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## Note and Comment

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# MICHIGAN LAW REVIEW

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## THE LIABILITY OF A PRINCIPAL, FOR THE PENAL, OR CRIMINAL, ACTS OF HIS AGENT.

§ 1. WHAT HERE INVOLVED.—In a previous article the question of the liability of a principal or master for the wilful or malicious acts of his servant or agent, was considered.<sup>1</sup> It is proposed here to consider the liability of a principal or master for the penal or criminal acts of his agent or servant. This will involve two aspects: (a) The *civil* liability of the principal or master, and (b) His *penal* or *criminal* liability.

### a. CIVIL LIABILITY.

§ 2. PRINCIPAL'S CIVIL LIABILITY FOR AGENT'S CRIMINAL OR PENAL ACT.—The principal's civil liability for his agent's criminal or penal act rests upon the same considerations, and is, in many aspects, of the same nature, as his liability for his agent's torts generally. The performance of an act *as a crime*, unless expressly directed, or immediately participated in by the principal, could rarely be deemed to be within the scope of the agent's authority, but inasmuch as most acts which are punished as crimes have also a side from which they may be regarded merely as torts, it may often happen that the same act, which may from one standpoint be regarded and punished as a crime, may, from another, be regarded as a mere private tort; and if from this standpoint the act would impose liability upon the principal as an act done within the scope of the employment, the fact that it might from another standpoint be treated and punished as a crime would not affect the result. This is still more clear in the cases in which the act would not ordinarily be regarded as criminal even though in the particular case it may be prohibited under a penalty.

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<sup>1</sup> See 9 Michigan Law Review, 87, 181.

Thus, as an illustration of that class of cases in which a criminal intent is necessary to constitute the offense, the malicious assault of a conductor upon a railway passenger may be adverted to. Here, as has been seen, the principal is liable in a civil action by the person injured, for damages occasioned by the trespass. At the same time the assault is an offense against the state, which the state may and does punish as such. As respects the individual injured the act is a tort; as respects the state, it is a crime.<sup>2</sup>

Many cases have already been referred to, when dealing with the question of the master's liability for the wanton or wilful acts of his servant, and it is not necessary to repeat that discussion here. As was pointed out in a leading English case,<sup>3</sup> "There is no distinction in this respect between the effects of a tortious and criminal act, provided such acts are done by the servant in the conduct of his employment and in the interests of his master."

§ 3. CIVIL LIABILITY FOR STATUTORY TORTS COMMITTED IN COURSE OF EMPLOYMENT.—But there is also another class of cases where the liability is not dependent upon the intent, but upon the question of the infraction. These are usually the subject of express statutory prohibition, based often upon the police power of the state, and making that, which might under other circumstances be a thing innocent or indifferent in itself, a wrong prohibited under a penalty,—a *malum prohibitum* as distinguished from a *malum in se*. Of this class, the now common legislation providing for the recovery of penalties or damages for the prohibited sale of intoxicating liquors, furnishes a well-recognized illustration. In such cases, so far as the forbidden act can be regarded as a mere statutory tort, or the penalty prescribed regarded as damages, a civil action may be maintained against the principal.

Thus in an action to recover as damages a penalty fixed by law, alleged to be due by reason of the unlawful sale of intoxicating liquors by an agent, the Supreme Court of Massachusetts said: "The action is brought under a statute which makes that a tort

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<sup>2</sup>In *Dyer v. Munday* [1895] 1 Q. B. 742, the defendants' servant, while acting in the scope of his employment, namely, in endeavoring to retake property sold by his master on the instalment plan, and on which the instalments were in arrears, had committed an assault on plaintiff. For this he had been arrested, convicted, fined, and paid the fine. Then this action was commenced against the master to recover damages. Held, that the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the defendant for the act of his servant, and that the release of the servant, under 24 and 25 Vict. c. 100, s. 45, from civil proceedings for the assault, did not release the defendant from liability.

See also that the master is responsible for acts that might also have been punished criminally: *Marion v. C. R. I. & P. Ry. Co.*, 64 Iowa 568, 21 N. W. 86.

<sup>3</sup>*Dyer v. Munday*, [1895] 1 Q. B. 742.

which was not so before, and provides for the recovery of damages against the tort-feasor. The tort consists in selling intoxicating liquor to one who has the habit of using it to excess, after notice of his habit and a request from his wife not to sell such liquor to him. The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment."<sup>4</sup> And the same result would, within the principles already considered, undoubtedly follow though the act was willful.<sup>5</sup>

§ 4. NO CIVIL LIABILITY FOR ACTS NOT IN COURSE OF EMPLOYMENT.—But here, as in other cases, the principal is liable only while the agent was acting within the scope of his employment. If the

<sup>4</sup> *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376. See also *Worley v. Spurgeon*, 38 Iowa 465; *Peterson v. Knoble*, 35 Wis. 85; *Smith v. Reynolds*, 8 Hun (N. Y.) 130; *Keedy v. Howe*, 72 Ill. 133; *Walker v. Dailey*, 101 Ill. App. 575; *Kennedy Bros. v. Sullivan*, 136 Ill. 94, 26 N. E. 382; *Skinner v. Hughes*, 13 Mo. 440; *Manning v. Morris*, 28 Tex. Civ. App. 502, 67 S. W. 906; *Boos v. State*, 11 Ind. App. 257; *Gullikson v. Gjordur*, 82 Mich. 503, 46 N. W. 723; *Austin v. Davis*, 7 Ont. App. 478; *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67. And so where a servant unlawfully sold to a minor. *Comm. v. Stevens*, 155 Mass. 291, 29 N. E. 508.

See the same principle applied under a penal statute against the employment of slaves: *Buel v. N. Y. Steamer*, 17 La. 541.

In *Bryan v. Adler*, 97 Wis. 124, 72 N. W. 368, 65 Am. St. R. 99, the proprietor of a public restaurant was held liable for statutory damages because one of his waiters refused to serve a colored man, in violation of the statute, although the refusal was willful, in direct violation of the principal's orders, and neither approved at the time nor subsequently ratified.

In *City of Hammond v. New York, etc. Ry. Co.*, 5 Ind. App. 526, 31 N. E. 817 (a civil action) it was held that the defendant was liable for a statutory penalty, as in an action for damages, for the act of one of its locomotive engineers in exceeding a speed limitation.

In *Zellers v. White*, 208 Ill. 518, 70 N. E. 669, it was held that in an action, under a statute, to recover money lost in gambling, the action may be either against the proprietor of the gambling-house or against the employee who played for the house.

See also *Gulf, etc. Ry. Co. v. Reed*, 80 Tex. 362, 15 S. W. 1105, 26 Am. St. Rep. 749, an action under a statute for polluting streams.

In a great variety of cases, the violation of statutes and ordinances designed to promote the public safety is held to be negligence. See 2 *Thompson on Negligence*, § 1394 et seq.

<sup>5</sup> *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 475; *Keedy v. Howe*, supra. His assent must be shown. *Commonwealth v. Putnam*, supra.

A druggist is not criminally liable for a sale by his clerk without his knowledge and in violation of his instruction, of liquor to be used for other than a medicinal purpose: *State v. Baker*, 71 Mo. 475; *State v. McGrath*, 73 Mo. 181.

agent has gone outside of that, to commit a criminal act, the principal is not liable. Thus where an armed watchman, employed by the owners of a brewery to guard their premises and preserve the peace, pursued a person, who had been acting on the premises in a drunken and disorderly manner, and, while the latter was retreating and was off of the premises, killed him, it was held that the proprietors of the brewery were not liable. Without determining whether the principals would be liable in any event for such an act, the court held that the fact that the deceased was retreating from the brewery at the time he was shot, showed conclusively that the shot was not fired either in the defense of the brewery or in the line of the watchman's duty.<sup>6</sup> Other cases are cited in the note.<sup>7</sup>

§ 5. USURY.—The question of how far the principal is to be subjected to the penalties imposed upon usury, where the loan was made by an agent, is one of considerable difficulty owing to the varying forms of the statutes upon the subject, and to the marked tendency of legislatures in many states to make that usury which would not be so, in form at least, under ordinary statutes. In order

<sup>6</sup> *Golden v. Newbrand*, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257.

See also *Oxford v. Peter*, 28 Ill. 434; *Candiff v. Louisville, etc. Ry. Co.*, 42 La. Ann. 477, 7 So. 601.

<sup>7</sup> The defendants were decorators at work on the building in which plaintiff lived. The defendants employed two irresponsible workmen, and in the course of the work, defendants directed these workmen to enter plaintiff's room through a window. While therein the workmen stole a ring. It was held that defendants were not liable for the theft, in an action of trespass to recover the value of the ring. *Searle v. Parke*, 68 N. H. 311, 34 Atl. 744.

But where a district telegraph company undertook to protect plaintiff's premises from burglars and employed one Burg as watchman, Burg committed a theft from the premises, and the court held that defendant was liable civilly therefor:

In *Cheshire v. Bailey* [1905] 1 K. B. 237, the defendants were job-masters who furnished the plaintiff a brougham and coachman by the week. The defendant was informed that a trustworthy coachman would be required as plaintiff was carrying with him valuable silver samples. The defendant used due care in selecting a coachman, but the coachman conspired with others and robbed the plaintiff of his samples. The defendant was held to be not liable, for the act complained of was not within the servant's authority.

In *Jackson v. St. Louis, etc. Ry. Co.*, 87 Mo. 422, 56 Am. Rep. 460, the conductor of a train accepted and transported a man against his will, and against the protests of his family. The court held that since the defendant had not authorized or sanctioned the act of the conductor, it could not be held liable for the damages accruing from such act.

In *Merchants Nat. Bank v. Guilmartin*, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322, it was held that a bank was not liable, if not at fault for the theft by its cashier of special deposits.

In *Satterlee v. Groat*, 1 Wend. (N. Y.) 272, a master was held not liable for theft by servant who without authority and against master's commands takes property and appropriates it to his own use.

In *Fay v. Slaughter*, 194 Ill. 157, 62 N. E. 592, 88 Am. St. R. 148, 56 L. R. A. 564, a principal was held not liable, where not personally at fault, for the forgery and theft of certificates of stock and the embezzlement of their proceeds.

to affect a principal with the consequences of usury exacted by one said to be his agent, it must first appear that the alleged agent was really such. The mere fact that the borrower may have paid more than legal interest to obtain the money does not necessarily present a case of usury under the ordinary statute.<sup>8</sup> If the alleged agent was not the agent of the lender, but of the borrower, commissions or fees charged by the borrower's agent for his services in finding a lender cannot be imputed to the lender in order to make the loan usurious.<sup>9</sup> If the borrower has employed a broker, who is not the agent of the lender, to procure a loan for him, the commissions paid to the broker cannot be charged against the lender to make the loan usurious.<sup>10</sup> In order to affect the lender, the agent must be the lender's agent, and while of course the courts will look behind devices or subterfuges designed to conceal the actual relation,<sup>11</sup> it must still remain true that the lender can be charged with the penalties of usury only when he made the loan in person or through his agent.<sup>12</sup>

<sup>8</sup> In *Ridgway v. Davenport*, 37 Wash. 134, 79 Pac. 606, it was held that, under the broad terms of the peculiar usury statute in force, it was immaterial that the agent did not act within the scope of his authority. See, also, in *Missouri*, *Western Storage Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917.

<sup>9</sup> Agent of borrower. *Dagnall v. Wigley*, 11 East 43; *Dryfus v. Burnes*, 53 Fed. 410; *Holt v. Kirby*, 57 Ark. 251, 21 S. W. 432; *Martin v. Adams*, 66 Ark. 10, 48 S. W. 494; *Pottle v. Lowe*, 99 Ga. 576, 27 S. E. 145, 59 Am. St. Rep. 256; *West v. Equitable Mfg. Co.*, 112 Ga. 377, 37 S. E. 357, 81 Am. St. Rep. 59; *Polk Co. Savings Bank v. Harding*, 113 Iowa 511, 85 N. W. 775; *Smith v. Wolf*, 55 Iowa 555, 8 N. W. 429; *Secor v. Patterson*, 114 Mich. 37, 72 N. W. 9; *Thomas v. Miller*, 39 Minn. 339, 40 N. W. 358; *Davis v. Sloman*, 27 Neb. 877, 44 N. W. 41; *Leipziger v. Saun*, 64 N. J. Eq. 37, 53 Atl. 1; *Coster v. Dilworth*, 8 Cow. (N. Y.) 299; *Crane v. Hubbel*, 7 Paige (N. Y.) 413; *Guardian Mut. L. Ins. Co. v. Kashaw*, 66 N. Y. 544; *Terminal Bank v. Dubroff*, 66 Misc. 100, 120 N. Y. Supp. 609; *New England Mfg. Security Co. v. Baxley*, 44 S. C. 81, 21 S. E. 444; *Fay v. Lovejoy*, 20 Wis. 407; *Ottile v. Waechter*, 33 Wis. 255.

Where the intermediate party obtains the money on his own credit only or by adding his credit, and is paid for doing so, there is no usury: In re *Holmes Lumber Co.*, 189 Fed. 178; *Brown v. Harrison*, 17 Ala. 779; *Jones v. Norton*, 9 Ga. App. 333, 71 S. E. 687.

<sup>10</sup> *Cox v. Mass. Mut. Ins. Co.*, 113 Ill. 382; *Haldeman v. Mass Mut. Ins. Co.*, 120 Ill. 390, 11 N. E. 526; *Secor v. Patterson*, 114 Mich. 37, 72 N. W. 9; *Thomas v. Miller*, 39 Minn. 339, 40 N. W. 358.

<sup>11</sup> *Lukens v. Hazlett*, 37 Minn. 441, 35 N. W. 265; *Sherwood v. Roundtree*, 32 Fed. 113; *France v. Munro*, 138 Iowa 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391; *McFarland v. Carr*, 16 Wis. 259. See *Hare v. Winterer*, 64 Neb. 551, 90 N. W. 544. At the same time, as is pointed out in *Merck v. American Mortg. Co.*, 79 Ga. 213, 7 S. E. 265, "Implications of agency are easily overstrained, misapplied or otherwise abused."

The borrower may pay an attorney for services rendered in the way of examining or clearing up his title, removing incumbrances, etc., without tainting the transaction with usury. Even though the attorney be one selected by the lender. But the courts will inquire into the transaction, and if it is but a shield to cover what is really a bonus for the loan, the transaction will be held usurious. *Sanders v. Nicolson*, 101 Ga. 739, 28 S. E. 976; *Gannon v. Scottish American Mfg. Co.*, 106 Ga. 510, 32 S. E. 591.

<sup>12</sup> In *Scruggs v. Scottish Mfg. Co.*, 54 Ark. 566, 16 S. W. 563, a loan company made a loan and took a note bearing eight per cent interest and a mortgage securing

It must also appear, as in other cases, that what the agent has done was within the scope of his authority, or has subsequently been ratified. If the principal leaves the whole matter in charge of a general agent, and the agent exacts commissions or allowances which make the rate usurious, it is held in many cases that the principal may be chargeable with it.<sup>13</sup> If the principal confides the loaning of the money to the agent, but expressly or by implication requires the agent to get compensation, for the services which he thus renders to the lender, out of the charges which he makes to the borrower, and this charge makes the rate usurious, it is held in many cases that the lender may be held responsible, even though he receives no portion of such commissions.<sup>14</sup> *A fortiori* would this be true where the principal requires the agent to divide the commissions with him.<sup>15</sup>

§ 6. ———. But where an agent is authorized to loan for legal interest only, and, without the knowledge or consent of the principal, exacts from the borrower a usurious interest for the agent's

same. Its agent, by its authority, took a commission note of two per cent of the principal, and a mortgage securing same. The agent, without the authority of the company, appointed a sub-agent who exacted a commission for himself, which rendered the loan usurious. In a suit to foreclose the mortgages it was held that neither was affected by the usury, as it had been exacted by one who was not the agent of the lender.

<sup>13</sup> *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898.

See *Hall v. Maudlin*, 58 Minn. 137, 59 N. W. 985, 49 Am. St. Rep. 492; *Horkan v. Nesbitt*, 58 Minn. 487, 60 N. W. 132; *Western Storage Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917; *Austin v. Harrington*, 28 Vt. 130; *Rogers v. Buckingham*, 33 Conn. 81; *Meers v. Stevens*, 106 Ill. 549; *France v. Munro*, 138 Iowa 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391.

But so far as any of these cases hold that an agent having general authority to loan money, but only at lawful rates, affects his principal by demanding usurious rates, they are contrary to the weight of authority, as will be seen in the following section.

<sup>14</sup> *Thompson v. Ingram*, 51 Ark. 546, 11 S. W. 881; *Vahlberg v. Keaton*, 51 Ark. 534, 11 S. W. 878; *Avery v. Creigh*, 35 Minn. 456, 29 N. W. 154 (distinguishing *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734); *Kemmitt v. Adamson*, 44 Minn. 121, 46 N. W. 327; *Hall v. Maudlin*, 58 Minn. 137, 59 N. W. 985; *Horkan v. Nesbitt*, 58 Minn. 487, 60 N. W. 132; *Carpenter v. Lamphere*, 70 Minn. 542, 73 N. W. 514; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786; *Siegelman v. Jones*, 103 Mo. App. 172, 77 S. W. 307; *France v. Munro*, 138 Iowa 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391; *New England Mtg. Security Co. v. Gay*, 33 Fed. 636; *Hare v. Winterer*, 64 Neb. 551, 90 N. W. 544; *Meers v. Stevens*, 11 Ill. App. 138 (affirmed in 106 Ill. 549); *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Ammondson v. Ryan*, 111 Ill. 506; *Texas Loan Agency v. Hunter*, 13 Tex. Civ. App. 402, 35 S. W. 399.

See also *American Mtg. Co. v. Woodward*, 83 S. Car. 521, 65 S. E. 739.

The fact that the principal knows that he is paying his agent nothing for his services is material upon the question whether he did not expect the agent to exact compensation from the borrower: *Western Storage Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917; *Little v. Hooker Steam Pump Co.*, 122 Mo. App. 620, 100 S. W. 561, 228 Mo. 673, 129 S. W. 221. To same effect: *Hare v. Winterer*, *supra*.

<sup>15</sup> *Pottle v. Lowe*, 99 Ga. 576, 27 S. E. 145, 59 Am. St. Rep. 246.

own private benefit, and the principal does nothing subsequently to ratify the act, it is held in many cases, largely influenced by the New York decisions, that the usury will not affect the principal.<sup>16</sup> These cases proceed upon the theory that the employment of the agent in the particular case is to accomplish the result by legal methods only, and that therefore the principal cannot be held responsible for an usurious exaction by his agent unless he has authorized or ratified it. As has been seen in many cases, however, the principal is often held responsible in other fields for the illegal acts of his agent, committed while acting within the general scope of his authority, even though it may be entirely clear that the principal intended that lawful methods only should be adopted, and some cases have applied that doctrine to this case.<sup>17</sup>

§ 7. ———. LIABILITY BY RATIFICATION.—The question whether the principal, by subsequently accepting the benefits of the loan, thereby ratifies the usurious exaction made by his agent is one over

<sup>16</sup> *Rogers v. Buckingham*, 33 Conn. 81; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442; *Boardman v. Taylor*, 66 Ga. 638; *McLean v. Camak*, 97 Ga. 804, 25 S. E. 493; *Cox v. Life Ins. Co.*, 113 Ill. 382; *Chicago Fire Proofing Co. v. Park Nat. Bank*, 145 Ill. 481, 32 N. E. 534; *Boylston v. Bain*, 90 Ill. 283; *Mass. Mut. Life Ins. Co. v. Boggs*, 121 Ill. 119, 13 N. E. 550; *Richards v. Purdy*, 90 Iowa 502, 58 N. W. 886, 48 Am. St. Rep. 458; *Greenfield v. Monaghan*, 85 Iowa 211, 52 N. W. 193; *Gokey v. Knapp*, 44 Iowa 32; *Bingham v. Myers*, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140; *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734; *Jordan v. Humphrey*, 31 Minn. 495, 18 N. W. 450; *Stein v. Swensen*, 44 Minn. 218, 46 N. W. 360; *Mackey v. Winkler*, 35 Minn. 513, 29 N. W. 337 (but see *Robinson v. Blaker*, 85 Minn. 242, 88 N. W. 845); *Muir v. Newark Savings Instl.*, 1 C. E. Green (N. J.) Eq. 537; *Manning v. Young*, 28 N. J. Eq. 568; *Gray v. Van Blarcom*, 29 Id. 454; *Nichols v. Osborn*, 41 Id. 92, 3 Atl. 155; *Lane v. Washington L. I. Co.*, 46 Id. 316, 19 Atl. 617; *Forbes v. Baaden*, 31 Id. 381; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Bell v. Day*, 32 N. Y. 165; *Fellows v. Longyor*, 91 N. Y. 330; *Wyck v. Watters*, 81 N. Y. 352; *Baldwin v. Doying*, 114 N. Y. 452, 21 N. E. 1007; *Lyon v. Simpson*, 12 Daly (N. Y.) 58; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379; *Silverman v. Katz*, 120 N. Y. Supp. 790; *Barger v. Taylor*, 30 Ore. 228, 42 Pac. 615, 47 Pac. 618; *Williams v. Bryan*, 68 Tex. 593, 5 S. W. 401; *Baxter v. Buck*, 10 Vt. 548; *Franzen v. Hammond*, 136 Wis. 239, 116 N. W. 169, 19 L. R. A. (N. S.) 399; *Whaley v. American, etc. Co.*, 74 Fed. 73; *Call v. Palmer*, 116 U. S. 98, 6 S. Ct. 301, 27 L. Ed. 61; *Eddy v. Badger*, 8 Biss. (U. S. C. C.) 238, Fed. Cas. No. 4276.

<sup>17</sup> Thus in *Philo v. Butterfield*, 3 Neb. 256, the court says: "It is a settled rule of law which will not be questioned, that in all cases where a person employs another as his agent to loan money for him, and places the funds in the hands of the agent for such purposes, the principal is bound by the acts of his agent; and if the agent charges the borrower of such money unlawful interest, or even demands and receives from the borrower a bonus for such loan, and appropriates it to his own individual use, either with or without the knowledge of his principal, the principal is affected by the act of his agent," and this doctrine is reaffirmed in later cases: *Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487; *Cheney v. Woodruff*, 6 Neb. 151; *Olmstead v. New England Mortgage Security Co.*, 11 Neb. 487; *Cheney v. Eberhardt*, 8 Neb. 423; *Anderson v. Vallery*, 39 Neb. 626, 58 N. W. 191; *Hare v. Hooper*, 56 Neb. 480, 76 N. W. 1055; *Hare v. Winterer*, 64 Neb. 551, 90 N. W. 544; *Griswold v. Dugane*, 148 Iowa 504, 127 N. W. 664, seems to go upon this theory. *Robinson v. Blaker*, 85 Minn. 242, 88 N. W. 845, seems to be in the same line, though the theory of the case is not clear.



which the authorities are very much in conflict. As has been seen in an earlier chapter, in order to establish a ratification it is generally held essential that the agent in performing the act in question purported to act as agent for the person whose ratification is in question. It is also ordinarily essential that the person sought to be charged by the ratification, must at the time of the alleged ratification have had full knowledge of all the material facts. Applying the rule first referred to, it is held in a number of cases that if the agent, without the knowledge or consent of his principal, exacts the sum alleged to make the loan usurious, in his own name and on his own account, the conditions for ratification are not present, and the fact that the principal takes the benefit and seeks to enforce the contract of borrowing made as authorized, even though he may then have learned of the unauthorized exaction, does not amount to a ratification. This doctrine was early established in the Court of Appeals, in New York, and though in the first cases there was very vigorous dissent, it seems to have become firmly established there.<sup>18</sup> The same doctrine has also been adopted in other states.<sup>19</sup>

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<sup>18</sup> The leading case is *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137. There Baldwin, desiring a loan of \$400 upon his note with sureties, applied to one M to see if he could procure it for him and agreed to compensate him for his services. M applied to W who was the general loan agent of the plaintiff who resided in New Jersey. W said he had the money to loan but preferred to loan upon bonds and mortgages because in that event he could get a fee for drawing the papers and investigating the title. M thereupon said to W that if W would make the loan in this case he should have \$25, as an attorney fee. W consented and made the loan and paid the \$400 to M who thereupon turned it over to defendant. Defendant asked M how much his charges were for procuring the money and M replied \$40, which Baldwin paid. Of this M paid W \$25. The note was drawn at the highest rate of lawful interest. Plaintiff did not know that W had received the \$25 until she came to enforce the payment of the note when usury was interposed as a defense. The majority of the court held that there was no authority to demand the \$25 and that the plaintiff by seeking to enforce the note, did not ratify it. The \$25 was not demanded by W as the plaintiff's agent but on his own personal account, and "when the agent did not assume to act for another but acted for himself and his own benefit, a subsequent ratification does not bind the principal." Comstock, C. J., delivered a dissenting opinion, with which two Judges concurred. His contention was that the whole matter constituted but one transaction. That the agent said in substance: "I will lend you the \$400 if besides the legal interest which you pay to my principal, you will pay me the sum of \$25." That this was all one entire contract and that the plaintiff, if she adopted any of it, must assume responsibility for the whole.

A substantially similar case was *Bell v. Day*, 32 N. Y. 165, where *Condit v. Baldwin* was followed by a divided court. Denio, J., who had dissented in *Condit v. Baldwin*, now followed it on the ground of stare decisis.

Other New York cases are: *Estewez v. Purdy*, 66 N. Y. 446; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379.

<sup>19</sup> See also *Call v. Palmer*, 116 U. S. 98, 6 S. Ct. 301, 29 L. Ed. 559; *Hall v. Maudlin*, 58 Minn. 137, 59 N. W. 985; *Richards v. Bippus*, 18 App. (D. C.) 293; *Franzen v. Hammond*, 136 Wis. 239, 116 N. W. 169, 19 L. R. A. (N. S.) 399.

In *Hall v. Maudlin*, 58 Minn. 137, 59 N. W. 985, the court said: "It perhaps would

§ 8. — Where however, a certain amount is loaned, but the note or other security is taken for a larger amount, to include the amount of the agent's commission, the principal's action upon the note or other security to recover the amount thereof, after he knew that the commission had been so included, has been held even in New York to be such a ratification or adoption as to make the principal responsible.<sup>20</sup> Where the added amount was exacted for the principal's benefit and not for the agent's, the case is one which admits of ratification.<sup>21</sup> So where the agent takes the security in his

have been more in harmony with the principles of the law of agency, and have more effectually prevented evasions of the usury laws, had the courts, at the start, adopted the views of Comstock, J., in his dissenting opinion in *Condit v. Baldwin*, 21 N. Y. 219, and held that where an agent exacts more than the legal rate of interest the contract is an entirety, and if the principal adopts it he must adopt it as a whole, with all its vices; that if the agent has exceeded his authority the principal is not bound by it, but may repudiate the whole, and recover back his money, but that the principal must either disavow the dealing, or take all the consequences."

In *Nye v. Swan*, 49 Minn. 431, 52 N. W. 39, an agent authorized to purchase land, loaned the plaintiff, the owner of the land, the money which had been intrusted with him for the purpose of purchasing it. This loan was made without the knowledge of his principal, and was made at a usurious rate of interest, and was secured by a deed of conveyance, absolute in form, but intended as security for the loan. The plaintiff brought this action to cancel the deed; but it was held that the defendant could avail himself of it as security for the money actually loaned and legal interest, without thereby ratifying the act of the agent in exacting usury. Compare *Leipzigiger v. Saun*, 64 N. J. Eq. 37, 53 Atl. 1.

See also *Jordan v. Humphrey*, 31 Minn. 495, 18 N. W. 450.

<sup>20</sup> Thus in *Bliven v. Lydecker*, 130 N. Y. 102, 28 N. E. 625, it is said, after referring to *Condit v. Baldwin*, supra, "But where, as in this case, an agent authorized to lend, but not to take usury, lends the money of his principal at a usurious rate and both the sum lent and the usury exacted are secured by the same instrument, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation accepts, and has the benefit of, he adopts, ratifies, and is bound by the act of his agent the same as if it had been done by himself." Followed in *Schwarz v. Sweitzer*, 202 N. Y. 8, 94 N. E. 1090.

In *Trimble v. Thorson*, 80 Iowa 246, 45 N. W. 742, it is said: "If the agent, without authority, professes to take a bonus in the name of his principal which is in excess of the legal rate of interest, and the principal accepts the benefits of the agency, he makes the illegal act his own."

In *Richards v. Bippus*, 18 App. (D. C.) 293, the plaintiff entrusted \$300 to her husband to loan for her. This the husband did, and the loan obtained the highest legal interest. Incorporated in the note taken for the principal sum, was \$50 the husband had exacted from the borrower, the defendant, as a commission, and this amount the plaintiff agreed to pay to her husband when collected. The court held that she could not recover on this note, as it included the commission, and thereby gave notice to the plaintiff that her agent had exacted a bonus, which, being thus taken by him with the knowledge of the plaintiff, rendered the whole note usurious. See also *Lewis v. Willoughby*, 43 Minn. 307, 45 N. W. 439.

<sup>21</sup> In *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898, the plaintiffs were partners in the banking business, and the entire management of the business had been intrusted to a cashier, with instructions to him not to charge more than the legal rate for the use of the money. In the transaction in question, however, he exacted usurious interest, on the account and for the benefit of the plaintiffs, and included such interest in the note, taken in the plaintiffs' name. The plaintiffs learned of this before they brought

own name, as principal, upon usurious interest, the borrower supposing him to be the principal, the real principal, if he seeks to avail himself of the security, will be bound by the usury.<sup>22</sup>

b. CRIMINAL OR PENAL LIABILITY.

§ 9. PRINCIPAL'S CRIMINAL LIABILITY FOR AGENT'S CRIMINAL OR PENAL ACTS.—But it is not only in a civil action that the principal may be made liable for the criminal or penal acts of his agent; he may be held criminally liable also under certain circumstances. Thus the principal is unquestionably so liable, in greater or less degree, where he is present and co-operates with the agent or encourages, aids or abets him; or where, though not present, he expressly or impliedly commands, encourages or incites the doing of the act.<sup>23</sup> He would be so liable if he directed the doing of an act which was in itself a crime, or which necessarily involved or required the commission of a crime.<sup>24</sup> But as a general rule he cannot be held criminally liable for the act of his agent committed without his knowledge or consent.<sup>25</sup>

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this suit on the note. The court held that the notes were usurious in the hands of the principal and that this action cannot be maintained.

To same effect, see *McNeely v. Ford*, 103 Iowa 508, 72 N. W. 672, 64 Am. St. Rep. 195.

<sup>22</sup> *Erickson v. Bell*, 53 Iowa 627, 6 N. W. 19, 36 Am. Rep. 246; *Glick v. Bramer*, 78 Iowa 568, 43 N. W. 531.

<sup>23</sup> See *Bishop on Crim. Law*, § 649.

<sup>24</sup> See *Bishop on Crim. Law*, §§ 649-651; *State v. Smith*, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802.

Where an employer expressly authorizes or co-operates in an illegal act on the part of his clerk, they are both guilty. *Lewis v. State*, 21 Ark. 209.

Where the principal is carrying on the liquor business without a license, with the aid of clerks and agents, he is responsible for sales made by the agent in the ordinary courses of the business: *State v. Skinner*, 34 Kan. 256, 8 Pac. 420; *Loeb v. State*, 6 Ga. App. 23, 64 S. E. 338.

Where a proprietor is found in a prohibition state with a bar, a Federal liquor license, and liquor on hand, he is liable for a sale made by a bartender without resort to doctrine of agency on the ground that he aided and abetted in the crime whether present or not: *Cox v. State*, 3 Okl. Crim. App. 129, 104 Pac. 1074.

Where there was an indictment for retailing liquor without a license, it was held that the crime was established by proof of sales made by a wife with the knowledge and assent of the husband: *United States v. Burch*, Fed. Cases, No. 14682.

So where the proof showed a sale made by a negro porter acting in conjunction with defendant: *Kittrell v. State*, 89 Miss. 666, 42 So. 609.

So where there was evidence that the principal intended the sales to be made, though he gave instructions not to make them: *Com. v. Coughlin*, 182 Mass. 558, 66 N. E. 207.

The master is responsible criminally for a sale made by his command or authority: *State v. Falk*, 51 Kan. 298, 32 Pac. 1122; *State v. Skinner*, 34 Kan. 256, 8 Pac. 420; *State v. Wiggins*, 20 N. H. 449; *Martin v. State*, 30 Neb. 507, 46 N. W. 621; *Collins v. State*, 34 Tex. Cr. 95, 29 S. W. 274.

<sup>25</sup> *Commonwealth v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Commonwealth v. Putnam*, 4 Gray (Mass.) 16; *Somerset v. Hart*, 12 Q. B. Div. 360; *Patterson v. State*, 21 Ala. 571; *State v. Society for Prevention of Cruelty*, 47 N. J. L. 237;

§ 10. PENAL ACTS.—There is, however, a class of cases, as has been seen, where, by statutory enactment, the doing of a certain act otherwise perhaps innocent or indifferent, or at the most not criminal, is expressly prohibited under a penalty. Of this class are many of the statutes in the nature of police regulations which impose penalties for their violation, often irrespective of the question of the intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation exceedingly improbable, if not impossible.<sup>26</sup> Similar to these stat-

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*Gaiocchio v. State*, 9 Tex. Cr. App. 387; *People v. Parks*, 49 Mich. 333, 13 N. W. 618.

A principal cannot be arrested under a statute permitting arrest "where defendant has been guilty of a fraud in contracting the debts" for frauds committed without his knowledge or authority by his agent in purchasing goods for him: *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186. See also *Jaffray v. Jennings*, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645.

Where the statutory offense consists in keeping intoxicating liquor with intent to sell contrary to law, the guilty intent of a servant who sells in violation of law and in defiance of the instructions of his master, cannot be imputed to the master: *State v. Hayes*, 67 Iowa 27, 24 N. W. 575.

<sup>26</sup> In *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 52 Am. Rep. 270, *Cooley, C. J.*, says: "I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes, which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus, in Massachusetts, a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating; *Commonwealth v. Boynton*, 2 Allen 160; and of the offense of selling adulterated milk, though he was ignorant of its being adulterated; *Commonwealth v. Farren*, 9 Allen 489; *Commonwealth v. Holbrook*, 10 Allen, 100; *Commonwealth v. Waite*, 11 Allen 264; *Commonwealth v. Smith*, 103 Mass. 444. See *State v. Smith*, 10 R. I. 258. In Missouri a magistrate may be liable to the penalty of performing the marriage ceremony for minors without the consent of parents or guardians, though he may suppose them to be of the proper age. *Beckham v. Nacke*, 56 Mo. 546. When the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. *Commonwealth v. Raymond*, 97 Mass. 567. See *The King v. Dixon*, 3 M. & S. 11. In *State v. Steamboat Co.*, 13 Md. 181, a common carrier was held liable to the statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is *Queen v. Bishop*, 5 Q. B. Div. 259. If one's business is the sale of liquor, a sale made by his agent in violation of the law is prima facie evidence of his authority. *Commonwealth v. Nichols*, 10 Met. 259; and in Illinois the principal is held liable though the sale by his agent was in violation of instructions. *Noecker v. People*, 91 Ill. 494. In Connecticut it has been held no defense, in a prosecution for selling intoxicating liquor to a common drunkard, that the seller did not know him to be such. *Barnes v. State*, 19 Conn. 398. It was held in *Faulks v. People*, 39 Mich. 200, under a former statute, that one should not be convicted of the offense of selling liquors to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril. There are many cases in which it has been held, under similar statutes, that it was no defense that the seller did not know or suppose the purchaser to be a minor. —*State v. Hartfiel*, 24 Wis.

utes were many of the well settled doctrines of the common law, as for example, the law of libels and nuisances. As to these, it is often said to be the duty of the principal to see to it that such statutes are not violated by his agents in the course of their employment. For what they may do outside of the employment, he is, of course, not responsible;<sup>27</sup> but if the prohibited act be done by them in the course of their employment, he must respond. This is particularly true in those cases where the principal confides, in a greater or lesser degree, the conduct and management of his business to his agents. He selects his own agents, it is argued, and has the power, as well as the duty, to control them; and if, by reason of his lack of oversight or their own carelessness or unfaithfulness, the prohibited act is done, he should be held accountable. He therefore cannot relieve himself from responsibility for the manner in which his purposes are carried out, by turning over the management of his business to agents.

§ II. ———. ILLUSTRATIONS.—Instances of these principles may be found in the case of the publication of libels, the smuggling of goods, the sale of unwholesome or adulterated food, the erection or continuance of nuisances, the transportation of forbidden goods, the transaction of business without a license, and the like. Frequent

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60; *McCutcheon v. People*, 69 Ill. 601; *Farmer v. People*, 77 Ill. 323; *Ulrich v. Commonwealth*, 6 Bush. 400; *State v. Cain*, 9 W. Va. 559; *Commonwealth v. Emmons*, 98 Mass. 6; *Redmond v. State*, 36 Ark. 58; and in *Commonwealth v. Finnegan*, 124 Mass. 324, the seller was held liable, though the minor had deceived him by falsely pretending he was sent for the liquor by another person. So a person has been held liable to a penalty for keeping naphtha for sale under an assumed name, without guilty knowledge, the statute not making such knowledge an ingredient of the offense. *Commonwealth v. Wentworth*, 118 Mass. 441. Other cases might be cited, and there is nothing anomalous in these. A person may be criminally liable for adultery with a woman he did not know to be married. *Fox v. State*, 3 Tex. App. 329; or for carnal knowledge of a female under ten years of age though he believed her to be older. *Queen v. Prince*, L. R. 2 Cr. Cas. 154; *State v. Newton*, 44 Ia. 45. And other similar cases might be instanced.<sup>27</sup>

See also *City of Spokane v. Patterson*, 46 Wash. 93, 89 Pac. 402, 123 Am. St. Rep. 921; *State v. Constantine*, 43 Wash. 102, 86 Pac. 384, 117 Am. St. Rep. 1043; *State v. Kittelle*, 110 N. Car. 560, 15 S. E. 103, 28 Am. St. Rep. 698, 15 L. R. A. 694; *City of Paducah v. Jones*, 126 Ky. 809, 104 S. W. 971; *Redgate v. Haynes*, 1 Q. B. Div. 89.

As to liability of principal for statutory penalty under an automobile act, see *Nicholas v. Kelley*, 159 Mo. App. 20, 139 S. W. 248.

<sup>27</sup> Where a proprietor closed up his saloon on Sunday and went on a visit for the day leaving a colored porter or caretaker in charge of the premises consisting of a saloon and residence, and where the porter had no authority to sell liquor at all, but was merely employed to watch the place, the proprietor was held not liable for a sale made by this servant. *Ollre v. State*, 57 Tex. Cr. App. 520, 123 S. W. 1116.

Where a principal had four bottles of beer stored for his own use at a soft drink refreshment stand and had not given his agent express or implied authority to sell them, he was not liable for sale of beer made by the agent: *Partridge v. State*, 88 Ark. 267, 114 S. W. 215.

illustrations are also found in the statutes regulating the traffic in intoxicating liquors.

Thus booksellers and publishers have been held criminally liable for publications, issued from their establishment, in the regular course of business, although the particular act of sale or publication was done without their knowledge;<sup>28</sup> a trader has been held liable to a penalty for the illegal act of his agent in harboring and concealing smuggled goods, although the principal was absent at the time;<sup>29</sup> a baker has been held liable to a criminal charge for selling adulterated bread, although the adulteration was put in by his servant, and although he did not know that it was used in improper quantities;<sup>30</sup> the directors of a gas company have been held liable to an indictment for a nuisance created by their superintendent, acting under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and although it was a departure from the original and understood method, which they supposed him to be following;<sup>31</sup> a saloonkeeper has been held criminally responsible for not keeping his saloon closed upon Sunday, though it appeared that it was opened by his clerk, without his knowledge or consent, but while he was on the premises;<sup>32</sup> for

<sup>28</sup> *Rex v. Walter*, 3 Esp. 21; *Rex v. Gutch*, 1 Moo. & M. 437. But see *Queen v. Holbrook*, 3 Q. B. Div. 60, as to the effect of the statutes limiting such liability.

<sup>29</sup> *Attorney General v. Sidden*, 1 Crompt. & Jer. 220.

See also *Attorney General v. Riddle*, 2 Crompt. & Jer. 493.

<sup>30</sup> *Rex v. Dixon*, 4 Camp. 12. Where an agent sells oleomargarine for dairy butter, the principal is liable although he had instructed the agent to sell all products for what they were, and not to substitute: *Groff v. State*, 171 Ind. 547, 85 N. E. 76.

A master was sued on a penal statute for selling skimmed milk. The act was done by the defendant's servant, the defendant being present on the farm at the time. Held, that since the statute used the word 'knowingly' the defendant must have authorized the sale to be liable, but here the plaintiff, by the above facts, had established a prima facie case which defendant failed to rebut. *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314.

Where a servant sold lard without the proper label in violation of a statute, it was held in a prosecution of the master that it was error to exclude evidence that he had expressly forbidden that act. The master could only be held where he had authorized the offense: *Kearley v. Tonge*, 60 L. J. (Magist. Cas.) 159.

<sup>31</sup> *Rex v. Medley*, 6 C. P. 292.

See also *Barnes v. Akroyd*, L. R. 7 Q. B. 474 (a case of smoke nuisance): *Queen v. Stephens*, L. R. 1 Q. B. 702 (a case of putting obstructions in a stream).

<sup>32</sup> *People v. Roby*, 52 Mich. 579, 50 Am. Rep. 270; *People v. Kriesel*, 136 Mich. 80, 98 N. W. 850; *People v. Lundell*, 136 Mich. 303, 99 N. W. 12; *Lehman v. Dist. of Columbia*, 19 App. Cases (D. C.) 217. *City of Paducah v. Jones*, 126 Ky. 809, 104 S. W. 971. Likewise was the principal liable for his servants keeping open after hours although it was done without the principal's knowledge: *Pulver v. State*, 83 Neb. 446, 119 N. W. 780. *Reismier v. State*, 148 Wis. 593, 135 N. W. 153.

The contrary view is held in Arkansas: *Beane v. State*, 72 Ark. 368, 80 S. W. 573; *People v. Utter*, 44 Barb. (N. Y.) 170; *Moore v. State*, 64 Neb. 557, 90 N. W. 553. Compare *State v. Burke*, 15 R. I. 324, 4 Atl. 761.

sales to minors and drunkards,<sup>33</sup> and, in a variety of cases, depending more or less upon the peculiarity of statutory phraseology, for other acts done by his servants or agents in violation of the statutory prohibitions;<sup>34</sup> a master carrying on operations involving blast-

<sup>33</sup> In the following cases the statute prohibiting the sale, read, "Any person selling," etc. *Carroll v. State*, 63 Md. 551, 3 Atl. 29 (in which the defendant was held guilty of a sale made to a minor by his agent without his knowledge or authority): *State v. Shortell*, 93 Mo. 123, 5 S. W. 691 (in which, under similar circumstances, the defendant was held not guilty of an unauthorized sale made to a common drunkard by his agent); see, also, *Lehman v. District of Columbia*, 19 App. Cases (D. C.) 217 (a sale made on Sunday by a servant). Under a statute, "No person shall knowingly sell," the proprietor of a saloon was held liable for a sale made to an intoxicated person without his knowledge and during his absence from the saloon: *O'Donnell v. Commonwealth*, 108 Va. 882, 62 S. E. 373.

In the following cases, the defendant was held guilty under a broad statute which provided for conviction for a sale made by "any person, by himself or another," or a statute of similar effect: *State v. McConnell*, 90 Iowa 197, 57 N. W. 707; *McCutcheon v. People*, 69 Ill. 606. See also *Noecker v. People*, 91 Ill. 494 (a sale made by a servant without a license); *Loeb v. State*, 75 Ga. 258; *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; *Van Valkenburg v. State*, — Ark. —, 142 S. W. 843 (soliciting orders in prohibition territory). But see *Johnson v. State*, 83 Ga. 553, 10 S. E. 207.

In *State v. McCance*, 110 Mo. 398, 19 S. W. 648, under a statute providing that the act of the agent shall be deemed the act of the master, it was held that proof of a sale by a clerk only operated to shift to the defendant the burden of proving the lack of knowledge or authority. See also *State v. Weher*, 111 Mo. 204, 20 S. W. 33; *State v. Reiley*, 75 Mo. 521 (sales made without a license); *State v. Fagan* (Del.) 74 Atl. 692. And apparently contra, *State v. McGinnis*, 38 Mo. App. 15. See also *People v. Parks*, 49 Mich. 333, 13 N. W. 618, which limited such a statute to cases where the master knew of or authorized the sale; also, *People v. Hughes*, 86 Mich. 180, 48 N. W. 945.

But in *People v. Longwell*, 120 Mich. 311, 79 N. W. 484, the court distinguished the two preceding cases on the ground that they were decided on an earlier statute; and construed a later statute (reading, any person who "himself or by his agent, clerk or employee," etc.) to impose a liability on the master for sales made by such agent, clerk or employee, regardless of the fact whether he knew of such sale or had authorized it.

In *Reismier v. State*, 148 Wis. 593, 135 N. W. 153, a proprietor was held on an instruction to the jury as follows: "the person who takes out a license to run a saloon business assumes all responsibility for having it run according to law; that if any one, who is found acting contrary to law, is not their representative, the court views it that that is an affirmative defense; that the defense \* \* \* should show that the person was an interloper and not a representative of the owner of the place."

In *re Berger*, 84 Neb. 128, 120 N. W. 960, held that the principal was liable unless he could affirmatively show that the sales (to minors) were made contrary to his express commands.

But in *State v. Crawford*, 151 Mo. App. 402, 132 S. W. 43, it was held that the principal, to rebut a prima facie case, need not show that the act was contrary to express commands but need show only non-assent to the act of the agent, where the act was a permitting of liquor to be drunk on the premises of a drug store.

<sup>34</sup> For cases, generally, holding the principal liable for unlawful sales made by his servant, without his knowledge or authority, and even against his express instructions, see: *Mugler v. State*, 47 Ark. 109, 14 S. W. 473; *Edgar v. State*, 45 Ark. 356; *Waller v. State*, 38 Ark. 656 (sale made by co-partner); *Walters v. State*, 174 Ind. 545, 92 N. E. 537; *State v. Anderson*, 127 La. 1041, 54 So. 344; *People v. Longwell*, 120 Mich. 311, 79 N. W. 484; *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103, 28 Am. St. Rep. 698, 15 L. R. A. 694: (but see *State v. Neal*, 133 N. C. 689, 45 S. E. 756); *State v. Gilmore*, 80 Vt. 514, 68 Atl. 658, 16 L. R. A. (N. S.) 786; *State v. Nichols*, 67 W. Va. 659,

ing has been held liable to the penalties imposed by a statute, where blasting is done by his servants without taking prescribed precautions, even though the failure to comply with the statute was in direct violation of his directions.<sup>35</sup>

§ 12. ———. CONTRARY HOLDINGS.—On the other hand, the principal has, in a variety of cases, been held not liable in the absence of something to show his own personal default. Thus, where a master was sued in debt on a penal statute for cutting timber, it was shown that the master had cautioned his servants not to cut on any other person's land, and he was held not liable. The court said that in order to charge the master it must be proved that he wilfully caused the act to be done.<sup>36</sup> This holding was followed in a later case.<sup>37</sup> In another case a master was prosecuted for having given credit to a student at Yale College in violation of a statute. It ap-

69 S. E. 304; *State v. Constantine*, 43 Wash. 102, 86 Pac. 384, 117 Am. St. Rep. 1043; *Olson v. State*, 143 Wis. 413, 127 N. W. 975; *Comm'rs of Police v. Cartman* [1896] 1 Q. B. 655.

For cases holding the contrary doctrine on the same point, see: *Bower v. State*, 19 Conn. 398; *Lathrop v. State*, 51 Ind. 192; *Hipp v. State*, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; *Thompson v. State*, 45 Ind. 495; *Comm. v. Bryant*, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; *Comm. v. Stevens*, 153 Mass. 421, 26 N. E. 992, 25 Am. St. Rep. 647, 11 L. R. A. 357; *Comm. v. Joslin*, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449; *State v. Shortell*, 93 Mo. 123, 5 S. W. 691; *Kittrell v. State*, 89 Miss. 666, 42 So. 609.

For cases holding that an innocent principal is not liable to the penalty prescribed by a statute for selling liquor without a license, or liquor to be consumed on the premises or in small quantities, and the like, the sale being made without his knowledge or consent, see: *Siebert v. State*, 40 Ala. 60; *Wreidst v. State*, 48 Ind. 579; *Comm. v. Hayes*, 145 Mass. 289, 14 N. E. 151; *State v. McGrath*, 73 Mo. 181; *State v. Neal*, 133 N. C. 689, 45 S. E. 756; *Comm. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432 (followed in *Com. v. Wachendorf*, 141 Mass. 270, 4 N. E. 817, a case of sale after hours).

Contra: *Riley v. State*, 43 Miss. 397; *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315; *State v. Dow*, 21 Vt. 484. See also, *Noecker v. People*, 91 Ill. 494; *State v. Reiley*, 75 Mo. 521.

It is held, in some jurisdictions, that proof of a sale made by a clerk in a saloon owned by the defendant, raises a presumption, or as sometimes put, "makes a prima facie case," of the defendant's guilt, but it is competent for him to show that such sale was forbidden: *Comm. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *State v. McCance*, 110 Mo. 398, 19 S. W. 648; *State v. Stamper*, 159 Mo. App. 382, 141 S. W. 432; *Kirkwood v. Autenreith*, 21 Mo. App. 73; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Comm. v. Perry*, 148 Mass. 160, 19 N. E. 212; *Fullwood v. State*, 67 Miss. 554, 7 So. 432; *Anderson v. State*, 22 Ohio 305; *Rooney v. Augusta*, 117 Ga. 709, 45 S. E. 72.

Compare *Parker v. State*, 4 Ohio St. 564.

But see, to effect that one sale will not raise such a presumption, *State v. Mahoney*, 23 Minn. 181.

<sup>35</sup> *Spokane v. Patterson*, 46 Wash. 93, 89 Pac. 402, 123 Am. St. R. 921.

Principal may be convicted for act of his agent in giving an unstamped receipt for money (received by the agent for his principal) in violation of a stamp act; *Ex parte Turnbull*, 21 New South Wales L. R. 414.

<sup>36</sup> *Cushing v. Dill*, 2 Scam. (Ill.) 460.

<sup>37</sup> *Satterfield v. Western Union Tel. Co.*, 23 Ill. App. 446.



peared that the credit had been extended by the defendant's bar-keeper in direct disregard of defendant's instructions. The defendant was acquitted in spite of the fact that he had subsequently ratified his servant's act.<sup>38</sup> Again, an ordinance prohibited the driving of wagons on the sidewalk. An employer was held not liable, criminally, where his teamster, who was a competent man, drove the employer's team on the sidewalk to enable himself to more easily unload his wagon in the prosecution of his master's service, where the master had no knowledge that the servant intended to, or did, so violate the ordinance.<sup>39</sup> So where bankers were indicted under a statute forbidding the receipt of deposits while a bank was insolvent. The money had been taken in by the cashier, and the lower court instructed the jury that the evidence tending to show that the defendants were ignorant of that fact, and had prohibited such action, was immaterial. The supreme court reversed this holding.<sup>40</sup> Likewise, it has been held that a railroad company is not liable for the statutory penalty for an overcharge in freight or passenger rates, where the charge was made by a conductor and the act was neither authorized nor approved by the company.<sup>41</sup>

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<sup>38</sup> *Morse v. State*, 6 Conn. 9.

<sup>39</sup> *State v. Bacon*, 40 Vt. 456.

<sup>40</sup> *Commonwealth v. Junkin*, 170 Pa. 194, 32 Atl. 617, 31 L. R. A. 124.

<sup>41</sup> *Hall v. Norfolk & W. R. Co.*, 44 W. Va. 36, 28 S. E. 754, 67 Am. St. Rep. 757.

But compare *City of Hammond v. New York, etc., Ry. Co.*, 5 Ind. App. 526, 31 N. E. 817, cited *supra*, in § 3.