

the present ones, they agree with the *McNamara* case. See also 116 A. L. R. 604 where the *McNamara* case and others are cited. With slight variation in the statement of facts pertaining to this case, the *McNamara* decision could be written as the opinion in the instant case.

It cannot be doubted that if the original action had been against the employee, and a verdict in his favor had been rendered and judgment entered thereon, suit could not thereafter be brought against the employer. The negligence of the servant is the issue; if absolved, the employer is absolved. Likewise in a suit against the employer, the negligence of the employee is also the issue; what renders the liability of the employee that of the employer is the principle of control and direction. *McCarthy v. Souther*, 83 N. H. 29, 36, 37. Other authorities supporting those above cited are to be found collected in the annotations, 133 A. L. R. 196; 112 A. L. R. 404.

The only argument plaintiff can advance as a right to maintain this action is that certain evidence to be elicited from the defendant in this case against the employee was not admissible in the case against the employer, and that is a claim of admission of liability on the part of this defendant in the form of an agreement to pay for the damages. Having made his election, plaintiff assumed the chance of variation of evidence in the action brought from that in the other action if it had been brought.

*Judgment for the defendant.*

All concurred.

Hillsborough, }  
Feb. 3, 1942. } No. 3265.

JESSIE L. BRADLEY *v.* FREDERICK W. BRADLEY.

*Barnard & Barnard* (Mr. Charles H. Barnard orally), for the libelee.

*Omer H. Amyot*, by brief and orally, for the libelant.

BRANCH, J. Laws of 1937, chapter 154, which was passed in amendment of Public Laws, chapter 287, section 16, provides that "Upon a decree of nullity or divorce, the court may order him [the husband] to pay such sum of money, as may be deemed just, provided that in cases in which no children are involved, or in which the children have reached the age of majority, said order shall be effective for not more than three years from the date thereof, but such order may be renewed, modified or extended if justice requires for periods of not more than three years at a time."

The libelant contends that this statute requires that the order for monthly payments be rescinded. We are told that "The whole legislative history of the statute indicates the intention of the legislature to limit the ordering of allowances, except in the limited exception provided in the statute and in those cases in which extreme hardship other than financial loss might be sustained by one of the parties." We find nothing in the language of the statute or in its legislative history which indicates a purpose on the part of the legislature to limit the power of the court to make orders for support in divorce proceedings except in the matter of duration. No limitation to cases of "extreme hardship other than financial loss" is perceived. The effect of the statute is to bring up such orders for reconsideration every three years, but the power of the court to make such orders "as may be deemed just" is in no way limited. Here, at the end of the statutory period, the matter was properly reconsidered by the court and the libelee was given substantial relief. The situation of the libelant, as reported by the probation department, fully justified the order for further payments in the sum of \$30 per month.

*Exception overruled.*

All concurred.