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Agency--Liability of Employer for Acts of Independent Contractor

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CASE COMMENTS

AGENCY—LIABILITY OF EMPLOYER FOR ACTS OF INDEPENDENT CONTRACTOR.—An independent contractor, while delivering gasoline sold by *D* oil company, overflowed a tank situated in the same building with a coal stove, causing an explosion which injured *P*. *Held,* that the handling of gasoline was not an intrinsically dangerous undertaking nor was the injury a direct foreseeable consequence of the work engaged in by the independent contractor, so as to fall within exceptions to the general rule which absolve an employer from liability for injuries arising from work let to an independent contractor. *Brewer v. Appalachian Constructors,* 76 S.E.2d 916 (W. Va. 1953).

The court reasoned that the handling of gasoline was not intrinsically dangerous in so far as it could have been done safely had it been handled in a careful manner and also felt that the consequences could not have been reasonably anticipated to result directly from performance of the work.

It will be well to note that the ground upon which *P* seeks to impose liability upon the employer, by virtue of the work being intrinsically dangerous, is altogether a separate question from whether liability may attach to an employer on the basis that the

injury was a reasonably foreseeable consequence of the work. It is not only clear under past decisions that both grounds will impose liability upon an employer for work done by an independent contractor, but that they exist as separate and distinct doctrines. *Trump v. Bluefield Waterworks & Improvement Co.,* 99 W. Va. 425, 129 S.E. 309 (1925); *Wilson v. City of Wheeling,* 19 W. Va. 323 (1882). Though the doctrines are closely related and somewhat overlapping, there could arise situations in which a particular undertaking could be of such character that injury to third persons could result directly from its performance if reasonable care were omitted and yet the work would not be intrinsically dangerous. This is illustrated by *McNulty v. Ludwig,* 153 App. Div. 206, 138 N.Y. Supp. 84 (1912), where the claimant was allowed to recover on the ground that the injury resulted directly from the work in which the independent contractor was engaged, after it had been adjudged on a previous appeal that he was not entitled to recover on the ground that the work was intrinsically dangerous, 121 App. Div. 912, 109 N.Y. Supp. 703 (1908).

The question here to be considered, however, is when will the West Virginia court classify a particular undertaking as intrinsically dangerous so as to impose liability upon an employer? Before examining the interpretation in the instant case, it would first be well to attempt some general definition of the phrase "intrinsically dangerous undertaking." Words expressive of this phrase are commonly found to the effect that it means "work necessarily attended with danger, however skillfully performed." *Jefferson v. Chapman,* 127 Ill. 438, 20 N.E. 33 (1889). Or, to elaborate negatively, works which are only "attended with great danger if carelessly managed, although with proper care they are not specially hazardous," do no fall within this phrase. *Laffery v. United States Gypsum Co.,* 83 Kan. 349, 111 Pac. 498 (1910).

The court in the present case impliedly adopts this definition by excluding the applicability of the doctrine on the ground that the work could have been done safely had due care been used. The court, nevertheless, in a prior case held that the digging of a ditch across a public street by an independent contractor was so intrinsically dangerous as to impose liability upon the employer. *Wilson v. City of Wheeling,* 19 W. Va. 323 (1882). This case appears to be inconsistent with the instant case in the application of the doctrine since it would seem that the digging of a ditch

could be more readily done with safety than could the handling of gasoline. The court's opinion in the *Wilson* case, however, hints that liability was perhaps imposed on the City of Wheeling, as the employer, by virtue of a non-delegable duty of a municipal corporation to keep the public streets in repair. At least it would seem so, since the court, before considering whether the work was intrinsically dangerous, dwelt at considerable length on the proposition that an employer is not absolved from liability for the negligent performance of a non-delegable duty which has been let to an independent contractor. The court had little trouble in finding that the work of building and maintaining public streets was a non-delegable duty, quoting 2 DILLON, MUNICIPAL CORPORATIONS § 791 (2d ed. 1873), to the effect that this duty to maintain public streets "can not be evaded, suspended, or cast upon others by an act of its (the city's) own." It is well settled that such a duty is another exception to the general rule exempting an employer from liability for work done by an independent contractor. *Vickers v. Kanawha & West Virginia R.R.*, 64 W. Va. 474, 63 S.E. 367 (1908).

In apparently the only other case in this jurisdiction which turned upon the intrinsically dangerous exception, it was held that dynamite blasting operations were so classified. *Walton v. Cherokee Colliery Co.*, 70 W. Va. 48, 73 S.E. 63 (1911). The court did not elaborate; yet it is not surprising that the use of dynamite is classified as intrinsically dangerous.

In view of the cases mentioned in which the court has been called upon to decide just what work will qualify as intrinsically dangerous, it would seem that the court in the instant case could have either excluded or included the handling of gasoline as intrinsically dangerous without any breach of the stare decisis doctrine.

Since by definition of the phrase, the test is whether the work can be done safely if due care is used, it is apparent that any attempt to classify a given undertaking as intrinsically dangerous may be quite speculative. Apparently for this reason the court will not find a work which has been let to an independent contractor to be intrinsically dangerous so as to impose liability upon the employer except in fairly extreme cases, but there may be an implication that less will suffice if there is also present some other exception to the independent contractor rule which in itself would

impose liability upon the employer, as was present in the *Wilson* case. On this basis the exclusion of the handling of gasoline as an intrinsically dangerous undertaking in the instant case seems justified in view of the fact that no other applicable exception to the independent contractor rule existed.

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CONTRACTS — REMOVAL OF TIMBER — FAILURE SEASONABLY TO EXERCISE OPTION.—*P* was the assignee of a contract of sale of the standing timber on *D*'s land. The contract provided that *P* was to have five years in which to cut and remove the timber with the right to extend such time, from year to year, not exceeding an additional five years upon payment to *D* of the sum of $75.00 per year for each annual extension. *P* did not remove the timber within the time allotted and tendered payment for one of the additional years two and one-half months after the beginning of the period. *D* refused payment, contending that title to the timber had reverted to him. *Held,* that a defeasible fee was created in the timber with an option to extend the period for removal, and the belated payment was properly refused. *Sun Lumber Co. v. Thompson Land & Coal Co.*, 76 S.E. 2d 105 (W. Va. 1953) (3-2 decision). The dissent maintains that *P* had vested property rights in the timber, and that equity will not permit forfeiture of a valuable property right without intervening.

A provision regarding payment for extension privileges in a timber contract is not a covenant but a condition, because it is optional with the purchaser whether or not the extension privilege will be exercised. *Hall v. Ritter Lumber Co.*, 167 Va. 95, 187 S.E. 503 (1936). Under this type of contract the absolute title to the timber never passes out of the seller until the purchaser cuts and removes the timber within the period allowed by the contract. There is no forfeiture of the title to the timber remaining uncut or unremoved after the time limit because there is nothing to forfeit. *Lange & Crist Box & Lumber Co. v. Haught,* 132 W. Va. 530, 52 S.E.2d 695 (1949). The condition spoken of in the *Hall* case is a condition precedent and until it is performed *P* has no property interest in the timber. *Curtis v. Peebles,* 160 Va. 735, 169 S.E. 548 (1933). So when the dissent speaks of *P*'s "property