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Casual Employment and Employment Outside of Business

I

IN THE great majority of American compensation acts the definition of employees entitled as such to compensation excepts persons casually employed.¹ The language used differs in the various acts. In some few the exception stands alone.² But in a predominant number of acts persons "whose employment is casual *and* not in the usual course of their employer's business, trade, profession or occupation" are excepted from the term "employee" as defined therein,³ while in a few acts persons "whose employment is casual *or* not in the usual course of the employer's business, etc.," are so excepted.⁴ Under this last definition a person casually employed to perform the most normal and usual function of the employer's business and a workman permanently employed but

¹ In many of the acts in which compensation is restricted to the hazardous industries, such as those of Arizona, Louisiana, New Hampshire, New York and Oklahoma, there is no exception of casual employees, especially where employers engaged in such industries are required to pay annual premiums to an exclusive state insurance fund, upon which the payment of compensation is imposed, such as in Oregon, Washington and Wyoming. But in other states, such as Illinois and Maryland, the acts, though restricted to hazardous industries, exclude casual employees, as did the West Virginia Act of 1915, by which employers were required to subscribe to an exclusive state fund.

In some of the more recent acts, such as those of Idaho and Virginia, which are not restricted to hazardous employments, casual employees are not excepted.

² Georgia, Maryland and New Jersey.

³ Alabama, California, Colorado, Connecticut, Delaware, Indiana, Minnesota, Missouri, Montana, Nevada, North Dakota, Pennsylvania, South Dakota, Tennessee and Texas. In Connecticut and Rhode Island the language used is an exact replica of that in the British Act of 1907.

⁴ Illinois, Maine, Massachusetts, Ohio, Utah, Vermont, West Virginia and Wisconsin. The Illinois, Massachusetts, West Virginia and Wisconsin acts have been amended by striking out the words, "casual *or*" or other similar language, while the Ohio act has been amended by substituting "casual *and*" for "casual *or*." On the other hand, the original Iowa act which contained the words "casual *and*" has been amended to read "casual *or*."

temporarily engaged upon work of a sort not usually done by his employer are equally barred from the benefits of the act. The exception first appears in Section 13 of the British Act of 1906, the Act of 1897, which was restricted to certain industries rather generally defined as hazardous, containing no such limitation upon the term "employee." The language used is as follows: "'Workman' does not include a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade and business." In the American acts, other than those of Connecticut and Rhode Island whose definition of "employee" is substantially identical with the British definition of "workman," the nearest approach to this is the phrase "whose employment is casual in character" used in the Pennsylvania Act of 1915. The language generally used is "whose employment is casual" or "but casual."

In *Gaynor's Case*,⁵ one of the earliest cases which attempts to define this latter phrase, Rugg, C. J.,⁶ attaches a considerable and probably undue importance to this slight change of phraseology, holding that it indicates a legislative intent to reject the construction placed by English courts upon the phrase used in the English act and that therefore, inasmuch as the English courts had held that the term "of a casual nature" had reference to the nature of the work to be done, the term "whose employment is casual" has reference to the nature of the contract of employment. While in *Hill v. Begg*,⁷ the first case in which the Court of Appeals was required to construe and apply the words "whose employment is of a casual nature," the language of Buckley, L. J., lends support to Chief Justice Rugg's view of the construction judicially put upon the words used in the British act,⁸ the fortuitous or occasional character of the job, if ever

⁵ (1914) 217 Mass. 86, 104 N. E. 339.

⁶ This statement is open to doubt on two points, one of opinion, the other of fact. It is highly probable that the draftsman in making this slight change had in mind nothing but an improvement in style, a more concise statement of the effect of the English phrase whose draftsmanship has been adversely criticised (see *Birkenhead, L. C.*, in *Manton v. Cantwell* [1920] A. C. 781, 786, 123 L. T. 433, 36 T. L. R. 534) and had no intention of rejecting the construction put upon it by English decisions of whose existence it is by no means certain that the draftsman was aware. But while this is a mere matter of opinion in which one man's guess is as good as another's, it is a fact that even by 1914 when *Gaynor's Case* was decided the British Courts had definitely rejected, if indeed they had ever adopted, the temporary and fortuitous character of the work to be done as the decisive test of the casual nature of an employer. (As to this see particularly note 10.)

⁷ [1908] 2 K. B. 802, 1 B. W. C. C. 320, 99 L. T. 104, 24 T. L. R. 711.

⁸ But see *Cozens-Hardy, M. R.*, in *Hill v. Begg* [1908] 2 K. B. 802, 804, "There was no engagement that he should be employed, no complaint could

regarded as the sole or predominant test, was soon held to be merely one of many factors. Such factors include the temporary character of the employee's engagement (as shown, *inter alia*, by its actual or agreed duration and by the manner of payment by the day, week or month) and the fact that the employee had or had not a right (rather than no matter how good a chance or how reasonable an expectation) of being employed or continued in the employment—none by itself decisive, but each and all to be considered by the county court judge in determining whether under the peculiar facts of each particular case the employment was or was not “of a casual nature.”

There has been the same unwillingness to lay down general principles or to indicate the relative importance of particular facts as appears in the British decisions on other provisions of their act. After a few unsuccessful attempts to reach a satisfactory definition, the question has been left, as if a question of fact,⁹ to the personal judgment of the county court judge, controlled, to the same but to no greater extent than the verdict of a jury or a master's finding of fact, by the aggregate personal judgment of the appellate tribunals. The phrase is said to be used in a colloquial sense and the judgment exercised in applying it is a more or less subconscious and instinctive reaction to the facts of each particular case.¹⁰ Various factors are said to be worthy of consideration, though no one is decisive. Length of time during which the employment has continued or during which there is a right to, or reasonable expectation of employ-

have been made if any other person had been employed,” Lord Stormonth Darling in *Rennie v. Reid* [1908] S. C. 1051, 45 S. L. R. 814, 1 B. W. C. C. 324 (Scottish Court of Sessions); Farwell, L. J., in *Dewhurst v. Mather* [1908] 2 K. B. 754, 99 L. T. 568, 24 T. L. R. 819, 1 B. W. C. C. 328; Cozens-Hardy, M. R., and even Buckley, L. J., in *Knight v. Bucknill* [1913] W. C. & I. Rep. 175, 57 S. J. 245, 6 B. W. C. C. 160—C. A.

⁹ See Swinfen-Eady, M. R., in *Stoker v. Wortham* [1919] 1 K. B. 499, 120 L. T. 426, 35 T. L. R. 225, 12 B. W. C. C. 34—C. A.

¹⁰ The later cases quote with approval the opinion of Hamilton, L. J., in *Knight v. Bucknill*, 6 B. W. C. C. 160, 164-5: “One might infer that the employment of a casual nature is something distinguished from a workman under the Act. It would appear to refer to something midway between the regular employment of a workman and a single employment for a single day and I think casual is here used not as a term of precision, but as a colloquial term. I can think of no adjective to describe it better nor will I venture to add an adjective to the already considerable list of those contrasted with it by various learned judges. There is a state of facts in which it would be impossible for a reasonable tribunal to say that it was permanent; but I am unable to formulate the test which would determine the boundary between these two conditions as a matter of law and I think it may be inferred that when a state of facts is midway between these two states, so that the question is reasonably debatable, it must be for the County Court Judge to decide.”

ment had he not been injured, is merely one factor.¹¹ There seems to be some difference of opinion as to the significance of the manner of payment, whether by the hour, day, week or month or by the amount of work done.¹²

The fact that the employment or its continuance was wholly at the will of both parties and could be refused or terminated by either at any time is often spoken of as an important factor,¹³ to this extent supporting the decision in *Gaynor's Case*¹⁴ (though inconsistent with the reasoning of its opinion), but it alone is not decisive,¹⁵ certainly not where the engagement, though binding, is for a short period and to meet some fortuitous need.¹⁶ The fact that the work in which the employee is engaged is required by an emergency or by some desire on the part of the employer, itself a matter of whim or caprice, or arising out of the peculiar situation of the employer and so not in its nature necessary to the employer's normal needs, is often spoken

¹¹ Thus the employment of a laborer to assist in a considerable improvement upon the defendant's home park, who had worked continuously thereon for five weeks, *Knight v. Bucknill*, *supra*, n. 8, and of a cook, engaged to fill the temporary vacancy left by the permanent cook's vacation, who had filled the position for two weeks when injured, were held to be casual. *Stoker v. Wortham*, *supra*, n. 9.

¹² In *Smith v. Buxton* [1915] W. C. & I. Rep. 126, 112 L. T. 893, 8 B. W. C. C. 195—C. A., Cozens-Hardy, M. R., and Swinfen-Eady, L. J., speak of the fact that the wages were payable by the week rather than the day as very significant, while Phillimore, L. J., regards it as of no importance whatever.

¹³ See *supra*, n. 8.

¹⁴ *Supra*, n. 5.

¹⁵ It is clear that the right of either or both to terminate the contract of employment if dissatisfied cannot of itself be decisive of the casual nature of an employment. A large proportion of the heavy labor of the world is done under day to day engagements with the tacit understanding that as long as both are satisfied the engagement will be renewed, but without either having a legal ground to complain of even the most arbitrary and capricious refusal to renew the engagement. In such acts as the English acts, where the workman is excluded from compensation only if his employment is both casual and "not for the purposes of" or "outside the usual course of the employer's business," the effect of holding such employment to be casual may not be serious, but in those acts in which the employee is excluded if his employment is either casual or outside the usual course of his employer's business, such a decision would exclude from their benefits a class of labor, enormous in size and peculiarly in need of their protection. In England the employment the casual nature of which has been under discussion has fallen under the head of domestic service (within the broad construction which American courts have put on that term) and the conviction that a householder ought to be required to care only for those definitely and either permanently or periodically received into his household may well lead English courts to attach considerable importance to the legal right to serve and be served. But in American jurisdictions, particularly those in which the casual employee is excluded even if engaged in the usual course of his employer's business, the unanimous course of decision has been to hold that an engagement does not lose its permanent character and become casual merely because it is terminable by either party if dissatisfied.

¹⁶ Cases cited *supra*, n. 11.

of as important. But this is not of itself decisive, since an employment may be casual, although the work itself is absolutely essential to the constant and usual needs of the employer, if the particular person's employment therein is temporary and due to some fortuitous and irregularly recurring shortage¹⁷ in the permanent staff regularly employed to perform it.¹⁸ But whether the court in *Gaynor's Case* was or was not wrong in its view of the meaning of the English phrase, its construction of the prevalent American phrase "whose employment is casual" or "but casual" has been generally followed,¹⁹ even in Pennsylvania, the language of whose act is closely similar

¹⁷ If the need be recurrent at fairly regular intervals and the workman has been given a right to expect the opportunity to fill it, his employment is not casual (*Dewhurst v. Mather*, supra, n. 8.), particularly if the work required is of substantial duration and any irregularity in its recurrence is due to climatic conditions and not to more or less capricious desire of his employer (*Smith v. Buxton*, supra, n. 12). See Ruegg, "Employers' Liability and Workmen's Compensation," p. 276. Compare *Boyle v. Maloney* (1918) 92 Conn. 404, 103 Atl. 127; *State Acc. Bd. v. Jacobs* (1919) 134 Md. 133, 106 Atl. 255; and *Dyer v. J. Black Co.* (1916) 192 Mich. 400, 158 N. W. 959 (where the employees were under definite and binding engagement to do work required at irregularly recurring intervals) with *Cheever's Case* (1914) 219 Mass. 244, 106 N. E. 861; and *Bridges v. Lincoln Co.* (1920) 105 Neb. 222, 179 N. W. 1020. See *Diamond Livery v. Ind. Com.* (1919) 289 Ill. 591, 124 N. E. 609, where the employment of a man who had for years been permitted to sleep in the defendant's stable and to drive and help about the stable when the regular staff was absent and who was injured while driving one of the defendant's carriages was held to be "casual."

¹⁸ As in *Stoker v. Wortham*, supra, n. 9.

¹⁹ *Scully v. Ind. Com.* (1918) 284 Ill. 567, 120 N. E. 492, and *Western Union Telegraph Co. v. Heckman* (1918) 248 Fed. 899, though here color is lent to this construction by the fact that the West Virginia act authorized employers to deduct a part of their employees' wages as their contribution to the premium payable to the State Insurance Fund.

Employment on a particular piece of work undertaken by the employer is usually regarded as casual if the time required for its accomplishment is short. *Herberg v. Walton Co.* (1921) 191 Iowa, 394, 182 N. W. 204; *Aurora Brewing Co. v. Ind. Bd.* (1917) 277 Ill. 142, 115 N. E. 207; *McLaughlin v. Ind. Bd.* (1918) 281 Ill. 100, 117 N. E. 819; *Cousineau v. Black* (1919) 206 Mich. 479, 173 N. W. 213; *Blood v. Ind. Acc. Com.* (1916) 30 Cal. App. 274, 157 Pac. 1140. When the undertaking is of considerable magnitude an employment therein is not casual if for the duration of the undertaking or so long as both parties remain satisfied. *Shaeffer v. de Gratota* (1914) 85 N. J. Law, 444, 89 Atl. 921; *American Steel Foundries Co. v. Ind. Bd.* (1918) 284 Ill. 99, 119 N. E. 902; *Johnson v. Choate* (1918) 284 Ill. 14, 119 N. E. 985; *Miller and Lux v. Ind. Acc. Com.* (1918) 32 Cal. App. 250, 162 Pac. 651.

While it is said that in the absence of proof of the job's duration it will not be assumed that it is so short as to make the employment thereon casual (*American Steel Foundries Co. v. Ind. Bd.*, supra) an employment was held to be casual though the employee was to be paid at a monthly rate and when engaged was told that there would be three or four weeks' work in *Consumers Oil Co. v. Ind. Bd.* (1919) 289 Ill. 423, 124 N. E. 608. And it is the duration of the particular work for which the workman is engaged that is decisive and not the magnitude of the undertaking of which such work forms a part. *Chicago etc. R. Co. v. Ind. Com.* (1918) 284 Ill. 573, 120 N. E. 508. In *Thompson v. Twiss* (1916) 90 Conn. 444, 97 Atl. 328, the court, in construing language which was an exact copy of that used in the British Act of 1916, in-

to that used in the English Act of 1906.²⁰ In some of those states in which the workman is excluded from the benefits of the act if his employment is either casual or outside of the usual course of the employer's business, there has been a tendency to hold that an employment is not casual, though on a temporary job, if the job is itself part of the usual business of the employer and is one the necessity for which is certain to arise even though at irregular intervals, depending upon such chances as the arrival of the defendant's vessels in port for unloading or the desire of the employer to make necessary repairs at one time rather than another.²¹ In this way the courts substantially treat the act as though the workman was not excluded unless his employment was both casual and outside the

timated that a definite employment for the completion of a work lasting a definite time, "as a week or a month or longer," is not casual though either party might terminate it if dissatisfied. The California Act of 1917 expressly provides that the term casual "shall be taken to refer only to employments when the work contemplated is to be completed in not exceeding ten working days and when the total labor cost of such work is less than one hundred dollars." See *Jones v. Ind. Acc. Com.* (1921) 35 Cal. App. Dec. 531, 200 Pac. 50. Under this definition the duration of the particular employee's engagement or the particular part of the work on which he is engaged is immaterial. For reasons given later in this article, this definition seems altogether admirable and worthy of imitation in substance if not in exact form.

In *Blake v. Wilson* (1920) 268 Pa. 469, 476, 112 Atl. 126, 15 A. L. R. 726, there appears the curious and novel suggestion that "character of his (the claimant's deceased husband) employment (roofing and painting an unfinished silo) may well be considered as casual considering (*inter alia*) that it was out of the line of his regular employment (school teaching) and occurred only because of the temporary supervision of that employment;" but see contra, *McDonald v. Great Atlantic & Pacific Tea Co.* (1920) 95 Conn. 160, 111 Atl. 65, where the employment of an errand boy during his school vacations was held not to be "of a casual nature."

²⁰ *Callihan v. Montgomery* (1922) 272 Pa. 56, 115 Atl. 889. The earlier case of *Marsh v. Groner* (1917) 258 Pa. 473, 102 Atl. 127, L. R. A. 1918F 213, appears to regard the exception of persons whose employment is casual and not in the course of the usual business of the employer as indicating a legislative purpose to restrict the term *employer* "by necessary implication" (!) to such employers as are themselves "engaged in regular business" for profit "with a view to earning a livelihood or some gain," and this in the teeth of a definition of *employer* which specifically includes "corporations not for profit" and of the fact that the legislature which enacted the Compensation Act of 1915 thought it necessary to pass a supplement excluding persons engaged in "domestic service and agriculture" for its operation, thus clearly indicating in their opinion that householders, who certainly as such are not pursuing a business for profit, were included in the Compensation Act. See the extremely obscure opinion of Stewart, J., in *Blake v. Wilson*, *supra*, n. 19.

²¹ In *Sabella v. Brazilliera* (1914) 86 N. J. Law, 505, 91 Atl. 1032, a long-shoreman brought from Brooklyn to Jersey City to aid in unloading a ship of the employer, the prosecutor of the appeal, was not casual, though the "class of work was not constant, depending upon there being a ship of the prosecutor in port." "An employment is not casual, that is, arising through accident and chance, when one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period"—quoted and applied in *Ind. Com. v. Funk* (1920) 68 Colo. 467, 191 Pac. 125.

employer's usual business.²² Whether or not such a construction is legally sound, those who, like the author, can see no good reason for so seriously limiting the number of compensatable employees as fixed by the English Act of 1906 by the apparently trivial substitution of the word "or" for the word "and," will find little fault with the method by which so beneficial a result is accomplished.

II

Under the British Act of 1906 and under most of the American acts, the fact that a workman's employment is "of a casual nature" or "casual" does not of itself deprive him of the right to compensation. To do this his employment must, under the British Act also, "be otherwise than for the purposes of his employer's trade or business" and under the American acts "not in the usual course" thereof.

At first glance it would seem that the British act was broader in scope because it omits the word "usual." But while the earlier decisions, particularly of the Irish courts, were to this effect, the later decisions have construed it substantially as though it included the word "usual."

Under both British and American acts, "business" is held to mean a business for gain or profit.²³ The object of the enterprise itself

²² In *Holmen Creamery Assn. v. Ind. Com.* (1918) 167 Wis. 470, 167 N. W. 808, in which the employment of a workman employed to make repairs consisting of mason work and plastering was held not to be casual and in *Utah Copper Co. v. Ind. Com.* (1920) 57 Utah, 118, 193 Pac. 24, 13 A. L. R. 1367, in which a farmer temporarily called in to aid the regular employees in cleaning and repairing a canal, was held not to be casual, the court distinguished between the necessarily, though irregularly, recurrent nature of repairs and the exceptional service of scrapping a worn-out truck.

²³ *Stewart, J., in Marsh v. Groner* (1917) 258 Pa. 473, 478, adopts the definition given in Webster's Dictionary—"some particular occupation or employment habitually engaged in for a livelihood or gain." *Jessel, M. R., defines business as "anything which occupies the time and attention of a man for the purpose of profit."* *Smith v. Anderson*, L. R. 2 Ch. Div. 258; see also *Gray v. Sedgwick Co.* (1919) 101 Kan. 195, 165 Pac. 867; *State v. City of Lawrence* (1919) 101 Kan. 225, 165 Pac. 826; and *State ex rel. Lennon v. District Court* (1917) 138 Minn. 103, 164 N. W. 360; but see *Blyth v. Sewell* (1909) 2 B. W. C. C. 476, 126 L. T. J. 552, in which County Court Judge Mulligan held that anything is a "business" which "occupies an employer as such" whether it is his usual calling or not or "whether he is occupied with a view to profit or to pleasure or to health or to the common weal."

The status of a single venture is doubtful. It is probable that if of considerable size it would be regarded as a business, whether embarked upon as a side line by a man regularly engaged in some other business or by a man who had never before engaged in any business. *Thompson v. Twiss*, supra, n. 19, in which it was held that the development of a considerable tract of land was "one of the businesses of the defendant, not evidently his main business and yet a very substantial one;" and see *von Moschzisker, C. J., dissenting, in Marsh v. Groner*, supra, n. 19, but see *Stansbury v. Ind. Acc. Com.*,

must be gain or profit; it is not enough that the doing of it with workmen directly employed saves the middleman's profits which would go to the contractor to whom such work is usually entrusted.²⁴ The word "business" is held to be used in its popular meaning; therefore even a permanent and regular occupation whose sole object is gain will not be regarded as business unless it is popularly so regarded. Thus an owner of real property held as an investment who manages and rents it is not regarded as carrying on a business, so as to make him liable to a workman casually employed in repairing it.²⁵

Many of the earlier cases under the British act held that any work or operation essential for the carrying on of the business, such as necessary repairs to the premises or plant or the hauling of raw material or finished product, was "for the purposes of the business," whether usually done by the employee with his regular force or done on the particular occasion by a person temporarily employed for that particular purpose, though such work was usually entrusted to an independent contractor.²⁶

infra, n. 41, and *Skates v. Jones & Co.* [1910] 2 K. B. 903, 3 B. W. C. C. 460, a case dealing with Section 4 of the British act in which the phrase "for the purposes of the trade or business" of the principal is used but the "work" to make such principal liable to pay compensation to a workman employed by the contract must have been "undertaken" by the principal. In applying Section 4, considerable importance is attached to this word "undertaken" and therefore a decision that the "work was not undertaken for the purposes of the business of the principal is not conclusive that similar work might not be for the purposes of the employer's business so as to make those employed thereon workmen within the meaning of Section 13."

²⁴ As in *Marsh v. Groner*, *supra*, n. 19.

²⁵ *Bargewell v. Daniels* (1907) 98 L. T. 257—C. A.; *Kelly v. Buchanan* (1913) 13 Compensation L. R. 729—C. A.; *McCain v. McDonnell*, note to *Kelly v. Buchanan*. In *McCain v. McDonnell*, the defendant (a publican) owned fifteen houses. It is probably possible to make a business of holding houses for rental. A company incorporated for such a purpose would probably be held to be engaged in business and the incidental renting of houses built or bought for resale pending their disposal by a man who makes dealings in real estate his habitual occupation would, it is submitted, be regarded as part of his business. But it is doubtful whether the renting of houses held as investment would ever be regarded as a business, no matter how considerable their number.

See *State ex rel. Lennon v. District Ct.*, *supra*, n. 23, in which it is said that "There is no evidence to show that the defendant made it a part of his calling to rent out farms." . . . "For all that appears this was the only farm he owned and it may have been of such small area that its renting and care could not properly be classified as a business or occupation."

The original English decision in *Bargewell v. Daniels*, *supra*, upon whose authority all the others rest, was undoubtedly influenced by the very natural and traditional feeling that the holding of real estate as an investment, usually an inheritance, was a thing quite apart from trade or business, a natural function of all aristocracy carrying none of the social stigma originally attached to trade.

²⁶ *Johnson v. Monasterevan General Store Co.* (1908) 2 B. W. C. C. 183, 42 Ir. L. T. 268—C. A. Ir.—slater injured while repairing the roof of a building

But since 1906²⁷ the words "for the purposes of the employer's business" have been consistently construed to mean the business as it has been habitually carried on by the employer. It is for the employer to fix the limits of his business operations, and such work

which was entirely used for the purposes of the employer's business; compare *Rennie v. Reed*, supra, n. 8, where it was held that the employment of window cleaner engaged to clean all the windows of the employer's residence and injured while cleaning the dining-room windows was "in connection with the (employer's) private residence" though it included the cleaning of the surgery windows. *Cotter v. Johnson* (1911) 5 B. W. C. C. 568, 45 Ir. L. T. 259—C. A. Ir.—laborer casually employed to cut trees whose swaying was injuring a wall on his employer's farm; *Tombs v. Bomford* (1912) 5 B. W. C. C. 338, 106 L. T. 823—C. A.—laborer casually employed to cut a hedge on his employer's farm, the fact that a part of the cuttings were used for hop poles might serve to bring this case within the later decisions, as to which see *Cozens-Hardy, M. R.*, in *Alderman v. Warren* (1916) 9 B. W. C. C. 507, 509, 115 L. T. 363, 32 T. L. R. 665—C. A. *Warrington, L. J.*, attempts in *Alderman v. Warren*, supra, to reconcile *Johnson v. Monasterevan General Store Co.*, supra, with his opinion in that case by calling attention to the fact that in *Johnson's* case "it was proved that it was the duty of the manageress of the business to keep the roof in repair." It is difficult to see how the owner's recognition of the need of future repairs by giving his manageress the power and duty to have them done makes such repairs part of his business to any greater extent than his recognition of their immediate necessity which causes him to himself employ a man to do them. Such a distinction would make repairs and all other operations essential to the proper conduct of the business part of the business of every owner who entrusted its management to another.

The earlier decisions construing Section 4 of both the British Acts of 1897 and 1906 gave as broad or a broader interpretation to the words "for the purposes of the (principal's) business" or the somewhat similar words "part of the process of" the principal's business. *Bee v. Owens* (1900) 2 Fraser, 439 (Sc. Ct. Sess.) and *McGovern v. Cooper & Co.* (1901) 4 Fraser, 249 (Sc. Ct. Sess.), in both of which it was held that the hauling of raw material or finished product was "part of the process" of a manufacturer's business, and it intimated in *Dittmar v. Wilson, Sons & Co.* [1909] 1 K. B. 389, 100 L. T. 212, 2 B. W. C. C. 389, that any operation mentioned in a company's memorandum of association is part of its business. But see *Waites v. Franco-British Exhibition* (1909) 2 B. W. C. C. 199, 25 T. L. R. 441—C. A. But even before the passage of the Act of 1906, the trend of decision had changed—cf. *Stewart v. Dublin etc. Co.* (1902) 5 Fraser, 57, 40 Sc. L. R. 41 (Sc. Ct. Sess.) with *Bee v. Owens*, supra, and in *Mulvoony v. Todd* [1909] 1 K. B. 165, 2 F. W. C. C. 191, the court calls attention to the importance of the requirement that the work must be "undertaken" by the principal; and in *Skates v. Jones*, supra, n. 23, the court holds that the work must be such as is usually and habitually done by the principal for himself or for others. See *Hockley v. West London Timber Co.* [1914] 3 K. B. 1013, 7 B. W. C. C. 652, in which the opinion of the County Court Judge contains a full citation of the earlier decisions. It was there held that repairing or construction of plant or premises was not work undertaken for the purposes of the principal's business; see cases cited in *Hockley v. West London Timber Co.*, supra. While the language of the two sections differs somewhat and the importance of the word "undertaken" (which does not occur in Section 13) is often emphasized, it seems probable that the decisions under Section 4 have influenced the course of decision under Section 13.

²⁷ *Alderman v. Warren*, supra, n. 26, a rag and bone man called in by a public-house keeper to repair a stove in the bar, "I do not think the cleaning or the taking down of a stove is an employment for the purposes of the employer's trade or business, though no doubt it was advantageous for that business that the stove should be repaired." *Pickford, L. J.*, p. 511.

as repairs, construction,²⁸ emergency hauling, protection of his property from an unusual danger such as fire and the like, however essential to the operation of the employer's business, are not for its purposes—as in America they are generally held not to be “in the usual course” of it—unless it has been theretofore habitually done by him or his regular force,²⁹ or unless he has on the particular occasion chosen to make it part of his business by doing it with his permanent and regular staff of employees whom the claimant is called in to assist on the particular job as an extra hand.³⁰

In America a few jurisdictions hold that repairs³¹ and construc-

²⁸ At first glance it might appear that a distinction is made between construction and repair work, but in *Boothby v. Patrick* (1918) 11 B. W. C. C. 201, 120 L. T. 7—C. A., the construction work was held to be in the course of the employer's business because he had made it so by undertaking to do it with his regular and permanent force whom the claimant was called in to assist as an extra hand. In *State ex rel. Lundgren v. Dist. Ct.* (1918) 141 Minn. 83, 169 N. W. 488, the construction of a shed in which to store coal was held to be in the usual course of a coal dealer's business. The earlier case of *State ex rel. Lennon v. Dist. Ct.*, supra, n. 23, in which the construction of a temporary shed to shelter a tenant's cattle until the barn, which had been burned down, could be rebuilt, was held not to be in the usual course of the business of the owner and lessor of a farm, was distinguished on the ground that “the employment was for a temporary purpose only.” This distinction appears in no other jurisdiction. It would make permanent but not temporary repairs a part of the employer's business. Not only is the distinction novel and doubtful but it was unnecessary. The court in *Lennon's* case, while showing a tendency to follow the majority American view that neither construction or repair is in the course of an employer's business unless he has made it so by customarily doing such work himself, places the principal emphasis upon the fact that “there was no evidence that the defendant made it a part of his calling to rent out farms or erect buildings *either permanent or temporary*, citing *Bargewell v. Daniels*, supra, n. 25. See also *Globe Indemnity v. Ind. Acc. Com.* (1919) 45 Cal. App. 328, 187 Pac. 452.

²⁹ *Manton v. Cantwell* [1920] A. C. 781, 123 L. T. 433, 13 B. W. C. C. 55—thatching a farm house was held to be within the business of a farmer. “The County Court Judge was quite justified in coming to the conclusion that it was part of the ordinary business of farms of this description in that district that the farmer should do such work himself or by his servants, as was involved in the thatching of this house.” Lord Finlay, 13 B. W. C. C. 65. There was evidence not only that it was the custom of other farmers in the district to do such work themselves but also that he has himself often done so before. Where there is no evidence as to the particular employer's conduct on prior occasions, it would seem that the custom of employers in the same locality engaged in similar business to do such work themselves or to intrust it to contractors would be controlling. Lord Finlay on page 64 uses the following curious language: “It cannot be that work done on premises where business is carried on either in the way of building or repairing can be regarded as part of the business itself; it is work done *for the purposes of the business* (!), and it may be essential for the carrying on of the business but it is not part of the carrying on of the business.”

³⁰ *Boothby v. Patrick*, supra, n. 28.

³¹ *Holmen Creamery v. Ind. Com.*, supra, n. 21. It is immaterial that the repairs are of a sort which are bound to become necessary from time to time though it cannot be foretold when the necessity will arise, or “are such as may occur but once in an industrial life.” *Vinge, J.*, 167 Wis. 473, as in *Gross & Bros. v. Ind. Com.* (1918) 167 Wis. 612, 167 N. W. 809. *Utah Copper Co.*

tion work,³² being "an essential and integral part of every business employing material things in its prosecution,"³³ are within the usual course of such a business. But the majority of courts hold that neither repairs,³⁴ construction,³⁵ emergency hauling³⁶ or the protection of the property or plant from sudden and unusual perils³⁷ are within the usual course of a business, no matter how essential such work may be to the production and sale of its product, unless the employer has previously made it part of "the usual course" of his

v. Ind. Com. (1920) 57 Utah, 118, 189 Pac. 666, *semble*, though here the Copper Company had for many years made it their practice to clean and repair the canals on which the claimant's decedent was working when killed and had employed a canal boss to supervise such work; cf. *Manton v. Cantwell*, *supra*, n. 29, and see *State ex rel. Lundgren v. Dist. Ct.*, *supra*, n. 28, where, though the particular job was construction work, the language of the court may be taken to have overruled the intimation that repairs were outside of the usual course of business, at least if such repairs were permanent and not mere temporary patching.

³² *State ex rel. Lundgren v. Dist. Ct.*, *supra*, n. 28, distinguishing *State ex rel. Lennon v. Dist. Ct.*, *supra*, n. 23, which had held that the erection by lessor of a temporary shed to shelter the tenant's livestock till a barn destroyed by fire was rebuilt was not in the usual course of the lessor's business, on the ground that in *Lundgren's* case the construction of a coal shed was a permanent improvement necessary for a coal dealer's business. In *Lennon's* case, the lessor's position was similar to that of the defendant in *Bargewell v. Daniels*, *supra*, n. 25, which was cited by the court as authority for its decision, and there was therefore no reason to draw this novel and, it is submitted, unjustifiable distinction between temporary and permanent construction and repairs.

³³ *Vinge, J., Holmen Creamery v. Ind. Com.*, *supra*, n. 21.

³⁴ *Maryland Casualty Co. v. Pillsbury* (1916) 172 Cal. 748, 158 Pac. 1031, *semble*, though in *Miller & Lux v. Ind. Com.* (1919) 179 Cal. 764, 178 Pac. 960, the repairing of farm machinery was held to be an essential part of farming so that a mechanic employed in a repair shop on a ranch was "engaged in farm or agricultural labor." *Holbrook v. Olympia Hotel* (1918) 200 Mich. 597, 166 N. W. 876, per *Ostrander, C. J.*, p. 603. *Callihan v. Montgomery* (1922) 272 Pa. 56, 115 Atl. 889.

³⁵ *Marsh v. Groner*, *supra*, n. 20. *Blake v. Wilson*, *supra*, n. 19.

³⁶ In *Carter v. Ind. Acc. Com.* (1917) 34 Cal. App. 739, 168 Pac. 1065, a grain dealer employed a workman to load onto cars grain bought of neighboring farmers who had sold it f. o. b. the cars, but had been prevented from putting it on board by a car shortage and had dumped it on the platform. It may be noted that this, though work necessary to the shipment of his grain, was not usually entrusted by him to an independent contractor since it was not, under his contract of purchase, part of his duty but that of the vendors to do the loading.

³⁷ *London & Lancashire Co. v. Ind. Acc. Com.* (1916) 173 Cal. 642, 161 Pac. 2—a railroad section hand called in by the superintendent of a ranch to help fight a brush fire, *Sloss, J.*, saying, "To hold that the fighting of fire which may occur at intervals of years is within the definition of the Statute (the California Act of 1913) is to take all meaning and effect from the word 'usual.'" Compare *Tarr v. Hecla Co.* (1920) 265 Pa. 519, 109 Atl. 224, where fighting a fire in a coal mine, an ever-present peril in coal mining, to meet which provision is always made and indeed is by statute required to be made by operators, was held to be within the usual course of the mine operator's business.

business by doing it himself rather than by entrusting it to others.³⁸

As in Great Britain, it is held in the American cases in which the question has arisen that the renting of real estate held for investment is not a business,³⁹ though there is an intimation in one case that it may become a business if done on a large scale.⁴⁰ The idea of gain or profit is held to be inherent in the terms "trade," "business," "profession" and "occupation."⁴¹

³⁸ In *Walker v. Ind. Acc. Com.* (1918) 177 Cal. 737, 171 Pac. 954, L. R. A. 1918F 212, a lodginghouse keeper was accustomed to call in an odd jobber to do such cleaning, carpet-beating, etc., as the chambermaid regularly employed had neither time nor strength to do; and see cases cited in n. 31 and von Moschzisker, C. J., in *Callihan v. Montgomery*, *supra*, n. 34.

A substantially similar problem arises in acts restricted to hazardous industries. An employee hurt while placing a partition in premises on which a hazardous business was being carried on—to wit, preparing macaroni—was held not to be an employee in such business since he was not making macaroni. "The placing of the partition was a specific act for which (the workman) was specifically employed, which had no relation to the hazardous employment except that it made more useful the building in which the employment was carried on." Nor was he employed "in the construction, repair or demolition of buildings," since the defendant company did not carry on any such occupation. *Bargey v. Massaro Macaroni Co.* (1916) 218 N. Y. 410, 113 Atl. 407, per Collin, J. *Uphoff v. Ind. Bd.* (1916) 271 Ill. 312, 111 N. E. 128, Ann. Cas. 1917D 1—here also an employer if he customarily does the necessary repairs and alterations by a staff of carpenters regularly employed for that purpose may carry on this hazardous business as a part of his principal business even if such business be itself non-hazardous. *Alteman v. A. I. Namon & Son* (1919) 190 N. Y. App. Div. 76, 179 N. Y. Supp. 584.

³⁹ *Ford v. Ind. Acc. Com.* (1921) 35 Cal. App. Dec. 200, 200 Pac. 667; *State ex rel. Lennon v. Dist. Ct.*, *supra*, n. 23.

⁴⁰ *State ex rel. Lennon v. Dist. Ct.*, *supra*, n. 23.

⁴¹ See *supra*, n. 23. In *La Grande v. Pillsbury* (1916) 173 Cal. 777, 161 Pac. 988, it was held that "uncompensated favors extended occasionally to its stockholders do not constitute a business of a corporation usual or otherwise," *Melvin, J.*, at page 779. The defendant, a small family corporation, had for years been accustomed to make repairs to houses owned by its stockholders. A carpenter regularly employed to do the necessary repairs to the company's business premises was sent to repair the door in the residence of one of the stockholders, who was also president. Finding the work too hard for him to do unaided, he was told by the president to employ his brother as an assistant. It was held that the brother was not employed in the usual course of the company's business. *Contra, Howard's Case* (1914) 218 Mass. 404, 105 N. E. 636, where a man temporarily employed to trim trees which interfered with the lines of his employer, an electric light company, was injured while trimming trees which did not interfere with his employer's lines, but which the foreman thought unsightly. It is difficult to perceive why the fact upon which the court relies in the *La Grande* case as distinguishing *Howard's Case*, that *Howard* did not know that work which the foreman had ordered him to do was of no benefit to his employer, should affect the question of its being in the usual course of his employer's business; and compare *Associated Theaters v. Ind. Acc. Com.* (1922) 37 Cal. App. Dec. 645, 206 Pac. 665, where repairs to a garage owned by the president (the principal and only stockholder) was held to be in the course of the company's business because the car which was kept in the garage, though owned by the president, was principally used on company business. Apparently a single side venture is not regarded as business; *Stansbury v. Ind. Acc. Com.* (1918) 36 Cal. App. 68, 171 Pac. 698; see *supra*, n. 23. So a single act is not a "transaction or carry-

The fact that practically all American compensation acts qualify the words "course of business" by the addition of the word "usual" has led American courts to lay particular stress upon the scope of the employer's business as established by his previous custom to include or exclude this or that particular work or service from it, and thus to hold that a particular service, though necessary for the preservation of the property,⁴² for the clearing away of wreckage or to save a part of a worn-out vehicle or tool by turning it into salable scrap,⁴³ or for the repair of machinery not usable in his regular business but bought for resale as a single speculative side venture,⁴⁴ is not within the usual course of the employer's business,⁴⁵ apparently without regard to the question whether or not the particular piece of work has been undertaken by the employer with his own regular staff whom the injured workman is called in temporarily to assist.⁴⁶

III

It remains to consider the reason for the exclusion of workers casually employed and those whose employment is not "for the purpose of the employer's business" or "is outside of the usual business of the employer." With all due deference to the opinion of a judge whose decisions interpreting the Workmen's Compensation Act of Pennsylvania have been characterized by an exceptional breadth of view and an unusually keen perception of its underlying

ing on business within the state" under statutes requiring foreign corporations to register or procure a certificate, and as to the meaning of the word "business" under the U. S. Income Tax Laws and other acts, see 71 U. of Pa. L. R. 255 (March 1923).

⁴² *London & Lancashire Co. v. Ind. Acc. Com.*, *supra*, n. 37.

⁴³ *Utah Copper Co. v. Ind. Com.* (1920) 57 Utah, 118, 193 Pac. 24, 13 A. L. R. 1367, *semble*, in which the court, after holding the repair of a canal to be in the course of the business of a mining company, gave as an example of an employment outside the course thereof the demolition of a wrecked or worn-out truck.

⁴⁴ *Stansbury v. Ind. Acc. Com.*, *supra*, n. 41.

⁴⁵ But it is enough that the work is of a sort lying within the scope of the employer's business as he customarily carries it on. An employment is not taken to be outside the usual course of such business because a sudden and unusual emergency makes it more onerous and so requires the temporary engagement of an extra hand to aid in its performance. *State ex rel. Nienaber v. Dist. Ct.* (1917) 138 Minn. 416, 165 N. W. 268. See *Fritz Motor Car Co. v. Ind. Com.* (1919) 168 Wis. 436, 170 N. W. 285.

⁴⁶ In none of the cases cited in notes 42, 43 and 44 was there reported any testimony tending to show whether or not the employer had undertaken to do the particular piece of unusual work with his regular force whom the injured workman was called in temporarily to assist, but it is submitted that even in such case the unusual nature of the work and the exceptional quality of the need which required it would rob it of that habitual and regular character which these cases intimate is required to make it within "the usual course of a business." Cf. *Boothby v. Patrick*, *supra*, n. 28.

social purpose, it is impossible to accept Chief Justice von Moschzisker's suggestion that the exclusion of persons whose employment is of a casual character is due to the Pennsylvania legislature's recognition of their superior ability to earn enough to remove them from the need of compensation.⁴⁷ The fact that casual employees are not deprived of the benefits of the act unless their employment is also outside of the regular business of their employer negates the idea that the legislature regarded them and their families as above the need of assistance when their earning power is temporarily or permanently destroyed.⁴⁸

The statement of Cozens-Hardy, M.R., in *Hill v. Begg*⁴⁹ is extremely significant: "If a man for the purposes of his trade or business employs another, it matters not that the employment is of a casual nature, such as, for example, a dock laborer and the man so employed is a workman within the meaning of the act, but an entirely different principle is applicable to the case of what for the purposes of distinction I may call domestic employments. I am not prepared to extend the burdens of the act to householders who simply call in a man, not part of their regular establishment, to do a particular job as the necessity arises."

When one remembers that this exception first appears in the Act of 1906, which extended the scope of compensation from hazardous industries (which alone were covered by the Act of 1897) to every form of employment, and made the farmer, the householder, the church, the social and sporting club, and the man who employed

⁴⁷ *Callihan v. Montgomery*, supra, n. 34. Indeed it may be doubted whether it is true that the ordinary casual employees "keep themselves detached in order to use their labor and abilities in the best market and the most advantageous ways which may from time to time present themselves," and are, therefore, as compared with regular employees, in a better position "to seek out and grasp opportunities for advantageously using what little capital they can accumulate."

On the contrary, it would seem that the casual worker is either a man who is not trained to any trade, who, indeed, is below the level required for regular work and who ekes out a more or less precarious existence by taking the occasional odd jobs that may offer themselves to him, or a man who, though having a regular trade, is forced by its slackness to earn what he can by casual labor, or at best, a skilled workman who, in some locality where there are no large industries which could permanently require his skilled services, makes a moderate livelihood by serving the individually occasional but in the aggregate constant though moderate needs of his neighbors.

⁴⁸ Had the legislature regarded the odd jobber as a plutocrat of labor, above the need of a compensation, it would not have made his exclusion depend upon his employment being "casual and not in the regular course of his employer's business," but would have adopted the words already used in many American Acts "casual or not in the regular course of his employer's business" which would have clearly excluded from the benefits of the act all but those who are regularly and permanently employed.

⁴⁹ 1 B. W. C. 320, p. 322. (Supra, n. 7.)

another to aid him in living comfortably and enjoying life, as fully liable as employers as the owners and operators of the greatest and most hazardous of industries, it is not surprising that the statutory definition of the term "workman" contained this exception.⁵⁰ In such employments, the so-called economic theory, often said to underlie such acts, that the consumer of the product should, through the industry which produces it, bear a part at least of the injury to the human tools of production—as he does in fact bear the total cost of the repair and replacement of the inanimate machinery, which the manufacturer, who owns such machinery, adds to his cost of production, upon which to some extent at least the selling price of his commodity or service depends—is inapplicable. There is no product, unless mere comfort of living be so considered, no consumer unless the employer directly served be so called, no possibility of spreading the burden of the employer over the many consumers of his commodity as can be done where he is a manufacturer. The liability of such an employer must be based on some other idea. Its purpose may be purely charitable, it may be to relieve the public of the burden of caring for those whose means of support have been destroyed by an accident sustained in such an employment, or it may have been, it is submitted, and most probably was, based on a persistence of the praiseworthy but more or less archaic and patriarchal instinct that a good master should care for his loyal household when misfortune overtook them—an instinct which actually inspired many if not most of the higher classes to do without compulsion far more than the Act of 1906 required of them. Such a reason for including domestic servants as beneficiaries of a compensation act and regarding householders as employers thereunder would logically exclude the outsider temporarily called in to do an odd job.

While this instinct seems to have been active only in New Jersey among American states,⁵⁰ there is a more modern reason operating to retain the exclusion of casual employees. Fundamentally, workmen's compensation should be a matter of compulsory insurance. Employees cannot be expected to procure this protection out of their wages barely sufficient for the needs of themselves and those dependent on them. Employers can provide it and charge its cost upon the consumers of their commodities. Unlike the British acts, which left it to the employers to insure or not as they thought wise, trusting to

⁵⁰ Since all the acts of the other states either expressly exclude domestic employees or are restricted to more or less specially designated hazardous industries or apply only to employers whose employees exceed a number greater than that of the domestics in any but the more elaborate households.

their intelligent self-interest as a sufficient stimulus to insurance, the vast majority of American acts require the employer to insure or to prove, to the satisfaction of the board or commission administering the act, that they have that super-solvency which makes it certain that they can continue to pay the installments of compensation as they accrue in the often far-distant future.

While the primary purpose of compulsory insurance is to secure to the employees the payment of compensation which the act provides for them, yet it has a secondary purpose, of which no administrative board or commission should lose sight.⁵¹ The function of insurance is to spread and distribute this burden over a sufficiently great body of persons employed in a particular occupation to give an insurable accident exposure. The burden imposed upon an industry taken as a whole is slight, the addition to the cost of producing the commodity astonishingly small, yet a single serious injury or death, one of the many which must be expected in the industry as a whole, if it happens to a workman employed by an employer with a small business employing only a few men, may well ruin him if he has to pay the appropriate compensation himself. Yet it would probably be mere chance that his workman rather than a workman of one of his competitors was the victim of this accident. It is the function of insurance to reduce this chance, this gamble on ruin or immunity, to distribute this risk over so large a number of workmen pursuing the same occupation as to give an accident exposure sufficient to enable actuarial experience to calculate the average risk per unit of payroll and so fix a fair but adequate premium as the price of securing protection against liability under compensation acts. Therefore, it would be exceedingly unfair to impose a liability to pay compensation upon employers who had no real opportunity to obtain the protection of insurance.⁵²

The man calling in another to do an odd job for him cannot ob-

⁵¹ In determining whether the right of self-insurance should be granted, a board or commission should not lose sight of the fact that an employer is taking a great and unwise chance in not taking out insurance unless his employees are sufficient in number to give a fair average exposure, and should refuse the privilege of "self-insurance" to employers of a less number of employees no matter how absolute his solvency may be, or should at the least point out to them the grave risk they are running. This is especially true of small municipal corporations whose taxing power insures their solvency but whose tax rate is likely to be seriously increased by the accidental serious injury or death of one of their employees.

⁵² See Loring, J., in *Cheever's Case* (1914) 219 Mass. 244, 246, 106 N. E. 861, and Melvin, J., in *Miller & Lux v. Ind. Acc. Com.* (1919) 179 Cal. 764, 767, 178 Pac. 960, and see *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 151 Pac. 398.

tain insurance save at a rate altogether out of proportion to the risk insured against. The cost of underwriting demands that no policy be written except at a substantial premium, a premium often actually greater than the whole wages paid to the workman employed on some trivial job. In addition, the need of such work often arises suddenly and gives no time to secure insurance—for after all a leaky roof cannot wait for repair till the householder has obtained an insurance policy to cover any possible liability he might incur to the workman whom he employs to mend it. Add to this fact that, notwithstanding the maxim that every man is presumed to know the law, the average citizen is crassly ignorant of the terms of even the most constantly discussed legislative acts and that the ordinary householder has the not unnatural idea that workmen's compensation acts concern only "big business," and it can be easily seen that to impose a compensation liability upon every man who employs another to do an odd job would entrap many a moderately prosperous citizen into financial ruin and reduce his family to want without anyone to look to their support.

There is, however, no such reason why a workman, no matter how temporarily called in to do a piece of work necessary for the production of a commodity or service, manufactured or supplied as a business for gain, should be denied compensation. The labor cost involved is paid by the employer and forms as much a part of his cost of production as the payroll of his permanent and regular employees. And under present insurance practice there is no injustice to either the employer or insurer. The practically universal practice is to pay in advance a premium based on the estimated payroll, which is adjusted at the end of a year to the actual payroll of the insured. While it may be impossible to foresee the emergency which required the employment of the temporary and so casual employee, there is no difficulty in including his wages in the adjusted payroll after the emergency has arisen and requires his employment.

Nor is there any good reason to restrict the liability to pay compensation to casual employees to those employed in the usual course of the employer's business, as fixed by the custom of that employer or similar employers in his business and locality to do such work themselves rather than to employ independent contractors to perform it. In either event the cost of the service is paid by the business and forms part of the production cost ultimately thrown on the consumer. The employer is generally relieved if he entrusts the work to an independent contractor for two reasons, one bad, one good in theory. The first is the persistence of the idea that the term "workman" or

"employee" is after all only a polite way of saying "servant," and to the derivative idea that no one is responsible for or to any one as a servant unless he has the legal though not necessarily the actual power of control over the detail of the manner upon which he performs his service. This idea may have some theoretical or historical place in a liability based on fault, even though the fault be that of another, but has none in the liability to pay workmen's compensation which is imposed without regard to the employer's personal or vicarious fault.

The other reason is that the workman employed by an independent contractor is entitled to compensation from the contractor, his immediate employer, and is therefore in no need of an additional right whether secondary or alternating, to claim compensation from the industry which employs the contractor. But neither of these reasons, good or bad, applies to the workman casually but directly employed to do such work as is usually done through a contractor.

An intermediate situation constantly arises of which a typical instance is that of a property owner desiring to improve his property by erecting or altering a building upon it or faced with the necessity of making substantial repairs to a building already upon his property. The building is intended for his own use. The undertaking is therefore not for gain or for profit in any directly financial sense. He feels himself competent to superintend the work and so save the contractor's charge for his "know how." He therefore engages a corps of carpenters, masons, plasterers, paper-hangers, etc., and puts them to work under his own direction or the direction of foremen themselves under his supervision and control. While his undertaking is not commercial, while his purpose is not to realize a profit from the sale or rental of the building and so does not fall within the accepted definition of a business or an undertaking for profit or gain, yet his purpose is to benefit himself financially by saving the middleman's profit. If he chooses to undertake such work himself, so depriving those engaged upon it of an employer who as contractor would be carrying on the work as part of his business and would thus be obliged to pay compensation to those injured in the job, it does not seem unfair to require him to take the place of the contractor and assume a like obligation to those whom he employs, unless there is no reasonable opportunity to protect himself by insurance against the risk of an unusual and ruinous accident experience. If the undertaking is of any considerable magnitude, he has this opportunity. The necessity for small repairs may arise unexpectedly and must often be met without delay. They cannot wait till the householder has

secured insurance and, even if there is an opportunity to procure insurance, the minimum premium would be ridiculously disproportionate to the labor cost of the job. But when construction, alteration and substantial repairs are deliberately undertaken, there is no need for such immediate action as to preclude the opportunity for securing insurance. And the workmen and their families are in no better economic position than those employed by employers carrying on a business for profit, and the same social reasons which require the latter to be protected from the economic distress involved in a destruction of the workmen's earning power apply with equal force to the former. It would therefore appear that the exclusion of casual employees has no place in an act restricted to hazardous industries or to businesses, professions, trades and occupations carried on for gain or profit.

Its place in an act restricted to employers of five or more employees is doubtful—but looking at it from the insurance standpoint it would seem that its propriety depended upon whether domestic and agricultural employees are excluded from the act. If they are not, then the employer of any five employees should insure and, since compensation policies cover the entire liability of the insured under the act, it would cover injuries to casual as well as to regular employees if casual employees were not specifically excluded from compensation by the act. No injustice would be done the insurer, since the wages of the unexpected casual employee necessarily omitted from the estimated payroll could readily be included in the adjusted payroll at the end of each year. If, however, domestic and agricultural employees are excluded from the benefits of the act the situation would be the same as in those states in which the compensation liability is imposed upon the employer without regard to the number of men whom he employs. In both situations a casual employee should be excluded if, but only if, the employment is of a sort and for a purpose which would render it impracticable for the employer to cover his compensation liability by insurance.

The casual employee should, therefore, not be excluded unless his employment was not directly or indirectly in furtherance of any business, trade, occupation or profession of his employer, or of an undertaking of his employer for profit, or of an undertaking which though not for profit (as that term is judicially construed) is deliberately undertaken and involves a labor cost of (say) one hundred dollars.⁵³ The limit of labor cost fixed in the suggested defini-

⁵³ As has been done in the California Act of 1917 amending the Act of 1913, 1917 Cal. Stats., p. 831, §8 (c): "The term casual as used in this

tion is in a sense arbitrary but certainly is of prime importance in such acts, and the amount fixed enables the employer to obtain insurance at a reasonable charge for the expense of underwriting. Under such a definition it would be immaterial how temporary the employment of a particular employee might be, or how small a part of the whole undertaking was to be done by him. It is the labor cost of the entire undertaking which is controlling. Nor should it be material that the work undertaken should be such as is likely to require any particular time for its accomplishment. It is the deliberate character of the undertaking which gives the opportunity for insurance, and the size of the aggregate payroll which makes it possible to obtain it for a premium bearing some reasonable proportion to the risk involved, that should be important.⁵⁴

The phrase "in the usual course of the employer's business," etc., should be eliminated. Its construction has been fixed by the vastly preponderant weight of authority to exclude many operations which are essential to the production of the commodity or service sold or rendered by the employer and whose cost, including the cost of the necessary labor, is as much a part of the cost of production as those operations habitually done by the employer's regular and permanent force. It is not enough to define "the usual course of the business" as including repair construction and alteration to the employer's premises, machinery and plant. This would still exclude many operations such as the hauling of raw material or finished product,⁵⁵ the protection of his premises or plant from some sudden and unusual danger,⁵⁶ the scrapping of a worn-out or wrecked machine or vehicle,⁵⁷ the repair of a machine of a sort not useful for the employer's regular business, bought as a speculation for resale, or any other single side venture of an unusual sort.⁵⁸ Yet all of these necessities or ventures, though new and unusual, are essential parts of the production cost though it had previously been the employer's custom to entrust

section shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days without regard to the number of men employed and where the labor cost of such work is less than one hundred dollars."

⁵⁴ While, under Section 8 (c) of the California Act of 1917, it is the work which must be completed in ten days and not the particular employee's part thereof, there seems no good reason why a workman temporarily employed upon work deliberately undertaken and involving a labor cost of one hundred dollars should be deprived of compensation because the entire work can be completed in less than ten days.

⁵⁵ *Carter v. Ind. Acc. Com.*, *supra*, n. 36.

⁵⁶ *London & Lancashire Co. v. Ind. Acc. Com.*, *supra*, n. 37.

⁵⁷ *Utah Copper Co. v. Ind. Com.*, *supra*, n. 43.

⁵⁸ *Stansbury v. Ind. Acc. Com.*, *supra*, n. 41.

such work to an independent contractor. The demolition of a wrecked machine or worn-out vehicle is necessary to perform a duty, incumbent upon its owner, of clearing the highway of the wreckage, or to realize the value of the machine or vehicle as scrap. The side venture is undertaken for profit no matter how small the labor cost involved and its labor cost can really be shown in the employer's adjusted payroll, so that there is no difficulty in obtaining protection as there is when a small venture is undertaken by a person who carries on no business which requires him to take out insurance. Some phrase should be substituted which includes all work which aids in the production or sale of the commodity and whose cost enters into the cost of producing and putting it on the market, irrespective of the employer's precedent general habit of letting it out to contractors or doing it himself,⁵⁹ and should clearly show the intention of the legislature that the employer's liability is not intended to be restricted to those employed in his principal business, but is intended to include those directly, though temporarily, employed by him in side ventures undertaken with a view to profit—profit in its broadest sense, which includes not only obtaining an actual gain but also the saving of expense or the minimizing of a loss, as in the case of scrapping an expensive machine so as to get back a small fraction of its original cost.

Francis H. Bohlen.

University of Pennsylvania Law School,
Philadelphia, Pennsylvania.

⁵⁹ Section 8 (a) of the California Act of 1917 omits the word "usual" and Section 8 (c) provides "The phrase course of trade, business, profession or occupation of the employer shall be taken to include all services tending to the preservation, maintenance or operation of the business, business premises or property of the employer."

But though an immense advance, this definition leaves uncertain whether construction work is included. Clearly it does not tend to the preservation or maintenance of the employer's business property. In *Globe Indemnity Co. v. Ind. Acc. Com.* (1919) 45 Cal. App. 328, 187 Pac. 452, the construction of a silo was held to be "as essential to the dairy business as the maintaining of barns for the shelter of the animals," but it may be noted that the maintenance of such barns, being a part of the business premises of the employer, was specifically provided for and if such maintenance essentially tended to the operation of the employer's business the specific mention of it as distinct from the operation of the business would seem unnecessary and meaningless. See *Roberts v. Ind. Acc. Com.* (1921) 34 Cal. App. Dec. 161, 197 Pac. 978, where a dictum to the effect that the repair of a broken pipe in a saloon was not in the course of the saloonkeeper's business appears to overlook Section 8 (c) of the Act of 1917.