm name alone, but that the individual names of the members thereof must be set out in the complaint was early adopted in Indiana.² This rule has been continually followed in actions against a partnership as a type of business organization.³ In this respect it is consistent with the status of the law in the majority of the states,⁴ except where recent statutes have enabled unincorporated associations to sue and be sued in the association name. The reason for the rule is to render judicial proceedings certain and conclusive as between the parties, and to give full force and effect to the doctrine of *res judicata*.

However, not only have recent statutes in several jurisdictions changed this common law rule, but also there are many states which have changed it without the aid of a statute by recognizing the partnership as a legal entity for the purposes of suing and being sued.⁵ Probably the first case to go this

⁸ *In re Duncan* (1920), 73 Ind. App. 270, 127 N. E. 289; *Birdsell Mfg. Co. v. Tripp* (1923), 80 Ind. App. 450, 141 N. E. 252; *Clark v. Woods* (1933), 95 Ind. App. 530, 183 N. E. 804.

¹ *Thompson v. Corn* (1936), 200 N. E. 737 (Ind. App.).

² *Hays v. Lanier* (1833), 3 Blackf. 322 (Ind.).

³ *Livingston v. Harvey* (1858), 10 Ind. 218, *Adams Express Co. v. Hill* (1873), 43 Ind. 157, *Pollock v. Dunning* (1876), 54 Ind. 115, *Karges Furniture Co. v. Amalgamated Union* (1905), 165 Ind. 421, 75 N. E. 877

⁴ *Conn v. Sellers* (1917), 198 Ala. 606, 73 So. 961, *Hotchkiss v. Di Vita* (1925), 103 Conn. 436, 136 Atl. 668, *International Harvester Co. v. Clements-Middleton Co.* (1931), 35 S. W (2d) 462 (Tex. Civ. Appeals), *Pope v. State* (1935), 86 S. W (2d) 475 (Tex. Civ. Appeals); *Wilson v. Guess Dry Cleaning Co.* (1934), 5 Fed. Supp. 762 (Miss.).

⁵ *Johnson v. Smith* (1841), *Morris Reports* 105 (Iowa), *People v. Zangain*