

# California Law Review

Published Bi-Monthly throughout the Year by Students of the  
School of Jurisprudence of the University of California, Berkeley,  
California. Indexed in Index to Legal Periodicals, Public Affairs  
Information Service and Current Legal Thought.

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Subscription Price, \$3.50 Per Year

Current Single Copies, 65 Cents

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## Comment

### AGENCY:

#### INDEPENDENT CONTRACTORS IN CALIFORNIA.

The question of what is an independent contractor arises chiefly in cases under the Workmen's Compensation Act<sup>1</sup> and in actions against employers for the torts of their alleged agents or employees.<sup>2</sup>

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<sup>1</sup> CAL. LABOR CODE § 3201 *et seq.*

<sup>2</sup> It has been held that the definition of an independent contractor found in section 3353 of the Labor Code, part of the California Workmen's Compensation Act, does not change the rules of law applicable to that status. *Flickenger v. Industrial Acc. Comm.* (1910) 181 Cal. 425, 184 Pac. 851; *Fidelity & C. Co. v. Industrial Acc. Comm.* (1923) 191 Cal. 404, 216 Pac. 578. The fact that cases not arising under the Workmen's Compensation Act cite those which do so arise is also indicative of the fact that there is no distinction made as to definitions in the two groups of cases. But see *Heard v. Board of Administration* (1940) 39 Cal. App. (2d) 685, 694, 104 P. (2d) 47, 51, where the court says that cases arising under the Act are in a class by themselves.

Section 3353 of the Labor Code defines an independent contractor as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished".

If a person hired to perform work, labor or services is an employee,<sup>3</sup> the Workmen's Compensation Act is applicable and the hirer is liable to pay him compensation. If he is an employee or an agent, the hirer is liable for his torts if committed within the scope of his employment. But if he is an independent contractor, the Workmen's Compensation Act does not apply, and there is no liability on the part of the hirer for his torts.<sup>4</sup>

Some holdings under the Workmen's Compensation Act may be explained by reference to section 5952 of the Labor Code, a part of the Act. That section limits the scope of judicial review of the commission's decisions to questions of jurisdiction, fraud and reasonableness.<sup>5</sup> Aside from these considerations the commission's decisions are binding upon the courts.<sup>6</sup> The result is that a finding of a relationship may be affirmed, though the court is in doubt as to the propriety of such a finding and, if free, might well reach a contrary conclusion on the facts before it. An example of this compulsion at work is found in *Schaller v. Industrial Accident Commission*,<sup>7</sup> where an award to a vaudeville performer, paid by the job and free to change the details of his act as he and the other members of the troupe thought best, was affirmed. The court spoke of the persuasive power of the commission's decision and refused to discuss a prior contra holding on similar facts in the district court of appeal.<sup>8</sup> But in many cases the courts have either resisted or ignored this compulsion.

The following considerations, or combinations of them, have influenced California courts in determining that the relationship is one of independent contractor: (1) that the hirer lacks control over the manner and details of performance of the one hired or could not terminate the contract of hire at will; (2) that the one hired is engaged in a distinct occupation or is a separate business organization;

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<sup>3</sup> The presumption is that one performing work and labor for another is an employee of the one for whom the work is done. *Hillen v. Industrial Acc. Comm.* (1926) 199 Cal. 577, 250 Pac. 570; *Robinson v. George* (1940) 16 Cal. (2d) 238, 105 P. (2d) 914.

<sup>4</sup> Where an independent contractor is employed to perform work which will necessarily involve the creation of a nuisance or the infringement of a statute or ordinance, or where the carrying out of the contract specifications results in injury to the person or property of a third person, the employer is liable for those consequences, though the performer is an independent contractor. *Snow v. Marian Realty Co.* (1931) 212 Cal. 622, 299 Pac. 720 (creation of a nuisance through breach of an ordinance); *Hedstrom v. Union Trust Co.* (1908) 7 Cal. App. 278, 94 Pac. 386 (negligent trespass in carrying out the contract specifications).

<sup>5</sup> The courts are directed by section 3202 of the Labor Code to construe the Act's provisions liberally. *La Franchi v. Industrial Acc. Comm.* (1931) 213 Cal. 675, 3 P. (2d) 305.

<sup>6</sup> *Hillen v. Industrial Acc. Comm.*, *supra* note 3; *Drillon v. Industrial Acc. Comm.* (1941) 17 Cal. (2d) 346, 110 P. (2d) 64.

<sup>7</sup> (1938) 11 Cal. (2d) 46, 77 P. (2d) 836.

<sup>8</sup> *Brosius v. Orpheum Theatre Co., Ltd.* (1936) 16 Cal. App. (2d) 61, 60 P. (2d) 156.

(3) that the services performed are delegable, not personal; (4) that the one hired supplies the tools or other instrumentalities used in the work; (5) that payment is by the job; and (6) that there are no set hours for work by the person hired. These considerations are given varying weight by the courts; no one of them alone is sufficient to establish the status of independent contractor.<sup>9</sup>

#### CLASSIFICATION OF HOLDINGS BY OCCUPATION

A review of fact situations which have been dealt with in the California cases shows the difficulty, if not impossibility, of making any positive statement as to what combinations of the foregoing factors will or will not control a court's decision.

*Salesmen.* Where the one hired was a salesman, using his own automobile, he has been held to be an agent or an employee where he received detailed instructions, traveled a specified territory, was dischargeable at the will of the hirer, worked between set hours and was paid a weekly salary.<sup>10</sup> This result is held to follow even though the salesman-employee is paid partly or wholly by commissions<sup>11</sup> and may only have to attend a daily or weekly sales conference,<sup>12</sup> or even though he may have no definite working hours at all.<sup>13</sup> But where these conditions are present—payment by commissions, no specified working hours, and use of the salesman's own automobile—the salesman has also been held to be an independent contractor. The result apparently turned upon the degree of control exercised by the hirer over the salesman. Where no sales instructions of any kind are given and the work is arranged between the alleged employer and the alleged employee by common consent, it is clear that no true relationship of employment exists.<sup>14</sup> But if the salesman's duties include tasks

<sup>9</sup> *Press Pub. Co. v. Industrial Acc. Comm.* (1922) 190 Cal. 114, 210 Pac. 820; *Guth v. Industrial Acc. Comm.* (May 13, 1941) 44 A. C. A. 850, 3 Cal. Dec. 857, 112 P. (2d) 969.

The belief of the parties as to their status is said to be completely irrelevant. That belief is, however, sometimes mentioned in the court's opinion, perhaps as a makeweight. *State Comp. Ins. Fund v. Industrial Acc. Comm.* (Aug. 18, 1941) 46 A. C. A. 584, 5 Cal. Dec. 350, 116 P. (2d) 173.

<sup>10</sup> *Dillon v. Prudential Ins. Co. of America* (1925) 75 Cal. App. 266, 242 Pac. 736.

<sup>11</sup> *Cameron v. Pillsbury* (1916) 173 Cal. 83, 159 Pac. 149 (partly); *Phillips v. Larrabee* (1939) 32 Cal. App. (2d) 720, 90 P. (2d) 820 (wholly).

<sup>12</sup> *Ryan v. Farrell* (1929) 208 Cal. 200, 280 Pac. 945 (daily); *Hartford A. & I. Co. v. Industrial Acc. Comm.* (1928) 93 Cal. App. 313, 269 Pac. 733 (weekly; a daily report by telephone also required).

<sup>13</sup> *Brown v. Industrial Acc. Comm.* (1917) 174 Cal. 457, 163 Pac. 664; *Curran v. Earle C. Anthony, Inc.* (1926) 77 Cal. App. 462, 247 Pac. 236; *Fischer v. Havelock* (1933) 134 Cal. App. 584, 25 P. (2d) 864.

<sup>14</sup> *Royal Indemnity Co. v. Industrial Acc. Comm.* (1930) 104 Cal. App. 290, 285 Pac. 912.

other than that of selling, or if his contract of employment specifies that he is to devote his entire time and effort to his work, he is an employee.<sup>15</sup> Control by the hirer over prices and credit terms and the use of the hirer's business cards have been regarded as insufficient to establish that relationship.<sup>16</sup>

*Truckdrivers.* One hired to drive a truck of which he is not the owner, who is hired for no specified period and is paid for his labor by the time put in rather than by the job, is an employee.<sup>17</sup> This is also the holding where he is engaged by the trip and is paid not for his labor but by a percentage of the proceeds of each trip.<sup>18</sup> If he owns the vehicle he is hired to drive, is hired for a specified period and is paid a lump sum, he has been considered an employee where the employer retains complete discretion as to the circumstances under which he may be discharged.<sup>19</sup> But where he furnishes drivers and vehicles other than the one he himself is driving, though the services are paid for by the day and used between specified hours, he has been said to be an independent contractor.<sup>20</sup> This is also the result where he makes periodic trips and is paid according to the weight of the freight hauled, another way of paying by the job, even though his exclusive services have been contracted for.<sup>21</sup> If in these circumstances he hires another to drive his truck, or operates a general transfer business, it is clear that he is an independent contractor.<sup>22</sup>

*Skilled workers.* Another group of cases concern the status of those hired to perform tasks requiring special skill or training, for example, vaudeville performers, jockeys, plumbers, painters, carpenters, plasterers, mechanics, window trimmers, longshoremen, blasters, pilots, nurses and auditors. If the one hired is paid for his labor, is furnished the materials needed in his work and is supervised generally in his work, he has been held to be an employee.<sup>23</sup> The extent

<sup>15</sup> *Brown v. Industrial Acc. Comm.* (entire time devoted to work); *Curran v. Earle C. Anthony, Inc.* (other tasks), both *supra* note 13.

<sup>16</sup> *Barton v. Studebaker Corp. of America* (1920) 46 Cal. App. 707, 189 Pac. 1025.

<sup>17</sup> *White v. City of Alameda* (1899) 124 Cal. 95, 56 Pac. 795.

<sup>18</sup> *Keeling v. Industrial Acc. Comm.* (1936) 16 Cal. App. (2d) 733, 61 P. (2d) 373.

<sup>19</sup> *Smith v. Joint Union H. S. Dist.* (1931) 118 Cal. App. 673, 5 P. (2d) 930. In *Chapman v. Edwards* (1933) 133 Cal. App. 72, 24 P. (2d) 211, the court said that a truck owned by a driver who worked between set hours at wages paid by the load but arbitrarily fixed by the hirers was only a "super wheelbarrow", and the driver was held to be an employee.

<sup>20</sup> *Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 159 Pac. 721.

<sup>21</sup> *Fidelity & C. Co. v. Industrial Acc. Comm.*, *supra* note 2.

<sup>22</sup> *Flickenger v. Industrial Acc. Comm.*, *supra* note 2 (general transfer business); *Luckie v. Diamond Coal Co.* (1919) 41 Cal. App. 468, 183 Pac. 178 (general transfer business); *Preo v. Roed* (1929) 99 Cal. App. 372, 278 Pac. 928 (hired driver).

<sup>23</sup> *Archbishop v. Industrial Acc. Comm.* (1924) 194 Cal. 660, 230 Pac. 1; *Schramm v. Industrial Acc. Comm.* (1936) 15 Cal. App. (2d) 475, 59 P. (2d) 858.

In *Curcic v. Nelson Display Co.* (1937) 19 Cal. App. (2d) 46, 64 P. (2d) 1153, a

of the supervision necessary in such a case will necessarily involve determining what part of the work is to be done first.<sup>24</sup> Even if the one hired furnishes his own materials and is paid by the job, he is an employee if he is subject to a watchful supervision of the details of his work and if there appears to be no limitation on his right to discontinue his work.<sup>25</sup> And if no such limitation appears, even absent the watchful supervision, he is an employee where he does not furnish his own materials.<sup>26</sup> In one case, where the alleged employee was paid by the day, the court in dealing with the problem of control said merely that there appeared to be no restrictions placed upon the power of the employer.<sup>27</sup> The existence of the power itself seems to have been assumed in that case since it was not expressly contracted for, no facts from which it might have been inferred appeared, and no direction or control was in fact exercised by the employer. Yet under like facts, even where the court has found that the one hired may be discharged at any time, it has refused to find a relationship of employment.<sup>28</sup>

The fact that the alleged employee is regularly employed elsewhere than on the job on which he is working when the cause of action arises or that he is working for more than one person is significant as indicating an independent contractor relationship.<sup>29</sup> And the fact

window trimmer who was paid by the job, furnished with materials and told how to install and trim was held to be an employee. There the supervision appeared greater than general. Comparable cases are *Murray v. Industrial Acc. Comm.* (1932) 216 Cal. 340, 14 P. (2d) 301, and *Drillon v. Industrial Acc. Comm.*, *supra* note 6. In the *Murray* case a pilot was hired by petitioner to deliver an airplane to him, was paid only his traveling expenses and was given directions as to everything except the choice of a route. *Held*, an employee. In the *Drillon* case the holding was the same where a jockey, hired to ride in a single race, was to be paid \$25 if he won, \$10 if he lost, and was told how to handle the horse throughout the race.

<sup>24</sup> *Archbishop v. Industrial Acc. Comm.*, *supra* note 23.

The courts have too often failed to indicate what facts lead them to a finding of supervision. In *Schramm v. Industrial Acc. Comm.*, *supra* note 23, it appeared that construction plans and specifications were prepared by the alleged employee and one of the alleged employers; also, said the court, the alleged employer supervised the work of construction "to some extent".

<sup>25</sup> *Hillen v. Industrial Acc. Comm.*, *supra* note 3. In this case a watchful supervision consisted chiefly of giving a few directions plus continual inspection of the work being done.

<sup>26</sup> *Helmuth v. Industrial Acc. Comm.* (1922) 59 Cal. App. 160, 210 Pac. 428; *Chas. R. McCormick Lbr. Co. v. O'Brien* (1928) 90 Cal. App. 776, 266 Pac. 594 (some materials purchased by hirer).

<sup>27</sup> *Cemetery Ass'n v. Industrial Acc. Comm.* (1918) 37 Cal. App. 706, 174 Pac. 351.

<sup>28</sup> *Teller v. Bay & River Dredging Co.* (1907) 151 Cal. 209, 90 Pac. 942; *Pryor v. Industrial Acc. Comm.* (1921) 186 Cal. 169, 198 Pac. 1045; *Moody v. Industrial Acc. Comm.* (1928) 204 Cal. 668, 269 Pac. 542.

<sup>29</sup> *Hedge v. Williams* (1901) 131 Cal. 455, 63 Pac. 721 (regularly employed elsewhere); *Thompson v. Robinson-Roberts Co.* (1936) 13 Cal. App. (2d) 166, 56 P. (2d) 599 (regularly employed elsewhere); *Coleng v. Ramsdell* (1937) 19 Cal. App. (2d) 376, 65 P. (2d) 365 (working for several persons). See also *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407, 156 Pac. 491.

that he is engaged in an occupation independent of his hirer's has been given some importance.<sup>30</sup>

If one agrees to accomplish a certain result, using his own tools and employing his own assistants, and is paid for that result, he is usually an independent contractor.<sup>31</sup> In one case, where these facts appeared, but the head contractor exercised control over the hiring and firing of workers used by an alleged subcontractor, the subcontractor, and so the workers he used, were held to be employees of the head contractor.<sup>32</sup>

*Newsboys.* So far the classification of cases by the occupations involved has shown how many similar situations, some of which seem substantially the same, have led to different holdings by the California courts. The "newsboy" cases present the same picture. In most of these cases the newsboy has purchased his papers from the publishing company and has sold them at a price set by the company, has been assigned his route or corner, has contracted to comply with certain regulations as to prompt distribution, courtesy, keeping within the assigned territory and the like, and is subject to immediate discharge. Where these facts have been present, and he has received some definite periodic compensation, he has been treated as an employee,<sup>33</sup> even though in one case the sum was only three dollars a month given to cover certain extra costs of distribution;<sup>34</sup> but in cases where he has received no such compensation he has been called an independent contractor.<sup>35</sup>

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<sup>30</sup> *Bennett v. Truebody* (1885) 66 Cal. 509, 6 Pac. 329; *Hedge v. Williams*, *supra* note 29; *Green v. Soule* (1904) 145 Cal. 96, 78 Pac. 337.

<sup>31</sup> *Bennett v. Truebody*, *supra* note 30; *Freiden v. Industrial Acc. Comm.* (1922) 190 Cal. 48, 210 Pac. 420.

<sup>32</sup> *New York Indem. Co. v. Industrial Acc. Comm.* (1927) 80 Cal. App. 713, 252 Pac. 775.

<sup>33</sup> *Globe Indemnity Co. v. Industrial Acc. Comm.* (1930) 208 Cal. 715, 284 Pac. 661; *Call Pub. Co. v. Industrial Acc. Comm.* (1928) 89 Cal. App. 194, 264 Pac. 300; *cf. Robinson v. George*, *supra* note 3, where the newsboy was subject to call between certain hours by his district manager to deliver papers to subscribers who had not received them from their regular distributors. He was paid a set sum for each delivery. *Held*, an employee.

<sup>34</sup> *Globe Indemnity Co. v. Industrial Acc. Comm.*, *supra* note 33. This case was distinguished on the ground mentioned by the supreme court in *New York Indem. Co. v. Industrial Acc. Comm.* (1931) 213 Cal. 43, 1 P. (2d) 12, (1931) 19 CALIF. L. REV. 220, 554. A stronger case for so distinguishing is *Call Pub. Co. v. Industrial Acc. Comm.*, *supra* note 33, where the regular compensation received every month was larger and was given to guarantee some profit on the venture.

<sup>35</sup> *New York Indem. Co. v. Industrial Acc. Comm.*, *supra* note 34; *State Comp. Ins. Fund v. Industrial Acc. Comm.* (1932) 216 Cal. 351, 14 P. (2d) 306; *Bohanon v. James McClatchy Pub. Co.* (1936) 16 Cal. App. (2d) 188, 60 P. (2d) 510; *Batt v. San Diego Sun Pub. Co.* (1937) 21 Cal. App. (2d) 429, 69 P. (2d) 216. A similar case holding the same way where the alleged employee was a milkman is *Mt. Meadow v. Industrial Acc. Comm.* (1938) 25 Cal. App. (2d) 123, 76 P. (2d) 724.

*Other groups.* There are a few situations not covered by any of the categories so far discussed. Where the one hired is a woodchopper, paid by the cord, and there is no agreement between him and the hirer as to hours, methods or the length of the job, he is an independent contractor.<sup>36</sup> But one case has held a workman employed to gather brush to be an employee, though he was to be paid by the job, could employ assistants, and his only instructions were to pile the brush straight.<sup>37</sup>

One who picks up and delivers cars for automobile servicing companies is an independent contractor where he is paid by the car handled, has no fixed quitting time, uses his own equipment and pays all costs of its operation.<sup>38</sup>

Purported lessees of agricultural land or orchards have been considered employees of their "lessors" where they had obligated themselves to work the land, harvest and market according to their "lessor's" wishes.<sup>39</sup>

#### RATIONALE

*Lack of control.* A study of the holdings thus far summarized reveals that the element to which the courts seem to give the most weight is that of the hirer's lack of control over the details of performance, or of such lack as is implied in his inability to discharge at will the one hired. The degree of control exercised or agreed on appears to have been the determining factor in the reaching of different results on otherwise similar fact situations. There have even been some dicta to the effect that it alone is enough to determine the court's decision;<sup>40</sup> and, in any case, the right of control is indispensable to a finding of an employer-employee relationship.<sup>41</sup>

The courts in discussing the control factor have used language which seems to lay down three different rules as to the degree of control necessary to the relationship of employment. Some cases say that control must be complete, authoritative and unqualified.<sup>42</sup> Some fol-

<sup>36</sup> *Parsons v. Industrial Acc. Comm.* (1918) 178 Cal. 394, 173 Pac. 585; *Provenciano v. Division of Indus. Acc.* (1930) 110 Cal. App. 239, 294 Pac. 71.

<sup>37</sup> *La Franchi v. Industrial Acc. Comm.*, *supra* note 5.

<sup>38</sup> *Hammel v. Keehn* (1937) 18 Cal. App. (2d) 387, 63 P. (2d) 1165 (work done by a partnership); *Washko v. Stewart* (1937) 20 Cal. App. (2d) 347, 67 P. (2d) 144.

<sup>39</sup> *Carlson v. Industrial Acc. Comm.* (1931) 213 Cal. 287, 2 P. (2d) 151; *S. A. Gerard Co. v. Industrial Acc. Comm.* (1941) 17 Cal. (2d) 411, 110 P. (2d) 377.

<sup>40</sup> *Press Pub. Co. v. Industrial Acc. Comm.*; *Guth v. Industrial Acc. Comm.*; *State Comp. Ins. Fund v. Industrial Acc. Comm.*, all *supra* note 9.

<sup>41</sup> *Luckie v. Diamond Coal Co.*, *supra* note 22; *Counihan v. Lufstufka Bros. & Co.* (1931) 118 Cal. App. 602, 5 P. (2d) 694.

<sup>42</sup> *Western Indemnity Co. v. Pillsbury*, *supra* note 20; *Brosius v. Orpheum Theatre Co., Ltd.*, *supra* note 8; *Mt. Meadow v. Industrial Acc. Comm.*, *supra* note 35.

low *May v. Farrell*<sup>43</sup> in saying that "the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it". And many merely speak of "control" without further description.<sup>44</sup>

Nearly all of those cases purporting to apply the test of complete control are cases where the relationship in question is found to be that of an independent contractor, so that there seems to be no actual example available of what constitutes complete control.<sup>45</sup>

The facts of *May v. Farrell* which were said to meet a test of "general supervision and control" are as follows: the employee was an automobile salesman who had to report to a sales conference at a specific hour each morning where he received only general instructions as to the promotion of sales and where the manager discussed with the salesmen the details of their work; it was clear that he was not subject to his employer's control over each detail of his work.

It is well settled that a right of general control insuring conformance to the terms of the contract to be performed, either by an architect where the work is construction or by the hirer, does not prevent the status of an independent contractor.<sup>46</sup> Nor does the fact that the hirer reserves the right to make alterations, deviations, additions, or omissions from the original terms of the contract prevent the existence of that status.<sup>47</sup> Assuming that the court had these settled rules in mind, the test applied by the *May* case seems to require control to be extended to the manner of performance of the details of the work, independently of the contract provisions as to the results desired and the means to be used to reach such results. But in terms the opinion does not so state.<sup>48</sup>

<sup>43</sup> (1928) 94 Cal. App. 703, 710, 271 Pac. 789, 793. *Accord*: *Ryan v. Farrell* (1929) 208 Cal. 200, 280 Pac. 945; *Fearn v. Ralph Hamlin, Inc.* (1932) 215 Cal. 211, 8 P. (2d) 1015; *George v. Chaplin* (1929) 99 Cal. App. 709, 279 Pac. 485.

<sup>44</sup> *Brown v. Industrial Acc. Comm.*, *supra* note 13; *Guth v. Industrial Acc. Comm.*, *supra* note 9.

<sup>45</sup> If the employer has complete control, it follows that the employee has none. Yet in *Curran v. Earl C. Anthony, Inc.*, *supra* note 13, where the court professed to apply a test of complete lack of control by the alleged employee over the manner of performance, a salesman who was admittedly allowed wide discretion as to his hours and actions was found to be an employee.

<sup>46</sup> *Frassi v. McDonald* (1898) 122 Cal. 400, 55 Pac. 139; *Coleng v. Ramsdell*, *supra* note 29; *Rathbun v. Payne* (1937) 21 Cal. App. (2d) 49, 68 P. (2d) 291.

It is accepted law that the driver of a taxicab is an independent contractor; yet the person who hires him may direct the manner of reaching the destination, the rate of speed at which to drive, where to stop before the final destination is reached, and so on. In *Western Indemnity Co. v. Pillsbury*, *supra* note 20, at 811, 159 Pac. at 723, the court quotes 1 *LABATT, MASTER AND SERVANT* (2d ed. 1913) § 25, as the basis for its view that these rights constitute control only "for a definite and restricted purpose".

<sup>47</sup> *Frassi v. McDonald*, *supra* note 46; *Green v. Soule*, *supra* note 30.

<sup>48</sup> The court in *May v. Farrell*, *supra* note 43, based its holding upon the case of *Cameron v. Pillsbury*, *supra* note 11, where the facts showed a greater right of control



Cases relying merely upon control, using no qualifying language, talk chiefly of control over the manner and mode of performance,<sup>49</sup> or over the details as distinguished from the results of the work.<sup>50</sup>

A problem involved in the test of control arises where the alleged employer is shown to lack the skill or knowledge necessary to the efficacious exercise of any right of control. That no right of control is possible in such a case was early intimated by the California courts.<sup>51</sup> Later cases for the most part have ignored the problem; but from the few which have considered it, two lines of authority have resulted. *Moody v. Industrial Accident Commission*<sup>52</sup> is typical of the cases asserting that there is no right of control in this situation. In that case the alleged employee was a nurse who could not be directed by the patient in the performance of her technical duties; she was held to be an independent contractor.<sup>53</sup> On the other hand in *Cemetery Ass'n v. Industrial Accident Commission*,<sup>54</sup> in holding that the relationship was one of master and servant, the court remarked that the fact that an employer was unskilled in the processes of blasting helped explain why he had actually exercised no control over his employee, but did not prevent such control.

Closely related to the entire question of control is the problem raised where the parties to the agreement of hire have the right to terminate it at will. The finding of such a right often contributes to the finding of the relationship of employment, since, in the absence of statute or a binding agreement to the contrary, it is a factor inherent in the relationship.<sup>55</sup> A few cases make the presence of this factor, along with that of the right of control, conclusive evidence of

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over the alleged employee than that possessed by the hirer in the May case. The commission had found it to be nearly if not entirely complete. Cases following the rule announced in *Cameron v. Pillsbury* and *May v. Farrell* have been closer to the latter on their facts.

<sup>49</sup> *Fidelity & C. Co. v. Industrial Acc. Comm.*, *supra* note 2; *Luckie v. Diamond Coal Co.*, *supra* note 22.

<sup>50</sup> *Hillen v. Industrial Acc. Comm.*, *supra* note 3; *Hollingsworth v. Pemberton* (1934) 138 Cal. App. 261, 31 P. (2d) 1063.

<sup>51</sup> *Bennett v. Truebody*, *supra* note 30.

<sup>52</sup> *Supra* note 28. *Accord*: *Teller v. Bay & River Dredging Co.*, *supra* note 28; *Fay v. German General Ben. Soc.* (1912) 163 Cal. 118, 124 Pac. 844, *semble*.

<sup>53</sup> As to the liability of hospitals for the tortious acts of doctors and nurses furnished by them, see AGENCY RESTATEMENT, CAL. ANN. (Am. L. Inst. 1937) § 220.

<sup>54</sup> *Supra* note 27; *cf. Archbishop v. Industrial Acc. Comm.*, *supra* note 23 (the employer's lack of skill was pointed out, but was not commented upon).

As a matter of everyday experience it is obvious that many who are conceded to be masters lack the requisite skill to exercise actual control over the manner of their servants' performances. Examples of the types of services as to which this is generally true are those rendered by cooks, chemists, electricians.

<sup>55</sup> *Los Flores S. Dist. v. Industrial Acc. Comm.* (1936) 13 Cal. App. (2d) 180, 56 P. (2d) 581; 1 LABATT, *op. cit. supra* note 46, § 183; see CAL. LABOR CODE § 2922 (requiring notice to be given by the one terminating the employment).

the employer-employee relationship.<sup>56</sup> Most of the cases use the factor as the best means of determining whether or not the necessary right to control exists,<sup>57</sup> particularly where the right has been exercised to a very small degree or not at all.<sup>58</sup> Some go further and assert that the presence of this power amounts to positive proof of the right of control.<sup>59</sup> This is so, the California Supreme Court has said, since "One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed."<sup>60</sup> If the employee does not obey, he can be discharged at once, and since he can be discharged at once, he will obey.

Though the majority of California cases give great weight to the presence of the right to terminate the employment at will, several recent cases in the district courts of appeal have said that the right is just as consistent with the theory of an independent association as with the relationship of master and servant.<sup>61</sup> Some of these cases, on their facts, show express agreements between the parties to the contract of hire providing for termination at the will of either, indicating, perhaps, that both parties had freely contracted for this right. But in others no such agreement has appeared.<sup>62</sup>

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<sup>56</sup> *George v. Chaplin*, *supra* note 43; see *Hollingsworth v. Pemberton*, *supra* note 50, at 265, 31 P. (2d) at 1065.

<sup>57</sup> *Teller v. Bay & River Dredging Co.*, *supra* note 28; *Press Pub. Co. v. Industrial Acc. Comm.*, *supra* note 9.

<sup>58</sup> *Helmut v. Industrial Acc. Comm.*; *Chas. R. McCormick Lbr. Co. v. O'Brien*, both *supra* note 26; *Casselman v. Hartford A. & I. Co.* (1940) 36 Cal. App. (2d) 700, 98 P. (2d) 539.

<sup>59</sup> *Globe Indemnity Co. v. Industrial Acc. Comm.*, *supra* note 33; *Smith v. Joint Union H. S. Dist.*, *supra* note 19. But *cf.* *Fay v. German General Ben. Soc.*, *supra* note 52, where the court pointed out that the right to discharge for unsatisfactory service is not the right used as a test in these cases. *Batt v. San Diego Sun Pub. Co.*, *supra* note 35. But see *George v. Chaplin*, *supra* note 43, at 712, 279 Pac. at 487. That misconduct or disobedience, even on the part of an independent contractor, would ordinarily amount to a breach of the contract of hire is clear.

<sup>60</sup> *Press Pub. Co. v. Industrial Acc. Comm.*, *supra* note 9, at 121, 210 Pac. at 823; quoted in *Globe Indemnity Co. v. Industrial Acc. Comm.*, *supra* note 33, at 718, 284 Pac. at 662.

A case which gives no apparent significance to the right to terminate the employment at will is *Parsons v. Industrial Acc. Comm.*, *supra* note 36.

<sup>61</sup> *Royal Indemnity Co. v. Industrial Acc. Comm.*, *supra* note 14; *Counihan v. Lufstufka Bros. & Co.*, *supra* note 41; *Coleng v. Ramsdell*, *supra* note 29. The court's statement has been that the right is of "less significance" where it fits in equally as well with either theory. It would seem that if the facts are such that either employment or independent contractor is a possible theory, the right to terminate at will should influence the court toward the theory of employment. Thus, in actual effect the statement means the existence of the right has not the significance that most cases have attributed to it.

<sup>62</sup> *Coleng v. Ramsdell*, *supra* note 29.

*Engagement in a distinct occupation or character as a separate business organization.* It is obvious that one who exercises a calling distinct from that of his hirer is more probably an independent contractor than is one who exercises his hirer's calling. For example, a person hired by a butcher to assist him in carving meat is more likely to be an employee than if he were hired as a drover to drive an animal to the butcher's slaughterhouse. This distinction was recognized in California at an early date,<sup>63</sup> and its importance has been reiterated in several cases.<sup>64</sup> But that importance should not be overemphasized. Many cases which would meet this test for the relationship of independent contractor have reached a different result, often without mention of the test.<sup>65</sup> The factor is best considered as a make-weight among such stronger arguments as control or personal service.

The significance of the related fact that the one hired is a separate business organization has been indicated above in the summary of case holdings. The point does not seem to need further elaboration.<sup>66</sup>

*Delegable, non-personal character of the work.* The importance of this consideration is clearly shown by the summary of case holdings given above, though opinions do not always discuss the point.

The courts have often said that an independent contractor "represents his employer only as to the results of his work, and not as to the means whereby it is accomplished".<sup>67</sup> That is, the independent contractor is responsible only for the finished job, apart from any contract provisions as to the means he must use, and how that job is accomplished is not the employer's concern. Thus, the contractor may delegate the actual work to others by employing assistants or laborers.

In some cases one found to be an employee has been allowed to delegate portions of his work to others.<sup>68</sup> Though the personal char-

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<sup>63</sup> Bennett v. Truebody, *supra* note 30.

<sup>64</sup> Hedge v. Williams, *supra* note 29; Green v. Soule, *supra* note 30.

<sup>65</sup> Murray v. Industrial Acc. Comm., *supra* note 23; Chas. R. McCormick Lbr. Co. v. O'Brien, *supra* note 26.

<sup>66</sup> If, unlike the ordinary business, the alleged employee serves only one person, there is usually a presumption that he has no independent occupation, *i.e.*, that he is not an independent contractor; but this is not a conclusive presumption. 1 SHEARMAN and REDFIELD, NEGLIGENCE (6th ed. 1913) § 164; quoted in Fidelity & C. Co. v. Industrial Acc. Comm., *supra* note 2, at 410, 216 Pac. at 581. Cf. Sumner v. Nevin (1906) 4 Cal. App. 347, 87 Pac. 1105. In the Fidelity case the contract of hire provided that the alleged employee should give his exclusive services to the hirer; he was held to be an independent contractor.

<sup>67</sup> Moody v. Industrial Acc. Comm., *supra* note 28; Lillibridge v. Industrial Acc. Comm. (1935) 4 Cal. App. (2d) 237, 239, 40 P. (2d) 856, 857. See also CAL. LABOR CODE § 3353, discussed *supra* note 2.

<sup>68</sup> Hillen v. Industrial Acc. Comm., *supra* note 3; Keeling v. Industrial Acc. Comm., *supra* note 18.

acter of the service has been said to be a requisite to the relationship of employment,<sup>69</sup> these cases are not necessarily inconsistent with that statement. Since the employer has the right to control the manner and mode of his employee's performance, a right indispensable to the relationship of employment,<sup>70</sup> it is clearly possible to say that the service is in fact personal and non-delegable because the employer can at any time refuse his permission for the delegation of work.

The personal character of the work to be done may be indicated in the agreement of hire or may be inferrable from the facts.<sup>71</sup> Or it may be a necessary quality of the work. An example is the service rendered by a porter<sup>72</sup> or by a chambermaid.<sup>73</sup>

It must be remembered that the personal service factor, like the others, is not alone sufficient evidence of an employment relationship.<sup>74</sup>

*Furnishing of tools.* The fact that the alleged employee furnishes his own tools and other instrumentalities is said to be only evidence tending to show that he is not an employee.<sup>75</sup> Where the employer furnishes the tools, the converse is true—the evidence tends to show that he is the master.<sup>76</sup>

In the related matter of furnishing of materials used in the work, purchase by the hirer has been thought to be entirely inconsistent with a relationship of independent contractor.<sup>77</sup>

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<sup>69</sup> *Donlon Bros. v. Industrial Acc. Comm.* (1916) 173 Cal. 250, 159 Pac. 715; *Fidelity & Deposit Co. v. Brush* (1917) 176 Cal. 448, 168 Pac. 890. But see *Larson v. Lewis-Simas-Jones Co.* (1938) 29 Cal. App. (2d) 83, 89, 84 P. (2d) 296, 300 (personal service omitted from list of incidents necessary to employment relationship).

<sup>70</sup> Cases cited *supra* note 41.

<sup>71</sup> In *Press Pub. Co. v. Industrial Acc. Comm.*, *supra* note 9, the employer agreed to furnish his automobile as a means of transportation in the event that the alleged employee could not furnish his own. This was said to be a circumstance indicating that personal services had been contracted for.

<sup>72</sup> *Pearson v. M. M. Potter Co.* (1909) 10 Cal. App. 245, 101 Pac. 681. In the case of a firm supplying porter or janitor service it is possible that as to the person to whom service is being rendered the porter or janitor would stand in the position of an employee during the time he is rendering such service. Cf. *Claremont C. Club v. Industrial Acc. Comm.* (1917) 174 Cal. 395, 163 Pac. 209, where the court reasoned that since employment and discharge of a caddy during all the time when he was not actually in the service of a club member was wholly under the control of the club, such caddy was an employee of the club and not of the member for whom he happened to be caddying at the time he was injured. And see 1 *LABATT, op. cit. supra* note 46, §§ 52-62.

<sup>73</sup> See *Pearson v. M. M. Potter Co.*, *supra* note 72, at 248, 101 Pac. at 682.

<sup>74</sup> *Fidelity & C. Co. v. Industrial Acc. Comm.*, *supra* note 2; *Guth v. Industrial Acc. Comm.*, *supra* note 9.

<sup>75</sup> *Freiden v. Industrial Acc. Comm.*, *supra* note 31; *Barton v. Studebaker Corp. of America*, *supra* note 16.

<sup>76</sup> *Press Pub. Co. v. Industrial Acc. Comm.*, *supra* note 9, *semble*. And see *supra* note 71.

<sup>77</sup> *Chas. R. McCormick Lbr. Co. v. O'Brien*, *supra* note 26. Cf. *Lillibridge v. Industrial Acc. Comm.*, *supra* note 67.

*Payment by the job.* The definition of an independent contractor in section 3353 of the Labor Code<sup>78</sup> includes as one element the payment of a "specified recompense for a specified result". This provision, and another requiring the independent contractor to be engaged in non-manual labor, were held unconstitutional in *Flickenger v. Industrial Accident Commission*<sup>79</sup> because they brought into the definition elements that were found not to exist at the time of the original constitutional grant of authority to the legislature. In *Pryor v. Industrial Accident Commission*<sup>80</sup> the *Flickenger* case was cited as authority for a holding that a "specified recompense" is not essential to the finding that the one hired was an independent contractor. In that case the independent contractor was paid by the day. However, in *Fidelity & Casualty Co. v. Industrial Accident Commission*,<sup>81</sup> a later case, the non-manual labor provision was omitted but the "specified recompense" provision was retained by the court in its statement of the definition of an independent contractor under the Workmen's Compensation Act, and the latter provision was applied to the facts in the case. The court cited the *Flickenger* case as authority for this definition, evidently overlooking the fact that that case had held both provisions unconstitutional. The *Flickenger* case was also cited for the proposition that the accepted interpretation of the term independent contractor had not been altered by the constitutional grant of authority. In other words, the traditional meaning of the term as it was interpreted in *Flickenger v. Industrial Accident Commission* was changed by the "specified recompense" provision, though the court purported to retain that traditional meaning and cited the *Flickenger* case as authority.

In *Lillibridge v. Industrial Accident Commission*,<sup>82</sup> decided in the district court of appeal twelve years after the supreme court decided the *Fidelity* case, the *Flickenger* case was cited as authority for the holding that an independent contractor may be paid on a *per diem* basis. And other cases, in both the district courts of appeal and in the supreme court, though sometimes repeating the "specified recompense" requirement, have held the basis of compensation merely to be evidence tending to show one relationship or the other: independent contractor if payment is by the job, employment if for labor expended.<sup>83</sup> Moreover, in the *Fidelity* case itself, where the

<sup>78</sup> *Supra* note 2.

<sup>79</sup> *Supra* note 2. This provision has since been removed from the Workmen's Compensation Act.

<sup>80</sup> *Supra* note 28.

<sup>81</sup> *Supra* note 2.

<sup>82</sup> *Supra* note 67.

<sup>83</sup> *Brown v. Industrial Acc. Comm.*, *supra* note 13; *Press Pub. Co. v. Industrial Acc. Comm.*, *supra* note 9; *Drillon v. Industrial Acc. Comm.*, *supra* note 6; *Los Flores S. Dist. v. Industrial Acc. Comm.*, *supra* note 55.

independent contractor was paid forty cents per hundred pounds of freight carried, he was guaranteed an average of \$700 a month, regardless of the amount of freight he had actually carried.

Where the case is not one arising under the Workmen's Compensation Act, it is also said that the basis of payment is only evidence tending to show one relationship or the other.<sup>84</sup>

The way in which the money payment is given to the one hired is of little consequence. For example, if a person lets a contract for a job to one who furnishes his own assistants, he may pay those assistants without assuming liability for their actions and without relieving the contractor of that liability.<sup>85</sup> The presence of this factor, payment by the job, does not, of course, force the finding of an independent contractor.<sup>86</sup>

*No set working hours.* Where the contract of hire fails to specify hours of work, the relationship of an independent contractor is indicated.<sup>87</sup> But, of course, that relationship is not the necessary conclusion.<sup>88</sup>

*Doris Brin Marasse.*

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<sup>84</sup> Curran v. Earl C. Anthony, Inc., *supra* note 13; Bohanon v. James McClatchy Pub. Co., *supra* note 35; Phillips v. Larrabee, *supra* note 11.

<sup>85</sup> Smith v. Belshaw (1891) 89 Cal. 427, 26 Pac. 834; Houghton v. Loma Prieta Lbr. Co. (1907) 152 Cal. 574, 93 Pac. 377.

<sup>86</sup> Cameron v. Pillsbury, *supra* note 11; Curcic v. Nelson Display Co., *supra* note 23.

<sup>87</sup> Parsons v. Industrial Acc. Comm., *supra* note 36; Easton v. Industrial Acc. Comm. (1917) 34 Cal. App. 321, 167 Pac. 288.

<sup>88</sup> *Ibid.*; Helmuth v. Industrial Acc. Comm., *supra* note 26.