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R. Vincent Goodlett

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NOTES

THE TEST OF "EMPLOYMENT" UNDER THE STATE UNEMPLOYMENT COMPENSATION ACTS

An oil refining company consigned petroleum products to the operator of a bulk station. The company filed a bill in equity asking for a declaration that the consignee was not its employee within the meaning of the state unemployment compensation act. This presents a problem already faced by several courts, and since all of the states have passed unemployment compensation statutes to conform to the provisions of the Federal Social Security Act, the question will probably arise with increasing frequency. They have been asked to decide what test should be used to determine whether a particular person is so related to another as to be within the meaning of "covered employment" under the provisions of the enacted law. Obviously, the problem is one of statutory interpretation which in this case is a matter of determining the test intended by the legislature. In construing an unemployment compensation act, in order to find the true intention of the legislature, the following fundamental propositions are believed to be paramount: (1) the statute should be studied as a whole and not as a series of isolated clauses; (2) it should be construed with reference to its intended purpose; and (3) since the legislature has recognized an interest never before secured by the law, the enactment should be considered in the light of modern social and economic ideals and policies.

2Barnes v. Indian Refinery Co., 280 Ky. 811, 134 S.W. (2d) 620 (1939). The Kentucky Court of Appeals construed that act (Ky. Stat. Baldwin's 1939 Supp. sec. 4748g-1-22) to apply only where the relationship of master and servant existed between the individuals, and concluded from the facts that the operator was an independent contractor.

3It is urged that the excellent article by Prof. Powell, Construction of Written Instruments, 25 A.B.A.J. 185 (1939) be read at this point before considering the problem here presented. Other valuable articles on the subject of interpretation of statutes are: Landis, Statutes and the Sources of Law (1934) Harvard Legal Essays, 213; Davies, The Interpretation of Status in the Light of Their Policy by the English Courts (1935) 35 Col. L. Rev. 519; de Sloovere, Contextual Interpretation of Statutes (1936) 5 Fordham L. Rev. 219; de Sloovere, Extrinsic Aids in the Interpretation of Statutes (1940) 88 U. of Pa. L. Rev. 527.
THE PURPOSE OF THE STATUTE

The theory that the courts should refer to the purpose of an act to find the meaning of the legislature’s language was developed in early English law and was accepted by such great writers as Blackstone, Coke and Powden. This principle has been followed in the United States, and effect should be given to the purpose of the statute unless the result would amount to doing violence to its provisions. In many instances the legislators have not expressly stated the purpose of the enacted law, but most of the state unemployment compensation acts contain a declaration of policy to be used “as a guide for the interpretation and application” of the act. From this declaration

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3 Davies, supra n. 2 at 520–522.

4 “The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty, for courts to say: We see what you are driving at, but you have not said it, therefore we shall go on as before.” Johnson v. United States, 163 Fed. 30, 32 (1908).

6 The declaration of policy contained in Kentucky’s Act is typical: Ky. Statutes, (Baldwin’s 1939 Supp.) sec. 4748g-2. “Declaration of state policy.—As a guide to the interpretation and application of this Act, the public policy of this State is declared to be as follows:

Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to furnish benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The General Assembly, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police power and other reserved powers of this state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. This Act is enacted as a part of a national plan of unemployment compensation and social security.”
it appears that the primary purpose is to prevent the occurrence of the evils which accompany unemployment. This is to be accomplished by encouraging employers to provide more stable employment, and by systematically creating a fund for the benefit of those who may become unemployed. The act is to aid not only the individual who may find himself without work, but is intended to increase the economic security of the general public. Since the unemployment compensation laws were adopted as a part of a national policy, the general purpose of Congress in passing the Federal statute becomes a part of the policy of each state's enactment. Referring to its objective Mr. Justice Cardozo in holding the Social Security Act constitutional, said:

"The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train."

Considering the expressed purpose, independent of the remaining provisions, the test of employment intended by the legislature would seem to be in the nature of the following: Whether the relation of the individual to his employer is of such a character that the cumulative effect of its termination induced by inexorable economic factors could reasonably be expected to create the conditions against which the statute was directed, place any great hardship on the individual and would create a serious burden on the social and economic life of the general public? Thus, the legislature has established its basic test of "employment" and any apparent limitations found in the act must be considered with a reference to that basic criterion. It should clearly appear that a provision was intended to narrow the test before such a construction is placed upon it. It is significant that the decisions limiting the scope of "covered employment" to common law "servants" contain no discussion of the purpose of the unemployment compensa-

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tion acts, while most of the cases in which a broader meaning is given to ‘‘covered employment’’ refer to the purpose of the statute.10

THE STATUTES RECOGNIZE A NEW INTEREST

Unemployment compensation is a radical advance in social legislation. The legislatures have granted protection to an interest which the common law ignored.11 That interest is social in nature and inures to all members of society. All classes of persons, from the lowest-paid laborer to the wealthiest capitalist, have an economic and social interest in preventing the occurrence of the evils of unemployment for none escape its consequences. It is the duty of the court then, in interpreting a statute which acknowledges a previously unsecured claim, to regard the standards of the society that called for its recognition. The North Carolina Court in Unemployment Compensation Commission v. Jefferson Std. Life Ins. Co.12 refused to apply the narrow common law master-and-servant test of employment, but felt impelled to construe the provisions of the statute to conform with the present day conditions which produced the enactment. The courts should avoid falling victim to a suspicion, so often characteristic of the legal profession, that anything new is undesirable. Nothing is to be gained by the importation of medieval concepts, which may have their

* See also Great Western Mushroom Co. v. Industrial Comm., 103 Colo. 39, 82 P. (2d) 751, 752 (1939); Susquehanna Collieries Co. v. Unemployment Comp. Bd, 8 A. (2d) 445, 446 (1939); Landis, supra n. 2 at 222-223; Powell, (1939) 25 A.B.A.J., 185, 188; de Sloovere, (1936) 5 Fordham L. Rev. 219, 221, 238; (1940) 88 U. of Pa. L. Rev. 527, 551, 562.
place in certain branches of the law, into a law which is a product of an entirely different world.\textsuperscript{13}

The common law concept of master and servant is based upon the fiction that "the act of the servant is the act of the master." This fiction was used in torts in order to make the master liable for the servant's negligence.\textsuperscript{14} Originally the theory related only to slaves, but once the formula was created it was soon extended to make the master liable for the acts of his free servants. Even attorneys and factors were treated as "servants."\textsuperscript{15} It was eventually recognized as a matter of common sense that an employer should not be liable for the acts of all persons employed by him, and the result was the doctrine of "independent contractor."\textsuperscript{16} This theory did not create a new legal status but only served as a limitation on ex delicto liability.

The fictional concept of master and servant can serve no useful purpose in alleviating the evils of unemployment.\textsuperscript{17} For example, consider the facts in the case of Wisconsin Bridge and Iron Co. v. Ramsey.\textsuperscript{18} The X company was engaged in manufacturing and erecting iron works. Y was employed by them to superintend construction. Should Y become unemployed, through no fault of his own, the hardship placed upon him and the burden on society would be the same regardless of whether or not he was an "independent contractor." Unless the legislature has expressly limited the scope of the application of the unemployment compensation law to the "master


\textsuperscript{14} See Holmes, Collected Legal Papers (1920) 58, 59, 62-68; Pound, The Interpretation of Legal History (1923) 109-111; Seavey, Speculations as to Respondeat Superior (1934) Harvard Legal Essays 433.

\textsuperscript{15} See Holmes, op. cit. supra n. 14 at 91, 92.


\textsuperscript{17} Globe Grain & Milling Co. v. Industrial Comm., — Utah —, 91 P. (2d) 512, 514 (1939); Note (1938) 7 Brooklyn L. Rev. 480, 482.

\textsuperscript{18} — Wis. —, 290 N.W. 199 (1940). (The court used the "independent contractor" test to exclude the person in question from the operation of the statute.)
and servant" relationship there is no logical reason for the courts to read such a limitation into the statute.

A glaring example of a failure to recognize the difference between tort liability and the duty created in an "unemployment compensation statute" is found in the case of Washington Recorder Publishing Co. v. Ernst. Discussing the statutory definition of "employment" Judge Millard said:

"Surely, the legislature did not intend to establish a different rule than that which has heretofore been employed by this court. To hold otherwise would be to, in effect eliminate the relationship of independent contractor. It would be a violent presumption indeed to hold that was the purpose of the legislature." (Italics added.)

Those words reveal an unfounded apprehension that the elimination of the test of "master and servant" in unemployment insurance laws would affect liability in tort cases. The court disregarded the fact that it was interpreting a statute relating entirely to a new field of law which has no relation to vicarious liability. To illustrate, the X company might not be liable for a tort of its salesman Y under the master-servant test of liability but at the same time might well be obliged to contribute to a state unemployment fund on the commissions paid to Y.

Workmen's Compensation was a somewhat novel innovation in the law, and had behind it a policy in some respects similar to the purpose of the unemployment compensation acts. Steffen comments upon the interpretation of Workmen's Compensation Acts as follows:

"... Moreover it is essential to determine upon the general philosophical basis for the workmen's compensation laws, since, on close questions it is the courts point of view in this regard which will be determinative. A few courts have approached the statute as 'an act in derogation of the common law' and 'to be strictly construed,' but most courts . . . have adopted a liberal viewpoint."[21]

LIBERAL OR STRICT CONSTRUCTION

The Kentucky Unemployment Compensation Statute provides that it shall be liberally construed,[22] and that it is enacted "under the police power and other reserved powers of this
Nevertheless the court in *Barnes v. Indian Refining Co.* said that it was a taxing statute and therefore must be strictly construed in favor of the person taxed. Two of the cases cited by the court to support this view hold that the Federal Social Security Act is constitutional under the taxing power of Congress. The powers of Congress must be expressly or impliedly delegated to it, while the states have all powers not specifically denied to them nor delegated to the national government. Congress learned in the AAA case that federal social and economic legislation might be a violation of the reserved powers of the states. So, in order to prevent constitutional objections the Social Security Act was enacted under the taxing power of the Federal Government. It does not follow that a state unemployment act is an exercise of the state's power to tax, since the police power is within the state's sphere of sovereignty. As a matter of fact, there may be some question as to the constitutionality of the Kentucky act as a tax measure. If it is a taxing statute any withdrawals from the fund must comply with the requirements of Section 230 of the Kentucky Constitution relating to appropriations. Such a difficulty would be avoided by recognizing the legislature's exercise of its police power in the premises. All of the contributions of employers and employees go into a trust fund for the benefit of the unemployed, and it is difficult to visualize funds disposed of in this manner as being "revenue" of the state.

One court that used the master-servant test said that the unemployment compensation statutes are not to be construed

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28 In Carmichail v. Southern Coal & Coke Co., 301 U.S. 495, 57 Sup. Ct. 868, 81 L. ed. 1245, (1937) the Act of Alabama was held valid under the state's power to tax, but the language of the court in the second part of the opinion (301 U.S. at 514-518) which is captioned by the court " Validity of the Tax as Determined by its Purposes" sounds very much like the "police power" of the state.
as changing the common law unless the purpose to effect such change is clearly expressed therein, and to have such effect the language must be clear, unambiguous, and peremptory. This seems to be but another way of stating the old canon that statutes in derogation of the common law must be strictly construed. The value of the distinction between "strict" and "liberal" construction has been questioned, but if "liberal construction" means that a common-sense interpretation is to be made with a reference to the purpose and background of the statute, then unemployment compensation acts should be liberally construed. To say that such statutes are to be strictly construed is to say that little effort is to be made to give effect to the intentions of the legislature.

TYPICAL STATUTES AND THEIR INTERPRETATION

The test of "employment" within the meaning of the Social Security Act has been determined in two instances by Federal District Courts. In both cases it was found that under Regulation 91 of the Bureau of Internal Revenue the individual in question was not an "employee" but an "independent contractor". The federal act defines employment as "any service, of whatever nature, performed within the United States by an employee for his employer ..." The act contains no definition of "employee" or "employer" but it is submitted that the purpose and history of the statute should be referred to in determining the test of employment. Since the regulations of the Bureau seem to indicate that the administrators of the Social Security Act have attempted to apply the master-servant test of employment, it may be that an amendment will be necessary to reconcile the inconsistencies that have resulted from the use

29 Wisconsin Bridge & Iron Co. v. Ramsey, — Wis. —, 290 N.W. 199, 202 (1940).
31 Indian Refining Co. v. Dallman, 31 F. Supp. 455 (S.D. Ill. 1940) (Same contributor who objected to paying under the state act in Barnes v. Indian Refining Co., supra n. 1); Texas Co. v. Higgins, 32 F. Supp. 428 (S.D.N.Y. 1940). Both cases seem to use the same test of employment as is ordinarily used in cases holding the master liable for torts of his servant, though in the Texas Co. case it was agreed before trial that the definition of employment should not be so limited.
of the common law test. State courts have held that the rulings of the Bureau of Internal Revenue are not conclusive upon them, and that the state statute must be construed according to the legislative intent disclosed by it. There seems to be nothing to prevent a state legislature from making its laws more inclusive than the Social Security Act, if constitutional rights are not invaded.

The typical state unemployment statute contains a section that defines the terms as used in the act. These terms may include "wages", "services", "employing unit", "employment" or "covered employment", "subject employer", and "employee". The legislature is its own lexicographer and may give its own meaning to terms which have another technical meaning in the common law. In a Kentucky case a statute requiring petitioners to be "freeholders" was satisfied by stating that the signers were "citizens, landowners, legal voters and taxpayers" though under the common law definition this might not have been sufficient. The Restatement of Agency says:

"Statutory use of Servant. Statutes have been passed in which the words 'servant' and 'agent' have been used. The meaning of these words in statutes varies. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of the Subject." (Italics added.)

Moreover, the definitions that are included in the glossaries of the various statutes are not to be isolated and construed separately, but they must be read in connection with the entire act.

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35 For the various state statutes see the Commerce Clearing House, Inc., Unemployment Insurance Service.
37 Pendleton v. Letcher Co. Fiscal Court, 194 Ky. 688, 240 S.W. 358 (1922). See also Payne v. Fiscal Court, 200 Ky. 41, 252 S.W. 127 (1923).
38 Section 220; comment, subsection (1), (d).
A clause, or phrase, or even a section might appear to have but
one plain meaning when read alone, but would be ambiguous
or have an entirely different meaning when considered in
the light of the purpose and history of the whole statute.40

The New York Act defines "employment" as "any employ-
ment under any contract of hire—including all contracts entered
into by helpers and assistants of employees whether paid by
employer or employee..."41 This phrase seems more inclu-
sive than the master and servant relationship, especially when
considered with the entire act. However, the courts of the
Appellate Division have applied the "independent contractor"
test to determine whether persons were employees within the
meaning of the statute.42 The case of Andrews v. Commodore
Knitting Mills, Inc.,43 is interesting in that the court used defini-
tions of terms found in an earlier labor statute44 and disregarded
the glossary within the unemployment compensation act. In
none of the cases did it appear to have been urged that a broader
test than that of the master-and-servant relationship was in-
tended by the legislature, and the highest court of the state has
not passed on the question.

Mississippi's statute45 defines "wages" as all remuneration
payable for personal services, including commissions and
bonuses. "Employment" means service performed for wages
or under any contract of hire—. The statute was construed
by the Mississippi Court46 to exclude "independent contractors",
but the statutory definitions, seem to have been ignored, and the
court isolated the terms "contract of hire" and "employer" and
ascribed to them their common law meanings.

4 See Powell, supra n. 2 at 189, de Sloovere, (1940) U. of Pa. L.
Rev. 527, 553.
4 Thompson's Laws of New York (1939), Labor Law, sec. 500 et seq.
Andrews v. Commodore Knitting Mills, Inc., 13 N.Y.S. (2d) 577
(1939); In re Scatola, 14 N.Y.S. (2d) 55 (1939); Andrews v. North
Shore Country Club, 16 N.Y.S. (2d) 363 (1940) Caddies were held to
be within the provisions of the act and no mention was made of the
independent contractor test); Levine v. Aluminum Cooking Utensil
Co., Inc., 17 N.Y.S. (2d) 434 (1940).
4 13 N.Y.S. (2d) 577 (1939)
4 Thompson's Laws of New York (1939), Labor Law, secs. 2 and
350.
4 Miss. Laws 1936 c. 176, amended by Laws 1936 (1st ex. ses.) c. 3
amended by Laws c. 147.
4 Texas Co. v. Wheeless, — Miss. —, 187 So. 880 (1939). See also
American Oil Co. v. Wheeless, — Miss. —, 187 So. 889 (1939).
A number of states have adopted a statute containing a definition of employment similar to the following:

"Employment" subject to the other provisions of this subsection, means service . . . performed for wages or under any contract or hire. . . .

Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the Commission that—

(A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

(B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) such individual is customarily engaged in an independently established trade, occupation, profession, or business."

"Wages" is usually defined as "all remuneration payable for personal services including commissions and bonuses."

Some of the courts in applying a statute containing these "three point exemptions" have refused to use the common law master-and-servant test to determine whether a person is within the meaning of "employment." Those courts have considered the purpose of the enactment, and have read the definitions with reference to the whole act, realizing they were dealing with a newly created interest. As Chief Justice Rosenberry pointed out in his dissenting opinion in Wisconsin Bridge and Iron Co. v. Ramsay, the definition of each of the terms defined in the act, such as "employer", "employment", etc., contains the other terms.
defined terms. Since those terms are cognates, in order to find the meaning of any one of them it is necessary to refer to the entire glossary.

Other courts have treated the "three point exemption" statute as nothing more than a recital of the ordinary tests used to determine whether an individual is a common law "servant." In some instances the courts seem to have consciously ignored the statutory definitions and proceeded to use the common law test of master and servant.

The glossary in the Kentucky Unemployment Compensation Act defines "wages" as all remuneration payable for services, including commissions and bonuses. "Services" shall not include odd-jobs and subsidiary work. "Employing unit" and "subject employer" are also defined. "Covered employment" means service, performed for wages or under any contract of hire, written or oral, express or implied in which the relationship of the individual performing such service and the employing unit for which such services are rendered, is as to those services, the legal relationship of employer and employee. In its construction of the act the court took the phrase "the legal relationship of employer and employee" to be the key to the determination of what persons were covered by its provisions, and concluded that the phrase "means what it says and that the words are synonymous with the legal concept of master and servant". It is significant that the terms "master and servant".

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60 Washington Recorder Publishing Co. v. Ernst, — Wash. —, 91 P. (2d) 718 (1939); Wisconsin Bridge & Iron Co. v. Ransay, — Wis. —, 290 N.W. 199 (1940). See the dissenting opinion in Unemployment Compensation Comm. v. Jefferson Std. L. Ins. Co., 215 N.C. 479, 2 S.E. (2d) 584, 590 (1939). In Buckstaff Bath House Co. v. McKinley, — Ark. —, 127 S.W. (2d) 802 (1939) (Affirmed in 60 Sup. Ct. 279, 84 L. ed. 242 (1939)) the individuals were held "employees" and not "independent contractors" but the question as to whether the act excluded "independent contractors" was not discussed.

Note, 124 A.L.R. 652.

61 See Washington Recorder Publishing Co. v. Ernst, — Wash. —, 91 P. (2d) 718, 724 (1939); Wisconsin Bridge & Iron Co. v. Ramsey, — Wis. —, 290 N.W. 199, 202 (1940).


63 In the original act (Ky. Acts, 1936, 4th ex. ses. c. 7, p. 100, sec. 19) "wages" was defined as all remuneration for personal services, but in the 1939 Act (Ky. Acts 1939 c. 50 p. 301, sec. 3-g) the word "personal" does not appear. This would seem to indicate an intention of the legislature to broaden the scope of the act, but the court in Barnes v. Indian Refining Co., 280 Ky. 811, 134 S.W. (2d) 629 (1939) said the omission of the word was without significance.

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and "independent contractor" do not appear in the statute. It is true that the phrase used by the legislature is treated in some tort cases as being synonymous with "master and servant", but it is submitted that had the court considered the act as a whole, with reference to the declared purpose of the legislature it could not have said that the plain meaning of "legal relation of employer and employee" was the "common law concept of master and servant."

Connecticut's statute does not contain a declaration of policy and defines "employment" as "any service ... performed under any express or implied contract of hire creating the relationship of master and servant. No definition of the master and servant relationship appears in the statute and the court in Northwestern Mutual Life Ins. Co. v. Tone applied the common law "independent contractor" test. The legislature seems to have indicated its intention that the scope of unemployment compensation should be limited to common law servants.

An examination of the cases as a group discloses that the conclusions reached by the different courts do not depend so much upon the form of the statute as upon the attitude the particular court adopted toward the unemployment compensation law. Those courts which considered the expressed policy of the act, and realized that it applied to a new field in the law, gave effect to that policy in construing the provisions of the statute. The courts which did not adopt such an approach found terms within the statute to which they could attach entirely unrelated common law connotations and limited the coverage of the statute to "servants". The result reached by the first group is a broad application of the act according to its policy and terms. The second group only partially recognizes a claim of society that the legislature intended to secure.

If the common law concept is not to be used to determine who are "employees", it may be asked "what is to be the test?" The Kentucky Court seemed to be troubled with that problem when it said:

Any other construction would lead us into the purest speculation uninvited by the plain terms of the Act itself. We will not seek to

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55 125 Conn. 183, 4 A. (2d) 640 (1939).
56 See the dissenting opinion in Globe Grain & Milling Co. v. Industrial Comm., — Utah —, 91 P. (2d) 512, 517 (1939).
The answer is that a line does not have to be precisely drawn nor in terms of concepts known to legal phraseology. The statute contains its own glossary and defines the relationship that must exist before new rights and duties, created by the enacted law, will be enforceable. The task given the courts by the legislature is not easy. But the judicial branch should not avoid a duty merely because it is difficult. The courts must now do what they have been doing since the beginning of the common law. By the process of inclusion and exclusion as the cases are presented it will be determined on which side of the line, drawn by the statutory test of employment, particular persons or classes or persons will fall. This very method was used by the courts in the law of negligence in determining the persons who were included under the formula of "master and servant" so as to make the master liable for the servant's acts. Since Unemployment Compensation law is in its infancy in this country, more definite lines cannot be drawn.

R. VINCENT GOODLETT

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57 280 Ky. 811, 816, 134 S.W. (2d) 620, (1939)