[HIGH COURT OF AUSTRALIA.]

MOIR . . . . . APPELLANT;
APPLICANT,

AND

SCHRADER AND ANOTHER . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 21; *Dec.* 15.

Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Principal and contractor—Injured worker, employee of contractor—"Work undertaken by the principal"—"For the purposes of his trade or business"—Workers' Compensation Act 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *sec.* 6 (3) (*a*)*.

The respondents bought a large parcel of fairly heavily timbered land for the purpose of subdividing it and selling the subdivided areas as small farm blocks. They set about clearing and cutting down the timber preparatory to subdivision. They resolved to cut up the small trees into firewood blocks and sell them as such to the public, and to sell the large trees *in situ* for milling purposes. An arrangement was made with two men, who were doing certain work preparatory to or connected with the subdivision, to cut the smaller trees into lengths suitable for firewood at a specified price per ton. To enable them to cut it the respondents obtained necessary machinery and tools and made a contract with them to erect a shed over the machinery. A plan of

* Sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929 (N.S.W.) provides: "Where any person (in this sub-section referred to as the principal) in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under this Act which he would have been liable to pay if that worker had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom he is immediately employed."

what was to be done was made by the respondents' agent, and the contractors were bound to follow it with any modifications suggested by him. A lump sum was fixed as payment for the erection of the shed; this was to be paid as the building proceeded except that a balance was to be retained until the engine had worked at full cutting for two days. The contract to cut at the specified price was to begin on the saw operating, and wood cut during the two days was to be included in that contract. The agent closely superintended the erection and installation of the shed and plant. The appellant was employed by the contractors on this work. As soon as the machinery was ready to operate, a test was made and several logs were cut. Whilst the appellant was holding the next log against the saw the log broke, and the appellant's hand came into contact with the saw and was injured. On a claim by the appellant against the respondents under the *Workers' Compensation Act* 1926-1929 (N.S.W.) the Workers' Compensation Commission found that the respondents were principals in a firewood business, that in the course of and for the purposes of that business they had contracted with the contractors for the execution by or under the latter of part of the work undertaken by the principals, and that the appellant, when injured, was engaged, in the employ of the contractors, in the execution of that work. The commission accordingly awarded compensation against the respondents under sec. 6 (3) (*a*) of the Act. The Supreme Court of New South Wales held that the commission had erred in law in making its award, and that the respondents were not liable under sec. 6 (3) (*a*). On appeal to the High Court, *Starke* and *Dixon* JJ. were of opinion that the case was not within sec. 6 (3) (*a*): *Evatt* and *McTiernan* JJ. were of opinion that there was evidence which supported the findings and decision of the commission. The court being equally divided, the decision of the Supreme Court was affirmed.

APPEAL from the Supreme Court of New South Wales.

William John Moir claimed compensation under sec. 6 (3) of the *Workers' Compensation Act* 1926-1929 (N.S.W.) in respect of injuries received by him whilst working for certain contractors with the respondents, as a labourer, at Castle Hill on 17th January 1935. The respondents were Willoughby Douglas Schrader, a solicitor of the Supreme Court of New South Wales, and Charles McAlister Campbell Shannon, a retired bank manager. The respondents denied liability to pay compensation and relied upon the following defences:—(*a*) that they were not persons made liable in any way to pay compensation under the Act; (*b*) that the applicant was not employed by them; (*c*) that the applicant's injury was solely attributable to his own serious and wilful misconduct; and (*d*) that the applicant's injury did not arise out of and in the course of his employment.

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The following statement of the facts is substantially as set forth in a case stated at the request of the respondents under sec. 37 (4) of the Act, by the Workers' Compensation Commission, wherein certain questions of law were referred to the Supreme Court of New South Wales for decision.

The respondents purchased 416 acres of land at Castle Hill by way of speculation, their ultimate purpose being to subdivide it into farmlets and then sell the farmlets to the public. The land was fairly heavily timbered, and in connection with the clearing of it, preparatory to subdivision, they decided to cut up the small trees into firewood blocks and sell them as such to the public, and to endeavour to sell the remaining big timber *in situ* for milling purposes. The conversion of the small trees into firewood necessitated the purchase by the respondents of tree-felling tools, the erection of a shed, and the installation of sawing machinery on the Castle Hill property. On 2nd January 1935 the respondents by their agent, one T. B. Phillips, entered into a contract with Harry Sutley Sullivan, a carrier, and R. Adams, an engineer, which was in the following terms, and duly stamped:—"In consideration of your erecting shed over engine and saw-bench and portion of slides as per plan handed to you by Mr. Phillips with any modifications he may suggest, you to employ 4 men, 2 working on the forest devil and snigging, the other two erecting the shed I undertake to pay you the sum of £24 payable as the building proceeds, you to line engine and adjust same to saw-bench and do all things necessary to put engine, saw-bench and slide in working operation. It is agreed that £5 of this money be retained until such time as the engine has worked at full cutting for two days and on the saw operating it is understood that your contract of 3s. per ton starts, and that no future wages be paid to you, the payment of 3s. per ton to include the wood that was cut into 9″ blocks the two days above-mentioned. Yours faithfully, T. B. Phillips. Agreed to, H. S. Sullivan, R. Adams." The agent had interviewed Sullivan early in December 1934, was present when Sullivan subsequently interviewed the respondents in Schrader's office, and from time to time on behalf of the respondents inspected and passed the work carried out by the contractors on the Castle Hill property and paid them. About

the time the contract of 2nd January 1935 was entered into Adams asked the applicant "if he would like a job wood cutting" at the living wage. The applicant agreed, and on 7th January he commenced work with Sullivan and Adams on the respondents' Castle Hill property and was paid £3 12s. 6d. per week. On 11th January the respondents, by their agent, paid the contractors the sum of £14 "on account contract re-erection of shed for engine staging and slide," and on 17th January the agent made payment of £5 to the contractors, the receipt therefor being in the following terms:— "Received from Mr. Phillips on behalf of Messrs. Shannon and Schrader the sum of £19, being 1st payment on 11th Jany. of £14 and 2nd payment of £5 0s. 0d. on this date making in all £19 0s. 0d., balance due on completion £5 0s. 0d. H. S. Sullivan, R. Adams." The contractors had made an arrangement that Sullivan, and three assistants, were to fell trees and haul logs to the saw-bench to be cut up for firewood, and that Adams and the applicant were to work on the engine and saw-bench. On 17th January Adams and the applicant were working on the saw-bench, and, after fitting the belt on the 18 inch circular saw, tested the saw. In the presence of the contractors, the agent mentioned that a space left between the top of the bench on the left side and the saw constituted a danger. Later in the afternoon the contractors worked the engine and used the saw; they commenced cutting up logs into firewood blocks not more than 9″ in length and 9″ in diameter. Adams cut up one log, Sullivan cut another, and the applicant cut a third log. It was then about 4.45 o'clock p.m. and they decided to put another log through the machine before finishing work for the day. The applicant put another log on the machine and commenced cutting it. He stood facing the saw, holding the piece which was about 4″ in diameter, and at the moment in question 2′ 9″ in length. He had nearly severed a 9″ length when the saw jammed. The applicant eased the log away from the saw and allowed it to gather speed. He then pushed the piece against the saw but the piece rolled instead of sliding and as a consequence it broke where previously cut, both the 9″ and the remaining 2′ pieces falling from the saw. In the effort to save himself from falling on the saw, the applicant's left hand came in contact with

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the saw and it severed terminal portions of his left index and mid-fingers. He was immediately taken to hospital for treatment. At the time of the happening of the injury the respondents had not actually sold any firewood. There were sufficient trees on the property to keep the men employed for many months. The contractors had not insured their liability to pay compensation, and the applicant claimed compensation from the respondents in respect of the injury sustained by him. The contractor Sullivan stated in evidence that he had asked the agent about insurance and he told him, Sullivan, " not to worry about it, that I was working for two gentlemen and they would see to all that. I said ' Well, if I have to insure, the job is off, because I have not the money to pay for the premium.' He said ' All right, leave that to me, let me organize everything.' I then said ' It amounts to this, we are supplying labour and you supply everything else,' and he said ' that is all right.' "

The commission found (*a*) that the applicant was not employed by the respondents but by their contractors, Sullivan and Adams; (*b*) that the injury received by the applicant was not attributable to either serious or wilful misconduct on his part; (*c*) that the injury arose out of and in the course of his employment with the contractors; and (*d*) that the respondents were " principals " within the meaning of sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929, and in the course of and for the purposes of their firewood business, contracted with Sullivan and Adams for the execution by or under them of part of the work undertaken by the principals, and that the principals were liable to pay to the applicant, who was employed by the contractors in the execution of work of the firewood business, the compensation which the principals would have been liable to pay if the applicant had been immediately employed by the principals. An award in the sum of £180 was made in favour of the applicant.

The questions referred for the decision of the Full Court of the Supreme Court were as follows :—

1. Whether on the true construction of the document of 2nd January 1935, and the relevant evidence, the respondents were (*a*) " principals " within the meaning of sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929, when applicant received personal injury on 17th January 1935 ? and (*b*) at that time carrying on a firewood business ?

2. Was there any evidence before the commission upon which it was entitled to find, as it did, that the applicant, when he received personal injury on 17th January 1935, was employed cutting firewood blocks (*a*) in the execution of work under his employers' contract with the respondents for procuring and preparing firewood blocks at 3s. per ton ? (*b*) for the purposes of the respondents' firewood business ?
3. The applicant having alleged that the respondents were carrying on the business of sawmillers, and the commission having found that the respondents had a saw plant which was, on the happening of the injury to the applicant being used simultaneously to (*a*) test the full cutting efficiency of the saw plant by cutting logs into firewood blocks, and (*b*) cut the said logs into firewood blocks for the purposes of the respondents' firewood business, but that the evidence did not establish that the respondents carried on the business of sawmillers, as alleged, did the commission err in law in holding that the applicant's failure to establish this allegation did not bar his statutory right to compensation ?
4. Did the commission err in law in holding that the respondents were liable under sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929, to pay compensation to the applicant ?

The Supreme Court answered questions 1 (*a*) and (*b*) in the negative ; question 2 (*a*) in the affirmative and 2 (*b*) in the negative ; and question 4 in the affirmative. Question 3 was not answered.

From that decision the applicant, by leave, appealed to the High Court.

Further facts appear in the judgments hereunder.

Evatt K.C. (with him *S. C. Taylor*), for the appellant. The proper construction of the contract is that the "two days" referred to were included in the contract to cut wood, but that payment therefor was not to commence unless and until the saw operated. Question 2 (*a*) is in terms of sec. 6 (3) (*a*) of the *Workers' Compensation Act*. As the Supreme Court answered that question in the affirmative it must result in a finding for the appellant, because when he received

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the injury he was cutting firewood blocks. Whatever may be the result of that finding, it is clear the Supreme Court has fallen into error. The case upon which it relied was *Hockley* v. *West London Timber and Joinery Co.* (1). That case was criticized in *Cole* v. *Calvert and Harpur* (2). The work performed by the appellant was work usually "undertaken," or performed in a firewood business. There is ample evidence to support the commission's finding, left undisturbed by the Supreme Court, that the respondents carried on a firewood business. It is immaterial that they carried on another or other businesses. At the time of the injury the appellant was engaged on work which formed a usual and essential part of the respondents' firewood business. An application of provisions similar to those contained in sec. 6 (3) (*a*) of the Act is shown in *Dittmar* v. *Owners of Ship V*593 (3). The so-called two days' test merely fixed the point of time at which the further remuneration should be paid.

Bradley K.C. (with him *Shortland* and *Kinsella*), for the respondents. Under the Act the appellant is entitled to compensation only from his direct employers; that is to say, the contractors. The respondents were not carrying on a firewood business (*In re Wallis*; *Ex parte Sully* (4); *Smith* v. *Anderson* (5)). There were not any sales of firewood. The true interpretation of the arrangement of 2nd January 1935 is that the contract to cut wood and payment therefor was to commence after the saw-bench had been erected and the machinery installed and tested, and that wood cut during the testing period could for purpose of payment be included in the subsequent contract. The appellant was injured during the testing period, that is, before the work had actually commenced. The essential facts in this case are different from those in *Cole* v. *Calvert and Harpur* (6). The test which should be applied is set forth in *Willis' Workmen's Compensation Acts*, 29th (1934), ed. pp. 168 et seq. The work upon which the appellant was engaged was merely ancillary or incidental to, and was not part of, the respondents' business

(1) (1914) 3 K.B. 1013; 7 B.W.C.C. 652.
(2) (1931) N.I. 38, at pp. 46, 47.
(3) (1909) 1 K.B. 389.
(4) (1885) 14 Q.B.D. 950.
(5) (1880) 15 Ch. D. 247, at p. 277.
(6) (1931) N.I. 38.

(*Wrigley* v. *Bagley & Wright* (1)). It was not work undertaken by the respondents for the purpose of their business (*Spiers* v. *Elderslie Steamship Co. Ltd.* (2); *Skates* v. *Jones & Co.* (3); *Hockley* v. *West London Timber and Joinery Co.* (4); *Alderman* v. *Warren* (5)). This is so even though it be assumed that they were carrying on a firewood business, and is more particularly so as regards the business of selling land. *Bobbey* v. *W. M. Crosbie & Co. Ltd.* (6) is distinguishable on the facts.

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered :—

STARKE J. This is an appeal by special leave from the decision of the Supreme Court of New South Wales upon a case stated under the *Workers' Compensation Act* 1926-1929. The respondents, Schrader and Shannon, purchased certain land for the purpose of subdividing and selling it. The land was fairly heavily timbered, and the respondents set about clearing and cutting down the timber preparatory to subdivision. They resolved to cut up the small trees into firewood blocks and sell them as such to the public, and to sell the large trees *in situ* for milling purposes. But clearing the land necessitated the purchase of felling tools, and the installation of saw-milling machinery for the purpose of cutting the small trees into a size suitable for firewood. On 2nd January 1935 the respondents made an agreement with Sullivan and Adams as follows :— " In consideration of your erecting shed over engine and saw-bench and portion of slides as per plan handed to you . . . you to employ four men, two working on the forest devil and snigging, the other two erecting the shed, we undertake to pay you the sum of £24 payable as the building proceeds, you to line the engine and adjust same to saw-bench and do all things necessary to put saw-bench and slide in working operation. It is agreed that £5 of this money be retained until such time as the engine has worked at full cutting for two days, and on the saw operating it is understood that

(1) (1901) 1 K.B. 780.
(2) (1909) S.C. 1259; 2 B.W.C.C. 205.
(3) (1910) 2 K.B. 903, at pp. 907, 908.
(4) (1914) 3 K.B. 1013; 7 B.W.C.C. 652.
(5) (1916) 9 B.W.C.C. 507.
(6) (1915) 114 L.T. 244; 9 B.W.C.C. 142.

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your contract of 3s. per ton starts, and no future wages be paid to you, the payment of 3s. per ton to include the wood that was cut into 9″ blocks the two days above mentioned." Sullivan and Adams proceeded with the erection of the shed, and the installation of the plant, and they employed the appellant Moir on this work. According to the evidence attached to and forming part of the case, Moir met with an accident before the installation of the plant was completed, or at all events before the engine had worked at full cutting for two days. A test was being made of the sawing machine, some five logs had been cut, and the appellant was cutting the sixth into firewood lengths, when the saw jammed and the accident happened, resulting in the appellant losing the tops of two fingers on his left hand. He made a claim against the respondents, based upon the provisions of sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929, which is as follows: "Where any person (in this sub-section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under this Act which he would have been liable to pay if that worker had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom he is immediately employed." The Workers' Compensation Commission awarded the appellant compensation, but the Supreme Court, upon the case stated, determined that the commission erred in law in making its award. The commission made the following finding: "The respondents were 'principals' within the meaning of sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929, and in the course of and for the purposes of their firewood business contracted with Messrs. Sullivan and Adams for the execution by or under them of part of the work undertaken by the principals, and that the principals are

liable to pay to the applicant, who was employed by the contractors in the execution of work of the firewood business, the compensation which the principals would have been liable to pay if the applicant had been immediately employed by the principals." "Every business" said the commission, "must have a commencing point; in this case, the commencing point may have been when the first tree was being felled. But, for the purposes of the applicant's claim, we do not need to look back further than when the first log was being cut into firewood blocks for subsequent sale. The business had been commenced, and it was being carried on when applicant received injury."

The proper construction of the provision which appears in sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929 has caused considerable difference of opinion. But it is now, I think, settled that the section refers to cases in which a person contracts for the execution by a contractor of any work part and parcel of his own trade or business, or in the usual course of his trade or business. "It is not sufficient to say that it was for the purposes of the business; it must also be part of the work undertaken by the principal" (See *Skate* v. *Jones & Co.* (1); *Hockley* v. *West London Timber and Joinery Co.* (2)). Now the commission find that the respondents had undertaken a firewood business. Certainly, they were felling trees, installing saw-milling plant, and preparing to cut timber into suitable lengths for firewood. They had not, however, commenced the sale of the firewood, nor were they likely to commence selling until the lengths into which the timber had been cut, dried, which might have taken two or three months. I rather doubt the finding of the commission that the respondents had commenced a firewood business. Assuming, however, that that finding was open to the commission, is there any evidence which supports the further finding that the work which Sullivan and Adams contracted to perform for the respondents was part and parcel of the firewood business, or in the usual course of that business? In my judgment, there is no evidence to warrant any such finding. The respondents engaged Sullivan and Adams to erect a shed and instal a saw-milling plant. That work may have been incidental to and even necessary

(1) (1910) 2 K.B. 903. (2) (1914) 3 K.B. 1013.

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for the purpose of carrying on a firewood business, but it was not part and parcel of the work of a firewood business, or in the usual course of such a business. The special stipulation that Sullivan and Adams should run the plant for two days to test its efficiency, and be paid for the firewood cut during that period, was for testing purposes, and of an exceptional nature, and not of the class usual in the course of a firewood business nor part and parcel of that business.

In substance the Full Court of the Supreme Court of New South Wales was right in its decision, and this appeal should be dismissed.

DIXON J. This appeal depends upon the proper application to the facts of the very difficult provisions governing the liability for workers' compensation which persons who delegate work to independent contractors incur to employees of the latter.

The provisions in force in New South Wales (sec. 6 (3) of the *Workers' Compensation Act* 1926-1929) do not substantially differ from their British prototype (sec. 4 of the *Workmen's Compensation Act* 1906).

An essential condition of the liability which is imposed upon the principal is that in the course of or for the purposes of his trade or business he should contract with the contractor for the execution by or under the contractor of the whole or a part of work undertaken by the principal. The meaning of the expression " work undertaken by the principal " has been the subject of much difference of opinion, but in England it appears to be settled that on the one hand it covers more than work which the principal himself has contracted with another party to carry out, and, on the other hand, it does not extend to all work done in the course of or for the purpose of the trade or business of the principal. As I understand the interpretation which the expression has received, the liability of the principal is limited to workmen employed in the execution of work forming part of the operations which constitute the exercise of the principal's trade or business. " The man of business or tradesman is not made a principal because he is in business or in trade, but because the particular work in question is his own trade or business " (*Skates* v. *Jones & Co.* (1), per *Farwell* L.J.). In the same case (2),

(1) (1910) 2 K.B., at p. 910. (2) (1910) 2 K.B. at p. 912.

Kennedy L.J. says that the words "work undertaken by the principal" include, besides a contractual undertaking, the performance of work which the principal may be said to "undertake" because he has adopted it as his particular trade or business. The application of this view of the provision is illustrated by the decision in the case. A syndicate formed for the purpose of conducting a skating rink purchased an existing structure for removal to the site chosen. They let a contract for the removal and re-erection of the building and, in the course of that work, one of the contractor's men was injured. Although the contract may have been for the purpose of the business of a skating-rink proprietor, it was held not to be for work undertaken by the principals who had adopted that business. The Court of Appeal cited with approval an earlier case which further illustrates the limitation. It is *Spiers* v. *Elderslie Steamship Co. Ltd.* (1), in which the Court of Session decided that, although the business of shipowning involved maintaining ships' boilers in good condition, the operation of cleaning them was not one which the shipowner undertook as part of his business. On the other hand, coal merchants who in the course of that trade acted as lightermen were considered to "undertake" work which included the navigation of a lighter from the place where it was taken over by them from the shipbuilders to the depot where it was to be employed in the coal trade. Accordingly they were held liable to a member of the crew injured upon the voyage, notwithstanding that he was employed by an independent contractor to whom the owners had delegated the work of taking the vessel out to the depot (*Dittmar* v. *Owners of Ship V*593 (2)). The coal merchants in the course of their trade or business contracted for the execution of part of the work proper to their undertaking and in that sense undertaken by them (per *Cozens-Hardy* M.R. (3)). This means that the work of navigating the vessel which they had delegated was regarded as a component part of the work which the coal merchants had assumed to perform as traders. In this it differed from boiler-cleaning and from the operation of overhauling barges which, in *Hayes* v. *S. J. Thompson & Co.* (4), was held to be not part of the trade

(1) (1909) S.C. 1259; 2 B.W.C.C. 205.
(2) (1909) 1 K.B. 389.
(3) (1909) 1 K.B., at p. 396.
(4) (1913) 6 B.W.C.C. 130.

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or business of barge owners but only work which arose out of it. The fact that boiler cleaning or scaling is never done for himself by a particular shipowner but is always entrusted to contractors may show that the work "undertaken" by that shipowner does not embrace such operations (*Luckwill* v. *Auchen Steamship Co. Ltd.* (1)). This accords with the view taken in *Bush* v. *Hawes* (2). It was there held that, to determine whether a thing was in the usual course of or for the purpose of a trader's business, it was necessary to consider not how such a business was generally conducted by others but what was the nature of the work done by the particular trader. In two further cases the Court of Appeal has applied the same interpretation of the word "undertaken." In *Hockley* v. *West London Timber and Joinery Co.* (3) a manufacturer of mouldings used timber purchased from abroad. The manufacturer, acting in accordance with the general practice of the trade, did not employ his own servants to take delivery of the timber from the ships by which it was imported. Contracts were made with several contractors for the successive operations of receiving the timber into barges, carting it from the wharves upon which it was discharged from the barges and unloading the timber from the carts and stacking it in the yards where it would season. It was held that the operation of stacking was not part of the work "undertaken" by the manufacturers of mouldings. *Pickford* L.J. said:—"In order to do their business of moulding manufacturers they must have timber, and they must have seasoned timber. Therefore the timber is stacked, and it is stacked for the purpose of being seasoned, but the stacking and seasoning are not parts of the actual operation of moulding manufacture, and it is a thing that has been always done by this firm, and by other firms in the same business, by means of contractors, and not by means of their own men or by themselves at all. The authorities make it quite clear that it is not enough that the work that is being done should be incidental to, or even necessary for, the preparation for the work which is actually done by the principal" (4). In *Bobbey* v. *W. M. Crosbie & Co. Ltd.* (5) the Court of Appeal applied this decision to a case in which the manufacturers, whose raw material

(1) (1913) 108 L.T. 52; 6 B.W.C.C. 51.
(2) (1902) 1 K.B. 216.
(3) (1914) 3 K.B. 1013.
(4) (1914) 3 K.B., at p. 1019.
(5) (1915) 112 L.T. 900.

was imported, employed outside labour to unload a cargo consigned to them and to place the goods in their store. But they did so by paying a lump sum to a wharf labourer who collected a gang to do the work and divided the payment amongst the members of the gang; and the House of Lords reversed the decision of the Court of Appeal on the ground that under this arrangement the members of the gang were directly employed by the manufacturers and there was no contractor intervening (1). In the Court of Appeal Lord *Cozens-Hardy* M.R. said that the work of unloading a bulk cargo was not work undertaken by the principals. "They deliberately abandoned such work, one experiment having satisfied them that their own men were not suitable for such work, and they employed gangers or similar men to do the work" (2). In Northern Ireland the actual decision in *Hockley's Case* (3) has met with disapproval (*Cole* v. *Calvert and Harpur* (4)). The facts of the latter case do not appear to me to involve the principle upon which *Hockley's Case* (3) was decided. But, in any event, that principle, or interpretation of the section, is well settled in England and the question whether it was correctly applied to the facts of the particular case seems unimportant. It is unnecessary to say that as the legislation has been almost literally transcribed we should apply the interpretation adopted by the English Court of Appeal. Unfortunately the principle which that interpretation of the words "any work undertaken" ascribes to the legislation is not susceptible of exact definition and of completely certain application. It is based upon the view that from the course of the principal's trade or business and the manner in which he conducts it, he will be found to have assumed responsibility for the performance of a class of work, the fulfilment of given functions or the pursuit of a system of activities. What he has thus adopted as his proper operations, he may accomplish by means of direct employees, or by means of contracts which remove him from the relation of employer with the workmen who do the work. Whichever be his method, he is to be responsible for the workers' compensation payable to those injured in the course

(1) (1915) 114 L.T. 244.
(2) (1915) 112 L.T., at p. 901.
(3) (1914) 3 K.B. 1013.
(4) (1931) N.I. 38.

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of the work for the performance of which he has assumed responsibility, the work which he has "undertaken." But when, although the work performed by the injured workman is necessary to enable the principal to carry out the operations the execution of which he has adopted as his trade or business, yet that work does not form a component part of the operations and only contributes or conduces to their performance or is preliminary or ancillary or incidental to them, then the workman must look to his direct employer for compensation.

The facts of the present case appear to me to give the worker no recourse to the principals for compensation. He was injured in the course of performing work which the principals had not "undertaken." The principals are two business men, a solicitor and a retired banker, who had bought a parcel of land for the purpose of subdividing it and selling the subdivided areas as small farming blocks. The land happened to carry timber. For the purpose of subdividing the land it was necessary to cut the timber. The larger trees they decided to dispose of as they stood for milling. But the smaller timber was suitable only for firewood. They were paying two men, one described as a carrier and the other as an engineer, for doing certain work preparatory to or connected with the subdivision. They arranged with these men to cut the smaller timber into lengths suitable for firewood at a price of 3s. a ton. To enable them to cut it the proprietors obtained an engine, saws and implements and made a contract with them to erect a shed over the engine, the saw-bench and the slides. A plan of what was to be done was made by the proprietors' agent and the contractors were bound to follow it with any modifications the agent suggested. A lump sum price was fixed which was to be paid as the building proceeded except a balance which was to be retained until the engine had worked at full cutting for two days. The contract to cut at 3s. a ton was to begin on the saw operating, and wood cut during the two days was to be included in that contract. The agent closely superintended the erection and construction of the plant. The appellant, who is the workman, was employed by the two men who had made the contract. When the plant was ready to operate one of the two men cut one log and the other a second log. The

appellant then cut a third log. He took a fourth log and held it against the saw. The saw jammed after partly cutting it. He withdrew the log to some extent to allow the saw to regain speed but when he pressed it against the saw a second time the log broke and in saving himself the appellant brought his hand in contact with the saw, which inflicted the injuries for which he seeks compensation. The Workers' Compensation Commission held that the principals were liable to him. The learned chairman found that the principals intended to sell the firewood at a profit to the public; that the worker was, at the time of his injury, employed by the contractors in cutting firewood for which they were to be paid under their contract with the principals to cut it at 3s a ton. He found, having regard to the quantity of trees to be cut, that the principals were carrying on a firewood business and that they "undertook" the business of procuring, preparing and selling firewood at a profit to the public and both in the course of and for the purpose of that business contracted with the two men who employed the appellant for the execution by them of part of the work of the firewood business which, unlike the erection of the shed and the installation of the plant, involved doing work for others.

In my opinion the circumstances will not admit of the inference that the principals in the course of or for the purposes of a business contracted for the execution by or under the contractors of part of work undertaken by the principals. The principals intended to sell timber when cut. No doubt they would sell it to wood and coal merchants. But they were not engaged in a continuous process of obtaining timber and selling it, nor were they about to establish such a process. They wished to rid themselves of particular timber. They abstained from doing for themselves more than selling it as firewood when it was cut. Doubtless there was enough to enable them, if they were so minded, to make a number of successive sales to different wood merchants so that their wood-selling activities might for a time become repeated and systematic enough to be described as a "business." On the other hand, they might have contracted with one buyer to take the whole at so much a ton. In fact they had not sold any timber so far as appears.

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The selling, whether a business or not, was still in the future. All they had done was to obtain the plant for cutting some of the timber that must be cleared in the course of reselling their land and to let two contracts, one for the installation of the plant and the other for cutting the timber into sizes at which they could sell it, as they thought, to best advantage. To treat this incident of a land speculation by two business men as setting up in the firewood trade undertaking the procuring, preparation and sale of firewood and delegating part of the function undertaken to a contractor appears to me to give the transaction an entirely false complexion. All that can be said is that they intended to sell the firewood cut by the contractors. If this was to be so done as to amount to a business, that business had yet to be commenced and in any case would as a business be restricted to the disposal of a particular quantity of wood the cutting of which was done by contract. The work the principals assumed to perform or undertake did not include the cutting of the firewood. The circumstance that they bought the necessary plant and that their agent supervised its installation does not seem to me to affect the matter (Cp. *Skates* v. *Jones & Co.* (1)). The question what work they " undertook " does not depend on the manner in which they or their agent acted towards the contractors but on the scope of the trading or business activities they assumed.

In my opinion the appeal should be dismissed.

EVATT J. The respondents purchased 416 acres of land at Castle Hill. The land was fairly heavily timbered. The ultimate purpose they had in view was to subdivide the land into farmlets. But their immediate purpose was to cut up the small trees into firewood blocks to sell the firewood to the public, and to sell, for milling purposes, the big timber remaining *in situ*. Accordingly they purchased tree-felling tools, and caused a shed to be erected and sawing machinery to be installed on the Castle Hill property.

On January 2nd, 1935, the respondents entered into an arrangement with two persons named Sullivan and Adams. According to the document they signed, Sullivan and Adams agreed to erect a shed over the engine and saw-bench and to " employ 4 men, 2 working

(1) (1910) 2 K.B., at p. 913.

on the forest devil and snigging, the other two erecting the shed." The respondents were to pay Sullivan and Adams £24, it being stipulated that

> " on the saw operating it is understood that your contract of 3s. per ton starts, and no future wages be paid to you, the payment of 3s. per ton to include the wood that was cut into 9″ blocks "

during the first two days on which the engine was working at full cutting, and in respect of which two days £5 of the £24 was retained by the respondents.

The respondents through their agent, one Phillips, supervised the work carried out on the property by the " contractors " and paid them. At about the time of the written contract of January 2nd, Adams asked the present appellant Moir whether he would like a job of " wood cutting " and Moir duly commenced work on the property on Monday 7th January, 1935.

By January 17th, all of the £24, except the £5, had been paid to the contractors. Moir was then working with Adams on the saw-bench. The agent of the respondents, Phillips, pointed out certain dangerous features in connection with the use of the saw and, whilst the appellant was working the saw later on the same day, his hand came in contact with the saw, which severed the terminal portions of his left index and mid fingers.

The case came on for hearing before the Workers' Compensation Commission on April 12th, 1935. Counsel for the respondents showed considerable anxiety that no attempt should be made by Moir to prove that Adams and Sullivan were not independent " contractors," but merely instruments of the respondents. Partly as a result, conversations between Moir and Phillips, the agent of the respondents, were not given in full. But it sufficiently appeared that Phillips took the leading part in the supervision of the work on the land, and that, for all practical purposes, Adams and Sullivan were under his constant direction.

After Moir had met with his injury, he called upon the two respondents, Phillips also being present, and asked: " Are we insured ? " Schrader, one of the respondents, said that they would be insured when they started cutting. Schrader said at this conversation that the appellant was not an employee of his, and he

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must look to his direct employer. He also said that, if the mill had been running, the respondents " intended everyone to be covered, but as it was only being erected, we do not see how we could have covered you if we had wanted to."

The evidence also showed that, on the morning of the accident, Phillips informed the contractors: " You chaps can go your hardest now; you are all insured up to £100 a week wages." The evidence of Sullivan showed, as also did the written document of January 2nd, 1935, that the " contractors " had previously been employed on wages. Sullivan had arrived on the property first on December 18th, 1934, and received instructions from Phillips as to filling in washaways and filling up the road. Sullivan said with regard to worker's compensation insurance :—

> " I asked Mr. Phillips about the insurance and he told me not to worry about it, that I was working for two gentlemen and they would see to all that. I said ' Well, if I have to insure, the job is off, because I have not the money to pay the premium.' He said, ' All right, leave that to me, let me organize everything.' I then said ' It amounts to this, we are supplying labour and you supply everything else,' and he said ' That is all right.' "

While the case of the appellant was pending, Schrader, one of the respondents, discussed with Sullivan the question of giving him a further job, delivering wood from the property. Each of the respondents gave evidence showing that their purpose was to sell the wood as soon as it was cut, and that this purpose existed on the day of the accident. It also appeared that it would take a long while to cut up the timber intended for firewood.

Owing to the particulars filed, the Workers' Compensation Commission was precluded from making a complete investigation into the question whether the so-called contractors were anything more than servants employed by the respondent. But it was held that the respondents were liable to pay compensation by virtue of sec. 6 (3) (*a*) of the *Workers' Compensation Act* 1926-1929.

That sub-section proceeds upon the assumption of a genuine contract entered into by the principals. There is an important proviso to sec. 6 (3) (*a*) by which, where the contract relates to threshing chaff-cutting or ploughing, and the contractor provides or uses machinery driven by mechanical power for the purposes of such work, he alone is liable to pay compensation. This proviso indicates that, under

the New South Wales law, whatever may be the position in England, a worker is at least enabled to look to the principal for whose benefit he was working when injured, provided that such work constitutes an essential, integral and typical portion of the business of the principal.

Applying the very words of sec. 6 (3) (*a*), the first question is whether the respondents' contract with Sullivan and Adams was made in the course of, or for the purpose of, their trading or business. That is really a question of fact. Did the respondents' series of operations in (*a*) felling the trees, (*b*) hauling them to the saw, (*c*) cutting them and (*d*) selling and delivering the blocks, amount to the carrying on of a business ? The Workers' Compensation Commission expressly found that it did, and that, at the time of the accident, logs were being cut into blocks, and the saw was in full working operation as a part of the business there being carried on. The commission also held that the fact that some wood was cut before the expiration of the so-called trial period of two days did not affect the question, because all such wood had to be paid for, and would be sold and delivered in the course of business. In the Supreme Court, *Stephen* J., without expressly dissenting on the point from the conclusion of the majority, felt grave doubt about disturbing the finding of the commission that, at the time of the accident, respondents were carrying on a firewood business. In my opinion there was ample evidence to support the commission's finding. The business commenced, not at the moment of cutting, but when the timber was being felled for the purpose of cutting.

The next question is whether the contract made with Sullivan and Adams was for the whole or any part " of any work undertaken by the principal." In point of fact, the contract was to cut wood at three shillings per ton. Having regard to all the circumstances, including the fact that the contract was being executed on the respondents' property, was the cutting of wood by the contractors work undertaken by the respondents ? This question is also a question of fact (*Hockley* v. *West London Timber and Joinery Co.* (1)). In that case Lord *Cozens-Hardy* M.R. gave several illustrations of the

(1) (1914) 3 K.B. 1013.

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principle embodied in the corresponding English section. A cotton-mill owner who has, periodically, to have painting done on his premises cannot be said to be "undertaking" painting, although that is done for him by contractors. Similarly, a corn-mill owner is not liable in respect of an accident occurring to the farmer's men delivering wheat to the mill. These examples also serve to illustrate the principle that sec. 6 (3) (*a*) of the New South Wales Act must apply to all cases where a worker is injured in performing work for a contractor, provided that the contract between principal and contractor requires the performance of work which is an essential part of the very business or trade in which the principal is at the time engaged. In the present case, cutting wood by means of a saw was the central feature of the business then carried on by the respondents, and was part of "work undertaken" by the respondents. The general object of the provision is that the worker who is injured is entitled to say:—"The work I was doing was not only for the benefit of the principal, but was done under an arrangement by which my direct employer was really conducting a portion of the principal's own business. In such a case I should not be put in the position of attempting to enforce my statutory right against an impecunious employer, and I look to the principal in the transaction."

I have referred at some length to the facts of this case for several reasons. In the first place, those facts show that a grave doubt exists as to whether the respondents were not, through Phillips, their agent, directly employing the applicant at the time of the injury. This issue could not be raised in the present proceedings before the Workers' Compensation Commission, but it should not be assumed to be decided *against* the appellant if any further proceedings take place. In the second place, the facts show that the agent of the respondents was actually supervising the cutting operations at the time of the accident. This and other evidence was admissible to show that the respondents were themselves undertaking the work performed on the day of the accident, for there was actual intervention on their part for the purpose of securing the efficient operation of the cutting which was to be the pivotal feature of their business adventure. Finally, the commission's investigation of the facts showed that the "contractors" were obviously men of

straw, and quite unable even to pay workers' compensation premiums, although such insurance is made compulsory under the law of New South Wales.

In my opinion, the judgment and order of the Workers' Compensation Commission were warranted by the evidence and should be restored.

McTIERNAN J. The appellant was injured in the performance of work for the execution of which the respondents had contracted with his immediate employers. The question whether the respondents are liable to pay him compensation turns upon sec. 6 (3) of the *Workers' Compensation Act* 1926-1929.

It is essential for the application of this provision that the person who is to be made liable as principal should carry on some trade or business. In the present case the respondents are a solicitor and a retired bank manager respectively. The tribunal of first instance, the Workers' Compensation Commission of New South Wales, however, found that they had embarked on the business of selling firewood which was to be derived from clearing land which they had bought for the purpose of selling in areas suitable for small farms. The Supreme Court did not disagree that the evidence supported the finding that the respondents had entered upon that business. I concur that there is evidence to support that finding. The commission further found that "it was part of the respondents' business to fell trees on their property, haul the logs to a saw plant they had erected, and have the trees cut into requisite lengths in preparation for sale." Again there is ample evidence to support the conclusion that the business did involve these operations. Another fact proved was that the respondents contracted with the appellant's immediate employers to fell trees on the land, haul the logs to the wood-sawing plant, and cut them up there into firewood. This contract is referred to in a contract made between the respondents and the appellant's employers for the erection of a shed over the respondents' engine and the setting up of various other parts of the respondents' wood-sawing plant which the contractors were to use. It was a condition of such contract that the contractors should employ two men "on the forest devil and snigging" and

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two men on building the shed. Another condition was that they were to set the engine going and the plant was to be given a two days' trial at cutting the wood. The final condition was: "On the saw operating it is understood that your (the contractors) contract of 3s per ton starts, and no future wages be paid to you, the payment of 3s per ton to include the wood that was cut into 9″ blocks the two days above mentioned." The appellant was injured while sawing a log on the first of these two days when only a few logs had been sawn. He was employed at this work by the contractors. Although the appellant was injured before the contract for cutting firewood started, the wood which was then being sawn was to be paid for under that contract and it was to become part of the respondents' stock for sale in their business.

The crucial question is whether the cutting of the wood into blocks for sale as firewood was "any part of any work undertaken" by the respondents in the sense in which that expression is used in sec. 6 (3) of the *Workers' Compensation Act* 1926-1929. It is settled that the expression includes, but is not limited to, work which is undertaken pursuant to a statute or a contract (*Mulrooney* v. *Todd* (1); *Skates* v. *Jones & Co.* (2)). But the expression does not cover any sort of work which a trader or man of business may in the course of or for the purpose of his trade or business contract to have performed by another person (*Skates* v. *Jones & Co.* (2); *Hockley* v. *West London Timber and Joinery Co.* (3)). The words "undertaken by the principal" are not tautologous but were inserted by way of limitation.

In *Willis' Workmen's Compensation Acts*, 27th ed. (1931), Mr. *Willis* says that *Dittmar* v. *Owners of Ship V*593 (4) is the only case decided on appeal in which the English section, which is the same as sec. 6 (3), has been applied to private traders. There the Court of Appeal said that, because the appellants had made a contract "for the execution by or under" the contractors "of part of the work proper to their undertaking and in that sense undertaken by them" (5), they were liable to pay compensation. In *Skates* v. *Jones & Co.* (2) it was decided that the work of erecting a building in which a skating

(1) (1909) 1 K.B. 165, at p. 170.
(2) (1910) 2 K.B. 903.
(3) (1914) 3 K.B. 1013.
(4) (1909) 1 K.B. 389.
(5) (1909) 1 K.B., at p. 396.

rink was to be conducted by the respondents was not work undertaken by them within the meaning of the section. The Master of the Rolls, distinguishing between work "required" by a business man for the purpose of the business and work "undertaken" by him, rejected the former characteristic as a criterion of liability under the section. In illustrating the section the Master of the Rolls said that a cotton spinner would not be made liable as a principal should he contract with a boiler-maker to replace a boiler. The reason assigned was that "he never held himself out as a boiler-maker. It was not part of his trade or business to erect boilers" (1). *Farwell* L.J. said in the same case: "We are not entitled to use the marginal note as a guide to construction, and I do not rely on it; but the section appears to me to have been originally intended to apply to the contractor who sub-lets part of his contract and then to have been developed on the basis that a contractor who does work for another on contract is in the same position towards the workman as the contractor who does the same class of work in the usual way of business for himself and sub-lets part of it, and this explains the words 'undertaken by the principal' as including the man who undertakes in the usual course of his business to do the work, whether for himself or for another" (2). He concluded his observations on the section by saying: "The man of business or tradesman is not made a principal because he is in business or trade, but because the particular work in question is his own trade or business; and this is the true construction of the section in my opinion" (3). *Kennedy* L.J., the third member of the court said: "Besides that which I should call the natural sense of a contractual undertaking, these words include the performance of work which the principal may be said to 'undertake' because he has adopted it as his particular trade or business" (4). In *Hockley's Case* (5) the Court of Appeal decided that the work of stacking wood was not part of the work undertaken by the respondents, who were manufacturers of wood mouldings. There the Master of the Rolls again denied that everything that was reasonably necessary to be done for the purpose of a business or incidental to it is "work undertaken by" the person carrying on

(1) (1910) 2 K.B., at p. 908.
(2) (1910) 2 K.B. at p. 909.
(3) (1910) 2 K.B. at p. 910.
(4) (1910) 2 K.B. at p. 912.
(5) (1914) 3 K.B. 1013.

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the business within the meaning of the section. The precise reason why the appellant worker failed in that case is stated: "This stacking was not a step in the process of manufacture; it was something incidental and reasonably necessary for the purpose, at a later stage of the manufacture, but was not, as it seems to me, anything undertaken by the principal within the meaning of this section" (1).

The Master of the Rolls gave instances of operations habitually performed by contractors for the purpose of various trades and businesses, to which the section would not apply. None of these answered the description of "work undertaken by" the person carrying on the trade or business because no more could be said of the work in each instance, than that it was work necessary or ancillary for the purpose of the trade or business. After giving these instances the Master of the Rolls, however, made a reservation:— "There may be cases in which an accident happens in the course of one step in the process of manufacture. As to that I say nothing; that does not arise here" (1). It would appear that the judgment avoids laying down a general rule that, where it is the practice of a manufacturer to contract for the execution of a process in manufacture by another person, such work is necessarily outside the purview of the section. The principle upon which the Court of Appeal decided that the company which manufactured mouldings was not liable as principal was that, although stacking the timber was incidental to or even a necessary operation for their business, it was an operation outside the scope of the business carried on by a manufacturer of mouldings as such. The manufacturing of mouldings and the stacking of the timber were in fact two separate industrial operations.

It is because the word "undertaken" has an extended meaning, not being confined to work undertaken pursuant to a statute or a contract, while it is also to be read as limiting the class of work which was intended to be within the sub-sec. 6 (3) (*a*), that the application of the sub-section is a matter of difficulty. The cases decided under the corresponding provisions of the English Act show that it is not sufficient to establish the appellant's claim in the

(1) (1914) 3 K.B., at p. 1018.

present case to prove that the work he was doing at the time he was injured was incidental to or even necessary for the respondent's business.

There is no evidence that they entered upon the execution of such work by their own workmen or had intended to do so. But is that a ground of immunity from the obligation imposed by the sub-section on the "principal"? In the case where there is a contractor who is bound by contract to execute work, and a sub-contractor to whom he sublets the work, that work may nevertheless be undertaken by the contractor within the meaning of the sub-section. It is not necessary that the person to be made liable as the principal should perform as well as undertake the work. And, as has been observed, a person may be liable as a "principal" under the sub-section who is not under a contractual obligation to perform the work which he agreed with the injured workman's immediate employer to have carried out. This is a development of the principle that a contractor strictly so called cannot shield himself against liability to pay compensation by subletting his contract to others who are the employers of the workmen engaged. Where there is a contract between the person sought to be made liable as principal and the worker's immediate employer for the execution of work, it is difficult to understand why the former should not be liable as principal under the sub-section because it was not his practice to perform such work by workmen directly employed by him. It would not, in my opinion, be consistent with the intention of the sub-section as it has been construed, to say that the operation of sawing the wood was not undertaken by the respondents in the present case, because it was not part of their enterprise to have that operation carried out by workers directly employed by them.

The Workers' Compensation Commission found that the business in which they embarked consisted of felling the trees, hauling the logs, sawing them, and selling the firewood thus obtained. To say that the only work undertaken by the respondents as principals within the meaning of the sub-section was the sale of the firewood is, in my opinion, to destroy the unity of the whole undertaking. The land, the trees, the logs cut from them, the firewood cut from the logs, the wood-cutting plant, were all the property of the

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respondents. It was not part of their business to sell any firewood except that cut from trees growing on their own property and cut by their own plant. It was not part of the contractor's work to cut any logs except those obtained on the respondents' land. In my opinion the work which the appellant's employers contracted to perform was proper to the respondents' undertaking. It was an integral part of the undertaking of clearing the land and selling the wood. It follows that the appellant was injured while performing work undertaken by the respondents within the meaning of sec. 6 (3). All the questions in the case stated should be answered in favour of the appellant.

The appeal should, in my opinion, be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Rosendahl & Devereux.*

Solicitors for the respondents, *W. D. Schrader & Schrader.*

J. B.