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LIABILITY OF PERSONS REQUESTING APPOINTMENT OF SPECIAL OFFICER FOR HIS ACTS.

In *Samuel v. Wanamaker*, 24 N. Y. Law Journal, 215 Sup. Ct., App. Div.) it was held that a special officer appointed pursuant to the charter of New York, but at the request of the defendant, in so far as he acts independently of the person requesting his appointment, is solely responsible for his acts. In considering this subject there are three distinctions to be noticed among the cases. The first class includes those wherein it was held that such special officer was not an agent or servant of the person requesting his appointment. The second class comprises those wherein it was recognized that he had an official character, but that, nevertheless, his employer was chargeable as for the acts of an agent. The third class comprises those cases in which the plaintiff's own words and acts contributed to the suspicions causing his arrest; and it was immaterial whether the officer acted as an agent or in his official capacity inasmuch as there was no liability in either case. *Formwalt v. Hylton*, 66 Tex. 288.

The first class of cases seems to incline toward this proposition that it is the intent of the law to invest the special officer with all the rights and immunities of a regular policeman. If this were not so and the person appointed had not such powers and privileges, the appointment would be rendered nugatory. The authorities also agree that the mere fact that the officer's salary is paid by the person requesting his appointment does not deprive the policeman of the broad authority specially delegated to him. So it was held, he was not the mere servant of a person who paid

his salary and whose premises he was appointed to watch, and such person was not liable for his official acts. *Hershey v. O'Neill*, 36 N. Y. 168; *Healy v. Lathrop*, 171 Mass. 263. So, where a special officer makes an arrest for disorderly conduct, the presumption is that he acted in his official capacity as an agent of the state. *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313. But this presumption is one of fact and may be rebutted. *Brill v. Eddy*, 115 Mo. 605. And where a special officer makes an arrest he should show his warrant. *Frost v. Thomas*, 24 Wend. (N. Y.) 418. So where a passenger had been arrested without a warrant for alleged non-payment of fare—but the alleged offense was not committed in the presence of the officer arresting—the company may be liable for damages in an action for false imprisonment. *Krulevitz v. Eastern Ry. Co.*, 143 Mass. 228. And to charge the employer of a special officer for liability, it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted. *National Bank of Commerce v. William Baker*, 77 Md. 462; *Carter v. Howe*, 51 Md. 298. So a railway company is not liable for an unlawful arrest not directed by it, and outside a conductor's authority, unless it subsequently ratifies the same. *Gardner v. Boston and Me. R. R.*, 72 N. H. 413.

The cases which are apparently in conflict with *Samuel v. Wanamaker* can, however, be distinguished. Without examining them all in detail the following general principle is undoubtedly true. The right of selection lies at the foundation of the responsibility of a master or principle for the acts of his servant or agent. *Kelly v. New York*, 11 N. Y. 436; *Walcott v. Swampcolt*, 1 Allen (Mass.) 151. So a police officer may be a civil agent. And where he is in the employ, and under the direction, and subject to the control and interference of a person, he becomes thereby that person's servant and is in no just and accurate sense an independent officer. *Gerhardt v. Savings Institution*, 38 Mo. 60; *Walker v. Railroad Co.*, 39 L. J. C. P. 346. And where a servant was also a city police officer, and, through excessive violence, injured a boy wrongfully jumping cars on his employer's property, the fact that he was such an officer will not relieve the company from liability. *Brill v. Eddy*, 115 Mo. 596. And where the code enacts "That the conductor of every train of railroad cars shall have all the powers of a conservator of the peace" the company is not relieved from liability, although the arrest was made in good faith and on probable cause. *Gillingham v. Ohio River R. R. Co.* 35 W. Va. 588. The rule may also be deduced that, where an employer authorizes arrests to be made whenever the officer thinks necessary to preserve order, or to see that his stock of goods be not depleted, and such officer makes wrongful arrests, such employer is liable, for he has made the officer his agent. So, although an honest mistake is made, his official character will not avail the principal of such agent. *Dickson v. Waldron*, 135 Ind. 507; *Tyson v. Bauland*, 68 App. Div. (N. Y.) 310; 85 App. Div. 612. Where an officer is called in to enforce the-

atre regulations, the theatre is liable, but if he discovers the violation of a city ordinance, and makes an arrest without either the implied or express authority of the theatre, and although he was, prior to such arrest, the agent of the theatre, yet his act was an official one, and he is solely liable. *Jardine v. Cornell*, 50 N. J. Law 485.

In this connection there is an interesting case to be noted. The Massachusetts Code provided that persons requesting the appointment of a special officer should give a bond to the city treasurer, "to be liable to parties aggrieved by *official* misconduct of such police officer to the same extent as for the torts of servants and agents in their employ." It further provided that recovery could be had upon the bond as upon the bond of a constable. But the court held that this provision did not make the officer the servant of the person at whose request he was appointed. *Healy v. Lathrop, supra.* Where an officer is an agent, and exceeds his authority in a particular case, the principal may yet be liable. *Eichengreen v. Sourville*, 35 Fed. Rep. 116. The question as to whether the officer acted within the scope of his employment is for the jury. *Duggan v. Railroad Co.*, 159 Pa. St. 248; *Tyson v. Bauland, supra.* The underlying principle of all those cases wherein it was held that the special officer was a servant, and, therefore, the employer was liable, was well stated by the court in *Mallach v. Ridley*, 24 Abb. N. Cas. (N. Y. Sup. Ct.) 172, as follows: "The employers can not confer authority upon the employee and claim the benefits of his action when he acts advisedly, and absolve themselves from all risk when he acts on insufficient evidence."

FORGERY AT COMMON LAW AND ITS EXTENSION UNDER STATUTES.

The case of *People v. Abeel*, 34 N. Y. Law Journal 189 (N. Y. Ct. of App.), decided recently, announces a doctrine of forgery little short of revolutionary in its departure from the rules of common law governing this crime. The decision is an extremely important one in the development of the criminal law and merits the careful attention of the American bar.

The case under consideration involved the construction of sec. 514, subdivision 3, of the New York Penal Code, the provisions of which, so far as pertinent to the case, are as follows: "A person who . . . shall alter (utter) . . . any letter . . . purporting to have been written . . . by another person . . . which said letter . . . the person uttering the same shall know to be false . . ., and by the uttering of which the sentiments, opinions, conduct, character, prospects, interests or rights of such other person shall be misrepresented or otherwise injuriously affected . . . is guilty of forgery in the third degree." The court held that the uttering of a false writing, with knowledge of its falsity, by which writing the sentiments, opinions, conduct or rights of another person are misrepresented, constitutes the crime of forgery under the statute. The mere misrepresentation is made the gist of the offense, and proof of injury to the one whose

name is forged, or intent to defraud on the part of the defendant, is held not necessary to convict.

No extension of forgery to take in so many acts criminal in their tendency is to be found in all the centuries of legislation on the subject, as is made in this case. Writing, some years ago, a leading authority said: "From the earliest times to the present a legislative mania seems to have prevailed on this subject of forgery. The reader has seen that the common law is broad enough to cover all sorts of forgeries, which in their nature can be harmful either to individuals or the community, yet this has not satisfied the law makers, who, nevertheless, have piled statutes on statutes upon the top of the common law to overwhelm it." *Bishop, New Criminal Law*, sec. 548. It would be interesting to read what that eminent author would have written had he had this decision before him, placing forgery yet further away from the formulas of the text-books.

Forgery at the common law is the false making or material altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *Bishop, New Criminal Law*, sec. 423. There were, therefore, three elements essential to the crime: *a.* The making must be false. *Reg. v. White*, 1 Den. C. C. 208; *Barnum v. State*, 15 Ohio, 717. *b.* It must be with intent to defraud. *Rex v. Powell*, 2 W. Bl. 787; *U. S v. Moses*, 4 Wash. U. S. 726. *c.* The instrument must be of legal efficacy to impose a liability. *State v. Briggs*, 34 Vt. 501. The early English statutes relating to forgery had, for the most part, to do with the making of particular forms of it felony. Legislation in the American states has been largely along the same line. At common law forgery was a misdemeanor. In no instance has either statute or judicial decision removed from the requisites of forgery the first essential, *i. e.*, that the making of the instrument must be false. In some states statutes have been passed rendering it unnecessary to allege or prove an intent to defraud on indictment for particular species of forgery, thereby eliminating the second essential of the common law crime. A statute of Pennsylvania declaring it forgery to utter a false diploma is an illustration of such legislation. *McClure v. Com.* 86 Pa. 353.

The decision in *People v. Abeel, supra*, however, entirely sweeps away the second and third essentials of the common law crime and establishes an entirely different set of component parts, which are: *a.* The uttering of a false writing; *b* With knowledge of its falsity, and *c.* The misrepresentation by the false writing of the sentiments, conduct or rights of another person. It will be observed that the first essential remains the same as at common law. There is a marked difference between the issuing of an instrument, "with knowledge of its falsity," and issuing the same "with intent to defraud." Equally apparent is the great change in the third essential, by which the scope of that essential is enlarged to take in instruments beyond those affecting mere property rights and to include such subjects as sentiments, opinions or conduct.

The breaking down of this third essential of the common law crime, *i. e.* that the forged instrument must be of apparent efficacy to impose a liability, is the most striking differentiation of the new forgery from the old. In fact, under the New York decision, there are but two essential facts to be proved. They are (1) The uttering of the false writing. (2) The knowledge of its falsity. The third element, misrepresentation, is inferred from the false writing itself.

It is interesting to note that, while no statute has been given the extreme scope of this case, yet there is a line of decisions both in England and in this country which has gone almost as far and has positively disregarded the rule that an instrument to be the subject of forgery must be of apparent legal efficacy. These cases relate chiefly to letters of recommendation or testimonials of good character, holding such instruments susceptible of forgery. In *Reg. v. Sharman*, Dears. C. C. 285, the issuing of a false letter to enable a person to obtain a situation as schoolmaster was held to be forgery. To the same effect is *Reg. v. Toshack*, 4 Cox C. C. where, for the purpose of obtaining a berth as a seaman, a false testimonial of character was issued. In *Reg. v. Moah*, 7 Cox C. C., the defendant, with a view to obtaining a situation as police constable, issued a false letter of recommendation and his conviction on the charge of forgery was sustained. The two leading American cases which follow the English cases cited are *State v. Ames*, 2 Greenleaf (Me.) 265, and *Com. v. Coe*, 115 Mass. 481. This line of cases has, however, been much questioned and a leading text-writer on criminal law says they are at least extreme. *Clark, Criminal Law*, 338 N.

In view of the unprecedented breadth of the statutory crime as construed by the New York court and the incongruous situations that may arise from its strict application, as pointed out by Cullen, Ch. J., in his strong dissenting opinion, it seems extremely improbable that either the wisdom of the legislatures or the learning of the courts will be invoked again in the near future to further develop this peculiar aspect of the crime of forgery.

PRIVILEGED COMMUNICATIONS OF LIBELOUS MATTER.

It is well established that statements made with the *bona fide* intent on the part of the person making them, to protect his own interest in a matter where it is concerned, are privileged communications. The question is, how far does this privilege extend? Can a person, even to protect his own interest, make libelous statements to anyone, regardless of the fact that such persons may have no connection with the matter?

This question is answered in the case of *Sheftall v. Central of Georgia Ry. Co.*, 51 S. E. 646 (Ga.). Sheftall, a passenger conductor, had been discharged from the service of the defendant. At the time of his discharge he held a number of unused and uncancelled tickets, which were good for passage over the defendant's line of railway. The defendant issued a bulletin, beginning as

follows, "Tickets lost and scalped," and containing the above facts. This bulletin was issued to defendant's conductors and was also placed in a public and conspicious place where it was read by other employees and by the public. *Held,* That the communication to the conductors was privileged, but the communication to the other employees and to the public was not within the privilege.

This case lays down the rule, that the communication, of such libelous matter, is privileged only so far as it is necessarily made to others than those concerned in the subject matter of the publication. The statement must not only be no broader than the protection of the involved interest demands, but it must not be made to persons having no interest in the subject matter.

A circular letter sent out by a firm, stating that a certain person is no longer in their employ, and advising their friends and customers to give him no recognition on their account, is not a privileged communication. *Warner v. Clark,* 45 La. Ann. 863. But a publication issued by a railroad company to its division superintendents, of a list of employees discharged for cause, issued to prevent unsuitable men from being re-employed on other parts of the road, is a privileged communication. *Missouri Pac. Ry. Co. v. Beehee,* 2 Tex. Civ. App. 107. These two cases clearly show to whom such communications may be made and still be privileged. The persons to whom the statement is published must be limited to those to whom the interest to be protected requires that such information be given. Matter not necessary for the protection of the interest involved must not be embraced within the statement or the privilege will be lost. The privilege may also be lost by the use of violent language, when it is clearly unnecessary or by a method of publication which gives unnecessary notoriety and publicity.

"Where the expressions employed are allowable in all respects, the manner of publication may take them out of the privilege. *Newell on Slander and Libel,* 477. But mere publication to persons not interested will not *ipso facto* take the case out of the privilege. This question is well settled both in England and in the United States. Some courts have gone further than others, however, in extending the privilege. The Supreme Court of Michigan, in the case of *Bacon v. Michigan Central Ry. Co.,* 66 Mich. 166, went so far as to declare a blacklist within the privilege.

The presence of third persons may have been merely casual and not sought by the person making the statement, or the presence of such third person may have been due to the act of the party complaining of the publication, and of course in such cases the privilege is not lost. The statement must be made in good faith. A truthful statement, made to the parties interested, will be taken out of the privilege if made maliciously and with the purpose of injuring the plaintiff. *Rice v. Simmons,* 31 Am. Dec. 766. Good faith is essential in all cases.

In brief, we find that in action of libel it must appear that there is a statement made in good faith to persons interested, that

such a statement must be published upon a proper occasion and in a proper manner, and solely for the purpose of protecting some interest, or the defense of privilege will fail. The absence of any one of these essentials is fatal to the defense.

SALES OF MERCHANDISE IN BULK.

The remarkable rapidity with which the legislatures of the different states have passed laws favoring certain classes of people, has kept in the public eye the ever vexatious question of the proper limitations upon the police power of the state. And as this is necessarily a question of opinion and discretion, we are not surprised at the conflicting decisions on that subject. The recent case of *Wright v. Hart,* 34 N. Y. Law Journal, 165, (N. Y. Ct. of App.). seems contrary to the weight of authority, but was decided consistently with the position the courts of New York have taken, in tending to regard such legislation as unconstitutional.

The case turned on the constitutionality of a New York statute, *Laws of 1902, c. 528,* which provides that a sale of an entire stock of merchandise, or any portion of merchandise, other than in the ordinary course of business, shall be fradulent and void unless the seller and purchaser shall, at least five days before the sale, make an inventory as therein provided, and unless the purchaser shall make certain inquiries of the seller and give the creditors of the seller notice. In this case the plaintiff, a trustee in bankruptcy, sought to set aside the sale of his bankrupt's stock of goods to the defendant, on the ground that it was made without complying with the provisions of the statute. The Court of Appeals, by a scant majority, reversing a like majority of the Appellate Division, sustained the defendant's demurrer, holding that the statute is invalid because (1) it deprives the vendor and vendee of liberty and property without due process of law, by interfering with the freedom to contract; and because (2) it deprives them of the equal protection of the laws, in that the provisions of the act are aimed at merchants only and do not affect any other class of the community.

In his majority opinion, Justice Werner, strongly condemns the constant legislative encroachments upon the rights and liberties of the citizen under the guise of its police power. "Such a statute," he says, "sweeps away the constitutional rights of liberty and property of a limited class of citizens who are entitled to the equal protection of the laws with all other citizens." It denies the right of a specified class of citizens to sell a particular kind of property; it makes no distinction between honest and dishonest sales; it restricts the right of contract so as to deprive property of its characteristics as such. The right to use, buy, and sell property is protected by the Constitution, and when the law destroys its value and strips it of the attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation of the constitutional provisions enacted expressly to shield personal rights from the exercise of arbitrary power. *Wynehamer v. People,* 13 N. Y. 378-389.

In a strong dissenting opinion, Justice Vann contended that such a statute is a valid exercise of the police power in that it was passed to prevent fraud and is similar to acts passed in relation to chattel mortgages and conditional sales, and being uniform in its effect upon all persons to whom it applies is not invalid because it applies to a limited number. And in the first case decided on this subject, the court held that such an act was not in restraint of trade, as the act in question did not prevent the sale of stocks of goods in bulk, but merely restricts the application of the proceeds when the stocks are sold in that manner. *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549.

On the other hand, in *Miller v. Crawford*, 20 Ohio, St. 207, such a statute was declared unconstitutional because it place an unwarrantable restriction upon the rights of the individual to acquire and possess property, and because it discriminated in favor of a limited class of creditors. It is to be noticed, however, that this statute went further than the others in that it made the violation of its provisions a misdemeanor punishable by fine and imprisonment.

In considering a similar statute, which exempted from its operation, however, sales by executors, public officers, etc., the court in *Squires & Co. v. Tellier*, 185 Mass. 18 remarked, "The object of this statute is like that of our numerous statutory provisions, which authorizes attachments on mesne process and require nothing unreasonable." But under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it. And the Connecticut court, in upholding such a statute, asserted that the legislature undoubtedly has power to adopt reasonable measures to prevent fraud in the sale of merchandise and such an act is clearly within that power. *Walp v. Moor*, 76 Conn. 515. And even admitting that such a law applies alone to merchants and not to other persons, such as farmers, traders, etc., it is a valid exercise of police power because it prevents fraudulent practices and secures to creditors a just participation in the distribution of the assets of such merchants. *Neas v. Borches*, 109 Tenn. 398. But Justice Wilkes, in his dissenting opinion in that case remarked that "to take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate manner, is as much depriving him of his property as if the property itself were taken."

In *Block v. Swartz*, 27 Utah 387, as in the Ohio case, where noncompliance with the statutory provisions was made a crime, such a statute was held unconstitutional, since it did not apply to sales of the same character by merchants not owing debts, but applied to, and renders criminal, similar sales by merchants who are debtors. But an act which made such sales *prima facie* and not conclusive evidence of fraud was adjudged valid, the constitutional question not even having been raised by the highest courts in Maryland and Wisconsin. *Hart v. Roney*, 93 Md. 432; *Fisher v. Hermann*, 118 Wis. 424.

Thus though within the past two years twenty states have passed such statutes, in the majority of which they were upheld, yet the law on the subject is by no means settled and until the Supreme Court of the United States passes upon it, the question whether such acts transcend the proper sphere of the police power will continue to form the subject of conflicting decisions.

We wish to call attention to an error in the November issue, where the article entitled, "International Agreements Without the Advice and Consent of the Senate," was attributed to James T. Barrett, instead of James F. Barnett, as it should have been.