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Agency

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1. James-Parker, an agent for Swift & Co., purchases from Robert Leach a lot of fat cattle, which are to be paid for ten days after delivery to Swift & Co., but he decides to take Parker's individual note, payable ten days after date for the purchase money. It later develops that Parker is insolvent and Leach confers with you as to his right to sue Swift & Co. What would you advise?

Where a creditor elects to give credit to the agent and not to his principal when he has all the facts before him, he cannot hold the principal for the debt, although the latter gets the benefit of the credit. Thus, if an agent gives his own note to a third person who has full knowledge of the principal, his acceptance generally constitutes an election to extend credit exclusively to the agent, and relieves the principal from liability. Leach has elected to hold the agent. See 2 C.J. 836; 14462.

2. In the absence of express authority, in what circumstances will an agent have the power to make or endorse negotiable instruments so as to bind his principal?

"Authority to make or endorse negotiable paper is not to be lightly inferred. It may, of course, be expressly conferred, but it will rarely be implied from even very general words. If sought to be upheld as an incident to an express authority, it will, as a rule be implied only when its exercise is practically indispensable to the execution of that authority." 147276. Authority to manage a business might give such authority where it became necessary to borrow money in an emergency.

3. B agrees to purchase for A a farm called "Whiteacre" at a price not to exceed $6,000. B then in his own name enters into a written contract with C, the owner, for the purchase of said farm for $5,000, but before the deed is executed B becomes a bankrupt. Has C any right of action against A, and why?

A third person may sue an undisclosed principal. Since B was acting for A, and had authority to act for A, A was bound by B's acts, so C could recover from A. "Qui facit per alium, facit per se."

4. A hires from a public garage an automobile and chauffeur to take him to the Union Station. On the way the chauffeur, becoming angry with the driver of a truck which obstructs his passage, deliberately runs the car into the rear of the truck with such force as to hurl the driver from his seat and seriously injures him. From whom, if at all, may the injured party obtain redress and why?

From the chauffeur, for it was his tort. From the owner of the public garage, for a principal is responsible for the torts of his agent unless committed within the scope of his employment. This is so even though the principal has told his agent not to commit the tort. If, however, the agent turns completely from his employment for a purpose of his own, the principal is not liable. A would not be liable in this case for the owner of the public garage is an independent contractor, and, except in case of a non-delegable duty, one hiring work done by an independent contractor is not liable for a tort committed by his agents, unless the work is extra hazardous.

5. B, acting as agent for A for the sale of a horse, effects a sale to C for $500. C pays the down payment cash upon false representation as to the horse's pedigree, of which representations A, however, has no knowledge. Can C recover his $500 from A and why?

Yes. The principal is responsible for torts committed within the scope of the agent's employment. The knowledge of the agent that his statement was false, is, in law, the knowledge of the principal, so that we have all the elements of the tort of deceit against A.

6. The following note is placed in your hands for collection:

"Richmond, Va., Nov. 1, 1914.

One year after date I promise to pay John Jones, or order, $500.

Henry Smith,

(For William Brown.)"

Whom would you sue and why?
AGENCY (continued)
If Henry Smith had authority to execute the note I would sue William Brown. V/16-372.
"When the instrument contains, or a person adds to his signature, words indicating
that he signs for or on behalf of a principal—he is not liable on the instrument if
he was duly authorized; but the mere addition of words describing him as an agent,
or as filling a representative character, without disclosing his principal, does not
exempt him from personal liability."

Admissibility of Statements by Agent to prove Agency by Principal
1. I sue B on a contract alleged to have been made by C as his agent. B denies the
agency. A offers to prove statements of C that he was agent. Is the evidence ad-
missible? Why?
Not admissible except for corroborative purposes where there is other evidence of
agency. See 157 S. E. 511. For any other purpose this would violate the hearsay rule.
The statements are not admissible as an admission against B for there is nothing to
show that C was authorized to make such admissions. Otherwise I could make myself
Ford's agent by my own statements. In the absence of an estoppel the third person
acts at his peril if he believes what the purported agent tells him as to his right
to represent the purported principal. Note, however, that C could be personally put
upon the stand to testify as to the facts.

Where entire business under Agent—his powers
B. Where an entire business is placed under the management of an agent, what are his
powers?
To do what is usual or customary for a general manager of that sort of business to
do. But he would not ordinarily have authority to borrow money, make or endorse
negotiable paper, mortgage or sell the business since these acts are not generally
necessary to the carrying on of a business. In emergencies, and when he cannot get
in touch with his principal his powers would of course be extended.

Agent with full authority to sell need act have his sale confirmed by principal
9. An agent having full authority to sell an article at a particular price, offers
the article at that price, and the offer is accepted unconditionally, has the prin-
cipal to confirm the sale to complete it?
No. Since the agent's act is the principal's act he would only be confirming his
own act. "Qui facit per alium, etc."

Authority to make a sealed instrument
10. James Hawley desires to borrow $1,000.00. Not knowing from whom, you, as his
attorney, will obtain the loan, he executes a bond for the amount, leaving the payee
blank. You obtain the money from the Albermarle Trust Co. and you then insert the
name of the trust company in the bond. Can Hawley successfully resist a suit on the
bond?
Yes. An agent, in order to have authority to make a sealed instrument must have
his authority under seal. 23 Grat. 600.
Note(1) If a blank is filled in or the principal's seal affixed by the agent in the
principal's presence this is regarded as the principal's own act and the agent is
considered a mere instrumentality. The agent is said not to be any more an agent than
the pen with which one writes. (2) If the seal is not necessary and was not intended
by the principal it may be treated as surplusage and a recovery allowed not on the
sealed but on the unsealed instrument. (3) While a suit on the bond would not lie
in the instant case there could be a recovery in quasi-contract—if the statute of
limitations had not run.

Duties of Agent to Principal
11. State four of the principal duties of an agent to his principal.
(1) Loyalty (2) Duty not to exceed his authority (3) Duty to obey instructions (4)
Duty to exercise care (5) Duty to account for money and property (6) Duty to give notice
of material facts.

Modes of Termination of Agency
12. What are the modes of termination of an agency?
(1) By act of parties (a) Accomplishment of object (b) Expiration of agreed time
(c) Happening of agreed event (d) Mutual consent (e) Revocation by principal at any time
(unless coupled with an interest) (f) Resignation at any time by the
AGENCY (continued)

2. Termination by operation of law (a) Death of principal or agent (b) Bankruptcy of principal or agent where bankruptcy makes further relations impossible. (c) Insanity of principal or agent (d) Loss, destruction or sale of subject matter (e) Change of law.

Note: Where the agency is coupled with an interest (as where factor has a lien on goods for advances made) death will not terminate the agent’s authority. It must be coupled with some actual property (in rem) interest and not merely with a power to sell. This is illustrated by the famous case of Hunt v. Roumanier 21 U.S. 174. In that case X lent the owner of a ship, Y, a sum of money. Y gave X power of attorney authorizing X to sell the ship in case of default. Y died insolvent. Held: Y’s death revoked the power of attorney and X can come in only as a general creditor.

Whose employees?

13. A employs B to do certain work for him and agrees to pay the employees of B. Whose servants are the employees of B? and why?

Best test is that of control. The fact that A is to pay B’s employees is not conclusive of the question. If the employees are really controlled by B as to methods of accomplishing work, and power of hire and discharge, B would be an independent contractor and B’s employees his own servants even if paid by A.

Undisclosed Principal — Agent & Principal liable.

14. A, the undisclosed agent of B, acting for and in behalf of B, enters into a contract with C in his A’s name. The contract is breached against C, who thereafter learns that A is the agent of B. Can C hold both A and B personally liable for the contract?

C can hold either liable. Since the undisclosed principal gets the benefit of the contract the law makes him agent the burden also. An agent who negotiates a contract for an undisclosed principal is liable therefore for the third person relied on the agent. But of course there can not be a double recovery.

Death terminates “power of attorney” & agent’s authority.

15. A executed a power of attorney to B to sell his farm “Black Acre,” at the price of $5,000; thereupon went abroad and shortly thereafter died. After A’s death B contracted to sell “Black Acre” to C, neither B nor C having any knowledge of A’s death. C brings suit for specific performance of the contract against A’s heirs. Can he enforce it? Give reason for answer.

No. Death terminated the agent’s authority. Knowledge or lack of knowledge is immaterial as dead men cannot act themselves or through the agency of others.

Agent’s suit for commission — In US. — Agent need not have authority in writing to execute Kin writing.

17. Charles Harris verbally authorizes Trout & Son to sell his river farm at the price of $10,000 cash, agreeing to pay them a 5% commission, and giving them six months within which to make the sale. Within this period, Trout & Son contract in writing with John Williams, agreeing to sell Williams the farm on the terms as authorized by Harris. Harris, however, refused to convey, and Williams sues him for specific performance, while Trout & Son sue for their commissions. Can these suits, or either of them, be maintained? Give reasons.

Both these suits could be maintained. The statute of frauds is satisfied by the agent’s written contract. A contract to sell land does not need to be under seal. The agent only agreed to find a purchaser on the terms indicated. The written contract thus bound both parties. No party to a contract can escape liability by refusing himself to perform.

Note: In many states, but not in Virginia, an agent by statute must have authority in writing to execute a contract in writing.

Scope of agent’s authority.

18. A driver in charge of a wagon invites a child to ride with him. While alighting from the wagon, the child is hurt by the driver’s negligence. Is the owner of the wagon liable?

No, the act was outside the scope of the driver’s authority.

Agent cannot serve as masters by conflicting interest — X is public officer.

19. A company manufacturing rifles agrees to pay the purchasing agent of a foreign government a handsome commission on all orders placed with them by him. After the orders are placed and the arms delivered and paid for, the company refuses to pay his commissions. Can he make it pay them to him? Why?
AGENCY (continued)

No contract is against public policy and illegal. The first duty of an agent is to be loyal to his trust. He could have gotten the arms just that much cheaper for his principal. The word "commission" here is a polite word for graft. An agent cannot serve two masters with conflicting interests unless each has full knowledge of all the facts.

20. When is an agent's knowledge of facts notice to his principal? When are the declarations of an agent or servant admissible? If at all, as evidence against his principal or master?

(1) (a) When the knowledge is given to the agent while acting within the scope of his authority (b) Knowledge previously acquired and then in mind, or which had been acquired, and so recently, as to reasonably warrant the assumption that he then remembered it. 4445c. (2) (a) When authorized to make the declarations and the same are against the interests of the principal (b) When part of the res gestae.

21. A master discharges his servant, employed for four years, in the middle of the second year, without just cause. What are the remedies of the servant and what is he entitled to recover?

A master has the power but not the privilege to break such a contract. Hence the servant may sue for damages. The measure of damages will be the balance of the wages less what the servant can make in the exercise of reasonable diligence in like work in the same general locality.

31F Voiding Agents K

22. A verbally authorizes B to sell a tract of land. B enters into a written contract with C for the sale of the land as agent of A and signs A's name to the writing. D by a power of attorney authorizes B to sell his farm. A by a verbal contract sells it to E. Can either contract be enforced? If so, which and why?

The second contract cannot be enforced because the party to be charged has not signed a memorandum and hence the Statute of Frauds has not been satisfied. As to first contract, see (17)

33. A, selling agent for a carriage manufacturer, sells a carriage to B, guaranteeing it for ten years. B gives six months' note in payment, and the carriage is delivered. A had no authority to make the ten-year guarantee, and the manufacturer notifies B, after the sale, that he will not be bound by it. B resists the payment of the note on that ground, offering to return the carriage, and suit is brought. Can the manufacturer recover?

Yes. An agent who has "apparent authority" to bind his principal may do so even when these are instructions expressly given to him not to do so, unless the third party knew of the instruction. An agent to sell has implied authority to make such warranties as are usually made by agents in the sale of such products. A warranty for ten years seems too long a time to be usual in the sale of a carriage, but since the principal, knowing all the facts, has accepted the note, he has ratified the contract.

Note: Facts about ratification: (a) If a person without authority purports to act for an existing disclosed principal, that principal may reject or ratify if the third person has not in the meantime withdrawn. (b) Ratification relates back and is equivalent to authority at that time. (c) The rights of intervening parties, once ver, will be protected. (d) Ratification must be of the whole agreement. (e) Unless made with full knowledge of the facts it is not binding. (f) It needs no consideration.
P, an employee of the X Company, did not report for work on time. The employer sent A to P's house to get him and bring him to his job. A drove negligently and P was injured. P sued the X Company (which was a large corporation) in a tort action for damages. Is the action maintainable?

Held: No. P's only remedy is under the Workmen's Compensation Law. The general rule that an employee's injuries which are sustained while he is going to and from work are not compensable is subject to an exception where the means of transportation are furnished by the employer.

Where special police officer appointed by court under statute, but paid by railroad negligently shot plaintiff when he was seeking to arrest after having discovered plaintiff stealing coal in interstate transit, railroad held not liable to plaintiff for injuries sustained on doctrine of respondent superior, since officer was acting in discharge of public duty and not as servant of railroad.

If, however, the employee had been clothed with certain police authority by virtue of duties performed by him (as a conductor); or there had been an assault upon a passenger when the Railroad owed a duty of protection; or the police officer was ejecting trespassers from the premises—in those three types of cases it is a jury question whether or not the employee with police powers was acting for the company or for the State. The fact that the legislature has not seen fit to require a bond is immaterial.

The insured and the agent collude to obtain a policy for insured, the agent and the insured both knowing of false material statements in the application. Is the knowledge of the agent imputed to his principal so as to work an estoppel?

No. When the third party knows that agent is acting contrary to his principal's interest notice to agent is not notice to the principal as it is most unlikely the agent will tell the principal of his fraud.

In order to be entitled to a writ of error the appealing party must execute his bond, signed by himself as principal, and by some other person as an approved surety. (Even a certified check will not do). P's attorney signed the bond as follows:

Sealed with our seals: P, by S, Atty (Seal)

Held: (1) that since P's attorney did not have authority under seal he could not execute P's bond.

(2) The fact that S would be liable for violation of an implied warranty of authority is immaterial as such liability is not on the bond.

(3) That the then six months period for asking for a writ of error had in the meantime expired and a ratification under seal came too late as ratification will not relate back so as to impair or defeat rights of third parties which have intervened between time of doing unauthorized act and its ratification.

P was a laborer in Grief Bros. Clothing Manufacturing plant. D was a labor union which was seeking to unionize Grief Bros. A labor organizer promised P that if she would join the union and should lose her job it would pay her the amount of her wages. This it refused to do on the ground that its constitution did not authorize any such contract and its organizer had no power to enter into any such contract.

Held: (two judges dissenting) that all rights, privileges and duties of an unincorporated trade union and its members, and all implied powers must be found in the constitution which was simple and unambiguous. No such power is contained in the constitution. Hence judgment for D.
AGENCY Power of A to fix condition of price

9 S.E. 2d 446.

Case: C. G. was an agent of a packing company with actual authority to buy, sell, and deliver meat and to collect the purchase price.

Question: Has he apparent authority to sell meat at a certain price and to promise the purchaser that if a certain tax on the meat is held to be invalid by the courts (which tax was included in the price) the tax would be refunded?

Hold: Yes. "The agent, in agreeing to return the processing taxes upon the happening of the named event, in effect, did no more than fix a conditional price for the meat. He certainly possessed the power, either actual or apparent to make a price for the meat, and having this power we think he also had the apparent authority to fix it conditionally."

Liability of P for physical conduct of A arises. Suggested by 11 S.E. 2d 444, 649.

X was a life insurance agent. He drove his own car to collect premiums and solicit prospects. The company had no control over the car. He could have walked or he could have ridden a bicycle. X negligently injured P and P sued the life insurance company. Result?

Hold for defendant. A principal employing another to achieve a result but not controlling nor having the right to control the details of his physical movements is not responsible for incidental negligence which such person is conducting the authorized transaction. It is only when the relationship of principal and agent is added that right to control physical details as to the manner of performance which is characteristic of the relation of master and servant, that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor.

R of Agency §251 cited to same effect (p.648)

But compare Electrolux Case 11 S.E. 2d 644.


In this last case A went from Dr. to Town to install machinery. He hired company when through and they replied for him to return home. He could have gone by bus or train or in his own car. He did the latter and while in Virginia negligently ran over plaintiff. He received pay while returning home and company controlled his actions. Hold for plaintiff.

Liability of P determined by control—also independent v. Agent

177 Va. 557.

H operated a Texaco filling station. He hired his brother, B, to drive a truck. The contract between H and the Texaco Co. provided that H was to hire all help, take care of workmen's compensation and Social Security requirements, H was not allowed to do business in his own name unassociated with that of the company; his trucks all carried Texaco insignia; Texaco owned the filling station, and license; Sales were in the name of the company and under conditions as to price and credit fixed by the company.

B negligently killed Z while driving the truck. Is the Texaco Co. liable?

Hold: This depends on whether the relationship of H to Texaco Co. is that of independent contractor or that of agent, and hence defendant Company has complete control over the operation of the business and hence H is an agent and not an independent contractor, and hence defendant Company is liable.

Recent case of Gr. Electrolux Corp. 11 S.E. 2d 644 distinguished. In that case power of dismissal was not absolute. In this case it is.

In the Electrolux case this is not merely devoted what time he pleased to the business and could accept or reject suggestions.

Agency Federation P, June 1938.

Abercrombie was Cashier of the Peoples Bank. He was also engaged in selling automobiles. Eastman gave Abercrombie his six months negotiable note in payment for a car warranted by Abercrombie to be in good running order. A few days
thereafter, it was found that the car was defective and not worth a fraction of the purchase price. After this situation was discovered, but before the maturity of the note, Abercrombie presented the note for discount to the board of directors of the Peoples Bank, telling them that it was offered in the regular course of business. Abercrombie's statement was all the information the Bank had of the transaction when its board took the note. Abercrombie became insolvent, the car was never put in good running order and the Bank asks your advice as to whether it can recover on the note from Eastman. What is your opinion?

The Bank can recover as it is a holder in due course of a negotiable note. The fact that their cashier had knowledge of the breach of warranty would not be imputed to the Bank for where the agent's interest conflicts with his principal's interest notice to the agent is not notice to the principal for under such circumstances one would hardly suppose that the agent would notify his principal.

Affidavit made by purported agent creates presumption

The Cumberland Corporation sued Jones on an open account verified by an affidavit purporting to be made by its bookkeeper. Jones tendered a plea of nil null to which the plaintiff objected, on the ground that as it had sued on the account verified by affidavit, no plea in bar not sworn to ought to be received. How should the court rule?

The Court reads in part, "When an affidavit is made by any person other than the principal authorized by law to make it, such person shall be deemed to have been the agent of the person so authorized until the contrary is made to appear."

And Judge Burks says, "If the affidavit has been made by one purporting to act as agent of another, the statute raises a prima facie presumption that he was such agent, and the burden of showing the contrary is on him who denies the agency. See 6/276 and annotations, also Burks 3rd Ed., 1933, note 32.

Since Jones has not rebutted the above presumption and the correctness of the account has been sworn to, an unserved plea should be received as this is one of the cases where a sworn plea is required.

AGENCY Zone of Employment

X was a Negro truck driver for D. He had instructions not to pick up any passengers at any time. While he was on a trip for D he met Y, another Negro, who had a bad nose bleed and who begged X to take him home which was 13 blocks out of X's way. X did so and while returning from Y's house and only two blocks from it he negligently injured P who sued D. Result?

Held: Judgment for D. X was not within the zone of his employment. X departed from the employment rather than engaged in a slight deviation. The fact that the accident took place while returning from Y's house rather than when going thereto ought not to make any difference. This is so clear, in this case, that the court should set aside a jury verdict for X though in boundary line cases as to whether there is a departure or deviation the jury should be the judge.

Exception to Rule that notice to A is notice to P

Miss X had $10,000 which she requested B to invest for her. Without Miss X's knowledge B had C buy some lots in O's name for B. B then represented to Miss X that C wished to borrow the $10,000 to erect a building on the lot. Accordingly notes and a deed of trust were executed by C but B did not record the deed of trust until after he became insolvent. Then within four months of the recording he was adjudicated a bankrupt. B's trustee in bankruptcy claims the lots
and building free from Miss X's deed of trust on the theory that Miss X received a voidable preference. In order to show that Miss X knew of B's insolvency when the deed of trust was recorded it was submitted that B knew of his own insolvency, that he was the agent of Miss X, and that notice to the agent is notice to the principal.

Held: The instant case comes under an exception to the rule, "Where the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting for his own personal interest, adversely to the principal, or has a motive in concealing the facts from the principal, this rule of imputed knowledge does not apply."

Hence Miss X did not know of B's insolvency and had no reason to suppose she was being preferred. Only B's interest in the estate over and above Miss X's interest can be reached by B's trustee in bankruptcy.

**AGENCY Agent or Independent Contractor**

181 Va.931.

X owned land and requested Y to build a barn on his land just like the one Y had built for himself, Y to get $1 per hour for his time and 10% of total cost for hiring men, purchasing materials, and supervising the job. Y secured P to do carpenter work. X requested that the barn be built under some electric wires, saying that the wires were not yet electrified as the line was under construction. P was seriously injured when he came into contact with them. The line had been completed and electrified.

P sued X. X said P was working for Y and not for him. Held: Y was not an independent contractor but X's agent. X did not pay him a lump sum for his work, and had the right to direct and control him. These are the two most important tests to determine whether one is an agent or employee on the one hand, or an independent contractor on the other.

**AGENCY Lack of Ratification—Servant has no right to hire sub-servant**

182 Va.127.

A owned a truck. He hired B to drive it. B felt very tired and so, without consulting A, he asked C to drive it. A's father, F, also worked for A as any other employee. F saw C with the truck and asked him why he was driving it. C told F the facts and F then asked C if he would like to have the job regularly. C negligently ran over P while driving the truck. Is A liable?

Held: No. A servant has no implied authority to hire a sub-servant. C was working for B, and not A. A's father, F, had no power to ratify B's act since he had no authority to hire people. A ratification to be effective, must be made by a person who had the authority to authorize the act in the first place since ratification is a substitute for the original authority.

**AGENCY Unemployment Comp. Law—"Employment"**

182 Va.426.

X had been engaged in the timber business for years, and owned timber lands. He rented a saw mill to Y at an agreed rental and agreed to buy back all the lumber saved by Y at $20 per 1000. Is Y an employee of X within the meaning of the Unemployment Compensation Law?

Held: Yes. The language of the statute (Va.§60-2 to 60-23) provides that employment means any service performed for remuneration or under any contract of hire, written or oral—unless

A. Such individual has been and will continue to be free from control both under his contract of service and in fact, and

B. Such service is either outside the usual course of the business for which such service is performed, or outside of all the places of business of the enterprise for which such service is performed; or such individual in the performance of such service, is engaged in an independently established trade, occupation, profession, and business.

Y does not come under these exceptions, Border line cases should be held to come under the act to help accomplish its beneficent purposes.
P agreed to give A $1500 if A found a buyer for P's warehouse for $60,000. A found T who was willing to pay $60,000, but T sold to B directly for $20,000 and $40,000 terms. P refused to pay A any commission because A did not make the sale for $60,000 cash. Was A entitled to his commission?

Held: Yes. P should not be allowed to appropriate A's work when A's efforts were the substantial causes of the sale and when the contract of agency was still in force. In the instant case P was the one who suggested the terms. But for that suggestion T might have paid cash. P impliedly promised that as long as the contract of agency was in force he would not himself prevent the consummation thereof by himself selling to the very person A had found on substantially the same terms.

Note: This case differs from the earlier case of Patter v Garnett, 147 Va.1009 in that in that case:
(a) The principal in good faith first revoked the agent's authority, and
(b) Sold the property to T at a less figure, so that the agent never did find a purchaser for the amount the principal told the agent he was authorized to sell the property for.

AGENCY--Special Agent limits on authority thru power of attorney 182 Va.788.

The Southern Ry. Co. secured a writ of error from one of the judges of the Supreme Court of Appeals. The statute requires a bond with surety. The American Surety Co., authorized A of Lynchburg to represent it and give its surety bonds "as surety at Lynchburg." The bond in the instant case was executed in Amherst County. After the statutory four months and 15 days period for giving bond had expired the adverse party moved that the writ of error be dismissed. What ruling?

Held: Motion granted as there is no surety. The words "as surety at Lynchburg" are not merely descriptive. They are clearly limitative, restrictive, and confining. Under his power of attorney A had no more authority in Amherst County than he had in Oregon. "An act done by an attorney in fact which is not authorized by the power of attorney under which he acts is a nullity."

AGENCY--Pleading and Practice 184 Va.553.

D offered to give P a 5% commission if P who was a licensed real estate broker found a purchaser of D's property for $25,000. P produced a man who had $14,000 cash and who could borrow from a bank the other $12,000 on the security of the land. D refused to sell after orally agreeing to do so and P sued D for $1300. The jury found for P in the sum of $500. D was granted a writ of error and P claimed there was cross-error in that he should have obtained a verdict and judgment for $1300. What decision?

Judgment for P for $1300. P performed this contract when he found a man able and willing to purchase the property on the agreed terms. It is common knowledge that purchasers frequently borrow on the very property purchased, and if the arrangements have already been completed with a reliable lender the purchaser is then able to pay even if he does not have all the money in his hand in legal tender. The word "able" must be given a reasonable interpretation.

The jury had no right to lighten D's obligation. As the Supreme Court of Appeals can here tell the amount the final judgment should be it is their duty under WHB-193 to set aside the jury's verdict and enter final judgment for P for $1300.
P out of his own wages. P was injured when the bread truck collided with another car. P sued Nolde Brothers. After the evidence was in, Nolde Brothers moved to dismiss the case for lack of jurisdiction. What ruling?

The motion should be granted. P's only remedy is under the Workmen's Compensation Laws where an employee to the knowledge of his employer hires others to help him. Where the employer has control over his employee and does not object to him hiring helpers such helpers are a fortiori under the control of the principal employer. Conversely, if the employer has no such knowledge the person employed by the employee is not in the employment of the principal employer. Since Nolde Brothers are under the Workmen's Compensation Act P's remedy is under that law. A motion to dismiss for want of jurisdiction over the subject matter of the case is proper at any time for if the court does not have jurisdiction it is only wasting everyone's time.

AGENCY Real Estate Brokers v. To Commission 184 Va. 642.

T was guardian of an incompetent. T wished to sell a house and lot owned by the incompetent and listed the house with A, B, and C who were real estate brokers for $16,000 subject to approval of the court. T did not have court authority to do this. A told D that the property was for sale at $16,000. D replied that the price was too high, and the next day D went directly to T and offered him $13,500 cash saying no real estate commission was involved. When A heard of this he told T he claimed a commission. T obtained court approval for a sale at $13,500 net. D refused to pay the commission first because A did not sell the property for $16,000 and second because T had no authority to list the property with A.

Held: Commission is due A. Court approval of the sale was a ratification of T's act of listing. If a sale at $16,000 had been an express condition precedent then A would not be entitled to a commission, but here the $16,000 was only "the asking price." It is common to list property at more than one really expects to get, and, in such cases, if the broker is the procuring cause of the sale at a lower price he is entitled to his commission. Otherwise unscrupulous sellers would list property above its market price for the express purpose of selling it lower directly to persons the broker had interested.
AGENCY Workmen's Comp (Industrial Accident) 185 Va. 95

P's employer is under the Workmen's Compensation Laws. P was injured due to the negligence of D, a fellow servant. May P sue D?

Held: No. This is purely an industrial accident and under our Workmen's Compensation Act Va. 95-99 and 36-109, the entire risk of purely industrial accidents is on the employer. Were P injured by an outsider (as where P drives a truck and a third party negligently runs into him) then P may elect to claim workmen's compensation or to sue the third party as this is only partially an industrial accident. If P does the former then his employer or insurance carrier is subrogated to P's rights against the third party, may collect all damages, retain the amount of compensation paid P and attorney's fees, and pay over the balance, if any, to P.

AGENCY Commission 187 Va. 284.

P wished to buy a certain piece of real property. He asked B, a real estate broker to get a price for the land in question from O, the owner. B told O he had a prospective purchaser and that if the sale went through he would have to charge O the usual 5% commission. O told him to charge at least $1,000 for the land, more if possible and gave B the exclusive right to sell. B agreed to sell to P for $33,000. Values went up and O refused to give P a deed. P sought specific performance. O defended on the ground that the contract was voidable since P was the agent of both buyer and seller and representing conflicting interests.

Held: B was agent of seller only. Seller paid B his commission and told him to get all he could. B made full disclosure. The more fact that P asked B to get him a definite price when seller was to pay B his commission was not enough to make B the purchaser's agent. Hence O's (seller's) defense not valid.

AGENCY Effect of change of terms on commission 187 Va. 536.

A refused to list his farm with P for sale but agreed to consider any offer A might get for it. Finally P agreed to sell it to T for $15,000 cash and to pay A $1,000 commission when the sale was made. A accordingly prepared a contract but the contract called for $1,500 commission. When P called attention to the discrepancy A said $1,000 would do but P sold to X and refused to give A any commission. A sued P for $1,000 commission. Discuss principles involved. (1) By the very terms of the agreement no commission is due until the sale is made. But if A arbitrarily refuses to sell then he has violated an implied condition and owes the $1,000. (2) But if there never was a binding contract because of A's change of one of the terms (the amount of the commission) then A is not entitled to any commission as the sale has not been made. Hold: No commission due. A's statement later on that $1,000 would be all right seems too late as his counter offer put an end to his power to accept. There was no new offer so P's part or acceptance of the counter offer so P was in his rights in selling to X.

AGENCY Broker employed 'to sell' v. 'to find a purchaser' 187 Va. 543.

P employed A to sell his land for him for $5,000 and gave him the exclusive right to sell until Dec. 29th. A found a purchaser who orally promised to take the land before Dec. 29th but no binding promise was made. On Dec. 31 P sold to another. Is A entitled to his commission? Hold: No. "Ordinarily, the undertaking of a real estate is to procure a purchaser ready, willing and able to buy the property at the terms stipulated by the owner. When the broker does this he has earned his commission. In case of such an undertaking the broker is not required to procure a written contract signed by the purchaser to recover commissions, nor does his right to compensation depend upon a consummation of the sale. "But it has long been settled in this State that a broker employed to sell, as distinguished from a broker employed to find a purchaser ready, willing and able to buy, is not entitled to compensation until he effects a sale or procures from his customer a valid and enforceable contract of sale. The procurement of a verbal offer or agreement to purchase is not sufficient," at page 552.
P, A, and T were principal, agent, and third party. P told A he would like to sell all his realty in the town of Fairfax for $175,000 on the following terms: 20% cash down and 20% a year until paid in full, 41/2% interest on deferred payments. A persuaded T to agree to pay $160,000 of which $40,000 was to be in cash. A went back to P with this proposition and P rejected it. Then A prepared a contract in accordance with the original proposal except that the 20% cash payment was changed to 29%. A did not tell P that he had made that change and P in hastily reading it over did not notice it. P had agreed to pay A 5% commission on consummation of the sale. The reason P desired only 20% cash was to minimize taxes all of which had been explained to A. P's wife objected strongly to giving up the realty so P called off the deal. A claims his commission on the ground that P prevented the consummation of the sale.

Held: For the defendant, P. When A changed the amount to be paid in cash from 20% to 29% he was under a duty to call P's attention to that fact as he owed a duty of the utmost good faith. Hence P has not prevented the consummation of an authorized contract and is not liable.

AGENCY Tort liability of Employer for Rees acts 49 S.E. (2d) 363; 188 Va. 299.

While S, an employee of a bus company, was attempting to negotiate a sharp curve, T called upon him to stop as he was crowding his car. S stopped and got out and engaged in an argument. S struck T knocking him out for a few seconds. T's car was in gear and as a result of the blow it got out of T's control and was damaged to the extent of some $320. T sued S and the Bus Co. Is the latter liable?

Held: (1) That since the tort arose while S was trying to make a turn as an employee it was connected with his employment and the Bus Co. is liable for compensatory damages. (2) That anger, malice, and vindictiveness are among the risks imposed upon the master in the employment of servants. (3) The case of Davis v. Harrell 133 Va. 69 was followed. In that case defendant was held liable for the act of its servant in shooting a third party as the result of an argument about the raising of a railway crossing gate.

Note: In this case plaintiff obtained a jury verdict below which was approved by the trial judge. The Supreme Court of Appeals calls this "the most favored position known to the law".

Note also that the principal is not liable for punitive damages in cases of this type unless he has ordered or ratified the wanton or malicious acts of his servant.

AGENCY Where not to get Commission 41, Agreed thing done 188 Va. 564.

P authorized A to sell certain property for $21,000 cash. A was to receive 5% commission. A found X who was willing to pay $21,000 as follows: $1,000 to A on his commission, $16,000 cash and $4,000 on time payments secured by a mortgage. P refused the offer. Then A asked for a few days to arrange for financing for cash assured P that everything would be all right and asking for permission for X to move into the house which X did. After weeks had gone by and after repeated promises on the part of A to pay the cash P rescinded the contract with A and sold directly to X as per X's original offer. He then sued A for the $1,000 that X had already paid A as part of his commission. A claimed he was entitled to his commission as his efforts were the direct procuring cause of the sale, and that P could not short circuit him by selling directly to X.

Held: Where the agreement is that the agent is not to have a commission unless the agent does a certain agreed thing he cannot earn his commission without doing that thing unless the principal prevents him from doing that thing. Here P did not prevent A from performing. He gave him one chance after another to perform, and A never did as agreed. P took less favorable terms and let X have possession of the house in advance and it would be strange if the law under those circumstances would treat A's non-performance as if it were performance. So P was entitled to recover judgment for the $1,000 paid A on his commission.

Here
D listed his real estate with P, a real estate agent, at a price of $23,000 net. P induced B to buy the property after showing it to him, and arranged to meet B that night to put everything in writing. B failed to appear. P wrote D that B was his customer and had orally agreed to take the property. B wanted his friend X, to get the commission so he went to X and the two of them then went to D who told X that B was P's customer. X said that made no difference as the deal had not been closed. P sued D and X for his commission and the trial court sustained a demurrer.

Held: Reversed and remanded. In the absence of an agreement requiring a written contract of purchase P has fulfilled his part of the contract when he finds a buyer who is able and willing to perform. Since both D and X had notice that B was P's customer they owed a duty of good faith. Here P's efforts were the procuring cause of the sale and P and not X is the one who is entitled to the commission if P's allegations can be proved in a new trial on the merits.

AGENCY Scope of Employment

A and B run the Granby Garage in Norfolk, and W is their night manager. The garage stores cars and sells gasoline but does no repair work. P, while driving his car, carelessly ran into T's car inflicting minor damages. Both P and T took their cars to the Granby Garage and T attached P's car but did not put up any bond. O, a police officer, ordered P to give the keys to the car to W and he told W not to let P have the car until the attachment case was disposed of. P called his lawyer who informed O that he was acting illegally since T had not given bond but O stupidly stood his ground. After O and T left P asked W for his keys stating that he wanted his house key. P then jumped in his car and drove it away. W called the police and swore out a warrant for P's arrest. P was apprehended, tried and acquitted. P then sued A and B for malicious prosecution and they defended on the ground that W was not their representative when he acted as he did.

Held: The defense is good. A and B had no interest in the contest between P and T. W had no authority to swear out warrants as an agent of A and B. What W did was for T's supposed best interests and not for the interests of A and B who had no knowledge of what he had done and who refused to ratify what had been done after learning about it.

AGENCY-Fellow Servant or Vice Principal

Plaintiff's deceased was hired by defendant, who operated a food store, to help one of his employees, Thomas, load and unload the truck used by Thomas in making deliveries for defendant. Solely due to the negligence of Thomas, deceased was killed while riding in the truck with Thomas to make a delivery. Since defendant did not employ seven workers, if Thomas and deceased were fellow servants plaintiff can recover nothing from defendant because of the common law fellow servant defense. Plaintiff, however, contends that Thomas was a vice principal, basing his contention on defendant's admission that Thomas had authority to tell deceased what to do.

Held: Judgment for defendant. The mere fact that one servant is superior in authority to another does not have the effect of changing his relation of fellow servant to that of vice principal unless his superiority consists in performing a non-assignable duty of the master. Such non-assignable duties include furnishing a reasonably safe place to work, reasonably adequate tools and appliances, and a reasonably adequate and competent fellow servants. In the instant case Thomas had none of these duties.
O had $10,000 in cash, he wished to buy realty from K who insisted on $40,000 all in cash. One L was agent for both parties with the full knowledge of each. L, in order to consummate the sale, agreed to lend O $30,000. After everything was ready but before any money was paid the Internal Revenue Department levied a jeopardy tax assessment against O thereby tying up his bank account. As a result O was unable to pay the land within the period that had been agreed upon. But O and K agreed to go ahead after O had succeeded in settling his tax affairs and raised another $10,000. L, however, changed his mind and refused to advance the $30,000. K sued O for specific performance and recovered a judgment and O secured a discharge in bankruptcy. L claimed he was entitled to a $2,000 commission. Discuss points involved.

(1) General rule, "Where the principal uninfluenced by the fraud or misrepresentation of the broker, has, voluntarily, after such investigation as he cared to make and upon establishing such safeguards as he deemed desirable, accepted a purchaser produced in good faith by the broker, and has entered into a final contract of sale with him, the fact that the buyer ultimately fails to perform does not defeat the broker's right to his commission."

(2) "But when the sale fails because of some default of the broker, he could not recover under the rule above stated." In the instant case L made a contract with O for the benefit of K. If L wants his commission from K he will have to show that O performed that contract. L's lending O $30,000 was part and parcel of the whole transaction. Since he did not lend O the money, he cannot now claim a commission on a sale that would have been completed had the money been lent.

AGENCY

Property Effect of Buyer's Failure to Fulfill A on Broker's Commission

Owner wished to sell Blakemore for $25,000 of which $2,500 was to be paid down and the rest one year from date. P, a broker, found a buyer who, however, objected to taking the land because he learned of a buried ground sewer which constituted an encumbrance. This matter was adjusted by an agreement that the down payment would be reduced $5,000 and the deferred payment increased $2,000 and a contract was drawn up accordingly. It then developed that the buyer was not financially able to go through with the deal, and there was a compromise settlement whereby the seller kept $300 of the amount that had actually been paid and returned the rest. P claims the customary 10% commission on the $25,000. Is he entitled to it?

 hold: Yes. (1) A broker is entitled to his commission even if the sale is not consummated due to a defect in vendor's title where broker was not told of the defect.
(2) Where vendor enters into a contract with purchaser found by a broker, and broker has acted in good faith, the latter is entitled to his commission even if purchaser turns out to be unable to fulfill his financial obligations. When vendor accepts buyer as a contracting party he has thereby indicated that his financial status is acceptable to him. (3) A compromise settlement between seller and buyer without broker's consent does not deprive the broker of his commission.

AGENCY

Employment under Working's Camp

L had a contract with the City of H to lay a 20 inch pipe line. L had ditch digging machinery. The surplus dirt had to be hauled away, and L needed no trucks. He hired a truck and driver at $2.50 per hour for both from G who owned a fleet of trucks. G paid the driver and had the right of discharge. L carried liability insurance. L particularly liked driver H. While H or any other driver was on duty he did whatever L requested. L told him to start work, then to quit, when and where to back in for dirt, and what odd things to do when he was not hauling dirt. Had L found his work unsatisfactory L could have insisted on some other driver. P, the plaintiff in this case, was L's foreman and H negligently backed his truck over P seriously injuring him. P collected worker's compensation, and is now suing H and G for the benefit of the worker's compensation insurance carrier and to the extent of any surplus recovery for himself.
Hold: For the defendants. M and P were fellow servants of L and one fellow servant cannot sue another for injuries arising out of the employment when such employment comes under the workers' compensation law. L had control of M's actions and in determining whether M was L's employee or G's employee at the time of the accident the right of control is the most important element. When M did what I told him to do he did not do it merely to be co-operative but because it was his duty to L to do so. The fact that G carries insurance and that no payment will in fact be made by M or G is beside the point.

AGENCY-Brokers-Misrepresented by

P, a broker found B, a buyer for D's house, but misrepresented B's financial status. D closed a contract with B in reliance upon the misrepresentations. When D discovered that B could not perform he refused to pay P his commission, and subsequently sold the land to B on different terms. Is P entitled to a commission?

Hold: No. Whether broker is guilty of fraud or non full disclosure he violates the fiduciary relationship between himself and client and forfeits his commission unless client waives his rights. A sale to B at a later time on different terms not made for the purpose of beating the broker out of his commission is not a waiver.

AGENCY-Scope of Employment—Jury Question

D employed S as a farm laborer. S was to have Fridays off so he could go to Washington for medical treatment. D also operated a restaurant 15 miles from the farm. On the Friday in question S drove the truck from the farm to the restaurant, left it at the restaurant, went to Washington, and returned to the restaurant at 2 p.m. D asked S to take several articles back to the farm in the truck. On the way back S stopped off at various places for personal matters and consumed much liquor. He negligently killed P's intestate and this action by P against D followed. A jury found for P, and the court entered judgment for P.

Hold: Affirmed. S was hauling some articles for D and was on the way to D's farm. Where the case is a doubtful one on the point of a deviation or departure it is a question for the jury. "The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business constitutes the servant to any appreciable extent, the master is subject to liability, if the act otherwise is within the service."

AGENCY--Trusts--Evidence--Legal Ethics-Fiduciary Duty

H and W had two sons, A and B, and three daughters, C, D and E. A was W's favorite child and an attorney at law. W was 79 years of age and H 84. A had always handled his mother's financial affairs. VEPCO wished a right of way across W's property and A handled the whole affair. He took a check for $16,200 payable to his order as attorney, and executed the necessary legal papers. He then deposited this sum in two equal separate accounts as follows: (1) $3,100 to the credit of W and himself the survivor to have any amount that had not been checked out by the one or the other; (2) $3,100 to the credit of H and himself the survivor to have any amount that had not been checked out by the one or the other. He then checked out almost the whole of the latter account for himself personally. W died without having checked out any of the $3,100 and the other children discovered what had happened. A testified that his mother wanted it done in this particular manner so she could make a gift to a dutiful son. W and H had both signed the signature cards which contained the above provisions, but there was no evidence that they actually read the provisions, or that they were read to them. Is A entitled to the benefits of the provisions?
Held: No. Whether he was an attorney or simply an agent he acted in a fiduciary capacity. Where a fiduciary receives a personal advantage there is a presumption of fraud, and that presumption can be overcome only by the clearest and most satisfactory evidence. There is not such evidence in this case to rebut that presumption. Furthermore since A is claiming the money as a gift from a deceased person his claim must be corroborated. He cannot recover on his own uncorroborated testimony(Vf8-286); and there is no fiduciary relationship a higher degree of corroboration is necessary than in ordinary transactions. Held: Sprott, J. dissenting, that the evidence stated above was not sufficient corroboration.

AGENCY Principal's non-liability for sub-servant act — Blind Lawyer—

P, a blind lawyer, had an office in the K building which was owned by D. C was the regular janitor. C without any authority to do so hired G to do janitorial work, from time to time over a two year period. D knew nothing of this. When P came to his office he reasonably supposed that the elevator was on the first floor as the gate was open (which fact he ascertained by the use of his cane) and he heard someone humming (presumably the elevator operator.) As a matter of fact G had opened the gate to clean out the elevator pit which was some five feet below the first floor level. P stepped into the shaft and was seriously injured. As soon as D discovered what had happened he told G to go out of the building and stay out.

Held: D is not liable. G was not his servant, C had no authority to hire anyone. D had not ratified G's act. As for the two years off and on employment the court said, "More failure to observe when there is no occasion for observation is not negligence. It is only negligent ignorance that can be chargeable as the equivalent of knowledge."

AGENCY Master-Servant or Guest-Host? Jury Question—

S and G lived in Michigan and were stationed in a Marine Corps Camp in North Carolina. G's father owned a car which he wished to let G use while he was in camp. S was G's close friend and the two secured a pass to enable them to go to Detroit and drive the car back to North Carolina. While S was driving the car it was negligently driven into a tractor-trailer truck. S and G were killed and P, the driver of the truck, was seriously injured. Is G's estate liable?

Held: This depends on whether S was the agent of G while he was driving the car, or whether the relationship at the time was that of guest and host with the guest driving the car as a favor. Whether it is the one or the other is a jury question, and the court correctly refused to set aside the verdict which was in favor of G's estate.

"The testimony of Captain Saunders indicated that S undertook the trip for the benefit of G and for the purpose of helping him drive the car back to camp. Under such circumstances we think the jury would have had the right to infer that S was thus driving the car as the agent or servant of G. On the other hand the jury might have inferred from the evidence that S went to Detroit as the guest of G and undertook to share in the driving of the car as a friendly act and in return for the courtesies shown him by his host." And this they did.

AGENCY Fee who authority to rep principal in business matters—

P sold D an air conditioning unit on approval. T worked for P as a mechanic and visited D's place of business to do some mechanical work on the unit. D claims that he told T he did not want the unit and for him to tell P to come and get it. T denies he was told any such thing.

Held: It is immaterial whether or not D told T the matter set forth above. Even if he did it would be legally inoperative as notice to P, as D was a mere employee with no authority to represent P in business matters. Hence the rule that notice to the agent is notice to the principal has no application.

AGENCY Employee or Independent Contractor? Accident on industrial—

The State hired X and his truck at $2 per hour. X was under a duty to report as requested, do the work he was told to do, and could quit or be discharged. A state employee, E, was killed while riding in X's truck in performance of his duties as a result of X's negligence. E's personal representative sued X who was insured. What judgment?
 Held: For defendant, X, He is an employee of the State and not an independent contractor as State had the right to control details of his work. Hence the accident was an industrial one and recovery from employer under workmen’s compensation law is the only remedy allowed.

AGENCY Contracts Novation

P owned a lot. D advertised that he would erect homes. So P called up D's office and the telephone operator at D's office asked her what she wanted. She said she wanted to talk to D about building a house for her whereas on she was put on L's line. L worked for D as a salesman and contacted people who wished to build. L called on P and took a $100 deposit from her "on house to be constructed." Later L brought B around and introduced him as P's builder. P and B then executed a contract which made no mention of D, and L turned over the $100 deposit to B. The contract also called for a $2,000 down payment. P asked L to whom she should make the check, and L replied that it should be made out directly to B as he was the one who would have to buy the materials and that it would be quicker that way. But no house was built and P complained to the Real Estate Board. All parties got together and D said, "We have got to get this thing straightened out because the Board is on my neck." But no house was ever started. P sued D for the return of her $2100. D defended on the ground that he was only a broker and that the contract was between P and B only; and also on the ground that if he was originally liable there had been a novation when P and B entered into their contract.

Held: Judgment for P affirmed. A jury could find that D held out L as his general manager in such matters. Although D had a number of opportunities to deny the agency he never did so. He knew that the original $100 deposit was made to him. P was reasonable in believing that B was D's agent to build her house. There was no novation for it was never P's intention to release D and take B in his place. A novation is never presumed but must be proved by the party relying on that defense.

AGENCY Torts Scope of Authority

P was injured when a jeep owned by D and driven by S, an eleven year old boy, was backed against him. D had employed the boy from time to time to do odd jobs and on the afternoon of the injury to help load the jeep and to open and close gates. But he had not directed him to drive or move the jeep though he had taught him how to drive the jeep in connection with farming operations on D's land. Is D liable for P's injury?

Held: No. S was not D's employee for the purpose of driving the jeep. Hence S's tort was not committed within the scope of his authority to act for D.

AGENCY Bell-boy Traffic in Women disability of Nol

B, a bell-boy at a respectable hotel was under orders (1) not to carry a gun on his person and (2) not to traffic in women or in liquor. P1 and P2 were brothers and guests of the hotel. They alleged that B owed them some money in connection with some arrangement by which B was to procure a couple of women for them. At 3 a.m. they got into the elevator with B as he was taking ice to a room on the eighth floor and demanded the money claimed to be due. They threatened to beat B up if he did not pay. B pulled out a small pistol and killed P1. Is the D Hotel Corporation liable for P1's death?

Held: No. B was not acting within the scope of his employment in getting women for guests. He was on his own. The argument in this case was not about how the elevator should be operated or any other phase of defendant's business. The elevator was merely the place of the shooting. Case distinguished from (1) where the railroad gate- man shot a man in an argument over raising the gate and (2) where a bus driver got off of bus to assault a man in an argument over the bus making a right turn in both of which cases the principal was held liable.
P contended that there was an oral contract by which he was to sell D's home for $16,500 net, that he found a buyer willing to pay $17,000 and who paid D a $2,000 "forfeit binder", that D and Buyer had entered into a contract of purchase and sale, that it was immaterial that Buyer was unable to fulfill the terms of his agreement, and that he is entitled to his $500 commission. Held: If the facts are as he claims he is correct for he has found a purchaser satisfactory to the buyer whom the buyer has accepted.

D contended that the oral agreement specifically provided that P was not to get any commission until D received $16,500 and that he had only received $2,000 and hence no commission was due. Held: If the facts are as D contends, there has been a special contract the conditions of which must be met by P before he is entitled to any commission. Which way it actually was is a question of fact for the jury, and the trial court was in error when it gave proper instructions for P under his theory, but refused to give any instructions for D in the event the jury found the facts as per D's contentions.

P's friend, F, who resided with her, had undergone surgery at the hospital. P requested X to call for P and then to go to the hospital to bring F back to P's home. While X, P, and F were on the way home, D negligently ran into X's car injuring F. There was evidence from which the jury could have found that X was also negligent. Since X was on an errand for P, the court, at D's request, instructed the jury that X's negligence, if any, would be imputed to P. The jury found for P and D appealed. Held: X was not P's servant or agent since P had no right to control the way in which the car was operated. X, on his own volition, was driving his car in order to do P and F a favor. Hence judgment should be for P whether or not X was negligent. Nor can D complain of the erroneous instruction as he was the one who asked for it.

P was engaged in the business of rendering dead animals. Several of D's top employees repeated stories to the effect that P was selling the meat from unbutchered cattle for human consumption and that he would soon be tried for that offense. It is admitted that there is no foundation in fact for the story. The statements were "trade gossip" and were made while the employees were working on D's time. When D was sued he defended on the ground that such talk was not within the scope of the employment. The court instructed the jury that the employees must have been acting as such "at the time and in respect to the very transaction out of which the plaintiff's injury arose." It also instructed the jury that it could not award damages for loss of money, property, customers or business if no such losses have been claimed or proven. What points are raised?

Held: (1) Whether or not D's employees were acting within the scope of their employment was a question for the jury since it is not a clear cut case either way. (2) The first of the above instructions is too narrow, for employees may be acting within the scope of their employment if they acted from some impulse or emotion which naturally grew out of or was an incident to an attempt to form his employer's business. Davis v. Merrill followed. (That was the case where a railroad gate keeper shot a man who requested him to raise the gates when no train was approaching.) (3) The second instruction is erroneous as in defamation cases general damages are presumed and such items as loss of business, property, or money are general damages.
AGENCY--Equitable Estoppel

D was ticket agent for P Bus Co. at Norton. He received a ten per cent commission on all tickets sold. He employed M to take care of all bus transactions. D was under a duty to make deposits daily in the local bank of P's share and to send P duplicate deposit slips. M embezzled some of P's money and when P questioned her she was falsely told by M that another party substituting for her had made some mistakes. P in good faith accepted this explanation. Thereafter M embezzled several thousand dollars. P sued D for the amount embezzled. D defended on the ground that since P knew of the earlier embezzlement and failed to tell D anything about it P was estopped to maintain the action.

Held: No estoppel. P did not realize that anything was wrong at first. One of the elements of an estoppel is that the person estopped intended to mislead the other party. P, by his silence, did not intend that D act on that silence to his detriment.

AGENCY--Broker's Commission

D owned a drug store in Vienna. P, at D's request, found X who was able and willing to buy this store on terms satisfactory to D though he(X) had not signed a binding contract. D refused to go through with the deal because he thought Mrs. X had talked out of turn in giving advance information to one of D's employees. P claimed a commission. D told him to collect it from Mrs. X as "she was the one that loused your deal."

Held: For P. When he found X who was ready, willing and able to buy on D's terms (even though he had not yet signed a contract which he would have signed but for D's calling off the deal) P earned his commission. It is immaterial that there was no sale as that fact was due solely to D's refusal to sell.

AGENCY--Scope of Employment

D through his servants, A and B, operated two trucks. P was a passenger in her husband's car which had stopped at a red traffic light. A ran into the rear of the car and there were some words between P's husband and A. B was following A's truck and ran into it thereby pushing P's husband's car some distance further. A second argument then ensued and P's husband and A and B got into a fight. P went to her husband's assistance and received injuries as a result of entering the melee. She obtained a judgment for $3,000 against D under the doctrine of respondeat superior.

Held: Judgment reversed. A and B were acting outside the scope of their employment when they got into a personal argument about who was to blame for the accident. Be sure to compare this case with 188 Va.299 on p.607 of the Agency section of these notes. The Supreme Court of Appeals distinguished the instant case from 188 Va.299 in that in the latter case the assault took place while the turn was being made in the scope of the employment in an argument over who had the right of way, while in the instant case, the matter about which they were arguing was completely over.

AGENCY--No A coupled with an in rem interest

P, a corporation, duly appointed A its agent to secure stock subscriptions. The agency contract provided that either party could terminate the agency contract on five days notice. P learned that A was negotiating with T. Those in control of P did not wish T to become a stockholder so they persuaded P to terminate the contract of agency at once. Despite this termination, but before the expiration of the originally agreed five day period A completed the sale to T. Is T a stockholder?

Held: No. P had the power to terminate the agency in violation of his agreement even though it did not have the right to do so. Hence the sale was made by an unauthorized person and T acquired no right to the stock. A's rights against P for breach of contract are not now before the court. Note: The agency in this case was not coupled with an in rem interest in the subject matter of the agency and hence was revocable even though the revocation would give rise to a cause of action for breach of contract.
AGENCY--Real Estate Broker--Can't take buyer's money to pay his commission

S wished to sell Blackacre so he gave D the exclusive right to sell same at a
public auction. D sold to P who paid D $505 down payment, balance to be paid when S
furnished a good and sufficient warranty deed and proof of a merchantable title. S
was unable to furnish proof of such a title and P demanded that his $505 be returned.
Upon D's refusal to return it on the ground that he was owed $500 commission, P sued
S and D. The trial court gave judgment for P as against S, but held for D.

Held: D is liable also. S had no right to the $505 unless he could pass a
merchantable title. D cannot legally take P's money to pay S's debt to D without
P's consent.

AGENCY--Workmen's Compensation--Industrial Accident

In Va. 96 on p. 606 of this section of the Notes (which you should now refer to)
it was held that an employee who comes under the Workmen's Compensation laws cannot
sue a fellow servant for an industrial accident caused by the fellow servant's
negligence. In the instant case it was held that an employee cannot sue an
independent contractor who is doing the employer's work (loading and moving cast iron
pipes) for a negligent injury, it too being an industrial accident. The injured
party's only remedy is that given by the Workmen's Compensation Act.

AGENCY--Domestic Relations

H and W were husband and wife. W owned 51 acres of land. H decided to erect a
house on a portion of this land and W permitted H to use some of her money for that
purpose. H wanted to have electric heat and asked P for an estimate. H accepted P's
offer. W had full knowledge of H's acceptance and acquiesced therein. She pointed
out the way she wanted the flicks to run. After P presented his bill to H and W, W
told P that they were separated, that she had a prospective sale for the proper
and that she would pay for the installation from the proceeds of the sale. P was
not paid, sued W, and lost on the theory that a husband is not a wife's agent
merely because they are married.

Held: Reversed and final judgment. Here W had more than a "wifely interest" in the
matter. The facts stated above show clearly that H was W's agent. Moreover it would
be unjust for W to get the benefits of the improvement at P's expense.

AGENCY--Broker's Commission

While A was acting as B's agent to sell B's motel to T, A suggested certain
changes in a proposed contract that would be beneficial to T, and after T had secur-
ed a lease for one year with an option to purchase the motel (A to get an agreed
commission only if T exercised the option) A advertised the motel for sale without
B's knowledge. T exercised the option and B refused to pay any commission on the
ground that A was really looking after B's interest instead of B's and this despite
the fact that B agreed to all the suggestions made and repeated his promise to pay
his commission after he had knowledge of the above facts.

Held: A is entitled to his commission. In the absence of non-disclosure or fraud,
B is bound by his agreement at least when there is confirmation with full knowledge
of all facts. After T's right to buy became vested A owed no duty to B not to try
to sell the Motel for T.
P was a member of Local Union whose members went out on strike to secure a new and better contract with X. This strike was sanctioned and supported by the National Union which received one half the dues paid by members of local unions. National sent several men to direct the strike and to bargain with X. Among the directions given for conducting the strike was one advocating that strikebreakers be "entertained on their way back and forth". P decided to return to work and was beaten up on two successive days by members of the Local Union. Is the National Union liable?

Held: A jury verdict for P in the sum of $11,000 is valid. National had an interest in the strike and the preservation of Local. The representatives of National when advocating violence could have been found to have been acting within the scope of their employment which is defined by Mecham "if(1) it be something fairly and naturally incident to the business, and if(2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interest, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account".

P was a member of Local Union which was affiliated with a national union hereinafter called Brotherhood. The members of Local Union went on strike. Brotherhood sent one M to the local scene of the strike to advise and negotiate with Employer. M told P that if he would join the strikers the Brotherhood would make him certain payments from time to time to take care of his expenses while he was on strike. The workers lost the strike, the Local was dissolved, and Brotherhood made only a portion of the payments promised to P by M. P sued Brotherhood for the balance alleged to be due. The Articles of Association (whether called the Charter or Constitution and by-laws) provided that in case of strike where immediate aid is required, the President, Secretary, and Treasurer were vested with the power to appropriate such sums as in their judgment were necessary to meet the particular demand and until such time as the general Executive Board could act on the matter.

Held: For the Brotherhood. The rights of the parties as between themselves must be determined by the Articles of Association. There is nothing in these Articles giving M, or the President whom M represented, any authority to make the promises M made to P. The matter required the joint action of the President, Secretary, and Treasurer. If the President could not alone bind the Brotherhood, M, acting for the President, could not do so. The earlier case of Analgamated Clothing Workers v. Kiser, 174 Va. 229, 6 S.E.2d 562 followed and re-affirmed.

D listed his property with the plaintiff real estate company and several weeks later plaintiff produced a buyer who signed a contract of purchase with D which set the date of settlement as July 1, 1962, or as soon thereafter as the necessary papers could be prepared and the title examined. In Sept. 1962, plaintiff notified D that the purchasers were ready for settlement, at which time D stated that he wasn't going through with the sale. In an action by plaintiff to recover his commission, D defended on the grounds that his wife hadn't signed the contract of sale and that the purchasers hadn't tendered the purchase price.

Held: Judgment for plaintiff affirmed. D had made it known that he was not going to consummate the sale after being advised that the purchasers were ready for settlement, and they were not required to tender the purchase price under the circumstances. The law does not require one to do a vain thing. Plaintiff's right to a commission was not dependent upon the nature of D's ownership in the property. Where one employs a broker to find a buyer, and the broker procures a qualified purchaser, he is liable for the broker's commission even if he has no interest in the property whatsoever.
AGENCY—Recovery of Commission

P wished to sell certain valuable real estate and contracted with D, a Real Estate Corporation, to procure a buyer. D directed B, one of its brokers, to find a buyer which he soon did. The buyer, L, Corporation failed to make proper payments. P directed the trustee to foreclose on the deed of trust. In the course of the proceedings discovered that B, was an incorporator and a director of the L Corporation. P sued D for the recovery of the commission. D defended on the grounds that he had no ownership interest in the corporation, that he had no chance of gain in the purchase, and hence had made all the disclosure that the law requires. The trial court entered judgment for D.

Held: Reversed. No man can serve two masters, without the intelligent consent of both. It is not essential that B have an ownership interest in the corporation. In not informing P of his broker’s association with the L Corporation, D breached its fiduciary duty and should forfeit his commission.

AGENCY—Disobedience of Express Instructions

D became ill and was taken to the hospital. Afraid that thieves might tamper with her car if it was left at her home, D told her son, S, to go and get the car and take it to his home in a nearby town for safekeeping until her return home. She specifically told S not to drive the car himself, but to get someone else to do it, as S had no valid operator’s license. S was a competent driver, having driven for "Uncle Sam" for three years while in the army. He kept the car at his home and got someone else to drive it whenever he used it. Upon D’s return home, she requested S to return the car to her but stipulated that S was not to drive the car himself but to get someone else to do it. A friend of S agreed to drive the car for S, and they set out to return the car to D. On the way the car ran off the road several times, due to the fact that the friend was intoxicated. S then took the wheel to get the car and me and everybody in it safely to D’s home.

While speeding and with knowledge that the car had bad brakes, D ran into P’s car, injuring her. An action was brought by P against D and S as principal and agent. The dominant issue was whether the evidence showed, as a matter of law, that S was not the servant, agent, or employee of D, acting within the scope of his employment at the time of the collision. D contended that S was not paid, that he was merely doing a favor for D, that the service performed was one of safekeeping, and that S was expressly prohibited from operating the car. Hence S was acting without the scope of his employment, if employed, at the time of the accident.

P contended that D told S to return the car, that he was doing that when the accident occurred. The means were not authorized but S was still acting within the scope of his employment in returning the car to D.

Held: For P. This was a proper jury question. Since the jury had found in favor of P on all issues, P, on D’s appeal, was entitled to have the evidence stated in the light most favorable to P.
One of the terms of a construction contract between P and D was a clause whereby D agreed to indemnify P from all claims against P by reason of any act of D, his agents or employees in the execution of the contract. One of the terms of the contract called for D to furnish heavy equipment, whether owned by him or not, in which the latter case D was to bill P for the cost of the equipment and operator and 10%. On the day in question a type of crane was needed which D did not own so it hired both it and an operator from M. While the crane was lifting some metal bars under the direction of one of P's employees, it came into contact with an electric wire and another of P's employees was killed. D billed P for the work performed on this occasion. P settled with the employee's estate and now brings this action under the indemnity clause.

After the presentation of P's evidence, the trial court sustained D's motion to strike the evidence.

Held: Reversed. While D and M may have been independent contractors with respect to each other, nevertheless, when the accident happened, M and its crane operator were "agents" of D within the meaning of the indemnity clause of the contract. D's liability under the indemnity clause does not depend upon whether the agent committed a negligent act. The clause imposes liability on D for acts of its agent in performing work pursuant to the contract. An act of D's agents, putting the crane in contact with the power line, gave rise to the claims against P.

P was injured when a hose that was being used to transmit steam was burst. The hose, and portable generator used to supply the steam were owned and operated by an independent contractor. The hose was of inferior quality and unsuited for the job. P contended that the railroad had sufficient control over the contractor to be responsible for it. P also contended that the loading of the cars was an ultra-hazardous activity.

Held: For D railroad. Employer is not liable for physical harm caused to another by an act or omission of the contractor or his servant. There are exceptions with respect to work which is unlawful, a nuisance, inherently dangerous, or will in the natural course of events produce harm or injury unless special precautions are taken. Heating of cars by steam is not inherently dangerous.