[HIGH COURT OF AUSTRALIA.]

MARSHALL . . . . . APPELLANT;
APPLICANT,

AND

WHITTAKER'S BUILDING SUPPLY COMPANY . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *June* 14;

SYDNEY, *Aug.* 7.

Kitto, Taylor, Menzies, Windeyer and Owen JJ.

Workers' Compensation (W.A.)—Servant or independent contractor—Timber faller—Payment per load—To supply own equipment and employ swamper—Whether remuneration "in substance a return for manual labour"—Workers' Compensation Act, 1912-1960 (W.A.), s. 5*.

The respondent company was engaged in the timber industry and was the holder of a sawmilling permit. It entered into an oral contract with an experienced timber faller for the felling and hauling of certain timber in the permit area. The timber faller was to fall such "dieback" trees as were marked and to trim and haul the resultant millable logs to the respondent's mill. He was required to deliver approximately fifty loads weekly, and for this was to be paid at the rate of £3 per load. He was obliged to supply his own falling equipment and a truck with a power winch for hauling and he had also to employ a swamper at his own expense. The contract was to continue for an unspecified period. The timber faller was killed whilst performing work under the contract and his widow claimed compensation under the *Workers' Compensation Act*, 1912-1960 (W.A.), contending that the deceased was "a worker" within s. 5 of that Act.

Held: (1) by the whole Court that the deceased was working for the respondent as a contractor not as a servant, and accordingly he did not fall within the primary definition of "worker" in s. 5 of the *Workers' Compensation Act.*

*Section 5 of the *Workers' Compensation Act*, 1912-1960 (W.A.) provides *inter alia*: "'Worker' . . . means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied, is oral or in writing . . . The term 'worker' . . . also includes . . . (b) any person working in connexion with the felling, hewing, hauling, carriage, sawing, or milling of timber or firewood, or both for another person who is engaged in the timber industry or firewood industry, or both, for the purpose of such other person's trade or business under a contract for service, the remuneration of the person so working being in substance a return for manual labour bestowed by him upon the work in which he is engaged."

(2) by *Kitto*, *Taylor*, *Menzies* and *Owen* JJ., *Windeyer* J. dissenting, that the payments made to the deceased were not " in substance a return for manual labour bestowed by him " and, accordingly, he did not fall within the extended definition of " worker " in s. 5.

The construction of the extended definition of " worker " in s. 5 of the *Workers' Compensation Act*, 1912-1960 (W.A.) discussed.

Decision of the Supreme Court of Western Australia (Full Court) affirmed.

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APPEAL from the Supreme Court of Western Australia.

Ethel Annie Marshall, the dependent widow of Richard Leslie Marshall who died on 18th May 1961, applied to the Workers' Compensation Board at Perth, Western Australia, for an award of compensation on behalf of herself and of six dependent children of the deceased against Whittaker's Building Supply Company.

The facts are set out in the judgments hereunder.

The Board held that, assuming the deceased to have been a person working in connexion with the felling, hewing and hauling of timber for the respondent, a person engaged in the timber industry for the purpose of its trade or business, under a contract for service, then, because a substantial part of the remuneration paid to the deceased was for manual labour bestowed by him on the work in which he was engaged, the deceased was a worker within the meaning of the extended definition contained in s. 5. (b) of the *Workers' Compensation Act*, 1912-1960 (W.A.).

It held further that, in any event, the contract between the deceased and the respondent was a contract of service and that in consequence the deceased was a worker within the meaning of the Act without calling in aid the extended definition of s. 5 (b).

At the request of the respondent the Board stated a case for the opinion of the Full Court of the Supreme Court of Western Australia asking whether the Board erred in law in holding (a) that the deceased was a worker within the extended definition contained in s. 5 (b) of the Act, and (b) that the contract between the deceased and the respondent was a contract of service and the deceased was a worker within the meaning of the general definition of worker contained in the Act.

The Supreme Court of Western Australia (*Wolff* C.J., *Jackson* S.P.J. and *Hale* J.) on 21st December 1962 held that the Board erred in both findings.

From this decision the appellant appealed to the High Court.

J. L. C. Wickham and *R. I. Viner*, for the appellant.

E. F. Downing Q.C. and *T. A. S. Davy*, for the respondent.

Cur. adv. vult.

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The following written judgments were delivered :—

KITTO, TAYLOR, MENZIES AND OWEN JJ. This is an appeal from a judgment of the Full Court of the Supreme Court of Western Australia. The Court, upon a case stated by the Workers' Compensation Board after the award in favour of the appellant against the respondent company, was asked in effect whether, upon the facts which it found admitted or proved, it erred in law in deciding that the husband of the appellant, who had been killed while working under contract with the respondent company, was a worker within the meaning of the Act because either the deceased was working under a contract of service or he was a worker by virtue of a special definition in s. 5 of the *Workers' Compensation Act*, 1912-1960 (W.A.). It is there provided that the term " worker " includes " any person working in connexion with the felling, hewing, hauling, carriage, sawing, or milling of timber or firewood, or both for another person who is engaged in the timber industry or firewood industry, or both, for the purpose of such other person's trade or business under a contract for service, the remuneration of the person so working being in substance a return for manual labour bestowed by him upon the work in which he is engaged".

The Full Court decided that the Board did err in law both in regarding the deceased's contract with the respondent as a contract of service and in applying the extended definition of " worker " to him and held that upon the Board's findings of fact the deceased was not in law a " worker " for the purposes of the Act.

The relevant facts found by the Board were as follows. The respondent company was engaged in the timber industry and was the holder of a sawmilling permit covering 54,000 acres near Serpentine. The company had been required by the Forestry Department to cut back and mill all " dieback " timber and for the purpose of complying with this requirement it entered into a contract with the deceased, who was an experienced and capable timber faller with knowledge of the permit area. The contract, which was made orally, expressly provided : " (a) deceased was to fall such dieback trees on the Permit Area as were marked by a Forestry Department officer and to trim and haul the resultant millable logs to respondent's mill at Serpentine ; (b) respondent was to pay deceased £3 per load hoppus measure for millable logs ; (c) deceased was expected to deliver 50 loads weekly approximately." Furthermore, it was implied : " (a) deceased was to supply his own falling equipment (by custom tree fallers supply equipment such as power saws and axes personally) and also truck with power winch for hauling ; (b) deceased was to find and employ a swamper at his

own expense; (c) the contract should be executed in manner consistent with reputed skill and experience of the deceased, the approved usages of the industry and in complete observance of the conditions applicable to the working of the Permit Area either contained or referred to in Sawmilling Permit No. 1319; (d) the contract was to continue for an unspecified period."

Between August 1960 and the date of his death on 18th May 1961 the deceased, pursuant to the contract, had delivered logs to the mill and had been paid £4,233 therefor. The work was done by the deceased and one swamper. The expenses, including the operation of the plant but excluding the wages of the swamper, totalled £1,380, leaving a balance of £2,850. The wages of the swamper were not ascertained but it was calculated that the deceased's net gain on the contract approximated a little under £45 weekly. Findings that were relied on particularly as justifying the conclusion that the contract was one "of service" and not merely "for services" were contained in par. 10 of the case stated as follows: "The respondent on no single occasion directed or attempted to direct the deceased as to his methods of work in performance of the contract but had the deceased used methods unacceptable to the respondent in that for example they resulted in wastage of timber to which respondent had cutting rights or broken fences or breached any of the conditions of Sawmilling Permit No. 1319 on the part of the respondent to be observed so as to jeopardize the respondent's property in the permit then the respondent would have directed or attempted to direct as to the use of such methods either by remonstrance or should this be ineffective by terminating the contract and the right to so do was in the tacit understanding of the contracting parties". Findings relied on particularly to show that the deceased was a worker within the definition already set out were contained in pars. 12 and 13 as follows: "12. The work involved in the performance of the contract namely falling, trimming and loading of trees and logs and the driving of trucks was basically and substantially of a strenuous physical nature rather than one calling for any significant degree of mental effort although the deceased contributed a very considerable degree of skill and knowledge gained from past experience. 13. That portion of the deceased's remuneration remaining after deduction of all expenses either including the swamper's wages or not was substantial."

We agree with the Full Court that the Board's decision that the contract was a contract "of service" was an error of law. The so-called contract of service, although no doubt requiring that the deceased should himself work on the job, required him to employ

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other labour and did not limit that employment to one swamper. The contract also required the provision of a truck with a power winch as well as felling equipment. The payment of £3 a load for timber delivered to the mill could not be regarded as the deceased's wages but was clearly the contract price for the agreed services which necessitated a great deal more than the work of the deceased. What is set out in par. 10 of the case stated does not upon examination go beyond a finding that, if in the performance of his contract the deceased misconducted himself to the company's detriment, the company had the right to terminate the contract if remonstrance failed to secure proper performance of the contract. Such a finding gave no ground for concluding that the character of the contract was one " of service " rather than " for services ".

The question whether the Board's findings brought the deceased within the extended definition of worker requires both consideration of the meaning of the definition and its application to the facts as found.

In Australia certain work such as timber getting and sleeper cutting is normally carried out under contracts providing for payment by results under which the contractor, within the limits of his contract, works as he thinks fit rather than in accordance with the directions of the person for whom the work is being performed ; and it is common to find in workers' compensation legislation limited provisions for bringing such contractors within the scope of the legislation. The definition with which we are here concerned is clearly enough such a provision and its effect is that in the cases specified, where there is a contract for services providing for remuneration which appears in reality to be payment for manual labour, the person providing the services is a worker for the purposes of the Act. The words " in substance " do not mean, as the Board appears to have thought, " to any substantial extent ". Their function is to enlarge the description which the words immediately following provide, so that the definition may apply not only where the remuneration is a return for manual labour bestowed by a person upon the work in which he is engaged and for nothing else, but also where, although the remuneration is a return for something else also, the something else is comparatively so insignificant that in reality, or as one might say to all intents and purposes, it is a return for manual labour so bestowed. For instance, the definition could cover a tradesman who provides his hand tools to do the manual work required of him by his contract or a man whose work in performing his contract is not wholly manual.

The meaning which we have attributed to the definition, however, renders it entirely inapplicable to the facts found by the Board. A contract, which by its terms requires not only the labour of the contracting party but his employment of other labour and his provision of power equipment to do the job and which provides for payment according to the results of the combined activity, cannot in law be regarded as a contract which provides for remuneration " of the person so working " as " in substance a return for his manual labour ". The £3 per load here could not be so described.

For the foregoing reasons we agree with the answers given by the Full Court to both questions and accordingly dismiss the appeal.

WINDEYER J. The question in this case is whether Richard Leslie Marshall, who was killed while felling timber for the respondent, was a " worker " within the meaning of the *Workers' Compensation Act*, 1912-1960 (W.A.). He was at the time of his death employed under a contract to fell timber and cart the logs for the respondent, Whittaker's Building Supply Company, which is the trade name of an unincorporated partnership, who were the holders of a sawmilling permit under the *Forests Act*, 1912 (W.A.). This permit authorized them, for payment of a royalty, to obtain log timber from marked trees in a forest area some fifty-five thousand acres in extent and to saw it at a sawmill in the area. Their mill manager engaged Marshall, who was an experienced timber feller, to cut certain " dieback " trees, to be indicated by a forester, in the permit area, to trim them and haul the logs to the mill. Marshall was to be paid £3 per load for millable logs and was expected to deliver fifty loads a week. He brought his own equipment, a mechanical chain saw, a truck with a power winch, chains, axes and so forth, as is customary with tree fellers. And also, and this again is common in the industry, he employed an assistant known as a " swamper ". The swamper's main duty is said (in the reasons for the decision of the Workers' Compensation Board) to have been to clear tracks and help with the loading of the truck. The term " swamper ", used in this sense, comes from the logging and lumber industry in the United States.

On an application by the present appellant, Marshall's widow, the Workers' Compensation Board made an award in her favour. It held that Marshall was a " worker " within the meaning of the primary definition of the word in s. 5 of the Act as " any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise . . . ". The Board also found that Marshall was a worker within the meaning of what has been called the " extended

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definition ", relating to workers in the timber industry, which is as follows: " The term 'worker' ... also includes— (a) ... (b) any person working in connexion with the felling, hewing, hauling, carriage, sawing, or milling of timber or firewood, or both for another person who is engaged in the timber industry or firewood industry, or both, for the purpose of such other person's trade or business under a contract for service, the remuneration of the person so working being in substance a return for manual labour bestowed by him upon the work in which he is engaged."

At the request of the respondent the Board, pursuant to s. 29 (9), stated a case for the decision of the Supreme Court. It set out the facts it had found, annexed the reasons it had given for its decision and asked did it err in law in holding that the deceased was a " worker " within the definitions in the Act. The Supreme Court (*Wolff* C.J., *Jackson* S.P.J. and *Hale* J.) held that the Board did err in law and that it was not open to it on the facts found to conclude that the deceased was " a worker " within the meaning of the Act. From that decision this appeal is brought to this Court.

Counsel for the appellant at the outset of his argument submitted that the question was one of fact and therefore not susceptible of being made the subject of a stated case, which is only available to raise a question of law. This was one of the grounds taken in the notice of appeal. But the proposition is quite untenable. In *Bagnall* v. *Levinstein Ltd.* (1), a case under the *Workmen's Compensation Act*, 1897, *Collins* M.R. said: " We have been pressed in argument with the difficulty that the question before the learned judge was one of fact on which he has decided, and that this Court has no jurisdiction to interfere with his decision. But as has been pointed out repeatedly in this Court, and has received the sanction of the House of Lords, the question in such a case is a mixed one of law and fact, and when the facts are found it is a question of law whether they bring the case within the Act ". This is directly applicable here in relation to the primary definition, for the question is: was the deceased a servant or an independent contractor ? The relevant facts being found, the legal nature of the relationship created is a matter of law. But the question secondly argued (the first asked in the case stated), that founded on the extended definition, is in a rather different position. The matter the Board had there to determine was not whether a recognized category of legal relationship, master and servant, existed. It was whether, on the basis that there was not that relationship, the contractual remuneration of the deceased man answered " in substance " to the description

(1) [1907] 1 K.B. 531.

in the definition. That is a question of fact which does not necessarily admit of an absolute answer as a matter of law. Nevertheless, the facts being found, it can be asked whether, as a matter of law, the Board was bound to come to a different conclusion from that which it did. The manner in which the question in the stated case is framed may be open to criticism, but I take it that is what is meant: see *Ross* v. *Ross & Bowman Pty. Ltd.* (1), per *Jordan* C.J. The Board annexed to the stated case a copy of its reasons for its decision. This is a common practice, and it has had some qualified approval in New South Wales: *Way* v. *Ridley* (2). But argumentative material cannot be part of a case stated. The Board's reasons can, I think, only be used by the Court to the extent that they contain some further express findings of fact in elaboration of the express statements in the case itself. They may, however, be illuminating in a case such as this, where the question is whether the Board's conclusion was open to it on the facts found. That is because the Board's finding, although open to it, may be seen to be unreliable because based on unsound reasoning. A simple answer, favourable to the Board's decision, to the question of law submitted by it can in such a case have misleading consequences for other cases. But it is possible to guard against that. The form that a case stated should take has often been pointed out: see *The Queen* v. *Rigby* (3). I think this one met the requirements, and that there was no substance in the objections made by counsel for the appellant. Nor do I think there was any substance in his suggestion that the matter had been approached in the wrong way in the Supreme Court —as if, he said, it had been an appeal on the facts. Moreover, the question for us is not whether the learned judges in the Supreme Court approached the question correctly, but whether they answered it correctly.

The procedural objections made by the appellant being therefore out of the way, I turn now to the questions of law that we have to decide, and first to the primary definition of "worker". This depends on the distinction between a servant and an independent contractor. That is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own. First formulated in its modern form in relation to vicarious liability, the distinction came somewhat deviously and indirectly into the early law of workmen's compensation. It now enters it expressly and directly because, in most workers' compensation statutes, a worker

(1) (1942) 59 W.N. (N.S.W.) 209.
(2) (1958) 76 W.N. (N.S.W.) 31.
(3) (1956) 100 C.L.R. 146.

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means any person who enters into or works under " a contract of service ". It was argued for the appellant that the deceased was a servant of the respondent, paid at a piece work rate. None of the incidents of his employment was, of itself, it was said, necessarily incompatible with his being a servant. That may be so, but the legal character of the relationship created by the contract depends upon the total effect of its terms, and especially on whether the supposed servant was subject to the commands of the employer, not only as to what he should do but as to how he should do it. Lawful authority to command, so far as the work to be done gives scope for it, is still the important test: see *Attorney-General for N.S.W.* v. *Perpetual Trustee Co. (Ltd.)* (1), per *Kitto* J. (2); *Zuijs* v. *Wirth Brothers Pty. Ltd.* (3). If there be no right at all in the employer to give directions during the currency of the engagement, the relationship can scarcely be that of master and servant. But, on the other hand, " a reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract ": see *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (4) and cases referred to there. The rationale and practical validity of the distinction between the two forms of engagement under which a man may undertake to do work for another have been questioned in recent times. And the tests or indicia relied upon for determining that a particular contractual relationship is the one thing or the other have produced practical anomalies. Academic writers and judges have suggested that some re-examination of this matter may some day have to be undertaken. Lord *Thankerton* said so in *Short* v. *J. & W. Henderson Ltd.* (5). In *Humberstone* v. *Northern Timber Mills* (6) *Dixon* J., as he then was, referred to this statement and said: " The regulation of industrial conditions and other laws have in many respects made the classical tests difficult of application and it may be that ultimately they will be re-stated in some modified form " (7). And in *Stevenson Jordan & Harrison Ltd.* v. *Macdonald & Evans* (8), Lord *Denning* (then *Denning* L.J.) referred to the difficulty of giving a precise definition of the distinction. In the present case the Board seems to have thought that the deceased was a servant because, if he had so acted as to jeopardize the respondent's sawmilling permit, the respondent would have been justified in treating the contract of

(1) (1952) 85 C.L.R. 237.
(2) (1952) 85 C.L.R., at pp. 297-300.
(3) (1955) 93 C.L.R. 561.
(4) (1945) 70 C.L.R. 539, at p. 552.
(5) (1946) S.C. (H.L.) 24, at pp. 33, 34; 62 T.L.R. 427, at p. 429.
(6) (1949) 79 C.L.R. 389.
(7) (1949) 79 C.L.R., at p. 404.
(8) [1952] 1 T.L.R. 101, at p. 111.

employment as at an end. But that means no more than that the contract was to do work that the permit authorized, and to do it in accordance with the conditions of the permit. That was its fundamental term. On the facts found, taken as a whole, it is I think beyond doubt that the deceased man was working as a contractor and not as a servant. Timber getters throughout Australia do ordinarily, or at least very often, work as contractors, not as servants, as numerous cases have shown. They were in the past often denied the benefits of workers' compensation. This led to the enactment of special provisions in several of the States extending the benefits of workers' compensation to them. The amendment of the *Workers' Compensation Act* of Western Australia by the inclusion of the extended definition is one example of this. To it and the second aspect of the argument for the appellant I now turn.

The extended definition brings in certain persons in the timber industry who work under " a contract for service ", as distinct from a " contract of service ". The expression " contract for service " (singular) is unusual. " Contract for services " is the usual phrase by which to describe a contract for work and labour as distinct from a contract of service. Indeed, " contract for service " may mean an engagement to enter into service, that is to work as a servant: see for example the reference by *Littledale* J. in *Hardy* v. *Ryle* (1), to " actual service or a contract for service ". But in *Eloff* v. *Lewis & Reid Ltd.* (2), a case in which before the introduction of the extended definition a timber cutter was held not entitled to the benefits of the Act, *Burnside* J. used the expression " contract for service " in contradistinction from " contract of service ". It seems likely that it was his use of it in that sense that later brought it into the Act when it was amended to cover timber workers. Whether used in the singular or the more usual " contract for services ", the expression in this context seems to have no precise legal meaning except as distinguishing an independent contractor from a servant. But it seems, generally speaking, to connote the position of an independent contractor who undertakes to perform personally, and not by an agent, services for which he is employed. That is to say he is an independent contractor but one who cannot assign or sublet his contract. That I consider is its meaning in the Western Australian Act. I think it was certainly intended by both parties to the contract in this case that Marshall the contractor was to do the work personally, assisted in it by his swamper. And that is what he in fact did. It is the next words that

(1) (1829) 9 B. & C. 603, at p. 612 [109 E.R. 224, at p. 228].

(2) [1922] W.A.L.R. 134, at p. 136.

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are difficult: "the remuneration of the person so working being in substance a return for manual work bestowed by him upon the work in which he is engaged". This phrase is peculiar to the Western Australian statute. In other States where timber cutters and other rural workers have been brought within workers' compensation legislation that has been achieved by very different forms of words. The Western Australian phrase seems to have been taken from the judgment of *Real* J. in the Queensland case of *Herbert* v. *Edelston* (1). In that case the Supreme Court of Queensland held that a man employed to ring-bark trees was entitled to the benefit of the *Workers' Compensation Act*, 1905 (Qld.) which in relevant respects was similar to the English *Workmen's Compensation Act*, 1897. Two of the judges (*Real* J. and *Chubb* J.) apparently thought that in certain circumstances a worker who was not a servant could nevertheless be a worker within the meaning of the Act. Whether their decision was correct is not now material. They reached it partly on the basis of English decisions on the effect of the *Employers and Workmen Act*, 1875. *Real* J. expressed his conclusion in a passage from which I extract part of a lengthy sentence: "When ... the remuneration which the person so employed is to receive is understood and intended, both by the employer and employed to be, and is in substance the measure of reward which the employed is to receive for manual labour on his part, or for what, taking the whole work to be performed by the person employed, may in substance be considered as manual labour, then it does not matter whether that remuneration is ascertained by the time to be spent on the work or by the quantity of work to be done, and it does not matter if the person who undertakes the work intended, and was known by the employer when the work was given to intend, to employ others in doing part of that work, or if he did, in fact, so employ others and pay them out of the price received by him for the whole work, so long as the balance which remains to the person taking the work was intended to be, and is in substance, remuneration for the actual manual labour bestowed on the work by him (2)." This decision was followed by *Webb* C.J. in *Jones* v. *Insurance Commissioner* (3).

In Western Australia it was apparently thought, in 1948, that expressly introducing the words of the judgment of *Real* J. into the amended definition of "worker" would give the Western Australian Act the effect that his Honour had thought the Queensland Act of 1905 had. But words from a judgment in a Queensland case do not,

(1) [1909] St.R.Qd. 316.
(2) [1909] St. R. Qd., at p. 322.
(3) (1940) 34 Q.J.P. 123.

when transplanted into a Western Australian statute, get their meaning from the context whence they came but from the context into which they are put. They must be interpreted as part of the Western Australian statute in the light of common practices in the timber getting industry. They give the benefit of the Act to workers there who are paid what, in economic effect although not in legal character, amounts to wages for manual work. They look to the nature of the services for which the remuneration is in reality a return. They prevent persons employed to work and working in the ways stated in the definition from being excluded from the Act because they are, in law, independent contractors. They also prevent their being excluded because the remuneration can be expressed to be, not for doing work, but for supplying timber on which work had been done. That was a difficulty that had arisen in some cases elsewhere than in Western Australia when it was sought to apply workers' compensation legislation to timber getters. But, to get the benefit of the extended definition, the remuneration must be in substance for manual labour. The expression " manual labour " is here, I think, used in the sense it has been held to have in decisions concerning its use in various statutes in England, Employers' Liability Acts, Workmen's Compensation Acts, the National Health Insurance Act, the Truck Act, the Factory and Workshop Act. Generally it may be said that " manual labour " excludes services which are primarily by way of skilled direction and supervision, clerical work and other activities in which manual operations are casual, merely incidental, or accessory to the main purpose. As Lord *Sumner* said, " the Courts have almost uniformly looked to the real and substantial work to be done, to the main duty of the employee and the general nature of his employment, to that which is primary and substantial in his operations and not to that which is merely incidental and accessory ": *Jaques* v. *Steam Tug Alexandra* (1). Of the many cases to this effect it is enough to mention *Bound* v. *Lawrence* (2); *Re Dairymen's Foremen and Tailors' Cutters* (3); and *Re Gardner* (4), followed in *Tansey* v. *Renown Collieries Ltd.* (5). If the question in this case were whether Marshall was employed to do manual labour the Board could, in my view, have found that he was. He was employed to work himself, with only one swamper to help him, in felling, trimming and carting timber. The work he contracted to do did not cease to be manual labour because in doing it he used a mechanical power

(1) [1921] 2 A.C. 339, at p. 345.
(2) [1892] 1 Q.B. 226.
(3) (1912) 28 T.L.R. 587.
(4) [1938] 1 All E.R. 20.
(5) [1945] N.Z.L.R. 568.

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saw and a motor truck with a winch as well as an axe. I do not think that the tools a man uses determine whether or not the work he does or is employed to do, is manual labour. To take some illustrations: a man using a pneumatic drill to break up concrete is engaged in manual labour just as much as is a man attempting the same task with a pick and crowbar. A man cutting logs at a saw bench with a circular saw—"working in connexion with milling" as the Act puts it—is, it seems to me, engaged in manual labour just as much as is a man splitting firewood with an axe. The Act in terms indicates that in the timber industry a man working in connexion with the hauling or carriage of timber may be engaged in manual labour as well as a man working at felling or sawing. But the question is not, as was suggested, whether the work of the deceased man was, in substance, manual labour. That is not an irrelevant consideration. But it is misleading to regard it as the question that the Board had to determine. It was not, and the Supreme Court did not think that it was. The actual question is whether the deceased man's remuneration was in substance a return for the manual labour he bestowed upon the work. That is a more difficult question. In the first place, what is meant by "the remuneration of the person so working"? If it were justifiable to interpret this by reference to the passage in the judgment of *Real* J. quoted above it would mean the money from his contract that remained to the deceased after he had paid his swamper. But I do not think it is legitimate to construe the words of the Act by reference to the somewhat questionable use that was made of them elsewhere. "The remuneration" of the deceased must, for the purposes of the definition, be taken, I think, to mean what he was to have as the consideration for his performance of his contract, that is to say £3 per load of logs delivered. What then is the effect of the requirement that the remuneration must be "in substance a return for the manual labour bestowed by him upon the work"? It is, I think, intended to differentiate the working contractor, whom the Act assimilates to the position of an employee paid by wages, from the contractor who is himself an undertaker, an employer, and for the purposes of the Act to be considered as such rather than as a working employee. The distinction is a real one, but it depends upon economic rather than ordinary legal criteria. The phrase "in substance" is frequently used in legal writing, although it does not very often appear in statutes. Its common use is in connexion with definition and classification, or "characterization", as it is now often called. There the question is, looking to substance and not to form, what for the purpose in

hand is a thing's essential quality ? The expression " in substance ", and the word " substantially " in that sense, are related to the distinction that the old logicians described as that between *propria* and *accidentia*. That it seems to me is the sense in which the expression is used in the Act. It follows that the inquiry that the Act demands is not that which the Board made. The Board found that, " because a substantial part of the remuneration paid to the deceased was for manual labour bestowed by him on the work in which he was engaged ", he was a worker within the definition. This, however, involved treating the phrase " in substance " as if it were equivalent to " to a substantial extent ". But we are concerned with " in substance " as determining the essential character of the remuneration—not with whether it was substantial, either in the sense of " large " or in the sense of " not unsubstantial ": cf. *Palser* v. *Grinling* (1) ; *Atkinson* v. *Bettison* (2).

When a skilled person of any sort, a professional man, tradesman or experienced bush worker, is employed as an independent contractor to do work in the way of his profession or trade, his remuneration can, I think, properly be said to be paid to him for his personal work. That is not, I think, altered because he employs some subordinate to assist him or because he provides the equipment with which he works. To take some illustrations : a solicitor employs clerks. A dentist may have an assistant and expensive equipment. Each has to provide premises, an office or surgery. A farrier has his smithy, his forge and anvil ; he may employ an assistant ; he provides the iron from which he fashions horse shoes ; yet his remuneration could fairly be said to be in substance paid to him for manual labour bestowed by him on the work on which he is engaged. The same thing may be said of many jobbing contractors who bring their own tools and equipment and are very often accompanied by an assistant, a mate, whom they employ. In all such cases the contractor, if he had to sue for his fee or the price of his work, would, using the terminology of the common law, do so in an action for money payable for work and labour done. And therefore, if the work and labour were manual labour, the claim could properly be said to be for remuneration for his manual labour. But the inquiry that the Act requires is not quite that. It is rather : what is it that the man does for which his remuneration is a return ? Does he earn his remuneration in substance by manual work ? The answer that the Supreme Court gave was that his remuneration was a return for all that he provided, his equipment, the work of the swamper, his own labour. From the point of view of economic

(1) [1948] A.C. 291, at pp. 316, 317. (2) [1955] 1 W.L.R. 1127.

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theory and accounting that unquestionably is so. Then, by dissecting the total sum received by the deceased under his contract, it can be shown that after deducting the swamper's wages and the cost of maintaining the equipment less than half that total sum remains as the net income of the deceased; and that amount it is then said is the most that can be considered as his return for manual labour bestowed by him upon the work. I see the force of this. But in my opinion the proportion the net income of the working contractor bears to the total amount of his contractual remuneration is not the proper determinant of whether or not that remuneration was in substance a return for his own work. So to regard it too readily leads to " in substance " being read as if it meant " in the main " or " for the most part "; and that would be an error similar to that which I think the Board made. The question appears to me to be whether in substance the contractor earned his pay for his work as a tree feller and carrier of timber. The amount he was paid for his services reflected, no doubt, the cost to him of equipping himself with the necessary plant and assistance and getting them and himself to the job. But, as I see it, what he was to do was to fell and cart timber, manual labour. The Board could I think consider that his remuneration was, in substance, for doing just that, not for providing a truck and power saw, but for using them. And, as *Hale* J. said, " if the evidence would permit such a finding it would be for the Board and not for the Court to say whether or not the finding should be made ".

In some cases there may be difficulties in calculating compensation in the case of contractors coming within the extended definition. But they do not arise here for the man was killed. In any event such difficulties cannot, in my opinion, curtail the scope of the definition.

In the result I consider that the Board approached the question in the wrong way because it misinterpreted the Act. But the facts that the Board found do not in my view compel a conclusion as a matter of law that the deceased man was not a worker within the extended definition. As the Supreme Court took the view that the facts constrained the Board so to find I would allow the appeal and remit the matter to the Board.

Appeal dismissed with costs.

Solicitors for the appellant, *Muir & Williams.*
Solicitors for the respondent, *Parker & Parker.*

G. A. K.