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Workmen's Compensation - Scope of the Louisiana Statute - Definition of Business

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statute or ordinance a plaintiff must have his land fenced in before he can recover for damage done by trespassing cattle.[25]

In the instant case the court was faced with the problem of determining the duty imposed on a cattle owner in the absence of a local ordinance. The court stated that a duty is imposed upon the defendant to show he was without the slightest fault. But the court then announced that a cattle owner is not to be treated as an insurer against all damage caused by his cattle. Here the cattle owner had not kept a part of the fence in sufficient repair, because of the fencing agreement; this was the only "fault" imputed to defendant, yet the court would have held him liable.[26] Thus the court demands a very high degree of care; such a demand is understandable in light of the growing population leaving fewer areas where an unfenced herd of cattle is the normal thing. This case seems contrary to the decision of the two Louisiana cases which require the owner of the damaged property to fence in his property before he can claim damages. The decision explicitly states that the agreement whereby defendant was not responsible for the upkeep of the part of the fence through which the cattle escaped would not relieve defendant of his duty to keep his cattle properly enclosed.[27] Apparently plaintiff need have no fence at all.

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WORKMEN'S COMPENSATION — SCOPE OF THE LOUISIANA STATUTE — DEFINITION OF BUSINESS

Plaintiff sustained injuries while employed by defendant in the construction of defendant's residence, the only one defend-

25. Parrott v. Babb, 132 So. 377 (La. App. 1931); Morgan v. Patin, 47 So.2d 91 (La. App. 1950). See Note, 5 LOUISIANA LAW REVIEW 316, 318 (1954): "Where . . . there is no [ordinance preventing stock from running at large,] it is up to the property owner to fence the livestock off his premises, and plaintiff must show that his property was enclosed with a sufficient fence before he can recover for damage done by trespassing animals."

26. At common law where an owner of land is bound by agreement to maintain a fence, and through defects in it his neighbor's cattle enter upon his land and do damage, without the fault of the owner, as a general rule, it may be said that the landowner cannot recover therefor. If a partition fence has been divided and a particular portion assigned to each of the adjacent proprietors to keep in repair, each is liable for trespasses committed only through defects in his own part of the fence. Only when cattle escape through that part of the fence to be maintained by the plaintiff is the cattle owner relieved of liability for his trespassing cattle. See 2 HARPER & JAMES, TORTS 829, § 14.10 (1956). Louisiana cases on this point could not be found; the instant case holds that a fencing agreement would not relieve a cattle owner from liability. Apparently in the absence of a local ordinance, this should be taken as the Louisiana position.

27. See note 26 *supra*.

ant had ever built. A regular employee of a federal agency, defendant used nine weeks of accumulated leave for the construction of his home. He hired and supervised plaintiff and seven other carpenters to work full time on the project for the nine-week period. In an action against defendant's compensation insurer, the court of appeal held that the injury occurred in the course of the employer's business, and therefore granted compensation,[1] upon the ground that the employer had made the work his business by engaging full time for a considerable period of time in work that would ordinarily be performed by a contractor. The Supreme Court, on certiorari, *held*, reversed. The activity was not the employer's business because the house was built for his personal use with no intention of selling it for a profit. To grant compensation in such a case would not be in accord with the economic principle of the workmen's compensation statute. *McMorris v. Home Indemnity Ins. Co.*, 107 So.2d 645 (La. 1959).

The basic purpose of the Louisiana workmen's compensation statute is to relieve employees of accident costs by shifting the burden to groups of the public through employers.[2] The statute contemplates that this distribution of accident costs will be made through business channels as an element of the cost of production. This is reflected in the requirement that an employment must be in the course of the employer's trade, business, or occupation in order for the employer to be subject to compensation liability.[3] Because the phrase "trade, business, or occupation" has no simple, definite meaning,[4] its meaning must be deter-

1. McMorris v. Home Indemnity Ins. Co., 94 So.2d 471 (La. App. 1957).

2. Puchner v. Employers' Liability Assurance Corp., 198 La. 921, 5 So.2d 288 (1941); Kroncke v. Caddo Parish School Board, 183 So. 86 (La. App. 1938); MALONE, LOUISIANA WORKMEN'S COMPENSATION § 32 (1951); 1 LARSON, WORKMEN'S COMPENSATION § 1 (1952).

3. LA. R.S. 23:1035 (1950): "The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation in the following hazardous trades, businesses or occupations: . . . ." As indicated by the above-quoted provision, Louisiana also exempts non-hazardous employments, an exemption which became entangled with the non-business exemption in cases involving the repair or construction of business properties. This problem is beyond the scope of this Note, except to point out that the case of Landry v. Fuselier, 230 La. 271, 88 So.2d 218 (1956), discussed in Malone, *Torts and Workmen's Compensation*, 17 LOUISIANA LAW REVIEW 345, 353 (1957), has tended to clarify the problem by holding that *regular* repair or reconstruction work in connection with a nonhazardous business constituted a separate hazardous business. *Cf.* MALONE, LOUISIANA WORKMEN'S COMPENSATION § 102 (1951).

4. "The term 'business' has no definite or legal meaning. It is a general term with widely variegated meanings." Meyers v. S.W. Regional Conf. Ass'n of Seventh Day Adventists, 230 La. 310, 319, 88 So.2d 381, 384 (1956).

mined in particular cases in the light of the statute's purpose.[5] Where an employer is engaged in selling goods or services at a profit, it is clear that the pursuit constitutes a trade, business, or occupation because he is in a position to pass the cost of compensation liability to his customers as an element of the cost of production.[6] Conversely, where an employment is solely for the personal benefit of the employer, such as for home repairs, it is not in the course of business.[7] However, the compensation principle does not necessarily require that the employer be selling something for a profit in order for the activity to constitute a business. It suffices if there is a group, receiving the benefits and paying the costs of the operation, to whom the ultimate burden of compensation costs can be shifted. Thus, because the costs of a church are borne by a number of contributors who enjoy its spiritual services, it has been held that a large non-profit church association is a business.[8] Similarly, since the costs and benefits

5. The court of appeal opinion in the *Meyers* case, *supra*, was predicated upon the reasoning that it would be a violation of the economic principle underlying compensation to hold that a church organization was a business. 79 So.2d 595, 595 (La. App. 1955). In reversing the court of appeal opinion, the Supreme Court did not differ with the approach employed by the court of appeal in construing the word "business," but differed only in its conclusion that it was not contrary to the economic principle of the compensation statute to hold that a church was a business, since the costs of injuries could be passed on to persons supporting the church. 230 La. 310, 318, 88 So.2d 381, 383 (1956). In reference to the scope of statutes having the non-business exemption it was said at 1 LARSON, WORKMEN'S COMPENSATION 740 (1952): "[W]hatever the statutory background, the courts will not ordinarily find in the compensation act coverage of work undertaken by a person as, so to speak, a consumer instead of a producer."

6. The Supreme Court stated in the instant case: "Since the employer in the instant case was not constructing the house for sale at a profit . . . it cannot be concluded that he was engaged in construction work as a trade, business or occupation." 107 So.2d 645, 647 (La. 1959). No statements were found in cases prior to the instant case which squarely advanced the proposition of the above text statement, but such was the clear implication of those cases which held that employments for the purely personal purposes of the employer were not within the meaning of employment in the trade or business of the employer. See note 7 *infra*. As to the repair or reconstruction of business or rental properties, even though there is a profit motive, such activity may not comprise a business where the principal business is not hazardous. But as pointed out in note 3 *supra* the problem was one largely enmeshed in the hazardous business requirement. It is clear that no matter how brief or unstable the employment where the hazardous problem is not present, it should have no effect on the problem of what is a business. See Hayes v. Barras, 6 So.2d 66 (La. App. 1941) (plaintiff hired for single job of loading truck).

7. The landmark case, with facts similar to those of the instant case, was Shipp v. Bordelon, 152 La. 795, 94 So. 399 (1922) (repair of personal residence of physician not a business). Other cases involving similar holdings to the effect that work undertaken for personal motives does not constitute a business are Brooks v. Smith, 41 So.2d 800 (La. App. 1949); Prater v. Sun Indemnity Co., 38 So.2d 663 (La. App. 1949); Gerstmayr v. Kolb, 158 So. 647 (La. App. 1935); Charity Hospital v. Morgan, 143 So. 508 (La. App. 1932); Lay v. Pugh, 119 So. 456 (La. App. 1928).

8. Meyers v. S.W. Regional Conf. Ass'n of Seventh Day Adventists, 230 La. 310, 88 So.2d 381 (1956).

of government are distributed among the public, the statute expressly applies to public employments.[9]

Broad language in two Supreme Court opinions[10] suggested the possibility that any sustained or regular undertaking of an employer would constitute a business, a notion in conflict with the purpose of the Louisiana statute insofar as it might subject an employer to compensation liability in a situation where there is no one to whom the burden could be shifted as an element of cost or price. In *Landry v. Fuselier*,[11] after having found that an employment connected with the repair of business properties was in the course of the employer's business, the court added the thought that because of the regularity of the repair work it constituted a business in and of itself.[12] In *Meyers v. Southwest Regional Conf. Ass'n of Seventh Day Adventists*,[13] the court used language which also suggested that any sustained or time-consuming undertaking would constitute a business.[14] Both cases involved fact situations wherein the burden of compensation could be shifted from the employer to a group.[15] Therefore, the

9. LA. R.S. 23:1034 (1950). See Meyers v. Southwest Regional Conf. Ass'n of Seventh Day Adventists, 230 La. 310, 318, 88 So.2d 381, 383 (1956): "The Act . . . does not, either in letter or spirit, limit its scope to businesses conducted for profit. [R.S. 23:1034] manifests that it was never intended . . . that the Act was to be confined to individuals and corporations engaged only in trades or businesses operated for a profit."

10. See notes 12 and 14 *infra*.

11. 230 La. 271, 88 So.2d 218 (1956).

12. Landry v. Fuselier, 230 La. 271, 279, 88 So.2d 218, 221 (1956): "Thus, the construction activities of Fuselier involved in repairs and construction of his business premises were a *regular* part of his economic activities." (Emphasis supplied.) The court of appeal opinion by Judge Tate, which was adopted as the opinion of the Supreme Court, took particular note of the evidence tending to show the regularity with which the employer engaged in repair and reconstruction work. Also, there was language which suggested that Shipp v. Bordelon, 152 La. 795, 94 So. 399 (1922), the landmark case holding that private ventures were not businesses where there was no motive to produce an item for sale, was weakened by subsequent decisions. However, in the *Landry* case there was an already admittedly existing business, and clearly a profit motive. Also, as indicated in note 3 *supra*, the *Landry* case was the last case among a chain of decisions dealing with unique problems resulting from the confusion of the hazardous and business requirements. It seems that there the stability or duration of employer activity does play a part in certain limited situations involving the hazardous business problem.

13. 230 La. 310, 88 So.2d 381 (1956).

14. Quoting from *Webster's Dictionary*, the court in Meyers v. Southwest Regional Conf. Ass'n of Seventh Day Adventists, 230 La. 310, 319, 88 So.2d 381, 384 (1956), noted that business has been defined as "that which busies, or engages time, attention, or labor, as a principal serious concern or interest." It is submitted that in using this language the court was doing so in an effort to support a holding in a case of first instance in Louisiana and did not intend to formulate a broad rule to the effect that *all that busies is a business*. However, the language could conceivably be taken to mean that non-profit enterprises will not be considered businesses unless they have some duration or stability.

15. In the *Landry* case, the work was connected with a filling station business

result of these decisions conformed with the compensation principle, although their language seemingly conflicts with that principle.

In the instant case, the court of appeal relied upon the *Meyers* and *Landry* cases to support its holding that the housebuilding project constituted a business of the employer because of the considerable amount of time and effort which he had devoted to it.[16] In a project of such duration and complexity, the work is ordinarily undertaken by a professional contractor. Therefore the court of appeal seemed to feel that in order to afford compensation protection to workers who would ordinarily be engaged in business employments, it should be held that the employer had entered the construction business.[17] In reversing the court of appeal, the Supreme Court centered its opinion upon the fact that the house was constructed as a personal residence for the employer, and not for sale at a profit,[18] a fact which was considered immaterial by the court of appeal.[19] The *Meyers* and *Landry* cases were distinguishable in that the compensation principle was not violated; in the instant case, the ultimate burden of accident costs could not be shifted from the employer to anyone as an element of cost or price.[20]

It is interesting to note that the result reached by the court of appeal would have been reached under the compensation statutes of a majority of the states. It is commonly provided that only casual non-business employments are excluded from the scope of compensation legislation.[21] Such statutes seem to recog-

which was engaged in selling at a profit. See note 6 *supra*. In the *Meyers* case, the court considered that the supporters of the church constituted a group to whom the cost of accident risks could be passed. See note 5 *supra*.

16. 94 So.2d 471, 477 (La. App. 1957).

17. *Id.* at 476-77: "Whether one intends to construct a house for rent, for sale or for personal use, when he actually . . . acts as architect, contractor or foreman . . . and devotes his entire time and attention . . . which took nine to ten weeks, it constituted a 'trade, business or occupation'. . . . Where one engaged in the contract business, although it be for the purpose of building his own home . . . , rather than employing a general contractor, then his employees came under the protection of the employer's liability law."

18. 107 So.2d 645, 647 (La. 1959).

19. See note 17 *supra*.

20. 107 So.2d 645, 647 (La. 1959).

21. Twenty-four states, plus the District of Columbia and Puerto Rico, have this type of exclusion. See 1 LARSON, WORKMEN'S COMPENSATION § 50.10, n. 66 (1952). In addition or in lieu of this type exclusion, a great variety of exemptions are sometimes contained in the statutes.

Among the various specific exemptions which have been included either singly or in various combinations in the statutes of the different states are those relating to domestic service, agricultural employment, casual employment, employment not in the course of the employer's trade, business, or occupation, specified minimum

nize, in effect, that where there is a sustained non-business employment, the employer can use insurance as a means of avoiding the full burden of accident risks connected with the employment. The Louisiana statute does not reflect so liberal a view because its scope is expressly confined to business employments without any mention of their duration or regularity.[22] The relatively conservative approach[23] of the Louisiana statute is perhaps explained by the fact that it was enacted early in the history of compensation in the United States at a time when the constitutionality of such statutes was in doubt.[24] In view of the background and phrasing of the statute, it is submitted that the Supreme Court correctly interpreted the statute as excluding from its scope all employments of a personal nature, without regard to the duration of the employment activity.

The decision is also sound in that it prevents non-business employers from having to decide at their peril whether their personal undertakings are of sufficient regularity or duration to be "businesses" in need of compensation insurance. However, the decision leaves non-business employees without any compensation protection and exposes non-business employers to unlimited tort liability. The statute makes no provision for such employers and employees to elect to come within the act.[25] There appears to be no policy reason for making it impossible for the employer in the instant case to provide compensation protection

number of employees, non-hazardous employment, non-profit employers, charitable employers, highly paid employees, corporate executives, and public employments. A table reflecting the importance of these various specific exemptions and indicating which of them are contained in the statutes of which states is contained in 1 *id.* at § 50.10.

22. The Louisiana statute makes no mention of casual employees, and the Louisiana Supreme Court has clearly indicated that casual business employees are within the scope of the statute. Langley v. Findley, 207 La. 307, 21 So.2d 229 (1944). The only consideration, apart from the hazardous business problem, is whether the employment was in the course of a trade, business, or occupation. LA. R.S. 23:1035 (1950). No cases were found which would indicate that the Louisiana statute was ever intended or broadened to include non-casual, non-business employments. See MALONE, LOUISIANA WORKMEN'S COMPENSATION § 55 (1951), wherein it is indicated that no matter how brief a business employment may be, it falls within the statute.

23. A further indication of the relatively conservative nature of the Louisiana statute is the hazardous business requirement. LA. R.S. 23:1035 (1950). Only a minority of the states have this requirement. 1 LARSON, WORKMEN'S COMPENSATION § 50.10 (1952).

24. See MALONE, LOUISIANA WORKMEN'S COMPENSATION § 34 (1951).

25. The election provisions of the Louisiana statute apply only as to the hazardous exclusionary feature. Employers and employees in non-hazardous businesses can agree to come within the statute, but no provision is made for employers and employees in non-business situations to bring themselves within the statute. See LA. R.S. 23:1036 (1950). *But see* Lay v. Pugh, 9 La. App. 183, 119 So. 456 (1929).

for his workers through procuring compensation insurance. It is submitted that it would be well to enable non-business employers to furnish such protection. Rather than require a formal election agreement, a simpler device would be to provide that employments covered by compensation insurance need not be of a business nature. A precedent for this type of provision is the recent amendment which estops insurers from asserting the non-hazardous nature of a business in connection with the hazardous business requirement.[26] The suggested amendment would not be a very substantial departure from the economic principle underlying the statute. Although it would not be in accord with the objective of distributing accident costs through business channels, it would be in accord with a more basic aspect of the compensation principle. It would provide a voluntary means — insurance — whereby the burden of accident costs could be shifted from the employee to a group.

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26. LA. R.S. 23:1166 (Supp. 1958), as added by La. Acts 1958, No. 495.