In the principal case the judgment was reversed and remanded on the weight of the evidence because of the ambiguity in the testimony of the plaintiff's key witness. In the event of the introduction of substantial evidence upon a new trial, it would seem necessary for the plaintiff, in order to charge the defendant with notice of an alleged defective condition, to establish that Zinn & Co. was an agent, with authority by reason of being such, by contract or custom, to appoint the sub-agent, who subsequently employed other sub-agents, of notice within the scope of his employment.

MARGARETTA BEYNON

TEST FOR ESTABLISHING RELATIONSHIP

While riding in a bus the plaintiff was injured in a head-on collision with a taxi cab owned by defendant cab company. The driver of the cab obtained the cab from the defendant by paying a deposit of $4.25 each morning, receiving the cab to use for the day as he saw fit. The defendant also maintained call stations where the cab drivers might receive calls by waiting their turn in line. The court dismissed the petition, holding that in the absence of evidence indicating that the defendant had any right to exercise any acts of control over the acts of the cab driver after the cab was turned over to him in the morning, there was no agency existing between the driver and the owner of the cab so as to make the owner liable for the negligence of the driver. *Hudson* v. *Ohio Bus Line Co. and Parkway Cabs, Inc.*, 23 Ohio Abs. 634, 8 Ohio O.P. 312 (1937).

It may be stated as a general proposition that when the employer has the right to control the employee in the performance of his work the latter is a servant, as distinguished from an independent contractor. *Babbitt* v. *Say*, 120 Ohio St. 177, 165 N.E. 721 (1929); *Klar* v. *The Erie Rd. Co.*, 118 Ohio St. 612, 162 N.E. 793 (1928); *Kruse* v. *Revelson*, 115 Ohio St. 594, 155 N.E. 137 (1927); *Gechei* v. *Boltz*, 13 Ohio App. 180, 31 Ohio C.A. 506 (1920); *Collier and Sons Distr. Corp.* v. *Drinkwater*, 81 Fed. (2d) 200 (1936); *Bohanon* v. *James McClatchy Pub. Co.*, 16 Cal. App. (2d) 188, 60 Pac. (2d) 510 (1936); *Keeling* v. *Nall*, 261 Ky. 232, 87 S.W. (2d) 370 (1935); Annotations, 75 A.L.R. 725 (1931); 19 A.L.R. 226, subsection 6 (1922); 14 R.C.L. 67 (1916). Many decisions require control as to the "manner and means" of doing the work, or control as to the "means of accomplishing the result," or control as to the "details" of the work. *Klar* v. *The Erie Rd. supra; Spears Dairy, Inc.*

v. *Bohrer*, 54 S.W. (2d) 872 (Tex., 1932); *Moaten* v. *Columbia Cotton Oil Co.*, 97 S.W. (2d) 629 (Ark., 1936); *Hughes* v. *Railway Co.*, 39 Ohio St. 461, 7 O.D. Rep. 502 (1883); *Snodgrass* v. *Cleveland Co-op Coal Co.*, 31 Ohio App. 470, 167 N.E. 493 (1929); *Lassen* v. *Stamford Transit Co.*, 102 Conn. 76, 128 Atl. 117 (1925). A better statement of the general rule is that an independent contractor is a person employed to perform work on the terms that he is to be free from the control of the employer as respects the manner in which the details of the work are to be executed, Annotation, 19 A.L.R. 235 (1922). Moreover, where the right to control exists it is immaterial that there was in fact no control exercised. *Pickens* v. *Diecker*, 21 Ohio St. 212, 8 Am. Rep. 55 (1871); *Chicago, R. I. & P. Ry. Co.* v. *Bennett*, 36 Okla. 358, 128 Pac. 705, 20 A.L.R. 678 (1912); *Kniceley* v. *W. Va. Midland R. Co.*, 64 W. Va. 278, 61 S.E. 811, 17 L.R.A. (N.S.) 370 (1908).

A few courts, however, do not recognize or apply this generally accepted doctrine, saying that no objective test can be set up to determine the existence of a master-servant relationship, but that each case must be determined upon its facts. One recent decision states that the existence of the right of the employer to control the employee is the most important, though not the controlling, fact to be considered in the determination of a master-servant relationship on this basis. *Kehrer et al.* v. *Industrial Comm.*, 365 Ill. 378, 6 N.E. (2d) 635 (1937).

In the principal case the driver of the cab received the cab for the day to use "as he saw fit." In this case, as in the case of *Whitehall Chev. Co.* v. *Anderson*, 53 Ga. App. 406, 186 S.E. 135 (1936), where an auto salesman was left free to perform the details of his work in any manner he wished, no right of control by the employer existed and therefore there was no master-servant relationship. Another comparable case is *Consolidated Motors, Inc.* v. *Ketcham*, 66 Pac. (2d) 246 (Ariz., 1937), where no right to control the employee in the "physical conduct" of his work existed, and the employer was held not liable for the negligent conduct of the employee. In a recent Ohio decision on facts very similar to those in the principal case, *Coviello* v. *Industrial Comm.*, 129 Ohio St. 589, 196 N.E. 661 (1935), the cab driver rented the cab at a stipulated rate per day and drove wherever he chose in the city, further agreeing, however, to wear a uniform cap, answer calls promptly and to obey other rules concerning courtesy and neatness of appearance. The court there found no master-servant relationship to exist.

In a few cases the plaintiff has sought to apply the doctrine of

estoppel. But since, in the principal case, as the court points out, the plaintiff was not a passenger in the defendant's cab, he could not be said to have in any way relied upon an apparent agency. Even where reliance has been established it must be further shown to find an estoppel that reliance 'induced the parties to have the collision.' *Keeling* v. *Nall*, *supra*. *Contra*, *Middleton* v. *Frances*, 257 Ky. 42, 77 S.W. (2d) 425 (1934).

Since no estoppel is to be found in the principal case, the plaintiff must recover, if at all, upon the basis of the employment relationship existing between the driver and the owner of the cab. In view of the above authorities it would appear that as a matter of law no master-servant relationship existed and the court was correct in dismissing the petition.

JUSTIN J. GRIBBELL

WORKMEN'S COMPENSATION — GOING AND COMING RULE — ATTENDING CONVENTION

The general phrase "in the course of the employment," found in the Ohio Constitution, Art. II, sec. 35 and the Ohio Gen. Code, sec. 1465-68 in connection with compensable injuries, has been construed in two recent Ohio decisions, which present extremes in their respective fact situations.

The Goodyear Tire and Rubber Co. owns a property in the city of Akron on the south side of East Market St. extending adjacently to the sidewalk for approximately 2500 feet. On this street the company maintains an entrance gate for employees and 300 to 400 feet east of it on the same side of the street an "East Gate" used only by tractors for loading and unloading purposes. The plaintiff, an employee of the company, had the option of taking several routes to work. While crossing on the sidewalk in front of the "East Gate," he was struck by a tractor of the company, coming out of the gate, driven by a company employee. The plaintiff recovered in a common law action for damages. This was affirmed on appeal by the company, the court refusing to hold that the injury occurred in the course of the employment on the following grounds: (1) it was not a necessary incident of plaintiff's employment that he use said sidewalk; (2) the sidewalk, a part of a public street, was not in the zone of control of the company; (3) he suffered hazards common to the public; and (4) plaintiff had not reached the place where he could enter the defendant's premises to perform his duties. *Fike* v. *Goodyear Tire and Rubber Co.*, 56 Ohio App. 197, 23 Ohio Abs. 480, 9 Ohio Op. 312 (1937).