

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 2

JUNE 1935

NUMBER 4

INDEPENDENT CONTRACTOR AND THE GOOD LIFE

ROSCOE T. STEFFEN*

THE "legal literature" about the independent contractor has been occupied, almost exclusively, with the question of how best to identify him. Since early in the last century, when the name was first bestowed to express the idea that he is a citizen and quite able to pay his own way, his actual existence as a member of society in good standing has gone without question¹—that is, until very recently. Of late however, there has been a growing tendency, somewhat emotional in character, to look upon him with disfavor, as little more than a sham, a mere lawyer's device, conceived in sin and brought forth to provide undeserved immunity.² Though we steadfastly refuse to give much weight to this ethical judgment, it has its effect. Indeed, the matter has gone so far that the question now is whether the contractor has had a fair hearing; possibly he is being condemned upon insufficient evidence. At all events something in the way of a legal-sociological investigation is in order, which while perhaps not exonerating him in full should at least show more clearly what his place in society is and—hesitantly—should be.

The first thing is to agree, at least tentatively, upon who exactly is an

* Professor of Law, Yale University School of Law.

¹ There is scarcely a dissenting voice on this point in the cases decided by the middle of the last century. See *Hilliard v. Richardson*, 3 Gray (Mass.) 349 (1855), in which the authorities are reviewed.

² For example, Harper, in his recent valuable work on the Law of Torts (1933), 646, says: "A number of factors concur to constitute . . . such a powerful argument for the liability of the employer of an independent contractor that it would seem highly desirable for the courts to adopt the rule of liability and confine nonliability to a few exceptional cases." And still more recently, Morris, in 29 Ill. L. Rev. 339, 345 (1934), has this to say: "These considerations have led the writer to conclude that, while it is usually desirable that a contractor be ultimately liable for his torts, in general, the contractee should be responsible to third persons."

independent contractor. For, how else can he be isolated for study? The description, worn smooth from much use through the years, runs in terms of "control," a person who undertakes to complete a specified job according to his own methods and without being subject to the control of his employer as to the means of doing the work is an independent contractor.³ If he is engaged in a special calling⁴ as well, and is paid a lump sum for the job,⁵ identification is said to be quite positive. Conversely, where the work is done subject to the employer's control or "right to control" both the thing done and the manner of doing it, the contractor becomes with equal certainty a "servant." Such is the law in broad round phrases, the employer being liable or not to outsiders, depending on whom he hired, a servant or an independent contractor.

The difficulty is not so much with the law, which is thus certain enough, as with its application to particular cases—or at least so the courts point out from time to time. Certainly it is true that as much day by day litigation occurs in this corner of jurisprudence as in almost any other. There are too many variables, both in the description of the independent contractor and of his antithesis the servant, to admit of anything approaching automatic application of the law. A contractor may go forth in the morning proud in his independence and return at nightfall a servant, some court having found in the employer such a measure of control of prices, of working conditions, of what not, as no truly independent contractor could countenance.⁶ Or a servant may suddenly find that he has so far departed, in thought, in time or in space from the "scope of his employment" that he has achieved, at least temporarily, the estate of an independent contractor.⁷ It is all very confusing. Whether a better form of words could be evolved, that is, one which would reduce the need for continual recourse to the courts, is highly questionable; the Restatement

³ See 1 Mechem, *Law of Agency* (2d ed. 1914), § 40. Also, *Hexamer v. Webb*, 101 N.Y. 377, 4 N.E. 755 (1886); *Rait v. New England Furniture & Carpet Co.*, 66 Minn. 76, 68 N.W. 729 (1896).

⁴ See *Leidy, Salesmen as Independent Contractors*, 28 Mich. L. Rev. 365 (1930), in which the "independent calling" notion is stressed on the authority of the case of *Milligan v. Wedge*, 12 Adol. & El. 737, 113 Eng. Reprint 993 (1840).

⁵ The mode of payment is not regarded as being controlling, though of some significance. See *Arnold v. Lawrence*, 72 Col. 528, 213 Pac. 129 (1923).

⁶ *Cf.*, *Singer Mfg. Co. v. Rahn*, 132 U.S. 518 (1889), for example, in which the salesman was found to be a servant, with *McCarthy v. Souther*, 83 N.H. 29, 137 Atl. 445 (1927), in which on similar facts he was held to be an independent contractor, both courts using the same rule.

⁷ See *Hickson v. W. W. Walker Co.*, 110 Conn. 604, 149 Atl. 400, 68 A.L.R. 1044 (1930), where the deviation in intent was held controlling.

of Agency, in one of its franker moments, thought not and was content merely to serve notice that there are many considerations involved.⁸

But there is a worse difficulty. It seems that this carefully formulated law is not at all the substantial structure it purports to be, but merely a façade behind which the courts deliberate. It takes no account whatever of another principle which has crowded its way to the fore in recent years. If the work being done by the contractor is of an "inherently dangerous" character, then regardless of how independent the contractor may be, immunity will be denied to the employer.⁹ Of course it has long been recognized that an employer may not do murder with impunity by engaging an independent contractor for the job; nor evade statutory provisions determining how certain work shall be done;¹⁰ nor excuse non-performance of contractual obligations by putting the blame upon an independent contractor.¹¹ But when it is granted that the mere circumstance that the particular work is likely to result in harm to third persons is enough to convert a contractor into a servant, a wide door in the "law" has been opened. It is mainly through this that those who favor broad employer's responsibility propose to enter, perhaps to upset the whole structure.

That this notion has explosive possibilities has been evident ever since *Bower v. Peate*,¹² notwithstanding it still, after nearly half a century, rates

⁸ Restatement, Agency (1933), § 220 (2):

"In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; and (i) whether or not the parties believe they are creating the relationship of master and servant."

⁹ For discussion, see *Blount v. Tow Fong*, 48 R. I. 453, 138 Atl. 52 (1927). The subject is further annotated in 23 A.L.R. 984, 1005 (1923), and 21 A.L.R. 1229, 1243, 1265 (1922).

¹⁰ The leading case on the point is *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767, 118 Eng. Reprint 955 (1853).

¹¹ Nor satisfy a non-delegable duty to workmen by engaging a negligent independent contractor, for example, to erect a scaffolding for their use. See *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487 (1878) with which compare *Devlin v. Smith*, 89 N.Y. 470, 42 Am. Rep. 311 (1882). Nor to tenants by engaging an independent contractor to make repairs. *Clark v. Engelhardt*, 9 La. App. 334, 120 So. 498 (1928). The line between these cases and those where defective instrumentalities are "bought" from a supposedly reputable manufacturer is difficult to draw. See *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936 (1905).

¹² 1 Q. B. D. 321 (1876).

only the position of an exception. In that case a landowner, desiring to build well and truly his house, specified foundations somewhat lower than those of his neighbor, and due to the way the work was done the neighbor's house was damaged. The court created a non-delegable duty upon the landowner, as a condition of immunity, to see at least that the usual precautions to avoid injury be taken; "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and can not relieve himself of his responsibility by employing someone else. . . ." It was not enough that the landowner stipulated that his contractor should "take upon himself the risk and responsibility of shoring and supporting" the adjoining building.

The principle announced in *Bower v. Peate* was easily a full step in advance of the so-called absolute liability cases. The case of *Fletcher v. Rylands*,¹³ decided less than ten years before, was not even cited as authority. Moreover, one gathers from the latter that, even assuming the reservoir figuring in that case¹⁴ had been built with all known precautions, the owner would still have been liable. But of course this holding was thought to be limited to certain type cases, those involving fire, wild animals, impounded water and so on. *Bower v. Peate* borrowed the absolute liability idea, limited its application to certain details of the work, it is true, but, as so limited, made it apply to all transactions wherever likelihood of harm to third persons was reasonably foreseeable. The only dialectical material apparently left to prevent a run upon the position of the independent contractor was the notion of collateral negligence;¹⁵ had the shoring been properly done the owner would have been under no responsibility for negligence on the part of the contractor as to other

¹³ L. R. 3 H. L. 330 (1868).

¹⁴ Which incidentally had been constructed by an independent contractor.

¹⁵ For a statement of this distinction as to collateral negligence, though in a somewhat different case, the employer being held liable to a pedestrian falling into an unlighted areaway, see *Robbins v. Chicago*, 4 Wall. (U.S.) 657 (1866). The court said:

"Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results *directly* from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." 4 Wall. (U.S.) 657, 679 (1866).

And see further *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16, 39 L.R.A. (N.S.) 328 (1912).

matters, whether occurring while the shoring was being done or at a later stage of the construction. Actually, there was one other stopping point, the possibility of smearing the whole matter with one phrase, "inherent danger," and so tying the broad principle of *Bower v. Peate* to the limited group of cases envisaged by *Fletcher v. Rylands*.

Yet another condition, still further restricting the employer's immunity, has succeeded by dint of much repetition in gaining a foothold. This is that the employer must have used care to select a competent contractor.¹⁶ Its sister condition, that the contractor should also be financially responsible, appears always to have met with a cold reception,¹⁷ though it is true that both lack of skill and absence of funds have been used at times to expose the "dummy" contractor. But, of course, the statement that the contractor must be competent has enough truth in it to be plausible.¹⁸ When a contractor is brought upon a job to work with employees of the employer, this obviously does not relieve the employer of his duty to supply reasonably safe working conditions. So too if, within *Bower v. Peate*, the work is likely to result in injury to third persons unless performed by a specially qualified contractor, no doubt there would be liability. But while there are many broadly stated dicta¹⁹ few if any cases

¹⁶ See, for example, *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32 (1893) where an inexperienced contractor, engaged to do excavating in the street, had damaged plaintiff's pipes. The court said the defendant would be liable not only "in knowingly employing incompetent contractors, but also in failing to exercise due and reasonable care to select such as were skillful and competent." Of course it is probable the city would be liable for injuries of this character, on the principle of *Bower v. Peate*, even had it exercised care in hiring.

¹⁷ See *Lawrence v. Shipman*, 39 Conn. 586 (1873), a case involving negligence on the part of a mason contractor. To the argument that the employer must engage a financially responsible contractor the court said:

"I am not prepared to say that this fact may not be of some weight where the work to be done is hazardous to others. If a person having an interest in a job which naturally exposes others to peril, should attempt to shield himself from responsibility by contracting with a bankrupt mechanic, I think the employers might be subjected for damages done by the contractor, but, as before stated, the work to be done by the contractor involved no peril in its usual performance, and I cannot hold the defendants liable under this claim." 39 Conn. 586, 590 (1873).

¹⁸ Under the Massachusetts bank collection rule it is said the forwarding bank must exercise care in the selection of a correspondent, independent contractor, but this, of course, is to fulfill the forwarder's agency obligation to its customer, a quite different matter. See *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330 (1840).

¹⁹ In many cases where the employer has been held *not* liable for acts of his contractor, the fact that the contractor was competent has been given weight. *Carr v. Stevens*, 295 Fed. 701 (D.C. Md. 1924) (explosion of boat while fumigating); *Riley v. Steamship Co.*, 29 La. Ann. 791 (1877) (stevedore) ("In a case like this, we think the utmost extent of the liability of the

have carried the matter further.²⁰ Nevertheless, both ideas are ready, one having attained to the status of a quasi-exception, so that some court full more of zeal than of discrimination may give them general life and currency.

It is evident that the law is not precise and that some search must be made for guiding reasons. But to embark upon an examination of that curious complex of truths, half truths and mystic intuitions which is the theoretical basis for vicarious responsibility, offers little promise. Perhaps it is most accurate to say that our present rule is merely a fortuitous result of the English habit of "muddling through"; that person who starts the enterprise, who selects the workmen, who directs the course of the work, should be made to answer for injury to third persons. How this came to be, whether as an outgrowth of an older absolute liability upon the master,²¹ whether as an expansion of the view that the employer should be liable for directed acts,²² or whether it is merely a consequence of the promiscuous use of the phrase that master and servant are one,²³ it is difficult to say. The modern rationalization in terms of "control," however, gives principal significance to the notion of *fault*, in keeping with the supposed basis of liability for torts of negligence. The person most to *blame* for an injury should pay.

That this principle of liability for fault fails to cover the case is only too apparent. Perhaps it once did when the employer worked at the elbow of his employee. Today, however, regardless of how carefully personnel

company would be that they employ a stevedore of experience and good repute . . ."); *Pickett v. Waldorf System*, 241 Mass. 469, 136 N.E. 64, 23 A.L.R. 1014 (1922) (window cleaning, ice formed on sidewalk). Further cases are collected in 30 A.L.R. 1538-1544 (1924).

²⁰ *Mullich v. Brocker*, 119 Mo. App. 332, 97 S.W. 549 (1905), is probably as good an example as any. Here the employer had engaged a 16 year old boy to break horses. The court said:

"Breaking horses to harness is not necessarily dangerous to others if properly done, and in selecting a contractor to do work of that character a proprietor need only use ordinary care to choose a competent person. But if he is careless in selecting he remains liable." 119 Mo. App. 332, 339, 97 S.W. 549, 551 (1905).

The tendency is strong in these cases, where an individual rather than an organization is involved, to treat the employment as merely a master and servant relationship. See further, *Baker v. Scott County Milling Co.*, 323 Mo. 1089, 20 S.W. (2d) 494 (1929).

²¹ Holmes, *Collected Legal Papers* (1920), 49; 4 Harv. L. Rev. 345 (1891); 5 Harv. L. Rev. 1 (1891).

²² Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 383, 441 (1894).

²³ Holmes, *supra* note 20. ". . . in modern days these doctrines have been generalized into a fiction, which, although nothing in the world but a form of words, has reacted upon the law and hastened to carry its anomalies still farther. That fiction is, of course, that, within the scope of the agency, principal and agent are one."

is selected, how rigorous the rules for its direction, or what supervision is provided, the employer is being held increasingly for the torts of his employees.²⁴ Indeed, with the advent of the large corporation—absentee ownership—employer control in any realistic sense almost vanished. And, while the sop thrown to the employer, that he at least has the “right to control” the work, may serve to keep the principle verbally intact, it fails to conceal the fact that it is obvious rationalism. In all honesty it should be admitted that there are now large areas of employer responsibility which cannot be accounted for realistically upon a fault rationalization.

What the actual philosophy behind this advance has been is not open to exact demonstration. From almost the beginning, however, there has been discernible another theory of responsibility; possibly it antedates the present notion of control or fault as a basis of liability. For instance, in *Hamlyn v. Houston & Co.*,²⁵ where defendants’ partner who was to get trade information for the firm bribed one of the plaintiff’s clerks, the court said:

“The principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and *who will have the benefits of his efforts if successful*, should bear the risk of his exceeding his authority. . . .”²⁶

This matter of profit, it is true, has not often been so openly adverted to, yet one may be fairly sure that both lawyer and laymen through the years have been quite well aware that in general the rule of vicarious responsibility has served to give access to the “deepest pocket;”²⁷ the courts, whatever they may profess, have actually tried to observe the principle that legal duties must have some relation to ability to pay.²⁸

The triumph of this idea, of course, came with adoption of the workman’s compensation statutes, which were promoted on the principle, or

²⁴ A great many illustrations could be given. The modern cases holding the employer responsible for *wilful* torts, contrary to the earlier decisions, are an illustration. See *Son v. Hartford Ice Cream Co.*, 102 Conn. 696, 129 Atl. 778 (1925). Again the recent trend toward holding the employer liable, possibly in contract, where his agent has fraudulently issued bills of lading without receiving goods, is a case in point. The older decisions denying recovery were put on the agent’s lack of “authority.” See *Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349 (1929).

²⁵ [1903] 1 K. B. 81.

²⁶ [1903] 1 K. B. 81, 85.

²⁷ “In hard fact, the real reason for employers’ liability . . . is the damages are taken from a deep pocket. The present is not a very propitious time for withstanding a dogma based on such a principle. But a return to simpler manners will probably bring with it a return to saner views of liability, even if it is not sooner recognized that to injure capital is to injure industry.” *Baty, Vicarious Liability* (1916), 154.

²⁸ As the legislatures are supposed to do in levying the “good” tax.

slogan, that "the risks of industry should be borne by industry."²⁹ The movement frankly recognized that the assumption of Shaw, J., in the *Farwell* case,³⁰ that wages bargained for by the employee were presumably proportioned to the risk involved in the work, was simply not true in fact. It recognized further, pragmatically, that some means must be provided to care for human wreckage; the day of state insurance and the Townsend plan had not yet dawned. Further, on the fault side, there was more than a suspicion that possibly more could be done than was currently being done by employers to avoid injuries. And it was only too obvious that the legal machinery had reached such a tangle as to be hopelessly slow and uneconomic, when it functioned at all.

What the practical repercussion of all this is to be on the independent contractor, is problematical. The evidence presented to show that profit taking on the part of the employer ever had a bearing in determining his status, is of the slenderest sort, at best merely inferences from the fact that lump sum payments are often made to the contractor and that he usually occupies a distinct calling, matters at most only consistent with there being some financial competence on his part. Although, in the lent servant cases there has been language indicating that responsibility turned on "whose work" was being done, it has too often been coupled with lapses into control philosophy to be persuasive.³¹ There is coming to be considerable evidence, however, that the courts, under stress of bringing a contractor within the servant class for purposes of giving a workmen's

²⁹ "To say with the appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burden." *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L.R.A. 1916A, 358, Ann. Cas. 1915D, 154 (1913). And see generally, Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105 (1916).

³⁰ *Farwell v. Boston & W. R. Corporation*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339 (1842).

³¹ For instance the court in *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909), said: ". . . we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and to direct the servants in the performance of their work." It was decided that a winchman employed by a shipowner to hoist freight as directed by a stevedore was merely "cooperating" with him and that he was not acting subject to the stevedore's "control." *Cardozo, J., in Charles v. Barrett*, 233 N.Y. 127, 135 N.E. 199 (1922), another lent servant case, had this to say:

"The rule now is that, as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division."

compensation recovery, will actually accomplish a change in the definition, however carefully the verbal framework may be preserved.³²

At most, then, we have merely succeeded so far in identifying two of the possible hereditary factors determining the independent contractor. The first, control, may be called the risk prevention factor and the second, the matter of who stands to profit by the enterprise, the risk shifting or distribution factor. Although the question may then be phrased in terms of who should bear the risk, that in reality has been the question from the first. The proponents of the entrepreneur test³³ thought to answer the question with certainty by resort to the "scientific method" of the physical sciences, though why they saw fit to wrest the word *entrepreneur* from its peaceful setting in classical economics to rename the independent contractor is not clear. Four distinguishing "earmarks," supposedly things which could be counted or measured, were more or less arbitrarily seized upon with the idea that, a majority being found with one enterprise or another, it could be said that the particular "function" in question had been "lopped off" from the one and "allocated" to the other.³⁴ It followed, by hypothesis, that the one so found to be conducting the work in question was the entrepreneur, alias risk bearer, alias independent contractor, for the occasion.³⁵ Though a gallant effort, the principal success of the entrepreneur test lay in showing how hopelessly unworkable is the scientific method as a basis of decision in law; "earmarks" are not fixed quantities nor, even so, can their weight and consequence be assumed for all time.

There is but one further hope of attaining certainty, apparently, and

³² See, for example, *Le Blanc v. Nye Motor Co.*, 102 Vt. 194, 147 Atl. 265 (1929), holding an automobile salesman to be an employee and not a contractor, since the defendant company "had complete control *respecting the terms of all sales*, unless, perhaps sales for cash. While it appears that it exercised no control over claimants work in other particulars, it does not appear that it did not have the *right* to do so." And see, also, *Aisenberg v. C. F. Adams Co., Inc.*, 95 Conn. 419, 111 Atl. 591 (1920).

³³ Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L. J. 584 (1929); Smith, *Frolic and Detour*, 23 Col. L. Rev. 444 (1923); Tiffany, *Agency* (Powell's 2d ed. 1924), 100-105.

³⁴ "The problem is to find if there has been an agreement in fact to lop off the particular function in question from one person's enterprise and to allocate it to another." Douglas, *supra* note 33, at 597.

³⁵ But it must be said that Douglas later states (*supra* note 33, at 603) that the "four earmark test" would only be useful in some indefinite preliminary stage of the proceedings and that in the final analysis the "problem would take on a sociological aspect" to be considered in terms of risk prevention and risk distribution.

that is, as has been suggested by eminent authority, an appeal to the principles of "the rational sciences of Ethics and Politics."³⁶ Or perhaps, since the aim of Ethics and Politics, as of Law, is said to be the "Good Life," the real inquiry is: What are the principles of the Good Life applying to the case? What for example, to take a concrete case, are the principles of the Good Life as regards the householder, the plumbing contractor, the plumber's helper, and the plaintiff whom the helper may have run over in his haste? Perhaps the question can be as easily answered by asking, what is Justice?—equally entitled to be spelled with capital letters,—as the courts have traditionally done, and with the degree of success which has been observed. The rational science of Ethics, at least, would seem to have no carefully formulated principle to offer upon so prosaic a person as the plumbing contractor; indeed, I suspect it has never so much as considered his specific problems.

One is tempted to say the same of the rational science of Politics, for it certainly does not offer any ready made answer to particular problems, nor for that matter any single "frame of reference" by which to test an answer. Still, we have advanced since the day of Blackstone and the rationalists,³⁷ when the law as it then existed was regarded as the perfection of all reason. We have come to recognize with Austin that one of the functions of the courts is to legislate, as witness the whole structure of the common law, and that not all of their work is perfection. But whether to go farther and adopt Bentham's philosophy that law exists to provide the greatest happiness for the whole community, for example, is quite another matter. There are many conflicting political principles. In spite of the recrudescence of the Bentham philosophy in the current scene,³⁸ those who with Alexander Hamilton seek to promote a high degree of wealth and possibly of culture also in a privileged group, building necessarily upon a greater or less degree of exploitation of the rest of the population, are far from being entirely quiescent.

The overwhelming political, economic and social objective of the past century has been commercial exploitation, more euphemistically spoken

³⁶ Hutchins, *The Autobiography of an Ex-Law Student*, 1 *Univ. Chi. L. Rev.* 511 (1934), 7 *Am. L. School Rev.* 1051 (1934). Dr. Beard would substitute "esthetics" for "politics" as a guide without emphasis upon the "rational" principles thereof, if any. *The Open Door at Home* (1934), c. 1.

³⁷ Commons, in his *Institutional Economics* (1934), c. VI, has an interesting discourse on Bentham versus Blackstone.

³⁸ See Chase, *Government in Business*, 41 *Current History* 641-659 (1935).

of as "progress."³⁹ The rights of property so carefully stipulated for by the founding fathers to safeguard an individualistic society of landowners and small tradesmen⁴⁰ have been taken over and made the chief protection of the modern combination,⁴¹ having entirely different purposes and recognizing few responsibilities, all in the interest of progress. To promote the early mills of New England the courts violently opposed the rule in *Rylands v. Fletcher*⁴² in the first labor cases the right to combination had to give way to what was deemed best for business;⁴³ in the *Farwell* case,⁴⁴ establishing the fellow servant rule, Shaw, J., was obviously moved by the need of freeing railroads and businesses generally of responsibility for injuries to employees. At hand in each case was the material in the form of an extreme individualistic philosophy with which to shape the result. Thus, so far from being unaware of the rational science of politics, the courts have been one of its chief executive agents. At times, almost, it has been necessary to cut and measure the rational sciences to fit the decisions—if it is not blasphemy to suggest such a thing.⁴⁵ It can hardly be said that certainty lies that way.

The part the independent contractor has played is a further striking illustration of the imperative quality of this demand for progress. Actually he did not come into prominence, that is before the courts, until the nineteenth century was well advanced. In the last year of the eighteenth century the court in *Bush v. Steinman*⁴⁶ had held the employer liable for the negligence of a sub-contractor, but on quite uncertain grounds. With the great increase in business and industrial activity during the first half of the century contractors multiplied in numbers and variety. More-

³⁹ The procession of the economic and social sciences, including law, "in the general direction of progress" is described in considerable detail by Arnold, *Theories about Economic Theory*, 172 *Annals of Am. Academy of Pol. and Soc. Science* 26, 27 (1934).

⁴⁰ See Hamilton, *Property According to Locke*, 41 *Yale L. J.* 864-880 (1932).

⁴¹ Tawney, *The Acquisitive Society* (1920), c. 2.

⁴² Bohlen in his study, *The Rule in Rylands v. Fletcher*, 59 *U. of Penn. L. Rev.* 298 (1911), beginning at 313, has done a nicer job of analyzing this fragment of "law" in the light of its social and economic function than have the new realists with respect to anything as yet. Generally as to the new realists see Fuller, *American Legal Realism*, 82 *U. of Pa. L. Rev.* 429 (1934).

⁴³ Nelles, *The First American Labor Case*, 41 *Yale L. J.* 165 (1931).

⁴⁴ *Supra* note 30.

⁴⁵ That the courts have at times been in advance of the prevailing ethical and political standards of their time does not admit of doubt. See Radin, *The Lawful Pursuit of Gain* (1931), and, for a case example, the decision of Cardozo, J., in *Meinhard v. Salmon*, 249 *N.Y.* 458, 164 *N.E.* 545, 62 *A.L.R.* 1 (1928).

⁴⁶ 1 *Bos. & Pul.* 404, 126 *Eng. Reprint* 978 (1799).

over, possibly because corporate charters with limited liability were yet difficult to obtain, he offered the best means available for those having things to do, to hire skilled services without responsibility. It would have been inconceivable that any court, caught in this storm of expansion and imbued with the ideas of rugged individualism then current, could have done other than find the law necessary to make the contractor's business thrive and to encourage immensely his employer. That this rigorous philosophy may have proven a bit harsh at times to those who lived on the wrong side of the railroad tracks was just too bad, but it simply could not be helped. Only gradually have doubts and exceptions crept in.

It is evident, however, that this line of inquiry, so far from describing accurately who the independent contractor is, has really served to confuse his identification, though perhaps his antecedents are somewhat clearer. One difficulty, it seems, is that he, like most legal personages, is a round-about way of fixing or limiting responsibility.⁴⁷ Probably it is desirable, therefore, to agree, more or less arbitrarily, that all business *organizations* which may be employed are independent contractors. The problem of fixing the employer's responsibility may then be taken up as a separate matter item by item, each on its own merits. This way of looking at the thing discloses at once that there has been a singular lack of perspective, a failure to canvass the various elements of possible liability to the employer. One gets a distorted picture of the contractor seeing him only through the "inherent danger" category, for after all, even assuming that the term independent contractor must connote a measure of insulation to the employer, it is a rare organization that does not afford insulation in some degree.

The most obvious illustration concerns the rights of the contractor's employees. No matter how ready a court may be to give a third person, who has been injured by an employee's negligence, a cause of action against the employer, it has ordinarily been clear that the employee could look only to the contractor for his wages.⁴⁸ This has provided a very important insulation, particularly where the contractor has been insufficiently financed.⁴⁹ Even in the "lent" servant cases it has been true, although

⁴⁷ See Llewellyn's attack upon the "title" concept, which functions in a similar way in sales law, although his confusion of physical facts with legal conclusions at times leaves one in doubt. Llewellyn, *Cases and Materials on Sales* (1930), 562.

⁴⁸ It is difficult to establish this on authority as both cases do not come up at once. See generally *James Bradford Co. v. Edward Hill's Son & Co.*, 31 Del. 546, 116 Atl. 353 (1922).

⁴⁹ Of course in the building industry the mechanics' and materialmen's lien statutes have been a great protection to workmen and third persons—and an expense to the employer. So also, in many states, the workmen's compensation statutes have provisions whereby the general

they have shown some disposition, where the employee has himself been injured, to give a remedy for workmen's compensation against either contractor or general employer.⁵⁰ Only in the "inherent danger" case, has the employee, like the injured third person, been able to break through in recent years to subject the employer to responsibility.⁵¹ In the converse case, where the employer has sought to hold employees of the contractor directly responsible for negligence, there likewise has been immunity,⁵² although there has been some indication that a dual fiduciary responsibility may be imposed.⁵³ Though these are but commonplaces of organization law, in large measure dictated by notions of privity of contract, they indicate that the tort problem is by no means the only question of insulation to be considered.

Though torts are torts and contracts are something else again, a loss on one score is as expensive to the employer as one on the other. This being true, do the same reasons exist in one case as in the other for "piercing the veil" of the "independent contractor?"—if I may use a phrase not altogether respectable but at least current in the corporation field.⁵⁴ The contract case would seem to be much weaker, not only because the third person has an opportunity, usually denied the tort creditor, to ascertain with whom he is dealing, but, since his loss is a pecuniary one, there are not the same social values demanding recognition as in the personal injury cases. Nevertheless, the court, in *North Carolina Lumber*

employer may be held liable to employees of the contractor for workmen's compensation. See *Fox v. Fafnir Bearing Co. et al.*, 107 Conn. 189, 139 Atl. 778, 58 A.L.R. 861 (1928). At times, for the same purpose, the court has been willing to strain a point to find no independent contractor relation existing. *Franks v. Carpenter et al.*, 192 Iowa 1398, 186 N.W. 647 (1922).

⁵⁰ Emotionally good law but unnecessarily expensive since it is usual to insure such risks and not both employers should be expected to do so. *Famous Players Lasky Corporation v. Industrial Accident Commission*, 194 Cal. 134, 228 Pac. 5, 34 A.L.R. 765 (1924). It is now provided by statute in Connecticut as follows: "When the services of a workman shall be temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service, the latter shall, for the purposes of the workmen's compensation act, be deemed to continue to be the employer of such workman while he is so lent [to] or hired by another." Conn. Laws (1931) c. 280, § 1121b.

⁵¹ *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W. (2d) 617 (1928); *Greer v. Callahan Const. Co.*, 190 N.C. 632, 130 S.E. 739 (1925). But see generally *Schip v. Pabst Brewing Co.*, 64 Minn. 22, 66 N.W. 3 (1896).

⁵² *Gilpin v. Columbia Nat. Bank*, 220 N.Y. 406, 115 N.E. 982, L.R.A. 1917F, 864 (1917). And see *Ultramares Corporation v. Touche*, 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139 (1931).

⁵³ *Powell & Thomas v. Evan Jones & Co.*, [1905] 1 K.B. 11.

⁵⁴ See *Wormser, Piercing the Veil of the Corporate Entity*, 12 Col. L. Rev. 496 (1912).

Co. v. Spear Motor Co.,⁵⁵ put both matters on the same footing; since there was that measure of "control" which would make the contractor a "servant" in the personal injury case, it followed, so the court said, that he was an "agent" in the contract case, and the employer accordingly must pay for materials furnished for the job.

This change of dress from "servant" to "agent" is not alone so disquieting. It, of course, has long been possible for the "independent contractor," without causing undue comment,⁵⁶ to appear also in the guise of an "agent," as witness the factors, brokers, banks and other similar organizations which act to change the contractual relations of their employers by buying or selling goods or stock or collecting commercial paper, and yet which are solely responsible not only for the wages of their employees but for their torts as well.⁵⁷ There is a possibility, in fact, that the modern management company can perform the unparalleled feat of occupying the dress of all three categories at once, though according to high authority this is not possible in the nature of things.⁵⁸ The company functions as a contractor so far as wage claims of its employees are concerned, for example, but since the whole contractor organization occupies the status of a manager, or servant, in the employer's organization, the latter should be liable for any acts of the contractor or his organization *qua* manager.⁵⁹ Of course this is dialectically what happens when the "agent" type of "independent contractor" subjects the employer to liability for false representations made in connection with an authorized sale.

There was one circumstance in the *Spear Motor Co.* case, however, which deserves particular attention; the contract was on a ten per cent

⁵⁵ 192 N.C. 377, 135 S.E. 115 (1926). See also *Seales v. First State Bank*, 88 Ore. 490, 172 Pac. 499 (1918), and *Lambert v. Phillip*, 109 Va. 632, 64 S.E. 945 (1909). The court in the latter case says the contractor may have shielded the employer from tort claims and yet subjected him to responsibility for material and wage claims.

⁵⁶ See 22 Ill. L. Rev. 181 (1927), for an interesting comment on this use of terms.

⁵⁷ Though the employer would be liable for torts, such as false representations, which are intimately connected with the contract remedy or may be said to run with the contract. See *Hannon v. Siegel-Cooper Co.*, 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 429 (1901). But compare *Friedman v. New York Telephone Co.*, 256 N.Y. 392, 176 N.E. 543 (1931).

⁵⁸ Restatement, Agency (1933) § 220. But it should be said that this section was probably drafted with the individual rather than the organization contractor in mind.

⁵⁹ See the opinion of Swan, J., in *Costan v. Manila Electric Co. et al.*, 24 F. (2d) 383 (C.C.A. 2d 1928), dismissing the third person's tort claim against the J. G. White Management Corporation on the ground that it was merely a manager and not a proprietor. No case has been found going the full length of the text statement. See further *Zurich General Acc. & Liability Ins. Co. v. Watson Elevator Co.*, 253 N.Y. 404, 171 N.E. 688 (1930).

cost plus basis. As the court pointed out, this made for considerable day by day control of the work, but surely no greater in total than if all plans and specifications had been settled in advance—and none whatever of the *means* of doing the work. The possibly significant feature of the arrangement, however, though this the court seemed not to consider material, was that the employer took the speculative risk of the work; if by cutting corners or plain good fortune the work progressed rapidly or should the costs of materials fall, the employer alone stood to gain and, in the converse case, to lose. Since the employer could be said to have contracted for the gross benefits of the undertaking it may be contended he should bear the losses. But is this profit matter a factor here, as in the “servant” cases, to show that the contractor was an “agent”? After all, when *is* an agent? The cost plus cases afford no certain answer.⁶⁰

The orthodox dialectical approach has been to square the “agent” with the contract rationalization of offer and acceptance, as is natural since by definition he is one who changes the *contractual* relations of his principal. Accordingly, therefore, he is said to function as a manifestation of his employers’ consent,⁶¹ which is entirely consistent with the “control” idea in the “servant” cases. Even the rapidly growing “apparent authority” doctrine fits in, for here the employer is said at least to have manifested his consent to the third person,⁶² though he may have emphatically told his agent not to act in the circumstances. But with acceptance of the objective theory of contracts an opening wedge was driven into the generalization that “contract” is a wholly consensual relationship; subjective intent at least is no longer controlling. The reluctant recognition of the once “anomalous” undisclosed principal doctrine,⁶³ dictated in part by the possibility in its absence of a person profiting by a venture without being subjected to any very immediate responsibility therefor,⁶⁴ made the opening much wider, for in such case the third person has no intention at all of dealing with the principal. But these and the other cases to

⁶⁰ See *Kruse v. Revelson*, 115 Ohio St. 594, 155 N.E. 137, 55 A.L.R. 289 (1927) (claim for labor and material against employer denied); *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N.W. 816, 19 A.L.R. 1141 (1917) (workmen’s compensation denied to cost plus contractor). But see *Cowles v. J. C. Mardis Co.*, 192 Iowa 890, 181 N.W. 872 (1921); *McCormick Lumber Co. v. O’Brien*, 90 Cal. App. 776, 266 Pac. 594 (1928); and *Gilbert Mfg. Co. v. Connellee*, 265 S.W. 375 (Comm. App. Tex. Sec. A 1924).

⁶¹ Restatement, Agency (1933), § 7.

⁶² *Ibid.* § 8.

⁶³ Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 Yale L. J. 443 (1909).

⁶⁴ See, for example, *Bankers Surety Co. v. Willow Springs Beverage Co.*, 104 Neb. 173, 176 N.W. 82 (1920).

which the contract remedy is being extended⁶⁵ in the absence of consent are probably due fully as much to the supposed need of certainty in commercial transactions as to any notion that the one receiving the benefits of a transaction should respond to creditors. It is evident, however, that there is no sanctity *per se* in contract as a remedy over that of tort; either may be used as occasion demands.

If one steps over the very real but imaginary line dividing the supposedly precise "contract" concept from that of "partnership," an entirely different climate is encountered. The early case of *Waugh v. Carver*⁶⁶ must very materially have cooled the ardour of the enterpriser of that day intent on business expansion. It seems that two ship agents, one in Portsmouth and the other to establish himself at Cowes, had agreed to share the profits of their businesses in certain stipulated proportions. Neither party was to have any control over the other's affairs, nor was either to have any responsibility for the other's losses—or at least so the parties agreed—but each was to aid the other where possible by sending him business. The action grew out of a sale of goods to one of the businesses. On accepted contract rationalization today there would seem to be no basis whatever for recovery in *assumpsit* against the other business; neither party had subjectively or otherwise intended such a result. But the court was quite clear that:

"he who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts."⁶⁷

And in such emergency *assumpsit* followed as a matter of course.

Of course the ready answer today is that this matter of profit-sharing as a self sufficient basis of responsibility—whether in contract or otherwise—is no longer good partnership law. But it was not until some 60 odd years after *Waugh v. Carver* that the House of Lords in *Cox v. Hickman*⁶⁸ purported to cast aside the doctrine and put recovery, verbally at least, on an agency-control basis instead. Since that time the courts have seemed almost to go out of their way—perhaps they protest too much—

⁶⁵ For example, §§ 20 and 137, N.I.L., operate to give a contract recovery regardless of intention. See particularly *New Georgia Nat. Bank v. J. & G. Lippmann*, 249 N.Y. 307, 164 N.E. 108, 60 A.L.R. 1344 (1928). And then there is the expansible § 90. Restatement, Contracts (1932)

⁶⁶ 2 H. Bl. 235 (1793).

⁶⁷ 2 H. Bl. 235, 247 (1793).

⁶⁸ 8 H. L. Cas. 268, 11 Eng. Reprint 431 (1860). See also *Wells-Stone Mercantile Co. v. Grover*, 7 N.D. 460, 75 N.W. 911, 41 L.R.A. 252 (1898).

to say that profit sharing is no longer a conclusive test of partnership. The important thing, however, is not what the law now is, but rather to inquire why it ever changed. *Cox v. Hickman* came about the time, perhaps somewhat after, the independent contractor had reached his fullest stature. Also it never quite succeeded in eliminating the profit element as a recognized basis of liability, for profit sharing is admittedly still an important test of partnership today.⁶⁹ It is a fair surmise that the result here, as with the independent contractor, grew out of a desire of the time to encourage enterprise, even at considerable cost to those unfortunate enough to get in the way of progress.

The result for present purposes is that the employer may without warning find his independent contractor wearing still another dress, that of a "partner" or, if the occasion is less formal, that of a "joint adventurer." His appearance, moreover, is as disappointing to the employer in the one case as in the other. The decision in *Keiswetter v. Rubenstein*⁷⁰ is illustrative. The defendant there, who owned certain lots, had arranged with a building contractor to erect some small houses upon them. Defendant was to furnish some money to carry on the job and the contractor, who had his own organization and equipment, was to do the construction, each having control of his own part in the enterprise and each to share in profits upon sale of the completed houses. Though the court purported to find some elements of control present, it was ready apparently to hold the employer liable for the contractor's negligence upon the ground alone that "each was acting for both in furtherance of their joint adventure, or enterprise, for their mutual profit." While this was a tort case, one of the houses having collapsed on the plaintiff, it is difficult to see why a contract action would result any more favorably to the employer, assuming the same rationalization were to be adopted by the court.

The difference between such a case and the long since repudiated case of *Waugh v. Carver* is almost imperceptible, barring the fact that the older case shows the better craftsmanship. But, at that, the invention of the phrase "joint adventure," whereby a court can at one stride escape the rigidity of the statutory definition of partnership,⁷¹ and, at the next, re-

⁶⁹ Uniform Partnership Act, § 7 (4).

⁷⁰ 235 Mich. 36, 209 N.W. 154, 48 A.L.R. 1049 (1926). In contrast with this case the court in *Walker, Mosby & Calvert, Inc. v. Burgess*, 153 Va. 779, 151 S.E. 165 (1930), reached an opposite result on similar facts using a partnership rationalization.

⁷¹ "A partnership is an association of two or more persons to carry on as co-owners a business for profit." § 6 (1) U.P.A. In many cases it is difficult to show that anything like a "business" is being "carried on" by the parties as "co-owners." See discussion, Mechem, *The Law of Joint Adventures*, 15 Minn. L. Rev. 644 (1931).

turn unannounced to the earlier basis of liability, shows that modern courts, at least, are still not lacking in ingenuity. Why there has been such a trend to the "joint adventure" category, however, is quite another matter. Perhaps it comes from a desire to charge enterprise, whether in tort or contract, somewhat more often with the results of its doings than heretofore, with the consequent recognition that profit sharing, or ability to pay, is fully as important a guide to responsibility in such case as control.

It is evident that the independent contractor is far from being the dependable fellow he once was; so far from affording insulation he seems almost to have become an invitation to hold the employer liable. Should he, therefore, be wholly abandoned? An examination of what part of the world's work he performs daily is revealing. He has been busy. He is the builder, the broker, the stevedore, the factor, the hostler, the architect, the warehouseman; he paints your house, repairs your automobile, washes your windows, handles your collections, sells your real estate, procures your divorce and so on *ad infinitum*. He is the small business man incarnate, the last stubborn refuge of rugged individualism. It is simply impossible to say that he is to pass from the scene and give way to a "servant" class, in either a lay or law sense, nor is it incumbent upon the employer, ordinarily, to question him closely as to his competence or as to his financial ability, as a condition of immunity. Indeed, it is a fair guess that by and large he is financially better able to absorb losses, as he certainly is better able to prevent them, than the individual employer himself would be.

Which lets the cat out of the bag. The emotional drive, at least, is directed not against the individual, who in common with the rest of the community makes occasional use of the contractor, but against the business enterprise which seeks to monopolize his services—and the protection he affords—as a continuous part of its business. It is only where such employers have been able to muddy the water by use of still other concepts that insulation continues relatively secure. The manufacturer-dealer setup is a case in point.⁷² There the contractor may become a "buyer" and behind the magic word "sale" it has been possible for the manufacturer to assert a very great deal of control,—of advertising, of accounting, of sales terms, of quantities to be sold, of methods of sale and delivery. The dealer's right to territory is usually contingent upon a certain business being done. And, on the profit side, not only are the terms of sale to the dealer fixed by the manufacturer but, practically speaking, those of sale

⁷² Isaacs, *The Dealer-Purchaser*, 1 *Univ. of Cin. L. Rev.* 373 (1927).

by dealer to customer as well, the difference being a relatively fixed and narrow margin which the dealer keeps as his profit, so-called. Even the "title" of the "buyer" to the goods he sells has become an extremely attenuated thing.

So far from being a rugged individualist, a man of property, the local merchant has thus become little more than a mere outpost of big business, a keeper of the toll gate, so to speak.⁷³ He is not expected to receive much more than a subsistence moiety of the profits, and yet is to absorb the risks involved in consumer distribution. The practice of selling packaged trade-name goods behind a barrage of national advertising operates to hold the dealer at his post; there is no demand for other goods. There is, however, one bright spot in his life. The Sales Act, § 15(4), humanely relieves him of any warranty of fitness for a special purpose in handling such merchandise—and as for the manufacturer, privity of contract is a bulwark of protection, for it must not be forgotten that the goods are "sold" to the dealer. As might be expected, the customer, left to absorb his own losses, has attacked the manufacturer's position on a wide line and with some success. The now celebrated *Buick* case⁷⁴ broke down the privity of contract defense in a limited tort area, making use of the "inherent danger" category. Suits in contract upon warranty, more recently, have been winning through to the manufacturer where the court has been persuaded to see the dealer as an "agent."⁷⁵ Indeed, there is some intimation that the third party beneficiary doctrine may be conscripted in aid of the consuming public.⁷⁶

These cases involve risks having to do with the goods; the large number of loose risks, those having to do with credit extensions, with accidents in the course of delivering goods, and so on, are scarcely in issue as yet. But even here there have been some inroads made on the tort side. The case of the oil companies, needing as they do thousands of outlets through-

⁷³ Veblen, *Absentee Ownership* (1923), particularly c. VII. For a good example of an unsuccessful attempt to make a route salesman look like a substantial merchant, by use of the word "sale," see *Glielmi v. Netherland Dairy Co., Inc.*, 254 N.Y. 60, 171 N.E. 906 (1930).

⁷⁴ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann. Cas. 1916C, 440 (1916).

⁷⁵ *Baxter v. Ford Motor Co. et al.*, 168 Wash. 456, 12 P. (2d) 409, 88 A.L.R. 521 (1932).

⁷⁶ Particularly in the food cases. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928). Here the court said:

"Whatever implied warranty arises in favor of the groceryman, who established the contractual relationship with the Baking Company, is for the benefit of this third party, namely, the ultimate consumer." And see *Coco-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927).

out the country, is an example.⁷⁷ One plan is to "sell" the gas and other products to the station operator, sale to the public being at company prices, and the station operator then in turn engages and pays his own organization to do the work, though subject to more or less control as to the type of men employed. The station may be owned by the company and "leased" to the operator, or owned by the latter with only the pumps owned by the company. Trucks and other equipment are often owned by the operator, possibly as part of a garage business. The oil company's advertising is prominently displayed at the station. So far, the weight of the cases passing upon this state of affairs is clearly in favor of sustaining the dealer as a "buyer" and an "independent contractor" in full vigor,⁷⁸ but the question is by no means at rest.⁷⁹

Another good common law device affording protective coloration to the cautious or unduly acquisitive business man is the lease. It is particularly useful in those businesses dealing in services. The owner of a hotel property "leases" it to a contractor and as one of the terms of lease stipulates for certain control as to the way the business is to be conducted, possibly that certain employees are to be hired, the prices of rooms and so on. Now it is fairly clear that, in the usual case where property is leased upon a fixed rental, the landlord's responsibility to the public is supposed to turn on "control"; where control has been surrendered to the lessee there is no liability⁸⁰—except for nuisances existing upon the property when leased or situations once more which involve "inherent danger." And it would seem, even if a rental proportioned to the earnings of the property were to be stipulated for, as is currently being done, the result⁸¹ both in tort and in contract would be the same—upon the principle perhaps that one who is once a "lessee" is always a "lessee."

⁷⁷ For a description of the organization set-up, see *Fox v. Standard Oil Co. of New Jersey*, 55 S. Ct. 333 (1935), holding constitutional a tax graduated according to the number of units under one management.

⁷⁸ *Texas Co. v. Brice*, 26 F. (2d) 164 (C.C.A. 6th 1928), and cases there cited.

⁷⁹ *Gulf Refining Co. of Louisiana v. Huffman & Weakley*, 155 Tenn. 580, 297 S.W. 199 (1927).

⁸⁰ *Berkowitz v. Winston*, 193 N.E. 343 (Ohio 1934); *Shellman v. Hershey*, 31 Cal. App. 641, 161 Pac. 132 (1916) (nuisance alleged). Nor has any court seen fit in recent years to extend liability to the landlord for the reason that he may be in default upon a covenant to repair. *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931). It is interesting that the early case to the contrary, *Payne v. Rogers*, 2 H. Bl. 350 (1794), like the repudiated cases of *Waugh v. Carver*, *supra* note 66, and *Bush v. Steinman*, *supra* note 45, were all decided within only a few years of each other in the 1790's.

⁸¹ No inference of partnership shall be drawn from the fact that a person receives a share of the profits of a business "as rent to a landlord." Uniform Partnership Act § 7 (4)(b). But

Almost, therefore, the perfect setting for the independent contractor has been found. All that is needed is to "mortgage" the property to the hilt, "lease" it to the contractor, and take the profits of the enterprise as "rent," except for a certain small amount needed to keep the contractor contented, or, that is, quiet.⁸² As "security" for the rental payment, moreover, a very considerable hand can be taken in the management of the business.⁸³ Should the "lessee" become unable to pay his contract creditors or should the operation result in serious tort liabilities to third persons, it is only necessary to get another "contractor" and announce that business will proceed as usual under "new management." Scarcely an exemplification of the good life and probably not good business in the Rotarian sense, but with the contractor disguised as a "lessee," the element of control appearing as "security," and profit-taking masquerading as "rent," a fair chance of "getting by," at least for a time, is assured.

It may be observed that the lease in such cases actually covers only the fixed property, the business being something else again. Thus the "lessee" might reasonably be held solely liable for risks having to do with the premises, and the lessor, as "employer," "partner" or "joint adventurer," for risks growing out of the business. But the courts have difficulty with such split personalities, this is still a black or white world for the most part, and there is little authority for the suggestion.⁸⁴ The large number of "share-cropper" tenancies, possibly because the line between

no guide is given as to when receipts are "rent" and when "profits." Moreover, there is no specific recognition that rentals may "vary with the profits of the business," as is provided in the case of interest. Uniform Partnership Act, § 7 (4)(d). See *Dake v. Butler et al.*, 7 Misc. 302, 28 N.Y. Supp. 134 (1894) holding that a landlord's share in net profits did not give rise to partnership liability in contract.

⁸² It has even been held possible for a mine owner to "lease" his property to a foreman and thus avoid liability to miners engaged in working the mine. *Laffery v. United States Gypsum Co.*, 83 Kan. 349, 111 Pac. 498, 45 L.R.A. (N.S.) 930, Ann. Cas. 1912A, 590 (1910).

⁸³ *H. T. Hackney Co. v. Robert E. Lee Hotel*, 156 Tenn. 342, 300 S.W. 1 (1927); *Parker v. Fergus*, 43 Ill. 437 (1867); *Drilling v. Armstrong*, 94 Ark. 505, 127 S.W. 725 (1910); *McDonnell v. Battle House Co.*, 67 Ala. 90, 42 Am. Rep. 99 (1880); *Austin, Nichols & Co. v. Neil*, 62 N.J. Law 462, 41 Atl. 834 (1898). But see *Merrall v. Dobbins*, 169 Pa. 480, 32 Atl. 578 (1895), and *Oriental Investment Co. v. Barclay*, 25 Tex. Civ. App. 543, 64 S.W. 80 (1901).

⁸⁴ Cases where the owner of an automobile puts it in the possession of a contractor to operate on a profit sharing basis should afford an illustration. But even where the cause of action grows out of the operation of the car, tort as contrasted with contract, the courts are by no means in accord. See *Jarvis v. Wallace*, 139 Va. 171, 123 S.E. 374 (1924) (denying recovery) and *Hackney v. Dudley*, 216 Ala. 400, 113 So. 401 (1927) (allowing recovery). Of course where the owner's name is used third persons relying upon it may have an action against the owner on principles of estoppel. See *Rhone v. Try Me Cab Co.*, 65 F. (2d) 834 (App. D.C. 1933), and 33 Mich. L. Rev. 287 (1934) (comment).

risks concerning the premises and those growing out of the business is extremely difficult to draw, but more probably because the evidence of lessor control is lacking, usually result in exonerating the lessor from tort⁸⁵ and contract⁸⁶ responsibility. And, of course, if the lessor's name is held before the public, as in the department store cases,⁸⁷ where a particular department is put in charge of a contractor, or as in the amusement park concession cases,⁸⁸ the "lessor" comes under liability upon quite different principles.

It is the "lender," however, who plays the game with most finesse. Early and persistently challenged by the disciples of the Good Life as a "usurer" unworthy of a place in society, he has had a long struggle for existence.⁸⁹ But there have been compensations, for his position is now both legally⁹⁰ and ethically⁹¹ almost impregnable. It is true that he loans money to the contractor to start him in business,⁹² that he takes a sizeable share in the profits, which he calls "interest," and that he may on occasion assume a considerable control of the venture. But as long ago as *Cox v. Hickman*,⁹³ in fact, it was decided that the lender, though he may exercise control for purposes of "security," is not for that reason to be made liable as a partner.⁹⁴ The share in profits, it should be noted also, is a fixed and limited amount, a relatively virtuous position, thanks in

⁸⁵ See *Marsh v. Hand*, 120 N.Y. 315, 24 N.E. 463 (1890); *Florence v. Fox*, 193 Iowa 1174, 188 N.W. 966 (1922).

⁸⁶ See *Day v. Stevens*, 88 N.C. 83, 43 Am. Rep. 732 (1883); *Cedarberg v. Guernsey*, 12 S.D. 77, 80 N.W. 159 (1899).

⁸⁷ *Hannon v. Siegel-Cooper Co.*, 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 429 (1901); *Augusta Friedman's Shop, Inc. v. Yeates*, 216 Ala. 434, 113 So. 299 (1927); *Fields, Inc. v. Evans*, 36 Ohio App. 153, 172 N.E. 702 (1929).

⁸⁸ *Frear v. Manchester Traction, Light & Power Co.*, 83 N.H. 64, 139 Atl. 86, 61 A.L.R. 1280 (1927).

⁸⁹ See, for an account of the lender's struggle, *Hamilton, In re the Small Debtor*, 42 Yale L. J. 473 (1933).

⁹⁰ *Martin v. Peyton et al.*, 246 N.Y. 213, 158 N.E. 77 (1927).

⁹¹ Ethically—or at least politically—for there has never been a more persistent courtship than the wooing of the lender by the business man during the last century—though recent banker disclosures have been somewhat disillusioning.

⁹² That the lender may be held not to be an undisclosed principal in such case was decided by *Chase v. West*, 121 Me. 165, 116 Atl. 213 (1922), in spite of a considerable reservation of control.

⁹³ *Supra* note 68.

⁹⁴ Of course this position has not by any means been recognized in all cases. See *contra*, for example, *Purvis v. Butler*, 87 Mich. 248, 49 N.W. 564 (1891); *Righter v. Farrel*, 134 Pa. St. 482, 19 Atl. 687 (1890); *Furnace Run Saw Mill & Lumber Co. v. Heller Bros. Co.*, 84 Ohio St. 201, 95 N.E. 771 (1911). But see *Davis v. Patrick*, 122 U.S. 138 (1887).

part to the usury statutes.⁹⁵ And as for control, there are other and more effective methods of asserting control, ordinarily, than by crudely ordering certain work to be done in a certain manner; it is easier and less obvious to curtail credit extensions to the same end. Moreover, and this is said to be important, the lender may theoretically be paid off at any time;⁹⁶ he is not expected to take "a moiety of all the profits indefinitely," whatever the practice may be.

But it is doing the large banker-lender an injustice to intimate that he assumes such day by day control of a contractor that he should be liable to creditors of the business.⁹⁷ Where he has designs upon a business, they are much more far-reaching, as Mr. Ford would testify, the purpose too often being confiscation not management. By the use of loan and mortgage a situation can be brought about where those who dealt with the contractor in good faith are left sadder, most certainly, and too often very little wiser. By "calling" a loan at a critical juncture in a contractor's affairs his business may be brought to a standstill. One is tempted to suggest that the word "control" in the orthodox definition of the independent contractor be expanded only slightly to include "economic" control. After all there are various types of control and this may well be one of them. The suggestion has the virtue of requiring no change in the verbal statement of the law and yet gives actual recognition to the profit element, even as in *Waugh v. Carver*.⁹⁸ But it should be recognized fully that a step in this direction would be an affront to "progress" and the American system.

Standing squarely athwart the path of any such development, moreover, is the modern corporation, conceived in aid of piracy⁹⁹ and, though

⁹⁵ Though it is now provided in many states that corporation borrowers may not set up usury as a defense. See Paton's Digest of Legal Opinions (1926), § 2988a.

⁹⁶ And, where the "loan" ripens into a continuing stake in the business, the courts have not had much difficulty in subjecting the lender to partnership liability. *San Joaquin Light & Power Corporation v. Costaloupes*, 96 Cal. App. 322, 274 Pac. 84 (1929). See also *Styers v. Stirrat & Goetz Inv. Co.*, 65 Wash. 676, 113 Pac. 896 (1911), where an "employee" "lender" was held to be a partner for similar reasons.

⁹⁷ After he has taken over the business a different situation is presented and there have been cases holding the banker liable to subsequent creditors of the business. *Portsmouth Cotton Oil Refining Corporation v. Fourth National Bank*, 280 Fed. 879 (D.C. Ala. 1922), *affd.* 284 Fed. 718 (C.C.A. 5th 1922).

⁹⁸ *Supra* note 66.

⁹⁹ Powell, *Evolution of the Money Market* (1915) p. 163 *et seq.* "When the great expedition of Norris and Drake set sail in April, 1589, says Dr. Jessopp, it assumed the character of a mere joint-stock speculation, a huge piratical venture, to which the Queen contributed £20,000 and six ships."

blessed in the past century as the chief engine of progress, still possessed of some of its original characteristics. Why be harsh on the independent contractor way of doing things when, by incorporating the contractor and selling or giving a few odd shares in the enterprise to friendly outsiders in the interest of candor, everything can apparently be done as efficiently—and quite without responsibility? Of course one no doubt may not do murder by incorporating the assassin or commit any other “unlawful act,” but short of that there have been few restrictions. The “inherent danger” situation, for example, which has played such havoc with other relationships has scarcely had a hearing. The corporation was designed for the very purpose it is said of permitting the shareholder to avoid risks and so pre-eminently to avoid the serious ones.¹⁰⁰ That the concern may have paid rich profits through the years upon a minimum capitalization is simply not material—in fact it is good business—however little there may be left for creditors at a later day.¹⁰¹ And so far from recognizing that the shareholders perhaps owe some obligation to elect competent directors or to see that ordinary precautions of operation are taken, as the employer was charged with doing in *Bower v. Peate*, the subject is scarcely mentioned; they may apparently dictate the more dangerous course with impunity,¹⁰² though the dictation, it is true, is usually done negatively.

Looked at in the light of the preceding discussion the corporation is thus an amazing phenomenon. Of course the sailing has not been entirely clear, especially in recent years. But, as Hand, J., has pointed out,¹⁰³ shareholder liability has usually resulted only where the shareholder has

¹⁰⁰ In one of the very few cases where the point has been raised, the court said: “Indeed, it was hardly denied that one of the objects of forming a company [to manufacture D.N.P. during the war] was to seek to limit the liability of the contractor in respect of explosion. It was quite a legitimate object; but in my judgment, in a case of this kind, the law does not enable it to be achieved in the manner here adopted.” *Belvedere Fish Guano Co. v. Rainham Chemical Works*, [1920] 2 K.B. 487.

¹⁰¹ Of course nothing in corporation law is much better established, in theory, than that dividends may not be paid out of capital. *Wood v. Dummer*, 3 *Mason* 308 (1824). Yet the practice of starving the operating departments of a business, even though at increased hazard to workmen and the public, is scarcely so much as questioned in the cases.

¹⁰² Perhaps this overstates the matter. There have been a few cases holding the shareholder liable where he has voted for corporate action resulting in damage to third persons, as by inducing breach of contract, *Gulf C. & S. F. Ry. v. Cities Service Co.*, 281 *Fed. 214* (D.C. Del. 1922) though these are perhaps explainable on other grounds. It would be safer to leave the matter to the directors—perhaps with an informal hint or two—as such action by the directors would not be actionable ordinarily. See *Dangler v. Imperial Mach. Co.*, 11 *F. (2d)* 945 (C.C.A. 7th 1926); and *Said v. Butt*, [1920] 3 K.B. 497.

¹⁰³ *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 *F. (2d)* 265 (C.C.A. 2d 1929).

disregarded the formal "paraphernalia of incorporation" and intervened directly in his corporation's affairs. Intervention alone should make the intervenor personally liable for the acts in question on ordinary principles of *respondeat superior*,¹⁰⁴ and if sufficiently grave—possibly coupled with failure to observe the rites of formal shareholder or director meetings—might indicate that the shareholder had "swallowed" his corporation, so as to be liable for all of its obligations.¹⁰⁵ But why, from the viewpoint of society, meticulous care to respect all the formalities should make any particular difference, is nowhere indicated. In fact no one has been concerned. The corporation, viewed with hostility less than one hundred years ago, has now become the accepted way of doing things—provided the amenities are observed.

There has been a quantity of muddy thinking upon the matter, possibly induced in part by the romanticism of Marshall, C. J.; the corporation "is an artificial being, invisible, intangible, and existing only in contemplation of law. . . ." ¹⁰⁶ It has been less than 40 years since the House of Lords decided¹⁰⁷ that Salomon, a leather merchant, could incorporate his business and, though he owned all but 6 shares of the stock, not only be immune from personal liability to creditors but himself prove as a creditor of the business. Since that case a vast holding company structure has been erected relying upon it in part to establish shareholder immunity for subsidiary obligations. But it does not follow from the *Salomon* case that a man may incorporate a building company, for example, to erect his own house at a nominal price, and then be free to tell the creditors, when his house is finished, that it is just too bad that the

¹⁰⁴ There is a singular dearth of authority on the exact point. Even in the *ultra vires* cases where by parity of reasoning it would seem the majority shareholders should make themselves personally liable—assuming the corporation were held not liable—there is little authority. See Stevens, A Proposal as to the Codification and Restatement of the Ultra Vires Doctrine, 36 Yale L.J. 297 (1927).

¹⁰⁵ See Douglas and Shanks, Insulation from Liability through Subsidiary Corporations, 39 Yale L. J. 193 (1929), where most of the literature of the subject is cited. These writers make the point that insulation should follow as of course provided: (1) the subsidiary is capitalized "to carry the normal strains" upon it, (2) the day by day business record is kept separate, (3) there is no direct intervention in the management of the subsidiary and (4) the two units are not represented to the public as one. Of course this analysis proceeds upon the familiar basis that the two units are either wholly "assimilated" or quite separate, and largely ignores the possibility of a parent corporation being liable upon a particular transaction though not upon all transactions of the subsidiary. But much more serious, it further ignores the various uses to which the corporation may be put or denies that a difference in this regard is important.

¹⁰⁶ *Dartmouth College v. Woodward*, 4 Wheat. (U.S.) 518, 636 (1819).

¹⁰⁷ *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22. And see in accord, *Elenkrieg v. Siebrecht et al.*, 238 N.Y. 254, 144 N.E. 519, 34 A.L.R. 592 (1924).

company's assets are exhausted.¹⁰⁸ Nor is it material that all of the "paraphernalia of incorporation" may have been religiously observed. Merely because one is a "shareholder" should not obscure the fact that he may also be an "employer," and his corporation at most an independent contractor. Salomon's leather business, by contrast, had a chance of meeting its obligations by buying and selling on the market; the creditors at least had a run for their money. The courts, when cases of this character have come up, have said simply that they would not allow "injustice" to be done¹⁰⁹—but in so doing they have tacitly recognized that here too, as in the partnership cases, one may not take all the benefits of an enterprise without responsibility.

What principles of the rational sciences of Ethics and Politics, if any, may be at the bottom of the decisions respecting subsidiary corporations is conjectural. Perhaps they merely disclose impatience with that venerable principle of Ethics which lent respectability to *laissez faire* economics, that the greatest selfishness produces the highest good. According to the *mores* of the time anything has been right which could be gotten away with,¹¹⁰ it being for the courts to set the rules of permissible and so, presumably, of Ethical conduct. And, as final arbiters of the Good Life, it must be said they have often held the reins rather loosely, at least until

¹⁰⁸ Possibly because of unexpected losses; possibly because the price paid to the contractor was shaded too carefully. See Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 Calif. L. Rev. 12, 19 (1925). In the case of *Steele v. C. G. Meaker Co., Inc.*, 131 Misc. 675, 227 N.Y. Supp. 644 (1928), aff'd. 226 App. Div. 717, 233 N.Y. Supp. 901 (1929), defendant grocery company was held liable for the torts of its subsidiary delivery company, the court saying: "The Auburn Delivery Company was organized to do the business of the C. G. Meaker Co. and did work for no one else. It was the means employed by the C. G. Meaker Co. to do a part of its work, consisting of the delivery of goods. Its business connections with the C. G. Meaker Co. were such as to establish the legal relationship of master and servant between it and the C. G. Meaker Co. and thus create a liability for the acts of its subordinate in driving the truck involved in this accident."

¹⁰⁹ See, for example, *Minifie v. Rowley*, 187 Cal. 481, 202 Pac. 673 (1921); and see *Ambridge Borough v. Phila. Co.*, 283 Pa. 5, 129 Atl. 67 (1925) denying recovery against the parent, there being no "unfair dealing" found. Of course there are many cases directly recognizing the business entity as being of controlling significance rather than the artificial split up of the enterprise into separate corporations. See *Central Vermont Ry. Co. v. Southern New England R. Corporation*, 1 F. Supp. 1004 (1932), and cases there cited. And for an independent contractor case decided upon the same principle see *Mitchell v. Elizabeth River Lumber Co.*, 174 N.C. 119, 93 S.E. 464 (1917).

¹¹⁰ The obvious difficulty with any philosophy which treats law as merely a reflection of the *mores* of the time is that it tends to bring about a wholly static society, for it cannot be ignored that once a particular point has become "well settled" it in turn may become a fixed point in the *mores* of the time. Of course to those who see no need for change this is as it should be. To those who feel that perfection has not yet been achieved it is a philosophy of obstruction.

recently. But this worship of "progress," that is, of commercial expansion, though it squared with the good principle of "the rational science of Politics," that that course is right which can command the largest war chest, is slowly giving way. It is now recognized that such progress cannot go too far rough shod without coming abruptly to the end of its road, which in turn gives prominence to that other good principle of Politics having to do with the forgotten man, that that course is right which appeals to the largest number of voters. It remains for Ethics then to add to Marshall's definition of the corporation by constructing for it a conscience, carefully measured to fit the case.

In large measure the basic justification for the corporation is the same as that which was used to put over the workmen's compensation statutes, that is, the enterprise should bear the risks of the enterprise. The difference is that the shareholder is on the other end of the stick, workmen's compensation added to the costs of doing business, limited liability restricts losses to the capital put at the disposal of the business. Unlimited responsibility should not follow profit taking, but quite the contrary, for profit taking is the breath of life in a capitalistic society. In other words we have created a conception of the corporation as a going concern, a mechanism capable of dealing in the market on its own responsibility, of paying wages and other obligations on the one hand and of returning a gain to its promoters on the other. When the floodgates were opened in the last century,¹¹¹ permitting anyone to incorporate to do almost anything he saw fit, it was taken for granted that the enterprise and the corporation were in effect one. And whether the business succeeded or not, was quickly made a matter with which government should not meddle. From this it followed, inexorably if not logically, that incorporation should be made increasingly easy and restrictions concerning capital requirements and such matters increasingly lenient, or "liberal," as some would have it. But, however this may be, it is obvious that the modern multiplication of sterilized corporations set up in part to conduct the unprofitable or dangerous functions of an enterprise has departed wholly from the original pattern.¹¹²

As regards the ordinary business, no problem of parent and subsidiary being involved, this theory of the corporation as a mechanism which can be set spinning and left to run itself has been very comforting. It squared

¹¹¹ The troubled path leading to this end in New York, beginning with the general Banking Act of 1838, is discussed in Warren, *Corporate Advantages without Incorporation* (1929), 426 *et seq.*

¹¹² See Wormser, *Frankenstein, Incorporated* (1931), 97 *et seq.*

nicely with the prevailing thought of the last century which regarded society itself as an economic mechanism, operating according to natural laws.¹¹³ Moreover, by putting no emphasis upon personal responsibility there was evidently no ethical problem involved. At all events, share ownership in large measure due to limited liability and aided by the feature of negotiability,¹¹⁴ has expanded enormously.¹¹⁵ Indeed, as has been pointed out,¹¹⁶ the average shareholder's position in the larger corporation has now practically come to be that of a lender, subordinate to creditors generally. So true is this that as disaster has from time to time overtaken a business it has come to be the "management" which is held up to public censure, and not the "shareholders." And of course it is true that, without any substantial contribution to capital, management has not only exercised actual control of policies but at times helped itself all too generously to the profits of the venture.¹¹⁷ Thus, still another departure from the original corporate pattern!

It is one thing to predicate a notion of enterprise as an efficient risk bearer, toward which the courts are groping, and quite another to give it precise bounds.¹¹⁸ In addition to "shareholders" and "management," there may also be "lessors," "lenders" and "sellers," as mentioned above, all claiming some part in the profits of a venture and having some say in the conduct of its affairs. If further, the company, organized let us say to do blasting and excavating, engages as an independent contractor to do a certain job for an "employer" on a cost plus basis, still another interest has been introduced. On principles of "fireside equity" it might be well should they all assume some responsibility for tort and contract claims of the business but, of course, the suggestion has no practical value. We have always proceeded upon the assumption that it is better business, so long at least as reasonable provision is made for creditors, to localize losses,

¹¹³ According to Commons it would probably be more descriptive to speak of the corporation as a *machine*, rather than as a *mechanism* or even as an *organism*, since it is man-made and can be fashioned to suit varying purposes. Commons, *Institutional Economics* (1934), 634.

¹¹⁴ See Steffen and Russell, *Registered Bonds and Negotiability*, 47 *Harv. L. Rev.* 741 at 775 (1934).

¹¹⁵ See Berle and Pederson, *Liquid Claims and National Wealth* (1934).

¹¹⁶ See Berle and Means, *The Modern Corporation and Private Property* (1932).

¹¹⁷ For a discussion of the problem as presented by the American Tobacco Co. case, see 42 *Yale L. J.* 419 (1933) (comment). According to the Senator Long school of Politics, \$1,000,000 is a sufficient income for anyone.

¹¹⁸ The similar problem as to where ultimate responsibility for workmen's compensation losses should be put has caused difficulty. The cases are collected in Steffen, *Cases on Agency* (1933), 192-209.

putting them where possible upon a single entity.¹¹⁹ Any other course greatly expands the area of contingent liability and makes less calculable the hazard of conducting each business.

For sake of concreteness, suppose that the contractor in the illustration should suffer a serious business loss; perhaps an explosion occurs in which various persons are killed. Who should be liable? There may have been many contributing causes. Perhaps the board of directors was elected for social reasons—such things have happened—and failed to manage the work efficiently.¹²⁰ Perhaps the “shareholders,” being insistent on larger profits, had forced the use of inferior materials or the employment of men at unduly long hours, thus setting the stage for trouble.¹²¹ The “lender” by threat of curtailment of credit or by more direct intervention may have aggravated the situation. Surely, on any rationalization yet discussed, these persons should not escape wholly without responsibility. But then it is said, there is the “employer” whose work was being done at the time, what of him? By the use of the “inherent danger” category, it is true, many courts have in fact been holding that he must bear the loss,¹²² though of course with recourse over against the contractor for whatever that may prove to be worth.

It is quite another question whether the “employer” *should* be liable. There obviously are many sides to the case. Moreover, even were it humanly possible to answer the question, one should not do so, for that would take away much of the interest in seeing how the thing is to work out. The most that may be done, ethically, is to hazard an opinion as to the probable points of expansion. Taking up the relatively fixed points first, there is little hope of putting increased responsibility upon the individual “shareholder,”¹²³ even in those cases where he does not take to cover as an “investor.” However much to blame he may be the trend is

¹¹⁹ The “fault” notion of responsibility and the practice of reducing causes to a single issue have no doubt been the means of accomplishing this result, but I suspect its deeper rationalization is the one stated.

¹²⁰ The courts have appreciated, though their attitude has been changing in recent years, that *according to business understanding* there should be no liability upon the part of the directors for anything short of *gross* negligence. See *Briggs v. Spaulding*, 141 U.S. 132 (1891). And no direct responsibility to creditors except for *fraud*. *Reno v. Bull*, 226 N.Y. 546, 124 N.E. 144 (1919).

¹²¹ Veblen, *Engineers and the Price System* (1921).

¹²² *Supra* note 9. Or by weighting one or another factor in the definition of “control” the same result is reached. In a great many cases, of course, the real burden of the loss falls upon the injured party.

¹²³ Not all contractors are incorporated by any means but the number who are is steadily increasing, though this fact is usually disregarded in any discussion of the subject.

too firmly set in the opposite direction, as witness the virtually complete elimination of the double liability provisions in recent years.¹²⁴ The present drive upon the "management" is but a flurry and will never be carried so far as to make it assume the burden of responsibility to creditors.¹²⁵ And as for the dual category employers, the "lenders" and "lessors" at least are too well entrenched to admit of much hope that they may be made to assume increased liability. The "seller," in the manufacturer-dealer position, is vulnerable, but is even now responding by taking over the unit businesses.

Which puts the "employer" of the independent contractor in the middle of the carpet. Enough has been said, however, to disclose that his case is merely one phase of the much larger question of how to adjust business losses generally. The blanket attempt to put all losses, even all tort losses, on his shoulders is obviously too simple a solution of a complex problem. Though the weapons at hand, "inherent danger" and "joint adventure," are new and sharp they cannot accomplish so much. This is particularly evident when the word "employer" is broken down into flesh and blood persons.¹²⁶ Probably employer immunity will continue indefinitely in the simpler, more primitive, situations—particularly where the employer is only one of many making use of the contractor's services.¹²⁷ And

¹²⁴ See 15 Minn. L. Rev. 222 (1931) (comment). In the case of the national banks the present thought is to abolish double liability as a haphazard and often illusory resource and to substitute in its place a greater paid-in capital. Banking Act of 1933, § 22, c. 89, 48 Stat. 189, 12 U.S.C.A., § 63.

¹²⁵ That the management can never be expected to carry the risks of a business should be obvious unless, indeed, they are to be given the gross profits of the business. See particularly, for a thorough study of the whole matter from the economists viewpoint, Knight, Risk, Uncertainty and Profit (1921), c. 10.

¹²⁶ The workmen's compensation laws recognize that all employers are not alike: in Connecticut, for example, by restricting the act to employers of five or more persons; and, in New York, by specifying the particular, so-called hazardous, businesses to which the act applies.

¹²⁷ Perhaps this point should be given greater emphasis for it has never been held, for example, that a person engaging a carrier, that is an independent contractor, to transport his goods with those of others should be liable on any basis for negligence of the crew. Likewise, in contract, the syndicate cases indicate a disposition to subject only the manager, so-called, to direct responsibility, though the position of the modern syndicate member is far from being secure. *Hoare v. Dawes*, 1. Doug. 371, 99 Eng. Reprint 239 (1780); *Brown v. Bedell*, 263 N.Y. 177, 188 N.E. 641 (1934). So also in the co-ownership cases it is usually the active owner alone who is held. *Strohschein v. Kranich*, 157 Mich. 335, 122 N. W. 178 (1909). Though there is sharing of gains in these cases as well as some control the courts have been reluctant to go so far as to put the whole loss of the venture upon any one of the several persons interested, as in the case of a partnership. And strangely no machinery has ever been developed to assess a direct proportionate responsibility. Even where the cause of action grows out of authorized conduct, as opposed to authority from an implied relationship, if the agent has lumped the orders of his several principals, recovery against them has been denied. *Beckhuson &*

conversely, it is where the contractor sells his services solely to a business enterprise, to function in some sense as a part of the enterprise, that the greatest chance of success lies. Neither "joint adventure" nor "inherent danger" are particularly adapted to make this distinction between employers,¹²⁸ but a franker recognition that responsibility must accompany any arrangement looking to a taking of profit or benefit which renders the contractor an inefficient risk bearer¹²⁹ will go a long way to do so.

But, after all, why not get at the matter directly? The poorly managed, insufficiently financed, commercial venture, like the small country bank, has been an extremely important factor in our development.¹³⁰ There is no doubt that each, whether acting as independent contractor or otherwise, has served well and faithfully as a sort of buffer in the vanguard of "progress." But there is also no manner of doubt that the country has been strewn from one end to the other with far more business and banking failures than can well be tolerated in the future. To permit a crippled business to operate, if the suicide records alone are consulted, may well be as "inherently dangerous" to the community as was ever the work of the blasting contractor. The obvious step therefore is for society to assume some degree of responsibility, perhaps by developing machinery whereby the capitalization of a venture at the outset may have some relation both to the physical and the pecuniary risks of the business,¹³¹ and to see that it continues that way.¹³² Perhaps something can be done to

Gibbs v. Hamblett, [1900] 2 Q.B. 18. Here, however, to the extent that benefits have been received there is possibility of proportionate recovery upon a quasi contract theory. Harvey v. Dwyer, 108 W. Va. 85, 150 S.E. 235 (1929).

¹²⁸ The "control" test, because it is so variable and incapable of precise definition, is probably better adapted to this end than either. This upon the good principle of trial tactics that ". . . once a word is elaborately defined it becomes useless as a medium of compelling definite action." Arnold, *Trial by Combat and the New Deal*, 47 Harv. L. Rev. 913 (1934), at 946.

¹²⁹ Indeed, I suspect this is the basic reason for making the master responsible for the torts of his servant, or the principal for the contracts of his agent—the matter of control in the one and its close relation, authority, in the other being not so much the basis for liability as the accepted means of delimiting its scope.

¹³⁰ The branch banking question affords many good illustrations, both of the social service of the small enterprise and of its cost to society. Ostrolenk, *The Economics of Branch Banking* (1930).

¹³¹ Most corporation laws merely require that some relatively nominal capital contribution be made and of course no attempt has been made to differentiate between the economic need for one type of business rather than another. The simple requirement that no shares be issued except for "money paid, labor done or property actually received" has been far from successful. Paskus, *The "Illegal" Creation of Shares in Return for Notes*, 39 Yale L. J. 706 (1930). No effort at all has been made to regulate the capitalization of the ordinary unincorporated business.

¹³² As is done in the case of banks and insurance companies!

pass upon the competence of a contractor, as by gently discouraging him from embarking on further ventures after several bankruptcies.¹³³ Perhaps a canvass of businesses will disclose that some are less needed socially than others and may be more strictly conditioned accordingly.¹³⁴ Perhaps that good ethical principle of the last century, each man for himself and let the devil take the hindmost, is at last on the wane.

It remains to make explicit the premises upon which this discourse has proceeded, although I suspect they are already quite apparent. It is assumed that the era of encouraged haphazard exploitation has overstayed its welcome by fully a generation. The present objective, and one which in a world of choice¹³⁵ can reasonably be attained, is an increased measure of security for the whole population. Some curb upon the free scope of enterprise, to charge it with a sense of responsibility, is not only essential to individual security but, indeed, may prove in the end to be good business.¹³⁶ The conclusion is that though an increasing number of independent contractors are being found wanting when weighed in the balance, there still are a great many who if held to it will yet lead the Good Life.

¹³³ See Douglas, *Some Functional Aspects of Bankruptcy*, 41 *Yale L. J.* 329 (1932).

¹³⁴ A great deal is actually being done in this regard by means of local ordinances relative to hazardous employments. The various automobile statutes are another illustration. And see the Uniform Aeronautics Act, § 5, putting absolute liability upon the owner of aircraft.

¹³⁵ "So we are driven to a formula which seems to strike bottom: in human affairs are to be found *necessity* or things inescapable, *fortune* or the appearances of choice, and *virtue* or the capacity for choice and action." Beard, *The Open Door at Home* (1934), 33-34.

¹³⁶ By some regarded as the acid test.