

October 1957

## Subrogation Rights of Employer Barred as Against Statutory Co-Employees

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### Repository Citation

Charles R. Cloud, *Subrogation Rights of Employer Barred as Against Statutory Co-Employees*, 1 Wm. & Mary L. Rev. 123 (1957), <https://scholarship.law.wm.edu/wmlr/vol1/iss1/17>

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places a harsh burden on hotelkeepers notwithstanding the fact that it also gives them an opportunity to limit their common law liability through positive action.

What are the needs of modern society that make it necessary to impose upon hotelkeepers a rule that served its purpose well in the days when the highways of England were infested with bandits, and when inns were as much places of protection as places of sustenance and rest? It is suggested that this rule of the common law has outlived its usefulness and that when the reason for the rule ceases, the rule itself should cease.

K. H. L.

### WORKMEN'S COMPENSATION— SUBROGATION RIGHTS OF EMPLOYER BARRED AS AGAINST STATUTORY CO-EMPLOYEES

*Rea v. Ford*,<sup>1</sup> a recent decision handed down by the Supreme Court of Appeals of Virginia, places Virginia with a small minority of states in respect to the question: Is a sub-contractor amenable to suit when an employee of the principal contractor is injured due to the negligence of the sub-contractor or his agent? Virginia, along with Massachusetts and Florida, holds that the sub-contractor is not amenable to suit.

The facts of the instant case showed that the principal contractor rented a crane and its crew from a sub-contractor for work on a construction project. During this work, due to negligence of either the sub-contractor or his agent, or both, an industrial accident occurred resulting in the death of one of the principal contractor's employees.<sup>2</sup> Decedent's widow asserted her claim for compensation under the Workmen's Compensation Act against the principal contractor and his insurance carrier. An award was entered in her favor by the industrial commission from which no appeal was taken.<sup>3</sup>

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<sup>1</sup> 198 Va. 712, 96 S.E.2d 92 (1956).

<sup>2</sup> Although agency and negligence questions arose, the court failed to discuss them.

<sup>3</sup> Evidence appeared that the sub-contractor, Ford, had accepted and complied with the act.

This suit was instituted by the insurance carrier of the principal contractor, in the name of Rea's administratrix, against the sub-contractor, Ford. It was brought under the provisions of the Virginia Workmen's Compensation Act<sup>4</sup> which provides for the subrogation of employer to employee's rights against third parties when a lawful claim has been made against the employer under the Act.

The court in determining the sub-contractor's non-amenability to suit relied upon the following sections of the Virginia Workmen's Compensation Act:<sup>5</sup>

Section 65-37. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

Section 65-38. The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against *any other party* for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. . .

Section 65-99. Every employer subject to the compensation provisions of this act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner here specified. [Emphasis added.]

The common employment interpretation of *Feitig v. Chalkley*<sup>6</sup> and *Sykes v. Stone & Webster Eng. Co.*<sup>7</sup> is again used to define "a stranger to the employment" with the result that a sub-contractor who had not even been present or given instructions as to how,

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<sup>4</sup> Va. Code §65-38 (1950).

<sup>5</sup> Va. Code §§65-37, 38, 99 (1950).

<sup>6</sup> 185 Va. 96, 38 S.E. 2d 73 (1946).

<sup>7</sup> 186 Va. 116, 41 S.E. 2d 469 (1947).

when, or where to work is held not to be a stranger to the employment.

In the *Feitig* case, *supra*, it was held that a fellow employee is not an "other party" within the meaning of Section 65-38 and thus is not subject to an action at law for damages as a result of his own negligence. The court arrived at this immunity to suit for the co-employee by giving the words in the phrase "he (the employer) or those *conducting* his business"<sup>8</sup> what they felt was a "usual and ordinary meaning." [Emphasis added.] The court appeared to consider that any and all employees of an employer were conductors of the employer's business.<sup>9</sup>

Further, the court in interpreting an amendment to the statute,<sup>10</sup> which provided for the assignment to the employer of the right to recover damages which the injured party might have against "any other party," said that since immunity was granted to a co-employee in Section 11 of the 1918 Act (now Section 65-99), then the intention in the amendment to Section 12 of the 1918 Act in 1920 (now Sections 65-37, 65-38), must be that "any other party" refers to one outside the employer-employee relationship. The unfortunate choice of words the Court used to describe this situation was "a stranger to the business."<sup>11</sup> The court lays the ground work for extending the area of immunity by stating that "the Workmen's Compensation Act is exclusive in so far as it covers the field of industrial accidents, but no further."<sup>12</sup> The implication is that the only remedy for one injured in an industrial accident is the remedy afforded by the Workmen's Compensation Act. However, the court neglected to state that in *Griffith v. Raven Red Ash Coal Co.* the court was talking about remedies against the employer, and not about remedies against a negligent co-employee or sub-contractor. Thus any action arising from an industrial ac-

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<sup>8</sup> Va. Code §65-99 (1950).

<sup>9</sup> Rather than this strained interpretation, it would seem more ordinary and usual that such words would suggest immunity for those in a supervisory capacity, i.e., vice-principals, and not merely those *performing* the employer's work. North Carolina in giving an ordinary meaning to such words as "those conducting his business" arrives at an opposite conclusion, holding that such does not include a co-employee. *Tscheiller v. National Weaving Co.*, 214 N.C. 449, 199 S.E. 623 (1938).

<sup>10</sup> Va. Code §65-38 (1950).

<sup>11</sup> *Feitig v. Chalkley*, 185 Va. 96 at 102, 38 S.E.2d 73 at 75 (1946).

<sup>12</sup> *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942).

cident against the employer *other* than that allowed under the Workmen's Compensation Act is barred unless the accident occurred outside the industrial field.<sup>13</sup> The court states that the purpose of the Act was to cast the loss upon the business as an ultimate expense thereof.<sup>14</sup> Was this the purpose? Or was it merely an equitable way for reaching the main purpose of Workmen's Compensation Acts—to benefit the workman by awarding him compensation where previously none could be obtained.<sup>15</sup>

The court concluded by saying that the underlying principle was stated by Chief Justice Rugg thus:<sup>16</sup>

One purpose of the Workmen's Compensation Act was to sweep within its provisions all claims for compensation flowing from personal injuries arising out of and in the course of employment by a common employer insured under the act, and not to preserve for the benefit of the insurer or of the insurer and those injured liabilities between those engaged in the common employment which but for the act would exist at common law. That is the broad ground underlying the decisions already cited.<sup>17</sup>

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<sup>13</sup> Such intention and purpose is clearly evident in Section 65-37. But as to the extension of such immunity to co-employees and subcontractors, the purpose first appeared in the minds of the court—not the legislature. There is no apparent justification for construing that the purpose of the Virginia Workmen's Compensation Act is to make the only remedy of the employee for any accident occurring within the industrial field the remedy prescribed by the Act. The intent was to affect the relation between the employer and his employee and not that relation between employee-employer, or employee-second-contractor.

<sup>14</sup> 185 Va. 96 at 99, 38 S.E.2d 73 at 74 (1946).

<sup>15</sup> *Humphreys v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926).

<sup>16</sup> *Bresnahan v. Barre*, 286 Mass. 593 at 597, 190 N.E. 815 at 817 (1934).

<sup>17</sup> It is interesting to note, that the then Under Secretary of Labor, Arthur Larson, in criticizing the manner in which Massachusetts arrived at the same holding as Virginia as to a sub-contractor's non-amenability to suit was especially critical of the afore-mentioned quotations of C. J. Rugg. (Larson, *The Law of Workmen's Compensation*, Vol. 2, 1956, Matthew Bender & Co., Inc., Albany, N. Y., Sections 72.32, 72.33). Massachusetts, under a statute permitting a third party action "where the injury for which compensation is payable was caused under circumstances creating a legal liability in some other person than the insured" (Mass.G.L. [ter ed.] c. 152 Section 15), began with the idea that only the insured (i.e. the employer) is granted immunity and ended up with the result that the employer's employee is given immunity (*Caira v. Caira*, 296 Mass. 448, 6 N.E.2d 431 (1923).) The rather anomalous result reached by the Massachusetts court is that an employer is held to mean employee. The Massachusetts court had no more qualms about legislating than the Virginia court did, especially when the result appealed to the court's conscience.

Virginia took her next step in *Sykes v. Stone & Webster Engineering Corporation*,<sup>18</sup> where the court held that there can be no action at law against the principal contractor for the wrongful death of an employee of the sub-contractor. The reasoning of the court is that the principal contractor is not *a stranger* to the employment and the work. Thus the court applies a catch phrase of the *Feitig* case without contemplating the original connotation of the words. What was originally meant to describe one outside the employer-employee relationship is now glibly said to embrace all those in the common employment. This extension in meaning is largely responsible for the plunge overboard in the instant case.

Upon consideration of the opinion of the court in the instant case, it is questionable whether the court realized that by so holding they were reaching such a minority result. Indeed, by reading the above code section with the intent and purpose of the Workmen's Compensation Act in mind, one is hard pressed to realize how the court arrived at such a holding. It would appear that the court is striving to make all who come under the canopy of the Workmen's Compensation Act immune from any common law liability and, in addition, to limit the remedy of the injured parties to recovery under the Workmen's Compensation Act. The Court fails to mention what the result might be in other jurisdictions. In fact, by stating that this case is the converse of the *Sykes* case, the court seems to mislead itself. Granted, that as far as parties are concerned, it is the converse.<sup>19</sup> But as to the legal proposition involved, there is a distinction. In the *Sykes* case, the injured employee can elect to receive his workmen's compensation from either the sub-contractor or the principal contractor but if the principal contractor is forced to pay he is entitled to indemnity from the sub-contractor.<sup>20</sup> However, in the present case the employee has no election. If he is to receive his benefits under the Workmen's Compensation Act, he must proceed against the principal contractor. As far as liability is concerned, the sub-contractor is a total stranger—he has no fear of a common law action, and has no responsibility under the Workmen's Compensation Act.

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<sup>18</sup> 186 Va. 116, 41 S.E.2d 469 (1947).

<sup>19</sup> Principal contractor's employee against sub-contractor in the *Rea* case as opposed to sub-contractor's employee against principal contractor in the *Sykes* case.

<sup>20</sup> Va. Code §65-30 (1950).

Insofar as they have gone, the Virginia Supreme Court of Appeals has reached decisions which are in line with most other jurisdictions with similar type acts and which seem to give the more desirable results. Workers in the industrial field, especially extra-hazardous fields, not only are subjected to the risks of injury, but also there is a great risk that they will negligently injure a co-employee. Thus if his own negligence can cost him thousands of dollars in damages, the beneficial effects of workmen's compensation might be affected by the potential liabilities which confront the worker.<sup>21</sup>

Forty-one states now have statutes which provide that the principal contractor shall be liable for compensation to the employee of an uninsured sub-contractor under him doing work which is a part of the principal contractor's.<sup>22</sup> Thus, in effect, for purposes of compensation, the principal contractor is made a statutory employer of the sub-contractor's employee. It follows that the principal contractor's employee is in effect made a statutory co-employee. There is a statutory employer-employee relationship between the principal contractor and the sub-contractor's employee giving immunity to the principal contractor from an action at law based on the negligence of the principal contractor. Also, on the basis of the aforementioned reasoning as to immunity of co-employee, there should be immunity granted to the statutory co-employee. Such results seem to be the modern trend and it is conceivable that in the near future most states will have statutes expressly granting immunity to such parties.

Virginia is, however, doing this by questionable judicial legislation, the first of which appeared in *Feitig v. Chalkley*,<sup>23</sup> was later enlarged in *Sykes v. Stone & Webster Engineering Corp.*,<sup>24</sup> and culminated in the instant case.

Unless there is an express provision granting immunity to all within the common employment, or all who come under the Act, there is no justification for holding the sub-contractor, whose negligence injures the employee of the principal contractor, immune from suit at law. There is no employee-employer relation! There

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<sup>21</sup> Larson, *The Law of Workmen's Compensation*, §72.20 (1956).

<sup>22</sup> *Ibid.* And see §72-31.

<sup>23</sup> 185 Va. 96, 38 S.E.2d 73 (1946).

<sup>24</sup> *Supra* at note 18.

can be no recovery under the Workmen's Compensation Act from the sub-contractor (in fact in a majority of cases the sub-contractor does not even carry insurance—one of the reasons for the amendment allowing the sub-contractor's employee to recover under the act from either the sub-contractor or the principal contractor!) A tortfeasor should not be allowed to escape liability for his own wrongdoing.<sup>25</sup>

The easiest remedy for this situation would be for the court to correct itself. But in so doing, it will have to again indulge in judicial legislation or else lag behind the modern concept of workmen's compensation, with the end result that the legislature will have to make amendments. Therefore the most expeditious and proper remedy would be for the legislature to step in and expressly manifest the course it wishes the courts to follow. The writer is not prepared at this time to advocate remedial measures for the legislature to follow. There are valid arguments on both sides of the question. The writer's main complaint is the process the court used in arriving at the decision—not the decision itself.

C. R. C.

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<sup>25</sup> *Rehn v. Bingham*, 151 Neb. 196, 36 N.W.2d 856 (1949) per Chappell, J.