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Notes on Recent Cases

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NOTES ON RECENT CASES

MASTER AND SERVANT—Employer, discharging employee under contract authorizing termination when deeming employee incapable of profitably serving him, must act in good faith.

Action on a contract of employment between the plaintiff, Hazen, and C. C. Cobb and another doing business as Cobb Motor Company. By the terms of the contract plaintiff was to work as a salesman for the defendants for one year at a stated monthly salary and certain commissions on sales. The contract contained a clause authorizing the defendants to declare the contract null and void at any time should they deem plaintiff incapable of serving them in a profitable manner. After contract had been in force for four months the defendants discharged plaintiff, he alleging that there was no provocation for such act. He sued, seeking damages, setting out as an element, the humiliation suffered by him as a result of the discharge. Defendants demurred to the declaration upon the ground that the contract sued upon was unilateral. Court sustained the demurred and this ruling is assigned as error. *(Hazen v. Cobb et al.* Florida 1928, 117 So. 853.)

The court reversed the lower court and after deciding that the contract was not unilateral, since a definite time for employment was stipulated, further held that the clause under which the plaintiff was discharged did not give the defendants the right to arbitrarily discharge but that they must have some reasonable ground for concluding that the employee was incapable of serving them in a profitable manner and that such ground must have had some relation to the profitableness of the employee's service and must have been acted upon in good faith. If good faith appeared the court could not inquire as to the sufficiency of the reasons upon which the defendants acted, but if the action of the employers was devoid of any reasonable basis whatever, it would be insufficient to sustain their breaking the contract and would tend to show bad faith.

As to damages recoverable in this case the court stated that they were prima facie, the wages for the unexpired term of the contract including any unpaid balance due at the time of dis-

charge for services already performed but that humiliation is not generally recognized as an element of recoverable damages in cases such as this.

D. M. Donohue.

Marriage—Bill by J. Walker against Emma Walker to annul the marriage between the parties. Appellant married her first husband, Jackson, in 1912. He shortly after left her and three years later, she, hearing that Jackson was dead, contracted a ceremonial marriage with the appellee and the parties lived together as man and wife for more than ten years. The appellee sought decree of annulment on the ground that at the time of the second marriage appellant had a husband living and undivorced. *(Walker v. Walker,* Ala. 1928, 117 So. 472.)

The court reversed the decision of the lower court with direction to dismiss appellee's bill stating that although the law would consider the second marriage unlawful if Jackson was alive at the time of the ceremonial marriage between the parties in this case, the marriage, in fact, having been shown, the presumption of validity arose casting the burden of establishing its invalidity upon the one who questioned it.

If a woman contracts a second marriage in the belief that she may do so, but when, in fact, her first spouse is alive, and the parties to the second marriage, intending matrimony, live together as man and wife until a lapse of seven years after the first husband is last heard from, an actual common law marriage is thereby established. *Klipfel's Estate v. Klipfel,* 41 Colo. 40, 92 P. 26.

Neither of these presumptions is conclusive and the case is to be decided upon the evidence aided to what extent it may be by the presumptions involved. *Turner v. Williams* (Mass.) 89 N. E. 110.

In this case the parties had lived together as man and wife for more than ten years, appellee had acquired a home, to which the labor of appellant had materially contributed. The evidence introduced by appellee was that about thirteen years after the disappearance of Jackson, the first husband, he had been told that Jackson was still alive. This evidence was not corroborated and was of itself of little importance. Upon the facts the lower court

should not have undertaken to annul by its decree the marriage between the parties contracted by them more than ten years before.

D. M. Donohue.

TRIAL—In an action to recover damages for injury to fruit trees caused by fire alleged to have been set by sparks escaping from defendant's locomotive, a judgment was had for the plaintiff and the defendant brings error. *(Atlantic Coast Line R. Co. v. Seckinger, Florida,* 1928, 117 So. 898.)

The error alleged is the act of the court in ordering a view of the premises and instructing that a witness for the plaintiff, in company of the bailiff, go along to point out the boundaries of the land on which the trees were. Three of the jurors went to the view in a car with the plaintiff and the bailiff, the other jurors went in a car accompanied by one of plaintiff's witnesses.

The Supreme Court held that even if there was no communication between the jurors and the plaintiff and his witness on the trip for the jury to have the view, it was not proper for the court to permit the jury to make the view in company with the plaintiff and his witness and it reversed the judgment of the lower court holding that such proceedings were unauthorized and improper.

D. M. Donohue.

CARRIERS—The plaintiff, Hugh Ryan, brings this action in trover against the defendant for conversion of a carload of hogs shipped by the plaintiff from Watertown, S. D. to Worthing, S. D. Judgment was for the plaintiff and the defendant appeals. *(Ryan v. Chicago M. St. Paul Ry. Co.*

The hogs were billed under the usual live stock shipper's contract, naming respondent, Ryan, as the shipper and also as the consignee. Ryan did not accompany the shipment, and when the car arrived at its destination it was unloaded, and a few hours later the hogs were delivered by appellant's agent at Worthing to One Burney, who receipted for them by signing the waybill, "H. Ryan by G. Burney".

Respondent brings the action on the theory that the delivery to Burney was unauthorized, and that thereby the railroad company became liable for the value of the hogs as for conversion.

Evidence showed that Burney bought the hogs from Ryan for cash shortly before they were shipped. Burney asked to take the hogs from the railroad because they had the cholera, and needed immediate attention.

Before the hogs were shipped, Ryan took his shipper's contract to the Security National Bank of Watertown, and the bank thereafter drew a draft upon Burney, attached it to the shipper's contract and sent it for collection to the First National Bank of Centerville. The draft and contract arrived at Centerville December 1st, and the car arrived at Worthing, November 29th. The draft was not paid, but was returned by the First National Bank of Centerville.

The court held that, where hogs were shipped under live stock shipper's contract, naming shipper as consignee, railroad's delivery of the hogs to the buyer from shipper, who had ordered the hogs and who had authority from shipper to receive them, does not constitute a wrongful delivery rendering carrier liable to shipper for conversion, though sale was for cash and buyer failed to pay draft. The delivery of goods from seller to buyer, though conditioned upon buyer's payment for the goods so that seller retains title, is nevertheless delivery by seller sufficient to relieve carrier from liability for conversion. Where the live stock shipper's contract was not in form of bill of lading as defined by Rev. Code 1918, 1131-1133, railroad could make delivery to consignee's agent without production of contract as is required in case of bill of lading. This case was decided by the Supreme Court of South Dakota, August 10, 1928, 220, N. W. 905.

F. Earl Lamboley.

MARRIAGE—In the case of *Ritzer v. Ritzer,* the Supreme Court of Michigan held that while marriage is a contract, it is also a relation governed by rules of public policy not applicable to mere private agreements. Marriage may be dissolved only with consent of the state or by death of one or both of the parties, and not by consent of the parties, as is the case in ordinary private contracts.

"Alimony" is an incident of marriage, based on husband's duty to support his wife, and signifies not a portion of his estate, but allowance for her sustenance according to his means and

their condition in life during their separation, though it may result in division of his estate. The power to award alimony is wholly statutory. Courts of chancery have no inherent jurisdiction to award alimony. 220 N. W. 812.

F. Earl Lamboley.

REFORMATION OF INSTRUMENTS—The parties here executed a written contract for an exchange of farms, with abstracts to be furnished and time to have them examined by competent persons for merchantable title, the deeds to be executed in ten days. The deeds were executed from the plaintiffs to defendants, and from one Mrs. Smith to plaintiffs. Her husband had no interest in his wife's farm, but acted as her agent in conducting the negotiations.

After acquiring the title, plaintiffs executed a contract for sale of part of the farm conveyed to them by Mrs. Smith, agreeing to convey unincumbered title, and, in a later action by the assignees of the contract, were required to pay damages of $1,700 on account of the flowage exception to the title. The plaintiffs brought this action for reformation of the deed on the ground of mutual mistake. The mutual mistake claimed was the belief of both parties that flowage rights expired in a certain year. The plaintiffs had decree of reformation striking the flowage easement clause from the deed for money damages.

The court held that to reform written instruments on account of mutual mistake, evidence of mistake and mutuality thereof must be clear and satisfactory. Purchasers, who were informed of outstanding easement of flowage before execution of preliminary contract and had independant investigation made by attorney, to whom facts were known, after defendants' statement as to the time of expiration of easement, and who took deed subject to easement, failed to sustain burden of showing mutual mistake as to time of easement's expiration, in suit to reform deed, and mistake, of any, was "mistake of law". The plaintiffs here did not show that there was any mutual mistake. *(Crane et al v. Smith et al,* Sup. Ct. of Mich.) 220 N. W. 750; 146 Mich. 430; 219 Mich. 493; 23 R. C. L. 367.

F. Earl Lamboley.

PRINCIPAL AND AGENT—Authority of agent to sell property of principal held to confer no authority to exchange property.

Action by the Hattiesburg Auto Sales Co. to recover a balance of $500.00 alleged due on an automobile sold by it to the defendant, Mrs. C. M. Eaton, and for enforcement of a purchase-money lien on the automobile. *Eaton v. Hattiesburg Auto Sales Co.,* Supreme Court of Mississippi, 1928. 117 So. 534.

Mrs. Eaton, shortly after purchasing a Dodge car, decided that she would prefer a Buick, and entered into negotiations with one of plaintiff's salesmen for the purchase from it of a Buick. Defendant alleged that this salesman, whose name was Brannon, agreed to exchange a Buick with her for her Dodge and the payment by her of $330.00 in cash. The Buick was afterwards delivered to her by Brannon, but he declined to accept $330.00 as the amount to be paid in cash by her, and the manager of the Sales Co., to whom she was referred by Brannon, declined also to do so. Mrs. Eaton testified that she later had another understanding with Brannon, who agreed that she should take the Buick, and that he would sell the Dodge for the best price obtainable, allowing her to pay the difference between that and the price of the Buick. She alleged that at this time she told Brannon that the most she would pay, as the difference in prices, would be $330.00.

Brannon, in his testimony, denied that he had agreed to exchange automobiles with defendant on payment by her of $330.00, and stated that in their preliminary negotiations nothing was said about the amount in cash she would have to pay. He also testified that the final negotiations between them ended in Mrs. Eaton's agreement to make the exchange, and in addition, to pay to the Sales Co. the sum of $500.00.

It was the contention of the Sales Co. that the agreement by Brannon to exchange automobiles with Mrs. Eaton was not within the authority conferred on him to sell automobiles, and for this purpose the manager of the Sales Co. testified that Brannon was without authority to take other autombiles in exchange for Buicks, except with the manager's approval, which was not alleged to have been given in this case.

In passing upon the question of Brannon's authority to make such an exchange, the court relied on the rule set forth in the American Law Institute Restatement, Agency (Tent. No. 3) sec. 316, which is as follows: "A manifestation of consent by one person that another, as his agent, may make a contract to sell or sale of personal property is, in the absence of usage or anything indicating a different meaning, interpreted as not including consent to make an exchange or barter, or a sale for a consideration not payable in money." The consent by one that another may sell property for him confers on such other authority to sell the property for cash only, and not to exchange it for other property. 2 C. J. 599. Brannon's authority, therefore, to sell automobiles for the Sales Co. did not confer on him authority to exchange them for other automobiles, and neither a special authority from the company to do so, nor a general custom or usage from which such special authority could be inferred was proven.

In answer to defendant's further contention that Brannon had apparent authority to make such an exchange, the court held "apparent authority" to be "that class of incidental authority which is implied from the express or declared authority, and which the third person dealing with the agent may properly assume to go with the declared authority unless the contrary is made known". 2 Mechem on Agency (2nd Ed.) sec. 721. But authority to exchange property is not implied from or within the apparent scope of authority to sell property. *Woodhard v. Jewel,* 140 U. S. 253; *Kearns v. Nickse,* 80 Conn. 23. Consequently, the evidence that Brannon was without authority to exchange automobiles for others, while probably unnecessary, was admissible. From these principles, the court held that Brannon was without power to bind his principal by a contract to exchange automobiles with Mrs. Eaton, and that judgment must be for the Sales Co.

J. J. Canty.

AUTOMOBILES—Negligence of driver operating automobile for owner as negligence of owner—Liability of owner for injury to guest.

Action for damages for personal injuries to Willie Thomas, against W. A. Carter, caused by the overturning of defendant's car through the incompetency of a person permitted by defend-

ant to drive, plaintiff being a guest in the automobile. *Thomas v. Carter*, Supreme Court of Alabama, 1928. 117 So. 634.

The defendant was driving his automobile from Gadsden to Montgomery, one Jewel Thomas being his guest. Plaintiff had occasion to be in Montgomery, and upon the invitation of defendant and Jewel Thomas, her daughter, went with them. At Celera, defendant said he was tired, and at Jewel's suggestion, allowed her to drive the car. While she was driving, the car overturned, causing injuries to plaintiff. This action was brought on the theory that Jewel Thomas was defendant's agent; defendant, on the other hand, contended that plaintiff was guilty of contributory negligence.

Although the question of whether Jewel Thomas drove negligently, thereby causing the accident, was a question for the jury, the facts authorized and required a finding that she was the agent of defendant—this, because she was driving with the owner's concurrence and approval, and in furtherance of his purpose and undertaking to drive the car from Gadsden to Montgomery. Babbitt, Motor Vehicles (3rd Ed.) sec. 1149. For this reason, the doctrine of repondeat superior was applicable, even if defendant had not been in the car at the time.

It appeared from the evidence that Jewel Thomas had previously had trouble with one of her arms, on which she had undergone an operation, and that she was nervous; that plaintiff had told defendant at the time that Jewel was not fit to drive the car. It was on this ground that defendant based his contention that plaintiff was contributorily negligent, in remaining in the car when she knew of the driver's incompetence. The court, however, decided that this contention could not be supported, because of the circumstances in which plaintiff found herself—she was far from home near midnight of a dark and rainy night—and held that contributory negligence could not be predicated as a result of her failure to leave the car, citing *B. R. L. and P. Co. v. Barranco*, 203 Ala. 639; *Birmingham Southern v. Harrison,* 203 Ala. 284; *Birmingham-Tuscaloosa Ry. v. Carpenter,* 194 Ala. 144.

In answer to defendant's further contention that the driver might presume, and act on the presumption, that a public road was safe for travel, even at night, and was not required to be on the lookout for extraordinary dangers of which she had no know-

ledge, the court held that a traveler on a public road is required to exercise ordinary care; that is, to act as a reasonably prudent man would act, considering all the circumstances surrounding him. 13 R. C. L. p. 462; *Dobbins v. Western Union*, 163 Ala. 222; *Bradford v. Anniston*, 92 Ala. 349.

Since plaintiff was in the automobile at the invitation of the owner, she was an invitee, and the fact that it was her pleasure to accept the invitation did not relieve defendant or his agent of the duty to exercise at least ordinary care for her safety. *Galloway v. Perkins*, 198 Ala. 658, L. R. A. 1916E 1190. The court was therefore not required to decide, in this case, whether the driver or owner of an automobile is liable for injury to one who is in the car not by invitation, but by mere tolerance, but it indicated that, if called upon to decide a case arising out of this state of facts, it would not hold the driver or owner to be liable.

J. J. Canty.

CERTIORARI—Use of certiorari for the review of decisions of the Court of Appeals by the Supreme Court on questions of fact.

Petition of E. J. Bolen and another, doing business as Bolen Bros., for certiorari to the Court of Appeals to review and revise the judgment and decision of that court in the case of *Bollen Bros. v. Miller.* (*Bollen Bros. v. Miller*, Supreme Court of Alabama, 1928. 117 So. 462.)

The argument for error in the opinion of the Court of Appeals did not rest upon alleged error of law in that opinion, but rested on the proposition that the Court of Appeals did not correctly judge the effect of the evidence and the facts shown thereby. Since there was no question of law involved, the court refused to issue the writ, holding it to be the settled rule of law in this state that the Supreme Court will not review the decisions of the Court of Appeals on any question of fact, but will do so only on questions of law. *Postal Telegraph-Cable Co. v. Minderhout*, 195 Ala. 420, 71 So. 91.

J. J. Canty.

AUTOMOBILES—Assault and battery may be committed by striking another with an automobile intentionally or by driving so recklessly as to show disregard of human life and safety.

In the case of *State v. Hamburg,* 143 A. 47 defendant was indicted for assault and battery. On October 12, 1927, defendant was driving an automobile, on 4th Street, night was damp and rainy and street slippery; she operated auto driven by her at a rate of speed at from 40 to 50 miles an hour. Pedestrians were crossing 4th Street at its intersection with Walnut Street. It was necessary for defendant to apply brakes to car driven by her, her auto skidded for 40 to 50 feet and struck an old woman, who was then crossing 4th Street and severely injured her.

Court in instructing the jury charged that "An assault is an unlawful attempt to injure another person, with apparent possibility of carrying it out. Battery is the unlawful use of physicial violence by one person toward another. It is essential in criminal prosecution for assault and battery to show a wrongful intent, such intent may be inferred from facts. That jury must believe beyond a reasonable doubt that injuries suffered by prosecuting witness, were due to grossly negligent, wantom and reckless acts of defendant in operating her car to find defendant guilty. Judgment for plaintiff.

This case is a good illustration showing the flexibility of our laws.

A. J. DeDario.

CARRIERS—Acceptance of express receipt without shipper's signature held binding on shipper and consignee to limited valuation state (Cummins Amendment to Interstate Commerce Act "49USCA#20").

Plaintiff, Thomas Windsor, owned and operated a hotel at Milford, Delaware. He claimed that a basket of laundry belonging to him, weighing 170 pounds and sonsigned to him at that place, had been shipped by express from Federalsburg, Md. on 8th day of September 1925, shipment in question had never been delivered to him. It's value was $146.04 for which this action is brought. Defendant claims that it was not responsible for more than .50 per pound of shipment, which based on a weight of 170 pounds, would amount to $85.00.

It was conceded that no value was declared by shipper and that express receipt was not signed by him or on his behalf, but the express charges based on the rate prescribed by Interstate

Commerce Commission on a shipment when no value was declared were paid by shipper.

Receipt expressly stated that carrier would not be liable for any shipment more than .50 a pound unless a greater value is declared at time of shipment.

Jury returned verdict for plaintiff.

Windsor v. American Railway Express Company, 143 A 37. On appeal court held that the respondent, by receiving and acting upon the receipt, altho signed only by petitioner, assented to its terms and the same thereby became written agreement of the parties. In absence of a statutory requirement signing by respondent was not essential. This signature, to be sure, would have brought into existance additional evidence of the agreement, but it was not necessary to give it effect.

Judgment reversed.

A. J. DeDario.