law. In any other case where the defendant undertakes to raise the question as to the correctness of the sheriff's return by an answer in abatement it would seem that sound policy requires that the Bartley case be followed.

It is open to the defendant to persuade the sheriff that he has made a mistake, in which instance the sheriff would be privileged to file an amended return which would dispose of the question. Walker v. Shelbyville & R. T. Co., 80 Ind. 452 (1882). In view of the fact that he is liable to the defendant for a "false" return, even although onestly made, Diedreich v. Lauenstein, supra, this procedure normally would be effective.

The real difficulty in the cases involving a false return as to a service at the defendant's last and usual place of residence arises out of the Indiana provision on this subject which frequently results in an unconstitutional service of process. Acts 1881 (Spec. Sess.), c. 38, Sec. 56, Ind. Stat. Ann. (Burns, 1933) Sec. 2-803 provides simply that service of summons on a defendant may be had ". . . by leaving a copy thereof at his usual or last place of residence." While it is settled that service at the last and usual place of residence is a constitutional substitute for personal service, Sturgis v. Fay, 16 Ind. 429 (1861), it is likewise settled that service of this character is invalid if in its application it cannot reasonably be expected to give actual notice to the defendant. This, the simple leaving of a summons at the home of a defendant from which he and his family are temporarily absent is not due process of law, and a default judgment based upon such service is subject to collateral attack on federal constitutional grounds. Earle v. McVeigh, 91 U.S. 503 (1895); McDonald v. Mabee, 243 U.S. 90 (1916). (The latter case involved service by publication, but the language of the opinion supports the proposition that any substitute for personal service can only be sustained when it is the best available under the circumstances, and only when it reasonably calculated to bring actual notice to the defendant). A valid provision on this subject necessarily involves the acceptance of the Federal Rule, Fed. Rules Civ. Proc., Rule 4(d), and requires that the summons be left ". . . with some person of suitable age and discretion then residing therein . . .", thus prohibiting the leaving of the summons at the residence when it is in fact unoccupied.

WORKMEN'S COMPENSATION

WAS MIDDLEMAN AN AGENT OR AN INDEPENDENT CONTRACTOR?

Appellant sawmill operator brought this appeal from an industrial board order awarding compensation to appellee timber cutter under the Indiana Workmen's Compensation Act.[1] Held, reversed. Appellee was not an employee of the appellant for purposes of workmen's compensation, although he was hired by a timber scalper

1. Acts 1929, c. 172, § 1 et seq., Ind. Stat. Ann. (Burns, 1933) § 40-1201 et seq.

who in turn was employed by the appellant. Eley et al. v. Benedict, —— Ind. App. ——, 46 N.E. (2d) 492 (1943).

The majority of cases interpreting the workmen's compensation act quite uniformily hold that the provisions of the act are to be liberally constructed so as to achieve the social purposes for which the act was enacted.[2]

By reason of the principle of liberal construction of the act, any doubt existing as to its applicability may be presumed to be in favor of the claimant.[3]

The court in the instant case detoured from the general rule: namely, that it should not weigh the evidence procured at the hearing of the industrial board, and that only when there is no evidence to sustain the facts found by the industrial board upon which the award is based will such award be set aside by the appellate court,[4] or by the supreme court.[5] If there be any evidence ". . . which by a reasonable inference would tend to support the verdict [award] . . . this court cannot reverse. . . ."[6]

The court stated, however, that it was ". . . unable to discover any evidence which justifies the finding of the Industrial Board. . . ."[7] But the record indicates that an agency relationship existed between the appellant and the timber scalper-employer of the appellee.[8] Thus

2. Kunkler v. Mauck, 108 Ind. App. 98, 27 N.E. (2d) 97 (1939); Union Hospital v. S. P. Brown & Co., 104 Ind. App. 430, 11 N.E. (2d) 520 (1937); Cunya v. Vance, 100 Ind. App. 687, 197 N.E. 737 (1935); Trustees of Indiana University v. Rush, 99 Ind. App. 203, 192 N.E. 111 (1934); Czuczko et al. v. Golden-Gary Co., Inc., 94 Ind. App. 47, 177 N.E. 466 (1931).
3. Meek v. Julian, 219 Ind. 83, 36 N.E. (2d) 854 (1941); J. P. O. Sandwich Shop, Inc. v. Papadopoulos, 105 Ind. App. 165, 13 N.E. (2d) 869 (1938); Domer v. Castator, 82 Ind. App. 574, 146 N.E. 881 (1924).
4. Hart, Schaffner & Marx v. Campbell, 110 Ind. App. 312, 38 N.E. (2d) 895 (1942); Studebaker Corp. v. Jones, 104 Ind. App. 270, 10 N.E. (2d) 747 (1937); Fritts v. Linton-Summit Coal Co., 101 Ind. App. 339, 197 N.E. 720 (1935); Castleman v. Eaves, 97 Ind. App. 363, 186 N.E. 904 (1933).
5. The supreme court held in the case of Warren v. Indiana Telephone Co., 217 Ind. 93, 114-115, 26 N.E. (2d) 399, 408 (1940), that a workmen's compensation case could be presented to the supreme court for review by following the statutory procedure for transferring cases from the appellate court to the supreme court. This might be done, the court said in effect, notwithstanding the fact that § 61 of the acts of 1929, c. 172 [Ind. Stat. Ann. (Burns, 1933) § 40-1512] provided for an appeal to the appellate court alone. The Warren v. Indiana Telephone Company decision was followed in Loucks v. Diamond Chain & Mfg. Co., 218 Ind. 244, 32 N.E. (2d) 308 (1941).
6. See Judge Royse, dissenting in the instant case at 494. Accord, Colgate-Palmolive Peet Co. v. Setliff, 98 Ind. App. 577, 189 N.E. 396 (1934); Haskell v. Barker Car Co., 67 Ind. App. 178, 117 N.E. 555 (1918); Columbia School Supply Co. v. Lewis, 63 Ind. App. 386, 115 N.E. 103 (1916).
7. Instant case at 494.
8. (a) First, there was a contract made by the timber scalper with an owner of land where timber was to be cut; the contract was

it would seem that the court should have affirmed the award of the industrial board since the appellee, hired by the appellant's agent, was obviously injured in the course of the appellant's employment.

At the outset, if one concedes that a liberal construction of the workmen's compensation act was adhered to, that there was no evidence to justify the industrial board's finding, and that the timber scalper was an independent contractor and not an agent; it is difficult to understand the decision in as much as the appellant did not comply with the statutory provision[9] which required him to obtain from the

made for and in behalf of the appellant and the wording expressly established the scalper as agent for the appellant. See the instant case at 493, 495. Such a contract gave the appellant the benefits to be derived, but by the court's holding, the appellant was relieved from any of the responsibilities arising thereunder—specifically, the liability for injury to an employee cutting the timber which was the subject-matter of the contract. (b) Second, in several instances the appellee and other cutters were paid their wages directly by the appellant; in other cases, the timber scalper traveled to the appellant's place of business to obtain the funds with which to pay the appellee and the others. See the instant case at 495. This mode of payment might easily supply the inference that the appellee was an employee of the appellant or that the scalper was an agent of the appellant. (c) Third, the appellant advanced money to the scalper, such credits being charged to his account. Since the scalper had no money nor equipment of his own, such advances were customary; yet the court held that the appellant exercised no control over the scalper's dealings. See the instant case at 493. To establish this lack of control one may assume that the scalper had free reign over the money so advanced, that he had plentiful resources at his fingers' touch, and that he had unlimited purposes for which he could use the money—but this appears untenable in light of the scalper's business position. (d) Last, the business engaged in by the timber scalper was clearly a function essential to the furtherance of the appellant's saw-mill operations. This would indicate that the occupation of the scalper was not one distinct and separate from that of the appellant; the question of occupation is commonly used as one test of whether one is a servant or independent contractor, and when it can be answered that the occupation was not distinct and separate from that of the employer, it is held that the workman is a servant and not an independent contractor. Restatement, "Agency" (1933) § 220. Furthermore, if any doubt exists as to whether one is an employee or independent contractor, the doubt is to be resolved in favor of being an employee. Meek v. Julian, 219 Ind. 83, 36 N.E. (2d) 854 (1941); Domer v. Castator, 82 Ind. App. 574, 146 N.E. 881 (1924).

9. Acts 1929, c. 172, § 14, Ind. Stat. Ann. (Burns, 1933) § 40-1214 which provides in part: ". . . any corporation, partnership, or person [appellant], contracting for the performance of any work by a contractor [timber scalper] subject to the compensation provisions of this act without exacting from such contractor a certificate from the industrial board showing that such contractor has complied with . . . this act, shall be liable to the same extent as the contractor for compensation . . . on account of the injury or death of any employee [appellee] of such contractor, due to an accident arising out of and in the course of the performance of the work covered by such contract."

timber scalper-independent contractor a certificate showing that the latter was complying with the act. In the absence of this certificate the appellant, as principal employer, would be liable for the injuries sustained by the appellee.[10] In the case of Moore et al. v. Copeland,[11] Heidenreich (comparable to the appellant) contracted with Moore (comparable to the timber scalper) for the performance of work without having obtained from Moore an employer's certificate issued by the industrial board. Moore hired Copeland (comparable to the appellee) to do some of the work and the latter was injured in the course of this employment. The court held that Heidenreich, who failed to exact the certificate, " . . . is also liable . . . for compensation."[12] This case appears to be "on all fours" with the instant case.

Had the violation by the appellant been of an administrative regulation of the industrial board rather than of a statute, the court would say that this was not negligence per se and that the appellant was not liable since the industrial board did not have the authority to make law. Town of Kirklin et al. v. Everman, 217 Ind. 683, 693, 28 N.E. (2d) 73, on rehearing, 29 N.E. 206 (1940); Sutherland, "Statutes and Statutory Construction" (Horack's ed. 1943) § 4003.

10. Freund et al. v. Allen et al., 98 Ind. App. 660, 184 N.E. 421 (1933); Makeever et al. v. Marlin et al., 92 Ind. App. 158, 174 N.E. 517 (1931); Moore et al. v. Smiley, 88 Ind. App. 703, 163 N.E. 235 (1928); Moore et al. v. Copeland, 88 Ind. App. 54, 163 N.E. 235 (1928); Chicago & Erie R. R. v. Kaufman et al., 78 Ind. App. 474, 133 N.E. 399 (1921).
11. 88 Ind. App. 54, 163 N.E. 235 (1928).
12. Id. at 56, 163 N.E. 235.