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# Workmen's Compensation--Independent Contractor--Negligence (Wawrzonek v. Central Hudson Gas and Electric Corp., 276 N.Y. 412 (1938))

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and must be paid regardless of whether the federal taxes have been paid.[17]

H. K.

WORKMEN'S COMPENSATION — INDEPENDENT CONTRACTOR — NEGLIGENCE.—Defendant entered into an agreement with a contracting firm whereby the latter was to do its construction work and furnish all necessary labor. However, defendant was to have the right of general supervision. The purpose of this arrangement was to evade the payment of premiums on accident insurance. Deceased was formerly employed by the defendant, but under the agreement he was discharged by the defendant and hired by the construction firm. He was killed because of the negligence of the defendant and the administratrix brings this action under Section 130 of the Decedent Estate Law. The defense is (1) that although deceased was hired by the construction firm, the defendant retained general supervision over all the work and the employees, and hence deceased was in the employ of defendant; (2) that the contract between defendant and the construction firm did not express the real intent of the parties; and (3) that since in fact deceased was in the employ of defendant, the sole remedy is under the Workmen's Compensation Law.[1] On appeal from a reversal by the Appellate Division of a judgment for the plaintiff, *held,* reversed and new trial granted. The action was properly brought in negligence. The reversal by the Appellate Division on the ground that there was a master and servant relationship was against the weight of evidence; but because of apparently inconsistent findings of fact by the jury, a new trial should be held. *Wawrzonek* v. *Central Hudson Gas and Electric Corp.,* 276 N. Y. 412, 12 N. E. (2d) 527 (1938).

Prior to the passage of the Workmen's Compensation Law in 1922, the common law rule of master and servant was the basis of

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[17] "* * * by the Constitution the States not only gave to the nation the concurrent power to tax persons and property directly, but * * *." Fuller, C. J., in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673 (1895).
In Lang v. Commissioner, 289 U. S. 109, 53 Sup. Ct. 534 (1933), in commenting upon the possible hardship to individuals subject to both federal and state taxes, the court said, "If the legislation hereunder review results in imposing an unfair burden upon the taxpayer, the remedy is with Congress and not with the courts. Unless there is a violation of the Constitution, Congress may select the subjects of taxation * * *."

[1] N. Y. WORKMEN'S COMPENSATION LAW § 11: "The liability of an employer * * * shall be exclusive and in place of any other liability * * *." Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795 (1916) (right to compensation is exclusive remedy where master and servant relationship exists); Lee v. Cranford, Inc., 182 App. Div. 191, 169 N. Y. Supp. 370 (2d Dept. 1918).

all liability.[2] The servant could recover for the master's negligence providing there was no assumption of the risk and no contributory negligence. But under the Act, these defenses cannot be availed of by the employer.[3] The Act also provides that the liability of the employer for compensation is exclusive of all other liability.[4] Prior to the amendment of Section 29 in 1937, the injured employee had the right to elect to sue the third party causing the injury in tort. He could not avail himself of both remedies. If he filed a notice of such election, the right of compensation was still available to him in the event of a recovery which was less than compensation. As amended,[5] Section 29 gives the double remedy to the employee, with the proviso that the employer or State Insurance Fund shall have a lien on the proceeds to the amount of the compensation award. If the employee fails to bring the negligence action, the carrier may do so, but in this event the employee will be entitled to only two-thirds of the balance remaining after the carrier's claim is deducted.

In the instant case the main point in issue was whether there existed a master and servant relationship between the deceased and the defendant. If such relationship existed, then the defendant can be held only to compensation under the Act.[6] Even though the words "Independent Contractor" were stricken out of the agreement, and even though the defendant had the right of general supervision, there existed the relationship of independent contractor.[7] The common law definition of an independent contractor as stated in *Hexamer* v. *Webb* [8] has been adopted in compensation cases.[9] In the light of the above a general employment cannot properly be found to exist. Defendant's contention that there existed a special employment must likewise fail.

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[2] EDGAR AND EDGAR, LAW OF TORTS (3d ed. 1936) 86, 87.

[3] N. Y. WORKMEN'S COMPENSATION LAW § 10: "Every employer * * * shall * * * secure compensation for * * * injury arising out of and in the course of employment without regard to fault as a cause of injury * * *."

[4] See note 1, *supra.*

[5] Laws of 1937, c. 684.

[6] Schweitzer v. Thompson Norris Co. of N. J., 229 N. Y. 97, 127 N. E. 904 (1920).

[7] Medford Lumber Co. v. Mahner, 197 Wis. 35, 221 N. W. 390 (1928) (reserved right of supervision and direction, did not create a master and servant relation so long as the supervision was to ultimate result and not details). Accord: Matter of Litts v. Risley Lumber Co., 224 N. Y. 321, 120 N. E. 730 (1918) (direction of details did not make master and servant relation where the directions were given to secure fulfillment of the contract and did not deprive the painter of means of painting as he wished); Slyter v. Clinton Construction Co., 107 Cal. App. 348, 290 Pac. 643 (1930); Long v. Eastern Paving Co., 295 Pa. 163, 145 Atl. 71 (1929); Lichtenwager v. Silverman, 243 App. Div. 127, 254 N. Y. Supp. 392 (3d Dept. 1931).

[8] 101 N. Y. 377, 383, 4 N. E. 755, 756 (1886).

[9] Beach v. Velzy, 238 N. Y. 100, 103, 143 N. E. 805, 806 (1924): "An independent contractor is one who agrees to do a specific piece of work for another for a lump sum * * *, who has control of himself and his helpers as to when, * * * he shall begin and finish the work; as to method * * * of accomplishing it; and who is not subject to discharge because he does the work in one way rather than another."

A general employee of one does not become a special employee of another unless there is a complete surrender of control [10] and in the absence of such complete surrender, the control of the general employer continued.[11] The division of control will not in and of itself raise a presumption of surrender.[12] The court also was influenced by the fact that the purpose of the agreement was to avoid the payment of premiums, and held that it did not lie in the mouth of the defendant to deny that the agreement set up an independent contractor relation.

S. C. S.

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[10] Ramsey v. N. Y. C. R. R., 269 N. Y. 219, 199 N. E. 65 (1935) (in absence of evidence of direction and control a train operator did not become a special employee).

[11] Bartolomeo v. Bennett Contr. Co., 245 N. Y. 66, 156 N. E. 98 (1927); Irwin v. Klein, 271 N. Y. 477, 3 N. E. (2d) 601 (1936).

[12] Charles v. Barrett, 233 N. Y. 127, 135 N. E. 199 (1922).

[13] Instant case at 420; Shuba v. Greendonner, 271 N. Y. 189, 193, 2 N. E. (2d) 536 (1936) (where a motor vehicle is registered, one cannot deny ownership. "Whether we call it estoppel or not makes no difference in the final result."); City of Buffalo v. Balcon, 134 N. Y. 532, 32 N. E. 7 (1892) (parties cannot accept benefits under a contract fairly made and at the same time question its validity). But *cf.* People v. Kaplan, 160 Misc. 179, 288 N. Y. Supp. 474 (1936) (the formation of a partnership was held valid even though it was for the express purpose of evading the payment of compensation premium).