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January 1951

## Agency and Partnership

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### Recommended Citation

William C. Charlton, *Agency and Partnership*, 5 Sw L.J. 255 (1951)  
<https://scholar.smu.edu/smulr/vol5/iss3/1>

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## SURVEY OF SOUTHWESTERN LAW FOR 1950

### AGENCY AND PARTNERSHIP

#### EMPLOYER'S LIABILITY FOR EXTRA WORK OF SALARIED EMPLOYEE

*Oklahoma.* In *Sanders v. Street's of Tulsa*<sup>1</sup> the plaintiff, a retail merchant, sued to recover the price of certain merchandise purchased by one of plaintiff's employees. The employee filed a cross-action for overtime wages, which had allegedly accumulated for the past few years, failing, however, to allege any express contract to pay. It was held that the employee's cross-action failed. The reason given was that the employee's cross-action for overtime compensation failed to allege a contract obligating the plaintiff to pay. The court went on to say that it would be presumed that the salary received by an employee is full compensation for all services rendered, overtime or otherwise, unless the employee can show an express or implied agreement to pay for the extra work. This view, in the absence of wages and hours legislation, has been subscribed to by most of the jurisdictions in the United States,<sup>2</sup> as well as in Oklahoma.<sup>3</sup>

Needless to say, no one can force a contract on another by doing unsolicited services. It is also settled that where one requests another, not a relative, to perform services, the law will presume that the former intended to pay therefor. But the contrary is true where one requests another, already employed by the former, to perform extra work of a type within the scope of the original employment.<sup>4</sup> The courts have learned that in the course of employment a servant many times will be requested to do additional work with no accompanying intention on the part of the employer

<sup>1</sup> \_\_\_\_\_ Okla., 214 P. 2d 910 (1950).

<sup>2</sup> *Sheets v. Eales*, 135 Kan. 627, 11 P. 2d 1020 (1932); and see cases collected in Notes, 25 A. L. R. 218 (1923) and 107 A. L. R. 705 (1937).

<sup>3</sup> *McKelvy v. Choctaw Cotton Oil Co.*, 52 Okla. 81, 152 Pac. 414 (1915).

<sup>4</sup> *Robinette v. Hubbard Coal Mining Co.*, 88 W. Va. 514, 107 S. E. 285 (1921), 25 A. L. R. 212 (1923).

or employee to pay or be paid therefor. The latter situation is the usual rather than the unusual one, and the law has developed a presumption of fact to safeguard the employer. Of course, if an implied promise be found, a duty to pay results; if none be found, there is no duty and consequently no cause of action. It should be noted that the rule is not inflexible and has its limitations. For instance, it has been held that an employee may recover compensation for requested additional work, though there is no express agreement to pay, where the extra services performed are of a type outside the original scope of employment,<sup>5</sup> or where the employee shows other facts from which a promise to pay may be implied.<sup>6</sup> In summation, the principal case can safely be said to fall within the weight of authority and, at the same time, to strengthen the Oklahoma position concerning extra compensation for salaried employees.

#### DELEGATION OF AUTHORITY TO SELL REALTY

*Oklahoma.* In *Edwards v. Storie*<sup>7</sup> the tenants in common of a tract of land in Oklahoma executed jointly a power of attorney to *X* expressly authorizing him to sell and convey the land and to appoint a subagent for the "care, control, and management" of the land until sold. After the execution of the power of attorney, *A*, one of the owners, died intestate, her undivided interest passing to her husband and six brothers and sisters. *A*'s husband and three of her brothers and sisters joined in the power of attorney. The evidence showed that *X* appointed *Y* to care for the property. *Y* wrote *X* that *Z*, the plaintiff, was willing to pay \$2,000.00 for the realty. *X* wrote back telling *Y* to "close the deal." *Y*, purportedly representing the owners, signed a contract of sale with *Z*. Subsequently, the owners conveyed the property to *D*; whereupon *Z* sued for specific performance of the contract. The supreme court held that the contract of sale was void and not binding on the owners of the property.

The court relied on several grounds in declaring the contract

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Kelsey v. Puckett*, 198 Iowa 839, 200 N. W. 421 (1924).

<sup>7</sup> ..... *Okla.*....., 213 P. 2d 572 (1950).

not binding on the principals. At the outset, the court saw that the power of attorney, on its face, failed to grant any express authority to delegate the power of sale. The question, then, which arose was whether *X* was impliedly authorized to delegate the power of sale. The court attacked the problem through two distinct theories. First, the power of attorney expressly authorized *X* to appoint a subagent for the care, control, and management of the land. The court said that where the express power to appoint a subagent for specified purposes is given, this authority necessarily excludes implied power to appoint a subagent for any other purpose. This rule is but another way of saying that the specific authorization of particular acts tends to show that a more general authority is not intended. Particularly is this true as regards a power of attorney, the courts agreeing that powers of attorney are to be construed strictly. Certainly, the subagent, *Y*, had all those implied powers ordinarily necessary to effectuate the main authority granted to him. But the power to sell or contract to sell the land itself can hardly be advanced as a power ordinarily necessary to effectuate the care, control, and management of land.

Secondly, the court held that where an agent has been entrusted with a task involving discretion and trust, the agent may not delegate such task to another. His authority is said to be personal and cannot be delegated unless this power is expressly set out in the power of attorney, or necessarily implied therefrom. Thus, by its decision the court placed the authority to sell realty among the powers which create a personal trust. The court followed the well-settled law in the United States,<sup>8</sup> the general feeling being that the personal confidence present in such relations is abundant reason that the trust should not be delegated to another without the principal's consent, the latter having no knowledge of the qualifications of the subagent.

On the other hand, it seems that an agent clothed with general authority, in contrast with a special agent to sell a particular piece of land, has an implied power of delegation when the necessity

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<sup>8</sup> *Brouse v. Cox*, 129 Okla. 130, 263 Pac. 1090 (1923); see cases collected in 2 *AM. JUR. Agency*, § 196, p. 154.

of such delegation is apparent from the nature of the business.<sup>9</sup> It must also be kept in mind that where, in the execution of an authority, a purely ministerial act is to be performed, it may be delegated to a subagent because the reason supporting the no-delegation rule has disappeared.<sup>10</sup> Under the facts in the principal case, it might seem plausible to argue that the power of sale was never delegated to *Y*—*i.e.*, that *X* exercised, rather than delegated, his discretionary duties. But there was no determination between *X* and *Y* as to the terms of the sale. *X* authorized *Y* to “close the deal.” To accomplish this, *Y* had to draw up a contract of sale and set out, at his discretion, the terms of payment. Drawing up a contract cannot be said to be a ministerial act. Rather, it is an incident of the authority to sell and convey realty which, possessing a personal nature, cannot be delegated. In all probability, the attorney in fact could have properly delegated the signing of a contract previously agreed upon, but could not do more than that.

To buttress its opinion further, the court declared the contract of sale void under the Oklahoma Statute of Frauds, which requires the authority of an agent, signing a land contract, to be in writing and subscribed by the party to be charged.<sup>11</sup> In the principal case there was no such writing signed by the party to be charged—the owners. The power of attorney was construed not to give the subagent any authority to contract to sell the land, and the letter to the subagent was not signed by the appropriate party. It is interesting to note that in Texas, Arkansas, New York, and several other states parol authorization of an agent to make a binding land contract is proper and effective.<sup>12</sup>

Even if the contract of sale had been valid, it would have failed to pass all the interest in the land, three of *A*'s heirs having failed to join in the power of attorney. In conclusion, the court noted that the payment of the \$100.00 earnest money to *Y*, an agent without authority to receive it, by *Z*, was not payment to the prin-

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<sup>9</sup> See *Williams v. Leforce*, 177 Okla. 638, 61 P. 2d 714, 718 (1936).

<sup>10</sup> *L. B. Grant Lumber Co. v. Robertson*, 84 Okla. 277, 203 Pac. 478 (1921).

<sup>11</sup> 15 OKLA. STAT. ANN. (Perm. Ed.) § 136-5.

<sup>12</sup> *Armstrong v. Palmer*, 218 S. W. 627 (Tex. Civ. App. 1920) *er. ref.*; see cases collected in Note, 27 A. L. R. 606 (1923).

cial when the money failed to come into the hands of the principal, or an agent authorized to receive it.

DUTY TO WARN SERVANT AND THE DOCTRINE OF  
ASSUMPTION OF SKILL

*Oklahoma.* In *Mid-Continent Oil Co. v. Price*<sup>13</sup> the administrator of the estate of the deceased, *X*, sued defendant oil company for damages, contending the defendant's failure to warn *X* of the hazards incident to his employment was a breach of duty and the proximate cause of his death. The evidence showed that *X* was employed to work on defendant's pipeline. Previous to *X*'s employment, several employees had suffered facial and skin burns as a result of exposure to the poisonous fumes emitted from the hot coal tar enamel which was used to coat the pipe. The defendant knew of this but did not seem to know of the injurious effect of breathing the fumes. *X*'s employment required him to work in and around the fumes. Upon *X*'s employment defendant failed to warn him of the dangerous propensities of the tar fumes. Upon these facts a verdict was returned for the plaintiff. On appeal the judgment was affirmed, the supreme court holding that the employer oil company in operating the pipeline, in coating the pipes with hot enamel, and in sending *X* without warning into the fumes was bound to know the dangerous constituents and effects of the fumes, and, in the exercise of ordinary care, was bound to warn *X* of the danger.

The court went on to quote from the case of *Mid-Continent Oil Co. v. Jamison*<sup>14</sup> to the effect that the master is charged with a knowledge of scientific facts which an uneducated man is presumed not to know. This doctrine has been called "assumption of skill." As a result of its application, defendant was charged with the knowledge that the fumes were injurious to the lungs. At first glance, the expression "bound to know," though commonly used, might lead one to believe that knowledge of the injurious effects of the fumes was strictly imputed to the employer without regard

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<sup>13</sup> .....Okla....., 225 P. 2d 176 (1950).

<sup>14</sup> 197 Okla. 387, 171 P. 2d 976 (1946).

to negligence. However, a careful reading of the opinion discloses that the question of whether or not the employer should have known of the danger was submitted to the jury. If the employer should have known of the danger, he is treated as if he did know, ignorance induced by negligence being the equivalent of knowledge. This imputed knowledge is commonly referred to as constructive knowledge. Knowledge, actual or constructive, together with the master-servant relationship, forms the basis for an employer's duty to warn his employees of hazards incident to the employment which cannot be discovered by ordinary care. One who is employed by another and is directed to perform certain work has good reason to believe his employer will disclose all non-obvious risks of which he knows, or in the exercise of ordinary care should know, since the employer is in a relatively better position to know of such dangers. This is particularly true where the employee is inexperienced. It follows that an employer is under a duty to warn his employees of the non-obvious risks of which he knows, or in the exercise of due care should know.<sup>15</sup> For failure to perform this duty the employer is liable in accordance with the accepted principles of the law of negligence.

With these general principles in mind, it is readily seen that the doctrine announced in the principal case follows the weight of authority in the United States. "Assumption of skill" is merely a facet of the standard of care accepted generally—the reasonably prudent man. The doctrine in effect requires of one who has undertaken a business enterprise to have that amount of skill and knowledge ordinarily found in persons who undertake such matters. Thus, it is seen that "assumption of skill" is but a name coined to indicate certain circumstances which shape the responsibility of the reasonably prudent employer. It seems that Pollock originated the expression<sup>16</sup> and that it was first adopted in an early Georgia case.<sup>17</sup> Since that time, the terminology has been limited to Oklahoma and several of the southeastern states.

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<sup>15</sup> *Britt v. Doty*, 195 Okla. 620, 161 P. 2d 521 (1945).

<sup>16</sup> POLLOCK, *TORTS* (14th ed. 1939) 21, 22.

<sup>17</sup> *Breard v. Georgian Mfg. Co.*, 70 S. E. 57 (Ga. App. 1911).