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Agency—Imputation of Notice as Between Principal and Agent—Dishonest Conduct of Agent

COMMENT ON RECENT DECISIONS

AGENCY—IMPUTATION OF NOTICE AS BETWEEN PRINCIPAL AND AGENT—DISHONEST CONDUCT OF AGENT—[Federal].—Action on a bank's blanket fidelity bond. Board of directors of plaintiff bank instructed its cashier to sign in its behalf the application for the bond. The cashier, although knowing of his own past fraud and dishonesty, represented in the application that no losses were known to have been sustained by the bank and that its officers and employees scheduled in the application were honest. *Held*, for defendant. The cashier's knowledge of the fraud is imputed to the plaintiff, and the representation being false the contract is vitiated.[1]

The general rule is that a principal is chargeable with the notice or knowledge received by its agent within the scope of the agency.[2] This rule is generally based either upon the theory of the legal identity of principal and agent,[3] or upon the theory that it is the duty of the agent to disclose his knowledge to the principal and that the agent is presumed to have discharged that duty.[4] A well-established exception to this rule is that a principal is not charged with the knowledge of its agent where the latter is acting for his own benefit and adversely to the interest of the principal,[5] because it can not be presumed that the agent will communicate such knowledge to his principal.[6]

Where, however, the principal seeks to enforce the benefit of a transaction based on a fraud perpetrated by its agent on a third party, it has been frequently held, in denying recovery, that the dishonest agent's knowledge is imputed to the principal on the ground that a principal accepts the burdens as well as the benefits of its agent's acts.[7] But the majority of

1. First Nat'l Bank of Weatherly v. Aetna Casualty & Surety Co. (C. C. A. 3, 1939) 105 F. (2d) 339.

2. Curtis Co. v. United States (1922) 262 U. S. 215; Gibson Oil Co. v. Hayes Equipment Mfg. Co. (1933) 163 Okla. 134, 21 P. (2d) 17, 88 A. L. R. 104; Hickman v. Green (1894) 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; Hicks v. American Natural Gas Co. (1904) 207 Pa. 570, 57 Atl. 55, 65 L. R. A. 209.

3. Hall & Brown Woodworking Mach. Co. v. Haley Furniture & Mfg. Co. (1911) 174 Ala. 190, 56 So. 726; Sooy v. State (1879) 41 N. J. L. 394; Houseman v. Gerard Mutual Bldg. & Loan Ass'n (1876) 81 Pa. 256.

4. The Distilled Spirits (U. S. 1870) 11 Wall. 356; Henry v. Allen (1896) 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; Traders' & Truckers' Bank v. Black (1908) 108 Va. 59, 60 S. E. 743.

5. Appeal of Metropolitan Life Ins. Co. (1932) 310 Pa. 17, 164 Atl. 715, 86 A. L. R. 1301; American Nat'l Bank v. Miller (1913) 229 U. S. 517.

6. Thomson-Houston Electric Co. v. Capitol Electric Co. (C. C. A. 6, 1894) 65 Fed. 341; Sebald v. Citizens' Deposit Bank (1907) 31 Ky. L. 1244, 105 S. W. 130, 14 L. R. A. (N. S.) 376; Allen v. South Boston R. R. (1889) 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185.

7. Knobeloch v. Germania Sav. Bank (1897) 50 S. C. 259, 27 S. E. 962; Taylor v. Flynt (1902) 28 Tex. Civ. App. 219, 67 S. W. 347. See Restatement, *Agency* (1933) 625, sec. 282 (2c); also 2 Mechem, *Agency* (2d ed. 1914) 1404, sec. 1818.

courts hold the contrary where, as here, the benefit sought to be enforced is the liability on a fidelity bond executed by the dishonest agent.[8]

It would seem that the question of whether an insured shall be permitted to recover in this latter situation should turn on a question of contract rather than on the technical doctrine of imputed notice.[9] Probably the parties had no "actual intention" with respect to the matter in issue at the time the contract was executed. Where such ambiguity of intent exists, the courts of necessity must determine what the parties would have intended had the specific question been presented at the time;[10] and it would seem fair to assume that, if it had been considered when the bond was issued, the parties would have intended that the bond cover the matter.

The federal court in the present case, however, was required[11] to follow Pennsylvania law[12] which denies recovery to the principal because of the doctrine of imputed notice. It is submitted that the better rule is in accord with the majority view which permits a recovery on the bond.[13]

P. H. A.

EQUITY—SPECIFIC PERFORMANCE AND INJUNCTION—INEXACT AND DISCRETIONARY OBLIGATIONS OF CONTRACTING PARTIES—[Federal].—Defendant invented and patented a unique type of military tank. By contract, plaintiff became the exclusive agent of defendant for the sale and manufacture of

8. American Surety Co. v. Pauly (1898) 170 U. S. 133; Maryland Casualty Co. v. Tulsa Industrial Loan & Inv. Co. (1936) 83 F. (2d) 14, 105 A. L. R. 529; Fidelity & Casualty Co. v. Gate City Nat'l Bank (1895) 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440.

9. In Fidelity & Casualty Co. v. Gate City Nat'l Bank (1895) 97 Ga. 634, 25 S. E. 392, 393, 33 L. R. A. 821, 54 Am. St. Rep. 440, Lumpkin, J., said, "* * * we cannot think that the parties to this contract contemplated that the bank would be bound to act upon mere constructive notice of Redwine's [the agent] shortcomings. The 'knowledge' referred to meant actual knowledge."

10. Reed v. Insurance Co. (1877) 95 U. S. 23; Higgins v. California Petroleum & Asphalt Co. (1898) 120 Cal. 629, 52 Pac. 1080; Hamill & Co. v. Woods (1895) 95 Iowa 246, 62 N. W. 735. See Corbin, *Contracts* (16th ed. 1924) 425, sec. 354.

11. Under the rule of Erie R. R. v. Tompkins (1938) 304 U. S. 64, 114 A. L. R. 1487. The court said, per Maris, J.: "The mere fact that the decision in Gordon v. Continental Casualty Co., supra, would seem to us somewhat out of line with the general trend of the authorities both in Pennsylvania and elsewhere cannot, under the case of Erie R. Co. v. Tompkins, above cited, be of more than academic interest to this court." First Nat'l Bank of Weatherly v. Aetna Casualty & Surety Co. (C. C. A. 3, 1939) 105 F. (2d) 339, 341.

12. Gordon v. Continental Casualty Co. (1935) 319 Pa. 555, 181 Atl. 574, 104 A. L. R. 1238.

13. Generally, where a contractual ambiguity arises in the case of fidelity or guarantee contracts, the courts construe them strictly against the insurer, and such surety's obligation is not considered to be strictissimi juris. Galveston Causeway Construction Co. v. Galveston, H. & S. A. Ry. (D. C. S. D. Tex. 1922) 284 Fed. 137; Royal Indemnity Co. v. Northern Granite & Stone Co. (1919) 100 Ohio 373, 126 N. E. 405, 12 A. L. R. 378. See Note (1921) 12 A. L. R. 382, where many authorities are collected.