South Carolina Law Review

Volume 7 | Issue 1 Article 8

Fall 1954

Agency

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Of the cases decided by the Supreme Court, during the review period, that can be considered as coming traditionally within the topic of Agency, only one, that of *Johnson v. Windham*,[1] deals with the power of an agent to bind his principal and a third party contractually, rather than with the possible creation by a servant of a tort liability against his master. Such an outweighing of principal-agent cases by master-servant cases would seem to be the rule in present day jurisprudence despite an opposite emphasis in Agency texts and case books.

The *Johnson* case announces no new rule of law but does illustrate a sound application of several basic Agency principles. The plaintiff sought specific performance of an alleged written contract to convey real estate, his testimony being to the effect that the defendant remainderman had bound himself and the defendant life tenant, his 74 year old mother, to convey the property, and that a written contract had been prepared and signed by the plaintiff and the remainderman and left with the remainderman for him to procure the signature of the life tenant. The writing was not produced, but the Court held that a contract sufficient to bind the remainderman had been established. Specific performance was refused, however, because the interest of the life tenant had not been legally bound by any act of her son. The son admittedly had no express authority from his mother to contract for the conveyance of her life estate, and the plaintiff pitched his case largely upon the claim of an authority implied from the fact that the son had handled similar transactions for her in the past, and that he received from the plaintiff and turned over to his mother the monthly payments called for by the contract. As to the claimed prior transactions, the Court found that the proof was entirely inadequate, and also found "no merit" in the plaintiff's "contention that an agency to

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1. 224 S.C. 502, 80 S.E. 2d 234 (1954).

collect money derived from the rental of a house implies the power to sell and convey the principal's real estate from which such money is derived." No ratification was shown by the mother's receipt of the monthly payments because there was no knowledge on her part that the payments were received under a contract of sale rather than as rent. The plaintiff made no claim as to apparent authority but such a claim would have been unavailing under the facts because the plaintiff, by admitting that the contract had been left with the son for the mother's signature, admitted that he had not relied upon any apparent authority in the son to sign for the mother.

The first of the *respondeat superior* cases decided during the review period involved the familiar "loaned servant" doctrine. The case is *Brabham v. Southern Asphalt Haulers Inc., et al.*,[2] in which the tractor-trailer which had injured the plaintiff was owned by the named defendant but leased at the time of the accident to the co-defendant, Infinger Transportation Co., Inc. The Infinger Company appealed from a verdict against it alone upon the contention that the driver of the tractor was the employee of the Southern Asphalt Company and subject to its control. The hauling was being done under a contract obtained by Infinger from the Standard Oil Company and the services of the driver as well as the vehicle were leased by Southern Asphalt to Infinger with Infinger responsible for paying the driver's wages and allied charges. Most important of all, the hauling was being done under an Interstate Commerce Commission certificate held by Infinger. Southern Asphalt had no such certificate and, therefore, no legal right to accomplish the transportation. In affirming the judgment below, the Court found it necessary to do little more than to apply to the facts before it the legal principles announced in 1939 in *Brownlee v. Charleston Motor Express Company*,[3] a case in which another lessee of heavy transportation equipment operating under a South Carolina Public Service Commission license had been held liable against a contention that only the lessor, who owned the vehicle and was the general employer of the driver, could be held. The Court in the present case, as it had in the *Brownlee* case, points out that the lessee had the full right to control the driver's acts and that this is the controlling test in all cases involving the loan or lease of vehicles with drivers. Whichever employer has the

2. 223 S.C. 421, 76 S.E. 2d 301 (1953).
3. 189 S.C. 204, 200 S.E. 819 (1938).

right of control, whether the general employer or the special, is the responsible master.

Although the soundness of the *Brownlee* and *Brabham* decisions can hardly be questioned, a simpler ground of decision might have been available to the Court in both. Under the quasi-monopoly which had been granted Infinger by the I. C. C., upon a showing of the company's ability to perform and to protect the travelling public, could not it be said that Infinger had a "non-delegable duty" to see that all transportation accomplished under the I. C. C. certificate was accomplished safely? In such cases as *Engelberg v. Prettyman,*[4] the South Carolina Court has held railroad companies responsible for the injuries arising from the operation of their equipment by lessees on the theory that the railroad companies had no right to free themselves from liability by delegating their common carrier duties to third parties. The same doctrine should be applicable to motor carriers licensed for particular operations by the proper Federal or State regulatory agencies. The South Carolina Court in the *Brabham* case does cite cases, such as the North Carolina case of *Jocie Motor Lines, Inc. v. Johnson,*[5] decided wholly upon this ground.

The fact that the case of *McJunkin v. Waldrep*[6] decides a point never before passed on in this State was occasioned by the resourcefulness of defendant's counsel in attempting to apply the doctrine of joint enterprise between the parties to the enterprise. The plaintiff and two other beauty operator employees of the defendant were traveling in the defendant's automobile from Greenville to New York for the purpose of taking special beautician training when a collision occurred in Virginia, injuring the plaintiff. The defendant's defense of joint enterprise, founded factually upon the general purpose and financial arrangements of the trip, was allowed to go to the jury, which returned a verdict for the defendant. The Supreme Court reversed, relying upon 38 AMERICAN JURISPRUDENCE, NEGLIGENCE, § 238, to the effect that the doctrine of joint enterprise "does not apply in actions between members of the joint enterprise and does not, therefore, prevent one member of the enterprise from holding another liable for personal injuries inflicted by the latter's negligence in the prosecution of the enterprise."

4. 159 S.C. 91, 156 S.E. 173 (1930).
5. 231 N.C. 367, 57 S.E. 2d 388 (1950).
6. 81 S.E. 2d 284 (S.C. 1954).

Still on the subject of joint enterprise, the Court's decision in *Thompson v. S. C. Highway Department*,[7] was merely a reminder that in the ordinary automobile accident case the question of whether the plaintiff and the driver of the car were engaged in a joint enterprise is for the jury.

The final case to be commented upon, *Gillespie v. Ford*,[8] contains easily the most elaborate discussion of Agency law, by both the majority and the dissenting judges, of all the cases cited. Actually, however, the holding is a narrow one. It is simply that under certain circumstances an industrial life insurance agent may, as a servant, subject his company to *respondeat superior* liability for his traffic torts.

The insurance agent in the *Gillespie* case was in charge of a "debit" of such a size that the use of an automobile was necessary. His duties to his employer involved the collection of weekly premiums from each policy holder in the debit and the general servicing of the insurance. These facts and others more or less peculiar to the employment of this individual agent led the majority of the Court, which consisted of Justices Stukes and Oxner and Acting Associate Justice Greneker, to conclude that the insurance company had the right at the time of collision to control the physical conduct of the agent. The dissenting members of the Court, Justice Taylor and Chief Justice Baker, found from the facts that no such right of control existed. The opinions of Mr. Justice Stukes for the majority and Mr. Justice Taylor for the minority both recognized that this right of control is the factor which distinguishes the status of a servant from that of an agent who is not a servant and whose physical torts will therefore not subject his employer to *respondeat superior* liability. The Justices seem to differ, therefore, not as to the applicable rule of law but as to the factual aspects of the particular agency before the Court.

The *Gillespie* decision was foreshadowed to some extent by the 1946 decision of *Carter's Dependents v. Palmetto State Life Ins. Co.*,[9] in which an agent of the industrial insurance company defendant was held to be an employee of the company within the terms of the Workman's Compensation Act. The *Carter* case did not control the *respondeat superior* question because Workman's Compensation laws are always lib-

7. 224 S.C. 338, 79 S.E. 2d 160 (1953).
8. 81 S.E. 2d 44 (S.C. 1954).
9. 209 S.C. 67, 38 S.E. 2d 905 (1946).

erally construed in order to give as broad a coverage as possible, but Mr. Justice Stukes' opinion in the *Gillespie* case cites the *Carter* case against the insurance company's contention that the agent was an independent contractor. Although a large part of the discussion of the Justices is in terms of "independent contractor" versus "servant", technically the question seems to be whether the insurance salesman is a servant or "an agent who is not a servant" within the meaning of Section 250 of the RESTATEMENT OF THE LAW OF AGENCY. See the annotation in 116 A. L. R. 1389.

The opinions in the *Gillespie* case cite and discuss many of the earlier landmark Agency decisions in this state and it is evident that a great amount of research went into both.