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**West Virginia Annotations to the Restatement of the Law of Agency**

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BOOK REVIEWS

WEST VIRGINIA ANNOTATIONS TO THE RESTATEMENT OF THE LAW OF AGENCY. BY KENNETH C. DAVIS. ST. PAUL, MINN. AMERICAN LAW INSTITUTE PUBLISHERS, 1938. PP. 272.

The Restatement of the Law of Agency, comprising 528 sections and 1242 pages, as adopted and promulgated by the American Law Institute, was published in 1933. The West Virginia Annotations to the Restatement were completed in 1937 and published early in 1938. They comprise 272 printed pages and were prepared by Professor Kenneth C. Davis of the College of Law, West Virginia University, under the auspices of a committee of the West Virginia Bar Association.

The method followed by the annotator in finding and abstracting all the West Virginia agency cases was to examine each volume of the West Virginia Reports, page by page, a method unusually tedious because agency questions are frequently so well hidden in judicial opinions that sometimes they cannot be found through a reading either of the syllabus or of the court's statement of facts. Each case thus found was allocated to the appropriate section or sections of the Restatement. This step required especially careful work because of the fact that, despite the thoroughness of paging the Reports, the allocation of a case to a particular section would not exhaust the authority cited unless that case was allocated to every section to which it was relevant. Therefore it was necessary that the annotator at all times have in mind the subject matter of each of the 528 sections of the Restatement. After the authorities had been thus collected and classified, the annotator then drafted the annotations and appended them to the sections to which they related. The bar of West Virginia is indebted to Professor Davis for the thorough, painstaking and accurate work that he has done in assembling and classifying the cases and in preparing and allocating the annotations.

The annotator carried his study of cases through volume 116 of the West Virginia Reports, volume 191 of the Southeastern Reporter, page 552, and Acts 1937 of the West Virginia Legislature. The Virginia decisions prior to 1863, although authoritative in West Virginia, were not included in these annotations because it was assumed that they would be covered in the Virginia annotations.

The West Virginia Annotations to the Agency Restatement, except where otherwise indicated, are intended to be exhaustive,
and to make available to the West Virginia lawyer an authoritative answer to every problem that falls within their scope. They may readily be found through the use of the Restatement’s index, which is unusually thorough. As stated in the preface to the annotations, “they deal with results, not reasons, they are devoid of analysis of theories, criticism of principles, and discussion of merits of rules and cases.”

The arrangement of the annotations follows that of the Restatement, which consists of fourteen chapters in which the following general subjects are treated: (1) Introductory Matters; (2) Creation of Relationship; (3) Creation and Interpretation of Authority and Apparent Authority; (4) Ratification; (5) Termination; (6) Liability of Principal to Third Persons; Contracts and Conveyances; (7) Liability of Principal to Third Person; Torts; (8) Liability of Principal to Third Persons; Notice through Agent; (9) Admissibility in Evidence of Statements of Agents; (10) Liability of Third Person to Principal; (11) Liability of Agent to Third Person; (12) Liability of Third Person to Agent; (13) Duties and Liabilities of Agent to Principal; (14) Duties and Liabilities of Principal to Agent. The foregoing chapters are further subdivided into topics, titles, and sections.

It is of interest to note that of the 528 sections of the Restatement, more than one-fourth, 148 to be exact, have no West Virginia annotations. As to these sections where no West Virginia law exists, the general law as set forth in the Restatement will be particularly useful to the practicing lawyer.

The remaining 380 sections are annotated with West Virginia cases which are either directly or indirectly relevant. As stated in the preface to the annotations, one who compares the West Virginia cases with the appropriate sections of the Restatement, and who “looks through language to substance will be impressed with the infrequency of holdings which depart radically from what the Institute denominates ‘the general common law of the United States.’”

Due to the limitations within which a review of this nature must be kept, it will not be practicable to devote more than a cursory discussion to the annotations under the various chapters of the Restatement.

Chapter 1. Introductory Matters — relating to definitions, knowledge and notice, and essential characteristics of the agency relationship. West Virginia law is substantially in accord with
the Restatement. However, under topic 1 of this chapter, on Definitions, some of the West Virginia terminology is rather strikingly different from that of the Restatement. This is true of many cases cited in the annotation to section 1, of the last full paragraph on page 11 under section 2, of the last paragraph on page 13 under section 3, of the court’s failure to use the term “partially disclosed principal” which is used in section 4 of the Restatement, of a large part of section 5, of all of sections 6 and 7, partially of section 8, and of the distinctions drawn in section 9. Of course, all of these sections relate only to definitions of terms. But the Restatement has set up a terminology which is largely new and which is probably not wholly in accord with the terminology used in any single American jurisdiction.

Chapter 2. Creation of Relationship — relating to mutual consent and consideration, delegable acts and powers, and capacity of the parties to the agency relationship. Here also West Virginia law is substantially in accord with the Restatement. However, certain cases are not wholly in accord with section 15, which states that “An agency relationship exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.” Apparently our court, in the cases referred to, has declared the existence of an agency relationship in spite of lack of consent or manifestation of consent. The annotator says: “This disagreement, however, is not one of substance, but arises from the employment of ‘agent’ or ‘agency’ to justify a result which might well have been placed on other grounds.”

Chapter 3. Creation and Interpretation of Authority and Apparent Authority — relating to the methods of manifesting consent, interpretation of authority and apparent authority, interpretation of particular authorizations to contract, to buy or sell, to lease, to take charge of land, chattels, or investments, to receive payment, to manage a business, to borrow, to make negotiable instruments, and to delegate or appoint agents and subagents. Many important annotations are found under this chapter. Those dealing with authorizations to manage a business, to borrow, to make negotiable instruments, and to delegate or appoint agents and subagents, (§§73-80), are of particular interest to business men.

Chapter 4. Ratification — relating to definitions, when affirmation results in ratification, what constitutes affirmation, and liabilities. West Virginia law is substantially in accord with the
Restatement. However, some of the cases apparently are irreconcilable with section 94 of the Restatement which states that "An affirmation of an unauthorized transaction may be inferred from a failure to repudiate it."

Chapter 5. Termination—relating to termination of the agent’s authority as inferred from the original manifestation of the principal to the agent in the light of subsequent events, termination by mutual consent, revocation, renunciation, loss of capacity and impossibility, termination of apparent authority, notice of termination of authority and apparent authority, termination of authority and apparent authority of a subagent, and termination of powers given as security. Of the 35 sections comprising this chapter about one-half have no West Virginia annotations. The annotations to the remaining sections are substantially in accord with the Restatement.

Chapter 6. Liability of Principal to Third Persons; Contracts and Conveyances—relating to (a) general principles; (b) the liability of a disclosed or partially disclosed principal created by authorized or unauthorized acts, including the interpretation of written instruments as to parties, and defenses and liability as affected by subsequent events, (c) the liability of an undisclosed principal created by authorized or unauthorized acts, including defenses and liability as affected by subsequent events. Thirty of the 72 sections comprising this chapter have no West Virginia annotations. The annotator reports that section 161, on the creation of liability by unauthorized acts of a general agent, was the most difficult section of the Restatement to annotate. The importance of this section is apparent. West Virginia law apparently is in accord with the section, "although not a single holding stands on this principle alone, and although numerous clear dicta are abstractly contra." West Virginia law apparently is contra to section 164 of the Restatement, which states that "If an agent, having the power to bind a disclosed or partially disclosed principal by certain terms in a contract, makes a contract including such terms and also other terms which are beyond the power which he has to bind the principal, the principal is not liable either upon the contract as made or the contract with the additional terms omitted." West Virginia law apparently is inconsistent with section 173 of the Restatement, which states that "A disclosed or partially disclosed principal who employs a general agent in a position in which it is usual for such agents to issue negotiable instruments is
subject to liability to a holder in due course of such an instrument issued by the agent in the name of the principal, although contrary to the principal’s direction, as if the instrument were authorized.’” Also West Virginia law apparently is contra to section 191 of the Restatement, which states that “An undisclosed principal is not liable as a party to a sealed instrument.” Attention is especially directed to the interesting discussion of cases involving limitations upon agents’ authority to waive conditions of insurance policies, appearing at pages 108-114 of the West Virginia Annotations.

Chapter 7. Liability of Principal to Third Person; Torts—relating to (a) liability for personal violation of duty, (b) liability for authorized conduct or conduct incidental thereto, including torts of servants, torts of agents who are not servants, and conduct within apparent authority or apparent employment. West Virginia law is substantially in accord with the Restatement. Of particular interest are the annotations relating to the failure of the principal to perform non-delegable duties (§214), those defining “servant” (§220), those relating to the kind of conduct within the scope of the employment (§229), and those relating to specific torts or servants, such as negligence, trespass and conversion, use of force, tortious institution or conduct of legal proceedings, and defamation (§§243-247).

Chapter 8. Liability of Principal to Third Persons; Notice Through Agent—relating to notification to or by, and knowledge of, agents, servants and subagents. West Virginia law is substantially in accord with the Restatement. Of particular interest are the annotations dealing with the extent to which the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information (§§272-282).

Chapter 9. Admissibility in Evidence of Statements of Agents. This is a short chapter comprising only eight sections, six of which are annotated.

Chapter 10. Liability of Third Person to Principal—relating to contracts where the agency is disclosed, contracts where the agency is undisclosed, non-contractual liability of a third person to the principal, and the effect of ratification, by the purported master or other principal, of a transaction entered into by a purported servant or other agent with a third
person, upon the liability of the third person to the principal. West Virginia law apparently in contra to section 296, which states that "An obligor named in a sealed instrument given to an agent on behalf of the principal is not liable to the principal upon it in an action at law unless the principal appears therein as a covenantee."

Chapter 11. Liability of Agent to Third Person — relating to (a) contracts and conveyances, both where the agent is a party to the contract and where the agent is not a party to a transaction conducted by himself, (b) things received from or for the principal, (c) torts, (d) liability of or for servants and subagents. West Virginia law is substantially in accord with the Restatement.

Chapter 12. Liability of Third Person to Agent — relating to actions by the agent on behalf of the principal and actions by the agent on his own behalf. There is no West Virginia law on 9 of the 13 sections of this chapter. The cases relating to the remaining sections are substantially in accord with the Restatement.

Chapter 13. Duties and Liabilities of Agent to Principal — relating to duties of service, obedience and loyalty, liabilities, defenses, and duties and liabilities of particular kinds of agents. West Virginia law is substantially in accord with the Restatement. Of particular interest are the annotations dealing with the duties of loyalty owed by the agent to his principal, including the duty to account for profits arising out of his employment (§388), the duties owed by the agent when he is acting as an adverse party, without the principal’s consent, in a transaction connected with the agency (§389), when he is acting as an adverse party with the principal’s consent (§390), when he is acting for an adverse party without the principal’s consent (§391), when he is acting for an adverse party with the principal’s consent (§392), the duty not to compete with the principal concerning the subject matter of his agency (§393), the duty not to act or agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed (§394), and the extent of the agent’s duty not to use or disclose confidential information during or after the termination of the agency (§§395, 396).

Chapter 14. Duties and Liabilities of Principal to Agent — relating to (a) the principal’s contractual and quasi-contractual duties and liabilities, (b) liability in tort for his own misconduct, (c) liability to agents, not servants, for the torts of servants, other agents, and contractors, (d) liability to servants for the torts of
servants, other agents, and contractors, including matters involving the fellow servant rule, non-delegable duties of the master, and defenses involving assumption of risk, contributory negligence, disobedience of orders, illegal employment, and the effect of workmen's compensation acts. West Virginia law is substantially in accord with the Restatement. Of particular interest are the annotations dealing with the compensation of an agent (§§441-457), the agent's lien (§464), the fellow servant rule (§§474-491), non-delegable duties of the master (§§492-520), and the defenses of the servant's assumption of risk and contributory negligence (§§521-525).

In preparing the West Virginia Annotations to the Restatement of the Law of Agency, Professor Davis has rendered a distinct service to the judiciary and bar of the state. This publication merits careful reading and study by judges and lawyers alike. Clarksburg, West Virginia.        LAWRENCE R. LYNCH.


"Cultivated mind is the guardian genius of democracy, and while guided and controlled by virtue, is the noblest attribute of man." This ideal pervades the present collection of essays and addresses by a scholarly jurist of the Southwest,—who has now set forth in carefully-phrased expression his creed of law and civilization. It has been said that men are never so likely to settle a question as when they discuss it freely; as a matter of course, we assume just opinions are best formed when one has no other wish than to know the truth. The material here thus offers many thoughtful observations on the common heritage of justice in modern society.

The author is equally known to the profession and to (what might be termed) the scholars alike. As a lawyer in active practice, as a federal district judge and now as circuit judge, he has not only found kindly critics in academic circles: he has even for a brief space dwelt among the infidels as a law school teacher, with all the rights and privileges appertaining thereto. "A deductionist, at least as applied to law, with a touchingly simple faith in syllogisms," he temporarily took "the king's shilling and put his

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1 President Mirabeau B. Lamar, First Message to Third Congress of the Republic of Texas, quoted by Judge Hutcheson, JUDGMENT INTUITIVE 11.

2 P. 94: "There in Looking Glass Land, where the professors live, ever making words mean what they choose them to mean."

3 P. 68.