AGENCY

By ROY M. THORNTON, JR.*

PLEADING AND PROVING THE RELATIONSHIP

Several cases decided during the survey period were primarily concerned with the mechanics of pleading agency. In *Nechtman v. Wellington Plaza, Inc.*[1] the court of appeals held that:

> In order to establish agency three things are necessary: (1) By pleading the facts from which agency may be established; (2) By pleading that the principal, through its agent, did the act; and (3) By pleading that the act was done by the alleged agent in the prosecution of the principal's business and within the scope of his agency.

While the quoted excerpt from the court's opinion is somewhat misleading, the three methods of pleading agency being joined conjunctively, it is not considered that the court intended to alter the existing rule that agency may be pleaded by any one of three alternative methods; namely: (1) by alleging simply that the principal by its agent committed the wrongful act, or (2) that the wrongful act was the act of the principal's servant and committed in the prosecution of the principal's business and within the scope of his authority, or (3) by alleging the special facts by which the pleader claims that the relationship of principal and agent exists, alleging the agency as a conclusion.[2]

The petitions of the plaintiffs in two cases[3] were fatally defective for the reason that the petitioners in both cases simply failed to plead the agency relationship by any one of the three alternative methods set out above. In the *Rivers* case[4] the court also reminded counsel that an alternative allegation that a named person is the employee of one of three legal entities is not an affirmative averment that he is an employee of any one of them, and that the doctrine of respondeat superior is not applicable to actions for slander.

The court of appeals again enunciated the rule that while sworn testimony of an agent is competent evidence of such agency, the

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1. 97 Ga. App. 40, 102 S.E.2d 57 (1958).
2. Rothberg v. Manhattan Coil Corp., 84 Ga. App. 528, 66 S.E.2d 390 (1951).
3. Sherwin-Williams Co. v. St. Paul-Mercury Indemnity Co., 97 Ga. App. 298, 102 S.E.2d 919 (1958); Rivers v. Matthews, 96 Ga. App. 546, 100 S.E.2d 637 (1957).
4. *Supra.*

mere declarations of such person are not admissible to prove such agency.[5] Nor can agency be proved by a witness stating that a person acted as an agent or by general reputation in the community as to such agency although the conduct of the principal and agent may be used to rebut the denial of the existence of the agency for the purpose of impeaching the testimony and contentions of the principal and agent as to the existence of the agency or the scope of the powers of the agent.[6]

Creation, Existence and Scope of the Relationship

In *Chamberlin Co. of America v. Mays,*[7] the court parlayed the doctrine of implied authority into an agency relationship between an attorney and his client. It held that one who engages the services of a collection agency vests the agency with implied authority to go to court; and since a collection agency cannot institute suit, it further has the implied authority to employ an attorney who becomes the agent and attorney of the original creditor with the implied authority to effect the collection of the debt through appropriate litigation, even though it constitutes abuse of legal process in that the attorney levied on property in possession of and belonging to one not the debtor.

Implied authority is not always such a useful device for the plaintiff's attorney, however. In *Cox v. Estes,*[8] the court held that the fact that the defendant furnished a truck to his sharecropper for the purpose of using it on the farm in furtherance of the farm's operation, did not give the cropper implied authority to permit a twelve year old boy to operate the truck on a public highway contrary to law, so as to bind the defendant.

Although the doctrine of ratification, by finagling with one legal fiction or another, has seemingly become a conventional method of creating the agency relationship, it is not applicable against a person as to an act of one who did not assume to act in his name or under authority from him.[9] Thus the court of appeals in *Broyles v. Kirkwood Court Apartments, Inc.,*[10] held that where a contract was entered into and signed by two individuals who were the sole officers, directors, stockholders and agents of a corporation, and where the

5. Augusta Roofing and Metal Works, Inc. v. Clemmons, 97 Ga. App. 576, 103 S.E.2d 583 (1958).
6. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591 (1957).
7. 96 Ga. App. 755, 101 S.E.2d 728 (1957).
8. 96 Ga. App. 649, 101 S.E.2d 107 (1957).
9. Greene v. Golucke, 202 Ga. 494, 43 S.E.2d 497 (1947).
10. 97 Ga. App. 384, 103 S.E.2d 97 (1958).

contract, though referring in the body thereof to the corporation, did not purport to be an undertaking of the corporation but was merely the individual undertaking of the signers thereof, the corporation is not liable to one of the signers for money paid out by him pursuant to the provisions of the contract, on the theory of ratification.

The subject of the existence of the agency or master-servant relationship again presented the perennial question of "independent contractor or servant (agent)". The true test of whether a person employed is a "servant" or "independent contractor" is whether the employer, under the contract whether oral or written, has the right to direct the time, manner, methods and means of execution of the work, as distinguished from the right to insist upon the contractor producing results according to the contract. Accordingly in *Weiss v. Kling*,[11] it was held that where a tree service company employed to cut trees on defendant's land on a flat fee in a specified time, controlled the manner of doing the work as well as employment, control and payment of labor, it was an "independent contractor" and defendant was not liable for its trespass in cutting trees on plaintiff's adjoining land. And in *Harley v. General Motors Corp.*,[12] it was held that an automobile dealer, in attempting to correct a defect in a newly purchased automobile, was acting as an independent contractor rather than as an agent for the manufacturer.

The scope of employment question was again threshed about in two cases decided during the survey period. In *Fortenberry & Sons, Inc. v. Malmberg*,[13] the court held that where an employee, who is employed for the special purpose of operating a truck for his master, is found driving the truck in the usual manner, a presumption arises that he is acting within the scope of his employment. The presumption in this case was not rebutted by testimony adduced as to the personal nature of the employee's mission in carrying scrap lumber which had been given him by the defendant-employer to the employee's home. The evidence warranted an inference not only of the charitable disposition of the employer but also of an intent to engender good managerial and labor conditions between the employer and his employee, this being a matter connected with the promotion and conduct of the defendant's business.[14] In *Hickman v. Paulk*,[15] the plaintiff, a butcher, "quit" during a dispute with the market manager concerning his employment duties and allegedly was as-

11. 96 Ga. App. 618, 101 S.E.2d 178 (1957).
12. 97 Ga. App. 348, 103 S.E.2d 191 (1958).
13. 97 Ga. App. 162. 102 S.E.2d 667 (1958).
14. Starr & Sons Lumber Co. v. York, 89 Ga. App. 22, 28, 78 S.E.2d 429, 434 (1953).
15. 96 Ga. App. 589, 100 S.E.2d 634 (1957).

saulted by the manager as he was about to leave the premises. The court held that the plaintiff had ceased to be a fellow servant of the market manager and that a jury question was presented as to whether the manager was acting within the scope of his employment in assaulting the plaintiff.

On the question of the authority of an agent it was held that a special bond agent does not necessarily have authority to act for his principal in advising third parties as to the legal effect of the bonds;[16] that a rental agent has no implied authority to invite a photographer upon his principal's premises to take pictures of a defective roadway so as to constitute him an invitee;[17] and that a parking authority, being an agent of the county, has no greater authority or power, than its principal.[18]

Relations Between Principal and Agent

An agent cannot serve two masters without consent of both where there exists a conflict of interest. Thus the principal-policyholder could not recover against her agent in an action based on the agent's negligence in failing to renew a policy of insurance on her home, where the agent was also the agent of the insurer, and no evidence was adduced at the trial to show that the insurance company had any knowledge of any such proposed dual agency.[19] Nor could a real estate agent recover against his principal-property owner in a suit to recover a commission for procuring the sale of real estate, where right to sell said real estate had been retained by principal-owner, in absence of showing that the principal in selling the property had actual knowledge that the purchaser had been procured by acts of the agent under his contract of agency.[20] And finally in *Warnock v. Elliott*,[21] a case arbitrarily discussed under this topic, the court held that the agent, being in complete charge of the business while the owner was away, was a joint tort-feasor with the principal in performing any acts of misfeasance and intermingled acts of nonfeasance.

There was no significant legislation affecting the principal-agent relationship during the survey period.

16. Sherwin-Williams Co. v. St. Paul-Mercury Indemnity Co., *supra*.
17. Nechtman v. Willington Plaza, Inc., *supra*.
18. Tippens v. Cobb County Parking Authority, 213 Ga. 685, 100 S.E.2d 893 (1957).
19. Georgia Insurance Service, Inc. v. Wise, 97 Ga. App. 461, 103 S.E.2d 445 (1958).
20. Palmer v. Malone,_____Ga. App._____, 104 S.E.2d 131 (1958).
21. *Supra*.