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Agency—1961 Tennessee Survey (II)

W. Harold Bigham*

I. EMPLOYEE AND INDEPENDENT CONTRACTOR DISTINGUISHED

II. MISREPRESENTATIONS OF AGENT

I. EMPLOYEE AND INDEPENDENT CONTRACTOR DISTINGUISHED

During the abbreviated survey period there were no significant or momentous decisions by Tennessee courts—state or federal—involving agency principles. Indeed the only state appellate case properly to be considered here involved the rather pedestrian question of whether a petitioner for workmen's compensation benefits was, vis-a-vis the defendant prime contractor, an employee or an independent contractor.

The applicable provisions of the Tennessee Workmen's Compensation Law¹ impose liability where there is an "employer-employee" relationship. "Independent contractors" are therefore not within the ambit of coverage under the act.² In *Smart v. Embry*³ an injured workman sought compensation from a prime contractor who denied that the petitioner was an employee and contended to the contrary that the injured workman was an independent contractor. The only problem for the court was which of the contentions was correct in view of the facts, which may be briefly summarized as follows.

The S. & S. Construction Company built houses, but, although it provided the materials, all the labor was subcontracted to various individuals. Embry was one of S. & S. Company's subcontractors and was responsible for the framing of several houses. He in turn engaged the petitioner to do the corncicing work, and paid petitioner a lump sum per house, adjusted for variation in size of house. Petitioner worked "by the job" and furnished his own employees. S. & S. inspected petitioner's work almost daily to insure that it met plans and specifications; under its contract with petitioner, however, it did not have any right to control, nor did it attempt to control, the manner in which petitioner actually performed the work. While engaged in the performance of the corncicing contract, the petitioner was injured.

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1. TENN. CODE ANN. § 50-902 (Supp. 1961).

2. *Clendening v. London Assur. Co.*, 206 Tenn. 601, 336 S.W.2d 535 (1960); *Barker v. Curtis*, 199 Tenn. 413, 287 S.W.2d 43 (1956). This is the general rule. See 27 AM. JUR. *Independent Contractors* § 3 (1940).

3. 348 S.W.2d 322 (Tenn. 1961).

The supreme court in an opinion by Justice Felts affirmed the chancellor's decree which had denied the petitioner compensation on the ground that he was not an employee, but an independent contractor.

The decision is a sound one. It is apparent from an examination of the cases involving the independent contractor relationship that there is—in the words of Justice Felts—"no one infallible test"⁴ for determining whether one is an independent contractor or an employee, and that each case must be determined on its own facts; nevertheless, there are many well-recognized and fairly typical indicia of the status of an independent contractor.⁵ Among these indicia are the rights to direct what shall be done, and when and how it shall be done, even though subject to the right of the owner or primary contractor to approve or disapprove the finished product.⁶ Other commonly recognized tests, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance of a certain piece of work at a fixed price, the independent nature of the business or calling, obligation to furnish necessary tools, and method of payment, whether by time or job.⁷ The petitioner here met all these additional tests as well as the prime test of "control," and was without doubt an independent contractor.

II. MISREPRESENTATIONS OF AGENT

*Butts v. Colonial Refrigerated Transportation, Inc.*⁸ is merely another example of the Sixth Circuit's unfortunate proclivity for writing per curiam affirmances. It is well-nigh impossible to determine whether the liability of the defendant which the court affirmed sounded in tort for deceit or was based on breach of contract. In any case the liability resulted from certain false statements made by the defendant's authorized agent, the plaintiffs having relied on the statements to their detriment.⁹

4. 348 S.W.2d at 324.

5. See, e.g., *Seals v. Zollo*, 205 Tenn. 463, 327 S.W.2d 41 (1959); *Bond Bros., Inc. v. Spence*, 198 Tenn. 316, 279 S.W.2d 509 (1955); RESTATEMENT (SECOND), AGENCY § 220 (1958).

6. *Frost v. Blue Ridge Timber Corp.*, 158 Tenn. 18, 11 S.W.2d 860 (1928); *Odom v. Sanford & Treadway*, 156 Tenn. 202, 299 S.W. 1045 (1927); *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S.W. 691 (1890). See also 27 AM. JUR. *Independent Contractors* § 6 (1940); Annot., 75 A.L.R. 725 (1931).

7. 27 AM. JUR. *Independent Contractors* § 5 (1940).

8. 290 F.2d 221 (6th Cir. 1961).

9. Apparently the agent in this case was authorized to make the false statements. *Quaere*: Why should not the master be liable for contracts entered into by an agent attempting to "be about his master's business," even though not specifically authorized by the master? For an interesting argument that the master should be liable for agency contracts on the same terms as he is now liable for agency torts, see Mearns, *Vicarious Liability for Agency Contracts*, 48 VA. L. REV. 50 (1962).