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MASTER AND SERVANT — INDEPENDENT CONTRACTOR — SALESMAN AS SERVANT OR INDEPENDENT CONTRACTOR — Plaintiff was injured as a result of a collision between his automobile and one being driven by *N*. *N* was a traveling salesman for defendant company and plaintiff sued both *N* and the company. It was held that, under the facts of the case, while *N* had been negligent, and was therefore liable, defendant company was not liable, for *N* was an independent contractor. *Holloway v. Nassar*, 276 Mich. 212, 267 N. W. 619 (1936).

Undisputed evidence showed that *N* was a traveling salesman for defendant company; his compensation was a salary plus commissions; he had a definite territory; he sold fruits and groceries; he usually selected the fruit to fill the orders he had taken, and sometimes he transported them himself, but, more often, this was done by company trucks; he canvassed his territory once a week or oftener, using his own judgment as to hours during which he would call on customers and as to the order in which he would visit certain places; he drove his own car; he received no orders from the company as to whom he should see, or when, except that he was to call once a week; he could add new customers or drop old ones; and he was returning to the company's office when the accident occurred. The court, in distinguishing the principal case from an earlier case,¹ which plaintiff's attorney thought was controlling, said: "The *Marchand* Case is plainly distinguishable. There, Russell worked on salary, in furtherance of the general operation of the business of his employer, with no special profit to himself from the particular transactions. He had had directions from the employer and he was subject to its instructions and control." In the *Marchand* case the Michigan court applied a test, adopted by the court in previous cases,² which includes, as at least one element of independent contractorship, the "carrying on of an independent business."³ In applying the test to the salesman Russell, in

¹ *Marchand v. Russell*, 257 Mich. 96, 241 N. W. 209 (1932).

² *Zoltowski v. Ternes Lumber & Coal Co.*, 214 Mich. 231, 183 N. W. 11 (1921); and *Hanisko v. Fitzpatrick Bros.*, 232 Mich. 593, 206 N. W. 322 (1926).

³ "An independent contractor is one who, carrying on an independent business,

the *Marchand* case, the court said: "He was not in any sense engaged in an independent business, with profits or losses dependent on his conduct of it. Were it not for the fact that he used his own car, and that the expense of its operation and maintenance, as well as his personal expenses when traveling about, was included in the weekly compensation paid him, the situation would be no different from that of the ordinary salesman traveling about and selling the goods of his employer."⁴ Admitting that a plaintiff may not properly complain of a result which denies vicarious liability when the injuring party is carrying on an independent business (the justification for the master's liability being the fact that his servant is furthering, not his own, but the master's business), the layman might think it odd that he can recover from a company whose salesman is paid a salary and is denied recovery when the compensation is a salary and commissions. The emphasis, however, is placed not on the fact that the salesman is paid one way or another, but rather on the fact that the method of payment, together with other facts, will enable the court to determine whether or not the salesman is in an independent business.⁵ There seems to be no tendency, on the part of the Michigan court, to depart from the announced test of the earlier cases. That test includes the "independent calling" requirement.⁶ One who objects to a finding, in a salesman case, that the true relationship was that of an independent contractor, must argue that, from the very nature of things, a "salesman for the defendant company," selling its products (and its products alone), simply cannot be engaged in his own independent business.⁷

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contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the *independent nature of his business*. . . ." *Marchand v. Russell*, 257 Mich. 96 at 100, 241 N. W. 209 (1932).

⁴ *Marchand v. Russell*, 257 Mich. 96 at 101, 241 N. W. 209 (1932).

⁵ For a discussion of this point, see 28 MICH. L. REV. 365 (1930).

⁶ In the instant case the court, after distinguishing the *Marchand* case, continues. "In the instant case Nassar's profits depended upon his conduct of the business. He was engaged in a special undertaking, the selling of goods, and did no work for the benefit of the company which did not inure to his immediate profit." *Holloway v. Nassar*, 276 Mich. 212 at 217, 267 N. W. 619 (1936).

⁷ For an argument to that effect, see the article referred to in note 5, supra.