Washington Law Review

Volume 27 | Number 1

2-1-1952

Master and Servant—Liability of Master for Injuries Inflicted by Incompetent Servant—Respondeat Superior and Original Negligence

Edward J. McCormick Jr.

error. *Held*: Conviction reversed. Such conduct was extremely prejudicial and constituted reversible error. *State v. Yoakum,* 137 Wash. Dec. 129, 222 P. 2d 181 (1950).

Where a witness *denies* having made the alleged contradictory statement, a failure subsequently to prove that it was made is obviously prejudicial. The prosecutor in effect vouches that the prior statements were made, and thus becomes an impressive witness to the jury, though the matter is hearsay. Hence such statements must be proved. *Hash v. State,* 48 Ariz. 43, 59 P. 2d 305 (1936); *Thurmond v. State,* 57 Okla. Crim. 388, 48 P. 2d 845 (1935); *Phila. & R. Ry. Co. v. Bartsch,* 9 F. 2d 858 (1925).

Where a witness *admits* making contradictory statements, the rule is that it is not error to exclude proof of the making of such statements by other evidence because such evidence is only cumulative. *Quayle v. Knox,* 175 Wash. 182, 27 P. 2d 115 (1933); *Black v. State,* 82 Tex. Cr. R. 358, 198 S.W. 959 (1917).

Where the witness neither *admits* nor *denies* making the prior statement, the rule is that proof of such statements *may* be introduced at the option of counsel, *Hancock v. Bevins,* 135 Kan. 195, 9 P. 2d 634 (1932); *People v. Preston,* 341 Ill. 407, 173 N.E. 383 (1930); *Humpolack v. State,* 175 Ark. 786, 300 S.W. 426 (1928), for the reason that such proof furthers the process of impeachment, and that only an unequivocal admission should serve as a basis for exclusion. *Chicago, M. & St. P. Ry. Co. v. Harrelson,* 14 F. 2d 893 (1926).

The Washington court is the first court to decide whether, when a witness gives an equivocal answer, a *failure* to offer proof is error. The decision is that proof *must* be offered. In support of this proposition the court cites only those cases in which the witness has denied making the statement. From this it appears that the court has taken the position that an equivocal answer is, in effect a denial. Other courts in permitting such proof have indicated that such an answer is more in the nature of an admission than a denial. It is submitted that the latter position has the sounder logical basis in view of the transparent falseness of such answers as "I don't remember," or "I don't deny it or confirm it," and that in the instant case the rule governing denials should not have been applied.

JAMES M. TAYLOR

Master and Servant—Liability of Master for Injuries Inflicted by Incompetent Servant—Respondeat Superior and Original Negligence. The owner of an apartment house employed a manager who, in the exercise of his duties, employed a janitor. Thereafter, the janitor became drunk and assaulted a tenant. The trial court expressly found that this fact was communicated to the manager who nevertheless continued to employ the janitor. There was no express finding that any information concerning the dangerous propensities of the janitor was communicated to the owner. However, the trial court found generally that both the owner and manager were negligent in retaining the janitor in "their employ." Shortly after the first assault the janitor assaulted *P*, also a tenant. This assault did not occur in the course of the janitor's employment. The trial court awarded *P* judgment against both the manager and the owner. On appeal, *Held*: Affirmed. Liability of both the owner and the manager is based on original negligence, not on the *respondeat superior* doctrine. *LaLone v. Smith et al.,* 139 Wash. Dec. 152, 234 P. 2d 893 (1951).

Inasmuch as the defendants did not assign as error the trial court's findings of fact, the decision is undoubtedly correct. Although the conclusion of fact that both defendants were negligent stood unchallenged on the appeal, there appears to be no justification for such a conclusion insofar as the owner was concerned. In order for the owner to be guilty of negligence in retaining a dangerous employee, personal

knowledge of the dangerous characteristics of the employee is essential. RESTATEMENT, AGENCY § 213. Apparently no point was made by the owner of his lack of such personal knowledge.

The court's statement that *respondeat superior* was not involved is misleading unless it is kept in mind that the case was presented to the court by both sides entirely on the theory of original negligence. Actually, the facts clearly establish liability of the owner under the *respondeat superior* theory. The fundamental rule that a master is liable for the tort of his servant committed in the course of the latter's employment fits the facts perfectly. The manager was clearly negligent in the course of his employment in his knowing retention of a sub-servant who was dangerous to tenants. For that tort, the owner is clearly liable under the *respondeat superior* rule. Personal knowledge on the part of the owner thus becomes immaterial, his liability being based rather on the tort of his manager-servant. In approaching the matter from the standpoint of original negligence, *P* sets himself a more difficult task than the facts required. Fortunately, he was aided by the trial judge and opposing counsel who seemed to have ignored the gap in the proof of original negligence of the owner. Failure of plaintiff to invoke the simple *respondeat superior* approach probably arose from the specious belief that the action was based on the janitor's tort which was not in the course of his employment and hence could not have stood the test of *respondeat superior*. The owner's liability, however, actually arose from the separate tort of the manager within the course of his employment, with resulting vicarious liability of his principal, even though the latter was not at fault.

EDWARD J. MCCORMICK, JR.

Injunctions—Temporary Injunction or Temporary Restraining Order—Right to Continue in Force Pending Appeal. *P, ex parte,* requested a temporary restraining order. The court refused the request because the adverse party was not present. The next day both parties appeared and after oral argument by counsel, the court issued an order entitled "Temporary Injunction and Restraining Order and Order to Show Cause." The show cause order was made returnable on the same date as the trial on the merits. The trial court held for *D*. *P* gave notice of appeal and pursuant to REM. REV. STAT. § 1723 [P.P.C. § 5-25] and Rules on Appeal 24, 34A Wn. 2d 27, moved that the court fix the penalty of the bond so that the order would continue in force pending the appeal. Upon the refusal of the court, *P* brought this application for a writ of mandamus. *Held*: Mandamus denied. "If it be conceded that there was a hearing," it was to determine whether a temporary restraining order and not whether a temporary injunction should be issued because the order provided that *D* was to show cause why it should not be continued in effect. The mere fact that the order was continued in force until the trial does not make it a temporary injunction. *Davis v. Gibbs,* 139 Wash. Dec. 163, 234 P. 2d 1071 (1951).

REM. REV. STAT. § 1723 provides that where a "final judgment" of a superior court is rendered in a cause "wherein a temporary injunction has been granted," if the party at whose instance the injunction was granted shall appeal, then, upon proper filing of a bond, the order shall continue in force pending appeal as a matter of right. Because the statute refers only to a temporary injunction and does not provide for the continuance of a temporary restraining order pending appeal, counsel should be certain of the exact nature of the order he requests and subsequently obtains. The purpose of this note is to present the distinction between these two orders and to propose possible solutions to the problem presented by the instant case.

While the court has sometimes distinguished the two orders by purpose, the more