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the fulfiillment of his duties as an independent contractor, he is returning to resume his duties as a servant.[11] It is not necessary for him to have reached the zone of his employment or debit.

It is generally agreed that it is a question for the jury whether the employee was a servant or independent contractor at the time of the wrongdoing if there is sufficient evidence to support either finding.[12] Where employment appears, the burden is on the employer to establish an independent contractor relationship.[13] Control again is the determinant factor. The right of discharge is a circumstance of much importance.[14]

In reviewing the cases, it appears that in the majority, the insurance salesmen have been found to be independent contractors, and even where they occupy the dual relationship of the principal case, they have been found to be independent contractors when the accident occurred. This is not a result of a set rule of law that insurance salesmen are independent contractors per se, but rather, results from the facts in each case, indicating that the salesman was acting in that capacity.

ALLYN E. HENDERSON

APPLICATION OF F. L. S. A. TO OIL WELL DRILLERS

Plaintiff, an oil well driller, was employed at local wage rates to drill a well for defendant. Oil had been discovered in the hole but not in commercial quantities.[1] While so engaged, plaintiff requested that he be paid overtime wages pursuant to the Fair Labor Standards Act.[2] The defendant refused the request and ceased operations, stating that he could not afford to pay wages at the rate required by the Act. Oil was never produced in commercial quantities. In an action against the employer to recover overtime for the drilling already performed, an equal amount as liquidated damages, and attorney's fees, plaintiff sought to show that if any oil had been produced in paying quantities, it normally would have been shipped to Utah for refining. *Held,* that because oil was not produced in commercial quantities, the driller was not engaged in the "production of goods for commerce"[3] and hence plaintiff was not within the coverage of the Fair Labor Standards Act. *Atwater v. Gaylord* (Wyo. 1947) 184 P. (2d) 437.

11. 39 C. J. 1298, Sec. 1495; Whimster v. Homes, 177 Mo. App. 130, 164 S.W. 236 (1914); Barmore v. Vicksburg, S. & P. Ry., 85 Miss. 426, 38 So. 210 (1905); Glass v. Wise & McAlpin, 155 La. 170, 99 So. 409 (1923).
12. Standard Oil Co. v. Parkinson, 152 Fed. 681 (C. C. A. 8th 1907).
13. Income Life Ins. Co. v. Mitchell, 168 Tenn. 471, 79 S.W. (2d) 572 (1935).
14. Ibid.

1. Masterson v. Amarillo Oil Co., 253 S.W. 908 (Tex. C. A. 1923). The court defined "commercial quantities" as meaning "That the quantity discovered must be sufficient to pay the lessee a profit, though small, over operating expenses, although it may never repay the cost of the well and its operation, and the whole may result in a loss to the lessee."
2. 52 Stat. 1060 (1938), 29 U. S. C. A. sec. 201 (1942).
3. 52 Stat. 1060 (1938) 29 U. S. C. A. sec. 201 (1942).

"There is little authority setting up the proper application of the Act to the various phases of the oil industry, the problem having failed to attract much attention due to the fact that such employees usually receive extraordinarily high wages."[4]

Section 7 of the Fair Labor Standards Act provides that overtime compensation must be paid by an employer to any employees "engaged in commerce or in the production of goods for commerce." Section 3 (j) provides that " for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State".[5]

The Act was applied in the case of *Culver v. Bell and Loffland, Inc.*[6] Action was brought by employees to recover overtime pay pursuant to the provisions of the Act for drilling done on dry holes in a producing area. Some of the wells drilled were producers and others were dry holes. *Held,* that, the work done in the drilling of the nonproductive wells as well as the productive wells is within the coverage of the Act. In applying the Act, the court pointed out that it is inevitable that some of the wells drilled will prove to be dry holes, but that the entire drilling process is essential to the exploitation of the field. The object of all drilling is production for obviously no well would be drilled if it could be known in advance that it would prove to be a dry hole. The fact that the work done in drilling is closely connected with and necessary to the process of production of oil was emphasized by the opinion.

Warren Bradshaw Drilling Co. v. Hall[7] held that where it was not the rotary drilling crew employed by an independent contractor that actually brought the wells in but another group of men, the original workers were within the Act. Defendant, as an independent contractor was held to be governed by the Act since there were ample grounds to anticipate at the time of drilling that any oil produced by the wells would move into other states, and that the activities in partially drilling the wells bore a close and immediate tie to production.

In both the *Culver* case and the *Hall* case, analogies were drawn to the services of maintenance employees. The *Culver* case, in reaching a decision concluded that the work done in drilling a dry hole in a producing area is at least as necessary and as closely related to the process of production as are the services of building maintenance employees in a building or in a factory. The *Hall* case relied upon *Kirschbaum v. Walling*[8] which is an action brought by maintenance employees claiming coverage by the Act. The work of these employees was considered necessary to the process of production of goods for commerce because they had such a close and immediate tie with the process and were such an essential part of it.

4. Comment, 20 Tex. L. Rev. 204 (1941).
5. 52 Stat. 1060 (1938), 29 U. S. C. A. sec. 207, 203 (j) (1942).
6. 146 F. (2d) 29 (C. C. A. 9th 1942).
7. 317 U. S. 88, 87 L. Ed. 83, 63 Sup. Ct. 125 (1942).
8. 316 U. S. 517, 86 L. Ed. 1638, 62 Sup. Ct. 1116 (1942). (Reversed in 10 East 40th Street Building, Inc. v. Callus, 65 Sup. Ct. 1227 (1945) on the ground that the building was actually occupied by offices and not manufacturers.)

Prior to the decisions in the foregoing cases, the problem of the Act's coverage had arisen in numerous cases and in a great many of them an affirmative answer was given to the question of the Acts applicability to various types of employees.[9] Among these are maintenance employees and also, to a large degree, cases involving watchmen. In *Midcontinent Pipe Line Co. v. Hargrave*,[10] defendant contended that men hired as watchmen to protect property during a strike were not covered by the Act because no oil was being shipped through the pipes in question at the time. However, the court held, that, the watchmen were within the Act and that the same result would be had if no oil was going through the pipes. A New Mexico court[11] held that a watchman was employed in interstate commerce even though the rigs which he was guarding were idle, dismantled, and stored near a lease on which a well had been drilled, while awaiting removal to another drilling location.

According to the instant case, the determining factor in deciding whether the relationship is covered by the Act is the production of oil in commercial quantities. A positive decision cannot be had until the well is proved to be either producing or dry. A decision by the employer to pay wages pursuant to the Act is needless should the well be dry. On the other hand, if local wages are paid, it may prove costly[12] and subject the employer to an indefinite amount of litigation should the well be a producing one.

The cases cited are to be distinguished from the instant case in that oil was actually produced in paying quantities or a product of some sort actually entered interstate commerce. Nevertheless, the determining fact set forth was not production but rather, either that the employee's activities under consideration were prerequisites to the goods produced entering interstate commerce, or that the employer must have had reasonable grounds to anticipate that the goods produced would enter interstate commerce.[13]

Clearly, if maintenance employees, rotary drilling crews, etc. are covered by the Act for these reasons,[14] the drillers in the instant case must also be included. Certainly it was anticipated that the oil would enter interstate commerce when produced in commercial quantities and certainly the drilling was a necessary and indispensable part of that production.

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9. Comment, 11 Geo. W. L. Rev. 262 (1942-43).
10. 129 F. (2d) 655 (C. C. A. 10th 1942).
11. Robertson v. Oil Well Drilling Co., 131 P. (2d) 978, 47 N. M. 1 (1942).
12. 52 Stat. 1060 (1938), 29 U. S. C. A. sec. 216 (1942).
13. See e.g., St. John v. Brown, 38 F. Supp. 385 (N. D. Tex. 1941). Crude oil from stripper wells was sold within the state of Texas, however, the men who pumped and handled the oil were held to be covered by the Act on the basis that the employer must have known that the goods would enter interstate commerce. Gangi v. D. A. Schulte, 150 F. (2d) 694 (C. C. A. 2nd 1945). Maintenance employees of a building were held to be covered by the Act since the defendants had at the very least reasonable grounds to anticipate that their products would move into other states. Fleming, Adr' of Wage and Hour Division, U. S. Department of Labor v. Rex Oil and Gas Co., 43 F. Supp. 950 (W. D. Mich. 1942). In spite of the fact that all of the oil produced by defendant was sold within the state of Michigan, they had reason to believe or knew that substantial portions of the products refined therefrom would move in interstate commerce.
14. For a list of cases applying the Act to a variety of types of employees, see, Comment, 11 Geo. W. L. Rev. 262 (1942-43).