AGENCY

By JOHN S. SIMS, JR.*

During the 1962-63 survey period, there were no startling changes in the law of agency in Georgia. Masters pretty well continued to be masters and servants continued to be servants, with, of course, the servants being a little negligent here and there, costing the masters some pocket change here and there.

POSSESSION AND CUSTODY

As a lead-off to this survey, a rather odd case comes to light involving an agency relationship set in a bail trover action.

In *Mullis v. Packer Corporation*,[1] the defendant, Mullis, was languishing in the Fulton County jail as a result of a bail trover action brought against him by two auto sales companies. It seems that the defendent had purchased automobiles in Michigan, given drafts upon himself and had the automobiles shipped to his agent, Ford, in Georgia. Thereupon, the automobiles disappeared as did Ford and the money the automobiles brought on sale by Ford. The drafts remained unpaid whereupon the defendant, as a result of the actions under discussion, was placed in jail.

Attempting to gain release under the provisions of GA. CODE ANN. section 107-205 (1956 Rev.),[2] by proving an existing physical impossibility as a satisfactory reason for nonproduction of the property,[3] the defendant proved that prior to the time the action was brought he had the property delivered to his agent, Ford, and that such was all

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1. 106 Ga. App. 776, 128 S.E.2d 544 (1962).
2. "When the defendant in any action for the recovery of personal property, in which bail is required, shall, by reason of his inability to give security, be held in imprisonment, he may make his petition in writing under oath to the judge of the court in which the suit is pending, in which he shall state that he is neither able to give the security required by law nor to produce the property, and can furnish satisfactory reasons for its nonproduction . . . it shall be the duty of such judicial officer . . . to hear evidence . . . and if he shall find that the petitioner can neither give the security nor produce the property, and that the reasons for its nonproduction are satisfactory, he shall discharge the petitioner upon his own recognizance. . . ."
3. "An existing physical impossibility, at the time of the suing out of the bail trover process, to produce the property, and the continued existence of such impossibility, without any fault or misconduct on the defendant's part since that time, is a satisfactory reason." Mullis v. Packer Corp., 106 Ga. App. 776, 128 S.E.2d 544 (1962).

he knew as to the whereabouts of the automobiles, none of them still being in his possession.

Not so, held the Court of Appeals, for:

> Property in the hands of a servant or agent is in the possession and control of the master or principal; the servant or agent has only custody, since the possession of the servant or agent is the possession of the master or principal.[4]

And, since it was " . . . shown that the possession of the property was in the defendant, there is 'some degree of presumption that the possession had not changed, and that he still had possession.' "[5]

Therefore, disregarding the contention that actual custody rather than the legal distinction between "custody" and "possession" was the test, the Court of Appeals decided the defendant had not carried the burden of proving the statutory condition,[6] and remanded him to jail.

It seems that the instant case goes a little far in upholding the distinction between "custody" and "possession" when applying such a legal refinement to a bail trover case.[7] There was an "existing physical impossibility" if the agent, Ford, had, in fact, absconded with the automobiles or the money representing the automobiles but it seemed the court was not entirely satisfied with the defendant's proof of such a happening. Upon proper proof however, a conversion, or action analogous thereto, should serve to sever the "possession" from the principal, at least to the extent needed to carry the burden of proving the statutory condition required here.

Scope of Employment

In *Porter v. Jack's Cookie Company*,[8] the plaintiff brought an action for damages against his father's employer. At the time of the accident complained of, the plaintiff, a minor, was riding with and assisting his father in servicing a cookie route. The father-employee had been instructed not to drive on the route after sundown on Fridays and not to accept riders in company vehicles, the accident taking place after sundown on a Friday and injuring (the court decided) a gratuitous rider.

The question, as formulated by the court, was of agency law, and stated as follows:

4. *Id.* at 777, 128 S.E.2d at 545.
5. *Ibid.*
6. *Supra*, n. 2.
7. For a discussion of the distinction, see Brown, Personal Property §76, p. 269 (1955).
8. 106 Ga. App. 497, 127 S.E.2d 313 (1962).

> Where an employee is expressly forbidden to work during certain hours but does so and engages in carrying out the duties for which he was employed, does his disobedience of the employer's rule cause him to be out of the scope of his employment?[9]

The court decided, after quoting the familiar agency rules surrounding such a situation, to follow *Evans v. Caldwell*,[10] where it was stated:

> It must . . . be made to appear that the servant whose act is in question has authority from the master to perform the class of service to which the act belongs. *If the act is within the class, the master is bound, although the servant is forbidden to perform the particular act.*[11]

Here, the employee-driver was performing an act within the class of service for which he was employed even though doing so at a forbidden time.

At first blush, the instant case and the *Evans* case seem to be stretching the "scope of employment" theory, but both cases, and another Georgia case decided during the survey period,[12] are correct in following the general rule[13] in such situations.

Although the answer that even though disobedient the servant remains in the scope of employment if he is performing the class of service for which he was hired is not patently correct in every situation, "if . . . disobedience could be set up . . . as a defense when charged with negligence, the remedy of the injured would in most cases be illusive."[14]

In *Davenport v. South Atlantic Gas Co.*,[15] the plaintiff was a housewife around whose home the defendant's alleged agent had dug a ditch for connection of the plaintiff's home to a gas line. While the work was going on, the plaintiff entered her home by jumping the ditch several times without any mishap.

But, upon the occasion of the accident, the defendant's employees " . . . directed that she stand on a mound of dirt, which had been removed from the ditch and was piled up by them around the rim of the ditch, and then step across."[16] Upon being assured that the dirt

9. *Id.* at 501, 127 S.E.2d at 316.
10. 52 Ga. App. 475, 184 S.E. 440 (1936); *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937).
11. *Id.* at 477, 184 S.E. at 442.
12. Southern Airways Co. v. Sears, Roebuck and Co., 106 Ga. App. 615, 127 S.E.2d 708 (1962).
13. See, FERSON, PRINCIPLES OF AGENCY §60, p. 86 (1954); RESTATEMENT, AGENCY §230 (1933).
14. Philadelphia & Reading Co. v. Derby, 14 How. 468 (1852).
15. 106 Ga. App. 45, 126 S.E.2d 480 (1962).
16. *Id.* at 46, 126 S.E.2d at 482.

was packed down and firm, the plaintiff stepped upon it; the dirt collapsed and the plaintiff came tumbling down.

Against general demurrer, the Court of Appeals held the petition good. The defendant's employees were within the scope of their employment in directing the plaintiff over the ditch and had the authority to so direct her, for:

> Digging the ditch was in furtherance of the defendant's business. If the ditch was an impediment to entering the house, or if it was necessary in digging and maintaining the ditch to direct persons over it, such directions would also be in the furtherance of the employer's business. The persons employed in digging and maintaining the ditch would be impliedly authorized to give such directions as 'a necessary and usual means for effectually accomplishing their task.'[17]

Frolic and Detour

Turning now to "deviation" or "frolic and detour", there appears in the reports the case of *Pratt v. Melton*.[18]

In the *Pratt* case, the defendant operated a service station in the city of Atlanta. A customer delivered her car to him in order to have it serviced, the defendant to deliver it back to her. Later, the defendant instructed one of his porters to deliver the car back to Mrs. customer.

In returning the car to the customer, the porter, knowing the shortest and most direct route, was traveling in the wrong direction at some distance from the direct route and was also traviling away from the intended destination at a high rate of speed when he struck the plaintiff's stopped automobile. At the point of collision, the porter was 13.8 miles northeasterly of the most direct route. Needless to say, he was not heard from nor seen after the accident.

Following the case of *Bunch v. McLeskey*,[19] the Court of Appeals reversed a directed verdict for the defendant-employer. In the *Bunch* case, the Supreme Court of Georgia held that an employee who went 10 miles northwesterly of, then turned in the opposite direction from the route he should have taken, traveled about a mile, then turned at right angles from, the direction in which he should have been traveling, could still have been found by a jury to be within the scope of his employment.

The court in the instant case pointed out that in neither the case sub judice nor the *Bunch* case, did the record show the motivation of

17. *Id.* at 48, 126 S.E.2d at 483.
18. 107 Ga. App. 127, 129 S.E.2d 346 (1962).
19. 173 Ga. 545, 161 S.E. 128 (1931).

the employees in their far-flung travels, thereby differentiating the cases of obvious deviation where evidence other than alleged physical deviation itself shows it to be the intent of the employee to depart from the business of his master,[20] and cases where the only evidence of a deviation is an alleged physical deviation such as in the instant case. The court seems to say that there *must* be separate proof of a mental, as well as a physical, deviation by the employee in order for a court to find, as a matter of law, the employer to be free from liability.[21] It would be logical, however, to infer intent from physical action in cases as extreme as the *Bunch* and *Pratt* situations.

The Court of Appeals, although questioning the soundness of the *Bunch* decision, followed it and even threw in a presumption for good measure,[22] in holding it was error to direct a verdict for the defendant, and " . . . except in plain and palpable cases the question whether the tortious act was 'so closely connected with the master's affairs' that it was within the scope of the servant's employment is for the jury to determine."[23]

"Lent Servant" Doctrine

In *Fulghum Industries Inc. v. Pollard Lumber Company, Inc.*,[24] the agency law question involved was that of the "lent servant" theory.

The plaintiff, Pollard, purchased a debarking machine from the defendant, Fulghum, which subsequently fell into a state of disrepair. Upon being advised that the machine needed repairs, the defendant agreed to send a repairman, but requested the plaintiff to furnish a helper. The plaintiff did so, sending an employee (of the plaintiff) who was not working at his usual tasks on the day the repairs were made. The repair work done involved some cutting with an electric torch and various welding jobs. On the day after the repairs were made, the plaintiff's sawmill burned.

In an action for damages in the Superior Court of Columbia County, the plaintiff recovered a verdict for $30,000.00, based in part upon the

20. Brennan v. National NuGrape Co., 106 Ga. App. 709, 128 S.E.2d 81 (1962); Dawson Chevrolet Co. v. Ford, 47 Ga. App. 312, 170 S.E. 306 (1933).
21. "[W]here the servant steps aside from the employer's business for no matter how short a time to do an act entirely disconnected with it, the master is not liable." Pratt v. Melton, 107 Ga. App. 127, 130, 129 S.E.2d 346, 349 (1962).
22. " . . . if it is shown that the driver operating the master's vehicle was in the master's employment at the time of the injury, the presumption arises that the driver was engaged in the master's business and within the scope of his employment, and the burden is then placed upon the master to show that the person operating the machine was not his servant or was not at the time of the injury engaged in the business of the master." *Id.* at 132, 129 S.E.2d at 350.
23. *Id.* at 133, 129 S.E.2d at 350.
24. 106 Ga. App. 49, 126 S.E.2d 432 (1962).

negligence of the assisting helper, but, on appeal, the case was reversed on grounds other than those involved in this discussion.

Discussing the contention of the defendant that the helper sent to assist the defendant's repairman was an agent of the plaintiff rather than the defendant, the Court of Appeals quoted the rules in regard to the "lent servant" theory as follows:

> . . . (1) that the special master must have complete control and direction of the servant for the occasion; (2) that the general master must have no such control; (3) that the special master must have the exclusive right to discharge the servant, to put another in his place or to put him to other work.[25]

The court stated that all of the requirements of the above set out rules " . . . related only to the *specific* task for which the servants are loaned," giving as an example that the "right to discharge" means only that the special master must have the right to remove the servant from the *particular* job the servant is doing, rather than a general removal from employment.

Holding control to be the determinative factor in such cases, the court found that the employee-helper was a servant of the defendant (control being in the repairman the defendant sent) and not the plaintiff, thereby negativing the plaintiff's alleged negligence and casting the burden of negligence, if in fact the employee-helper was negligent, upon the defendant. The court then went on to discuss whether or not the employee-helper was negligent, the procedural aspects of the case and the trial judge's charge, finally reversing the case on a portion of the charge.

In *Porter v. Patterson*,[27] and *Porter v. Emory University*,[28] the plaintiff, an infant, by next friend brought an action for damages against Crawford W. Long Hospital (operated by Emory University) and Dr. Joseph H. Patterson. It was alleged that the plaintiff had been taken to the hospital by reason of instructions from Dr. Patterson and turned over to a nurse. Thereafter, Dr. Patterson arrived and directed that the plaintiff be prepared for an operation.

While being prepared for the operation, the plaintiff was placed in an incubator by employees of the hospital, the incubator being heated by light bulbs. In placing the plaintiff in the incubator, the hospital's employees placed her left foot in contact with a 150 watt electric bulb and strapped her down so that she could not move her foot away.

25. *Id.* at 52, 126 S.E.2d at 435.
26. *Ibid.*
27. 107 Ga. App. 64, 129 S.E.2d 70 (1962).
28. *Ibid.*

Upon commencement of the operation, Dr. Patterson did not check the manner in which the plaintiff was placed in the incubator, but proceeded with the operation, the plaintiff's foot being left in contact with the light bulb for a period of one to two hours. Thereafter, the burns sustained by the plaintiff caused the amputation of three-fourths of her foot.

The trial court overruled the demurrers of the hospital, but sustained the demurrers of Dr. Patterson. On appeal, the Georgia Court of Appeals affirmed.

The court held that the Crawford W. Long Hospital was not a charitable hospital and entitled to charitable immunity, but, rather, a private hospital operated for pecuniary profit,[29] and "a private hospital operated for pecuniary profit owes to the patient the duty to use reasonable care for his safety, and reasonable skill and diligence in nursing and caring for him."[30]

In destroying the argument of the hospital that its employees were "loaned servants" loaned to a physician when performing services for a physician in the treatment of a patient, the court followed a Minnesota case,[31] to hold that:

> where no unusual features are involved which call for an exercise of medical skill or experience, a doctor may reasonably take for granted that the experienced nurses on the staff of a modern hospital will attend to their ordinary and customary duties without detailed instruction.[32]

And, in such cases, " . . . control remains with the hospital when its employees perform nonmedical acts."[33] Therefore, a hospital is liable:

> . . . for the negligence of its nurses in performing mere administrative or clerical acts, which acts, though constituting a part of a patient's prescribed medical treatment, do not require the application of the specialized technique or the understanding of a skilled physician or surgeon.[34]

In recognizing, then, the existence of "control" in the hospital, the "loaned servant" defense theory of the hospital was negatived completely and the question of liability became whether or not the actions of the hospital staff in preparing the plaintiff for the operation were

29. See, Emory University v. Donna Lee Porter, 103 Ga. App. 752, 125 S.E.2d 668 (1961).
30. Porter v. Patterson, 107 Ga. App. 64, 69, 129 S.E.2d 70, 73 (1962).
31. Swigerd v. City of Ortonville, 246 Minn. 339, 75 N.W.2d 217 (1956).
32. Porter v. Patterson, 107 Ga. App. 64, 72, 129 S.E.2d 70, 75 (1962).
33. *Ibid.*
34. *Ibid.*

medical, or administrative or nonmedical. To this question, the court answered

> . . . it is clear that the acts of the hospital employees in preparing the incubator to receive the plaintiff . . . and in actually placing the plaintiff therein . . . were merely administrative or clerical acts . . . . . . they were merely routine acts within the scope of the duties of the hospital employees and in the performance of such acts the hospital employees did not become loaned servants of the defendant physician.[35]

And, " . . . the hospital is liable therefor under the maxim of *respondeat superior.*"[36]

As to whether or not the petition stated a cause of action against Dr. Patterson, the court held in an interesting point of tort law, that:

> where no unusual features are involved which call for an exercise of medical skill or experience, a doctor may reasonably take for granted that the experienced nurses on the staff of a modern hospital will attend to their ordinary and customary duties without detailed instruction.[37]

And:

> . . . where the facts as alleged in this case show that the patient was entrusted by the physician to the care of hospital employees whose regular duty it was to prepare the patient for a contemplated operation by the physician, the preparation of specialized medical knowledge or skill, and where, when the physician arrived in the operating room he found the patient apparently ready for the operation and no fact appeared to put him on notice of any neglect or omission on the part of the hospital employees in making such preparations, the physician was entitled to rely upon the proper performance of those duties by the hospital employees, and was not required, in the exercise of ordinary care, and, in the absence of some fact or circumstance putting him on notice that such duties had been negligently or improperly performed, to make any inspection or to review the performance of such duties by the hospital employees before proceeding with the operation.[38]

Therefore, the court held that the petition failed to state a cause of action against Dr. Patterson.

The net effect of this case can be summarized by saying that under the rulings of the *Porter* case, a private hospital operated for profit is responsible for those acts of its employees, even when done under

35. *Ibid.*
36. *Ibid.*
37. *Id.* at 74, 129 S.E.2d at 76.
38. *Ibid.*

the direction of a private physician, which do not involve the exercise of medical discretion, but are, rather, actions which involve only the performance of administrative or clerical duties. Of course, the words "administrative or clerical" create a rather nebulous standard in themselves. Therefore, cases of this ilk will not be decided by any truly definitive standard but will be left for decision by the courts on practically the same basis as the well-established "governmental-nongovernmental" confusion present in municipal corporation law.

MISCELLANEOUS

In *Roxy Furniture and Novelty Company, Inc. v. Brand,*[39] the plaintiff advanced money to its agent as a draw against the agent's commissions. The commissions not amounting to the sums advanced, the plaintiff sued for the deficiency.

Since the plaintiff did not allege either an express or implied agreement by the agent to repay any advances made after the first ninety days of employment[40] the Court of Appeals held:

> where a principal advances money to his agent on a drawing account against his commission to be earned as a salesman for selling merchandise, and his commission does not amount to the sum advanced, the employer cannot, in the absence of an express or implied agreement or promise to repay any excess of advances over the commissions earned, recover any such excess from the employee.[41]

A case involving a question of evidence in connection with agency law was *School Boy Sportswear Corporation v. Cornelia Garment Company.*[42] There, the court held that where the defendant's bookkeeper had verified the correctness of an account on the bottom of a letter written by the plaintiff asking that the amount be verified, the plaintiff having visited defendant's office and talked with the bookkeeper about the accounts, such evidence showed a sufficient foundation to identify and authenticate the letter as indicating a business transaction between agents of the plaintiff and defendant corporation so as to make it admissible in evidence.[43] However, the court left it to a jury to decide whether or not the bookkeeper had authority to verify.

In *Genesco, Inc. v. Greeson,*[44] the plaintiff worked from 1941

39. 106 Ga. App. 104, 126 S.E.2d 295 (1963).
40. See, *Id.* at 105, 126 S.E.2d at 295, for the contract involved.
41. *Id.* at 105, 126 S.E.2d at 296.
42. 106 Ga. App. 99, 126 S.E.2d 248 (1962).
43. See, GA. CODE ANN. §38-302 (1954 Rev.).
44. 105 Ga. App. 798, 125 S.E.2d 786 (1962).

through 1959 as an "upper leather cutter" in the defendant's shoe factory.

Contacting pneumoconiosis, the plaintiff alleged " . . . that the machine he operated kept the air filled with minute particles of leather, suede and fabric and dust," thereby causing him to contract the disease.

The defendant, of course, pleaded "assumption of risk." However, the court held that it was " . . . not prepared to say that the plaintiff here should have known that he would contract pneumoconiosis from inhaling this dust . . . ,"[45] and applied the "assumption of skill" doctrine.

The doctrine of "assumption of skill", as explained by the court, is that:

> the master is conclusively presumed to have knowledge of the nature of the constituents and general characteristics and things used in his business, which frequently makes the knowledge implied against the master superior to that implied against the servant as to things used in connnection with the master's business.[46]

And, the master having such knowledge, he is under a duty to warn his servant of the dangers involved, the court stated. The general demurrers of the defendant were overruled and the questions of negligence on the part of master and servant were left to a jury.

In several cases,[47] the Court of Appeals stated the well-known rule that "knowledge of the agent is knowledge of the principal" and in one case,[48] the court repeated the oft-stated rule that "payment to an authorized agent discharges the debtor's liability to the principal whether or not the principal is ever paid by the agent."

45. *Id.* at 802, 125 S.E.2d at 790.
46. *Id.* at 802, 125 S.E.2d at 789.
47. Moore v. J. C. Penney Co., 107 Ga. App. 254 (1963; Hicks v. M.H.A. Inc., 107 Ga. App. 290, 129 S.E.2d 817 (1963); City of Marietta v. Godwin, 106 Ga. App. 113, 126 S.E.2d 302 (1962); De La Perriere v. American Home Assur. Ins., Co., 106 Ga. App. 516 (1962).
48. Wilbanks v. James Talcott, Inc., 106 Ga. App. 770, 128 S.E.2d 333 (1962).