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Torts - Master and Servant - Payment of Social Security Tax as Evidence of Relationship

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TORTS — MASTER AND SERVANT — PAYMENT OF SOCIAL SECURITY TAX AS EVIDENCE OF RELATIONSHIP — Plaintiff's decedent was killed when his tractor-truck collided with an automobile driven by defendant's salesman. In an action to recover damages for the death of decedent, the trial court submitted to the jury, as evidence of a master-servant relationship, the payment of social security taxes by the defendant on behalf of the salesman. Judgment was rendered for the plaintiff. On appeal, *held,* the record of social security payments by defendant on behalf of its salesman was properly submitted to the jury as evidence of a master-servant relationship. *Peetz v. Mazek Auto Supply Co.,* (Neb. 1955) 70 N.W. (2d) 482.

In determining whether a master-servant relationship exists for the purpose of imposing on the employer liability for the torts of his employees, the courts have consistently stressed the traditional common law test of control over the details and methods of operation.[1] However, when the context of the inquiry is the issue of applicability of modern social legislation, there is a tendency for greater liberality as to the scope of the inquiry. Thus, in cases of the latter type, the courts have been prone to stress the evils the legislation was designed to correct and the "economic realities" of the situation as being more significant than merely the extent of the employer's control over the employee.[2] This is true even where the statute itself has expressly called for the application of common law tests to determine the existence of an employer-employee relationship.[3] The weight given to social security payments as evidence of the relationship of master and servant has not been substantial in those cases which have discussed the issue.[4] The general view seems to be that such payments will be admissible but will not be considered conclusive evidence of such a relationship.[5] Nor is any differentiation made as to the purpose of the determination; the

1 Other elements of the relationship usually considered by the courts are (1) selection and engagement, (2) payment of wages, (3) power of dismissal. Atlantic Coast Line R. Co. v. Tredway's Administratrix, 120 Va. 735, 93 S.E. 560 (1917); Outdoor Sports Corp. v. AFL Local 23132, 6 N.J. 217, 78 A. (2d) 69 (1951).

2 See, e.g., NLRB v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851 (1944); United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463 (1947); Bartels v. Birmingham, 332 U.S. 126, 67 S.Ct. 1547 (1947); McKinley, Commissioner of Labor v. R. L. Payne & Son Lumber Co., 200 Ark. 1114, 143 S.W. (2d) 38 (1940); Globe Grain & Milling Co. v. Industrial Commission, 98 Utah 36, 91 P. (2d) 512 (1939).

3 See Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins, (2d Cir. 1951) 189 F. (2d) 865, where the court disregarded the mandate of the Social Security Act, 49 Stat. L. 625 (1935), §210 as amended by 64 Stat. L. 500, §210 (K) (2), (1950), 42 U.S.C. (1952) §410 (k) (2), in determining whether an employer-employee relationship existed.

4 Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N.W. (2d) 810 (1943); Carter v. Hodges, 175 Tenn. 96, 132 S.W. (2d) 211 (1939); Brown v. Minngas Co., (D.C. Minn. 1943) 51 F. Supp. 363; Williams v. United Mine Workers of America, 298 Ky. 117, 182 S.W. (2d) 237 (1944); Turner v. Good, 48 Lanc. L. Rev. 559 (1943); Hyman v. Carolina Veneer & Lumber Co., 194 S.C. 67, 9 S.E. (2d) 27 (1940); Tennessee Valley Appliances, Inc. v. Rowden, 24 Tenn. App. 487, 146 S.W. (2d) 845 (1940).

5 But see Carter v. Hodges, note 4 supra, where the court seemed to imply that payment of the tax will estop the paying party from denying the existence of an employer-employee relationship.

courts seem prone to adopt the same position whether the case is one in tort, or one concerning the application of social legislation. If the courts insist on adhering to the common law "control" test in tort cases, consistency would seem to dictate that no weight be given to evidence of social security payments by one person on behalf of another. It might be argued that since the Social Security Act defines an employee in terms of the common law standards,[6] payment of the tax by an employer constitutes a recognition by him of the employer-employee relationship with respect to the individual in question. However, in the absence of proceedings against an employer, payment of social security taxes is a voluntary act on his part. It is only prudent to comply with federal requirements where a reasonable doubt exists, and such compliance, therefore, should not be interpreted as an admission of the existence of an employer-employee relationship.[7] If voluntary payment of the tax will be taken as such an admission, the inevitable result will be to discourage compliance in doubtful cases, thus necessitating litigation to force payment. In addition, the Second Circuit has indicated that, despite the language of the Social Security Act,[8] a broader standard should be applied to determine whether the requisite relationship exists under the act.[9] If this view gains acceptance, it is a further reason to disregard social security payments as evidence of a master-servant relationship for the purposes of tort law.

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[6] "The term 'employee' means . . . (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Note 3 supra.

[7] Query: If the employer had resisted payment of the tax and the government had proceeded against him and obtained a ruling that the party concerned was an employee under the Social Security Act, should such ruling be admissible as evidence of a master-servant relationship in a later suit concerning the employer's tort liability, in light of the broader standard authorized by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins, note 3 supra? For the effect of such a ruling in a later case involving applicability of other social legislation, cf. Henry Broderick, Inc. v. Squire, (D.C. Wash. 1946) 69 F. Supp. 109.

[8] See note 6 supra.

[9] Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins, note 3 supra.