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Workmen's Compensation: Who is the Employer?

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COMMENTS

WORKMEN'S COMPENSATION: WHO IS THE EMPLOYER?

In construing workmen's compensation statutes, problems which are perhaps as perplexing as the problems connected with the *"arising out of and in the course of employment"* test are the cases which have for determination the question of who is the employer within the meaning of the acts. This is particularly true where the controversies involve lessees and other contractors. In applying the statute to the recent case of *Continental Oil Co. v. Sirhall*,[1] the Colorado court held that a filling station attendant, who was hired, paid and under the exclusive direction and control of the lessee-operator of the station, was nevertheless the employee of the lessor oil company, and it sustained his claim against the company for compensation for his injuries. Conceding that by the terms of the lease contract the lessee, who paid a specified monthly rental and was technically free to sell products other than those of the lessor company, would, by common law tests, be deemed an independent contractor, the fact that he did actually sell nothing but the company's products warranted a finding by the Industrial Commission that the lessor *"was operating its business by leasing part of the work of its business to a lessee."* Two justices dissented without opinion.

This decision disregards the familiar common law tests of employer-employee relationship, *e.g.*, existence of a contract of employment between the injured workman and the alleged employer,[2] power of control by the person for whom

1. 222 P.2d 612 (Colo. 1950). "Any person, company or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sub-lessee, contractor or sub-contractor, shall, irrespective of the number of employees engaged in such work, be construed to be an employer . . . " COLO. STAT. ANN. c. 97, § 328 (1935).
2. Young v. Demos, 70 Ga. App. 577, 28 S.E.2d 891 (1944) (injured person's claim disallowed where claimant failed to carry burden of proving employment agreement with defendant owner); Fine-

the work is being done over the one doing the work,[3] the person for whose pecuniary benefit the work is being done,[4] method of computing and source of the remuneration for the services,[5] etc. The court plainly states:

> "Independent of statute, claimant beyond question was an employee of Miller, and not of the company."

The *ratio decidendi* appears to be that the *lessor was conducting its business by leasing out,* that the contract of sale, though theoretically nonrestrictive upon the freedom of the lessee to sell other products than those of the lessor, was made under circumstances which negatived that freedom —the duration of the lease being for only one year and it being practically certain that the lessor would not renew should the lessee sell competitors' products.

Obviously the *Continental Oil Company* case cannot be reconciled with cases whose results have been predicated upon the application of the independent contractor tests. Does the case illustrate an application of the social insurance theory of workmen's compensation law, strongly advocated by Professor Larson, as distinguished from the strict liability theory founded in tort?[6] Professor Larson's view is supported by the trend of the decisions; yet, as he points out,[7] lawyers find it difficult to disassociate workmen's compensation from tort law, and for that reason continue to approach the problems in this field in terms of hairsplitting

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berg v. Public Service Ry. Co., 94 N.J.L. 55, 108 Atl. 311 (1919) (defendant's contention that case was within workmen's compensation act was not valid where it appeared that agreement with injured plaintiff was contingent one which might have ripened into contract of employment; plaintiff allowed to recover for negligence).

3. Cooper v. Dixie Construction Co., 45 Ga. App. 420, 165 S.E. 152 (1932); Murray's Case, 130 Me. 181, 154 Atl. 352, 75 A.L.R. 720 (1931); 58 Am. Jur. 670, *Workmen's Compensation* § 138.
4. Kinsman v. Hartford Courant Co., 94 Conn. 156, 108 Atl. 562 (1919).
5. Brown v. Industrial Commission, 174 Cal. 457, 163 Pac. 664 1917); RESTATEMENT, AGENCY § 220(g) (1933).
6. See Larson, *The Welfare State and Workmen's Compensation,* 5 NACCA L.J. 18-36.
7. *Id.* at 25.

technicalities, but that judges are more inclined to accept the layman's concept of the social insurance theory. However, the lawyers are not altogether to blame.

An examination of a few of the workmen's compensation acts and decisions thereunder will show that even a liberal construction of the statutes cannot insure socially desirable results because they are not uniform in delineating the respective liability of owners, lessees and contractors. Nor is there manifest a legislative intent to disregard common law definitions.[8]

8. (a) *Arizona.* ARIZ. CODE ANN. § 56-928 (1939): " . . . (b) When an employer procures work to be done for him by a contractor over whose work he retains control, and such work is a part or process in the trade or business of the employer, then such and the persons employed by him, and his subcontractor, and persons employed by the subcontractor, are within the meaning of this section, employees of the original employer . . . " But subsection (c) provides that one engaged in the execution of the work, not subject to rule or control of the employer, but subordinate only in effecting a result is an *independent contractor* and is himself an employer. See in this connection, Haggard v. Industrial Commission, 223 P.2d 915 (Ariz. 1950), discussed in the text. § 56-929 makes special provision as to status of lessees of mining property, so as to make them employees of the lessor when "engaged in the performance of work which is a part of the business conducted by the lessor," but the quoted words are followed by: "and over which the lessor retains supervision or control." The control test provided in this section, it seems, adds nothing not provided in subsection (c) of § 56-928.

(b) *California.* CAL. LABOR CODE § 3353 (Deering 1937), defines "independent contractor" as " . . . any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to means by which such result is accomplished." No similar provision to that contained in § 56-928 (b) of the Arizona code, *supra*, appears to have been included in the California statute. The element of control or right to control is emphasized in the California decisions in the fixing of liability under the statute. Pacific Lumber Co. v. Industrial Accident Com., 22 Cal.2d 410, 139 P.2d 892 (1943). See Ann. 43 A.L.R. 346 § 6, for numerous California decisions there cited.

(c) *Connecticut.* CONN. GEN. STAT., tit. 61, c. 373, § 7423 (1949), imposes liability upon the "principal employer" where the work procured to be done " . . . shall be a part or process in the trade or business of such principal employer, and

shall be performed in, on or about the premises under his control. . . . " The italicized words present still another element, not found in the Arizona and California statutes, *supra*, to be considered in determining who is an independent contractor for the purpose of relieving the party for whom the work is being done from compensation liability. Wilson v. Largay Brewing Co., Inc., 125 Conn. 109, 3 A.2d 668 (1939) (principal employer not liable for compensation as injury did not occur on premises under its control).

(d) *Georgia.* It appears that the statute, GA. CODE § 114-112 (1933), provides no definition of independent contractor, but it does give the injured person the right to recover compensation from the "principal or intermediate contractor" with provision that claim must first be presented to the immediate employer. The party actually paying is entitled to recover from the employer who " . . . would have been liable to pay compensation . . . " independently of this section. While the section seems intended merely to facilitate collection by the injured worker and not to change ultimate liability as between the principal and the independent contractor, even that provision is applicable " . . . only in cases where the injury occurred on, in or about the premises on which the principal contractor has undertaken to execute work, or which are otherwise under his control or management." Cooper v. Dixie Construction Co., 45 Ga. App. 420, 165 S.E. 152 (1932). See Ann. 105 A.L.R. at 591.

(e) *Illinois.* ILL. REV. STAT., c. 48, § 168 (1949), ILL. STAT. ANN., c. 48, § 168 (Smith-Hurd) imposes liability for workmen's compensation upon "Any one engaging in any business or enterprise referred to as extra-hazardous . . . " (as enumerated in § 139 id.) unless the contractor " . . . shall have insured, in any company or association authorized under the laws of this State to insure liability to pay compensation. . . . " There follows a limitation upon the liability of the principal like that found in the Georgia law, (d) *supra*, that the section " . . . shall not apply in any case where the accident occurs elsewhere than on, in or about the immediate premises on which the principal has contracted that the work shall be done." Baker & Conrad v. Chicago Heights Const. Co., 364 Ill. 386, 4 N.E.2d 953 (1936); Nat. Alliance of Bohemian Catholics v. Industrial Com., 364 Ill. 249, 4 N.E.2d 362 (1936) (construing § 168 to include owner liable as employer where the contractor had no insurance, and giving the owner right of action to recover from the contractor the compensation so paid).

(f) *Kansas.* KAN. GEN. STAT. § 44-503 (a) (1949) declares that the principal shall be liable for compensation when he "undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person . . . *for the execution by or*

As between contractors and subcontractors, the problem of fixing the liability is not difficult since most of the acts expressly give the worker (employee of the subcontractor) the right to recover from the contractor, and they further provide that the contractor shall have right of action for sums so paid against the immediate employer[9] (subcontractor upon whom the ultimate liability should fall), or

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under the contractor of the whole or any part of the work undertaken by the principal. . . . " The quoted portion of subsection (a) is, however, made inapplicable by subsection (d) if the accident shall occur " . . . elsewhere than on, in or about the premises on which the principal has undertaken to execute work . . . " or which are not under his control or management. Another section of the statute, 44-508, subsection (h), purports to define "employer" with specific reference to leasing arrangements: " . . . and when any mine, quarry, factory, or other place covered by the provisions of the act in which work is being or to be performed, is leased or let to any lessee or lessees under any form of contract or agreement other than on a royalty basis, then and in all such cases the lessee . . . and the lessor . . . shall be deemed to be operating said mine, quarry, factory or other place . . . as employers jointly." This provision, however, has not enjoyed immunity from the nullifying effect of subsection (d) of § 44-503. Maughlelle v. Price, 99 Kan. 412, 161 Pac. 907 (1916) (commented on in the text, *infra*).

(g) *New York.* The act does not appear to provide any stautory definition of "independent contractor." The frequently cited cases of Beach v. Velzy, 238 N.Y. 100, 143 N.E. 805 (1924) and Litts v. Risley Lumber Co., 224 N.Y. 321, 120 N.E. 730, 19 A.L.R. 1147 (1918), involving compensation claims, apply the common law definition. As between contractors and subcontractors, the N.Y. WORKMEN'S COMPENSATION LAW § 56 provides that the contractor shall be liable for compensation of injured employees of a subcontractor unless the latter is covered by insurance; the contractor being entitled to recover from the subcontractor all amounts for which the latter was primarily liable and it gives the contractor the right of a lien against any moneys due the subcontractor from the contractor. The New York law, it seems, does not impose liability upon the owner with respect to the employee of an independent contractor as does the Illinois statute, (e) *supra*, but the immunity of the owner does not extend to a general contractor even though the injured worker was the employee of an independent subcontractor. Bassett v. Van de Bogart, 221 App. Div. 606, 225 N.Y, Supp. 20 (3d Dep't 1927).

9. See note 8 (d), (e) and (g) *supra*.

create a lien[10] upon sums due the subcontractor in the hands of the contractor. But it cannot be said that the courts are as ready to impose liability for compensation upon owners and lessors where the hirer is an independent contractor by statutory or common law definition unless the statute otherwise specifically provides.[11] Where compensation has been allowed against owners and lessors, there has generally been found to exist a degree of control by the owner or lessor over the contractor sufficient to take the latter out of the independent category.

Haggard v. Industrial Commission[12] is a recent case in which the Arizona court, in reversing the trial court, construed the pertinent provisions of that state's compensation act,[13] and held that trainers, employees of owners of racing horses and dogs, jockeys, owners of racing horses and racing dogs, veterinarians employed by the plaintiff race track operators, and concessionaires were not employees of the race track operators but were independent contractors or employees of such even though they are all within the provision that their work is a part or process in the trade or business of the track owners. The court said, in stressing the element of supervision and control as necessary to the employer-employee relationship:

> "It is beyond the power and jurisdiction of the commission to assume as a matter of law there is a supervision or control which does not *as a matter of fact* appear to exist. . . "[14]

10. New York, see note 8(g) *supra.*
11. Zurich Gen. Accident & Liability Ins. Co. v. Lee, 36 Ga. App. 248, 136 S.E. 173 (1926) (injured worker hired and under supervision and control and right to fire of one who operated sawmill under contract with owner of the machinery and equipment at a specified rate per thousand feet of lumber sawed, held to be employee of the operator, an independent contractor, and not of the owner). Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P.2d 701 (1945) (holding that under the Kansas statute a principal contractor might also be the owner). Conflicting Kansas decisions on the last point mentioned are referred to in note 32 *infra.*
12. 223 P.2d 915 (Ariz. 1950); see also Fox West Coast Theatres v. Industrial Com., 38 Ariz. 442, 7 P.2d 582 (1932).
13. See note 8(a) *supra.*
14. See also Gillum v. Industrial Com., 141 Ohio St. 373, 48 N.E.2d 234 (1943) (owner of truck who contracted to haul logs for stipulated price but not subject to control as to manner and means of

It is frequently said that the *right* to control, whether exercised or not, is the true test.[15] But in *Continental Oil Co. v. Sirhall, supra,* the absence of the legal right to control did not change the result where the power did in fact exist. The facts in the *Haggard* case do not indicate what rights, if any, the race track owners and the various classes of "employees" had to terminate the relationship without exposing themselves to liability for breach of contract. It requires no strain on the imagination to perceive that the voice having the power to discharge has no less power to didect and control.[16] Since other common law tests of independent contractor are essentially secondary in relation to the right or power to control, it will not aid to discuss further along this line. At best they provide not a rule but a variable standard causing highly unpredictable results.[17]

The social insurance theory rests fundamentally on the principle that the business which enjoys the fruits of enterprise should bear the risks it creates. This principle is easily rendered ineffectual where a worker is excluded from workmen's compensation coverage because of the provisions of an act which declare his immediate employer an independent contractor (assuming that the immediate employer has fewer than the minimum number of employees required to bring his business within the compulsory coverage pro-

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accomplishing result, held not "*in the service*" of the person or firm within the statutory definition of the term "employee"). OHIO GEN. CODE § 1465-61, OHIO GEN. CODE ANN. § 1465-61 (Page 1946).

15. McDermot's Case, 283 Mass. 74, 186 N.E. 231 (1933). Stover Bedding Co. v. Industrial Com., 99 Utah 423, 107 P.2d 1027 (1940) (salesman who furnished own means of transportation, paid all his own expenses, and using his own judgment as to trips he should make, held not an employee but an independent contractor). See dissenting opinion in the Stover case by Wolfe, J. See also Wolfe, *Determination of Employer-Employee Relationships in Social Legislation,* 41 COL. L. REV. at 1026, where, in referring to the Stover case, he speaks of a "potential right of control."

16. Beach v. Velzy, 238 N.Y. 100, 143 N.E. 805 (1924); Taylor v. Lumbermen's Mutual Cas. Co., 43 Ga. App. 292, 158 S.E. 623 (1931); 71 C.J. 460, *Workmen's Compensation* § 188 and cases there cited.

17. RESTATEMENT, AGENCY § 220, comment 1(b) (1933).

visions of the statute). Legislative response to prevent this avenue of escape from liability for the owner or lessor is found not only in the Workmen's Compensation Act of Colorado,[18] but also in the acts of other states,[19] although the force of the provisions in most acts is circumscribed by qualifying clauses like, *"over whose work he retains control,"*[20] or *"and shall be performed in, on or about premises under his control."*[21]

Perhaps the South Carolina act[22] furnishes as clear an example as any of a statute which extends to employees of contractors and subcontractors compensation coverage to the same extent as if they were immediate employees of the owner and without dubious exceptions, the only limitation seemingly being that the work contracted for *"is a part of his (the owner's) trade, business or occupation."* The old trappings of independent contractor, performance in or about the premises under the control of the owner, and the like, have been discarded. Does this statute clear the legal highway which the judge, with his established general concepts of agency law, could not theretofore travel because there has been incorporated into most of the workmen's compensation acts limitations of a character alien to the true purpose of those acts?[23]

There is strong reason for so believing. Thus in *Marchbanks v. Duke Power Co.*[24] the South Carolina court, in de-

18. COLO. STAT. ANN. c. 97, § 328 (1935), see note 1 *supra*.
19. See note 8 *supra*.
20. ARIZ. CODE ANN. § 56-928 (1939), see note 8(a) *supra*.
21. CONN. GEN. STAT. tit. 61, c. 373, § 7423 (1949), see note 8(c) *supra*. Compare the cited Connecticut statute and the Arizona code section cited in note 20 *supra* with the pertinent part of the South Carolina statute, S. C. CODE § 7035-22 (1942), which has not been burdened with the qualifications so characteristic of the relationships tested by tort law standards.
22. See note 21 *supra*.
23. See in this connection, Wolfe, note 15 *supra* at 1020.
24. 190 S.C. 336, 2 S.E.2d 825 (1939); and the following cases applying the South Carolina statute: Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4 (1946); Berry v. Atlantic Greyhound Lines, Inc., 114 F.2d 255 (4th Cir. 1940), affirming 30 F. Supp. 188 (E.D. S.C. 1939).

ciding that Marchbanks, an employee of one who, it was contended, was an independent contractor, and who was injured while painting a pole belonging to the Power Company, was not entitled to recover in a common law action against the Power Company for negligence but only to the right to file a claim under the workmen's Compensation Act, said:

> "The reason for the enactment of Section 19 is clear and no ambiguity exists when properly construed.
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> "It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was a part of his trade or business by permitting such owner to sub-let or sub-contract some part of said work. Doubtless in many instances such contractor would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such contractor would not be required under the Act to carry compensation insurance. It was therefore, provided . . . that where such work in which the employee was engaged was *a part of the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not.*" (Italics supplied.)

Berry v. Atlantic Greyhound Lines, Inc.,[25] a case wherein a federal court applied the South Carolina Act, is illustrative of the ready willingness of the courts to give effect to the social insurance character of compensation acts under a policy of inclusion of employees engaged in work being done as part of the general trade, business or occupation of the owner, rather than of exclusion on the ground of being employees of an independent contractor. In that case an employee of a garage was injured when the engine of defendant's bus, which the garage had been called upon to repair in an emergency, exploded. Recovery under a common law action was denied, it being held that repair of the bus was in the course of work which was part of the "trade, business or occupation" of the bus company even though the company had regular shops for repair of its buses. Plaintiff's remedy was under the Workmen's Compensation Act.

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25. *Supra* note 24.

The Colorado court in *Continental Oil Company v. Sirhall,* mentioned earlier in this comment, provides another example in the direction of the Berry case, *supra.* This is further illustrated by a federal court in *Wisinger v. White Oil Corp.*[26] in applying the pertinent provisions of the workmen's Compensation Act of Louisiana.[27] In the latter case owners of oil leases, who were obligated to the owners to develop and operate the field, entered into a contract with C. & B. to operate the property and divide the profits. The equipment, including a steam boiler, was turned over to the latter. One of C. & B.'s employees died from injuries sustained when the boiler exploded. In holding the lease owners liable for workmen's compensation, the court said that since C. & B. were doing for the defendant work that it was obligated to do, it made no difference under the Louisiana statute whether C. & B. were classed as sublessees or independent contractors.

If protection for the worker is the paramount consideration in workmen's compensation laws, as seems to be recognized in the cases just cited, the fact soon loses its primacy in those statutes where the liability of the owner or principal is hedged with the exceptions familiar to the law of agency.

As heretofore noted,[28] the Georgia Workmen's Compensation Act makes the principal liable only contingently by requiring that the claim in the first instance be "presented to and instituted against the immediate employer."[29] But the term "principal" as used in the Georgia act seems to mean not the owner, but a contractor as distinguished from intermediate and subcontractor. Examination of the cases indicates that under the Georgia law the independent contractor has lost none of the attributes which attached to him under the common law to insulate the owner from liability, regardless of whether the work being done is part of the owner's trade, business or occupation.[30]

26. 24 F.2d 101 (5th Cir. 1928).
27. LA. GEN. STAT. § 4396 (1932).
28. See note 8(d) *supra.*
29. GA. CODE § 114-112 (1933); Zurich Gen. Accident & Liability Ins. Co. v. Lee, 36 Ga. App. 248, 136 S.E. 173 (1926).
30. Zurich Gen. Accident & Liability Ins. Co. v. Lee, *supra* note 29;

What results will be reached under a provision like that found in the Workmen's Compensation Act of Kansas?[31] Under that act the provision which seeks to give protection to employees of contractors and subcontractors by imposing liability for compensation upon the principal[32] when the work undertaken is "a part of his trade or business" is modified by a later subdivision, (d), which reads:

> "This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in or about execution of such work under his control or management."

Applying the particular section of the Kansas statute in *Maughlelle v. Price*,[33] the court of that state held that the owners-lessors of a coal mine were not liable for compensation to an injured employee of the lessee of the mine, the contract providing:

Maryland Casualty Co. v. Radney, 37 Ga. App. 286, 139 S.E. 832 (1927); Banks v. Ellijay Lumber Co., 59 Ga. App. 270, 200 S.E. 480 (1938); Young v. Demos, 70 Ga. App. 577, 28 S.E.2d 891 (1944).

31. See note 8(f) *supra*.

32. The term "principal" as used in the Kansas statute (see note 8(f) *supra*) has seemingly been held to refer to one normally occupying the position of an owner and not merely to a principal contractor as does the similar term in the Georgia statute. Wells v. Eagle-Pitcher M. & S. Co., 148 Kan. 794, 85 P.2d 22 (1938); Williams v. Cities Service Gas Co., 139 Kan. 166, 30 P.2d 97 (1934). *But see*: Phoenix Indemnity Co. v. Barton Torpedo Co., 137 Kan. 92, 94, 19 P.2d 739, 740 (1933), where the "principal" is referred to as the "owner" throughout the contract, but in appealing from the decision of the lower court, it (the appellant) proceeds upon the theory of its being a principal contractor and the court decided that the appellant (principal) could not be held liable in a common law action in tort. The cited cases seem to lead to the conclusion that an owner may be liable under § 44-503 but only if, under the particular contract, he has assumed the character of a principal contractor; otherwise he is purely an owner and the opposite contracting party is an independent contractor.

33. 99 Kan. 412, 161 Pac. 907 (1916).

> "One of the principal objects of this agreement being to secure (to the lessor) the *entire output* from this mine." (Italics supplied.)

There seems little question that the lessor here was a principal who undertook to execute work which was a part of its trade or business as contemptaled by the statute. It also appears that the accident occurred on the premises which were the subject of the lease undertaken in furtherance of the lessor's trade or business. The lessor's immunity, according to the court, rested on subdivision (d), above quoted, apparently reading the disjunctive *"or"* to mean *"and"* so as to require that the accident must have occurred on premises on which the principal has undertaken to execute the work *and* which are otherwise subject to his control. The court said:

> "Whatever may be the basis of the liability of the owner in certain cases . . . this statute attaches no liability for compensation to one who is not in the execution, control or management of the work wherein the injury occurs."

A more recent case was *Bittle v. Shell Petroleum Corporation,*[34] where the injured plaintiff was allowed to recover in a common law action for negligence, it being held that he was an employee of an independent contractor. Plaintiff's immediate employer sent him to repair a boiler maintained on the defendant's premises where the injury occurred after plaintiff's arrival at the premises and while driving to the boiler location. The court decided that no control was exercised by the defendant; also the particular work was " . . . *a single isolated transaction such as occurs in the business world every day. . .*" The *Bittle* case under the Kansas statute and *Berry v. Atlantic Greyhound Lines, supra,* decided under the South Carolina statute, provide an interesting comparison.

There are, however, many decisions made under §44-503 of the Kansas statute reaching opposite results from those

34. 147 Kan. 227, 75 P.2d 829 (1938).

in the *Maughlelle* and *Bittle* cases,[35] because emphasis was placed upon the primary purpose of the section, namely, to make coverage of the act apply when the principal undertook through contracts with others to execute work which is a part of his trade or business.

Under the comparable section of the Connecticut act[36] liability for compensation generally does not exist as against the principal employer where the injury does not occur on *premises under his control* although the work is part or process of his trade or business.[37]

From the statutes referred to and the cases decided thereunder it becomes evident that the difficulties stem from the attempt to retain the fine-line distinction employed to define independent contractor while the broad purpose of the acts, particularly under the contracting and subcontracting sections, is to protect the injured worker against the principal who might in many cases otherwise escape liability himself and thus exclude the worker from coverage because his immediate employer is not within the provisions of the statute or is otherwise financially irresponsible.[38] With few exceptions[39] the workmen's compensation acts of the various jurisdictions so qualify the provision respecting the liability of the principal to the injured employee of a contractor or subcontractor that the courts are compelled to resort to common law definitions and tests. Those jurisdictions whose legislatures have omitted from their acts the

35. Purkable v. Greenland Oil Co., 122 Kan. 720, 253 Pac. 219 (1927); Phoenix Indemnity Co. v. Barton Torpedo Co., *supra* note 32; Williams v. Cities Service Gas Co., *supra* note 32; Eagle-Pitcher Mining & Smelting Co. v. Com. of Workmen's Conpensation, 147 Kan. 456, 76 P.2d 808 (1938); Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P.2d 701 (1945) and cases there cited.

36. See note 8(c) *supra.*

37. Wilson v. Largay Brewing Co., 125 Conn. 109, 3 A.2d 668 (1939); Downing v. Stamford Community Chest, 125 Conn. 728, 4 A.2d 329 (1939); Bales v. Connecticut Power Co., 130 Conn. 256, 33 A.2d 342 (1943).

38. For an interesting analysis of the devices employed to insulate the principal from liability for negligence as well as for workmen's compensation, see Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501 (1935).

39. Notably the Colorado and South Carolina acts.

troublesome qualifications discussed in the preceding pages have eliminated at least in part the source of conflicts not easily reconciled in the decisions of other jurisdictions.

It may be argued that the extremely liberal acts found in a few states are desirable from the viewpoint of the principal as well as that of the employee, because the principal then knows with certainty that he will be held liable for compensation to injured employees of the immediate employer in the event the immediate or intermediate employer fails to provide coverage. That being the case, the principal will include the expense of insuring such risks in computing his business costs and will pass the same on to his customers. This conclusion, however, does not answer the following questions which manifest themselves.

It is inescapable that the desire for certainty in fixing liability for workmen's compensation in the view above suggested presupposes an abandonment of fundamental principles in that the big business enterprise is being subjected to a burden which is justified only on the ground that the business is big and better able to bear the loss. Legally sound reasoning and equitable principles demand a better explanation. If a true employer-employee relationship is not to be preserved as the basis upon which the theory of workmen's compensation is founded, to what degree of remoteness is indirect employment to be recognized? Should *all* owners who enter into transactions bona fide with independent contractors be penalized because *some* large employers may seek, by the false use of the "independent contractor" label, to escape legitimate social responsibilities? Do not the workmen's compensation acts of most states suggest that their legislatures have purposely tried to avoid such a blanket condemnation?

Is the solution to this phase of workmen's compensation problems to be found in the method typified by social security legislation, that is, by state taxation of *all* employers[40] and by the administration of workmen's compensation

40. For a comparison of the plans adopted in England and New Zealand with those obtaining generally in the United States, see Larson, *supra* note 6, at 34.

funds by state agencies; or perhaps by a federal law which would operate uniformly throughout the states? While such questions naturally arise upon a reading of the preceding pages, the scope of this comment must be limited to the review which has been made, its main purpose being to point out the many variations in this single but important phase of the workmen's compensation laws of the several states and the inconsistent decisions resulting under them.

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