New Jersey
Court of Errors and Appeals

HENRIETTA I. KENNEDY, Admx., &c., of James E. Kennedy, decd., Appellant and Plaintiff below, vs. THE DAVID KAUFMAN & SONS COMPANY, a corporation, &c., Respondent and Defendant below.	On Appeal from New Jersey Supreme Court.

BRIEF FOR APPELLANT

Statement

This appeal brings up for review, an order and judgment, made upon the striking out of the complaint of the plaintiff below, filed in the Supreme Court.

The paragraphs of the complaint objected to, which embrace the whole of plaintiff's action, are as follows:

2. The defendant is a corporation of the State of New Jersey, and among the objects for which it was incorporated are to buy, sell and deal in iron, steel and all kindred products, and to acquire by purchase or otherwise materials of the above and to acquire merchandise and personal property of all kinds of class and description, and hold, sell, trade and otherwise dispose of the same.

3. On August 15, 1913 and August 18, 1913, the defendant had such dealings in writing with the Standard Oil Company, that it purchased a certain metal tank from said Oil Company #2023 at the Crude Department of the said Oil Company, Bayway, N. J., and the said defendant *as part of the said contract of said purchase, assumed to cut down, remove and load and ship the said tank.*

4. On August 20 and 22d, 1913, the defendant had such dealings in writing with one M. Hendriksen or Hendrickson, *that it engaged him to cut down* said tank for it, and *to load* the same as taken down on *car or cars of the defendant,* and entrusted to this said Hendriksen or Hendrickson the entire work of furnishing the ways, works, machinery or plant of doing the aforesaid work, and entrusted him with the duty of seeing that these were and should be in proper condition.

5. After August 22, 1913, James E. Kennedy, plaintiff's deceased was engaged and hired by the said Hendriksen or Hendrickson *as a laborer to cut down* and remove the aforesaid tank, and that while engaged at said work on September 6, 1913, the said tank collapsed through the defects in the

ways, works, machinery or plant in and about the said tank, *which defects arose, and had not been discovered and remedied through the negligence of the said Hendriksen or Hendrickson, who had been entrusted by the defendant with the duty of seeing that they were in proper condition,* and that as a result of the said collapsing plaintiff's deceased, James E. Kennedy was hurled to the ground and struck and forcibly covered with parts of the said tank and appliances, connected therewith, and received such injuries that he straightaway died on the 6th day of September, 1913, plaintiff's deceased himself not being willfully negligent at the time.

POINT I

The New Jersey Employer's Act differs from all others.

A careful examination of the various Employer's Liability Acts, of the many states and countries, which have adopted such legislation, shows that no other act is precisely like the one which we have in this State.

California has an Arbitration Board; Connecticut, agreement between the parties; Illinois, same procedure; Kansas, applies only to employer of more than fifteen men, and arbitration by both; New York, act not yet in effect, and previ-

ous act declared unconstitutional; (*Ives vs. Railway Co.*, 201 N. Y., 271); Texas, arbitration between parties, act being something like Massachusetts; Washington, arbitration between parties, and much involved. The acts of foreign countries carry out the provisions by commissioners who arbitrate. So that counsel is able to state that there is no other act in existence precisely like that in New Jersey, which, as I shall show, is much simpler than any other, and was evidently designed to overcome all difficulties met with in other jurisdictions.

The acts which most nearly resemble our own, are those of Massachusetts and England, although the procedure is not as simplified as ours. In these acts, and those stated above, various sections are employed to cover the different classes of employments to which they relate.

In other states of the Union, not set forth above the acts are all liability acts, and not compensation acts. These define what negligence of either party entitles to recovery, and are extremely complicated, dealing with who is or who is not a fellow servant, and the like.

It may be stated at the outset, that the New Jersey act embraces all employers of labor, unless the employer or workman serves notice on the other that he does not wish Section 2 to apply; then they go under the common law Sections of

1 and 3, with no defence except wilful negligence on the part of the workman. This was undoubtedly done to avoid the constitutional objection of depriving either side of a trial by jury. That was the fatal objection to the New York Act, (*Ives vs. Rlwy. Co.*, 201 N. Y., 271).

The other provision giving the right to a common law action, is the one in question, Paragraph 3 of Section 1, relating to an employer hiring an independent contractor to do his work. That will be gone into fully hereafter, but the design of it may be stated here as undoubtedly being to protect the whole act. Otherwise, an employer would only have to hire a worthless independent contractor every time he wished his work done, and thus escape liability.

The distinction that must be kept in mind at the very beginning is this, that every person who hires a contractor is not responsible for injuries to the workmen of that contractor. A man who hires a man to paint his house is not responsible to the workmen of that man; a man who hires a contractor to build a house for him is not responsible to the workmen of that contractor. A man is only responsible to the workmen of his independent contractor when he hires that contractor to do and perform some work which he (the principal) has contracted to do himself or has undertaken to perform himself. That is why the defendant is charged in this case, because the defendant *undertook and as a part of* its contract of purchase *agreed to cut and take down the tank.* The independent contractor was therefore doing what it contracted to do, in and about its business of dealing in metals.

POINT II

The Massachusetts Liability Acts

The Massachusetts Act of 1887, contained many provisions which were so complicated, that much litigation resulted, and workmen were frequently defeated, and in many cases were in no better position than before the passage of the Act. This was especially so in regard to the workmen of an independent contractor, as shown by the section relating to that subject:

> "4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract ~~with a sub-contractor to do all or any part of the work comprised in such contractor's contract~~ with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employees of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery or plant *if they are the property of the employer, or furnished by him,* and if such defect arose or had not been discovered or remedied through the negligence of the employer or some person intrusted by him with the duty of seeing that they were in proper condition."

The italicized part of this section shows these words to be absent from the N. J. Act. The great difference is that this Massachusetts section restricted recovery to cases where the original employer furnished to the independent contractor the ways, works, machinery or plant.

This is quite different from Par. 3 of Sec. 1 of our own Act which is much broader, so that, Justice Bergen, in reading the defendant's brief below, may have been somewhat influenced by *Sullivan vs. Gas Co.,* 190 Mass., 208, which construed this section. It was stated at the time that our Par. 3 was similar to the above Sec. 4, but it will be seen that there is a vast difference.

As Sec. 4 stood above, it proved very unsatisfactory. In fact the whole law was so complicated that a new act was adopted in 1911, and the part relating to the workmen of independent contractors is as follows:

> "If a subscriber enters into a contract, written or oral, with an independent contractor, to do such subscriber's work, or if such a contractor enters into a contract with a subcontractor, to do all or any part of the work comprised in such contract with the subscriber, and the Association would, if such work were executed by employees

immediately employed by the subscriber, be liable to pay compensation under this Act to those employees the Association shall pay to such employees any compensation which would be payable to them under the Act, if the independent or sub-contractors were subscribers (association allowed to recover indemnity)."

This section shall not apply to any contract of any independent contractor, merely ancillary, and no part of or process in the trade or business carried on by the subscriber.

Mass. Laws of 1911, Chap. 751, Sec. 17, Part 3; Vol. 5, Labatt M. & S., p. 5559.

The above section in many respects is like that of the English Act of 1897, and it will be seen that it is a great advance over the former law of Massachusetts.

Massachusetts requires employers to join an accident association, and this association awards a compensation, subject to a review by the County Court. Up to the present time there has been no decision recorded concerning this section. But it will be seen that the italicized words in the old section do not figure in the slightest degree in the new section.

POINT III

The English Liability Acts, the foundation of the New Jersey Act.

As was stated by Judge Martin, in the Essex Common Pleas, in *Sexton vs. Telegraph Co.*, 34 N. J. L. J., 368, "The Act in question (N. J.) is to a great extent a copy of the Workmen's Compensation Act, of England." The decision was affirmed in 55 Vr., 85.

So that we must turn to the English Law, and the decisions and comments thereon.

The original section of the English Act of 1897, relating to independent contractors, was as follows:

> "Sect. 4. Where, in an employment to which this act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this act to those workmen in respect of any accident arising out of, and in the course of, their employment, the undertakers shall be liable to pay to any workmen employed in the execution of the work any compensation which is payable to the workmen (whether under this act, or in respect of personal

negligence or wilful act independently of this act), by such contractor, or would be so payable if such contractor were an employer to whom this act applies: Provided, That the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

"This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, of process in the trade or business carried on by such undertakers respectively." Act of 1897, as set forth in Vol. 2, of Labatt, on Master and Servant, (1st Ed.,) Sect. 755, p. 2143 * * *.

This was followed by a new act in 1906 and Section 4 now reads:

"(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with another person (in this section referred to as the contractor), for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work, any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where

compensation is claimed from or proceedings are taken against the principal, then in the application of this Act, references to the principal shall be substituted for ~~the~~ references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman, under the employer by whom he is immediately employed." (Here follows an exception as to agricultural work).

6 Edw., 7, C. 58.

The above is taken from Elliott's Workmen's Compensation Act (6th Ed., 1912) at p. 187.

Counsel deems it best, before presenting the N. J. Act, and giving his own views, to state the views of several noted English writers, concerning the above section, the first being that of Elliott.

"Object of this Section." The object of this Section is, perhaps, best illustrated by applying it to cases of sub-contracting. In such cases its object is to make the chief contractor or principal liable to all the workmen engaged on the work, which he has undertaken to do, no matter in whose employment those workmen may happen to be. In other words the section makes the principal liable for injuries received by a workman, who is not in his own employ, but who is employed by or under a contractor, who has contracted with the principal to execute the whole or a part of the work undertaken by him.

The person who in the first instance undertakes the work is the "principal"; the person who contracts with him to do the whole or any part of the work which he has undertaken to do, is the "contractor," and when the whole or any part of the work undertaken by the principal is executed by or under the contractor, the principal becomes liable to pay compensation for injuries to all the workmen engaged in the execution of the work, just as though they were all in his own employment—a law which is very beneficial to workmen.

"Under the general law a principal or a contractor, who sub-lets to an independent sub-contractor, is not responsible to the others for the acts or defaults of that sub-contractor; that is to say, a principal or contractor, by subletting a contract, could divest himself of all responsibility, in respect of all accidents occurring on the work he had sub-let. So that if a sub-contractor were a man of straw, the result was, that a workman's remedies at common law, or under the Employer's Liability Act, were useless to him because he was the immediate servant of an impecunious sub-contractor.

It was undoubtedly to meet this state of things that Sec. 4 was inserted in the Act, (originally it was not in 43 and 44 Vic., 42), and the effect of it is to provide that where a principal, does not himself perform a particular work which he has undertaken, but substitutes another person for himself in the performance of it, he incurs the same liability to the workman of the person whom he so substitutes, as if that person were in his own employment. Such being the effect of the section, a workman is no longer deprived of compensation, because a contractor or sub-contractor, who hap-

pens to be his immediate employer, is unable to pay it, as he has now a remedy against the principal."

Elliott, *ibid.*, pp. 189, 190.

For instance, if A, a builder, contracts with B to erect a house for him, A is the "principal" and not B.

If A sublets a portion of the contract to C, and one of C's workmen is injured, the injured workman can claim compensation from A by reason of this section. Beyond, the section does not go. It does not give any claim for compensation against B, for whom the house is being built, but who himself does not engage in and undertake the work.

Elliott, *ibid.*, p. 191, citing McGregor vs. Dansken, 36 S. L. R., 393.

Excluding these two possible constructions, the only possible construction was that the words ("undertaken by the principal") referred to cases where a person contracted for the execution by a contractor of any work which was part and ~~principal's~~ PARCEL OF HIS OWN trade or business.

Elliott, *ibid.*, p. 195.

What seems clear is that, whilst a man is not to be liable as a principal when in his private life, or anything apart from his trade or business, he contracts with another to do work for him, yet in all matters connected with his business, happening on his premises, or premises under his con-

trol, and being part of work undertaken by him, he is to be responsible. Thus, a gentleman who has a house built for himself would hardly be a principal within the meaning of this section, whilst the contractor building it for him who let out a portion of the work on sub-contract clearly would be.

Dawbarn's Employer's Liability, etc (1911), at page 176.

Possible meanings of Section 4—three different views were possible as to the meaning of the section.

1. That it includes any work done by a contractor for a principal in the course of, or for the purposes of the principal's trade or business.

2. That it includes all the work done by a contractor for a principal, which is in the way of the principal's trade or business.

3. That it only includes work done by a contractor for a principal, which the principal, in the way of his business, has contracted with a third party to do himself.

Ruegg's Employer's Liability (Eng., 1910) page 417.

The author expressed the opinion in the last edition of this work, that the second meaning propounded (No. 2, *supra,* which, of course, includes No. 3) would be found to be the correct one, and that the principal is liable not only where he himself contracts with a third party, but where he sub-contracts for any work which is within the scope of his own trade or business, *i. e.,* work

which in the ordinary course of following his trade and business he holds himself out as being willing to do, excluding work which can not fairly be called a part of his trade or business.

Ruegg, *ibid.*, at page 419.

The aforesaid references to the works of eminent authorities, show that no such fine distinctions are drawn by them, as Justice Bergen drew in the case below.

All of those references show that where the person "undertakes" the work, that is where he is the principal, and he gets somebody to do the very work he himself ought to have done, or held himself out as being ready to perform, then he is responsible.

Line 12, case page 7, shows clearly that the defendant was to "cut down" the tank. Then, of course, he "undertook" the work of cutting down the tank.

Counsel now appends cases bearing out the references made heretofore.

In this, counsel has avoided citing any cases from states which have not a compensation law. There is positively no use in citing cases from New York or any states which have only "Liability Laws," that is laws which attempt to define when an employer or his contractor may be held, and which are no more than something declaratory of the common law itself. All of these statutes have words in them that directly limit the liability of the principal, and all of them have led to endless trouble.

The Court below must have been greatly influenced by the Massachusetts cases cited, and yet, as hereinbefore stated, the act was entirely different from our own; has been repealed by a new act containing no such words as the former act; and no decisions at all on the new act.

Counsel still contends, as upon the argument below that the meaning of our own section must be got from a study of the English decisions, because they have only applied the section where it was perfectly apparent that the independent contractor was doing the work or undertaking of the principal.

They did not apply it in *Skates vs. Jones & Co.*, 3 Butterworth's Comp., cases, 460, because although the defendants had contracted with Howarth, to move a building for them, and one of Howarth's men was hurt, the defendants were not liable to him. They were billiard hall keepers, and although the work of moving the building was "required" by them, yet it was not "undertaken" by them. That is quite different from purchasing a metal tank, in which one deals, and actually agreeing in the purchase to cut it down, and then hiring someone to do it for one. If that is not "undertaking" in its fullest sense, then it is difficult to conceive otherwise.

POINT IV

The decisions under the English Act.

The following decisions under the English act will show how they have construed the section, and especially the words "undertaken."

There are no decisions in the State directly upon the point, so that the meaning and intention of the independent contractor section can best be got by considering the English decisions upon the workmen's act.

> "It is not out of the way to consider what is the place of this section, that is to say, what is the position in the scheme of the Act—and for this purpose it is perfectly proper to look at the rubric. You may look at the rubric of the section in examining the position of the section of this act, though you can not do so in order to put an interpretation upon the actual words of this section.
>
> "Now the rubric is 'sub-contracting.' The act has dealt with the ordinary relations between employer and employee; it goes on to provide for the cases where a middleman or subcontractor is introduced. It seems to me that what is in the section is clear enough.
>
> "When a person has undertaken as principal to perform a piece of work, and then

enters into a contract with another for the performance of the whole or part of the work, he will be liable to the workmen employed by that other contractor, but always provided he has undertaken to perform the work.

"Now the undertaking as a principal must mean undertaking on the order of someone else, *viz.*, a customer. In other words to get the state of affairs contemplated by the section, there must be an undertaking by A to perform the work for B, and a sub-contract between A and C (whose immediate servant the workman is), to perform the work undertaken.

"In the present circumstances, I am unable to see that the work of leaving the building in position, was work undertaken by the appellant, whose business is not the erection or repair of structures, but the manufacturer of chemicals; and the 4th section does not apply."

Zugg vs. Cunningham, Vol. I, Butterworth's Compensation Cases, 257.

Cozzens-Hardy, M. R.:

"The appellants, Wilson's Sons & Co., Ltd., are a company carrying on business as coal merchants and lighter-men in England and elsewhere, including Cape Verde.

"The business of lighter-men is mentioned among the first objects of the company, and the organization of the association expressly authorizes the purchase of lighters.

"Lighter No. 393 was purchased by the appellants in England for use in their business in Cape Verde. Not being minded themselves, to undertake the navigation, they entered in to a contract dated March 17, 1908, with Glover, by which in consideration of £92, Glover agreed with the appellants (described as owners), on receipt of written instructions to take the lighter from Stocton to St. Vincent, and deliver her to the owner's house there.

"Glover was to provide a sufficient crew, and pay their wages, and to indemnify the owners against any claims of the crew.

"The accident to Ditmar happened during rough weather off Ramsgate. In these circumstances I think that the appellants, in the course, or for the purpose of their trade or business, contracted with Glover, for the execution by or under Glover, of part of the work proper to their undertaking, and in that sense undertaken by them, so that the case falls within the precise terms of Section 4."

Ditmar vs. Wilson's Sons and Co., Vol. 2, Butterworth 178, at pages 181 and 182.

At the hearing before the County Court judge, evidence was given on behalf of the defendants by one of the partners, that they never did pull down houses; that it was usual to have a pulling down clause in their contracts for reconstruction or alteration; and that when they entered into this contract it was the intention to pull down the house and rebuild, and that they sub-contracted

to pull down this house. Further evidence was also given that the defendants never did pull down a building themselves, and that the business of builders was distinct from that of housebreakers, and the deceased workman was employed by the sub-contractors.

Collins, M. R.:

"Then as to the question as to whether the defendants were undertakers within the meaning of the act. It is first said that the defendants were not undertakers, because they did not themselves deal directly with the work of demolition. The answer to that contention is that according to the evidence it was a regular part of the business to contract for the demolition of buildings, although it may be that they did not actually do the work themselves, for the purpose of constructing or altering a building.

"I do not see where there could possibly be better evidence that the defendants were undertakers in respect to the work. Therefore it seems to me that they were in fact undertakers. I construe the term 'undertakers' in the act by reference to the act itself and I do not care what it may be in other acts.

"There is nothing in this case to exclude the defendants from being undertakers. This particular accident arises under Section 4 of the act, which deals with the question of undertakers and holds as an undertaker the very person who *ex-hypothesi* has contracted with another to do the work.

"Therefore Section 4 embraces a person who is actually doing by others the work

which he has contracted to do. The appeal fails and must be dismissed."

Knight vs. Cubitt & Co., 85, Law Times Reports 526 (1902).

It is perfectly evident from a reading of the above citations that the defendant in this case is clearly responsible for the acts of Hendrickson, his independent contractor.

The latter part of *Knight vs. Cubitt* above, certainly and exactly fits the case under consideration, because the Kaufman Company contracted with the Standard Oil Company to buy the tank and cut it down. Then the Kaufman Company hired and contracted with Hendrickson to do this very same work of cutting down this said tank, and plaintiff's deceased, working for Hendrickson, was killed during the progress of the work.

POINT V

The requirements of the statute have been complied with.

In order to make a complaint sufficient in law against the defendant, counsel contends that the following matters were only necessary to be pleaded:

(1) That the defendant contracted to cut down and remove the tank.

(2) The defendant contracted with another to do this "part of" the very same work.

(3) The plaintiff's deceased was employed by such independent contractor, and was killed during the work.

(4) That the death resulted from a defect or defects in the condition of the ways, works etc., as set forth at the end of Par. 3, of Sec. 1 of the Liability Act.

(5) That the deceased himself was not willfully negligent (so as to comply with Par. 1 of Sec. 1, of the Liability Act.)

(6) That the deceased left next of kin; that letters of administration were taken out; and that the defendant received some notice of the accident, or had some actual knowledge.

(7) The specification by the plaintiff that the present action is brought under Secs. 1 and 3 of the Liability Act, with the amount claimed.

It is submitted that an examination of the complaint, will show that all these matters have been fully pleaded with some degree of care. The defendant's dealing in metals is also shown.

A careful consideration of the pleadings will show that nothing essential has been left out.

The claim that the defendant is not liable to a workman of Hendrickson, is not only disposed of by pleadings themselves, showing so clearly how Hendrickson practically stood in the shoes of the Kaufman Company, but the matter is entirely clinched by the few cases cited in this brief.

POINT VI

The New Jersey Employers' Liability and Compensation Act.

The New Jersey act is found in the Laws of 1911, page 134. The second section of this act relates to the compensation feature. The first and third sections relate to cases where the second section does not apply. Either party can refuse to abide by section two, simply through giving notice to either that said party is not working under it. Then the parties go under the other two sections. This was done so as to avoid the New York question about depriving a party of a trial by jury.

The design of the New Jersey act was to overcome the objections made to acts in other states, and its constitutionality has been sustained in *Sexton vs. Telegraph Co.*, 55 Vroom, 85.

The further design of the act was to make it so simple and readable that its meaning could easily be arrived at.

Now, the present action charges the defendant with being a dealer in metals, buying, holding and acquiring such products (case, p. 6).

It further charges that the defendant bought a metal tank from the Standard Oil Co., and as a part of said contract of purchase *agreed and contracted to cut down, remove, and load and ship said tank* (case, p. 7).

Then it states that the defendant *engaged an independent contractor, Hendrickson, to cut down said tank for said defendant,* to load the same on cars of defendant, and entrusted to Hendrickson the entire work of furnishing the ways, works, machinery or plant of doing this work; and that Kennedy, the deceased, was an employee of Hendrickson, and was killed through a defect in such ways, works, machinery or plant (case, p. 7).

These matters are stated before giving the Court, paragraph 3, of Section 1, of the Act, which relates to workmen of independent contractors. Counsel does this because he wishes the Court to fix firmly in mind that Hendrickson, the independent contractor, was doing the very work and business which the defendant itself engaged to do, that is the cutting down of the tank. For, if the defendant had just bought that tank, without assuming anything else, then counsel admits that the case might be somewhat more difficult. But it is plainly charged that the defendant also contracted to cut it down, and, surely if it hired an independent contractor to do so for it, that contractor was doing the defendant's (the employer's) work.

Paragraph 3 of Section 1, of our Act, should be read as follows, to get plainly at its meaning:

> "*If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work,* (or if such contractor enters into a contract, written or verbal, with a subcontractor, to do all or any part of such work comprised in such contractor's contract with the employer), *such contract* (or sub-

contract) shall not bar the liability of the employer under this act for injury caused to an employee of such contractor (or sub-contractor) by any defect in the condition of the ways, works, machinery or plant, if the defect arose or had been discovered and remedied through the negligence of the employer or someone entrusted by him with the duty of seeing that they were in proper condition. This paragraph shall apply only to actions arising under section one."

The underlining is done by counsel, to make it more readable. The other paragraphs of section one extend actions to death claims.

Now, the disputed words in the above section seem to be the words "part of."

It is the contention of counsel that those words *are descriptional, and not divisional.* That is, they mean "part of, or kind of work which the employer himself contracted to do, or held himself out in his business as being willing to do."

The words "part of" are a broader and more comprehensive term than that of "undertakers" which was used in the English acts. It will be seen by studying the decisions heretofore cited, that the English Courts always sought to trace out if the employer of the independent contractor had himself contracted to do what he hired the contractor for; or had he held himself out in his business to do what he hired the contractor for. The English Courts did not hold every employer of an independent contractor. They have always sought to find if the employer of such contractor himself "undertook" the work.

Then again, when one considers the words

"part of" does it not fairly come to mind "What part of?". It must mean, to make sense, "any part of," because it goes without saying that part of anything is any part of that thing.

Also was not Kennedy, the deceased, killed upon the "part of" (the cutting down of the tank) that Kaufman Co. hired the independent contractor to do?

POINT VII

The Conclusions of Justice Bergen.

Upon the argument at Circuit, this case was not as fully gone into as it is presented here. Such may have led Justice Bergen to form the conclusions, which we shall now consider. The meaning of paragraph 3 will be then more easily to bring out.

On page 17 of case, Justice Bergen states "The legislature, when it declared that in cases WHERE the employer contracted part of his work to an independent contractor he should be liable for defects in the ways, works machinery or plant, was dealing with a situation not shown by this complaint, but with one where the employer furnished them to the independent contractor for doing a part of the work; otherwise it would not have limited the employers' liability to cases where only part of the work let to a contractor, for un-

less such was the legislative intent, the expression 'to do part of such employer's work' might as well have been omitted."

Let us read the section with the words "part of" left out, and see what the sense then is.

It would then read—"If an employer enters into a contract, written or verbal, with an independent contractor to do such employer's work, &c."

If the section read that way it would mean that any person who hired a contractor would be responsible to the workmen of that contractor. There is no getting away from that, and such was never the intention of the section. It would mean that if a person hired an independent contractor to fix up his office, he would be responsible to the workmen of that contractor.

Again, if we seek to make the expression more comprehensive by substituting, we will say, the words "whole of" for "part of," let us see what we shall get.

That would mean that an employer could only be held where he let the whole of his work to an independent contractor. One would have to show that he did, and if it appeared that he let only half of his work, or three quarters, the action would fail. Such a thing would present rather an anomaly. An employer could scoff at the law, for all he would have to do is to simply make out a contract with his independent contractor to do anything but the whole. It would lead to endless litigation, and the very reason why those words "part of" were put in was to obviate this very difficulty. As long as the paragraph itself doesn't

say what part of, then common sense tells us they must mean "any part of."

Again, on page 17, Justice Bergen states,

> "What the plaintiff claims is that in all cases where the entire work is let to an independent contractor, the employer is liable for defects in ways, works, machinery or plant belonging to, furnished by such independent contractor. This is not the proper construction of the statute, but on the contrary the employer is only liable where he furnishes the ways, works, machinery or plant in aid of part execution of his work, and does not make him liable where the entire work is let to an independent contractor, who furnishes the ways, works, machinery or plant, over whose negligent conduct in not remedying defects, the employer has no control."

The statute does not say that. The statute says:

> "Such contract or sub-contract shall not bar the liability of the employer by any defect in the condition of the ways, works, etc., if the defect arose or had not been discovered and remedied through the negligence of the employer or someone entrusted by him with the duty of seeing that they were in proper condition."

The conclusions are entirely wrong, for the rule that Justice Bergen states is nothing more than the old common law rule, relating to the liability

of a principal for the workmen of an independent contractor.

If that is so, why was the legislature put to the trouble of simply adopting something declaratory of the common law?

Another thing, Justice Bergen seems to lay to counsel a responsibility for the use of the words "entire work of furnishing the ways, works, &c."

Those words taken by themselves do not weigh for anything. It is the part that the defendant *"entrusted to Hendrickson (his independent contractor) the duty of seeing that these were and should be in proper condition," that makes the cause of action.*

Whoever heard of a principal at common law, having to see that the ways etc., of his independent contractor were not only in good condition, but also that he should be responsible for the acts of anyone that he entrusted that duty to? That isn't declaratory of the common law; that isn't just the same thing; it means that he can not escape under the old doctrine or anything like it.

If there is any doubt about how far that ~~action~~ SECTION goes, it is cleared up by a reference to the latter part of paragraph 24, section 3, which reads:

> "Section 1 of this act shall not apply in cases where section 2 becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law."

P. L. 1911 at pg. 144.

In "extension of the common law" doesn't mean the reading in of words that make it the same as the common law. It means, if anything, just what the words mean, and it must be given such a meaning that it will be in extension of the common law.

The construction which Justice Bergen puts upon the section is decidedly unfavorable to the workman. It it submitted, that if anything is to be read into the section, such words should be those that will carry out the intention of the section and act, and should be favorable to the workman.

> "As regards statutes of the class which includes the English employers' liability act, and those copied from it, it is scarcely possible to say that any fixed principle of construction has been generally and definitely adopted. But on the whole, the tendency seems to be in the direction of treating them as enactments of a remedial character, and construing them in a sense favorable to the servant."
>
> Vol. 5, Labatt M & S, Sec. 1641, at p. 5042, citing Eng. & Amer. cases; *ibid.*, Sec. 1666, p. 5142.

The Court is fully aware of the non-responsibility of a principal to the workmen of his independent contractor. Since the days of *Cuff vs. Railroad*, 6 Vroom, p. 17, at p. 28, this State has held that a workman can only recover from the contractor. The duty ended when the employer hired what he thought to be a competent contractor.

Well, this was so, too in England, under the common law of that country. But, just as soon as their compensation law went into effect, they at once said that such legislation was enacted to cure the old defects. Taking that view, they held that a principal could not escape by delegating the work which he had undertaken.

And, the statutes of England contain no such strong words as I have set forth from ours, "in extension of the common law." There is no getting away from that, for it means that no narrow, restricted or confined view must be taken that will defeat a workman's action, or encumber him with things to prove that get right back to the old trouble under the common law rule which has been abrogated.

> "Or someone entrusted by him with the duty of seeing that they were in proper condition."

Why were these words put in this section? They are not in the English law, as will be seen by reference. They were put in so that there could be no loophole left for the employer to escape. It not only meant that he should be held to

it and made to look out for the men of an independent contractor, but it also meant that he could not come in (if the words were not there) and say that he had entrusted that duty to someone else.

In other words, it simply means that there is no getting away from it that an employer is responsible in every case to the workmen of his independent contractor, if they are hurt while doing the work which the principal undertook. The section means that the employer has no defence left except to show wilful negligence in the injured employee.

The meaning of this section can be well arrived at by considering the terms of the answer defendant would have to file, regarding this claim.

The responsibility under the section is predicated either upon the employer not discovering and remedying the defects of the ways, etc., or of someone entrusted by him.

It is charged in this case that he entrusted that duty to his independent contractor, Hendrickson, for it is manifest that someone must look out for the safety of the men (case, p. 7, lines 20 to 40).

It certainly means that the employer must either look after the ways, etc., or get someone to do so, else why would it say he should be responsible for "someone entrusted by him (the principal) with the duty of seeing that they were in proper condition."

Who is the "someone" entrusted by the employer of an independent contractor? Why, it is the independent contractor. It is a broad term, and was meant to leave no loophole.

Now, supposing the defendant were ruled to answer this part of the complaint.

1. He would have to answer that he did not entrust the duty to the independent contractor. In that case, the law would assume that he retained

the duty himself under the section. It couldn't hang in the air.

2. He would have to admit that he entrusted the duty to Hendrickson, the independent contractor.

So, there would be the case, either himself withholding the duty of discovering the defects, or admitting that he entrusted the duty to "someone."

He would be obliged to plead that he either did not let out the duty to someone, or else he would have to plead that he did, and name the "someone."

Now, the words "entire work" which Justice Bergen comments on as being pleaded by counsel, form no real ground of objection. Those words were put in to show that Kaufman was not a co-employer. If you leave out the words "entire" no radical difference is made; it would simply read "entrusted to Hendrickson the work of furnishing the ways, &c." Practically and really the same thing, and the only reason why counsel added the word "entire" was so that the Court wouldn't say such should have been added, otherwise there might be relief by petition against the Kaufman Co., in the Common Pleas.

The real words that amount to the gist of the whole action are "*that the defendant entrusted to the said Hendrickson the duty of seeing that such ways, &c. were in proper condition.*" Without these the case as pleaded would be nothing.

The construction which the Court shall put upon this section either means the whole act shall stand or fall.

If the construction of Justice Bergen be affirmed, then no recovery can ever be had under

that section. It will simply be going back to the old common law, for that is the sum and substance of the memorandum.

It needs no argument to show that any employer can rig a contract to show that he is not employing the contractor to do more than a part of his work, and that he is leaving to the contractor the entire work of furnishing the ways, works and machinery. Under those circumstances, where shall we be, except back under the old law?

Is it to be supposed that the legislature which passed this law, contemplated any such thing as this?

Is it not the duty of this Court to construe the section so that it shall stand and be good law, instead of reading words into it that make it a nullity?

Do not the words "extension of the common law" remove the slightest doubt of the meaning of the section?

At the argument below, Justice Bergen, propounded some questions to counsel, which are repeated and answered here.

1. Has Kennedy's widow an action against Hendrickson, the independent contractor? Yes, she can sue him under the 2nd section of the Act. The reason why she has not are perfectly obvious, because there wouldn't be any chance of collecting a recovery.

2. Is the plaintiff tied down to suing Hendrickson alone, by petition? No, because there is no such provision anywheres in the act, saying that shall be so. That is another reason why it is perfectly apparent that principals of independent contractors could be held.

3. Can the plaintiff sue the defendant by petition in the Common Pleas, under section 2?

No, because that section applies only between immediate employer and employee.

4. Can the plaintiff in this case, elect then as to suing?

Yes, she can either petition against Hendrickson under section 2;

Or, she can sue the defendant at common law under sections 1 and 3.

Part 3 of section 1, specifically states that it shall only apply to actions under section 1; and the concluding part; of paragraph 24, section 3, is that section 1 shall not apply where section 2 comes in (immediate employer and employee), but shall apply in all other cases.

What other cases outside of section 2 are there except where either side gives notice they are not working under it;

And cases as provided in section 1, where an independent contractor is brought in?

5. Is every person who hires an independent contractor, responsible to the workmen of that contractor?

No, it only applies, as the decisions in England show, to cases where a person hires the contractor to do work which he the principal undertook, or held himself out as being ready to perform.

It wouldn't apply to a grocer who should hire a carpenter to fix his store; nor to the owner of a house who should hire a builder or painter; nor to the owner of a factory who should hire a man to fix the boilers.

Conclusion

It is respectfully submitted that a careful study of the aforesaid remedial section; the decisions and comparisons herein made, will show that the complaint is good in law, and that the judgment striking it out should be reversed. For the deceased was surely caused to meet his death on the "part of" the work the defendant assumed, and contracted for with the independent contractor. Every necessary requirement in that law being pleaded.

J. A. KIERNAN,
Attorney and of counsel with Appellant.

THE ARTHUR H. CRIST CO., Cooperstown, N. Y.
New York Office, 220 Broadway.

New Jersey Court of Errors and Appeals

HENRIETTA I. KENNEDY, Ad'x, &c., of James E. Kennedy, deceased,
Appellant and
Plaintiff Below,

vs.

THE DAVID KAUFMAN & SONS COMPANY, a corporation of the State of New Jersey,
Respondent and
Defendant Below.

On Appeal from New Jersey Supreme Court.

BRIEF FOR RESPONDENT.

This is an appeal from an order and judgment made upon a motion to strike out the complaint, upon the ground that it did not allege facts sufficient to constitute a cause of action against this defendant.

The complaint alleges that the defendant was engaged in the iron business (par. 2); that it purchased a tank from the Standard Oil Co. in August, 1913, which tank was located on the premises of the Oil Co. and agreed to cut down and remove

same (par. 3); that thereafter the defendant entered into a written arrangement with one M. Hendricksen *to cut down said tank for it, and to load the same, and entrusted to this said M. Hendricksen, the entire work* of furnishing the ways, works, machinery or plant *of doing the aforesaid work* and entrusted him with the duty of seeing that these were and should be in proper condition (par. 4); that thereafter the plaintiff's intestate was engaged by the said *Hendricksen* as a laborer and that while engaged on the work the tank collapsed through alleged defects in the ways, works, machinery or plant in and about the said tank, which defects arose and had not been discovered and remedied through the negligence of Hendricksen; that as a result of injuries received at the time the plaintiff's intestate died (par. 5). The complaint further alleges the appointment of an administratrix and recites the next of kin of deceased and that a cause of action has accrued to them in accordance with the Act of 1848.

In paragraph 7 of the complaint there is an allegation that notice of claim for compensation was mailed pursuant to the Act of 1911.

In paragraph 8, the last of the complaint, plaintiff demands judgment for damages pursuant to Sections 1 and 3 of the Liability Law of 1911 and also the Death Act of 1848.

POINT I.

The defendant owed the plaintiff no duty at common law except to commit no active negligence.

The relation of master and servant did not exist between the plaintiff and the defendant corporation.

The complaint, paragraph five, and the statutory notice served, state that plaintiff's intestate was engaged and hired by a *contractor, or one Hendricksen.* Hendricksen according to paragraph four of the complaint had been engaged in writing by the defendant to cut down and load the tank. It is evident that Hendricksen was an independent contractor, and the employer of the plaintiff's intestate, and therefore the plaintiff's intestate could not be, and was not the servant of the defendant corporation, and that the plaintiff recognizes this fact is evident by this action having been commenced under Section I of the Employers' Liability Law. This is conceded in the brief of the appellant.

In general it is entirely competent for one having any particular work to be performed to enter into an agreement with an independent contractor to take charge of and do the *whole* work, employing his own assistants, and being responsible only for the completion of the work as agreed. In such case, as a general rule the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not those of the employer he contracts with; and the contractor is in no such sense the servant of his employer as to give to others rights against the employer growing out of the negligence of the contractor or of his servants.

In *Vol. 26 Cyc.*, at page 1567:

> "Ordinarily the contractor and not the contractee is the person liable to an employee of the contractor for injuries received by the employee in the course of his employment."

POINT II.

Paragraph 3 of Section 1 of the Liability Law of 1911 does not impose an additional liability upon the defendant, but is merely declaratory of the common law.

This paragraph is as follows:

> "If an employer enters into a contract, written or verbal, with an independent contractor to do *part* of *such employer's work*, or if such contractor enters into a contract, written or verbal, with a sub-contractor to do *all* or any part of *such work* comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer under this act for injury caused to an employee of such contractor or sub-contractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and remedied through the negligence of the employer or some one entrusted by him with the duty of seeing that they were in proper condition. This paragraph shall apply only to actions arising under Section one." (Italics ours.)

This provision has not yet been construed by our Courts so far as we have been able to find. It is worded almost identically with the Mass. Em-

loyers' Liability Act, Revision Laws, page 16, Section 76, which is *identical* with Section *200* of the Labor Law of New York State, Subdivision *2* as amended by the Laws of 1910, Chapter 352. That section reads as follows:

> "If an employer enters into a contract, written or verbal, with an independent contractor to do *part* of such employer's work, or if such contractor enters into a contract with a sub-contractor to do *all* or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for the injuries to the employees of such contractor or sub-contractor, caused by any defect in the condition of the ways, works, machinery or plant, *if they are the property of the employer or are furnished by him,* and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition." (Italics ours.)

The only difference between the Massachusetts, New York and the New Jersey acts is the requirement in the former two that the ways, works, machinery or plant be the property of the employer, or furnished by him, which would only seem to impose an additional obligation under the New Jersey act if the employer assumed control over the ways, works, machinery or plant, regardless as to whether or not they were his property or furnished by him. It is therefore respectfully submitted that Paragraph 3 contemplated actions resulting from injuries caused through the negligence of an employer in furnishing the ways, works, machinery or plant pertaining to any work where the employer's, or general contractor's and subcontrac-

tor's employees were working *or* where the employer has control over part of the work his contractor is engaged upon. The plaintiff in this case alleges that the *entire work* was entrusted to Hendricksen, the *contractor,* including the ways, works, machinery or plant.

In *Galbally* v. *Strauss,* 144 *N. Y. Supplement, page* 102, construing the section in the New York law and quoting the case of *Sullivan* v. *New Bedford Gas & Electric Co.,* 190 *Mass.,* 288; 76 *N. E.,* 1048, *at page* 1050, the Court held:

> " 'The effect of Revised Laws, Chapter 106, Section 76, is in our opinion to make certain that the intervening contract does not *prevent* the owners *owing a duty directly* to the employee of the contractor. This, we think, is the true construction to be given to the provision quoted from our own statute. *It does not enlarge the obligation* of an owner circumstanced as was the lessee, and does *not purport to enlarge such obligation.* It merely provides that *if an owner or general contractor assumes the obligation of furnishing safe ways and appliances, he may not shield himself from liability* for his failure to carry out that obligation by showing that he has entrusted the work to an independent contractor no matter how competent.' "

In the *Sullivan* case, cited *supra,* the Court held:

> "We agree with the plaintiff in his contention that where an owner makes a contract to have work done for him by an independent contractor (with his [the owner's] apparatus), the owner owes a duty to employees of a contractor (citing cases). We do not think that it (the statute) was intended 'to enlarge the liability of the owner,' as was said in *Toomey* v. *Donovan,* 158 Mass., 232, at page 236; 33 N. E., 396."

In Toomey v. *Donovan, quoted supra, the defendant undertook to furnish and keep the machinery in condition,* thereby placing him under an obligation to the employees of his contractor. The section of the Massachusetts act has been enforced since the year 1887, and the section of the Labor Law has been enforced since 1910, and it must be presumed that the Legislature of our State was mindful of the decisions of other States construing similar statutes.

There is nothing in the provision of the Labor Law of New York which imposes a duty upon the employer or requires him to provide anything for the performance of the work by the contractor, or his servants. If he remained aloof from the whole matter, he violated no duty to the servants of any contractor or subcontractor.

The statute merely incorporates one of the earliest principles of common law, that where a person undertakes to furnish apparatus for the use of another, he assumes a duty to furnish apparatus which is reasonably safe for the use for which it is intended. This doctrine does not depend upon any contractual relation. The obligation is the same whether the one undertaking to furnish the apparatus is the employer or an entire stranger to the injured person.

The ways, works, machinery and plant, which were furnished by the independent contractor, cannot be said to have been furnished by the defendant corporation to the workmen employed upon the said building for use in the progress of their work, and no liability therefore can be established as against the defendant corporation, but even if it should be considered as having been furnished by the defendant corporation for that purpose, the common law and the statute require the concurrence of another condition before liability is estab-

lished, namely, that the alleged defect arose from or had not been discovered or remedied *through the negligence of the defendant corporation,* or someone entrusted by it with the duty of seeing that they were in proper condition.

To predicate negligence it becomes apparent that *control* of the ways, works, machinery and plant must appear.

See:

Long v. *Stephenson Co.,* 73 *N. J. L.,* 186.

In *Burns* v. *Washburn,* 36 *N. E.,* 199, referring to a temporary scaffolding, the Court held:

> "We are of opinion that these words in the statute refer to ways or works of a permanent character, such as are connected with or used in the business of an employer; and that they do not apply to a temporary structure like the staging in question, *erected on the land of a third person.*"

To the same effect:

Lynch v. *Allyn,* 35 *N. E.,* 550.

Also:

Nye v. *Dutton,* 73 N. E., 654.

In *Hawkes* v. *Broadwalk Shoe Co.,* 207 *Mass.,* 117, 121; 93 N. E., 1017, 1018,

> "It would seem that an action could not be supported on that ground as being part of the ways, works, and machinery, without proof that *the defendant controlled and managed it.*"

It is important to bear in mind that the *entire* work of taking down the tank was turned over to Hendricksen, the independent contractor, and *he* was to furnish the ways, works, machinery or plant of doing the *aforesaid work,* and until he assumed charge of the taking down of the tank no ways, works, machinery or plant came into existence within the contemplation of the statute, and when it did, it was the property and under the control and management of Hendricksen, the independent contractor.

It is therefore quite apparent that the defect causing the accident could not arise from the negligence of the defendant corporation.

In *Burke* v. *Witherbee,* 98 *N. Y.,* 562, it was said:

> "Ought they (the defendants) to have perceived danger that was not visible to anyone else, and which those whose lives were most exposed were not sufficiently wise or vigilant to foresee?"

That *Hendricksen,* the contractor, should be the person entrusted with the duty of seeing that the ways, works, machinery or plant in connection with the taking down of the tank, and for that purpose be the agent or employer of this defendant is inconsistent with his status as an independent contractor.

The work done by the independent contractor is not under the control and direction of the contractee, and the contractor is liable.

The principle upon which the superior who has contracted with another exercising an independent employment for the doing of the work is exempt from liability for the negligence or other wrongful act of the latter in the execution, applies as be-

tween the contractor and his subcontractor. See *Cuff* v. *Newark & N. Y. R. R. Co.*, 35 *N. J. L.*, 17, at page 28. Vol. 26, *Cyc.*, at page 1556.

POINT III.

The appellant's construction of the statute is erroneous.

The theory by which the plaintiff attempts to fasten liability upon the defendant is expressed on page 5 of appellant's brief as follows:

> "That is why the defendant is charged in this case, because the defendant *undertook and as a part* of its contract of purchase *agreed to cut and take down the tank.*"

The concurring element of negligence which is required under the statute in order to impose liability is entirely omitted and this element is precluded as hereinbefore argued.

The use of the word "undertake" is foreign to our statute and therefore the citations and reference of the English statute and of the new Massachusetts act, which is radically different from the former law, are inapplicable.

The suggestion which is contained on page 25 of appellant's brief that the words "part of" are "descriptional and not divisional," is not in accordance with the settled rules of statutory construction.

In *Lewis' Sutherland Statutory Construction*, Vol. 2, Second Edition, page 749, Section 390:

> "As a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the

> context or otherwise that they were used in a different sense."

And at page 750:

> "The words of a statute are to be read in their ordinary sense unless so construing them will lead to some incongruity or manifest absurdity." (Citing *State v. Deshler*, 25 *N. J. L.*, 177, 183.)

In Vol. 6, *Words and Phrases*, at page 5179:

> "A part (Latin, 'pars') is defined to be one of the portions, equal or unequal, into which anything is divided or regarded as divided; a piece, a fragment, division, a member, a constituent—and is synonymous with section. The word 'part' may mean section, share, division." (Citing *Hand* v. *Hoffman*, 8 *N. J. L.* [3 *Halst.*], 71, 79.)

That any other construction of the words "part of" would be different from the intention of the section, and that "such was never the intention of the section" is conceded by counsel for the appellant at page 27 of his brief. Counsel on same page concedes that the introduction of the words "part of" were put in to obviate a difficulty such as has arisen by this suit.

The difficulty in the past has been the fellow-servant rule, and in an endeavor to remedy this the "extension of the common law," Employers' Liability legislation has been enacted. This was one of the defenses abolished by the statute, and this is the "extension of the common law" referred to. If it were intended that any person who hired a contractor would be responsible to the workmen of that contractor regardless as to whether or not that person had any control over the premises or had furnished the ways, works, machinery or plant

in connection therewith, it is respectfully submitted that such legislation was not contemplated in the title of the act under which this action was instituted. The title reads as follows:

> "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder."

If the construction of counsel for the appellant is correct, the effect of Paragraph 3 would be to embrace a class of employers other than the immediate employer of the employee that suffered injury, and imposing upon them an additional liability. This form of legislation coming without notice of its effect to those conversant with the existing state of the law, would plainly be a violation of the restriction in the State Constitution in connection with the object of a statute being properly expressed in its title.

POINT IV.

The judgment and order appealed from should be affirmed.

Respectfully submitted,

FRANCIS A. GORDON,
Attorney for Respondent
and Defendant Below.

FOSTER M. VOORHEES,
Counsel.

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NOTICE AND GROUNDS OF APPEAL

(Filed April 28, 1914)

New Jersey Supreme Court

HENRIETTA I. KENNEDY, Adm'x. &c., of James E. Kennedy, Deceased, Appellant, vs. THE DAVID KAUFMAN & SONS CO., a corporation of the State of New Jersey, Respondent.	Action at Law. Notice and Grounds of Appeal.

To The David Kaufman & Sons Co., a corporation of the State of New Jersey:

Sirs:

Please take notice that the above named Henrietta I. Kennedy, Adm'x etc., of James E. Ken-

nedy, Deceased, plaintiff in a certain cause in the above Court, wherein you, The David Kaufman & Sons Co., a corporation etc. are defendant, hereby makes appeal to the Court of Errors and Appeals of New Jersey, from the whole of the order, and the whole of the judgment and determination of the said Supreme Court of the State of New Jersey, in the above action, made and rendered upon the motion of the defendant to strike out the complaint filed by the plaintiff in the above cause:

And further take notice that the grounds on which the said appeal is taken are as follows:

1. That the said order to strike out the said complaint of the plaintiff, and the judgment and determination of the Supreme Court rendered upon the said motion to strike out said complaint, should not have prevailed, but that the motion, order to strike out, judgment and determination thereon should have been denied and overruled; because the matters and things, stated in the plaintiff's complaint, disclose a good and legal cause of action against the said defendant, according to the form, mnner and contents of the said complaint, and particularly according to the laws of the land, and of the State of New Jersey.

J. A. KIERNAN,
Attorney for and of counsel with Appellant.

(*Endorsed*)

"Receipt of a true copy of the within acknowledged this 27th day of April, 1914.

FRANCIS A. GORDON, ESQ.,
Atty. of Respondent."

RETURN

(Filed, April 29, 1914)

The answer of the Justices of the Supreme Court of the State of New Jersey, within named, with the records, and proceedings and all things touching and concerning the same, certified to the Court of Errors and Appeals, in a certain schedule to these proceedings.

DAVID S. CRATER,
Secretary of State, and Clerk of
Court of Errors and Appeals of the
State of New Jersey.

FINAL JUDGMENT

(Entered April 24, 1914)

Final Judgment

SUPREME COURT OF NEW JERSEY

HENRIETTA I. KENNEDY, Adm'x. &c., of James E. Kennedy, decd., Plaintiff, vs. THE DAVID KAUFMAN & SONS COMPANY, a corporation, etc., Defendant.	Action at Law. Judgment final.

Defendant having regularly moved upon a Notice of Motion, dated March 31, 1914, to strike out the complaint filed in this cause, upon the ground that it disclosed no cause of action; and it appearing that said Notice was duly served; that said motion was heard before this Court, on April 4, 1914, before his Honor, James J. Bergen, one of the Justices of the Supreme Court of the State of New Jersey, Francis A. Gordon, Esq., Attorney for Defendant, appearing in support of the motion, and J. A. Kiernan, Esq., Attorney for plaintiff, in opposition thereto; and such proceedings had, that an order of this Court was made on April 9, 1914, that the complaint of the said plaintiff be stricken out, with costs to the defendant, which rule and order was regularly entered April 14, 1914.

Final Judgment

Whereupon it is adjudged that the complaint of the said plaintiff, be and it is hereby stricken out and that judgment final be entered in favor of the defendant and against the plaintiff and that the defendant do recover of the plaintiff his costs.

Entered April 24, 1914.

Let this rule be entered.

On motion of J. A. Kiernan, Atty. of Plff.

J. J. BERGEN,
Jus. Sup. Ct.

COMPLAINT

(*Filed, March 21, 1914*)

SUPREME COURT OF NEW JERSEY

COUNTY OF UNION

HENRIETTA I. KENNEDY, ad'x., etc. of James E. Kennedy, deceased, Plaintiff, vs. THE DAVID KAUFMAN & SONS COMPANY a corporation of the State of New Jersey, Defendant.	Complaint.

1. The plaintiff resides at #219 Erie Street, in the City of Elizabeth, County of Union, State of New Jersey.

2. The defendant is a corporation of the State of New Jersey, and among the objects for which it was incorporated are to buy, sell and deal in iron, steel and all kindred products, and to acquire by purchase or otherwise materials of the above

and to acquire merchandise and personal property of all kinds of class and description, and hold, sell, trade and otherwise dispose of the same.

3. On August 15, 1913, and August 18, 1913, the defendant had such dealings in writing with the Standard Oil Company, that it purchased a certain metal tank from said Oil Company, #2023 at the Crude Department of said Oil Company, Bayway, N. J., and the said defendant as part of the said contract of purchase, assumed to cut down, remove and load and ship said tank:

4. On August 20 and 22d, 1913, the defendant had such dealings in writing with one M. Hendriksen or M. Hendrickson, that it engaged him to cut down said tank for it, and to load the same as taken down on car or cars of defendant and entrusted to this said Hendriksen or Hendrickson the entire work of furnishing the ways, works, machinery or plant of doing the aforesaid work, and entrusted him with the duty of seeing that these were and should be in proper condition.

5. After August 22, 1913, James E. Kennedy, plaintiff's deceased was engaged and hired by the said Hendriksen or Hendrickson as a laborer to cut down and remove the aforesaid tank, and that while engaged at said work on September 6, 1913, the said tank collapsed through the defects in the ways, works and machinery or plant in and about the said tank, which defects arose, and had not been discovered and remedied through the negligence of the said Hendriksen or Hendrickson, who had been entrusted by the defendant with the duty of seeing that they were in proper condition, and that as a result of the said collapsing plaintiff's deceased, James E. Kennedy was hurled to the ground and struck and forcibly covered with parts

of the said tank and appliances, connected therewith, and received such injuries that he straightaway died on the 6th day of September, 1913, plaintiff's deceased himself not being willfully negligent at the time.

6. That the said James E. Kennedy, upon his death, from the causes aforesaid, left him surviving as his next of kin, the following:

Henrietta I. Kennedy, his widow, and Agnes, Joseph and Francis Kennedy, his three children respectively; and that on January 22, 1914, letters of administration of the said James E. Kennedy, deceased were issued to the said Henrietta I. Kennedy by the Surrogate of the County of Union and State of New Jersey; and that as such administratrix, and for the benefit of herself and said next of kin of the deceased, an action has accrued to her against the said defendant under and by virtue of an act of the State of New Jersey entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto.

7. On March 16, 1914, plaintiff deposited in the postoffice of Elizabeth, a written notice, signed by plaintiff, notifying the defendant that compensation would be claimed against it by the plaintiff, for said death above referred to, under and by virtue of a certain act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and com-

pensation thereunder. Chapter 95, Laws of 1911, and supplements thereto,'' which notice was addressed to the defendant, at its principal office in this State, at the corner of Second Street and Port Avenue, Elizabeth, N. J., which letter containing said notice was registered and the registery receipt's notices and the aforesaid dealings in writing between the Standard Oil Company, the defendant, and Hendriksen or Hendrickson, and letters of administration aforesaid, are hereby proffered and brought into Court.

8. Plaintiff claims compensation, as such administratrix, for the benefit of herself and next of kin, under the provisions of the ''Death Act'' referred to in #6 from said defendant, under sections 1 and 3 of the aforesaid act entitled ''An act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder. Chapter 95 Laws of 1911 of the State of New Jersey and supplements thereto, and sets the amounts so claimed from said defendant in the sum of $10,000.00.

J. A. KIERNAN,
Attorney of Plaintiff.

NOTICE OF MOTION TO STRIKE OUT

(*Filed, April 4, 1914*)

SUPREME COURT OF NEW JERSEY

COUNTY OF UNION

HENRIETTA I. KENNEDY, Ad'x etc., of James E. Kennedy, deceased,
Plaintiff,
vs.
THE DAVID KAUFMAN & SONS COMPANY, a corporation of the State of New Jersey,
Defendant.

To J. A. Kiernan, Esq., attorney for plaintiff:
Sir:

PLEASE TAKE NOTICE that on the fourth day of April, One Thousand, Nine Hundred and Fourteen, at 10 o'clock in the forenoon, or as soon

thereafter as counsel can be heard at the Union County Court House, in the City of Elizabeth, before the Honorable James J. Bergen, Justice of the above stated Court, I shall move to strike out the complaint filed in this case, upon the ground that it discloses no cause of action, in that this defendant claims that according to the allegations contained in the plaintiff's complaint, especially paragraphs four and five no cause of action exists as a matter of law for the accident as alleged in paragraph five of the complaint, as the defendant claims it was under no legal obligation to this plaintiff's deceased in connection with the ways, works, machinery or plant therein mentioned.

Dated, Elizabeth, New Jersey, March 31st, 1914.

FRANCIS A. GORDON,
Attorney of Defendant,
Office and postoffice address,
225 Broad Street,
Elizabeth N. J.

ORDER ON MOTION TO STRIKE OUT

(*Filed, April 14, 1914*)

SUPREME COURT OF NEW JERSEY

COUNTY OF UNION

HENRIETTA I. KENNEDY, Ad'x etc., of James E. Kennedy, deceased, Plaintiff, vs. THE DAVID KAUFMAN & SONS COMPANY, a corporation of the State of New Jersey, Defendant.	In Tort Action at Law Order.

The defendant having moved upon a Notice of Motion dated the thirty-first day of March, 1914, to strike out the complaint in this cause upon the ground that it disclosed no cause of action, and it appearing herein that Notice of Motion was duly served and the said Motion having come on

to be heard before this Court on the Fourth day of April, 1914 before his Honor, James J. Bergen, one of the Justices of the Supreme Court of the State of New Jersey and after hearing Francis A. Gordon, Esq., Attorney for the Defendant in support of the said motion and J. A. Kiernan, Attorney for the Plaintiff in opposition thereto:

It is on this ninth day of April, 1914 ORDERED that the complaint herein be stricken out with costs to the defendant.

Let this rule be entered

J. J. BERGEN,
Jus. Sup. Ct.

Entered, April 14, 1914
On motion of
Francis A. Gordon,
Atty.

MEMORANDUM, OF BERGEN, J.

(*Filed, April 7, 1914*)

NEW JERSEY SUPREME COURT

HENRIETTA I. KENNEDY, Ad'x of James E. Kennedy, deceased,
vs.
DAVID KAUFMAN & SONS CO.

On Motion to Strike out Complaint

MEMORANDUM

Francis A. Gordon, for Motion.
J. A. Kiernan, contra Motion.

Argued at Circuit before

BERGEN, J.:

The cause of action set out in plaintiff's complaint is that the defendant purchased from the

Standard Oil Company a metal tank, and as part of the terms of purchase, agreed to take down, remove, load and ship it; that the defendant thereafter contracted with one Hendrickson to take down the tank and remove it for defendant which intrusted to him the entire work of furnishing the ways, works, machinery or plant for doing the work, and also the duty of seeing that these were and should be in proper condition; that Hendrickson engaged plaintiff's intestate as a laborer to take down and remove the tank, and while he was doing the work the tank collapsed through defects in the ways, works, machinery or plant which arose and had not been discovered and remedied thorugh the negligence of Hendrickson, who had been intrusted by the defendant with the duty of seeing that they were in proper condition, whereby the plaintiff's intestate was killed, by reason of which the action was brought for the benefit of his next of kin under the "Death Act" of 1848.

The defendant moved to strike out the complaint upon the single ground that no cause of action is stated, because under the facts averred defendant was under no legal obligation to the deceased concerning the ways, works, machinery or plant. The question whether the deceased was subject to the conditions of Section 2 of the act prescribing the liabilities of an employer to make compensation for injuries received by an employe in the course of his employment, commonly called the Employers' Liability Act, P. L., 1911, 134, is not raised by the notice, and the consideration of this motion is limited to the question whether if the plaintiff has a right of action against an independent contractor under the first section of

the act, it is legally set out in the complaint, and the result is predicated upon the assumption that the parties were not bound by Section 2 and stood in the same relation to each other that would exist if either had given notice to the other that the provisions of Section 2 should not apply to the contract of employment, or the contract contained an express statement that it did not.

The plaintiff claims that the complaint states a cause of action against this defendant under Paragraph 3 of Section 1 of the Employers' Liability Act which provides, that if an employer enters into a contract with an independent contractor to do a part of the employers' work, of if such contractor (the independent contractor) contracts with a sub-contractor to do all or any part of such work, such contract shall not bar the liability of an employer for injury to an employee of the contractor, or sub-contractor, caused by any defect in the condition of the ways, works, machinery or plant if the defect arose through the negligence of the employer or some one intrusted by him with the duty of seeing they were in proper condition. No facts are set out in the complaint showing that this defendant furnished or was required to furnish, any of the ways, works, machinery or plant. On the contrary the complaint alleges that the defendant intrusted to Hendrickson "the entire work of furnishing the ways, works, machinery or plant for doing the aforesaid work" so that Hendrickson is averred to be an independent contractor intrusted with the entire work without the control, cooperation, assistance, or interference of the defendant, while the statute applies only to cases where part of the work is to be done by the independent contractor. Under this complaint

the deceased was employed, not as a sub-contractor, but as a laborer to take down the tank, and therefore an employe of the independent contractor who had assumed, not a part of defendant's contract, but the whole.

The legislature, when it declared that in cases where the employer contracted part of his work to an independent contractor he should be liable for defects in the ways, works, machinery or plant, was dealing with a situation not shown by this complaint, but with one where the employer furnished them to the independent contractor for doing a part of the work; otherwise it would not have limited the employers' liability to cases where only part of the work was let to a contractor, for unless such was the legislative intent, the expression "to do part of such employer's work" might as well have been omitted.

What the plaintiff claims is that in all cases where the entire work is let to an independent contractor, the employer is liable for defects in ways, works, machinery or plant belonging to, and furnished by, such independent contractor. This is not the proper construction of the statute, but on the contrary the employer is only liable where he furnishes the ways, works, machinery or plant in aid of part execution of his work, and does not make him liable where the entire work is let to an independent contractor, who furnishes the ways, works, machinery or plant, over whose negligent conduct in not remedying defects, the employer has no control.

As this complaint charges that the doing of the entire work as well as the furnishing of the ways, works, machinery or plant was let to an independent contractor by the defendant through whose

negligence, in not discovering and removing the defects complained of, the plaintiff's intestate was killed, it does not state a cause of action under the statute invoked, and it is not claimed that this defendant would be liable for the negligence of Hendrickson, unless Paragraph 3 of Section 1 of the Employers' Liability Act applies.

The motion to strike out should be allowed. The defendant may take an order striking out the complaint with costs.