1924

Notice to an Agent Acting Adversely - "Sole Actor"

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COMMENT ON RECENT CASES

FEDERAL CASES

AGENCY—NOTICE TO AN AGENT ACTING ADVERSELY—"SOLE ACTOR."—In *Kean* v. *National City Bank of Memphis*,[1] the Circuit Court of Appeals for the Sixth Circuit had before it the always difficult question whether the knowledge of an agent, who is in fact acting adversely to his principal, will be imputed to the principal. It appeared that in November, 1920, liberty bonds of a face value of $466,000 had been stolen from the plaintiff in New York. In January, 1921, a group of men at Memphis was engaged in endeavoring to sell liberty bonds there, which were afterwards shown to be part of those stolen. The president of the defendant bank was approached by a man who offered to sell $100,000 of such bonds, or to borrow $80,000 upon them. Both offers were declined, and the president of the bank warned the active vice-president of the bank against having anything to do with them should the offer be renewed. Nevertheless, shortly after this caution, the vice-president instructed the teller to get ready to cash a draft for a large amount, and presently presented a draft for $85,000, drawn by a local bank upon its New York correspondent, and endorsed in blank. The teller cashed this draft, less exchange, and handed the proceeds to the vice president. Some days later the vice-president presented a similar draft for $65,000 and this was also cashed, less exchange, and the money handed to the vice-president. Both of these drafts were duly paid on presentation in New York, and the bank sustained no loss upon them, and made no profit beyond the exchange. Upon the same day that the last named draft was cashed, the vice-president also presented another draft which he had prepared. It was drawn in the name of the defendant bank itself, to its order, and was stamped with its endorsement. It was for $9,202.76, drawn upon a New Orleans banker, and had attached to it $10,000 of liberty bonds. The teller cashed this draft also, paying the proceeds to the vice-president, and the draft with bonds attached was sent on for collection and duly paid. The New Orleans buyer afterwards testified that he supposed he was buying the bonds directly from the defendant bank.

It being afterward discovered that the first two drafts cashed by the defendant bank were given for the purchase price of certain of the bonds stolen from the plaintiff, and that the bonds attached to the New Orleans draft were also a part, the plaintiff brought this action against the bank, seeking to recover upon three grounds: (1) A conspiracy to get these bonds into the hands of holders for value, with knowledge that they were stolen; (2) that the several drafts were purchased with knowledge that they were the proceeds

1. 294 Fed. 214.

of stolen bonds, for which the bank must account; and (3) that as to the $10,000 of bonds sold to the New Orleans buyer, the bank was guilty of a conversion.

Granting that the vice-president of the bank had knowledge of all the facts, and was acting in collusion with the holders of the stolen securities, was his knowledge to be imputed to the bank? As to the first two drafts cashed (to which no bonds were attached). the court answered the question in the negative. As to these two, which were presented by the vice-president, who received their proceeds, the vice-president was not at the time acting for or representing the bank. He presented the drafts for discount as any stranger might have done; the bank had no interest of its own in the matter, as to which he acted as its agent, and his knowledge will not be imputed to the bank. In the current phrase, he was acting adversely and for the time being had withdrawn from his agency relation.

As to the third draft drawn upon the New Orleans buyer, the contrary was held. Since this draft was drawn in the name of the defendant bank, and to its order, and was endorsed by and paid to it, it had the appearance, at least, of an act done on its account. The New Orleans buyer justifiably believed that he was buying the bonds from the defendant. The bank accepted the proceeds of the act when the draft was paid:

> "The first two transactions were typical sales to the bank, a dealing with it, apart from any agency. The last was an act on behalf of the bank, and liability attached, if at all, the moment the bank accepted the act of its agent by putting the draft through for collection as the property of the bank. This beneficial interest cannot be retained, and the agency by which it was acquired repudiated."

There is elaborate discussion of the reason for the exception to the rule of notice, where the agent is acting adversely, and of a qualification to that exception where the agent is the "sole actor." It has been suggested that where the agent was the only person concerned in the transaction, i. e., where he was the "sole actor," his knowledge is to be imputed, because otherwise it never could be imputed. This, however, does not seem to be a genuine distinction. The real distinction would seem to be this: If something of value has come to the possession of the principal through the act of one who is ordinarily his agent, he either acquired it as the result of an act of agency, or he has no title to it at all. He may surrender it when the facts are brought to his knowledge, but if he elects to retain it, he must take it as the act of his agent, and be charged with the agent's knowledge.

Some criticism may fairly be made of the holding of the court that the New Orleans transaction was to be regarded as the act of the bank, in this case, because it appeared to be so to the New Orleans purchaser. That purchaser had sustained no loss, and was no further interested in the transaction. There seems to be no essential difference between this transaction and the others, so far as

the present plaintiff is concerned. The vice-president in this particular case brought in from the outside certain of the stolen bonds and attached them to this draft. The defendant bank did not own these bonds or really undertake to sell them. The vice-president was not really acting for the bank in the matter. He took advantage of his position, and the opportunities it afforded, to make a purely personal act appear as the act of the bank. If anyone had been misled by this appearance a suitable remedy could be had, but it is difficult to see how it harmed the plaintiff any more than the other transactions.[2]

A petition for certiorari was dismissed by the Supreme Court.

The most recent case in the Supreme Court of the United States is *Curtis, Collins & Holbrook Co.* v. *United States,*[3] which charged the principal with the knowledge of the agent through whom the benefits in question were acquired.[4]

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CONSTITUTIONAL LAW—SEPARATION OF POWERS—POWER OF PRESIDENT TO PARDON CRIMINAL CONTEMPT.—The case of *United States* v. *Grossman,*[1] decided May 15, considers at large the mooted question of the power of an American executive to pardon a criminal contempt committed against a court of general jurisdiction. The precise point at issue was, of course, the power of the President, but, in the absence of controlling special provisions of state constitutions, the same considerations seem applicable to the power of a governor, and this was assumed by Judge Carpenter who wrote the opinion (Wilkerson, J., concurring). On a bill filed by the United States an order authorized by the Volstead Act had been issued by the court, temporarily restraining the defendant from selling liquor in violation of the act. For disobedience of this order the defendant was found guilty of contempt, fined $1,000, and ordered imprisoned for a year. The President having pardoned the imprisonment, the court denied that he had this power.

Judge Carpenter's opinion is strong and elaborate. Its outline is as follows: The power expressly given to the President by the Constitution[2]—"to grant reprieves and pardons for offenses against the United States, except in cases of impeachment"—is confined to offenses declared to be such by Congress. Offenses against the federal courts, punishable as contempts (even though classified as "criminal" contempt as contrasted with "civil" contempt whose

2. Cases cited from the state courts, upon the "sole actor" rule, were *Cook* v. *American Tubing Co.* 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; *First Nat. Bank* v. *Burns* 88 Ohio St. 434, 103 N. E. 93, 49 L. R. A. (N. S.) 764; *Smith* v. *Mercantile Bank* 132 Tenn. 147, 177 S. W. 72; *Tatum* v. *Commercial Bank* 193 Ala. 69 So. 508, L. R. A. 1916C, 767.

3. 262 U. S. 215, 43 Sup. Ct. 570.

4. There is elaborate discussion in the opinion and notes in *Brookhouse* v. *Union Publishing Co.* 73 N. H. 368, 62 Atl. 219, 2 L. R. A. (N. S.) 993, 111 Am. St. R. 623, 6 Ann. Cas. 675.

1. (N. D. Ill. E. Div. 1924) ... Fed. ....

2. (Art. II Sec. 2.)