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AGENCY — 1960 TENNESSEE SURVEY

WARREN A. SEAVEY*

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I. COMPENSATION OF REAL ESTATE BROKER DEPENDENT UPON SALE

In *Richardson v. Snipes*¹ both parties to an exchange of land employed the plaintiff, the contract providing that the defendant would pay no commission unless the transfer was completed. The other party satisfied the conditions imposed by the defendant, who, however, refused to go through with the exchange. The court properly reversed judgment for the defendant; but the result should not have turned upon the finding of bad faith of the defendant, as the court held. The plaintiff had performed his undertaking which was to provide one who would exchange titles and who would have gone through with the transaction but for the refusal of the defendant. A condition as to the completion of a transaction has effect only if the other party, having contracted, refuses to perform, or if there are extraneous circumstances which prevent completion. All courts agree that the broker is entitled to his commission if failure to satisfy a condition is the fault of the employer.² The rule involving bad faith is applicable only where the bargaining parties have not come to an agreement but where they are so close to one that it can be found that the relation with the broker is terminated in order to avoid payment of his commission. That was the situation in the cases cited as authorities by the court.³

II. COMPETITION BY AGENT WITH PRINCIPAL

Associated Dairies, Inc., v. Ray Moss Farm, Inc.,⁴ was an action

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1. 330 S.W.2d 381 (Tenn. App. W.S. 1959).

2. *Stagg v. Lawton*, 133 Conn. 203, 49 A.2d 599 (1946); *Cherry v. Joyce*, 168 Kan. 475, 213 P.2d 1010 (1950); *Messick v. Powell*, 236 S.W.2d 897 (Ky. 1951); *Cockerell v. Maxcey*, 202 S.W.2d 293 (Tex. Civ. App. 1947); *Kittrell v. Barber*, 198 S.W.2d 155 (Tex. Civ. App. 1946).

3. *Chambers v. Percefull*, 28 Tenn. App. 517, 191 S.W.2d 568 (E.S. 1945). Accord, *RESTATEMENT (SECOND), AGENCY* § 454 (1958).

4. 326 S.W.2d 458 (Tenn. 1959).

by an operator of a milk route against a competitor and a former employee, the complaint alleging that the competitor was hiring the plaintiff's drivers and causing them to violate their contracts which required them not to solicit the plaintiff's customers for a competitor for a period of one year. On demurrer, the court affirmed the chancellor who had sustained it in favor of all defendants. The court summarily held that Tennessee Code Annotated section 50-201, which forbids enticing servants, was not applicable since it applies only to those who were caused to leave the employment before the expiration of the time of the contract. But further, since the drivers were employed only from day to day, the contract against competition was without consideration and hence unenforceable against servants whose employer had no duty to retain.

Dismissal of the action against the dairies was clearly correct but the result as to the employees might well have been different. Although, in the absence of a contract, an employee has a right to compete for the trade of his former customers immediately after the termination of his employment, these employees had agreed that they would not do so, and the fact that their employment was from day to day does not prevent the existence of technical consideration.⁵ The contract was limited to the solicitation of former customers, far more limited than a contract against general competition and a "milk man" is in a peculiarly favorable position to gain the good will of his customers. The time limit is reasonable. Although formerly such agreements were frowned upon as being in restraint of trade, the tendency today is to uphold them unless too oppressive to the employee as to space or time.⁶ On the other hand, the decision as to their validity and enforcement lies, within reasonable limits, in the discretion of the court, and I would agree that it is not unfair to require that an employer who seeks protection against competition by former employees should make contracts of employment which have more than a fleeting existence.

III. HIT AND RUN DRIVER: SERVANT OF OWNER OR INDEPENDENT CONTRACTOR

The plaintiff was injured by the negligent driving of an automobile owned by one of the defendants, a salesman in the employ of the other defendant, and bearing the license plates of the employer. The

5. The court relied upon *Savage v. Spur Distrib. Co.*, 33 Tenn. App. 27, 228 S.W.2d 122 (M.S. 1949), which held only that in that case the employment was at will.

6. *De Long Corp. v. Lucas*, 176 F. Supp. 104 (S.D.N.Y. 1959); *Marshall v. Covington*, 339 P.2d 504 (Idaho 1959); *RESTATEMENT (SECOND), AGENCY* § 396, comment *a* (1958).

employee testified that he had put the car in the used-car lot of his employer, put the latter's plates on it without permission (corroborated by the employer), and had authorized fellow salesmen to sell the car, but that he did not know that the car had been taken out. After the accident the car was found in the used-car lot. The trial judge directed a verdict for both defendants; for the employer on the ground that the statutory presumption that the driver of a car was in the service of the owner of the plates on it (Tennessee Code Annotated section 59-1037 as amended in 1957) was overcome; and for the employee-owner on the ground that, even if the car was taken out with his permission for the purpose of sale, the driver was not a servant, but was an independent contractor. On appeal the judgment for the employer was sustained, but the case was sent back for a new trial as to the employee on the ground that the jury could have disbelieved his testimony, leaving intact the statutory presumption. Further, if, as the jury could have found, the car was being driven for the purpose of sale with his permission, the driver, whether fellow salesman or prospective purchaser, was his servant acting within the scope of employment.⁷

The decision on the agency point is sound, supported by the prior Tennessee cases cited by the court and also by the principles which determine the distinction between the independent contractor, who may or may not be an agent, and the special kind of agent known as a servant (in modern terms, an employee). The primary test used by most American courts in making this distinction concerns the right to control the physical activities of the one doing the act. If he is subject to control, not only as to what acts can be done but also as to the manner of doing them, he is a servant, otherwise not.⁸ Even as to one not in his general employment, the owner of a car should normally expect that one whom he directed to drive on the owner's business would respond to his directions in the management of the car. The cases which perhaps most strongly bring this out are those involving the borrowing of a mechanism with operator from the owner and general employer. If it is understood that the employee is to obey the borrower in the way in which the mechanism is to be operated, he is the borrower's servant *pro tem*.⁹ If in the principal

7. *Moore v. Union Chevrolet Co.*, 326 S.W.2d 855 (Tenn. App. W.S. 1959).

8. There are other tests, but at least in the operation of mechanisms by a person engaged in work for another, the control test is of most importance. See, e.g., *American Homes v. United States*, 173 F. Supp. 857 (D. Mass., 1959); *Garrison v. Ryno*, 328 S.W.2d 557 (Mo. 1959); *Smith v. Crotts*, 336 P.2d 1102 (Okla. 1959); *Johnson v. Claiborne*, 328 S.W.2d 215 (Tex. Civ. App. 1959). See also RESTATEMENT (SECOND), AGENCY § 220 (1958), with cases citing or quoting it.

9. *Peoples Supply, Inc. v. Vogel-Ritt*, 173 F. Supp. 199 (N.D.W.Va. 1958); *Jeffrey v. Colley*, 322 S.W.2d 951 (Mo. App. 1959); *Brown v. Bonesteele*, 344

case the car was being driven by a prospective purchaser, it is equally clear that the salesman-passenger would intend to control¹⁰ and that this control was to be exercised in the scope of employment. This would be true, even without the statutory presumption which, however, puts the matter beyond all doubt.

IV. CAMPAIGN DEBTS OF POLITICAL CANDIDATES

*Rich Printing Co. v. McKellar's Estate*¹¹ involves only elementary agency principles but is interesting because of its political overtones. A printing company sued the estate of a defeated candidate for printing and mailing bills incurred by his campaign manager, whom he had appointed to advance his election. That there was authority and apparent authority to incur the expenses as well as ratification was clear, provided the decedent's conduct manifested that he was to be personally liable and the plaintiff so understood it. Reversing the finding of the lower court and remanding the account to the probate court, the court of appeals held that there was sufficient proof of a custom that a candidate in a primary election is responsible for the debts incurred by his campaign manager and that this result is supported by public policy. The dissenting opinion doubted proof of the custom, pointing out that McKellar in his six previous campaigns had never paid his campaign bills and that it was rational to believe that the parties never contemplated personal liability, the plaintiff relying on payment from cash contributions, which he had been paid in the previous successful elections. If so, the resulting agreement would have been only an implied in fact promise by the decedent or his manager that the plaintiff (and other creditors) would have the benefit of contributions.

Liability for campaign expenses depends upon the type of organization which forwards the campaign and this in turn depends upon the interpretation of the parties to the contract. If there is a campaign committee without formal organization, for liability of a member there must be proof that he has granted authority or apparent authority to enter into the transaction in question and to bind him personally upon it.¹² The situation is analogous to that in which an unincorporated club or other non-profit organization enters into a

P.2d 928 (Ore. 1959). See also RESTATEMENT (SECOND), AGENCY § 227 (1958) and cases citing or quoting it.

10. This is the normal inference which prevails in the absence of evidence that an owner-passenger has surrendered control to the driver. *Gochee v. Wagner*, 257 N.Y. 344, 178 N.E. 553 (1931); *Naphtali v. LaFazan*, 165 N.Y.S.2d 395 (Sup. Ct. 1957).

11. 300 S.W.2d 361 (Tenn. App. W.S. 1959). The dissent is to be found at 330 S.W.2d 959.

12. *Bloom v. Vauclain*, 329 Pa. 460, 198 Atl. 78 (1938), holding that the treasurer was not personally liable.

contract; the members are not liable for its debts unless it can be shown that they have authorized the expenditures and it is clear that personal liability was intended.¹³ In such cases there may have been no promise of payment by anyone but merely an undertaking to make available money which, in the case of a club, was in its coffers or, in the case of a political campaign, money to be collected. It is possible for a contracting party to rely upon a hope that others will approve, as where an administrator without power to bind the estate, signs a note which was understood not to be a personal obligation of the administrator,¹⁴ or where one dealing with a corporate promoter relies upon the acceptance of the agreement by a subsequently formed corporation.¹⁵

As pointed out in the principal case, however, primary campaigns are in a special category. The candidate normally appoints a manager, as he did in this case, and there is more reason to believe that he should be personally responsible. If to this is added the existence of a custom that he would pay the deficit, there is an abundance of proof. The fact that in six previous campaigns McKellar had never paid the bills raised no issue since collections were sufficient to take care of them. It is likely that the parties never contemplated resort to personal liability, and further, as the plaintiff testified, that the action would not have been brought had McKellar lived.¹⁶ But neither fact is determinative. It is not the intent but the manifestations which are important. In this case the appointment of a manager created apparent authority, if not authority, to contract such debts, at least for normal items, and the fact that the plaintiff because of friendship would not have brought an action during McKellar's lifetime does not prevent an action since if there is the outward form of a contract the intent of the parties not to enforce it is immaterial.¹⁷ Assuming the custom that the candidate in a primary election is responsible for debts created during the progress of the campaign (this the dissenting judge could not find) the result is sound.

V. DISCIPLINARY POWERS OF COURTS OVER ATTORNEYS

In *Ex parte Chattanooga Bar Ass'n*¹⁸ the Association had petitioned

13. *Cousin v. Taylor*, 115 Ore. 472, 239 Pac. 96 (1925); *Dunlap Printing Co. v. Ryan*, 275 Pa. 556, 119 Atl. 714 (1923).

14. *R. D. Johnson Milling Co. v. Brown*, 113 Md. 366, 196 Atl. 100 (1938); *Johnson v. Graff*, 68 S.D. 562, 5 N.W.2d 33 (1942).

15. RESTATEMENT (SECOND), AGENCY § 326, comment b (1958).

16. Extract from evidence given by the plaintiff: "I had a long friendship with Senator McKellar. I would never have brought suit against him for this account; and if Senator McKellar had died and not left a large estate, I would never have filed it." 330 S.W.2d at 371.

17. RESTATEMENT, RESTITUTION § 57, Ill. 7 (1936).

18. 330 S.W.2d 337 (Tenn. 1959).

the county chancery court to appoint Special Masters to inquire into the conduct of unnamed members of the bar, alleged to be guilty of unprofessional conduct. The court, perhaps to get the matter authoritatively determined, declined jurisdiction; and from this an appeal was taken. The result is a resounding affirmation of the power inherent in courts to discipline its assistants in the search for justice. Said the court, in substance: this is a power which has been exercised from time immemorial as essential to the judicial process; the rule of the supreme court under which it has acted is no denial of the right of inferior courts to act in the interest of those within their jurisdiction;¹⁹ and their power to discipline would be only partially effective if they could not establish machinery by which it could ascertain facts which would indicate the desirability of its exercise.

The decision is very welcome but it is not surprising in view of the unanimity of American courts in authorizing similar investigations. As has been stated many times, an attorney is an officer of the court and the court derives its jurisdiction "by virtue of its inherent powers to control the conduct of its affairs, to maintain its dignity and to enable itself to do justice."²⁰ Because of this the court has an independent interest in the conduct of attorneys and will act of its own initiative if it seems desirable.²¹

Statutes regulating procedure are accepted by the courts if keeping within reasonable limits.²² It would seem that the legislature cannot substantially impair the power of a constitutional court.²³ Fortunately the Tennessee courts have been able, by interpretation, to avoid a conflict with legislatures.

A dramatic situation resulted in a recent opportunity for the

19. Rule 40, 192 Tenn. 827 (1950), provides that upon the written complaint of any person, the chief justice will appoint lawyers to investigate and upon their recommendation he will appoint an attorney to conduct a prosecution against the accused, before a judge, to be appointed, of the county in which he resides.

20. *In re Keenan*, 287 Mass. 577, 192 N.E. 65 (1934).

21. *People ex rel Karlin v. Kulkin*, 248 N.Y. 465, 162 N.E. 487 (1928). In authorizing an investigation by a bar association, Judge Cardozo gives a resume of the development of the control of attorneys by the court.

22. See *In re Evans*, 72 Okla. 215, 179 Pac. 922 (1919), in which the statute limited admission and disbarment to the state supreme court which accepted the power of regulation by the legislature; *Higgins v. Burton*, 64 Utah 562, 232 Pac. 914 (1924). Compare *In re Robinson*, 48 Wash. 153, 92 Pac. 929 (1907), in which the court, admitting legislative power to regulate, says that a court with power to admit an attorney to practice has inherent power to disbar him in proceedings before it.

23. See *Meunier v. Bernich*, 170 So. 567 (La. App. 1936), in which a statute permitting laymen to give advice was held unconstitutional; *In re Sparks*, 267 Ky. 93, 101 S.W.2d 194 (1936), in which it was said that the power, being inherent, is not dependent upon constitution or statute; *Ramstead v. Morgan*, 347 P.2d 594 (Ore. 1959), in which the court held that a statute giving only a qualified privilege (instead of an immunity) to a person filing a complaint against an attorney, was unconstitutional since it interfered with the court's constitutional power of discipline.

Minnesota court to underline the extent of its disciplinary powers. The court had issued a writ of prohibition against three county boards which had established "daylight saving time" within their counties, a matter of great public interest. The attorney general violently attacked the jurisdiction of the court in many widely publicized speeches, charging that it had far exceeded the limits of its power. The court summoned him to appear before them which he refused to do. In admonishing and renewing its summons, the court said that he had no immunity either from his position or upon the orders of the governor, and apparently would have been willing to disbar him from acting as an attorney in matters not involving his official duties.²⁴ This is in accord with the cases involving public prosecutors and judges, the punishment being usually limited to reprimand.²⁵ Where disbarment of a prosecutor or judge would prevent him from acting in his official capacity, the courts are not agreed as to their power to disbar.²⁶ There would, of course, be no impediment to disbarment from private practice.²⁷ The limitation by the court over officials adopted by the Kentucky court²⁸ which refused to discipline a county judge who had improperly refused to allow certain attorneys to practice before him "because the offense is not one capable of commission by any lawyer without being set apart as an officer" is unique.²⁹

VI. IMPUTED NEGLIGENCE IN ACTION BY PRINCIPAL AGAINST AGENT

In *Archie v. Yates*,³⁰ the plaintiff had borrowed an automobile from his father and, in accordance with the latter's instructions, had secured a friend, the defendant, to drive him on a "double date." In the action for harm caused by negligent driving, the court of appeals sustained a directed verdict for the defendant on the ground that the defendant was "the alter ego of the plaintiff, to whom the defendant's negligence would be imputed and hence the action was barred by

24. *In re Lord*, 254 Minn. 17, 97 N.W.2d 287 (1959).

25. *In re Ridgely*, 48 Del. 204, 106 A.2d 527 (1954).

26. *Commonwealth ex rel Ward v. Harrington*, 266 Ky. 41, 98 S.W.2d 53 (1936) held that a state's attorney would be censured only, since he could not perform his official duties if disbarred. *In re Silkman*, 88 App. Div. 102, 84 N.Y.S. 1025 (1903) held that a court could not disbar a surrogate required by statute to be a member of the bar. *Contra, In re Stolen*, 193 Wis. 602, N.W. 379, *aff'd*, 193 Wis. 627, 216 N.W. 127 (1927) (judge of legislatively created court disbarred although thereby prevented from acting as a judge). As in the principal case, a reprimanded prosecuting attorney has been promised drastic measures if he disobeyed the court's orders. *In re Ridgely*, *supra* note 7.

27. *State v. Peck*, 88 Conn. 447, 91 Atl. 274 (1914) (judge disbarred from private practice); *In re Rempfer*, 51 S.D. 123, 216 N.W. 355 (1927).

28. *In re Wehrman*, 327 S.W.2d 743 (Ky. 1959).

29. See 13 VAND. L. REV. 811 (1960).

30. 325 S.W.2d 519 (Tenn. 1959).

contributory negligence." The supreme court reversed and sent the case back for trial.

The case illustrates the difficulties into which courts can get by the use of fictions. There is a large group of cases in which the knowledge of an agent is "imputed" to a principal—those in which an agent acts for the principal in the acquisition or control of property. Typical situations are those in which an agent, with knowledge of any equity held by a third person, acquires property for the principal, or where a servant with knowledge of a dangerous defect in property in his charge causes harm to another. In such cases, the principal takes subject to the equity in the first case;³¹ in the second he is liable for harm caused by the defective property.³² In both cases the principal is made liable because of the wrongdoing by the agent; these cases are merely illustrations of the rules involving the liability of the principal for the derelictions of an agent. The imputation of knowledge is but a method by which the principal is charged with liability.

Another group of cases, more pertinent to our principal case, are those in which a parent or administrator brings an action for harm negligently caused to a child or spouse or to the decedent. In such cases, it is held that the plaintiff is barred by the contributory fault of the person harmed, this because of public policy, sometimes justified by describing the action as derived from the right of the injured person,³³ distinction being made between these cases and those in which the owner of a car sues for negligent damage to it and in most states recovers although the car was driven by a bailee who was guilty of contributory negligence.³⁴ That the contributory negligence of a servant acting in course of employment is a bar to an action by his employer for negligent harm to the employer or his property in actions against a negligent third person is, of course, a commonplace.³⁵

It is surprising to find a court imputing the negligence of the wrongdoer to the person whom he harms. Calling the defendant the "alter ego" of the plaintiff adds nothing. "Alter ego" is a phrase which was

31. *Munroe v. Harriman*, 85 F.2d 493 (2d Cir. 1936) (opinion giving the rationale). See also *State ex rel. Clarke v. Ripley Sav. Bank & Trust Co.*, 25 Tenn. App. 490, 160 S.W.2d 189 (E.S. 1941), in which the knowledge of a bank president was imputed to the bank. The case is more easily explained on the ground that the bank was benefitted by its agent's fraud upon the third person. The court quotes a passage from an Ohio opinion stating the reason to be that the agent was the "alter ego" of the principal.

32. *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (1943).

33. Administrator barred: *Purdy v. Kerentoff*, 152 Ohio St. 391, 89 N.E.2d 565 (1949); *Sartori v. United States*, 186 F.2d 679 (10th Cir. 1950). Parent barred: *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198 (1925), the court pointing out that the result is not reached because of imputed negligence.

34. See, e.g., *Nash v. Lang*, 268 Mass. 407, 167 N.E. 762 (1929).

35. RESTATEMENT (SECOND), AGENCY § 317 (1958).

formerly sometimes used as a synonym for vice-principal, for whose negligent supervisory conduct the master was liable to his subordinates, thereby avoiding the application of the fellow servant rule.³⁶ It would not apply to the present case in which it means no more than a servant. If the court of appeals is right, any master, or in fact the lender of a car, since the plaintiff was said to be the "alter ego" of his father, would be barred from suing a negligent servant for harm done to the car or for obtaining indemnity for causing his employer to be liable to third persons. Of course that is not the law and, so far as the author knows, never has been.³⁷ The supreme court properly put to rest any doubt which may have been created by earlier Tennessee cases in sending the case back for a new trial to determine the question of contributory negligence—or of assumption of risk—which were obvious issues in the case. It is unfortunate that the supreme court deemed it desirable to state that imputed negligence is applicable to actions brought against a third person by a master, whose servant is guilty of contributory negligence, instead of using the non-fictitious method of statement that a master is barred by the contributory negligence of a servant acting in the scope of employment.³⁸

36. The phrase is occasionally used in other connections. See *State ex rel. Clarke v. Ripley Sav. Bank & Trust Co.*, *supra* note 31.

37. Only three years ago, the House of Lords decided for the first time, with some dissent, what the American courts have long held: that a servant is under a contractual duty to his master to indemnify him for the amount paid by him to a person injured by the negligence of a servant in scope of employment. *Lister v. Romford Ice & Cold Storage Co.* [1957] A. C. 555, (H.L.) [1957] 1 All. E.R. 125.

38. This method of statement is not, however, unusual. Thus in *Dosher v. Hunt*, 243 N.C. 247, 90 S.E.2d 374 (1955), the court used the same technique.

