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Master and Servant--The Simple Tool Doctrine

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theory. Surely the legislatures intend by their enactments to simplify rather than complicate the problem.

Conclusion

Under all three theories intention is a controlling factor and it would seem that the best theory is the one which affords the best opportunity to determine this intention accurately. Intention is primarily a question of fact, and the average person using the joint bank account probably intends to give his co-depositor a legal power to draw upon the account, and the legal right of survivorship. Since it is intended that the co-depositor should be able to demand payment from the bank, it is inconsistent with this intention to say that the depositor merely intended a testamentary disposition. It is also inconsistent with this intention to say that the depositor made the account for his own convenience, or to say that survivorship was intended but no right to make withdrawals during the life of the depositor was intended. It is not inconsistent with this intention to say that the beneficiary of the contract, or the donee of the gift, has the rights and interests provided for in the agreement.

It is submitted that the contract theory will lead to the proper result in the majority of cases, and should be followed, because in applying it the courts do not need to use the historical and sometimes confusing principles of gift intention. Nor are they confined to any prescribed statutory provision. They can look at the agreement, and base their decision on general contract principles. Under any of the theories, however, the desired result of giving effect to the true intentions of the parties will be reached if the written agreement or signature card is held to be conclusive. Holding the parties to the written manifestation of intention works no hardship on either of them, because if they intend otherwise, they can so express themselves to the bank in writing. Under any other rule there is great risk that virtually every joint deposit will result in litigation.

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MASTER AND SERVANT—THE SIMPLE TOOL DOCTRINE

In a recent North Dakota case, *Olson* v. *Kem Temple, Ancient Arabic Order of the Mystic Shrine*,[1] the plaintiff, a member of a fraternal organization, volunteered to assist in decorating a pavilion for the use of the organization and was injured when he fell from a loose

[1] 77 N. D. 365, 43 N.W. 2d 385 (1950).

step of the ladder furnished for his use by the organization. The defendant fraternal organization was held not liable because the step-ladder was a simple tool within the simple tool doctrine.

This case was adjudicated without the interference of a workmen's compensation statute or an employers' liability act, and thus permits an opportunity to consider the scope and merits of the simple tool doctrine without their influence.[2] This doctrine developed as an exception or a defense to the well established common law rule that whenever the employer undertakes to supply the employee with tools, he is under a duty to exercise reasonable care to furnish and maintain them in a safe condition.[3] The doctrine was stated in this manner in the principal case:

> Where the tool or appliance is simple in construction and a defect therein is discernible without special skill or knowledge, and the employee is as well qualified as the employer to detect the defect and appraise the danger resulting therefrom the employee may not recover damages from his employer for an injury due to such a defect that is unknown to the employer.[4]

The theory behind the doctrine is that the employee is in as good a position as the employer to discover the defect in a simple tool.[5] The doctrine is usually employed in one of three ways. Some courts hold that an employee who is injured while using a defective tool is contributorily negligent.[6] Other authorities state that the foundation of

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[2] The doctrine is not applicable to cases arising under the Federal Employers' Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. sec. 51 *et seq.* (1946); Pitt v. Pennsylvania R. Co. 66 F. Supp. 443 (1946), *affirmed* 161 F. 2d 733 (4th Cir. 1947); nor in all probability to cases arising under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. sec. 688 (1946); see Jacob v. City of New York, 315 U.S. 752 (1941). In a suit brought under a workmen's compensation statute, it would seem that the doctrine would never be employed since negligence is not an issue. But in a suit against an employer who has rejected the provisions of a workmen's compensation statute whether the doctrine is applicable may depend upon the jurisdiction. See 91 A.L.R. 781 (1934). Generally as a consequence of rejection of the statute, the employer loses his common law defenses to negligence. Thus in a jurisdiction which applies the doctrine as a defense it would follow that the doctrine would be inapplicable. Kentucky takes this view, see Nugent Sand Co. v. Howard, 227 Ky. 91, 11 S.W. 2d 985 (1929). If the doctrine is applied as an exception to the employer's common law duty to furnish safe tools, then theoretically the abolition of the common law defenses should not affect the availability of the doctrine and some courts have so held. Newbern v. Great Atlantic & Pacific Tea Co., 69 F. 2d 523 (4th Cir. 1934).

[3] For application of the common law rule, see Meny v. Carlson, 6 N. J. 82, 77 A. 2d 245 (1950); Prefontaine v. Great Northern Ry. Co., 51 N.D. 158, 199 N.W. 480 (1924); Swaim v. Chicago R. I. & P. Ry. Co., 187 Ia. 466, 174 N.W. 384 (1919); 35 AM. JUR. 569 (1941); 56 C.J.S. 900 (1948).

[4] Olson v. Kem Temple, Ancient Arabic Order of the Mystic Shrine, 77 N.D. 365, —, 43 N.W. 385, 387 (1950).

[5] Newbern v. Great Atlantic & Pacific Tea Co., 68 F. 2d 523 (4th Cir. 1934); Vanderpool v. Partridge, 79 Neb. 165, 112 N.W. 318 (1907); 35 AM. JUR. 574 (1941).

[6] Nolen v. Halpin-Dwyer Const. Co., 225 Mo. A. 224, 29 S.W. 2d 215 (1930);

the doctrine lies in the defense of assumption of risk.[7] Still another line of cases takes the position that the doctrine is an exception to the common law duty of the employer to exercise care in furnishing and maintaining tools for the employee's use—that there can be no negligence because there is no duty.[8]

Nearly every American jurisdiction has utilized the doctrine,[9] but there is a great lack of uniformity in its application.[10] Only a few courts have abandoned the doctrine,[11] but many have shown a tendency to reduce its scope by finding it inapplicable to certain situations; for example, where the tool was being used by another than the injured servant,[12] or where the defect was not observable or discoverable by an inspection such as a workman using it could reasonably be expected to make.[13]

It would seem that the court was dealing with this latter situation in the principal case.[14] The defect in the ladder was a step that tipped or tilted when the plaintiff stepped on it. It was not shown that the officers of the defendant organization had knowledge of the particular defect; but testimony indicated that they knew the ladder was fifteen

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Neeley v. Chicago Great Western R. Co., 14 S.W. 2d 972 (Mo. 1928); Ringer v. St. Louis & S. F. R. Co., 85 Kan. 167, 116 Pac. 212 (1911); Holt v. Chicago M. and St. P. Ry. Co., 94 Wis. 596, 69 N.W. 352 (1896).

[7] Vandalia R. Co. v. Adams, 43 Ind. App. 664, 88 N.E. 353 (1909); Nugent Sand Co. v. Howard, 227 Ky. 91, 11 S.W. 2d 985 (1928); Phillip Carey Roofing and Mfg. Co. v. Black, 129 Tenn. 30, 164 S.W. 1183 (1914).

[8] Newbern v. Great Atlantic & Pacific Tea Co., 68 F. 2d 523 (4th Cir. 1934); Allen Gravel Co. v. Yarborough, 133 Miss. 652, 98 So. 117 (1923); Koschman v. Ash, 98 Minn. 312, 108 N.W. 514 (1906).

[9] 56 C.J.S. 1208 (1948).

[10] This becomes obvious upon examining the materials of almost any authority; e.g., 3 LABATT, MASTER AND SERVANT 2476 (2d ed., 1913); see also notes 6, 7 and 8 *supra* and notes 12 and 13 *infra*.

[11] Quanah, A. & P. Ry. Co. v. Gray, 63 F. 2d 410 (5th Cir. 1933); Drake v. San Antonio & A. P. Ry., 99 Tex. 240, 89 S.W. 407 (1905). In Fischer v. City of Cape Girardeau, 345 Mo. 122, 131 S.W. 2d 521 (1939), the court said that the doctrine as applied elsewhere is not the law in Missouri and that the rule is merely one of contributory negligence, while in Missouri Pac. R. Co. v. Spangler, 140 F. 2d 917 (8th Cir. 1944), the court decided that the doctrine does not apply absolutely in Arkansas. In a note, 30 OREGON L. REV. 269 (1951), it is said that Oregon courts will not apply the doctrine my name although similar results are predicted by application of the defense of assumption of risk.

[12] Shepherd v. City of Chattanooga, 168 Tenn. 153, 76 S.W. 2d 322 (1934).

[13] Southern Ry. v. Cowan, 52 Ga. App. 360, 183 S.E. 331 (1936). Other situations where the courts have found the doctrine inapplicable are: Thomas v. National Concrete Const. Co., 166 Ky. 512, 179 S.W. 439 (1915) (the tool was not being used in the ordinary and usual way); Ft. Smith and W. R. Co. v. Holcombe, 59 Okla. 54, 158 Pac. 633 (1916) (the master had knowledge of the defect and the servant had not); Cole v. Seaboard Airline Ry. Co. 199 N. C. 389, 154 S.E. 682 (1930) (the employee had no opportunity to inspect the tool); Middleton v. Faulkner et al, 180 Miss. 737, 178 So. 583 (1938) (the servant was of immature years and was without experience).

[14] Broderick in his dissent places this case in a different situation where the doctrine is said not to be applicable—where the master has actual knowledge of the defective condition and the servant does not.

or sixteen years old, was rickety, and the top steps could not be safely used unless someone was steadying the ladder. Prior to its use the plaintiff shook the ladder to be sure that it was balanced on all four legs, and the ladder appeared safe. After the plaintiff had been standing on the lower steps of the ladder for about an hour, he stepped onto a higher step near the top of the ladder. The step tilted, and the plaintiff fell, injuring himself. The majority of the court took the position that the ladder was a simple tool within the doctrine, and therefore the plaintiff could not recover. It would seem that the employment of the doctrine in this case places too much weight upon one factor—the simplicity of the tool. Should the fact that the tool was simple in construction override the fact that the plaintiff had done all that could be expected of a reasonable man by way of inspection? Does the decision perhaps demonstrate the danger in using the doctrine since it can be so readily applied to situations where it should be held inapplicable?

In view of the fact that the real problem should be whether the employer has breached his duty to use ordinary care in furnishing and maintaining safe tools, it seems unnecessary to place simple tools in a separate category.[15] The problem can be solved more justly and with less confusion in most cases by applying ordinary common law principles of negligence weighed against the affirmative defenses of contributory negligence and assumption of risk.[16] Judge Christianson in his dissenting opinion to the principal case makes this observation:

> Obviously the character of a tool is an important matter for consideration in determining whether the employer has exercised due care in furnishing a reasonably safe and suitable tool to the employee for the performance of his work. But it is one thing to say that the character of the tool is a matter to be considered in determining whether the employer exercised due care in the performance of his duty to furnish his employee with a safe tool and quite another to say that because a tool is simple the employer has no obligation to furnish a safe tool, as has been held in some of the cases in applying the so-called simple tool doctrine.[17]

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[15] In Quanah, A. & P. Ry. Co. v. Gray, 63 F. 2d 410, 413 (5th Cir. 1933) the court said: "We have reached the conclusion that there is no reasonable basis for the statement of a 'simple tool doctrine' as a doctrine or rule of law, either relieving the defendant as matter of law of all duty of inspection, or establishing as matter of law its affirmative defenses, where injuries from simple tools are in question." See PROSSER, HANDBOOK OF THE LAW OF TORTS 384 (1941).

[16] In 3 LABATT, MASTER AND SERVANT 2484 (2d ed. 1913) there is this statement: ". . . it is illogical and unreasonable to say that the master is free from the obligation of using ordinary care merely because the appliance to be furnished is a simple tool, but the better view is that the appliance being a simple tool, and entirely understood by the servant, the latter's obligations to his master and to himself are increased; and cases involving injuries from simple tools furnish a broader scope for the application of the various affirmative defenses. . . ."

[17] Olson v. Kem Temple, Ancient Arabic Order of the Mystic Shrine, 77 N.D. 365, —, 43 N.W. 385, 395 (1950).

Judge Christianson's approach seems to be similar to that taken by the Arkansas Court when it said: "Ordinarily, the simplicity of a tool is but a circumstance to be considered by the jury in determining the duty resting upon the master in furnishing it and of the servant in using it."[18] It should be noted that the opinion of Judge Christianson and that of the Arkansas Court both refer to the character or simplicity of the tool as being *one* factor to be considered in determining the duties owed by the employer while Labatt in his treatise says that cases involving injuries from simple tools furnish a broader basis for use of the affirmative defenses.[19] It is submitted that whether one allows the simple tool factor to decrease the duty of the employer or increase the applicability of the affirmative defenses, the pragmatic effect will not vary greatly. The important consideration is to discard the notion that the character of the tool is the deciding factor, and this seems less likely to be accomplished where the doctrine is retained.

It is not impossible for a court to solve the problem fairly in a jurisdiction which recognizes the doctrine, but sound decisions are more difficult to achieve. The doctrine places undue importance upon the character of the tool, and a court in considering the application of the doctrine also has the difficult job of ferreting out the variety of situations where the courts have found the doctrine inapplicable. It is all too easy for courts, while worrying over the many details of application of the doctrine, to fall into the trap of relegating what should be determining factors into secondary positions, as perhaps was done in the principal case.

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[18] Norton and Wheeler Stave Co. v. Wright, 194 Ark. 115, 106 S.W. 2d 178, 181 (1937).

[19] *Supra* note 16.