AGENCY

By JOHN S. SIMS, JR.*

The 1963-64 survey period in regard to the law of agency brought forth several cases of interest, but the fundamentals remained the same as they have from year to year. In past issues of the MERCER LAW REVIEW, writers involved in the agency field have attempted to categorize the various topics. However, the cases arising during his survey period fail to give a basis for specific categorization, thereby causing this article to be divided into more or less general subjects.

CONTRACTS — AGENCY

In a decision[1] reversing the old equitable rule that, "the boss is not always right, but he is always boss," the Court of Appeals held that a provision of an employment contract stating: " . . . that the decisions of [certain officers] of the corporation shall be accepted, as conclusive and final in connection with any disputes whatsoever which may arise in connection with this agreement. . . . "[2] was against public policy and void " . . . as an attempt to oust the courts of jurisdiction."[3]

Crown Carpet Mills, Inc. v. C. E. Goodroe Co., Inc.,[4] involved a situation whereunder the plaintiff, Goodroe, had contracted with the defendant, Crown, through Sobel, Crown's employee, for the purchase of surplus jute. The jute was not delivered with the consequence that Goodroe was forced to buy on the open market at a higher-than-contract price.

Deciding the question as to the authority of Sobel to contract for the sale of jute in behalf of Crown [Sobel's contract providing specifically the authority for *purchase* of materials] the Court of Appeals, relying on GA. CODE ANN. section 4-301 (1962 Rev.),[5] held that, as a matter of law, Sobel's contract stating that he was given the general authority to supervise production operations of the plant " . . . in a careful and competent manner . . . economically and efficiently . . . " did not negative his authority to sell surplus materials.

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1. Gettys v. Mack Trucks, Inc., 107 Ga. App. 694, 131 S.E.2d 205 (1963).
2. *Id.* at 694, 131 S.E.2d at 206.
3. *Ibid.*
4. 108 Ga. App. 327, 132 S.E.2d 824 (1963).
5. "The agent's authority shall be construed to include all necessary and usual means for effectually executing it."

In *Sam Schaffer v. G. B. Padgett*,[6] the plaintiff, Schaffer, sued for a real estate broker's commission under the following facts.

The defendant, Padgett, orally listed properties with the plaintiff, no time limit for the listing being discussed, but setting the selling price at $34,000.00. The plaintiff produced an offer of $17,000.00 for the property. Upon unsuccessful efforts to make a sale, the plaintiff, the defendant testified, through his salesman, Wolbe, told the defendant to "go ahead and let him [another broker] have it." A few days later the property was sold by another broker. The plaintiff testified that he had put the defendant on notice that if the property should be sold to the same person who had made the offer of $17,000.00, he would expect a commission.

The court held the plaintiff's suit without merit as " . . . broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner".[7] As the plaintiff never produced an offer matching or exceeding the sales price, he could not recover as " . . . even a slight variation from the owner's terms will prevent the agent from recovering. . . . "[8] The court also quoted the rule that "an agency for an unspecified time is an agency for a reasonable time, the latter being a jury question,"[9] in holding that the effect of the jury verdict was to say that the agency had been voluntarily terminated by the agreement of the parties.[10]

The Court of Appeals in *Atlantic Nat'l. Bank v. C. A. Edmund*,[11] followed GA. CODE ANN. section 14-219, (1933), which provides:

> The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency.

The holding was that an agent may be orally authorized to endorse negotiable instruments on behalf of his principal. While this decision does not follow the general rule that the authority delegated to an agent must be conferred upon him with the same degree of formality as is required of the agent in the execution of the powers delegated (equal dignity rule), the interpretation of the NEGOTIABLE INSTRUMENT LAW by the court in this situation is manifestly correct.

6. 107 Ga. App. 861, 131 S.E.2d 796 (1963).
7. *Id.* at 862, 131 S.E.2d at 798.
8. *Ibid.*
9. *Ibid.*
10. See reference to salesman Wolbe, *supra*.
11. 108 Ga. App. 63, 132 S.E.2d 103 (1963).

In deciding the case of *Kennesaw Life and Acc. Ins. Co. v. R. W. Hendricks*,[12] the court followed the familiar rule[13] that:

> 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 such excess from the employee.[14]

The situation involved was a nearly "standard" one in that the company had advanced to the defendant-agent allowances over and above commissions earned and failed to make any agreements as to repayment. Perhaps the MERCER LAW REVIEW should be required reading for companies offering employment on the basis herein set out.[15]

TORTS — AGENCY

The case of *Walter Miller v. Friedman's Jewelers, Inc.*,[16] revolved around the acts of an employee of the defendant, Friedman's, in attempting to collect an account.

After having received a collection letter written on behalf of the defendant, the plaintiff went into the defendant's store to investigate same. There he was greeted with shouting " . . . in a loud and boisterous voice" by the defendant's employee involved.

Having a cardiac history, the plaintiff, after suffering the humiliation and informing the defendant's employees that he had never had an account there, suffered dizziness and weakness and " . . . fear that he would have another heart attack."

In affirming the trial court's sustaining of a general demurrer to the petition, the Court of Appeals held that:

> Where one engaged in a retail mercantile business impliedly extends an invitation to the public to trade there, a customer visiting the establishment in response to such invitation is entitled to protection from the tortious mistreatment or misconduct of the employees of the person conducting such business.[17]

12. 108 Ga. App. 148, 132 S.E.2d 152 (1963).
13. See, Sims, *Agency*, 15 MERCER L. REV. 10, 18 (1963).
14. 108 Ga. App. 148, 150, 132 S.E.2d 152, 154 (1963).
15. See, Roxy Furniture and Novelty Co. v. Brand, 106 Ga. App. 104, 126 S.E.2d 295 (1963); Sims, *Agency*, 15 MERCER L. REV. 10, 18 (1963).
16. 107 Ga. App. 841, 131 S.E.2d 663 (1963).
17 *Id.* at 842, 131 S.E.2d at 664.

In order to recover, the court stated, the plaintiff must have undergone treatment amounting of itself to a tort. Since "the words alleged here are not slanderous, and no physical injury or other tort on the part of the employee is alleged, the most that can be said is that the plaintiff has been subjected to a moral wrong which does not, however, amount to an invasion of a legal right so as to entitle him to damages."[18]

The Court of Appeals in *A. F. King & Son v. Simmons*,[19] a case more properly placed in the tort category of the MERCER LAW REVIEW, set forth the rules of pleading in a negligence suit involving employee v. employer. The facts were alleged to be that the employer had furnished to the employee a defective ladder from which the plaintiff-employee had suffered a disasterous fall.

In its decision, the court held the petition sufficient to set forth a cause of action; it being pointed out that:

> . . . suits for injuries arising from the negligence of the employer in failing to comply with the duties imposed by Code §66-301[20] the employee's petition in order to set forth a cause of action must set out issuable facts constiuting not only negligence on the part of the employer, causing the injuries, but also due care on the part of the employee; and it must also appear from the allegations that the injured employee did not know, and had no equal means of knowing, all that which is charged as negligence to the employer, and by the exercise of ordinary care could not have known thereof.[21]

In *Georgia Elec. Co. v. Smith*,[22] plaintiff Smith brought an action against defendant Georgia Electric for damages to a truck owned by the plaintiff. The damages occurred when a chimney fell upon the truck during wrecking operations. The plaintiff had rented a backhoe, and the services of an operator, from the defendant at a certain sum per hour.

Alleging that the damages had been sustained by him as a result of the negligence of the backhoe operator, the plaintiff was rebuffed in his try for damages as a result of the "control and direction" rule applied by the courts in situations analogous to the one under considera-

18. *Ibid.*
19. 107 Ga. App. 628, 131 S.E.2d 214 (1963).
20. "The master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency; he shall use like care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery, or dangers incident to an employment, unknown to the servant, of which the master knows or ought to know he shall give the servant warning in respect thereto." GA. CODE ANN. §66-301 (1933).
21. 107 Ga. App. 628, 630, 131 S.E.2d 214, 217 (1963).
22. 108 Ga. App. 851, 134 S.E.2d 840 (1964).

tion. The court held that the facts alleged showed conclusively that the backhoe operator was under the control and direction of the plaintiff, and, as a result of same, the defendant could not be held liable under the doctrine of *respondeat superior.*

As to allegations in the petition regarding the injury received by the plaintiff by reason of the defendant's furnishing to him a negligent employee under their contract, the court stated that:

"Mere breach of a contract cannot be converted into a tort by showing that failure to perform upon the part of the one committing the breach had resulted in [damage] to the other party to the contract."[23]

The plaintiff failed to set forth a cause of action because:

> a failure to allege facts showing that the defendant knew the operator furnished was unskilled, or in the exercise of ordinary care should have discovered that said operator was unskilled, is a failure to allege necessary requirements to show negligence arising out of the failure of the defendant to furnish a skilled operator.[24]

In a case[25] the writer believes to be weak, the defendant J. C. Penney Company had contacted defendant Oglesby in regard to collecting worthless checks received by the company. Oglesby explained to the store manager the method of collecting checks,[26] and, thereafter, on instruction from the store manager, proceeded with collection efforts. As a result of same, plaintiff Green was arrested, tried and the case dismissed when it was discovered he was the wrong man.

The Court of Appeals held the allegations of the petition insufficient in that Oglesby, who was acting as a constable, failed to swear to the truthfulness of the warrant affidavit before his cohort, Koehler, who was acting as a justice of the peace, issued same, therefore making the warrant void; and, that, since the warrant was void, there was no action for malicious prosecution.

Thereafter, construing the action as one for false arrest, the court stated that: " . . . the allegations as to Oglesby's authority show that Penney's manager authorized him to take out only a valid warrant and to proceed only against the person who signed the check as maker."[27] And that:

> It is essential in order to charge one who did not actually

23. *Id.* at 853, 134 S.E.2d at 843.
24. *Ibid.*
25. J. C. Penney Co. v. Green, 108 Ga. App. 155, 132 S.E.2d 83 (1963).
26. " . . . which method included the swearing out of a criminal warrant for the party whose name appeared on the check, the arrest of the party, and allowing him to settle the charge upon the payment of the costs and the amount of the check." *Id.* at 156, 132 S.E.2d at 84.
27. *Id.* at 158, 132 S.E.2d at 85.

> make the arrest with responsibility for the act of the arresting party that it be alleged and shown that the party making the arrest was acting under the express authority of the one sought to be charged . . . or that a subsequent ratification of his acts be alleged.[28]

Therefore, the petition was insufficient to charge J. C. Penney Company with the acts of Oglesby.

This case, when viewed in the light of the only purpose of our system of laws—justice—does not square with that concept. While perhaps the court is technically right in its reasoning,[29] the fact remains that J. C. Penney Company, through its store manager, knew the method of collection that would be employed and expressly authorized Oglesby to proceed. Oglesby acted for and in behalf of Penney and the plaintiff was forced to the humiliation of a trial before the truth was discovered. Although ratification was not expressly pleaded, it was shown that Penney accepted the benefits of Oglesby's actions in bringing the plaintiff to trial.

The mere technicality of a failure of the defendant's agents to use the correct method of taking out a warrant should not have blocked the plaintiff from having his damages. Evidently, the criminal action against him was not dismissed on this account. The defendant, J. C. Penney Company, used the vehicle of the criminal law in effectuating its collections and brought the wrong man into court. Thereafter, the Court of Appeals allowed it to escape liability for this action on a technical ground of the same vehicle.

It would seem that the situation here amounted to no more than the usual negligence case in the employer-employee-third party situation, and that the defendant J. C. Penney Company should have been held responsible for the acts of its agents. Valid warrant or no valid warrant, the plaintiff was held up to public scorn and ridicule as a direct result of acts of the defendant J. C. Penney Company's agents. The writer feels sure that no employer has ever given his employee express authority to run down someone with a truck, but this has occurred. By the same token, the defendant, J. C. Penny Company, might have given Oglesby only the authority to proceed against the person who wrote the check. But, while acting in the scope of the employment and on behalf of the principal, the agents apprehended the wrong man. This negligence should not have gone the way of a general demurrer.

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28. *Ibid.*
29. "The authority given to the agent by the principal must be given a reasonable interpretation, and an agent's authority must not be construed as authorizing him to use anything other than legal means to effectuate the purposes of his agency." *Ibid.*

In *Ford Motor Co. v. Williams*,[30] the Court of Appeals discussed, on its way to the more important decision that an action for the invasion of the right to privacy may exist concurrently with an action for trespass, two interesting points of agency law.

Judge Eberhardt, in construing allegations of the plaintiff's petition that " . . . defendant Ford Motor Company had in its employ a named person whose duties included the investigation of thefts from his employer and the location and return to his employer of any missing property belonging to his employer,"[31] against a later allegation that the:

> . . . employee of the defendant corporation, entered upon and into the premises and home of the plaintiff, at a time when the plaintiff and his family were away from home, for the purpose of removing therefrom personal property belonging to the plaintiff . . . , [32]

held the opinion that the quoted allegations did not create a situation subject to a general demurrer.

The defendant Ford argued that when it was alleged that its agent broke into the home of the plaintiff and removed therefrom property " . . . belonging to the plaintiff", the petition showed upon its face that the agent was acting without the scope of his employment when his (the agent's) duties were alleged to be the " . . . location and return of any missing property . . . " belonging to Ford.

The plaintiff also alleged, however, that:

> For all purposes material to this action the acts of the said Seiver [the agent] were performed within the scope of his employment, as the agent and servant of the defendant Ford Motor Company and the acts alleged herein of the said employee chargeable to the defendant corporation.[33]

Repeating the rule of strict construction against the pleader on demurrer,[34] Judge Eberhardt dismissed the same as " . . . a strained, unnatural and unreasonable construction . . . " to hold other than that the clear intendment of the petition was to allege that Seiver, as defendant Ford's agent, had seized the plaintiff's property *not as the*

30. 108 Ga. App. 21, 132 S.E.2d 206 (1963).
31. 219 Ga. 505, 506, 134 S.E.2d 32, 33 (1963).
32. *Ibid.*
33. *Ibid.*
34. "It is an elementary rule of construction, as applied to a pleading, that it is to be construed most strongly against the pleader; and that, if an inference unfavorable to the right of a party claiming a right under such a pleading may be drawn from the facts stated therein, such inference will prevail in determining the rights of the parties." Krueger v. MacDougald, 148 Ga. 429, 96 S.E. 867 (1918).

plaintiff's property, but as Ford's property. Therefore, whether or not the agent Seiver was acting within the scope of his employment was question for the jury not to be resolved on general demurrer.

Suffice it to say that the decision of Judge Eberhardt in regard to the construction of the allegations involved is logically correct.

The second point of agency law involved was the question of the construction of GA. CODE ANN. section 4-312.[35] Although one of the dissents in the case[36] quarreled with Judge Eberhardt's construction of the pleadings in regard to the above discussed point, no mention was made of the fact that the Supreme Court of Georgia, in its holding that GA. CODE ANN. section 4-312,[37] quoted below, when construed in pari materi with GA. CODE ANN. section 105-108,[38] quoted below, should have added to it the word "implied" in relation to command or assent. Therefore, there was agreement in the opinion that a principal " . . . may be liable if the trespass was committed by his *implied* command or *implied* assent; and if committed within the scope of the agency, the implication will arise as a matter of law."[39] The construction of pleadings, in situations such as the one under discussion, should be no more strictly looked upon than the construction of statutes, and, both should be accomplished with the aim of doing equity between the parties rather than exercising the technicalities of rigid rules of Bleak House adage.

In regard to the first-above discussed point, however, the Supreme Court of Georgia, on certiorari from the Court of Appeals, reversed Judge Eberhardt's decision.[40] Reciting that:

> . . . in the present case we are confronted with a definite, positive, unambiguous statement by the pleader that the servant of the defendant entered the plaintiff's home, not for the purpose of recovering his employer's property, but for the purpose of removing therefrom property of the plaintiff . . . ,[41]

Justice Head, for the court, stated:

> Courts of this State are not authorized to revise the applicable rules of construction to a pleading on the concept that definite, positive, and unambiguous allegations may be treated as

35. "The principal shall not be liable for the wilful trespass of his agent, unless done by his command or assented to by him." GA. CODE ANN. §4-312 (1962 Rev.).
36. See, 108 Ga. App. 21, 31, 132 S.E.2d 206, ___.
37. See, *supra* n. 35.
38. "Every person shall be liable for torts committed by his wife, his child, or his servant, by his command or in the prosecution and within the scope of his business, whether the same shall be by negligence or voluntary." GA. CODE ANN. §105-108 (1956 Rev.).
39. 108 Ga. App. 21, 24, 132 S.E.2d 206, ___.
40. Ford Motor Co v. Williams, 219 Ga. 505, 134 S.E.2d 32 (1963).
41. *Id.* at 509, 134 S.E.2d at 34.

> "mere trivialities that may seem to lie as obstructions to substantial justice."[42]
>
> Justice in this State is nothing more, or less, than a determination of rights under the applicable rules of law. The allegations of the plaintiff's petition refute his right to recover against Ford Motor Company for acts of its agent, which the plaintiff shows to be outside of and beyond the scope of the agent's employment and not in the prosecution of the master's business.[43]

The writer leaves the decision to the conclusion of the reader. It is submitted that the holding of the Court of Appeals is correct. Every attorney should carefully read both decisions in their entireties, however, in order to gain the full reasoning of both lines of thought.

MISCELLANEOUS

In the case of *National Homes, Inc. v. City Plumbing & Heating Supply Co.*,[44] the holding of the court, according to its syllabus was:

> To create an estoppel by conduct of the principal it must be shown that the complaining party dealt with the supposed agent in reliance upon the authority which the principal apparently conferred upon him, and changed his position as a result of such reliance.[45]

The plaintiff, City Plumbing & Heating, sued defendant National Homes, Inc., and one Edge, on an account. The plaintiff had delivered supplies and materials to homes under construction by Knox Corporation, the predecessor of the defendant. However, the materials were billed to Edge, who later became bankrupt.

Worried about the past due account, the plaintiff contacted B. Knox of the Knox Corporation who told him (the plaintiff) he would look into the matter. B. Knox later sent the plaintiff a memo requesting all the Edge invoices so "[he] could get them straight." Several other calls were made, but other Knox's, who were officers of corporations other than Knox Corporation, did the talking.

After a jury verdict for the plaintiff, the Court of Appeals, in its decision, quoted the rules as to estoppel of the denial of agency[46] and

42. *Id.* at 509, 134 S.E.2d at 35.
43. *Ibid.*
44. 108 Ga. App. 519, 133 S.E.2d 416 (1963).
45. *Id.* at 519, 133 S.E.2d at 417.
46. " . . . the authority of an agent . . . may be established by the principal's conduct and course of dealing, and in one who holds out another as his agent, and by his course of dealing indicates that the agent has certain authority, and thus induces another to deal with his agent as such, he is estopped to deny that the

held that the plaintiff had not changed his position in view of the above mentioned rules, therefore made out no case for liability on the part of National Homes.

The materials having been billed to Edge, and the plaintiff not having proven Edge to be an agent of Knox Corporation, the court's decision followed the general law to a correct conclusion. The only point of differing with the decision might be the fact that the plaintiff failed to file liens on the homes as a result of a conversation with one Peter Knox. This would have constituted a change of position on the part of the plaintiff, but Peter Knox's agency, either express or implied by conduct on the part of the principal—national Homes, was not proven.

It was also held during the survey period[47] that a petition to foreclose a materialman's lien was fatally defective in that it was not alleged that " . . . the contractor in purchasing the materials was acting as the agent of [the] owner or that the contract of purchase was ratified by the owner."[48]

The remainder of the cases repeated well known rules of agency law. Among them were the statements that "lawful possession of the agent is the possession of the principal"[49] and "a general averment of agency is sufficient to state a traversable fact."[50]

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agent has any authority which, as reasonably deducible from the conduct of the parties, the agent apparently has. . . . An estoppel will arise when a principal places an agent in a position of apparent authority, so that a person of ordinary prudence conversant with business usuages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption." *Id.* at 520, 133 S.E.2d at 418.

47. Wold v. Northcutt, 107 Ga. App. 365, 130 S.E.2d 257 (1963).
48. *Ibid.*
49. State v. Davis, 219 Ga. 398, 133 S.E.2d 329 (1963).
50. Arnold v. Garner, 108 Ga. App. 590, 134 S.E.2d 69 (1963).