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Master and Servant-Workman's Compensation-Casual Employments

MASTER AND SERVANT—WORKMEN'S COMPENSATION—CASUAL EMPLOYMENTS.—The appellant was employed in helping the appellee tear down a barn on the land occupied by the appellee as tenant. The appellant had never worked for the appellee before that day. The appellant had been a sheet metal worker until physical incapacities forced him out of that employment. For three years preceding the accident he had performed odd jobs, and within the last year he was not employed in any labor.

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[7] *Renting v. Titusville* (1896), 175 Pa. 512, 34 Atl. 916.

[8] *Kelly v. Chicago* (1871), 62 Ill. 279.

[9] *Kelly v. Chicago* (1871), 62 Ill. 279; *Gilmore v. Utica* (1892), 131 N. Y. 26, 29 N. E. 841; *Renting v. Titusville* (1896), 175 Pa. 512, 34 Atl. 916.

[10] *Gilmore v. Utica* (1892), 131 N. Y. 26, 29 N. E. 841.

[11] *McClain v. McKisson* (1896), 54 Ohio St. 673, 47 N. E. 1114.

[12] *Jacobson v. Bd. of Education,* (1906), (Vt.), 64 Atl. 609.

[13] *Wells v. School Dist.* (1868), 41 Vt. 353.

[14] *Inge v. Bd. of Public Works* (1903), 135 Ala. 187, 33 So. 678.

[15] *Renting v. Titusville* (1896), 175 Pa. 512, 34 Atl. 916; *McClain v. McKisson* (1896), 54 Ohio St. 673, 47 N. E. 1114.

[16] *Stuewe v. Hudson* (1912), 44 Mont. 429, 120 Pac. 485.

[17] *Kelly v. Chicago* (1871), 62 Ill. 275; *Denver v. Dumars* (1904), 33 Colo. 94, 80 Pac. 114.

[18] *Barber Asphalt Paving Co. v. Trenton* (1907), 74 N. J. L. 430, 65 Atl. 873.

[19] *Kitchel v. Bd. of Commissioners of Union County* (1889), 123 Ind. 540, 24 N. E. 366; *Kraus v. Lebman* (1907), 170 Ind. 408, 83 N. E. 714; *Windle v. City of Valparaiso* (1916), 62 Ind. App. 342, 113 N. E. 429; *Lincoln School Township v. Union Trust Co. of Indianapolis* (1905), 36 Ind. App. 113, 73 N. E. 623.

[20] *Seward v. The Town of Liberty* (1895), 142 Ind. 551, 42 N. E. 39; *Kitchel v. Bd. of Commissioners of Union County* (1889), 123 Ind. 540, 24 N. E. 366; *Windle v. City of Valparaiso* (1916), 62 Ind. App. 342, 113 N. E. 429; *Bd. of Commissioners of Newton County v. State ex rel. Bringham* (1903), 161 Ind. 616, 69 N. E. 442.

There was no agreement as to wages; the appellee told the appellant that he could not pay him very much and the appellant in effect said that he did not care how much it was so long as he got something. The Industrial Board on the facts found the employment to be casual and not in the usual course of the defendant's business; therefore there was no award to the appellant. From this decision the appellant appeals. *Held*, award affirmed. There was evidence here sufficient to sustain the finding of the Industrial Board.[1]

To be entitled to compensation under the Workmens' Compensation Act the worker must be found to be an employee.[2] However not all employees are within the statute. The employee whose employment is "both casual and not in the usual course of the trade, business, occupation or profession of the employer" is not within the benefit of the statute.[3] Both elements are said to be necessary to make the exception.[4] In some states the statute allows either of the characteristics of the employment to make the exception.[5]

Casual employment is "one that comes without regularity and is occasional and incidental."[6] This is the rule announced in the Gaynor Case, and which is followed in the majority of the states where both characteristics of the employment must be shown. Little more than this test for casualness of employment can be found in the cases. The Wisconsin court elaborated further "an employment that is only occasional, or comes at uncertain times, or at irregular intervals and whose employment cannot be reasonably anticipated as certain or likely to occur or to become necessary or desirable is but a casual employment."[7] No case has been found in Indiana or the states where the statute is similar, where the court found that the employment was not in the usual course of the employer's business and not casual, thus allowing the employee to recover. The reason for this seems obvious; if the employer employed an employee steadily it would seem that that employment would be in a business of the employer.

In determining what employment is in the usual course, trade, business, etc., of the employer the courts have not always agreed. Odd jobs about a residence or a farm are universally held to be outside the business of the employer.[8] Where the workman is hired to make repairs and additions to the physical plant of an established business, the employment is generally held to be in the usual course of the business of the employer;[9] however,

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[1] *Craiger v. Koch*, Appellate Court of Indiana, October 6, 1932, 182 N. E. 538.

[2] *Muncie Foundry and Machine Co. v. Thompson* (1919), 70 Ind. App. 157, 123 N. E. 196.

[3] Burns' Ann. Ind. Stat. 1929, Secs. 9454, 9518 (B).

[4] *Cara v. Woodruff* (1919), 70 Ind. App. 93, 123 N. E. 120; *Domer v. Cartator* (1924), 82 Ind. App. 574, 578; *Wagner v. Wooley* (1926), 85 Ind. App. 259, 152 N. E. 856; *Kaplan v. Gaskill* (1922), 108 Neb. 455, 187 N. W. 943.

[5] *Mitchell v. Maine Feldspar Co.* (1922), 121 Me. 455, 118 Atl. 287, 11 Cal. L. R. 221.

[6] *In re Gaynor* (1914), 217 Mass. 81, 104 N. E. 339; *Zedler v. Prueher* (1926), 85 Ind. App. 627, 154 N. E. 35; see also *Blood v. Ind. Acc. Comm.* (1921), 30 Cal. App. 274, 157 Pa. 1140; and see note, 3 Ind. L. J. 326.

[7] *Holemen Creamery Assn. v. Industrial Comm.* (1918), 167 Wis. 470, 167 N. E. 808.

[8] *Bailey v. Humrukhouse* (1925), 83 Ind. App. 497; *H. Ray Berry Co. v. The Ind. Comm.* (1925), 318 Ill. 312, 149 N. E. 278; 11 Cal. L. Rev. 221.

[9] *Cara v. Woodruff* (1919, 70 Ind. App. 93, 123 N. E. 120; *Wagner v. Wooley* (1926), 85 Ind. App. 259, 152 N. E. 881; *Holmen Creamery Assn. v. Ind. Comm.*

there is authority to the contrary.[10] It is submitted that the majority view is correct. Repairs and additions to the physical plant are necessary to the continued life of a business. Thus persons employed for a short time for these repairs and additions are in the course of the employers business. Imposing liability on the employer for injuries from such employment is not a hardship. Employers protect themselves from the risks of industrial accident by insurance. The premium of such insurance in practice is based upon the estimated payroll for the year. At the end of that period there is an adjustment with the actual payroll. Thus by merely adding the wages of casual laborers for repairs and additions to the plant, to the actual payroll, the employer can get adequate insurance protection; and the social interest in the freedom of the workers from the risks of industrial accidents as embodied in the statute is carried out.[11]

There is no strict uniformity in decisions where the employer is repairing a house for rent; though the majority hold that it is not in the usual course of the employer's business.[12] This result where the employer has a few houses is correct; for it is impossible, due to the insurance practice, to get adequate insurance protection except at a cost out of all proportion to the risk involved.[13] Some courts seem inclined to go too far in protecting the employers of workers to repair buildings that are not industrial.[14] Others, however, hold large building operators liable under the act for injuries to casual workers engaged in the repair of buildings, and it would seem correctly so.[15] It can hardly be said that the owning of a large apartment or office building is not a business. The workers engaged in making repairs there seem to be entitled to as much protection as those making repairs to the plant of an industrial concern under the theory of the Workmens' Compensation Act. Furthermore the employer in this factual set up would be able to get adequate insurance protection.[16]

Where the owner of residences undertakes tentative repairs on a house and hires workers for this purpose intending to cut out the expense of a contractor, courts hold that the employment is in the usual course of the employer's business.[17] There are good reasons for this result. The contractor would have been liable to his worker under the act, and would have carried insurance to cover this risk. Thus the owner by saving the expense of the contractor saves the cost of the insuring the risk of accidents on the job, and at the same time shifts the risk to the worker. This would

(1918), 167 Wis. 470, 167 N. W. 808; *State ex rel. v. Lungreen v. District Court* (1918), 141 Minn. 83, 169 N. W. 488.

[10] *Packett v. Moretown Creamery Co.* (1917), 91 Vt. 97, 99 Atl. 638; *Holbrook v. Olympia Hotel Co.* (1918), 200 Mich. 597, 166 N. W. 876.

[11] 11 Cal. L. R. 221, 237.

[12] *Zudler v. Prueher* (1926), 85 Ind. App. 627, 154 N. E. 35; *Crickmore v. Pattison* (1930), 92 Ind. App. 309, 175 N. E. 138; *Blood v. Ind. Acc. Comm.* (1921), 30 Cal. App. 274, 157 Pac. 1140; *Mason v. Wampler* (1929), 89 Ind. App. 483, 166 N. E. 185; *Kaplan v. Gaskell* (1922), 108 Neb. 455, 187 N. W. 943.

[13] 11 Cal. L. R. 221, 237.

[14] *Holbrook v. Olympia Hotel Co.* (1918), 200 Mich. 597, 166 N. W. 876. See *Crickmore v. Pattison* (1930), 92 Ind. App. 309, 175 N.E. 138.

[15] *Johnson v. Choate* (1918), 284 Ill. 214, 119 N. E. 972; *Davis v. Ind. Comm.* (1921), 297 Ill. 29, 130 N. E. 333.

[16] 11 Cal. L. Rev. 221, 235, 237.

[17] *Domer v. Castator* (1924), 82 Ind. App. 574.

seem to be a result contrary to the spirit of the statute, namely, protecting the worker from risks of industrial accidents, in the course of their employment.[18]

The principle case is correct on authority[19] and also on policy. A man calling another to do an odd job for him cannot obtain insurance save at a rate out of all proportion to the risk insured against. The cost of underwriting demands that no policy be issued except at a substantial premium; a premium often greater than the whole wages paid the workman. In addition the necessity often arises suddenly and gives no time to secure insurance. The average man, in spite of any presumption that the law may indulge in, is ignorant even of the most discussed legislation. To impose compensation under these circumstances in every case where a man hires another to do an odd job, might be to entrap a moderately prosperous citizen into financial ruin.[20] A. S. M.

PLEADINGS—CONSTRUCTION OF COMPLAINT AND OF A PLEA IN ABATEMENT. —In two recent Indiana cases the question of the construction of the pleading has been involved. In an action by a Massachusetts corporation against a Missouri corporation upon a note signed in St. Louis payable in Massachusetts, the defendant filed a plea in abatement questioning the jurisdiction of the court; although, property of the defendant had been attached under Burns' Ann. St. 1926, Section 981. From a judgment abating the action the plaintiff appealed. *Held,* that the trial court had jurisdiction and that a plea in abatement is a dilatory plea, construed without any intendments in its favor.[1]

In another recent case, an action for an injunction, the several defendants filed joint and several demurrers. The trial court sustained the demurrers as to all the defendants, and the plaintiff, having refused to plead further, appealed. *Held,* in reversing the judgment as to all the defendants except one; the trial court said that such words as "dangerous, hazardous, perilous, and unsafe" are conclusions of fact, and may be considered in determining the sufficiency of a complaint as against a demurrer for want of facts; while, such words as "wrongfully, unlawfully, arbitrarily, void, illegal, etc.," are legal conclusions and cannot be considered in determining the sufficiency of the complaint as against a demurrer.[2]

The common law rule was that pleadings were to be construed against the pleader.[3] However, a more liberal rule is to be preferred, one that will give effect to all the material allegations whenever reasonably possible.[4] Thus the liberal rule of construction which our code of civil procedure attempts to establish seems to be highly desirable. The statute says, "In the construction of a pleading, for the purpose of determining its

[18] 11 Cal. L. R. 238.

[19] See note 8 and note 12, *supra.*

[20] 11 Cal. L. R. 221, 237.

[1] *Dodgem Corporation v. D. D. Murphy Shows, Inc.,* Appellate Court of Indiana, Dec. 23, 1932, 183 N. E. 699.

[2] *Regester v. Lincoln Oil Refining Co., et al.,* Appellate Court of Indiana, Jan. 4, 1932, 183 N. E. 693.

[3] *Burrows v. Yount* (1843), 6 Blackford 458.

[4] *Flint, etc. Manufacturing Co. v. Beckett* (1906), 167 Ind. 491, 79 N. E. 505.