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EMPLOYEES AS FIDUCIARIES OF THEIR EMPLOYERS.

No principle is more firmly settled than that a court of equity exacts fidelity and loyalty from agents and fiduciaries of every sort to their principal, and will strip them of all advantages obtained by breach of trust and confidence. It will clothe them with the character and responsibility of trustees as respects dealings and purchases which involve a breach of good faith, and will turn over upon just terms the fruits of such transactions to the principal: *Glenwaters v. Miller*, 49 Miss. 150, 166. This is a rule of elementary law supported by an almost endless array of citations from English and American text writers, as well as by a multitude of cases illustrative of the manifold application of the principle by the Federal and the various state courts, together with those of the mother country. The principle might also be fortified by citations from the civil law. It is a fundamental doctrine of equity jurisprudence, and has, so often as a case came before them, received the sanction of the purest and most illustrious chancellors and equity lawyers. It prevails wherever the rule of conscience and good morals has found a home. The only questions that can arise in connection with the rule are: Is the person a fiduciary within its scope? Was his conduct such as to fall within its meaning?

It is not unfrequently attempted to restrict the rule to persons who are expressly created the agents, trustees, executors, administrators, guardians or attorneys of the beneficiaries. This narrow

construction of the rule has never been sanctioned. The criterion by which to judge whether the person is within the rule is, not the technical name—attorney, guardian or trustee—by which he has been designated, but the relation subsisting between him and his beneficiary. Is it a fiduciary relation? Does it imply trust and confidence, together with the knowledge of another's affairs. If so, then he is a fiduciary within the rule. Thus directors, officers, agents and employees of corporations or of firms, attorneys, executors, administrators, guardians, any and all persons who are placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that they become interested for him, or interested with him in any subject of property or business, are prohibited from acquiring rights in that subject antagonistic to the person with whose interests they have become associated. Lord ST. LEONARDS says: "It may be laid down as a general proposition that trustees who have accepted the trust (unless they are nominally such to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts, or their partners in business, solicitors to the commission, auctioneers, or others who have been consulted as to the mode of sale, counsel or any person who being employed or concerned in the affairs of another have acquired a knowledge of his property, are incapable of purchasing said property themselves except under the restrictions which will shortly be mentioned. * * * For if persons having confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of persons relying on their integrity. The characters are inconsistent:" Sugden on Vendors and Purchasers (14th ed.) 406, top page. The breadth and scope of his lordship's propositions are especially noticeable. Even more so are Mr. Bispham's observations. "The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others, as trustees, executors, attorneys and agents, but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise. Thus it will be enforced against partners, tenants in common, tenants for life, mortgagees, a husband, attorneys at law, and vendees under articles, in favor of copartners, cotenants, tenants in remainder, mortgagors, a wife, clients and vendors, respectively; and these instances must be considered only as illustrations of the principle

and not as an exhaustive catalogue of the parties to whom it will be confined." Bispham's Equity, sect. 93.

Having broadly indicated the persons falling within the scope of the principle, it will be interesting to examine some of the cases upon the very borderland of its application. Winn employed Dillon to obtain for him certain information as to lands in order that he might enter them, which information Dillon gave, but afterwards entered the same in his own name. He was not employed by Winn to enter them for him, but only to furnish him this information. It was *held*, that a relation of private trust and confidence was thus created which disabled Dillon from doing any act or acquiring any interest in the property adverse to the interest of Winn: *Winn v. Dillon*, 27 Miss. 494, citing *Murphey v. Sloan*, 24 Miss. 658.

Another case, in Wisconsin, involved the sale of a company's property to, among others, its superintendent, concerning whom the court, by RYAN, C. J., in deciding the sale voidable, said: "The superintendent appears to have occupied such a confidential position under the corporation. He appears to have had the principal charge of the general business of the corporation, apparently of all its business, possibly with exceptions not material here. The prosperity of the corporation was thus largely dependent upon him. He appears to have been in charge of the books, accounts, vouchers, papers, &c., of the corporation. He thus had peculiar opportunity of intimate and accurate knowledge of its affairs, perhaps better than the other officers, certainly better than stockholders not officers. He must have been presumed to have been intimately and accurately acquainted with the financial condition and prospects of the corporation, perhaps better than the other officers, certainly better than stockholders not officers. He stood toward the corporation in very much the same relation as the agents and stewards in the English cases stood toward their principals." *Cook v. Berlin W. M. Co.*, 43 Wis. 433, 444. See also, *Blake v. Buffalo Creek Rd. Co.*, 56 N. H. 485.

In another instance plaintiffs were warehousemen, having in their employ one Andrew, as clerk or agent in and about their business. He had access to their books and papers and knowledge of their business and customers. Plaintiffs' lease of the premises occupied by them was about to expire, and they were negotiating with the landlord for a renewal of it. During the negotiation Andrew,

without authority from the plaintiffs, told the landlord that they would probably give up the warehouse, and if so, he would take it, and the landlord, without receiving definite information from the plaintiffs that they intended to surrender the premises, but believing such would be the case, gave Andrew and an associate a lease of them. Andrew's object in obtaining the lease was to go into the warehouse business on his own account, and he solicited from some of the plaintiffs' customers their storage, stating that he had become the lessee of the warehouse because Gower & Gilman (the plaintiffs), did not want it any longer. During all this time Andrew was in the employ of plaintiffs, but he was dismissed as soon as they learned he had taken the lease, and an injunction applied for. MYRICK, J., for the court, said: "We think the injunction should have been granted. * * * We understand it to be the duty of the employee to devote his entire acts, so far as his acts may affect the business of his employer, to the interests and service of the employer; that he can engage in no business detrimental to the business of his employer; and that he should in no case be permitted to do for his own benefit that which would have the effect of destroying the business to sustain and carry on which his services have been secured. * * * It seems to us that if Andrew desired to engage in the same business as his employers, on his own account, a very plain and very proper course was open to him, viz.: to state to them all the facts and ask them to determine whether they desired a renewal. By pursuing the course which he did he gave Hopkins the landlord an inducement not only not to give plaintiffs a renewal at a decreased rental, but also an inducement not to renew at the then rental; and he compelled plaintiffs to have an unknown competitor who based his action upon knowledge acquired by him while in their employ. We do not think that this is equity, or good conscience." *Gower v. Andrews*, 59 Cal. 119.

The question was even more thoroughly examined in *Davis v. Hamlin*, 108 Ill. 39. In this case Hamlin, the lessee of the Grand Opera House in Chicago, employed Davis as manager. Acting as manager Davis corresponded with parties having attractions in reference to the terms on which they could be engaged, allotted to these attractions the time they were to occupy the house, employed the workmen, supernumeraries, orchestra and other theatrical help, supervised books and accounts, paid bills, and made nightly settlements with parties performing at the house, and in general did

everything which a proprietor or manager of a theatre usually does, subject only to Hamlin's approval or veto. He knew the theatre was profitable property and conceived the idea of securing the renewal of the lease of it to himself. He went to the owner of the premises, Borden, and made an offer to rent the theatre at a rental of \$5000 in excess of Hamlin's offer. This offer was secret, and in reply to Hamlin's inquiry whether he was bidding for the house he denied that he was doing so and advised Hamlin not to offer more than a reasonable price for it. He secured the lease, and Hamlin filed a bill to enjoin him from transferring it to innocent parties without notice and to compel its assignment to him. Davis claimed that he was not within the rule giving a *cestui que trust* the benefit of his trustee's acts, because he had not been employed to procure leases, but only to act as manager of the theatre; that it was no part of his duties as business manager to obtain a new lease of the theatre. Chancellor TULEY, in deciding the case at *nisi prius*, said: "I cannot agree with defendant's counsel in this narrow limitation of this broad principle of equity founded upon good morals and public policy. I do not deem it necessary that a confidential employee in a business, in order to come within the rule, should have any specific duty to perform in a matter which may affect that business. His duty need not necessarily be an active duty. It may be one of abstention only, or negative in its character. In this case it was clearly the duty of Davis to abstain from doing anything which would interfere with his employer in his efforts to obtain an extension of his lease. It was his duty not to overbid his employer. It was his duty not to place himself in a position where his duty as employee and his interest would come in conflict. It was his duty to inform his employer of all facts coming to his knowledge touching the re-leasing of the theatre; but in place thereof he concealed from him and denied his own efforts to obtain the lease, thereby practically removing the competition of his employer." * * * "If Davis had gone to Borden (the landlord) and offered Borden that he would use his confidential relation with Hamlin—his influence over Hamlin—to induce him to pay a much larger rental than he (Hamlin) was willing to pay if he (Borden) would give him (Davis) 10 per cent. of the rental value Hamlin should agree to pay, and Borden had accepted, and had thereby obtained a greater rental from Hamlin, could it be doubted for one moment but that a court of equity would

say to Davis: 'You cannot in good morals hold that 10 per cent. of the rental for your own use—it must be turned into the business of which you agreed to take the 10 per cent. of the net profits?' Would not any court of justice stamp the act as one of breach of confidence and treachery on the part of Davis towards Hamlin?"

"If such would be the nature of the act supposed, how can his conduct be defensible in the present case when receiving 10 per cent. of the net profits (this was Davis's compensation) he attempts to oust his employer from the entire business and appropriate all the profits to his own use." (Per TULEY, J., decision not printed.)

This view was upheld by the appellate court, and ultimately by the Supreme Court of Illinois, and which said in reply to the contention that the relation between Hamlin and Davis was that of master and servant, or employer and employee, that the rule has never been applied to that relation as a class, and that the classes coming within the principle are those embraced within the list of defined confidential relations, such as trustee and beneficiary, guardian and ward, &c. "The subject is not comprehended within any such narrowness of view as is presented on appellant's part. In applying the rule it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation." Per SHELDON, C. J., in *Davis v. Hamlin*, 108 Ill. 48. See also *Greenlaw v. King*, 5 Jur. 19; *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Keech v. Sandford*, 1 Lead. Cas. Eq. 53; *Devall v. Burbridge*, 4 W. & S. 305; *Hill v. Frazier*, 22 Penn. St. 320; *Fairman v. Bavin*, 29 Ill. 75; *Gilman, C. & S. Railroad Co. v. Kelly*, 77 Ill. 426; *Bennett v. Van Syckel*, 4 Duer 462; *Gillenwaters v. Miller*, 49 Miss. 150; *Grumley v. Webb*, 44 Mo. 446.

There may even be no relation of employer and employee, master and servant, attorney and client, &c., &c., existing, and still the parties may occupy such a position toward each other of *trustee* and *cestui que trust*. *Ex parte Hughes*, 6 Vesey 624, illustrates this point. In that case the contract was one of sale. The person making it did not sustain as to the person as to whom the contract was declared void any relation of trustee or agent. He was simply his creditor. It was intended by the debtor's representative, a receiver, to have a sale of the debtor's property, and a consultation was in progress in a private room as to the upset price to be fixed for said sale. Pending this discussion, Mr. Hughes, the creditor, entered, and was informed that there was a difference of opinion

among those present as to what price certain of the property should be put up for sale, and Mr. Hughes's views were solicited: He said he would abide by what one Mr. Dyke thought right, that gentleman having heard the views of those advocating the different prices, thought the property should be put up at 2000*l.*, and to this Mr. Hughes assented. It was accordingly put up at 2000*l.*, with a declaration that if any one advanced upon that sum it would be knocked down to him. After a considerable time, no one bidding, Hughes advanced 10*l.*, and was declared the purchaser. Lord ELDON said: “* * * I do not impute fraud to Hughes. * * * The first question is very considerable: whether Hughes could be permitted to bid. It is not necessary to give an opinion upon that, but I will go the length of saying it is extremely difficult in equity to sustain the title of a person dealing under the circumstances in which he then stood. If Hughes could bid, or the solicitor tendering the estate to sale, or agents for the sale however constituted, and if the danger of that species of transaction is compared with the danger of a purchase by a trustee, the court would overlook a danger far more considerable than that at which it looks with so much anxiety.” See also *Torrey v. Bank of New Orleans*, 9 Paige 649; *Greenlaw v. King*, 5 Jur. 18, where Lord COTTENHAM approves *Ex parte Hughes*.

The principle deducible from all the cases is that where a man is employed in anywise on another's behalf or occupies any fiduciary relation towards such other, no matter how such employment or relation may have arisen or been created, he cannot take to himself any benefit growing out of the subject-matter of the employment or relation, whatever may be the manner of the taking. An employee, agent or fiduciary cannot make himself an adverse party to his principal. This is a consequence of the confidential relation subsisting between the parties, and not of the fact that one of them is technically named an agent, or guardian, or attorney or other well-known designation of trust. The criterion is the relation not the name. Nor is there room for any moral hair-splitting or sophistical reasoning in applying the rule to all fiduciaries whatsoever. The principle is not to be trifled away. It is a just rule, sanctioned by the promptings of every honest man's heart and conscience. It should be firmly upheld and applied, whether a precedent be found for applying it to the case in hand or not. It is enough if such a case be within the principle and the reason thereof. It cannot be