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Agency

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Few decisions of the Supreme Court during the review period turned directly upon an application of Agency Law, most of the references to agency rules being made by way of secondary or "back up" holdings. For example, the holding in *Bulova Watch Co.* v. *Roberts Jewelers*,[1] was based primarily on the languages of the orders and correspondence concerning the orders for a shipment of watches. The court allowed the vendor, Bulova, to look for payment to the retail jeweler as an individual vendee rather than as a corporate vendee. The jeweler had organized the corporation and then allowed its charter to be cancelled for failure to pay taxes. This evidence was found to show that, at least from Bulova's viewpoint, the jeweler was trading as an individual and pledging his own credit—a conclusion which the court also found to be supported by some probably unintentional concessions in the statement contained in the transcript of record. In the last paragraph of Mr. Justice Brailsford's opinion the rule is stated that "one who undertakes to order and receive goods for a non-existent principal represents no one, and binds himself to pay the purchase price."[2] The principle is sound and does not involve the complication discussed by Professor Folk in last year's Agency Survey article[3] on the somewhat analagous question of whether an agent who contracts in excess of his authority is liable *on* the contract or for breach of his implied warranty of authority. The authorities seem to be in agreement that where no principal exists at all, one who purports to contract for that principal is contracting for himself and his liability is on the contract.[4]

Again in *Small* v. *Coastal States Life Ins. Co.*[5] the court had decided the case before it came to the agency point. An insured

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1. 240 S.C. 280, S.E.2d 643 (1962). This case is also noted in the Pleading section at note 23 and in the Corporations section at note 28.

2. *Id.* at 285, citing Medlin v. Ebenezer Methodist Church, 132 S.C. 498, 129 S.E. 830 (1925) and Lagone v. Timmerman, 46 S.C. 372, 24 S.E. 290 (1896).

3. 15 S.C.L. REV. 30 (1963). In conjunction with his discussion of Skinner & Ruddock, Inc. v. London Guar. & Acc. Co., 239 S.C. 614, 124 S.E.2d 178 (1962), Professor Folk reviews the South Carolina decisions holding an unauthorized agent liable on the contract itself.

4. RESTATEMENT (SECOND), AGENCY § 326 (1958); 2 AM. JUR. *Agency* § 316 (1939).

5. 241 S.C. 344, 128 S.E.2d 175 (1962). This case is also noted in the Insurance section at note 17.

under a health policy had brought an action for benefits due and for a judicial declaration that the policy was in full force and effect. The insurer defended on the ground that the plaintiff had misrepresented his history of health in making application for the policy. Judge Epps of the Civil Court of Horry County granted the plaintiff's relief and enjoined the insurer from cancelling the policy as long as the premiums were paid. The Supreme Court, speaking through the Chief Justice, affirmed. The gist of the opinion was that the insured's statements in the application concerning his medical history were not warranties but mere misrepresentations, the application form only calling for answers to the "best of the applicant's knowledge." The agency ruling was simply that if the insurer's soliciting agent had knowledge of the applicant's physical condition, such knowledge was binding upon his principal.

The case of *McPherson* v. *United Am. Ins. Co.*[6] was also concerned with the actions of a health insurance solicitor. This one collected a full year's premium, remitted only a fourth of it to his company for a three month's policy and pocketed the balance. A judgment by the Civil Court of Florence County for actual and punitive damages against the insurance company for conversion of the insured's money was affirmed. The defendant argued on appeal that when the agent received the premium money, it came into the possession of the insurance company with the insured entitled to a year's coverage. Therefore, the conversion was a matter between the company and its agent. The court, speaking again through Chief Justice Taylor, held that this would be true if the insured had elected to stand on the policy's coverage for a year, but he could not be compelled to do so. He has the alternative right, according to the court, to call the agent's act conversion and sue the principal for that tort. Although as a matter of law the money did go exactly where the insured intended it to go, *i.e.*, into the possession of the insurer, and the insured did get what he paid for, *i.e.*, the right to a full year's insurance, the court's conclusion that the transaction still constituted an actionable wrong for which the principal could be held under respondeat superior is probably sound. Certainly there can be no defense on the ground that the agent's dealing was for his own personal gain and was not in the real interests

6. 242 S.C. 28, 129 S.E.2d 842 (1963). This case is also noted in the Insurance section at note 23.

of his principal.[7] Granted this, the apparent anomaly of the result reached in the instant case disappears on the court's reasoning that it was up to the insured to say whether it was his money or the insurance company's money that the agent converted. Probably the closest South Carolina case on the facts is *Medlin* v. *Southern Ry. Co.*,[8] where a punitive damages recovery against the railroad company was allowed for its conductor having taken a twenty dollar bill for the plaintiff's fare and pocketed the change that was due him.

Martin v. *Southern Ry. Co.*[9] was an action by the plaintiff for his wrongful discharge as a railway conductor. The defendant maintained that he had been properly discharged under one of its operating rules which prohibited the use of intoxicating liquor while on duty. Defendant further contended since the plaintiff had been given an administrative hearing on the propriety of his discharge pursuant to a provision of the contract made on his behalf by the Railroad Brotherhood and the company and the results of the hearing had been adverse to the plaintiff, the matter was concluded. Therefore the present action could not be maintained in the absence of a showing of bad faith or arbitrary conduct on the defendant's part. Circuit Judge Martin accepted this argument and directed a verdict for the defendant, but the Supreme Court, speaking through Mr. Justice Bussey, reversed. The gravamen of the decision, which was supported by cases from other jurisdictions, mainly federal, was that the contract with the Brotherhood should not be interpreted as making the employer "the sole and final arbiter of whether the plaintiff was guilty or innocent. Whether or not he was wrongfully and unlawfully discharged depends upon whether or not he was in fact guilty of the conduct charged." The court added that, on the retrial, the defendant would have the burden of proving that the discharge was for proper cause.

Jackson v. *Powe*[10] and *Bellamy* v. *Hardee*[11] were actions for the injury of an employee through the alleged negligence of the employer. In *Jackson* v. *Powe* the plaintiff was hurt by a bale of cotton falling upon him while he was assisting in loading

7. RESTATEMENT (SECOND), AGENCY § 261, 262 (1958).
8. 143 S.C. 91, 141 S.E. 185 (1928).
9. 240 S.C. 460, 126 S.E.2d 365 (1962). This case is also noted in the Administrative Law section at note 101.
10. 241 S.C. 35, 126 S.E.2d 841 (1962). This case is also noted in the Torts section at note 12.
11. 242 S.C. 71, 129 S.E.2d 905 (1963). This case is also noted in the Torts section at note 11.

bales on his employer's truck at the platform of a third party's cotton gin. The bales were being loaded by means of a hydraulic lift belonging to the gin company and operated by one of its employees. The Supreme Court, in affirming Circuit Judge Baker's order granting the nonsuit, held that the defendant could not be held liable for the negligent operation which injured the plaintiff since such operation was not under the defendant's control. There is an exception, the court said, to the general rule that a master is under a non-delegable duty to provide his servant with reasonably safe instrumentalities and a reasonably safe place to work. This exception exists where the instrumentality or place is furnished by, or under the control of, a third party. The holding seems to be in accord with the general authorities,[12] which point out that under such circumstances the injured worker could well have an action against the owner of the premises for his failure to keep them, or the machinery thereon, in a safe condition. It should be borne in mind that the rule relied upon in the principal case does not apply where the employer of the injured worker is performing work on the foreign premises pursuant to a contract with the owner or someone else. In such cases the employer "must exercise for the safety of his employees the care which the law requires of him respecting his own premises."[13]

In *Bellamy* v. *Hardee*,[14] the plaintiff was injured while removing the middle section of the boom on the dragline which he operated for the defendant. To permit the joining of the bolt holes on the two remaining boom sections, one of them had to be raised slightly and an ordinary automobile bumper jack was provided by the employer and regularly used by the employee for that purpose. On the occasion of the injury, the jack had "stripped," causing the boom to fall and throwing the plaintiff down. The primary contention of the plaintiff was that the bumper jack was inadequate and unsuitable for this particular use and that the defendant should have provided a hydraulic jack. The difficulty of maintaining this position lay in the fact that the plaintiff, by his own testimony as well as that of the defendant, was in complete charge of the dragline operation. He knew at least as much as the defendant did about what was used in the

12. 35 AM. JUR. *Master & Servant* § 174 (1939); 56 C.J.S. *Master & Servant* § 219 (1954).
13. 35 AM. JUR. *Master & Servant* § 174 (1939).
14. 242 S.C. 71, 129 S.E.2d 905 (1963).

operation and had been told to let the defendant know if anything was needed. There was no evidence that the desirability of substituting a hydraulic jack for the bumper jack was ever called to the defendant's attention.

The court, speaking through Mr. Justice Bussey, held that even if it could be said that the defendant was negligent in providing an inadequate jack, the plaintiff was also negligent in continuing to use the jack and failing to ask for better equipment. This negligence on the the part of the plaintiff was clearly the immediate and proximate cause of the injury. Ordinarily the master's duty to furnish the servant with a reasonably safe place to work and reasonably safe tools is a non-delegable one. However, where the injured servant is in complete charge of the work and stands as a vice principal of the master, he cannot recover if he has been negligent in performing the delegated duty of keeping the premises and the tools in a safe condition. The holding seems to be in accord with generally recognized principles.[15]

It was held in *Eberhardt* v. *Forrester*[16] that a prospective purchaser trying out an automobile was not a servant of the automobile dealer. The dealer may be liable for turning over a defective instrumentality to his bailee, but there is no room for respondeat superior responsibility.

Marshall v. *Thomason*[17] contained a very important holding, but one which is more properly commented upon in Evidence article. The post-accident admissions of a servant-driver were held not admissible against the master.

In *Johnson* v. *Livingston*[18] the Fourth Circuit Court of Appeals decided, under South Carolina law, whether a servant who is doing something that he believes should be done on the master's behalf is acting within the scope of his employment. One Barnes, a regular and somewhat pampered employee of the defendant, had, on the date preceding the accident in question, used the defendant's stake body truck to deliver poles for his own profit to a third party. In returning from this private project, the truck broke down and the man for whom Barnes had been working took him to the defendant's house to get permission to use a pick-

15. 35 AM. JUR. *Master & Servant* §§ 142, 143 (1939); 56 C.J.S. *Master & Servant* § 204(b) (1954).
16. 241 S.C. 399, 128 S.E.2d 687 (1962). This case is also noted in the Torts section at note 39.
17. 241 S.C. 84, 127 S.E.2d 177 (1962). This case is also noted in the Torts section at note 47.
18. 315 F.2d 429 (4th Cir. 1963).

up truck to pull the stake body truck out of danger. It was late at night and the defendant irately refused permission. Barnes waited in the defendant's yard until he had gone to sleep, took the pickup, persuaded a neighbor that the defendant wanted him to help in the transaction, and undertook to pull home the illfated stake body. The two trucks became tangled with each other and blocked the road to such an extent that an approaching automobile crashed into them and killed the plaintiff's intestate. The court reversed a judgment of the South Carolina District Court against the truck owner, holding that Barnes was clearly "engaged in a project of his own in direct violation of his employer's orders." It was immaterial that Barnes thought that what he was doing would be helpful to the employer. The South Carolina case of *Holder* v. *Haynes*[19] is correctly relied upon in support of the holding.

The federal court makes no reference to the so-called *Osteen*[20] presumption, under South Carolina law, that "when one is found in possession of the property of another, using it in the service of the owner, he is presumed to be the servant of the owner." Under the facts of the case, however, the presumption would be of little significance in an appellate court since rebuttal evidence can be so strong as to completely destroy the presumption and require a direction of verdict.[21]

19. 193 S.C. 176, 7 S.E.2d 833, Annot., 51 A.L.R.2d 128 (1940).
20. Osteen v. South Carolina Cotton Oil Co., 102 S.C. 146, 86 S.E. 202 (1915).
21. Watson v. Kennedy, 180 S.C. 543, 186 S.E. 549 (1936).