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AGENCY—1961 TENNESSEE SURVEY

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The topic "agency" includes the areas of "master and servant" as well as those of "principal and agent." There were few cases in these areas decided by the Tennessee courts during the period under survey. Generally, basic principles were applied to routine cases. In certain instances the reliance upon a prior fact determination avoided the necessity of an elaborate treatment of the facts. In one or two cases the court reached a result that may not be deemed desirable though supported by much authority. Significant points received less attention than they deserved in certain cases. In one case the basic question turned on contract, rather than agency, law. Attorneys at law, a special category of agent, was dealt with in one case.

I. CREATION OF RELATION

Dobson & Johnson, Inc. v. Waldron[1] dealt briefiy with the problem of creation of an agency. Real estate brokers had shown land owned by the defendant to prospective purchasers, the plaintiffs. The landowner had knowledge of this and consented. The brokers handled the original written offer by the plaintiffs and delivered it to the defendant, who made a counter-offer upon the back of the offer. The brokers submitted this counter-offer to the plaintiffs. The court held that the brokers were agents of the defendant. The holding appears to be sound.

The principal point in the case was the attempt by the defendant

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1. 336 S.W.2d 313 (Tenn. App. M.S. 1960).

to revoke his counter-offer. The issue was handled as a contract question and turned upon when an offer, which by its terms expires on a day named, can be accepted and the necessity of revocation of an offer being communicated to the offeree prior to acceptance by him.

If the attempted revocation of the offer be deemed to involve the revocation of agency, the result seems equally sound.[2]

II. Liability of Principal to Third Persons—Contracts

The case of *Dobson & Johnson, Inc. v. Waldron* just discussed[3] held that the principal was liable to the third person upon the contract made by his agent. The contract was obviously within the scope of the authority, unless the revocation was effective. The court applied normal contract rules and found that the offer had been accepted prior to the attempted revocation.[4] In so doing, the court found that the chancellor had erred in resolving the issues in favor of the defendant.

III. Liability of Principal to Third Persons—Torts

It is interesting to note that, in all of the cases involving the liability of the principal for the acts of his servants or agents arising in tort, the principal or master was not held liable.

Ball v. Whitaker[5] involved the well-known problem of the liability of a master for negligence of his servant toward a rider in the vehicle driven by the servant, when the rider is riding with the consent or invitation of the servant in violation of the explicit directions of the master.

An employee of a carnival company was riding on a wagon pulled by a heavy truck driven by the servant of the operator of a trucking company. The trucking company had a contract with the carnival company to haul the wagons from the show grounds to the railroad

2. Apparent authority is not terminated merely because actual authority is terminated. Ordinarily apparent authority is not terminated until the third person has notice of the termination of the authority. Restatement (Second), Agency § 124A, 125 (1958). Of course, apparent authority would terminate when the time which conditioned the apparent authority expired. *Id.* § 126.

3. See note 1 *supra* and accompanying text.

4. The offer by its terms was to expire on July 1. The defendant attempted to revoke his offer on the evening of July 1. On June 30 the plaintiffs wrote an acceptance upon the contract, and upon July 1 notified the brokers by telephone. They mailed a letter to the defendants giving notice of the acceptance in a letter postmarked in the evening of July 1. There was a contradiction in the evidence as to whether the agent told the principal that the offer had already been accepted when the principal called the agent to revoke the offer. 336 S.W.2d at 314-15.

5. 342 S.W.2d 67 (Tenn. App. E.S. 1960).

yards. The plaintiff boarded the wagon with the implied permission of the driver, though the driver had explicit directions from the defendant to allow no one to ride upon the wagon or truck. The court held that the plaintiff was a trespasser as far as the defendant master was concerned, that the defendant would be liable only for wanton and wilful acts of the driver-servant, and that there was no evidence of wilful and wanton conduct, though there was clearly negligence. In so doing, the court followed the well-established Tennessee law,[6] which may be the majority view in the United States.[7] The theoretical objections to the rule are numerous: in many areas negligence toward a trespasser after his presence is known is called wilful and wanton;[8] the rider might be in better position under the trespasser rule if he had not secured the permission of the servant; The wilfulness and wantonness of the agent usually tends to insulate the master rather than make him liable;[9] and finally, the servant is obviously within the scope of his employment in driving the vehicle.[10]

The plaintiff attempted to avoid the rule barring his recovery by showing that the defendant's contract provided that defendant would be "responsible for the safety of the property and for any loss or injury which may be sustained by anyone because of the manner in which the property is hauled." The court simply said that this was an indemnity contract and did not make the hauler an insurer or modify

6. Modern cases reaffirming the position in Tennessee include: Reynolds v. Knowles, 185 Tenn. 337, 206 S.W.2d 375 (1947); and Home Stores, Inc. v. Parker, 179 Tenn. 372, 166 S.W.2d 619 (1942).

7. RESTATEMENT (SECOND), AGENCY, Reporter's Notes § 242 (App. 1958) observes that there is a distinct split of authority and that, though it is often hard to tell what the basis of a particular decision is, "in most of the cases below, the master was found not liable . . . ."

8. A leading authority has said in speaking of the duty of a landowner:

> "In a number of states it is still said that there is no liability even to a discovered trespasser unless the defendant's conduct is wilful or wanton. Some of these jurisdictions have defined 'wilful and wanton' . . . to include a failure to use ordinary care after discovery of the trespasser's presence. . . .
>
> The great majority of courts have now discarded 'wilful and wanton' as a limitation, and have held that when the presence of the trespasser is discovered there is a duty to use ordinary care to avoid injuring him by active operations." SMITH & PROSSER, CASES ON TORTS 795 (2d ed. 1957).

9. It was originally held that wilful and wanton conduct of the servant insulated the master because wilfulness and wantonness took the servant out of the scope of the employment. See Wright v. Wilcox, 19 Wend. 343 (N.Y. 1838). Modern cases have abandoned this as a rule of law, but the feeling persists that wilfulness and wantonness is relevant as showing that the servant was not furthering the master's business or interest. See, *e.g.*, Earley v. Roadway Express, 106 F. Supp. 958-60 (E.D. Tenn. 1952). The liability for such conduct is often viewed as an exception to a general rule of non-liability. Fugate v. Cincinnati, N.O., & Tex. Pac. Ry., 181 Tenn. 608, 183 S.W.2d 867 (1949). An earlier case, Reynolds v. Knowles, 185 Tenn. 337, 206 S.W.2d 375 (1947), is noted at 20 TENN. L. REV. 290 (1948).

10. This is directly stated in the RESTATEMENT (SECOND), AGENCY § 242 (1958).

his liability to third persons in any way; the contract being for the benefit of the carnival company, the plaintiff had no rights thereunder.[11]

The plaintiff's further attempt to recover was based upon the Tennessee Code Annotated provision requiring motor freight agents to carry liability insurance. Such insurance must undertake to pay for injuries to persons by reason of negligent operation of the motor carrier while engaged in carrying property.[12] The court simply pointed out that the act itself had an exception making the act inapplicable to motor vehicles "while used exclusively for carrying . . . property between railroad depots and any points in any city, town or suburb thereof . . . ."[13]

McCann Steel Co. v. Third National Bank[14] involved the liability of a bank to one whom the bank knew had a beneficial interest in a deposit when the bank paid funds out of the account upon forged endorsements on checks. The case could have been noted under section I of this discussion since it involved the question of whether agency existed.

The facts are interesting and somewhat involved. The McCann Steel Company contracted with Hall, doing business as the Middle Tennessee Erection Company, for the erection of certain steel. Hall acted as an independent contractor.[15] By agreement between the parties the Steel Company opened an account in the name of the independent contractor to enable the contractor to pay costs. The agreement provided that checks would be signed by the independent contractor and by a representative of the Steel company. The independent contractor filed false time reports so that checks were drawn for work not actually done. Instead of delivering the checks to the payees, Hall, the independent contractor, forged endorsements of the payees to the checks. The bank cashed the checks, and the

11. 342 S.W.2d at 70. The possible interpretation that the agreement related to damage to persons resulting from damage to the property apparently did not occur to the court; nor did the court seem to consider the possibility that such a contract was a third party beneficiary contract.

12. TENN. CODE ANN. § 65-1517 (1956).

13. TENN. CODE ANN. § 65-1503 (1956).

14. 337 S.W.2d 886 (Tenn. App. M.S. 1960).

15. The court accepted the chancellor's finding as not being contrary to the preponderance of the record. The chancellor said:

> "Robert A. Hall, in the performance of said contracts with complainant, was an independent contractor. He selected his employees, exercised supervision over them, paid the privilege taxes imposed upon contractors, carried workmen's compensation and public liability insurance as such contractor, and had actual charge and supervision of the erection of the steel on said job. Complainant looked to said Hall for results only, and from time to time did inspect the job so as to see that it was being done in accordance with contractual obligation. Hall was not an agent of the complainant." 337 S.W.2d at 888-89.

present suit was brought by the Steel Company to recover amounts so paid by the defendant bank.

The court found that the bank knew of the interest which the plaintiff had in the deposit and that the plaintiff was guilty of no negligence or fault either in drawing the checks originally or in failing to discover the forgeries earlier. The case was settled as a suit between one having an interest in a deposit and the bank. The court held that previous comparable cases were distinguishable since in those cases the forgeries were committed by an agent of the depositor.[16]

The case is listed here because the conduct of the independent contractor was tortious. The case is consistent with the normal rule that the principal is not liable for the tortious acts of an independent contractor. It could have been listed in section II of this discussion since in a previous case the liability of the employer was based upon a warranty under the Negotiable Instrument Law; there it was held that the principal was bound by the agent's warranty.[17]

The court's repeated statements that the independent contractor was not an agent cannot be strongly questioned; the possible implication, however, which results from quoting the chancellor's finding that because Hall was an independent contractor he was not an agent, is unfortunate.[18] It is perfectly clear that many independent contractors are agents with power to bind the principal in contract matters.[19] However, the *Restatement* recognizes that the term "independent contractor" frequently is understood to mean a person who is not an agent at all.[20] It is assumed that the court found Hall an independent contractor not because he was *not an agent,* but rather because he was a type of independent contractor who could not be an agent. The court said that "each party was acting for himself" and

16. Litchfield Shuttle Co. v. Cumberland Valley Nat'l Bank, 134 Tenn. 379, 183 S.W. 1006 (1916), involved forgeries by a branch manager of the plaintiff corporation. The manager had authority to draw checks on the plaintiff's account.

United States Guar. Co. v. Hamilton Nat'l Bank, 189 Tenn. 143, 223 S.W.2d 519 (1949) involved forgeries by a payroll clerk of the depositor. The basis of the decision was the negligence of the depositor. In the principal case the court emphasized that the employee of the depositor, acting in the scope of her apparent authority, made out the fraudulent checks.

17. Litchfield Shuttle Co. v. Cumberland Valley Nat'l Bank, *supra* note 16.

18. The language of the chancellor is quoted in full in note 15 *supra.* The court gave further support to the implication when it was joined by a statement that Hall was not an agent but an independent contractor acting for himself. 337 S.W.2d at 892.

19. RESTATEMENT (SECOND), AGENCY § 2 (1958), in speaking of independent contractors, says: "He may or may not be an agent." Section 220 further makes it clear that though "servant" and "independent contractor" are mutually exclusive, there is no such exclusiveness between "agent" and "independent contractor."

20. RESTATEMENT (SECOND), AGENCY § 438, comment *i* (1958).

that they "were each acting separately, and there was no such agency relationship between them . . . ."[21]

A third case involving liability of the master for the torts of the servant involved the question of the effect of a convenant not to sue given by the plaintiff to the servant. In *Stewart v. Craig*[22] the plaintiff, in suing the master, was met with the defense that the plaintiff had given the servant a covenant not to sue. The court held that this was a defense whenever liability was based solely upon the doctrines of *respondeat superior*. The court reiterated its previous position that if the plaintiff cannot recover against the servant, the master cannot be liable.[23] It is submitted that this is not universally true. It is possible to imagine a case in which the knowledge or conduct of two servants combined would make the master liable even where neither servant would be liable to the third person.

Tennessee, however, has been steadily moving toward a rule that if there be any defense available to the servant, the same defense is available to the master.[24] In this case the court disapproved an earlier case[25] "in so far . . . as [it] disagrees with what we have said herein."[26]

The basis of the opinion was explained in part upon the doctrine that one cannot do indirectly what one cannot do directly, and in part upon a circuity of action that would result when the third person recovered from the master and the master obtained reimbursement against the servant-covenantee, who could then sue the original claimant-covenantor. Needless to say, this argument involves the interpretation that the covenant not to sue is breached when another person, the master, sues his servant. This would, it is sug-

21. 337 S.W.2d at 893.
22. 344 S.W.2d 761 (Tenn. 1961).
23. The language was: "[U]nder our authorities where the injured party is barred from suing the servant, he cannot sue the master, where the suit is predicated solely upon negligence of the servant under the doctrine of *respondeat superior*." 344 S.W.2d at 763. The court also said that the servant, the immediate actor, "could not be charged with liability for the tort; the principal, the remote actor, had no part in the tortious transaction and could not be held responsible." 344 S.W.2d at 762, relying upon Loveman Co. v. Bayless, 128 Tenn. 307, 160 S.W. 841 (1913).
24. The court cited two particular cases. In Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932), the plaintiff had before the suit married the servant. She was held unable to recover against the master since she could not have sued her husband, the servant. In Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945), a minor child injured by his father, the servant, was held unable to recover against the master since the child could not have sued the father.
25. Mink v. Majors, 39 Tenn. App. 50, 279 S.W.2d 714 (W.S. 1953).
26. In so disapproving of the former decision, the court stated that legislation considered necessary by Dean Wade would not now be necessary since the result of the court's opinion is to adopt the "sound, reasonable and logical conclusion." 344 S.W.2d at 765. Dean Wade's suggestion was contained in his *Torts—1956 Tennessee Survey*, 9 VAND. L. REV. 1137, 1154 (1956). It is submitted that Dean Wade was speaking primarily of the joint tortfeasor case, and not the case of master and servant.

gested, convert a covenant not to sue to an agreement to hold harmless.

In any event, it seems perfectly clear in Tennessee that the third person who has given the servant a covenant not to sue cannot succeed in an action against the master for torts committed by the servant.

IV. LIABILITY TO THIRD PERSONS—NOTICE THROUGH AGENT

One case, *Dobson & Johnson, Inc. v. Waldron*,[27] previously mentioned, held that notice to the agent was notice to the principal. The court quoted from previous Tennessee cases[28] and from secondary authority[29] to show that the principal is charged with notice to the agent received while the agent is acting in the scope of his authority and which is in reference to a matter over which his authority extends. The rule seems sound, though there is a distinction between notice by notification and notice which results from the acquisition of knowledge.[30] It seems that the time, place, and manner of the agent's acquiring knowledge is immaterial except in the case of knowledge confidentially acquired.[31] For the notice to be effective, it must of course be within the actual or apparent authority of the agent to receive such notice or notification.[32]

V. DUTIES AND LIABILITIES OF AGENT TO PRINCIPAL—FOR BREACH OF CONTRACT

Holcomb v. Steele[33] involved the question of a breach of an attorney's duties to his client and his liability for breach of contract and tortious conduct.

Attorneys sought to reach[34] a portion of a recovery by a plaintiff against a defendant in a negligence case. The court viewed the facts as showing that a guest in an automobile was injured in a collision between the host's car and another vehicle. The attorneys represented the host in an action against the other driver. Then they represented

27. 336 S.W.2d 313 (Tenn. App. M.S. 1960).
28. Woodfolk v. Blount, 4 Tenn. 138 (1816); Williams v. Title Guar. & Trust Co., 31 Tenn. App. 128, 212 S.W.2d 897 (E.S. 1948).
29. 2 AM. JUR. *Agency* § 368 (1936).
30. RESTATEMENT (SECOND), AGENCY § 9 (1958).
31. *Id.* § 276. The reporter's Notes to the section show that this is the majority view. Of course, if the agent did not remember, he did not have knowledge. Interstate Life & Acc. Co. v. Potter, 17 Tenn. App. 381, 68 S.W.2d 119 (M.S. 1933).
32. RESTATEMENT (SECOND), AGENCY § 268 & comments (1958).
33. 342 S.W.2d 236 (Tenn. App. E.S. 1958).
34. The attorney "filed an intervening petition." There was a jury verdict. 342 S.W.2d 237.

the guest and advised her to accept a $400 settlement from the other driver. The guest was then advised by another attorney that she had a cause of action against the host as well. Ultimately the guest recovered judgment of $3000 against the host and $3000 against the other driver.

In the meantime the guest had attempted to discharge her attorneys, who successfully resisted an attempt to secure a court order discharging them. Special jury verdicts in the immediate proceedings had determined that the interests of the guest and host were conflicting, that the attorneys had advised the guest of her rights against the host, and that the attorneys were guilty of negligence in handling the guest's claim. It appears further that, after the other attorney entered the case, the attorneys did file a suit against the other driver but none against the host.

The court held that the attorneys could not recover on their contract of employment since they had been negligent and had breached their duty to properly advise and represent their client and had breached their contingent fee contract.

The court said that though attorneys do not guarantee the accuracy of all that they do, they are bound to exercise reasonable skill and diligence in attending to business entrusted to them and to possess such reasonable knowledge of well-settled rules of law as will enable them to perform the duties they undertake.

The court rejected the contention of the attorneys that they were not negligent because they had advised the client of her rights against the host. In view of the special duty which attorneys have to their clients because of the uniqueness of their agency,[35] and in view of the general agency rule prohibiting an agent from representing ad-

35. AMERICAN BAR ASS'N, CANONS OF PROFESSIONAL ETHICS No. 6 (1933) deals specifically with the duties of an attorney in representing adverse interests. The canon states in part:

> "It is unprofessional to represent conflicting interests when, . . . in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

It should be remembered that being guilty of unprofessional conduct is a ground for disbarment in Tennessee by statute. TENN. CODE ANN. § 29-308 (1956).

It should also be remembered that rule 31 of the Tennessee Court of Appeals adopts the Canons of Professional Ethics of the American Bar Association as the ethical standards relating to the practice of law. The supreme court has adopted the same as its rule 38. The law settling such matters is found in the statutes, the Canons of Professional Ethics, and in the judicial decisions. State *ex rel.* Turner v. Denman, 36 Tenn. App. 613, 259 S.W.2d 891 (M.S. 1953).

verse interests,[36] the court's decision on this point is clearly sound. In fact, it is difficult to understand how the petitioners could have made the contention.

It is suggested that such litigation suggests the desirability of the majority rule that gives a client the legal privilege and right to discharge an attorney without cause.[37] The Tennessee rule[38] contrary to this rule was partly responsible for the case. When a client loses confidence in an attorney, it should not be required that the client prove that his loss of confidence is justified by objective evidence. It does not lead to respect for the legal profession. In fact, if the trial court in the earlier stages of the litigation had recognized the universal rule[39] that clients have the power to discharge attorneys wrongfully, just as they can discharge an agent wrongfully, the case might have taken a more desirable turn.

VI. DUTIES AND LIABILITIES OF AGENT TO PRINCIPAL—LIABILITY FOR LOSS CAUSED

It is clear that when an agent by any breach of duty causes loss to his principal, the agent is liable to the principal. The liability may be for breach of contract, in tort, or on a restitutional principle.[40] This is illustrated indirectly in a case previously discussed, *Stewart v. Craig*,[41] involving the effect upon the master's liability to a third person for the agent's tort when the third person has given the servant a covenant not to sue. As has been pointed out,[42] the basis

36. RESTATEMENT (SECOND), AGENCY §§ 387-89 (1958) deal with the agent's duties of loyalty and the general rule of not representing adverse interests without fullest disclosure to both parties. *Id.* § 394. Comment *d* is particularly applicable to attorneys.

37. A leading case stating the majority rule and discussing the reasons for it is Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916).

38. Brownlow v. Payne, 2 Tenn. App. 154 (W.S. 1925). Moyers v. Graham, 83 Tenn. 57 (1885), also recognizes that clients may be liable in breach of contract for wrongful discharge of attorneys.

39. The trial court refused to permit the client to discharge the attorneys. 342 S.W.2d at 238.

"All authorities agree" that a client may discharge an attorney at any time. "[T]his is merely the general rule respecting all contracts of service . . . ." SUNDERLAND, CASES ON JUDICIAL ADMINISTRATION 118 (2d ed. 1948).

"[T]he authority of an agent terminates when the agent has reason to believe that the principal, if he knew the facts, would no longer wish him to act in accordance with the initial authorization. . . . Thus, authority may terminate although it is a breach of contract for the principal to terminate it, or it may be terminated without affecting the contractual liability. . . . [T]he principal has legal power . . . to terminate it before the end of the contractual period . . . ." RESTATEMENT (SECOND), AGENCY ch. 5, topic I, *introductory note* (1958). "Authority terminates if the principal or the agent manifests to the other dissent to its continuance." *Id.* § 118.

40. RESTATEMENT (SECOND), AGENCY § 401 & comments (1958).

41. 344 S.W.2d 761 (Tenn. 1961).

42. See note 22 and accompanying text.

of the decision was in part circuity of action and in part the doing indirectly of what could not be done directly. The court specifically stated that if the master was held liable to the injured party for the tortious conduct of the servant, the master "in turn can turn around and sue" the servant. There is nothing to indicate whether this is based upon breach of the contract to be careful, upon a theory of tort, upon an implied covenant to reimburse, upon the equitable principle of exoneration, or upon general principles of restitution. Any or all of these bases would seem appropriate.

VII. Duties and Liabilities of Principal to Agent—Torts

Marsh v. Fowler[43] involved an attempt by a servant farm hand to recover against the master for injuries received while rounding up cattle on the master's farm. The immediate cause of the injury apparently was a frisky calf which ran between the front legs of the horse which the plaintiff was riding. This caused the horse to stumble and throw the plaintiff to the hard rocky road. The plaintiff based his claim upon ten different grounds of negligence, including: furnishing an unsafe place to work, requiring the plaintiff to engage in hazardous duty, allowing the road to remain in a rocky condition, failing to anticipate that the horse would run and the calf be frisky, failure to provide assistance, failure to provide a safe horse, and failure to warn and caution.

The court refused recovery partly upon the grounds that the duty to furnish a safe place to work did not apply to the rocky road; that the law of Georgia, where the injury occurred, would be presumed to be the same as Tennessee law since Georgia law was not pleaded;[44] that the condition was obvious to the plaintiff; and that there was no allegation that the horse possessed vicious or unusual tendencies. The basic decision was simply that the frisky calf was the proximate cause of the accident, and that if the defendant had exercised ordinary care the accident would have happened anyway, there being no way to anticipate the "vagaries in the conduct of a calf."

Since the master is not an insurer, the case involves only the application of the normal rules of negligence concerning duty of care, violation of the duty, causation and damages.

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43. 340 S.W.2d 881 (Tenn. 1960).

44. The failure to plead the foreign law may not be the best grounds for this point. Under Tennessee law the courts are to take judicial notice of sister state law. Tenn. Code Ann. § 24-606 (1956). The court can call upon counsel to assist in obtaining information. Tenn. Code Ann. § 24-607 (1956). The party relying upon the law must in some fashion, either in the pleadings or otherwise, give notice to the adverse party. Tenn. Code Ann. § 24-610 (1956).

VIII. CONCLUSION

Though the cases involved, in general, the application of basic principles to routine cases, some of the cases were particularly interesting upon their facts. Significant, even in these cases, is the problem of choice between conflicting policies. In at least one case,[45] the facts and history suggest the desirability of re-examining the choice heretofore made.

45. Holcomb v. Steele, *supra* note 33 and accompanying text.