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DISCUSSION OF RECENT DECISIONS

EXEMPTIONS — PERSONS ENTITLED — HEAD OF FAMILY PARTIALLY EXEMPT IN GARNISHMENT FOR WAGES.—The Exemption Act[1] provides that when the debt or judgment on which a suit is brought is for the wages of any laborer or servant, and the finding is expressed in the record of the judgment and endorsed upon the execution, no personal exemption shall be allowed. The Garnishment Act[2] provides that the wages or salary for services of an employee who is head of and residing with his family shall to the extent of twenty dollars per week be exempt from any garnishment.

The problem of which claim is superior to the other when the application of facts would result in a conflict was presented in

[1] Ill. State Bar Stats. (1935), Ch. 52, par. 16, reads: "No personal property shall be exempted from levy of attachment or execution when the debt or judgment is for the wages of any laborer or servant: provided, the court rendering judgment shall find that the demand so sued for is for wages due such person as laborer or servant; which finding shall be expressed in the record of said judgment and endorsed upon the execution when issued."

[2] Ill. State Bar Stats. (1935), Ch. 62, par. 14, reads in part: "The wages or salary for services of an employee who is the head of a family and residing with the same to the amount of twenty dollars per week, shall be exempt from garnishment. . . . All above said exempt amount shall be liable to garnishment."

the case of *Markus* v. *Hart, Schaffner and Marx.*[3] George Guditus had worked as laborer on Markus' farm and had recovered a judgment for wages against Markus. Upon return of the execution nulla bona, garnishment proceedings were commenced against the Hart, Schaffner and Marx Company, by whom Markus was employed. The garnishee answered that it was indebted to Markus for the sum of $22.15 for wages, but that the amount was claimed as an exemption under section 14 of the Garnishment Act.

The lower court found that the exemption in favor of Markus under the Garnishment Act was paramount to that provision of the Exemption Act which provides that no exemption should be allowed where the judgment debt was for wages of a laborer or servant. This decision discharging the garnishee was affirmed by the Appellate Court. Thus, it is decided that the exemption from garnishment in favor of the head of a family is secure even against a claim for wages by his servant or laborer.

C. E. HACKLANDER

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—INDORSEMENT ON NON-NEGOTIABLE INSTRUMENT AS SUFFICIENT MEMORANDUM.—An interesting situation was recently presented to the Supreme Judicial Court of Massachusetts in the case of *Gloucester Mutual Fishing Insurance Company* v. *Boyer et al.*[1] The undertaking sued on was an instrument made by a fishing firm and given for insurance. On the back was written, "Waiving demand and notice," followed by the same date as on the face of the instrument, and then the signatures of the defendants. After the defendants had disposed of all their interest in the maker company, and it was clearly insolvent, suit was brought on the instrument to recover premiums and assessments owed. The trial judge ruled that the evidence indicated no liability by these defendants, but the upper court sustained the plaintiff's exceptions.

The instrument was clearly not negotiable because of the uncertainty of time and the sum payable, so the Negotiable Instrument Law was not applicable. For the same reasons this writing was not even a non-negotiable promissory note, on which defendants could be liable as anomalous parties. Furthermore, the facts that the back of the instrument was separately dated and bore the words "waiving demand and notice" above the signatures indicated that defendants had no intention of joining in the

[3] 284 Ill. App. 166 (1936).
[1] 200 N. E. 557 (Mass., 1936).

promise expressed on the face. However, before it could be concluded that the writing on the back was a nullity the court said it must apply the construction principle that effect must be given, if possible, to every word of an instrument and every signature thereon. The only alternatives were that it was an assignment of defendants' rights or that they thereby guaranteed the performance of the promise expressed on the face. The former was excluded because defendants had nothing to assign, and the words of waiver preceding their signatures showed an intent to assume some liability. It was objected that if it was a guaranty, then the statute of frauds disposed of that. The court conceded that it was within the statute, but asserted that a signature may be a sufficient writing to indicate the guaranty. These signatures were meaningless unless expressive of such intent. If it was a guaranty, then, the payee had authority to write in the contract implied by law. Actually to insert such words of guaranty above the signature the court thought would be an unnecessary concession to form. Although the consideration for such an undertaking must be alleged and proved, by statute in Massachusetts as in Illinois, it is not necessary that it be shown by writing. So it was error to hold that plaintiff had established no grounds of liability. The court cited an early Illinois case, *Underwood* v. *Hossack*,[2] one of the few cases on this question, which arrived at the same conclusion as to an indorsement on a non-negotiable warehouse receipt, and seems to be the only decision in this state on the question.

While at first glance it might seem that the court is approving as a memorandum a writing which contains no promise, it must be remembered that the contents of a memorandum will sometimes more clearly, sometimes less clearly, convey the idea of the writer. What is essential is that no ambiguity remain when the sense of the words is extracted from them. While there are fewer words here than might be desirable, one idea only is conveyed by them—that the defendants guaranteed the obligation on the reverse side of the paper.

J. M. HADSALL

VENDOR AND PURCHASER — VALIDITY OF CONTRACT — PURCHASER'S RIGHT TO RESCIND FOR FRAUD OF AGENT.—Despite the stipulations in a written contract that all representations affecting the contract were expressed therein, that the seller's salesman had no authority to modify the contract in any manner,

[2] 38 Ill. 208 (1865).

and that the buyer knew the contents of the contract and had examined the location of the property and found it to be as shown on the diagram of the contract, the Appellate Court of Illinois in *Klee* v. *Chicago Title and Trust Company*[1] held that the fraudulent misrepresentations of the agent furnished sufficient grounds for rescission of the contract.

Harry Schwartz, by one Malnick, his salesman, agreed in writing to sell the plaintiff a tract of land in Gary, Indiana. The salesman made extravagant statements concerning the prospective value of the land, but the actual representations of existing facts were that the land was located at the intersection of two section lines—Clinton Street and Fifth Avenue; that Fifth Avenue was a boulevard with an electric line, zoned for business. When the written contract was presented for signature, the plaintiff called Malnick's attention to the fact that the contract did not contain a statement that the two streets mentioned were section lines nor that Fifth Avenue was a boulevard nor electric line. Thereupon Malnick wrote those terms into the plaintiff's copy of the contract, but not on Schwartz's copy. Five years after signing the contract, and after he had paid a substantial amount toward the purchase price, the plaintiff learned from his uncle, who resided five miles from Gary that neither Fifth Avenue nor Clinton Street was a section line. Plaintiff then went to Gary and learned that the other representations enumerated were false. Thereafter he brought suit for rescission. Presumably, although it was not stated, the contract was made in Chicago.

The Appellate Court decided that the plaintiff was not estopped by the contract to assert that a fraud had been practiced upon him and that the plaintiff was not barred by laches as there was no unreasonable delay after discovery of the fraud. The court said the facts were (no evidence was recited to support this fact) that the plaintiff was not familiar with the location or value of the lots; that he was busy working and relied on defendant's representations.

If this case is given the strongest construction possible, the decision must be explained on the grounds that the plaintiff had a right to rely on the agent's representations and that the defendant was bound as he received and accepted a benefit acquired by the tort of his agent.[2] Where, however, the latter question is

[1] 284 Ill. App. 112 (1936).

[2] Bryant v. Rich, 106 Mass. 180 (1870); Woodward v. Webb, 65 Pa. St. 254 (1870).

involved, the vendee must prove that the vendor, after knowledge of such representations of his agent and an offer of rescission on those grounds, refused to accept the rescission.[3]

Although the facts are not disclosed, the plaintiff here probably offered to place the defendant in statu quo; therefore, we must consider that this case decides that a vendee who rightfully relies on fraudulent representations of the vendor's agent may rescind the contract despite a provision in the contract that all stipulations affecting it were expressed therein. Whether this conclusion is correct here depends upon the right of the plaintiff to rely on the statement of the agent, Malnick.

It does not appear that the plaintiff had any right whatever so to rely. The Illinois Appellate Court has repeatedly determined[4] that a vendee cannot show evidence of an oral agreement affecting a written instrument, when the contract states that all agreements of the parties are covered therein and cannot be varied by a verbal contract. These decisions were decided on the theory that when a third party has notice of the principal's instructions as to the limitations imposed on his agent, the principal should not be bound by an act of the agent beyond such authority.[5]

In a recent New York case[6] the plaintiff had signed a printed contract for the purchase of twenty tons of coloring material sold by the defendant. Shortly thereafter the plaintiff instituted an action to rescind the contract on the ground that the plaintiff had been induced to enter it by fraudulent representations of the sales agent of the defendant. The contract contained a statement that "the company makes no representation regarding previous sales in the distributor's territory"; also a statement that "no representation or warranty of any kind shall be binding upon either the Duralith Corporation [defendant] or the dealer unless it has been incorporated in this agreement."

The plaintiff maintained that a person could not exempt himself from liability for fraud by inserting in his contract a blanket clause protecting him from such liability. The court, however,

[3] Light v. Chandler Improvement Co., 33 Ariz. 101, 261 P. 969 (1928).

[4] McCaskey Co. v. Little, 253 Ill. App. 431 (1929); Ziehme v. McInerney, 167 Ill. App. 577 (1912). But see Plate v. Detroit Fidelity Co., 229 Mich. 489, 201 N. W. 459 (1924).

[5] Lycoming Ins. Co. v. Jackson, 83 Ill. 302 (1876); Lycoming Ins. Co. v. Ward, 90 Ill. 545 (1878); Maxcey v. Heckethorn, 44 Ill. 437 (1867); Leathers v. Springfield, 65 Mo. 504 (1877); Stainer v. Tysen, 3 Hill (N. Y.) 279 (1842).

[6] Ernst Iron Works v. Duralith Corp., 200 N. E. 683 (N. Y., 1936).

decided the case on the ground that a principal is not liable for loss caused to another by reason of his reliance upon a deceitful representation of an agent, unless the representation was authorized or apparently authorized. "If a third person has notice of a limitation of an agent's authority, he cannot subject the principal to liability upon a transaction with the agent in violation of such limitation." The court decided that the plaintiff could not rescind the contract.

Assuming, however, that this feature of the plaintiff's case is not conclusive, although it would appear to be so, the court would then be confronted with the problem of the vendee's right to rely on the seller's representations where the sale is made of property at such a distance that the vendee has not the means of ascertaining the truthfulness of the representation made to him by the purchaser. Where the distance is sufficient such a proposition is well supported by authority.[7] But in *Wightman* v. *Tucker*[8] the Appellate Court decided that the rule does not apply where the representation was made in Chicago concerning merchandise in Keokuk, Iowa, which was about twelve hours by rail from Chicago with three trains daily, and the plaintiff could not recover as he, the purchaser, should have used due diligence. In *Mosier* v. *Osborn,*[9] however, the Illinois Supreme Court allowed the plaintiff to rely on the seller where the land was in McDonough County, Illinois, and the representation was made in Chanute, Kansas. The latter distance was about one-half again as far as that in the Wightman case.

The question in any such case, however, is whether the distance is enough to justify the plaintiff in not making a personal inspection. Gary is about one hour's ride by electric train from Chicago and there is a train every hour. Also the plaintiff had a relative who resided near Gary who might have inspected the property for him.

On previously recognized principles therefore, this case cannot be sustained and a majority of the evidence allowed is irrelevent. On the contrary, there was no evidence that the seller knew of the agent's representations until six years after the contract was signed, so there is no possible ratification by the vendor.

In conclusion we can say that the court has actually decided

[7] Mosier v. Osborn, 284 Ill. 141, 119 N. E. 924 (1918); Ladd v. Pigott, 114 Ill. 647, 2 N. E. 503 (1885); Wightman v. Tucker, 50 Ill. App. 75 (1892); Harris v. McMurray, 23 Ind. 9 (1864); Smith v. Richards, 13 Pet. 26 (1839); Savage v. Stevens, 126 Mass. 207 (1879).

[8] 50 Ill. App. 75 (1892).

[9] 284 Ill. 141, 119 N. E. 924 (1918).

this case, not on the grounds enumerated by the court, but on the theory that there was a fiduciary relation between the laborer purchaser and the seller's agent. The court did not consider the notice to the plaintiff of the seller's limited authority.

If the court's decision is accepted at face value it must be that a vendee may rely on the seller's representations in Chicago as to the location and value of land in Gary, Indiana. Whether this is a valid extension of the distant land doctrine is open to doubt.

J. L. PORTER

PROCESS — DEFECTS IN SERVICE — WHEN ISSUANCE OF ALIAS WRIT BY ORDER OF COURT IS IMPROPER.—In the recent case of *First National Bank of Chicago* v. *Donnersberger*,[1] the Illinois Appellate Court held that the last sentence of Rule 5 (1) of the Supreme Court, providing that "The court may order the issuance of alias writs" does not change the old practice relating to the issuance of alias summonses by order of court, and that therefore, while an original valid summons was still outstanding no valid alias could be issued, and it was proper for the trial court on motion of the party served, to quash the summons issued under the order of court.

In this case, which originated as a bill to foreclose, the original summons was returned "not found" as to the defendant Belle Brigham. On January 19, 1934, an alias was issued against this defendant, which was returned "not found" on February 19. On January 27, while the original alias was still outstanding, the plaintiff learned that the defendant was in Highland Park, and was about to leave the jurisdiction. Thereupon he obtained an order of court authorizing an individual to serve process on the defendant, and a summons issued, which was returned February 2 as personally served. Upon motion by the defendant, the trial court quashed this second alias, and the Appellate Court, in its decision, affirmed the order of the trial court.

It seems that a practical solution of the difficulty in a case such as this, where it is determined that immediate service of a summons is necessary, and the original alias is still outstanding, would be found in one of the following alternatives: first, obtain the original alias from the deputy into whose hands it has been placed and then have an individual appointed by the court to serve it on the defendant; second, request the deputy to go into the adjoining county to make service on the defendant; third,

[1] 283 Ill. App. 517 (1936).

request the deputy to return the original "not found" and then take out a new alias directed to an officer of the county wherein the defendant can be found, or else have an individual authorized to serve the new alias; or fourth, have another deputy or an individual authorized by the court serve a copy of the original alias and make his return on the original.

M. H. TUTTLE

APPEAL AND ERROR—STATUTORY PROVISIONS AND REMEDIES—EFFECT OF STATUTORY PROVISION FOR NULLIFICATION OF APPEAL IF APPELLATE COURT FAILS TO RENDER DECISION WITHIN NINETY DAYS.—In a statute setting up a milk control board, the provision whereby the final judgment or decree of the circuit or superior court should be conclusively deemed to be affirmed unless, upon proper appeal to it, the appellate court render its decision within 90 days, was held, in *Albert* v. *Milk Control Board of Indiana*,[1] to be void as creating an arbitrary and capricious classification.[2]

The statute provided in part for appeal to the circuit or superior court from the orders of the control board, and it went on to give the litigants the right of appeal to the Appellate Court of Indiana under the rules governing such appeals in civil cases. But it included a proviso that if that court should fail to render its decision within 90 days after the transcript of the record therein was filed with it, the judgment or decree so appealed from should be conclusively deemed to be affirmed.

"Under the foregoing section," the Indiana court said, referring to the aforementioned provision of the act, "an appeal having been provided for in certain cases to the Appellate Court, we do not think the Legislature had the power to, in effect, compel the court to decide the case within 90 days. There must be an orderly procedure in the disposition of appealed cases, and to say that one class of cases must be decided within a specified time, and by failure to do so the judgment below must be considered affirmed, is an arbitrary and capricious classification. The act gives a right to appeal, and, after one appeals and incurs the expense thereof, he should not be deprived of the right to have his appeal disposed of in the regular manner because of the failure of the court, for one reason or another, to decide it within 90 days."

Precedent for the decision is to be found in *Schario* v. *State*,[3]

[1] 200 N. E. 688 (Ind., 1936).
[2] The other provisions of the statute were upheld as valid and effective.
[3] 105 Ohio St. 535, 138 N. E. 63 (1922).

involving a similar legislative provision. Here an act of the Ohio General Assembly read in part as follows: "Such petition in error must be filed within thirty days after the judgment complained of, and the case shall be heard by such reviewing court within not more than thirty court days after filing such petition in error." The court cited the requirement that the reviewing court determine the cause within 30 court days as "an unreasonable and unconstitutional invasion of judicial power."

It may be said, in general, in the words of the court in *The Freeport Motor Casualty Company* v. *Madden*,[4] that in purely statutory proceedings in which the jurisdiction of the court is not exercised according to the course of the common law, there can be no review of the judgment of an inferior court unless it is specifically provided for by statute, and then the review must be had in the manner prescribed.[5] In effect, if the legislature gives a remedy of appeal, it may also take it away. But to limit the remedy of appeal in a way that results in imposing a restriction upon the internal government of the court is objectionable under the traditional tripartite form of government. For the legislature to declare what shall be conclusive evidence would be an invasion of the power of the judiciary,[6] as also would an attempt to dictate the requirements for practice before the courts,[7] to cite but two of the many matters germane to the judiciary. The Milk Control Board decision is in harmony with this fundamental separation of powers.

H. MACDONALD

INSURANCE—DESCRIPTION OF TITLE—TITLE IN JOINT TENANCY AS VIOLATING WARRANTY THAT INSURED'S INTEREST IS UNCONDITIONAL AND SOLE.—That Illinois has adopted the rule of strict construction of insurance contracts is indicated by the recent

[4] 354 Ill. 486, 188 N. E. 415 (1933).

[5] To the same effect, see People v. McGoorty, 270 Ill. 610, 110 N. E. 791 (1915); Hall v. First Nat. Bk. of Pittsfield, 330 Ill. 234, 161 N. E. 311 (1928); People v. Hahlo, 228 N. Y. 309, 127 N. E. 402 (1920), affirmed in Crane v. Hahlo, 258 U. S. 142, 42 S. Ct. 214, 66 L. Ed. 514 (1922); Bake v. Smiley, 84 Ind. 212 (1882); City of Indianapolis v. L. C. Thompson Mfg. Co., 40 Ind. App. 535, 81 N. E. 1156 (1907), rehearing denied, 40 Ind. App. 535, 82 N. E. 540 (1907).

For legislative limitations upon matters upon which the court of last resort may pass, see Illinois Central Ry. Co. v. Richards, 152 Ill. 326, 38 N. E. 784 (1894); Sinopoli v. Chicago Rys. Co., 316 Ill. 609, 147 N. E. 487 (1925); Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402, 149 N. E. 422 (1925).

[6] People v. Rose, 207 Ill. 352, 69 N. E. 762 (1904).

[7] In re Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932).

decision of the Supreme Court in the case of *Pollock* v. *Connecticut Fire Insurance Company of Hartford.*[1] In this case, M. D. Pollock and his wife owned in joint tenancy certain property, improved by a dwelling house, in which they lived, and occupied as a homestead. In 1927, Pollock obtained a policy of insurance from the defendant, covering among other hazards loss or damage by lightning. In 1930, a renewal of this policy for an extended term was issued by the company and was mailed to and accepted by Pollock. A loss occurred within the policy, suit was started, and a verdict of $1140.77 given to the plaintiff, but on motion of the defendant, it was given a judgment notwithstanding the verdict, which was upheld by the Appellate Court.

Liability under the policy was denied under a clause of the policy which read: "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple. This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein." The fact that the property was held in joint tenancy was deemed by the court to have violated this condition and no recovery was allowed.

Apparently no case has arisen in the reviewing courts of Illinois involving construction of a policy with a stipulation such as this where the conditions of title and the attending circumstances of delivery are as here, and but few involving even closely similar situations in the country at large; so the decision is the more significant, particularly in view of the increasingly liberal attitude, not only of the Illinois courts, but of court generally.

In the Illinois Supreme Court case of *Fray* v. *National Fire Insurance Company,*[2] it was held that although the title was held as trustee, it was not objectionable to the clause that the interest must be "unconditional and sole." In that opinion other Illinois cases were cited wherein a title as life tenant and as trustee under a will, and the title of vendors with an executory contract outstanding were not offensive to the clause in question. Several other Illinois cases were distinguished from the instant case.

[1] 362 Ill. 313, 199 N. E. 816 (1936).
[2] 341 Ill. 431, 173 N. E. 479 (1930).

In *Capps* v. *National Union Fire Insurance Company*[3] recovery was denied to a vendee who was in possession of the property under a contract to purchase, on which several payments had been made, but with no other title. The court adopted the rule of the Capps case as controlling the question in the instant case.

It may be noted, however, that in the Capps case the insured had neither legal nor the entire equitable title, a fact which the court itself recognized and considered of importance. When considered from the standpoint of the materiality of the risk, arguments sustaining it and the other cases cited therein would not apply with equal logic to the facts in the main case. If the court had been disposed to adopt the liberal view, it could have used the argument suggested by the plaintiff that a title of joint tenancy with its characteristics—unity of time, title, interest, and possession—comes within the definition quoted in a Federal case[4] reviewed by the court: "To be unconditional and sole, the interest must be vested in the insured not contingent or conditional nor for years or life, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed."

Analysis discloses that there is a division of authority between those cases which contain the clause that the ownership must be "unconditional and sole" and those which contain the additional stipulation that the policy is void "if the interest of the insured in the property be not truly stated." In both series of cases the courts usually find offensive to the conditions mentioned titles of life tenancy, tenancy for years, or tenancy in common, or facts showing that there is a sale under execution of judgment, that a mortgage is outstanding, that the party is buying under contract, or that information has been given by the assured at variance with the facts either in a written application or orally or otherwise upon inquiry by the insurer. It may be observed that in the usual definition of "sole and unconditional" most of the estates just mentioned are specifically excluded, while no mention of specific exclusion is made of that of joint tenancy. In the case where incorrect information is given, there may be

[3] 318 Ill. 350, 149 N. E. 247 (1925).

[4] Rochester German Ins. Co. v. Schmidt, 162 F. 447 (1908), which denied recovery under a similar clause, where the interest of the insured was that of purchaser at a sale under a mortgage foreclosure, quoting the definition from Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 A. 29 (1897). A similar definition is given in George A. Clement, The Law of Fire Insurance (New York: Baker, Voorhis & Co., 1905), II, 152, and in Elliot on Insurance, p. 242.

actual fraud, and in the other instances mentioned there is more likelihood of it than would be the case where, in order to save the costs of administering an estate, husband and wife take title in joint tenancy.

The argument for a liberal construction in situations like the present one is well presented by Vance.[5] Referring specifically to the problem herein considered, he says, "An interesting and difficult issue is presented in the case not infrequently arising when a policy issued on oral application is intended by both parties to cover the risk of the applicant, but fails to do so because not adequately worded for that purpose."[6] After referring to the strict contract rule, he goes on: "But the growing dissent from this harsh doctrine has come to outweigh its support, and in a majority of the American states the insurer is held liable. This decision is based on the theory that the insurer is estopped to deny the soundness of the policy that he has sold for a sound price, though the process is often called waiver. It would seem to be the clear duty of the insurer professing to draw an instrument protecting the applicant's property against certain defined perils to exercise due diligence to supply a policy which will effect the purpose intended. Any damage caused to the applicant through the agent's mistakes or negligence in making inquiries that he should know to be pertinent should rest on the insurer. The situation seems to be strikingly analogous to that expressed in the familiar rule of the law of sales, to the effect that a vendor supplying an article which he knows is to be used for a specific purpose, impliedly warrants that the article furnished is suitable for that purpose."[7] Therefore, while the decision, considered from the standpoint of upholding the validity of a stipulation in a policy such as here mentioned, has the support of numerous text writers and of many decisions, the application of the doctrine to facts such as here presented seems to have gone the length in applying the rigid rule.[8]

C. E. HACKLANDER

[5] William R. Vance, Handbook of the Law and Insurance (2d ed., St. Paul, Minn.: West Publishing Co., 1930), secs. 71 and 71 (d), pp. 214-215.

[6] Ibid., p. 525.

[7] Ibid., p. 526, note 21, referring to the statement cited, lists numerous cases. The theory is set forth in 30 Yale L. J. 203, "The Application to Insurance Contracts of the Implied Warranty of Sales Law."

[8] For cases involving the problem, see the following:

Those denying recovery: Schroedel v. Humboldt Fire Ins. Co., 158 Pa. St. 459, 27 A. 1077 (1893); Porobenski v. American Alliance Ins. Co. of N. Y.,

PRINCIPAL AND AGENT—WRONGFUL ACTS OF AGENT—EXTENSION OF AGENT'S IMMUNITY TO PRINCIPAL IN RESPONDEAT SUPERIOR.—The case of *Miller* v. *J. A. Tyrholm & Company, Incorporated,*[1] which the Supreme Court of Minnesota has just handed down, indicates the great disparity between neighboring states as to certain principles of agency, and furnishes additional evidence that the law on that subject continues to be in a state of transition. The decision holds that a wife, who was injured by her husband's negligence while, with the dealer's consent, he was driving an automobile which he contemplated purchasing, may recover her damages from the dealer when contributory negligence is not established. This holding is based first, on the ground that this situation establishes an agency relation, and second, on the conclusion that a principal cannot share in his agent's immunity from suits brought by the agent's wife.

The first basis upon which the recovery was allowed is the provision of the Minnesota statute that "whenever any motor vehicle, after this act becomes effective, shall be operated upon any public street or highway of this State, by any person other than the owner, with the consent of the owner express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof."[2] It should be noted at the outset that the Illinois courts would arrive at a contrary conclusion on this point,[3] as there is no such statutory provision in this state.

The question as to the effect of the personal immunity of the operator of the car is more involved and is one on which there is much conflict of authority. The defendant here claimed that unless the agent or servant is liable, the principal or master cannot be held. The Minnesota court answered that argument by saying that many things might occur which would prevent the

317 Pa. 410, 176 A. 205 (1935); Western Assurance Co. v. White, 171 Ark. 733, 286 S. W. 804 (1926); Palma et ux. v. National Fire Ins. Co. of Hartford et al., 270 N. Y. S. 503 (1934).

Those allowing recovery: Conn. Fire Ins. Co. v. McNeil, 35 F. (2d) 675 (1929); Monpleasure et al. v. Home Ins. Co. of N. Y., 214 Mo. App. 530, 259 S. W. 815 (1924); Turner v. Home Ins. Co., 195 Mo. App. 138, 189 S. W. 626 (1916); Wilson et al. v. Commercial Union Assurance Co., Ltd., 90 Vt. 105, 96 A. 540 (1916); Valenti v. Imperial Assur. Co., 176 A. 413 (Vt., 1935); Livingstone v. Boston Ins. Co., 255 Pa. 1, 99 A. 212 (1916); Lilleback et al. v. Lincoln Fire Ins. Co. of N. Y., 162 So. 866 (Fla., 1935); Germania Fire Ins. Co. v. Nickell et al., 178 Ky. 1, 198 S. W. 534 (1917).

[1] 265 N. W. 324 (Minn., 1936).

[2] 3 Mason's Minn. St., 1934 Supp., sec. 2720-104.

[3] Mosby v. Kimball, 345 Ill. 420, 178 N. E. 66 (1931); Cook v. Connelly Chevrolet Co., 261 Ill. App. 242 (1931).

enforcement of liability against the agent which should not relieve his principal. For example, the agent might die before the cause is heard, he might be financially irresponsible or go through bankruptcy, or he might even receive from the injured party a covenant not to sue. The court placed strongest reliance upon the New York case of *Schubert* v. *Schubert Wagon Company*,[4] in which the plaintiff, while standing in a highway, was struck by defendant's car being driven by her husband. That court said that where an employer commits an unjustified trespass by the hand of a servant, he is brought under a distinct and independent liability, one which is entirely his own. When the plaintiff's husband is the moving cause, it does not cease to be an unlawful act. The fact that the master, if not personally at fault, has a remedy over against the husband was held to be irrelevant to this issue. The court also relied on *Chase* v. *New Haven Waste Material Corporation*,[5] a Connecticut case, which allowed a minor child to recover for his father's negligence, who was defendant's truck driver. That decision stated that there is no rule of law or public policy which would exempt the employer in such a case. "The recovery for the wrong done the wife or child by the employer does not belong to the husband or father, but to the wife or child." Support for the doctrine of this case was also found in comparatively recent decisions from Vermont,[6] West Virginia[7] and Mississippi.[8]

The Supreme Court of New Hampshire broke through the uniform rule in allowing a child, employed by his father, to recover from the one who insured him against injuries to his workmen in *Dunlap* v. *Dunlap*.[9] That decision repudiated the theory that a parent was under an absolute immunity from suit by his child, for torts, and moreover found that the child in question was emancipated so that he could sue his father. The liability of the third party insurance company was then taken for granted.

These cases all recognize that there are authorities for the contrary doctrine. The following language from one case[10] is often quoted in a more or less deprecating way as being the sole ground

[4] 249 N. Y. 253, 164 N. E. 42 (1928).
[5] 111 Conn. 377, 150 A. 107 (1930).
[6] Poulin v. Graham, 102 Vt. 307, 147 A. 698 (1929).
[7] Smith v. Smith, 179 S. E. 812 (W. Va., 1935).
[8] McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933).
[9] 84 N. H. 352, 150 A. 905 (1930).
[10] Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927).

for it: "If recovery may be had by the wife against the employer, and he in turn may recover from the husband-employee, then the family wealth remains the same save as diminished by the expenses of the litigation." This argument obviously disregards the fact that the wife's property is now separate from that of her husband, and would not, in the eyes of the law, be diminished by the employer's recovery over. The Illinois Supreme Court, moreover, has held[11] that the liability of a master to third persons for injuries inflicted by the negligence of his servant acting within the line of his duty is independent of any liability of the servant to the master.

The Iowa case of *Maine* v. *James Maine & Sons Company*[12] is probably the leading one supporting the opposite conclusion. The court said, "Unless the servant is liable, there can be no liability on the part of the master." When the only negligence is that of the servant, the employer is not a joint wrongdoer, as he did nothing, except through his employee. When both have been sued together, many cases have held that a verdict against the employer alone may not stand. There was a similar statute in force here, and the court said that it created no liability independent of the negligence of the operator of the car. There appeared to the court to be even less reason for giving a wife this right of action than one against a joint tort-feasor with her husband.

That doctrine was approved and followed by the Illinois Appellate Court in *Meece* v. *Holland Furnace Company*[13] which appears to be the only Illinois case on the subject. The defendant's salesman backed its automobile over his own minor son, and recovery was denied the latter. The court was of opinion that the doctrine of respondeat superior cannot include a case where the agent, who is the only actor, is not guilty of the offense charged. The immunity involved is not merely a lack of remedy, that is, only an incident to the family relationship, but is conceived as an integral part of the distinct unity which the family is in contemplation of law. The court distinguished the Schubert case as resting on the broader language of the New York statute as to married women. This seems erroneous because the New York courts have refused to construe it as entitling a woman to sue her husband for an injury to her person or character. The court, however, in its conclusion suggests as an additional reason

[11] Star Brewery Co. v. Hauck, Admx., 222 Ill. 348, 78 N. E. 827 (1906).
[12] 198 Iowa 1278, 201 N. W. 20 (1924).
[13] 269 Ill. App. 164 (1933).

for its stand, the probability of extended fraud by allowing such actions. The decision loses strength from the fact that after determining this question, the court decides that the father was not driving within the scope of defendant's employment at the time anyway.

The courts in these cases incline to select the precedents that appear most appropriate to justice when the problem first arises. Having made that choice, they must either follow it unswervingly in the future or expressly overrule it, as the arguments are incapable of compromise. Either the employer's liability is derivative, or it is not. It is submitted that no parallel should be drawn between an agent's negligence and his directed malfeasance, and also that the employer should not be identified with the insurer who agrees expressly to indemnify against such damages. The present case is undoubtedly indicative of a modern tendency, underlying which is the liberal theory that industry, personified by the employer, is better able to withstand the uncertain burden of accidents resulting from every phase of business than are individuals. That inclination can probably be counted on to carry more weight than the warning, expressed by the Illinois Appellate Court, that to apply the doctrine of respondeat superior would be to open the door to incalculable fraud.

J. M. HADSALL

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — PLAINTIFF'S PRIOR LIBEL OF ANOTHER HELD DEFENSE TO LIBEL ACTION. —That a newspaper which prints a libelous interview may turn around and print a reply, wherein the person attacked defames his attacker, without civil liability on the part of the newspaper for the counter-attack, was the unexpected holding of the Oregon Supreme Court in the recent case of *Israel* v. *Portland News Publishing Company*,[1] It was found that the defamation sued upon was published by the defendant at the request of the person originally libeled, that the request was made in self-defense, in good faith, without malice, and was as a matter of law privileged, and that the newspaper came within the limits of the privilege.

The facts were that one Akin, a public accountant investigating the fiscal affairs of the Port of Portland, Oregon, had been found shot. The next day, as part of the investigation of the murder, a police officer and a reporter of the defendants news-

[1] 53 P. (2d) 529 (Ore., 1936).

paper interviewed Israel, the plaintiff, a jeweler and loan broker. This interview contained charges of Akin's misconduct with a woman, and was printed under large headlines in the paper's next first edition. As soon as the paper was on the streets, a reporter on the same staff telephoned Akin's widow for her reaction to the story. The widow denied the truth of Israel's statement and sought to impeach his credibility by stating that he was stealing from his father-in-law, that Akin had discovered this in inspecting his accounts, and that Israel had hated Akin ever since the discovery. The newspaper carried this interview with full details in a signed story appearing in the second edition of the same day's paper.

Israel sued the publisher of the newspaper, alleging defamatory matter published wilfully, maliciously, falsely, and without just cause or excuse, and the publisher pleaded first, that the article was communicated by the widow in defense of her husband's good name as well as her own, and was published in good faith, and second, that the allegations objected to were generally accepted as true among the plaintiff's acquaintances. The court instructed the jury that as a matter of law the communication was privileged, and the plaintiff excepted. Verdict and judgment were for the defendant, and on appeal the judgment was upheld.

Without considering the ethical standards of the defendant's newspaper, marking a new low in journalism, which the court apparently finds unobjectionable, the legal basis for the opinion appears to strain the usual interpretation of decisions dealing with privilege in libel and slander. "The law seems to be well-settled," the court holds, "that when one is attacked by defamatory matter published in the press, one may resort to the same methods to reply to or rebut the charges made." Quoting Newell on *Libel and Slander*,[2] the court continues, " 'Every man has a right to defend his character against false aspersion. It is one of the duties which he owes to himself and to his family. Therefore, communications made in fair self-defense are privileged. . . . A man who commences a newspaper war cannot subsequently come to the court as plaintiff to complain that he has had the worst of the fray. . . .' " But in his discussion of the subject, Newell sets out a limit for the retaliation; it must be fairly an answer to the attack. The protection of privilege offered to a fair reply would not appear to cover the extreme of going entirely outside of the subject matter of the first attack and

[2] (4th ed., 1924) p. 456, sec. 429.

attempting to demolish the last vestige of good repute of the person making the original libel. The plea of privilege in a newspaper war where the defendant had made such a counter-attack was held bad in Illinois in the case of *Danville Press Company* v. *Harrison*.[3] In this latter case, a further defense which could have been applied equally well in the Israel case was that the defendant acted in the heat of anger, but the court followed previous decisions[4] and ruled that privilege did not arise from such circumstances.

From another aspect, the Israel case is exceptional, that is, when it finds on the authority of *Preston* v. *Hobbs*[5] that the privilege found to exist for the benefit of the widow runs also for the benefit of the newspaper. In the Preston case the court is confronted with a publisher who has taken no active part in soliciting a libel and has been a mere conduit through which the counter-attack passed. "Where one is the subject of a libel," the court there said, "having himself the right to make a reply, he may disseminate such reply in, or by means of some appropriate medium, and the one through whom such dissemination is effected is protected by the same privilege as that which protects the author." It appears unlikely that such immunity was meant for a publishing company which was a party to the original libel, which published it for profit to itself without attempting first to ascertain the truth, and which then solicited and published a counter-attack, likewise for profit to itself, with no interest in righting a wrong and every interest in the continuation of the libels.

H. MACDONALD

[3] 99 Ill. App. 244 (1901). See also Guenther v. Ridgway Co., 176 N. Y. S. 89 (1919), and Ritschy v. Garrels, 195 Mo. App. 670, 187 S. W. 1120 (1916).

[4] Hosley v. Brooks, 20 Ill. 116 (1858); Flagg v. Roberts, 67 Ill. 485 (1873); Miller v. Johnson, 79 Ill. 58 (1875).

[5] 146 N. Y. S. 419 (1914).