THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

The Twenty-fourth Annual Meeting of the Canadian Bar Association will be held in the City of Quebec, on the 16th, 17th and 18th days of August, 1939.

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CASE AND COMMENT

MORTGAGES—CLOG ON EQUITY OF REDEMPTION—CONSTITUTIONAL LAW—THE INTEREST ACT.—The recent decision of the Court of Appeal in England in *Knightsbridge Estates Trust, Ltd.* v. *Byrne*,[1] reversing the decision of Mr. Justice Luxmoore of the Chancery Division is of interest as a *ratio decidendi* in the mortgage redemption field and in regard to clogs affecting the legal and equitable right of redemption. In that case the Knightsbridge Estates Trust, of limited liability, mortgaged 75 houses, 8 shops, and a block of flats to secure a loan of £310,000 from the trustees of the Royal Liver Friendly Society. The principal was to be repaid over a period of 40 years in the form of 80 half-yearly instalments. None of the properties mortgaged could be sold free from the mortgage by the mortgagor under the terms of the mortgage. The respondent (plaintiff) claimed it was entitled to redeem the mortgaged property following six months' notice to the mortgagees and upon payment of principal, together with interest and costs. They also claimed that as the mortgage could not be redeemed for a period of 40 years that it was void as being a clog on the equity of redemption and in any event infringed the rule against perpetuities.

[1] [1938] 4 All E. R. 618.

The Court of Appeal held that the plaintiff was not entitled to redeem inasmuch as a mortgage irredeemable for a period of 40 years is not merely by reason of the length of the period unreasonable. And the postponement of redemption for 40 years, not being unconscionable nor inconsistent with the right to redeem, was not a clog upon the equity of redemption. Further, the rule against perpetuities was inapplicable to mortgages.

It is well established that a mortgagee need not permit redemption of the mortgage until maturity unless it otherwise provides. The period for which a mortgage is to run however, before it is redeemable must be reasonable. If it were too great the right of redemption, certainly in the case of an individual, might well be illusory.

In *Bradley* v. *Carritt*,[2] Lord Macnaghten, in reference to *Biggs* v. *Hoddinott*,[3] stated:

> In the first place, it purported to decide that a mortgage may be made irredeemable for a reasonable period. Well, everybody knows that when money was placed out on mortgage as an investment nothing was more common than to make the mortgage irredeemable for a certain limited time. It was an old and well-established practice, and a very reasonable practice too.

Just what constitutes "a reasonable period" varies considerably. An obiter dictum of Sir George Jessel, M. R. in *Tervan* v. *Smith*[4] states:

> . . . . . although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as 5 or 7 years.

On the other hand, a period of 28 years during which a mortgage was to be irredeemable, without the consent of the mortgagee, was held to be unreasonable in *Morgan* v. *Jeffreys*.[5]

In the case of leasehold mortgages the yard-stick is more readily applied, for if the mortgage extends virtually over the whole period demised, the right of redemption is obviously illusory. This was the case in *Fairclough* v. *Swan Brewery Co. Ltd.*,[6] where the contractual right to redeem a mortgage placed on land leased for 20 years did not arise until 6 weeks before the expiration of the term. Here the Appeal Court held that the provision for redemption was nugatory and granted relief to the

[2] [1903] A.C. at p. 259.
[3] [1898] 2 Ch. 307.
[4] (1882), 20 Ch. D. at p. 792.
[5] [1910] 1 Ch. 620.
[6] [1912] A.C. 565.

mortgagor. Plaintiff in the Knightsbridge Estates case attempted to show a similar lack of redemption, the period of irredeemability being 40 years, but failed. The test is not the length of time the mortgage is to run, but depends upon the "reasonableness" in relation to the surrounding circumstances, with quite different considerations being presented in the case of an individual, or of a corporation mortgagor. The decision establishes that insofar as the postponement of the contractual right of redemption is concerned this is not of itself necessarily a clog upon the equity of redemption. Individuals and corporations who secure advances of money by means of mortgages, do so with their eyes open, and, in the absence of unconscionable provisions, should be prepared to live up to the terms of their contractual obligations.

In Canada, we must consider the provisions of sec. 10 of the Interest Act, R.S.C., 1927, c. 102, insofar as a mortgage granted by an individual is concerned. The section provides that where a mortgage is not payable until a time more than five years from its date, it may nevertheless be paid off at the end of five years, provided principal, interest to date of payment, together with three months interest in lieu of notice is paid to the person entitled to receive the money. By sub-sec. (2) the section is not to apply to mortgages upon real estate given by a joint stock company or corporation, nor to debentures issued by such secured by freehold or leasehold property. Ontario has re-enacted aforementioned sec. 10 by provincial legislation, but in the other provinces it is an open question whether it is within the competence of the federal power to enact such legislation.

In *Re Parker, Parker* v. *Parker*[7], the section[8] was applied and the question of its validity was not raised but appears to have been taken for granted. Sec. 7, or sec. 10 as it now is under R.S.C. 1927, c. 102, was considered in *Bradburn* v. *Edinburgh Assurance Co.*,[9] and was declared *intra vires* of the Dominion power. Mr. Justice Britton stated:[10]

> It is however, one thing to legislate where the contract has sole reference to security for money lent at interest, and quite a different thing to legislate in reference to other contracts where interest is only an incident.

[7] (1894), 24 O.R. 373.
[8] R.S.C. 1886, c. 127, s. 7.
[9] 5 O.L.R. 657.
[10] At. p. 666.

It would appear that there is an analogy here, with the statement of the Privy Council in *Great West Saddlery Co. Ltd.* v. *The King*,[11] that it is the effect of the legislation that must be looked at, and if, under the guise of legislating as to an enumerated power under sec. 91 of the British North America Act the Dominion enters a field clearly assigned to the Provinces under sec. 92, in this case Property and Civil Rights, then such Dominion legislation is *ultra vires*. By accepting the decision of the *Bradburn Case* it would seem but a slight step further to assume that the Dominion has power to deal with mortgages generally, but this is irreconcilable with the right of the provinces to deal exclusively with Property and Civil Rights under sec. 92. Viscount Haldane in the *Great West Saddlery Case*[12] stated :

> It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods.

Chief Justice Ritchie in *Lynch* v. *The Canada N. W. Land Co.*,[13] says:

> It is obvious that the matter of interest which was intended to be dealt with by the Dominion Parliament was in connection with debts originating in contract, and that it was never intended in any way to conflict with the right of the local legislature to deal with municipal institutions in the matter of assessments or taxation, either in the manner or extent to which the local legislature should authorize such assessments to be made, but the intention was to prevent individuals under certain circumstances from contracting for more than a certain rate of interest, and fixing a certain rate when interest was payable by law without a rate having been named.

Again in *Royal Canadian Insurance Co.* v. *Montreal Warehousing Co.*,[14] a statute of the Province of Quebec authorized defendant company to borrow money at such rate of interest as might be agreed upon. It was held that the statute was *intra vires*. The reservation of "Interest" to the Dominion by sec. 91 of the B. N. A. Act applies only to general legislation as to the rate of interest.

It is submitted that the Dominion in attempting by sec. 10, of the Interest Act to limit the duration of a contractual obligation, viz., the redemption of a mortgage given by an individual, has encroached on the field of Property and Civil

[11] (1921), 58 D.L.R. 1.
[12] At. p. 25.
[13] (1891), 19 S.C.R. 204 at p. 207.
[14] (1880), 3 L.N. 155.

Rights which was expressly assigned to the Provinces under sec. 92 of the British North America Act.

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HUSBAND AND WIFE — AGENCY OF NECESSITY — QUASI-CONTRACT.—With the academic heavens in England still reverberating with the controversy concerning the underlying basis of quasi-contractual recovery,[1] it may not be out of the way to indicate another situation in which the use of fictions tends to obscure matters of substance. In *Thompson and Kerr* v. *Findlay*,[2] the Ontario Court of Appeal had to deal with the liability of a husband for necessaries supplied to the wife while she was living separate from the husband. Where a wife is living with her husband ordinary principles of agency law govern the contractual liability of a husband, and from the mere fact of cohabitation a presumption of authority in the wife to pledge her husband's credit arises.[3] This presumption, being one of fact, may be rebutted by proof that the husband had forbidden the wife to pledge his credit, or in other ways which prove that the husband has negatived any consent on his part to contractual liability entered into by the wife.[4] As opposed to this "delegated" authority, the cases speak of an "inherent" power in the wife which arises solely from the husband's duty to supply his wife with the necessities of life. Thus, even though the husband may negative any presumption of consent on his part to pledging his credit, there seems to be, even during cohabitation, a sphere of expenditure over which the husband has no control and in which the wife is said to have an inherent power to pledge his credit as an "agent of necessity".[5] Similarly, when the husband has wrongfully compelled his wife to leave

[1] Compare Friedman, *The Principle of Unjust Enrichment*, 16 Can. Bar Rev. 247, 369; Lord Wright, *Sinclair* v. *Brougham*, 6 Camb. L.J. 305; Winfield, *The American Restatement of the Law of Restitution*, 54 L.Q.R. 529; Holdsworth, *Unjustifiable Enrichment*, 55 L.Q.R. 37; Denning, *Quantum Meruit*, 55 L.Q.R. 54. This is merely a small part of the recent literature on the subject.

[2] [1939] O.R. 22.

[3] See Wright, *Implied Agency of the Wife for Necessaries* (1930), 8 Can. Bar. Rev. 722.

[4] See a summary of the various situations by McCardie J. in *Miss Gray, Ltd.* v. *Earl of Cathcart* (1922), 38 T.L.R. at p. 565.

[5] *Cf.* Rowlatt J. in *Seymour* v. *Kingscote* (1922), 38 T.L.R. 586 at p. 587; "He [the husband] cannot withdraw her authority if it has the effect of leaving her unprovided for with necessaries, because he is bound to provide her with necessaries, and if he purports to withdraw her authority, and she is not otherwise provided, *she may pledge his credit against his will.*"

his home, or if the wife voluntarily leaves her husband for just cause, then again the wife is said to have an inherent power as an "agent of necessity" to pledge her husband's credit, which in no way depends on the consent of her husband.[6]

It was with this latter situation that the Court of Appeal had to deal in *Thompson and Kerr* v. *Findlay*, and on the facts the Court came to the conclusion that the plaintiffs in that case who were seeking to hold the husband liable for medical services to his wife, who was living separate from her husband, had not shown that the wife was living apart from her husband under such circumstances as to give rise to an inherent power of pledging her husband's credit.

The fiction of agency employed in cases where a wife is said to have an inherent power of binding her husband was no doubt introduced into the law to preserve the appearance of privity of contract which has been the chief impediment to the development of any rational discussion of quasi-contract. But the right of a person who has furnished necessaries to a wife who has been deserted by her husband to sue the husband does not depend upon contract or privity. Thus, even though the husband expressly makes known to the third person who supplies the wife that he will not pay for them, he is none the less liable to that other person.[7] To those persons, who, like Professor Holdsworth and Mr. A. T. Denning,[8] insist on preserving the fiction of contract as the fundamental underlying notion of quasi-contractual recovery, such cases must be difficult to accept since they seem to be plain illustrations of a situation where one person may recover against another where there is not the slightest foundation for finding a request or implying consent. As a matter of fact, cases of this kind are merely an instance where a person who has conferred a benefit upon another without request, has, despite sweeping statements sometimes found in the English cases, a right of recovery for those benefits conferred.[9]

[6] See Blackburn J. in *Bazeley* v. *Forder*, L.R. 3 Q.B. at p. 564; *Archibald* v. *Flynn* (1872), 32 U.C.Q.B. 523.

[7] See *Harris* v. *Morris* (1801), 4 Esp. 41 : "if he even gave particular notice to individuals not to give her credit, still he would be liable for necessaries furnished to her."

[8] See *supra*, note 1.

[9] There is no doubt a policy against permitting recovery by persons whose injection into the affairs of another may be styled "a mere impertinence", (Fry L.J. in *Re Leslie* (1883), 23 Ch. D. 552, 561) but other policies or interests may outweigh this consideration and render the intervention one which could not be styled "officious". (See Hope, *Officiousness*, 15 Cornell L.Q. 25). Thus, recovery of expenses in burying a corpse is allowed since "common principles of decency and humanity" (*Rogers* v. *Price* (1829), 3 Y. & J. 28, 34) remove the "impertinent" element. Other illustrations can be found in the English case law.

In *Thompson and Kerr* v. *Findlay*, Gillanders J.A. said that the plaintiff had been specifically notified by the husband that he would not be responsible for his wife's debts and that this would furnish the husband with a defence. It is submitted that while such language is appropriate in the normal agency situation where the wife is presumed in fact to have the consent of her husband to pledge his credit, it is inappropriate to a discussion of liability which is in no way dependent on consent or authority.[10] The use of the term "agent" no doubt leads to confusing the two situations in the same way that "implied contract" obscures the basic difference between true contracts and quasi-contractual recovery.[11]

C. A. W.

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AGENCY—NEGLIGENCE OF DRIVER OF CAR TOWARDS SPOUSE —LIABILITY OF MASTER.—What is the extent of the vicarious liability in tort of the master for the acts of his servant while engaged in the master's business, and can the master be sued when the servant cannot be sued, and if so, on what basis? Is there an independent liability of the master for such wrongful acts of the servant, or is the liability of the master dependent on the servant being himself capable of being sued for such wrongful act?

These thoughts have been engendered by some recent decisions, in particular, *White* v. *Proctor*, [1937] O.R. 647, a decision of the Court of Appeal for Ontario which was appealed to The Supreme Court of Canada but settled before hearing. This case, though in relation to an accident which took place before the coming into force of The Negligence Amendment Act, 1935, Ontario, c. 46, and therefore of limited effect, is nevertheless important for what was discussed and left at large.

The plaintiff, a married woman, was injured whilst riding as a passenger in a motor truck driven by her husband, Harold C.

[10] It is, indeed, contrary to the English case law. See *supra*, note 7.

[11] THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW OF RESTITUTION, has been a large factor in the renewed interest in quasi-contractual recovery in England. Indeed Lord Wright (51 Harv. L. Rev. 369) thought that English law was, in the main, in accord with the extremely advanced views there set out. In the RESTATEMENT (sec. 113) the general principle of quasi-contractual recovery governing situations similar to that discussed is stated in the following language: "A person who has performed the noncontractual duty of another by supplying a third person with necessaries which in violation of such duty the other had failed to supply, *although acting without the other's knowledge or consent*, is entitled to restitution therefor from the other if he acted unofficiously and with intent to charge therefor."

White, and owned by Supertest Petroleum Corporation Limited. Her action was against one Proctor the driver of another motor vehicle which came into collision with the truck. She did not make Supertest a defendant but that Company was made a party defendant under the provisions of The Negligence Act, 1930, 20 Geo. V, c. 27, s. 6, at the instance of the defendant Proctor. Judgment was given at the trial against the defendant Proctor for large damages with a direction that upon payment by him he could recover from the defendant Supertest the proportion payable as the result of the contributory negligence of its driver. Supertest appealed but the appeal was dismissed.

The appeal of Supertest was on the ground that inasmuch as Harold C. White was the husband of the plaintiff and so could not be guilty of a tort quoad his wife, and as the claim against it was based upon the fact that the husband was an employee, she could not recover from the master. Henderson J.A. in giving the judgment of the Court said: "This raises a neat point for decision, which, so far as I know has not been considered. Since the amendments to The Negligence Act of 1935, the situation is not likely to arise again, but this case is to be determined by the law as it stood prior to the amendments of 1935." As a matter of fact, the question has arisen again in respect to an accident happening since The Negligence Amendment Act of 1935, as will be shown later.

The decision of the Court of Appeal involved a discussion of the Married Women's Property Act and the conclusion of the Court was:—

> . . . . . these provisions do not provide that a wife cannot commit a tort. They only provide that she shall not be sued for it by her husband. But after all, this is an Act which concerns itself with married women's separate property, and has nothing to do with the obligations of a husband in respect of his torts, except that he shall not be sued by his wife in respect of them.

The appellant had relied upon the case of *Phillips* v. *Barnet* (1876), L.R. 1 Q.B. 436, which was decided prior to the enactment of The Married Women's Property Act in England, and which held that a wife, after being divorced from her husband could not sue him for an assault committed upon here during coverture on the ground that the husband and wife are one. Henderson J.A. questioned this and said:—

> The Married Women's Property Acts in England and here have brought about a radical change in the status of married women and modern thought has borne at least an equal part. I question if the

> old fiction of law that husband and wife are in law one person has much place in modern jurisprudence. The provisions of Section 7 of the Ontario Married Women's Property Act have, as stated, preserved the old common law that husband or wife may not sue the other in tort, but I am not at all sure that the foundation on which the decision in *Phillips* v. *Barnet*, is rested has much existence today. It is, however, unnecessary to determine that in this case.

However, the real point of the appeal was that the liability of Supertest was resisted "because first, the master or employer is only liable on the maxim respondeat superior and secondly, because the master, if liable to the plaintiff, should have a right to be indemnified by the servant." On this latter point it has been held that the servant is responsible to the master for his breach of duty. (*Proctor* v. *Seagram*, 56 O.L.R. 633.) This principle was affirmed in *Treleaven* v. *Beatty Bros.* (unreported) where Masten J.A. said (July 7th, 1937) :

> I am of opinion that a principal is entitled to claim against his employee where the latter has been guilty of negligence which compelled the employer to pay damages.

The Court did not deal with this question, nor the more fundamental one whether respondeat superior applies where the servant cannot be sued, which was really the only objection because the question of indemnity by the servant was not in issue. Assuming such right of indemnity exists, is it any more than an argument that respondeat superior should not be applicable where the servant is not liable, since to hold the master liable would make the servant indirectly liable? In other words is this right of indemnity compatible with a master's liability to the injured person, apart from a similar direct liability of the servant? The court disposed of the appeal however, solely on the ground that the owner, of a motor vehicle as such is liable under section 41a of The Highway Traffic Act, R.S.O. 1927, c. 251 as amended in 1930 (20 Geo. V, c. 48, s. 10) which provides that the owner of a motor vehicle shall be liable for loss or damage for its negligent operation. While this represents the law as it existed prior to the amendment of The Negligence Act in 1935 (25 Geo. V, c. 46), and under circumstances where the master owned the car, what is the position since the amendment and what is the result where the master is not the owner of the car?

This amendment provides for two cases : actions brought by a passenger or a spouse :—

> (2) In any action brought for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon,

or entering or getting onto, or alighting from a motor vehicle other than a vehicle operated in the business of carrying passengers for compensation, and the owner or driver of the motor vehicle which the injured or deceased person was being carried in, or upon or entering, or getting on to, or alighting from is one of the persons found to be at fault or negligent, no damages, contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver, and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

(3) In any action founded upon fault or negligence and brought for loss or damage resulting from bodily injury to, or the death of any married person where one of the persons found to be at fault or negligent is the spouse of such married person, no damages, contribution or indemnity shall be recoverable for the portion of loss or damage caused by the fault or negligence of such spouse and the portion of the loss or damage so caused by the fault or negligence of such spouse shall be determined although such spouse is not a party to the action.

Before this amendment it was held in the case of *Macklin* v. *Young*, [1933] S.C.R. 603, that under section 3 of The Negligence Act as it then stood, namely, The Negligence Act, 1930, there could be no indemnity against a partially negligent husband in a suit brought by his wife against the owner and driver of another motor vehicle which had collided with the husband's because the wife could not sue her husband and therefore the husband could not be found "jointly and severally liable". But the amending Act of 1935 now reads, "where damages have been caused or contributed to by the fault or negligence of two or more persons". *Macklin* v. *Young* was cited in the *Proctor Case* but not discussed. There have been numerous cases where passengers have brought action against the owner or driver of a motor vehicle which has come into collision with the one in which the passenger was being carried and in such cases the judge or jury finds the degree of negligence of both drivers and gives judgment to the passenger for the proportion found against the driver of the other car only. The same applies in the case of a claim by a married person in respect to the proportion of damages suffered from the act of the spouse guilty of contributory negligence. While the Act covers most of the actual cases, the question might arise as to the liability of an employer who does not own the car driven by his servant, when such servant's negligence (in the course of his employment) injured a passenger or the spouse of the servant even though not a passenger.

The only such case the writer knows of is a decision in *Witherspoon* v. *Rennie et al* (unreported) Toronto Assizes 1938) where an employee brought action against her employer and the driver of the motor car in which she was riding, the driver being a fellow employee and owner of the motorcar. The owner-driver of the other colliding motor vehicle was also a defendant. On the answers of the jury it was held that the plaintiff and the driver of the car in which she was riding were fellow employees and proceeding on the business of the employer, and that her fellow servant's negligence contributed to her injuries, and that the employer was liable in such event. This decision was reached notwithstanding the above-quoted section of The Negligence Act of 1935, providing that in the case of passenger claims,

> no damages, contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver.

The Court took the view that this relieving section of The Negligence Act was confined to cases of owner and driver and here the master was neither. Further, the liability of the master arose at common law and there was nothing in the Statute to take away that liability even if the servant as driver of the car could not be sued by his passenger. No written reasons were given but the point was discussed on the motion for judgment and there was no appeal.

It might be noted that there have been a number of conflicting decisions in several of the United States dealing with the question whether or not a wife may recover against the employer of her husband for injuries sustained by reason of the negligence of the husband acting within the scope of his employment. With such division of opinion it is difficult to state at this time where the weight of authority lies, but reference should at least be made to a New York case where the judgment of the Court was written by the late Mr. Justice Cardozo of The Supreme Court of the United States, when he was Chief Justice of the Court of Appeals of New York. This was the case of *Schubert* v. *Schubert Wagon Co.* (1928), 249 N.Y. 253, 64 A.L.R. 293 where it was stated that

> The disability of wife or husband to maintain an action against the other for injuries to the person is not a disability to maintain a like action against the other's principal or master.

The reasoning of the Court was that although it is true a master is not liable for the act of his servant under the rule of

respondeat superior if the act was lawful, yet the master is not exonerated when a servant has had the benefit of a covenant not to sue or has set up a discharge in bankruptcy or has escaped liability upon grounds not inconsistent with the commission of a wrong unreleased and unrequited. Mr. Justice Cardozo continued :—

> An employer commits a trespass by the hand of his servant upon the person of another. The act, let it be assumed, is within the scope either of an express mandate or of an implied one. In either event, if the trespass is not justified, he is brought under a distinct and independent liability, a liability all his own. . . . . The defendant, to make out a defence, is thus driven to maintain that the act, however negligent, was none the less lawful because committed by a husband upon the person of his wife. This is to pervert the meaning and effect of the disability that has its origin in marital identity.

Of interest to Canadian readers is the fact that *Phillips* v. *Barnet, supra,* was cited and apparently conceded to be good law, but, says Mr. Justice Cardozo,

> A trespass, negligent or wilful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity. The trespass may be a crime for which even a husband may be punished, but, whether criminal or not, unlawful it remains. As well might one argue that an employer, commanding a husband to commit a battery on a wife, might justify the command by the victim's disability. The employer must answer for the damage, whether there is trespass by direct command, or trespass incidental to the business committed to the servant's keeping. In each case the maxim governs that he who acts through another acts by himself. In all this there is nothing at war with the holding of some cases that the remedy against the husband is denied altogether and not merely suspended during coverture.

The argument in regard to the master's right of indemnity aforementioned was also discussed as follows :

> We are told that in the long run the consequences of upholding an action against the master may be to cast the burden on the husband, since the master if not personally at fault has a remedy over.
>
> The consequence may be admitted, without admitting its significance as a determining factor in the solution of the problem. The master who recovers over against the servant does not need to build his right upon any theory of subrogation to a cause of action once belonging to the victim of the injury. A sufficient basis for his recovery is the breach of an independent duty owing to himself. The servant owes the duty to the master to render faithful service, and must answer for the damage if the quality of the service is lower than the standard.

Mr. Justice Cardozo also disposed of the argument that to permit recovery against the employer results in countenancing an encircling movement where a frontal attack upon the husband is inhibited, in that the employer in turn, may recover from the husband (employee) and so the wife in effect is no better off as the husband has to pay in the end, by pointing out that a recovery for the wrong done the wife by the employer through his servant does not belong to the husband but to the wife and that the recovery by the employer from the husband diminishes only the husband's own property and, adds, which is no doubt correct, that it would be a very unusual case where the employer could actually recover much from the employee. However, such a practical consideration should not weigh with the Court in deciding the legal liability of the master.

It was pointed out in the judgment that in some states it has been held that the master is not liable in such circumstances on the ground that the master's liability is derivative, that is, based upon the servant's liability, but Mr. Justice Cardozo concludes that the liability of each exists without relation to that of the other, the servant for his own wrongful conduct, and the master for the wrongful conduct of the servant while acting for him, and the breach of duty as to each is independent of the other.

> Though the law may deny to the wife . . . . . the right of recovery against the husband . . . . . the liability of the master must remain until he satisfy it or be by rule of law relieved from the liability of his servant's wrong.

It is possible to criticize Mr. Justice Cardozo's conclusion that the liability of the employer is independent of that of the servant and not derivative, for he recognizes that the master has, after recovery against him, a remedy over against the servant not, as he says, upon any theory of subrogation to the rights of the injured person, "but by reason of an independent duty owing to himself". No doubt this is an accurate statement of the law but is it consistent with the independent liability of the master? What was the duty of the servant? Was it not to operate the master's automobile carefully and without negligence, and is it not the failure to do that very thing which makes the master liable?

The basic principle of vicarious liability is that the master is liable (apart from special exceptions like husband and wife and passengers in automobiles) for the wrongful acts of the servant while engaged on the master's business. Is it necessary

to limit this established doctrine to cases where the servant is himself liable to be sued by the injured person? Does respondeat superior mean that the superior is only responsible because the servant is, or is it just that the master is responsible for the act of the servant, *i.e., qui facit per alium facit per se.*

There seem to be no reported cases in our own courts or in England dealing with the question and it would have been interesting had *White* v. *Proctor* gone to the Supreme Court of Canada although it is probable that sec. 41 (c) of The Highway Traffic Act would have rendered unnecessary any decision of the points here discussed.

Perhaps in these days a lawyer should suggest what ought to be the law, and on that point it may be sufficient to say that the recovery of damages for injuries due to negligence is of primary importance, and that it should not be defeated because of the identity in law of husband and wife which, while no doubt beneficial so far as it eliminates actions in tort between husband and wife, need not be extended to exonerate the employer of a negligent husband who injures someone while acting in the course of employment. If his act would render his master liable to others why not to the spouse? The same reasoning of course applies to the analogous passenger case where the employer does not own the car.

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