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# SCOPE OF THE BUSINESS: THE BORROWED SERVANT PROBLEM

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IF your client wants to erect an office building he may be advised of the cost within narrow limits. The necessary expenditure will be *X* dollars plus *Y* lives or limbs.[1] If his talents take the turn of bridge construction similar computations may be made. To carry forward to completion either of these projects he must use materials of various kinds, and he must use men. The expenditure of the human, animate, material is as inevitable as the expenditure of the inanimate. With increased care and skill the curve of expenditure of the human material will approach the asymptote of zero, but as long as men and materials are susceptible of failure, the Utopian condition of no loss whatever will never be reached. Loss, expenditure, there will always be. The business machine requires fuel. Perpetual motion has not yet arrived. So much is conceded. It is the last concession we shall make, for while someone must pay, there is no unanimity of opinion as to who that someone shall be.

It is conceivable that this inevitable loss might have been borne

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[1] There is intended here no inference that the modern "safety first" campaigns directed against industrial accidents have been other than thoroughly efficacious. As a result of such efforts the old "death per floor" idea has been completely discredited. See editorial "What About Construction Safety?" 117 Engineering News-Record 591 (Oct. 22, 1936). To the same effect the following extract from a personal letter from Mr. Swen Kjaer, Chief of the Division of Accident Statistics, U. S. Department of Labor: "There was an adage at one time current to the effect that it costs a life for each floor to build a skyscraper. This computation may have originated with a famous New York building of fifteen years ago, in which with the steel at the fifth floor five deaths had already occurred. At that time the Travelers Insurance Company was called in to take over the compensation insurance in the case. It made a study of conditions of the job, recommended certain changes, enforced its own supervision, and saw the remaining 32 stories built with only one additional fatality.

"Again, the same may have arisen and may have been true in the days of the 10-story skyscrapers, but to apply it to the 70-story buildings, like the six per cent fee for architects, would be pure extravagance. Accidents do, of course, occur in building construction, but at the same time several of the New York skyscrapers have remarkably good experiences.

"Number 500 Fifth Avenue is used as an object lesson for builders by insurance companies because it had no deaths. The Chrysler Building, which was built with the loss of one life, was awarded the Certificate of Merit by the Building Trades Employers Association of New York. In general, the deaths run from three to eight on sizable buildings, but in the opinion of the Travelers Insurance Company these figures are excessive and should not be more than two per building."

directly by either of two groups, the employing group or the group employed. We do not propose to trace the tortuous course of litigation between these two groups, with the development of the fellow-servant doctrine, the assumption of risk, and other doctrines of sanctuary.[2] It seems sufficient for our purposes to note that the success of the employer in convincing the courts of his lack of responsibility in the matter had its final result in the passage of the various workmen's compensation acts.[3] With their operation we are not concerned. Let it be noted only that in this situation, at least, our people have not been content to allow the loss to rest where it lay, on the injured social unit. For better or worse, there has been for some time a prevalent notion that a business should pay its passage, that there is no more reason to require that a man donate his life than there is that he furnish office space rent free. Maybe not as much.

Inevitable loss is not, however, confined to the more dramatic enterprises. Your client may be engaged in an essentially prosaic business, let us say the production, sale, and distribution of washing machines. His activities, however, may be widespread, extending over many states. Truckers and salesman are continually on the road, and under constant direction and supervision, for neither sales quotas nor trucking schedules can be modified with impunity. The cars of this economic empire must, in the nature of things, participate in their share of accidents as they traverse the traffic-filled highways. But we note a multiplication of participants: when the bridge worker stumbles he erases only himself. But when the truck driver slips there is always another victim. Again we are faced with a problem of allocation of loss. The victim or the employer? (The truck driver we shall dismiss from our consideration for obvious reasons.)

Resolutely the employer[4] took his position against liability. He was

[2] See 1 BOYD, WORKMEN'S COMPENSATION AND INDUSTRIAL INSURANCE, § 4 (1913); 1 HONNOLD, WORKMEN'S COMPENSATION LAWS, §§ 2, 3, 4 (1917); Wambaugh, "Workmen's Compensation Acts: Their Theory and Their Constitutionality," 25 HARV. L. REV. 129 (1911); Laski, "The Basis of Vicarious Liability," 26 YALE L. J. 105 at 126 (1916); Honnold, "Theory of Workmen's Compensation," 3 CORN. L. Q. 264 (1918). Also see judicial exposition of the problem and its attempted solution in Ives v. South Buffalo Ry., 201 N. Y. 271, 94 N. E. 431 (1911); Jensen v. Southern Pacific Co., 215 N. Y. 514, 109 N. E. 600 (1915), revd. 244 U. S. 205, 37 S. Ct. 524 (1917); State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602 (1912); State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101 (1911).

[3] See 1 HONNOLD, WORKMEN'S COMPENSATION LAWS, § 2 (1917).

[4] In order to minimize confusion due to variations in terminology, the writer has endeavored to adhere to that employed by the Agency Restatement. "Employer," then,

not at fault. He had exercised the utmost care in the selection of the driver. He had scrupulously observed all safety regulations. He had kept the truck in the best mechanical condition. He had issued direct orders that the speed limit never be exceeded. Furthermore, the driver had been hired to drive carefully, not to kill pedestrians. As far as such killing was concerned, the driver was no servant of this defendant at all.[5] The courts listened and were impressed. For a time. Then the retreat. The reasons for the employer's forced abandonment of this position have been examined with care and skill, and expounded with both heat and light.[6] Every conceivable reason has been assigned except one—that such immunity was just too good to be true, too good to last. The people may be "a great beast" but under our form of government its sense of justice will ultimately prevail. The lay mind is unschooled in such niceties as, for instance, the revocation of an offer for a unilateral contract after attempted performance.[7] To such a mind there seemed, it is submitted, something out of kilter with a system of law that allowed the profit-taker of a gluttonous enterprise to walk out of court with his profits untouched because he had made, at the best, sincere but unavailing efforts to abolish the casualty list. As a practical matter it could not be abolished, any more than the rise and fall of the tides. The employer knew it and the workmen knew it and the public knew it. Those who brought the entrepreneur into court, the victims of the enterprise, had been numbered and tolled off before the operation

as the term is here used, is a "neutral expression." See Lewis, J., in Eggington v. Reader, [1936] 1 All Eng. Rep. 7 at 10, cited 15 CAN. BAR REV. 285 at 286, note 2 (1937), which see also for an excellent discussion of the "right to control."

[5] "Beyond the scope of his employment the servant is as much a stranger to his master as any third person." Morier v. St. Paul, M. & M. Ry., 31 Minn. 351 at 352 (1884). "Hence, when a servant steps outside of his employment to do an act for himself not connected with his master's business no liability attaches. The reason for the rule is that beyond the scope of his employment a servant is as much a stranger to his master as a third person." Tyler v. Stephen's Admx., 163 Ky. 770 at 773, 174 S. W. 790 (1915); 2 MECHEM, AGENCY, 2d ed., § 1898 (1914). See also note 23, infra.

[6] See Holmes, "Agency," 4 HARV. L. REV. 345 (1891), 5 ibid., 1 (1891), reprinted in HOLMES, COLLECTED LEGAL PAPERS 49, 81 (1920); Hackett, "Why is a Master Liable for the Torts of his Servant?" 7 HARV. L. REV. 107 (1893); Wigmore, "Responsibility for Tortious Acts: Its History," 7 HARV. L. REV. 315, 383, 441 (1894), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 474 (1909); 2 POLLOCK and MAITLAND, THE HISTORY OF ENGLISH LAW, 2d ed., 533 (1911); BATY, VICARIOUS LIABILITY (1916); Laski, "The Basis of Vicarious Liability," 26 YALE L. J. 105 (1916); Young B. Smith, "Frolic and Detour," 23 COL. L. REV. 444 (1923); Douglas, "Vicarious Liability and Administration of Risk," 38 YALE L. J. 584, 720 (1929); Seavey, "Speculations as to 'Respondeat Superior,'" HARVARD LEGAL ESSAYS 433 (1934).

[7] Petterson v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928).

commenced, only their names and addresses being left in blank on the tally sheet.[8]

There is much, of course, that can be said against the concept of liability without personal fault, although it is no stranger to the law in other fields.[9] It has been bitterly attacked and as ably defended. Suffice for our purposes that it is here. We have moved, be it progression or retrogression, from the test of command, when the master answered only for those errors he had "commanded"[10] to the test of "scope of employment."[11] No longer does it suffice that the master plead, nay, prove, his utter lack of personal fault, or, in fact, that the act was actually prohibited by him.[12] Was the act within the scope of the servant's employment? If so, the business must bear the loss. The sweep of the cash and carry doctrine, that a business must pay cash to its victims and carry its own losses, has been well-nigh irresistible.[13] Occasional resurrections of the control criterion there may be, but they are exceptional and may well be regarded as anachronistic.[14] Here, as in the workmen's compensation field, it may be taken as firmly established that the personal fault of the master is not the test of his liability.

Suppose, however, that *A*, the washing-machine entrepreneur above described, is short one truck. Without it the Cleveland run cannot be made. It must be made; without it no profits, and without profits no business. The solution is simple. From *B*, a trucking entrepreneur,

[8] Supra, note 1.

[9] Seavey, "Speculations as to 'Respondeat Superior,'" HARVARD LEGAL ESSAYS 433 at 442 (1934); Isaacs, "Fault and Liability," 31 HARV. L. REV. 954 (1918).

[10] See Wigmore, "Responsibility for Tortious Acts: Its History," 7 HARV. L. REV. 315, 383 at 391, 441 (1894), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 474 (1909); AGENCY RESTATEMENT (Tentative Draft No. 5, 1930), § 470 (Explanatory Notes).

[11] 1 AGENCY RESTATEMENT, § 219 (1933).

[12] Limpus v. London General Omnibus Co., 1 H. & C. 526, 158 Eng. Rep. 993 (1862); 1 AGENCY RESTATEMENT, § 230 (1933); 2 MECHEM, AGENCY, 2d ed., § 1881 (1914). "It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject." Taft, J., in Warax v. Cincinnati, N. O. & T. P. Ry., (C. C. Ky. 1896) 72 F. 637 at 643.

[13] Note the extrapolation in Gleason v. Seaboard Air Line Ry., 278 U. S. 349, 49 S. Ct. 161 (1929); cf. Kohlman v. Hyland, 54 N. D. 710, 210 N. W. 643 (1926).

[14] Magnolia Petroleum Co. v. Guffey, (Tex. Comm. App. 1936) 95 S. W. (2d) 690, noted 15 TEX. L. REV. 253 (1937), revd. (Tex. Comm. App. 1937) 102 S. W. (2d) 408; Burke, J., dissenting in Kohlman v. Hyland, 54 N. D. 710 at 730-731, 210 N. W. 643 (1926): "The test of the master's liability is whether there was authority expressed or implied to do the act in question."

is rented or borrowed a truck with driver, *C*. The stage is now set. The inevitable accident occurs. *B's* truck, with *C* at the wheel, injures the plaintiff. Who is liable? *A*, the so-called "special employer," or *B*, the "general employer?" The question as to *C's* relationship to the one or the other may arise in numerous forms. An injured plaintiff may bring his action against *A* as *C's* "master" under the doctrine of respondeat superior, whereupon the action will be defended upon the ground that *C* is *B's* "servant" and that *B* is an independent contractor, for the torts of whose servants he alone is responsible.[15] To this *B* will reply, if called upon, that while he admits being an independent contractor beyond any doubt or question, nevertheless he is not liable for *C's* act because *C* was no longer his servant at the time of the accident. *A* having assumed control over him for the purposes of *A's* business, *C* is, according to *B*, the servant of *A*. In another form of the problem, *C* himself may be the plaintiff or claimant and the success of his action against *A*, *B*, or a third party, may turn upon whether *A* or *B* is his "employer" either at common law or under the applicable workmen's compensation act.[16] The latter situation throws us back to the inquiry arising under the former since, unless a statutory definition is framed, the status of the workman as an employee or independent contractor under the acts is governed by common-law principles.[17] A slight alteration of the facts, the removal of *B* as the boss trucker and the substitution of an agreement running directly between *A* and the lone operator *C*, will leave us with a problem somewhat less involved, though essentially the same, since the defense set up by *A*, primarily because of an alleged lack of control over *C*, will be that *C* is an independent contractor.

But to consider more in detail the situation presented when *C* is obtained from *B*, who is in the business of supplying trucks with drivers, we are face to face with the notorious "borrowed servant" problem. At this point its outlines seem fairly clear. Upon superficial examination, at any rate, it seems that it should be but little more puzzling than that presented by any other truck accident involving the Cleveland run of

[15] Damage actions by third persons: Burns v. Jackson, 59 Cal. App. 662, 211 P. 821 (1922); Badertscher v. Independent Ice Co., 55 Utah 100, 184 P. 181 (1919); Olson v. Clark, 111 Wash. 691, 191 P. 810 (1920).

[16] Workmen's compensation cases: Jones v. Getty Oil Co., (C. C. A. 10th, 1937) 92 F. (2d) 255 (claim for damages against borrower, workman-plaintiff asserting that the former was not an employer); Robson v. Martin, 291 Pa. 426, 140 A. 339 (1928) (claim against special employer).

[17] Henry v. Mondillo, 49 R. I. 261, 142 A. 230 (1928). See HARPER, TORTS, § 209 (1933); cf. the common-law control criterion employed by 1 HONNOLD, WORKMEN'S COMPENSATION LAWS, § 49 (1917).

the *A* Washing Machine Company. The fact is, however, that the legal problem is regarded as next to insoluble. Those charged with the administration of workmen's compensation acts complain of their inability to follow the holdings of the courts,[18] an inability not surprising

[18] Mr. Harry A. Nelson, Director of Workmen's Compensation, Industrial Commission of Wisconsin, is reported as speaking of the general problem of the independent contractor in the following terms: "One of the most controversial and troublesome questions which arise in compensation claims before commissions is that of whether a given worker is an employee or an independent contractor. He may work elbow to elbow with another worker, subject to the same hazards, performing his work in the same manner, and earning essentially the same wage, and yet, in one case, the court will hold the worker to be an employee, and in the other will hold him to be an independent contractor. If he works in California, he may be held to be an employee, and in Wisconsin he may be held to an independent contractor, although in each case his contract and the circumstances under which he works are identical. Thousands of cases have disclosed an amazing diversity in their holdings." Nelson, "The Independent Contractor Problem in Workmen's Compensation," DISCUSSION OF INDUSTRIAL ACCIDENTS AND DISEASES 137 at 138 (1939) (U. S. Dept. Labor, Division of Labor Standards, Bull. No. 24; 1938 Convention, Intl. Assn. Industrial Accident Boards and Commissions). As to the effect of the state of decisions from Mr. Nelson's point of view, he continues (p. 140): "The sad feature is that in many of these cases, we are unable to assure the person asking the question, whether or not if an employer, he may or may not be hiring employees, or, if a worker, he may or may not be an independent contractor. We are unable to tell employers whether they are subject to the compact, whether or not insurance is required to be carried, and whether premiums can be assessed against certain workers whose status could be determined only as of a given time, after full hearing, and then decisively only by the supreme court. Insurance carriers are in constant quandry likewise. The precedent in a single case is of little assistance because the next case with which we are faced may vary as to one apparently minor element which may be held decisive and to create a different status." Apparently a certain type of employer has not been slow to turn the confusion to profit. Mr. O. F. McShane, Commissioner Industrial Commission, Utah, speaks of a retail coal sales agency, to the coal yard of which men seeking employment apply for work each morning. If successful they are given a car to unload. "These men, because they undertake to unload a car of coal within a given number of hours to conform to the demurrage rules for a specific price per ton are technically construed to be independent contractors. They have no special skill, no training necessary, no capital invested, no particular resourcefulness, or they would not be unloading coal; no tools and equipment—nothing but their naked hands with which to work—and in their undertaking is no hope for an enlarged remuneration for their services." McShane, "Right of Injured Workman to Select his own Physician," 14 PROC. INTL. ASSN. INDUSTRIAL ACCIDENT BOARDS AND COMMISSIONS 181 at 208-209 (1927) (U. S. Dept. Labor, Bureau of Labor Statistics, Bull. No. 456).

The *modus operandi* is thus described by Mr. Nelson, op. cit. supra, at 144: "The employer tells the employee that he cannot afford to hire him anyway because of the compensation costs and other reasons, so he says 'Now we will make an independent contractor of you;' and the employee does not want to lose his job, so he says that is fine and he signs a contract. . . ."

These cases do not, of course, specifically concern the *borrowed* servant, but the fundamental question, the status of the doer of the work, is the same.

in view of the fact that not only are the holdings as between different jurisdictions inconsistent and irreconcilable, but the holdings within any one jurisdiction are vulnerable to the same charge. Justice Cardozo spoke from a wealth of experience when he said:[19]

> "The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried."

In this situation the courts have turned to various formulae, which, if justice is to be done between the parties, must be twisted out of all recognition in successive applications, until as was well said, chaos reigns. It is submitted, however, that whatever difficulties there may be in arriving at a solution have been caused, not by the inherent intricacies of the problem, but by the criteria employed for resolving liability, devotion to which has served the dual function of making recovery doubtful and uncertain, and obscuring the fact that the fundamental problem involved is the scope of the business enterprise. It is, in a sense, the reverse side of the shield of "scope of employment." Our problem here is "scope of business."

## THE CONTROL TEST

On the facts hypothesized, recovery aganist the driver, *C*, will not detain us long. There is, of course, no question here, assuming the negligence, as to the judgment itself, although its collection may be another matter.[20] But further, this servant, assuming him to be one, had a master. That master, it is settled, logically or not, shall respond. Thus runneth respondeat superior. But, query, who is *C's* master? Is it *A* or is it *B*? The orthodox modern inquiry here relates to control. He who controls *C* shall be liable for *C's* acts, for that person is *C's* master.[21]

[19] Cardozo, "A Ministry of Justice," 35 HARV. L. REV. 113 at 121 (1921).

[20] Cf. 2 POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW, 2d ed., 533 (1911): "Should we now-a-days hold masters answerable for the uncommanded torts of their servants if normally servants were able to pay for the damage that they do?"

[21] The statement of the orthodox dogma is couched in somewhat the following language: "The relation . . . exists, it ordinarily is said, whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done." 18 R.C. L. 490-491 (1917). Stevens, "The Test of the Employment Relation," 38 MICH. L. REV. 188 (1939), traces the origin and growth of the control test as determinative of the existence of the master-servant relationship. See also comment, 20 COL. L. REV. 333 (1920).

Control being the test for the existence of the master-servant relationship, it should logically follow that with interruption of control would come suspension of the relationship. Thus the argument: The act in question was not authorized, nor was it within the sphere of the servant's authority. It was his own idea. As to it, he was a free agent, uncommanded and uncontrolled. Hence, his "old" master was no longer his master. The relationship, it is argued, has been suspended.[22] And upon just that ground, that the master-servant relationship has in fact been temporarily suspended,[23] have been rationalized many cases involving a servant who has gone off "on a frolic of his own,"[24] or otherwise departed from the scope of his employment. On the other hand, if the servant takes a mere "detour," for some purely private purpose of his own, the master remains liable.[25] Why? Does the "test" for the relationship give us the answer? Obviously not. In both the frolic case and the detour case there is utter lack of control, yet in the one the master is freed, and in the other he is held liable. If we concede

[22] "It was claimed on the argument, that the persons doing the wrong were not, in law, the servants of the defendants, but were in the position of independent contractors, for whose acts none but themselves and their immediate employer could be held liable." (The men involved had been employed "in the ordinary way as laborers of defendants" to work under an overseer in cutting trees and gathering bark for the defendants.) Smith v. Webster, 23 Mich.298 at 299 (1871).

[23] Fiocco v. Carver, 234 N. Y. 219 at 224, 137 N. E. 309 (1922), per Cardozo, J.: "The self-same act that was the cause of the disaster is supposed to have ended the abandonment and re-established a relation which till then had been suspended." The suspension of the relationship is not, of course, an inevitable rationalization for the result of non-liability. It could as well be said that the master remained the master but that he was free of liability (i.e., that respondeat superior would not operate) on these facts. The frolic and detour cases, however, quite uniformly employ the language of "suspension" or "re-entry." Sweeden v. Atkinson Imp. Co., 93 Ark. 397 at 403, 125 S. W. 439 (1910) (elevator accident): "And if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business, then the relation of master and servant is for such time, however short, suspended." Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42 at 60, 135 N. W. 507 (1912) (joy-ride in bailed car): "The torts and negligences of an employee in doing the very thing he is directed or employed to do, must be seen apart from those which are entirely separate therefrom. As to the latter, the relation of master and servant does not exist." See also cases cited note 5, supra.

[24] Parke, B., in Joel v. Morison, 6 Car. & P. 501 at 503, 172 Eng. Rep. 1338 (1834).

[25] Ritchie v. Waller, 63 Conn. 155, 28 A. 29, 27 L. R. A. 161 (1893). See Fleichmann Co. v. Howe, 213 Ky. 110 at 115, 280 S. W. 496 (1926), wherein it is said, "The generally accepted rule, as expressed in the many opinions of courts throughout the country, makes the master liable for injuries inflicted by the chauffeur where the departure from the master's business was but temporary, amounting to no more than a deviation. . . . In all such cases it is held that a deviation does not relieve the master of liability for an injury inflicted by the chauffeur."

that control is the test of the master-servant relationship, the logic of the argument that the master should not be liable in either case is unanswerable. But something other than logic governed in the final analysis, for today the master is liable, regardless of control, provided that the act was done within the scope of the servant's employment. That something else, it is submitted, was a feeling no more profound than that he who expends shall replace, that a business must pay its way.

But not only is control as a test of the existence of the master-servant relationship weakened in its attempted application to the borrowed-servant cases by its demonstrated futility and partial abandonment in the admitted servant cases, but its inherent ambiguity makes for confused and contradictory results. Who does have control over *C* in the driving of the truck? It must be obvious that in a sense *A* has control. It is *A* who is directing and managing the entire enterprise, who tells *C* where to go, and when, how much of a load to take, what time to reach Cleveland, by which route, and at what speed. It is utterly fantastic to say that *A* has no "control" over *C*, when *A's* telephone call to the nearest junction will stop *C* entirely, or start him off for Buffalo. Yet it must be equally obvious that it is *B* who has, in another sense, control over *C*. It was *B* who hired him, who trained him, who pays him, who disciplines him and who can discharge him. As a matter of fact, we are using as a "test" a word susceptible of two antithetical, equally "correct" interpretations—broad control, control in the broad sense of hiring, training, and firing; and spot control, the control exercised by the employer on the spot, the man who says when and where to go and how fast. It is not surprising that able courts have construed the word both ways.[26]

[26] The borrower, special employer, found liable: Byrne v. Kansas City, Ft. S. & M. R. R., (C. C. A. 6th, 1894) 61 F. 605; American Express Co. v. O'Connor, (App. D. C. 1922) 279 F. 997; Burns v. Jackson, 59 Cal. App. 662, 211 P. 821 (1922); Greenberg & Bond Co. v. Yarbrough, 26 Ga. App. 544, 106 S. E. 624 (1921); Sargent Paint Co. v. Petrovitzky, 71 Ind. App. 353, 124 N. E. 881 (1919); Bowen v. Gradison Const. Co., 236 Ky. 270, 32 S. W. (2d) 1014 (1930); Badertscher v. Independent Ice Co., 55 Utah 100, 184 P. 181 (1919); B. & B. Building Material Co., Inc. v. Winston Bros. Co., 158 Wash. 130, 290 P. 839 (1930); Olson v. Veness, 105 Wash. 599, 178 P. 822 (1919); Olson v. Clark, 111 Wash. 691, 191 P. 810 (1920); Rourke v. White Moss Colliery Co., 2 C. P. D. 205 (1877); Donovan v. Laing, [1893] 1 Q. B. 629.

The lending employer, general employer, found liable: Quinn v. Complete Electric Construction Co., (C. C. N. Y. 1891) 46 F. 506; Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241 (1922); Wilbur v. Forgione & Romano Co., 109 Me. 521, 85 A. 48 (1912); O'Brien v. Rindskopf, 334 Mo. 1233, 70 S. W. (2d) 1085 (1934); Courtinard v. Gray Burial & Cremation Co., 98 N. J. L. 493, 121 A.

What is the true meaning of control as applied to these facts? There is no true meaning nor is there any one "correct" meaning. As employed in the early famous "carriage cases," [27] from which stem one of our great lines of authority, that line holding the general employer of the borrowed servant liable, the word meant control in the broad sense, conduct and management. Those cases involved the familiar situation wherein *X*, the passenger, hired from *Y*, the general employer, a cab with driver *Z*. The injured pedestrian sued *X*. In deciding that *X* should not be held, it was pointed out that *X* had not selected *Z*, had not trained him, and could not discharge him. *X* did not, then, have control, and since he did not, he was not liable. It is doubtless true that the casual cab passenger should not, from the mere fact of his passage alone, be held for the driver's negligence, and in view of the dates of the decisions and the nature of the actions involved,[28] it is not surprising that the release of *X* was rationalized in substance in terms of control or the lack thereof.

Other English cases, equally prominent, *Rourke v. White Moss Colliery*,[29] and *Donovan v. Laing*,[30] to which can be traced the cases forming the opposing line of authority, the line holding that the special employer is liable,[31] held that control was in the special employer, the temporary user of the workman in question, and it is unquestionable that this employer does have a measure of control. On the other hand, those cases finding control for purposes of liability in the general employer distinguish "control" from "the mere giving of directions" by the special employer, which, they say, is not "control." [32]

145 (1923), 99 N. J. L. 189, 122 A. 805 (1923); Charles v. Barrett, 233 N. Y. 127, 135 N. E. 199 (1922); Wagner v. Larsen, 174 Wis. 26, 182 N. W. 336 (1921).

[27] Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204 (1826), and Quarman v. Burnett, 6 M. & W. 499, 151 Eng. Rep. 509 (1840), are the leading cases. In the Laugher case the court was equally divided, but the Quarman court adopted as the basis of its decision the opinions of Lord Tenterden and Littledale, J. These opinions noted, among other points, that the general employer was carrying on a distinct employment of his own; that the passenger did not select the driver, paid him no wages, had no power to dismiss him, did not have "the conduct and management" of the team, they not being under his "care, government, and direction," and, furthermore, that the "common sense of all men would be shocked" by the logical consequences of a contrary decision.

[28] Wigmore, "Responsibility for Tortious Acts: Its History," 7 HARV. L. REV. 383 at 400 (1894), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 474 at 533 (1909).

[29] 2 C. P. D. 205 (1877).

[30] [1893] 1 Q. B. 629.

[31] See note 26, supra.

[32] See O'Brien v. Rindskopf, 334 Mo. 1233 at 1243, 70 S. W. (2d) 1085 (1934), and cases and authorities there cited.

The battle at this point is one of terminology, raging in a verbal wilderness.

In terms of the prevention of the risk involved, it may well be argued that control should be so interpreted as to place liability upon the general employer.[33] He has consciously assumed supervision over the mechanical details of brakes and steering gear, to the exclusion of the special employer, and he wields the whip of discipline. It has been suggested that the courts, in the formulation of a risk prevention concept as yet inchoate, may have utilized the concept of control with this end in mind.[34] Such an allocation, however, has its justification, if any, in the prophylactic facet of the concept of fault: the general employer could have exercised care, and he should have, and his will be the liability.[35] If any aspect of the fault concept is to be the determinant of liability, much can be said for the imposition of liability upon the general employer.

As enunciated, then, in those early leading borrowed-servant cases in which control was construed as broad control, control in the sense of selection, training, and discharge, the control of the general employer, the result of such construction was to place liability upon the employer who could have best prevented the risk. It also placed liability, it will be noted, upon the same actor who would have borne it had the court asked, rather than who had control, the question the modern courts regard as the more pertinent, whose business was being done at the time. In one person, the general employer, were lodged two determinative elements, broad control and proprietorship. Such being the case, liability should not be difficult to place. But such concentration is unusual today, for the complexity of modern industrial operations gives rise to diversification. It is not unusual now to find these elements divided between individuals or business units. It is then that the borrowed-servant problem becomes acute. Which test will we follow?

As far as the control test alone is concerned, we have seen in the cases of frolic and detour that a master may remain a master although he does not control.[36] The relationship is not suspended. And hence respondeat superior still applies, although we may not agree why it

[33] See Douglas, "Vicarious Liability and the Administration of Risk," 38 YALE L. J. 584 at 601 (1929), for a discussion of the closely analogous situation where there has been a "lop-off" by contract.

[34] Ibid., 602, note 39.

[35] Cf. Harper, "The Basis of the Immunity of an Employer of an Independent Contractor," 10 IND. L. J. 494 (1935).

[36] Note 25, supra.

applies. In other words, having the consensual relationship of superior and subordinate, the one being engaged in the business of the other, the courts agree that the absence of control in fact does not necessarily result in the absence of liability if the servant has remained within his scope of employment. But by thus departing from the strict logic of the no-control-no-servant position, the hitherto uncontrolled finality of the control test as an answer to the existence of the relationship of master and servant has of necessity been weakened. For if, when the question as to the relationship arises in the borrowed-servant cases, it can be shown that *C*, not officiously or as a mere volunteer, was at the time doing the work of *A* or *B*, engaged in the business of the one or the other, it would seem that control need not necessarily be the final test as to the liability of *A* or *B*.

The control test, moreover, in principle is medieval, inextricably mixed with the now-discredited "command" rationale of vicarious liability. In application it is uncertain and ambiguous. In practice the difficult cases of frolic and detour ignore it. With the gradual fading of fault as controlling the master's liability, the lessening in importance of the control test as a determinant of which of two possible masters was liable was clearly foreshadowed and has been as clearly accomplished. Undoubtedly the ever expanding theory that business must shoulder its burdens has contributed largely to its diminished importance. Possibly its very ambiguity was a factor in the increased emphasis now placed upon other elements.

## "WHOSE BUSINESS" TEST

Whatever the reason or reasons may have been, the courts are stressing another "test," namely, Whose business is being done by the borrowed servant? As a test it is not wholly new; for years this question has run hand in hand with the question of control,[87] but the increased emphasis upon it in modern cases is noticeable. Thus it has been referred to as "the really determinative and controlling ques-

[87] Byrne v. Kansas City Ft. S. & M. R. R., (C. C. A. 6th, 1894) 61 F. 605 at 607: "The result is determined by the answer to the further questions, whose work was the servant doing? and under whose control was he doing it?" Standard Oil Co. v. Anderson, 212 U. S. 215 at 221-222, 225, 29 S. Ct. 252 (1909): "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." Again: "Was the winchman at the time he negligently failed to observe the signals engaged in the work of the master stevedore, under his rightful control, or was he rather engaged in the work of the defendant, under its rightful control?"

tion"[38] or "the ultimate test,"[39] while in one leading case the test of control has not even been paid the courtesy of lip service.[40] The only trouble with the whose business test is that, in difficulty of application, it is as bad as the control test. The results are unpredictable, uncertain, and in many cases probably unjust. Thus the "chaos" about which Justice Cardozo spoke.

To apply the test with more modern emphasis, then, we will ask, whose business is being done? Consider again the *A* Washing Machine Company. It cannot be denied that in a sense it is *A's* business being done. His are the washing machines being distributed far and wide. His are the salesmen and the trucks on the road day and night. His are the profits and his are the losses. In our previous consideration of control we might have colored the law review monotone by attempting to imagine the picture in *A's* office, before the multi-colored map of his economic empire, if he were told that he had no control over *C*. It is even more fascinating to contemplate telling *A* that *C*, on the Cleveland run, is not doing his business. Yet it must be obvious also that in another sense it is *B's* business being done. *B*, it will be recalled, was described as a "trucking entrepreneur." He was in the business of trucking for all and sundry. In addition to the one truck rented to *A*, he has rented a dozen to *D* and has a score of his own on the streets. It may well be said that it is *B's* business being done and *B* has, in fact, been held liable on just that ground.[41] To complete the analysis we might also add that it is the driver's, *C's*, work that is being done—not that of his brother, certainly, who is working for a rival trucking concern, nor yet that of the traffic policeman on the corner just passed in Mishawaka. The difficulty is, of course, that to ask "whose work" is not enough. Further definition must be employed. In a broad and loose sense the business of all three, *A*, *B*, and *C*, is being done, just as in a sense all three have a sort of control. But we have asked the question in order to apply the doctrine of respondeat superior. Certainly for that pur-

[38] Devaney v. Lawler Corp., 101 Mont. 579 at 589, 56 P. (2d) 746 (1936).
[39] Jones v. Getty Oil Co., (C. C. A. 10th, 1937) 92 F. (2d) 255 at 263.
[40] Braxton v. Mendelson, 233 N. Y. 122, 135 N. E. 198 (1922).
[41] The leading cases applying the whose work test in conjunction with control are Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252 (1909), and Braxton v. Mendelson, 233 N. Y. 122, 135 N. E. 198 (1922). In addition, see Thatcher v. Pierce, 281 Pa. 16, 125 A. 302 (1924); Schweitzer v. Thompson & Norris Co. of N. J., 229 N. Y. 97, 127 N. E. 904 (1920); Cattini v. American Ry. Exp. Co., 202 App. Div. 336, 196 N. Y. S. 10 (1922), affd. 234 N. Y. 585, 138 N. E. 456 (1922); and dictum in Macale v. Lynch, 110 Wash. 444 at 448, 188 P. 517 (1920). Note also the holding in Benschoter v. New York Cent. R. R., 30 Ohio App. 276, 164 N. E. 785 (1928).

pose it cannot be the "work" of *C* himself and should not be the work of both *A* and *B*.[42] The later, indeed, would be the most simple solution and the solution easiest of administration.[43] Yet to hold that both *A* and *B* are "masters" on the facts supposed is merely to admit the inadequacies of the criteria used, to confess the insolubility of the problem with the tools being employed. Small wonder, then, that courts have striven to make the necessary choice, though the state of the decisions reflects the deficiencies of the analyses used. To say that the master will be liable if an admitted servant acts within the scope of his employment, since the business being done must pay its way, puts a test which is fairly simple in its application. There is only one business involved. But, conceding that a business must bear the burdens fairly

[42] See Atwood v. Chicago, R. I. & P. Ry., (C. C. Mo. 1896) 72 F. 447 at 455: "The contract contemplates no such absurdity. It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one and betray the other. He cannot be subject to two controlling forces which may at the time be divergent. So the English courts, which are generally apt to hit the blot in the application of fundamental rules, hold that there can be no application of the doctrine of respondeat superior in its application to two distinct masters; that the servant must be subject to the jurisdiction of one master at one time." Littledale, J., in Laugher v. Pointer, 5 B. & C. 547 at 558, 108 Eng. Rep. 204 (1826), stated: "The coachman or postillion cannot be the servant of both. He is the servant of one or the other, but not the servant of one and the other; the law does not recognize a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you cannot have two separately liable. . . ."

[43] No question is presented as to the liability of both employers if the employment is joint. Rosander v. Market St. Ry., 89 Cal. App. 721, 265 P. 541 (1928); Gordon v. Byers Motor Car Co., 309 Pa. 453, 164 A. 334 (1932); Moore v. Southern R. R., 165 N. C. 439, 81 S. E. 603 (1914); Western Union Tel. Co. v. Rust, 55 Tex. Civ. App. 359, 120 S. W. 249 (1909). See 39 C. J. 1278 (1925).

There may, too, be exceptional cases in which in fact both the general and the special employers are masters at one and the same time. Such a case would be presented when the borrowed servant's act is within the scope of his employment as to both employers. See 1 AGENCY RESTATEMENT, § 226 (1933). Note also able comment in 26 CAL. L. REV. 370 (1938), pointing out that under certain workmen's compensation acts both employers may be held for compensation.

The procedural aspects of an attempt to hold both employers deserve attention. Since it is often impossible to ascertain in advance what the proofs will disclose as to control and whose business is being done, pleading in the alternative is desirable, but far from universal in availability. See Bennett, "Alternative Parties and the Common Law Hangover," 32 MICH. L. REV. 36 (1933). It is not inconceivable, however, that as between the general and the special employer the jury may finally be unable to determine which of the two was in fact the master at the time. In this situation the Supreme Court of Pennsylvania, aided by a statute liberally construed, said by way of dictum that both employers should be liable. Lang v. Hanlon, 302 Pa. 173 at 178, 153 A. 143 (1930), noted 70 UNIV. PA. L. REV. 973 (1931); 44 HARV. L. REV. 1136 (1931). Cf. Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927), noted 36 YALE L. J. 886 (1927).

apportionable to it, in the case of the borrowed servant there are *two* businesses involved, the washing-machine company's and the trucker's, two employers, and two exercisers of control. Under such circumstances when we ask whose business is being done we naturally get a variety of answers, and a "test" that yields a variety of answers hardly deserves its name. The trouble is that our terminology is too loose and we are rattling around in it. It must be borne in mind that the question of whose business is asked because we are seeking the employer who should bear the burden of the loss. For such purpose surely one of them, *A* or *B*, is working *for* the other. In that sense the work of only one of them is *being* done—and the other is *doing* it. The circumstance that we have two employers involved should not cloud the fact that one normally an employer can become in turn an employee. Thus a master painter and his crew of five are, as between themselves, employer and employees, but when hired by Farmer Jones to paint his barn they are all employees, as to him. Thinking not in conceptual terms but rather in terms of fact differentiation between the functions exercised by two groups both engaged in their respective parts of a larger endeavour, we must differentiate between the director of the entire operation, of which the part farmed out is only a unit, and the doer of the work, the man who assumed the physical task of accomplishment. Rephrased, then, we are asking which of these is the employer and which is the employee, whether the special employer is hiring the general or vice versa. If we could answer that question we might be aided in a determination of whose work is *being* done and who is *doing* it.

The answer requires an analysis of a fundamental relationship. With the basic identification established, knowing which is the employer and which the employee in a simple situation in which the services of one are utilized by another, we may proceed with more confidence to the somewhat more complex relationship problem presented by the borrowed servant. Ordinarily the categorization in the simple two-party relationship presents no problem. Not, however, because there is no problem involved, but because of our habits of thought in our present society. Thus a farmer requires the services of a ditchdigger. We think of the farmer as being the employer, he whose work is being done, he who is receiving the service, and the digger as the employee, the man who is doing the work of the farmer, who is rendering the service required. There is nothing fundamentally either "right" or "wrong" with this analysis and assignment of status, provided it is recognized that it is not an inevitable assignment of the status of the two parties.

It could as well be said, were we redefining social values and concepts, that the digger's is the work being done and that the farmer merely furnishes him the opportunity for doing it. Hence that the farmer is rendering the redefined "service," and the digger receiving it. This, however, our society has not done. We have assigned the two parties involved their relative positions of employer-farmer and employee-digger for a variety of reasons, partly because of control and authority exercised, partly because of payment in currency made *by* the one *to* the other, and largely, it must be admitted, because of common sense. It offends our sense of the practical, of the realities of the situation, it smacks too much of the classroom to think of the parties in the reversed relationship. We are content to let it so rest. Employer and employee they are. One commands and the other obeys. One is the superior, the other the subordinate. One the boss, the other the hand. One the man whose work is being done, the other the servile fellow who is doing the work. All of this seems labored, obvious, but it should be well fixed, for with the next step may come doubt.

Assume that instead of employing a ditchdigger who is a sovereign digger in his own right, the farmer employed one of a group of diggers, one of the "*X* Digging Company, Diggers of Wells and Ditches." Will the heretofore-ascertained relationship of employer-employee be changed? Has the added fact that our digger was hired from Mr. *X's* group of diggers changed any of the elements we weighed and measured in making the original allocation of the farmer to the employer's status, the digger to the employee's? Is the farmer still the boss? Is the one still the superior, the other the subordinate, and so forth? Nothing is changed save the one fact that our digger, prior to his employment by the farmer, owed allegiance to Mr. *X*, still owes some measure, and will ultimately acknowledge again his full sovereignty. What, precisely, is *X's* status on these facts? It would seem to be no more than that of a reservoir of labor as far as the farmer is concerned. The farmer is still the employer; if he were a master before he is a master still, and if so, his and not *X's* is the liability for the digger's torts. And yet allocation of liability to *X* is now easy to make for, by hypothesis, there are now two "employers" in the facts—one the general employer, *X*; the other the special employer, the farmer. We now might reason as follows: *X* is the digger's master, and a master is liable for his servant's torts. Therefore, *X*, and not the farmer, bears the risk and burden of loss. We concluded heretofore, however, that it was the farmer's work that was being done *by* the digger, although we conceded that the opposite rationalization might not be absurd. Just

so, we might now say that it is the diggers (*X* and Company) whose work is being done and that the farmer has merely furnished a means for them to carry out their alloted function. If, however, such an analysis offended our mores and common sense when the digger was his own sovereign, it seems equally offensive now that the only change made was to superimpose, on our individual digger, a boss digger, *X*. We cannot avoid the conclusion that if the farmer's work was being done in the first instance it is still being done, and that if he were liable on that account in the first instance he is still so liable. Similarly, it appears that it is the work of the *A* Washing Machine Company that is being done, not that of *B*, the trucking entrepreneur.

But it may be said that we have still not touched bottom. Conceding, for the sake of argument, that it is the farmer's work that is being done, afer all it was Mr. *X* who selected as a digger the particular employee involved, and it was Mr. *X*, not the farmer, who trained him in careful or careless digging. Is, then, the imposition of liability upon the farmer justified merely because it is his work being done? Should not, rather, the selector-trainer bear the loss? This is the crux of the present issue. It is true, as was suggested, that it was *X* who selected this digger as a digger when his talents might have been obviously better suited to some other pursuit, such as violin playing, or lawyering. True it is that *X* trained him, and that *X* can discharge him. The argument that he should, for these reasons, bear the burden of his lapses from grace is forceful. In broader terms the question is simply this—in event we have had the selection and training of an employee by one person, but, as to the act in question such employee is temporarily doing the work of another, which of those two persons should bear the loss for the employee's torts in the course of such special employment? Either, conceivably. But if there is anything of social value to be gained by making a business pay its way, the answer will unquestionably be made that he whose business is being done, not the initial selector-trainer, must bear the loss.

As a matter of fact, if there were any deep-seated ethical conviction on the part of our people that the loss should fall on the selector-trainer as a matter of policy, not only as punishment for poor training, but as incentive for future careful training, it is inconceivable that the idea would not have been more persistent, that the law would not have shaped itself differently. That it has not done so is obvious. Consider, for instance, a radio electrician, originally employed by *A*. From *A*, let us assume, he receives all his training. *A* permits the careless handling of tools, the use of inferior materials, and encourages, for sake of speed,

the slipshod making of electrical connections. After months of this type of apprenticeship, the electrician leaves *A's* employment and goes to work for *B*, in whose service there occurs, on the first day of employment, the inevitable accident. There is no question here, in a proper case, of *B's* liability. He is the master, he has control, it is his work being done. Yet, were selection and training to govern, liability for the loss would just as clearly fall on *A*. We can rationalize the result in a dozen ways: the electrician is no longer working "for" *A*; there is no "privity"; *A* is now a mere "stranger" to the transaction; it is *B's* "business" being done; *B* has "control" and so on. Yet the hard fact remains that the selector-trainer is not held and the man whose work is being done at the time is held. If it is socially desirable that the employer whose work is being done shall bear the loss in this situation, it would seem equally desirable in the borrowed-servant situation where, similarly, there is a conflict as to liability between the selecting and training employer and the employer who is temporarily using his services and this, in fact, is the result of one of the leading borrowed-servant cases.[44] The one impressive feature of the series of New York cases following, it will be noted, seems to be the vigor with which persisted, in spite of efforts to contain it, the idea that the business borrowing the employee and utilizing his talents must pay for his misdeeds. There is no particular significance in the fact of our hypothetical electrician's permanent severance of employment under *A*, in the fact that *A* is merely an ex-employer. Every borrowed-servant case involves some severance of employment as far as the original, lending, employer is concerned, and the matter is purely one of degree. Furthermore, were it socially desirable to impose liability upon the selecting and training employer, there would be no magic in the attempted severance of employment. The law has never been slow to prohibit the attempted temporary or permanent severance of contractual relationships in event such severance seemed to jeopardize the public good, as the "inherently dangerous" independent contractor cases, in this field alone, amply demonstrate.[45]

Upon this analysis it would seem to be the "work" of the special employer that is being done, at least for the application of the doctrine of respondeat superior. The whose business test, then, if properly interpreted, would place liability upon the special employer. Behind the facade of words there is a logical core or basis, economically sound. Yet the test, because of the duplication of enterprises presented in the

[44] Schmedes v. Deffaa, 214 N. Y. 675, 108 N. E. 1107 (1915).
[45] See notes 69-74, infra.

borrowed-servant cases, is peculiarly susceptible to misinterpretation and misapplication, as the chaotic state of the decisions bears eloquent witness. If possible, we would do well to phrase our test in terms not capable of such perfeect transposition of thought.

In an effort to cope with the situation, various are the formulae employed. Any desired result may be reached by the choice of the appropriate formula. Should *A* be held liable? Follow the *Rourke* formula—when one person lends his servant to another, the servant so lent must be dealt with as the servant of the borrower.[46] Should we hold *B*? Use the opposite formula—as long as the loaned servant is furthering the business of his general employer the latter will be liable.[47] If any formula once adopted were consistently followed, the uncertainty now existing would disappear, regardless of the justice of the result. It is not peculiar, however, to this situation, that a formula, once adopted, will be employed only so long as it serves the end of what the court conceives to be justice. At that point a distinction will be made, though the distinction may involve no substantial difference. To illustrate the hopelessness of the mechanical solution let us consider a segment of the life history of a formula with a wide following, that enunciated by Justice Cardozo in the celebrated case of *Charles v. Barrett*.[48]

Prior to the time of the announcement of this formula the state of the New York decisions was one of hopeless confusion, the general employer being held in some cases, the special in others.[49] There seemed,

[46] Cockburn, C. J., in Rourke v. White Moss Colliery Co., 2 C. P. D. 205 at 209 (1877): "But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." The passage of the same case, as reported in 36 L. T. R. 49 at 50 (1877), reads as follows: "When one person lends his servant to another, and in the course of the servant's employment by that other, some injury occurs through the servant's negligence, the servant must be held to be the servant of the borrower (if I may use the expression), for the purpose of the particular work the latter employs him to do, and the borrower must be held liable."

[47] Cardozo, J., in Charles v. Barrett, 233 N. Y. 127 at 129, 135 N. E. 199 (1922): "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."

[48] 233 N. Y. 127, 135 N. E. 199 (1922).

[49] A survey of certain of the leading cases over the past thirty years will illustrate the difficulties of an able court with this problem. Much of the modern history of the New York cases starts with the case of Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406 (1911). The St. John's Hospital, a Brooklyn institution, owned an ambulance which was kept by one Williamson, a "livery stable man,"

in fact, to be considerable support for the view that as between the employer having what has been referred to as broad or general control and the employer whose "work" was being done at the time (i.e., the borrowing or renting employer) the latter should be held liable.[50] This is, of course, consistent with the doctrine that the enterprise requiring the services of the borrowed servant should bear its normal burdens.[51] Recognizing that its decisions were in conflict,[52] the New

who furnished for it both the horse and driver. A cyclist, injured by collision with the ambulance, brought suit against the hospital corporation. In reversing the judgment for the plaintiff the court stressed the analogy of the cab cases, pointing out that, among other things, control of the ambulance was in the driver and not in the hospital surgeon accompanying the vehicle. Of interest primarily is the basis of the decision and the analogy drawn.

[50] The case of Schmedes v. Deffaa, 214 N. Y. 675, 108 N. E. 1107 (1915), involved facts similar to those of the Kellogg case, supra note 49. One Herlich, an undertaker, requiring cabs for the transportation of mourners to the cemetery, contracted with the defendant Deffaa for a number of horses, carriages, and drivers. Deffaa had not sufficient carriages of his own to fill the order, whereupon he requested one Naughton, another livery stable keeper, to furnish an additional cab with driver. It was this cab involved in the accident. The plaintiff brought his action against the special employer, Deffaa, who, like the hospital defendant in the Kellogg case, pointed out his lack of control and of authority to hire and discharge. In the appellate division this position prevailed, 153 App. Div. 819, 138 N. Y. S. 931 (1912). The majority affirmed the action of the trial court in dismissing the complaint. The minority, however, pointed out that the work being done was that of the defendant Deffaa, quoting with approval the words of Justice Moody in the leading case of Standard Oil v. Anderson, 212 U. S. 215, 29 S. Ct. 252 (1909), and stating that in the quoted portion Justice Moody was discussing the proposition that "the true test of liability is whether the servant was doing the defendant's work." 153 App. Div. at 823. The court of appeals reversed the majority opinion on the dissenting opinion below. The case would seem to be square authority for the proposition that, as between an employer having broad control and one whose work was being done at the time, the latter should be liable.

[51] That this factor governed in the minds of the Schmedes court, supra note 50, appears clear. "Every man," said the dissenting opinion, which finally prevailed, "should be held answerable for the conduct of his own business, and for the agencies employed by him in this business, whether animate or inanimate, and that reason appears to me to be the only satisfactory one for holding one man answerable for the torts—the unauthorized acts—of another." 153 App. Div. at 823.

[52] In the following year the case of Hartell v. Simonson & Son Co., 218 N. Y. 345, 113 N. E. 255 (1916), had come before the court of appeals. The defendant corporation was engaged in the lumber business, in the conduct of which it required teams and drivers. These were obtained from one Durr who was in the trucking business. One of such teams injured the plaintiff, who sued the defendant lumber corporation, the special employer. The appellate division, 164 App. Div. 873, 148 N. Y. S. 433 (1914), in reversing the judgment for the plaintiff, said that the case could not be distinguished from the Kellogg case (in which the special employer had been freed) and that the driver was the servant of Durr, the general employer, as a matter of law. It also cited its own decision in the Schmedes case. It might be noted in passing that the appellate division's difficulty in distinguishing the Kellogg case was shared by Learned Hand, J., in Still v. Union Circulation Co., Inc., (C. C. A. 2d, 1939) 101 F.

York court, in 1922, "undertook to harmonize [the prior decisions] by stating a general rule to be applied. . . ."[53] This general rule was enunciated in the case of *Charles v. Barrett*[54] and was stated by Justice Cardozo to be 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."[55]

In the facts before the court in the *Charles* case, the Adams Express Company had rented from one Steinhauser, who was in the trucking business, a motor van and chauffeur. This van struck and killed the plaintiff's son and action was brought against the president of Adams Express. The court, speaking through Cardozo, J., dismissed the complaint, pointing out that the borrowed servant's duty of going care-

(2d) 11 at 13. The court of appeals, however, Pound, J., dissenting, reversed the case, distinguishing the Kellogg case on the ground that "the element of an independent contractor is *clearly* apparent in that case," (italics ours) and stating also that the liveryman had undertaken "to do the work of running the ambulance" for the defendant, whereas here the defendant was merely doing its own work with Durr's team. The short opinion of the appellate division betrays no doubt whatever as to the correctness of its decision and the court of appeals devotes little space, in its reversal, to analysis of the opposing position. It is apparent that each court regarded its position as the only reasonable one under such simple facts, and it is further apparent that each court was "right." The appellate division either regarded "the work" as that of Durr, or it entirely missed the significance of the Schmedes opinion. The court of appeals, on the other hand, regarded "the work" as that of the special employer, the defendant lumber corporation. Neither position is unreasonable if the whose work test is to be regarded as final.

A peculiarity of the cases should not go entirely unremarked at this point. It is not unusual that a court dealing with a difficult question of law will recognize the cogency of the arguments on both sides and seek to justify its decision one way or the other as being the more desirable for reasons stated. An excellent example may be seen in Cushing v. Rodman, (App. D. C. 1936) 82 F. (2d) 864. This is not usually so in the borrowed-servant cases. To a court regarding the "work" as that of the general employer, any conclusion other than that he will be liable is obviously unthinkable. To a court approaching the problem from the other end, as the "work" of the special employer, it is just as difficult to conceive of any other conclusion than that *he* will be liable. Perceptible, indeed, is the unspoken comment that this is a simple case to have occasioned so much diversity of thought—this in spite of the fact that a lower appellate court may have split on the same question and that a higher court will, in turn, by a divided court, reverse the court so speaking. The histories of the Schmedes and Hartell cases are illustrative. Note also the history of the Bain case, infra, note 60. Nothing could better illustrate the perfect ambiguity of the "test" employed.

[53] McLaughlin, J., in Wagner v. Motor Truck Renting Corp., 234 N. Y. 31 at 40, 136 N. E. 229 (1922).

[54] 233 N. Y. 127, 135 N. E. 199 (1922).

[55] Ibid., 233 N. Y. at 129.

fully (as distinguished from the duty to go where ordered and when) remained a duty to his general employer. The court is clearly imposing liability upon the employer who employed the driver, trained him, and who could discharge him, that is, the employer who had broad control and hence, probably, the employer who could best have prevented the risk. With this decision and the enunciation of this formula, the contest between the test of broad control and whose work in the doubtful case was, temporarily at any rate, settled in favor of the former.[56] There was no discussion in the case of whose was the work being done; the emphasis was placed upon control. Much can be said in favor of either the control or the whose work test, but regardless of the demerits of either test, there is at least the advantage to be obtained from the formula enunciated that the law will be settled.

Such, however, did not prove to be the case. In fact, scarcely four months had elapsed before a minority of Cardozo and McLaughlin protested that the majority was reaching a result not consistent with the rule announced in the *Charles* case,[57] and what remains today of the formula then enunciated it is difficult to say. The United States Circuit Court of Appeals for the Second Circuit recently, in speaking of the *Charles* formula, interpreted the words "furthering the business of the general employer" to mean furthering "that part of the enterprise whose conduct the 'general employer' has reserved to himself."[58] But when a trucker lends a truck and driver to another to do the latter's bidding, it is difficult to see what, if any, portion of the enterprise the trucker has "reserved to himself." He was called upon for a machine and driver and he furnished them. His connection with the enterprise would seem to be over, unless we assume that it is his work being done by the truck in question, and the latter assumption would throw us back to the whose work criterion. Unhampered, then, by the *Charles* formula, that court affirmed the dismissal of the complaint against the general employer on the ground that the special employer owned the machine involved and that it was his work being done.

The *Charles* formula, then, placing liability upon the general employer, is, when occasion arises, distinguished to death. This devel-

[56] It is of interest to note that in the case of Braxton v. Mendelson, 233 N. Y. 122, 135 N. E. 198 (1922), decided the same day as the Charles case, involving a division of the enterprise and allocation of respective performances by contract, the court's primary inquiry related to whose work it was, under the allocation thus made, that gave rise to the injury. See text relating to note 87, infra.

[57] Wagner v. Motor Truck Renting Corp., 234 N. Y. 31, 136 N. E. 229 (1922).

[58] Still v. Union Circulation Co., Inc., (C. C. A. 2d, 1939) 101 F. (2d) 11 at 13.

opment is extremely significant, because in favor of the liability of the general employer imposed by that rule we have the powerful social argument that the risk can probably best be prevented by him and hence that his should be the liability, to say nothing of the fact that it is child's play to construe either the control or the whose business "test" in such a way as to hold him. There is no wish in this discussion to minimize the importance of the function of risk prevention, and rash indeed would be the analyst taking the position that the *Charles* formula did not have much to commend it. Yet it went the way of all formulae, and the result accomplished by its repudiation, that the special employer shall be liable, is not peculiar to this country. A recent Scottish writer notes the extension in that country of the doctrine of the servant *pro hac vice* to the case of one ordering from a garage a temporary chauffeur,[59] and a number of well considered recent English cases have also placed the liability in the borrowed-servant cases upon the special employer,[60] it being, in the expressive phraseology employed in the *Bain*[61] case, the "patron momentané" rather than the "patron habituel" who is responsible for the negligence of the borrowed servant. It must be evident that there is some tremendous force here at work that will not be confined by formulistic straight-jacket, that overrides the opposition of the prevention of risk factor, and that is as contemptuous of common-law logic as the doctrine of respondeat superior itself. The isolation of the insurgent element will require leaving for a time the welter of cases pro and con for a consideration of the fundamental problems involved.

In the first place, as to the servant borrowed of an independent contractor as an instrument for the accomplishment of a given purpose, it cannot be doubted that there is no policy of the law requiring that a man personally undertake the execution of all of the acts of service of which he may have need. To use the expressive phrase occasionally found, there is no reason in a proper case why a man cannot "farm out"[62] a portion of his work, why he cannot "lop off"[63] a portion,

[59] Professor A. Mackenzie Stuart, commenting in 46 JUR. REV. 401 (1934) on Bowie v. Shenkin, [1934] SCOTS L. T. 374.

[60] Bain v. Central Vermont Ry., [1921] A. C. 412; Societe Maritime Francaise v. Shanghai Dock & Engineering Co., Ltd., [1921] 2 W. W. R. 800 (Priv. Council); Bull & Co. v. West African Shipping Agency & Lighterage Co., [1927] A. C. 687. Commenting on the English cases, see 64 L. J. (N. S.) 194, 293, 398 (1927); 167 L. T. 25 (1929); 81 Sol. J. 873 (1937).

[61] Bain v. Central Vermont Ry., [1921] 2 A. C. 412 at 415.

[62] Still v. Union Circulation Co., Inc., (C. C. A. 2d, 1939) 101 F. (2d) 11; Postal Telegraph & Cable Co. v. Doyle, 123 Fla. 695 at 698, 167 So. 358 (1936).

[63] Douglas, "Vicarious Liability and Administration of Risk," 38 YALE L. J. 584 at 595 (1929).

detach it, split it off from his other activities and hand it over, free of liability, to another for accomplishment. There seems to be no compelling reason, for instance, why a lawyer should have to repair his own shoes or fill his own teeth. Similarly there seems to be (up to a certain point) no requirement in law that a man conduct in person or assume personal responsibility for the proper conduct of all of the various phases of any enterprise in which he may engage. He may employ an independent contractor to do the work, splitting off such portion of his work to be done by the other, not by himself. He contracts for the "result," to use the language of the cases, without prescribing the means or methods to be employed.[64] In these he is presumably uninterested. It is apparent, however, that certain restrictions must be placed upon this power of split-off. Otherwise there would be nothing to prevent a master from freeing himself from liability for the acts of each and every servant in his employ merely by ostensibly dissolving the master-servant relationship as to each. The janitor's work would thus be split off from the rest of the business and farmed out to him for accomplishment, the employer contracting for the "result" only; similarly the truck driver would take over all of the trucking for a specified sum. These necessary restrictions, then, which theoretically serve to check the unconscionable abuse of the independent contractor doctrine, are that the split-off shall in fact have been made, and shall have been made in good faith. Both provisos must have an affirmative answer, according to the standards of the particular court, before the insulation of the entrepreneur is complete, and questions may arise at either end. When a housewife calls for the radio electrician there would seem to be no doubt on either score. When, however, those in charge of a business involving a possibly dangerous operation farm out such operation to a contractor entirely lacking in financial responsibility, the good faith may well be questioned.[65] On the other hand, the operation may be farmed out to a contractor of unquestioned skill and reliability, and yet interference with such contractor be so unceasing, minute, and "proprietary"[66] that it may well be questioned whether, in fact, there has been any splitting off of the operation at all.[67]

[64] Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755 (1886).

[65] Nelson v. American Cement Plaster Co., 84 Kan. 797, 115 P. 578 (1911).

[66] Respondeat superior is sometimes said to rest upon the power to control "as [a] proprietor." Note the use of the term in Devaney v. Lawler Corp., 101 Mont. 579 at 589, 56 P. (2d) 746 (1936).

[67] New Orleans, Mobile & Chattanooga R. R. v. Hanning, 15 Wall. (82 U. S.) 649 (1872); North Bend Lumber Co. v. Chicago, M. & P. S. Ry., 76 Wash. 232, 135 P. 1017 (1913). See elaborate citation of authorities in 19 A. L. R. 1168-1361 (1922).

But clear as it may be that the law will not require that a business man perform in person, or as master, all of the various phases of his business in every conceivable case, so is it clear, at the other extreme, that he has not unlimited freedom as to splitting off various portions of the enterprise he conducts. Regardless of how earnestly he may attempt to detach a portion, regardless of how scrupulously he may keep hands off the farmed out portion, there is a limit past which he cannot pass scot-free. The ever-expanding boundaries of this principality within which the master must be king, whether he wishes or not, within which he must assume full responsibility for the conduct of his business, form an interesting study in the growth of the law. These, of course, are the cases commonly referred to as "exceptions" to the rule of the employer's non-liability for the torts of an independent contractor. No sooner had the doctrine of immunity become established in the law than the process of erosion commenced.[68] Not only did the employer remain liable if the injury complained of were traceable directly to him[69] but also if his duty were non-delegable, either by force of statute[70] or the common law.[71] But with these cases we have barely scratched the surface of the exceptions, if, indeed, the first class be exception at all. Possibly the greatest number rise from an application of the doctrine of *Bower v. Peate*,[72] that an employer cannot relieve himself of liability by delegating to an independent contractor the performance of work "from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise"[73] unless precautions are taken. This class shades into another

[68] For highlights in the development of the immunity doctrine and its subsequent welfare, see Bush v. Steinman, 1 Bos. & Pul. 404, 126 Eng. Rep. 978 (1799); Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204 (1826); Milligan v. Wedge, 12 Ad. & E. 737, 113 Eng. Rep. 993 (1840); Ellis v. Sheffield Gas Consumers Co., 2 El. & Bl. 767, 118 Eng. Rep. 955 (1853); Bower v. Peate, 1 Q. B. D. 321 (1876). Morris, "The Torts of an Independent Contractor," 29 ILL. L. REV. 339 (1934); Harper, "The Basis of the Immunity of an Employer of an Independent Contractor," 10 IND. L. J. 494 (1935); Steffen, "Independent Contractor and the Good Life," 2 UNIV. CHI. L. REV. 501 (1935); 39 YALE L. J. 861 (1930).

[69] Brady v. Jay, 111 La. 1071, 36 So. 132 (1903). The insulation breakdown of this type also includes the cases where the employer is personally at fault in the selection of an incompetent independent contractor. Cases are collected in 66 L. R. A. 941 (1905) and 30 A. L. R. 1502 (1924).

[70] Rockford, R. I. & St. L. R. R. v. Heflin, 65 Ill. 366 (1872). The cases are collected in 23 A. L. R. 984 (1923).

[71] Dalton v. Angus, 6 A. C. 740 (1881) (lateral support); 23 A. L. R. at 1004 ff. (1923).

[72] 1 Q. B. D. 321 (1876).

[73] Ibid., at 326.

large group commonly classified as the "inherently dangerous" cases.[74] An idea of the number and scope of these exceptions may be gained from the fact that the American Law Report monographs[75] dealing therewith cover something over one hundred and forty pages. Confronted with this ever-growing and formidable mass of "exceptions," one cannot but agree with Harper's conclusion that "comparatively little is now left of the generalization that an independent contract relieves an employer from liability for harm tortiously done within the scope of the contract."[76]

For the purposes of this discussion, the vast number of "exceptions" to the rule of insulation are of interest primarily as illustrating the principle that an entrepreneur cannot be said to have a free hand in farming out portions of his enterprise with resultant freedom from liability. Whether he wishes or not he remains liable in numerous cases. We are not concerned with the precise boundaries of the prohibition. Regardless of their extent there is no doubt whatever that the master's personal desire as to farming out does not pass unscrutinized, unchallenged, or uninhibited. Entire freedom of action is not his. In certain cases he must remain the master. The common thread through such cases is scarlet, a danger not merely possible but probable. It is not inconceivable that we are approaching the time when an employer will not be allowed to split off even the routine operations within the normal scope of his business, provided those operations, as usually conducted, subject third persons to the risk of possible injury. Should the "inherently dangerous" doctrine ever be widely applied to cars and trucks, the bulk of the borrowed-servant litigation would disappear. Possibly it is not putting the matter too strongly, in view of the development above outlined, to say that the area of operations within which the master has been forced to assume full responsibility for injuries has widened in direct ratio with the increasing conviction of society that a business may pay its way. Must pay its way not only as to the inanimate, but also as to the human, materials expended in the manufacture and distribution of the finished product.

The *A* Washing Machine Company can, then, farm out portions of its work to others, within limits. It might, for instance, enter into a contract with *B* according to the terms of which it split off all of its trucking work and transferred it for accomplishment to *B*. *B's* position,

[74] See cases collected in 23 A. L. R. 1084 (1923).

[75] 23 A. L. R. at 948, 1016, and 1084 (1923).

[76] Harper, "The Basis of the Immunity of an Employer of an Independent Contractor," 10 IND. L. J. 494 at 497 (1935).

then, with respect to *A*, would be that of an independent contractor, provided *A* did not interfere too minutely in *B's* conduct of the split-off portion.[77] But *A* has not entered into such an agreement. All he has done is to rent from *B* one truck, complete with driver, *C*. Up to the moment of hiring, *C* was, as regards *A's* liability for his torts, a total stranger, a fortiori, an independent contractor. After the hiring, however, *A* tells him where and how to go. Remembering the orthodox statement that *A* is responsible for the acts of those employees he "controls," and that those he does not "control" are independent contractors, is he now liable for *C's* negligent acts? This control test, as we have seen, has obvious deficiencies. Not only does it fail to answer the hard cases, but here both *A* and *B* have a form of control. If we turn to the whose business test we are but little better off.

### "SCOPE OF THE BUSINESS" TEST

It remains to suggest an analysis which may possibly avoid the ambiguities of the present tests without doing violence to accepted principles. The suggested analysis, as has been noted, is framed in terms of the scope of the business. The results obtained by its use are the results the courts now reach in those cases presenting clear-cut issues, and as to the doubtful cases no test employed could result in greater confusion than now exists.

We will postulate as a starting point the undoubted conviction of our people at the present time, reflected in untold cases to which reference has heretofore been made, that a business must pay the reasonable cost of its passage. For acts within the fair scope of the business, its liability should be fixed. This does not mean absolute liability for the entrepreneur. Just as the scope of employment doctrine does not render a master liable for any whimsical or abnormal act of an admitted servant,[78] neither would the doctrine of scope of the business render an employer liable for any and every operation remotely or indirectly connected with its conduct. The phrase "scope of the business" requires interpretation, just as does "scope of the employment." There is nothing automatic in the application of either.

If we concede, then, that the business being done must answer for the costs of its operation, our first inquiry will be the orthodox one, the ascertainment of the borrowing (or hiring or renting) employer. The second inquiry, however, will not be phrased in terms of control

[77] See note 67, supra.

[78] Smothers v. Welch & Co. House Furnishing Co., 310 Mo. 144, 274 S. W. 678 (1925).

or whose business. Rather it will relate to the normal scope of the business of such borrowing employer. If the questioned act is within the scope of the business, within its normal sphere of operations, within the boundaries reasonably fixed by the usual conduct of similar enterprises, liability should normally follow. "Normally" follow, not inevitably, for we have seen that there is no disposition on the part of the courts, no feeling on the part of our people (within limits), that a man must undertake and assume full responsibility for the conduct of all operations involved in his business. In other words, he may do a certain amount of farming out, or splitting off. If he has, in fact and in good faith done so, there will be no liability as to the portion so split-off and transferred. Thus the steps in our inquiry are three—Who is the borrowing employer? What is the normal scope of his business? Has a portion of the normal business operation been farmed out?

It is believed that the results now reached in the courts fall, in the main, into a rational pattern under this analysis. Thus it is reasonably clear that where the work performed by the temporary employee is of a totally different kind from that of his temporary employer, calling for a different type of skill,[79] it should not be said to be within the normal scope of the temporary employer's business. Never having been within, no question of farming-out arises. Such is the situation, for instance, where one unskilled in the use and technique of X-rays employs a skilled operator,[80] where a farmer contracts for the services of a specialist in the erection of a certain type of structure,[81] or where the buyer of a piece of machinery receives services from the factory's installation expert.[82] Regardless of the analysis used, the only reasonable result obtainable on such facts is nonliability for the temporary employer. *A fortiori*, on any conceivable test, where a couple of elderly ladies hire a cab for an outing,[83] or where, in fact, any casual passenger hails a cab, the same result should—and does—follow.[84] Control, whose business, or scope of the business, all reach the same result. Conversely, if the service rendered must, from its very nature, in order to be rendered at all, be rendered as an integral part of the temporary employer's busi-

[79] Cf. Holmes' phrase in "Agency," 5 HARV. L. REV. 1 at 15 (1891), reprinted in HOLMES, COLLECTED LEGAL PAPERS 81 at 102 (1920): "if the employment is well recognized as very distinct" and note Leidy, "Salesmen as Independent Contractors," 28 MICH. L. REV. 365 (1930), stressing the independent calling.

[80] Runyan v. Goodrum, 147 Ark. 481, 228 S. W. 397 (1921).

[81] Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938 (1914).

[82] Bortino v. Marion Steam Shovel Co., (C. C. A. 8th, 1933) 64 F. (2d) 409.

[83] Quarman v. Burnett, 6 M. & W. 499, 151 Eng. Rep. 509 (1840).

[84] Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204 (1826).

ness, such temporary employer should be—and is—held liable, again regardless of the analysis used. Again no question of farming-out can arise, from the very nature of the undertaking and its peculiar requirements. Examples of such cases are a doctor's utilization in a surgical operation of a nurse borrowed from the general employment of another,[85] or a railroad's borrowing from a general employer an engine and crew for use in its system and for its purposes.[86] It staggers the imagination to conceive of the borrowed engine as an independent contractor, cruising up and down the main line of the borrowing employer with complete disregard of the latter's block signals and train dispatchers.

The cases involving an actual farming-out by agreement also seem clear. If the entrepreneur in the position normally occupied by the temporary employer has, in fact and in good faith, expressly cut off a portion of his normal business operations and transferred it to another, his liability for negligent acts in connection therewith should pass with it. A milk company, for instance, may wish to confine its activities to the production of the commodity and transfer the distribution thereof to operators more familiar with the care and upkeep of cars than of cows. A contract accomplishing this would seem effectual to free the milk company from liability for torts committed in the course of such distribution and so it has been held.[87] Suppose, however, that for some purpose of his own the dairy owner wished to retain that portion of the distribution from the farm to the wholesale milk depots, and it was so agreed between the trucking entrepreneur and the dairy owner. Liability for an injury in the course of the loading of the liquid at the farm would, of course, remain with the dairy owner, even though, conceivably, a representative of the ultimate distributor, the trucker, was present to see that the trucks were adequately filled. The loading activity was within the scope of the dairyman's business and had not been farmed out to another. This was the famous *Standard Oil* case[88] in which an unloading vessel was unwilling to trust the stevedores and had retained in its own hands the operation of the steam winch, although a representative of the stevedores was required to cooperate with the winchman, since the stevedore's men were on the dock and in the hold. Possibly the reason for such retention was the fear of the

[85] Aderhold v. Bishop, 94 Okla. 203, 221 P. 752 (1923).

[86] Linstead v. Chesapeake & Ohio R. R., 276 U. S. 28, 48 S. Ct. 241 (1928); Bain v. Central Vermont Ry., [1921] 2 A. C. 412.

[87] Braxton v. Mendelson, 233 N. Y. 122, 135 N. E. 198 (1922).

[88] Standard Oil Co. v. Anderson, 212 U. S. 215, 29 S. Ct. 252 (1909).

later experience of the *Samson*.[89] In that case the stevedores, being unfamiliar with the operation of the particular winch in use, operated it improperly with the result that the load being hoisted by the winch fell, passed through the bottom of the vessel, and presumably came to rest on the bed of the stream, the *Samson* following soon thereafter. The Supreme Court in the *Standard Oil* case talked of control and whose business and reached the unquestionably sound result that Standard Oil, the vessel's owner, was liable. But it would seem a simpler and more easily applied rationalization to say, which was the fact, that the vessel's unloading as well as her loading was within her normal scope of business and the portion of the operation in question had never been transferred to another.

The scope of the business, then, answers with the control and whose business tests a substantial number of cases, but it must be conceded that they are, relatively speaking, the extreme cases. Between the extremes, however, lies a vast shadowland where the work performed by the borrowed servant for the special or borrowing employer may reasonably be done within the normal scope of the business of such special employer, and there has been no agreement in fact farming out such portion of the work. There has been the mere hiring of a temporary employee. This is the case of the *A* Washing Machine Company heretofore considered. It is with these cases that the greatest confusion exists, and it is with respect to these difficult cases that we have suggested the frank abandonment of the control criterion. The trend of the modern cases seems in this direction, the more modern emphasis being on that portion of the test relating to whose business is being done. This emphasis, while fundamentally sound from economic and social points of view, is unfortunate in its phrasing and is inherently and peculiarly susceptible to irreconcilable results because the general and the special employer are *both* "in business."

We have proposed, then, that in the borrowed servant cases, instead of attempting to apply a control or whose business test, there be conducted a dual inquiry, asking first who borrowed the servant in question for temporary use, and second, whether the servant's act as to which liability is sought to be imposed was within the normal scope of the business of the borrower. If so, the responsibility should normally be the borrowing employer's unless there has been (1) in fact and in good faith (2) a permissible (not inherently dangerous, etc.) farming out of the operation in question. Mere temporary use of the servant of another within the normal scope of the temporary employer's business

[89] The Satilla, (C. C. A. 2d, 1916) 235 F. 58.

should not, per se, constitute a farming out of the work such temporary employee is hired to do. The independent contractor doctrine is not to be denied its proper insulating effect, but within the normal scope of one's business it should require an agreement in fact, made and carried out in good faith, to bring such doctrine into operation and not the mere hiring of a temporary employee whose source, it so happens, is another employer also in business. In fact, an essential difference between the doctrine of the scope of employment and that of the scope of the business is illustrated by the exception to the temporary employer's liability arising from the employment, in a proper case, of an independent contractor: When we are dealing with an admitted servant and we ask whether a given act done by him is within his scope of employment, the fact that the master may have directly forbidden its accomplishment by him is not controlling as to the master's liability. Likewise, where the master has ordered its accomplishment by a servant, any inquiry as to the scope of the servant's employment is immaterial; the "master" is liable because he ordered the act done regardless of principles of respondeat superior. Scope of employment, then, partakes of the nature of a fixed concept. The scope of the business, as long as the independent contractor exception is applied, does not. If the employer fears a certain operation of his business as a liability-producer and attempts to remove it from his business by farming out its accomplishment to another, the courts will usually respect such removal, though the power of removal is shrinking, not to say vanishing. As to "scope of employment" it has vanished. The employer is powerless to remove any given act, although he fears it as a liability-producer, provided only that it is within the servant's normal scope of employment.

The test of scope of employment and the test of scope of the business both seek to answer the same question—how much of an injury-load a given business should bear. In seeking to answer this question the only difference between the two is in directional aspect. One looks within and the other looks without. The one is internal, the other external. The scope of employment test looks within an organization, looks to the activities of those who are *admitted* to be servants, and determines whether or not a questioned act was sufficiently intimately connected with the servant's normal conduct that the business in which he is employed should answer for such act. The scope of the business is just the reverse. It looks outside the organization to determine whether or not the activities of a certain member of the public, who is by consent rendering a given service to a given business, are sufficiently intimately connected with the conduct of the business that it should respond for mishaps in the performance of such activities. The burdens that should be borne by the business involved is the real question in

each case. The only difference is that the question arises concededly within the organization in the one case, and allegedly without in the other.

There is but the faintest shadow of judicial support for this suggested test in the language of the reported cases. It has been noted, for instance, that the borrowed servant was not "performing a function ordinarily performed by [the temporary employer's] regular employees,"[90] and that the record did not disclose that the service rendered by him was "within the scope of [the temporary employer's] activities,"[91] and, further, that "the work in which the employee was engaged at the time of the injury was a part of the [temporary employer's] regular business,"[92] but these are isolated quotations and we do not attach exaggerated significance to them or their like. On the other hand, one seeking an explanation of the results of the borrow-servant cases in terms of a weighing of the elements of control is inexorably driven to the expedient of making and accepting "desperate refinements," ethereal in substance and revolting in reason, in order to approach any semblance of reconciliation. There is no doubt whatever that more than a mere weighing of the elements of "control" is entering into the decisions in these cases. That something more, it is submitted, is the rarely articulated consideration that a business must bear its normal burdens. Whether the machinery of compulsion looks primarily after the workman himself and goes by the name of workmen's compensation, whether it looks primarily at a plaintiff injured by an admitted servant and operates through the doctrine called scope of employment, or whether it looks at a plaintiff injured by the servant of an unknown but to-be-ascertained master and operates through the here-submitted doctrine of the "scope of the business," the causative factor, loss of life from the business operation, is the same and the object to be attained, payment for such loss by the business itself, the same. If the fundamental consideration ruling these borrowed-servant cases is whether or not a given business should pay for the loss, the court's answer to the argument over the ostensible question, whether or not the special employer actually split off this portion of his business and handed it over to another, an independent contractor for whose torts he is not liable, will depend on whether or not it believes that this particular operation of the business should be allowed to be split off in this fashion at all. This germ of doubt, manifesting itself in

[90] Walter v. Everett School Dist. No. 24, 195 Wash. 45 at 49, 79 P. (2d) 689 (1938).

[91] Ibid., 195 Wash. at 50.

[92] Jones v. Getty Oil Co., (C. C. A. 10th, 1937) 92 F. (2d) 255 at 260.

confused and contradictory decisions phrased in terms of control and whose business, may yet localize in the doctrine that within the normal scope of a business, no farming out of operations will be permitted, certainly not by a casual borrowing. But whether or not farming out will be permitted is, after all, the second step. The basic inquiry remains —What is the normal scope of this particular business?

It may well be asked whether or not we will gain anything over the control or whose business tests by attempting to determine the normal scope of the borrower's business. This is similar to asking whether we gained anything when we passed from the command test to the scope of employment test in determining the liability of the master for the acts of an admitted servant. Arguably not, for there is nothing simple in the application of either the scope of employment test or the here-proposed scope of business test. But there is no doubt that when the scope of employment test was adopted by the courts we passed from the employment of a fiction, with a fiction's infinite possibilities of meaningless distinctions, to the employment of a test with a rational, understandable basis. We moved, as regards liability for a servant's torts, from fiction to fact. We no longer distinguish express from implied commands and try to determine, for instance, whether a commanded act, negligently performed in fact, was expressly commanded to be done negligently or whether it was just impliedly commanded to be done negligently, for command there had to be. Similarly in the borrowed-servant cases control is a meaningless fiction. Whose business, as the test is usually employed, answers too much. But if we ask whether or not the questioned act was within the normal scope of the business of the borrower (or renter, or hirer pro tem) of the servant who did the questioned act, we have at least a rational basis, justified on social and economic grounds, from which to start our inquiry, a basis markedly similar to (if not identical with) that employed in the closely related field of responsibility for the torts of the admitted servant. If the act of the borrowed servant was within the normal scope of the business of the borrowing employer, and there has not been, in fact and in good faith, a permissible farming out to another, such borrowing employer should, it is submitted, be liable.[93]

[93] A study of the concept here termed "the scope of the business" has been undertaken in three principal categories—as applied to parent-subsidiary corporations, to two or more businesses linked by common employees (the borrowed servant problem), and to individual enterprises (e.g., is the salesman an independent contractor?). The latter two studies are here combined and presented in condensed form. The major undertaking, the application of the concept to parent-subsidiary corporation problems, has not yet been completed.