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Agency

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MASTER AND SERVANT

The facts in *Dickson v. Blacker*[1] were these: Dickson operated a filling station in Memphis and, along with it, a parking lot situated one and one-half blocks from the filling station. Blacker left his automobile at the filling station for storage, and it was taken to the parking lot. An employee of Dickson was sent to the parking lot to get the car. The employee, without permission, drove the car away and wrecked it six blocks from the filling station. Blacker, the owner of the car, was allowed to recover from Dickson, the owner of the filling station parking lot.

A good many cases similar to this one have come before the courts. They are cases where servants of bailees have wrongfully taken out the thing bailed and then either injured the thing or made off with it. It may seem at first blush that when such a servant takes out a customer's car "he is on a frolic of his own" and is not acting as a servant of the bailee. It must be remembered, however, that it is the duty of the bailee to protect the car or other chattel that has been entrusted to him. The bailee has employed the servant to perform that duty. Therefore, the servant's omission to protect the car is in the scope of his employment. The bailee-master should be liable whether his servant drives the car away or permits some third person to do it.

A dramatic illustration of the idea that a master can be charged for an omission, as well as for an act, on the part of his servant is found in *Craker v. Chicago & Northwestern Ry.*[2] In that case, it appeared that an amorous conductor employed by the defendant had kissed the plaintiff, a protesting lady passenger. The company was held liable for the indignity that befell the plaintiff. Was the conductor remiss within the scope of his employment? His behavior must be viewed in two aspects. First, his act — *i.e.*, kissing the plaintiff — was clearly outside the scope of his employment. But, second, his omission to protect the plaintiff was just as clearly within the scope of his employment. Said the court: "The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her: reserving to the shepherd's dog a right to

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1. 253 S.W.2d 728 (Tenn. 1952). See the comment on this case in the Bailments section of the Personal Property and Sales article.
2. 36 Wis. 657 (1875).

worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity."[3]

The decision reached by the Court in *Dickson v. Blacker* is in accord with the majority of the decisions in such cases.[4] The theory on which the Court reached its decision is not altogether clear. At one point in the opinion, it is said "the garage keeper merely becomes liable for the acts of his servant regardless of whether these acts were committed within or without the scope of the servant's employment. The damage to the car was due to the tort of the servant of the garagekeeper."[5] But, as to acts outside the scope of his employment, he would not be a servant of the garagekeeper. It would seem, however, that when the servant permitted himself to drive the car away, he was remiss in the scope of his employment, just as he would be if he permitted a third person to drive it away. And that omission should be charged to the master-bailee.

In *Stone & Webster Engineering Corp. v. Hamilton Nat. Bank*,[6] the facts were these: Stone & Webster had considerable business with the Hamilton National Bank. An employee of Stone & Webster, by the name of Bales, was permitted by the Bank to have access to its banking house. "Bales stole $5000 in cash from the Hamilton National by purloining from a table behind a teller's window packages of money aggregating that amount and carrying the currency away without permission. . . . Bales stole the money to repay a shortage in his accounts with his employer, Stone & Webster."[7] Bales turned the money over to Stone & Webster and took a receipt from the cashier of that corporation. The Bank sued to recover the money stolen by Bales and by him turned over to his employers, Stone & Webster. By a two-to-one decision, it was held that the Bank should recover.

Let us consider first whether Stone & Webster was liable for the act of Bales in converting the plaintiff's money. There is no showing that the taking of this money fell within the scope of Bales' employment. The mere fact that Bales' work took him to the vicinity where he did wrong is not enough to establish that his wrongful act was within his employment.[8] And this is not one of the exceptional cases where an alleged master is held because he has created an appearance that the wrongdoer acted for him. It is not, for example, like the case of

3. 36 Wis. at 673.

4. Miller v. Viola State Bank, 121 Kan. 193, 246 Pac. 517 (1926); Eaton v. Lancaster, 79 Me. 477, 10 Atl. 449 (1887); Citizens Bank of Coldwater v. Callicott, 178 Miss. 747, 174 So. 78 (1937); Todd v. Natchez-Eola Hotels Co., 171 Miss. 577, 157 So. 703 (1934); Linam v. Murphy, 360 Mo. 1140, 232 S.W.2d 937 (1950); Aitchison v. Page Motors, Ltd., 52 T.L.R. 137 (K.B. 1935). *Contra*: Castorina v. Rosen, 290 N.Y. 445, 49 N.E.2d 521 (1943).

5. 253 S.W.2d at 730.

6. 199 F.2d 127 (6th Cir. 1952) (case appealed from E.D. Tenn.).

7. 199 F.2d at 131.

8. Greathouse v. Texas Public Utilities Corp., 217 S.W.2d 190 (Tex. Civ. App. 1948); Linden v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941).

Gleason v. Seaboard Air Line Ry.,[9] where an employee of a railroad company falsely and fraudulently represented to the plaintiff that a shipment had arrived for him. Nor is it like the case of *Rutherford v. Rideout Bank*,[10] where a bank manager made false and fraudulent statements to a customer of the bank. In these cases, the fraudulent persons had been employed to do the kind of acts they did. Such employers are held liable. The latter is the type of case that is contemplated by section 261 of the *Restatement of Agency* — a section that is relied on by the Court in the principal case. However, it would seem that the taking of the money by Bales did not fall within his real or apparent employment.

Now we come to the transaction wherein Bales paid the stolen money to Stone & Webster. The background of that transaction is this: Owing to Bales defalcation, Stone & Webster had a claim against him that it did not know it had. That claim could come to an end in either one of two ways — that is, it could be surrendered by the creditor, Stone & Webster, or it could be paid and satisfied by the debtor, Bales. In this case Bales, the debtor, paid it.

Bales clearly intended to pass the title to this money to Stone & Webster. As the dissenting judge points out,[11] United States currency is negotiable in the sense that it can be passed by delivery, and when such currency comes into the hands of a holder in due course his title is good against the claims of former owners. Was Stone & Webster a holder in due course? More specifically, (1) did it have notice that Bales had stolen the money, and (2) did it take for value?

First, it is conceded that Stone & Webster had no actual knowledge that the money Bales paid in had been stolen. It should not be charged with what Bales knew. He was its servant in the doing of some things, but he was an adverse party in the paying of money to square his account. A principal is not charged with the knowledge of his agent when the agent is dealing as an adverse party.[12]

Second, in considering whether Stone & Webster was a taker for value, it should be noted that the question is not whether it gave "consideration," as that term is used in the law of contracts. One can take for value without giving consideration. For historical reasons,[13] it came to be a doctrine in the common law that a contract obligation cannot be created unless there is consideration for the promise. In order to make out consideration, it is not enough to find that the promisee suffered detriment. It must also appear that the detriment was "bargained for and given in exchange for the promise."[14] The very

9. 278 U.S. 349, 49 Sup. Ct. 161, 73 L. Ed. 415 (1929).
10. 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383 (1938).
11. 199 F.2d at 133.
12. RESTATEMENT, AGENCY § 279 (1933).
13. See FERSON, BASIS OF CONTRACTS 125-32 (1949).
14. RESTATEMENT, CONTRACTS § 75 (1932).

transaction is not made if consideration, as thus defined, is lacking. On the other hand, when a transfer of property is attempted, the transaction can be perfectly valid whether the transfer is by way of gift, sale or exchange. The giving of consideration is not essential to the vesting of title in the transferee.[15]

But should a donee of property retain his title free from the claims of other persons against his donor with regard to the very property transferred? The question arises when an unfaithful trustee has transferred his title. It arises also when a donor transfers the title to a negotiable instrument or a chattel which he has fraudulently acquired. A donee of trust property holds it subject to the trust,[16] and a donee of a negotiable instrument or a chattel which his donor procured by fraud must give it up to its former owner.[17] The rights of former owners in such cases rest on an idea — equitable by nature — that it is unconscionable for a donee to retain the property. The point being emphasized is that the rights of former owners, who have been wronged, to get their property back are not a part of the doctrine of consideration. It is no part of the taking-for-value requirement that surrender of an antecedent debt, or other value, shall have been "bargained for and given in exchange for" the property acquired.

It has come to be almost uniformly held that one who receives a transfer of a negotiable instrument or a chattel in payment of an antecedent debt is a holder for value.[18] Bales owed Stone & Webster a duty to reimburse it for his defalcation. Stone & Webster was not aware that it had this right. It was wiped out when Bales paid what he owed. Does the fact that Stone & Webster was not aware that it had such a right until after it was gone prevent it from being a taker of the money for value? The majority opinion recites that Stone & Webster "gave nothing for the money . . . surrendered no evidence of debt. . . . parted with no valuable consideration. . . ."[19] This is enough to negate a bargained exchange between Bales and his employer. If the right of Stone & Webster to retain the money depended on its making out that it gave "consideration"[20] for the money, it should fail. But, although it gave no "consideration," it did take title to the money for value, and it is conscionable for it to retain that money. Analogous cases have come up from time to time. In the case of *Baldwin v. Childs*,[21] for instance, it appeared that Childs & Joseph sold fraudulent bills of lading to certain banks. The goods these bills of lading purported to represent

15. Waite v. Gruble, 43 Ore. 406, 73 Pac. 206 (1903).
16. 2 SCOTT, TRUSTS § 289 (1939); RESTATEMENT, TRUSTS § 289 (1935).
17. 3 WILLISTON, SALES § 650 (Rev. ed. 1948); RESTATEMENT, RESTITUTION § 168 (1937).
18. BRANNAN, NEGOTIABLE INSTRUMENTS 391 *et seq.* (6th ed., Beutel, 1938); 3 WILLISTON, SALES § 620 (Rev. ed. 1948).
19. 199 F.2d at 131.
20. RESTATEMENT, CONTRACTS § 75 (1932).
21. 249 N.Y. 212, 163 N.E. 737 (1928).

were not given to the carrier. They were not even in existence when the banks bought the bills. Childs & Joseph then procured goods from the plaintiff by fraud and delivered them to the vessel "to feed the bills of lading." It was held that the banks were purchasers for value. The cash payments made by the banks gave them a right to be indemnified for the fraud that had been perpetrated on them. They did not know they had such a right. But, when goods were delivered to the carrier for the banks, they were purchasers for value.

It would seem that the dissenting opinion in the principal case is better supported by principle and authority than is the majority opinion.

The case of *Earley v. Roadway Express, Inc.*,[22] held that exemplary damages cannot be assessed against a master on account of wanton injuries inflicted by his servant except in these cases: (1) where the master is under a special duty to the person injured, such as the duty of carrier to passenger; (2) where the nature of the employment is such that the use of force must be contemplated, as where guards or watchmen are entrusted with weapons and told to keep off trespassers; and (3) where a dangerous instrumentality is entrusted to the servant, as in the case of a railroad locomotive whose whistle is willfully sounded.

In *Boles v. Russell*,[23] these facts were in evidence: Fox Russell, twenty-nine years of age and single, desired to buy an automobile. Since he was of draft age and unmarried, a finance company refused to finance the purchase. In that situation, Fox's father, H. C. Russell, gave a note for the price of the car. The title and license were taken in the father's name. Fox, the son, lived with his father. He worked part time on his father's farm and part time for Greene County. The plaintiff was injured by the negligent operation of the car by Fox Russell, the son. The father, H. C. Russell, was made party defendant on the theory that he was liable under the family purpose doctrine. The jury rejected the idea that the family purpose doctrine applied and returned a verdict in favor of the father, H. C. Russell. This verdict was upheld by both the trial court and the Court of Appeals.

The appellate court recognized that the family purpose doctrine is a part of the law of Tennessee. It held, however, that the mere facts that a father owned a car and that his son drove it fall short of proving "family purpose." Said the Court: Liability in such cases "must be predicated solely on the theory of respondeat superior, i.e., that the car was being maintained by a member of the family for family use and that, at the time of the injury, it was being operated by a member of the family in furtherance of that purpose, thus making the operator

22. 106 F. Supp. 958 (E.D. Tenn. 1952).
23. 252 S.W.2d 801 (Tenn. App. E.S. 1952).

the agent of the person maintaining the car."[24] The view of the Court seems interesting and sound, as it subsumes the family purpose doctrine under the more comprehensive doctrine of respondeat superior.

PRINCIPAL AND AGENT

In *Bailey v. Life & Casualty Ins. Co.*,[25] an agent of the insurance company, by the name of Crump, received from the plaintiff's husband an application for a life insurance policy and a small payment to be applied on the first premium. Crump represented to the insured that the policy would take effect immediately, if a cash payment were made at the time the application was executed. The application signed by the insured provided that such policy as the company might issue would not take effect until the applicant should pay an amount equal to the full amount of the first premium on the policy applied for. The receipt Crump gave to the applicant, for the part payment he made, also recited that no insurance would be in effect under the application unless the full first premium were paid. Neither the plaintiff nor the applicant read the application or receipt. The applicant was killed soon after making the application and before the policy was delivered. The Court of Appeals, reversing the trial court, held that the company was not liable.

The decision involved and approved several propositions that seems to be sound. In the first place, the recitals in the application signed by the applicant were binding on him whether or not he read them.[26] In the second place, the assurance given Crump that the policy would take effect, even if the first premium had not been paid in full, would not bind the company unless Crump was authorized to make such assurance. It will be noted that Crump had not merely made a representation; he had presumed to bind the company in a contract. That calls for authority.[27] In the third place, the insured could not establish an estoppel against the company. He could not claim to have been misled after signing the application, which virtually told him that he had no insurance until the first premium was paid in full.

In *Cherokee Fire Ins. Co. v. Ingraham*,[28] it appeared that Truett, an agent of the insurance company, approached the Ingrahams and solicited that they list with him a piece of land for sale. Truett did not disclose to the Ingrahams that he was an agent of the insurance company. After securing from the Ingrahams a written listing of their property at $17,500, Truett procured the signature of the insurance

24. 252 S.W.2d at 802.

25. 250 S.W.2d 99 (Tenn. App. M.S. 1951).

26. 1 WILLISTON, CONTRACTS § 35 (Rev. ed. 1936).

27. Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 VAND. L. REV. 260, 266 (1951).

28. 250 S.W.2d 114 (Tenn. App. M.S. 1952).

company. This signature was essentially an acceptance of the Ingrahams' offer to sell. The insurance company was denied specific performance of the contract. The decision well illustrates a doctrine in the law of agency. The agent is a fiduciary. Since it is his duty to act solely for the benefit of his principal, he cannot act as agent for adverse parties unless the respective principals consent to such double agency. A contract that has been negotiated by an agent who was acting for both parties is voidable at the option of a principal who had no knowledge of the double agency.[29]

29. Olson v. Pettibone, 168 Minn. 414, 210 N.W. 149, 48 A.L.R. 913 (1926). For a collection of many cases, see Note, 48 A.L.R. 917 (1927).