CASE AND COMMENT

AGENCY — HUSBAND AND WIFE — TERMINATION OF AUTHORITY.—The decision of the Ontario Court of Appeal in *Robert Simpson Company* v. *Godson*,[1] raises a point of fundamental importance in the law of agency and one on which express authority is singularly lacking. The facts in the case were as follows. In 1924 Mr Godson opened a charge account with the plaintiff company upon which his wife was authorized to purchase. Purchases had been made and paid for by the husband for some time until on January 19, 1935, the husband saw a clerk in the charge account office of the plaintiff company to whom he stated that he wished to close the charge account because it ran too high. At the trial the credit manager of the plaintiff company produced the record card of the defendant's charge account under which there appeared an entry under date of January 22nd as follows: "Closed by request, runs too high." On the same card under date of January 24, 1935, was the annotation "Clear restrictions." The evidence of the credit manager on this point was to the effect that the second entry was probably the result of purchases coming through on the account and the conclusion reached by the credit department that the account holder had changed his mind. Eventually, the husband and wife having separated, the account was formally closed on February 23, 1935, by letters from both the husband and wife. The question before the court concerned the liability of the husband, for purchases made between January 23 and February 23.

The trial judge, Jackson Co. Ct. J., gave judgment for the plaintiff, on the ground that sufficient notice had not been given to the company on January 21. The Court of Appeal in an oral judgment said it was not necessary to pass upon the effect of the notice in January, because it was clear on the evidence that Mrs Godson had authority to purchase on the Simpson account and "in order to terminate that authority it must be shown that the husband had in fact terminated it. Mrs Godson says that he did not do so." The Court of Appeal therefore held that Mr Godson was liable because his wife "had authority to purchase and her authority had never been terminated".

Assuming that the husband had expressly authorized his wife to pledge his credit, the decision apparently stands for the proposition that unless a principal notifies his agent that his

[1] [1937] 1 D.L.R. 454.

"authority" is terminated, such agent can make a valid contract between the principal and a third person regardless of the fact that such third person is fully aware that the principal is not minded to enter into such a contract. Such a proposition is a startling one from the standpoint of the law of contracts. In no case that the writer has been able to find, has it been held possible for one person to bind another by a contract which he knows that other does not consent to enter.[2]

One of the chief difficulties in all agency situations is due to the fact that one word is very often used in two distinct senses. It is customary to speak of "authority", either "real" or "apparent", as synonomous with the agent's power or ability to affect the legal relations of his principal.[3] An agent ordinarily has a power to bind his principal in contract if he is authorized, that is, if the agent is acting in accordance with the principal's manifestation of assent to him. Likewise an agent has the power to bind his principal by a contract made in accordance with a manifestation of the principal's consent to a third person. This is usually spoken of as "apparent authority". There may be cases where an agent has a power to bind his principal by contract where there is neither a manifestation of assent to the agent nor a manifestation of assent to the third person. This is not the place to enter into a discussion of these situations.[4] It is sufficient for this purpose to consider the liability of a principal on contracts made by his agent as flowing from the assent of the principal manifested either to the agent and transmitted to the third person, or manifested directly to the third person. Indeed Sir Frederick Pollock states that this is the sole ground of liability of the principal in all cases of contracts made by an agent.[5]

[2] In view of the decision in *Bolton Partners (Ltd.)* v. *Lambert* (1889), 41 Ch. D. 295, perhaps the statement in the text should be amended to read "in no *accredited* case etc." In that case A, purporting to act on behalf of P, made a "contract" with T. A was unauthorized to make the contract. T purported to withdraw from the "contract". Knowing this P ratified A's conduct in making the "contract". It was held that T was bound. This decision has been severely criticised and is clearly contrary to elementary principles of contract law. See *Fleming* v. *Bank of New Zealand*, [1900] A.C. at p. 587; FRY, on SPECIFIC PERFORMANCE (5th Canadian ed.) Appendix, Note A; Wambaugh, *A Problem as to Ratification*, 9 Harv. L. Rev. 60. An Ontario court in *Goodison Thresher Co.* v. *Doyle* (1925), 57 O.L.R. 300, indicated the principle should not be extended. Indeed, there is no reason why a Canadian court should follow it at all. In any event, it is based on the fiction of relation back involved in ratification which has no bearing on the present discussion.

[3] See this whole question admirably discussed by Seavey, *The Rationale of Agency* (1920), 29 Yale L.J. 859.

[4] See these situations discussed in Seavey, op. cit., and by the present writer in an article on *The American Law Institute's Restatement of Contracts and Agency* (1935), 1 Univ. of Tor. L.J. 17 at pp. 40 *ff.*

On this ground it might be useful to compare two illustrations. Suppose P authorizes A to make an offer to T. A does so. Plainly if P subsequently notifies T that the offer is revoked, T cannot by giving an acceptance to A bind P by a contract, and this, although A still believes that he has P's consent to receive T's acceptance. What difference does it make if P authorizes A to make a contract, but notifies T *before* A makes either an offer or an acceptance, that he, P, no longer wishes to make a contract with T. In both cases the question is identical, namely, is T entitled to rely on A's offer or acceptance as representing P's willingness to contract? Put in this way, it seems impossible to follow the reasoning of the Court of Appeal in the *Godson Case*. Surely the all important thing was whether the notice given by the husband was sufficient to indicate to the Simpson Company that the husband no longer wished to make a contract with them. Whether the notice was sufficient for this purpose may raise serious doubts, but to say that it was immaterial to consider the notice seems opposed to what would appear to be an elementary principle of contract law.

It is, of course, true to say that until an agent receives notice of termination of his authority, he is privileged, so far as the principal is concerned, to act in accordance with the principal's manifestation of assent to him. It is another thing to say that such agent has the power to bind the principal directly with a person who knows the principal is not minded to make the contract in question. While the English books do not appear to deal with this question, it is interesting to note that in the recent *Restatement of the Law of Agency* of the *American Law Institute*, there are several instances where the view just stated is set out. To take one example, the Restatement gives the following illustration. Speaking of cases where the authority of the agent terminates only upon notice to him it says that

> while the agent has authority to bind the principal in transactions with others who have no notice of such withdrawal, and while he is privileged to act for the principal even with one who has notice, a person having notice can acquire no rights against the principal by entering into a transaction with the agent. The notice of the termination of the principal's consent may result from a statement or

[5] POLLOCK, PRINCIPLES OF CONTRACT, (10th ed., 1936), p. 199: "A contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification; and that authority or ratification is nothing else than *the assent of the principal to be bound*, and the contract which binds him is his own contract." Such an explanation, while capable of justifying most of the cases of agency, cannot include those involving an undisclosed principal where, *ex hypothesi*, the third person contracts only with the agent.

> notification by the principal to the third person, or from knowledge or conduct by the principal inconsistent with the continuance of consent, as where he sells the subject matter, or from any other manifestation indicating a definitive withdrawal of consent whether or not intended to be communicated to the third person.

The following example is given to illustrate this position:

> P, angry because of errors of A, one of his salesmen, telephones to T, to whose office A has gone to make an authorized contract for the sale of Blackacre, that A is not authorized to make the sale. When A appears, T tells him nothing of P's statement but executes the contract as originally authorized. Although A is privileged as to P and T to execute a purported agreement and to receive money for P from T, he has no power to bind P by the contract.[6]

On this view it would appear in the situation as disclosed in *Robert Simpson Company* v. *Godson,* that if the notice by the husband was sufficient to indicate that the husband no longer wished to be bound, the company should have no direct contractual rights against the husband. On the other hand, as the wife was privileged as against her husband to do the thing she did, in the event that the wife was held personally liable she would have recourse against her husband. This raises considerations outside the scope of this note, the chief difficulty in such a situation being to establish the personal liability of the wife.[7]

It is submitted, with respect, that the decision in *Robert Simpson Company* v. *Godson,* in so far as it disregards a notice to the company as affecting the liability of the principal in contract to the company, cannot be supported.[8]

C. A. W.

---

[6] *American Law Institute's Restatement of the Law of Agency,* pp. 324, 325. See also *Restatement of Agency,* sections 7, d; 27, b; 144, f, all to the same effect.

[7] In view of the fact that a married woman is only liable on her contract when she acts "otherwise than as agent" (see the Married Woman's Property Act R.S.O. 1927, c. 182, s. 4) there might be difficulty in holding the wife liable in such a case. See this problem discussed by the present writer, *Implied Agency of the Wife for Necessaries* (1930), 8 Can. Bar Rev. 722 at p. 727.

[8] McCardie J. in *Miss Gray, Ltd.* v. *Earl of Cathcart* (1922), 38 T.L.R. at p. 565, in dealing with the manner in which a husband can negative liability for contracts made by his wife states that the husband can warn the tradesman not to supply goods on credit. The fact that McCardie J. was dealing with the presumption of authority which arises from cohabitation seems immaterial in this connection since, the presumption being one of fact, the wife, unless apprised of her husband's decision, would still believe herself to be authorized and hence in exactly the same position as though express authority had been given to her.

STATUTORY CAPACITY OF DIVORCED PERSONS TO RE-MARRY —SETTING ASIDE A DECREE ABSOLUTE.—It seems singular that section 57 of the Matrimonial Causes Act, 1857, should not have been more frequently noted and commented upon in decided cases than it appears to have been. Its importance in Canada, since the function of dissolving marriages by court decree has become common, can scarcely be over estimated. For by it a new status, a new capacity or right, is granted to divorced persons, the status, namely, of unmarried persons, the capacity to re-marry. The section as it appears in the Matrimonial Causes Act, 1857, is in part as follows :—

> When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death.

The rest of the section grants immunity to clergymen of the Church of England from being compelled to marry divorced persons and is not of special importance from the standpoint of a lawyer. The law enacted in the section is unquestionably substantive divorce law and as such is in force in those provinces of Canada to which the decisions of the Privy Council in *Watts* v. *Watts*,[1] *Walker* v. *Walker*,[2] and *Board* v. *Board*,[3] apply, that is to say in the Provinces of Manitoba, Saskatchewan, Alberta and British Columbia (see per Lord Blanesborough in *McPherson* v. *McPherson*[4]). It was not, however, until the recent decision of the Privy Council in *McPherson* v. *McPherson* that its provisions attracted any particular attention. Indeed, in two decided cases, one in Alberta in 1931, *Blatchford* v. *Van Ruyven*,[5] and one very recently in Manitoba, *Jones* v. *Jones*,[6] its provisions appear to have been completely overlooked. Even in England, where jurisdiction to dissolve marriages has been exercised by the courts ever since the Matrimonial Causes Act was passed in 1857, that is for eighty years, there are only two cases prior to *McPherson* v. *McPherson* that I have been able to find in which it is referred to, and in one of these, *Ousey* v. *Ousey*,[7] the reference is merely a casual one. In the other, *Chichester* v. *Mure, falsely*

[1] [1908] A.C. 573.
[2] [1919] A.C. 947.
[3] [1919] A.C. 956.
[4] [1936] A.C. 177 at p. 195.
[5] [1931] 1 W.W.R. 444; 25 A.L.R. 404.
[6] (1936), 44 Man. R. 233.
[7] (1875), 1 P.D. 56.

called Chichester,[8] the probable reason for the enactment of section 57 is given in the judgment of the Judge Ordinary. He points out that prior to the passing of the Matrimonial Causes Act the Ecclesiastical Court, having no power to dissolve a marriage valid at the time it was contracted, the only way in which this could be done and the right obtained by either party to marry again during the lifetime of the other was by Act of Parliament, and that the form invariably adopted by the Legislature in divorce bills (a form by the way, similar to the form adopted by the Parliament of Canada) implied a doubt whether the dissolution of the marriage by Act of Parliament was of itself sufficient to enable the parties to marry again. A clause of the bill enacted "that it shall be lawful for the complainant at any time after the passing of the Bill, to marry again as freely in all respects as if the party convicted of adultery were actually dead". "The introduction of such a clause into divorce bills," says the judgment, "probably caused the Legislature to make express provision as to the consequences of a decree of dissolution of marriage pronounced by the Court about to be created."

The only reported case in England in which, according to a careful search (see per Ford J. in *McPherson* v. *McPherson*[9]) an attempt was made to set aside a divorce after decree absolute granted is *Kemp-Welch* v. *Kemp-Welch and Crymes*.[10] In that case the person named as co-respondent in the divorce petition sought by notice of motion in the divorce proceedings to set aside the decree absolute on the ground of fraud. Preliminary objection was taken on behalf of the petitioner that the court had no jurisdiction to entertain the application. The President of the Probate, Divorce and Admiralty Division, Sir Samuel Evans, gave effect to the objection, and said: "If there is any method of getting rid of the decree after it has been made absolute, it is not by motion in this Court." The singular feature of the case is that no reference is made in it to section 57 of the Matrimonial Causes Act, 1857 (now contained with a slight change of language in the English Supreme Court Act of 1925 as section 84). This section would appear to have been a conclusive answer to the application. The President does not refer to it though he seems to have had some memory of such a provision for he obviously has doubts as to whether there is any way of getting rid of a divorce decree once it has been

[8] (1863), 3 Sw. & Tr. 223; 164 E.R. 1259.
[9] [1933] 2 W.W.R. at p. 513.
[10] [1912] P. 82.

made absolute. It is now clear, since the judgment of the Privy Council in *McPherson* v. *McPherson*, that upon the expiry of the time for appealing there is no way of getting rid of the absolute decree short of an Act of Parliament. Lord Blanesborough, in giving the judgment of the Committee, referring to the right of intervention on behalf of the public by the King's Proctor, states :

> But any such invention had to be made before time for appeal had expired, or before the rights of third parties had intervened. Just as a contract to take shares in a company induced by fraud, and being voidable only, may be set aside before winding-up commenced but not later, after the rights of the company's creditors have intervened —so here, the order absolute cannot be touched after the time for appeal therefrom has passed, and a new status has been acquired, or in this case, after the respondent, having remarried, is entitled, as is also his wife, to the protection afforded by s. 57 of the Matrimonial Causes Act, 1857.

Perhaps it is because of this vital statutory provision that there is an absence of any cases in the reports referring to the section since 1875. It is, however, strange that it should have dropped out of sight so completely as it apparently has done. No reference is made to it in the Alberta case of *Blatchford* v. *Van Ruyven*, either in argument or in the judgments of the judge of first instance or of the Appellate Division, and it would seem to have been a complete answer to the action which in the result succeeded. The action was to set aside a decree of divorce obtained by a husband on the ground of fraud, and in the result the decree was set aside. Had the court been made aware of the provisions of section 57 of the Matrimonial Causes Act, 1857, this result could not have happened.

The recent Manitoba case of *Jones* v. *Jones* furnishes another instance of a similar kind. In that case the husband had not been served with the petition of his wife for divorce though a formal affidavit of service upon him had been made by a private detective employed by the wife in the divorce proceedings. He presented a petition to the same judge who had granted the decree absolute for an order setting aside and annulling the decrees nisi and absolute some time after the time for appealing from the order absolute had expired, and in the result the decrees were set aside. Again no reference was made either in argument or in the judgment to section 57 of the Matrimonial Causes Act of 1857 nor to the judgment of the Privy Council in *McPherson* v. *McPherson*. The section was a complete answer to the petition and, notwithstanding the judgment setting aside the

decrees, it would seem still to be effective to confer upon Mr and Mrs Jones the status of unmarried persons. It seems clear that when the English Courts were given jurisdiction to dissolve marriages, Parliament thought it advisable to make conclusive statutory provision as to the status of divorced persons. The Act as originally passed did not provide for a decree nisi. This was done by the amendment 23 & 24 Vict., c. 144, apparently because the Legislature thought it too abrupt a course to dissolve a marriage by a single decree (see per Brett L.J. in *Norman* v. *Villars*[11]). The interval thus interposed between the decree nisi and the decree absolute (in the Canadian provinces to which the case of *Board* v. *Board* applies, three months, in England, six months) must presumably be used to ferret out any fraud, or other circumstances such as lack of service of the petition or any other matter or thing, that would or should prevent the decree being made absolute. After the decree is made absolute and after the time for appeal has expired it is too late. Any relief after that time even in a case where the respondent has never been served and thus has been in complete ignorance of the proceedings, can only be obtained by legislation. A de facto decree absolute of a court having jurisdiction to dissolve marriages is as final and conclusive to confer the status of single blessedness upon the parties to the decree as the death of either of them would be.

S. B. Woods.

Edmonton.

* * * *

Sale of Goods—Fictitious Hire-Purchase Agreement — Seller Remaining in Possession — Sale to Purchaser Without Notice.—The story of *Union Transport Finance Ltd.* v. *Ballardie*[1] is a mixture of fact and fiction, which may profitably be resolved into its constituent elements. The plaintiff, hereinafter called the finance company, in the course of its business bought motor cars for cash, in order to let them, under hire-purchase agreements, to would-be purchasers who were not prepared to pay the whole purchase price at once. Clark was short of credit or cash (though he was not adjudicated a bankrupt until after the material events had happened) and on May 17, 1935, he persuaded his friend Thom, local manager of the finance company, to buy, on behalf of the company, a motor car owned by Clark and in his possession, and to let it, under a hire-purchase

[11] 2 Ex. D. at p. 359.
[1] [1937] 1 All E.R. 420, [1937] W.N. 29.

agreement, to Felton, an employee of Clark, the company paying to Clark £180 (the balance after deducting the first payment of £60 to be made under the hire-purchase agreement).

Pursuant to the agreement between Clark and Thom, the finance company forthwith went through the form of making a hire-purchase agreement with Felton, who acknowledged that he had received delivery of the car, and agreed not to change the permanent garage of the car (expressed to be at his mother's residence, where there was in fact no garage), and not to part with its possession or control. In fact Felton was not financially in a position to buy a car on any terms, and Clark, Thom and Felton all knew that the hire-purchase transaction was not genuine in the sense that it was never intended that Felton's part in it should be a real one. The car remained in Clark's garage except when it was in use by Clark, or by Felton in the course of his employment. Clark made such payments to the finance company as were made under the fictitious hire-purchase agreement.

On August 9, 1935, Clark delivered the car to the defendant under a new hire-purchase agreement, the defendant taking in good faith and without notice of the earlier transactions.

An action in detinue and for damages for conversion, brought by the finance company against the defendant, was dismissed after trial by du Parcq J. on the ground that Clark, having contracted to sell the car to the finance company, was a seller continuing in possession within section 8 of the Factors Act, 1889[2] and therefore gave a good title to the defendant.

It was ingeniously argued, in view of Felton's acknowledgment of delivery of the car, that Clark was in possession as bailee for Felton, but in fact Clark had never attorned to Felton, and Clark's conduct, as Thom (the finance company's agent) well knew, was inconsistent with the view that Clark had attorned to Felton.

Again, it was ingeniously argued that Clark was to be regarded as himself a party to the hire-purchase agreement, Felton being merely his nominee,[3] but the agreement itself said that it was a contract "personal to the hirer", and the finance company might well have refused to make a contract with Clark.

---

[2] Substantially the same as section 25 (1) of the Sale of Goods Act, 1893, re-enacted in Ontario: R.S.O. 1927, c. 163, s. 25(1).

[3] This was an attempt to bring the case within *Staff Motor Guarantee Ltd.* v. *British Wagon Co. Ltd.*, [1934] 2 K.B. 305.

It appears from the case of *Bender* v. *National Acceptance Corporation Ltd.*[4] that fictitious contracts of sale are not entirely unknown in Ontario. Embree, a dealer in motor cars, went through the form of making a conditional sale agreement with Currie, taking a promissory note from Currie for part of the price. Embree then endorsed the note and transferred the agreement to a finance company (the defendant), which discounted the note for him. The car remained in the possession of Embree, and subsequently he dishonestly sold it to the plaintiff, who took in good faith and without notice of the earlier transactions. It was held by the Court of Appeal that whether the agreement between Embree and Currie was fictitious or not, Embree's transfer of the agreement to the finance company vested in it the title to the car, and, on any view of the earlier transactions, Embree was a seller who continued in possession within section 25 (1) of the Sale of Goods Act, and therefore the plaintiff acquired a good title.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.

* * *

DOCTOR'S LIABILITY FOR NEGLIGENCE OF NURSES—RESPONDEAT SUPERIOR.—The courts have found continuous difficulty in applying the maxim *respondeat superior* to cases involving liability for a nurse's negligence.[1] The liability of the hospital who employs the nurse has been much discussed.[2] A new problem has been recently dealt with in South Africa and New Zealand in two cases, in both of which the surgeon was sued for the negligence of a nurse during an operation, and it is of interest to examine the rules applied and their application to the older line of hospital decisions.[4]

These cases had almost identical facts. The defendant surgeon operated on the plaintiff with various assistants, includ-

[4] (1928), 63 O.L.R. 215, [1929] 1 D.L.R. 222.

[1] See (1936), CAN. BAR REV. 699, where the problems of hospital responsibility are discussed with particular reference to the contrast between duty owing and control.

[2] *Loc. cit.*, and see the following recent cases: *Vuchar* v. *Trustees Toronto General Hospital*, [1936] O.W.N. 589; *Strangeways-Lesmere* v. *Clayton*, [1936] 2 K.B. 11; *Dryden* v. *Surrey County Council*, [1936] 2 All E.R. 535; *Lindsay County Council* v. *Marshall*, [1936] 2 All E.R. 1076; *Logan* v. *Waitaki Hospital Board*, [1935] N.Z.L.R. 385.

[3] *Van Wyk* v. *Lewis*, [1924] App. D. 438 (S.Af.); noted in (1924), 41 So. Af. L.J. 71; *Ingram* v. *Fitzgerald*, [1936] N.Z.L.R. 905. And see *Perionawsky* v. *Freeman* (1868), 4 F. & F. 977.

[4] See the cases cited in note 2, *supra*, and *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820.

ing nurses supplied by the hospital, and in each case, a nurse was negligent in carrying out some duty which was properly left to her in the best interests of a successful operation. In the earlier South African case, the nursing sister failed to count correctly the minute swabs used in the operation, and in the more recent New Zealand case, the assistant nurse painted the plaintiff with iodized phenol in mistake for tincture of iodine, an error caused by her own omission to remove the phenol from the room. Both cases were disposed of on the same ground, the New Zealand case following the earlier South African decision of *Van Wyk* v. *Lewis*. The courts found that "the undertaking" of a surgeon is to use skill and care and to do all things necessarily required to be done by him under the circumstances. This view of the surgeon's responsibility of undertaking is so narrow that in fact, if not in theory, it completely excludes vicarious liability, since it can only include personal negligence by the surgeon's own hand or negligence in permitting an assistant to perform some act which in the best interests of the patient should be done by the surgeon. In the principal cases, the court expressly found that the acts negligently done were delegated to the nurses in the best interests of a successful operation. The second ground of judgment was probably firmer if less clearly expressed. As stated by Wessels J.A. in *Van Wyk* v. *Lewis*: "The relation of a hospital sister or nurse . . . . to a surgeon operating is not that of master and servant. The nurse is an independent assistant . . . . . though under his control in respect of the operation . . . . . They are members of an allied profession and have duties of their own to perform."[5]

The views expressed in the above cases carry the problem back to the fundamental basis of tortious liability. In the words of Baron Bramwell, "There can be no action except in respect of a duty infringed . . . . . ."[6] Such logic would justify the conception of duty owing found in the principal cases but such strict logic could always be used to exclude vicarious liability. The scope of undertaking has been an important factor in all the nurse-hospital cases, and the most recent judgment in Ontario, *Vuchar* v. *Trustees Toronto General Hospital*,[7] seems to reconcile the distinction between the English and Canadian cases by limiting the former broad Ontario view that hospitals undertake "to nurse" to a more narrow one that hospitals undertake to perform ministerial but not professional acts.[8]

[5] At p. 454.
[6] *Ruck* v. *Williams* 4 H. & N. 318.
[7] [1936] O.W.N. 589; Rowell C.J.O. at p. 595.

The other element in all cases of this nature is control, and it has been long accepted as the basic distinction between servants and independent contractors.[9] The essential independence attributed to the nurses in the principal cases, is an ability or power to exercise a personal judgment which is completely lacking within the surgical theatre. The control or right to control of a surgeon within the confines of the operating room, has been a matter for judicial "dicta",[10] and it seems indisputable that the exigencies of a surgical operation require a complete right to control in the surgeon much akin to the power of a captain at sea. While there can be no doubt that the New Zealand case only applied the logic discussed in so many previous cases, vicarious liability requires more liberal treatment if it is to continue in English law.

JOHN T. WEIR.

Toronto.

[It may be doubted whether the decision commented on can be styled "logical". It might equally be argued that it was "logical" to give full effect to the element of control of the surgeon in the operating-room as imposing liability on the surgeon for all negligence done within the confines of that room. As a matter of fact, like so many other situations, the results in the case discussed seem based on a wide, but inarticulate view that it would be unfair to the doctor to make him respond for the negligence of nurses in the operating theatre. In other words, the surgeon is in control of the operation. This is enough to exonerate the hospital from liability since it cannot interfere. It does not follow, however, that because the doctor is in control of the operation, he must answer for the negligence of nurses supplied him by the hospital board. If there be a broad underlying basis of vicarious liability, it is that a person shall respond for the agencies doing *his* work. Are the nurses doing the doctor's work in the operating theatre, or is the situation not that of a number of trained experts acting in co-ordination? If the latter, a directing power in the surgeon would not seem to involve liability.—C. A. W.]

[8] This reconciliation is theoretical rather than practical. Compare *Lavere* v. *Smith Falls Public Hospital* (1914), 35 O.L.R. 98, approved in *Nyberg* v. *Provost Municipal Hospital Board*, [1927] S.C.R. 226, with the English decisions cited in note 2, *supra*. The fundamental test will remain, is the act "purely ministerial or administrative".

[9] The element of control has overridden questions of status: *Bain* v. *Central Vermont Railway*, [1921] 2 A.C. 412; *Donovan* v. *Laing*, [1893] 1 Q.B. 629; *Jones* v. *Scollard*, [1898] 2 K.B. 565; *Quarman* v. *Barnett* (1840), 6 M. & W. 499; *Rourke* v. *White Moss* (1877), 2 C.P. 205. The history of the law of Master and Servant shows a gradual evolution from "status" to "control" as the basic factor. The principal cases ignore control and look at status, as the quotation from Wessels J.A. above, indicates.

[10] *Hillyer* v. *Governors of St. Bartholomew's Hospital, supra.*