LABOR LAW: SCOPE OF THE TERM "EMPLOYEE"

The determination of whether or not the status of employee actually exists is increasingly difficult because of the manifold legal consequences which may or may not follow from such a determination.[1] An examination of the tests which are applied in the field of labor law in order to determine whether or not a particular worker is an employee of a particular individual or firm reveals an increasing emphasis upon the functional approach to the problem. Traditional legal concepts are often inadequate to permit the achievement of the specific objective of a statute, and therefore their retention can result only in thwarting the will of the legislative body which passed the law in order to correct some social ill. It is the purpose of this paper to examine the expanding and widening meaning which statutes and decisions have given to the term "employee".[2]

I. THE ORTHODOX CONTROL TEST

The trend which can be observed increasingly in both statutes and court decisions toward a more functional definition of the term "em-

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[1] "Within a single jurisdiction a person who, for instance, is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for the purposes of particular legislation, such as unemployment compensation." National Labor Relations Bd. v. Hearst Publications (April 24, 1944) 64 Sup. Ct. 851, at 856. See: Wolfe (Justice of the Supreme Court of Utah), *Determination of Employer-Employee Relationships in Social Legislation* (1941) 41 COL. L. REV. 1015, for a brilliant analytical, historical discussion of the subject.

[2] Those who argue against the extension of social legislation have always stressed the fact of the alleged unfavorable economic consequences of such extension. New York Indemnity Co. v. Industrial Accident Commission (1931) 213 Cal. 43, 1 P. (2d) 12, a leading California case, *held* that a thirty-four old "newsboy", injured by an automobile after he had run out into the street for the purpose of making the sale, was not covered by the Workmen's Compensation Act, on the ground that the "limited amount of control which the publishers undertook to exercise over the newsboys . . . would not as a matter of law be sufficient to constitute such newsboys the employees of the publishers". But before the rehearing and reversal of itself, the Supreme Court, 81 Cal. Dec. (Dec. 1930) 40, at 42, declared: "We cannot escape the conclusion that the evidence was sufficient to justify the Commission in concluding that such a system of distribution was established and such an organization built up to effect control of those selected to aid in obtaining the largest possible circulation by the particular means employed as to amount in effect to a *complete exercise or retention of control of the activities of the newsboys to the end that the desired result be accomplished and thus satisfy the tests laid down in well known cases.*" (citing Globe Ind. Co. v. Industrial Acc. Com., (1930) 208 Cal. 715, 284 Pac. 661; Moody v. Industrial Acc. Com. (1928) 204 Cal. 668, 269 Pac. 542, and other leading California compensation cases. Italics added.)

Here, applying the "control" test to the same set of facts, the same court on two occasions reaches completely opposite holdings. Why on rehearing did the court reverse itself? The reversal was due in large part to the emphatic representations of counsel and *amici curiae* of the economic consequences of the first decision, which upheld the award of the Industrial Accident Commission.

ployee" is best seen by considering first the orthodox control test[3] for determining the existence of the employer-employee relationship. A characteristic formulation of this test is to be found in the regulations of the Internal Revenue Bureau governing the imposition and collection of social security taxes.[4] This statement of the control test[5] may be briefly outlined as follows:

A. INDICIA OF RELATIONSHIP OF EMPLOYER-EMPLOYEE:

I. The *right* to the *control* and *direction* of the individual performing the services as to *details* and *means* and not merely as to the *result*.[6]

II. The *right* to *discharge* the individual performing the services.[7]

[3] Boswell v. Laird (1857) 8 Cal. 469, is perhaps the first California case to formulate clearly the control test.

[4] U. S. Treas. Reg. 91 (1936) art. 3. *Ibid.* (1936) art. 205.

[5] RESTATEMENT OF THE LAW OF AGENCY (Am. L. Inst., 1933) §2(2) formulates the *control* test for a servant. §220 of the Agency Restatement enumerates the tests for determining the relationship of master and servant.

[6] Two very recent California Supreme Court decisions (California Employment Commission v. Los Angeles Downtown Shopping News Corp. (July 5, 1944) 24 A. C. 420, ... P. (2d) ....; California Employment Commission v. Bates (July 5, 1944) 24 A. C. 431, ... P. (2d) ...., apply this control test in order to establish the status of carrier boys distributing papers as employees under the Unemployment Insurance Act. The contention of the publishers was that the carrier boys were independent contractors. In these cases the carrier boys were distributing papers at no charge to the readers, and thus the cases are different factually from earlier newspaper cases.

[7] Riskin v. Industrial Accident Commission (1943) 23 A. C. 249, 254, 144 P. (2d) 16, 18, declares: "A strong factor tending to show the relationship of an employer is the employer's right to terminate the work at his pleasure." This decision approves earlier cases which came to this conclusion and expressly overrules previous California cases holding that this right to discharge is not determinative of the employee status. The California cases overruled are: Donlon Bros. v. Industrial Acc. Comm. (1916) 173 Cal. 250, 159 Pac. 715; Fidelity and Deposit Co. v. Brush (1917) 176 Cal. 448, 168 Pac. 890; and Parsons v. Industrial Acc. Comm. (1918) 178 Cal. 394, 173 Pac. 585. See: Comment (1942) 30 CALIF. L. REV. 57, at 65, 66. The court in the Riskin case cites with approval Hillen v. Industrial Acc. Comm. (1926) 199 Cal. 577, 250 Pac. 570, which declared that the right to immediate discharge involves the right of control.

"This power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so." Press Publishing Co. v. Industrial Accident Commission (1922) 190 Cal. 114, 119, 120, 210 Pac. 820, 823. The court held that the injured worker was an employee of the publishing company and therefore entitled to recovery under the Workmen's Compensation Act, notwithstanding the fact that he also transported cream for a creamery in addition to his duties of delivering newspapers.

"But the test is whether . . . [employer] had the right or authority to discharge . . . [the alleged employee], and it is of no consequence that because of physical inability he was unable to communicate his exercise of such authority to . . . [alleged employee]." Drillon v. Industrial Accident Commission (1941) 17 Cal. (2d) 346, 351, 110 (P. (2d) 64, 67. The award to a jockey, hired to run a single race, was upheld, notwithstanding

B. INDICIA WHICH ARE NOT CONCLUSIVE OF EITHER THE EMPLOYER-EMPLOYEE RELATIONSHIP OR INDEPENDENT CONTRACTOR RELATIONSHIP:

I. The *name, designation,* or *description* given to the relationship in the agreement.[8]

II. *Measurement, method,* or *designation* of *compensation.*[9]

III. The *furnishing* of *tools* and a *place* to work.[10]

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the fact that the employer was not physically able, during the race, to communicate with the jockey so as to exercise his authority and power to discharge.

See also: Yucaipa Farmers Co-op. v. Industrial Accident Commission (1942) 55 Cal. App. (2d) 234, 130 P. (2d) 146; and National Automobile Insurance Co. v. Industrial Accident Commission (1943) 23 A. C. 213, 143 P. (2d) 481.

[8] Pacific Lumber Co. v. Industrial Accident Commission (1943) 22 Cal. (2d) 410, 139 P. (2d) 892, five to two decision, Justices Schauer and Edmonds dissenting: a written contract between a tie-maker and a lumber company, which purported to be a conditional sales agreement between the "buyer" (the worker) and the "seller" (the lumber company) held not to negative the employer-employee relationship under the Workmen's Compensation Act, for the practical effect of the contract was to give the company complete control over the worker.

[9] McCormick Lumber Co. v. O'Brien (1928) 90 Cal. App. 776, 266 Pac. 594 [here a construction job worker was considered to be an employee (agent), notwithstanding the fact that he was paid on the basis of 10% plus cost of the job, a method of compensation often employed in the case of an independent contractor); Brown v. Industrial Accident Commission of California (1917) 174 Cal. 457, 163 Pac. 664 (real estate agent selling for a commission of 20% of the selling price of each lot); Dillon v. Prudential Ins. Co. (1925) 75 Cal. App. 266, 242 Pac. 736 (insurance solicitor and salesman paid a regular salary and commission *held* to be an employee); Schramm v. Industrial Accident Commission (1936) 15 Cal. App. (2d) 475, 59 P. (2d) 858 (carpenter working out grocery bill at the rate of so much an hour *held* to be an employee); Claremont Country Club v. Industrial Accident Commission (1917) 174 Cal. 395, 163 Pac. 209 (caddy subject to discharge by country club while not actually in service of a member *held* to be an employee notwithstanding the fact that his services were paid for and his activities directed by member at time of injury); see also National Labor Relations Board v. Blount (C.C.A. 8th, 1942) 131 Fed. (2d) 585; Williams v. United States (1941) 38 Fed. Supp. 536.

[10] The furnishing by the person doing the work of tools or the place of work is more commonly associated with the independent contractor relationship. Freiden v. Industrial Accident Commission (1922) 190 Cal. 48, 210 Pac. 420 (longshoreman furnishing his own tools and implements for unloading automobiles from cars for dealers and *not under control* in any way as to performance of work *held* to be an independent contractor); Fidelity and Casualty Company of New York v. Industrial Accident Commission of California (1923) 191 Cal. 404, 216 Pac. 578, 43 A. L. R. 1302 (a party carrying on the business of transporting freight by automobiles engaged another, latter to furnish his own truck and trailer and not under control of first party; latter *held* an independent contractor). *Cf.* Chapman v. Edwards (1933) 133 Cal. App. 72, 24 P. (2d) 211, *holding* that although the worker used his own truck, he was not an independent contractor because the employer could terminate the employment at any time.

C. INDICIA OF INDEPENDENT CONTRACTOR RELATIONSHIP:

I. The *right* to the *control* of the *result only* of the work.[11]

II. Services rendered in an *independent trade, business,* or *profession.*[12]

In the California Labor Code occur several definitions of the term "employee". These definitions vary in inclusiveness in accordance with the purpose of the statute. The term "employee" as used in the Article on "Gratuities" has almost the broadest application which can be imagined.[13] The definition in the Workmen's Compensation section of the Code[14] is less broad but has been given rather liberal judicial interpretation.[15]

[11] Lee v. Nanny (1940) 38 Cal. App. (2d) 90, 92, 100 P. (2d) 832, 835: "The independent contractor engages to do work according to his own methods and without being subject to the control of his employer except as to the result of the work." Section 3353 of the California Labor Code defines an "independent contractor" as meaning "any person . . . under the control of his principal as to the result of his work only." This definition is cited with approval in the following cases: Fidelity and Casualty Company of New York v. Industrial Accident Commission of Calif. (1923) 191 Cal. 404, 407, 216 Pac. 578, 579, 43 A. L. R. 1304, 1306; Guth v. Industrial Accident Commission (1941) 44 Cal. App. (2d) 762, 766, 112 P. (2d) 969, 971.

[12] Moody v. Industrial Accident Commission (1928) 204 Cal. 668, 269 Pac. 542, 60 A. L. R. 299 (a nurse who was not under any orders of patient as to methods and means of treating *held* to be an independent contractor); Coleny v. Ramsdell (1937) 19 Cal. App. (2d) 376, 65 P. (2d) 365 (an auditor, who could do the work at any time he chose, whose principal had no control over the means employed to accomplish said work *held* to be an independent contractor); Associated Indemnity Corporation v. Industrial Accident Commission (1943) 56 Cal. App. (2d) 804, 133 P. (2d) 698 (an attorney employed under a general retainer, engaged to do specific pieces of work, *held* to be an independent contractor); *cf.* Atwood Crop Dusters v. Industrial Accident Commission (1942) 8 C. C. 19 (pilot leasing plane from crop dusting company on percentage basis *held not* to be an independent contractor—writ denied); Hayes v. Board of Trustees of Elon College (1944) .... N. C. ...., 29 S. E. (2d) 137 (electricians regularly employed by power company working in their off-hours for a specified sum for college *held* to be independent contractors, although college furnished truck, some helpers, and some tools and equipment).

[13] §350(b) of the Labor Code.

[14] §3351 California Labor Code. See also §3357.

[15] Union Lumber Co. v. Industrial Accident Commission (1936) 12 Cal. App. (2d) 588, 55 P. (2d) 911 (language of statute *held* to include a vocational high school student operating a meat-cutting machine in a butcher shop maintained by the Union Lumber Co., for whose services the industry paid the boy $25.00 per semester *indirectly* through the school vocational fund).

Massachusetts Bonding and Indusance Co. v. Industrial Accident Commission (1937) 19 Cal. App. (2d) 583, 587, 65 P. (2d) 1349, 1351: the phrase ("whether lawfully or unlawfully employed"—§3351) is "intended to cover those cases in which the contract of employment is unlawful merely because of some provision of law dealing with such contracts of employment and is not intended to cover cases where the contract of employment is unlawful for the reason that it requires the employee to perform acts constituting violations on his part of the express provisions of our penal statutes." Thus in Drakos v. Makiwell (1940) 6 C. C. 228, compensation was denied an employee who was himself engaged in activities constituting a violation of the provisions of sections 318, 330, and 332 of the California Penal Code (employee's duties were to participate in various gambling games and assist in increasing the "take" of the employer).

The statutory exclusion of independent contractors from the benefits of the Workmen's Compensation Act was forced on the legislature on constitutional grounds, and the control test is applied as the criterion of the employer-employee relationship. The constitutional amendments of 1911 and of 1918 have both been narrowly construed.[16] Notwithstanding the broader language of the 1918 amendment, it was held not to enlarge the power of the legislature.[17] It is contended that this narrow restriction of the legislatures powers ignored entirely the fact that the police power of the state was broad and extensive enough to support the constitutionality of a workmen's compensation act without any express constitutional provision.[18]

II. THE "MISCHIEF-REMEDY" TEST

In *National Labor Relations Board v. Hearst Publications*[19] Justice Rutledge delivered the opinion for the majority of the court, in

John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Dorman (C.C.A. 9th, 1939) 108 Fed. (2d) 221, 223: "It is our opinion that the including provision of the section [subd. c of 3351] of the Labor Code does not limit the character of employee under the provisions of the Insurance Code and make invalid a policy insuring as an employee, a director actually rendering valuable service to the corporation though without compensation."

Section 3352(c) reads as follows: "Any person engaged in vending, selling, offering for sale, or delivering directly to the public, any newspaper, magazine, or periodical *where the title thereto has passed to the person so engaged.*" (Italics added.) This provision was added by Stats. 1931, c. 1021, §1, p. 2068. Pacific Employers Insurance Company v. Industrial Accident Commission (1935) 3 Cal. (2d) 759, 47 P. (2d) 270 (award for personal injuries *sustained on appeal* where newsboy worked under the direction of the publisher's district manager and received a specified amount for each paper sold plus a bonus). See also: Associated Indemnity Corporation v. Industrial Accident Commission (1935) 20 I. A. C. 178.

Section 3358.5 includes "any person engaged in household domestic servite who is employed by one employer for over fifty-two hours per week" within the protection of the statute. However, one may be hired to do duties usually and customarily performed by domestic servants and not work fifty-two hours per week, yet be covered under the Workmen's Compensation Act, when the "domestic" duties are performed in the office quarters in the residence. Baugh v. Rogers (1944) 24 A. C. 194, 148 P. (2d) 633.

In Lacoe v. Industrial Accident Commission (1930) 211 Cal. 82, 293 Pac. 669, court held that a person must be unmistakably excluded by the Act to be denied benefits. Here a worker who was not a "domestic servant" nor a "farm, agricultural, or horticultural laborer", but something in between, was given protection. See 19 CALIF. L. REV. 222.

[16] CAL. CONST., art. XX, §21.

[17] Flickenger v. Industrial Accident Commission (1919) 181 Cal. 425, 184 Pac. 851, 19 A. L. R. 1150. See also Provensano v. Division of Industrial Accidents (1930) 110 Cal. App. 239, 294 Pac. 71.

[18] Thus in New York Central Ry. Co. v. White (1917) 243 U. S. 188, at 206:

"We recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except *on the ground of the police power* of the state. In our opinion it is fairly supportable on that ground." (Italics added.)

[19] (April 24, 1944) .... U.S. ...., 64 Sup. Ct. 851, ... L. ed. .....

which common law standards for distinguishing between "employees" and "independent contractors" are discarded as not relevant to the statute's purposes.[20] Justice Reed concurred in the result but applied the same test of "coverage for employees" as that announced in the decision of the National Labor Relations Board, which felt that the facts of the case met the requirements of the control test.[21] Justice Roberts dissented, holding that "the question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act, and therefore is a judicial and not an administrative question".[22] He approved the decision of the Circuit Court of Appeals,[23] which the Supreme Court majority opinion reverses.

Four Los Angeles newspapers, the *Times,* the *Examiner,* the *Herald-Express,* and the *News,* refused to bargain collectively with a union representing certain newsboys selling their papers on the street. The contention was that the newsboys were not employees within the meaning of the National Labor Relations Act.

The National Labor Relations Board, after hearings and proceedings as provided by statute, issued a cease and desist order against the newspapers for their violations of the Act. Upon review, the Circuit Court of Appeals rejected the Board's findings that the newsboys were employees of the newspaper companies within the meaning of the statute and held that by common law standards the newsboys were not employees and were not therefore included within the protection of the Act.[24]

In reversing the Circuit Court decision the majority of the Supreme Court was guided by the following principles:

1) There is no simple, uniform, and easily applicable test for determining who is an employee; tests simple in formulation are not simple in application.[25]

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[20] *Ibid.* at 855, 856.

[21] *Ibid.* at 862.

[22] "Clearly also Congress did not delegate to the National Labor Relations Board the function of defining the relationship of employment so as to promote what the Board understood to be the underlying purpose of the statute." *Ibid.* at 863. The majority opinion in contrast held that the National Labor Relations Board was authorized to find in the first instance the fact of employment, and that if this fact was supportable, even though on a legal theory other than that rested upon by the Board, the latter's finding should be sustained. Here the Supreme Court concluded that the Board's finding that the "newsboys" were employees was supportable by a proper legal test, though not the test actually used by the Board.

[23] Hearst Publications, Inc. v. National Labor Relations Board (C.C.A. 9th, 1943) 136 Fed. (2d) 608.

[24] *Ibid.* Judge Denman dissenting at 614, on the ground that the National Labor Relations Board could reasonably infer "from the varied incidents between the men and the publishers that it [the relationship] is one of employer and employee", and that the court therefore was not free to draw its own inferences but was obliged to sustain the Board's holding.

[25] *Supra* note 19 at 855, 856. See 14 Words and Phrases, 360-363, 380 ff., 440, 448, 465, 466, 515, 516.

2) Congress by an "employee" under the Act "had in mind a wider field than the narrow technical legal relation of 'master and servant', as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others".[26]

3) The application of this national act is not limited by "varying local conceptions, either statutory or judicial" as to the meaning of the term "employee", and the "federal law must prevail no matter what name is given to the interest or right by state law".[27]

4) The word "employee" takes its color from its surroundings in the statute where it appears, and is to be applied in the light of "the history, terms, and purposes of the legislation".[28]

5) The application of traditional legal distinctions between "employees" and "independent contractors" is improper, for it will exclude workers the Act is designed to protect.[29]

6) It is relevant that the workers in a particular case are "as a matter of economic fact subject to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation".[30]

7) "Technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants" are inapplicable, and in doubtful situations "underlying economic facts" expand conventional limitations of the conception of an "employee".[31]

8) The National Labor Relations Board is given the administrative task of determining "who is an employee under the Act", and the "Board's determination that specified persons are 'employees' under the Act" is to be accepted if it has "warrant in the record and a reasonable basis in law".[32]

On the basis of the foregoing rules and principles the newsboys, except the temporary, part time, and casual workers, distributing newspapers in Los Angeles were held to be employees of their respective newspapers.

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[26] *Supra* note 19 at 857.
[27] *Ibid.* at 857, 858.
[28] *Ibid.* at 857.
[29] *Ibid.* at 857.
[30] *Ibid.* at 858.
[31] *Ibid.* at 859.
[32] *Ibid.* at 860.

It is notable that the majority opinion bases its decision on a much broader ground than the "supervision and control test" applied by the National Labor Relations Board in its disposition of the case. Indeed, the opinion expressly rejects such a test as here inadequate and therefore inapplicable.[33]

After a lengthy and specific recital of the details of the activities and duties of the newsboys, the National Labor Relations Board declares: "On the basis of the foregoing, we are of the opinion that the Companies have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act."[34]

But the majority opinion of the Supreme Court includes within the term "employee" not only workers who are clearly under the supervision and control of an employer but any person "rendering service to others" who is subject to the evils the statute is designed to eradicate and who can reasonably be expected to be saved therefrom by the remedies of the statute.

"The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors' ".[35] In this sentence of the opinion occur the key words of the test applied by the court to determine who under the statute is an employee. The words are "msichief" and "remedies". We thus have what may be called the "mischief-remedy test". Stated very simply then, if the worker suffers from the evils (mischief) which the Act seeks to correct, and if the remedies of the Act will prevent or cure the harmful effects of the evils in the situation involving the worker, then the worker is an employee for the purposes of the Act and is entitled to its protection.

This test of who is an employee is social, rather than individual in its approach. It looks beyond narrow and technical contractual rights to economic forces and their consequences for its meaning and authority. In this sense it is a realistic and practical attempt to formulate a flexible, workable concept of the term "employee".

The impossibility of formulating a definition of the term "employee" that can be automatically applied with propriety and fairness in all situations necessitates the establishing of principles of separation and classification of possible employer-employee situations. The National Labor Relations Board in its decision in the instant case clings, as we have seen, to the "control test", the most widely applied

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[33] *Ibid.* at 859.

[34] 28 N. L. R. B. 1006, at 1022 (1941).

[35] *Supra* note 19 at 858.

criterion. The United States Supreme Court has now in this one field at least supplanted this traditional test with what we have called the "mischief-remedy test".

The expansion of the meaning of the term "employee" in order to accomplish the particular social objective of preventing economic strife by fostering labor organization and promoting peaceful collective bargaining is not limited to a few isolated or sporadic manifestations, as the Supreme Court in the instant case points out.[36] This perhaps demonstrates the fact that in any sphere where economic pressures are strong the courts are increasingly inclined to uphold a finding that the employer-employee relationship has been established. In *National Labor Relations Bd. v. Mackay R. & Tel. Co.*[37] it was held by the United States Supreme Court that the National Labor Relations Act's provision that striking employees remained employees for the purpose of the Act was in the light of such purpose a reasonable and therefore constitutional provision.[38] In *National Labor Relations Bd. v. Reed and Prince Mfg. Co.*[39] striking employees who ceased to work as a consequence of and in connection with a labor dispute, although the strike was not caused by an unfair labor practice, were held to retain their status as employees. The labor dispute need not even be current if the employee has ceased work because of any unfair labor practice, according to *National Labor Relations Board v. Grower-Shipper Vegetable Assn.*[40] The action of the Na-

[36] See: International Association of Machinists v. National Labor Relations Board (1940) 311 U.S. 72, 80, 81, 61 Sup. Ct. 83, 88, 89, 85 L. Ed. 50; H. J. Heinz Co. v. National Labor Relations Board (1940) 311 U.S. 514, 520, 521, 61 Sup. Ct. 320, 323, 85 L. Ed. 309; and in the federal courts: National Labor Relations Board v. Condenser Corp. of America (C.C.A. 3d, 1942) 128 F. (2d) 67; North Whittier Heights Citrus Ass'n v. National Labor Relations Board (C.C.A. 9th, 1940) 109 F. (2d) 76, 82. See further, *supra* note 19 at 860.

[37] (1938) 304 U.S. 333, 58 Sup. Ct. 904, 82 L. Ed. 1381. This case reversed National Labor Relations Board v. Mackay Radio and Telegraph Co. (C.C.A. 9th, 1937) 87 F. (2d) 611, which *held* that enforcement of Board order to reinstate five former employees and to cease discharging or threatening to discharge employees for union activity was improper; Judge Mathews in concurring with Judge Wilbur did not find it necessary to decide the constitutionality of the Act, except as to the portion which gave the Circuit Courts of Appeal "jurisdiction to review orders of the National Labor Relations Board".

[38] *Cf.* Judge Wilbur of the Ninth Circuit Court of Appeals when the case was before that court. (1937) 87 Fed. (2d) 611, at 629. He held that the "decision must be based on the broad ground that the act, according to its plain terms is unconstitutional as violative of the Fifth Amendment in so far as it attempts to force upon an employer engaged in interstate commerce a contract of employment with those so engaged who have voluntarily terminated contract of employment." However, Judge Wilbur even in his ruling recognized that the specific statutory language included "striking employees".

[39] (C.C.A. 1st, 1941) 118 Fed. (2d) 874, at 885: "But assuming the strike to have been tortious by state common law, the strikers remained employees of the respondent since the strike was a consequence of or in connection with a current labor dispute."

[40] (C.C.A. 9th, 1941) 122 F. (2d) 368.

tional Labor Relations Board in permitting employees who have been laid off for four months to vote in an election to designate a union as collective bargaining representative was upheld in *Marlin-Rockwell Corporation v. National Labor Relations Board.*[41] Under the Railway Labor Act "furloughed employees" were entitled to vote in an election to choose bargaining representatives, since the Act is remedial and should not be narrowly construed, according to *Nashville, C. & St. L. Ry. v. Railway Employees' Department of the American Federation of Labor et al.*[42] These and many similar cases indicate a strong trend toward a flexible definition of the term "employee" from the standpoint of function and in the direction of including as employees those occupying a status or position formerly considered wholly incompatible with the employer-employee relationship.

III. A PROPOSED TEST OF EMPLOYER-EMPLOYEE RELATIONSHIP

Justice William O. Douglas, in his treatment of "Vicarious Liability and Administration of Risk",[43] investigates the practicality of loss allocation in terms of modern business organization and practice. "Compensation for an injured party comes first," he says, "but that cannot be considered separately from the capacities of the parties, to whom the loss is allocated to bear it. Only when those capacities are measured, can the scope of the right of the injured party be intelligently determined."[44]

Now some such realtistic analysis of the problem is usually present when legislators consider and act upon particular proposals and usually determines the nature of the statute's provisions. The difficulty which makes the orthodox legal concepts often obviously inappropriate, no matter how logical the chain of reasoning that applies them, is that in the interpretation and administration of the law the acute awareness of a specific problem and the realistic attempt at its solution which were present to the legislator at the time of law making, influencing his every decision, are absent in the appellate and final courts of review. Practical urgencies are difficult to apprehend from printed briefs.

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[41] (C.C.A. 2nd, 1941) 116 F. (2d) 586.

[42] (C.C.A. 6th, 1937) 93 F. (2d) 340. The British National Health Insurance Act, which is administered on the basis of the employer-employee relationship, includes within its protective provisions many categories of occupations classified usually as those of independent contractors, such as brickmakers under contract, timber fellers, subcontractors in the building trades, etc. See INSURING THE ESSENTIALS by Barbara Nachtrieb Armstrong, p. 364 ff. for first authoritative comparative account of coverages of such acts.

[43] 38 YALE L. J. 584.

[44] *Ibid.* at 585.

The only workable definition of the employer-employee relationship which can aspire to wide applicability is one that will combine in so far as possible the viewpoint of both employer and employee. It will permit the attainment of an equilibrium of interests, rather than a deadlock between violent antagonisms. This goal Justice Rutledge recognizes when he says that "to eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships."[45]

The following questions raise what appear to be basic considerations in the determination of whether or not a particular statute covers a particular worker. If the questions are answered in the affirmative, the worker should for the purposes of the statute be considered an employee.

1) Is there an express or implied *contractual service relationship* between individuals? (Does A perform services for B?)[46]
2) Is the worker included within the broad *social* and *economic objectives* sought by the statute? (A practical test of inclusion is to ask whether the worker suffers from the evils the statutes seek to correct.)[47]

If either of the foregoing questions is answered in the negative, no court should find that the employer-employee relationship has been established.

In our modern complex business society *risk shifting* and *risk prevention* are increasingly the responsibility of the group. Accordingly, any test for determining the existence of the employer-employee relationship in order to create employer responsibility and liability must recognize the "capacities of the parties to whom the loss is allocated".

The question of whether the establishment of the employer-employee relationship will impose an indeterminable, unduly harsh eco-

[45] *Supra* note 19 at 859.

[46] Justice Rutledge calls attention in the following language to the fact that many types of contractual relationships exist which may or may not impose liability: "Myriad forms of service relationships, with indefinite and subtle variations in the terms of employment, blanket the nation's economy." *Supra* note 19 at 858.

[47] In reference to the Merchant Marine Act and its definition of "seaman", the U. S. Supreme Court in Warner v. Goltra (1934) 293 U. S. 155 at 158 said: "What concerns us here and now is not the scope of the class of seamen at other times and in other contracts. Our concern is *to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.*" The italicized phrase was quoted with approval in the following U. S. Supreme Court decisions: South Chicago Coal and Dock Co. v. Bassett (1940) 309 U. S. 251 at 259, 60 Sup. Ct. 544 at 549, 84 L. Ed. 732 at 737 (where the issue was whether the worker was an employee under the Longshoremen's Compensation Act); and in National Labor Relations Board v. Hearst Publications, Inc. (1944) .... U. S. ...., 64 Sup. Ct. 851 at 857, ... L. Ed. .....

nomic burden on the employer should not be ignored. The device of insurance,[48] whereby the burden is transferred to society generally or to the specific industry concerned as a whole, enables most employers in perhaps a majority of the employer-employee relationships to avoid unpredictable losses or to reduce their impact to the point that they constitute a controllable item in operative expense. Thus modern economic forces make increasingly inapplicable legal definitions and concepts which were nurtured in the developing industrialism of the nineteenth century. The conscious or unconscious motivation that frequently led in the past to the use of the orthodox control test in order to avoid placing a burden on the employer now finds less and less opportunity to manifest itself. The case becomes, therefore, stronger for discarding a definition of the employer-employee relationship which retards social progress and for adopting a realistic functional test.

In the foregoing discussion emphasis has been placed upon the determination of the employer-employee relationship under social security, workmen's compensation, and collective bargaining statutes. It is not contended that the establishment of the employer-employee relationship by the above test should necessarily impose tort liability upon the employer for the acts of the employee. In tort liability other considerations are involved than the inclusiveness of the term "employee" under a particular statute.

*Bert Bookham Meek, Jr.**
John Harold Swan

*Member second-year class.

[48] It has not been within the province of this discussion to indicate the influence of special interest groups, like insurance company lobbyists, on the passage of legislation or its interpretation.