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PRINCIPAL AND AGENT; PRINCIPAL'S LIABILITY FOR AGENT'S DISHONESTY. In the case of *Knox* v. *Eden Musee American Co.*, 45 N. Y. Supp. 255 (May 7, 1897), it was decided that an employer is not negligent in not knowing or suspecting the dishonesty of an employe who has been in his service for several years and who has discharged his duties honestly and faithfully until within a short time before he left the service; and the employer is not liable to a third person whom the employe was enabled to defraud by virtue of his employment, though the dishonesty could easily have been detected by an inspection of the books of which the employe had exclusive charge.

An investigation of the facts in this case will show that the decision follows the general trend of the law. The agent acted clearly outside his authority when he pledged the stock certificates, which had been left in his charge for cancellation, for his own debt. His act was not in any way connected with his employer's business: *British Bank* v. *Charnwood Co.*, 18 Q. B. D. 714 (1878).

The principal is not bound to inform himself as to the manner in which the agent conducts his business, and to see that his instructions are obeyed. His neglect to do so is not ground of liability,

unless it induces those dealing with the agent to believe he had authority: *Wheeler* v. *McGuire*, 86 Ala. 398 (1889). The principal is not bound to supervise the conduct of the agent to see that he does not exceed his authority: *Schmidt* v. *Garfield National Bank*, 19 N. Y. Supp. 252 (1892). Whether or not the principal has used diligence in supervising his agent's work is a question for the court: *Manhattan Co.* v. *Lydig*, 4 Johns. 376 (1809).

Stock certificates fraudulently pledged by one who has them in his possession as a trustee may be recovered by the owner: *Shaw* v. *Spencer*, 100 Mass. 382 (1868). The owner of a non-negotiable note, past due, may recover it from one who has purchased it for value from the agent of the owner, where the latter was intrusted with it for a special purpose and fraudulently transferred it to the purchaser: *Weathered* v. *Smith*, 9 Tex. 622 (1853). Where a bookkeeper in a bank fraudulently entered moneys in the deposit-book of a dealer, which the latter had intrusted the bookkeeper to deposit, though this was outside of the latter's business, and the money not given in the bank or during banking hours, the bank was allowed to recover from the dealer for the deficiency in his account caused by the misappropriation by the bookkeeper, the bank having used the ordinary means of detecting any error in the books: *Manhattan Co.* v. *Lydig*, (*supra*).

The stock certificates were not negotiable and so the principal was not bound by the fraudulent act of the agent: *Mechanics' Bank* v. *N. Y., Etc., R. R.*, 13 N. Y. 599 (1856). The fraudulent issue of stock by the secretary of a corporation to himself, and afterwards pledged for his own debt, does not bind the corporation, and this even though the fraud was made possible by the officers of the corporation in signing blank certificates and leaving them with the secretary to be used as transfers: *R., N. O. & T. P. Ry. Co.* v. *Citizens' National Bank*, 24 Wkly. Law Bull. 198 (Cincinnati Super. Ct. 1891). Nor is a bank liable on notes left in a negligent manner so that they were stolen and the president's name forged thereon: *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1 (1820). In general the misappropriation by an agent of his principal's fund for his own purposes does not bar the principal's right to recover, nor make him liable therefor: *First National Bank* v. *Oberne*, 121 Ill. 25 (1889); *Edwards* v. *Dooley*, 120 N. Y. 540 (1890); *First National Bank* v. *Taliaferro*, 19 At. 364 (Md. 1890); *Gerard* v. *McCormick*, 130 N. Y. 261 (1892); *Manhattan L. Ins. Co.* v. *Forty-second St., Etc., Co.*, 19 N. Y. Supp. 90 (1892).

CONSTITUTIONAL LAW; DUE PROCESS; PERSONAL PROPERTY; DOGS. In *Sentell* v. *N. O. & C. R. R.*, 17 S. C. Rep. 693 (April 26, 1897), the plaintiff sought to recover for the death of his dog, which was run over and killed by the defendant's electric car. The dog had not been placed upon the assessment rolls, and was, therefore, according to a certain statute of Louisiana, not entitled to the protection of the law. The plaintiff claimed that

the statute was unconstitutional as depriving him of his property without due process of law. On appeal, the Supreme Court of the United States held that property in dogs is of a qualified nature, and not perfected until the regulations prescribed by the State are complied with; that it is within the discretion of the legislature to say how far dogs are property, and that therefore the statute in question was constitutional, and the plaintiff could not recover.

It has long been recognized that there is no complete property in dogs as in beasts of burden, or as in those useful for food. At common law a dog is not the subject of larceny, but the taking of a dog is an invasion of property amounting to a civil injury, and redressed by a civil action: 2 Black. Comm. 393; 4 Black. Comm. 236. The right of civil action shows there is some property in a dog at common law which distinguishes him from animals *feræ naturæ: Ireland* v. *Higgins*, Cro. El. 126 (1592); *Wright* v. *Ramscot*, 1 Saund. 84 (1667). Such an action has been allowed in this country in the absence of any statute: *Dodson* v. *Mock*, 4 Dev. & Bat. (N. C.) 146 (1838); *Parker* v. *Mise*, 27 Ala. 480 (1855); *Wheatley* v. *Harris*, 4 Sneed (Tenn.) 469 (1857); *Brent* v. *Kimball*, 60 Ill. 211 (1871); *Ten Hopen* v. *Walker*, 96 Mich. 236 (1893). But a criminal prosecution for larceny of a dog will not be allowed: *Ward* v. *State*, 48 Ala. 161 (1872); *State* v. *Holder*, 81 N. C. 527 (1879); *State* v. *Doe*, 79 Ind. 9 (1881); nor for a malicious injury to a dog: *State* v. *Marshall*, 13 Tex. 55 (1854). It has been held, however, that where a statute punishes the malicious injury of personal property, this includes injury to a dog: *State* v. *McDuffie*, 34 N. H. 583 (1857); *State* v. *Kinsman*, 77 Ind. 132 (1881). So a statute declaring that larcency includes the taking away of any personal property makes dogs the subject of larceny: *Harrington* v. *Miles*, 11 Kan. 480 (1873); *State* v. *Brown*, 9 Bax. (Tenn.) 163 (1876); *Mullaly* v. *People*, 86 N. Y. 365 (1881). In some States, on the other hand, it has been held that a dog is not included under the term "goods and chattels," and that the old common law rule as to larceny still exists: *Findlay* v. *Bear*, 8 S. & R. (Pa.) 571 (1823); *State* v. *Lymus*, 26 Ohio St. 400 (1875). In England it has been held that a dog is not a "chattel" under a statute providing punishment for obtaining chattels under false pretences: *Regina* v. *Robinson*, 8 Cox C. C. 115 (1859). A statute punishing the killing of domestic animals has been held not to include a dog: *U. S.* v. *Gideon*, 1 Minn. 292 (1856); *State* v. *Harriman*, 75 Me. 562 (1884).

Following out the common law idea that property in dogs is not absolute, statutes ordering the killing of unmuzzled or unregistered dogs have been held within the police power: *Tower* v. *Tower*, 18 Pick. 262 (1836); *Haller* v. *Sheridan*, 27 Ind. 494 (1867); *Blair* v. *Forehand*, 100 Mass. 136 (1868); *Morewood* v. *Wakefield*, 133 Mass. 240 (1882); *Jenkins* v. *Ballantyne*, 8 Utah, 245 (1892). But such a statute does not authorize the conversion of

an unmuzzled dog to one's own use: *Cummings* v. *Perham*, 1 Met. (Mass.) 555 (1840); nor does it justify the killing of such a dog by another dog: *Heisrodt* v. *Hackett*, 34 Mich. 283 (1876). But in States where the common law has been changed by statute, and dogs have all the attributes of property, and are the subject of larceny, an order for the shooting of unmuzzled dogs is unconstitutional, as depriving a man of his property without due process of law: *Lynn* v. *State*, 25 S. W. 779 (Tex.) (1894).

As property in dogs is therefore of such an imperfect character and at common law protected only by civil action, in the absence of a statute making such property absolute the legislature has the right to prescibe the means by which that property right shall be perfected, and brought under the full protection of the law, and as it affords such means by registration when the owner thinks the property worth it, it may refuse the protection of the law to such property as, by omitting to register, he is deemed to consider worthless. The legislature, in the exercise of the police power, has provided, in the interests of the community, for the means of distinction between valuable dogs and dogs not worth preservation, and has placed the securing of the safety of his own property in the power of every owner.

EVIDENCE; PROOF OF PATERNITY. It has always been a difficult matter for the courts to determine how far evidence of resemblance between persons should be admitted to prove relationship. In *Copeland* v. *State*, 40 S. W. 589, Tex., (May 12, 1897), the appellant was tried for larceny, and her defense being that the money had been given her by the prosecutor for the support of her grandchild, she offered the six weeks' old child in evidence to prove that the prosecutor was the father. It was held that the child was too immature in development to be inspected by the jury in comparison with the prosecutor. As the same court had previously held, in *Barnes* v. *State*, 39 S. W. 684, Tex., (Mar. 24, 1897), that a child of three months old could not be offered for the same purpose, the decision could not well have been otherwise.

The general rule is that evidence of resemblance, as testified to by other persons, will not be received, as being only matter of opinion: *U. S.* v. *Collins*, 1 Cranch Circ. 592 (1809); *Keniston* v. *Rowe*, 16 Me. 38 (1839); *Eddy* v. *Gray*, 4 Allen, (Mass.) 435 (1862). In some States it is further held that the child cannot be brought before the jury for their inspection: *Risk* v. *State*, 19 Ind. 152 (1862); *State* v. *Danforth*, 48 Iowa, 43 (1878), disapproving of *Stumm* v. *Hummel*, 39 Iowa, 478 (1874); *People* v. *Carney*, 29 Hun, (N. Y.) 47 (1885); *Hanawalt* v. *State*, 64 Wis. 84 (1885); *Robnett* v. *People*, 16 Ill. App. 299 (1885); *Clark* v. *Bradstreet*, 80 Me. 454 (1888); *Overlock* v. *Hall*, 81 Me. 348 (1889). In most States, however, such inspection is allowed: *Gilmanton* v. *Ham*, 38 N. H. 108 (1859); *Finnegan* v. *Dugan*, 14 Allen, (Mass.) 197 (1867); *Paulk* v. *State*, 52 Ala. 427 (1875); *State*

v. *Britt*, 78 N. C. 439 (1878); *Gaunt* v. *State*, 50 N. J. L. 490 (1888); especially if there is a question of mixed blood: *Warlock* v. *White*, 76 N. C. 75 (1877). In most of the cases in which the inspection was refused, though the reasons were stated in general terms, it will be found that the child was too young for any supposed likeness to be a safe guide in the determination of its paternity. In *State* v. *Danforth* (*supra*), the child was only three months old; in *Clark* v. *Bradstreet* (*supra*), the child was six months old, and it was held the evidence was too vague, uncertain, and fanciful; in *Overlock* v. *Hall* (*supra*), the child was six months old; *Hanawalt* v. *State* (*supra*) decided that a child less than a year old could not be admitted in evidence.

There seems to be no fixed age limit after which the child will be admitted. In *State* v. *Smith*, 54 Iowa, 104 (1885), where the child was two years old, the jury were allowed to inspect, as it was considered that the circumstances differed from those of *State* v. *Danforth* (*supra*). The court said: "Though resemblance often exists between persons who are not related, still what is called family resemblance is sometimes so marked as scarcely to admit of mistake. We are of the opinion, therefore, that a child of the proper age may be exhibited to the jury as evidence of alleged paternity."

The test of what is the proper age seems to be whether the child still retains the immaturity of features which render it unsafe for comparison; if so, as is plain in the case under discussion, it cannot be shown to the jury as evidence of paternity or other relationship.

MISTAKE; RIGHT TO RECOVER MONEY PAID UNDER MISTAKE OF LAW. That the doctrine denying the right to recover money paid under a mistake of law is no longer accepted in its entirety is instanced in a recent Pennsylvania case, *Comm.* v. *Lancaster County*, 6 District Reports (Pa.), 371 (June, 1897). The facts were that the Receiver of the Insurance Company collected various assessments from policy-holders, in some cases with, in some without, suit. The policies having been adjudged to be non-assessible, those who had paid sued to recover the amount of the assessments, their recovery being resisted on the ground that it was money paid under a mistake of law. After a searching analysis of the authorities, the Court of Common Pleas of Dauphin County, in a learned opinion, allowed a recovery, adopting the principle laid down by Lord Mansfield, in *Bize* v. *Dickason*, 1 T. R. 285 (1786), that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience ought, he cannot recover it back; but if money be paid under a mistake which there was no ground to claim in conscience, the party may recover it back. (This case will be noticed more fully when it reaches, as it probably will, the Supreme Court of Pennsylvania.)

WILLS; DEVISE TO ATTESTING WITNESS: *Davis* v. *Davis*,

Supreme Court of Appeals of West Virginia, 27 S. E. Rep. 323 (April, 1897). If a will can be proven independently of the testimony of an attesting witness beneficially interested therein, is a devise to such witness or her husband void? This is a question which the Supreme Court of West Virginia has lately answered in the negative. In the case in which this question arose, the validity of the will or the probate thereof was in no wise attacked,—it was simply claimed that because one of the devisees placed herself in the attitude of an attesting witness, she must be deprived of her interest. Section 18, c. 77, of the Code of West Virginia, has an important bearing on the issue, and is as follows: "If a will be attested by a person to whom or to whose wife or husband any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proven, such person shall be deemed a competent witness, but such devise or bequest shall be void, etc." The position of the appellants was that the attestation was valid, but that it was so for the reason that the disability of the witness to attest the will was taken away by destroying her interest therein, in other words that the attestation rendered the will void, and not the fact that the will could not otherwise be proved. The court said that this construction was plainly contrary to the intent of the statute, which clearly contemplated that no valid will should be held void in any of its provisions if established by disinterested testimony.

In the case of *Blake* v. *Knight*, 3 Curt. Ecc. 547 (1843), it was said: "The court is not bound to have positive affirmative evidence of the subscribing witnesses." In *Jesse* v. *Parker*, 6 Grat. 57 (1849), Judge Allen said: "The law does not prescribe the mode of proof nor that the will should be proved as well as attested by a specific number of witnesses. If such proof were to be required from each subscribing witness, the validity of wills would be made to depend upon the memory and good faith of the witnesses and not upon reasonable proof that all the requirements of the statute had been complied with." In the case of *Webb* v. *Dye*, 18 W. Va. 376 (1881), it was held, that a will must be subscribed but need not be proven by two attesting witnesses. So the will under consideration could have been, and was, fully established by the other attesting witnesses. It might have occurred that the will could not have been established without the testimony of this particular devisee, and in such a case to make her competent, as against the heirs of the testator, her beneficial interest would have to be avoided. It was contended by counsel for the appellant that the word competent related to the time of the attestation. If this were so, then a will attested by such person would be void although it might be otherwise proved. Following this argument to its logical conclusion, the will, though invalid in its conception, could be rendered valid by destroying all other means of proof except that of the interested attesting witness. The conclusion of the court was that an interested attesting witness merely ran the risk of losing

all beneficial right under the will by reason of the statutory provision. Such risk she had the right to take, and was not subject to forfeiture merely by reason thereof.

RIPARIAN RIGHTS; PRESCRIPTION. An interesting question arose in the case of *Smith et al.* v. *Youmans et al.*, (Supreme Court of Wisconsin,) 14 N. W. Rep. 1115 (April 30, 1897), as to the right of property owners whose lands have been overflowed by back water from a dam, to have the water maintained at the artificial level so produced.

Lake Beulah, the watercourse in question, had originally been a shallow, marshy, lake, but the grantors of the defendants had, more than forty years previous to the suit, closed the natural outlet of the lake and constructed a dam and an artificial overflow at another point, raising the level of the lake six feet above its natural height and completely submerging the marshy edges. The lands surrounding the lake thereupon became very valuable as sites for villas, country seats, and pleasure resorts.

The mill, for which the dam had been built, having been destroyed, the defendants removed the bulkheads for the purpose of drawing down the water in the lake for use in the stream below. The defendants asserted their right to decrease or increase the level of the lake free from any restriction, although by their act the marshy edges of the lake were exposed, rendering the neighborhood unhealthy and destroying the value of the lands as pleasure resorts.

The court held that the defendants had, by forty years user, obtained a prescriptive right to maintain the water of the lake at the original height of the dam and to overflow the plaintiffs' lands, and that the landowners had obtained a prescriptive right to have the water maintained at that level so long as the defendants retained their easement; that the rights of the parties were reciprocal and could be enforced by the one against the other. It appears that the defendants could escape their liability by abandoning their easement. Much the same question had been decided by the same court in the case of *Cedar Lake Hotel Co.* v. *Cedar Creek Hydraulic Co.*, 79 Wis. 297; 48 N. W. 371 (1891); but in that case the natural level of a watercourse had been changed, while in the present case the change had been made in the artificial level. The court practically held that after forty years user the artificial pool became the natural level, and the same rules of law applied.

CONTRACTS; RESCISSION IN CASE OF FRAUD; RETURN OF BENEFITS. In *Stodder* v. *Southern Granite Co.*, 27 S. E. 174 (Ga.), Nov. 30, 1896 (first reported May 10, 1897), the plaintiff was injured by defendant's negligence. Afterwards, while still weak in body and mind on account of his injury, he was induced through fraud to sign a paper purporting to be in full settlement of all claim for damages For this paper plaintiff received twenty dollars, which sum he alleged that he was utterly unable to repay.