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Partnership: Workmen's Compensation--Partner as Employee

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conditions. Surely, if the courts may declare a restriction wholly unenforceable, they may do so in part.

While there are no precise rules to govern the courts in cases involving changed conditions, certain of the above mentioned factors appear to have been accorded greater wight. The size of the tract, and the location of the change in relation to the restricted area seem to be more important than the other factors. California, in *Wolff v. Fallon*, has expressed a liberal view of these two considerations. The tract was large, the whole tract was not affected by the changed conditions, and only four minor violations occurred within the tract, and yet the court granted affirmative relief.

It may be that the expansion of California in the past decade was a silent factor in arriving at this view. Undoubtedly as business reaches into areas so recently converted to housing a rapidly growing population, the battleground for these conflicting interests will be the courts of California.

These courts must, in times of such rapid change, remain sensitive to the problems arising from this change if they are to serve those who seek their help.

Donald C. Thuesen.

PARTNERSHIP: WORKMEN'S COMPENSATION—PARTNER AS EMPLOYEE.—Can a partner be an employee of the partnership of which he is a member?

The First Circuit Court of Appeal of Louisiana in *Trappey v. Lumbermen's Mutual Casualty Co.*,[1] an action by an injured partner against the firm's insurance carrier, held that a partner could be an employee within the scope of the Workmen's Compensation Law and overruled the defendant's exception of no right or cause of action, a decision in conflict with prior Louisiana decisions[2] and with the prevailing view in the United States.[3]

The overwhelming weight of authority in both the United States and England that a partner may not be an employee of the firm[4] stems from the common law concept of a partnership as an aggregate of individuals which has no entity nor identity separate from that of the individuals comprising it.[5] In effect the use of a partnership name was only a shorthand method of designating the individuals referred to. Under this view it would follow that the partners as individuals were the employers of anyone who worked for the firm under a contract of hire. Hence the difficulty—if a partner claimed employee status, he was his own employer.

In the English case of *Ellis v. Ellis*,[6] dealing with a claim by a partner, the court stated that the Workmen's Compensation Act

> ". . . clearly contemplates a relation between two opposite parties, one of whom is employer and the other employee. . . . It seems to me obvious that a person cannot for the purposes of the Act occupy the position of being both employer and employee."

Up to the time of the *Trappey* decision courts in almost every state of the United States approved the *Ellis v. Ellis* view except where statutes expressly covered partners. Oklahoma stood alone in the contrary contention.

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[1] 77 So.2d 183 (La.App. 1954).

[2] Dezendorf v. National Cas. Co., 171 So. 160 (La.App. 1936); Harper v. Ragus, 62 So.2d 167 (La.App. 1952).

[3] 58 AM. JUR., *Workmen's Compensation* § 146 (1948).

[4] CRANE, PARTNERSHIP, 288 (2d ed. 1952).

[5] *Id.* at 12.

[6] [1905] 1 KB 324.

The Oklahoma view is based on a literal interpretation of the workmen's compensation statute. Since the definition of employer expressly includes a partnership and the definition of an employee as "*any* person engaged in work in employment of any person, firm or corporation carrying on a business covered by the terms of the act" does not expressly exclude a partner, it is held that a partner can be an employee of a partnership of which he is a member within the meaning of the act.[7]

After judicial decision had excluded such partners from coverage, the California legislature amended the Workmen's Compensation Act to expressly include as employees working partners who received a stated wage independent of their share of profits.[8] Washington, Nevada and Michigan laws also include such express coverage.[9]

Such was the state of the law at the time the First Circuit Court of Appeal of Louisiana was called upon to decide the *Trappey* case. In addition to the almost unanimous holdings in other jurisdictions, two Louisiana cases decided by the Second Circuit Court of Appeal had followed the majority rule.[10] How, then, did the court reach the opposite decision in this case?

The reasoning of the court turns upon the Louisiana civil law doctrine that a commercial partnership is "a moral being, distinct from the persons who compose it . . . a civil person. . . ."[11] Logical deductions from this concept of a partnership led to the conclusion that this partnership, acting as an entity, could and did hire the plaintiff as an employee. The partnership, then, was liable to the plaintiff under the Workmen's Compensation Act for injury incurred in the course of his employment.

The opinion is well argued and amply supported with citations regarding the prevailing view in the United States and the Louisiana entity theory of partnerships.

Judge Ellis, writing the majority opinion of the court, quotes at length from F. Hodge O'Neal's article entitled *An Appraisal of the Louisiana Law of Partnership, (Part II)*[12] to summarize both the common law aggregate theory of partnerships and the Louisiana civil law entity theory.

Regarding the Louisiana view, the court quotes Dean O'Neal:

> "Louisiana courts have shown remarkable unanimity in their comments on the nature of the partnership. They might have been expected to encounter considerable difficulty in maintaining a consistent theory. . . . Further, in view of the tendency of Louisiana courts in most phases of partnership law to import Anglo-American concepts, it would not have been surprising to find the Louisiana courts at times borrowing entity ideas and on other occasions adopting aggregate theories. Such has not been the fact. Louisiana courts consistently have asserted that both the commercial partnership and the ordinary partnership are legal persons."[13]

It is interesting, however, that after analyzing several types of cases, Dean O'Neal concludes:

> "The conclusion seems unavoidable that Louisiana's entity theory has not resulted in practices which differentiate Louisiana law from law in other states. . . . In most situations where the Louisiana courts utilize the entity theory to explain their conclusions, underlying practices in Louisiana do not differ from practices prevailing in aggregate jurisdictions. Further, an analysis of the cases in Louisiana and in other jurisdictions shows that the courts often use the entity or aggregate concepts as a *convenient rationalization for conclusions actually predicated on other grounds.* That many courts are beginning to

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[7] Ohio Drilling Co. v. State Industrial Comm., 86 Okla. 139, 207 Pac. 314 (1922).
[8] 27 CAL. JUR., *Workmen's Compensation* § 23 (1926).
[9] CRANE, *op. cit. supra,* note 4, at 289, n. 84.
[10] See note 2 *supra.*
[11] Smith v. McMichen, 3 La.Ann. 319 (1848).
[12] 9 LA. L. REV. 450 (1949).
[13] *Id.* at 453.

realize that neither theory furnishes an adequate premise from which to deduce rules to fit all problems is demonstrated by their departure from the prevailing theory whenever an occasion seems to demand. If partnership practice in Louisiana differs materially from practice in other states, those differences cannot be attributed to the Louisiana courts adherence to the entity view."[14] (Emphasis added.)

Was the court in the *Trappey* case reluctantly carrying the entity theory to its logical extreme, or was it instead using it as a "convenient rationalization for conclusions actually predicated on other grounds"?

It is agreed that the Uniform Partnership Act has adopted entity concepts in some respects though not explicitly avowing the entity theory.[15]

The tendency to personify the partnership under the Uniform Partnership Act for the purpose of holding the spouse of a partner to be within the protection of the Workmen's Compensation Acts is shown in *Keegan v. Keegan*[16] and *Felice v. Felice.*[17]

In the latter case the court states that "under the present state of the law the Workmen's Compensation Act has personified the partnership . . . for purposes of accomplishing the beneficent social intention of the Legislature" and that the contract of hire of the spouse of the partner was with that "jural person and not with her husband individually."

Professor Crane comments regarding partnerships: "As in the case of the corporation, the entity may be recognized or disregarded according to the demands of justice in the particular situation."[18] Such a discretionary approach regarding corporations is indicated in the treatment of Workmen's Compensation cases regarding coverage of corporate officers, stockholders, and directors nominally in the employ of the corporation. Instead of automatic coverage of these individuals since the corporation is a legal entity, recovery under the compensation laws depends upon the nature of the work performed, percentage of ownership of stock, and whether work of an employee nature is merely occasional or incidental, or is part of the regular work of the individual involved.[19]

As an example, in *Skouitchi v. Chic Cloak and Suit Co.*[20] the president of a corporation, owning 12% of the stock and having no substantial operating duties as president, was employed as manager in which capacity he performed duties of a typical employee. The New York court held he was entitled to compensation for injury in the course of his managerial duties since "a corporation is a complete entity, separate and distinguishable from its stockholders and officers" and this entity was his employer.

On the other hand, in *Bowne v. S. W. Bowne Co.*[21] the president of a corporation was denied compensation coverage. The plaintiff was the majority stockholder, drawing a salary of $70.00 per week which was uninterrupted by the accident. The court said: "Theoretically, he was subject to the orders of his corporation and was liable to be discharged for disobedience. Practically, he *was* the corporation and only by a legal fiction its servant in any sense."

Similarly, in *Leigh Aitchinson, Inc. v. Industrial Comm'n.*,[22] the principal stockholder, owning 127 of 130 shares of outstanding capital stock, was denied compen-

[14] 9 LA. L. REV. 472 (1949).
[15] CRANE, *op. cit. supra* note 4, at 19.
[16] 194 Minn. 261, 260 N.W. 318 (1935).
[17] 112 A.2d 581 (N.J. Superior Ct., 1955).
[18] CRANE, *op. cit. supra* note 4, at 17.
[19] 58 AM. JUR., *Workmen's Compensation* § 150 (1948).
[20] 230 N.Y. 296, 130 N.E. 299 (1921).
[21] 221 N.Y. 28, 116 N.E. 364 (1917).
[22] 188 Wis. 218, 205 N.W. 806 (1925).

sation for injuries. It was shown that he fixed his own salary and was subject to the direction of no one; the court accordingly held that he was not an employee of the corporation, citing *Bowne v. Bowne, supra.*

Clearly these decisions do not turn upon the legal entity of the corporation but on the actual existence of the requisites of the Master-Servant relationship, such as right of control of hours and of manner of doing work. If these requisites are lacking, the entity of the corporation as employer is disregarded.

Consider the results if the same tests be applied to the partnership situation. In *Trappey v. Lumberman's Mutual Cas. Co.* the plaintiff had been employed by the Trappey Beverage Co., a partnership, in the capacity of manager and supervisor of its bottling plant. Some time later, he was given a 1/6 interest in the partnership. After the creation of this interest he was injured in the course of his duties as manager.

Is it not conceivable in this factual situation that the plaintiff retained his employee status in that he remained subject to the direction and control of the partners acting as a group and subject to discharge by them? In business practice such a fact situation is common. If a 12% stockholder may be an employee of the corporation as in the *Skouitchi* case *supra,* why should not a partner with a 16⅔% interest be an employee of the partnership when doing comparable work?

It is argued in *Le Clear v. Smith*[23] that

> "there is little room for doubt but that in certain aspects a copartnership is a legal entity, and it may be regarded as such, particularly here, where the effort of the Workmen's Compensation Law is to cast upon the business of the employer the burden of compensation for injuries growing out of such business. But though an entity, it had not as such the capacity as an artifice to hire, discharge, and direct its employees. That power rested in the copartners, or in some person authorized by them. As pointed out in *Bowne v. Bowne Co.* . . . the claimant should not be considered an employee because he was the corporation. So here we are led to hold that Le Clear cannot be regarded as an employee, because he was a member of the partnership."

It is submitted that a corporation has no more capacity as an artificial being to hire, discharge or direct its employees than a partnership. Such power rests in its board of directors or some person authorized by them. If the law can conceive of a corporate officer or director who is also an employee, why not a partner who is also an employee, if the facts meet the requisites for coverage in other respects? In view of present business practice and broadening concepts in the partnership law, isn't it as unrealistic to hold that as a matter of law Trappey could not be an employee since each partner is the employer, as it would have been to hold in the *Bowne* case that the plaintiff president and majority stockholder was as a matter of law an employee because the corporation was a legal entity, though for all practical purposes he *was* the corporation?

In the *Trappey* case the court states that, though difficulties might arise as a result of its holding, recognition of the possible employee status of a partner is *preferable* to the English theory which controlled the prior Louisiana decisions[24] cited to the court as precedents in Louisiana for the view that a partner could not be an employee.

It should be noted, however, that Judge Cavanaugh concurred in the decision on the ground that the claim was against the insurance carrier whose policy listed the plaintiff as an employee. While declining to accept the entity of the partnership as employer he felt the insurer should be bound by its contract.

It would seem that the Louisiana court has taken a step forward in giving judicial

[23] 207 New York A.D. 617, 202 N.Y. Supp. 514 (1923).
[24] See note 2 *supra.*