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Agency

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The case of *Cooper v. Graham*[1] illustrates once again how difficult it is for a gasoline distributor or an oil company to show that as a matter of law the corner filling station operator is an independent contractor. The plaintiff was a fourteen year old boy employed in a filling station operated by the defendant Graham but owned by the defendant Beard Oil Company. In cleaning out the grease pit, under instructions from Graham, gasoline fumes were ignited by a spark from an electric outlet in the pit, and the plaintiff was burned. The circuit judge granted a nonsuit as to Beard on the ground that Graham was an independent contractor. The Supreme Court, in an opinion by Mr. Justice Moss, reversed and remanded the case for a new trial. The only evidence as to the relationship between Graham and Beard was, of course, that presented by the plaintiff and consisted only of a depiction of how the station was in fact operated. The plaintiff was able to show, largely through the testimony of one of Graham's predecessors in the business, that the station itself and all of its exterior equipment and appliances belonged to Beard, that Beard maintained all of the equipment and did necessary repairs, that Beard required that only Sinclair gasoline be sold at the station and fixed the price for retail sale, and that Beard's agents collected from Graham at the close of each day for the gasoline that he had sold that day. These and other facts made it incumbent, in the Supreme Court's opinion, for a jury to pass upon the question of whether Graham was an independent contractor within the standard test, quoted from *Gomillion v. Forsythe*,[2] that an independent contractor is one "who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject

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1. 231 S. C. 404, 98 S. E. 2d 843 (1957).
2. 218 S. C. 211, 62 S. E. 2d 297 (1950).

to the control of his employer except as to the result of his work."

Mr. Justice Moss also held, although he did not separate the two propositions as clearly as he might, that even were Graham an independent contractor Beard could still be found liable to the plaintiff because it had provided defective equipment inherently dangerous for its intended purposes. In the application of the law of independent contractor this is the doctrine of "nondelegable duty" and is illustrated by such South Carolina cases as *Engelberg v. Prettyman.*[3]

Another interesting point which the opinion in this case makes is that when the plaintiff established that Graham was in possession of a filling station belonging to Beard for the purpose of selling oil products delivered to him by Beard, a prima facie showing of a master-servant relationship was made out, at least to the extent of requiring the defendant to go forward with contrary proof. This holding would seem to be a slightly extended application of the presumption, first announced by our Court in *Osteen v. S. C. Cotton Oil Co.,*[4] that "when one is found in possession of property of another, using it in the service of the owner, he is presumed to be the servant of the owner." It should be noted that in *Watson v. Kennedy*[5] the Court said in reference to this presumption that the defendant's evidence could so completely destroy it as to require the direction of a verdict. Mr. Justice Moss does not say to the contrary, but refers to the presumption merely as another reason why a nonsuit could not be granted at the close of the plaintiff's case.

Lawlor v. Scheper,[6] if it receives publicity among the real estate brokers, should lead to scrupulous care in representations made to accomplish a real estate sale. The defendant brokers were held personally liable for incorrectly stating to the plaintiff purchaser the balance due on two real estate mortgages which the purchaser was to assume. The trial court had directed a verdict in their favor for punitive damages, and there was no appeal by the plaintiff, so we may assume that the representations were made in good faith and upon information which the brokers believed to be accurate.

3. 159 S. C. 91, 156 S. E. 173 (1930).
4. 102 S. C. 146, 86 S. E. 202 (1915).
5. 180 S. C. 543, 186 S. E. 549 (1936).
6. 232 S. C. 94, 101 S. E. 2d 269 (1957).

They were still held liable, however, for the actual damages which the plaintiff suffered by being responsible for $650.00 more of mortgage indebtedness than he had bargained for.

The brokers' reliance in the Supreme Court was upon the rule that an agent is not personally liable on a contract if he makes it within the scope of his authority for a disclosed principal,[7] but Mr. Justice Oxner, who wrote the opinion, pointed out that the rule has no application where, as here, the agent is proceeded against in tort for an alleged false representation made to induce a sale. It was said that even though the brokers may have originally owed the prospective purchaser no duty to furnish information as to the amounts due on the mortgages, they undertook to do so and thereby took upon themselves the duty not to mislead the purchaser. This duty was a personal one on their part, and the resulting liability is personal.

During the review period the United States Court of Appeals for the Fourth Circuit decided the agency points in a slander case under South Carolina law and, although there is nothing novel about the holdings, the case should be noted. It is *Tedder v. Merchants & Manufacturers Ins. Co.*[8] An insurance adjuster employed by the defendant to investigate a fire loss on a crop of tobacco and the building in which it was stored discovered in the course of his investigation that the insured, a Mr. Brown, had a sharecropper on his tobacco crop, that this sharecropper was the plaintiff, and that the plaintiff had had a fire loss on his own home several years before. The adjuster made a new investigation of that loss although it had been with a different company and had been paid. Brown called on the adjuster at his office in Sumter to inquire as to why his claim had not been paid, and in the course of the ensuing conversation the adjuster was alleged to have made the slanderous utterances about the plaintiff. He was quoted by Brown as saying that the defendant company had records proving that the plaintiff had burned his home for the purpose of collecting insurance and that it had proof that, on the loss being investigated, the plaintiff had stolen the tobacco out of Brown's house and then burned the building. He is further supposed to have said that the

7. Green v. Industrial Life & Health Ins. Co., 199 S. C. 262, 18 S. E. 2d 873 (1942).
8. 251 F. 2d 250 (4th Cir. 1958).

defendant company would not pay Brown one penny on his claim if the plaintiff was to share in it, and he advised Brown to get rid of the plaintiff as a sharecropper because the plaintiff was a known arsonist and bootlegger. At the time of this conversation, as the Court of Appeals was later to emphasize, Brown still had to sign a corrective proof of loss. He did sign it and subsequently settled for one-half of his original claim.

Judge Williams, who tried the case in the district court, denied the defendant's motion for a directed verdict but after the trial and a $4,000.00 verdict for the plaintiff, he granted the defendant's motion for judgment *non obstante veredicto* on the ground that the adjuster was not acting within the scope of his authority when he made the alleged slanderous remarks. The Court of Appeals, speaking through District Judge Thompson of Virginia, reversed and held it was an issue for the jury as to whether the adjuster was acting within the scope of his employment. The decision would seem to be quite sound under the South Carolina cases relied upon — *Johnson v. Life Ins. Co.*[9] and *Mann v. Life & Casualty Ins. Co.*[10] The court said that under the facts the jury would have been justified in inferring that the defamatory remarks were made to influence Brown to settle for less than his original claim and that, in any event, the business entrusted to the adjuster by the defendant brought about the occasion for the slanderous remarks. Under its view, the plaintiff's case was thus brought within the requirements of the rule that to hold a corporation liable for slander uttered by its agent it must appear that the remarks were made "in the actual performance of the duties of the corporation touching the matter in question."

The Court of Appeals also seems correct in its holding that the cases relied upon by the defendant, *Courtney v. American Railway Express Co.*[11] and *Bosdell v. Dixie Stores Co.*,[12] were inapplicable because in those cases it was not shown that the agent was engaged in the defendant's business when the defamatory remarks were made and the remarks were made concerning incidents which had occurred some time in the past.

9. 227 S. C. 351, 88 S. E. 2d 260 (1955).
10. 132 S. C. 193, 129 S. E. 79 (1925).
11. 120 S. C. 511, 113 S. E. 332, 24 A. L. R. 128 (1922).
12. 168 S. C. 520, 167 S. E. 834 (1933).

Another interesting agency point was made by the defendant in its claim that there was no publication of the defamation because Brown was acting as the plaintiff's agent in collecting the insurance and it was just as though the utterances had been made directly to the plaintiff. The court overruled this position also, pointing out that Brown was the only insured and was trying to collect the entire loss; that, although the plaintiff might be entitled to a part of the proceeds of the insurance for his sharecropper interest, Brown was acting in his own behalf in making the insurance collection; that the plaintiff had not authorized Brown to act as his agent in any capacity and did not even know that Brown had insurance. It was said that the sharecropper relationship in itself did not constitute one party as the agent of the other, citing *Powers v. Wheless*.[13]

13. 193 S. C. 364, 9 S. E. 2d 129 (1940).