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Master and Servant -- Ratification of Tort by Failure to Discharge

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ant) as lessee." The court intimates[20] that it considered the defendant under a contractual duty to pay rent and cites an early North Carolina case[21] embodying a dictum[22] to the effect that an assignee is ordinarily bound contractually for rent. If the decision is based on this theory, there was no occasion for the court to pass on the rule in *Dumpor's Case,* for the defendant was liable for the rent regardless of the reassignment.

If the defendant was under no contractual duty to pay rent, he would have been bound to do so only in case the reassignment was invalid.[23] No grounds of invalidity appear, except a violation of the condition not to assign without the lessor's consent. The application of the rule in *Dumpor's Case* in the *Childs Case* situation would have "wiped out" the condition before the reassignment. The judgment for the plaintiff, therefore, would entail the existence of the condition and a repudiation of the rule in *Dumpor's Case.*

If the defendant was under no contractual liability to pay rent, the North Carolina court has refused to perpetuate a "venerable error," and has placed a "reasonable construction" on a condition that the lessee and his assigns will not assign the lease. If the defendant was under contractual liability to pay rent, the language[24] of the court is strongly prophetic that the court will refuse to follow *Dumpor's Case* when a proper case is presented.

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Master and Servant—Ratification of Tort by Failure to Discharge.

Plaintiff passenger sues defendant railroad for alleged assault on her by a Pullman porter while she was reclining in her berth. *Held,*

[20] ". . . the lessee and his assigns agreed to pay the rent. . . . The covenant to pay rent is continuous in its nature, and such covenant is binding by express provision upon the assigns of the lessee. . . ." This view, however, is in conflict with the authorities cited in note 17 *supra,* and would make every assignee of the lease, for whatever length of time, responsible for the rent for the rest of the term.

[21] Krider v. Ramsay, *supra* note 17, at 357.

[22] "The privity of estate and privity of contract still subsist between the lessor and the assignee, as it did between the lessor and lessee."

[23] Cases cited in note 17 *supra.*

[24] Brogden, J.: ". . . a reasonable construction of the lease . . . leads to the conclusion that the restriction against assigning . . . operated upon . . . the assigns of the lessee as well as himself" and "one assignment did not waive the conditions of the lease" so that "thereafter any subsequent assignee could turn the (lessor's) property over to the use and occupancy of any undesirable and irresponsible person without his approval."

plaintiff may recover only actual damages, failure to discharge the porter not being a ratification of the tort to justify a recovery of punitive damages.[1]

A railroad, as a public service corporation, owes a special duty of care and protection to its passengers, the breach of which by a servant entails actual damages without resort to the doctrine of *respondeat superior*.[2] A ratification by the railroad of this breach entails punitive damages.[3]

As to what constitutes a ratification, railroad cases either hold,[4] or imply in dicta,[5] as in the principal case,[6] that retention is relevant evidence of ratification which may go to the jury, but not sufficient to warrant its submission to the jury unaccompanied by other evidence of ratification.[7] However, the fact of retention is irrelevant where the master is not fully aware of the tortious character of the servant's act and believes the servant's account of the affair.[8]

In cases of injury occurring outside the scope of employment, where the question is one of fixing liability for actual damages only, retention after knowledge of the tort[9] is either held,[10] or mentioned

[1] Pullman Co. v. Hall, 46 F. (2d) 399 (C. C. A. 4th, 1931).

[2] (1929) 17 CALIF. L. REV. 185.

[3] Bass v. Chicago & N. W. R. Co., 42 Wis. 654, 24 Am. Rep. 437 (1877) (expulsion from train by brakeman).

[4] Bass v. Chicago & N. W. R. Co., *supra* note 3; Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39 (1869) (assault by brakeman); St. Louis & Chicago R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689 (1876) (assault by servants off duty and conductor's refusal to interfere); Dillingham v. Anthony, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634 (1889) (misconduct of conductor).

[5] See Tangner v. S. W. Mo. Electric R. Co., 85 Mo. App. 28, 32 (1900) (conductor's wanton conduct toward passenger); Pullman Co. v. Alexander, 117 Miss. 348, 78 So. 293, 294 (1918) (porter's mistreatment of negro passenger); Craker v. R. Co., 36 Wis. 657, 17 Am. Rep. 504, 513 (1875) (conductor's assault on female passenger); Gasway v. Atlanta W. P. R. Co., 58 Ga. 216, 221 (1877) (misconduct of conductor); Ricketts v. Chesapeake & O. R. Co., 33 W. Va. 433, 10 S. E. 800, 803 (1890) (assault on passenger).

[6] Pullman Co. v. Hall, *supra* note 1.

[7] Voves v. G. N. R. Co., 26 N. D. 110, 143 N. W. 760 (1913) (conductor's assault and battery on passenger); Toledo, St. Louis & W. R. Co. v. Gordon, 143 Fed. 95 (C. C. A. 7th, 1906) (expulsion from moving train by conductor).

[8] Donivan v. Manhattan R. Co., 21 N. Y. Supp. 457 (1893) (expulsion of passenger from platform); Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631 (1888) (porter's vicious assault on passenger); Paul v. So. R. Co., 158 S. C. 550, 155 S. E. 884 (1930) (conductor's assault).

[9] It would be otherwise without such knowledge: Mann v. Life & Casualty Ins. Co. of Tenn., 132 S. C. 193, 129 S. E. 79 (1925) (slander by company's superintendent of agents); Turner v. American District Telegraph & Messenger Co., 94 Conn. 707, 110 Atl. 540 (1920) (a shooting by company's roundsman).

[10] Sullivan v. People's Ice Corp., 92 Calif. App. 740, 268 Pac. 934 (1928) (assault by driver of ice wagon).

in dicta,[11] to be relevant evidence of ratification which may be submitted to the jury when accompanied by other such evidence. However, some cases hold to the contrary and say that retention in such cases is not relevant.[12] Most cases place emphasis—and it seems quite correctly—on the question whether the tort purported to be in the master's interest, holding that if it did not, retention is not relevant evidence of ratification.[13] But at least one case disregards this distinction and holds that retention is not relevant even where the tort was committed in the master's interest.[14]

The instant case seems to be in line with the weight of authority in refusing to hold that retention alone amounts to a ratification of the servant's tort as a matter of law. Such a holding would indeed impose an injustice on master and servant alike. The same would be true of a rule that evidence of retention is alone sufficient to carry the case to the jury, since ordinary juries are notoriously prejudiced against railroads. To constitute ratification, the conduct should clearly evince an intent to ratify. The failure to discharge may be impelled by motives completely foreign to those of ratifying. Either rule might lead to the discharge of many innocent and worthy servants, due to the fact that the master would prefer to discharge rather than run the risk of assuming liability for the servant's act.

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[11] See Wells v. Robinson Bros. Mot. Co., 153 Miss. 451, 121 So. 141, 142 (1929) (assault and battery by automobile salesman); Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 278 (1903) (assault and false imprisonment of customer by floorwalker); McFadden v. Anderson Mot. Co., 121 S. C. 407, 114 S. E. 402, 403 (1922) (automobile collision with plaintiff); International & G. N. R. Co. v. McDonald, 75 Tex. 41, 12 S. W. 860, 862 (1889) (negligent railroad collision with automobile).

[12] Kastrup v. Yellow Cab & Baggage Co., 129 Kan. 398, 282 Pac. 742 (1929) (assault by superintendent trying to collect a bill); Gulf, Chicago & Santa Fe R. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495 (1891) (plaintiff forced to jump from moving train); Edelman v. St. Louis Transfer Co., 3 Mo. App. 503 (1877) (collision with wagon driven by defendant's servant).

[13] Mandel v. Byram, 191 Wis. 446, 211 N. W. 145 (1926) (assault and battery by railroad rate clerk on plaintiff shipper); Chaney v. The Frigidaire Corp., 31 F. (2d) 977 (C. C. A. 5th, 1929) (assault by salesman on prospective female customer); Gratton v. Suedmeyer, 144 Mo. App. 719, 129 S. W. 1038 (1910) (assault by contractor's employee); Home Telephone & Electric Co. v. Branton, 7 S. W. (2d) 627 (Tex. 1928) (assault by local manager of telephone company); Knight v. Laurens Motor Car Co., 108 S. C. 179, 93 S. E. 869 (1917) (negligent act by mechanic during a joy ride); Everingham v. Chicago B. & Q. R. Co., 148 Iowa 662, 127 N. W. 1009 (1910) (assault); Kweichin v. Holms & Hallowell Co., 106 Minn. 148, 118 N. W. 668, 19 L. R. A. 255 (1908) (negligence of wagon driver).

[14] Pruitt v. Goldstein Millinery Co., 169 Ky. 655, 184 S. W. 1134 (1916) (slander by employee).