[HIGH COURT OF AUSTRALIA.]

QUEENSLAND STATIONS PROPRIETARY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1945.

BRISBANE, *June* 20.

SYDNEY, *Aug.* 3.

Latham C.J., Rich and Dixon JJ.

Pay-roll Tax (Cth.)—"*Wages*"—*Drover—Droving contract—Employee or independent contractor—Remuneration—Pay-roll Tax Assessment Act* 1941-1942 (*No.* 2 *of* 1941—*No.* 48 *of* 1942), *s.* 3.

A drover agreed with the owner of cattle to serve in the capacity of a drover, drove certain cattle to a place of destination, obey and carry out instructions and devote the whole of his time, energy and ability to droving the stock. His remuneration was a fixed sum per head of cattle delivered. As drover he was bound to find the men, plant, horses and rations necessary and pay all wages in connection therewith.

Held that the payments made to the drover were not wages within the meaning of the *Pay-roll Tax Assessment Act* 1941-1942 and that the company was not liable to pay-roll tax in respect of these payments.

Per *Rich* J. and *semble* per *Latham* C.J. and *Dixon* J.: The relationship between the owner and the drover was that of employer and independent contractor. *Logan* v. *Gilchrist, Watt & Cunningham*, (1927) 33 A.L.R. 321, wherein it was held that the owner was liable for trespass by sheep in charge of a drover on the ground that the relationship between the owner and the drover was that of master and servant, considered: *Latham* C.J. and *Dixon* J. were of opinion that the actual decision in the case was correct, because, under the express terms of the contract, control of the trespassing cattle was retained by the owner, but questioned whether the relationship was that of master and servant; *Rich* J. distinguished the case.

CASE STATED.

Queensland Stations Pty. Ltd. appealed to the High Court from a decision of the Board of Review which confirmed a decision made by the Federal Commissioner of Taxation that certain payments made

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

by the company to drovers were wages within the meaning of the *Pay-roll Tax Assessment Act* 1941-1942, and that the company was liable to pay tax thereon.

Upon the appeal coming on to be heard before *Latham* C.J., his Honour, pursuant to s. 18 of the *Judiciary Act* 1903-1940, stated a case which was substantially as follows for the consideration of the Full Court.

1. Queensland Stations Pty. Ltd. is a company duly incorporated and carrying on business in the pastoral industry in the State of Queensland.

2. In the course of such business the appellant enters into agreements with drovers for the droving of cattle in the said State. Such agreements at all times since the enactment of the *Pay-roll Tax Assessment Act* 1941 have been in the following form (except as to date, name of drover, number of cattle, place of delivery and rate of payment) :—

Memorandum of Agreement made this fourth day of February 1941, between Queensland Stations Pty. Ltd. graziers of Wando Vale, Pentland in the State of Queensland hereinafter called the owners of the one part and Arthur Bryant drover of Charters Towers in the State of Queensland of the other part whereby it is agreed as follows :—

The said Arthur Bryant agrees to serve the said owners in the capacity of drover and take charge of three hundred and seventeen cows at Wando Vale and to drove same to Sellheim trucking yards to obey and carry out all lawful instructions and to use the whole of his time, energy and ability in the careful droving of the stock in his charge and to report from time to time as opportunity offers the number and condition of the cattle in his charge and shall deliver the cattle at Sellheim trucking yards. The drover shall find all men and plant horses and rations necessary and sufficient for the safe droving of the cattle and pay all wages in connection therewith. He shall take proper care of and account for all stock placed in his charge and shall not dispose of any without the consent of the owners.

The owners shall have the right at any time to terminate this agreement in the event of the drover committing a breach of the covenants contained therein and in such event the said drover shall accept instant dismissal at any time or place without recourse against the said owners or any of their agents for such dismissal.

In consideration of the said drover well and faithfully performing the above-mentioned conditions of this contract the said owners agree to pay him at the rate of three shillings and six pence (3s. 6d.) for all cattle delivered at Sellheim trucking yards.

Should any dispute arise out of the terms of this agreement the said dispute shall not vitiate the agreement but shall be settled by arbitration in the usual manner.

3. From time to time the appellant made returns in accordance with s. 18 of the *Pay-roll Tax Assessment Act* 1941 in respect of employees other than drovers.

4. On 8th September 1941 the appellant wrote to the respondent as follows :—

" In connection with the enclosed return of wages and pay-roll tax for July 1941, I desire to advise that an amount of £258 6s. 10d. was earned during that month by sundry contractors, but has not been included in the return, inasmuch as we have not yet been advised whether it is necessary to include such contract earnings or not.

The contracts referred to above, and the amounts under each heading, are as follows :—

Fencing	£78 9 6
Building	93 11 6
Droving	86 5 10
	£258 6 10

We shall be glad of your advices in the matter, in the meantime a cheque value £28 5s. 6d. is enclosed herewith."

5. On 6th October 1941 the respondent wrote to the appellant in reply thereto as follows :—

" I refer to your letter dated 8th September 1941 and desire to advise that the information furnished is not sufficient to enable a decision to be made as to whether or not payments made under the contracts are subject to tax.

In order to examine the matter, I shall be glad if you will furnish me with copies of the contracts for perusal, if written contracts are in existence.

You should also advise me as to whether in respect of each job the company has the right of directing what work shall be done and the manner and time of doing it ; also whether the company has the right of employing or dismissing the persons engaged on the work."

6. On 7th October 1941, in compliance with such request, the appellant forwarded a copy of the agreement between the appellant and one Arthur Bryant dated 4th February 1941 set out in par. 2 hereof.

7. It is admitted that the said agreements created the relationship of employer and employee between the appellant and the drover engaged.

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

8. Each of the drovers in order to carry out his droving agreement with the appellant would require (*a*) to employ men, (*b*) to provide horses, (*c*) to provide hobbles and riding and saddlery gear for himself and his employees, (*d*) to provide wagonettes with the necessary horses and harness, (*e*) to provide other equipment such as camping and cooking gear, (*f*) to provide rations for himself and his employees.

9. The drover Arthur Bryant in order to carry out his said agreement would require (*a*) to employ about 4 men, (*b*) to provide about 30 horses, (*c*) to provide about eight sets of riding gear consisting of saddles and bridles, and also hobbles for the horses, (*d*) to provide one wagonette, one pair of wagonette horses and their harness, (*e*) to provide other equipment such as camping gear and cooking gear, and (*f*) to provide rations for himself and his employees for 14 days.

10. Each drover in the performance of such agreement would take the risks of bad behaviour of the cattle causing rushes and possibly crashes, of bad natural conditions such as lack of food or water, of the possibility of the consumption by the cattle of some poisonous food or shrubs, or of bad climatic conditions.

11. Each drover must be an experienced man and possess a considerable amount of skill.

12. The cattle are counted over to each drover when he takes delivery and they are again counted over when the drover delivers them at their destination. Otherwise the company does not supervise the work of the drover.

13. From time to time the appellant paid to drovers the amounts payable to them under the said agreements.

14. By letter dated 16th February 1943 the respondent informed the appellant that he had made the following decision :—That payments to drovers are subject to pay-roll tax in their entirety, including any part of such amounts which may be intended to reimburse the drover for the use of equipment, &c., and requested that supplementary returns for tax unpaid in this respect for a period commencing 1st July 1941 be furnished within twenty-one days.

15. The appellant duly made objection in writing to the said decision by letter dated 5th March 1943.

16. The respondent disallowed such objection by letter dated 27th April 1943.

17. The appellant being dissatisfied with the said decision requested that it be referred to the Board of Review for review.

18. The Board, after taking evidence and hearing counsel for the company and the Commissioner, decided not to uphold the company's claim and gave reasons for its decision on 29th September 1944.

The questions stated for the determination of the Full Court were :—

(1) Are the moneys paid to drovers under the said agreements wages within the meaning of the *Pay-roll Tax Assessment Act* 1941-1942 ?

(2) Is the appellant liable to pay pay-roll tax in respect of any part of such payments, and if so what part ?

The relevant statutory provisions are set out in the judgment of *Dixon* J. hereunder.

McGill K.C. (with him *Lukin*), for the appellant. The question arising for determination on this appeal is not concluded by the decision of this Court in *Logan* v. *Gilchrist, Watt & Cunningham* (1). Even though the relationship between the company and the drover is that of employer and employee the payments made to the drover are not wages within the meaning of s. 3 of the *Pay-roll Tax Assessment Act* 1941-1942. Those payments are not wages, salaries, commission, bonuses or allowances. The drover's only remuneration is the profit he makes from the contract. He has to provide the plant, horses, men and rations. The amount payable to the drover is not determined until the completion of the contract and depends upon the success of the venture. The drover takes all the risks of bad weather and other risks attendant on the cattle. Wages are payments for work performed. Here the payment is for more than services. It is for men, plant, horses and rations. A payment is not wages unless made to a recipient who actually does the work (*Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (2) ; *Federal Commissioner of Taxation* v. *J. Walter Thompson (Aust.) Pty. Ltd.* (3)). Although the relationship of employer and employee existed the drover's reward depended upon the success of the venture. There is a difference between profit and the wages for labour (*Ingram* v. *Barnes* (4)).

Fahey for the respondent. The agreement is a contract for the drover's services. The question is concluded by the decision of the Court in *Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (5). There allowances paid to employees for the use of motor cars were held to be wages. The payments made to the drover were made in respect of an incident of the service. They were made as something additional to ordinary wages for the purpose

(1) (1927) 33 A.L.R. 321 ; (1927) Q.S.R. 185.
(2) (1944) 69 C.L.R. 389, at pp. 398, 401, 403.
(3) (1944) 69 C.L.R. 227, at p. 233.
(4) (1859) 7 El. & Bl. 115, at p. 136 [119 E.R. 1190, at p. 1198].
(5) (1944) 69 C.L.R. 389.

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

of meeting some particular requirement connected with the service rendered by the drover or as compensation for unusual conditions of that service. The fact that one lump sum is paid to the drover to cover both his reward and the incidents of his service makes this case stronger, as one cannot be dissociated from the other and the whole payment is wages within the meaning of the *Pay-roll Tax Assessment Act* 1941-1942. The Act applies to all forms of remuneration for all types of services rendered under contracts of service (*Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). The Act is not concerned with the pecuniary benefit to the recipient of money, but only with the amount an employer pays as wages to an employee.

McGill K.C., in reply. In *Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (2) the allowances paid to the employees came within the definition of " wages " in s. 3 of the Act.

Cur. adv. vult.

Aug. 3.

The following written judgments were delivered :—

LATHAM C.J. The question for decision upon this case stated is whether payments to drovers in pursuance of certain contracts are payments of wages within the meaning of the *Pay-roll Tax Assessment Act* 1941-1942 in respect of which tax is payable. It was decided by the Commissioner of Taxation that the moneys paid were wages, and his decision was upheld by a Board of Review. The appellant company has appealed to this Court (*Pay-roll Tax Assessment Act* 1941-1942, s. 40).

The contention for the Commissioner is that the contracts created the relation of employer and employee, as was decided in the case of a substantially identical contract by the Supreme Court of Queensland in *Gilchrist, Watt & Cunningham* v. *Logan* (3), affirmed in this Court (4), and that payments made to drovers thereunder were therefore payments of wages.

The contracts provide that the drover is to serve the owners of certain cattle in the capacity of drover and is to drove them to a destination, to obey and carry out all lawful instructions, and to devote the whole of his time, energy and ability to droving the stock. He is to report from time to time as to the number and condition of the stock. The owners have the right to terminate the agreement for breach of covenants " and in such event the drover shall accept

(1) (1944) 69 C.L.R. 389, at p. 398.
(2) (1939) 69 C.L.R. 389.
(3) (1927) Q.S.R. 185.
(4) (1927) 33 A.L.R. 321.

instant dismissal." The drover is bound to " find all men and plant horses and rations necessary and sufficient for the safe droving of the cattle and pay all wages in connection therewith." The remuneration of the drover is a fixed sum per head of cattle duly delivered at the specified destination.

The case includes by way of typical illustration the terms of a particular contract made with one Arthur Bryant. The case states : " The drover Arthur Bryant in order to carry out his said agreement would require (*a*) to employ about 4 men, (*b*) to provide about 30 horses, (*c*) to provide about eight sets of riding gear consisting of saddles and bridles, and also hobbles for the horses, (*d*) to provide one wagonette, one pair of wagonette horses and their harness, (*e*) to provide other equipment such as camping gear and cooking gear, and (*f*) to provide rations for himself and his employees for 14 days."

The payment per head of cattle constitutes the reward to the drover for droving the cattle and doing all the things mentioned in this statement.

If the work to be done by one person for another is subject to the control and direction of the latter person in the manner of doing it, the person doing the work is a servant and not an independent contractor, and prima facie his reward would be wages. An independent contractor undertakes to produce a given result, but is not, in the actual execution of the work, under the order or control of the person for whom he does it (*Performing Right Society Ltd.* v. *Mitchell and Booker* (*Palais de Danse*) *Ltd.* (1))—and cf. *Federal Commissioner of Taxation* v. *J. Walter Thompson* (*Aust.*) *Pty. Ltd.* (2). In *Logan's Case* (3) this Court based its decision upon provisions in the contract which are also to be found in the contracts now under consideration which showed that the owner had " a constant right to intervene and full right of control," and upon the provision with respect to " dismissal." It was held that the drover was the servant of the owner, who was therefore liable for a trespass by his sheep while in charge of the drover under the contract.

Liability for trespass by attended cattle lawfully upon a highway depends upon negligence (*Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.* (4); *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 547; *Pollock* on *Torts*, 14th ed. (1939), p. 397). The liability falls upon an owner who is in possession of the cattle (*Winfield's Text-book of the Law of Tort*, (1937), p. 547, citing *Dawtry* v. *Huggins* (5)).

(1) (1924) 1 K.B. 762.
(2) (1944) 69 C.L.R. 227, at p. 229.
(3) (1927) 33 A.L.R. 321.
(4) (1924) 2 K.B. 75.
(5) (1635) Clayton 32.

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

In England droving is regarded as ordinarily being an independent occupation: see the comparison between a contract drover in Australia and a licensed drover in England per *Macrossan* S.P.J. in *Gilchrist, Watt & Cunningham* v. *Logan* (1). Persons following the occupation of droving may be droving animals belonging to several owners at the same time. There would be obvious difficulties in treating such drovers as the servants of all the persons who simultaneously employed them. Thus, as a general rule, they are independent contractors, and the cattle in their charge are treated as in their possession under a bailment (*Halsbury's Laws of England*, 2nd ed., vol. 22, p. 115, and cases there cited). But a drover, even though licensed to carry on his occupation, may nevertheless be the servant of the owner of cattle which he is droving—as was held in *Turnbull* v. *Wieland* (2).

But if a consideration of all the circumstances shows that the owner retains control so that there is no bailment, he remains responsible to third parties for damage caused by negligence in the management of his chattels (*Samson* v. *Aitchison* (3), and other cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 777). In *Logan's Case* (4) (and in the present case) control was retained by the owner by the express terms of the contract, and accordingly he could be held liable for trespass by cattle in the charge of a drover under such a contract independently of whether the drover was the servant of the owner. The decision in *Logan's Case* (4) can therefore be supported upon this ground.

But even if *Logan's Case* (4) be accepted as requiring the Court to hold that the relationship of master and servant exists in the present case between the owner and the drover, it does not follow, in my opinion, that the payment made to the drover in consideration of the fulfilment by him of his contract was a payment by way of wages.

The application of the Act, as I said in *Federal Commissioner of Taxation* v. *J. Walter Thompson (Aust.) Pty. Ltd.* (5), depends upon the existence of an employer-employee—i.e. a master-servant—relation. This is shown by the fact that " wages " is defined so as to include only payments made " to any employee as such." But " employer," for the purposes of the Act, is not defined so as to bring all employers within this term. " Employer " is defined (s. 3) as meaning " any person who pays or is liable to pay wages." Unless

(1) (1927) Q.S.R. 185, at p. 191.
(2) (1916) 33 T.L.R. 143.
(3) (1912) A.C. 844.
(4) (1927) 33 A.L.R. 321.
(5) (1944) 69 C.L.R. 227.

the moneys payable to the drovers are " wages," such moneys are not liable to tax.

" Wages " is defined in the Act, s. 3, as meaning " any wages, salary, commission, bonuses or allowances paid or payable (whether at piece work rates or otherwise and whether paid or payable in cash or in kind) to any employee as such " and as including payments under certain contracts and the provision of meals or quarters by way of consideration for the employee's services. The payment in the present case cannot be said to be a salary, a commission, a bonus or an allowance. The only question is whether it can be held to be wages in the ordinary sense of that term.

A person may be an employee and yet payments made to him by an employer may not be wages. It is necessary to examine all the terms of the relationship between the parties before determining whether or not a payment is wages in the ordinary sense of remuneration for services rendered.

One person may hire the services of another *simpliciter*, so that the relation constituted between them is completely described as that of master and servant. The position is the same if, for example, a workman is hired and he is to bring his own tools, but is to work under the direction as to the manner of doing the work. In both of these cases the reward paid would be wages. But if A were to make an agreement with B that B should provide a fleet of motor cars and manage them as a hiring business for £100 per week, it could hardly be said that the money paid by A to B was wages. Similarly in the present case the payment made to the drover represents much more than a payment for his work. Payments under the contracts in question are not wages in the ordinary sense and do not otherwise fall within the statutory definition of wages. They are therefore outside the Act.

The questions in the case are :—

(1) Are the moneys paid to drovers under the said agreements wages within the meaning of the *Pay-roll Tax Assessment Act* 1941-1942 ?

(2) Is the appellant liable to pay pay-roll tax in respect of any part of such payments, and if so what part ?

In my opinion both questions should be answered—No.

RICH J. The questions submitted in the case stated involve the interpretation of " wages " in the definition clause (s. 3 (1)) of the *Pay-roll Tax Assessment Act* 1941-1942 and its applicability to the payment per head of cattle made to a drover pursuant to the agreement for droving cattle set out in the case. This part of the definition

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

clause was considered by this Court in *Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (1), when it was said: "A definition of this kind is not an exercise in philology. It is a mechanical device to save repetition. Its purpose is not to endow the word 'wages' with a new meaning, but to enable the expression 'wages, salary, commission, bonuses or allowances paid or payable,' &c., to be supplied by a single word whenever it is desired to legislate in this Act for anything which is included in that expression. In ordinary parlance, wages is the term used for the remuneration paid for other than 'white-collar jobs.' The definition clause is employed to make it clear that, where not otherwise indicated, the Act is intended to apply to all forms of remuneration for all types of services rendered under contracts of service."

What falls to be determined in this case is whether the kind of payment made under this droving agreement is in law "wages" within the meaning of ss. 12 and 13 of the Act as expanded by s. 3. The material part of the agreement is that which obliges the drover to "find all men and plant horses and rations necessary and sufficient for the safe droving of the cattle and pay all wages in connection therewith." The drover also undertakes to take proper care of and account for all stock placed in his charge and not to dispose of any without the consent of the owners. The owners reserve the right at any time to terminate the agreement in the event of the drover committing a breach of the "covenants" contained in the agreement and in such event the drover shall accept instant dismissal. The consideration for the performance of the conditions of the contract is the payment to the drover of three shillings and sixpence for all cattle delivered by him at certain trucking yards. For the purpose of carrying out the agreement on the part of the drover the requirements are set out in clauses 8 and 9. A consideration of these requirements and of the portions of the agreement I have mentioned lead me to the conclusion that the drover was an independent contractor. The contract between the parties is a contract for services but it is not a contract of service (*Simmons* v. *Heath Laundry Co.* (2)). The tests applicable in deciding whether a man be a servant or an independent contractor are discussed at length in *Performing Right Society Ltd.* v. *Mitchell and Booker (Palais de Danse) Ltd.* (3); *Dowd* v. *W. H. Boase & Co. Ltd.* (4). The facts I have referred to appear to me to show that the drover undertook to produce or bring about a specified result employing his own means to accomplish that result.

(1) (1944) 69 C.L.R. 389, at p. 398.
(2) (1910) 1 K.B. 543, at pp. 548, 549.
(3) (1924) 1 K.B. 762, at pp. 766 et seq.
(4) (1945) 1 All E.R. 605.

The owner had no control over the particular details of the job as it went on. The calling of a drover—one of great antiquity—is distinct and separate from the business of graziers. By trade and usage he is at liberty to drive the cattle of any other person. While engaged in the operation he is, apart from specific agreements, in exclusive possession of the cattle and is free from the control of the owners. In *Ex parte Campbell* (1), it was held that the person in charge of certain sheep was " the owner " within the meaning of " owner " in the *Pastures Protection Act* 1902 No. 111 (N.S.W.). And it was found necessary in 1850 in New South Wales to legislate to prevent selling or disposing of cattle by drovers by providing that such persons shall in law be deemed to have the charge and not the possession of cattle where the unlawful taking or disposition would if such persons were in charge merely as the servants of the owner amount to larceny —14 Vict. No. 6 (repealed 22 Vict. No. 9). In 1853 this statute was referred to in *R.* v. *Liffidge* (2), where, after discussing such cases as *Quarman* v. *Burnett* (3), *Milligan* v. *Wedge* (4), *R.* v. *Hey* (5), the Supreme Court of New South Wales held that a drover, being in the position of one who has an independent calling, was in possession and not charge merely, *Stephen* C.J. saying : " To hold that a person of that description, engaged on such a service, becomes thereby the employer's servant, subjecting the owner of the cattle to all the consequences of such a relation, we think would be as little consistent with reason, as with law " (6).

In the instant case it is clear from the facts that the owner had parted with the possession and control of the cattle. The obligation imposed on the drover to obey and carry out all lawful instructions is not a reservation of detailed control and possession having regard to the terms of the agreement as a whole.

But it was contended that the matter was concluded by *Logan* v. *Gilchrist, Watt & Cunningham* (7). In that case there was no fixed destination for the delivery of the sheep, but such as the owner might from time to time decide, and, as *Isaacs* A.C.J. said, " the sheep could be shifted all over the country," and his Honour decided that the grazier " maintained a constant right to intervene " and that he " had full control " (8). And *Higgins* J. said in effect that there was no rule of thumb of universal application to droving contracts, but that each case should be decided on its particular facts. *Gavan Duffy* J.,

(1) (1909) 26 W.N. (N.S.W.) 169.
(2) (1853) 1 Legge 793, at pp. 794, 795.
(3) (1840) 6 M. & W. 499, at p. 510 [151 E.R. 509, at p. 514].
(4) (1840) 10 L.J. Q.B. 19.
(5) (1849) 1 Den. 602 [169 E.R. 390]; (1849) 2 Car. & K. 983, at p. 987 [175 E.R. 413, at p. 414].
(6) (1853) 1 Legge 793, at p. 794.
(7) (1927) 33 A.L.R. 321.
(8) (1927) 33 A.L.R., at p. 322.

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

the other Justice who sat in the case, gave no reasons. I do not think that this case affects the authority of *R.* v. *Liffidge* (1) or is decisive of the present case. And see *Wyatt* v. *Forrester* (2), per *Macrossan* S.P.J.

For the reasons stated I consider that the drover was not the servant of the respondent company and that the payment to him does not fall within the list of words contained in s. 3 (1) under the heading " wages." I would answer both questions in the negative.

DIXON J. The object of this case stated is to obtain a decision upon the question whether, under the *Pay-roll Tax Assessment Act* 1941-1942, the appellant company is liable to tax upon payments made to drovers for the droving of cattle. The tax is levied on all wages paid or payable by any employer (s. 12). It must be paid by the employer who pays or is liable to pay the wages (s. 13). " Employer " means any person who pays or is liable to pay wages (s. 3 (1)). " Wages " means any wages, salary, commission, bonuses or allowances paid or payable (whether at piece-work rates or otherwise and whether paid or payable in cash or in kind) to any employee as such (s. 3 (1)). The definition is extended to cover, among other things, any payment made under any classes of contracts prescribed by regulations, to the extent to which that payment is attributable to labour (s. 3 (1)).

The drovers in question are paid at rates per head of the cattle driven calculated upon the number delivered at the place of destination. The company uses a form of agreement into which the drover enters. Under its provisions he agrees to " serve " the owners of the cattle in the capacity of a drover and to take charge of the specific cattle described, to drove them to the place of destination named, to obey and carry out all lawful instructions, to use the whole of his time, energy and ability in the careful droving of the stock in his charge, to report from time to time the number and condition of the cattle and to deliver them at the end of the journey. So much of the agreement is consistent with a contract of service. But the form proceeds to require the drover to find all men and plant, horses and rations necessary and sufficient for the safe droving of the cattle, and to pay all wages in connection therewith. It imposes upon him an obligation to take proper care of and to account for the stock and not to dispose of any of them without the owners' consent. It gives the owners a right at any time to terminate the agreement if the drover commits a breach, and in that event the drover must " accept instant dismissal at any time or place without

(1) (1853) 1 Legge 793.

(2) (1943) Q.S.R. 113, at pp. 117, 118.

recourse against the owners or any of their agents for such dismissal." Then, in consideration of the drover's well and faithfully performing the foregoing conditions, the owners agree to pay him the stipulated rate per head for all cattle delivered at the destination. The case stated says that in order to carry out his agreement a drover must employ men and provide horses, hobbles, saddlery, a wagonette with horses and harness, camping and cooking gear, and other equipment, and rations for himself and his men. An example is given in which the drover had to provide four men, thirty horses, eight sets of riding gear, that is, saddles, bridles and hobbles, as well as other equipment and rations.

I should not have thought that such a contract created the relation of master and servant, or employer and employee, between the cattle owners and the drover. It appears rather to be a contract for the performance of a service for one party by another who is to employ men and plant for the purpose and is to be paid according to the result. This view is confirmed by a number of cases. In *R.* v. *Goodbody* (1) a drover was entrusted by a farmer in Huntingdonshire with eight beasts to drive to London and deliver at Smithfield, unless he sold them on the road. He converted six of them and was indicted for larceny, but it was held that he was not a servant, having custody of the cattle; on the contrary they had been delivered into his possession. In *R.* v. *Hey* (2), pigs were given into the hands of a drover to take by rail from Newcastle to Leeds and deliver them to a named pig dealer. He sold them and absconded. A conviction for larceny of the pigs was held improper because he had received possession of the pigs. He could not be considered to have the mere custody of the pigs as a servant of the prosecutor, unless in driving them to market he was his servant, and on the whole the judges thought that was not the case. The fact of his being a drover by trade was one of the matters relied upon for this conclusion. In *Milligan* v. *Wedge* (3), a bullock driven from Smithfield ran into a showroom in Portland Road and damaged some articles. The bullock had been placed in the hands of a licensed drover, who employed a boy to drive it. The owner was held not to be liable. Lord *Denman* said: "He employs a drover, who employs a servant, who does the mischief. The drover, therefore, is liable, and not the owner of the beast" (4). *Coleridge* J. said that he made no distinction between the licensed drover and the boy. "The owner makes a contract with the drover that he shall drive the beast, and

(1) (1838) 8 C. & P. 665 [173 E.R. 664].
(2) (1849) 1 Den. 602 [169 E.R. 390]; (1849) 2 Car. & K. 983 [175 E.R. 413].
(3) (1840) 10 L.J. Q.B. 19.
(4) (1840) 12 A. & E., at p. 741 [113 E.R., at p. 995].

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

leaves it under his charge ; and then the drover does the act. The relation, therefore, of master and servant does not exist between them " (1).

In New South Wales in *R.* v. *Liffidge* (2), the same view was taken and it was said that the drover has an independent calling and is not in law the servant of his casual employer. It must be remembered that droving has been a well-recognized vocation, both here and in England, where it has a long history. For example, by 5 Eliz. c. 12, drovers must be licensed and they are to be married men and householders ; by 3 Car. I. c. 2, they must not ply their trade on Sunday, and, by 29 Car. II. c. 7, s. II, " no Drover . . . their or any of their Servants, shall travel or come into his or their Inn or Lodging upon the Lord's Day."

There is, of course, nothing to prevent a drover and his client forming the relation of employee and employer : See, for example, *Turnbull* v. *Wieland* (3). But whether they do so must depend on the facts. In considering the facts it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed and the cattle are handled. For instance, in the present case the circumstance that the drover agrees to obey and carry out all lawful instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered. That a reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract appears from *Reedie* v. *London and North Western Railway Co.* (4) ; *Steel* v. *South-Eastern Railway Co.* (5) ; *Hardaker* v. *Idle District Council* (6). See the observations of *McCardie* J. in *Performing Right Society Ltd.* v. *Mitchell and Booker (Palais de Danse) Ltd.* (7), and the passage there quoted from *Smith's Law of Master and Servant* (1922), 7th ed., p. 238.

However, in *Logan* v. *Gilchrist, Watt & Cunningham* (8), upon an analogous contract, this Court held that the owner of sheep stood in relation to the drover in the position of a master, and on that ground was responsible for the drover's allowing the sheep to trespass upon the plaintiff's holding and to depasture thereon. In view of this decision the appellant's counsel did not deny that the relation with which we are now concerned was that of employer and employee.

(1) (1840) 12 A. & E., at p. 742 [113 E.R., at p. 995].
(2) (1853) 1 Legge 793.
(3) (1916) 33 T.L.R. 143.
(4) (1849) 4 Ex. 244 [154 E.R. 1201].
(5) (1855) 16 C.B. 550 [139 E.R. 875].
(6) (1896) 1 Q.B. 335, per *Lindley* L.J., at p. 343 ; per *A. L. Smith* L.J., at p. 340.
(7) (1924) 1 K.B. 762, at p. 767.
(8) (1927) 33 A.L.R. 321.

But the conclusion of the Court in *Logan's Case* (1) that the relation was that of master and servant was rested upon the power of control reserved to the owner and made enforceable by " dismissal." The judgment was not considered, but was given at the conclusion of the opening of the appellant, and none of the foregoing cases appears to have been referred to. The case is not elsewhere reported. It is true that a considered judgment had been delivered in the Supreme Court of Queensland (2) and this was affirmed. But in that judgment not a little reliance was placed upon a case from Mauritius decided under the *Code Civil* there prevailing (*Serandat* v. *Saisse* (3)), as one in which the relation of master and servant was established, notwithstanding that the person contracting was to employ servants of his own. That this was a misapprehension has been pointed out by *Neal Macrossan* S.P.J. in *Wyatt* v. *Forrester* (4) —see too the report (5).

The actual decision in *Logan's Case* (1) is, I think, correct, and, moreover, the reservation of the right of control serves strongly to support it; not because it shows that a relation of master and servant existed, but because it shows conclusively that the drover's possession of the sheep was not an independent possession in his own right. The case was one of cattle trespass, presumably trespass from the highway. In cattle trespass from a highway the liability of the " owner " is qualified. He is not responsible if the damage was not caused intentionally and could not have been avoided by the exercise on his part of reasonable care and skill: See *Glanville Williams* on *Liability for Animals*, p. 372, *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.* (6). The person responsible as " owner " in cattle trespass is he who has exclusive possession and control: See *Glanville Williams*, *op. cit.*, p. 178. But where possession is held on behalf of the actual owner and is to be used under his direction and control, his responsibility must remain. He cannot treat the neglect of a drover in possession as his agent as the " act of a third party " (*ibid.*, pp. 170 and 184)—cf. *Pinn* v. *Rew* (7). In a note on page 184 Mr. *Glanville Williams* makes the comment on *Logan* v. *Gilchrist*, *Watt & Cunningham* (1) that the arguments assumed either that " act of a third party " is a defence or that the owner of cattle is not liable for them when out of possession.

Upon this state of authority I do not think that we ought to hold that the payments made by the appellant company to the drovers fall within the provisions of the *Pay-roll Tax Assessment Act*. The

(1) (1927) 33 A.L.R. 321.
(2) (1927) Q.S.R. 185.
(3) (1866) L.R. 1 P.C. 152.
(4) (1943) Q.S.R. 113, at pp. 117, 118.
(5) (1866) L.R. 1 P.C., at pp. 156, 167-168.
(6) (1924) 2 K.B. 75, at pp. 79-83.
(7) (1916) 32 T.L.R. 451.

H. C. OF A. 1945.

QUEENSLAND STATIONS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

words " wages, salary, commission, bonuses or allowances paid or payable . . . to any employee as such " are, on the face of them, inappropriate to payments at a rate per head for cattle delivered by a drover employing his own men and plant for the purpose. It is difficult to fit such payments under the word " wages," under " salary," under " commission," and still more to fit them under " bonuses " or " allowances." In a case where the ordinary relation of employer and employee clearly subsisted, a difficulty in fitting the remuneration into one of these five descriptions might not be an insuperable objection to liability to the tax. But here we are asked to begin by giving literal effect to the decision in *Logan's Case* (1) that a relation of master and servant existed, to apply it blindly to the *Pay-roll Tax Assessment Act*, although the decision related to the principle commonly denoted by the phrase *respondeat superior*, and then by way of consequence to drag the payments under one or other of the expressions contained in the words of the definition of " wages."

I think in the state of authority I have described we ought not to follow this course. We should on the contrary consider afresh whether the whole transaction can fairly be brought within the tax. So considering the matter I am clearly of opinion that it cannot.

I think the questions in the case stated should both be answered : No.

Questions in case answered (1) *No.* (2) *No. Costs of case to be costs in the appeal. Case remitted to Chief Justice.*

Solicitors for the appellant, *Cannan & Peterson.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

B. J. J.

(1) (1927) 33 A.L.R. 321.