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Agency

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The only case decided by our Supreme Court during the review period in which a point of law not theretofore decided by the Court was enunciated was *Mackey v. Frazier*,[1] in which the Court held, in an opinion by Mr. Justice Moss, that a judgment in favor of a master, sued solely for the delicts of his servant, is a bar to a subsequent action against the servant. Williams had sued Mackey for property damage sustained by his truck which had been in a collision with Mackey's automobile at a time when, according to both the complaint and the answer, Williams' truck had been operated by Frazier as Williams' servant and agent. Mackey counterclaimed against Williams for personal injuries and property damage, alleging negligent and wilful conduct on the part of Frazier as Williams' servant. The case was tried and Williams obtained a judgment for $476.21 against Mackey and Mackey paid it.

Mackey thereafter brought the present case against Frazier and the allegations of negligence against him were verbatim those which he had asserted in his counterclaim against Williams. Frazier moved for a judgment on the pleadings on the ground that the former adjudication was a bar to the action. Judge Littlejohn overruled the motion but his order was reversed by the Supreme Court.

The Court held that, although unquestionably[2] a servant who is guilty of negligent conduct toward a third person is liable therefor, whether the master is or not, the doctrine of estoppel by judgment barred the action against the servant in the present case. Judge Moss soundly defines the doctrine of estoppel by judgment as:

> The principle that one person shall not a second time litigate, with the same person or with another so identi-

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1. 234 S. C. 81, 106 S. E. 2d 895 (1959).
2. Bell v. Clinton Oil Mill, 129 S. C. 242, 124 S. E. 7 (1924).

> fied in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits by a court of competent jurisdiction, in a judgment in personam in a former suit.

The doctrine was held applicable to the present case inasmuch as, according to the court, the master and servant were so identified in interest with each other that they represented the same legal right.

The decision of the Supreme Court seems to be in accord with precedent and sound reasoning. In dealing with the opposite situation where a master is sought to be held for the tort of a servant after a judgment for or against the servant, the Restatement[3] says:

> If the claim against the principal is based wholly on the rules of respondeat superior, a prior judgment for the agent normally terminates the principal's liability, and a judgment against the agent limits it.

Section 359B of the Restatement of Agency states that the effect upon the liability of the agent of a judgment by or against the principal is governed by the same rule.

The case of *Brown v. National Oil Company*[4] was concerned with the somewhat similar question of when a judgment against a master alone can be sustained when he and his servant were sued. The case involved a flash fire which broke out at the filling station of the plaintiff's intestate and caused his death. The fire started while a gasoline storage tank was being filled by the oil company's truck driver, one Taylor. The oil company and Taylor had been sued jointly but the jury's verdict against the oil company alone absolved Taylor and left the question of whether the plaintiff had proved any negligence against the oil company alone; the court accepting it as settled law that where a master and servant are sued jointly and the only evidence of negligence relates to acts committed by the servant and the verdict of the jury exonerates the latter, a verdict against the master alone cannot stand.[5]

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3. RESTATEMENT, AGENCY (2d ed.) § 217a, comment on clause (b).
4. 233 S. C. 345, 105 S. E. 2d 81 (1958).
5. LeGette v. Carolina Butane Gas Co., 210 S. C. 542, 43 S. E. 2d 472 (1947) and cases cited.

In an opinion by Mr. Justice Oxner, the Court held that the verdict against the oil company could stand inasmuch as there was some evidence that the underground tank which was being filled had been improperly vented. Even accepting that conclusion, the Court had still for decision the more difficult question of whether the acts of a third party in striking a match and later pulling the hose away from the filler pipe were such intervening causes as to break the chain of causation. This question was also resolved in favor of the jury's verdict and the judgment sustained.

The agency question in *Fochtman v. Clanton's Auto Sales*[6] came in by the back door. The plaintiff sued Clanton for stopping payment on two checks given him as the purchase price of an automobile sold at Clanton's well known auction sale in Darlington County. Clanton pleaded by way of justification that six weeks earlier one Barker, an alleged agent of the plaintiff, had purchased an automobile at the auction and given a worthless check for it. The plaintiff denied that Barker was acting as his agent at the time so the primary question before the Supreme Court was whether Judge Littlejohn had properly submitted to the jury the question of whether Barker on the earlier occasion was acting under "apparent authority" for the plaintiff. The Supreme Court, in an opinion by Mr. Justice Taylor, in reliance upon authorities dealing with both apparent authority and the allied principle of equitable estoppel,[7] held that the issue was properly for the jury and had been submitted by Judge Littlejohn under an appropriate charge.

During the review period the Court of Appeals for the Fourth Circuit decided one South Carolina case, *Burger Brewing Co. v. Summer*,[8] in the field of Agency. The holding was simply to the effect that under South Carolina law an agency of no fixed duration may be terminated by the principal at any time without previous notice, unless the agent has devoted to the achievement of the aims of the agency a substantial consideration beyond his services. It seems to the writer that the plaintiff made a rather strong case that he had expended substantial considerations beyond his agency service in the

6. 233 S. C. 581, 106 S. E. 2d 272 (1958).
7. Mortgage and Acceptance Corporation v. Stewart, 142 S. C. 375, 140 S. E. 804 (1927); Federal Land Bank of Columbia v. Ledford, 194 S. C. 347, 9 S. E. 2d 804 (1940).
8. 261 F. 2d 261 (4th Cir. 1958).

development of his beer distributorship for Burger, but the Court of Appeals, in an opinion by District Judge Bryan, held to the contrary and reversed the judgement which Judge Timmerman had allowed to be entered for the plaintiff.