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legislation to remain applicable to interstate traders, is whether or not there might be a commensurate lessening of interstate trade—whether or not interstate commerce is put at a disadvantage in fact. And this test can be applied appropriately to those penumbra situations falling between solicitors and peddlers, especially photographers, noted herein. It is believed that municipal occupational license fees on photographers, even if they do not discriminate expressly against itinerants, do operate to cut down on the volume of the interstate photography commerce.[43] The cumulative effect is just as bad for the photographer as it is for his pre-touring solicitor. If the tax is permitted to be levied against the cameraman so that he is effectively barred from following the protected solicitor, then what practical gain in the protection of interstate commerce can be achieved by immunizing the solicitor? As pointed out in the *Forrest City* decision, the taking of the picture is the central feature of this particular interstate business, and without the photographer and his camera there can not even be a *product* for interstate commerce to handle. It is therefore submitted that municipal occupational taxes upon such photographers are unconstitutional, being violative of Article I, Section 8, Clause 3.[44]

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[43] See ROTTSCHAEFFER, *supra* note 6 at 346; "A business consisting wholly in the performance of services that are an indispensable part thereof is equally immune to such taxation."

[44] The municipalities do have some recourse against such "nuisances." See, for example, Breard v. Alexandria, *supra* note 2 at 637: ". . . a permissible burden on commerce." [To require prior consent of owners of residences to be solicited] at 638: ". . . but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason." 50 MICH. L. REV. 150 (1951); 35 MARQ. L. REV. 198 (1951); 1953 WASH. U.L.Q. 233, 257, 262, suggesting Congressional legislation; 5 FLA. L. REV. 196 (1952).

WORKMEN'S COMPENSATION— WHAT ARE "PRINCIPAL CONTRACTORS"?

A confusing area in the law of workmen's compensation has developed in connection with the term "principal contractor." The term appears in provisions of workmen's compensation acts designed at making a "principal contractor" the statutory employer of the employee of his subcontractors.[1] Mr. Schneider, in his *Workmen's Compensation Text* states that:

[1] *See* 2 SCHNEIDER, WORKMEN'S COMPENSATION TEXT 176 (1942) (where he states that all but seven states have statutes which constitute the principal contractor the statutory employer of the employees of the subcontractor, although in fact he may not be the actual employer of the injured employee); 71 C.J. 483 (1935); 58 AM. JUR. 672 (1948).

> The apparent legislative purpose of constituting the principal contractor a statutory employer is to prevent evasion of the act; to protect the employees of subcontractors who are not finacially responsible; to induce all employers to carry insurance; or to make the principal contractor a guarantor of the personal injury obligations of the subcontractor.[2]

It is thus evident that one of the main purposes of the workmen's compensation acts is to prevent employers from relieving themselves of liability under the acts by doing through independent contractors what they would ordinarily do directly through employees.[3] However, the courts are not in complete agreement with regard to the scope of the term "principal contractor." It has been particularly a problem in those situations where an owner, instead of using his own employees, hires an independent contractor to do a portion of his work on a particular undertaking.[4] The problem is further complicated when the owner furnishes part of the labor and/or materials on the job. For example, suppose a large company hires an independent contractor to build some structure on the premises of the company or to perform some process necessary to the company's business. Will the company be liable as a principal contractor to employees of the independent contractor for workmen's compensation? Much may depend on the wording of statutes which vary according to purposes to be accomplished and according to the classes of employers or owners sought to be held liable by the legislatures.[5]

The Kentucky Workmen's Compensation Statute seems to be a typical example of a statute using the term "principal contractor," and when its wording is compared with other statutes in which this term is used and/or has been applied, the variety in the acts is demonstrated.[6] Kentucky Revised Statute 342.060 (Liability of Contractor and Subcontractor) provides:

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[2] SCHNEIDER, WORKMEN'S COMPENSATION TEXT 175 (1942).

[3] 58 AM. JUR. 673 (1948).

[4] Buckhorn Coal and Lumber Co. v. Georgia Casualty Co., 222 Ky. 683, 2 S.W. 2d 383 (1928); Brooks v. Buckley and Banks, 291 Pa. 1, 139 Atl. 379 (1927); Siskin v. Johnson, 151 Tenn. 93, 268 S.W. 630 (1925). Contra: Phoenix Indemnity Co. v. Barton Torpedo Co., 137 Kan. 92, 19 P. 2d 739 (1933).

[5] Some statutes are designed to make a "principal contractor" or "principal employer" primarily liable and others to make such a person secondarily liable to employees of independent contractors. Liability may also be conditioned on whether an injured employee of an independent contractor was engaged upon an undertaking that was part of the principal's trade, business, or occupation. "To hold the principal liable for compensation, even though the sub-contractor carries insurance, would mean giving the employees of the sub-contractor a greater right than the employees of the principal, for they would have a right against their immediate employer, the sub-contractor, as well as the principal." 2 SCHNEIDER, WORKMEN'S COMPENSATION TEXT 177 (1942).

[6] See SCHNEIDER, WORKMEN'S COMPENSATION TEXT (1942) for provisions of Workmen's Compensation Statutes by states.

> A principal contractor, intermediate or subcontractor shall be liable for compensation to any employee injured while in the employ of any one of his intermediate or subcontractors and engaged upon the subject matter of the contract to the same extent as the immediate employer.[7]

An indication of the meaning of "principal contractor" may be found in *Buckhorn Coal and Lumber Co.* v. *Georgia Casualty Co.*,[8] in which a company engaged in cutting and preparing timber for market was held not to be a "contractor" or "principal contractor" within the Kentucky statute. The Buckhorn Coal and Lumber Co. owned large areas of timber land from which it was having the timber cut and prepared for market. It contracted with third parties to float products by water to certain places of delivery. The court held that under these contracts the third parties became independent contractors, and accordingly their wages could not be taken into account in estimating the amount of premium under the insurance contract required by the compensation statute. The court said, "The conclusive feature of this branch of the case is the fact that the insured was prosecuting the business or undertaking . . . for itself, and not as a contractor."[9]

The court by way of illustration stated that if A, who owns a lot and desires to build a house on it, engages in the undertaking himself, buys his own material, and employs his own laborers, he would not be a contractor and would not come under the terms of the compensation act. "Consequently, if while so building his house he contracts with another under such circumstances that the other becomes an independent contractor to do the plastering or the brick work, the other is not his subcontractor within the section, supra, of the Compensation Act, and the employees of the latter are not employees of the former."[10] The court thus seems to be saying that one who is con-

[7] KY. REV. STAT. 342.060 (1953) continues to the effect that any principal intermediate or subcontractor who pays compensation under the section may recover the amount paid from any subordinate contractor through whom he has been rendered liable. The section makes the principal contractor only secondarily liable because it further provides that claims for compensation must first be instituted against the immediate employer.

[8] 222 Ky. 683, 2 S.W. 2d 383 (1928).

[9] *Id.* at 690, 2 S.W. 2d at 386.

[10] *Ibid.* See also, Staton v. Reynolds Metals Co., 58 F. Supp. 657 (W.D. Ky. 1945) (in which the Reynolds Metals Company was held to be a principal contractor when it was employed by the Defense Plant Corporation to perform construction work according to plans with a provision that subcontractors could be employed by the company, even though the company received no direct compensation in cash); Jennings v. Vincent's Adm'x, 284 Ky. 614, 622, 145 S.W. 2d 537, 541 (1940) (in which the court said, ". . . the general rule regarding the liability of the owner of property as to injuries and damages resulting from the acts of an independent contractor is that such owner is not liable unless the work to be done by the independent contractor is in itself a nuisance or unless the work of the

sidered an "owner" cannot be held liable as a "contractor."

This question was directly raised in the Tennessee case of *Siskin* v. *Johnson*[11] under a provision of the Tennessee Workmen's Compensation Statute almost identical in wording with that in the Kentucky statute. The Tennessee Workmen's Compensation Act, Chapter 123, Acts of 1919, states:

> A principal, intermediate or subcontractor shall be liable for compensation to any employe injured while in the employ of any of his subcontractors and engaged upon the subject matter of the contract to the same extent as the immediate employer.[12]

In the *Siskin* case the defendants employed an independent contractor to unload and transfer car wheels to a certain place, and an attempt was made to hold the defendants liable for compensation to the independent contractor's employee who was injured while unloading the wheels. The court took the position that the section was not intended to apply to an owner or person having work done for his own benefit by means of a contract with an independent contractor, but only to independent contractors, or subcontractors thereunder.[13] This interpretation is in accord with the plain meaning of the terms of the statutory provision and seems to be what is the better and the majority view on the question of interpretation of "principal contractor" as used in such statutory provisions.[14] Since the Kentucky Court of Appeals has indicated that a "principal contractor," or any type of contractor, within the subcontracting section of the Workmen's Compensation Act must be one who contracts to carry out work for another, it is submitted that it would adhere to the interpretation of "principal contractor" set forth in *Siskin* v. *Johnson* and other similar cases.

A leading case which takes an opposite view on the question of

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instrumentality for doing it is inherently dangerous."); Raponi v. Consolidation Coal Co., 224 Ky. 167, 5 S.W. 2d 1043 (1928) (in which laborers engaged to work for a person contracting with a coal company to excavate a slate dump were held to be employees of an independent contractor and not of the coal company even though the employees signed the compensation register of the coal company and were paid by it for their services).

[11] 151 Tenn. 93, 268 S.W. 630 (1925).

[12] Like the Kentucky Workmen's Compensation Act, the Tennessee act provides that every claim for compensation must first be instituted against the immediate employer.

[13] *See* note, 58 A.L.R. 880 (1929).

[14] *Supra,* note 4. For other cases defining and explaining "principal contractor" and indicating that such a person is not one who has work done for himself see generally: Jennings v. Vincent's Adm'x, 284 Ky. 614, 145 S.W. 2d 537 (1940); Eutsler v. Huff, 222 Ky. 48, 299 S.W. 1070 (1927); Lutz v. Long Bell Lumber Sales Corp., La. App., 153 So. 319 (1934); Priby v. Lee, 15 N.J. Misc. 292, 191 Atl. 105 (1936); Davis v. City of Philadelphia, 153 Pa. Super. 645, 35 A. 2d 77 (1943); McDonald v. Levinson Steel Co., 302 Pa. 287, 153 Atl. 424 (1930); Bomber v. City of Norfolk, 138 Va. 26, 121 S.E. 564 (1924).

whether one having work done for his own benefit by means of a contract with an independent contractor can be liable as a "principal contractor" to an injured employee of the independent contractor is *Phoenix Indemnity Co.* v. *Barton Torpedo Co.*[15] The Kansas Workmen's Compensation Statute involved in the *Phoenix Indemnity Co.* case provides:

> Subcontracting. (a) Where any person (in this section referred to as principal) 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 (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; . . .[16]

In this statute no mention is made of the term "principal contractor" until section (e) in which it is said, "A principal contractor, when sued by a workman of a subcontractor, shall have the right to implead the contractor." It is possible, therefore, that such a "principal" as the one described in subsection (a) can also be referred to as a "principal contractor." This haphazard use of terms in the statute itself is unfortunate because one can be a principal who is liable within the terms of the statute without being one who is commonly designated a contractor (whether principal or otherwise).

In the *Phoenix* case a petroleum company contracted with an individual to drill an oil well and agreed to furnish him with the drilling rig, casing, and other equipment. It reserved the right to take full charge of the well and the operations thereat and to manage and control the drilling into, shooting, and testing of oil bearing sand reached by the driller. The company required the driller to procure an insurance contract under the Workmen's Compensation Law to protect it against any right of action by an employee of the driller. The Kansas court held that the petroleum company was a "principal contractor" liable for compensation for the death of an employee of the driller. The court unfortunately stated that the petroleum company, by reserving to itself such rights and privileges as it did, made itself "more nearly in line with the definition of a *principal contractor* as defined in the first paragraph of the section above cited, than an owner, as it is regularly denominated in the contract."[17] (writer's italics).

It seems unfortunate that the court assumed that "principal con-

[15] 137 Kan. 92, 19 P. 2d 739 (1933).
[16] KAN. STAT. G.S. 1949, 44-503 (taken from R.S. 1923, sec. 44-503).
[17] *Supra*, note 15 at 740.

tractor" is defined in paragraph (a) of the statute because only the term "principal," a term which is broader and not necessarily inclusive of "contractor," is there defined. The court could simply have recognized the liability of the company as a "principal" on the theory that the statute, by its terms, indicates an intent to reach "owners" as well as "contractors." Therefore, this cannot be considered, in the light of the wording of the Kansas statute, as persuasive in the interpretation of the position of an owner-principal contractor under statutes such as in Kentucky and Tennessee. Just what a "principal contractor" is does not appear clearly from the wording of paragraph (a) of the Kansas statute, which refers both to "principal" and "contractors" but which does not combine the two terms.

The Kansas court no doubt reached the right result under the statute in the *Phoenix* case in spite of faulty reasoning, because the petroleum company had almost complete control over the work of the so-called contractor (who seemed to be in reality an employee) and the company was thus a "principal" as defined by the statute.[18] In the Tennessee case referred to above, the defendants supplied and paid a workman to assist the independent contractor, but the work was under the control and direction of the independent contractor.

The decisions in which the term "principal contractor" has been applied in various jurisdictions seem to be in conflict with regard to the definitions and explanations of the term. There appears, however, to be a possibility for a reconciliation of the contrary views of the courts when the wording of the particular statutory provisions as to employers and the facts of cases are considered. Apparently, the

[18] The reasoning of the Kansas case has not been followed. Since the Kansas court handed down its decision in the Phoenix Indemnity case, liability of those who contract for work, which is a part of their business or trade, to be done on their premises, has not been based on the finding that such persons were "principal contractors." Liability has been imposed, among other reasons, because that work contracted for was part of the business or trade of the owner and thus made the owner a principal "employer" under subdivision (a) of the subcontractor provision of Gen. St. 1935, 44-503 a,d. See Swift v. Kelso Feed Co., 161 Kan. 383, 168 P. 2d 512 (1946) (wherein a feed company, which as part of its business sold and delivered feed at a delivered price, that it collected from the buyer, contracted with one not operating under the compensation act, for the delivery of feed on a per-ton basis, and an employee of the hauler, while engaged in delivering feed to the buyer on the buyer's premises was accidentially injured. The feed company was held liable to the employee as a "principal employer" under subdivision (a) of Gen. St. 1935, 44-503, a,d); Lessley v. Kansas Power and Light Co., 171 Kan. 197, 231 P. 2d 239 (1951) (wherein a public utility which engaged in the production, sale, and transmission of electric power contracted for the erection of a building on its premises and the installation of equipment necessary to its business, was held liable to an injured employee of a subcontractor of the contractor because the employee was engaged in work that was part of the defendant's trade or business within the meaning of the act).

primary source of confusion and conflict is the use of "principal contractor" without definition in statutes, and the careless use and inappropriate application of the term by the courts in seeking to carry out the legislative purpose. The Kansas statute is open to the construction of placing owners under liability, whereas the plain meaning of the term "principal contractor" as found in the Kentucky and Tennessee statutes would seem to preclude it.[19]

In order to thwart the efforts of owners or large companies who are seeking to avoid liability for workmen's compensation by hiring independent contractors to do work which is a part of their usual business and which would ordinarily be done by the owners' or companies' own employees, a separate provision could be added to the workmen's compensation acts of Kentucky, Tennessee and other similar acts, placing liability on such owners or employers. Missouri, Vermont, Virginia, and New Jersey have such statutes.[20] The Missouri statute provides:

> 1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.[21]

The term "principal contractor" might be changed to "principal employer" to cover such cases, but even changing the words of the statute to principal employer is not an infallible solution to the problem because it would reach owners and attach liability to some businesses that would never do their own construction work with their own employees. Words to condition liability on the basis of work carried on as a part of one's trade, business, or occupation are needed in addition.

A less satisfactory means of placing liability on such employers of

[19] The plain meaning of the term "principal contractor" can be found by consulting a dictionary, although, definitions are hard or impossible to find in statutes. In BLACK'S LAW DICTIONARY, p. 397 (4th ed. 1951), it is said of "contractor," the most important word for present consideration: "This term is strictly applicable to any person who enters into a contract, but is commonly reserved to designate one who, for a fixed price, undertakes to procure the performance of works on a large scale, or the furnishing of goods in large quantities, whether for the public or a company or individual." A contractor is ". . . one who in pursuit of independent business undertakes to perform a job or piece of work, retaining in himself control of means, method and manner of accomplishing the desired result." It has been said that in Kentucky the true test of a contractor is "that he renders service in the course of an independent occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished." Kentucky Cottage Industries v. Glenn, 39 F. Supp. 642 (W.D. Ky. 1941).

[20] MO. REV. STAT. 287.040 (1949); 2 N.J. REV. STAT. 34:15-3; VERMONT STAT. Revision of 1947, c 353, 8079; 9 VA. CODE ANN. Tit. 65, Sec. 65-2 (1950).

[21] MO. REV. STAT. 287.040 (1949).

independent contractors would be the use of a statutory definition of "principal contractor" that would include such owners, but this would broaden the actual meaning of the term "contractor." A provision which might be wise and beneficial would subject an employer to liability for compensation to employees of any of his contractors in any case where the employer furnishes labor and/or machinery to a contractor on the basis of a presumption that, under such circumstances, the employer of the contractor is contracting for work that he would ordinarily do himself.

The Kentucky and Tennessee statutes as presently worded do not contain language broad enough to cover such situations, and the meaning of the term "principal contractor" should not be expanded in order to place liability on those who are not contractors by profession. Such expansion should come, if at all, through legislative action.

P. JOAN SKAGGS

TORTS—INTERVENING NEGLIGENT AND INTENTIONAL ACTS AS RELIEVING A NEGLIGENT ACTOR FROM LIABILITY

Liability of a negligent actor for injury to another's person or property may present a difficult question where an intervening independent negligent or intentionally tortious act of some third person is the direct or immediate cause of the injury. The problem is not one which can be disposed of wholly in terms either of proximate cause or of duty to the injured party. The purpose of this note is to examine the Kentucky decisions and attempt to reconcile them by using the tests applied by the Kentucky Court of Appeals, and also to present some other factors which are of prime importance in determining the basis of liability in these cases. No attempt will be made to go outside the Kentucky cases except to point out certain fundamental principles which bear on the subject, and to compare the rule in Kentucky with the general rule in other states. For purposes of clarity and emphasis the subject will be covered in the following order:

1) The ordinary case where an intentionally tortious or criminal act of a third person intervenes.

2) The ordinary case where a negligent act of a third person intervenes.

3) Certain cases where, because of some social relationships recognized by law, the defendant has an affirmative duty to control the acts of the intenvening third party.