

Washington University Law Review

Volume 12 | Issue 2

January 1927

Attorney and Client—Authority to Purchase Property at Mortgage Foreclosure Sale

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Law Commons](#)

Recommended Citation

Attorney and Client—Authority to Purchase Property at Mortgage Foreclosure Sale, 12 ST. LOUIS L. REV. 147 (1927).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol12/iss2/9

This Comment on Recent Decisions is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

by a physician in treatment. The court held that this was not within a similar exemption clause, and there seems to have been no disposition to challenge the rule.

The Federal rule does not seem to be well defined, some cases construing the exemption clause against the insured, *Bayless v. Ins. Co.* Fed. Cas. 1138; *Westmoreland v. Acc. Ins. Co.* 75 Fed. 244; *McGlother v. Acc. Co. of Phila.* 89 Fed. 685. Others following *Fidelity & Casualty Co. v. Lowenstein*, 97 Fed. 17 construe it against the company. It is interesting to note that in the *McGlother* case Judge Sanborn wrote the decision and Judge Thayer dissented, while in the *Lowenstein* case Judge Thayer wrote the decision and Judge Sanborn dissented. The latter case, however, went largely on the ground that by issuing a policy in New York containing the same clause, the company had adopted the decision in the Paul case.

A study of the case involved in the two rules will show, however, that there is not so great a difference as appears by a statement of the rule. The older cases are decided largely on the grounds that there was an ambiguity which would be construed against the insurer, and the later cases have merely advanced from that ground by holding that an exemption clause which is plain and unambiguous means just what it says.

W. M. T. '27.

ATTORNEY AND CLIENT—AUTHORITY TO PURCHASE PROPERTY AT MORTGAGE FORECLOSURE SALE.—An attorney, appearing in mortgage foreclosure proceedings for a bank which was insisting on security of mortgage, acting in good faith, purchased the property for his client, without express authority to do so. When the sale was called there was only one other bidder and unless the attorney had bid, the property would have been sold at a price insufficient to protect his client's interest. The bank afterwards refused to ratify the act of its attorney and to comply with the bid. Held, an attorney appearing in mortgage foreclosure proceedings has both actual and implied authority to do whatever is necessary for the protection of his client's interest, and is authorized to bid in the property at an amount sufficient to satisfy claims secured by the mortgage. *Foxworth v. Murchison National Bank*, (S. C. 1926) 134 S. E. 428.

This case cannot be sustained on authority. In every jurisdiction where this question has arisen it has been held that an attorney cannot bind his client to such a purchase without express authority to do so. In the case of *Savery v. Sypher*, 6 Wall. 157, 18 L. Ed. 822, the administratrix of the mortgagee brought foreclosure proceedings against the mortgagor. At the sale the attorney for the mortgagee bid off the property in the name of his client. The mortgagor insisted upon the mortgagee complying with the bid which her attorney had made. The court declined to confirm the sale, saying, "The burden of proof was imposed on . . . (the mortgagor) who seeks to confirm the sale, to show the authority of . . . (the attorney) for an attorney, *virtute officii*, has no authority to purchase property in the name of his client." In *Bauman v. Eschallier*, 107 C. C. A. 44, 184 F. 710, the facts were quite similar. Here the court said, "While an attorney has large discretionary powers in the conduct of a suit, he has no power, by virtue of his mere authority to conduct a suit and collect the judgment, to purchase property for his client, and thereby substitute such property for the money." In *Beardsley v. Root*, 11 Johns (N. Y.) 464, 6 Am. Dec. 386, the syllabus is as follows: "An attorney, by his general authority as such, cannot purchase land sold under execution in favor of his client, either in trust or for the benefit of such client." The case of *Washington v. Johnson*, 26 Tenn. 468, is in accord. Under but slightly changed circumstances, in *Fischer v. McInerney*, 137 Cal. 28, 69 P. 622, it is held that an attorney at law has no authority, as such, to purchase for his client the latter's property sold under execution in the proceedings in which the attorney is employed. The case of

Le Conte v. Irvin, 19 S. C. 554, in the same jurisdiction as the instant case goes even further and holds that the attorney for the plaintiff had the right at the foreclosure sale to purchase the property for *himself*, as he had no duty to perform that was inconsistent with the character of purchaser.

The court in the instant case, in ordering the bank to comply with its attorney's bid, said in part, "While not necessarily controlling, yet the custom of business as to what by common practice usually is expected of an attorney in the foreclosure of a mortgage of real estate, may not be wholly ignored. As a general proposition, when an attorney is employed to foreclose a mortgage of real estate, he is expected and it is the common practice at the bar of this state, not only to represent his client to the point of obtaining a decree of foreclosure and sale, but also to attend the sale, to see that his client's interest is not sacrificed or defeated, to make settlement with the officer conducting the sale, and to obtain a report and an order confirming the sale. If necessary to the protection of his client's interest, it is usual for the attorney to participate in the sale; indeed he would be derelict in his duty should he permit property to be bought for grossly inadequate amount which would result in his client's receiving nothing upon his demand." To sustain this contention the court cites *Smith v. Cunningham*, 59 Kans. 552, 53 P. 760, and *Cauthen v. Cauthen*, 76 S. C. 226, 56 S. E. 978. In the last mentioned case the court says, "It is held that the client is bound by the action of his attorney in relation to all matters within the scope of the action."

It would seem to the writer, that although the case is not supported by authorities, yet the principles upon which it is based are sound and meritorious. The case marks a step forward in the liberal interpretation of the law in keeping with the changing conditions of the times.

W. J. P. '27.

AUTOMOBILES—MASTER AND SERVANT.—Defendant's minor son wrongfully damaged plaintiff's automobile in collision while returning from deviating ten miles from authorized trip, for own benefit, to resume father's business. *Held*, father not liable for damages as authority of son ceased when he deviated from route for his own benefit. *Carder v. Martin*, (Okla.,) 250 P. 906.

The universal test of the master's liability for acts of his servants is: Was there authority, express or implied, for doing the act? That is, was it done in the course of and within the scope of the servant's employment? If so, the master will be liable for the act, whether negligent, fraudulent, deceitful or any act of positive malfeasance. *Tyler v. Stephans, Adm'x.* 163 Ky. 770, 174 S. W. 790. "An owner of an automobile is not liable for injuries to a pedestrian merely because he owns the car, or because the chauffeur was not engaged in the defendant's business." *Freibaum v. Brady*, 128 N. Y. S. 121, 142 App. Div. 220. As the court said in *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, "But it comes to nothing that the driver was the defendant's servant, if it appears that at the time the accident happened he was not on the master's errand or business. If he were on an errand of his own, then so long as so engaged he did not stand in the relation of servant." This rule is not modified where the servant is the son of the master. *Lenville v. Nissen*, 162 N. C. 95, 77 S. E. 1096. Similarly, no liability on master if servant is at liberty from service pursuing his own ends exclusively. *Cincinnati, N. O. & T. P. Ry. Co. v. Rue*, 142 Ky. 694, 134 S. W. 1144, 34 L. R. A. (N. S.) 200; *Sullivan v. L. & N.* 115 Ky. 450, 74 S. W. 171. In *Coldwell v. Aetna Bottle Co.* 33 R. I. 531, 82 Atl. 388 a chauffeur was directed to drive an automobile to a garage, but deviated to take co-employee home. Court held master not liable for injury caused after deviating. Like the holding in *Steffen v. McNaughtn* 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382. Distance of departure for personal errand held determining factor in *Fleischner v. Durgin*, 207 Mass. 435, 95 N. E. 801 where