

2000

Globe Grain and Milling Company, a corporation  
v. Industrial Commission of Utah and Albert E.  
Thomas : Response to Petition for Rehearing

Utah Supreme Court

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Joseph Chez; Attorney General; S. D. Huffaker; Assistant Attorney General; A. M. Ferro; Special Assistant Attorney General.

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UTAH SUPREME COURT

BRIEF

6050 A-PR

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# In the Supreme Court of the State of Utah

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GLOBE GRAIN AND MILLING  
COMPANY, a Corporation,  
*Plaintiff and Petitioner,*

vs.

THE INDUSTRIAL COMMIS-  
SION OF UTAH and ALBERT  
E. THOMAS,  
*Defendants and Respondents.*

Case No. 6050

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## BRIEF AND ANSWER TO PETITION FOR REHEARING

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### STATEMENT.

This brief is submitted in opposition to the petition filed by Globe Grain and Milling Company for a rehearing of the case of *Globe Grain and Milling Company v. Industrial Commission of Utah and Thomas*, decided June 20, 1939, (Utah, 91 P. (2d) 512), as well as in reply to the arguments advanced by amici curiae urging this court to reconsider and annul the decision it previously rendered.

No issue is raised upon this rehearing with respect to the facts found by the Industrial Commission and by the court, which are set forth at length in the court's opinion. The issues are rather as to the interpretations to be given to provisions in the unemployment compensation law.

The grounds upon which rehearing is sought by the Globe Grain and Milling Company are stated on pages 1-3 of its petition for rehearing. An examination of the allegations enumerated in the petition indicates, that apart from the question whether the Industrial Commission was bound to entertain an appeal from the determination of the appeal tribunal and was required under the law to grant Globe Grain and Milling Company a hearing before the Industrial Commission (Petition for Rehearing, points 2 (b) and (c), p. 3), the subject matter of the assignments of error all were previously considered by this court upon the original hearing. The brief of amici curiae, in addition to urging a reversal for the reasons advanced by Globe Grain and Milling Company, suggests that the decision previously rendered by this court should be annulled because, first, there is no proof in the record to show that Globe Grain and Milling Company is an employer, as defined in the act (Amici Brief, pp. 2, 3), and, second, the unemployment compensation law, in their opinion, does not authorize the Industrial Commission to determine the contribution liability of the Globe Grain and Milling Company and require it to file wage reports; and if the law be construed to contain such an authorization, it is in conflict

with Art. XIII, Sec. 11 of the State Constitution in that it permits the Industrial Commission to perform functions under a "tax law" which can be exercised only by the State Tax Commission (Amici Brief, pp. 3-15).

The Industrial Commission, however, takes the position that the original decision of this court in this case should be affirmed and that the petition of Globe Grain and Milling Company for a rehearing of this cause should be denied. The Industrial Commission contends:

First, that Globe Grain and Milling Company cannot for the first time on this application for rehearing assail the correctness of the procedure before the Industrial Commission which resulted in the order awarding unemployment compensation benefits to the claimant Thomas;

Second, that the award was properly made under terms of the State unemployment compensation act;

Third, that amici curiae are in no position to attack the validity of the proceedings of the Industrial Commission under the law, the order issued by the Commission, or the validity of the provisions of the statute; and

Fourth, that even if it be assumed that the new matter suggested by Globe Grain and Milling Company in its petition for rehearing and by amici curiae in their brief were properly in issue, the decision previously rendered by this court should be affirmed in all respects.

## I

THE ISSUE AS TO WHETHER GLOBE GRAIN AND MILLING COMPANY IS AN EMPLOYER AS DEFINED IN THE UNEMPLOYMENT COMPENSATION ACT AND THE ISSUES AS TO WHETHER THE INDUSTRIAL COMMISSION WAS AUTHORIZED BY THE STATUTE TO MAKE THE ORDER APPEALED FROM, AND IF THE STATUTE DID SO AUTHORIZE, WHETHER IT CONTRAVENED THE CONSTITUTION, CANNOT BE CONSIDERED IN THIS PROCEEDING.

- A. The question of whether Globe Grain and Milling Company is an employer under the unemployment compensation statute cannot be considered at this stage of the proceeding.

In reliance, apparently, upon the decision of this court in *Roberts v. Elder*, decided August 15, 1939, (not yet reported), amici curiae make much of the fact that the record made before the Industrial Commission does not establish, either affirmatively or by a stipulation of the parties, that Globe Grain and Milling Company was an employer subject to the provisions of the unemployment compensation act. No such contention, however, was made by Globe Grain and Milling Company in its original petition for a writ of review, nor in its original brief, and no such contention is made by the company in its application for rehearing. Accordingly, this contention, not having been listed by a party to the suit as a ground for reversal of the decision of the Industrial Commission in its original petition for a writ of

review, it cannot be considered by the court because "An inflexible rule of this court requires that every proposition relied on as grounds for reversing a judgment must be assigned as error in the original petition for review." *Pingree National Bank v. Weber County*, 54 Utah 599, 183 P. 334, 336; *Dahlquist v. Denver and Rio Grande Railway Company*, 52 Utah 438, 174 P. 833, 844.

It is equally well settled that this issue cannot be raised by an amicus curiae neither upon an original hearing nor upon a rehearing. An amicus has no control over a suit. His function is merely to assist the court in its consideration of the issues framed by parties; he has no standing to assist in the framing of issues by pleadings or otherwise. Therefore, since Globe Grain and Milling Company has evidenced no interest on its part to contest its status as an employer under the unemployment compensation act, and merely confined its application for rehearing to those matters set forth in its petition, the issue raised by amici curiae only as to whether or not Globe Grain and Milling Company is an employer and whether the record sufficiently supports that conclusion is not a proper one for consideration in this proceeding. *Dinet v. Orleans Dredging Co.*, (La. App. 1933), 149 So. 126, 129; *Union Steam Pump Sales Co. v. Deland*, 216 Mich. 261, 185 N. W. 353, 354; *State v. City of Albuquerque*, 31 N. Mex. 576, 249 P. 242, 248; *Moffat Tunnel Improvement District v. Denver & S. L. Ry. Co.*, 49 Fed. (2d) 715, 722 (C. C. 10th, 1930), cert. denied 283 U. S. 837; *Corning v. Patton*, (Ala. 1938), 182



So. 39, 42; *Hall v. Esslinger*, (Ala. 1938), 179 So. 639; *City of Phoenix v. Drinkwater*, 46 Ariz. 470, 52 P. (2d) 1175, 1176.

The rule concerning the province of amici curiae to raise issues not the subject of an assignment of error by a party to a suit is tersely summarized in *City of Phoenix v. Drinkwater*, *supra*. In that case, the Supreme Court of Arizona refused to consider issues raised by amicus curiae in his brief but with respect to which the parties made no complaint upon appeal to the Supreme Court of Arizona, and said (p. 1176):

“The Arizona Municipal League asked for and received permission to file a brief as amicus curiae. In such brief, in addition to arguing the questions raised by the assignments of error presented by defendant, it has attempted to assign other errors and to argue them. This is not within the rights of an amicus curiae, and we, therefore, consider the brief of the League only so far as it discusses questions raised properly by defendant’s assignments of error. *Farmers’ Union Ditch Co. v. Rio Grande Canal Co.*, 37 Col. 512, 86 P. 1042.”

Even if the status of Globe Grain and Milling Company as an employer under the unemployment compensation act of this State were properly in issue before this court in this proceeding, the certified copy of the status report of the company, attached as “Exhibit A” to this brief (p. 117 *infra*), would dispose of the contention made by amici curiae. The contention of amici is based upon the argument that there is no evidence in the

formal record before the Industrial Commission which would justify it in reaching the conclusion that Globe Grain and Milling Company employed a sufficient number of individuals during the calendar years involved to constitute it an employer under the unemployment compensation act. Although such evidence was not formally reflected in the transcript, the fact, nevertheless, remains that this company, by its own admission, has been an employer subject to the unemployment compensation act since its passage. It has filed wage reports, and has paid contributions periodically to the unemployment compensation fund. At no time has it ever seriously contested its liability as an employer. The only issue which it has seen fit to raise is whether Thomas, the claimant for benefits in this proceeding, was engaged in employment, as that term is defined in the unemployment compensation law.

Although ordinarily courts do not consider evidence not in the record on appeal, it is clearly within the province of the court to accept in this case as evidence of the status of Globe Grain and Milling Company the certified copy of the employment record filed with this brief. Appellate courts are fully empowered to accept supplementary evidence where to do so would avoid miscarriages of justice or unnecessary circuitry of action. The Federal Circuit Court of Appeals for the Eighth Circuit in *Ridge v. Manker*, 132 Fed. 599 (1904) stated the applicable rule in the following terms (p. 601):

“An appellate court may avail itself of authentic evidence outside of the record before it of matters

occurring since the decree of the trial court when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuitry of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled, or for other reasons has ceased to exist. *Chamberlain v. Cleveland*, 1 Black, 419, 17 L. Ed. 93; *Lord v. Veazie*, 8 How. 251, 12 L. Ed. 1067; *Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379; *Board of Liquidation v. Railroad Co.*, 109 U. S. 221, 3 Sup. Ct. 144, 27 L. Ed. 916; *Dakota v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016; *Washington and Idaho Railroad Co. v. Coeur D'Alene R. & N. Co.*, 160 U. S. 101, 16 Sup. Ct. 239, 40 L. Ed. 355; *Bryar v. Campbell*, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. Ed. 926."

See also: *Caldwell v. Modern Woodmen*, 89 Kans. 11, 133 P. 843, 844; *Burgess v. Lasby, et al.*, 91 Mont. 482, 9 P. (2d) 164, 166; *Schevenell v. Blackwood*, 35 F. (2d) 421, 423.

If the issue of whether Globe Grain and Milling Company was an employer had been raised before the Industrial Commission, unquestionably the document annexed to this brief as an exhibit or some other similar proof would have been put in evidence in the hearings before the Commission, and would have appeared in the record originally presented to this court. The importance of the proof represented by the exhibit arises at this time only by virtue of a contention of amici

curiae—a contention raised only after the decision of this court on the original appeal to this court.

But, if for any reason, this court is inclined to consider the absence of evidence in the formal record of the employer-status of Globe Grain and Milling Company, we submit that it should not dispose of this case and enter final judgment without affording an opportunity to the parties, by remanding the case to the Industrial Commission, to perfect the record in those respects in which the court deems it to be insufficient. *Colorado Public Welfare Board v. Viles*, Supreme Court of Colorado, October 2, 1939. (A Copy of this decision is attached hereto "Exhibit B", p. 118 infra.)

- B. The issues as to whether the Industrial Commission invalidly exercised "tax" authority or whether the unemployment compensation law invalidly delegates such authority to the Industrial Commission are not matters for consideration in this proceeding.

Amici curiae contend that the Industrial Commission's order in this case is invalid because in the course of determining the benefit rights of Thomas, the claimant, it ordered Globe Grain and Milling Company to file a liability report with respect to the wages paid to Thomas and to pay contributions. This contention seems to be supported by the following argument: The unemployment compensation law does not authorize the Industrial Commission to determine contribution liability

and if the statute be read so as to permit such determinations, it is invalid because in conflict with Article XIII, Sec. 11 of the State Constitution.\*

This attack on the validity of the order of the Industrial Commission is presented only by amici curiae. It is not a ground upon which Globe Grain and Milling Company seeks a reversal of the Commission's determination; neither is it a ground upon which the company seeks rehearing. The authorities uniformly hold that an amicus curiae cannot be heard to challenge the validity of a law or its application upon grounds not advanced by parties to the litigation. Amici curiae are not aggrieved by the order of the Industrial Commission which requires Globe Grain and Milling Company to file a "tax" liability report with respect to the wages paid to Thomas and to pay contributions thereon. That issue can be determined in a proper case where a similar order is directed to a party to the proceeding who chooses to challenge the order on such grounds, and a decision in this case would not foreclose the possibility of this question being considered by the court at a later date. It has been repeatedly held in numerous decisions of State Supreme Courts and of the United States Supreme Court that constitutional issues can be raised only by those adversely affected. *State ex rel. Johnson v. Alexander*, 87 Utah 376, 49 P. (2d) 408, 413; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571; *Southern Ry.*

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\*Article XIII, Sec. 11 of the State Constitution provides in part, as follows: "The State Tax Commission shall administer and supervise the tax laws of the State."

*Co. v. King*, 217 U. S. 524; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Hatch v. Reardon*, 204 U. S. 152, 160; *In re Knowles*, 295 Pa. 571, 145 Atl. 797; *Asplund v. Alarid*, 29 N. Mex. 129, 219 P. 786; 6 R. C. L. "Constitutional Law", section 87. This rule, that a person may only raise questions which directly affect his own interests and may not invoke questions which may properly be raised only by others, is rigidly followed with respect to amici curiae. In *State v. Martin*, 210 Iowa 207, 230 N. W. 540, the Supreme Court of Iowa said (p. 543):

"The court will not, at the instance of a stranger to the litigation, search for or pass upon grounds of invalidity of the statute not presented by the parties. *New York Life Insurance Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478; *State v. Lee*, 288 Mo. 679, 233 S. W. 20."

And in *State v. City of Albuquerque*, 31 N. Mex. 576, 249 P. 242, the Supreme Court of New Mexico, in refusing to consider an issue of invalidity raised exclusively by an amicus curiae, said (p. 248):

"Only persons claiming to be adversely affected are authorized to question the constitutionality of an act \* \* \* and particularly is this true of amicus curiae whose authority is to call the court's attention to facts or situations that may have escaped consideration. He is not a party and cannot assume the functions of a party. He must accept the case before the court with the issues made by the parties. *In re McClellan's Estate v. State*, 27 S. Dak. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029; *Farmers', etc., Co. et al. v.*

Rio Grande Canal Co., et al., 37 Colo. 512, 86 P. 1042; New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478.

“The constitutionality of the provision in question is not contested by an authorized person, and jurisdiction of the court is not involved. Cram v. Ry. Co., 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. (N. S.) 1028, 19 Am. Cas. 170, and note at page 175; 12 C. J. “Constitutional Law,” S. 217. Under these circumstances, this court will not raise the question on its own account, and amici curiae have no authority to do so.”

See also: *In re Kootz' Will*, (Wis. 1938), 280 N. W. 672; *Davis v. McCasland*, (Okla. 1938), 75 P. (2d) 1118; 3 Cor. Jur. (Secundum) 1050.

## II.

EVEN IF THIS ISSUE IS PROPERLY BEFORE THE COURT, THE INDUSTRIAL COMMISSION COULD DETERMINE WHETHER THOMAS WAS IN “EMPLOYMENT” AS DEFINED BY THE UNEMPLOYMENT COMPENSATION LAW: THE LEGISLATURE, IN CONFERRING UPON THE INDUSTRIAL COMMISSION THE POWER TO DETERMINE “EMPLOYMENT”, DID NOT VIOLATE ARTICLE XIII, SECTION 11 OF THE STATE CONSTITUTION.

A. The Industrial Commission is authorized to conduct proceedings to determine the validity of claims for benefits and, pursuant to such authorization, may determine whether a claimant was engaged in employment.

In enacting the Utah unemployment compensation law, the legislature entrusted its administration to the Industrial Commission (section 11). It imposed upon this Commission the duty to administer the act, granted it full authority to issue rules and regulations, within the framework of the law, to accomplish its purposes, and empowered the Industrial Commission "to require such reports" and "make such investigations" as it might deem necessary to carry out the provisions of the statute (section 11(a)). One of the clear statutory duties vested in the Commission is that relating to the payment of benefits to those entitled thereto under the law (sections 4 and 5). Section 4(e) of the law, (Chapter 43, Session Laws of 1937) prior to the amendment thereof in 1939, (Chapter 52, Session Laws of 1939) provided that an unemployed individual shall be eligible to receive benefits with respect to any week "only if it has been found by the Commission" that he has, "within the first four of the last five completed calendar quarters immediately preceding the first day of the benefit year," earned wages "for employment by employers" in a specified amount. Further, section 19 (j) (5) of the law requires the exclusions from "employment" to be determined by "the commission" which, in turn, is specifically defined by section 19 (f) of the law to mean "the industrial commission of Utah." Thus, by the terms of the statute, *the Commission is under a duty to determine whether a claimant earned wages in "employment."*

Moreover, section 6(b) of the original law and section 6(c) of the law as amended provide that if an appeal



tribunal or the Commission affirms a decision allowing benefits, "such benefits shall be paid regardless of any appeal which may be taken, but if such decision is finally reversed, no employer's account shall be charged for the benefits so paid." Manifestly, no benefits could be paid unless and until the Commission or its representatives or the appeal tribunal decided that services performed for wages or under a contract of hire constituted employment as defined by the law. To hold that the Industrial Commission does not possess the power to determine "employment" would be to destroy integral parts of the law. It would amount to ignoring completely section 4(e) of the law; the provisions of section 6 which are designed to set up procedures for the determination of claims for benefit and to afford benefit claimants a speedy determination of their rights; as well as the provisions of sections 19(j) (5) and 19(f). In short, the statute contemplates that the Industrial Commission shall determine when benefits are payable and in doing so the Commission is under a duty, if the question is in dispute, to determine whether the claimant has satisfied all conditions of eligibility including the condition enumerated in section 4(e). In arguing that no authority to determine the existence of the employment relationship has been conferred upon the Industrial Commission, amici curiae, by stressing section 14(b) only, and in arguing that in all cases where "employment" is in dispute, the issue can be resolved only by a court suit for contributions, appear to have completely overlooked the mandates of the law contained in

sections 4, 5, 6, 19(j)(5) and 19(f), that such determinations be made by the Industrial Commission, as well as the policy embodied in the law which calls for the speedy determination of benefit rights by the Industrial Commission. See *Utah Fuel Co. v. Industrial Commission*, 57 Utah 246, 194 P. 122, 124. In addition, their argument concerning section 14(b) of the statute seems to misconstrue completely the effect of determinations of "employment" by the Industrial Commission for benefit payment purposes and the relationship of such decisions to court actions to recover contributions (See Amici Brief pp. 4 and 5). As was indicated above, section 19(j)(5) of the law as well as sections 6 and 4(e) empower the Industrial Commission to determine the issue of "employment" for benefit payment purposes. From decisions of this character, employers may appeal to this court. (See section 6(h) Chapter 43, Session Laws of 1937; section 10(i) Chapter 52, Session Laws of 1939).

Should an employer appeal to this court and the court affirm the decision of the Industrial Commission, in a subsequent suit by the State Tax Commission for contributions on the wages paid to the claimant whose status under the Act was determined, the District Court would be compelled to follow the decision of this court with respect to the existence of the employment relationship as finally decided by this court for the purpose of paying benefits to the claimant. And should the employer fail to appeal to this court from the decision of the Industrial Commission, the District Court in a suit for contributions would be required to follow the

decision of the Industrial Commission in so far as it determined for benefit purposes the existence of the employment relationship between an employer and a claimant, not simply because it was a decision of the Industrial Commission, as such, but because the employer had an opportunity under the terms of the statute to secure judicial review of the decision and, in failing to do so, was bound thereby. This would not preclude an employer from contesting other issues relative to the suit for contributions; it would only, under well recognized principles of law, prevent relitigation of an issue already decided, or the opening up, by way of a collateral attack, of an issue previously settled. *Chicago N. S. & M. R. Co. v. City of Chicago*, 331 Ill. 360, 163 N. E. 141, 147; *Hoyne v. Chicago & O. R. Elevated Ry. Co.*, 294 Ill. 413, 128 N. E. 587, 591; *Indian Territory Illuminating Oil Co. v. Blake*, 154 Okla. 151, 7 P. (2d) 153, 155; *Warren County v. Mississippi River Ferry Co.*, 170 Miss. 183, 154 So. 349, 351; *United States Fidelity Co. v. Superior Court of City of San Francisco*, 214 Cal. 468, 6 P. (2d) 243; *Abrott v. Athanastos*, (Cal. App. 1936) 61 P. (2d) 982, 984.

B. In conferring authority upon the Industrial Commission to make determinations with respect to the existence of the employment relationship, the unemployment compensation law is not in conflict with the State Constitution.

Amici curiae in their brief (pages 9-15) claim that if the unemployment compensation law is so construed

as to confer authority upon the Industrial Commission to determine the existence of the employment relationship and to require Globe Grain and Milling Company to file "tax" liability reports and to pay contributions, it is invalid because in violation of Article XIII, Section 11 of the Utah Constitution. That provision reads in part as follows:

"The State Tax Commission shall administer and supervise the tax laws of the State."

When reduced to the form of logical propositions, the contention of *amici curiae* seems to resolve itself into either or both of the following syllogisms:

1. The constitutional provision applies to all exactions levied in pursuance of the taxing power of the State; "contributions" are "taxes" levied in pursuance of the taxing power of the State; therefore, the contributions are subject to the administrative jurisdiction of the State Tax Commission.

2. "Tax Laws", as used in the Constitution, signifies all laws levying compulsory exactions; "contributions" are compulsory exactions; therefore, contributions are taxes subject to the administrative jurisdiction of the State Tax Commission.

When expressed in syllogistic form the argument has an apparent and superficial validity which disappears upon closer scrutiny and analysis. The Industrial Commission denies the conclusions reached because a premise of each syllogism is faulty. For example, in

the case of syllogism "1" it is denied that contributions are levied in pursuance of the taxing power and are taxes. To the contrary, it is maintained that they are exactions levied in pursuance of the police power of the State. In the case of syllogism "2" it is denied that the Constitution uses the words "tax laws" to mean any and all statutes levying compulsory exactions. We believe reference is intended, rather, to those laws imposing exactions which are justified as an exercise of the taxing power exclusively.

The view that the unemployment compensation law may be sustained as an exercise of the police power has already been accepted by this court in its previous decision in this case. In *Globe Grain and Milling Company v. Industrial Commission of Utah*, (Utah), 91 P. (2d) 512 it was said at page 517:

"Both workmen's compensation and unemployment compensation as enacted in this state may, we think, be sustained as proper exercises of the police power, not to be restrained by the due process clause."

Likewise, in *Howes Bros. v. Massachusetts Unemployment Compensation Commission*, (Mass. 1936), 5 N. E. (2d) 720, in which an employer denied his obligation to pay contributions on constitutional grounds, the court sustained the unemployment compensation law as a proper exercise of the State's police power. As in the instant case, the plaintiff, among other contentions, claimed that the Constitution of the Commonwealth was violated in that the contributions were not handled in

the manner designated therein for *tax* receipts. The court in answer said at pages 725, et seq.:

“The Unemployment Compensation Law does not throw the burden of its expense upon funds obtained by general taxation. It puts that burden upon the employers and employees not exempted from its operation. \* \* \* The solution put forward after deliberation is the law here assailed. The connection between employers and unemployment is not remote and is affected by general business conditions. This law was enacted *in the exercise of the police power*. \* \* \* Many laws which interfere to some extent with freedom of contract and which cause additional expense to individuals have been upheld as valid exertions *of the police power*.

“Workmen’s compensation acts have been supported *as an exercise of the police power*. Their effect is to impose on the designated classes of employers of labor the burden of compensation for injuries to employees arising out of and in the course of their employment, leaving the employer to reimburse himself for the expense as a part of the cost of his product. (Citations omitted). In reason it is difficult to distinguish these decisions from the cases at bar.

“The principle is familiar that, within reasonable limits, the legislative department of government in mitigation of a public evil may place the cost on those in connection with whose business the evil arises. Statutes have been sustained providing for the collection of a percentage of deposits from State banks for the purpose of creating a guaranty fund to pay losses caused to depositors by the insolvency of any such banks. \* \* \*

\* \* \* \* \*

“It cannot rightly be determined that the Unemployment Compensation Law takes the property

of the plaintiffs without due process of law. *The contributions are exacted from the plaintiffs as well as from employees to effectuate some regulation of the evils of unemployment, in which both groups are interested and which is a subject within the scope of legislative competency. \* \* \** *The scheme of this law being within the police power, minor inequalities are not decisive against it.*

\* \* \* \* \*

“By the Unemployment Compensation Law, in substance and effect great sums of money are to be collected by compulsion of the Commonwealth from employers and employees. These sums are described in the law as ‘contributions’. These contributions are not collected in the ordinary way but are paid to the commission and then paid over to the State Treasurer as a fund to be used to pay benefits under the Unemployment Compensation Law. The State Treasurer is directed to deposit or invest the fund in the ‘unemployment trust fund’ of the United States government and keep it so deposited and invested, except as he may be entitled to requisition such sums standing to his account as may be required by the commission to pay benefits in accordance with the provisions of the Unemployment Compensation Law. These contributions paid by employers manifestly are received on account of the Commonwealth. *The contributions under the Unemployment Compensation Law are not a part of the general revenue of the Commonwealth although paid into the State Treasury. They are raised by the Commonwealth for a particular purpose through the exercise of the police power.* \* \* \*

\* \* \* \* \*

“*The Commonwealth has intervened in the exercise of its police power to relieve against the*

*acute evils of unemployment.* \* \* \* In principle these contributions stand on the same footing as the payments for insurance against personal injuries which are a valid part of almost every workmen's compensation act." (Italics supplied).

The Supreme Court of Mississippi has likewise sustained the validity of the unemployment compensation law of that State under its police power in *Tatum v. Wheeless*, (Miss. 1936), 178 So. 95, 101. The court said at page 101:

"A state, under its police power, has very large authority and discretion as to the recognition of public needs, and may provide for them by suitable legislation. This state has often exercised this power in the regulation or management of business affecting public welfare, and has enacted laws in restraint of acts deemed inimical to the public welfare or not promotive of the public good. \* \* \*,"

In support of the theory that unemployment compensation contributions are taxes, amici cites *Helvering v. Davis*, 301 U. S. 619; *Steward Machine Co. v. Davis*, 301 U. S. 548, and language from *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 57 S. Ct. 868 quoted by this court in its previous opinion.

Obviously *Helvering v. Davis*, *supra*, and *Steward Machine Co. v. Davis*, *supra*, have no conceivable bearing upon the issue of whether contributions under the State law are required under the police power or the taxing power of a State. These cases adjudicated, respectively,



the validity under the federal Constitution of federal taxes looking to the receipt of revenue in connection with the establishment of the federal old-age insurance system and the plan to induce State action with respect to unemployment.

Reliance upon the *Carmichael* case as an authority for the proposition that State unemployment compensation contributions must be regarded as taxes is also misplaced. The Supreme Court of the United States has clearly indicated that it is not concerned whether a particular exaction is sustainable as an exercise of the police or taxation power of a State. Its interest is confined to whether, in a case before it, the statute involved, whatever the power under which the legislature may have enacted it, violates a limitation contained in the Federal Constitution. In *Mountain Timber Co. v. Washington*, 243 U. S. 219, in which was adjudicated the validity of the workmen's compensation law of the State of Washington, requiring payments to be made into State fund (as does the Utah unemployment compensation law), the United States Supreme Court said (page 237):

“\* \* \* We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a person of rights secured by the Federal Constitution depends not upon how it is characterized but upon its practical operation and effect \* \* \*. And the Federal Constitution does not require a separate exercise by the states of their powers

of regulation and taxation. *Gundling v. Chicago*, 177 U. S. 183, 189."

Thus, in view of the fact that the United States Supreme Court does not undertake to determine the nature (in terms of police or taxing power) of a required payment as evidenced by its statement to that effect in the *Car-michael* case, 301 U. S. 495, 508, the Supreme Court's concurrence with the view that the unemployment compensation contribution required to be paid under Alabama law is a tax, is entitled to little weight as a precedent on that point. The effect of its decision was merely to accept, for purposes of the Federal Constitution, the designation of contributions as taxes made by the Alabama Supreme Court in *Beeland Wholesale Co. v. Kaufman*, (Ala. 1937), 174 So. 516. In that case, the Alabama Supreme Court denominated unemployment compensation contributions as taxes. They were so described, however, because, under the Alabama Constitution, as interpreted by its courts, there is:

"\* \* \* no authority of a State to take the property of a citizen except by way of taxes or eminent domain." (p. 520)

In short, unlike most other States in which governmental exactions may be referable to either the police power or taxing power, in Alabama, if the contributions were not considered as an exercise of the taxing power, they were wholly invalid because obviously not justified as an exercise of the power of eminent domain.

In view of the circumstances described, none of the decisions relied upon by amici curiae are of value as precedents in this State where it is permissible to distinguish between taxes in the technical sense, (i. e. compulsory payments exacted in pursuance of the taxing power) and those referable to the police power. See *Globe Grain & Milling Co. v. Industrial Commission of Utah*, *supra*; *State v. Packer Corporation*, 77 Utah 500, 297 P. 1013. This distinction is clearly marked out by this court in *State v. Packer Corporation*, *supra*, in which this court upheld against constitutional attack the validity of a statute regulating traffic in cigarettes and levying fees and impositions upon their sale. It was claimed that the fees represented an exercise of the taxing power but the court repudiated this argument and said:

“As an incident, and as a more efficient means of regulation, the act requires payment of a license fee by dealers and the payment of an excise tax on cigarettes. The fact that a considerable revenue is raised and paid into the public treasury does not itself indicate that the act was passed as a revenue measure nor destroy its character as a regulatory act passed in the exercise of the police power, where the object is to control, regulate and restrict rather than to encourage the traffic.”

It is of the greatest importance to observe that although the argument of amici is based upon the theory that contributions are “taxes”, (Amici Brief, pp. 11, 12) Article XIII, Section 11 of the Utah Constitution refers to “tax laws.” Thus, the Constitution does not purport

to give exclusive jurisdiction to the State Tax Commission with respect to the administration and supervision of *all* laws involving compulsory payments, but only "tax laws." The Constitution, however, avoids the ambiguity inherent in the use of the common word "taxes" and conveys the impression that the Tax Commission's jurisdiction is restricted to laws which are imposed exclusively by virtue of the taxing power of the State. This is clearly evidenced by the legislative exposition of this provision of the State Constitution. For example, the monies paid by employers into the State Insurance Fund under the Workmen's Compensation Law (a law which is predicated on the exercise of the police power of the state, *Utah Fuel Co. v. Industrial Commission*, 57 Utah 246, 194 P. 122, 124) are collected and administered by the Industrial Commission. (Rev. Stat. Utah 1933, Sec. 42-2-3). Similarly under the fish and game laws, the Fish and Game Commissioner collects fees and license monies and determines liability therefor independently of the State Tax Commission. These fees and monies are deposited by the Commissioner in a special fund which is administered by him separate and apart from the general funds of the state collected under "taxing laws." (Rev. Stat. Utah 1933, Title 30). The Department of Registration likewise collects monies and determines issues of liability with respect to many matters entrusted by the legislature to it for supervision, administration and control. (Rev. Stat. Utah 1933, Title 79). Like powers have been vested in administrative bodies other than the State Tax Commission with respect to the collection and

administration of funds derived by way of fees or assessments from attorneys (Rev. Stat. Utah, 1933, Title 6); from banks (Rev. Stat. Utah 1933, Title 7, Secs. 7—1—11 and 7—1—11x) and from airplane pilots and companies (Rev. Stat. Utah 1933, Title 4).

We shall now proceed to indicate the nature of the taxing power for the purpose of distinguishing it from the police power which requires payments to be made into a special fund for a particular purpose: The line which distinguishes an exercise of the police power from the exercise of the taxing power is difficult to draw, but notwithstanding these difficulties, there are criteria available for determining whether a particular statute falls on one side of the line or the other. In this connection, reference should be made to the discussion in Cooley, *The Law of Taxation*, 4th ed. 1924, vol. 4, c. 29, entitled "Impositions in Exercise of Police Power." On page 3511 it is said:

"If the purpose is regulation the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax."

On page 3513 the author says:

"Only those cases where regulation is the primary purpose can be specially referred to the police power. If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also

obtained does not make the imposition a tax, \*  
\* \* , \*

In support of this statement the author cites *State ex rel. Brewster v. Ross*, 101 Kan. 377, 166 P. 505; *Davis v. Hailey*, 143 Tenn. 247, 227 S. W. 1021; *Ard. v. People*, 66 Colo. 480, 182 P. 892; *Rhinehart v. State*, 121 Tenn. 420, 440, 117 S. W. 508 and other cases. In the *Rhinehart* case, it was decided that a "tax" of one-fifth of 1 per cent. on the gross premiums of fire insurance companies to provide a fund for investigation by the insurance commissioner of the origin of fires is not a "tax" although the surplus of such monies is paid into the State Treasury and expended for general State purposes. See also *Rell-foot Lake Levee District v. Dawson*, 97 Tenn. 171, 36 S. W. 1046.

On page 3514 Cooley writes:

"If, by the common understanding and general custom of the country, a particular duty is regarded as being imposed upon certain individuals, not as their proportionate share in the burdens of government, but because of some special relation to property peculiarly located, or to business peculiarly troublesome or dangerous, so that a requirement that the duty shall be performed by such individuals is usually regarded as only in the nature of regulation of relative obligations and duties through the neighborhood or the municipality, there is no sufficient reason why this may not be considered a mere police regulation, though the proceedings assume the form of taxation, *and are even designated by that name.*" (Italics Supplied).

We do not believe that it is possible to argue that the purpose of the unemployment compensation law is "revenue" or that revenue is the primary purpose of the law and regulation is merely incidental. The statute is declared in section 2 to be enacted under the police powers of the State and sets forth an unemployment compensation system which is self-financing in all respects insofar as the public funds of the State are concerned. It provides for an unemployment compensation fund "which shall be administered separate and apart from all public monies or funds of the State" (section 9(a)) and "which is to be administered by the State Treasurer, not in his regular capacity, but as ex-officio Treasurer and custodian." (section 9(c) (4)). The fund consists of all contributions collected under the act and the Industrial Commission is vested with full power, authority and jurisdiction over the fund (section 9(a)). Contributions are deposited in the Federal Unemployment Trust Fund (section 9(c) (4)) and requisitioned therefrom by the Industrial Commission (through the Treasurer acting as its fiscal agent) from time to time in such amounts as it deems necessary for anticipated benefit payments. When requisitioned such monies are required to be deposited in the unemployment compensation fund in a special benefit account and benefits are to be paid therefrom in accordance with such regulations as the Industrial Commission may prescribe (section 9(d)). It is apparent that the system of collection and the payment of benefits contemplated by the legislature differs fundamentally and radically from that set up by statute for the collec-

tion of general taxes. See *Howes Bros. v. Massachusetts Unemployment Compensation Commission*, *supra*, p. 728; see also Rev. Stat. Utah 1933, Titles 4, 6, 7, 30, 42 and 79 providing for the collection of fees from airplane pilots, attorneys, banks, from anglers, hunters, occupations generally, and employers for insuring under the Workmen's Compensation Law.

It is especially significant that, by statute, (section 9(a)), and, in practice, the contributions collected never become a part of nor are they ever mingled with the public funds of the State in its Treasury which are available for defraying the general expenses of Government. The contributions are deposited in special accounts and are treated as special monies impressed with a trust in favor of those persons who may qualify under the criteria set forth in the statute as unemployed individuals entitled to benefits. This is important because it is generally recognized that the outstanding characteristic of a tax, and that feature which distinguishes it from a levy under the police power, is that a tax is a compulsory exaction to defray the general expenses of government. *State ex rel. Davis-Smith Co. v Clausen*, 65 Wash. 156, 117 P. 1101; *First State Bank of Claremont v. Smith*, 49 S. D. 518, 207 N. W. 467, 469; *Home Accident Insurance Co. v. Ind. Comm. of Ariz.*, 34 Ariz. 201, 269 P. 501. See particularly *State ex rel. Attorney General v. Wisconsin Constructors*, (Wis. 1936), 268 N. W. 238, 242, 243; 26 R. C. L. 17, et seq.



Contributions, however, are not available for that purpose. Indeed, if they were available for any purpose other than the payment of unemployment benefits, the unemployment compensation law would not be in conformity with section 303(a) (5)\* of the Federal Social Security Act as amended, and section 1603(a) (4)\* of the Internal Revenue Code (formerly section 903(a) (4) of the Social Security Act). Such lack of conformity with the standards in the cited provisions would result in a deprivation to taxpayers of the credit against the Federal tax to which they would otherwise be entitled upon the payment of State contributions, and would deprive the State of Utah of federal funds for the administration of the unemployment compensation law—a consequence which would mean complete frustration and nullification of the legislative intention expressed in the Utah unemployment compensation law.

Moreover, the statute, section 7(f) of Chapter 43, Session Laws of 1937, and section 7(e) of Chapter 52, Session Laws of 1939, clearly shows that the legislature did not regard contributions to be taxes levied under the taxing power of the state. These sections provide that “contributions paid by an employer \* \* \* shall be deductible in arriving at taxable income of such employer under the provisions of Chapters 13 and 14, Title 80, Re-

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\*These sections require all State unemployment compensation laws, as a condition of approval for tax credits under the Federal Unemployment Taxing Act and for administrative grants to provide for—“Expenditure of all money requisitioned by the State agency from the Unemployment Trust Fund, in the payment of unemployment compensation, exclusive of expenses of administration; \* \* \*.”

vised Statutes of Utah, 1933, as amended, to the same extent as other taxes deductible during any taxable year by any such employer." Under Title 80, Chapters 13 and 14 of the Revised Statutes, *all taxes* payable under taxing laws are permissible deductions with named exceptions. If the legislature had regarded contributions to be taxes levied under a taxing law, this provision in the unemployment compensation law would have been unnecessary. The contributions would have constituted permissible deductions without specific provision being made for their deductibility in the unemployment compensation law. The insertion of this section clearly indicates, therefore, that the legislature did not view contributions to be taxes and accordingly, in order to permit their deduction under the income tax law, inserted the provision in the law that contributions might be deducted from gross income under the income tax law not "as taxes" but merely "to the same extent" as taxes.

The argument that enforced payments may be referable to the police power and not to the power of taxation, and, therefore, not "taxes" is not novel. The field of workmen's compensation furnishes an analogy which may be the most persuasive in its support. Workmen's compensation laws have been held to represent exercises of a power other than the taxing power of a State because, like the State unemployment compensation law, the monies they require to be paid into State funds or to be paid by way of premium for compulsory insurance are not raised for general revenue nor for the miscellaneous expenses of State Government, but for a part-

icular purpose within the regulatory powers of the State. It has been well established that workmen's compensation laws stem from the police power. See *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 P. 1101; *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554; *Hunter v. Colfax Consolidated Coal Co.*, 175 Ia. 245, 154 N. W. 1037; *Home Accident Insurance Co. v. Industrial Commission of Arizona*, 34 Ariz. 201, 269 Pac. 501; *State ex rel. Stearns v. Olson*, 43 N. D. 619, 175 N. W. 714. In *State ex rel. Davis-Smith Co. v. Clausen*, *supra*, the court said (p. 1116):

“The third principal objection to the constitutionality of the act is that it violates the provisions of the Constitution designed to secure equal and uniform taxation of property for public purposes. As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax and, in the language of a distinguished judge discussing a similar question, ‘for many purposes might be so spoken of without harm.’ *But it is manifest that it is not a ‘tax’ in the sense the word is used in the sections of the Constitution to which reference is here made.* No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government, but to recompense employes of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employment. It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is therefore in the nature of a license tax, and can be justified on the principle

of law that justifies the imposition and collection of license taxes generally." (*Italics supplied*).

In *State ex rel. Stearns v. Olson, supra*, the court said (p. 716):

"It is perfectly clear that the workmen's compensation fund is no part of the state fund, and is, in no sense public money. It is a special fund, accumulated by the collection of annual premiums from employers, the amount of which is determined and fixed by the Workmen's Compensation Bureau for the employment or occupation operated by such employer, \* \* \*. When the fund is accumulated, the state treasury is by the provisions of the act, made the custodian of it. The Legislature, if it had thought it wise, could have designated the Commissioner of Agriculture and Labor, or the Commissioner of Insurance, or other public officer, as custodian of the fund. It might, perhaps, if it deemed it wise, have designated a trust company or responsible banking institution, or any other responsible financial agency within the state as custodian; this upon the grounds that such funds are not public funds, but is a special fund, and in a sense a private fund as contradistinguished from a public fund in the sense that it is collected from not all the people of the state by way of taxation, but from certain individuals, corporations, associations, etc., of the state engaged in conducting certain occupations and employments denominated in the act. The purpose of the collection of the same into a special fund is to compensate for a definite length of time, depending on the character of the injury, employees who received injuries while engaged in such employment, for employers who have paid the premiums assessed against them into such fund."

Nor are workmen's compensation laws the only laws compelling the payment of contributions into a fund for a proper public purpose referable to the police power of the State. In *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688 (1908) a "per capita tax" was levied on dogs to indemnify individuals who suffered losses of sheep due to the depredations of dogs. The obvious purpose of the act was to promote the sheep industry. After pointing out that the regulation of dogs was an appropriate subject of regulation under the police power the court said (p. 690):

"We are also of the opinion that, the statute not being for revenue but an exercise of the police power, its provisions are not regulated by any section of the Constitution relating to fiscal matters, and, although the sum required to be paid by the owner of each dog four months old is called a tax, and it is required to be assessed by the assessor, collected by the sheriff and paid over to the State Treasurer, this is only a mode of regulating the dogs within the state and protecting the sheep industry."

In *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 142, the statute provided that no person could operate within the State as an agent of a fire insurance company until he had filed a bond conditioned on the payment of \$2 for every \$100 of premiums annually collected. The court held that the statute did not infringe the constitutional requirement that taxes should be uniform and said (p. 145):

"Nor is the requirement an exercise of the power of taxation as to the companies, but only a

proper exercise of the police power inherent in the sovereignty of the state.”

See *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367; *Hendrick v. Maryland*, 235 U. S. 610; *State ex rel. Sherman v. Pape*, 103 Wash. 319, 174 Pac. 468; *Noble State Bank v. Haskell*, 219 U. S. 104; *State v. Cassidy*, 22 Minn. 312. See also *First State Bank of Sutherlin v. Kendall Lumber Corporation*, 107 Ore. 1, 213 Pac. 142, in which it was held that an Oregon law requiring timber land owners to provide a fire patrol and authorizing the State forester in the event of their failure to do so to provide a patrol and to charge the expenses thereof against the lands protected, was not a taxing statute and is therefore not invalid as failing to provide for a uniform and equal rate of taxation required by the Constitution.

The above cases are referred to principally for the purpose of demonstrating that workmen's compensation statutes and others which provide for the compulsory payment of money to a fund for some purpose within the scope of regulatory or police powers, are not by reason thereof “taxing” statutes except in the most general and non-technical sense of the term. A “contribution”, “fee”, or “assessment” either to a fund or private association is frequently referred to as a tax although in contemplation of law it has an entirely different character.

In *Wirtz v. Nestos*, 51 N. D. 603, 200 N. W. 524, the court said that contributions to a State fund for workmen's compensation is a “species of taxation”, but the

exaction was sustained under the police power. In *State ex rel. Davis-Smith Co. v. Clausen, supra*, the court said with reference to the objection that the workmen's compensation law of Washington violated provisions of the Constitution designed to secure equal and uniform taxation of property for public purposes:

“As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax and, in the language of a distinguished judge discussing a similar question, ‘for many purposes may be so spoken of without harm’. But it is manifest that it is not a ‘tax’ in the sense the word is used in the sections of the Constitution to which reference is here made.”

To sum up, briefly: In referring to “tax laws”, Article XIII, Section 11 of the Utah Constitution confers jurisdiction upon the State Tax Commission with respect to all revenue laws enacted in pursuance of the State's power of taxation; the unemployment compensation law is not such a law; it does not contemplate the collection of revenue to defray the general expenses of government—to the contrary it reveals its police power origin as stated in section 2 of the law, by attempting to regulate the evils of unemployment by means of the collection of funds from those who stand in a proximate position to the problem, the deposit of such funds in a special account in accordance with procedures which differ radically from those applicable to general revenue receipts, and the payment of such funds to qualified individuals. The entire scheme of the law manifests a legislative un-

derstanding that the contributions are not to be regarded as taxes in the technical sense, but police power exactions levied by a statute which is not a "tax law" within the constitutional provisions.

The court is also respectfully referred to the widely accepted canon of statutory construction that where a statute is fairly susceptible of two constructions, one of which will uphold its validity and another which will render it unconstitutional, the court should favor that construction which will result in sustaining the statute. See *The Best Foods Co. v. Christensen*, 75 Utah 392, 285 Pac. 1001, 1004, and particularly, the cases cited at that page. See also *State v. Packer Corp.*, 77 Utah 500, 297 Pac. 1013; *Utah State Fair Association v. Green*, 68 Utah 251, 249 Pac. 1016; *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P. (2d) 161, 167; *Tintic Standard Mining Co. v. Utah County*, 80 Utah 491, 16 P. (2d) 637; *Salter v. Nelson*, 85 Utah 460, 39 P. (2d) 1061; 25 R. C. L., p. 100, et seq., sections 243, 244, 245.

Thus, where the unemployment compensation law may be upheld as an exercise of the police power (as was stated by this court in its previous decision in this case), (and as is stated by the legislature in its declaration of purpose in enacting the law), and might also be referable to the taxing power of the State, the court should not hold the statute unconstitutional, or the action of the Industrial Commission invalid on the theory that the statute is a "tax law" where a holding that the statute was enacted in pursuance of the police power,



and is not a taxing law, would result in an affirmance of the administrative action and the validity of the statute.

- C. Doubts that might arise concerning the conformity of the State unemployment compensation law with the standards of Title III of the Social Security Act should induce the court to sustain the authority of the Industrial Commission to determine the existence of the employer relationship.

The Utah unemployment compensation law, in common with the laws of other States approved by the Social Security Board under Title IX of the Social Security Act and financed as to their administration by grants of Federal monies under Title III of that act, sets up a procedure for determination by an administrative agency of the rights of claimants to benefits under the law. It provides, in connection with such procedure, for a fair hearing to be afforded to individuals whose claims for benefits are denied. If the Industrial Commission is not permitted to decide issues of "employment" in connection with claims for benefits, serious doubt would exist with respect to the conformity of the State law with the provisions of Title III of the Social Security Act.

Section 303(a)(3) of that Act requires, as a condition of Federal grants, that the State law provide:

"Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied."

This provision has been construed, in the standards of the Social Security Board with respect thereto, to require that the State statute and rules and regulations thereunder include provision for a fair hearing before an administrative tribunal; *opportunity for a fair hearing only upon appeal to a judicial tribunal is deemed inadequate to satisfy the standard*. Hence, to conform with this section of the Social Security Act, an administrative tribunal must afford a full and fair hearing to all individuals whose claims are denied on all issues relevant to the validity of their claims. Section 6(c) of the unemployment compensation law and the regulations of the Industrial Commission (Regulations 20—1 through 20—4), have been accepted by the Social Security Board as conforming with all the essential elements of the type of fair hearing contemplated by section 303(a)(3) of the Social Security Act. The jurisdiction of the Industrial Commission, under the law as found by the Social Security Board to conform with the requirements of section 303(a)(3), must extend, to determinations of questions of employment if it is to afford to a claimant an opportunity for a fair hearing in cases where the payment of benefits depends upon the resolution of the “employment” question. A hearing on this issue must, under the requirements of the Social Security Act, be afforded regardless whether it may or may not have been adjudicated for the purpose of contribution liability in a suit for contributions brought by the State Tax Commission.

The fair hearing provision in section 303(a)(3) of the Social Security Act was obviously intended as a

guaranty to those who assert claims for benefits. Such hearings must be afforded with respect to all issues involving the payment or denial of benefits. Unless it is held that the Industrial Commission can hold hearings to determine such a question, i.e., whether an individual earned wages in employment in the amount specified by the State law, in all cases where such issue is disputed in connection with a claim for benefits, serious doubt as to the conformity of the State law with the provisions of section 303(a)(3) of the Social Security Act exists.

Contrary to the assertions made by amici curiae that in all instances the existence of an employment relationship has been determined in suits for contributions, the attention of this court is called to the following cases in which coverage issues including the issue of "employment" have been adjudicated in appeal proceedings which arose out of claims for benefits. *Bronx Home News v. Miller*, (N. Y. 1939), 14 N. Y. S. (2d) 55; *In re Batter*, (N. Y. 1939), 14 N. Y. S. (2d) 42; *In re Kinney*, (N. Y. 1939), 14 N. Y. S. (2d) 11; *Wisconsin Bridge Co. v. Ramsey, et al.*, Prentice-Hall, Unemployment Compensation Service, Wisconsin, § 29624. That the number of judicial decisions on coverage questions which have been rendered in proceedings arising from claims for benefits is relatively small as compared with the number rendered in suits for contributions is easily accounted for. No benefits became payable under any State unemployment compensation law until two years after contributions were payable under the law of the State, and except in

Wisconsin, no benefits became payable under any law until 1938. (Cf. section 903(a)(2) of the Social Security Act, now section 1603(a)(2) of the Internal Revenue Code, which requires an accumulation of funds for a two-year period under State unemployment compensation laws before benefits might become payable.) The attention of the court is again directed to the provisions of the unemployment compensation laws of every State and Territory setting up provisions for administrative determinations of benefit rights and to the already large volume of benefit decisions rendered by the administrative appeal tribunals which have involved coverage questions. (Selections from these decisions have been printed by the Social Security Board in the "Unemployment Compensation Interpretative Service—Benefit Series", a compilation of the benefit decisions of the higher administrative appeal tribunals.) The provisions for determination of benefit rights through a system of administrative tribunals, with limited provision for appeal to the courts, are designed to facilitate the speedy determination of benefit rights in a manner which would not be possible if all issues pertinent thereto had to be resolved by judicial proceedings. (Cf. Statement of this Court in *Utah Fuel Co. v. Industrial Commission*, 57 Utah 246, 194 P. 122, 123, and 124). If such provisions accomplish their purpose it is to be expected that questions of covered employment will, in connection with decisions upon individual benefit rights, be generally decided by administrative tribunals.

Section 303(a)(1) requires that a State law, to be eligible for grants of Federal funds for its administration, must provide:

“Such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be reasonably calculated to insure full payment of unemployment compensation when due.”

This provision appears to have as its purpose to insure that State laws certified for Federal grants shall contain provisions calculated to assure a prompt disposition of claims for benefits and the payment of benefits in accordance therewith. An unemployment compensation law which would permit delay in any payment until another agency of the State government, not charged with responsibility for the payment of benefits when due, should decide for tax collection purposes to press to ultimate conclusion in the courts the legal issue of the existence of the employment relationship would fail of its purpose because it would not provide benefits to unemployed workers at the time when they are most needed; such a law could only very questionably be regarded as one containing provisions for methods of administration calculated to assure the full payment of benefits when due.

It is submitted that in view of the doubts that might arise concerning the conformity of the State unemployment compensation law with Title III of the Social Security Act should the arguments of *amici curiae* prevail,

this court should be inclined to adopt such a construction of the State law as would insure the continued conformity of the law with the Federal Social Security Act.

- D. The court should sustain the Industrial Commission's order insofar as it affects the payment of benefits to the claimant, Thomas, and insofar as it determines that he was engaged in "employment" even if it be held that the portion of the Commission's decision which requires the employer to file reports and pay contributions is invalid.

In point II A, *supra*, we demonstrated that the authority to administer the unemployment compensation law, generally, has been conferred by the legislature upon the Industrial Commission, and that the Commission is burdened with the duty of determining the eligibility of claimants for benefits and the amount of benefits payable to them. In the course of making such determinations, the Industrial Commission is under the duty of determining whether a claimant "earned wages for employment by employers" in a specified amount (section 4(e)).

The brief of amici curiae seems to argue that if the Industrial Commission's decision requiring Globe Grain and Milling Company to file reports and to pay contributions is invalid, that by reason thereof, the portion of the decision adjudicating the claimant's eligibility for benefits and the amount thereof is also invalid. In so

arguing, *amici curiae* proceed upon the assumption that invalidity of a part of an order necessarily voids it in its entirety. While this might be the case where portions of an order are inseparable and mutually dependent, the assumption has no validity where the portions of an order are distinct and separable.

There is no direct relationship between a right to benefits by a claimant and the obligation of the employer to pay contributions. The two parts of the statute are separate and distinct. A claimant may be entitled to benefits notwithstanding that no contributions had been or will be paid by his employer if he meets the eligibility conditions as set forth in section (4) which do not require as a condition to the receipt of benefits that an employer shall have *paid* contributions. Likewise, an employer might be liable for contributions without any of his employees ever asserting a claim for benefits or qualifying therefor. Therefore, the alleged invalidity of the Commission's decision, insofar as it required Globe Grain and Milling Company to pay contributions, cannot affect that portion which adjudicated Thomas' claim for benefits. In *State ex rel. Kansas City Terminal Ry. Co. v. Public Service Commission*, 308 Mo. 359, 272 S. W. 957, a somewhat similar situation was involved. In that case, the Supreme Court of the State of Missouri held, after initial hearing, that under the Public Service Commission Law, the State Public Service Commission had no jurisdiction to construe and enforce a railroad's contract with Kansas City to construct and maintain a viaduct over railroad yards at its own expense. Subsequent-

ly, on motion to modify the decree, it appeared that the City sought only an affirmance of such portion of the Commission's order as permitted the construction of a viaduct over the railroad yards in accordance with prescribed specifications, leaving it to subsequent litigation to determine whether, under the contract, the railroad was obliged to assume the cost of erection and expense of maintenance. It was argued in opposition that the statute which authorized the Circuit Court to enter judgment "either affirming or setting aside the order of the Commission" did not "permit of a partial affirmance or reversal." The court held, however, that "there was nothing relating to the apportionment of costs that could have been properly considered by the Commission in determining the manner of crossing" and that:

"As the manner of crossing, as determined and prescribed, was, and is in no way dependent upon the apportionment of costs, the order under review can be set aside as to the latter without in any way affecting or modifying it in respect to the former." (p. 963)

The court, in this case can, therefore, take the same action as was taken by the Supreme Court of the State of Missouri. It can uphold the order of the Industrial Commission with respect to the remedial action of awarding benefits to the claimant, leaving it to subsequent litigation (such as a suit for contributions which may be instituted by the State Tax Commission) to determine how the cost to the State unemployment fund of the benefit payments is to be borne.



Thus, even if contributions be deemed to be "taxes" and the unemployment compensation law, to the extent that it requires the payment of contributions, be considered a "tax law" which, under the Constitution, must be administered by the State Tax Commission, it is clear that, to the extent benefits are paid and the Industrial Commission is required to make determinations of the existence of "employment" for benefit purposes, its orders must be sustained. The mere fact that both the State Tax Commission and the Industrial Commission, independently, might be called upon to make determinations as to the existence of "employment" (one for the purpose of contributions and the other for the purpose of benefits) does not mean that an invalid portion of an order of the Industrial Commission adjudicating "tax liability" is inseparable from a portion adjudicating benefit rights, nor that its invalidity taints that portion of the order which the Industrial Commission is clearly authorized to issue. Compare *Fuqua v. Watson, et al.*, 172 Okla. 624, 46 P. (2d) 486; *Chicago R. I. & P. Ry. Co. v. Forrester*, 72 Okla. 8, 177 P. 593; *Ballew v. United States*, 160 U. S. 187.

### III.

THE DENIAL BY THE INDUSTRIAL COMMISSION OF GLOBE GRAIN AND MILLING COMPANY'S APPLICATION FOR A REVIEW OF THE DECISION OF THE APPEAL TRIBUNAL WAS PROPER.

In its petition for rehearing, Globe Grain & Milling Company alleges that error was committed in that the

“appeal” before the Industrial Commission was determined without hearing or argument other than that had before the appeal tribunal (Company’s petition for rehearing, pp. 2, 3). This contention, not having been properly raised by the company on its original petition for a review of the decision of the Industrial Commission, cannot be considered upon the application for rehearing. *Pingree National Bank v. Weber County*, 54 Utah 599, 183 P. 334, 336; *Dahlquist v. Denver and R. G. Ry. Co.*, 52 Utah 438, 174 P. 833, 844.

But even if it were properly in issue, this contention lacks merit. It assumes that there is some constitutional necessity for a hearing before the Industrial Commission as well as before the appeal tribunal prior to appeal to the courts. The only constitutional provision which might have any bearing upon this claim would seem to be the “due process” provisions of the State and Federal Constitution. It is submitted, however, that although judicial review may be required of certain types of administrative action, an appeal is not a part of due process of law in either judicial or administrative proceedings. *Pittsburgh C. C. Ry. Co. v. Backus*, 154 U. S. 421; *James v. Appel*, 192 U. S. 129; *United States v. Heintz*, 218 U. S. 532; *Saylor v. Duel*, 236 Ill. 429, 86 N. E. 119; 6 R. C. L. p. 454. See *Morgan v. United States*, 304 U. S. 1; *Consolidated Edison v. National Labor Relations Board*, 305 U. S. 197, 224-228.

In *Pittsburgh C. C. Ry. Co. v. Backus*, *supra*, the United States Supreme Court, in holding that an ad-

ministrative appeal was not essential to due process of law, said (p. 426):

“It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect.”

An administrative appeal not being essential to due process of law, the only other question which remains for consideration is whether such an appeal is required by the terms of the unemployment compensation law. Section 6 of the unemployment compensation law, outlines the procedure to be followed by the Industrial Commission and its representatives in passing on the validity of claims for benefits. Under this section, provision was made by the legislature for a number of stages in the administrative determination of claims, and it is submitted that all the prescribed steps called for by the law were adhered to by the Industrial Commission and its representatives in considering the issues involved in the application for benefits.

According to the provisions of section 6(b), immediately following the filing of a claim for benefits, an initial determination of its validity must be made. This determination, except in cases which involve labor dispute issues, may be made in one of two ways. The claim may be passed upon by a representative or deputy designated by the Commission to perform that function, or, if the deputy or the representative, in his discretion, decides not to make an initial determination on the claim but to refer it for decision to an appeal tribunal, by an appeal tribunal consisting of either a three-member body or a single salaried examiner (section 6(b)). In this case, the deputy designated by the Industrial Commission, after examining the facts before him, made an initial determination. He concluded that Thomas, the claimant, was ineligible to receive benefits under the terms of the law. From this determination, Thomas appealed to the appeal tribunal which, after affording to Thomas and Globe Grain and Milling Company a full hearing on all disputed issues, reversed the initial determination and awarded benefits. An application for a review of this decision awarding benefits was thereupon filed with the Industrial Commission by Globe Grain and Milling Company. The Industrial Commission denied the company's application for review and affirmed the decision of the appeal tribunal, and in doing so without allowing a further hearing of the claim, it is submitted, the Industrial Commission acted fully in accordance with the provisions of the law.

Under the law, a decision of an appeal tribunal is the decision of the Industrial Commission unless reviewed by the Commission (section 6(c)). It is not the decision of a subordinate body or of a mere investigator. According to the language of the statute, further hearings on a claim may be had before the Industrial Commission as a matter of right only by a party to a decision of an appeal tribunal which was not unanimous, or by a deputy or representative of the Commission whose decision was overruled or modified by an appeal tribunal. In all other situations, a further hearing on a claim decided by an appeal tribunal may not be had unless the Industrial Commission, on its own initiative, directs a further hearing, or if it grants a hearing upon application by a party to the decision of the appeal tribunal (section 6(e)).

The Industrial Commission in this case was not required by the statute to further review the claim. The decision of the appeal tribunal being the decision of the Industrial Commission under the statute, the company's petition for review amounted to nothing more than an application for a rehearing of the claim. Such reconsideration could not have been had in this case before the Industrial Commission unless it granted the company's application therefor. This, the Industrial Commission refused to do, and its action in that regard cannot be held to be erroneous since it was fully empowered by the legislature to use its discretion as to whether it should grant or deny such reconsideration of claims in all but two types of situations, neither of which ob-

tained in this instance. Nor was it error for the Industrial Commission to deny the company's application for a reconsideration of the decision *made for it* by the appeal tribunal without affording the company an opportunity to argue the merits of the case, orally or otherwise, prior to the Commission acting upon the application. *Pinyon Queen Mining Co., et al. v. Industrial Commission of Utah*, 59 Utah 402, 204 P. 323.

In the *Pinyon Queen Mining Company* case, the company sought to review in court an award of workmen's compensation to one of its employees. Following the award of compensation, the State applied for a rehearing before the Industrial Commission. The rehearing was granted and the award was affirmed. On certiorari to the court, the company argued that the award should be vacated because the application for rehearing had not been served upon it and because it had not been afforded an opportunity to be heard with respect to the application. The court rejected this contention and, in holding that an opportunity to be heard in connection with an application for a rehearing was unnecessary, said (p. 324):

"So far as applications for rehearing are concerned, it would be a useless and cumbersome proceeding to have the parties appear for a special hearing on the motion for rehearing. There is no formal hearing on a motion for rehearing, and when a petition for rehearing is pending it is properly disposed of *ex parte*."

The facts in this case are even stronger than those involved in the *Pinyon Queen Mining Company* case.

Here it was the Globe Grain and Milling Company which filed the application for rehearing. It had an opportunity to state its grounds for dissatisfaction with the appeal tribunal's decision in its application and if an opportunity to be heard with respect thereto were required, it is the *claimant* who would have been entitled to the opportunity to argue before the Industrial Commission.

But even if it is assumed that the action of the Industrial Commission, in passing upon Globe Grain and Milling Company's application to annul the decision of the appeal tribunal, amounted to a review of the proceedings before that tribunal and an affirmance of the decision of the appeal tribunal, the Industrial Commission was not required under the statute to afford the claimant an opportunity to be heard before confirming the decision of the appeal tribunal. The unemployment compensation law provides that in the conduct of hearings, the Industrial Commission shall not be bound by "common law or statutory rules of evidence and other technical rules of procedure." (section 6(f)). And, therefore, the rules which ordinarily govern the conduct of cases in court do not apply to hearings before the Industrial Commission. *Pinyon Queen Mining Co. v. Industrial Commission*, 59 Utah 402, 204 P. 323; *McDonald v. Employers' Liability Assurance Corp.*, 120 Me. 52, 112 Atl. 719.

The statute, in terms, authorizes the Industrial Commission to review and decide claims for benefits on "the basis of the evidence previously submitted" in a

case or to permit the taking of additional evidence (section 6(e)). It would seem that the statute, therefore, not only vests in the Industrial Commission discretion with respect to allowing a review of decisions of appeal tribunals, but also as to the manner, form, and extent of the review. Review in the first instance being discretionary, it is also discretionary with the Industrial Commission as to whether in reviewing a claim on the basis of records previously made, it should give the parties notice of such review and afford them opportunity to be heard thereon prior to reviewing the case.

The decision of the Supreme Court of Oklahoma in *Oklahoma Pipe Line Co. v. State Industrial Commission*, 149 Okla. 162, 299 P. 180, 184, supports this view. In this case, the court ruled that the power of the Oklahoma Industrial Commission to review a workmen's compensation award and to set it aside upon petition of a party was not defeated by the failure to give notice of the filing of the petition and affording the parties an opportunity to argue the claim. In that situation the statute, like the statute in this case, did not, in terms, require such notice and hearing to be given. Whether the Commission should grant review at all was discretionary, and therefore, in the absence of a statutory requirement for notice and hearing in connection with reviewing determinations of appeal tribunals, the Commission had the authority to dispense with such notice and hearing. See *Derr v. Weaver*, 173 Okla. 140, 29 P. (2d) 97, 99.



## IV.

THE COURT PROPERLY DECIDED THAT EMPLOYMENT UNDER THE UNEMPLOYMENT COMPENSATION LAW IS BROADER THAN THE COMMON LAW RELATIONSHIP.

A. The legislative history, language and plan of the statute clearly contemplate coverage under the law broader in scope than the traditional common law relationship of master and servant.

The unemployment compensation law as originally enacted by the legislature in 1936 (Laws of Utah, Sp. Sess. 1936 Ch. 1) defined "employment" in Section 19 (g) thereof in the following terms:

"Employment means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, which service (1) is performed in this state by an individual, exclusive, however, of any service within this state which is incidental to the individual's service performed elsewhere; or (2) is performed elsewhere but is incidental to an individual's service in this state;  
\* \* \*."

Under this definition it might have been argued that coverage under the law was not defined in precise terms and it might have been urged that it alluded to the traditional common law master-servant relationship. See *Texas Company v. Wheelless*, (Miss. 1939) 187 So. 880. But the legislature of this state, in 1937, felt impelled to change this definition; to ascribe to the term "em-

ployment” a more precise meaning, and to give it the scope it intended it to have, namely, to cover thereunder persons other than those servants under common law concepts. Accordingly, in Session Laws of 1937 Ch. 43, Section 19 (j), it re-defined “employment” as “service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied” and, very significantly, added the provision that, regardless whether the relationship between an individual and the unit for which services were performed was that of master and servant or principal and independent contractor, all services performed for wages shall constitute “employment” unless the circumstances under which the services were performed met three named conditions for exclusion. The provision thus added reads (Section 19(j)(5)):

“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.”

This change in the definition of employment obviously flowed from a change in intent, and a comparison of the definition as written by the legislature shows that it adopted, for the purpose of determining coverage under the unemployment compensation law, standards which were wholly unlike those used to determine employment under traditional common law master and servant concepts.

The common law approach is outlined by the Restatement of the Law of Agency in Section 220, chapter VII, topic 2, title B of Volume I. It reads:

“b. *Generality of definition.* *The relationship of master and servant is one not capable of exact definition. It is an important relationship in that upon it depends the liability of the master to third persons and to his employees under the provisions of various statutes as well as under the common law; the relationship may prevent liability, as in the case of the fellow servant rule. It cannot be defined, however, in general terms with substantial accuracy.* The factors stated in Subsection (2) are all considered in determining the question, *and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship.* Where the inference is clear that there is, or is not, a master and servant relationship, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered.” (Italics supplied).

Under the common law approach to the master and servant relationship, the triers of facts must determine

“whether or not there is a sufficient group of favorable factors to establish the relationship” of master and servant as distinguished from that of principal and independent contractor. The Restatement lists nine such factors, which among others, are considered important and which must be “weighed”. These are:

- “(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- “(b) whether or not the one employed is engaged in a distinct occupation or business;
- “(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- “(d) the skill required in the particular occupation;
- “(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- “(f) the length of time for which the person is employed;
- “(g) the method of payment, whether by time or by the job;
- “(h) whether or not the work is a part of the regular business of the employer; and
- “(i) whether or not the parties believe they are creating the relationship of master and servant.”

But this process of choosing and weighing “factors” is not the method of determining coverage under the unemployment compensation law. The statute specifies

only three criteria to be considered and a determination that a relationship does not conform to any single one of these is sufficient to create statutory "employment". Common law tests thus become irrelevant under the legislative definition, and such factors as are generally used to determine relationships at common law, i. e., whether or not the parties intended that an "independent contractor" relationship flow from their action, the method of payment whether by the time or job, the kind of occupation and the customs of the locality, cannot outweigh the statutory criteria. See *Unemployment Compensation Commission of North Carolina v. Jefferson Standard Life Insurance Co.*, 215 N. Car. 479, 2 S. E. (2d) 584; *Industrial Commission of Colorado v. Northwestern Mutual Life Insurance Co.*, 103 Colo. 550, 88 P. (2d) 560.

Whatever doubt might exist as to whether or not the legislature intended to adopt a definition of "employment" unlike the common law master and servant relationship and to discard that relationship as the scope of coverage under the unemployment compensation law is dispelled by the rejection of the Senate at the 1939 session of the legislature of all efforts to amend the definition of employment so as to confine coverage under the law to the traditional master and servant relationship. The following appears on page 5 of the 1939 Senate Journal, Day 52:

"Further consideration of S. B. No. 83 on second reading. Senator McFarland moved to amend the bill as follows:

“Page 28, line 16 (referring to section 19(i)(1), following subdivision (6) insert subdivisions as follows:

“ ‘(7) Any employing unit which has in its employment under such conditions as to amount to a relationship of master and servant and not that of independent contractor of four or more individuals, irrespective of whether the same individuals are or were employed in each such day.’

“Page 28, line 28 (referring to sections 19(j)(2)(b)) following subdivision (2)(b) insert subdivision (c) as follows:

“ ‘(c) The employment is not performed under a contract which creates a relationship of independent contractor or does not amount to a relationship of master and servant.’

“Page 29, line 10 (referring to section 19(j)(5)) strike all of Section 5 and subdivisions (a), (b), and (c), ending on line 22, page 29, and insert in lieu thereof the following:

“ ‘(5) Services performed by an individual for wages shall be deemed to be employment subject to the act when it is shown that the services were performed under such conditions as amount to a relationship of master and servant and not that of independent contractor.’

“Page 30, line 17 (referring to section 19(j)(6)(i)) new subsection (i) as follows:

“ ‘(i) Services performed under a contract which does not create the relationship of master and servant or which are performed under a contract or condition which give rise to a relationship of one doing services of an independent contractor or services here performed under a special contract under such conditions that the person performing the work performs it as an independent contractor.’

“Page 31, line 13 (referring to section 19(p)) after the word ‘payable’ insert ‘to an employee and not to an independent contractor.’

“On motion of Senator Hopkin a roll call was ordered.

“The amendment failed to pass on the following roll call:

“Yeas 8; Nays 11; absent 4.”

This extract from the legislative history of the definition of “employment” in the statute shows, free from all doubt, that the legislature adopted a plan of coverage broader in scope than the common law of master and servant and that it wished to have coverage controlled by the criteria it enumerated in Section 19(j)(5) of the law rather than by the tests generally used for determining the master-servant relationship at common law. This view is further bolstered by the fact that all words of art are carefully excluded from the enactment. Its operative words are “employment”, and “service”, and “employing unit”, not “servant” “agent”, or “independent contractor”, or “master”, “principal”, or “contracting party”. The traditional “control test” or similar tests available to courts under the general body of law when confronted with propositions surrounding the concept of respondeat superior are wholly omitted from this law, and although the Industrial Commission has no quarrel with the value of the tests proposed in the Restatement of the Law of Agency, as such, it should be noted that the section relied upon by amici curiae to bolster their argument that section 19(j)(5) should be

construed in the light of these tests, is ripped from its context. Section 220 is taken from Chapter VII, Topic 2, Title B of Volume I of that work. The chapter is entitled: *Liability of Principal to Third Persons; Torts*; Topic 2 purports to discuss *Liability for Authorized Conduct or Conduct Incidental Thereto*, and Title B assumes to discuss the topic *Torts of Servants*. Moreover, not only does the Restatement thus point out that the criteria in Section 220 are for the purpose of determining ex delicto liabilities of a master rather than the existence of a general employment relationship, but the Restatement goes further and warns that the criteria it enumerates do not and should not be substituted for statutory definitions. On page 486 the Restatement contains the following cautionary remark:

“d. *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 the same word bears in the Restatement of this Subject.”

The authors of the Restatement of the Law of Agency would probably be the last to urge that, in a discussion of tort liability, they had finally established not only a perfect concept of employment for all purposes, but also that, in enumerating the criteria set forth therein, they had limited for all time legislative power in dealing with problems of employment. See “Interstate Bards and Yale Reviewers”, H. F. Goodrich (Advisor



on Professional Relations to the American Law Institute) 84 U. of Penn. L. R. 449.

Before proceeding to an analysis of the criteria by which the existence of the employment relationship, defined in the Unemployment Compensation Law, should be determined, it should be noted that Section 19(j)(5) squares with the reasons underlying the enactment of the unemployment compensation law. The general purpose of the unemployment compensation law is to alleviate the evils of unemployment. These objectives the law is designed to achieve by the imposition of liability for contributions to provide funds for benefits and by adjustments in the rates of contributions as an incentive to employers to stabilize employment. The basic risk with which unemployment compensation is concerned is the termination of the receipt of remuneration by persons performing services for others. Under our economy this is the hazard which initiates the evils of unemployment. In enacting the unemployment compensation law, the legislature, consistent with this purpose, could not have concerned itself solely with the different and innumerable situations wherein the activities of one person are controlled in such detail by another as to warrant the imposition of tort liability or some other liability nor with the type of risk originally covered in employer's liability and in workmen's compensation laws. These liabilities are imposed because the principal who has authority to control and supervise the particular activities of his employee is obviously in a position to minimize the risk of injury by the installation of safety

devices, or the imposition of strict rules and regulations respecting operations. In such situations it might be of importance whether the master could order a particular type of service or the kind of transportation to be used. The existence of such control over the particular details of the employee's activities or over the instrumentalities used by the servant justifies the determination that the master should bear the burden of injuries resulting from such risks, and the absence of such control over the particular instrumentality or act which caused an injury justifies freeing the employer from liability.

The risk of unemployment and the power to stabilize employment, however, as distinguished from the risk of injury to workmen or to a third person arises from *the dependence of an individual upon the continuance of a relationship with the business of another*. This risk arises where the receipt of remuneration for services is dependent on the will of another or the continuance of a relationship with the business of another. It is a risk which is not peculiar or restricted to individuals within the traditional and technical common law relationship. It may not be minimized or augmented to the same degree as other risks which can be minimized or augmented by virtue of an employer's authority to control or supervise a particular detail of an employee's activities. The risk of unemployment exists with respect to all employment regardless of whether, in connection with a *particular* tort or workmen's compensation question, the relationship between the worker and his em-

ployer is or is not such as to impose liability on the master. The fact that an employee might choose his means of travel or be completely in charge of a place of business of his employer does not negative the fact that unless he is a truly independent merchant or businessman, an entrepreneur in his own right, the *continuation of his employment and his continued right to remuneration is dependent upon the will of another, or the continuance of the business of another*. The existence or non-existence of a technical master servant relationship under such circumstances is irrelevant and has no realistic significance to the state whose concern it is to provide means whereby persons temporarily unemployed can maintain their morale and their health until they find jobs. These same considerations also apply to the raising of funds to pay benefits. Equality of treatment of business enterprises is related to the similarities between the general activities of the persons through which enterprises are conducted. It is not related to the extent the management might choose to exercise control over its employees or to delegate functions or to the extent to which persons performing services for them may for some purposes be either "employees" or "independent contractors".

Further, liability for contributions, in the computation of wage credits on which benefits are based under the unemployment compensation act, cannot, and should not, shift from moment to moment with each variation in the degree of control exercisable by the principal over the activities of the individual performing services, nor can it

or should it vary with the ownership of the particular tool or instrumentality used in connection with the employment which may cause an injury to an employee or third person. Liability, under the doctrine of respondeat superior, however, may so vary. To interpolate, therefore, this doctrine into unemployment compensation would create an impossible administrative task. It would be utterly confusing if under the statute it should be necessary to weigh the relationship in terms of possible tort liability at each moment and to determine, for the purpose of benefits or contributions, the amount of remuneration paid to an employee for the specific activities of the employee for which the employer might have incurred a tort liability. *It is the general relationship, the general status of the individual and his economic relationship to an enterprise, which is significant under the statute.* These distinctions between the operation of the doctrine of respondeat superior and the principles applicable to the unemployment compensation law are well summarized in *Wisconsin Bridge & Iron Company v. Industrial Commission of Wisconsin*, (Circuit Court, Dane County, Wisconsin, March 13, 1939, CCH Unemployment Insurance Service, Wis. para. 8122)\*, in which the court, in construing a statutory definition of employment similar to that contained in section 19(j) of the Utah unemployment compensation law, said:

“Unemployment compensation (to use the commission’s rather scholarly diction) is predicated

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\*A copy of this opinion is attached hereto marked “Exhibit C”, p. 122 *infra*.

upon the 'flow of time' element in employment whereas tort liability or liability in the field of workmen's compensation focuses upon the 'instant of time' element."

Thus, it is submitted, that this statute in Section 19 (j) (5) clearly evidences a realistic approach towards solving questions of coverage for the purposes of unemployment compensation. Under the statute, it is the status of the individual that is all important; not his relationship at a particular moment of time. The importance of this shift in emphasis for the purposes of unemployment compensation as well as the necessity therefor was fully recognized by Mr. John C. Gall, counsel for the National Association of Manufacturers, when he wrote (3 Law and Contemporary Problems (1936) p. 122):

"A payroll tax \* \* \* is a tax imposed upon an economic relationship which has escaped legal definition. At common law the relationship of master and servant was marked out under the law of contract and tort. Well established delineations carried us into the law of principal and agent, or succeeded in creating a new relationship of independent contractor. *Under modern statute law the emphasis has shifted from contract to status, and delineation of the employer-employee relationship has been controlled by the impact of public policy represented in modern legislation.* For example, the relationship, under workmen's compensation laws and employer's liability acts is defined to relate the employer's liability to the degree of control exercised over the employee or his place of employment. Under more recent legislation pertaining to labor disputes, the relationship of employer and employee is differently de-

fined (citing 29 U. S. C. A. (Sup. 1935) sec. 152 (5)) to effectuate an entirely different public policy. *It is obvious that under unemployment compensation laws the relationships must be even further defined to reflect the new social responsibilities imposed upon employers.*" (Italic supplied).

To hold, therefore, that Section 19 (j) (5) is merely declaratory of the traditional common law master-servant relationship would not only ignore the legislative intent thereof as evidenced by the history of the section and the plan and purpose of the statute, but also to deny to the legislature the power to fix rights and liabilities under the act in the manner it deemed best suited to meet the problems of involuntary unemployment. It would also mean a complete denial on the part of the court of power in the legislature to emphasize for the purposes of this statute the status of individuals; to regard relationships in terms of the dependence of individuals for remuneration on the will of another, or the continuation of the business of another; and to prevent the legislature, by a redefinition of concepts, from accomplishing that which many legislatures have already done even for workmen's compensation purposes, i.e., to enlarge the scope of coverage so as to include thereunder persons who, under traditional common law master-servant tests, might otherwise be regarded as independent contractors. See *Cates v. Williamson* (Mo. 1938), 117 S. W. (2d) 655; *McDowell v. Duer*, 78 Ind. App. 440, 133 N. E. 839; *O'Boyle v. Parker-Young Co.*, 95 Vt. 58, 112 Atl. 385; see also "Digest of Workmen's Compensation Laws" (1937

ed.) issued by Association of Casualty and Surety Executives, p. XIII.

It is highly significant that in all but one instance the courts of the several states when called upon to determine the scope of coverage under an unemployment compensation law which embodied a definition of "employment" and definitions of "employing unit", "wages", and "employer", like those in the Utah unemployment compensation law have held that their respective legislatures, in the definition sections of the laws, showed "a carefully considered and deliberate purpose to leap many legal barriers which would halt less ambitious enactments as far as language will permit it" and "to sweep beyond and to include, by redefinition, many individuals who would have been otherwise excluded from the benefits of the act by the former concepts of master and servant and principal and agent as recognized at common law." *North Carolina Unemployment Compensation Commission v. Jefferson Standard Life Insurance Co.*, 215 N. Car. 479, 2 S. E. (2d) 584; *Industrial Commission of Colorado v. Northwestern Mutual Life Insurance Co.*, 103 Colo. 550, 88 P. (2d) 560; *Wisconsin Bridge and Iron Co. v. Industrial Commission of Wisconsin and Ramsey*, Exhibit C, p. 122, *infra*; *Pond v. Michigan Unemployment Compensation Commission and Heinz Lumber Co.*, Circuit Court, Michigan, Marquette County, September 18, 1939.\*

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\*A copy of this opinion is attached to this brief, Exhibit D, p. 137 *infra*.

The single decision which has not so held is that of *Washington Recorder Co. v. Ernst*, (Wash. 1939) 91 P. (2d) 718. This decision was rendered by Department II of the Washington Supreme Court and is, moreover, at variance with a decision rendered by Department I of the Washington Supreme Court in *McDermott v. State of Washington* (Wash. 1938), 82 P. (2d) 568. No hearing has ever been had on either of these cases before the Washington Supreme Court en banc as in the Washington Recorder case, the Department which decided the suit refused to allow a petition for argument and hearing before the full court. Moreover, not only is the Washington Recorder decision in conflict with all other cases which have construed a definition of "employment" similar to that contained in Section 19 (j) (5) of the Utah law, but it is also inconsistent within itself. In construing section 19 (g) (5) of the Washington unemployment compensation act it purports to hold that the "A" and "C" provisions thereof are merely restatements of the common law tests of the existence of the master and servant relationship, but that the "B" provision is wholly unlike the common law and represents a statutory criterion. Thus within a single section of the law defining employment there is contained, according to its view, both a common law definition and a statutory definition. It is submitted that in reading this opinion the conclusion is inescapable that it is but an isolated instance of what Mr. Justice Holmes once described as "One of the misfortunes of the law" in that "ideas become encysted in phrases and thereafter for a long time cease to provoke



further analysis.” *Hyde v. United States*, 225 U. S. 347, 391.

B. The relationship between Thomas and Globe Grain and Milling Company constituted employment as defined in Section 19 (j) (5) of the law.

The three statutory criteria in section 19 (j) (5) are in the conjunctive. A showing of conformity with all three is a prerequisite to an exemption of coverage under the law. The finding of this court that Thomas was in employment was based upon a consideration of subsection C of section 19 (j) (5) and it is this finding which Globe Grain and Milling Company assails in its petition for rehearing. The provision reads:

“Such individual is customarily engaged in an independently established trade, occupation, profession or business.”

The company urges that the court should consider “customarily” in this subsection as “existing”. If by this the company seeks to substitute a theoretical standard based on the existence of businesses or occupations in which entrepreneurs perform activities similar to that of an employee who is not the operator of an established business, it is urging a standard that has no relationship to the problem of unemployment. The statute speaks in terms of the individual and therefore the test is not whether others might “customarily” be engaged in independently established businesses but whether the individual involved is so engaged. Thus the statute speaks

of the business as being “independently established”; not merely of being independent. The nature of the establishment governs whether the individual is subject to the type of risk which should be covered by unemployment compensation—whether the individual is so established that notwithstanding the fact that a particular connection is severed, he is in a position to continue to operate on his own account. This criterion is not met unless the individual is so set up that he is not dependent upon the continuance of a connection with a single company for a livelihood. In addition, he must be in a position to perform the duties incident to his business in accordance with his own methods; he must be free to buy his merchandise in the competitive market; the good will of the business must be his own transferrable at his pleasure and for a consideration satisfactory to him; he must be able to select his tools and fixtures; determine his sales policy and his method of advertising; and he must be free to perform the same or similar services for others while he is serving a particular company. This is the essence of being “independently established” and “customarily” in a business, trade, or occupation and it was so defined by the Colorado Supreme Court in *Industrial Commission of Colorado v. Northwestern Mutual Life Insurance Co.*, 103 Colo. 550; 88 P. (2d) 560. In that case, the court said:

“The third test as to exemption from coverage is that the ‘individual’ is customarily engaged independently in an established trade, occupation, profession or business. *This would neces-*

*sitate a showing by the company to the satisfaction of the Commission that its agents are established in the business of selling insurance, independent of whatever connection they may have with the company.*" (Italics supplied).

See also *Wisconsin Bridge Co. v. Wisconsin Industrial Commission*, Exhibit C, p. 122 *infra*; *Pond v. Michigan Unemployment Compensation Commission*, Exhibit D, p. 137 *infra*.

Under the construction which the company urges, the provision requiring a showing that the *individual* in question must be shown to be *customarily and independently established* in a trade or business would be meaningless. There is practically no activity in which an employee may be engaged that may not be the substance of an independently established business. Every bricklayer, salesman, painter, cook, truck driver, etc., is engaged in activities which are paralleled by existing and independently established businesses. There are established brokerage houses which sell and handle feed for livestock and processed agricultural products. Such a broker may solicit customers or take orders from manufacturers, nevertheless their businesses, unlike that of Thomas, is not subject to summary termination through the acts of a person with whom they contract and the good will they develop is their good will.

But by no stretch of the imagination could Thomas have been considered to be a broker. He could not and did not hold himself out as being ready and able to handle the distribution of livestock feeds generally for any

manufacturer or distributor who might seek his services. The contract required him to devote himself exclusively to the development and distribution of the company's products in a particular territory. Upon the termination of his connection with Globe Grain and Milling Company, Thomas could not undertake to continue the distribution of feed for livestock. Before he could engage in such activity he would have to secure a new job. He had no right to the customers and the company owned the good will he had developed. In brief, his business was in no sense *independently established*; it was entirely dependent upon the continuance of a contractual association with the company and, in all material respects, was restricted to the company and subordinated to its interests. See *Comer v. State Tax Commission*, (N. Mex. 1937), 69 P. (2d) 936.

Nor can it be successfully contended that Thomas was independently established as an insurance broker. There is no evidence in the record to show that he had a broker's license nor that he had any resource other than to seek a job selling insurance. In this respect the situation herein involved is substantially like those involved in *Pond v. Michigan Unemployment Commission*, Exhibit D, p. 137 *infra*, and in *Wisconsin Bridge and Iron Company v. Wisconsin Unemployment Compensation and Ramsey*, Exhibit C, p. 122 *infra*, in which it was held that the mere fact that a trade might be the subject of an independently established trade or business did not exclude an individual from the scope of coverage under the act unless the individual was independently estab-

lished and customarily in the trade, business, or occupation or was independently established and customarily in some other trade, business or occupation.

Moreover, under the facts of this case the Industrial Commission reasonably held that the relationship between Thomas and Globe Grain and Milling Company failed to meet the criterion for exclusion in Section 19 (j)(5)(a) of the law. This condition requires a showing that—

“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.*” (Italics supplied).

To conform with this condition, the party claiming exemption from the act must show not only that under the contract of employment the principal has not exercised and does not have the right to exercise control over the performance of service, but that the person performing the service is free from control or the possibility of control in the future both under the contract and in fact.

The statutory test above cited is considerably different from the test employed at common law to determine the existence of the master-servant relationship in that there is absent therefrom the factor of control over the details of the services performed which is commonly referred to in the Restatement definition relied upon by the company and amici curiae. Subsection (a) of the statutory test contains a positive requirement that the *individual* performing services be free from control

over his performance if exemption is to be granted. The approach in section 19 (j)(5)(a) to the question of freedom from control differs from the approach at common law, because the common law statement of the control test, as is indicated by the cases cited in the company in its original brief, requires that control extend to the details of performance. This requirement, however, does not appear in the statute. Under the statute, it is unnecessary to determine what is a detail and what is "satisfaction with a result." The statutory relationship exists if the employer has a general control over the service performed. *Such general control for the purposes of the statutory standard is present* when the manner and means of performance are either predetermined by contract, necessarily resulting from the circumstances under which the services are performed, or flow from the economic relationship which the persons performing the services bear to the enterprise for which they are performed. In recognition of this difference between the statutory test provided in section 19 (j)(5)(a) and the common law test relating to control, the Supreme Court of Colorado in *Industrial Commission of the State of Colorado v. Northwestern Mutual Life Insurance Co.*, 103 Colo. 550, 88 P. (2d) 560, stated, with respect to a statutory definition of employment identical with that contained in the Utah statute:

"The first condition in the statutory test relates to freedom of control and direction over the performance of services, both under contract and in fact. The test of freedom is either under contract

or fact. Does the company control and direct the performance of services, or will it have the right to do so under the contract, if it desires to do so? *We are not here concerned with details but with general control.* The possibility of control in the future is as important as no actual control at the present.

“In discussing the evidence we shall be controlled primarily by the undisputed facts, such as the contracts and the ‘Rules and Instructions’ governing the persons involved herein in their relations with the company. The question of control and direction, as set forth in section 19 (g)(5), is not a matter of degree. Undoubtedly, it relates to general control. It is not satisfied by some ‘detail’ in which the individual may be free to exercise his own judgment. The power to terminate a contract for personal service at any time without liability is an important factor in arriving at a conclusion as to whether the individual is free of control and direction, ‘because the right immediately to discharge involves the right of control.’ *Industrial Com. v. Bonfils*, 78 Colo. 306, 308, 241 Pac. 735.” (Italics supplied).

The view expressed by the Colorado court with respect to the significant differences between the common law test of control and the statutory test was adopted by a Wisconsin court. See *Wisconsin Bridge & Iron Co. v. Industrial Commission*, Exhibit C, p. 122 *infra*. In the course of interpreting statutory language identical with section 19 (j)(5)(a) the Wisconsin court said:

“For purposes of the present decision, we need not go into all the points wherein the present legislative definition of employment departs from prior accepted standards. For instance, it has

been regarded—and must still be so viewed under the workmen's compensation law—that lack of right to control is what precludes, in essence, the employment status. But by the first test of exclusion prescribed in 108.02 (5)(a), it must be established that there is freedom from control not only (1) under the contract but also (2) in fact. *Furthermore there must be established not only freedom from control in the past but that the individual 'will continue to be free from the employer's control or direction. \* \* \*'* (Italics supplied).

If, therefore, the power of control exists under the contract or in fact, proof of the extent of its actual exercise or even proof of its non-exercise is wholly immaterial. The statute looks to control which may be exercised in the future and it is sufficient under the statute to constitute employment if the employer has the power, if he chooses to exercise it, over the performance of service at any time during the continuance of the relationship.

Applying the foregoing analysis of section 19 (j) (5)(a) to the facts in this case, it would seem to be clear that Thomas was not either under his contract or in fact, free from control or from the possibility of such control in the future. The company at any time could have conditioned the continuance of the relationship between it and Thomas upon his submission to any instructions or restrictions which it might have chosen to impose. The company could have conditioned its acceptance of any order and the payment of commissions to Thomas on his compliance with its instructions as to any phase of his activities. The company could have condi-



tioned the continuance of the relationship on compliance with its instructions as to when, where, and whom Thomas should solicit. His remuneration could have been made conditional on his covering a designated territory at a particular time, on answering correspondence in a certain way, or on his refraining from disclosing information as to the company's operations. The company not only could have vetoed any assistants for Thomas but it could have refused to permit him to utilize assistants. See *Ludlow v. Industrial Commission*, 65 Utah 182, 235 P. 884, 888.

By the terms of the arrangement, it was clearly contemplated that Thomas would personally promote the sale of the company's products. The company could have at any time fired Thomas, or conditioned continuance of his services for it on submission to its will. Whatever freedom Thomas had in the performance of his services was at the sufferance of the company. Under such circumstances it is only reasonable to conclude that Thomas was not and would not continue to be free from the employer's right or power to exercise control either under the contract or in fact.

Further, under these circumstances it would not even be unreasonable to hold that the relationship between the company and Thomas was that of master-servant at common law. The company and the amici in discussing the common law relationship of master and servant have overlooked a primary condition for the existence of the status of an "independent contractor"; namely,

that a person performing services is not an "independent contractor" unless the contract for the services provides a fixed and definite result upon the completion of which such person is entitled to the contract price. See *Ludlow v. Industrial Commission, supra*. No such predetermined result existed in this case. The power of the company to determine from time to time, the price, quantity, and the product to be sold by Thomas and to enforce its will on all matters affecting the manner and means of his performance of the services by conditioning the continuance of the relationship on the acceptance by Thomas of the company's will, negatives the existence of a "result". The company did not undertake to make available any fixed quantity of goods to be sold by Thomas, nor did it undertake not to discontinue the line he was handling.

In addition, Thomas' compensation was subject to change by the company at any time. The company through the simple device of giving notice of termination of the contract could change or threaten to change Thomas' commission rates, or require him to service his or other accounts of the company as a condition to receiving remuneration. Thus, the company's power growing out of such right of termination to condition performance and compensation upon submission to such conditions as it might from time to time have imposed negatives the existence of a "result" and demonstrates the company's rights or powers of contract. The absence of a predetermined result upon the completion of which Thomas would be entitled to the con-

tract price not only brings the relationship within the statutory definition of employment but under the authorities would establish a common law master-servant relationship.

In *Industrial Commission of Colorado v. Bonfils*, 78 Colo. 306, 241 Pac. 735, a workmen's compensation case, one C. Sprigg, was engaged to haul coal with his own truck at a fixed price per ton by the Continental Investment Company, and was accidentally killed while so engaged. The question before the court was whether or not the deceased was an employee under section 9 of the Workmen's Compensation Act which reads as follows:

"The term 'employee' shall mean and include: \* \* \*

Every person in the service of any other person \* \*

\* under any contract of hire, express or implied. \* \*

\*" The court said (at p. 736):

"A servant is one whose employer has the order and control of work done by him, and who directs or may direct the means as well as the end. *Arnold v. Lawrence*, 72 Colo. 528, 530, 213 P. 129. *By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor.* *Franklin Coal & Coke Co. v. Ind. Com.*, 296 Ill. 329, 129 N. E. 811. The most important point 'in determining the main question [contractor or employee] is the right of either to terminate the relation without liability.' *Ind. Com. v. Hammond*, 77 Colo. 414, 236 Pac. 1006. This is

a confirmation by this court of the rule above stated as to control, because the right immediately to discharge involves the right of control.” (Italics supplied).

In *L. B. Price Mercantile Co. v. Industrial Commission, et al.*, 43 Ariz. 257, 30 P. (2d) 491, the court, in determining that a commission salesman was performing services as an employee under common law concepts, said (at p. 494):

“And in determining if the employer retains control the most important factor is whether either party may terminate the relation without liability. ‘Where such right exists,’ to use the language of the court in *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006, 1008, ‘the workman is usually a servant. Where it does not exist, he is usually a contractor.’ The power of the employer to end the employment at any time he sees fit is incompatible with the full control of the work which an independent contractor enjoys. 14 R. C. L. 72; *Press Publishing Co. v. Industrial Acc. Commission*, 190 Cal. 114, 210 P. 820; *New York Indemnity Co. v. Industrial Acc. Commission of California*, 80 Cal. App. 713, 252 P. 775; *Clark’s Case*, 124 Me. 47, 126 A. 18.”

In *Aisenberg v. C. F. Adams Company, Inc., et al.*, 95 Conn. 419, 111 Atl. 591, a travelling salesman whose compensation depended on commission sales, was held to be an employee within the workmen’s compensation act, which provided: “Employee shall mean any person who has entered into or works under any contract of service or apprenticeship with an employer.” In reject-

ing the company's claim that the deceased was not working under a contract of service because he was free to sell to anyone, the Connecticut court emphasized that the employer's control over the kind and quantity of product to be sold negated the existence of a result which is essential to the existence of the independent contractor relationship. The court said (p. 592):

"The means and method of conditioning this business, as we have in part detailed, comprise the essence of this business. *The subject of sale, the terms of sale, and the proceeds of sale remained in the control of the company.* Practically this constituted a general control.

"But the liberty to go anywhere in the entire state enlarged the freedom of action of this salesman over that of the ordinary salesman, but it did not enlarge his control over the goods sold, the terms of sale, or the proceeds of the sale. The fact that the deceased could regulate his own hours of work is without significance. His pay depended upon the results of his sales. The particular hours he worked were unimportant to his employer, provided adequate sales were made. When this did not result, the company was at liberty at any time to discharge the deceased from their employment. The right of discharge is one of the strong indications that the relation was one of employment. *An independent contractor must be permitted to finish his contract in the absence of breach on his part. That the deceased was paid by commission is not a determining test, but, as a rule, it is quite immaterial how the payment is made, whether in wages, salary, or commission, or by the piece or job.*" (Italics supplied).

For similar holdings with respect to commission salesman see *Wilson v. Times Printing Company, et al.*, 158 Wash. 95, 290 Pac. 691; *Borah v. Zoellner Motor Car Company* (Mo. App. 1924), 257 S. W. 145; *Burgess v. Garvin, et al.*, 219 Mo. App. 162, 272 S. W. 108; *Mitchem v. Shearman Concrete Pipe Company*, 45 Ga. App. 809, 165 S. E. 889; *Dishman v. Whitney, et al.*, 121 Wash. 157, 209 Pac. 12; *Lewis v. National Cash Register Company*, 84 N. J. Law 598, 87 Atl. 345; *Singer Manufacturing Company v. Rahn*, 132 U. S. 518; *Brown v. Industrial Accident Commission of California, et al.*, 174 Cal. 457, 163 Pac. 664; *Dillon v. Prudential Insurance Company of America, et al.*, 75 Cal. App. 266, 242 Pac. 736; *Howell v. Continental Casualty Co.* (Texas 1937), 110 S. W. (2d) 210; *Auer v. Sinclair Refining Company, et al.*, 103 N. J. Law 372, 137 Atl. 555; *United States Fidelity & Guaranty Company of Baltimore, Maryland v. Lowry* (Tex. Civ. App. 1921), 231 S. W. 818; *Bronx Home News v. Miller* (N. Y. 1939), 14 N. Y. S. (2d) 55.

C. The statutory definition does not impair the obligations of contracts.

Globe Grain and Milling Company urge that the unemployment compensation law "abrogates the contract between it and Thomas, creates an entirely new relationship and, therefore, the application of the statute is unconstitutional." This assumes that the statute abolishes, or prohibits, the exercise of any rights of the parties under their contract. This assumption is, however, untenable. The law does not affect any element of the

preexisting contractual obligations between the company and Thomas, nor does it interfere with their right to make any contract they may choose. The act imposes an exaction upon the exercise of the right to employ as defined in the statute, but does not impinge on the right to contract or on the performance of the contract. The definition of employment does not change the status of the parties nor prevent them from entering into or performing any contract they may see fit to make. The law takes the parties in the situation they have created. That the imposition of an exaction on the exercise of a right to contract or arising out of a contract does not impair the obligation of contracts is a principle of law that is beyond question. The parties do not have the right to enter into an agreement that they shall not be subject to an exaction. *Barwise v. Sheppard*, 299 U. S. 33; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Kehrer v. Stewart*, 197, U. S. 60. The *Kehrer* case is closely analogous to this case. In that case a state exaction was levied upon "all agents of packing houses doing business in" the State of Georgia. It was claimed that the exaction impaired the obligations of a preexisting contract between a packing house and a local salesman. The court, however, in holding that the statute did not impair the obligations arising under the contract, said:

"The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employe to serve for a specific sum. His contract remains entirely

undisturbed. There was no stipulation for an employment for a definite period; and if there were, it is inconceivable that the State should lose this right of taxation by the fact that the party taxed had entered into an engagement with his employer for a definite period." (p. 70)

The argument of the plaintiff that the unemployment compensation law impairs the obligation of its contract with Thomas is further disposed of by the decision of the United States Supreme Court in *Providence Bank v. Billings*, 4 Pet. (U. S.) 514. In that case it was held that in the absence of a specific grant of exemption from exactions by the State subsequent to the date of the grant of a corporate franchise, a State could require the payment of exactions on the exercise of rights created under such a franchise.

But even if it be assumed that the statute does interfere with the performance of the contracts or the rights of the party, it would not contravene the constitutional prohibition against impairment of contracts. In *Manigault v. Springs*, 199 U. S. 473, the United States Supreme Court said (p. 480):

"It is the settled law of this court that the interdiction of the statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the



Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic;—in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good.

“While this power is subject to limitations on certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with.”

See also *Bacon v. Walker*, 204 U. S. 311; *Northwestern Laundry v. Des Moines*, 239 U. S. 486; *Village of Euclid v. Ambler*, 272 U. S. 365, 392; *Rosenthal v. New York*, 226 U. S. 260; *Lilmieux v. Young*, 211 U. S. 489; *Kidd, Dater & Price Co. v. Musselmu Grocery Co.*, 271 U. S. 461; *Hardware Dealers Mut. Ins. Co. v. Glidden Co.*, 284 U. S. 151; *Camfield v. United States*, 167 U. S. 520; *Sligh v. Kirbough*, 237 U. S. 52, 58.

- D. The argument of amici curiae that if coverage extends beyond the common law master-servant relationship, the statute is a guaranteed income law is disproved by the provisions of the statute.

Amici curiae assert that to extend the scope of coverage of the unemployment compensation law beyond the

common-law master-servant relationship would render the law a "guaranteed income" statute. This attack upon the law is merely an argument addressed as to the wisdom of unemployment compensation laws and is a matter which the legislature already has decided. Moreover, amici seemed to believe that the receipt of benefits follows automatically from the termination of employment. They overlook the legislative requirements that an individual, to receive benefits, must meet the conditions for eligibility set forth in section 4 of the law. Such conditions require that the individual shall have earned "'wages' in employment," that he must be unemployed, be ready to work as well as willing and able to work. *Whether or not a person when employed was subject to that degree of control which would have made his employer liable for his torts, such person when unemployed presents the same social and economic problem as the individual who unquestionably was subject to such control.* Both have lost their jobs, and both are seeking an employer. Thomas, when he was no longer in the employ of the company, had to seek a new job. Only on the basis of his being willing to work but unable to find work, is he entitled to benefits.

Amici also argue that contributions are an excise and, therefore, a rule of strict construction should be applied in fixing the scope of coverage of the law. But all rules of construction yield to a stated legislative intent, and in section 2 of the act the legislature has declared its policy to be the establishment of a statutory plan to

alleviate distress caused by involuntary unemployment under the "police power". The statute seeks to solve and ameliorate the problems of unemployment and thus promote the public health, morals, and welfare. The problem of coverage under the act relates not only to an exaction from employers but to individual benefit rights. The legislative reference to the police power indicates that the plan as a whole should be liberally construed. But even if it be assumed for the purpose of argument that contributions are taxes, the rule contended for by amici would not apply. The statutory definition of employment, by stating in clear terms the scope of coverage under the act, bars application of the principle that excise taxes are to be narrowly construed. The problem here presented is not that of adopting a strict or liberal construction of the statute, but of applying the statutory definition of employment rather than the doctrine of respondeat superior. In *Alexander v. Casden*, 290 U. S. 484, 496, the Supreme Court said:

"Although imposing a tax, they are to be construed reasonably and the intent and purpose of each is to be ascertained by examining all of its provisions."

To allow full operation to the definition of employment, would not contravene rules of construction, but would conform to such rules. Meaning must be given to each provision of a law. In *Helvering, Comr. of Internal Revenue v. Stockholms Enskilda Bank*, 293 U. S. 84, the Supreme Court said (p. 93):

“In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts ‘are not to be extended by implication beyond the clear import of the language used,’ and that doubts are to be resolved against the government and in favor of the taxpayer. The rule is a salutary one, but it does not apply here. The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare *Rein v. Lane*, L. R. 2 Q. B. Cases 144, 151. *The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection.* We are not at liberty to reject the meaning so established and adopt another lying outside the intention of the legislature, simply because the latter would release the taxpayer or bear heavily against him. To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means.

“‘*The rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. United States v. Hartwell*, 6 Wall. 385, 396; *United States v. Corbett*, 215 U. S. 233, 242.’ *Sacramento Nav. Co. v. Salz*, 273 U. S. 326, 329. The rule of strict construction applies to penal laws, but such laws

are not to be construed so strictly as to defeat the obvious intention of the legislature; or so applied as to narrow the words of the statute to the exclusion of cases which those words, in the sense that the legislature has obviously used them, would comprehend. *United States v. Wiltbreger*, 5 Wheat. 76, 95. That view, expressed by Chief Justice Marshall, has since been frequently followed by this court. See, for example, *American Fur Co. v. United States*, 2 Pet. 358, 367; *United States v. Morris*, 14 Pet. 464, 475; *United States v. Hartwell*, supra, 395-6; *Donnelley v. United States*, 276 U. S. 505, 512." (Italics supplied). See also *Board of Education of Carbon County School District v. Bryner*, 57 Utah 78, 192 P. 627, 629.

## V.

CONTRARY TO THE CONTENTIONS OF AMICI, ADMINISTRATIVE OPINIONS IN OTHER JURISDICTIONS HAVE NOT RESTRICTED THE SCOPE OF THE A-B-C PROVISIONS TO THE COMMON LAW MASTER-SERVANT RELATIONSHIP: THE SCOPE OF COVERAGE UNDER THE STATUTE IS NOT IDENTICAL WITH COVERAGE UNDER THE FEDERAL LAW, OR UNDER STATUTES DEFINING EMPLOYMENT IN TERMS OF THE MASTER-SERVANT RELATIONSHIP: A DISREGARD OF THE STATUTORY DEFINITION WILL NOT INSURE UNIFORMITY OF COVERAGE.

The company and amici curiae insist that (a) coverage under the State law should be restricted to that of the Federal law as interpreted by the Bureau of Internal Revenue; (b) this court should reverse the holding in this case and follow the opinions rendered in the cases of *Washington Recorder Publishing Company v. Ernst*, su-

*pra*, and *Texas Oil Company v. Wheelless* (Miss. 1939), 187 So. 880 (decided on demurrer and remanded for trial under a statute which contains a definition of "employment" unlike the one set forth in section 19(j)(5) of the Utah law); and (c) this court should disregard the opinions in the cases of *Industrial Commission of the State of Colorado v. Northwestern Mutual Life Insurance Co.*, *supra*; *Unemployment Compensation Commission of North Carolina v. Jefferson Standard Insurance Company*, *supra*; and *McDermott v. State of Washington*, *supra*. This procedure, it is urged, will bring about uniformity in the interpretation of unemployment compensation laws.

The whole structure of this argument falls when it is realized that (1) the Bureau of Internal Revenue, contrary to the decision in the Mississippi case, has ruled that the persons involved in that case, i.e., persons engaged in the operation of bulk distribution plants of the Texas Company, were in employment under titles 1400 and 1600 of the Internal Revenue Code (formerly titles VIII and IX of the Social Security Act)\*; (2) in the case of *Bronx Home News v. Miller*, 14 N. Y. S. (2d) 55, the court, in interpreting the New York unemployment compensation law, held a newspaper route carrier to be in "employment" under practically the same facts as those presented in the case of *Washington Recorder Publishing Company v. Ernst*; and (3) the *Washington Rec-*

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\*A copy of this ruling as it appears attached to bill of complaint of the Texas Company in *Texas Company v. Higgins* in the United States District Court, Southern District of New York is appended hereto, Exhibit E, p. 143 *infra*.

*order* case was decided by one of the departments of the Washington Supreme Court, and in view of the decision of the other department of that court in *McDermott v. State of Washington*, the ultimate position of the Washington Supreme Court, with respect to the scope of coverage of the Washington unemployment compensation law, is speculative. As was indicated above, the court which wrote the Washington Recorder opinion was not the court which had written the McDermott decision, and the Washington Supreme Court has not, as is claimed by amici, “specifically and explicitly repudiated any such construction as the Colorado court had attempted to place upon the McDermott case”. Furthermore, amici’s attempt to distinguish the case of *Jefferson Standard Life Insurance Company* on the assertion that the court in that case did not consider the rulings of the Bureau of Internal Revenue, is absolutely groundless. The dissenting opinion in that case referred to rulings of the Bureau of Internal Revenue, and in *Unemployment Compensation Commission of North Carolina v. Wachovia Bank & Trust Co.*, 2 S. E. (2d) 592, decided on the same day as the Jefferson Standard case, the North Carolina Supreme Court, in interpreting the term “instrumentalities” in the State act which, unlike the definition of employment, paralleled the term “instrumentalities” in the Federal act, said:

“We cannot conceive that the ruling of the Commissioner of Internal Revenue, exempting the defendant from the payment of tax under the Social Security Act, is based on sound reason or logic.

While we fully appreciate the high purposes of the national plan and concur in the desire of this State to cooperate therein, we are unable in this instance to follow or to adopt the ruling of the Commissioner of Internal Revenue in his interpretation of language in the Social Security Act which is similar to that contained in our act. Nor is the fact that the North Carolina Unemployment Compensation Commission for a time likewise interpreted the language in the North Carolina act, while persuasive, conclusive upon us."

A similar approach to the problem of whether states should follow Bureau of Internal Revenue rulings was adopted by the Supreme Court of Kansas in *Capitol Building & Loan Association v. Kansas Commissioner of Labor and Industry*, (Kansas 1938) 83 P. (2d) 106, where the court refused to follow a ruling of the Bureau of Internal Revenue with respect to its interpretation of the term "instrumentalities". Also, we have carefully read the majority opinion in the *Jefferson Standard Life Insurance Company* case and cannot find the language "clearly involving independent contractors" which amici, on page 31 of its brief, purport to quote from that opinion.

It would, therefore, seem that the uniformity sought by amici curiae would not be achieved by attempting to apply the indefinite distinctions governing the employment relationship at common law nor by following the rulings of a Federal administrative agency under analogous or nonanalogous statutory provisions. Yet this is precisely the position of amici.



The other statements made by amici in attempting to sustain the argument that this court can and should follow administrative determinations by the Bureau of Internal Revenue are likewise groundless. The assertion that the decision in *Industrial Commission of the State of Colorado v. Northwestern Mutual Life Insurance Company*, 103 Colo. 550, 88 P. (2d) 560, "is now obsolete" overlooks entirely that the Colorado legislature has amended its definition of employment only with respect to insurance agents. The general statutory definition of employment under the Colorado law has not been changed. This indicates an affirmance of the prior administrative and judicial interpretation of the definition. See 25 Ruling Case Law, p. 983, sec. 230 in which the pertinent rule in this connection is stated in the following:

"The exception of a particular thing from the operation of the general words of a statute shows that, in the opinion of the lawmaker, the thing excepted would be within the general words, had not the exception been made."

The amendment excluding only one group out of the many relationships within the scope of the statutory definition, as applied in the *Northwestern Mutual Life Insurance Company* case, thus clearly indicates that the general scope of the definition was not intended to be affected by the amendment. The Colorado legislature did not insert an exemption into its law of "independent contractors" nor did it repeal the statutory definition of employment. Furthermore, the Supreme Court of Wis-

consin has not taken a position inconsistent with the one taken by this court in its opinion in this case. *Slocum Straw Works v. Industrial Commission* (Wis. 1939), 286 N. W. 593, cited on page 25 of the brief of amici, did not involve the scope of coverage of the Wisconsin unemployment compensation law nor of the scope of the statutory definition of employment in that law. The question there involved was whether or not a married woman who had been employed and returned to her household duties, was self-employed and hence not entitled to benefits. The court held that under the circumstances of the case, she was performing services for the household, the head of which was a parent, not her husband, and therefore she was not unemployed as required by the law. The Wisconsin court did not have before it the scope of the employment relationship under its law, and there is absolutely no indication nor any reason to suppose that the court in that case intended to pass on the criteria for determining the existence of the employment relationship. Further, in *Wisconsin Bridge & Iron Company v. Industrial Commission of Wisconsin*, Exhibit C, p. 122 *infra*, the Wisconsin Circuit Court recently held that the three criteria tests for employment were more inclusive than any common law test, and that the concept of independent contractor was not pertinent to a determination of coverage under the Wisconsin unemployment compensation law.

Nor do amici's assertions with respect to the administrative rulings of other jurisdictions withstand analysis. It is true that most employers coming within

the terms of the Federal Act are likely to be included within the coverage of State unemployment compensation laws unless they are not specifically exempt. The coverage of State laws is generally at least as broad as that of the Federal Act. But this does not establish that administrative exemptions from coverage under the Federal Act are to be applied automatically to all State laws nor that the coverage of State laws is restricted to that of the Federal Acts. The administrative rulings from other jurisdictions upon which amici rely were not introduced in evidence nor made a part of the record. Indeed, from aught that appears, these rulings dealt with fact situations, wholly dissimilar from the one involved in this case and with statutes containing different definitions of employment than that incorporated into the Utah law. If the rulings refer to insurance brokers, they may be correct; but if they refer to commission salesmen, they, or amici's interpretations of the rulings, represent a new and novel doctrine. Moreover, even in regard to soliciting agents of insurance companies these rulings would not be controlling in this State. This court has held such agents be in "employment" under the workmen's compensation law. *Commercial Casualty Co. v. Industrial Commission*, 71 Utah 359, 266 P. 721. However, we seriously question whether the opinion cited on page 7 of the brief of amici is representative or typical of "at least twenty-four states' jurisdiction" or that it even represents the present position of the Delaware agency.

In the absence of disclosure of facts involved and the circumstances surrounding the issuance of the administrative determinations upon which amici rely, it cannot be accepted as a fact that final administrative action is represented by either the Delaware quotation or the other undisclosed rulings which amici allege to have in their possession. Certainly a statement beginning, "In my opinion, \* \* \*", as does the Delaware statement quoted on page 27 of the amici brief, would indicate that some individual is expressing a personal opinion on the law rather than that the pronouncement was a formal ruling by an administrative agency. As a matter of fact, contrary to the contentions of amici, as far as the Industrial Commission of this state has been able to determine, the Delaware Unemployment Compensation Commission as well as the other agencies administering unemployment compensation laws which contain the "A" "B" "C" provisions have interpreted such provisions as extending the scope of coverage under their laws beyond that of the common law master-servant relationship. In an official interpretation of the Delaware unemployment compensation law, issued on August 17, 1937, the Delaware Unemployment Compensation Commission interpreted the law as follows:

"II. What is Employment?

"A. *More than the master-servant relationship.* (Section 2 (i) (1) and (5))—Every service performed by an individual for wages or under any contract of hire is employment covered by the Law with the exception of certain services ex-

plained in Section II-B, following. Usually it will not be difficult to determine what workers are covered by the Law. The term 'employment' includes all services not specifically excluded by the Law rendered by those workers who stand in the master-servant relationship to the employer. This term, however, includes services which may be rendered by individuals who are not usually regarded as employees and whose relationship to the EMPLOYER may not be the legal relationship of master and servant. The services of all individuals are included unless it has been established to the satisfaction of the Commission that any such individual has been and will continue to be free from control or direction over the performance of his services, both under his contract of service and in fact. Such service, however, must be performed either outside the usual course of the business or outside of all the places of business of the enterprise for which such service is performed. And each such individual must customarily be engaged in an independently established trade, occupation, profession or business." (See CCH Unemployment Insurance Service, Delaware, Vol. 2, Sec. 8002.02, p. 11,503.)

This interpretation has not been revoked and was followed in an opinion of the General Counsel of that agency published as a general guide to the interpretation of the Delaware law. This opinion of the General Counsel of the Delaware agency dealt with a situation not unlike that presented in this case. The opinion reads as follows:

*"Statement of Facts:* The M Company operates a retail grocery store. Among other individuals, they employ a man to solicit orders. The

conditions of this man's employment are set forth by the company as follows:

- (1) Compensation computed on a commission basis;
- (2) Has no drawing account;
- (3) Has no fixed hours of work;
- (4) Solicits orders from people of his own selection;
- (5) Only store work required of him is that he fill from the company's stock such orders as he may obtain;
- (6) Is free to work for others if he chooses.

"Advice is requested as to whether or not this individual's earnings should be included in total taxable pay roll for unemployment compensation.

"*Opinion:* Section 2(i)(5) of the Delaware Unemployment Compensation Law provides that:

"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.

“It will be noted that these paragraphs of the above-quoted section are joined by the conjunction ‘and’, and must be read together as one long sentence. Therefore all the conditions referred to must be present concurrently in order to establish the relationship of independent contractor. In our opinion, this relationship in the instant case fails specifically to meet the test imposed by paragraph (B) in that a portion of this individual’s service is performed on the premises of the employer in filling the orders he has obtained. Thus, the service is neither outside the usual course of business of the M Company nor wholly outside of all its places of business. Somewhat analogous cases arising under the workmen’s compensation laws of this State hold that the Industrial Accident Board has jurisdiction under similar circumstances. In addition, it has not been shown to the satisfaction of the Commission that the individual in question is engaged in an independently established trade or occupation. On the basis of the facts submitted, it is held that this individual is an employee of the M Company, and his earnings must be included in total pay roll for tax purposes. \* \* \*” (See CCH Unemployment Insurance Service, Delaware, Vol. 2, Sec. 2002.02.)

Practically every jurisdiction having the “A” “B” “C” provisions have issued statements and interpretations similar to that issued by the Delaware Commission. See, for examples, Commerce Clearing House, Unemployment Compensation Service, Georgia, page 14,503; Wyoming, page 55,503; Wisconsin, page 52,029-2; Tennessee, page 45,518. The statement of the Tennessee agency contains the following:

“Thus the term ‘employment’ covers all service rendered by those individuals who stand in the master-servant relationship to you, and all other individuals who perform service for you, unless it has been established to the satisfaction of the Commissioner that:

(1) Such individual has been and will continue to be free from control or direction over the performance of said service both under his contract of service and in fact; and

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

(3) Such individual is customarily engaged in [an] independently established trade, occupation, profession or business.”

These examples do not exhaust the list of state unemployment compensation agencies which have ruled that the “A” “B” “C” criteria extend the scope of coverage under their laws beyond the master-servant relationship. As a matter of fact, the Industrial Commission has been unable to find any ruling representing final administrative action which has not taken such a position.

A complete answer to amici’s assertion that the court should reverse its holding in this case in order to follow a ruling of the Bureau of Internal Revenue is the fact that there is nothing in the record, nor even in the assertions made in the briefs, to indicate that the Bureau of Internal Revenue has ruled on the status of Thomas or



on the status of any of the other salesmen employed by the company. Would amici regard a ruling by the Bureau of Internal Revenue holding that the relationship between Thomas and the company is employment for the purposes of the Federal Unemployment Tax Act or the Federal Old Age Insurance Tax Act as removing all objections to the inclusion of such relationship within the terms of the Utah law? Do not the company and amici take the position that administrative rulings of the Industrial Commission of this State should be ignored in determining the status of persons performing services for others, and that coverage under the act should be determined by some undisclosed rulings of another agency when in fact the position of the Utah agency is consistent with that of other State agencies having similar laws? Do not amici and the company take the position that this court should reverse its holding and disregard the administrative determinations made by the Industrial Commission of this State in order to follow what amici assert are determinations of other State agencies, when such rulings have, insofar as this company is concerned, not been issued, lack finality, and may not even be binding upon the agencies which issued them?

In considering the foregoing questions, we should not overlook the fact that the cases now pending in the courts of other jurisdictions indicate that the administrative agencies of jurisdictions having unemployment compensation laws which contain definitions of employment similar to the one in the Utah law, have taken the posi-

tion that such definitions extend the scope of coverage of their laws beyond the common law relationship of master and servant, else these suits would not exist. *Wisconsin Bridge & Iron Company v. Industrial Commission of Wisconsin*, *supra*; *Bonifas-Gorman Lumber Co. v. Michigan Unemployment Compensation Commission* (Circuit Court, Keweenaw County, Michigan); *Brindley-Roth, Inc. v. Michigan Unemployment Compensation* (Circuit Court, Wayne County, Michigan); *Mid-American Company, Bankrupt* (USDC, So. Dist., N. Div. of Illinois); *Hearst Consolidated Publications, Inc. v. Huie & Cruce*, (super. Ct. DeKalb County, Georgia); *Memphis Commercial Appeal v. Bryant*, Chancery (Davidson County, Tennessee).

A fundamental reason why the scope of coverage under the Federal Act does not express the ultimate limits of coverage under the Utah unemployment compensation law, is that the Federal Employment Taxing Act (formerly Title IX of the Social Security Act) does not contain any provisions resembling those in section 19(j)(5) of the Utah law. The definition of employment in the Federal Act, section 1607(c) of the Internal Revenue Code (formerly section 907(c) of the Social Security Act) as it existed at the time of the enactment of the Utah unemployment compensation law, was as follows:

“The term ‘employment’ means any service of whatever nature, performed within the United States by an employee for an employer, except—”

and there follows a list of exceptions similar to those in section 19(j)(6) of the Utah law. The 1939 amendments to the Social Security Act, although amending the exemptions from the scope of coverage of the Federal law, do not change this definition of employment. The inclusion in the Utah statute of the exceptions to "employment" originally set forth in the Social Security Act, makes it evident that the Utah legislature had before it for consideration the definition of "employment" in the Social Security Act, but that it rejected such definition of "employment" in favor of a definition which is entirely unlike anything found in the Federal Act. If the Utah legislature had adopted the Federal definition of "employment", it might be claimed that the construction thereof by the Bureau of Internal Revenue was pertinent to a construction of the Utah act; but even this proposition would be debatable.

The significant fact concerning the relationship between the State and Federal laws is that the Utah legislature did not adopt the Federal definition of employment but chose to define "employment" by reference to the criteria in section 19(j)(5) of the law—and consequently, neither the regulations of the Bureau of Internal Revenue nor the interpretations of the Federal Act by that agency can properly be regarded as defining the limits to be placed on the defined term "employment" in the Utah law. The definition of "employment" in the Utah act does not follow the definition of "employment" in title IX of the Federal Act. Instead it sets up a definition which is broader in scope than any

common law concept and when faced with the proposal to return to a common law test rejected it. (see p. 58, supra.) This fact alone should be sufficient to show intention of the legislature to extend the coverage of the act beyond the scope of the Federal Act. But it even went further and adopted other provisions which do not parallel any provisions of the Federal law.

Section 19(i)(2)(3) and (4) group various enterprises, not subject to the Federal tax, for the purpose of coverage under the State act, and under these provisions many enterprises, not subject to the Federal tax, are subject to the State law. Also, the Federal Act defines "employer" to include only those meeting certain requirements "during the taxable year" which is defined as a calendar year. Section 19(i)(5) of the State law defines a covered employer in terms that include those meeting certain requirements in either the calendar or the "preceding calendar year". Under section 8 of the State law, even though an employing unit does not meet coverage requirements in the calendar year, it may be required to pay contributions to the State for such year if its employment experience during the preceding year met the requirements or if it failed to file certain notices with the Commission. No such provision is found in the Federal law. Section 8(c) of the State act provides for the voluntary election of coverage, and this is also not found in the Federal Act. These sections definitely indicate the independence of approach to questions of coverage by the Utah legislature, and demonstrate that the scope of coverage under

the State law was not intended to be limited to that of the Federal law.

Further, the Federal Act does not purport to fix the scope of coverage of State unemployment compensation laws. Underlying amici's entire argument with respect to rulings of the Bureau of Internal Revenue and other State agencies is the misconception that Congress, in enacting title IX of the Social Security Act, intended to limit the scope of coverage of State laws to that provided under the Federal law. Unquestionably, the Federal law was intended to act as an incentive for the enactment of State unemployment compensation laws, but the very purpose of having a Federal-State system rather than a single Federal system was to enable the States to adopt their laws to local conditions. The legislative reports to Congress on the Social Security Act emphasizes that, but for compliance with a few standards set forth in section 303(a) of the Social Security Act and section 1603(a) of the Federal Employment Tax Law, (formerly section 903(a) of the Social Security Act) the States were free to determine the scope of coverage under their laws. The Senate Report contains the following:

“Except for a few standards which are necessary to render certain that the state unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the states are left free to set up any unemployment compensation system they wish, without dictation from Washington.” (Senate

Report No. 628, Calendar No. 661, 74th Congress, First Session.)

The House of Representatives' report contains this statement:

“The bill permits the states wide discretion with respect to the unemployment compensation laws they wish to enact.” (H. R. 74th Congress, First Session, Report No. 615.)

None of the standards to which State acts must conform in order to be approved by the Social Security Board relate to the scope of coverage of the State acts. The Social Security Board in its pamphlet, “Unemployment Compensation—What and Why” (Publication No. 14, Government Printing Office, March 1937) discusses the provisions a State law must have for approval under the Federal Act and states (p. 33):

*“Definitions of who shall contribute to the State fund, the amount and duration of benefits, eligibility requirements, and similar questions, are all left entirely to the discretion of the States in formulating their own laws.”* (Italics supplied.)

The wide variation in the provisions of State unemployment compensation laws approved by the Social Security Board indicates that no conformity of coverage was required or effected. The variance in State unemployment compensation laws is reported in “A Comparison of State Unemployment Compensation Laws” issued by the Social Security Board on August 1, 1938. This comparison based on the State laws then in force shows

that of the 48 State laws, and laws of the District of Columbia, Alaska and Hawaii, 29 cover employers of eight or more for twenty weeks or more in a calendar year; 9 cover employers of four or more for the same period; 10 cover employers of one or more, and the other laws cover employers of varying numbers of persons for varying periods of time. These laws also vary as to the length of time the employer remains liable for contributions. Unlike the provisions of the Federal Act, 47 of the laws provide that the employer once liable shall continue to be liable for contributions for the whole of the calendar year in which he becomes subject and through the succeeding calendar year. One State extends liability on a quarterly basis, and 3 treat liability accruing in the early years of their operation in a manner which is different from the treatment of liability in the latter years of operation. Variations likewise occur in the treatment of subsidiaries and separate establishments under joint control. Variations occur in the definition of employment. Thirty-three laws, as a part of the definition of employment, contain the statutory criteria set forth in section 19(j)(5) of the State law. The Alabama and Oregon laws contain the first and third criteria and Iowa the first only. Connecticut defines coverage in terms of the master-servant relationship. The Kentucky law defines coverage in terms of the employer-employee relationship.

The foregoing examples of variations in State laws arise not out of interpretation of such laws,

but from express provisions of the laws and by no means exhaust the variations among the provisions of such laws. The benefit provisions of the laws show as great or greater variations than those found in the contribution provisions of the laws. All of these laws are approved laws. In *Steward Machine Co. v. Davis*, 301 U. S. 548, the court, in denying that the Federal law called for the surrender of the independence of the States, said:

“A wide range of judgment is given to the several states as to the particular type of statute to be spread on their books.”

It is apparent, therefore, that the States not only may, but have, determined the scope of coverage of their laws and that uniformity of coverage between the State and the Federal Acts was not contemplated by either Congress or the State legislatures.

Only one further contention of amici on the relationship of the State law to the Federal law need be mentioned. Amici asserts that section 11(1) of the state law which deals with “State Federal Reciprocal Benefit Arrangements” indicates a legislative intent to restrict the scope of the statutory definition of employment contained in section 19(j)(5). This section is directed primarily to a solution of the administrative problems created by transitory and multi-state workers. The section authorizes neither an extension nor a restriction of the legislative definition of employment. Cooperation between Federal and State agencies with respect to



unemployment compensation is designed only to insure that State laws comply with certain minimum standards set forth in section 303(a) of the Federal Act so that the State may continue to qualify for grants under title III of the Social Security Act to cover expenses of administration, and with the conditions of section 1603 (a) of the Federal Unemployment Tax Law, to assure that the credit against the Federal tax is allowed only under a bona fide State unemployment compensation law. Further cooperation between State agencies is designed to solve some of the problems of multi-state workers. But these requirements do not affect the scope of coverage of State laws. State discretion in this respect is not only highly desirable but necessary when we recall that the State and not the Federal Government has the responsibility of obtaining coverage broad enough to insure the payment of benefits with respect to unemployment.

## VI.

THIS COURT DID NOT ERR IN DECLARING THAT THE ISSUE IN THIS CASE WAS TO DETERMINE WHETHER THE EVIDENCE WAS SUCH AS TO SHOW THAT THE COMMISSION WAS ARBITRARY OR UNREASONABLE IN NOT FINDING THAT THE RELATIONSHIP BETWEEN THE CLAIMANT AND THE COMPANY COMPLIED WITH THE THREE TESTS SET FORTH IN SECTION 19 (j) (5).

The brief filed by amici curiae argues that the court erred in limiting its review of the Industrial Commission's decision to a determination of whether, from the

record, the decision of the Commission was arbitrary or unreasonable. In support of this contention amici curiae urge that the existence of the employment relation between the company and the claimant is a "jurisdictional fact" capable of determination only by courts and hence, such a determination by the Industrial Commission is subject to redetermination by this court on the basis of the preponderance of the evidence. *Amici curiae do not make clear the extent to which such an independent review of the facts by the court would affect the result in this case*, but refer to certain workmen's compensation cases as illustrating the "jurisdictional fact" doctrine.

In this state, the leading case on the "jurisdictional fact" doctrine, and the one on which most of the others are based, is *Industrial Commission of Utah v. Evans*, 52 Utah 394, 174 Pac. 825, decided under a statute that provided:

"The Commission shall have full power and authority to hear and determine all questions *within its jurisdiction pertaining to the payment of compensation and benefits*, and its decision thereon shall be final, \* \* \*" (Emphasis by the court).

In that case the court pointed out that the statutory provision expressly referred to "payment of compensation and benefits." It also assumed that the claimant and the employer came within the scope of the act. But apparently because of the qualification in the statute, "within its jurisdiction", the court was of the opinion

that the provision did not purport to lend finality to any decision of the Industrial Commission on what was deemed to be "jurisdictional" facts. The court then enumerated three such facts: (1) Whether the claimant was within the scope of the coverage of the act; (2) Whether the injury arose in the course of employment; and (3) Whether, in cases of death, the claimant was a dependent of the deceased. The court was of the opinion that as to these facts the statute did not make the administrative findings conclusive.

It is not entirely clear whether, in this respect, the *Evans* case and those based upon it clearly reflect the present state of the law. It should be noted that under the Utah workmen's compensation statute as amended (Revised Statutes 1933, sections 42-1-79, 42-1-80; Sessions Laws of 1921, p. 165, section 1348), there are decisions by this court, as well as by courts of other jurisdictions having similar statutes, which hold that a finding by the Industrial Commission that a claimant is a covered employee, or that the injury arose in the course of the employment, or that the claimant is a "dependent" of the deceased, is conclusive upon the court if it is supported by competent evidence and it is not arbitrary or unreasonable, *Colonial Building & Loan Ass'n v. Industrial Commission*, 85 Utah 65, 38 P. (2d) 737; *Utah Fuel Company v. Industrial Commission*, 57 Utah 246, 194 P. 122; *Chase v. Industrial Commission*, 81 Utah 141, 17 P. (2d) 205; *Ntamanakis v. Industrial Commission*, 67 Utah 197, 246 P. 706; *Kavalinakis v. Industrial Commission*, 67 Utah 196, 246 P. 698; *cf.* as

to a finding of the employment relation, *Roman Catholic Archbishop v. Industrial Accident Commission*, 194 Cal. 660, 230 P. 1; *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356; *Index Mines Corp. v. Industrial Commission*, 82 Colo. 272, 259 Pac. 1036; *Emack's Case*, 232 Mass. 596, 123 N. E. 86; But see *Miller v. Industrial Commission*, (Utah 1939), 92 P. (2d) 342.

But irrespective of these decisions and regardless of the scope of judicial review in workmen's compensation cases of the issue of "employment", the nature of court review of the Industrial Commission's finding of "employment" for benefit purposes under the unemployment compensation law has been clearly limited by the legislature in section 19(j)(5) of the law. Thus we are faced at the outset with the first part of section 19(j)(5) which provides:

"Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, *shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission*  
\* \* \*" (Italics supplied).

By this provision the legislature has designated the agency or tribunal to determine the existence of facts satisfying the three criteria upon which exclusion from the law shall be based. The only position taken here is that the provision expresses the clear legislative intention that the findings of the Industrial Commission with respect to the existence of "employment", so long as they are not **unreasonable or arbitrary** on the basis of

the record, shall not be disturbed. It should also be noted that none of the statutes involved in the workmen's compensation cases attempted in any way to vest expressly and as completely in the administrative agency the power to determine whether or not the covered employment relationship existed. This difference in the statutes is but another example of the legislative purpose to adopt for the unemployment compensation program concepts and procedures unlike those employed under workmen's compensation laws, and it is not unreasonable to assume that the difficulties in administering the latter, difficulties with which this court is familiar, (*Kavalinakis v. Industrial Commission*, 67 Utah 196; 246 P. 698, 701) contributed substantially to the adoption of the more precise and effective methods under the unemployment compensation law.

Finally, it need only be pointed out that neither the Federal Constitution nor that of Utah prohibits the legislature from limiting the scope of judicial review of findings of even so-called jurisdictional facts, at least as long as unreasonable or arbitrary findings are subject to judicial correction, *Utah Fuel v. Industrial Commission*, 57 Utah 246; 194 P. 122, 124; *People v. Globe Grain and Milling Co.*, 211 Cal. 121, 294 P. 3; *Phillips v. Commissioner*, 283 U. S. 589; *St. Joseph Stockyard Co. v. U. S.*, 298 U. S. 38, 50-52; *Reetz v. Michigan*, 188 U. S. 505; *Helfrick v. Dahlstrom Metallic Door Co.*, 256 N. Y. 199, 176 N. E. 141 aff'd 284 U. S. 594; *Shields v. Utah Idaho R. Co.*, 305 U. S. 177.

The rule that the legislature may limit the scope of judicial review to the reasonableness of findings by an administrative tribunal which it appointed to act with respect to matters within the province of the legislature (see *St. Joseph Stockyard Co. v. U. S.*, 298 U. S. 38, 51) is ably summarized in *Reetz v. Michigan*, 188 U. S. 505 in which the United States Supreme Court quoted the following language from the opinion of the Supreme Court of Utah in *People v. Hasbrouck*, 11 Utah 291, 305:

“The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise ‘judicial power’, as the phrase is commonly used, and as it is used in the organic act in conferring judicial power upon specified courts.”

As the legislature was free to establish the conditions under which employing units shall be exempt from coverage, and to declare that benefits shall be paid or denied in accordance with establishment of those conditions, it could enlist the aid of an administrative agency to determine the question of fact whether a particular relationship satisfied the conditions for exception and could make that factual determination, after hearing and upon evidence, conclusive. *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, 180; *Virginia Railway Co. v. United States*, 272 U. S. 658, 663, *St. Joseph Stockyard Co. v. U. S.*, 298 U. S. 38, 51.

These views are in substance similar to those expressed by the Supreme Courts of North Carolina and Colorado in *Industrial Commission of the State of Colorado v. Northwestern Mutual Life Insurance Co.*, *supra*, and *Jefferson Standard Life Insurance Co. v. North Carolina Unemployment Compensation Commission*, *supra*. Both courts recognized that the scope of judicial review under provisions of law, like those in sections 19(j)(5) and (6) of the law of this State, was limited to a determination of the reasonableness of the Commission's position, and that the legislatures of both North Carolina and Colorado could so limit the scope of judicial review.

Respectfully submitted,

JOSEPH CHEZ,

*Attorney General,*

S. D. HUFFAKER,

*Assistant Attorney General,*

A. M. FERRO,

*Special Assistant Attorney  
General.*

**INDUSTRIAL COMMISSION OF UTAH**  
**UNEMPLOYMENT COMPENSATION DIVISION**  
 SIXTH FLOOR UNION PACIFIC BUILDING, SALT LAKE CITY, UTAH

OCT 31 1936

**EMPLOYERS STATUS REPORT**

To be returned by all employers and employing units regardless of number of employees and whether or not subject to the Unemployment Compensation Law of Utah

This report to be returned within ten (10) days to the Unemployment Compensation Division, Sixth Floor Union Pacific Building, Salt Lake City, Utah.

1. Business name of employing unit GLOBE GRAIN AND MILLING COMPANY
2. Business headquarters in Utah Ogden Weber  
(City or Town) (County)
3. Location of separate establishments where business is carried on in Utah (for each such location describe fully exact nature of business and list each separate type of business). Tremonton, Logan, Salt Lake City, Springville - Sales warehouses. Lampo, Nephi, Wellsville, Hyrum, Lewiston - Buying grain.
4. List of principal products manufactured or traded in Flour, Other grain products, Feed, & Grain.
5. Type of organization Corporation  
(Individual, partnership, corporation, etc.)
6. Date of organization Qualified in Utah November 26, 1918.  
(If a corporation, give state of incorporation and date of incorporation, or qualification to do business in the State)
7. Predecessor, if any, from whom business was acquired.  
(Answer only if business was acquired since the beginning of the preceding calendar year)  
Date acquired \_\_\_\_\_
8. Is the business of the employing unit named in Item 1 owned or controlled by another company or individual, whether by legally enforceable means or otherwise? No  
(Yes or no)  
If so, give the name and address of such company and state whether the employment of such employing unit was included in the status report made by the controlling company. \_\_\_\_\_
- (a) Does such controlling company own or control any other employing unit? \_\_\_\_\_  
(Yes or no)  
If so, give the names and addresses of each \_\_\_\_\_
9. Average weekly number of employees in employment in Utah to date in the current calendar year 114
10. Do you claim exemption as a "corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual?" NO
- (If so, follow instruction 6 implicitly.)
11. (a) If you believe that the provisions of the law do not make you subject to it, do you wish to elect to be subject to contributions and to have your employees become eligible for benefits? \_\_\_\_\_  
(b) If you believe that you are subject to the law, but that certain of your employees are performing services of exempted types, do you wish to elect to make ALL of your employees subject to the law? \_\_\_\_\_
12. Do you believe that the nature and extent of employment in your business during the preceding calendar year and to date in the current calendar year was such as to make you liable, under the provisions of the Utah Unemployment Compensation Law, for contributions to the Unemployment Compensation Fund established by that Law? Yes
13. Name, address and title of official who will furnish payroll data. If different officials at different locations, give names, addresses and titles L. J. Stevens, Ogden, Utah. Cashier.

Use and attach extra sheet in answering any question, if more space is required.

Date November 9, 1936

Name of employing unit Globe Grain and Milling Co.

By \_\_\_\_\_

Official position Cashier

IF THE EMPLOYER OR EMPLOYING UNIT DOES NOT FEEL THAT HE IS SUBJECT TO THE LAW AND DOES NOT WISH TO ELECT TO BE SUBJECT TO IT, BUT IS NOT CLAIMING EXEMPTION UNDER QUESTION 10 ABOVE, THE REVERSE SIDE OF THIS FORM MUST BE FILLED OUT AS HIS CLAIM FOR EXEMPTION.

From the Unemployment Compensation Law:

Section 16 (b). Penalty: " \* \* \* Any officer or agent of an employing unit \* \* \* who fails or refuses to make any such contribution, \* \* \* or to furnish any reports required hereunder, or to produce or permit the inspection or copying of records, as required hereunder, shall be punished by a fine of not less than \$20.00 nor more than \$200.00, or by imprisonment for not longer than sixty days, or by both \* \* \* and each such false statement or representation or failure to disclose a material fact \* \* \* shall constitute a separate offense."

I hereby certify that the foregoing Status Report is a true and correct copy of the original Status Report filed by the Globe Grain and Milling Company, on November 10, 1936, with the Department of Placement and Unemployment Insurance of the Industrial Commission of Utah.

*W. M. Kneer*  
 W. M. Kneer  
 Chairman

Industrial Commission of Utah

114

A-1127

310-007  
 451-007  
 0351-001  
 1251-001



EXHIBIT B.

No. 14591.

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Colorado Public Welfare Board,	}
<i>Plaintiff in Error,</i>	
v.	
Edmond L. Viles,	}
<i>Defendant in Error.</i>	

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IN DEPARTMENT.

Error to the District Court of the City  
and County of Denver.

Hon. George F. Dunklee, Judge.

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JUDGMENT REVERSED IN PART.

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Hon. Byron G. Rogers, Attorney General.

Mr. Joseph D. Iskow, Assistant Attorney General.

Attorneys for Plaintiff in Error.

Mr. Edmond L. Viles, Pro se.

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Mr. Justice Burke delivered the opinion of the Court.

Defendant in error, hereinafter referred to as plaintiff, alleging that he was entitled to a pension because of blindness, brought mandamus against plaintiff in error, hereinafter referred to as the board, to compel the allowance thereof. An alternative writ was issued to

which the board demurred on the ground "that the court had no jurisdiction of the person of the respondent or the subject of the action." That demurrer was overruled, the board elected to stand, and to review the judgment entered accordingly it brings error.

A number of propositions are argued in the briefs but from the foregoing it is clear that the only question before us is the question of jurisdiction.

Mandamus is the proper remedy "to compel the performance of an act which the law specifically enjoins as a duty resulting from an office.

Sec. 342, chap. 30, Vol. 1, '35 C. S. A.

From the petition it appears that plaintiff made the necessary application to the county director, was examined and his case referred to the board which determined that he was eligible except that the board "did not believe the reports of the three ophthalmologists above mentioned." And this under section 37 to 50, inclusive, chap. 22, vol. 2, '35 C. S. A. Therefrom it appears that the duty devolved upon the county director and the board to have a fair hearing, consider all the facts and circumstances and make award accordingly, in any event not to exceed a total of \$30.00 per month. Thus the duty to exercise discretion, and the basis and limits of that discretion are specified by law. From the complaint we learn that all the evidence and all the facts and circumstances established that plaintiff was entitled to relief which was denied, "arbitrarily, and unrea-

sonably and capriciously'', without shadow of excuse except that the board paid no attention to its own witnesses. It is thus sufficiently made clear that the board ignored the hearing and exercised no discretion, and that the holding of the district court was correct.

In the record before us is the so called answer of the board. We ignore it for two reasons. First, because it is an answer to the petition instead of to the alternative writ.

Chipman v. Forward, 41 Colo. 442; 92 Pac. 913.

Second, because that answer did not enter the judgment of the district court and is not involved in the question before us.

It is said no statutory court review is provided. The district court under its general jurisdiction, and this court by writ of error under its constitutional powers, may review the acts of any board or commission where it is contended that legal rights have been denied, or that such body is vested with a discretion which it refuses to exercise.

It is further urged that this is not an action to compel the exercise of discretion, but to control that discretion, because plaintiff makes demand for the maximum statutory allowance. We look to the substance of the petition and are not controlled by the prayer. If his demand was excessive the question was one for answer, not demurrer.

The alternative writ required the board to pay \$30.00 per month or show cause. The final judgment was simply that the writ be made peremptory. As to the payment the judgment is erroneous. The refusal of the board to exercise discretion neither vested the court with the discretion nor entitled plaintiff to the maximum. The mandate should have been to act.

The demurrer was properly overruled, but for the last mentioned reason the judgment is amended and it is ordered that the cause be considered by the board, its discretion exercised as demanded by statute, and disposition be made accordingly.

Mr. Chief Justice Hilliard and

Mr. Justice Bakke concur.

## EXHIBIT C.

43

STATE OF WISCONSIN  
CIRCUIT COURT — DANE COUNTY

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WISCONSIN BRIDGE & IRON  
COMPANY, (Unemployment  
reserve account of), a corpor-  
ation,

*Plaintiff,*

vs.

INDUSTRIAL COMMISSION  
OF WISCONSIN and ROY  
RAMSEY, ROBERT GEHRT,  
BUD W. LIPSCOMB, and  
FRED AHL,

*Defendants.*

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Before Hon. Alvin C. Reis, Judge.

DECISION.

BY THE COURT:

These are actions to review Industrial Commission orders under the Unemployment Compensation Act. They involve the eligibility for unemployment benefits of the four co-defendants named.

We say at the outset that the complaint in the Ahl case should be dismissed for the obvious reason that the commission's order was in plaintiff's favor; and, although plaintiff may not agree with some finding or conclusion expressed by the commission, there is not

order of which it can complain in this case (the fourth above).

The conception of "employee"—under the Unemployment Compensation Act—is said by these cases to be presented for the first time to a Wisconsin court. The commission maintains that employment, under this statute, has a much different meaning from that attributed to the term in the workmen's compensation law.

Sec. 108.02 (5)(a) of the Wisconsin Unemployment Compensation Act reads:

"(5) EMPLOYMENT. (a) 'Employment', subject to the other provisions of this subsection, means any service performed by an individual for pay, including service in interstate commerce, under any contract of service for pay or contract of hire, written or oral, express or implied, whether such individual's contract was directly made with and paid by the employer or through a person in his employ, provided the employer had actual or constructive knowledge or such contract; and each individual thus engaged by any employer to perform services for pay shall for the purpose of this chapter be treated as in an 'employment', unless and until the employer has satisfied the commission that such individual has been and will continue to be free from the employer's control or direction over the performance of his work both under his contract of service and in fact, and that such work is either outside the usual course of the employer's enterprise or performed outside of all the employer's places of business, and that such individual is customarily engaged in an independently established trade, business, profession or occupation."

The attorneys for the plaintiff company and for the defendant commission are, to a great extent, at cross purposes as to what constitutes the issue in these cases.

They do agree that the question presented is essentially one of law, not whether evidence supports a particular finding or findings of fact. Counsel for the commission stated in oral argument that the case offered a "legal proposition". Plaintiff's attorneys so contend in their brief (p. 42 seq.).

The question concerns the status as "employee" of one Drews, to whom the plaintiff Wisconsin Bridge & Iron Company allegedly sub-let a contract. If Drews is the "employee" of Wisconsin Bridge & Iron Company, then concededly the co-defendants—Ramsey, Gehrt and Lipscomb—are employees of the company, and admittedly are entitled to unemployment compensation benefits out of its reserve.

Referring to Drews, plaintiff's brief expresses the gist of its position by the statement (p. 44) that "if the Court is of the opinion that he was an independent contractor as a matter of law, then the decision of the commission must be reversed . . . ."

This is not conceded by the commission to be the issue, however, for in its brief the commission asserts (p. 31) that "the short and complete answer to plaintiff's position is that *independent contractors are not excluded from coverage under the Unemployment Compensation Act.*"

The question, as we view it, is not whether Drews became an "independent contractor," as that term is used in a long line of decisions under the workmen's compensation law. The question is whether he must be regarded, for purposes of these cases, as an "employee" under the definition in sec. 108.02 (5)(a) of the Unemployment Compensation Act, even though he may be regarded as an independent contractor for any other or for all purposes.

This delineation of the issue, if it be sound, renders it unnecessary to digest a great part of the testimony, which has been so painstakingly summarized by plaintiffs counsel in thirty-five pages of brief. Much of the evidence goes to show that Drews acted as an independent contractor in the instant situation. But that is not determinative of whether he is an "employee" under the description in 108.02 (5)(a) of the Unemployment Compensation Act.

Similarly, the respective counsel are at loggerheads as to the presumptions respecting "employment" which 108.02 (5)(a) sets up.

Plaintiff's brief (p. 61) cites the general doctrine that presumptions "completely disappear when substantial credible evidence is offered rebutting such presumption". The commission's brief, however, (p. 27) refers to the "unique . . . procedural aspects" of 108.02 (5)(a) whereby the employer must "assume the burden of proof if he is to prove an exclusion," the brief adding (p. 28): "The Legislature has substituted for



the common law presumption (that, in the absence of any evidence to the contrary, an employer-employee relationship exists) a statutory presumption which does not disappear when thrown into the scale against *any* evidence but remains to be decisive of the case in the face of an insufficient showing. The provision specifies that the presumption remains 'unless and until the employer has satisfied the commission.' "

We concur, that this clause creates a "unique" procedure. The presumption is neither *prima facie* (to be rebutted by some evidence) nor conclusive (and incapable of rebuttal) but persists only "unless and until" the commission (a) *is satisfied* (b) *by the employer* as to certain facts.

We need not anticipate in this decision the attack which may be made upon a provision requiring that the commission be *satisfied*; nor need we explore the ramifications as to what "satisfied" means. Suffice it that in the instant proceeding there has not been *any* showing to demonstrate the third of the three bases of exclusion made necessary by the statute if the person performing service for pay is not to be held an employee, namely, "that such individual is *customarily* engaged in an *independently* established trade, business, profession or occupation . . . ." (Our italics.)

The very presentation of the divergent views of the parties in their approach to the legal question herein has served to crystallize the issue and to reveal, in our judgment, the foundation upon which the commission's

orders must be sustained. The Unemployment Compensation Act, in our opinion, has evolved a new concept of employment—different from that at common law and broader than the one contained in the workmen's compensation law—and no attempt has even been made to show that Drews complies with *all* the tests which must be met if he is to be excluded as an employe, under the “unique” procedure provided by sec. 108.02 (5)(a).

We adopt from the commission's brief (p. 12) the following:

“SECTION 108.02 (5)(a), SUBSTANTIVELY CONSIDERED, SETS UP A NEW CONCEPT OF ‘EMPLOYMENT’ RELATIONS. IT COMPREHENDS ALL SERVICES FOR PAY UNLESS THEY ARE PERFORMED BY A BUSINESS (OR PROFESSIONAL) MAN IN THE COURSE OF THE BUSINESS (OR PROFESSION) WHICH CUSTOMARILY ENGAGES HIS EFFORTS . . . .

*“Section 108.02 (5)(a) establishes a new concept of employment . . . . a reference to the legislative history of the provision removes any doubt as to the intention of the legislature to break with the traditional concept of the employment relationship as found in common law and substitute in lieu thereof the new and unique creation here under consideration, and shows, furthermore, that this statutory creation was intended to extend coverage under the Unemployment Compensation Act.”*

The commission's brief then goes on to point out that *originally* the definition of employment under Chapter 108 (Unemployment Compensation) was substantially the same as under Chapter 102 (Workmen's Compensation). The brief continues (p. 13):

“There was an identity in the contemplated coverage in that both Acts defined the term employment as services performed under a contract of hire. This term embraced and called into operation the body of common law principles known as the doctrine of master and servant. A consideration of services that were not contracts of hire fell outside the scope of the law. Hence, services performed pursuant to an independent contractor relationship were not within the province of the Act.”

Pursuant to this original contemplation of the Unemployment Compensation Act, the Industrial Commission formulated a rule in which it declared that persons who were considered independent contractors under the Workmen's Compensation Act were not “employees” under the Unemployment Compensation Act.

This rule 2 read as follows:

“Persons doing work for an employer as contractors and subcontractors who are deemed independent contractors under the workmen's compensation act shall also be deemed independent contractors (and not ‘employees’) within the definition of Chapter 108. of the Wisconsin Statutes.”

Then came the 1935 amendments which, according to the commission's brief (p. 13), represented a "clean break" with the contract of hire concept and substituted the "presumptive coverage of all contract services."

The essential parts of 108.02 (5)(a), after the amendments of June 26, 1935, were as follows:

"An 'employment' . . . shall mean any personal service for pay, . . . under any contract of personal service for pay or contract of hire . . .; and each individual engaged by any employer to perform services for pay shall for the purposes of this chapter be treated as in an 'employment' unless and until the employer has satisfied the commission that such individual has been and will continue to be free from the employer's control or direction over the performance of his work both under his contract of service and in fact, and that such work is either outside the usual course of the employer's enterprise or performed outside of all the employer's places of business, and that such individual is customarily engaged in an independently established trade, business, profession or occupation; . . . ."

Subsequently, "personal service", as above quoted, was amended to read simply "service".

From this legislative "evolution" the commission draws the following conclusion in its brief (p. 15):

*"It is submitted that under a proper construction of the section coverage of the act is extended to the performance of all contracts involving services except in those instances where the services are per-*

*formed by a business or professional man engaged in his business or profession. (However, even the exception fails where the performance of the services is so related to the employer's business as to be in the usual course of the employer's enterprise and performed on/or at the employer's place of business.)''*

For purposes of the present decision, we need not go into all the points wherein the present legislative definition of employment departs from prior accepted standards. For instance, it has been regarded—and must still be so viewed under the workmen's compensation law—that lack of *right to control* is what precludes, in essence, the employment status. But by the first test of exclusion prescribed in 108.02 (5)(a), it must be established that there is freedom from control not only (1) under the contract but also (2) *in fact*. Furthermore, there must be established not only freedom from control in the past but that the individual “*will continue to be free from the employer's control or direction . . .*” (Our italics).

This prospective outlook and invisioning of the future lends credence to the broad suggestion made by the commission's brief (p. 20) herein, namely, that it is only the “tradesman, business man or professional man” as such, who is beyond the pale of the Unemployment Compensation Act.

The principle that there must be not only an independent but a customary and established trade, business or profession—in order for the individual to be omitted

from the Unemployment Compensation Act—is emphatically and, in *haec verba*, declared in the third test of exclusion laid down in 108.02 (5)(a), “that such individual is customarily engaged in an independently established trade, business, profession or occupation.”

This last criterion is decisive of the present cases. No effort could be made to show that Drews was an established, customarily engaged entrepreneur in the construction business. *He had been an employe of the company for years before the short-termed transaction here involved. He became admittedly the employe of the company after the transaction here involved.* Two and two simply make four.

Granting that there was a hiatus in which Drews’ relations to the company became that of independent contractor—granting that the alleged subterfuge could not operate to destroy the independent contractor relationship (York v. Industrial Commission, 223 Wis. 140)—still there is no pretense made, and none can be made, under the undisputed evidence, that Drews was “customarily” engaged and “established” in the construction business as an independent contractor. No testimony was offered or even suggested that Drews was *known* as a business or professional man or held himself out to the public as being engaged in the construction business as an independent and customary profession. He had been, and thereafter was, the company’s employe.

We realize that it is quite a jump from the classic “master and servant” doctrine to the almost horizon-

less concept of employment reflected by the present Unemployment Compensation Act. The rationale behind this change is plain, however. Unemployment compensation (to use the commission's rather scholarly diction) is predicated upon the "flow of time" element in employment whereas tort liability or liability in the field of workmen's compensation focuses upon the "instant of time" element. Unemployment reserves must be accumulated. Employees reap no advantages until the employer has been subject to contribution provisions for two years. In contrast, the right to recovery in a workmen's compensation case or for tort may accrue instantaneously, upon the employment relationship arising. It is relatively immaterial, in workmen's compensation cases, that employment is temporary and ephemeral. But to have an efficient unemployment compensation system, dependence cannot be had upon day-to-day or short-time relationships. There must be reasonable permanence and stability.

The essential nature and quality of the "long pull" are illustrated in the present cases where the co-defendants, Ramsey, Gehrt and Lipscomb, are not entitled to benefits if they are employees of Drews because he has made only six months' contributions rather than the twenty-four months' contributions demanded by law.

We note reliance by plaintiff in this regard on the circumstance that Drews petitioned to come under the Act and that such petition was allowed by the commission. We do not conceive, however, that the adminis-

trative act of granting such permission is significant in determining the present controversy on the merits and obviously there is no genus of estoppel which can be arrayed against the commission in this connection.

We observe also plaintiff's remonstrance (reply brief, p. 8) that to adhere to the requirement that one must be shown to the *established* and *customarily* in a trade, business or profession, before he may be regarded as *not* an employe, is to declare that "once an employe, always an employe". Indeed, counsel for plaintiff remarks in closing its main brief (p. 63):

"To deny validity to the independent contractor relationship created in this case would be to rob the American citizen of his inalienable right to direct his own destiny, to rise to any status he desires, and to choose whether he prefers compensation protection to the privilege of engaging in an independent enterprise."

This colorful appeal for the "inalienable right to direct his own destiny" is answered by the cold fact in this case that Drews, within five months after he initiated his assumed destiny, was back with a job in Kansas on the company's payroll, with his "destiny" already behind him.

We conclude that Drews was an "employe" of Wisconsin Bridge & Iron Company; from which it follows—without question—that Ramsey, Gehrt and Lipscomb were its employes.

Counsel for plaintiff raise a jurisdictional point, to-wit: The Wisconsin Bridge & Iron Company peti-



tioned the commission for review of the so-called "appeal tribunal" decision on September 3, 1938. On September 13, 1938, (within the ten day limit set by statute) the commission "set aside" the appeal tribunal's decision. It was not until October 15, 1938, that the commission *affirmed* the appeal tribunal's decision.

The contention is that, this *affirmance* not having been within ten days from the date of the company's petition, the commission lost jurisdiction.

The pertinent provision of the Unemployment Compensation Act—108.09 (6)(b)—reads:

"Either party may petition the commission for review of an appeal tribunal decision, pursuant to general commission rules, within ten days after it was mailed to his last known address. Within ten days after the filing of such a petition, the commission may affirm, reverse, change, or set aside such decision, on the basis of the evidence previously submitted in such case or direct the taking of additional testimony. The failure of the commission to act on such a petition within such ten days shall constitute an *affirmance* of the appeal tribunal decision."

This raises the question as to the effect of the commission's action on *September 13th* (within the ten day period) in *setting aside* the appeal tribunal's decision. We think that this clearly connotes a *suspense* of the decision and a holding of it *in statu quo*.

Unquestionably *and expressly* this is the effect of setting aside (as distinguished from reversing) an examiner's award under the Workmen's Compensation Act (Chapter 102). However, as plaintiff's counsel points

out, sec. 102.18 of the workmen's compensation law specifically states:

“If no petition is filed within twenty days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the industrial commission as a body, unless set aside, reversed or modified by such commissioner or examiner within such time. *If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside.*” (Our italics).

By virtue of the legislature having omitted this precautionary provision in the Unemployment Compensation Act, counsel for plaintiff maintains that it cannot be read in, by judicial decree. We acknowledge that there is persuasiveness in the company's point.

However, we reiterate that—taken by itself and without any such reservation as was written into the workmen's compensation law on this point (102.18)—to “set aside” must mean something different from “reverse” and it cannot mean “affirm”. The common acceptance of to “set aside” is that the situation is restored to what it was before and now awaits further disposition. We so interpret the meaning of “set aside” in the Unemployment Compensation Act—sec. 108.09 (6)(b).

Having “set aside” the appeal tribunal decision on September 13th (within ten days), the commission effectively held the matter open. Its subsequent affirm-

ance on October 15th was therefore an act within its powers and jurisdiction.

See *Milwaukee County v. Industrial Commission*, 224 Wis. 302.

We need not allude to the hopeless impracticality of an opposite construction which would require the Industrial Commission to *definitely and finally decide* every case submitted to it within ten days after submission. The task could not humanly be done with intelligence and any appreciable measure of judicious consideration.

The commission's findings and order should be confirmed.

It is so ordered.

The commission's attorneys may prepare and submit to opposing counsel the judgment.

Dated March 13, 1939.

I, Paul A. Raushenbush, Director of the Wisconsin Unemployment Compensation Department, hereby certify that I have compared the attached decision of the Circuit Court for Dane County, Wisconsin, with the original on file in the offices of said Department, and that the same is a true and correct copy of such original.

Dated at Madison, Wisconsin, this 28th day of March, 1939.

/s/ Paul A. Raushenbush.

Paul A. Raushenbush.

## EXHIBIT D

STATE OF MICHIGAN  
THE CIRCUIT COURT FOR THE COUNTY  
OF MARQUETTE

PETER POND,

*Plaintiff,*

vs.

MICHIGAN UNEMPLOYMENT  
COMPENSATION COMMIS-  
SION and HEINZ LUMBER  
COMPANY,

*Defendants.*

No. 13325

## OPINION OF THE COURT

I have given this case considerable study. The case came in just at the end of our summer terms and I have given it a lot of thought and study and I am sure you won't be offended if I tell you that I feel that I should dispose of the case now and not wait for briefs in view of the importance of the case. So I think we won't take any time for briefs. I will dispose of it now.

This case comes in here by certiorari. We all know that under our practice certiorari ordinarily brings up only questions of law upon the record that is made in the court from which the case is appealed. The statute, under which the case is brought, as I read it, provides for appeal and authorizes the court under certain circumstances to review the facts as well as to review the law. I am at a loss to know just what the rights and duties

of the court are in view of the fact that the case is here by certiorari instead of by appeal, but it seems to me I can dispose of the case without determining that question, and I feel that it can be disposed of on the record under the law applicable to the statute, or I might say under a reasonable construction of the law applicable to the statute.

The facts are well stated, if I exclude the argument, in the decision of the referee as amended by the decision of the board, and confining myself solely to the facts stated in those opinions and not to any arguments therein, I can adopt the statement of facts made by the referee and the board, and so we go right to the statute itself.  
L-14-i39

AB-119-44

-2-

I have been greatly interested in the argument of counsel on both sides, not only because of the study that I have given the case, but because this is a part of the new social program that has come upon the country within the last few years. Of course the court is not concerned with whether or not this statute is just or unjust to industry, whether it is just or unjust to labor, nor with possible abuses on both sides that may follow from the execution of the law. I must try to get at the meaning of this statute and apply the facts as they are here to it.

We have referred in the argument repeatedly to Section 42, Paragraph 6, Subdivisions A, B and C, which

provides that services performed by an individual for remuneration shall be deemed to be employment subject to the act, unless and until it is shown to the satisfaction of the commission that three certain things are present in the case, which I shall enumerate. I take it that under the language of the statute the burden of showing these three is on the employer, and I shall so consider the testimony.

(Subdivision A of the statute, reading back a little bit, provides that the service shall be deemed to be employment subject to the act unless it is shown to the satisfaction of the commission, "A", that 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. In disposing of this question I must confine myself to the record as made and I am thoroughly satisfied that the record in this case shows that the labor here was that of an independent contractor. In saying this, I confine myself to the record here. No one who lives in this country can fail to appreciate that in every such contract there are certain, I might say, implied provisions that could probably be shown that might possibly make a different result, but it appears here flatly that the Heinz Lumber Company had no control over this man.

We know as a matter of fact that any man who takes a job of cutting a strip of timber must cut the kind of timber that he is cutting clean. We know that if he went in and butchered a strip of timber he wouldn't be al-

lowed to proceed on the job. We know a man peeling posts and poles, either in the woods or on a landing, at so much per pole, is working as a piece maker, but going along with his contract, the duty on his part to peel the poles that are brought to him. He wouldn't last very long on his job if he picked out the medium size and easy to peel poles and left the knotty ones and big ones for someone else to peel. We know that the peeling of posts and poles is seasonal. Whether the contract provides for it or not it must be done at certain seasons of the year to be effective and efficient. But that isn't here. I merely mention that so that you will understand that the court has not overlooked the possible situation that may arise later.

So I am holding that this man was an independent contractor.

Now Subdivision B provides that the service shall be presumed to be employment unless such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the premises of the business or enterprise for which such service is performed.

L-14-i39

AB-119-44

-3-

The testimony indicates that the business of the Heinz Lumber Company is getting out timber, among other kinds, the kinds that were peeled under this contract. I think it must be held on the evidence as a mat-

ter of law that the work done here was within the usual course of business for which the service was performed for the employer, and I think it must be further held that such service was performed at the place of business of the enterprise for which it was performed. I know of no other way of treating a statute of this kind than to so hold. If I own a piece of land and let another a contract to cut the timber on that land at so much a thousand or so much a piece, it is my operation, and even though I pay him by the piece, he is on my premises. He may be an independent contractor, but he is on my place of operation.

But I go one step further in answer to the argument that has been made by counsel for the defendant. If I let the contract to an independent contractor to do the work and he employs others to do it, that other is his employee and not mine, and it is his operation and not mine. He is merely my contractee.

Now we go to the third question, that the person doing the work is an employee unless he is customarily engaged in an independently established trade, occupation, profession or business. It appears here that the work of peeling posts is in a sense a trade, but the language of the statute is "independently established trade". Now it does appear that this employee at another date was employed by a jobber for the Heinz Lumber Company in an entirely different class of business, and it appears that he sometimes worked by the month. I think it cannot be said that this was an independently



established trade at which he was customarily engaged because he was customarily engaged in other lines of work, and the particular business of peeling was seasonal.

So, that being true, the statute furnishing these definitions of employment, I must hold that this man was employed within the meaning of this section. I haven't overlooked the rulings of our courts, many of which have been made in connection with our Workmen's Compensation Act, and I haven't overlooked certain decisions of the social security act, but I think this act goes further, and whether it is a good act or a bad one, whether it is just or unjust, I think it is the duty of the court to construe it as I see it, so the litigants will have an opportunity to have the question finally settled by the court of last resort, if they desire to do so.

I haven't overlooked either the splendid argument that the counsel have made on the question of the relation of these statutes to the common law, but I feel that while there may be some difficulty in the application of the statutory provisions to the facts in many cases, yet the difficulty springs rather from the application than from the language of the statute, as the language seems clear. I think it was the intention of the legislature to take a forward step in the matter of social legislation. The courts should give a workable construction as they have done with the Workmen's Compensation Act.

L-14-i39

/s/ FRANK A. BELL,

*Circuit Judge.*

Dated September 18th, 1939.

EXHIBIT E

COPY

WASHINGTON

May 31 1938

Rec'd: Jul 27 1939  
Region No. 5  
Social Security  
Board, 2:00 p.m.

Office of  
Commissioner of Internal Revenue

Address reply to  
Commissioner of Internal Revenue

and Refer to  
SST:RR:2

The Texas Company,  
135 East 42nd Street,  
New York, New York.

Attention: Mr. Albert E. Van Dusen,  
Attorney.

Sirs:

Reference is made to your letter dated January 15, 1938, with which was submitted certain information relative to the facts and circumstances under which a particular individual operates a bulk plant for the marketing and distributing of products supplied by your company on a consignment basis. Such information was submitted for the purpose of enabling this office to determine the status of such individual for purposes of the taxing provisions of the Social Security Act.

There were submitted with your letter a photostatic copy of the consignment agreement, Form S-82 1-37 12M, together with certain amendments thereto, entered into between your company and Mr. J. E. Thomas, Marion, Virginia; a copy of a manual called "Successful Bulk Station Operation," which is furnished to Mr. Thomas by the company; and copies of rulings from various State governmental agencies relative to the status of consignees under certain acts and regulations of the particular States.

The information submitted discloses that Mr. Thomas is appointed as a consignment agent of The Texas Company at Abingdon, Virginia. The company ships its products to the consignee at its own expense and title thereto remains in the company until the products are sold by the consignee in accordance with the terms of his agreement with the company. The consignee is prohibited by the company from selling its products, directly or indirectly, at less than the authorized prices established by the company. He becomes personally responsible for any credit extended in excess of the limit placed on each account by the company, or for any sum due on any account opened by him without authority from the company. He is required to perform services in collecting and remitting all amounts due the company as the result of sales of its products from his bulk plant. If any deliveries of the company's approved accessories stocked in his bulk plant are made outside of the regular truck delivery radius of his bulk plant, the company

### The Texas Company.

bears the cost of transportation from the bulk plant to the destination.

Mr. Thomas is required to submit detailed reports as requested by the company, on forms prescribed and furnished by the company, of all the company's money, goods, products, equipment, etc., in his possession or coming into his custody. It appears also that the books and records and everything at the bulk plant pertaining to the company's business are subject to inspection by accredited station auditors of the company. The consignee agrees to furnish his own trucks and other equipment required for the distribution of the company's products, but such trucks and equipment must conform with standards prescribed therefor by the company. He is required to indemnify the company against liability for any premiums, taxes or contributions for workmen's compensation insurance, unemployment insurance or old-age pensions imposed by any State or Federal law, which are measured by the remuneration paid to individuals engaged by him to perform services under his agreement with the company. He is further required to furnish a bond satisfactory to the company, protecting the company against the loss of any of its property coming into his custody. The consignment agreement may be terminated by either Mr. Thomas or The Texas Company on five days' written notice.

You are advised that careful consideration has been given to all of the information submitted concerning the facts and circumstances under which Mr. Thomas operates his bulk plant under a consignment agreement with your company, and in the opinion of this office such information discloses that your company exercises or retains the right to exercise the control over the services of such consignee which is prescribed by the regulations under Titles VIII and IX of the Act as being necessary to establish the relationship of employer and employee for purposes of the taxes imposed thereunder. Such right of control is evidenced in part by the fact that the consignee is required to perform certain services as directed by the company, such as submitting reports and collecting money due the company. The company also controls the extension of credit by the consignee, and the minimum prices at which its products may be sold. Trucks and other equipment furnished by the consignee must conform with standards set by the company therefor. Also, the right of the company to terminate the agreement without cause on five days' notice, while not conclusive in and of itself, is nevertheless a factor indicating direct or indirect control on the part of the company.

In view of the right of control which The Texas Company retains over the services of the consignee in question, the fact that in certain respects he is free to use his own judgment and initiative in conducting the business at the bulk plant is not considered conclusive for the purpose of determining his status under Titles VIII and IX of the Act. It is concluded, therefore, that

Mr. Thomas is an employee of The Texas Company for purposes of the taxing provisions of the Act.

You are further advised that this office has consistently held that in cases in which the employees of a company, with either the express or implied consent of that company, engage other individuals to assist them in the performance of their services for the company, such other individuals are also employees of the company rather than of the individuals by whom they are engaged. Therefore, since Mr. Thomas is held to be an employee of The Texas Company, any individuals engaged by him with the express or implied consent of the company to perform services in connection with his employment by the company are also, to the extent that they perform such services, employees of the company for purposes of the taxing provisions of the Act.

For the purpose of determining the taxable wages of Mr. Thomas, the total amount of the wages of each employee engaged by him which is attributable to services performed in the business of the company should be deducted from the total amount of his commissions. A deduction from such amount may also be made for any other expenses he incurs in the business of The Texas Company, provided he accounts to the company for all such expenses and the company maintains adequate records in substantiation thereof. If proper accounting is not made of such expenses, or if the necessary records

with respect thereto are not maintained, the taxable wages of Mr. Thomas will be the total amount of his commissions minus the total amount of the wages of the employees engaged by him which are attributable to the services mentioned above.

It is necessary, therefore, for your company to maintain such records as will show, in addition to other information, the portions of the total amount of Mr. Thomas' commissions which represent, respectively, his taxable wages and the taxable wages of each of the employees engaged by him, and if a deduction is to be made for the expenses incurred by Mr. Thomas or his helpers, records must be kept of such expenses.

In connection with the provision in the agreement with Mr. Thomas, whereby such individual assumes liability for certain taxes, contributions and premiums with respect to the remuneration of his helpers, it may be stated that the Bureau will interpose no objection to the execution of an agreement between a taxpayer and another person whereby such other person assumes payment of the taxes imposed under the Social Security Act. However, your attention is directed to the fact that the taxing provisions of the Act are mandatory and that such an agreement does not relieve the taxpayer from responsibility for keeping the necessary records and filing the prescribed returns, or from liability for the payment of the taxes imposed under Titles VIII and IX of the Act. Accordingly, it will be necessary for your company to include in its returns filed under those titles of the

Act the wages of Mr. Thomas and of each individual engaged to assist him in the performance of his services for the company.

Although the ruling set forth above is made upon the basis of the information submitted concerning Mr. Thomas, such ruling is also applicable to the cases of other consignees similarly engaged by your company, provided the facts of such other cases do not vary in any material respect from the facts upon which this ruling is based.

Respectfully,

GUY T. HELVERING

JD

*Commissioner.*

DAP:MEH

A TRUE COPY

Charles Weiser /s/  
*Clerk.*