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JACK v. SMAIL.

Solicitors for the appellants, *Maddock & Jamieson*, Melbourne.

Solicitors for respondents, *Snowball & Kauffman*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

BEATH, SCHIESS & Co. . . . . APPELLANTS;
DEFENDANTS,

AND

MARTIN . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VICTORIA.

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MELBOURNE, *August* 30, 31; *September* 1.

Griffith C.J., Barton and O'Connor JJ.

Factories and Shops Act 1890 (*Vict.*) (*No.* 1091)—*Factories and Shops Act* 1893 (*No.* 1333)—*Factories and Shops Act* 1896 (*No.* 1445)—*Factories and Shops Act* 1897 (*No.* 1518)—*Factories and Shops Act* 1900 (*No.* 1654), *secs.* 3, 4, 15, 18, 27—*Factories and Shops Act* 1903 (*No.* 1857)—*Minimum wage—Fixing rate of Wage—Piece-work—"Employer," meaning of—Operative—Factory proprietor.*

The word "employer" in sec. 15 (19) of the *Factories and Shops Act* 1900 (Vict.) means a person who, in regard to any person for whom piece-work prices or rates are fixed, stands in the relation of employer to an operative, and the sub-section does not apply to the case of a contract between two independent persons not standing in that relation to each other.

Held, therefore, that a merchant who contracted with the registered occupier of a factory for the manufacture by the latter of articles of clothing out of material supplied by the merchant, at a certain price per dozen, could not be convicted of an offence under sub-secs. (19) and (20) of sec. 15 of that Act.

Judgment of Full Court *Martin* v. *Beath, Schiess & Co.* (1905) V.L.R., 386; 26 A.L.T., 96, reversed.

By *O'Connor* J. The decision of the Full Court, so far as it holds that sub-sec. 19 of sec. 15 applies to employers who are not registered occupiers of factories, is correct.

APPEAL from the Supreme Court.

At the Court of Petty Sessions at Melbourne an information was heard, which, omitting formal parts, was as follows:—

"The information of Edwin Charles Martin, Inspector of Factories and Shops, of Melbourne, in the State of Victoria, who saith that the said defendants, at 202 and 204 Flinders lane, in the City of Melbourne, in the said Bailiwick and State, between the 16th day of March, 1904, and the 28th day of March, 1904, the same being an employer of persons engaged in the preparation or manufacture of articles of clothing or wearing apparel of a kind to which applies the determination of a Special Board duly appointed under the Factories and Shops Acts to determine the lowest price or rate of payment which might be paid to a person for wholly or partly preparing or manufacturing, either inside or outside a factory or work-room, among other articles, women's aprons, committed a contravention of the provisions of sub-sec. 20 of sec. 15 of the *Factories and Shops Act* 1900, in that, after such Special Board, under the powers in that behalf conferred upon it by the Factories and Shops Acts, instead of specifying the lowest piece-work prices or rates which might be paid for preparing or manufacturing the articles the subject of its consideration, had determined that piece-work prices or rates based on the wages rate fixed by such Special Board should be fixed and paid by the employer as provided in sub-sec. 19 of the said recited section, the said defendants unlawfully did fix and pay to one A. Rodgers, a lower price or rate for preparing or manufacturing aprons than a rate based on what an average worker making aprons, and working under like conditions, paid a wage of fourpence an hour (the wages rate fixed by such Special Board) would earn in preparing similar aprons, contrary to the form of the Statute in that case made and provided."

At the hearing evidence was given on behalf of the informant that the defendants, who carried on the business of warehousemen, and did not themselves manufacture aprons, entered into an agreement with Mrs. A. Rodgers to make eighteen dozen women's aprons out of material supplied by the defendants, at the price of 1s. per dozen; that Mrs. Rodgers was registered pursuant to the Factories and Shops Acts as the proprietor of a factory in respect of the class of goods in question; that Mrs. Rodgers cut out the aprons and gave them out to certain outworkers employed by her in connection with her factory, that those outworkers com-

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pleted the aprons, and were paid by Mrs. Rodgers at the rate of 9d. per dozen; and that Mrs. Rodgers delivered the aprons when completed to the defendants, who paid the price agreed upon. Evidence was also given that the price of 1s. per dozen was less than a rate based on the wages rate fixed by the Special Board, in the case of work done by adult employés, and that it should have been at least 1s. 3d. per dozen.

At the conclusion of the evidence for the informant, counsel for the defendants contended that the Factories and Shops Acts did not apply to the case. No evidence was called for the defendants. The police magistrate, who presided on the bench, in giving the decision of the Court, said that on the point of law they were going to give the defendants the benefit of the doubt; that as to the facts they were perfectly satisfied that the defendants had gone to Mrs. Rodgers in order to get a class of work done which they themselves did not do; that they were of opinion that from 1s. 3d. to 1s. 4½d. would have been a fair rate for the work; that as a matter of fact too little was paid on the first occasion, but that the contract appeared to be of a tentative character; and that they did not think the evidence disclosed any moral turpitude or any desire on the part of the defendants to evade the Act or to sweat the workers. They thereupon dismissed the information.

An order *nisi* to review this decision was granted on the ground:—"That on the evidence the justices should have found that the defendants were the employers of Mrs. Rodgers within the meaning of sub-sec. 19 of sec. 15 of the *Factories and Shops Act* 1900."

The Full Court, to whom the matter was referred, having made the order absolute with costs [*Martin* v. *Beath Schiess & Co.* (1),] the defendants now appealed to the High Court.

Irvine (with him *Cussen* and *Davis*), for the appellants. The real question here is whether a merchant, not being the registered proprietor of a factory in respect of particular articles of clothing, who makes a contract with the registered proprietor of a factory in respect of those articles for the manufacture of those articles

(1) (1905) V.L.R., 386; 26 A.L.T., 96.

out of material supplied by the merchant, is bound under the Factories and Shops Acts to pay to that proprietor of a factory a rate of piece-work wages equivalent to that fixed by the Special Board for payment to adult employés generally. A factory proprietor is not an employé, nor is a merchant an employer of a factory proprietor. The judgment of the Supreme Court goes on the question whether employers and employés, who are not connected with a factory, are bound under the Factories and Shops Acts to pay the rate of wages or piece-work prices fixed by the Special Board in relation to any trade. Whatever may be the meaning of employer or the relation between employer and employé under sec. 15 (19), and (20) of the *Factories and Shops Act* 1900, those sub-sections do not include the relation between the appellants and Mrs. Rodgers. The element of personal service must come into that relation. Where work is given out to be done by piece-work the intention is that it shall be done by the person to whom it is given out. Taking into account the general relations established by the Factories and Shops Acts, between employers and employés, and the general purposes of those Acts, it was never intended that a contract such as was entered into in this case should be affected. An independent contractor is not an employé: *Vamplew* v. *Parkgate Iron and Steel Co.* (1); *Ex parte Rathbone* (2); *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (3).

[O'CONNOR J.—Under this contract there was nothing to prevent Mrs. Rodgers having the work done outside Victoria.

GRIFFITH C.J.—Whether she broke the law or not had nothing to do with the appellants. According to the decision of the Full Court a joint stock company could not contract for piece-work to be done on lawful conditions.]

It was possible that, by having the work done by apprentices or improvers in her factory, Mrs. Rodgers might have got the work done at a price equal to or less than that paid to her by the appellants. The contrary should have been proved by the respondent in order to support a conviction.

Counsel also referred to the *Factories and Shops Act* 1890, secs. 3, 9; *Factories and Shops Act* 1896, sec. 3 (b); *Factories and Shops Act* 1900, sec. 15 (2); *Factories and Shops Act* 1903, sec. 7.

(1) (1903) 1 K.B., 851. (2) 13 N.S.W. L.R., 56. (3) (1898) 2 Q.B., 588.

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Isaacs A.-G., *Mitchell* K.C. (with them *Bryant*), for the respondent. The word "employer" in sec. 15 (19) of the *Factories and Shops Act* 1900 is not used in the sense of "master," but it means there, as it does in other portions of the Act, a person who, within the meaning of the Act, is an "occupier of a factory," and by sec. 13 (6) of the *Factories and Shops Act* 1896 that term includes persons who give out any material for the purpose of being prepared or manufactured as articles of wearing apparel outside a factory for trade or sale. Such persons are referred to in sec. 15 (2) of the *Factories and Shops Act* 1896 by the word "employers," and would include the appellants. The use of the word "piece-work" connotes, not that there is the relationship of master and servant, but that there is the relationship referred to in sec. 13 (6) and sec. 14 (1) of the *Factories and Shops Act* 1896. The provisions of the Acts are intentionally made very wide in order to prevent sweating. The word "employer" in sec. 15 (19) of the *Factories and Shops Act* 1900 is not limited by using the word "employé." Any elements, such as that the work was intended to be done out of Victoria, or by apprentices or improvers in a factory, might be brought forward to show that the appellants did not fix a piece-work rate contrary to the Acts. The onus is on the appellants to show that they were contracting with a person who had such advantages that the rate agreed upon would not infringe the determination of the Special Board. Four persons working together constitute a factory under the Acts (see sec. 12 of the *Factories and Shops Act* 1900), and, if work was given to one of them, and it was divided up between all of them, according to the argument for the appellants, there would not be an offence against the Acts. If the effect of the Acts is that in order to constitute an offence under sec. 15 (19) and (20) of the *Factories and Shops Act* 1900 there must be the relation of employer and operative between the parties to a contract to do piece-work, that means that no person would be liable for paying less than the prescribed wages to any person other than the person who in fact does the work. It is immaterial whether the contractor—Mrs. Rodgers in this case—does the work herself or gets others to do it, or whether she pays a lower or a higher price than that paid under the original

contract. All that sec. 15 (19) and (20) of the *Factories and Shops Act* 1900 is concerned with is the price paid between the contracting persons. The first thing to look at is the object of the Acts: *Local Board of Health of Perth* v. *Maley* (1). The whole object would be defeated if the interpretation argued for on behalf of the appellants is right. The words in sec. 15 (19) of the *Factories and Shops Act* 1900, are not clear; they are not restricted to master and servant, nor to a case where the employer has control over the employé as to doing the work, *e.g.*, when or where it is to be done. Different constructions should not be put on the same word occurring several times in the same document: *Ridgeway* v. *Munkittrick* (2); *In re Birks*; *Kenyon* v. *Birks* (3). All the Acts concern themselves with is the person who pays and the person who receives money. The appellants without doubt are "employers" within the meaning of sec. 13 of the *Factories and Shops Act* 1900. Is there anything to suggest that a different interpretation is to be placed on the word "employer" in sec. 15 (19) so as to take the appellants out of that sub-section? The intention of the parties as to how the work is to be done has nothing to do with the offence charged. On the facts Mrs. Rodgers did part of the work herself, viz., the cutting out. All work done outside a factory is outside the principle of master and servant. As to the relation of master and servant see *Elderton* v. *Emmens* (4); *Baile* v. *Baile* (5); *Pollock on Torts*, 6th ed., p. 78.

Irvine in reply. The argument for the appellants, if sustained, will not affect the main principles of the Factories and Shops Acts. The appellants did not "fix" a price or rate within the meaning of sec. 15 (19) of the *Factories and Shops Act* 1900. Fixing a price or rate contemplates the laying down a rule under which payments are to be made, or that a scale of rates is fixed under which a number of people are employed and to be paid. The employer must have some sort of control over the employés because under the sub-section there must be conditions under

(1) 1 C.L.R., 702, at p. 709.
(2) 1 D. & War., 84, at p. 93.
(3) (1899) 1 Ch., 703.
(4) 17 L.J., C.P., 307, at p. 309.
(5) L.R., 13 Eq., 497.

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which the work is to continue to be done, and they are to be like conditions to those for which piece-work rates are fixed.

The Factories and Shops Acts are limited to persons working in or for a factory, and have not the extended meaning given by the Full Court, otherwise the limitation of the Acts in sec. 4 of the *Factories and Shops Act* 1896 to factories in a city, town or borough would be defeated.

One of the results of the construction giving the extended meaning would be that for manufacturing articles of clothing a person in a country district could not pay wages: See sec. 15 (5) of the *Factories and Shops Act* 1896.

GRIFFITH C.J. The question for determination in this case depends upon the construction to be put on the word "employer" in sec. 15 (19) of the *Factories and Shops Act* 1900 (No. 1654). That sub-section provides that:—"Any employer who pursuant to such determination fixes and pays piece-work prices or rates shall base such piece-work prices or rates on the earnings of an average worker working under like conditions to those for which the piece-work prices or rates are fixed and who is paid by time at the wages rates fixed by such Special Board." The appellants contend that the word "employer" does not apply to persons who are not owners of factories for carrying on the particular work in question. They also contend that the sub-section does not apply to persons who, as regards the persons to whom the rates are paid or to be paid, do not stand in the relation of employer to an operative or worker, and does not cover the case of contracts not of that sort. The learned Judges of the Supreme Court devoted their attention principally to the first of those points, and, unfortunately for us, have not favoured us with their reasons on the second point, which was most insisted upon before us.

In order to arrive at a conclusion as to the construction of this section, it is necessary to make reference to the history of the legislation, and to other parts of the Statute. The Factories and Shops Acts up to 1896 had no relation to the wages paid to employés, but dealt principally with the sanitation of factories and workshops, with the hours of labour, and with the ages of

persons who might be employed. In 1896 the legislature, by Act No. 1445, undertook to deal with the question of the wages paid to operatives. I use the word "operative" as the word used by the Judges of the Supreme Court, and because it conveniently expresses the idea desired to be conveyed. By Act No. 1445 it was provided by sec. 13 (1) that:—"Every occupier of a factory or work-room who has work done elsewhere than in his factory or work-room shall keep a record. Such record shall be kept . . . so as to be a substantially correct record of the description and quantity of work done outside of such factory or work-room and of the name and address of the person by whom the same is done and the prices paid in each instance for such work." The section also provided by sub-sec. (6) that:—"Every person who issues or gives out . . . any material whatsoever for the purpose of being wholly or partly prepared or manufactured outside a factory or work-room as articles of clothing or wearing apparel for trade or sale shall be deemed to be the occupier of a factory or work-room for the purposes of this section." That is to say he must keep a record similar to that required to be kept by the occupier of a factory; and he was required to show it to the inspector if required. By the following section (sec. 14 (1)) every person who outside a factory or work-room wholly or partly prepared or manufactured for trade or sale any articles of clothing or wearing apparel was required to give notice to the Chief Inspector of his full name and address so that he might be registered. Then in sec. 15 the legislature undertook to regulate wages. The mode adopted was to provide for the appointment of boards consisting of representatives of the employers and of the operatives. They were appointed by the Governor-in-Council after a *quasi*-election by the employers and operatives respectively, sec. 15 (2) providing that:—"Of such members one half shall be appointed as representatives of occupiers of factories or work-rooms in which such articles are prepared or manufactured and one-half as representatives of persons employed in wholly or partly preparing or manufacturing such articles." Sec. 54 contained provisions for discovering who were entitled to vote at elections of boards, and that section was afterwards amended by sec. 5 of Act No. 1518 so as to include in the list of electors for representatives of

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employers persons who, although not occupiers of factories or work-rooms, gave out work to be done for the purposes of trade or sale. That amendment applied to the case of the manufacture of clothing and wearing apparel, and not to other trades. Then sec. 15 (4) of Act No. 1445 provided that:—"So far as regards any articles in respect of which any Special Board is appointed every such Special Board shall determine the lowest price or rate of payment payable to any person for wholly or partly preparing or manufacturing any such articles specified by such Special Board." Sec. 15 (5) provided that:—"Such price or rate of payment shall in the case of work to be done outside a factory or work-room be fixed at a piece-work price or rate only; but in the case of any work done within any factory or work-room it may be fixed at a piece-work price or rate or a wages price or rate or both as the Special Board thinks fit." So far, it is plain that the legislature were dealing with persons standing to one another in the relation of employer and operative. They first thought only of factories, but afterwards they extended some of the provisions to persons who did not occupy factories, but gave work out to be done under similar conditions. The previous provisions related only to the occupiers of factories. This is the first section in which the question of "piece-work" comes in, and it is clear what the legislature meant by it at that time. We know what piece-work is generally understood to mean, that is to say, a certain amount of work to be done upon material supplied by the employer, for which the worker is to be paid a certain price for the finished article instead of being paid by wages. It is a term commonly used in speaking of the relation between employer and operative, and not commonly used in other connections.

By a later Act, No. 1654, sec. 15 of Act No. 1445 was repealed and another substituted for it. The powers given to the Board were extended, and it was provided by the new sec. 15 (1) that: "In order to determine the lowest prices or rates which may be paid to any person or persons or classes of persons for wholly or partly preparing or manufacturing either inside or outside a factory or work-room any particular article of clothing or wearing apparel or furniture . . . or to any person or persons or classes of persons employed in any process trade or business usually

or frequently carried on in a factory or work-room . . . the Governor in Council may if he think fit from time to time appoint a Special Board . . . In fixing such lowest prices or rates the Special Board shall take into consideration the nature kind and class of the work and the mode and manner in which the work is to be done and the age and the sex of the 'workers'"—which, I think, means operatives. Sub-sec. (2) provided that one-half of the number of members of the Special Boards were to be representatives of the "employers," and one-half of the "employés." Those terms, "employers" and "employés," are substituted for the terms used in Act No. 1445, which were, on the one hand, "occupiers of factories or work-rooms," and on the other, "persons employed in wholly or partly preparing or manufacturing such articles." In sec. 15 of Act No. 1654 the legislature had again in mind the relationship of employers and operatives, or, as they are called in the previous sub-section, "workers." By sub-sec. (8) of that sec. it was provided that:—"Such prices or rates of payment may be fixed at piece-work prices or rates or at wages prices or rates or both as the Special Board thinks fit, provided that for wholly or partly preparing or manufacturing outside a factory or work-room articles of clothing or wearing apparel a piece-work price or rate only shall be fixed." Stopping there for a moment, a person desiring to have the work of wholly or partly preparing or manufacturing articles of clothing or wearing apparel done outside a factory must pay piece-work rates, that is to say, he must agree with the operatives, who will work for him, to pay them piece-work rates. But if the work is done in a factory there is no such restriction. It may be done at piece-work rates or wages rates, and wages rates vary according to the quality of the worker. The minimum rate fixed by the Special Board would be for average workers, but there are two other classes of workers who may be employed in factories, viz., apprentices and improvers, and the Board is required by sub-sec. (10) to determine the lowest wages to be paid to them. So that a person desiring to have work done might have it done in his factory if he had one, and, whether he had one or not, he might have it done outside a factory, but in that case he must pay piece-work rates. Then there is a provision in sub-sec. (11) that,

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when a price or rate of payment has been fixed by a Special Board, a penalty shall be imposed on any person employing any other person at a lower price or rate of payment than that fixed by the Board. Sub-sec. (16) provides that when a Special Board has fixed a wages rate only for doing any work it shall not be lawful to pay for that work piece-work rates. That sub-section does not apply to clothing, because in respect of it work done outside a factory must be paid for at piece-work rates. Sub-sec. (18) provides that:—"Any Special Board, instead of specifying the lowest piece-work prices or rates which may be paid for wholly or partly preparing or manufacturing any article, may determine that piece-work prices or rates based on the wages rates fixed by such Special Board may be fixed and paid therefor subject to and as provided in the next following sub-section." Then comes sub-sec. (19) which I have already quoted, and which is the provision now under consideration.

Now, so far, it would appear that the persons whom the legislature had in mind all through were persons standing in the relation of employer and operative. So far as the first point taken is concerned, and which was not very fully argued before us, I confess I can see no sound reason for differing from the conclusion of the learned Judges of the Supreme Court. There are difficulties no doubt in the way, to which I need not refer, nor is it necessary to express a final conclusion upon the point. But it is necessary to deal with the other point, whether sub-sec. (19) applies to the present case—whether the term "employer" applies to any one except a person standing in the immediate relation of employer to the operative by whom the work is to be done. It will be necessary in determining that question to refer to the facts so far as they are material. The charge against the appellants was that, being employers of "persons engaged in the preparation or manufacture of articles of clothing or wearing apparel of a kind to which applies the determination of the Special Board, duly appointed under the Factories and Shops Acts to determine the lowest price or rate of payment which might be paid to a person for wholly or partly preparing or manufacturing either inside or outside a factory or work-room, among other articles, women's aprons, committed a contravention of the provisions of sub-sec.

(20) of sec. 15 of the *Factories and Shops Act* 1900, in that, after such Special Board, under the powers in that behalf conferred upon it by the Factories and Shops Acts, instead of specifying the lowest piece-work prices or rates which might be paid for preparing or manufacturing the articles the subject of its consideration, had determined that piece-work prices or rates based on the wages rate fixed by such Special Board should be fixed and paid by the employer as provided in sub-sec. (19) of the said recited section, the said defendants unlawfully did fix and pay to one A. Rodgers, a lower price or rate for preparing or manufacturing aprons than a rate based on what an average worker making aprons, and working under like conditions, paid at a wage of fourpence an hour (the wages rate fixed by such Special Board) would earn in preparing similar aprons." This charge does not exactly follow the words of sub-sec. (19) which is alleged to have been contravened, for what an employer is required to do under that sub-section is to "base" the piece-work prices or rates on certain earnings, whereas the charge is that he "did fix and pay" a lower price or rate than that based on certain earnings. It has however been assumed that the charge is sufficiently laid. There are difficulties of construction that would arise if the charge had strictly followed the sub-section, which it is not necessary to deal with at length. I assume that the sub-section means that an employer who, although he calculates his piece-work prices upon the earnings of an average worker so far as he understands it, yet fails to do so, is guilty of an offence.

In the present case Mrs. Rodgers is herself an underclothing manufacturer, and is the registered occupier of a factory which is required under the Acts to be registered. She had for many years been in the habit of doing the work of preparing articles of clothing for the appellants. In the present case she took a contract to make up two hundred dozen aprons at the price of one shilling a dozen, which was afterwards raised to one shilling and a penny a dozen. It was alleged for the prosecution that the price of one shilling a dozen was not based on the earnings of an average worker working under like conditions at the wages rate of fourpence an hour, the wages rate fixed by the Special Board, and evidence was given which was quite sufficient to establish

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the proposition that the price of one shilling a dozen was not sufficient to enable a person working at piece-work rates to earn a wage which an average worker would earn working at the wages rate. But it was assumed for the purposes of the prosecution that the work to be done under the contract with Mrs. Rodgers was to be done at piece-work rates, that is to say, was to be done by operatives at piece-work rates. If it had been necessary that the work Mrs. Rodgers undertook should be done and paid for at piece-work rates, then clearly the carrying out of the contract would have led to a breach of the law by her. Whether the appellants would have been responsible for that breach it is not necessary to consider. If that be so, many of the evils which the Act was intended to get rid of would, according to the argument of the Attorney-General, be involved in such a contract. But that assumes that the work Mrs. Rodgers was to get done was to be paid for by her at piece-work rates. That seems to me to be the flaw in the argument. Such work, if done in a factory, need not be done at piece-work rates, and if done in a factory at wages rates, those wages rates might vary from the maximum paid to a skilled worker to the least amount paid to the youngest improver or apprentice.

There is one preliminary question of fact to be decided, that is, what was the nature of the contract made between the appellants and Mrs. Rodgers? Having regard to their previous course of dealing, to the fact that she was an independent clothing manufacturer, and that she took a very large order, I think it is manifest on the face of it that the relation between the appellants and Mrs. Rodgers was not that of employer and operative, but that of independent contractors. But it is said that, if that view is taken, the law may be evaded. It may be that some of the intentions of the legislature may be defeated, but what have they said? There is nothing to suggest *primâ facie* that they intended to include the case of contractors contracting to have work done by wholesale. I cannot see my way to the conclusion that the word "employer" should be extended to cover the case of a person dealing with an independent contractor who is in a position, if he chooses to do so, to carry out the terms of the contract without violating the Statute.

Assume for a moment that the words are open to the construction contended for by the respondent, and see what remarkable results follow. The words in sec. 15 (19) must have the same meaning whether applied to clothing or furniture. Suppose in the case of furniture the Board had fixed a wages rate only. In that case it would not be lawful for a person to pay for such work by piece-work rates. Then the singular result would follow that a timber merchant, or a person having a large stock of timber, who wished to have it made up into chairs, would be absolutely prohibited from entering into a contract with another person to turn out chairs for him at so much per chair. Is there anything to suggest that the legislature ever intended such a result, or even intended to make such a provision? That would be a necessary consequence of the construction, and the Attorney-General had to admit that that would be so. Another singular result would follow. Mrs. Rodgers is the registered occupier of a clothing factory, and, unless she is prohibited by law from doing so, is entitled to make a contract for doing work in her factory. It is therefore perfectly lawful for her, from her point of view, to make a contract to do work for any body at any rates she thinks fit. If she cannot carry out that work without breaking the law as to her own operatives, so much the worse for her. Assume that she does not intend to break the law, but that she proposes to pay the wages prescribed by the Board. Doing the work in her factory, she may, perhaps, do it at the cost to her of ninepence a dozen, so that at a rate of one shilling a dozen paid to her she would make a profit. She offers to the appellants to do the work for them at one shilling a dozen. Then, according to the argument, the contract, which it would be lawful for Mrs. Rodgers, it would be unlawful for the appellants to make. This would be a most extraordinary result, and one which it is almost impossible to suppose that the legislature could have intended. The best that can be said in favour of such a construction is that the Statute is ambiguous. But, if so, the fact that such extraordinary results would follow upon one construction—results which apparently the legislature never contemplated—would be a sufficient reason for rejecting that construction, if any other is open upon the words of the Statute.

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I am of opinion that the real nature of this contract was that it was a contract for work to be done by wholesale, and not an agreement between persons standing in the relation to one another of employer and operative, and that the section has no application to it.

I think further that the word "piece-work" itself as used in sec. 15 involves the idea of a contract between an individual employer and an individual operative, and does not include the case of an ordinary contract made between two independent persons, one of whom may be a manufacturer, by which payment for work done by the manufacturer is to be calculated according to the number of articles manufactured. For these reasons I think that the appeal should be allowed.

BARTON J. I concur.

O'CONNOR J. As to the question which was decided by the Supreme Court of Victoria, I adopt the reasoning of the Chief Justice of Victoria, and I am of opinion that the Court was right in coming to the conclusion that sec. 15 (19) of Act No. 1654 applies as well to persons employing who are not occupiers of factories as to persons who occupy factories.

As to the other question, which was not expressly decided by the Supreme Court, and which now comes before us for determination, I entirely concur with the conclusion of my learned brother the Chief Justice, and for the same reasons.

As this matter is one of considerable importance I propose to add shortly some additional reasons which commend themselves to me.

The real offence charged under sub-secs. (19) and (20) of sec. 15, is this, that the defendants were guilty of a contravention of sub-sec. 19 in that, being employers within the meaning of that sub-section, they fixed for certain work which was to be done for them a rate of piece-work not according to the provisions of sub-sec. (19). Now, look for a moment at the contract which was made by Mrs. Rodgers with the appellants. Mrs. Rodgers is the proprietor of a small registered factory, and apparently she regularly does work for the trade. The appel-

lants wished to have a quantity of work done on aprons for which they supplied the material, and they made a contract with Mrs. Rodgers to supply the finished article—200 dozen aprons, at the price of one shilling per dozen. It was open to the appellants to make a contract with Mrs. Rodgers which would come within the provisions of sub-sec. (19), but we have to look in every case at what the contract really is, to consider the quantity of the order and the whole scope of the contract. It is quite clear that this is a contract in which Mrs. Rodgers was not herself to be the operative, but by which she undertook to supply the completed article at the rate I have mentioned, the appellants supplying the material. What were the rights of the parties under that contract? It was open to Mrs. Rodgers to do the whole of the work in her factory. As far as the evidence goes there appears to have been no reason why she should not pay the wages rates fixed by the Board for the work done. It was also open to her to give the work out at piece-work rates, for, if she gave it out, she must have employed workers at piece-work. From the nature of the contract, and by its very terms, the appellants had no control over the way the work would be carried out, neither could they have any knowledge of the conditions under which the work was to be carried out, nor of the comparison between those conditions and the conditions under which an average worker, earning fourpence an hour as fixed by the Board, would work. Under such circumstances, and such being the rights of the parties to the contract, it is alleged that the making of the contract is a contravention of sub-sec. (19), or, to expand the allegation, that by reason of that contract the appellants have become employers who have fixed a rate to be paid to operatives for carrying out the work which is not in accordance with sub-sec. (19). The question depends upon whether they are "employers" within the meaning of that sub-section, and also whether, being employers, they have fixed a rate to be paid to the operatives who carry out the work. It is not necessary for me to follow the learned Chief Justice in the analysis which he has made of the sections of the Acts preceding Act No. 1654, and the history of the legislation. I propose only to deal with the Act under which the offence is

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charged. I find it very difficult to escape from the conclusion that in every section of it, where the question of fixing wages is dealt with, reference is made, and is intended to be made, solely to the relation of the employer and the operative who carries out the work. In sec. 15 (1), which provides for the appointment of the Special Boards which are to fix prices, the words are:—"In order to determine the lowest prices or rates which may be paid to any person or persons or classes of persons for wholly or partly preparing or manufacturing either inside or outside a factory or work-room any particular articles of clothing or wearing apparel," &c. It is for the purpose of determining the lowest price which is to be paid for manufacturing or preparing certain articles that the Board is appointed. Then go on to sub-sec. (7), and find there also that, so far as regards any articles, process, trade, or business in respect of which any Special Board is appointed:—"Such Special Board shall determine the lowest prices or rates of payment payable to any person or persons or classes of persons employed in such process trade or business or for wholly or partly preparing or manufacturing any such articles specified by such Special Board." There again it is to be the lowest prices to be paid to persons actually employed in carrying out the work. Sub-sec. (8) is to the same effect. In sub-sec. (10) relating to the position of improvers and apprentices, exactly the same kind of language is used as that in regard to wages in sub-sec. (19) and the other sub-sections I have referred to. Sub-sec. (10) provides that:—"When determining any prices or rates of payment pursuant to this section every Special Board shall also determine the number or proportionate number of apprentices or improvers or of apprentices and improvers (as the case may be) who may be employed within any factory or work-room or shop or place, and the lowest prices or rates of pay payable to such apprentices or improvers when wholly or partly preparing or manufacturing any articles as to which any Special Board has made a determination or when engaged in any process trade or business respecting which any Special Board has made a determination." Sub-sec. (11) points even more strongly to the relation of employer and operative. It provides that:—"Where a price or rate of payment for any person or persons or classes of persons employed in

any process trade or business or for wholly or partly preparing or manufacturing any articles as aforesaid has been determined by a Special Board and is in force, then any person who either directly or indirectly, or under any pretence or device, attempts to employ or employs or authorizes or permits to be employed any person apprentice or improver . . . at a lower price or rate of wages or piece-work (as the case may be) than the price or rate so determined . . . " shall be liable to a certain penalty. All those sub-sections in their language point to dealing only with the relation of employer and person who does the work. When we come to sub-sec. (16) already referred to by the learned Chief Justice, we find there a consequence would follow from the interpretation of this section contended for by the respondent, which certainly would lead to a very wide extension of the powers of this Act to control the liberty of individuals to make their own contracts. Taking the case of clothing, sub-sec. (16) provides that: —"When in any determination a Special Board has fixed a wages rate only for wholly or partly preparing or manufacturing either inside or outside a factory or work-room any articles or for doing any work then it shall not be lawful for any person to pay or authorize or permit to be paid therefor any piece-work rates." As far as clothing is concerned, sub-sec. (8) provides that piece-work rates only can be paid for work done outside a factory. Where the work is done inside a factory, it appears to me that the sub-section is equally applicable to clothing and to any other class of work. The position, therefore, is this—that, if under sub-sec. (11) the Board had fixed a wages rate only for making clothing or wearing apparel in a factory, it would be quite impossible for anyone to enter into a wholesale contract for the making of clothing except at wages rates. How could it be possible to carry on all the ordinary operations of business—which, of course, must be calculated on such a basis as to give a profit—if the only way that this work can be done is by a contract for the work to be carried out by wages? At what wages? In what time? Under what conditions is the work to be carried out? All these things it would be impossible for the person making the contract to properly control. It does not seem to me possible to apply the provisions of sub-sec. (19) to a case of this kind. Such an applica-

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tion of the sub-section would really have a detrimental effect upon the operatives themselves, by hedging round the making of these contracts with such conditions as to make them unworkable without breaking the law. No doubt the evil aimed at by the legislature was a great one which required special legislation, and was one arising from the condition of society in which it is necessary for the interests of the operatives themselves to take away their liberty to contract as they think fit. It was open to the legislature to take away that liberty to such an extent as to prohibit a contract of the kind I have mentioned. But, although we are bound to carry out the intention of the legislature in all respects in which we can reasonably infer it from the language used, at the same time we cannot on that principle allow the rights, which other persons have at common law to make their own contracts in their own way, to be infringed to any greater extent than the legislature has expressed by its language. It appears to me it would be impossible, without holding that the legislature intended to bring about a state of things not indicated in other parts of this Act, that the Act could be held to apply to such a contract as we have here. For these reasons I think that, as the main object of the Act was to protect the persons actually working, the legislature thought fit to deal only with persons employing others to do work. Whenever a person employs another to do work at a price which is not in accordance with the scale fixed, then there is a remedy by prosecuting the person employing the operative. I do not think it was intended that the Act should go beyond that, and render liable to prosecution not only the person who employed the operative, but also every person in the chain of contract who was pecuniarily interested in having the work done.

There was one argument used by Mr. Irvine which seemed very strong. It was this:—If sub-sec. (19) applied to persons who entered into a contract of this kind, it would be impossible for the person making the contract—the employer—to really carry out the provisions of the Act with any regard to fairness to himself. For instance, if this work is given out at certain prices which the employer arranges, he cannot have any knowledge as to what are the conditions under which the work is to be carried

out, or as to the conditions which were supposed to exist when the Special Board fixed the rates of wages. Again, when a prosecution takes place, the onus of proving that the rate fixed and the price paid are in accordance with the sub-section, in all cases lies on the defendant. It would be impossible for him, in a contract of this kind, fairly to discharge that onus. For these reasons, I am of opinion that the appellant did not come within the provisions of sub-sec. (19) in making this contract. I concur in the order of the Court.

Appeal allowed, with costs. Order appealed from discharged. Order nisi discharged with costs.

Solicitors, for appellant, *W. B. & O. McCutcheon*, Melbourne.

Solicitor, for respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

CUMING SMITH & COMPANY PROPRIETARY LIMITED . . . . . DEFENDANT, . . APPELLANT;

AND

THE MELBOURNE HARBOUR TRUST COMMISSIONERS . . . . . PLAINTIFFS, . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA

Taxing Act—Wharfage rates on goods—Exception of named goods—Extension of meaning of name—"Guano"—Phosphatized Rock—Burden of proof—What