Agency--A "Conclusive" Test of Agency Relation in West Virginia

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RECENT CASE COMMENTS

AGENCY— A "CONCLUSIVE" TEST OF AGENCY RELATION IN WEST VIRGINIA.— Plaintiff was employed by the defendant company to deliver gasoline to its customers at a flat rate of three cents per gallon, and furnished his own trucks and drivers for that purpose. The duration of the contract was indefinite, and the plaintiff was specifically directed to make deliveries by being handed certain slips of paper. While engaged in loading a truck from defendant's storage tank, the plaintiff suffered an injury. In order to preclude the defendant from setting up the defense of contributory negligence, the plaintiff relied on the following facts to show that he was a servant of the company rather than an independent contractor:

(a) Indefinite duration of the employment. (b) Payment by a flat rate as distinguished from payment for a completed job. (c) The defendant furnished the tanks for the plaintiff's trucks. (d) Plaintiff followed the specific directions of the defendant in making deliveries.

Judgment was found for the plaintiff in the trial court on the ground that he was a servant. On appeal, the judgment was reversed, and the plaintiff was held to be an independent contractor. Greaser v. Appaline Oil Company. The Court refused to consider the plaintiff's facts as determinative of a servant relation, and expressly refused to harmonize or differentiate this case from others where such facts were given a varying degree of significance and proceeded to submit the case to a conclusive test: Did the defendant have the right of supervising the plaintiff in the manner of performing his work? The Court found no such right existed, and, therefore, the plaintiff was an independent contractor.

The Pennsylvania Court has held that the power to terminate employment at any time is a strong circumstance showing the sub-serviency of the employee, and is incompatible with the full control

1 Unless an employer is a contributor to the Workmen's Compensation Fund he is deprived of the three common law defenses of contributory negligence, assumption of risks, and the fellow-servant rule when sued by a servant. W. Va. Rev. Code (1931) c. 23, art. 2, § 8.
3 14 R. C. L. p. 71, § 8.
4 Tiffin v. McCormack, supra n. 2.
5 Waters v. Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52 (1893).
6 155 S. E. 170 (W. Va. 1930).
of the work which is usually enjoyed by an independent contractor.\textsuperscript{7} Considerable significance has also been attached to the manner and time of payment. If a contractor pays and has full control of his workmen, it has been held that this is practically decisive of his independence.\textsuperscript{8} It is important to consider who furnishes the appliances for the work.\textsuperscript{9} The general rule is the servant uses the means furnished by the master.

In \textit{Tompkins v. Pacific Mutual Life Insurance Company},\textsuperscript{10} our Court placed liability on the insurance company for the negligence of an examining physician on the ground that he was a servant of the company, altho it is difficult to see how the company could control the doctor in his detailed treatment of the broken ankle. Actual control, though, need not be exercised; it is enough that the right is reserved.\textsuperscript{11}

In a Minnesota case,\textsuperscript{12} a teamster furnishing his own team and wagon and drawing coal for a coal company at a certain price per ton was held a mere servant if he works for one employer. This case is hardly distinguishable from the principal case. A Virginia case categorically lists four elements to be considered at common law to establish a master-servant relation.\textsuperscript{13} The Illinois Court says the real test is to ascertain if the employee is subject to another’s orders and control, and is liable to be discharged for disobedience to such orders.\textsuperscript{14}

In addition to these cases showing that courts take other factors into consideration besides the right to control, our own court prior to the principal case has done the same thing. In \textit{Anderson v. Coal Company}, in addition to the right to control, the court gave serious consideration to the question as to who employs and pays the subordinate help. In two coal mine cases which were

\textsuperscript{7} Dickson v. Hollister, supra n. 2.
\textsuperscript{8} Supra n. 3. Mechem, \textit{Law of Agency}, 2d ed. 1914) § 1871.
\textsuperscript{9} Tiffin v. McCormack, supra n. 2; But see Central Coal Co. v. Grider, 115 Ky. 745, 74 S. E. 1058 (1903); Miller v. Minnesota R. Co., 76 Ill. 655, 39 N. W. 188 (1888).
\textsuperscript{10} 53 W. Va. 479, 495, 44 S. E. 439 (1903). \textit{Thompson on Negligence} (2d ed. 1901) § 518.
\textsuperscript{11} Aderholt v. Condon, 189 N. C. 748, 128 S. E. 337 (1925).
\textsuperscript{12} Waters v. Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52 (1893).
\textsuperscript{13} (1) Selection and engagement of servant, (2) payment of wages, (3) power of dismissal, (4) power of control of servant’s action. “Where all these co-exist in one person alone, that person is without doubt the master of the person engaged. None of these elements are absolutely determinative.” Atlantic R. Co. v. Tredway, 120 Va. 735, 93 S. E. 560 (1917).
\textsuperscript{14} City of Chicago v. Gotham, 138 Ill. App. 253, aff'd. 236 Ill. 9, 86 N. E. 152 (1908).
almost identical in the material facts, contrary results were reached. In both cases X was employed to mine coal, and he secured his own workmen, which the employer paid. The employer also furnished the equipment. In Waldron v. Coal Company,\textsuperscript{16} X was held a servant. In Rawson v. Coal Company,\textsuperscript{17} he was called an independent contractor. In an attempt to distinguish the former case, the court said that it was distinguishable because the employer assisted in the work, by drilling holes and otherwise, and that X recognized the authority of the company in the selection of workmen.

In conclusion, it may be said that the principal case is unique in adopting a single conclusive test, and giving minimum consideration to factors that other cases have held more or less significant.

―August W. Petroplus.

**Banks and Banking — Set-Off of Deposit of Insolvent Estate Against Bank’s Distributive Share of the Estate.**—In a recent case,\textsuperscript{1} the administrator de bonis non of an insolvent estate claimed the right to set-off pro tanto a deposit of funds collected from the assets of the insolvent estate against the bank’s distributive share of the insolvent estate. An action was pending to determine the claims of the creditors and the amount available for distribution when the bank closed and when this action was brought. The court denied a set-off on the ground that the bank could not have charged the indebtedness against the deposit and the right of a depositor to a set-off is reciprocal to the bank’s right to charge the deposit account. The insolvent estate was required to pay the bank its distributive share of the estate and the bank was required to pay the insolvent estate its distributive part of the bank’s assets.

In a dissenting opinion, it is agreed that there is no mutuality and no right to set-off the deposit against the intestate’s debt to the bank,\textsuperscript{2} but it is contended that upon the insolvency of the intestate,

\textsuperscript{15} 59 W. Va. 301, 53 S. E. 713 (1906).
\textsuperscript{16} 89 W. Va. 426, 109 S. E. 729 (1921).
\textsuperscript{17} 100 W. Va. 263, 130 S. E. 492, 43 A. L. R. 330 (1925).

\textsuperscript{1} Allen v. Holleman, 156 S. E. 446 (S. C. 1931).
\textsuperscript{2} A bank to which a depositor owes a matured debt may appropriate a general deposit of the debtor to the payment of the debt; but it has no