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GENERAL RULES DETERMINING THE EMPLOYMENT RELATIONSHIP UNDER SOCIAL SECURITY LAWS: AFTER TWENTY YEARS AN UNSOLVED PROBLEM

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Twenty-four years ago the Social Security Act was adopted. Whereas in its inception it covered about half the labor force, now it applies to nearly 90% of American workers. One would expect that the basic rules of law applicable to such a vast program would, by now a generation later, be rather well settled. Yet, in one very important area of Social Security law, this is not true. This article discusses that unsettled part of the law. It deals with the general rules applicable in determining the employer-employee relationship under the Federal Social Security laws, with greatest emphasis on the old age, survivors and disability insurance program. Surprisingly enough, this problematic area of a law which touches millions of people has received little attention in legal literature.

In its inception the Social Security program provided benefits for "employees" only. This excluded, of course, all self-employed persons. Soon much litigation swirled around the distinction between "employees" and self-employed persons, or "independent contractors". If one was classified as an employee, the employer was liable for the employment tax and the employee was liable for the income tax and benefits of coverage under the program. On the other hand, if one was classified as an independent contractor, none of these legal consequences ensued. In 1950 self-employed persons were brought under the coverage of the program so that now the above distinctions are somewhat less meaningful. An independent contractor is entitled to the benefits of the Social Security program the same as an employee. However, important differences remain. The employee's tax contribution is less than an independent contractor's and, from the point of view of the hiring party, there are no employment taxes imposed if the hired party is classified as an independent contractor. That these differences are important is attested to by the fact that the Internal Revenue Service makes many rulings every year distinguishing employees and independent contractors.

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As administrative and judicial litigation has brought to light borderline occupations Congress has expanded and made more detailed the legislative definition of employee. In the original enactment Congress merely specified that "The term 'employee' includes an officer of a corporation." [1] Congress anticipated that there might be disputes as to whether officers could be classified as employees and hoped to put the matter to rest by the above provision. However there were a multitude of other borderline occupations that Congress did not and could not foresee. It was the responsibility of the administrative adjudicatory processes of the Social Security Board and the Treasury Department to pass upon these initially. To facilitate the uniform settlement of these disputes these agencies promulgated interpretive regulations relating to the statutory term "employee". The Treasury Department's regulations were promulgated on November 9, 1936,[2] and the Social Security Board promulgated its regulations on July 21, 1937.[3] For all practical purposes they were identical. The regulations emphasized that the distinction between an employee and an independent contractor turned largely on the degree of control that could be exercised over the individual performing the service by the hiring party. But as the following vital excerpt from the regulations shows, control was not the exclusive relevant factor for consideration:

> * * * The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services.

In the beginning Internal Revenue rulings on the "employer-employee" relationship appeared to take the position that a number of factors including control of the details and means of performance were relevant but that no single factor was conclusive.[4] As time passed this

1. 49 Stat. 620, 647; P.L. 271, 74th Cong., 1st Sess., Sec. 1101(a)(6).

2. 1 FED. REG. Part. 1, p. 1764 (1936).

3. 2 FED. REG. Part. 1, p. 1276 (1937).

4. In XVI-45-9030, S.S.T. 212, 1937-2 C.B. 397 persons who read literary material for motion picture companies and then submitted synopsis of the material were held not to be employees. They did the work intermittently, at home, and were not controlled at to the manner of performing the work. The ruling stated: "In determining whether an individual is an employee or an independent contractor, the following, among other things, should be considered: (1) The extent of control which the employer may exercise over the details of the work either under the contract or in fact; (2) the skill required in the particular occupation; (3) whether the employer or workman supplies the instrumentalities, tools, and the place of work; (4) whether the one employed is engaged in a distinct occupation or business; (5) the length of time for which the person is employed; and (6) the method of payment, whether by the time or by the job." In XVI-34-8889, S.S.T. 183, 1937-2 C.B. 388 club waiters

flexible position withered and was replaced by an apparent mechanical reliance on the single factor of control.[5] However it is evident in many rulings that adherence to the control formula is a mere formality and that factors other than control are more important to the result reached.

It has been said that in the early days of social security the Social Security Board was more inclined to include borderline occupations under the program than the Treasury Department.[6] Suffice it to say that a goodly number of cases testing the agency determinations of the employer-employee relationship question reached the United States Courts.[7] The results of these cases and the legal tests adopted by the many district courts and courts of appeals were inconsistent.[8] Some judges emphasized the common law rules but differed among themselves as to what these rules were. They differed as to the extent to which the factor of control was exclusive and conclusive. Others rejected the common law rules and emphasized that the purpose of the Act furnished guides to the meaning of the term "employee". Still others adopted a combination of these two approaches.

In an effort to settle these differences among lower federal courts, the Supreme Court, in 1947, rendered decisions in *United States v. Silk and Harrison v. Greyvan Lines*[9] and *Bartels v. Birmingham and Geer v. Birmingham*,[10] hereafter referred to as the 1947 Supreme Court cases. The opinions in these cases were designed to provide lower federal courts, the agencies and private citizens with the general propositions of law which were applicable in determining the employer-employee relationship under the Social Security laws. They were intended to be and were considered the leading cases on the subject.

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were held to be employees. In the course of the ruling it was made clear that control was a factor, but not the only factor to be considered. "Other factors characteristic of an employer are the furnishing of tools and a place to work to the individual who performs the services."

5. In REV. RUL. 57-79, 1957-1, C.B. 323, a schochet engaged by a poultry company to slaughter poultry in accordance with the dietary laws of the Hebrew faith was held to be an employee. He did his work on company premises during prescribed hours on three specified days a week. The remainder of the time he did similar work for others from his own home. In REV. RUL. 57-80, 1957-1 C.B. 324, a schochet who performed slaughtering services off the premises of the company at his convenience was held an independent contractor. In both rulings the almost "canned" formula of control was invoked as determinative. However, it is evident that the right to control the details and means of performance was equally absent in both cases. Performance was controlled in both cases by the dietary laws. It was other factors more related to the independent calling that were really determinative.

6. Testimony of Nelson A. Cruikshank representing the A.F.L. in hearings before Senate Finance Committee on H.P. RES. 296, 80th Cong., 2d Sess. 53 (1948).

7. Testimony of Adrian W. DeWind, of the Treasury Department in Hearings Before Senate Finance Committee, on J. J. RES. 296, 80th Cong., 2d Sess. 16, 20 (1948).

8. U.S. v. Silk, 331 U.S. 704, 705 (1947).

9. 331 U.S. 704 (1947).

10. 332 U.S. 126 (1947).

Five months after the *Silk, Greyvan* and *Bartels v. Birmingham* cases were decided the Commissioner of Internal Revenue proposed new regulations defining the employer-employee relationship under the Social Security laws.[11] He expressly stated that the new regulations were being proposed to conform to the Social Security laws as interpreted by the Supreme Court in the *Silk* and *Bartels v. Birmingham* cases.[12] Whereas existing regulations emphasized the control factor, the proposed regulations emphasized the "Economic realities" of the relationship. In the latter the control factor was identified as one of at least six relevant factors to be considered. Shortly thereafter resolutions, known as the "Status Quo" or "Gearhart" resolutions, were introduced in the House and Senate to nullify what the proponents considered an abandonment of the common law test to determine whether an individual was an employee or an independent contractor and an unwarranted attempt to administratively broaden coverage under the Social Security laws. The resolution was enacted over President Truman's veto.[13] The resolution specified that the usual common law rules were to be determinative of whether a person was an employee or an independent contractor. Because of the enactment of this resolution, the proposed regulations were not adopted[14] and the then existing regulations remained in force.

There is wide judicial disagreement as to the effect of this resolution. Purportedly Congress was merely declaring that the original Congressional meaning of the word "employee" in the Social Security laws was to be maintained. It is clear Congress *felt* the proposed regulations would have expanded the original meaning and to that extent the resolution squelched the proposed regulations. But the courts differ widely as to the effect of the resolution on the then recent leading cases of *Silk, Greyvan,* and *Bartels v. Birmingham.* Some courts take the view that the resolution repudiates these 1947 cases and restores earlier decisions of United States Court of Appeals. Other courts take a diametrically opposed position, that is, the resolution is a restatement of the principles of the 1947 cases. Since 1948 Congress has clarified the definition of the term "employee" by specifically including in it certain borderline groups in addition to officers of corporations, to wit, certain agents and commission drivers, life insurance salesmen, homeworkers, and traveling and city salesmen. The purpose of these specific inclusions is to remove any doubt as to the

11. 12 FED. REG. 7966 (1947).
12. 12 FED. REG. 7966 (1947).
13. 62 STAT. 538 (1948).
14. 13 FED. REG. 5332 (1948); 1948-2, C.B. 141.

classification of these borderline occupational categories. However as to all other existing and new borderline groups the common law test applies and the courts differ as to whether the broad general principles of the 1947 Supreme Court cases are relevant.[15] This is the present unsettled situation regarding the basic rules applicable in determining employer-employee status under the Social Security laws.

This study is not intended as a form of criticism of the Congress, federal courts, the executive branch, the bar, employers or employees (although I suspect all warrant some blame). On the contrary, it is presented as one more piece of evidence to support the writer's suspicion that practically all areas of the law hide such problematic skeletons in their closet, and that if anyone takes the trouble to open enough doors he will find them, and that the main business of the adjudicatory phases of the judicial and administrative processes (except criminal cases) is to render decisions in these borderline cases. No one takes the easy cases to court. No one questions the fact that the 20 million "Joe and Jane Bluecollars" who work from 7:00 a.m. to 3:30 p.m. for $2.31 per hour and are told to tighten nuts 3 and 4 as they pass them on the assembly line are employees. The court cases and agency adjudications deal with the relatively few half-breeds such as outside commission salesmen, brokers, homeworkers, distributing agents and others who are in a way "employees" and who are yet in a way "in business for themselves". But unfortunately under the Social Security laws never the twain shall meet. They either are or are not employees. And tax liability now and benefit credit before 1950 rode on the category. The writer suspects that as long as our economy continues to spawn such

15. As we have seen the 81st Congress (1948-1950) brought about the first significant liberalization of social security coverage after the creation of the program in 1935. Among other things, the Social Security Act Amendments of 1950 extended coverage for the first time to self-employed persons. In the process of enacting this comprehensive piece of legislation Congress hammered out a more detailed definition of the term "employee". However the focus of attention on the definition was now largely directed to the question of tax liability, the employee relationship no longer being necessary to coverage under the Act. In general, those who were not employees were eligible for Social Security benefits under the self-employment coverage provisions. Congress retained existing provisions in defining the term "employee", *i.e.*, it included officers of corporations and persons who would be employees according to the usual common-law rules. It then added provisions expressly including certain agent or commission drivers (distributing meat, fruit and vegetables, bakery goods, beverages and laundry and dry cleaning services), life insurance salesmen, homeworkers and traveling and city salesmen. The purpose was to remove any doubt as to the classification of these borderline occupational categories.

The Treasury Department and Bureau of Internal Revenue promulgated new regulations to take into account the many changes made by the 1950 Act. 16 FED. REG. 12453 (1951). The special classes of occupations expressly included within the definition of "employee" by the 1950 Act were described in more detail therein. However the regulations 26 C.F.R. 408.204(c), 16 FED. REG. 12460 (1951), relating to the general definition of "employee" remained substantially unchanged from those promulgated in 1936. It will be recalled that these regulations emphasize, but are not limited to, consideration of the factor of "control".

half-breeds, either legitimately for business reasons or illegitimately for reasons of tax avoidance, the courts and agencies will keep busy deciding on which side of the line the particular borderline cases fall. Our fate as humans at best is to assist in the partial solution of some of our problems but never to be able to solve all of our present problems or some of our problems for all time.

Another introductory remark—a word of caution—is in order. Much of this study is devoted to the analysis of rules of law that have been enunciated either by Congress, the federal courts or executive agencies. The significance of these rules should be kept in proper perspective. As was said above, when Congress provides that "employees" are covered under the Social Security laws, the legal rights and obligations of the vast number of "Joe Bluecollars" are clear. Under any of the various legal rules which serve as tests for the "employer-employee" relationship, these persons would be considered "employees". This is not the case for the borderline occupations. It is to assist in the adjudication of these borderline occupations that more precise legal definitions of the term "employee" are provided by legislation, by agency regulations and by court decisions. However, because a borderline occupation is involved, it is almost impossible to know how much the announced rule of law has to do with the outcome of the case. In a case for refund of taxes a judge may be disposed to find that outside commission salesmen, brokers or homeworkers are independent contractors no matter how the rule of law is verbalized. On the other hand, in a case by a widow to establish eligibility for Social Security benefits, the same case might go the other way. This relative impotence of rules of law in close cases is an inherent and unpredictable characteristic of the adjudicatory process. It is not confined to Social Security cases but it must be kept in mind as we proceed with our study.

Early Judicial Interpretations

Some background knowledge is necessary to an understanding of the relationship between the basic statutory test for the employer-employee status and the leading 1947 Supreme Court cases. The early court cases illuminate the problem faced by the Supreme Court and then Congress.

The general approach of these early cases is exemplified by the opinion of Judge Learned Hand in *Texas Co. v. Higgins*,[16] where Judge Hand indicated that the Social Security Act "appears to take over the term employee as the common law knew it. The regulation is

16. 118 F.2d 636 (2d Cir. 1941).

in harmony with this assumption, for it enumerates the generally accredited determinants in such cases, of which, the most important is the putative employer's control over the employee's business." [17] This is one of what came to be known as the "Bulk Sales Cases". They dealt with the status of "Distributors" of the large petroleum companies such as Texas Co., Standard Oil, and others. These distributors usually carried on business in their own names, often put up a substantial investment, owned their own trucks, and hired and paid their own help. On the other hand they sold at prices fixed by the large oil companies, agreed to sell such petroleum products as were consigned to them, accounted to the companies for the proceeds of all sales, were furnished a company manual on the operation of "bulk stations", and could have the agency terminated and the station taken over at cost whenever the company desired. They were held to be independent contractors because the company had no right of control, no right of discharge, and did not furnish tools or a place to work—factors enumerated in the regulations.

However, instead of relying on a number of factors many of the early cases put great emphasis on the factor of control alone. In many of the cases one gets the impression that the judge considered the sole question to be whether the alleged employer had the right to control the means and details of the work performance. For example in the *Radio City Music Hall* [18] case, Judge Learned Hand, two years after his opinion in *Texas Co. v. Higgins,*[19] made the oft cited statement:

> The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said * * *.[20]

In the case vaudevillian actors were held independent contractors and the only factor discussed was that of control. The opinions of Hand in *Higgins* and *Radio City Music Hall* demonstrate that there is a certain treachery in drawing broad general propositions from particular cases. Because a judge in one case alludes only to the factor of control does not mean that in every case he would consider control to be the exclusive and conclusive factor. Nevertheless, many of the early cases, even read with caution, give one the impression that the factor of control was the conclusive factor. This is true even though the opinions occasionally allude to one or more other possibly relevant factors. In *Jones v.*

17. 118 F.2d 636, 638 (2d Cir. 1941).
18. Radio City Music Hall Corp. v. U.S., 135 F.2d 715 (2d Cir. 1943).
19. 118 F.2d 636 (2d Cir. 1941).
20. Radio City Music Hall Corp. v. U.S., 135 F.2d 715, 717 (2d Cir. 1943).

Goodson,[21] cab drivers were held to be employees because, according to the court, the company exercised a "reasonable measure of direction and control".[22] In his opinion, Judge Bratton also mentioned other factors, namely, the manner of compensation, and the impermanence of the relationship due to the company's right to discharge but the control factor appeared conclusive. In *Glenn v. Beard*,[23] the independent contractor label was applied to women who sewed at their farm homes on materials provided by the taxpayer. The lack of control over the method of performance was emphasized even though the work was to be done according to specifications and patterns provided by the taxpayer. The lack of occasional inspection by the taxpayer, payment on the basis of a finished comforter or quilt, the freedom of the women to work at their own pace and the right to sew for competitors of taxpayer apparently negatived, in the eyes of Judge McAllister, the control requisite for the employee status. Similarly in *McGowan v. Lazeroff*,[24] house to house commission salesmen were held independent contractors, ostensibly because they could sell where and when they wished. This result was reached even though the taxpayer fixed the price at which merchandise was sold and could terminate the relationship at will.

Somewhat more realistic was the result in *U.S. v. Mutual Trucking Co.*,[25] where owner-operator of truck tractors and trailers were held independent contractors because of the lack of control over their work performance. The court also alluded to the fact that the fixed fee per trip could not be considered "wages" within the meaning of the term in the Act. And in *U.S. v. Wholesale Oil Co.*,[26] a retail filling station operator was held an employee because there was a "reasonable measure of control over the method and means of performing the service."

In contrast to the approach of these cases which either emphasized or made exclusive the factor of control are a number of Social Security decisions rendered after the Supreme Court decided *N.L.R.B. v. Hearst Publications*.[27] In the *Hearst* case, Justice Rutledge enunciated the "economic reality" test and indicated that common law tort case principles were not helpful in determining the employer-employee relationship in social legislation cases. This approach was picked up and applied in a few Social Security cases, the most striking of which is *U.S.*

21. 121 F.2d 176 (10th Cir. 1941).
22. 121 F.2d 176, 180 (10th Cir. 1941).
23. 141 F.2d 376 (6th Cir. 1944), *cert. denied*, 323 U.S. 724 (1944).
24. 148 F.2d 512 (2d Cir. 1945).
25. 141 F.2d 655 (6th Cir. 1944).
26. 154 F.2d 745 (10th Cir. 1946).
27. 322 U.S. 111.

v. Vogue,[28] holding a seamstress who worked at a Vogue Store to be an employee. In that case Judge Parker said:

> Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act like the Fair Labor Standards Act and the National Labor Relations Act, was enacted pursuant to a public policy unknown to the common law; and its applicability to it is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability.

Evidently Judge Parker considered control to be the exclusive common law test because he suggested that the Treasury Regulations (which included other factors such as the provision of tools, a place to work, the right to discharge, and the manner of compensation) departed from rules of common law.[29]

Other cases deemphasizing the common law rules and attaching greater significance to the purposes of the legislation are *U.S. v. Aberdeen Aeire No. 24,*[30] *Nevin v. Rothensies,*[31] and *Grace v. Magruder.*[32] Each of these cases shows the influence of the *Hearst Publications* case. In *Aberdeen Aerie,* physicians who were elected annually by the lodge to treat the members were held independent contractors. While recognizing that the purposes of the legislation must be given great weight, Judge Garrecht apparently did not agree with Judge Parker that common law rules throw little light on these cases. He weighed "all the elements to be considered at common law" and in addition gave consideration to the purpose of the Act in reaching his conclusion. Similarly in the *Nevin* case, Judge Kirkpatrick in the United States District Court indicated that the purpose of the Act must be considered in determining the meaning of the term "employee" but that the "common law concepts" cannot be ignored. He held the operators of chain drug stores to be independent contractors even though to a considerable extent control was in the parent corporation but other factors such as risk and the possibility of profit dictated that conclusion. In the *Grace* case, Judge Miller held that coal hustlers who stored the company's coal in customers' bins were employees both according to the common law rules and according to the "standard of interpretation" of the *Vogue* case and the *Hearst* case.

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28. 145 F.2d 609 (4th Cir. 1944).
29. 145 F.2d 609, 611 (4th Cir. 1944).
30. 148 F.2d 655 (9th Cir. 1945).
31. 151 F.2d 189 (3d Cir. 1945), *affirming* 58 F. Supp. 460 (E.D. Pa. 1945).
32. 148 F.2d 679 (D.C. 1945), *cert. denied,* 326 U.S. 720 (1945).

These early cases demonstrate that there was a lack of agreement among the judges as to the basic test applicable in determining the employer-employee relationship. Some thought the common law rules determinative but differed among themselves as to the content of these rules particularly as to the extent to which the factor of control was conclusive. Others, notably Judge Parker in the *Vogue* case, repudiated the common law rules as the test and looked to the purposes of the legislation for guidance. Still others adopted a position combining the common law rules with the purposes of the legislation.

The 1947 Supreme Court Cases

In 1947 the Supreme Court handed down two opinions in cases involving employee-independent contractor status disputes under the Social Security laws. The first opinion was in the case of *U.S. v. Silk* and *Harrison v. Greyvan Lines*.[33] The second opinion was delivered a week later in *Bartels v. Birmingham* and *Geer v. Birmingham*.[34] They purport to establish broad general principles applicable in determining the employer-employee relationship under the Social Security laws. In the *Silk* and *Greyvan* cases, taxpayers sued to recover employment taxes paid under the Social Security Act. They contended that the persons for whose benefit the taxes were paid were independent contractors not employees as the Commissioner of Internal Revenue had concluded. In the *Silk* case the status of two groups, coal unloaders and coal truck drivers, was in question. In the *Greyvan* case the status of moving van drivers was in question. The Court upheld the Commissioner as to the coal unloaders in the *Silk* case. The Court said:

> * * * The unloaders provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. * * * They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.[35]

However, a majority of the court in an opinion written by Mr. Justice Reed, held the coal truck and moving van drivers to be independent contractors:

> * * * These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance

33. 331 U.S. 704 (1947).
34. 332 U.S. 126 (1947).
35. U.S. v. Silk, 331 U.S. 704, 718 (1947).

> they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.[36]

The Court indicated that a number of factors must be evaluated in determining whether a person is an independent contractor or an employee:

> * * * The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete. These unloaders and truckers and their assistants are from one standpoint an integral part of the business of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.[37]

Justice Reed's opinion in the *Silk* case is put into proper perspective when read in the light of the Tenth Circuit Court of Appeals handling of the case. Circuit Judges Phillips, Bratton and Huxman, in an opinion written by Judge Huxman, upheld the District Court's finding that neither the coal workers nor coal unloaders were employees.[38] In making this decision Judge Huxman alluded *only* to the factor of "control".[39] He quotes that portion of Regulation 90 that related to control—leaving out those parts dealing with the following factors: right to discharge, provision of tools, provision of place to work, designation of relationship and manner of compensation. He cites a passage from a prior Tenth Circuit case[40] which spells out the "control" factor as the determinative test. Finally Judge Huxman analyzes the undisputed facts in the light of the question of control and concludes:[41]

36. U.S. v. Silk, 331 U.S. 704, 719 (1947).

37. U.S. v. Silk, 331 U.S. 704, 716 (1947).

38. U.S. v. Silk, 155 F.2d 356 (10th Cir. 1946).

39. 155 F.2d 356, 358 (10th Cir. 1946). This is true even though at the outset Judge Huxman denies that a strict common law test should be applicable:

> * * * [The Social Security Act] * * * is remedial in its scope and should be liberally construed to effectuate its remedial objective. It may be conceded that the strict common law concept of employer and employee relationship is not the test for determining such relationship when it comes into question under the remedial provisions of the Act.

40. Jones v. Goodson, 121 F.2d 176, 179 (10th Cir. 1941).

41. U.S. v. Silk, 155 F.2d 356, 359.

> The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers as is necessary to establish a legal relationship of employer and employee between [the taxpayer] and the workers in question.

There is a strong suggestion in the *Silk* case that Justice Reed thought that even relying on the "control" factor exclusively, the unloaders would be classified as employees. He says "Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases." [42]

However, Reed, speaking for the Court, makes it clear that Judge Huxman placed too much emphasis on the "control" factor to the exclusion of others, such as the meager investment of the unloaders (picks and shovels) and their lack of risk.[43] In footnote 11 of Justice Reed's opinion [44] he sets out what he considers the reasons for the lower court's conclusion. The footnote consists of a series of quotations from Judge Huxman's opinion all of which portray the factor of control as being determinative. Footnote 3 of Justice Rutledge's concurring opinion indicates that both the District Judge and the Judges of the Court of Appeals treat the case as if it turned upon the factor of control exclusively.[45]

Similarly when *Greyvan Lines, Inc. v. Harrison,* was before the Court of Appeals for the Seventh Circuit,[46] Judge Sparks writing for himself and Judges Major and Kerner emphasized the factor of control as being determinative of the question of the status of moving van drivers. He concluded that the Company did not exercise sufficient control over the drivers to render them employees. To him the fact that the drivers were free to employ or not to employ helpers was decisive:

> We think it cannot be said that a truckman to whom is left the determination of whether to do the work himself or engage others to do it is a mere employee.[47]

Justice Reed agreed with the conclusion of Judges Sparks, Major and Kerner that moving van drivers were not employees and with the conclusion of Judges Huxman, Phillips and Bratton that coal truck drivers were not employees. He disagreed however with their reason-

42. U.S. v. Silk, 331 U.S. 704, 718 (1947).
43. U.S. v. Silk, 331 U.S. 704, 718 (1947).
44. 331 U.S. 704, 716 (1947).
45. 331 U.S. 704, 720 (1947).
46. 156 F.2d 512 (7th Cir. 1946).
47. 156 F.2d 412, 416 (7th Cir. 1946).

ing in that it made the "control" factor exclusive and the conclusive test:

> It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver owners as independent contractors.[48]

Again in footnote 11 of his opinion Justice Reed indicated what he conceived to be the lower court's reasons for its conclusion. These were a series of quotations from Judge Sparks' opinion indicating that the factor of control was conclusive.[49] And Justice Rutledge in footnote 3 of his concurring opinion observes that in *Greyvan* the Circuit Court of Appeals found the factor of control to be conclusive.[50]

Justices Black, Douglas and Murphy agreed with Reed's statement of the applicable principles but thought they dictated the conclusion that the driver-owners were employees. Rutledge was non-committal as to the conclusion. He thought that in borderline occupations, such as these truckers, the Supreme Court should lay down the general principles and then remand the case to the District Court. It would then be the duty of the District Court to apply the principles to the facts and render the proper conclusion.[51]

A week after handing down the opinion in the *Silk* case the Supreme Court announced the decision in *Bartels v. Birmingham.*[52] In that case the taxpayers were operators of public dance halls who were required by the Commissioner of Internal Revenue to pay employment taxes for the personnel of "name brands". These bands usually made one-night stands at the halls. The operators contended that the band personnel were not their employees but were the employees of the band leader and that the leaders were independent contractors in relation to the operators. The Government contended that the written contract between the band and the operators expressly provided that all band personnel including the leader were employees of the operator and that this was determinative. District Judge Dewey [53] held against the Government and in favor of the operators. He regarded the contractual provision as inconclusive and held that the real power of control over the band personnel was in the band leader not in the dance hall operators and that therefore the band personnel were employees of

48. 331 U.S. 704, 719 (1947).
49. 331 U.S. 704, 716-717 (1947).
50. 331 U.S. 704, 720-721 (1947).
51. U.S. v. Silk, 331 U.S. 704, 719-722 (1947).
52. 332 U.S. 126 (1947).
53. 59 F. Supp. 84 (1945*).

the leader who in turn was an independent contractor. This was reversed by the Eighth Circuit Court of Appeals in a split decision. Judges Johnson and Woodrough thought the contractual provision which expressly gave the operators the right to control the band personnel was dispositive of the issue, there being "no clear and convincing evidence that the right of control mutually was abrogated so as to have changed the employment relationship".[54] Judge Gardner dissented on the grounds that the District Court's finding of fact—that the band leader had the right to control band personnel—was not clearly erroneous and should therefore be sustained on appeal.

A majority of the Supreme Court thought the band personnel were employees of the leader not of the dance hall operators and thus held the latter not liable for employment taxes:

> We are of the opinion that the elements of employment mark the band leader as the employer in these cases. The leader organizes and trains the band. He selects the members. It is his musical skill and showmanship that determines the success or failure of the organization. The relations between him and the other members are permanent; those between the band and the operator are transient. Maintenance costs are a charge against the price received for the performance. He bears the loss or gains the profit after payment of the members' wages and the other band expenses.[55]

Justice Reed, who wrote the majority opinion, indicated that the "control clause" of the written contract should not be conclusive of the matter as Circuit Judges Johnson and Woodrough had decided. Reed reiterated what had been announced a week earlier in the *Silk* case:

> In *United States v. Silk, supra,* we held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act, was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk,* we pointed out that permanency of the relation, the skill required, the investment in the facilities for work, and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls. These standards are as important in

54. 157 F.2d 295, 304 (8th Cir. 1946).

55. Bartels v. Birmingham, 332 U.S. 126, 132 (1947).

> the entertainment field as we have just said, in *Silk,* they were in that of distribution and transportation.[56]

As with any case in an unsettled area of the law the shadowy nuances of the 1947 Supreme Court cases are only apparent under the illumination of the unsettled background. In the light of this background, it is apparent that there were a number of different theories as to the proper interpretation of the term "employee" available for a majority of the court to embrace. The court could have said that the common law meaning was intended and that at common law the factor of control was determinative. The attractive authority of Judge Learned Hand in the *Radio City Music Hall* case [57] could be marshalled in support of this theory. Or the court could have said the common law meaning was controlling and that this required the evaluation of a number of factors including but not limited to the factor of control. Many of the Circuit Courts of Appeals decisions could be brought forth in support of this approach. At the other end of the spectrum the court could have embraced the theory of Judge Parker in the *Vogue* case,[58] rejecting the common law altogether.

Significantly Justice Reed avoided this disagreement over the nature and scope of the common law rules in this matter. However, on the one hand he made clear that control was not the exclusive factor to be considered and, on the other hand, without singling out the *Vogue* case for express condemnation, he made clear that those factors which many considered a part of the common law test were relevant to the question. Actually Justice Reed's theory of interpretation is closer to those lower court cases which used as a basis of interpretation a combination of: (1) what they conceived to be the common law rules, *i.e.,* a number of factors including control with, (2) the purpose of the Act.

By side-stepping the disagreement over the relevance of the common law rules Justice Reed departed from Justice Rutledge's approach in the historic *N.L.R.B. v. Hearst Publications case.*[59] In that case Justice Rutledge premised his opinion on the controversial and inflammatory proposition that Congress rejected the "traditional common-law conceptions." Instead the meaning of the term "employee" in the N.L.R.A. was to be determined primarily by the purpose of the Act. If, because of the "underlying economic facts" of a borderline occupational group's status the Act's remedy of collective bargaining

56. Bartels v. Birmingham, 332 U.S. 126, 130 (1947).
57. 135 F.2d 715 (2d Cir. 1943).
58. 145 F.2d 609 (4th Cir. 1944).
59. 332 U.S. 111 (1944).

was necessary to prevent inequality of bargining power and economic unrest, the group should be considered "employees" rather than "independent contractors". It is worthy of note that Justice Reed concurred in a separate opinion in *Hearst* indicating his disagrement with Rutledge's reasoning.

Reed's reference in *Silk* to the *Hearst*[60] decision must not be considered an incorporation by these references of everything Rutledge said in his *Hearst* opinion. A superficial view might find Reed's reliance on *Hearst* inconsistent with his test that takes into account many common law factors including control. However it must be observed that Reed does not join in Rutledge's strictures against the common law in general. What Reed does embrace in *Hearst* are those statements which disapprove a test that relies solely on the factor of control, a test often attributed to tort cases involving the question of the master-servant relationship.[61] He further relies on and approves of *Hearst* to the extent that it emphasizes the relevance of the purpose of the legislation.[62] With these significant limitations the relationship of the *Hearst* and *Silk* cases is the proper perspective.

This also sheds some light on the approach to this question of the majority of the Supreme Court in 1947. Instead of Justice Rutledge, Justice Reed was designated to write the opinions for the court in *U.S. v. Silk* and *Harrison v. Greyvan,*[63] in *Bartels v. Birmingham* and *Geer v. Birmingham,*[64] in *Rutherford Food Corp. v. McComb,*[65] presenting the question of the test applicable in determining the employer-employee relationship under the Fair Labor Standards Act, and *Cosmopolitan Co. v. McAllister,*[66] presenting the same question under the Jones Act. The court in the main apparently preferred Reed's position which was less antagonistic to the common law background than Rutledge's.

Lower Federal Court Reaction to 1947 Cases Before Status Quo Resolution

Further light is shed on the meaning of the *Silk, Greyvan* and *Bartels v. Birmingham* cases by lower federal courts during the year preceding the enactment of the Status Quo Resolution. These lower courts applied the principles of the *Silk, Greyvan* and *Bartels v. Birm-*

60. N.L.R.B. v. Hearst Publications, 322 U.S. 111, 125 (1944).
61. U.S. v. Silk, 704, 713 (1947).
62. U.S. v. Silk, 331 U.S. 704, 713 (1947).
63. 331 U.S. 704 (1947).
64. 332 U.S. 126 (1947).
65. 331 U.S. 722 (1947).
66. 337 U.S. 783 (1949).

ingham cases in eleven cases dealing variously with the Social Security laws,[67] the Fair Labor Standards Act,[68] and disputes involving employee reinstatement under the draft laws.[69]

The general reaction of the lower federal courts was that the Supreme Court cases introduced no new principles into the law. In a penetrating opinion [70] District Judge Graven said:

> The factors referred to by the Supreme Court in the cases of United States v. Silk, supra, Harrison, Collector, v. Greyvan, Inc., supra, and Bartels v. Birmingham, supra, are not new to the law. All of them have been noted at some time or other in cases in the general field of law having to do with the legal responsibility of one person for the actions of another.[71]

A similar sentiment was expressed by Circuit Judge Carrecht: [72]

> Whether we are dealing with cases involving the responsibility of a person for the acts of those under his control or with remedial or regulatory statutes, the basic distinctions between an employee and an independent contractor are the same.

Although it is always difficult to estimate how much difference the verbalized rules make to the result in a case, it is interesting to examine the results of some of these cases. In *Henry Broderick, Inc., v. Squire,*[73] a real estate company sought refund of Social Security taxes paid on some of its real estate brokers. The District Court, before the Supreme Court decided the *Silk, Greyvan,* and *Bartels v. Birmingham* cases, held the brokers to be employees. In his opinion District Judge Leavy emphasized very strongly that common law concepts were not controlling in determining the employer-employee relationship in Social Security cases. By the time the Court of Appeals for the Ninth Circuit reviewed Judge Leavy's ruling the Supreme Court decisions had been rendered. The Ninth Circuit reversed and relied exclusively on the *Silk* and *Greyvan* cases. Similarly the Tenth Circuit relied on *Silk,*

67. Woods v. Nicholas, 163 F.2d 615 (10th Cir. 1947); Broderick v. Squire, 163 F.2d 980 (9th Cir. 1947); Schwing v. U.S., 165 F.2d 518 (3d Cir. 1948); Fahs v. Tree-Gold Co-op., 166 F.2d 40 (5th Cir. 1948); Martin v. F.S.A., 73 F. Supp. 482 (W.D. Pa. 1947); Tapager v. Birmingham, 75 F. Supp. 375 (N.D. Iowa 1948); and Atlantic Coast Life v. U.S., 76 F. Supp. 627 (E.D. So. Car. 1948).

68. McComb v. McKay, 164 2d 40 (8th Cir. 1947) and Western Union Telegraph Co. v. McComb, 165 F.2d 65 (6th Cir. 1947), *cert. den.* 333 U.S. 862 (1948).

69. Brown v. Luster, 165 F.2d 181 (9th Cir. 1947) and Hudspeth v. Standard Oil, N.J., 74 F. Supp. 123 (W.D. Ark. 1947).

70. Tapager v. Birmingham, 75 F. Supp. 375 (N.D. Iowa 1948).

71. Judge Graven went on to say that control was one of many factors to be considered and that it should not receive primary or paramount consideration.

72. Brown v. Luster, 165 F.2d 181 (9th Cir. 1947).

73. 69 F. Supp. 109 (W.D. Wash. 1946), *rev'd,* 163 F.2d 980 (9th Cir. 1947).

Greyvan and *Bartels v. Birmingham* to reverse a District Court decision that cab drivers were employees under the Social Security laws.[74] The District Court decision had been rendered before the Supreme Court decided the 1947 cases. The results of these cases suggest that the Court of Appeals for the Ninth and Tenth Circuits read the 1947 Supreme Court cases as not making great upheavals or changes from the traditional test for the employer-employee relationship. In general the overall results in these eleven cases decided during this period reflect no great upheaval in the law. In six cases the courts held the individuals involved to be employees.[75] In the other five the courts concluded the persons involved were independent contractors.[76]

However, just as courts differed before the Supreme Court decisions of 1947 as to the test for the employer-employee relationship so some of these same differences persisted after the 1947 cases. For example the Third Circuit in an opinion written by District Judge McGranery saw in the 1947 Supreme Court cases an approach which greatly emphasized the purposes of the Act and correspondingly deemphasized "technical common law concepts." [77] The court said:

> That is to say, the Act was aimed to protect those humble workers whose livelihood is dependent upon another rather than upon the public at large, and who are subject to unemployment disability and old-age insecurity, and the issue is whether these tailors are in that class.

Judge McGranery's overriding emphasis on the purposes of the legislation is more closely associated with Justice Rutledge's approach in the *Hearst* case than to Justice Reed's views in *Silk, Greyvan, Bartels v. Birmingham* and *Rutherford v. McComb.*[78] It is also reminiscent of

74. Woods v. Nicholas, 163 F.2d 615 (10th Cir. 1947).

75. *Social Security Laws:*

Schwing v. U.S., 165 F.2d 518 (3d Cir. 1948) tailors; Fahs v. Tree-Gold Co-op., 166 F.2d 40 (5th Cir. 1948) fruit craters; Tapager v. Birmingham, 75 F. Supp. 375 (N.D. Iowa 1948) outside commission salesmen; and Atlantic Coast Life v. U.S., 76 F. Supp. 627 (E.D. So. Car. 1948) insurance agents.

F.L.S.A.:

McComb v. McKay, 164 F.2d 40 (8th Cir. 1947) door makers for railroad; Western Union Telegraph Co. v. McComb, 165 F.2d 65 (6th Cir. 1947), *cert. den.*, 333 U.S. 862 (1948) telegraph agents.

76. *Social Security Laws:*

Woods v. Nicholas, 163 F.2d 615 (10th Cir. 1947) cab drivers; Broderick v. Squire, 163 F.2d 980 (9th Cir. 1947) real estate brokers; and Martin v. F.S.A., 73 F. Supp. 482 (W.D. Pa. 1947) operator of grain elevator at ports.

Draft Laws:

Brown v. Luster, 165 F.2d 181 (9th Cir. 1947) outside salesmen; and Hudspeth v. Standard Oil, N.J., 74 F. Supp. 123 (W.D. Ark. 1947) bulk plant operator.

77. Schwing v. U.S., 165 F.2d 518 (3d Cir. 1948).

78. *Supra.*

the old common law "independent calling" test. The same approach is evident in *Fahs v. Tree-Gold Co-op Growers of Florida,*[79] where in a split decision Judge Holmes writing for himself and Judge Lee said that the 1947 Supreme Court cases indicate that "* * * the question of control is not the sole or determining factor. The ultimate criteria are to be found in the purposes of the act." [80]

What is most significant about the eleven cases decided during this period is their treatment of the factor of control. All read the 1947 Supreme Court cases as rejecting the factor of control as the exclusive test for determining the employer-employee relationship and it is inconceivable how any other reading is possible. As we have seen this is no mean conclusion.

Beyond this important conclusion, however, there is a subtle but nevertheless clear difference of opinion as to the relative significance to be attributed to the factor of control. At one end of the spectrum is the approach of the Third and Fifth Circuits which suggests that the purpose of the legislation to protect humble workers from unemployment disability and old age insecurity furnishes the key test and that the various factors mentioned in the 1947 cases are subordinate but may be helpful in determining whether the individual in question is one of those "humble workers whose livelihood is dependent upon another rather than upon the public at large." In the middle of the spectrum is the approach suggested by Judge Graven that the various factors mentioned by the Supreme Court and other unspecified factors furnish the basis for determination. In applying these factors, control is on a par with, not above, any other factor.[81] At the other end of the spectrum is the approach of the Tenth Circuit in *Woods v. Nicholas* [82] where Judge Bratton, writing for himself and Judge Phillips said that control is just one among many factors to be examined but seems to give to the control factor a primary though not exclusive influence. In deciding the cab owners and drivers were not employees of the taxpayer, Judge Bratton said: [83]

> Here, the taxpayer did not hire the owners or drivers of the taxicabs, and did not have any right of control in respect to the method and manner in which they did their work. He did not have the right to determine whether they should work on the day or the night shift, did not have the right to determine which

79. 166 F.2d 40 (5th Cir. 1948).

80. 166 F.2d 40, 44.

81. See also Atlantic Coast Life Ins. Co. v. U.S., 76 F. Supp. 627, 630-631 (E.D. So. Car. 1948).

82. 163 F.2d 615 (10th Cir. 1947).

83. 163 F.2d 615, 621.

> cab or cabs they should drive, and did not have the right to determine the routes over which they should operate. He did not pay they any wages or like compensation, and he did not have the right to discipline or discharge them. He merely furnished the licence and certificate of convenience and necessity, as well as certain facilities, for which he was compensated. His primary compensation was the fixed fee paid him. And he was paid certain additional sums to be applied on the rental on the salaries of the telephone operators. The owners of the cabs bore their own responsibility with respect to the method and manner of operating the cabs, and the drivers were responsible to them in that respect. In that regard, neither the owners nor the drivers were responsible to the taxpayers.

Emphasis on the control factor is even more pointed in the case of *Martin v. F.S.A.*,[84] where Judge Fallmer held operators of grain elevators at ports to be independent contractors rather than employees of the Pennsylvania Railroad. Judge Fallmer said:

> I therefore conclude that the facts in this case during the entire period covered by the employment of this wage earner unmistakenly indicate that Pennsylvania in its dealings with Western was only concerned with the results to be obtained; that for the period prior to January 1, 1940, or thereafter, not a solitary instance of the exercise of control over personnel or the manner of operation existed; * * *.

The Judge emphasized control even though three paragraphs earlier he had quoted from the *Silk* case to the effect that a number of factors are to be considered.

These eleven cases reveal that while the 1947 Supreme Court cases did not dispel all differences as to the appropriate test for determining the employer-employee relationship, they did tend to eliminate reliance on the factor of control exclusively. As to the relation of the Supreme Court cases to the "usual common law rules" lower federal court opinions are less informative. This is understandable in view of the fact that the 1947 Supreme Court cases avoided discussion of the common law. Nevertheless the Tenth Circuit in *Woods v. Nicholas,* suggests that control was the exclusive law test,[85] and that the Supreme Court cases therefore depart from the common law. On the other hand, Judge Graven in *Tapager v. Birmingham,*[86] and Judge Garrecht in *Brown v. Luster,*[87] suggest that the factors referred to in the 1947 Supreme Court cases are factors which have been employed in common

84. 73 F. Supp. 482, 495 W.D. Pa. 1947.
85. 163 F.2d 615, 618-619 (1947).
86. 75 F. Supp. 375 (N.D. Iowa 1948).
87. 165 F.2d 181 (9th Cir. 1947).

law cases.[88] More typically the Ninth, Eight and Third Circuits were ambiguous on the point, satisfying themselves with the observation that "technical common law concepts" or "narrow and legalistic interpretations" are not proper.[89] These opinions do not specify whether all common law concepts are to be considered objectionable as "technical", "legalistic", and "narrow" or only *some* alleged common law tests. However it is not unlikely that the latter is the intended meaning. This is particularly true of the Third and Ninth Circuit cases. Both these cases reversed District Court decisions which had held persons to be independent contractors primarily on the basis of the "control" test. The Courts of Appeals' strictures against "technical common law concepts" should be read in the light of the District Courts' positions limiting the common law test to the factor of control.[90]

Employee According to the "Usual Common Law Rules"

As we have seen up to 1948 there was no attempt by Congress to define the term employee, other than to indicate that it was meant to include officers of corporations. In 1948, the Status Quo Resolution was enacted.

Since then the statutory phrase "the usual common law rules applicable in determining the employer-employee relationship" [91] has provided basic definition of the employer-employee relationship under the Social Security laws. Some have assumed that the common law rules referred to are those applicable in tort cases when vicarious liability turns on the existence of the "master-servant" relationship. Most of the early Social Security cases we have analyzed would lend support to this assumption. Many judges considered the common law rules applicable in determining the "master-servant" relationship in tort cases were the rules to be used in determining the employer-employee relationship under the Social Security laws. However, if Congress had intended these rules exclusively (presuming agreement as to what they were), it would have been much more precise to have substituted "master-servant" for "employer-employee" in the statutes.[92]

88. Judge Graven thought at common law the control factor would be given "primary and paramount consideration." 75 F. Supp. 375, 388 (1948).

89. Henry Broderick, Inc. v. Squire, 163 F.2d 980, 982 (9th Cir. 1947); McComb v. McKay, 164 F.2d 40, 49 (8th Cir. 1947); and Schwing v. U.S., 165 F.2d 518, 520 (3d Cir. 1948).

90. Henry Broderick, Inc. v. Squire, 69 F. Supp. 109 (1946) and Schwing v. U.S., 65 F. Supp. 227 (1946).

91. 62 Stat. 438 (1948); 26 U.S.C. (1954 Code) Sec. 3121.

92. The "master-servant" terminology was recommended to the Senate Finance Committee in 1950. Hearings before Senate Finance Committee on H.R. 6000, 81st Cong., 2d Sess. 2204 (1950).

As a matter of fact there is a deceptive simplicity about the phrase "the usual common law rules." Justice Rutledge in *N.L.R.B. v. Hearst Publications,*[93] conclusively exploded the myth that there is some simple, uniform and easily applicable test which the courts have used to distinguish employees from independent contractors. Literally, in common parlance, and in the law "employer-employee" is often used without regard to the "master-servant" relationship and the attendant "servant-independent contractor" legal distinction. There are many common law rules having no relation to the "servant-independent contractor" distinction applicable in determining whether in the broad sense of the term one is an employee.[94]

> The term "employee" had different shades of meaning in different relationships. We need not recount them all. We are not permitted arbitrarily to choose between them. Where, in an insurance policy, a term is open to two or more constructions we are required to adopt that one more favorable to the insured. * * * This is just rule because insurance policies are written by the insurers. * * * "Employee" may mean any one who render services to another.[95]

Justice Rutledge made this point in the *Hearst* case.[96] Among other authorities he cited *Lumley v. Gye*[97] to exemplify the proposition that there were a variety of common law rules applicable in determining the employer-employee relationship depending upon the purpose for which the determination is to be made. In *Lumley v. Gye* the court held that an employer could recover damages from a third person who maliciously induced an employee to breach the contract of employment. The defendant and Justice Coleridge in dissent argued that this rule only applied to workmen in the "master-servant" relationship. But a majority of the court disagreed. Justice Crompton said:[98]

> * * * I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employee or master and servant, within the meaning of this rule.

93. 322 U.S. 111, 120-124 (1944).

94. "In its broad signification and in common or popular speech, employee is defined as one who is employed; any one who renders labor or services to another * * *". 30 C.J.S. 227 (1942). Tentative Draft No. 3 of the SECOND RESTATEMENT OF THE LAW OF AGENCY, 18 (1955), Comment c to Section 2 recognizes that the broad meaning of the term "employee" has received some acceptance. "In some Statutes, however the term "employee" has been given a much broader meaning than that given herein to the term "servant". This has been the tendency of the interpretation of both Federal and State Acts dealing with social security, unemployment insurance, minimum wage, fair labor practices and similar matters."

95. 1 Bouv. Law Dict., 1035 (Rawle's Third Rev.).

96. N.L.R.B. v. Hearst Publications, 322 U.S. 11, 120 n.19 (1944).

97. 1853 El. & Bl. 216, 118 Eng. Rept. 789.

98. 1853 El. & Bl. 216, 229; 118 Eng. Rept. 749, 754.

The usual common law contract rules applicable in determining whether or not a contract of employment is in existence are in this category. These rules, which include, for example, principles of law applicable to offer and acceptance, obviously are totally distinct from the vicarious tort liability rules.

Also there are common law rules which have been developed to determine whether a person, is, in the broad sense, an employee entitled to restitution for services rendered to another by mistake. These have no relation to the "servant-independent contractor" distinctions arising out of tort cases but rather relate to quasi-contractual principles.[99]

Other examples of "usual common law rules" include the following. A principal is liable in contract or tort for the acts of his agent, *regardless of whether he is a servant, independent contractor or neither,* if the principal directs a specific tortious act or result,[100] if the agent makes certain representations which he is authorized or apparently authorized to make,[101] and if the situation is such that the duty to protect the third person may not be delegated by the principal.[102] Each of these situations involves "usual common law rules applicable in determining" whether the agent has been actually or apparently authorized or, *in the broad sense, employed* to act for the principal. This broad use of the term *employed* as applicable to agents not only comports with laymen's terminology but also is consistent with the approach of the *Restatement of the Law of Agency.* Time and time again in the *Comments* and *Illustrations* appended to general common law rules the term employ is used without regard to the "servant-independent contractor" distinction. One able writer disagrees with this broad use of the term employ in relation to agents. Professor Ferson in his *Principles of Agency*[103] sharply distinguishes between "employing servants" and "authorizing agents". His approach would not admit of an "agent" being "employed".[104] Would that the Congress were as careful in its use of terms. However, it is feared the Congressional ways in the use of language are more akin to the layman's than to Professor Ferson's.

99. RESTATEMENT, RESTITUTION, Secs. 40 and 41.

100. RESTATEMENT, AGENCY, Sec. 251(a).

101. RESTATEMENT, AGENCY, Sec. 251(b).

102. RESTATEMENT, AGENCY, Sec. 251(a).

103. Brooklyn, 1954.

104. Ferson's basic analysis differs from that of the RESTATEMENT. The latter considers servants a species of agents (RESTATEMENT OF AGENCY SECTION 2) whereas Ferson distinguishes servants from agents, FERSON, PRINCIPLES OF AGENCY, pp. 122-123. For him servants perform non-juristic acts, agents perform juristic acts. The Fourth edition of MECHEM'S OUTLINES OF AGENCY lends some support to Professor Ferson's approach. It distinguishes agents from servants on the basis of the type of act performed, MECHEM, OUTLINES OF AGENCY, Sections 12-14 (4th Ed. 1952).

It is evident from these examples that the employer-employee relationship is not limited to the master-servant relationship or realm alone and that the phrase "the usual common law rules applicable in determining the employer-employee relationship" is an ambiguous one. To determine what Congress intended by this phrase we shall now examine its legislative history.

(TO BE CONTINUED)

TEMPLE LAW QUARTERLY