grandchildren immediately on the death of the testatrix, since there were members of the class then in being. The remainder being vested, the rule did not apply. If the gift were confined to the children of the named grandchildren, there would be no violation of the rule whether the remainder was vested or contingent, since the named grandchildren were lives in being when the will went into effect, and their children must reach their majority within twenty-one years of the death of the grandchildren. A gift to the issue, as opposed to children, of the grandchildren at age 21 would be void, since issue could be born after the death of the grandchildren. But in this case, the class apparently consisted only of issue who were in being but under 21 at the death of the grandchildren, and therefore the gift did not violate the rule.

VI. Conclusion

A class gift is the only means which a testator can use to benefit persons who may be unborn at the time of the testator's death, for example, his grandchildren. A class gift is also a convenient method of providing for an alternative disposition of an estate if all the named beneficiaries die before the time of distribution.

The will draftsman must be particularly careful in making class gifts to express clearly the intent of the testator. For example, if the testator wishes the share of a class member who predeceases him to go to the member's issue rather than to the surviving members of the class, this must be explicitly stated in the will. The most common subject of litigation over class gifts is conditions of survivorship. Potential litigation can be avoided by stating these conditions clearly: "to the children of A who survive me," or "to the children of A who are living at the death of the life tenant." If the testator's intent is clearly expressed, class gifts can be a very effective tool for distributing the testator's estate.

Susan P. Cramer

THE BORROWED EMPLOYEE DOCTRINE IN WORKMEN'S COMPENSATION

The Loaned or Borrowed employee doctrine has been at issue in numerous workmen compensation cases. From these cases many interpretations have developed. The interpretations are so numerous that one attorney has stated: "A lawyer, in advising a client as to the probable outcome of a loaned employee case, shouldn't predict—merely guess."[1] The purpose of this Note is to alleviate this situation by collecting, interpreting, and discussing the relationship between the common law doctrine of borrowed or loaned employee and workmen's compensation acts of the states. Although there has been no attempt to cover all circumstances and every ramification of the law of each state, a general picture is presented which will aid further research.

I. Common Law Background

At common law when the general employer loaned his employee to the special employer and when the employee committed a tort upon third persons, the question which arose was whether the general employer or the special employer should be liable for the tort of the employee. This question required the consideration of the loaned or borrowed servant doctrine.[2] This consideration involved a determination of the extent to which each employer had a right to direct and control the employee. At times the doctrine also included the necessity of determining which employer's work was being performed, which employer had the right to discharge the employee, which employer had the obligation to pay the wages, and other minor aspects of a work relationship.[3]

At common law the employer could also be held liable in certain instances for injuries sustained by the employees.[4] However, actions to determine liability on the part of the employer for the injuries of the employee were seldom successful.[5] Therefore, the liability of employers for injuries sustained by employees was removed from common law to the field of social insurance by enactment of workmen's compensation laws.[6] The borrowed employee doctrine was carried over with that removal and now bears a unique relationship with workmen's compensation laws.

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1 Levitan, *Loaned Employees*, 27 Wis. Bar Bull. 7, 56 (Oct. 1954).

2 References to this doctrine in legal material can be found under numerous headings, including "loaned", "lent", and "borrowed". The doctrine will be referred hereinafter as the borrowed employee doctrine when referring to workmen's compensation cases. It will, however, be referred to as the borrowed servant doctrine when referring to the common law concept.

3 *See generally* 99 C.J.S. *Workmen's Compensation* § 47 (1958); 56 C.J.S. *Master and Servant* § 2 (1948).

4 W. Prosser, Torts § 80 (3d ed. 1964).

5 *Id.*

6 *Id.*

II. Three Interpretations

In the workmen's compensation cases involving a borrowed employee, there are three possible interpretations concerning the legal responsibility of the employer. The three are: (1) acceptance of the common law borrowed servant doctrine allowing either the general or special employer to be held liable depending upon the facts of the case; (2) rejection of the common law borrowed servant doctrine in workmen's compensation cases whereby the general employer is held responsible; (3) allowing for compensation from either the general or special employee, or from both jointly and severally. These different interpretations are the result of both specific statutory provisions and case law.

At least four states, Colorado,[7] Connecticut,[8] Hawaii,[9] and Illinois[10] have enacted specific statutory provisions designating which employer is liable. These statutes were passed to avoid lengthy litigation in determining which employer would be liable in a borrowed employee situation. The Connecticut statute is the most simple and straightforward of the four statutes. It prohibits the application of the borrowed employee doctrine in workmen's compensation cases and reads:

> When the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service, the latter shall, for the purposes of this chapter, be deemed to continue to be the employer of such workman while he is so lent or hired by another.[11]

The Hawaii statute holds the special employer liable. The statute reads:

> Where an employee is loaned or hired out to another person for the purpose of furthering the other person's trade, business, occupation, or profession, the employee shall, beginning with the time when the control of the employee is transferred to the other person and continuing until the control is returned to the original employer, be deemed to be the employee of the other person regardless of whether he is paid directly by the other person or by the original employer. The employee shall be deemed to remain in the sole employment of the original employer if the other person fails to secure compensation to the employee as provided in section 386-121.[12]

The last sentence of the appropriate part of the Hawaii statute gives the borrowed employee maximum protection by providing that if the special employer is not covered by workmen's compensation the general employer remains liable.

The Illinois[13] and Colorado[14] statutes are not as definite as the Connecticut

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[7] Colo. Rev. Stat. Ann. § 81-31-1 (1963).
[8] Conn. Gen. Stat. Ann. § 31-292 (Supp. 1971).
[9] Hawaii Rev. Laws § 386-1 (1968).
[10] Ill. Ann. Stat. ch. 48, § 138.1(4) (Smith-Hurd 1969).
[11] Conn. Gen. Stat. Ann. § 31-292 (Supp. 1971).
[12] Hawaii Rev. Laws § 386-1 (1968).
[13] The Illinois Statute reads:

Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sus-

and Hawaii statutes in placing liability for the employee's injuries. The Illinois statute is an attempt to provide continuing compensation protection under various conditions. It provides alternate designations where the responsibility rests depending upon the solvency of the special employer. The Colorado statute basically complies with the borrowed servant doctrine holding the special employer liable only when a new contract of hire is present. Several other states have statutes concerning closely related areas.[15] However, these are not true loaned employee situations. The most frequent of these involves contractors, subcontractors[16] and joint or dual[17] employment.

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tains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer shall be liable to provide or pay all benefits or payments due such employee under this Act and as such employee the liability of such loaning and borrowing employers shall be joint and several, provided that such loaning employer shall in the absense of agreement to the contrary be entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the industrial commission or in any action to secure such reimbursement. Where any benefit is provided or paid by such loaning employer, the employee shall have the duty of rendering reasonable cooperation in any hearings, trials, or proceedings in the case, including such proceedings for reimbursement.

Where an employee files an Application for Adjustment of Claim with the Industrial Commission alleging that his claim is covered by the provisions of the preceding paragraph, and joining both the alleged loaning and borrowing employers, they and each of them, upon the written demand of the employee and within seven days of the receipt of such demand, shall have the duty of filing with the Industrial Commission, a written admission or denial of the allegation that the claim is covered by the provisions of the preceding paragraph and a default of such filing or if any such denial be ultimately determined not to have been bona fide then the provisions of Paragraph K of Section 19 of this Act shall apply.

An employer whose business or enterprise or a substantial part thereof consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers shall be deemed a loaning employer within the meaning and provisions of this section.

ILL. ANN. STAT. ch. 48 § 138.1(4) (Smith-Hurd 1969). *See* Fransen Const. Co. v. Industrial Comm'n, 384 Ill. 616, 52 N.E.2d 241 (1943), for an interpretation of this statute as acceptance of borrowed servant doctrine under Workmen's Compensation Act.

14 COLO. REV. STAT. ANN. § 81-31-1 (1963) reads:

Where an employer, who has accepted the provisions of this chapter and has complied therewith, shall loan the service of any of his employees who have accepted the provisions of this chapter, to any third person, he shall be liable for any compensation thereafter for any injuries or death of said employee as provided in this chapter, unless it shall appear from the evidence in said case that said loaning constitutes a new contract of hire, express or implied, between the employee whose services were loaned and the person to whom he was loaned.

15 *See, e.g.*, GA. CODE ANN. § 114-419 (1956), and MO. ANN. STAT. § 287.130 (1965), both dealing with an employee in service of two or more employers; NEV. REV. STAT. § 616.055(6) (1967), dealing with lessees of mining or operating reduction plants deemed employees of the lessor.

16 *See, e.g.*, ALASKA STAT. § 23.30.045 (1962); ARIZ. REV. STAT. ANN. § 23-902 (1971); ARK. STAT. ANN. § 81-1306 (1960); CONN. GEN. STAT. ANN. § 31-291 (Supp. 1970); DEL. CODE ANN. tit. 19 § 2311 (1953); FLA. STAT. ANN. § 440.10 (1966); GA. CODE ANN. § 114-112 (1956); IDAHO CODE ANN. § 72-811 (1949); IND. ANN. STAT. § 40-1214 (1965); MICH. STAT. ANN. § 17.237(161) (Supp. 1971); N.Y. WORKMEN'S COMP. ACT. § 56 (1965); TEX. REV. CIV. STAT. ANN. art. 8307, § 6 (1967); VA. CODE ANN. § 65-26 (1950).

In the states not having a statutory designation of liability, the practitioner must look to the case law of his jurisdiction. A jurisdiction will usually favor one of the three interpretations. This, however, does not mean that all of the cases within a state will always adhere to one of these interpretations, but it is an indication of the general rule which the state is following.[18]

A. *Acceptance of the Borrowed Employee Doctrine*

Under the majority rule, it is possible for either the general or special employer to be held liable for injured employees. In jurisdictions adopting this rule, the general employer will be held liable,[19] unless it is shown that the special employer has really become the employee's true employer.[20] This change in the employment relationship is found by using certain generally ac-

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[17] *See, e.g.*, GA. CODE ANN. § 114-419 (1956); MO. ANN. STAT. § 287.130 (1965); LA. REV. STAT. ANN. § 23.1031 (1964).

[18] For example in some cases, states accept the first interpretation while in other cases the second or third interpretation is accepted. The following cases accept the first interpretation. *California*: Associated Indem. Corp. v. Industrial Accident Comm'n, 6 Cal. App. 2d 476, 44 P.2d 582 (1935); Zurich Gen. Accident & Liab. Assurance Co. v. Industrial Accident Comm'n, 132 Cal. App. 101, 22 P.2d 572 (1933); Callahan v. Harm, 98 Cal. App. 568, 277 P. 529 (1929); *Kentucky*: Louisville Cooperage Co. v. Bailey, 273 Ky. 313, 116 S.W.2d 643 (1938); *Minnesota*: Finn v. Phillippi Bros., 211 Minn. 130, 300 N.W. 441 (1941); *New Jersey*: Miller v. National Chair Co., 19 N.J. Misc. 275, 18 A.2d 847 (1941); *New York*: Sweet v. Board of Educ., 290 N.Y. 73, 48 N.E.2d 266 (1943); Conningham v. Department of State, 255 App. Div. 279, 6 N.Y.S. 2d 823 (1938); *Wisconsin*: Wisconsin Holding Corp. v. Industrial Comm'n, 215 Wis. 67, 254 N.W. 115 (1934). *See* either footnotes 16 *supra* or 23 *infra* for cases in these states accepting second or third interpretations respectively.

[19] For cases holding general employer liable, *see, e.g., Alaska*: Selid Const. Co. v. Guaranteed Ins. Co., 355 P.2d 389 (Alaska 1960); *Colorado*: Industrial Comm'n v. Aetna Life Ins. Co., 88 Colo. 82, 292 P. 229 (1930); *Connecticut*: Massolini v. Driscoll, 114 Conn. 546, 159 A. 480 (1932); *Georgia*: Fidelity & Cas. Co. v. Wicker, 63 Ga. App. 435, 11 S.E.2d 365 (1940); *Idaho*: *In re* Sines, 82 Idaho 527, 356 P.2d 226 (1960); *Illinois*: Meyer v. Industrial Comm'n, 347 Ill. 172, 179 N.E. 456 (1931); *Indiana*: Ben Wolf Truck Lines v. Bailey, 102 Ind. App. 208, 1 N.E.2d 660 (1936); *Louisiana*: Stafford v. Gilmer, 98 So. 2d 522 (La. App. 1957); *Maine*: Gagnon's Case, 128 Me. 155, 146 A. 82 (1929); *Massachusetts*: Brooks Case, 338 Mass. 692, 157 N.E.2d 231 (1959); *Missouri*: Stroud v. Zurich, 271 S.W.2d 529 (Mo. 1954); *New Hampshire*: Manock v. Amos D. Bridge's Sons, Inc., 86 N.H. 104, 164 A. 211 (1933); *Oklahoma*: Akers & Van Hook Const. Co. v. Beller, 356 P.2d 738 (Okla. 1960); *Pennsylvania*: Doyle v. Commonwealth, 153 Pa. Super. 611, 34 A.2d 812 (1943); *Tennessee*: Owen v. St. Louis Spring Co., 175 Tenn. 543, 136 S.W.2d 498 (1940); *Texas*: Southern Underwriters v. Lloyds America, 133 S.W.2d 151 (Tex. Civ. App. 1939); *Vermont*: Mercier v. Holmes, 119 Vt. 368, 125 A.2d 790 (1956).

[20] For cases holding special employer liable, *see, e.g., Connecticut*: Parsons v. M.J. Daly & Sons, 114 Conn. 143, 158 A. 216 (1932); *Florida*: Rainbow Poultry Co. v. Ritter Rental Sys., Inc., 140 So. 2d 101 (Fla. 1962); *Georgia*: Liberty Mut. Ins. Co. v. Kinsey, 65 Ga. App. 433, 161 S.E.2d 179 (1941); *Idaho*: Pinson v. Minidoka Highway Dist., 61 Idaho 731, 106 P.2d 1020 (1940); *Illinois*: Fransen Const. Co. v. Industrial Comm'n, 384 Ill. 616, 52 N.E.2d 241 (1943); *Indiana*: Taylor v. Brainard, 111 Ind. App. 265, 37 N.E.2d 714 (1941); *Louisiana*: Spanja v. Thibodaux Boiler Works, Inc., 2 So. 2d 668 (La. App. 1941); *Maine*: Torsey's Case, 130 Me. 65, 153 A. 807 (1931); *Massachusetts*: Gates Case, 297 Mass. 178, 8 N.E.2d 12 (1937); *Missouri*: Simmons v. Kansas City Jockey Club, 334 Mo. 99, 66 S.W.2d 119 (1933); *New Hampshire*: Bisson v. Winnipesaukee Air Service, Inc., 91 N.H. 73, 13 A.2d 821 (1940); *Oklahoma*: Snetcher & Pittman v. Talley, 168 Okla. 280, 32 P.2d 883 (1934); *Pennsylvania*: Doyle v. Commonwealth, 153 Pa. Super. 611, 34 A.2d 812 (1943); *Tennessee*: Wardrep v. Houston, 168 Tenn. 170, 76 S.W.2d 328 (1934); *Texas*: Maryland Cas. Co. v. Donnelly, 50 S.W.2d 388 (Tex. Civ. App. 1932); *Utah*: Burke v. Industrial Comm'n, 75 Utah 441, 286 P. 263 (1930); *Virginia*: Ideal Steam Laundry v. Williams, 153 Va. 176, 149 S.E. 479 (1929).

cepted factors. The factors determining whether the special employer is liable under workmen's compensation for the borrowed employee's injuries are the same ones used to determine whether a relationship of master-servant exists. (These factors will be discussed later in this Note.) Therefore, this interpretation which provides that the special employer is liable for the injuries sustained by a loaned employee while performing specific tasks of the special employer is simply the common law doctrine completely carried over to workmen's compensation.

Scribner's Case[21] is representative of this majority view. This case involved a dispute between the insurers of the general employer (ice company) and a special employer (coal company) as to who was responsible to Scribner for his injuries. Scribner was employed by an ice company who lent him with a wagon and a team of horses to a coal company. This was a frequent arrangement between the two companies. By this arrangement, the servant received his wages from the ice company but took his orders from the coal company. The Massachusetts court held Scribner to be an employee of the coal company, the special employer. Therefore, the insurer of the coal company was responsible for workmen's compensation payments. The court expressed its reasoning in the following way:

> In order to safeguard fully the rights of all parties, the well recognized common law rule should prevail in the application of the Workmen's Compensation Act. The one who is in fact the employer should be held for the consequences of his own neglect, and the employee should not be deprived of the protection afforded him by the act.[22]

B. *Rejection of the Borrowed Servant Doctrine*

In a few of the jurisdictions, the borrowed employee doctrine is not recognized in the workmen's compensation cases even when there is clearly a loaned employee.[23] The Iowa supreme court has taken this position in *Muscatine City Water Works v. Duge*.[24] A widow was asking for workmen's compensation benefits due to the death of her husband. The municipal water works had loaned their employee, Duge, to the municipal electric company. Duge was to continue on the payroll of the municipal electric company. As in the *Scribner Case* the two insurance companies of the general and special employer were not denying the benefits due, but merely questioned who was responsible for pay-

[21] 231 Mass. 132, 120 N.E. 350 (1918).

[22] *Id.* at 351.

[23] *See, e.g., Iowa*: Coleman v. Ringle Truck Lines, Inc., 249 Iowa 1133, 91 N.W.2d 566 (1958); Elliott v. Wilkinson, 248 Iowa 667, 81 N.W.2d 925 (1957); Hassebroch v. Weaver Const. Co., 246 Iowa 622, 67 N.W.2d 549 (1954); Muscatine City Water Works v. Duge, 232 Iowa 1076, 7 N.W.2d 203 (1942); Hoover v. Independent School Dist., 220 Iowa 1364, 264 N.W. 611 (1936); Knudson v. Jackson, 191 Iowa 947, 183 N.W. 391 (1921); *Minnesota*: D.M. Gilmore Co. v. District Court of Hennepin County, 147 Minn. 12, 179 N.W. 216 (1920). *But see* Campbell v. Connolly Contracting Co., 179 Minn. 416, 229 N.W. 561 (1930); *New Jersey*: Rongo v. R. Waddington & Sons, Inc., 87 N.J.L. 395, 94 A. 408 (1915).

[24] 232 Iowa 1076, 7 N.W.2d 203 (1942).

ment. The Iowa supreme court held that the insurer of the municipal water works, the general employer, was responsible for the death benefits. The rationale for this decision was that in order to collect under workmen's compensation a contract of employment must exist. The court said that to have such a contract between a special employer and an employee of another there must be some expressed or implied recognition on the part of the employee of the existence of an employer-employee relationship. The court found no such consent either express or implied. The court further elaborated as to elements which would or would not be used in determining whether an employer-employee relationship exists. For example, the power to discharge would be a positive indication of the relationship, while the place of work or the kind of work would be irrelevant.

However, the reasoning in the *Duge*[25] case was later rendered superfluous by *Coleman v. Ringle Truck Lines, Inc.*[26] In this case Ringle Truck Lines leased from Coleman's employer, a tractor and semi-trailer for one year. The lease provided that the owners would operate the semi-truck themselves or provide a competent employee for that purpose. Coleman, the furnished employee was subsequently injured. The plaintiff's right to compensation was not in dispute, the only question was whether the lessor's insurer or the lessee's insurer was liable. The court held the borrowed employee doctrine not applicable in workmen's compensation cases. The court stated:

> The "borrowed servant" doctrine has been defined, in brief, as the rule that the general servant of one person may be loaned or hired by his master to another for some special service so as to become, as to that service, the servant of such other person. However, such relation is merely constructive and not real, and is actually a fiction resorted to by the courts to enable them, with greater ease and facility, to apply the law of negligence and especially the rule of respondeat superior. Some jurisdictions, including Iowa, have held such fiction, utilized in the law of negligence, has no place in the administration of a workmen's compensation act.[27]

Therefore, it appears that the borrowed employee doctrine is not applicable to workmen's compensation cases in Iowa. This position is one that has been favored by statutory law[28] and has also been enunciated as the most advantageous position by law review commentators.[29]

C. *General and Special Employer Held Jointly Liable*

There are some states[30] which have found joint and several liability in

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[25] *Id.*

[26] 249 Iowa 1133, 91 N.W.2d 566 (1958).

[27] *Id.* at 1135, 91 N.W.2d at 568.

[28] CONN. GEN. STAT. ANN. § 31-292 (Supp. 1971); COLORADO REV. STAT. ANN. § 81-13-1 (1963); and the English Statute, 6 Edw. VII ch. 58, § 13 (1906) discussed in Cayll v. Industrial Comm'n, 172 Wis. 554, 179 N.W. 771 (1920).

[29] *See, e.g.*, Parse, *General and Special Employer Problem in Workmen's Compensation—A Recommended Solution*, 33 TEX. L. REV. 1058 (1955); Note, *The Borrowed Servant Doctrine*, 9 LOYOLA L. REV. 225 (1959).

[30] *See, e.g.*, *California*: Wessell v. Barrett, 62 Cal. App. 2d 374, 144 P.2d 656

workmen's compensation cases involving the borrowed employee doctrine.

The leading case concerning joint liability is *Famous Players Lasky Corporation v. Industrial Accident Commission.*[31] In this case a motion picture company hired two airplanes, each with a pilot, to be used in the making of a movie. While making the picture one of the airplanes struck an air pocket and crashed injuring the pilot and causing the death of a passenger. The court held that the injured pilot was an employee of both the general and special employer. It was reasoned by the court that since under the common law the employee looks to the general employer for wages and to the special employer for compensation of injuries caused by negligence; the same employee should, therefore, be able under workmen's compensation to look to the general employer or the special employer or both for compensation of occupational injuries.[32] This interpretation holding both employers jointly and severally liable is an attempt to confer maximum protection for the borrowed employee. This undoubtedly protects an employee when either the general or special employer is insolvent. However, this interpretation appears to close off any common law action which the employee may have been able to maintain against the special employer as a third party, since the law of most states provides that workmen's compensation benefits are the exclusive remedy available against the employer responsible under workmen's compensation.[33]

III. Factors In Determining Liability

In the states accepting the borrowed servant doctrine under workmen's compensation, the courts have generally used four factors or tests in determining liability between the general and special employer. These four factors are:

(1944); Lloyd Corp. v. Industrial Accident Comm'n, 61 Cal. App. 2d 275, 142 P.2d 754 (1943); Lloyd Corp. v. Industrial Accident Comm'n, 60 Cal. App. 2d 5, 140 P.2d 77 (1943); Hartford Accident & Indem. Co. v. Industrial Accident Comm'n, 8 Cal. 2d 589, 67 P.2d 105 (1937); American Motorists Ins. Co. v. Industrial Accident Comm'n, 8 Cal. 2d 585, 67 P.2d 103 (1937); National Auto Ins. Co. v. Industrial Accident Comm'n, 220 Cal. 642, 32 P.2d 356 (1934); Department of Water & Power v. Industrial Accident Comm'n, 220 Cal. 648, 32 P.2d 354 (1934); Famous Players Lasky Corp. v. Industrial Accident Comm'n, 194 Cal. 134, 228 P. 5 (1926); Employer's Liab. Assurance Corp. v. Industrial Accident Comm'n, 179 Cal. 432, 177 P. 273 (1918); *Kansas*: Bell v. Hall Lithographing Co., 154 Kan. 660, 121 P.2d 281 (1942); Mendel v. Fort Scott Hydraulic Cement Co., 147 Kan. 719, 78 P.2d 868 (1938); *Kentucky:* Wright v. Cane Run Petroleum Co., 262 Ky. 251, 90 S.W.2d 36 (1936); *Michigan*: Wing v. Clark Equip. Co., 286 Mich. 343, 282 N.W. 170 (1938); *New York:* McDonald v. City of New York, 265 App. Div. 1026, 39 N.Y.S.2d 2 (1943); Schweitzer v. Thompson & Norris Co., 229 N.Y. 97, 127 N.E. 904 (1924); *Washington*: Lunday v. Department of Labor & Indus., 200 Wash. 620, 94 P.2d 744 (1939); American Sur. Co. v. Northern Trust Co., 240 Wis. 78, 2 N.W.2d 850 (1942).

[31] 194 Cal. 134, 228 P. 5 (1924).

[32] Quoting another case, the Supreme Court of California said:

> One and the same time they are generally the employees of the general employer and specially the employees of the special employer. As they may, under the common law of master and servant, look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards. *Id.* at 6.

[33] *See, e.g.*, Iowa Code § 85.20 (1971).

(1) which employer has control over the employee's activities; (2) which employer's business is being performed by the employee; (3) which employer is paying the employee's wages; (4) which employer has the power to hire, dismiss, or recall the employee. While the courts usually do not depend on only one of these exclusively in determining responsibility in the borrowed employee relationship, many courts do prefer to emphasize one factor more than another.[34]

However, before any court can consider these four factors it must first find a contract between the special employer and the employee. This contract can be either express or implied.[35] If the court finds no contract, the court may then abandon further deliberation and the general employer will be liable. If the court, however, finds such a contract, the court will then turn to consider the four factors. If the court finds that the weight of these factors are present in the contract of employment between the special employer and employee, the special employer is then liable; if not, the general employer remains liable.

A. *Control*

The factor most frequently favored by the courts is the right to control the employee's activities. It is usually interpreted as the power to manage the details of the work. This factor, however, should not be interpreted to mean that the employer *must* actually control the activities of the employee but should be interpreted as the *right* to control the employee's activities if the employer so desires.[36] If the special employer does not have the right to assume this direction and control over the borrowed employee, then the special employer is not held responsible within this factor.

B. *Whose Work Being Performed*

Of course, it is necessary to determine that the borrowed employee is performing the work of the special employer at the time the injury occurred and that he had not returned to work for his general employer.[37] In order to fulfill this factor under the borrowed employee doctrine, the employee must be substantially performing a special employer's work and only under minimum orders from the general employer. "Minimum orders" usually means that the employee has been told to report to the special employer and is only performing the general employer's work to the extent that he obeys this order. This obedi-

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[34] *See* Braxton v. Mendelson, 233 N.Y. 122, 135 N.E. 198 (1922); Keitz v. National Paving and Contracting Co., 214 Md. 479, 134 A.2d 296 (1957).

[35] IA A. Larson, Workmen's Compensation § 48.00 (1967). [Hereinafter cited as Larson].

[36] Stuyvesant Corp. v. Waterhouse, 74 So. 2d 554 (Fla. 1954); Pinson v. Minidoka Highway Dist., 61 Idaho 731, 106 P.2d 1020 (1940); Jackson Trucking Co. v. Interstate Motor Freight Sys., 122 Ind. App. 546, 104 N.E.2d 575 (1952); Uland v. Little, 119 Ind. App. 315, 82 N.E.2d 536 (1948); Bisson v. Winnipesaukee Air Serv. Inc., 91 N.H. 73, 13 A.2d 821 (1940); Mercier v. Holmes, 119 Vt. 368, 125 A.2d 790 (1956); Northern Trust Co. v. Industrial Comm'n, 231 Wis. 133, 285 N.W. 339 (1939).

[37] Turner v. Schumacher Motor Express, 230 Minn. 172, 41 N.W.2d 182 (1950).

equipment. The majority of decisions in this area hold that the general employer is responsible for the injuries of his employee.[49] The rationale behind the majority of these opinions is based on two factors. First, the special employer wants only usefulness of the rented equipment; and second, the general employer does not want to give up control and operation of his equipment.[50] When there is a contrary decision, it is usually based on the fact that the special employer is not only interested in the use of the equipment but also how the work is accomplished. Often times, these cases overlap into other areas of the law, such as, I.C.C. Regulations when a borrowed truck and driver are involved.[51]

C. *Business of Furnishing Employees*

When the employer is in the business of furnishing employees without any equipment, this presents another unique situation. The typical example of such a business is where an employer sends temporary help to another employer for a fee. This fee covers the cost of insuring and paying the employee as well as providing for the cost and profits of the enterprise. In this situation, it is generally held that the special employer is liable;[52] however, there are numerous cases to the contrary.[53]

V. Third Party Actions

Although workmen's compensation acts relieve the employer from common law liability for injuries to his employees, it does not prevent claims against third parties.[54] When an employee is injured he will oftentimes bring an action against the special employer as a third party. The special employer may attempt to avoid liability by setting forth the defense that he was subject to workmen's compensation. This defense would not be possible in states rejecting the borrowed employee doctrine in workmen's compensation cases but would be possible in the states accepting the doctrine. However, even under the jurisdictions accepting the borrowed employee doctrine under workmen's compsensation, the courts have not reacted favorably to this defense.[55]

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[49] Larson § 48.30 at 835-36.

[50] *Id.*

[51] *See, e.g.*, DeBerry v. Coker Freight Lines, 234 S.C. 304, 108 S.E.2d 114 (1959). *See also* Solan, *Liability of Carriers for Inedependent Contractors' Negligent Operation of Leased Motor Trucks*, 43 Iowa L. Rev. 531, 534-36 (1958).

[52] *See, e.g.*, St. Claire v. Minnesota Harbor Serv., Inc., 211 F. Supp. 521 (S.D. Minn. 1962); American Stevedores Co. v. Industrial Comm'n, 408 Ill. 449, 97 N.E.2d 325 (1951); Shipman v. Macco Corp., 74 N.M. 174, 392 P.2d 9 (1964); Daniels v. MacGregor Co., 2 Ohio St. 2d 89, 206 N.E.2d 554 (1965); Combustion Eng'r Co. v. Industrial Comm'n, 254 Wis. 167, 35 N.W.2d 317 (1948).

[53] *See, e.g.*, Ettlinger v. State Ins. Fund, 12 App. Div. 2d 568, 206 N.Y.S.2d 739 (1960); Diaz v. Ulster Vegetable Growers Coop., 282 App. Div. 426, 123 N.Y.S.2d 321 (1953); Ishmael v. Henderson, 286 P.2d 265 (Okla. 1955).

[54] *See generally* Note, *Third Party Tort-Feasor Action*, 16 Drake L. Rev. 93 (1967).

[55] Larson § 48.10 at 806.

VI. Conclusion

While workmen's compensation cases involving the borrowed employee doctrine are highly unpredictable, certain elements reoccur in nearly every jurisdiction. Nevertheless when dealing with a case of this nature, it appears to be best to cite only cases in one's own jurisdiction because of each state's particular statutory construction and unusual variations in case law. The one exception is perhaps a case from another jurisdiction which falls under the same interpretation as one's own jurisdiction and presents nearly identical facts.

Various value judgments and reasoning are reflected in the different jurisdictions concerning the borrowed employee doctrine under workmen's compensation. However, it appears that a statute designating that the general employer will remain liable in a borrowed employee case under workmen's compensation is the surest and most expedient method of carrying out the purposes of workmen's compensation. A statute holding the general employer liable, similar to Connecticut's, works to the greatest benefit of the employee. However, in situations where the general employer does not come under the workmen's compensation law of the state, the special employer should then be held liable by a statutory exception to this statute.[56] The statute should allow a third party action against the special employer by the injured employee unless he has collected workmen's compensation benefits from the special employer when the general employer was not covered. If a statutory provision has not been adopted in the state, the second interpretation—such as accepted in Iowa—rejecting the borrowed employee doctrine under workmen's compensation is almost as effective.

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[56] This would be a statutory exception similar to Hawaii's. However it would hold the special employer liable instead of the general employer. *See* Hawaii Rev. Laws § 386-1 (1968).

Case Notes

Civil Rights—EMPLOYER VIOLATED TITLE VIII OF CIVIL RIGHTS ACT OF 1964 BY REQUIRING HIGH SCHOOL EDUCATION OR PASSING OF STANDARDIZED GENERAL INTELLIGENCE TESTS AS CONDITION OF EMPLOYMENT OR PROMOTION WHERE NEITHER REQUIREMENT WAS SHOWN TO BE JOB-RELATED.—*Griggs v. Duke Power Co.* (U.S. Sup. Ct. 1971).

The thirteen plaintiffs, all Negroes, brought this class action on behalf of all Negroes presently employed and all those who may be subsequently employed by the defendant, Duke Power Company. They alleged that defendant engaged in discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964[1] by requiring a high school education or passing of standardized general intelligence tests as a condition of initial employment or promotion into higher departments, thus operating to freeze Negroes into jobs of lower status because of previous racial employment practices. The district court[2] found that while the Company had practiced overt racial discrimination prior to the Act, such conduct had ceased, and thus the impact of prior inequities was beyond the reach of the court. The court of appeals[3] reversed in part and affirmed in part, holding that the high school education or test requirements could not be applied to those Negroes employed by Duke prior to the institution of the requirement, since whites hired contemporaneously had previously obtained higher positions without being subject to those conditions. The court of appeals noted, though, that in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. The United States Supreme Court, reversing the latter part of this decision, *held* that an employer is prohibited from requiring a high school education or passing of standardized general intelligence tests as a condition of employment or promotion when neither standard is shown to be significantly related to successful job performance. *Griggs v. Duke Power Co.*, 91 S. Ct. 849 (1971).

The defendants' Dan River Power Plant in North Carolina, in which the plaintiffs were employed, for functional purposes was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Prior to 1955, Negroes were employed *only* in the Labor department where the maximum wage was less than the minimum in other departments.[4] Promotions were normally made inter-departmentally.[5] In 1955, the Company instituted the policy of requiring a high

[1] 42 U.S.C. § 2000e *et seq.* (1964).
[2] Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C. 1968).
[3] Griggs v. Duke Power Co., 220 F.2d 1225 (4th Cir. 1970).
[4] *Id.* at 1228.
[5] *Id.*