MASTER-SERVANT

Scope of Employment — Notice to Sub-Agent

The plaintiff, Mrs. Shaffer, alleged in her petition that she tripped on a loose, upturned brass strip on the edge of the top step and fell down a stairway in a building owned by the defendant, S. S. Kresge Co. The plaintiff attributed her fall to the negligence of the defendant in permitting the defect to exist. A witness for the plaintiff testified that he had informed a janitor or some other employee of the defect, and that it had been existing for several years before the accident happened. The witness was none too specific, and was directly contradicted by several witnesses for the defendant, who testified that the brass strip was not raised and that no complaints had been made. The jury returned a verdict for the plaintiff, and after motion for a new trial was made by the defendant and overruled by the court, judgment was entered for the plaintiff. The court of appeals reversed the judgment as against the weight of the evidence and remanded the case for a new trial. *Shaffer* v. *S. S. Kresge Co.*, 24 Ohio Abs. 9 (1937).

The occupier of course owes a duty of reasonable care to make premises safe for an invitee. He is not an insurer. A defect in the steps would not *per se* establish negligence. But if the defect had been existing for some time, the defendant by the exercise of reasonable care should have discovered it. *F. W. Woolworth Co.* v. *Bland*, 22 Ohio Abs. 660 (1933); *Stephens* v. *Akron Palace Theatre Corp.*, 23 Ohio Abs. (1936); 2 *Cooley on Torts* (3rd ed.), page 1259). Or if notice of a dangerous condition had been given to the defendant, he would be negligent in not repairing it. The plaintiff attempted to establish both the defective condition and the notice, but the testimony of the principal witness was none too satisfactory. This note is concerned only with the agency problem.

Notice to an agent constitutes notice to his principal. *Cincinnati, etc. R. R. Co.* v. *Kassen*, 49 Ohio St. 230, 31 N.E. 282, 16 L.R.A. 674 (1892). The imputation is a result of either of two theories. 2 *Mechem on Agency*, (2d edition, 1914), sec. 1805-1806. The one is the "identity" theory, based upon so complete an identification of the principal and agent that notice to an agent, within the scope of his authority, is legally notice to the principal. This theory in effect makes the agent the "alter ego" of the principal. *Mock Mfg. Co.* v. *Wm. D. Smoot & Co.*, 102 Va. 724, 47 S.E. 859 (1904); *First Nat. Bank of New Bremen* v. *Burns et al*, 88 Ohio St. 434, 103 N.E. 931, 94

L.R.A. (N.S.) 764 (1913). The other theory is based upon a conclusive presumption that the agent will, according to his duty, make known to his principal all the facts concerning his employment that are material to his principal's interest, and the law presumes that the agent has performed his duty, whether he in fact discloses such knowledge or not. *The Distilled Spirits*, 11 Wall (U.S.) 356, p. 367, 20 L. Ed. 167 (1871); *Henry* v. *Allen*, 151 N.Y. 1, 45 N.E. 355, 36 L.R.A. 658 (1896); *Modern Woodmen of America* v. *Colman*, 68 Nebr. 660, 94 N.W. 814 (1903); *Booker* v. *Booker*, 208 Ill. 529, 70 N.E. 709, 100 A.L.R. 250 (1904); *Interstate Nat. Bank* v. *Yates Center Nat. Bank*, 245 Fed. 294, 157 C.C.A. 486 (1917).

Under the presumption theory the agent must disclose all the knowledge that he has regarding the subject matter, irrespective of the time at which it was acquired, whether prior to or during the existence of the agency. Under the "identity" theory, the rule is limited to knowledge acquired during the actual existence of the agency. However, so far as notice is concerned, the result is the same under either theory. 2 Mechem (2d Edition), sec. 1807.

In New Jersey the courts apply a somewhat different doctrine and hold the principal liable for knowledge of the agent only when he would have acquired it had he, the principal, acted in person. *Lanning* v. *Johnson*, 75 N.J.L. 259, 69 Atl. 490 (1908); *Willard* v. *Denise*, 50 N.J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788 (1892); *Vulcan Detinning Co.* v. *American Can Co.*, 72 N.J. Eq. 387, 67 Atl. 339 (1907); *Soy* v. *State*, 41 N.J.L. 394 (1879).

Ohio has relied at time on the "identity" theory; *Insurance Co.* v. *Williams*, 39 Ohio St. 584, 48 Am. Rep. 474 (1883); *First Nat. Bank of New Bremen* v. *Burns et al*, 88 Ohio St. 434, 103 N.E. 931, 49 L.R.A. (N.S.) 764 (1913); *Nat. Ins. Co.* v. *Roberts*, 27 Ohio C.A. 10, 28 C.D. 253 (1915). At other times the Ohio courts have quoted with approval a combination of the two theories. *Foster* v. *Scottish Ins. Co.*, 101 Ohio St. 180, 127 N.E. 865 (1920); *Myers* v. *John Hancock Mutual Life Ins. Co., etc.*, 108 Ohio St. 175, 140 N.E. 504 (1923); *Pateras* v. *Standard Accident Ins. Co.*, 37 Ohio App. 383, 174 N.E. 620 (1929).

Before the court can apply either theory it must be established as a fact that the agent received notice or knowledge regarding something within the scope of his authority, *Cleveland* v. *Payne*, 72 Ohio St. 347, 74 N.E. 177, 70 L.R.A. 841 (1905), or that such agent had control of the place or instrumentality. 26 Ohio Jur., p. 651, sec. 633; *Ashtabula Rapid Transit Co.* v. *Stephenson*, 12 Ohio C.D. 631, aff'd without opinion in 67 Ohio St. 512, 67 N.E. 1100 (1901).

Unless the notice is so given, the one giving it is not doing the required act, which is to direct the information to one who is employed to receive and act upon that particular knowledge. No duty of communication would rest upon an agent where, from the nature of the acts to be performed by him, the knowledge or notice would appear to have no relation to or connection with those acts. *Trentor* v. *Pothen*, 46 Minn. 298, 49 N.W. 129, 24 Am. St. Rep. 225 (1891); *Cleveland* v. *Payne, supra; Lane* v. *United Electric Light & Water Co.*, 88 Conn. 670, 92 Atl. 430 (1914); *Alabama Great Southern Ry. Co.* v. *Foley*, 195 Ala. 391, 70 So. 726 (1916); *Meyers* v. *John Hancock Mutual Life Ins. Co., supra; Neff* v. *Redmond*, 54 Cal. App. 757, 202 Pac. 925 (1921); *Marsh* v. *Wheeler*, 77 Conn. 449, 59 Atl. 410, 107 Am. St. Rep. 40 (1904); *Taylor* v. *Yorkshire Ins. Co.*, 2 Ir. R. 1, Ann. Cas. 1913 E. 807 (1913); *King* v. *Roberts*, 120 Mo. App. 120, 96 S.W. 493 (1906).

The opinion stated, in the principal case, that the evidence was undisputed that the agent alleged to have been notified of the defect in the steps was employed only to clean halls and stairways, not to do repairs. This is borne out, as to the extent of a janitor's duties, in a recent Missouri decision where the court stated in a *dictum* that the janitor had only to clean, not repair. But the court further stated that he would be under a duty to report a state of disrepair if he found such, or if others complained of such. *Lambert* v. *Jones et al*, 98 S.W. (2d) 752 (Mo., 1936). A recognition of this view in the principal case would have enabled the plaintiff to impute to the defendant such knowledge as she could establish in the janitor.

While, as before stated, the courts unqualifiedly lay down the general rule that knowledge must be acquired within the scope of an agent's employment before it can be imputed to his principal, it is pointed out in a note in 3 L.R.A. (N.S.) 444, [case note on *Foreman* v. *German Alliance Ins Co.*, 104 Va. 694, 52 S.E. 337, 3 L.R.A. (N.S.) 444 (1905)], that the preponderance of modern authority is in favor of holding the principal bound even when the agent acquires knowledge outside the scope of his employment or agency, provided the facts are yet present in his mind or memory. See, *Hall & Brown Woodworking Machine Co.* v. *Halley Furniture & Mfg. Co.*, 174 Ala. 190, 56 So. 726, L.R.A. 1918 B 924 (1911); *Borland* v. *Nevada Bank*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32 (1893); *Booker* v. *Booker, supra; Wilson* v. *Minnesota Farmers Mut. Fire Ins. Ass'n*, 26 Minn. 112, 30 N.W. 401 (1886). If this view were followed in the principal case, the plaintiff might recover on imputed knowledge even though

the court refused to follow *Lambert* v. *Jones, supra,* and if it were established that the janitor did in fact have notice.

The writer of the opinion of the principal case makes reference to the fact that the janitor's loyalty might prompt him to give notice of the defect, but he does not suggest any duty to do so. If, however, it was his duty to communicate such knowledge, the law would either "conclusively presume" the agent to have told his principal of the defect, or, under the "alter ego" theory, the court could hold that knowledge of the agent was knowledge of the principal, and the question of loyalty would not be material; for, in either event, the defendant would then be under a duty to repair. When an agent fails to communicate knowledge acquired by him within the scope of his employment, it is a breach of his duty to his principal; yet the notice has the same effect as to third persons as though his duty had been faithfully performed. *Cox* v. *Pearce,* 112 N.Y. 637, 20 N.E. 566, 3 L.R.A. 563 (1889). "The principal is affected by the knowledge which an agent had a duty to disclose." *Restatement of the Law of Agency,* sec. 275, p. 611.

In the principal case it was established that the defendant had placed Zinn & Co. in entire management and control of the building in which the plaintiff's injuries were received. Zinn & Co. had placed one Gugle in active management and in charge of all repair work. The latter testified to having no knowledge or notice of the defects. Other employees were Jackson, the head-janitor, and Porter, the elevator man and assistant janitor.

On the hypothesis that Zinn & Co. was a primary agent, the defendant retaining the right to control the manner in which the work is to be done, the defendant's liability, if notice is necessary, would ultimately turn on the question whether notice to a remote sub-agent, the janitor, is imputable to his principal. Where the employment of an agent is such as to necessarily imply that a sub-agent is to be employed, the principal is bound by any knowledge acquired by the sub-agent, within the scope of his authority, as in the case of any other agent. *Patterson* v. *Keys & Co.,* 13 Dec. Rep. 436, 1 C.S.C.R. 94 (1870); *Schloss Bros. & Co.* v. *Gibson Dry Goods Co.,* 6 Ala. App. 155, 60 So. 436 (1912); *Merritt* v. *Huber,* 137 Iowa 135, 114 N.W. 627 (1908).

But if the sub-agent is merely the agent of the agent, the necessary privity does not exist between such sub-agent and the principal, and the knowledge of the sub-agent can not be imputed to the principal. *Hoover* v. *Wise,* 91 U.S. 308, 23 L. Ed. 392 (1875); *Boyd* v. *Vanderkemp,* 1 Barb. Ch. (N.Y.) 273 (1846); *Waldman* v. *North British Ins. Co.,* 91 Ala. 170, 24 Am. St. Rep. 883, 8 So. 666 (1890).

In the principal case the judgment was reversed and remanded on the weight of the evidence because of the ambiguity in the testimony of the plaintiff's key witness. In the event of the introduction of substantial evidence upon a new trial, it would seem necessary for the plaintiff, in order to charge the defendant with notice of an alleged defective condition, to establish that Zinn & Co. was an agent, with authority by reason of being such, by contract or custom, to appoint the sub-agent, who subsequently employed other sub-agents, of notice within the scope of his employment.

MARGARETTA BEYNON

TEST FOR ESTABLISHING RELATIONSHIP

While riding in a bus the plaintiff was injured in a head-on collision with a taxi cab owned by defendant cab company. The driver of the cab obtained the cab from the defendant by paying a deposit of $4.25 each morning, receiving the cab to use for the day as he saw fit. The defendant also maintained call stations where the cab drivers might receive calls by waiting their turn in line. The court dismissed the petition, holding that in the absence of evidence indicating that the defendant had any right to exercise any acts of control over the acts of the cab driver after the cab was turned over to him in the morning, there was no agency existing between the driver and the owner of the cab so as to make the owner liable for the negligence of the driver. *Hudson* v. *Ohio Bus Line Co. and Parkway Cabs, Inc.*, 23 Ohio Abs. 634, 8 Ohio O.P. 312 (1937).

It may be stated as a general proposition that when the employer has the right to control the employee in the performance of his work the latter is a servant, as distinguished from an independent contractor. *Babbitt* v. *Say*, 120 Ohio St. 177, 165 N.E. 721 (1929); *Klar* v. *The Erie Rd. Co.*, 118 Ohio St. 612, 162 N.E. 793 (1928); *Kruse* v. *Revelson*, 115 Ohio St. 594, 155 N.E. 137 (1927); *Gechei* v. *Boltz*, 13 Ohio App. 180, 31 Ohio C.A. 506 (1920); *Collier and Sons Distr. Corp.* v. *Drinkwater*, 81 Fed. (2d) 200 (1936); *Bohanon* v. *James McClatchy Pub. Co.*, 16 Cal. App. (2d) 188, 60 Pac. (2d) 510 (1936); *Keeling* v. *Nall*, 261 Ky. 232, 87 S.W. (2d) 370 (1935); Annotations, 75 A.L.R. 725 (1931); 19 A.L.R. 226, subsection 6 (1922); 14 R.C.L. 67 (1916). Many decisions require control as to the "manner and means" of doing the work, or control as to the "means of accomplishing the result," or control as to the "details" of the work. *Klar* v. *The Erie Rd. supra; Spears Dairy, Inc.*