ARTICLES

CO-EMPLOYEE LAWSUITS UNDER THE ALABAMA WORKMEN'S COMPENSATION ACTS

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INTRODUCTION

In its most recent session the Alabama Legislature once again faced, and once again failed to resolve, a constitutional quandry which has bounced back and forth between it and the Alabama Supreme Court for a decade and a half. In two separate bills, one introduced in the Senate[1] and one introduced in the House,[2] the Legislature sought to reform the system under which injured workers are compensated under Alabama's workmen's compensation statute,[3] and to limit the availability of tort based co-employee lawsuits.[4] That the Legislature was unable to reach any consensus on these critical issues is symptomatic of the fact that the workmen's compensation system, as Alabama courts presently interpret it, is constitutionally unworkable. As a result the basic goals of the workmen's compensation laws are thwarted,[5] and there is some evidence that Alabama is losing business opportunities.[6]

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The authors gratefully acknowledge the assistance of Thomas Roe Frazer II in helping prepare this article for publication.

[1] S. 126, introduced by Senators Goodwin, Bishop, Dixon, Barrow, Dial, Hand, Cabaniss, Bailey, and Bedsole; RFD-Business and Labor Relations; Rd 1-5-23-84.

[2] Substitute for H.B. 55, LRS84-6426R1 (May 23, 1984).

[3] ALA. CODE § 25-5-1 to -231 (1975).

[4] *See supra* note 1. The Senate bill would have given injured workers greater freedom to select their own physicians, increased the maximum weekly compensation benefit to 80% from 66-2/3% with certain limitations, and would have limited suits by injured workers against co-workers and the employer's insurance carrier. *Id.*

[5] *See infra* notes 35-37 and accompanying text.

[6] West Point-Pepperell, the Russell Corporation, and Avondale Mills plan to relocate their facilities out of state because of Alabama's co-employee liability. Each company has already begun construction on a new plant. Birmingham News, "Bad Business Weather," November 28, 1983. *See also* note 177 *infra.*

Nationally, workmen's compensation acts serve two basic goals: (1) they assure an employee prompt and adequate compensation for on the job injuries, and (2) they guarantee predictable liability for the employer (in the form of insurance premiums) which can be calculated into the costs of doing business.[7] Until 1970, Alabama's workmen's compensation was fairly standard. However, in that year the Alabama Supreme Court, in *United States Fire Insurance Co. v. McCormick*,[8] interpreted an ambiguity in the definition of "employer" under the Alabama statute[9] to mean that an injured worker could seek both the benefits of workmen's compensation and bring independent tort actions against allegedly negligent co-employees.[10] The Legislature, perceiving a rash of disruptive litigation and resultant unfavorable business climate, responded to the *McCormick* decision by amending the statutory definition of employer to include co-employees and thus prevent co-employee tort actions.[11] In 1975, the Legislature again amended the Act to include the employee's compensation insurance carrier within the immunity to suit provisions of the Act.[12] If these amendments had stood, the Alabama compensation system would have remained in the mainstream of such systems around the country.[13] However, in the 1978 landmark

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[7] *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, 1-2 (1972) [hereinafter cited as LARSON].

[8] 286 Ala. 531, 243 So. 2d 367 (1970).

[9] *See infra* notes 41-56 and accompanying text.

[10] *McCormick*, 286 Ala. at 532, 243 So. 2d at 368.

[11] 1973 Ala. Acts 1062 (codified in amended form at ALA. CODE § 25-5-11 (1975)).

[12] 1975 Ala. Acts 86 (codified at ALA. CODE § 25-5-11 (1975)).

[13] For example, 11 of the 12 southern states surrounding Alabama do not allow co-employee suits. *See, e.g.*, FLA. STAT. ANN. § 440.11(1) (West 1981); Iglesia v. Floran, 394 So. 2d 994 (Fla. 1981); GA. CODE ANN. § 34-9-11 (1981); Woodward v. St. Joseph Hospital, 160 Ga. 676, 288 S.E.2d 10 (1981); Williams v. Byrd, 242 Ga. 80, 247 S.E.2d 874 (1978); KY. REV. STAT. § 342.690 (Baldwin 1979); Kearns v. Brown, 627 S.W.2d 589 (Ky. 1982); Wallace v. Wathen, 476 S.W.2d 829 (Ky. 1972); Black v. Tichenor, 396 S.W.2d 794 (Ky. 1965); Miller v. Scott, 339 S.W.2d 941 (Ky. 1960); Bazley v. Tortorich, 397 So. 2d 475 (La. 1981); LA. REV. STAT. ANN. § 23:1032 (West 1976).

Many courts and state legislatures extend co-employee immunity to gross negligence and wantonness. *See, e.g.*, Keating v. Shell Chem. Co., 610 F.2d 328 (5th Cir. 1980); Frazier v. Carl E. Woodward, Inc., 378 So. 2d 209 (La. Ct. App. 1979); MISS. CODE ANN. § 71-3-9 (1982); McClusky v. Thompson, 363 So. 2d 256 (Miss. 1978); Brown v. Estess, 374 So. 2d 241 (Miss. 1979).

Some courts and states, however, allow a co-employee to sue only for an intentional tort; *e.g.*, Doane v. E.I. Dupont de Nemours & Co., 209 F.2d 921 (4th Cir. 1954); Miller v. McRae's, Inc., 444 So. 2d 368 (Miss. 1984); N.C. GEN. STAT. § 97-9 to -10 (1979); Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), *cert. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982); Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982); S.C.

case of *Grantham v. Denke*,[14] the Alabama Supreme Court held the 1973 and 1975 amendments unconstitutional under the Alabama Constitution's open courts provision.[15] This decision caused not only an explosion of expensive and unpredictable litigation, but also, because the theoretical basis of *Grantham* is so amorphous, left the legislature with no clear guide with which to enact constitutionally permissible corrective legislation.

In an attempt to lend much needed clarity to this critical area of Alabama law, this article traces the common law and statutory development of workmen's compensation law in Alabama up to the present system of recovery. It then analyzes some of the more troubling aspects of the present framework and offers comment on how to resolve some of the more obvious problems with the present system.[16]

I. HISTORY OF WORKMEN'S COMPENSATION

Workmen's compensation has its roots in the law and culture of Western Europe and the United States. Professor Larson, author of the leading treatise in the field, traces the origins of workmen's compensation as far back as the year 1100 in

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CODE ANN. § 42-1-540 (Law. Co-op. 1977); Fernander v. Thigpen, 273 S.C. 28, 253 S.E.2d 512 (1979), *rev'd on other grounds,* 278 S.C. 140, 293 S.E.2d 424 (1982); Powers v. Powers, 239 S.C. 423, 123 S.E.2d 646 (1962); Williams v. Smith, 222 Tenn. 284, 435 S.W.2d 808 (1968); Majors v. Moneymaker, 196 Tenn. 698, 270 S.W.2d 328 (1954); TEX. REV. CIV. STAT. ANN. art. 8306 § 3 (Vernon 1983); McKelvy v. Barber, 381 S.W.2d 59 (Tex. 1964); VA. CODE § 65.1-40 (1983); Brown v. Reed, 209 Va. 502, 165 S.E.2d 394 (1969); Phillips v. Brinkley, 194 Va. 62, 72 S.E.2d 339 (1952); Coker v. Gunnter, 191 Va. 747, 63 S.E.2d 15 (1951); W. VA. CODE § 23-2-6(a) (1966); Bennett v. Buckner, 150 W. Va. 648, 149 S.E.2d 201 (1966).

Section 23-4-2 of the West Virginia Code, as amended in 1983, provides that a co-employee acts with "deliberate intention" only where he acts with a "consciously, subjectively and deliberately formed intention to produce the specific result of injury or death." W. VA. CODE 23-4-2 (1966). Under that statute, proof of wantonness, willfulness, or recklessness is not sufficient to overcome co-employee immunity. Mandolidis v. Elkins Industries, Inc., 246 S.E.2d 907 (W. Va. 1978).

[14] 359 So. 2d 785 (Ala. 1978).

[15] *Id.* at 789.

[16] Because this area is so controversial there already exists a considerable body of comment. *See, e.g.,* Smith, *Common Law Liability of Supervisory Employee to Subordinate*, 40 ALA. LAW. 230 (1979); Comment, *Co-employee and Workmen's Compensation Carrier Suits—Common-law Assault Upon Workmen's Compensation Exclusivity in Alabama*, 11 CUM. L. REV. 639 (1980); Comment, *Election and Co-employee Immunity Under Alabama's Workmen's Compensation Act*, 31 ALA. L. REV. 2 (1979); *Workmen's Compensation, 1979-1980 Alabama Law Survey*, 32 ALA. L. REV. 849 (1981); *Workmen's Compensation, 1977-1978 Alabama Law Survey*, 31 ALA. L. REV. 231 (1979).

fragments of both English and Germanic Law.[17] The growth of the Industrial Revolution brought an unprecedented number of injured workers into the courts. In response, the common law of England steadily grew more constrained. Theories of negligence were riddled with defense-oriented exceptions. Assumption of the risk, contributory negligence, and the fellow-servant rule proved a bar to the vast majority of claims. Either the desire to prompt industrial growth[18] or the general policy of economic laissez-faire[19] embraced by the courts prevented the growth of common-law remedies for an employee against an allegedly negligent employer. The first assault on this dearth of remedies was the Employer's Liability Act.[20] This Act created a statutory basis for an employee to recover against his employer.[21] The Employer's Liability Act did little, however, to provide the necessary and prompt compensation to injured workmen.[22] The task of devising a compromise system for recovery was left to the legislatures. New York enacted the first American workmen's compensation statute in 1910.[23] Within the next decade most of the other states followed suit, and Alabama enacted its first compensation act in 1919.[24]

Not surprisingly, these early attempts at legislation were met with vigorous constitutional challenges, and some of the first acts were struck down as unconstitutional on the ground that liability without fault constituted a taking without due process of law in violation of the fourteenth amendment, or that the acts violated the equal protection clause.[25] In one early case, *Ives v. South Buffalo Railway*, the New York Court of Appeals lauded the unsuccessful attempt by the drafters of the workmen's compensation statute declaring "[n]o word of praise could overstate the industry and intelligence of this commis-

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17 LARSON, *supra* note 7, at § 4.10.

18 *Id.* at § 4.30.

19 E.H. DOWNEY, HISTORY OF WORK-ACCIDENT INDEMNITY IN IOWA (1912).

20 ALA. CODE ch. 8 §§ 3910-13 (1907).

21 *Id.*

22 *See* Birmingham Ry. & Elec. Co. v. Allen, 99 Ala. 359, 31 So. 8 (1892).

23 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80 (4th ed. 1971) [hereinafter cited as PROSSER]. *Cf.* LARSON, *supra* note 7, at § 5.20 (Larson credits Missouri with beginning the workmen's compensation trend in 1904).

24 1919 Ala. Acts 245 (codified in amended form at ALA. CODE § 25-5-11 (1975)).

25 *See, e.g.*, Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 221-22, 119 P. 554, 556 (1911) (Montana Workmen's Compensation Act violates the right to equal protection); Ives v. South Buffalo Ry., 201 N.Y. 271, 317, 94 N.E. 431, 441 (1911) (New York Workmen's Compensation Act is a taking of property without due process of law).

sion in dealing with" employment-related injuries.[26] However, in *Ives*, where an employee petitioned the court to enforce the statute, the court considered itself bound by the constitutional argument of the employer and voided the act.[27]

These types of constitutional arguments over the early attempts at this kind of legislation provoked an overly cautious legislative reaction. Consequently, many workmen's compensation statutes suffered from a fragmentary approach which, although constitutionally acceptable, fell far short of satisfying the need for a comprehensive solution to this obviously complex problem. In one common approach, "elective" or "optional" statutes were drafted under which an employer could choose between providing compensation coverage or being faced with common-law actions without the benefit of common-law defenses. Typical of the confusion in this area, the first statutory treatment of the topic in Alabama begins with the frank admission that "[t]his act is greatly in need of condensation and clarification."[28]

Much of the federal constitutional uncertainty surrounding state compensation acts was put to rest by the United States Supreme Court in the 1917 case of *New York Central Railroad Co. v. White*.[29] In that case, a widow brought an action to recover compensation benefits pursuant to New York's new Workmen's Compensation Act for the death of her husband. She was awarded compensation by a New York commission set up to administer such claims, and that award was affirmed by the New York appellate courts. The defendant-railroad appealed to the United States Supreme Court on the same grounds which, prior to the amendment of the New York Constitution, had been successful in the state court—that the act violated the due process and equal protection clauses of the fourteenth amendment.[30] Writing for the Court, Justice Pitney opined that the act was plainly a compromise remedy designed to meet the needs of both employers and employees in the growing industrial movement of the United States, and that such acts were well within the police power of the various

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[26] 201 N.Y. 271, 94 N.E. 431, 436 (1911).

[27] 94 N.E. at 441.

[28] ALA. CODE ch. 287 (1923) (*see* Commissioner's note).

[29] 243 U.S. 188 (1917).

[30] *Id.* at 190-91.

states. Such an act did not offend the due process clause because, according to the Court:

> No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with a corresponding change in the test of negligence.[31]

The *White* Court further remarked that, although a state could not constitutionally abolish all rights of action, the trade-off which occurred under the New York system was permissible because it set "aside one body of rules only to establish another system in its place."[32] This type of substitution was permissible under the standard enunciated above.[33] With the constitutional objections settled, workmen's compensation acts received widespread acceptance around the country and were enacted more quickly than any other type of labor legislation in history.[34]

Since these decisions resolved the constitutionality of workmen's compensation laws, the premise of such acts has remained simple and fundamentally unchanged. Professor Larson outlines eight basic features of all workmen's compensation acts.[35] The basic premise common to workmen's compensation acts is that the receipt of benefits is triggered by the occurrence of personal injury by accidents arising out of and in the course of employment. Correspondingly, negligence or fault are largely immaterial in determining the award of benefits. The benefits are designed only for the class of employee—as distinguished from an independent contractor. Workmen's compensation acts generally award benefits based on the wages of the injured employee, and the medical bills incurred, with limits on the benefits in death cases. The employee and his dependents forfeit their right to sue the employer in a traditional action in exchange for this assured compensation. The

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[31] *Id.* at 198 (citations omitted).

[32] *Id.* at 201.

[33] *Id.* at 202.

[34] *See* U.S. Bureau of Labor Statistics, Bull. No. 126, at 9 (1923); LARSON, *supra* note 7, at § 5.20. The last state to enact a statute was Mississippi, which passed its first act in 1948. *See* FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

[35] LARSON, *supra* note 7.

employee and his dependents retain, however, their right of action against third parties, with a right of subrogation for the employer. A commission administers the act, with a liberal view toward accomplishing its remedial goals. Finally, the acts require the employer to secure his liability through some form of insurance, thus guaranteeing certainty in his liability in the form of premiums.[36]

The Alabama compensation system contains all these standard elements, and, up until 1970, there was nothing particularly unusual about its development. However, as noted above, in that year the Alabama Supreme Court ignited a new constitutional debate about Alabama's compensation statute by holding that the immunity granted to "employers" under the Act did not extend to co-employees of an injured worker.[37] Because the constitutional questions generated as a result of that decision involved not the due pocess clause of the fourteenth amendment but rather the open courts provision of the Alabama Constitution, a specific discussion of the development of the Alabama statute and the constitutional provision presently affecting it is needed at this point.

II. ALABAMA'S STATUTORY FOUNDATIONS

A. The Workmen's Compensation Act

The legislative development of Alabama's current Workmen's Compensation Act followed a simple path. In 1919, the legislature copied and passed a version of the Minnesota Workmen's Compensation Act.[38] That Act provided a means of fixing the liability of the employer to an injured employee at a certain rate of compensation based on the type of injury received and the weekly wages of the employee.[39] In exchange for this guarantee of compensation regardless of fault, the employee agreed to allow the employer to be immune from common-law liability.[40] The statute left open the question of co-employee liability. The common-law liability of "any party other than the employer" who caused injury or death was not

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[36] *Id. See also* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1295-96 (7th ed. 1982).

[37] *McCormick*, 286 Ala. 531, 243 So. 2d 367.

[38] *See* Fruehauf Corp. v. Prater, 360 So. 2d 999, 1001 (Ala. 1978).

[39] 1919 Ala. Acts 245 §§ 1-15 (codified in amended form at ALA. CODE § 25-5-11 (1975)).

[40] *Id.* at §§ 10-12.

changed by the statute.[41] Thus, as pointed out by the court in *United States Fire Insurance Co. v. McCormick*,[42] the original Act left open the question of whether the Legislature intended to include co-employees, officers, and other supervisory personnel in the classification of "party other than the employer,"[43] or whether it intended to include those parties in the immunity granted the employers under the Act.

Surprisingly, the first major modification of the Workmen's Compensation Act did not come until 1947.[44] In the amendments passed that year, the legislature removed the requirement in the original Act that the injured employee elect between a common-law action against an allegedly negligent third party and the assured compensation available from his employer under the compensation program.[45] The legislature then granted the employer, or his insurer, a right of subrogation such that after paying the injured employee his compensation benefits, the employer or his insurer could pursue the

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[41] 1919 Ala. Acts 245, § 32(1) at 232. In the discussion of employer liability to compensate for employee injuries, the statute specifically exempts the employer from liability for "injuries due to the acts or omissions of third persons not at the time in the service of the employer, nor engaged in the work in which the injury occurs. . . ." *Id.* at § 31(3). In that this would include a co-employee's actions among those for which an employer is ultimately liable, arguably the co-employee is excluded from those third parties whose liability remains after the institution of this comprehensive scheme of compensation because the statute offers that person a remedy.

[42] 286 Ala. 531, 243 So. 2d 367 (1970).

[43] The Act defines "employer" to include (1) every person not excluded by the statutory listing of employments that do not fall within the coverage of the workmen's compensation act, (2) if that person employs another to perform a service for hire, and (3) if the employer pays that person wages directly. The Act specifically lists any person, corporation, co-partnership, or association, or group thereof, and the employer's insurer. 1919 Ala. Acts 245 § 36(d) at 237.

Several other states also allow suits against "any person other than the employer:" ARK. STAT. ANN. § 81-1340 (1976); CAL. LAB. CODE § 3852 (West 1971); FLA. STAT. ANN. § 440.39(1) (West Supp. 1981); IDAHO CODE § 72-223 (1973); ILL. REV. STAT. ch. 48, § 138.5(b) (Supp. 1980-81); KY. REV. STAT. ANN. § 342.700(1) (Baldwin 1979); ME. REV. STAT. ANN. tit. 39, § 68 (1964); MD. ANN. CODE art. 101, § 58 (Supp. 1983); MASS. ANN. LAWS ch. 183, § 15 (Michie/Law Co-op 1976); MINN. STAT. ANN. § 176.061(1) (West 1966); MISS. CODE ANN. § 71-3-71 (1972); NEB. REV. STAT. § 48-114 (1978); N.J. STAT. ANN. § 34:15-40 (West 1959); N.C. GEN. STAT. § 97-10.2(a), (b) (1979); N.D. CENT. CODE § 65-01-09 (Supp. 1983); PA. STAT. ANN. tit. 77, § 671 (Purdon Supp. 1980-81); R.I. GEN. LAWS § 28-35-58 (1979); S.C. CODE ANN. § 42-1-560(a) (Law. Co-op 1976); S.D. COMP. LAWS. ANN. § 62-4-38 (1978); TENN. CODE ANN. § 50-914 (1977); TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1980-81); VT. STAT. ANN. tit. 21, § 624(a) (1978); VA. CODE § 65.1-41 (1980); WIS. STAT. ANN. § 102.29 (West Supp. 1983-84); WYO. STAT. § 27-12-104 (1977).

[44] 1947 Ala. Acts 635.

[45] *Id.* at § 1 (p. 485).

actual tortfeasor.[46] The modification and the concomitant creation of a right of subrogation for the employer or his insurer served to bring the compensation program closer to the common-law tort concept of applying liability where the fault lies, and further from the concept of a form of private industrial insurance. In so doing, the Legislature took the first step onto a confusing path. As Professor Larson points out, most problems with workmen's compensation are ultimately attributable to this confusion.[47] Workmen's compensation was designed as a compromise between a purely private contest of tort litigation[48] and a purely public social insurance.[49] Attempts by legislatures or courts to move workmen's compensation toward either pole disturb the balance of the compensation system and, correspondingly, lead to confusion in the development of the law in this area. Developments in this private system of compensation that drastically change fundamental tenets of the law cause tremors at the foundation of the system.

This change in the statutory scheme produced a more fertile environment for litigants to recover indemnity from actual tortfeasors, but in spite of the Legislature's attention to perceived defects in the Workmen's Compensation Act,[50] it still provided no express definition of "party other than the em-

[46] The stage was set for the Legislature to create this right of subrogation for the employer by the court's opinion in Western Union Tele. Co. v. George, 239 Ala. 80, 194 So. 183 (1940). A telegram deliveryman died when a train collided with his bicycle. *Id.* at 82, 194 So. at 185. A third party action against the train company resulted in a settlement for the messenger's dependents. *Id.* The employer asserted that the settlement amount should properly be deducted from the workmen's compensation judgment. *Id.* at 83, 194 So. at 186. *George* identifies a problem with the Act. By settling the claim with the train company for arguably less than the claim was worth, the claimants compromised the right of the employer to pay still less in compensation. The Legislature responded with a right of subrogation for employers. Hence, an employer in this setting would be allowed to pursue his interest in reducing the amount of compensation to be paid by bringing an action against the negligent party.

[47] LARSON, *supra* note 7, at § 1.20.

[48] For example, the American system of compensation for employment-related injuries prior to the advent of the workmen's compensation systems was purely tort based.

[49] *E.g.*, National Insurance (Industrial Injuries) Act, 9 & 10 Geo. 6, ch. 62, 67 (1946 eff. 1948); Ministry of National Insurance Act, 7 & 8 Geo. 6, ch. 46 (1944); Family Allowances Act, 8 & 9 Geo. 6, ch. 41 (1945); National Health Services Act, 9 & 10 Geo. 6, ch. 81 (1946). The foregoing are components of the British system of social insurance. For a general review of foreign compensation systems, see OCCUPATIONAL DISABILITY & PUBLIC POLICY (CHEIT & GORDON, eds. 1963).

[50] *See, e.g.*, 1961 Ala. Acts 272; 1947 Ala. Acts 635; 1939 Ala. Acts 661; 1936 Ala. Acts 29.

ployer"[51] for immunity purposes.

In 1961 the Workmen's Compensation Act again was amended, but these changes did not address the issue of co-employee suits.[52] This issue was finally brought to the attention of courts and lawyers in 1970, with the Alabama Supreme Court's decision in *United States Fire Insurance Co. v. McCormick*[53] which held "where there is no expressed legislative mandate to the contrary, a co-employee or fellow servant is a third party tortfeasor within the meaning of the Workmen's Compensation Act."[54] Reasoning from a prior holding[55] that executive level officials were employees for the purposes of workmen's compensation insurance policies, the court found it incongruous to classify these same functionaries as an "employer" for the statutory language.[56]

In response, the 1973 amendments to the Workmen's Compensation Act provided the express contrary legislative mandate demanded by the *McCormick* opinion.[57] The

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[51] *See generally* ALA. CODE tit. 26 (1940); 1961 Ala. Acts 272.

[52] *See* 1961 Ala. Acts 272. This amendment created a liability for the employer for a proportionate amount of any attorney's fees incurred by the injured employee or, in the case of death, his dependents, if the claimant(s) incurred the attorney's fees in obtaining a settlement with a negligent third party. *Id.*

[53] 286 Ala. 531, 243 So. 2d 367 (1970).

[54] *Id.* at 536, 243 So. 2d at 371.

[55] Queen City Furniture Co. v. Hinds, 274 Ala. 584, 150 So. 2d 756 (1963).

[56] *Queen City Furniture Co. v. Hinds* presented the court with a question of contract law interpretation: whether the deceased, although included in the premiums collected by the insurer as a salesman and collector, was covered under the workmen's compensation insurance policy. *Id.* at 588-89, 150 So. 2d at 759. The *Queen City Furniture* court narrowly limited its holding to finding the so-called executives in that case "employees" for purposes of that case only. It reasoned that ambiguous language in insurance policies must be construed in favor of the insured, *see* United States Fire Ins. Co. v. McCormick, 286 Ala. 531, 537, 243 So. 2d 367, 372 (1970), and made the factual finding that the decedent's executive duties in *Queen City Furniture* were "secondary to his work as an employee." 286 Ala. at 589, 150 So. 2d at 760. The *McCormick* court's reliance upon *Queen City Furniture* to decide who is a "party other than the employee" is misplaced. *See, e.g.,* Rosales v. Venson Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976) (allows dual function doctrine to permit officers to recover benefits but not to permit officer liability in third party actions). *See also* NLRB v. Hearst, 102 F.2d 658, 663 (9th Cir. 1979); National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (1976); 56 C.J.S. *Master & Servant* § 28(10) (1948).

[57] 1973 Ala. Acts 1062, § 26 at 1771-72. Many other states offer similar immunity to co-employees: *E.g.*, Alaska Stat. § 23.30.015 (1972); ARIZ. REV. STAT. ANN. § 23-1023 (1983); COLO. REV. STAT. § 8-52-108 (1973); CONN. GEN. STAT. ANN. § 31-293 (West 1972); DEL. CODE ANN. tit. 19, § 2363(a) (1979); GA. CODE ANN. § 114-103 (Supp. 1980); HAWAII REV. STAT. § 386-8 (1976); IND. CODE ANN. § 22-3-2-13 (Burns Supp. 1984); IOWA CODE ANN. § 85.22 (West Supp. 1984-85); KAN. STAT. ANN. § 44-504 (1981); LA. REV. STAT. ANN. § 23:1101 (West Supp. 1984); MICH. COMP. LAWS ANN. § 418.827

amendments provided that "neither an officer, director, agent, servant or employee of the same employer or his personal representative, shall be considered a party other than the employer against whom such action may be brought."[58] The Legislature thus waited fifty-four years before defining the scope of employer immunity under the Workmen's Compensation Act. In its final codified form in 1975, the list of those who were to share in the employer's immunity also included the employer's workmen's compensation insurance carrier and the carrier's officers, directors, agents, servants, employees, and official representatives or safety inspectors.[59]

Although the constitutionality of the 1973 and 1975 amendments was the topic in *Childers v. Couey*,[60] the court limited its focus to the constitutionality of second-guessing the legislature.[61] The plaintiff asserted that his action against co-employees should not be dismissed because the correction of typographical errors would remove the prohibition against co-employee lawsuits. The trial court accepted this argument, and refused to enter a summary judgment in favor of the defendant.[62] On appeal, the Alabama Supreme Court found the fundamentals of separation of powers prevented judicial inquiry into the matter, and reversed and rendered judgment for the defendants.[63] In an amicus brief filed on application for rehearing, the applicable code section of the Act was challenged by arguments focusing on the due process implications and the alleged guaranteed preservation of common-law rights under section 13 of the Alabama Constitution.[64] The court refused relief, however, on the grounds that, because of the procedural posture of these arguments, they were not available for consideration.[65]

(Supp. 1984-85); MONT. REV. CODE ANN. § 39-71-412 (1983); NEV. REV. STAT. § 616-560(1) (1979); N.H. REV. STAT. ANN. § 281.14 (Supp. 1983); N.M. STAT. ANN. § 52-1-56 (1978); N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-84); OHIO REV. CODE ANN. § 4123.741 (Baldwin 1983); OKLA STAT. ANN. tit. 85, § 44(A) (West Supp. 1983-84); OR. REV. STAT. § 656.154 (1983); UTAH CODE ANN. § 35-1-60 (Supp. 1979); W. VA. CODE § 23-2-6a (1981).

58 1973 Ala. Acts 1062, § 26 at 1771-72.

59 ALA. CODE § 25-5-11 (1975). *See also* Childers v. Couey, 348 So. 2d 1349 (Ala. 1977).

60 348 So. 2d 1349 (Ala. 1977).

61 *Id.* at 1350.

62 *Id.* at 1352.

63 *Id., citing* Mayor and Alderman v. Simmons, 165 Ala. 359, 51 So. 638 (1910).

64 *Childers*, 348 So. 2d at 1357.

65 *Id.*

Grantham v. Denke[66] followed *Childers* the next year, and counsel in *Grantham* did not overlook the section 13 arguments brought out by the amicus brief.[67] *Grantham* held unconstitutional only the portion of the extended employer immunity that immunized co-employees.[68] The constitutionality of the extended employer immunity applicable to officers, directors, agents, or workmen's compensation carriers was left unresolved in *Grantham.* The court's long standing policy of affording the Legislature a strong presumption of constitutionality in legislation operated to protect the remainder of the extended-employer immunity.[69] Cases subsequent to the *Grantham* decision clearly established that the Alabama Supreme Court considers the protections of section 13 to extend further.[70] It is unclear, however, just how far the constitutional analysis will go. The court's interpretation and analysis of section 13 applied in the workmen's compensation cases differs from that found in other cases.[71]

The piecemeal reform effected by the court which began with *McCormick* continually has left the Workmen's Compensation Act progressively less comprehensible. Originally, the Alabama Act afforded the employer a reasonably certain expense for industrial accidents. The activities of the court have removed the vestiges of certainty from the system. Corresponding increases in insurance premiums are destined to be similarly unpredictable.[72] In the course of amending the

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66 359 So. 2d 785 (Ala. 1978).

67 *Compare id. with Childers*, 348 So. 2d at 1357.

68 Grantham v. Denke, 359 So. 2d 785, 788 (Ala. 1978).

69 *Id.* at 786-87, 789-90 (Maddox, J. dissenting).

70 *See, e.g.*, Hathcock v. Commerical Union Ins. Co., 576 F.2d 653 (5th Cir. 1978) (extended co-employee holding of *Grantham* to include supervisory employees); Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1981) (extended co-employee holding of *Grantham* to include corporate officers, supervisory employees, and workmen's compensation insurance carriers); Johnson v. American Mut. Liab. Ins. Co., 394 So. 2d 1 (Ala. 1980) (extended co-employee holding of *Grantham* to include safety inspector of workmen's compensation insurance carrier); Jones v. Watkins, 364 So. 2d 1144 (Ala. 1978) (extended co-employee holding of Grantham to supervisory employees engaged in the function of a co-employee). *But see, e.g.*, Wilkins v. West Point-Pepperell, Inc., 397 So. 2d 115 (Ala. 1981) (refused to extend holding in *Grantham* to "true" occupational disease); Slagle v. Parker, 370 So. 2d 947 (Ala. 1979) (refused to extend holding in *Grantham* to statutorily created wrongful death action). *See also* Jackson v. Mannesman Demag Corp., 435 So. 2d 725 (Ala. 1983) (applying § 13 in context of a statute of limitation); Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982) (applying § 13 in context of a statute of limitation).

71 *See infra* notes 104-114 and accompanying text.

72 In fact, subsequent decisions by the court have relied, in part, on the increase in

Workmen's Compensation Act to immunize co-employees, the Legislature also removed the procedural steps for election to withdraw from coverage under the compensation scheme.[73] The result of legislative reform and judicial reform is that Alabama now has an unworkable statute. Inconsistencies need to be corrected by the body of government best-suited to undertake a massive overhaul of the system, namely, the Legislature. Unfortunately, the court's eagerness to correct the Legislature in *Grantham v. Denke* may have bound the Legislature's hands, preventing the needed repair. The new "common-law rights"[74] approach to the open court provision has forced the state into a position where the branch of government best-suited to address the workmen's compensation program is not allowed to do so.

B. Alabama Constitution Section 13

Section 13 of the Alabama Constitution led a fairly peaceful existence prior to *Grantham v. Denke*.[75] Since that time, it has been aptly dubbed a "judicial tar-baby."[76] This part of the article analyzes the growth of section 13 analyses before and after *Grantham*. As indicated by the following cases, two distinct forms of section 13 analysis emerge: first, the traditional analysis of section 13, referred to as the "vested rights" approach; and second, the variation thrust on this analysis by the *Grantham* rationale.

The "open court" provision is found in the Alabama Constitution of 1901 at section 13 of the Bill of Rights.[77] It reads: "That all courts shall be open; and that every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."[78] The same or similar guarantees are found in the constitutions of

premiums. *E.g.*, Johnson v. American Mut. Liab. Ins. Co., 394 So. 2d 1 (Ala. 1980); Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1980).

73 1973 Ala. Acts 1062. *See also* Pipkin v. Southern Elec. & Pipefitting Co., 358 So. 2d 1015 (Ala. 1978). In *Pipkin*, the court ruled that the Workmen's Compensation Act presumes one to elect to come within its provisions. *Id.* Thus, removal of the procedures to opt out makes the "elective" nature of the Act oxymoronic at best.

74 *See generally* Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 350-54 (Ala. 1980) (Shores, J. concurring).

75 359 So. 2d 785 (Ala. 1978).

76 Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1980) (Beatty, J. dissenting).

77 ALA. CONST. art. I, § 13.

78 *Id.*

thirty-six other states,[79] and, as will be seen below, prior to

[79] *Id.* (see text); ARIZ. CONST. art. II, § 11 ("Justice in all cases shall be administered openly and without unnecessary delay"); ARK. CONST. art. II, § 13 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the Laws"); COLO. CONST. art. II, § 6 ("Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay"); CONN. CONST. art. I, § 10 ("All courts shall be open, and any person, for an injury done to him in his person, property or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay"); DEL. CONST. art. I, § 9 ("All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial or unreasonable delay or expense"); GA. CONST. art. I, § 1 ("No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state, in person, by attorney or both"); IDAHO CONST. art. I, § 18 ("Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice"); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly"); IND. CONST. art. I, § 12 ("All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial, speedily and without delay"); KY. CONST. art. I, § 14 (All courts shall be open, and every person for an injury done him in his land, goods, person or reputation, shall have a remedy by due course of law and right and justice administered without sale, denial or delay"); LA. CONST. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury done to him on his person, property, reputation, or other rights"); ME. CONST. of 1820, art. I, § 19 ("Every person, for an injury done him in his person reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay"); MD. CONST. of 1867, decl. of rts. art. XIX ("That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land"); MASS. CONST. of 1780, decl. of rts. art. XI ("Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws"); MINN. CONST. of 1857, art. I, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws"); MISS. CONST. of 1890, art. III, § 24 ("All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay"); MO. CONST. of 1945, art. I, § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay"); MONT. CONST. of 1972,

Grantham, the Alabama courts' interpretation of this provision

art. II, § 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial or delay"); NEB. CONST. of 1875, art. VII, § 13 ("All courts shall be open, and every person, for any injury done him in lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay"); N.H. CONST. of 1784, part 1, art. 14 ("Every subject of this state is entitled to a certain remedy, by having recourse, to the laws, for all injuries he may receive in his person, property, or character, to obtain right and justice freely, without being obliged to purchases it; completely, and without any denial; promptly and without delay; conformably to the laws"); N.C. CONST. of 1971, art. I, § 18 ("All courts shall be open, every person for an injury done him in all his lands, goods, or reputation shall have a remedy by due course of law; and right and justice shall be administered without favor, denial, or delay"); N.D. CONST. of 1889, art. I, § 9 ("All courts shall be open, and every man for any injury done in his lands, goods, persons or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay"); OHIO CONST. of 1851, art. 2, § 16 ("All courts shall be open; and every person, for an injury done him in his land, goods, person or reputation shall have remedy by due course of law, and shall have justice administered without denial or delay"); OKLA. CONST. of 1907, art. II ("The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice"); OR. CONST. of 1859, art. I, § 10 ("No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation"); PA. CONST. of 1968, art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay"); R.I. CONST. of 1843, art. I, § 5 ("Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial; promptly and without delay; conformably to the laws"); S.C. CONST. of 1895, art. I, § 9 ("All courts shall be public, and every person shall have a speedy remedy therein for wrongs sustained"); S.D. CONST. of 1889, art. VI, § 20 ("All courts shall be open, and every man for any injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay"); TENN. CONST. of 1870, art. I, § 17 ("That all courts shall be open; and every man, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay"); UTAH CONST. of 1896, art. I, § 11 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay. . ."); VT. CONST. of 1793, ch. 1, art. IV ("Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws"); W. VA. CONST. of 1872, art. III, § 17 ("The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation shall have remedy by due course of law; and justice shall be administered

was similar to interpretations used in other states.[80]

1. History of the Open Court Provision

In her concurring opinion in *Fireman's Fund Insurance Co. v. Coleman*,[81] Justice Shores traced the open court provision back to Coke's commentaries on the Magna Carta in 1629.[82] She portrayed Coke's treatment of Chapters 39 and 40 of the Magna Carta[83] as the nascence of Alabama's section 13. Coke relied on one clause to define right (*rectum*) and the qualities of

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without sale, denial or delay"); WIS. CONST. of 1848, art. I, § 9 ("Every person is entitled to a certain remedy in the laws of all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws"); WYO. CONST. of 1890, art. I, § 8 ("All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay").

[80] *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 U.S. 59 (1978) (a person has no property right or vested interest in any rule of common law, hence legislative abolition is constitutionally permissible); Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir) (relinquishment of vested right raises constitutional question), *cert. denied*, 447 U.S. 908 (1980); State v. Estes Corp., 27 Ariz. App. 686, 558 P.2d 714 (1976) (vested right subject to constitutional protection must be immediate and fixed); Dunn v. Felt, 379 A.2d 1140 (Del. Super. Ct. 1977) (legislature has power to abolish old rights so long as those rights are not vested), *aff'd*, 401 A.2d 77 (Del. 1979); Mier v. Staley, 28 Ill. App. 3d 373, 329 N.E.2d 1 (1975) (legislated co-employee immunity held not violative of open court provision).

[81] 394 So. 2d 334 (Ala. 1980).

[82] *Id.* at 352.

[83] Chapter 39 of the Magna Carta reads: "*Nulles liber homo capiatur vel imprisonetur, aut disseisatur, ant atlagetur, ant exuletur, ant aliqus modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre.*" W. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914). McKechnie translates this chapter as: "No free man shall be taken or [and] imprisoned or disseised or in any way exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land." *Id.*

Coke delineates nine separate branches of this chapter: (1) No man shall be taken or imprisoned; (2) no man shall be disseised; (3) no man shall be outlawed; (4) no man shall be exiled; (5) no man shall be in any sort destroyed; (6) no man shall be condemned in court without the judgment of his peers; (7) Justice and Right shall not be sold; (8) Justice and Right shall not be denied to any man; and (9) Justice and Right shall not be deferred. F. THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300-1629, 363 at n.23 (1948).

Chapter 40 of the Magna Carta reads: "*Nuli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.*" McKechnie translates this chapter as: "[I]f no one will we sell, to no one will we refuse or delay, right or justice." MCKECHNIE at 395.

"[T]he law of the law" has been translated alternatively as due process of law. *See* Statute of 37 E. 3., cap. 8. This translation provides the underpinnings of the modern guarantee of due process upon which the open courts provision at issue here has been called "a mere gloss." F. GRAD, THE STATE BILL OF RIGHTS 135, *reprinted in* B. SACHS, LAWS LEGISLATURE, LEGISLATIVE PROCEDURES: A FIFTY STATE INDEX (1982).

justice in his commentary on the development of the Magna Carta, and specifically Chapters 39 and 40. Coke explained:

> The law is called *rectum*, because it discovereth that which is tort, crooked, or wrong, for as right signifieth law, so tort, crooked or wrong, signifieth injury, and *injuria est contra jus*, against right . . . it is called Right, because it is the best birth right the subject hath, for thereby his goods, lands, wife, children, his body, life, honour and estimation are protected from injury and wrong: *major haereditas venit unicuique nostrum a jure*, and *legibus quam a parentibus* . . . [84]

Coke furthered this exposition, quoting from the Year Books of Henry IV:

> And therefore every subject of this realm, for injury done to him in *bonis, terris, vel persona*, [self, land, reputation] by any other subject, be he Ecclesiastical, or Temporal, Free or Bond, Man or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay. Hereby it appeareth, that justice must have three qualities, it must be *Libera, quia nikil iniquius venali justitia; Plena, quia justicia non debet clandicase*, and *celeris, quia dilatio est quaedana negatio*; and then it is both justice and right.[85]

The key to Coke's interpretation is found in Justice Shore's own quotation. Just as the *rectum* (literally translated it refers to right), is employed in the Magna Carta to mean law, (i.e., the common law), the injury for which redress is due is that injury cognizable in tort. In other words, an injury actionable in tort must have some form of redress available in the common law. Today, this is almost a self-proving assertion, but in its historical setting, this principle limited the prerogative of the King to deny those suffering disfavor access to the courts to seek a remedy.

In the modern context, this principle operates to protect an individual's cause of action from pre-emption by the government once that cause of action has accrued. Thus, while an act by an individual may not give rise to liability on day one, the legislature may act to create liability for that same act if per-

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[84] F. THOMPSON, *supra* note 83, at 364 n.27.

[85] *Id.* at 365.

formed subsequent to the legislature's determination. Conversely, a cause of action may exist for acts committed on and before day one that would not be actionable if committed subsequent to a legislative determination that there should be no liability for such acts. The principle underlying section 13 would only operate to stop the legislature from withdrawing the cause of action from an individual once that individual's cause of action had accrued or "vested."

2. Modern Interpretations of Section 13: The Vested Rights Approach

Justice Shores traces two separate versions of section 13 interpretation in her concurrence in *Fireman's Fund Insurance Co. v. Coleman*.[86] The first interpretation is the "vested rights" theory, which she finds best explained in *Pickett v. Matthews*.[87] Under this theory, the legislature has the power to affect the duty of an individual, the breach of which duty would otherwise create an actionable injury. Once the duty is breached, a cause of action has accrued and section 13 protects that cause of action from legislative interference. *Pickett* analyzes section 13 in the context of the automobile guest statute.[88] The court's analysis proceeds from the basic tenet, supported by the historical roots of section 13, that "injury" described in the section "is damage which results from breach of some duty."[89] The *Pickett* court then laid down a rule of law that "section 13 . . . does not in language, nor intent, prevent the legislature from changing a rule of duty to apply to transactions which occur thereafter."[90] The court clearly outlined the vested rights approach to section 13: a person possessing a cause of action which has accrued (i.e., a duty has been breached causing that person injury) is entitled to a remedy at law.

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[86] 394 So. 2d 334, 351 (Ala. 1980) (Shores, J. concurring).

[87] 238 Ala. 542, 192 So. 261 (1939).

[88] *Id.* at 545, 192 So. at 263.

[89] *Id.* After quoting § 13, the court explained:

> It will be noticed that this provision preserves the right to a remedy for an injury. That means that when a duty has been breached producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for absence of a remedy. But this provision does not undertake to preserve existing duties against legislative change made before the breach occurs. There can be no legal claim for damages to the person or property of anyone except as it follows from the breach of a legal duty.

Id.

[90] *Id.*, 192 So. at 264.

Although Justice Shores traces the history of this view back only to *Pickett v. Matthews*, its roots lie far deeper in Alabama jurisprudence. In the 1857 case of *Coosa River Steamboat Co. v. Barclay & Henderson*,[91] the Alabama Supreme Court explained four fundamental precepts for the interpretation of section 13:

1. It is not within the power of the legislature to take away vested rights.
2. The legislature may alter, enlarge, modify or confer a remedy for existing legal rights without infringing any principle of the constitution.
3. It is not within the power of the legislation [sic] to create a cause of action out of an existing transaction, for which there was, at the time of its occurrence, no remedy.
4. Statutes which operate alone to the remedy without creating, enlarging or destroying the right operate generally on existing causes of action, as well as those which afterwards accrue.[92]

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[91] 30 Ala. 120 (1857).

[92] *Id.* at 126-27 (citations omitted). *Coosa River Steamboat* goes back still further in Alabama jurisprudence and that of other states for the sources used in its distillation of these four precepts. *See, e.g.*, Newton v. Tibbatts, 7 Ark. 150 (1846) (legislature has power to affect remedy); Searcy v. Stubbs, 12 Ga. 437 (1853) (remedial statutes are not void except when they affect vested rights); Bruce v. Schuyler, 9 Ill. (4 Gilm.) 221 (1847) (remedial statute may direct prior rights); Fisher v. Lacky, 6 Blackf. (Ind.) 373 (1843) (legislature free to end imprisonment for debts); Moltby & Bolls v. Cooper, 1 Morris (Iowa) 59 (1840) (legislatures may pass statutes of limitation); Austin v. Stephens, 24 Me. 520 (1845) (legislature cannot affect rights that have vested); Fales v. Wadsworth, 23 Me. 553 (1844) (legislature free to modify procedures); Read v. Frankfort Bank, 23 Me. 318 (1843) (legislature may freely change remedies); Baugher v. Nelson, 9 Gill. (Md.) 299 (1850) (constitution protects only rights that are vested); Knights v. Dorr, 36 Mass. (19 Pick.) 48 (1837) (legislative acts are constitutional so long as affect only remedy); Commonwealth v. Phillips, 28 Mass. (11 Pick.) 28 (1831) (legislation regarding sentencing procedure found constitutional); Medford v. Learned, 16 Mass. 215 (1819) (allows retroactive statute to affect debts previously incurred); Clarke v. McCreary, 20 Miss. (12 S. & M.) 347 (1849) (statute favoring married woman does not affect husband's vested rights); Woods v. Buie, 6 Miss. (5 Howard) 285 (1840) (legislature had undoubted right to alter remedies); People v. Tibbetts, 4 Cow. (N.Y.) 384 (1825) (rule that statute cannot affect vested right is inapplicable where statute affects only the remedy); Dash v. Van Kleek, 7 Johns. (N.Y.) 477 (1811) (act of legislature will not operate retrospectively if it affects vested rights); Houston v. Bogle, 32 N.C. 496 (1849) (legislature cannot divest rights once vested); Woodfin v. Hooper, 223 Tenn. (4 Hum.) 13 (1843) (legislature may abolish imprisonment for debt); Hope v. Johnson, 10 Tenn. (2 Yer.) 123 (1826) (remedy may be constitutionally changed even after right has vested); Paschal v. Perez, 7 Tex. 348 (1851) (right must be perfected before legislature's divertiture is unconstitutional); Sutherland v. DeLeon, 1 Tex. 250 (1846) (where a right exists, legislature is free to fashion a remedy); Pratt v. Jones, 25 Vt. 303 (1853) (laws affecting only the remedy are constitutional).

These principles provided the basis for the court's analysis of its jurisdiction to determine the propriety of an attachment of a foreign corporation's assets.[93] The most telling elements in the context of the *Grantham* decision are the first and second: that no vested rights may be taken away and that the Legislature may change any remedy. Applied in a straightforward fashion to Alabama Code section 25-5-11, at issue in *Grantham*, these precepts demand a result exactly opposite to the court's holding: the Legislature is not bound to the common-law remedy but can act within the bounds of its constitutional power to change the remedy, so long as it does not take any vested rights. So long as the 1973 and 1975 amendments to the Workmen's Compensation Act operated prospectively, the Legislature conformed to this restraint under the court's own analysis.

Twenty-four years after *Coosa River Steamboat*, the court used the same interpretation of section 13 in *Peevey v. Cabaniss*.[94] The *Peevey* court explained that an act by the Legislature that allows a real party in interest to intervene[95] is an act of legislation that refers exclusively to the remedy.[96] Because this act merely changes the procedure for the remedy, it is clearly within the constitutional power of the General Assembly.[97]

Historically, Alabama workmen's compensation decisions appear to follow this same interpretation of section 13. In the earliest decisions it was only academic, because by electing to come within the ambit of the Workmen's Compensation Act the court held an employee to have waived his constitutional objections.[98] In *Chapman v. Railway Fuel Co.*,[99] the court went so far as to state: "[n]o one has any vested right under the Constitution to the maintenance of common-law doctrines in statutory provisions regulating the relations between employer and employee in respect of rights and liabilities growing out of accidental injuries."[100] In the face of countless constitutional attacks thrust upon the court by this new compensation system,

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[93] Coosa River Steamboat Co. v. Barclay & Henderson, 30 Ala. 120, 124-25 (1857).

[94] 70 Ala. 253 (1881).

[95] *Id.* In this case a creditor sought to intervene in an action to determine homestead exemption. *Id.* at 259.

[96] *Id.*

[97] *Id.*

[98] Woodward Iron Co. v. Bradford, 206 Ala. 447, 450, 90 So. 803, 805 (1921).

[99] 212 Ala. 106, 101 So. 879 (1924).

[100] *Id.* at 109, 101 So. at 881.

the court in 1924 repeatedly found its provisions constitutional.[101] The elective nature of the compensation Act, even though it created a presumption that a party elected in favor of coverage, was sufficient to assure constitutionality. The lack of any vested right in a particular form of remedy also kept the Act within the broad bounds of the plenary powers of the Legislature.[102]

In *Gentry v. Swann Chemical Co.*,[103] the court discussed the constitutionality of the Workmen's Compensation Act in order to interpret it. As dictated by the history of section 13, the court concentrated on the need to preserve a remedy for injuries "if under the common law or the Employer's Liability Act, or other statute, he was entitled to maintain an action."[104] The constitutional provision charges the court with the responsibility of guarding against legislative abrogation of an accrued cause of action, i.e., vested rights. For this reason, a plaintiff is entitled to seek a remedy at common law only for *injuries* not remedied by the Workmen's Compensation Act.[105]

3. Modern Interpretations of Section 13: The Common-Law Rights Approach

In *United States Fire Insurance Co. v. McCormick*,[106] the court determined that the phrase "any party other than the employer" made co-employees amenable to suit as a matter of statutory interpretation.[107] In the 1973 and 1975 amendments to the Workmen's Compensation Act, the Legislature clarified its intent as to which parties should be considered immune and which are third parties amenable to suit. Not until *Childers v. Couey*[108] did the court even hint at the possibility of a change in the interpretation of section 13.[109] Although the court ultimately held in *Childers* that the legislative enactment of the amendments was constitutional, the opinion on rehearing suggested a potential flaw in the legislative withdrawal of co-em-

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101 *See id.*

102 *See id.*

103 234 Ala. 313, 174 So. 530 (1937).

104 *Id.* at 319, 174 So. at 534.

105 *Id.*, 174 So. at 535.

106 286 Ala. 531, 243 So. 2d 367 (1970).

107 *Id.* at 536, 243 So. 2d at 371.

108 348 So. 2d 1349 (Ala. 1977).

109 *Id.* at 1352.

ployee amenity to suit: section 13.[110]

Notwithstanding the consistent interpretation of section 13 throughout the history of Alabama jurisprudence and that of other states,[111] the court wrought a change in *Grantham v. Denke*.[112] In her *Coleman* concurrence Justice Shores termed this new approach the "common law rights approach."[113] Under this theory, section 13 operates to preserve both common-law rights and remedies against legislative abrogation in all but two circumstances. In each circumstance the abrogation or loss is tested against the purpose or gain. If one who holds a common-law right voluntarily relinquishes it in exchange for equivalent benefits or protection from the legislature, then that comports with section 13.[114] In the alternative, if society perceives some benefit, then the legislative act can be termed a valid exercise of police power, and so also comply with the requirements of section 13.[115]

Grantham v. Denke thus became the watershed for this new approach to section 13. Oddly enough, the court found support for its declaration of a new interpretation of section 13 in an Arizona case.[116] This was surprising because Arizona is one of the few states that does not have a parallel provision to Alabama's section 13.[117] The Arizona court had relied on article 18, section 6 of its constitution, which provides far more specific direction than does section 13 of the Alabama Constitution. The Arizona provision reads: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[118] Still more surprising distinctions appear when one considers this section in the scheme of the Arizona Constitution as a whole. The thirty-six states that have an open court provision place the provision in either their declaration of

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110 *Id.* at 1357.

111 *See supra* notes 86-105 and accompanying text.

112 359 So. 2d 785 (Ala. 1978).

113 Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 352 (Ala. 1980) (Shores, J. concurring).

114 *See generally* Grantham v. Denke, 359 So. 2d 785 (Ala. 1978).

115 *See generally id.*

116 *Id.* at 788. The court actually references two Arizona cases: Halenar v. Superior Court, 109 Ariz. 27, 504 P.2d 928 (1972); Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P.2d 18 (1970). It is only in *Halenar* that the court considered the constitutionality of the legislated co-employee immunity. *Grantham*, 359 So. 2d at 788.

117 *See supra*, note 79.

118 ARIZ. CONST. art. 18, § 6.

rights or the bill of rights.[119] The provision relied upon by the Arizona court is specifically drawn from the Arizona Constitution's labor section. The Alabama Constitution has no counterpart to this.[120]

Despite the incongruity of the constitutional provisions at issue in the Alabama and Arizona cases[121] and the availability in thirty-five other states' laws of provisions far more similar to Alabama's section 13,[122] not to mention the wealth of Alabama jurisprudence on section 13,[123] Justice Embry found two Arizona cases to be dispositive authority.[124]

With a foreign state's different constitutional provision as a guide, the court interpreted the words of Alabama's section 13 to mean that no legislative enactment that withdraws common-law rights is valid unless it either confers an individual benefit to the possessor of those rights or, in the alternative, exhibits a legislative finding of societal benefit, thereby bringing the enactment within the police power.[125] The Arizona Constitution has an inherent limitation on the section the Arizona court used to disallow co-employee immunity: the constitutional provision is found in the labor article.[126] Alabama, on the other hand, has thrust this view into the areas of general commerce with as yet unpredictable results.[127] The court has re-

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119 *See supra*, note 79.

120 *Compare* ARIZ. CONST. art. 18 *with* ALA. CONST. § 13.

121 *See supra* notes 117-120 and accompanying text.

122 *See supra* notes 79-80 and accompanying text.

123 *See supra* notes 86-105 and accompanying text.

124 Grantham v. Denke, 359 So. 2d 785, 788-89 (Ala. 1978).

125 *See generally id.*

126 *See* ARIZ. CONST. art. 18.

127 The new interpretation of § 13 already has prompted reconsideration of statutes of limitations; *see* Mayo v. Rouselle Corp., 375 So. 2d 449 (Ala. 1979); Street v. City of Anniston, 381 So. 2d 26 (Ala. 1980); and the automobile guest statute; *see* Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 351 (Ala. 1980). The *Grantham v. Denke* interpretation of the open court provision may well signal the constitutional recognition of the prima facie tort doctrine. This tort originated in England late in the nineteenth century. The leading case on the subject, Mogul S.S. Co. v. McGregor, Gow, & Co., [1889] 23 Q.B.D. 598 (C.A.), *aff'd*, 1892 A.C. 25 (1891), stated the principle of the tort that still governs today: "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause of excuse." *Id.* at 613 (per Bowen, L.J.) (citation omitted). Mr. Justice Holmes echoed this same basic principle in the first treatment of this tort doctrine in the United States. *See* Aikens v. Wisconsin, 195 U.S. 194, 204 (1904); Moran v. Dunphy, 177 Mass. 485, 487, 59 N.E. 125, 126 (1901); Plant v. Woods, 176 Mass. 492, 504, 57 N.E. 1011, 1016 (1900) (dissenting opinion); Vegelahn v. Guntner, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (dissenting opinion). For example, in the area of attorney liability to client's adversaries for frivolous

peatedly extended the common-law rights approach in the industrial accident setting.

Hathcock v. Commerical Union Insurance Co.,[128] a federal court case, extended the holding in *Grantham v. Denke* to include both supervisory employees and the insurance company that had conducted safety inspections.[129] *Jones v. Watkins*[130] was the next Alabama Supreme Court decision on the viability of co-employee immunity under the new interpretation of section 13. Initially, this case was dismissed on authority of the amended title 26, section 312 of the Alabama Code because the plaintiff and defendant were co-employees and hence immune.[131] The appeal in *Jones* arose when the court declared section 312 unconstitutional in *Grantham*.[132] The court used the opportunity to clarify that neither *Jones* nor *Grantham* discussed whether officers, directors or other supervisory employees could retain the legislated immunity.[133] The court did suggest, however, that the immunity of supervisory employees may depend on a functional analysis of exactly what task the supervisory employee was performing at the time of the injury.[134] The court derived this test from instances in which supervisory employees claimed employee status in order to gain compensation coverage.[135] Although not presented with the issue, the court did strongly suggest that this functional test is the rule for Alabama.

Slagle v. Parker[136] pointed out the basic problem with the new *Grantham v. Denke* interpretation of section 13. In a curi-

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lawsuits, a plaintiff might well insist that § 13 of the Alabama Constitution guarantees him a remedy for every injury done to him. Most state courts would simply reply that the open court provisions are "expression[s] of a philosophy and not . . . mandate[s] that a 'certain remedy' be provided in any specific form or that the nature of the proof necessary to the award of judgment or decree continue without modification." Pantone v. Demos, 59 Ill. App. 3d 328, 332, 375 N.E.2d 480, 483 (1978) (quoting Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 277, 281 N.E.2d 659, 662 (1972); *see also* Lyddon v. Shaw, 56 Ill. App. 3d 815, 822, 372 N.E.2d 685, 690-91 (1978). In Alabama, the *Grantham v. Denke* interpretation of the open court provision does not permit this same result, and, if anything, requires the opposite result to be reached.

128 576 F.2d 653 (5th Cir. 1978).

129 *Id.* at 653.

130 364 So. 2d 1144 (Ala. 1978).

131 *Id.* at 1145.

132 *Id.*

133 *Id.* at 1145-46.

134 *Id.* at 1146.

135 *Id.* The court again does not recognize the variant policies that guide the interpretation of statutes and insurance policies. *See supra* note 56.

136 370 So. 2d 947 (Ala. 1979).

ous opinion that retains the "vested rights" approach for some parts[137] but stands rigidly by the *Grantham* approach for others, the court allowed the legislated immunity of co-employees to stand for non-common-law causes of action.[138] In *Slagle*, the plaintiffs brought wrongful death actions against their co-employees. Because wrongful death actions are creatures of statute and not of common law, the court concluded that the legislature is free to change the cause of action as it finds proper.[139]

Wilkins v. West Point-Pepperell[140] tested this gap in the court's otherwise blanket withdrawal of co-employee immunity. In that case, the defendants hoped to enforce the legislated co-employee immunity by establishing that a cause of action had not existed at common law.[141] The defendants claimed if an occupational disease (brown lung in this case) was inherent in the workplace, then no action existed at common law for the redress of injuries attributable to occupational disease.[142] If no action existed at common law, the defendants argued, then the Legislature's establishment of co-employee immunity would be constitutionally valid for that cause of action. The court recognized that no action existed at common law for the true occupational disease, but drew a distinction between those irremediable workplace environments and remediable ones. If the exercise of due care could have avoided or reduced the risk of contracting an occupational disease, then liability remains.[143] In effect, this serves to increase the burden of proof that the plaintiff must carry in an occupational disease case. Accordingly, the plaintiff must show the individual defendants have a legal duty to provide the plaintiff with a safe environment in which to work. The plaintiff must also show that the requisite personal expertise and adequate facilities were reasonably available to the defendant so as to render the plaintiff's workplace reasonably safe.[144] Tacitly, however, the *Wilkins* court re-stated the proposition that section 13, as interpreted by *Grantham v. Denke*, only preserves the common-law

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137 *Id.* at 949. *See supra* notes 86-105 and accompanying text.
138 Slagle v. Parker, 370 So. 2d 947, 949 (Ala. 1979).
139 *Id.* at 934-50.
140 397 So. 2d 115 (Ala. 1981).
141 *Id.* at 118-19.
142 *Id.*
143 *Id.*
144 *Id.* at 119.

causes of action that an employee enjoyed against a co-employee, officer, director, or other supervisory employee.

III. ANALYSIS OF CO-EMPLOYEE SUITS AFTER *GRANTHAM* AND *FIREMAN'S FUND*

The judicial history of workmen's compensation in Alabama and section 13 of the Alabama Constitution make it apparent that the Alabama Supreme Court has supplemented, rather than merely preserved, the constitutional rights of injured workers. Despite its protestations of loyalty to the common law, it appears that the court's analysis in both *Grantham* and *Fireman's Fund* constitutes a significant break from precedent. Both opinions contain serious theoretical flaws which, if left uncorrected, will only continue to create legislative and constitutional confusion.[145]

The gist of the court's reasoning in *Grantham* is found in the following passage:

> It is this elective option between employer and employee, the parties being free to accept or reject to operate under and abide by the Act, that reconciles the Act with § 13 of the Constitution. The election is made upon the basis of a quid pro quo between employer and employee. Each voluntarily gives up rights guaranteed by § 13 in exchange for benefits or protection under the Workmen's Compensation Act.[146]

The *Grantham* court then opined because no quid pro quo existed between co-employees, the 1973 amendments granting co-employee immunity violated section 13, and were thus unconstitutional.[147] That the constitutionality of the immunity granted to a particular party must be judged on some quid pro quo existing between that particular party and the plaintiff has become the key to section 13 analysis.[148] The premise for this rule, however, is faulty in several regards.

The court proceeds to the idea that there must be a particularized quid pro quo before rights "guaranteed by section 13"

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[145] In addition to the legislative attempts to deal with the problems which were alluded to at the beginning of this article, see notes 1-2, *supra* and accompanying text; there also have been attempts to amend the Alabama Constitution in order to solve the problem. *See Fireman's Fund,* 394 So. 2d at 351.

[146] 359 So. 2d at 787 (citation omitted).

[147] *Id.*

[148] *See Fireman's Fund,* 394 So. 2d at 342-43 (Jones, J., concurring).

can be taken away without defining what rights are indeed guaranteed by section 13. As the historical discussion of workmen's compensation law contained in the earlier portions of this article establishes, there is no support for the proposition that the right to sue co-employees was protected at common law. The United States Supreme Court, in the landmark case of *New York Central Railroad Co. v. White*,[149] established the rule that "no person has a vested right in any rule of law,"[150] and the Alabama Supreme Court historically has followed the same rule. In *Chapman v. Railway Fuel Co.*,[151] ironically cited by the court in *Grantham*, an earlier Alabama court adopted the *New York Central* rule. There the court stated: "no one has any vested right under the Constitution to the maintenance of common-law doctrines in statutory provisions regulating the relations between employer and employee in respect of rights and liabilities growing out of accidental injuries."[152] Given these cases, it was a gaping leap in logic for the court to declare the right to maintain a co-employee action was "guaranteed by section 13." What section 13 guaranteed, as it was in interpreted prior to *Grantham*, was that no right of action could be taken away from any party unless constitutionally permissible procedures were followed and substitute remedies provided.

By obscuring this logical point in *Grantham*, the court escaped discussion of the second flaw in its analysis—that because Alabama's Workmen's Compensation Act is contractually based[153] and elective in nature,[154] courts historically held its provisions constitutional. In *Woodward Iron Co. v. Bradford*,[155] the first case in which the constitutionality of any portion of the Alabama Workmen's Compensation Act was challenged, the court held because coverage under the Act was elective, the employer waived his constitutional objections by choosing coverage under it.[156] This issue was raised again three years later in the *Chapman* case where the court declared "an act abolishing rights and defenses, the parties being free to accept or reject, violates no constitutional rights. All such at-

149 243 U.S. 188. *See* notes 26-30, *supra*, and accompanying text.
150 243 U.S. at 188-90.
151 212 Ala. 106, 101 So. 879 (1924).
152 *Id.* at 109, 101 So. at 881.
153 Owens v. Word, 49 Ala. App. 293, 271 So. 2d 251 (1972).
154 Pipkin v. Southern Elec. & Pipefitting Co., 358 So. 2d 1015 (Ala. 1978).
155 206 Ala. 447, 90 So. 803 (1921).
156 *Id.* at —, 90 So. at 805.

tacks upon laws of this character have failed of their purposes."[157] The principle, which actually emerges from these cases and which was carried forward into modern cases until *Grantham*,[158] was because the Act was elective, the Legislature could incorporate anything into it that the parties could incorporate into a private contract. The court avoided this logical conundrum by tying the elective nature of the Act to the particularized quid pro quo requirement appearing first in *Grantham* and later refined in *Fireman's Fund*.[159] This marriage of theories is the most subtle, and yet the most constitutionally disruptive aspect of the *Grantham* analysis.

At common law, the employer owed a duty to its employees "to exercise due care to provide a reasonably safe workplace, having regard to the kind of work involved, in which his employees may do the work assigned to them."[160] The potential employer liability arising from a breach of this duty was blunted significantly by the three common-law defenses available to employers: contributory negligence, the fellow servant rule, and assumption of the risk. The relationship of the fellow servant rule and the assumption of the risk doctrine to suits brought by injured workers was best stated by the Alabama Supreme Court in the early case of *Walker v. Bolling*:[161]

> that a servant, when he engages to serve a master, undertakes as between himself and the master, to run all the ordinary risks of the service, and this included the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both.[162]

These rules created the effect that in cases where another employee was charged with negligence, a recovery could not exist

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157 *Chapman*, 101 So. at 881.

158 *Owens*, 271 So. 2d 251. In *Owens*, the court stated:

> There is no question but that the Workmen's Compensation Act of Alabama is contractual. By accepting the provisions of the Workmen's Compensation Act, it becomes the contract between employer and employee insofar as rights or remedies for injury in employment are concerned, and all others, whether common law or statutory, are waived.

Id. See also Harris v. National Truck Serv., 321 So. 2d 690 (Ala. 1975).

159 The *Grantham* court stated that the election was "made upon the basis of a quid pro quo between employer and employee." 359 So. 2d 785.

160 Gentry v. Swann Chem. Co., 234 Ala. 313, 318, 174 So. 530 (1937).

161 22 Ala. 294 (1853).

162 *Id.* at 313.

against the employer, absent special circumstances.[163]

In initiating its particularized quid pro quo requirement, the court ignored the effect of those common-law doctrines on its new constitutional theory. Assume, for example, a situation in which a production-line worker is injured as a direct result of the undisputed negligence of one of his nonsupervisory co-workers. In this common scenario, the injured worker would have assumed the risk of negligence by the co-employee, and no recovery against the injured worker's employer would have been possible. This unfortunate example was remedied by workmen's compensation legislation; yet, if *Grantham* and its progeny are applied literally, then the entire Alabama workmen's compensation statute could be deemed unconstitutional under current section 13 analysis.

In the preceding example, the employer relinquishes his common-law defenses and, in effect, provides the injured worker with guaranteed compensation. Yet, since the injured worker could not have recovered against the employer under that same example at common law, the employer, through workmen's compensation acts, receives nothing other than the same common-law immunity to suit in return. The Alabama Supreme Court has declared that immunity to suit is not a constitutionally sufficient quid pro quo.[164] If the *Grantham* reasoning were applied to this example, then justification exists to rule the entire Workmen's Compensation Act unconstitutional. Such a result is absurd, yet it emphasizes the logical problem of tying the election concept of the early cases to the particularized quid pro quo concept of the *Grantham* reasoning.

When compared to the common-law cases, another theoretical problem emerges from the *Grantham-Fireman's Fund* line of cases. At common law, the employer's duty to provide a safe workplace could be discharged completely by the employer through delegation of that duty to competent employees.[165] The employer could be found liable to an injured worker for breach of this duty only if it was pleaded and proved that the delegation was made negligently.[166] The earli-

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[163] *See* Langhorne v. Simington, 188 Ala. 337, 66 So. 85 (1914).

[164] This is most clearly stated in Justice Jones' *Fireman's Fund* concurrence. *See* 394 So. 2d at 343.

[165] *Langhorne*, 66 So. 85. This delegated duty concept is the basis of the court's reasoning in *Fireman's Fund.*

[166] *Langhorne*, 188 Ala. at 343, 66 So. at 88.

est Alabama case to explore this issue was *Walker v. Bolling*.[167] In that case, an explosion on a ship caused the death of one slave and injuries to several others. The slave owner sued the ship owner-employer on the grounds that the latter, as employer of the slaves, was liable for the death and injuries in retaining a grossly negligent engineer. The proof at trial showed the fatal explosion resulted from a low level of water in the ship's boiler brought about by the ship engineer's habitual neglect to monitor the level of water in the boiler, all of which the ship's captain was aware. Based on these facts, the court in *Walker* held the employer liable for the negligent delegation of the duty to provide a safe place to work.[168] The concept which arose from this case is that although an employer normally could not be liable for injuries caused to one of his employees through the negligence of a fellow servant, he could be liable for personal fault in delegating a duty to an incompetent employee.[169]

This concept was adopted in a corporate context in *Tyson v. South & North Alabama Railway Co.*[170] In that case, a railroad yard worker was injured when an incompetent engineer caused an accident. The court ruled because the duty of operating a locomotive was, in that case, delegated to an unqualified employee, the negligence of the yard master who made the delegation should be imputed to the corporation. As the court put it: "the performance of such delegated power by the sub-agent or employees is the act of the corporation, and the corporation is responsible for its faithful and prudent performance, to the same extent as if the service were performed by the highest officer of the corporation."[171]

Both *Walker* and *Tyson* reflect an early dissatisfaction with the fiction of the fellow servant rule, a dissatisfaction that developed into an exception to the rule for the acts of "vice-principals." Under this exception, the employer, usually a corporation, could be liable for the acts of any servant charged with the performance of certain common-law duties, such as the duty of providing a safe place to work, notwithstanding the

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167 22 Ala. 294 (1853).

168 *Id.*

169 *See* Alabama & Florida R.R. v. Waller, 48 Ala. 458 (1872).

170 61 Ala. 554 (1878).

171 *Id.* at 557.

fellow servant rule.[172]

The significance of these holdings is twofold. First, the duty supposedly breached (the basis for the supervisory employee's liability in *Fireman's Fund*) was the duty to provide a safe place to work.[173] Since this was the common-law duty of the employer, a remedy already was provided to the plaintiffs in that scenario for the breach of that duty in the form of workmen's compensation benefits; the case further came within the reasoning of the *New York Central* and *Chapman* cases. Because of the old vice-principal rule, the *Grantham* quid pro quo argument is particularly weak in the case of supervisory employees. Second, as noted above, the duty to provide a safe workplace could be delegated completely by the employer at common law. In such a situation the employer could be liable only upon proof that the delegation was negligently made.

The same rule should apply to officers and supervisory employees today. In the modern context, employer-employee and duty-liability distinctions have become more confused. In the context of a steamboat owner who selects a captain to man his ship, the duty analysis is far simpler than in today's conglomerates where an "employer" might well be a corporation that is wholly-owned by another corporation. In the modern fact setting the "employer" often is unable to function without the delegation of authority; yet, even those individuals most senior in the corporate hierarchy face the expense in both time and money of defending actions because they fall within the broad ambit of "co-employee." Because of this, the corporate employer, in order to hire and retain capable employees, is forced to indemnify and defend these supervisory employees. The result is a forfeiture of the employer's "quid pro quo" that was the essence of the *Grantham* opinion.

The solution to this muddled aspect of the co-employee cause of action can be drawn from other labor legislation. In the Fair Labor Standards Act,[174] "employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee."[175] Adoption of this same standard for the constitutional co-employee action would have the effect of freeing management employees to perform

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[172] *See* PROSSER, *supra* note 23, at 529 and cases cited therein.

[173] *See Fireman's Fund*, 394 So. 2d at 337.

[174] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976).

[175] *Id.* at § 203(d).

their "employer" functions in the modern business world. By extending the definition of "employer," the court would not deprive injured workmen of the remedy guaranteed by section 13.[176] The statutory remedy would still be available. For the breach of the common-law employer's duty to provide a safe place to work, there should be no other remedy—otherwise the *employer* has lost the benefit of the particularized quid pro quo of workmen's compensation.

CONCLUSION

Workmen's compensation law in Alabama represents a radical departure from the goals of the Legislature. The statute that the court considered in *Grantham v. Denke* was clear in its intent. The Legislature expressly granted immunity to co-employees, supervisory employees, and workmen's compensation insurance carriers. The Alabama Supreme Court refused to allow this on novel constitutional grounds. The court refused to follow over a century of consistent Alabama decisions interpreting section 13 in favor of an Arizona decision that interprets a constitutional labor provision. This created a situation where labor intensive businesses are discouraged from locating in Alabama.[177] In favor of granting a cause of action for a few, the Alabama Supreme Court spurned jobs for many.

It is droll to reflect on how the law of industrial accidents has swung full circle. In the early days of the industrial revolution, common-law defenses provided almost impenetrable armor for the employer. As the inequity of this became more obvious, a system of assured compensation for injured workers emerged. Now we face the new era. The injured worker is assured compensation from his employer regardless of how the fault may lie in a particular accident. If the fault should happen to lie anywhere other than on the worker, however, then the worker also has a cause of action. With spiralling costs of litigation, the increased exposure through higher jury verdicts, and the costs to a company of losing a supervisory employee for the time required by depositions and trial, the simple nuisance value of these suits has increased. In view of the tortured path

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[176] *See supra* note 78 and accompanying text.

[177] *See, e.g., Legislation Turns off Industries: Study Shows Alabama Behind Its Neighbors*, Birmingham News, Sept. 12, 1984, at E8, cols. 1-3 (state government study concluded that co-employee lawsuits in Alabama deterred businesses from locating in Alabama).

taken by the Alabama Supreme Court to get to this juncture the question becomes: Is this good for anyone? Productive time is lost by the worker, the co-employee, the company, lawyers, judges, and all associated with a co-employee lawsuit. This loss must be balanced against the benefit to the individual in having an option of two remedies: compensation or compensation and a cause of action.

The weighing of policy considerations is a task given by the citizens to the Legislature. The Alabama Supreme Court acts to ensure that the Legislature stays within certain bounds. When the Alabama Supreme Court decided *Grantham v. Denke*, it lost track of its function. It legislated a new rule of law that favored injured employees. The court did so under the guise of keeping the Legislature within certain bounds. The new boundaries set by the court have shackled Alabama's Legislature to the common law. In the end, the citizens suffer through lost jobs, lost income, the direct effects of less available state revenues, and a diluted representative government.