The Employer-Employee Relationship Under the Louisiana Workmen's Compensation Act

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The scope of the Workmen’s Compensation Act is limited to the rights and duties that obtain between employer and employee. It follows that the existence of the employer-employee relationship is an essential requisite to any action arising under the Act. Although Section 6 allows recovery by an employee of an independent contractor directly against the latter’s principal (in which case the employment relationship will not exist between the litigating parties) yet it is essential that the claimant establish that he was the employee of the intermediate contractor, and thus the employment relationship is an indispensable matter to be proved under this procedure as well.

Matters relative to the employer-employee relation fall into two groups for purposes of discussion: First, the essentials of the relationship, which includes the means by which it is brought into being, its beginning, duration and ending. Since the parties must not merely become employer and employee respectively, but must likewise agree, expressly or impliedly, to subject themselves to the terms of the Act, the election to bring the employment under the compensation principle may appropriately be considered here.

Second, the relation between employer and employee must be distinguished from other relationships which are similar to it, but which are outside the protection of the Act. These include the relation of seller and buyer, principal and contractor and lessor and lessee. However, limitations of space preclude an adequate consideration of this phase of the inquiry, and the present article is limited arbitrarily to the first group of problems suggested above.

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1. Louisiana Workmen’s Compensation Law, La. Act 20 of 1914, as amended, § 1(1) [Dart’s Stats. (1939) § 4391(1)], provides that it shall apply to “every person in the service of the State” et cetera, and “for such employer and employee” the payment of compensation under the terms of the Act shall be exclusive. Section 1(2) covers “every person performing services arising out of and incidental to his employment in” certain designated hazardous businesses. (Italics supplied.)
A person may become an employee within the meaning of the Workmen's Compensation Act if he is performing a service for another with the latter's consent and subject to his control or direction. No formal contract between the two is necessary, and there need be no specific agreement as to how much is to be done or how long the arrangement shall continue. Nor is it required that the amount or terms of payment be settled, so long as the circumstances fairly indicate that the services were not intended as a gratuity and both parties understood that payment was to be made therefor.

The relationship, however, rests on contract, and an offer by the employer that contemplates an acceptance brought to the attention of the offeror cannot, without more ado, give rise to the employer-employee relation. Similarly, one person cannot make himself the employee of another merely by undertaking to do the latter's work without his knowledge, and in such case it is not sufficient that the claimant honestly believed he was an employee. Consent, however, may be implied where the employer, or even his authorized agent, knew that the work was being done, and failed to object when he had an opportunity to do so.

In view of the loose and informal practices that regularly prevail in the making of employments the courts have adopted a liberal attitude toward the existence of the relationship within the meaning of the Act. Here, as elsewhere in the administration of workmen's compensation, the courts have expressed themselves as favoring a liberal construction toward those who are to be benefited by the Act. This attitude is well illustrated by Kilpatrick v. Triangle Drilling Company. In that case the defendant employer left word at plaintiff's residence that he wanted either the plaintiff or the latter's son to work for him. According to the arrangement it was immaterial

2. See Spanja v. Thibodeaux Boiler Works, 33 So. (2d) 146, 149 (La. App. [Orl.] 1948). In view of the fact that the rate of compensation is computed in terms of the weekly wage received at the time of injury (Workmen's Compensation Law, La. Act 20 of 1914, § 8 as amended [Dart's Stats. (1939) § 4398] it is clear that no claim can be allowed with reference to gratuitous labor.


5. Noble v. Southland Lbr. Co., Inc., 4 La. App. 281 (2nd cir. 1926) (plaintiff, believing he had been employed for carpentry work, reported for duty. He was told to wait, while employer sought to find a place for him on the job. During the interval he was struck by falling timber).


7. 146 So. 758 (La. App. 2nd cir. 1938).
which person served, so long as the job was done; and one or the other of the two, indiscriminately, worked from time to time, although the name of the son only was carried on the defendant's payroll. When the father was injured during the course of his work, the court of appeal observed that the case presents the unusual situation of two men holding one job, but it allowed compensation.\(^8\)

**Effect of Fraud**

Even though the employment was secured through fraudulent misrepresentation by the employee and the contract is therefore rendered voidable, this does not prevent the employer-employee relationship from arising so as to create the right to compensation. In *Plick v. Toye Brothers Auto & Taxicab Company*\(^9\) the applicant, a negro, presented himself for a position as taxi driver, wearing a municipal license badge stolen from a third person. He further misrepresented both his race and his age and he used an assumed name. Despite the fact that the subject of at least two of his false statements (age and license) related directly to the safety conditions of the position of taxi driver, his parents were awarded compensation when he was killed during the course of employment in an accident due largely to his own carelessness.

If the matter that the employee misrepresented was not a factor in bringing about the accident, it is clear that he should not be deprived of his right to compensation;\(^10\) and even where, as in the *Plick* case, the misrepresentation directly affected the conditions of safety, it seems that the same result should follow; for the employer's liability to pay compensation is not limited to responsibility merely for the risks he could have avoided. If the employer were permitted to litigate the intricacies of the bargaining that led to the employment, a new uncertainty would be introduced and the now discredited notion that the employee must be free from fault would, to that extent, be resurrected.

**Proof of the Employment**

The claimant must prove by the preponderance of evidence that he was an employee of the defendant at the time of his injury.\(^11\)

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\(^8\) Cf. Litton v. Natchitoches Oil Mill, 195 So. 638 (La. App. 2nd cir. 1940) (fact that employee engaged in hauling was privileged to obtain assistance from his son did not prevent his being an employee against defendant's contention that he was an independent contractor).

\(^9\) 127 So. 59 (La. App. [Orl.] 1930), noted in (1930) 5 Tulane L. Rev. 137.


The situations in which this burden may be difficult to sustain fall generally into two groups. First are the cases where it may be clear that the complainant was working for someone, but informal usages and loose practices make it difficult to determine who is the employer. This may arise where the employment is made through the agency of an intermediary who is himself an employee, but who nevertheless directs the work of those under him, pays their wages from his own paycheck, and in effect may be the only superior with whom the sub-employee has any personal contact. If this intermediary works indiscriminately for several employers under similar arrangements, the problem of proof for the sub-employee may be a difficult one. Similarly one member of an employing concern may be engaged in similar work on his own account, and the employee may not know whether he is under contract with the firm or with the individual member. This dilemma is heightened when, as is often the case, payroll practices between the firm and the individual are informal or confused. In general, the problem of proof is likely to give trouble whenever the employment is sporadic, and, although it may be admitted that the claimant had worked on occasions for the defendant, it is denied that he was so employed at the time of the accident.

1938), the court, in referring to the proof necessary to establish the employment, remarked: "In a case of this character . . ., plaintiff must prove his demand with legal certainty. If this doctrine of liberal interpretation was to apply to the evidence required, it might be woven and expanded into a mantle of charity to cover many sins of commission and omission."


Of particular interest in this connection is Lognion v. Lake Charles Stevedores, Inc., 172 439 (La. App. 1st cir. 1937). Plaintiff, a stevedore, was periodically hired by defendant for unloading operations through the agency of a union. On the occasion in question a call had been issued for a loading employment through the union. Sometimes before the scheduled arrival of the vessel a dispute arose between this union and a rival organization and it became apparent that hostilities might break out. Apparently the sympathies of defendant employer were with the union of which plaintiff was a member, and defendant consented to plaintiff's storing firearms on the premises under union orders, presumably for the purpose both of protecting defendant's property and furthering the union's cause. Plaintiff was injured by the accidental discharge of a weapon. The court of appeal held that the employer-employee relationship had not taken effect, and compensation was denied. Compare Ledoux v. Fleming, 188 La. 52, 175 So. 747 (1937).
The fact that the injury was reported to the insurer, and even that compensation was paid for a short period, is not necessarily conclusive proof of the existence of the employment when it is shown that the entry was made by mistake and the facts otherwise indicate that the relationship did not exist. However, the fact that such a report was made is cogent evidence of hiring in an otherwise doubtful situation.

Second, the complainant may be able to show that he performed odd jobs for the defendant and was frequently present at the scene of the latter's operations, and yet may be unable to establish an understanding that he was to be paid or that he was subject to the defendant's control. This is the case of the hanger-on. It is illustrated in Suter v. Rednour. The complainant was a young man of itinerant habits who frequented defendant's establishment, a warehouse. He was allowed to sleep on the premises and performed odd jobs on occasion for defendant and others. He was injured on defendant's truck en route to Florida. It was shown that complainant made the trip for his own purposes, although he may have assisted the driver occasionally. Compensation was refused. Similarly, in Harris v. Sun Indemnity Company of New York, complainant was given a lift in defendant's poultry truck. Although he assisted with the driving, the court held that he was not an employee.

**Casual Employees**

The term "casual employment" has been so variously defined under the different workmen's compensation laws that it must be regarded as a word of art whose meaning is to be derived from the particular statute under consideration. The accepted dictionary treatment of the term defines it as "happening without design and unexpectedly, coming without regularity, occasional." When so viewed, the casualness of the employment relates to its unstable duration in point of time. Most compensation acts, however, do not exclude an employment merely because of its uncertainty in this respect so long as it is a part of the employer's regular business. It is generally required that the employment be both temporary in duration and also divorced from the regular calling of the employer if it is to

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escape coverage. Consequently the term "casual" as designating an employment excluded from the statutes has come to signify both the notion of irregularity of duration and the notion of being separate from the regular business of the employer.

The statutes of Alaska, Kansas, Louisiana, Michigan, New York, Oklahoma, Oregon and Washington make no mention of casual employment. The Louisiana Act, like most of these above, applies only to employments in the course of the employer's trade, business or occupation. If, however, the work of the employee is a part of the employer's regular business, the employment is covered under our Act despite the informality of the contractual arrangement and the short duration of the period of employment. The term, "casual employment," insofar as it has been employed by our courts, is used in connection with the temporary character of the relationship and, as such, casual employments have been held expressly to fall within the protection of the statute:

"There is no contention that [plaintiff] was a casual employee. However, if such a contention were advanced, it appears that our Workmen's Compensation Statute covers casual employment."

There are numerous reported cases in which the courts have without comment allowed compensation even though the employment was limited to a few days, or even, as in one case, to several hours. In these instances it may be difficult to determine the weekly rate of compensation, but this does not prevent the employment relationship from existing so as to warrant the allowance of compensation.

19. 2 Schneider, Workmen's Compensation (3 ed. 1942) § 279.
20. Ibid.
21. Louisiana Workmen's Compensation Law, La. Act 20 of 1914, as amended, § 1, par. 2 [Dart's Stats. (1939) § 4891(2)].
22. Langley v. Findley, 207 La. 307, 315, 21 So. (2d) 229, 231 (1944). "But in this state casual employees are not excluded from the benefits of the Compensation Law, and we are aware of no decision of our courts which has denied recovery upon the ground that the employment was casual and temporary." Westerfield, J., in Ranson-Rooney v. Overseas Ry., Inc., 134 So. 765, 769 (La. App. [Orl.] 1931), reversed on other grounds 173 La. 183, 136 So. 488 (1931).
EMPLOYER-EMPLOYEE RELATIONSHIP

Like any other contractual arrangement, the agreement to employ may be made through the employer's agent, and, if there is authority to employ, the principal may thereby be made liable for compensation. This is true whether the agency is a labor organization, another workman, or an outsider.

Of course the agent must be duly authorized to employ on his master's behalf, and one worker who secures another to assist him does not thereby create the relation of employer and employee between his helper and his employer. Generally, a common laborer is not clothed with ostensible authority to create an employment on his master's behalf. If, however, the employer, having full knowledge of the fact, allows the sub-employee to continue working for him, he may be estopped to deny any absence of authority to hire. Likewise, an employer who has placed his work in the hands of another and has vested him with apparent general authority to hire helpers, cannot assert secret limitations on the authority granted.

Usually the employing agent serves only to create a contractual obligation between the employer and the employee, so that the former assumes control of the latter's work and becomes liable for the payment of his wages, in which case the agent does not subject himself to liability for compensation. In some types of work, however, there prevails the practice of allowing one employee to hire others as his helpers, and the intermediate employee determines the number of persons he will hire, personally supervises their work, and pays their wages himself. This practice is common with the hiring of haulers, particularly in connection with lumbering operations. It would be expected that an intermediary who enjoys such an extensive latitude with reference to those who assist him would be looked upon as an enterpriser and would have the status of an

29. See Davis v. Buckley, 153 So. 303 (La. App. 2nd cir. 1934).
independent contractor. However, such is not necessarily the case. Frequently intermediaries of this kind are classified as employees, despite the fact that they operate a small organizational unit of their own and maintain a payroll for those under them.32

What is the status of a sub-employee under such an arrangement? Is he to be regarded as serving in the employment of the intermediary, of the ultimate employer, or both? If the intermediary were regarded as an independent contractor, those persons who are employed by him could recover compensation either from him or from the ultimate principal as they may elect.33 Insofar as the ultimate employer is concerned, there is certainly no reason why he should not be liable to compensate for injury to those who are his sub-employees and subject finally to his control, at least to the extent that he would be liable to the employees of an independent contractor. Moreover, it appears that those who serve under an intermediate employee should be regarded as direct employees of the ultimate master. Although in practice they are subject to the control of the intermediate employee, yet this is usually the case whenever an employer exercises his supervision through the agency of a supervisor, overseer or other superior servant. The control exercised by the latter is only the control of the principal. The fact that the wages are paid by the intermediary does not affect the relationship, since there is no requirement that the master be under a personal obligation to pay the servant.34 Accordingly the ultimate employer has been held liable in compensation to sub-employees without reference to Section 6 of the Act, despite the fact that only the intermediate employee was obligated for the payment of the wages,35 or that the ultimate employer paid the wages directly but under an agreement that a corresponding amount would be deducted from the wages of the intermediary.36

In view of the fact that the intermediary is himself an employee and his control over the sub-employee is exercised entirely on behalf of the ultimate employer, it follows that he should not be liable for compensation to an injured sub-employee. Nor should he be obliged

32. See, for example, Nesmith v. Reich Bros., 202 La. 928, 14 So. (2d) 767 (1943), affirming 14 So. (2d) 325 (La. App. 2nd cir. 1942) (truck-owner and hauler employed two drivers); Collins v. Smith, 13 So. (2d) 72 (La. App. 2nd cir. 1943) (truck-owner and hauler employed two helpers).
33. La. Act 20 of 1914, as amended, § 6 [Dart's Stats. (1939) § 4396].
34. 1 A. L. I., Restatement of Agency (1933) § 225.
to indemnify the ultimate employer who has paid compensation to the sub-employee. In this respect the intermediate employee differs from the independent contractor, who represents a distinct enterprise, and who must finally bear the compensation costs under Section 6.

An interesting variation of the general problem of employment through an agent arises in connection with public work done under the auspices of a federal relief agency. In these cases both the public body receiving the benefit of the labor, and the relief agency, maintain some degree of control over the employee. Each exercises control for a different purpose and the supervision is coordinated through informal arrangements. The public body is interested in the accomplishment of the construction work undertaken for its benefit, while the relief agency (which pays the wage) maintains supervision over the employee for the purpose of insuring that the conditions laid down for its own operation are complied with and that the federal public purpose to which the agency is dedicated is fulfilled. In view of the fact that the personal details are more directly under the authority of the relief agency than of the public body, and that the former has the power to hire and fire, it has been held that the public body is not the direct employer, and the allowance of compensation must depend upon the provisions of Section 6.

Borrowed Employee

One employer may lend his employee (sometimes together with a truck or other piece of equipment) to another. If the employee is injured while performing the work of the borrower, who is responsible for compensation? Since the purpose of the lending arrangement is to subject the employee to the control of the borrowing employer, it generally follows that the latter alone is liable to pay compensation, despite the fact that the lender pays the wages of the employee, and retains the right to dismiss him or substitute another in his place. However, it is now generally conceded that

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for some purposes the claimant may still be regarded as being in the employment of the lender, as where, for instance, he is injured while repairing or maintaining a piece of equipment that was entrusted to him by the lender. Likewise, if the equipment is highly complex or specialized, so that the borrower would not likely direct the method of operation, the employee may be regarded as subject to the control of the lender in operating it.

A lending arrangement is in effect a three party agreement. This means that not only must there be an understanding between lender and borrower, but the employee, as well, must have consented to the change of masters. For example, a construction laborer was ordered by the company employing him to perform work on the private property of one of the company's officers under an arrangement whereby the company continued to be responsible for his wages, but was to be reimbursed by the officer. This was without the knowledge of the employee, who reasonably believed that he was doing company work subject to its orders. Under these circumstances the company was not allowed to deny that the claimant, who was injured during this assignment, was its employee.

It is sometimes difficult to distinguish the lending employer from the independent contractor. This distinction is not of much importance in determining the liability of the principal or the borrowing employer (as the case may be) since he can be made liable as a principal under Section 6 of the Act or as a direct employer under Section 1. Nevertheless, the distinction becomes important when it is sought to maintain a claim in warranty against the lender or contractor. If the latter is designated a contractor, he can be called upon to indemnify the principal against loss under Section 6. If, on the other hand, he is a mere lending employer who has relinquished control over the employee, he is free from further liability.

Generally speaking, the lending employer has no interest in the result to be accomplished by the borrower through the use of the borrowed employee. His sole undertaking is to make the employee available for the borrower's work, and to that purpose he relinquishes control of his servant. The independent contractor, on the other hand, specifically agrees to become responsible for an end

40. 1 A. L. I., Restatement of Agency (1938) § 227, Comment c.
result. Usually he alone determines the means to be used in fulfilling the contract, fixes the number of employees to be assigned to the task, and controls them himself. Sometimes, however, the task undertaken by the independent contractor may be relatively simple and may be scheduled for performance at a distance from the contractor under circumstances where the principal is expected to exercise a general supervision and, in effect, to direct the doing of the work. In such cases the role of independent contractor may be difficult to distinguish from that of a lending employer. In *Lindsey v. White*\(^4^3\) the Ray Drilling Company entered into a contract whereby White undertook to haul fuel oil for use in Ray's drilling operations in Mississippi. It was understood that to accomplish this purpose a driver and truck would be furnished for four dollars per hour, and that Ray would direct the driver as to where the oil should be loaded and delivered. The employee, Lindsey, met with an accident while performing his duties under this arrangement. The court of appeal found that Ray's liability was that of a principal under Section 6, and that Ray was entitled to indemnity from White, who was held to be an independent contractor.

On the other hand, in *Sadler v. May Brothers, Incorporated*\(^4^4\), the defendant hired a truck and a driver, the plaintiff Sadler, from Wilson for hauling logs. After Sadler had worked under this arrangement for several months, he was injured and instituted his suit for compensation against defendant, who made a call in warranty on Wilson as an independent contractor. The court held, however, that Wilson was a mere lending employer and hence he was not obliged to indemnify May Brothers.

It is obvious that the lending employer is not to be distinguished from the independent contractor solely on the basis of the control exercised in each instance. It is obvious from the two cases above that there was little difference in the extent of control exercised by White and by Wilson. The difference lies primarily in the scope of the undertaking of the party who is charged as independent contractor. This, in turn, is gathered from the contract expressly or by implication, from the nature of the work to be done,\(^4^5\) the duration

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\(^4^3\) 22 So. (2d) 689 (La. App. 2nd cir. 1945).
\(^4^4\) 185 So. 81 (La. App. 1st cir. 1938).
\(^4^5\) If the scope of the work to be done is defined within fairly narrow limits, this is a factor indicating that the arrangement is one between principal and independent contractor. If, on the other hand, the borrower is free to put the employee to such tasks as he may choose, a borrowing arrangement is indicated. Furthermore if the work to be done is of a highly specialized nature which the person providing the services undertakes regularly for others, he is likely to be regarded as an independent contractor, rather than a lender.
of time for its completion, and the relationship between the work done and the general business of the principal or borrowing employer. In the Lindsey case it was shown that the drilling company regularly let out its hauling work, which was not an integral part of its business, to others. Furthermore, the complainant’s duties were confined to the hauling of a particular commodity within fairly circumscribed limits, and the directions to be given by the company were no more extensive than the nature of the contract required.

Even if it is found that the person who furnishes the services of his employee to another is an independent contractor, the borrowed employee problem may still arise. If the person for whom the services are provided requests the employee to perform additional duties not contemplated by the former’s agreement with the independent contractor, the employee, by acquiescing, may abandon for the time his general employment and become the temporary employee of the new master. In this instance he will be entitled to compensation from the latter if he is injured during the departure, and by the same token he will have relinquished his claims for compensation against his general employer, the independent contractor.

In such cases it is important to determine when the performance of the additional requested work operates as a departure from the original contract. Strictly speaking, any deviation whatever from the scope of the agreement between the principal and contractor would have this effect. However, it is common knowledge that minor enlargements of the contract which contemplate the same general type of work are frequently made without the advance personal consent of the contractor, who is generally agreeable there-

46. In the usual independent contractor situation the contractor specifies a time when he will complete the task he undertakes. Work for lengthy indeterminate periods is not usually of this nature.
47. The importance of the relationship between the work being done by the borrowed employee and the general business of the borrower is stressed in Smith, Scope of the Business: The Borrowed Servant Problem (1940) 38 Mich. L. Rev. 1222, 1233.
48. A similar situation arises where an ultimate employer gives an intermediate employee the privilege of hiring sub-employees for a designated type of work, and the ultimate employer then directly enlists the services of such sub-employees for a type of work different from that contemplated by the sub-employment contract. See Alphonso v. American Iron & Machine Work Co., 39 F. Supp. 934 (E. D. La. 1941).
49. In such case it is obvious that the lending employer cannot be held liable for compensation in solido with the borrowing employer, since the employee is not subject to the control of both parties. Spanja v. Thibodeaux Boiler Works, 38 So. (2d) 146 (La. App. [Orl.] 1938).
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It follows from the foregoing that a requested departure from the contract work must be substantial before the employee will be treated as the servant pro hac vice of the principal. This is well illustrated in Rooney v. Overseas Railroad, Incorporated.50 Rooney was employed by the Todd Company, an independent contractor, and was assigned by them to repair work on a vessel owned by the Overseas Railroad. During the performance of these duties Rooney was requested by Overseas to assist in making repairs on a crane which was installed on the adjacent dock, and he was injured while so engaged. The supreme court held that at the time of the accident Rooney remained the employee of Todd, despite the fact that work on the crane was not contemplated in the contract between Todd and the Overseas Railroad. Similarly, in Duke v. Dixie Building Material Company,51 the defendant company employed one Green to deliver ready mixed concrete for a builder, Moray. By the terms of the agreement between the latter and defendant the concrete was to be delivered at a single designated place. However, Green was requested by Moray to deposit the material at various other places on the premises. This was held not to be a substantial departure from the contract with defendant so as to make Green the servant pro hac vice of Moray.

On the other hand, in Spanja v. Thibodeaux Boiler Works, Incorporated,52 plaintiff was employed by the Texas Company to transport material and equipment by boat at such times and places as may be directed by his employer. The latter had a contract with defendant Thibodeaux Boiler Works, under which the boiler works agreed to repair a steam boiler for the Texas Company and to load it onto Spanja's barge for delivery. Pursuant to a request by Thibodeaux, Spanja assisted in the loading operation and was injured while so doing. It was held that he had departed from his employment under Texas and became for the time the servant of Thibodeaux. This case is difficult to distinguish from the Rooney case. The difference, if any, probably lies in the fact that the Texas Com-

52. 2 So. (2d) 668 (La. App. [Orl.] 1941).
pany was not performing work as an independent contractor for the boiler works, but was in fact a principal with reference to the latter company. Perhaps for this reason the contract between the two is not to be regarded as being as elastic as though Spanja's general employer were an independent contractor. The effect of the departure was to restrict, rather than to enlarge, the benefit that Texas would receive under its agreement with Thibodeaux.

**SEVERAL EMPLOYERS—PARTNERSHIP EMPLOYMENTS AND JOINT ENTERPRISES**

One employee may divide his time between two or more employers. If each of these has separate work to be done and each exercises exclusive control over the employee during the time the latter is working for him, the employments should be designated as separate and successive. Under such circumstances the injured employee is concerned only with the employer for whom he was working at the time of the accident. The fact that the claimant did not devote all his time to the work of this employer may be important in determining the wage upon which compensation is to be based, but it does not create a joint employment so as to subject the other employers to liability. Furthermore, the power to control the doing of the work, rather than liability for wages, is determinative as to who was employer at the time of the accident.53

If, however, the employee is subject to the joint control of several employers at the same time and for the same work, he is entitled, if injured, to subject them all to his compensation claim. The amount for which each employer can be made liable is discussed in the following paragraphs; but there is no reason why only one employer should be held to the exclusion of the others.

If the work being done at the time of the accident was in furtherance of a joint enterprise shared by all employers, so that each of them had a direct financial interest in the entire job, we are presented with a case of partnership or joint enterprise liability. Under these circumstances there is in reality only one employer, namely the partnership.54 Each partner controls the work for the benefit of himself and the other partners as well; and if one employer only is sued, he can insist that the others be joined and that liability be imposed first upon the partnership assets, if any.55 The

53. 1 A. L. I., Restatement of Agency (1933) § 225.
55. Ibid.
individual liability of the partners is determined according to Articles 2872 and 2873 of the Louisiana Civil Code.\(^6\)

It is not necessary that each partner or joint venturer personally control the work of the injured employee. It is sufficient that they are engaged in a common enterprise that contemplates the employment and control of the claimant by one of the interested parties for the benefit of all. This is illustrated by *Robinson v. Younse Lumber Company*.\(^7\) A and B entered into an agreement whereby B undertook to sever the timber from a tract that A had purchased on credit, and to haul it to A's mill where it would be cut into lumber and sold. B was to furnish the equipment and pay the laborers engaged in his department of the enterprise. He likewise agreed to pay A a specified fee for each thousand feet cut, to be applied to the purchase price of the timber. For his performance, B was to receive one-half of the proceeds from the sale of the lumber. It does not appear that the parties were equally chargeable with the risks of the undertaking, and the arrangement could not be regarded strictly as a partnership. Nevertheless, both parties were equally interested in the outcome of all phases of the venture, and their relationship could not appropriately be classified as that of principal and contractor. The court of appeal correctly held that both of them were liable as employers for compensation to the injured claimant who was employed by B and was engaged exclusively in cutting timber.

If, however, the defendant's interest in the enterprise is merely that of a creditor or lessor, he will not be regarded as a partner of his debtor or lessee so as to cause him to be subjected to compensation claims by the latter's employees.\(^8\) In *Burks v. Glenmora Service Station*\(^9\) the defendant company entered into an arrangement with Hall whereby the latter was permitted to occupy a portion of defendant's service station for a repair shop free of rent. Hall agreed to hire his own helpers and he was to receive the full amount collected for repairs. Defendant's name, however, was deliberately used in advertisements for repair work, and accounts owed to Hall were charged to patrons by defendant. The general appearance

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\(^7\) 8 La. App. 160 (2nd cir. 1927).

\(^8\) Jones v. Pan American Petroleum Corp., 190 So. 204 (La. App. 2nd cir. 1939) (father of one partner who loaned money to partnership was not liable for compensation to an employee of the business).

was that all aspects of the business were under the single control of defendant. The claimant was hired by Hall as a mechanic with full knowledge of this arrangement. His claim for compensation against defendant was dismissed.

Similarly, a distributor of gas and oil leased a service station to a partnership and the distributor’s name was used prominently on the premises. An injured employee of the partnership was denied compensation as against the distributor in spite of a provision in the lease that the lessees would sell the distributor’s products according to its instructions. The court found that no instructions had ever been given, and that the lessees purchased for cash and resold the products entirely as they saw fit. If, however, the contract of lease were to specify in some detail that the lessor intended to control the method of sale and collection so as to indicate an agency despite the use of lease terminology, the employees of such a lessee-agent might well be regarded as sub-employees of the lessor and could claim compensation from him.

It sometimes happens that two persons who have entirely separate interests may procure an employee who will discharge his duties to both employers in a single operation. For example, A, who has goods to be carried from one point to another, employs P for the job. P likewise agrees with another employer, B, to carry his goods on the same trip. If P, who is conceded to be an employee for this purpose, is injured while en route, how should the respective liabilities of A and B be determined? Partnership or solidary liability would obviously be unfair in such a situation, for neither employer had a full interest in the mission. Nor can the work be separated so as to charge one employer to the exclusion of the other, as in the case of separate successive employments discussed above. Obviously, an arbitrary division must be made, and such is provided by Section 32 of the Act:

“In case any employee for whose injury or death payments are due under this act, shall at the time of the injury be employed and paid jointly by two or more employers subject to the pro-

vision of this act, such employers shall contribute to such payment in proportion to their several wage liabilities to such employees. 

The contention has been made that this provision applies also to employments by partners and thus supersedes Articles 2872 and 2873 of the Revised Civil Code. This is obviously not sound, and it has been rejected by the courts. Section 32 contemplates a situation where each employer has undertaken a separate wage liability, which is alien to the entire notion of the partnership obligation. It seems clear that this section is applicable only where there are separate employments in the sense that there is no single partnership or joint enterprise purpose to be served, but where nevertheless it is not possible to allocate the risk exclusively to one employment or the other.

In this connection, the case of Hatch v. Kilpatrick, decided by the court of appeal, presents an interesting and somewhat difficult situation. Kilpatrick and one Haskins created a partnership, purchased a plane and employed Hatch, an aviator, to operate the plane in carrying passengers for hire. It was agreed that Hatch would look to Kilpatrick exclusively for his wages and that he would devote part of his time as a salesman in Kilpatrick’s automobile sales agency. There was no apportionment of Hatch’s salary with reference to the time spent as salesman and as aviator, although it appeared that most of the flying took place during the week-ends. Hatch was killed while carrying passengers for hire under the personal supervision of the partner, Haskins. Although the court clearly recognized that Hatch’s dependents were entitled to compensation, it granted full recovery against Kilpatrick individually and dismissed the claim against the partnership (which, of course, relieved Haskins of responsibility). The court regarded Kilpatrick individually, and the partnership of Kilpatrick and Haskins as joint employers, and accordingly it concluded that since the wages were

62. This section continues as follows: “... provided, however, that nothing in this section shall prevent any arrangement between such employers for different distribution as between themselves of the ultimate burden of such payments. If one or more, but not all such employers should be subject to this act, then the liability of such of them as are so subject shall be to pay that proportion of the entire payments which their proportionate wage liability bears to the entire wages of the employee; provided, however, that such payment by such employer subject to this act shall not bar the right of recovery against any other joint employer.”


64. 142 So. 202 (La. App. 2nd cir. 1932).
paid entirely by the individual employer, Kilpatrick, he alone should be liable for compensation under Section 32, above.

The writer suggests that the court of appeal was in error. The situation presented was that of two separate successive employments. There was no joint employment between Kilpatrick and the partnership as contemplated by Section 32. Hatch was hired to sell automobiles as the employee of Kilpatrick individually; but he was also hired to devote other parts of his time as an aviator employed by the partnership of Kilpatrick and Haskins and subject to the orders of either partner. The two employments called for entirely different acts of service, different times for performance, and subjected Hatch to different sources of control. When Kilpatrick received Hatch's services as aviator, it was solely in his capacity as a member of the partnership, and he had no separate power of control which was not shared by Haskins. The fact that a single undivided wage was paid by Kilpatrick alone for all Hatch's services is not important except as it may be a complicating factor with reference to the amount of compensation to be awarded. The situation resolves itself into an employment by a partnership and thus a judgment against Haskins and Kilpatrick as partners would have been more appropriate.

ELECTION TO ACCEPT OR REJECT THE COMPENSATION ACT

Except for employments under the state or its political subdivisions, the Louisiana Workmen's Compensation Act becomes applicable only through the election of both the employer and the employee. The Act provides, however, that in every contract of employment in businesses affected by the Act, there is an implied election that the terms of the Act shall apply. If either or both parties wish to exclude compensation, this must be done by express provision in writing. Both parties may agree in the initial contract

65. Workmen's Compensation Act, § 1, par. 1, La. Act 20 of 1914, as amended [Dart's Stats. (1939) § 4391(1)].
66. Id. at § 3, par. 1 [Dart's Stats. (1939) §4393(1)].
67. Id. at par. 3. Philps v. Guy Drilling Co., 143 La. 951, 79 So. 549 (1918); Summers v. Woodward, Wight & Co., Ltd., 142 La. 241, 76 So. 674 (1917); Roy v. Mutual Rice Mill Co. of La., Inc., 177 La. 883, 149 So. 508 (1933).
68. Id. at par. 8. The implied election to come under the terms of the act is not negatived by the fact that the employer may have misrepresented the extent of danger in the employment. Brooks v. American Mutual Liability Ins. Co., 7 So. (2d) 658 (La. App. 1st cir. 1942).
69. The same provision is made for employments in existence at the time the act took effect. Workmen's Compensation Act, La. Act 20 of 1914, as amended, § 3, par. 2 [Dart's Stats. (1939) § 4393(2)].
70. Id. at par. 8.
EMPLOYER-EMPLOYEE RELATIONSHIP

that the Act shall not apply, or one of them may serve written notice upon the other prior to the time the contract is to take effect. In either event the employment is excluded from its inception.  

Also, where the contract is covered under the Act by the express or implied election of the parties, either of them may terminate his election by giving written notice to the other. Where, however, the application of the Act is rejected by termination of a prior election, the termination does not become effective for thirty days after the notice is served, and any accident that may occur during this period falls within the coverage of the Act. Any such notice by employer or employee that he elects not to be subject to the provisions of the Act may be waived at any time and the waiver becomes effective immediately.

An express exclusion of compensation in a contract of employment, whether made in the initial contract or by notice of termination, is operative only during the life of the agreement to which it relates. In Berry v. Lawton the employee was hired for seasonal work under an agreement excluding compensation. After the termination of his employment he was re-hired for a second season under a contract that was silent as to the operation of the Act. The court of appeal held that the original agreement to exclude compensation expired with the first employment and that the re-employment carried with it an implied election that the Act shall apply. Presumably, however, mere extensions of an initial contract would be governed by any express election to which the contract was sub-

69. This was not formerly true under La. Act 20 of 1914 prior to amendment. This act provided in substance that an express agreement to exclude its provisions made in connection with the initial contract of employment should not become effective until thirty days thereafter. (§ 3, par. 3). In Woodruff v. Producers' Oil Co., 142 La. 368, 76 So. 803 (1917), the court found that this provision was in conflict with Paragraph 1 of the same section, which states that the act shall be elective. Strangely enough, this conflict was resolved by holding that the terms of the act could not be made applicable to any accident which occurred within thirty days of the date of hiring. This case was overruled, however, in Philips v. Guy Drilling Co., 143 La. 951, 79 So. 549 (1918). In the latter case the court held that in the absence of express stipulation to the contrary it will be presumed that the provisions of the act shall become effective immediately upon employment, and that any agreement to the contrary shall not become effective for thirty days, as provided in Paragraph 3. The act was thereafter amended so that express initial agreements to exclude the act shall become operative at once. Only terminations of prior express or implied agreements for coverage are inoperative for thirty days (La. Act 88 of 1918, § 1 [Dart's Stats. (1939) § 4393(3)].

70. Id. at par. 4.
71. Ibid. Barry v. Lawton, 147 So. 703 (La. App. 2nd cir. 1933).
72. La. Act 20 of 1914, as amended, § 3, par. 5 [Dart's Stats. (1939) § 4393(5)].
73. 147 So. 703 (La. App. 2nd cir. 1933).
ject, and the same would be true as to later changes in the terms of the employment so long as it can fairly be implied that a continuous employment relationship remained in existence.

In view of the fact that the Act operates to the general prospective advantage of both the employer and employee, it is seldom that they will choose to exclude its operation by express agreement. However, in order to further encourage the bringing of employments within the terms of the Act, the legislature has provided that if the employee elects to come under the Act, but the employer elects to exclude its operation, the employee shall enjoy certain strategic advantages in the event he is forced to institute suit for an accident which is attributable to his employer’s negligence. In such a suit the employer will be deprived of the defenses of contributory negligence, assumption of risk, and the fellow servant rule. More important, perhaps, is the fact that the occurrence of the injury shall be presumed to have been the direct result of the employer’s carelessness. Conversely, if the employer elects to cover the employment under the Act, but the employee serves notice of his intention to exclude the employment from compensation, the employer has available to him the usual employer defenses of contributory negligence, assumption of risk, and the fellow servant rule.

There is no provision in the Act as to the consequences of a mutual election to exclude the operation of the compensation statute, although it is obvious that an employer who wishes to avoid compensation will probably do so by presenting to the employee a mutual agreement that the Act shall not control. Presumably, their respective rights would be regulated as though there were no applicable compensation legislation, which would mean that in the event of an accident the usual employers’ defenses would be available, and the employee would be obliged to sustain the normal burden of proof.

MINORS EMPLOYED IN VIOLATION OF LAW

The Workmen’s Compensation Act does not apply to employees of less than the minimum age prescribed by law for the employment

74. La. Act 20 of 1914, § 4 [Dart’s Stats. (1939) § 4394].
75. Ibid.
76. La. Act 20 of 1914, § 5 [Dart’sStats. (1939) § 4395]. In view of the fact that these defenses would be available to the employer in any situation where the act is not applicable, it appears that the penalty on the employee in the present instance is inconsequential.
of minors in the business or trades covered by the Act. It has been held that this exclusion refers only to state statutes such as the minimum age law and the child labor law, and does not apply to a person twenty years of age who was employed in violation of a municipal ordinance prohibiting the issuance of a chauffeur's certificate to anyone under the age of twenty-one.

The provision was doubtless intended for the benefit of children whose employment is illegal under state law, since the act of employing such minors is negligence per se on the part of the employer. Thus recovery of full damages may be had on behalf of the minor if he is injured while he is illegally employed, and the employer would be deprived of the benefit of the limitations of the compensation schedule.

In practice, however, the broad exclusion of illegally employed minors might conceivably result disadvantageously for the very group whose protection was intended. Not all the provisions making the employment of minors illegal are of the type whose violation gives rise to a conclusive presumption of negligence. For example, in the case of *Picou v. J. B. Luke's Sons* the employer was guilty of employing plaintiff's son who was between the ages of fourteen and sixteen years in violation of Section 2 of Act 301 of 1908 as amended. This act makes such an employment unlawful unless there has first been secured an employment certificate, which may be issued by *inter alia* the superintendent of schools. When the minor was injured during the performance of his duties, his parents instituted suit under Article 2315 R.C.C. The supreme court properly held that there could be no recovery in the absence of proof that there was negligence in fact on the part of the employer. The statute, said the court, related in no way to the safety of the work. It was enacted solely to insure a minimum disturbance of the education progress of the minor. The courts have not indicated whether an employment in violation of this type of statute would be excluded from the Compensation Act, under the provision referred to.

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79. *Alexander v. Standard Oil Co. of La.*, 140 La. 54, 72 So. 806 (1916), on rehearing. Damages, however, would not be allowed in such an instance to the parents who knew of the employment, without objecting. Id. at 811.

80. 11 So. (2d) 38 (La. App. 1st cir. 1942).

81. La. Act 20 of 1914, § 3, par. 6 [Dart's Stats. (1939) § 4393(6)]. The pertinent portion of this paragraph reads as follows: "... this act shall not
Furthermore, our court has adopted the minority view that a child employed in violation of a child labor law may nevertheless be excluded from recovery in tort by reason of his contributory negligence. Here again the group of children whose protection is sought by the provision of the Act under consideration may in fact be penalized thereby, since the contributory negligence of the employee is no defense in an action for compensation.

MINORS—ELECTION TO COME UNDER THE ACT

Paragraph 6 of Section 3 of the Act states that the right of election, termination or waiver shall be exercised personally by any employee who is eighteen years or more of age. If, however, the employee is under the age of eighteen, his rights in this respect shall be exercised on his behalf by either his father, mother, tutor, or if neither of these can be readily gotten to act, then by the court. In the light of Article 376 of the Revised Civil Code our supreme court has interpreted this provision as not to include a minor under eighteen who has been emancipated by marriage.

It follows that the employment of a minor under eighteen years of age does not, without more, give rise to an implied election by the employee that the Act shall control. But the parent may be held to have elected impliedly for the minor. This has given rise to controversy on several occasions where it has been sought to determine what constitutes an implied election by a parent. If the hiring takes place without the parent's knowledge and the accident occurs before the parent has learned of the employment, there can

apply to employees of less than the minimum age prescribed by law for the employment of minors. . . ."

83. La. Act 20 of 1914, § 3, par. 6 [Dart's Stats. (1939) § 4393(6)].
84. Roy v. Mutual Rice Mill Co. of La., 177 La. 883, 149 So. 508 (1933), reversing 143 So. 688 (La. App. 1st cir. 1932).
85. Ballard v. Stroube Drug Co., 10 So. (2d) 532 (La. App. 1st cir. 1942). It would seem too clear for dispute that if such minor employee is not empowered to elect expressly for compensation he cannot be held to have made an implied election. See, however, suggestions to the contrary in Parham v. Standard Oil Co. of La., 275 Fed. 1007 (N. D. Miss. 1921) and Ross v. Cockran & Franklin Co., Inc., 122 So. 141 (La. App. 2nd cir. 1929). In the Parham case, however, this notion was discountenanced by the circuit court of appeals [Standard Oil Co. of La. v. Parham, 279 Fed. 945 (C. C. A. 5th, 1922)], while in the Ross case the court expressly found that the parents elected for the child.
be no implied election by the latter that the Act shall control. Furthermore, after the parent has gained knowledge of an already existing employment of the minor, he should be allowed a reasonable period either to enter an objection or to manifest his election one way or the other. It appears, however, that the parent must act promptly if he wishes to avoid the presumed election that the Compensation Act shall apply. In *Ross v. Cockran & Franklin Company* the sixteen year old son of plaintiff was hired by defendant without the knowledge of his parent, who did not learn of the employment until eight days later. The son was injured two days thereafter, and the plaintiff sought to recover in tort under Article 2315. The court held that in view of the fact that the parent owned an automobile and resided only five miles from the place of work, his inaction for two days gave rise to an implied election that the employment should be covered under compensation. Similarly, it has been held that where the parent knew that the minor proposed to seek employment by defendant as a delivery boy and later saw him on defendant's motorcycle (although accompanied by a more mature employee) and raised no objection thereto, there was an implied election that the Act should control, although the minor was injured that same day on his first mission for his employer.

Where the parent has consented to the minor's general employment in an occupation designated as hazardous under the Act and has thereby impliedly elected that the Compensation Act shall control, this election is not terminated by the action of the employer in assigning new duties to the minor, even though these may be more hazardous than the duties he had previously performed with the parent's consent. It would appear, however, that the parent should be able to restrict expressly the duties to be performed by his minor child and by so doing to preclude his election from being made applicable to an unauthorized imposition by the master of new and more hazardous duties on the minor employee.


88. 122 So. 141 (La. App. 2nd cir. 1929).


90. Garcia v. Salmen Brick & Lbr. Co., 151 La. 784, 92 So. 335 (1922) (boy employed to roll wheelbarrow was transferred to help on cars without parents' consent); Liner v. Riverside Gravel Co., 127 So. 146 (La. App. 2nd cir. 1930) (boy employed to clean banks of bayou was assigned to work on barge machinery without parents' consent).

more, if the initial duties to which the minor was assigned with the
parent's consent were wholly nonhazardous92 (even though the
employer's general business may be designated as hazardous under
the Act) no occasion for an initial presumed election would arise.
If, thereafter, the employee is transferred to a hazardous employ-
ment, it would be essential to the application of the Act that the
parent either expressly consent to the change of work, or that knowl-
edge of the minor's new duties be brought home to him and that
his implied election thereto be found.

SAME—ELECTION BY PARENT AFTER ACCIDENT

If the minor under eighteen years of age was employed without
his parent's consent and suffered injury before the parent learned
of the employment, may the latter thereafter elect for the application
of the Act despite the provision of Paragraph (1) of Section 3, which
requires that the election be made prior to the accident? It can be
urged plausibly that the intendment of the Statute is that there be
afforded the parent of the minor a fair opportunity to make the
election prior to the accident, and when this is denied him, as in the
above instance, the privilege still remains despite the literal meaning
of paragraph (1).

Bourgeois v. J. W. Crawford Construction Company93 is the
only case in which this problem has been squarely presented to a
Louisiana court. It appeared that a minor under the age of eighteen
was killed before his parent had an opportunity to elect either ex-
pressly or impliedly. The court held that after the minor's death
the parent could not make an election to accept the Act. It indi-
cated, however, that if the minor had survived, the parent might
make a post-accident election by reason of Section 16 of the Act,
which reads as follows:

"Section 16. 1. That in case an injured employe is men-
tally incompetent or a minor or where death results from the
injury, in case any dependent as herein defined is mentally
incompetent or a minor, at the time when any right, privilege
or election accrues to him under this act, his duly qualified
curator or tutor, as the case may be, may, in his behalf, claim

La., 279 Fed. 945 (C. C. A. 5th, 1922), where the parent sought to recover in
tort under Art. 2315, La. Civil Code of 1870, after the death of the child. The
court held that since no election had been made prior to accident, the Workmen's
Compensation Act did not apply and the tort suit was therefore permissible.
and exercise such right, privilege or election, and no limitation of time, in this act provided for, shall run, so long as such incompetent or minor has no curator or tutor as the case may be."

This Section, however, appears to have been enacted for the protection of the rights of minor or incompetent claimants with respect to the exercise of elections made available to them in that capacity after their rights under the Act have accrued. The application of this Section to the election to accept or reject the Act is certain to produce anomalous results such as were suggested in the Bourgeois case.

The election to accept or reject is vested solely in the employee, or, if he is a minor under eighteen, in his parent. The claimant, as such, has no interest in it, and the fact that he is a minor or is incompetent is wholly immaterial.


"Section 16 of the act refers particularly to two classes of people in their relation to the compensation law. The first class embodies an employee who is either mentally incompetent, or a minor, and the second class, to mentally incompetent or minor dependents of a minor employee whose injury resulted in death. Nowhere do we find anything in that section which would justify applying its provisions to a dependent parent who, like the plaintiff in this case, is mentally competent.

"Let us take the first class embodied in the provision of the section. That would include an injured employee who is mentally and legally incompetent to have made the election for himself or a minor who did not have the legal capacity to make the election. It is contemplated that when either of those two classes of employees survive the injury and the demand for compensation has not accrued to anyone else, then in presenting the claim for compensation on their behalf the duly qualified curator or tutor, as the case may be, may exercise such right as he may have under the act, including that of election to come under its provisions, regardless of the time when such election should have been made.

"Now let us take the other situation which may arise under that section of the act and analyze it: To us it means that when either an injured employee who is mentally incompetent or a minor is injured, and death results and a claim for compensation accrues to any dependent as defined under the act, and such dependent is mentally incompetent or a minor, at the time any right under the act accrues, including the right of election, then the duly qualified curator or tutor of such dependent, as the case may be, may claim and exercise any rights under the act including that of election, regardless of the time when such election should have been made. Under no circumstances presented in that section however can a dependent who is mentally competent, such as the plaintiff in this case, claim any right under the act without regard to any limitations of time therein provided for."