[HIGH COURT OF AUSTRALIA.]

STEELE . . . . . APPELLANT;
DEFENDANT,

AND

TARDIANI AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1946.

BRISBANE, *June* 18, 19.

SYDNEY, *July* 30.

Latham C.J. Dixon and McTiernan JJ.

Work and Labour—Special contract—Cutting firewood—Widths not in accordance with contract—Acceptance—Quantum meruit—Work covered by industrial award—Jurisdiction of Supreme Court—The Industrial Conciliation and Arbitration Acts 1932 *to* 1942 (*Q.*) (23 *Geo. V. No.* 36—6 *Geo. VI. No.* 21), *s.* 17—*National Security* (*Economic Organization*) *Regulations* (*S.R.* 1942 *No.* 76—1943 *No.* 142), *reg.* 15 (1).

The plaintiffs were enemy aliens who were released from internment to work for the defendant. The plaintiffs alleged a contract, under the terms of which they were to cut for the defendant firewood into six feet lengths, each length being of a diameter of approximately twelve inches. The plaintiffs further alleged that they were to be paid at the rate of eight shillings per ton. The plaintiffs claimed that they had cut 2,000 tons of firewood in accordance with this contract.

The defendant alleged that under the terms of the contract the diameter of each length was to be only six inches and that payment was to be made at the rate of six shillings and one penny per ton in accordance with the terms of a State industrial award. The defendant alleged that the plaintiffs had cut considerably less timber than they claimed to have cut and that the work was performed so negligently as to be of no value to him. He also relied upon the defence that the plaintiffs' claim, being covered by an award, was by the *Industrial Conciliation and Arbitration Acts* 1932 *to* 1943 (Q.) within the exclusive jurisdiction of the Industrial Court.

The trial judge found that the contract was to cut firewood into lengths each six feet long and six inches in diameter; that payment was to be made

at the rate of eight shillings per ton, and that the amount of timber cut by the plaintiffs was 1,500 tons split into lengths varying from six inches to fifteen inches in diameter. He held that the defendant was liable under the contract to accept and pay for the firewood which was cut to the proper dimensions, and that he was liable to pay a fair price for the other firewood because he in fact accepted the benefit of the plaintiffs' work by taking possession of the firewood and selling it. He accordingly made an allowance for the cost of splitting the wood to six inches diameter and entered judgment for the plaintiffs for the sum of £367 17s. 10d.

On appeal, a majority of the Full Court of the Supreme Court held that, on the evidence, the contract was to cut firewood of varying lengths and diameters and that payment therefor was to be at the rate of eight shillings per ton. The Full Court accordingly varied the judgment of the trial judge, and entered judgment for the plaintiffs for the sum of £400.

Held that the findings and judgment of the trial judge should be restored.

Held, further, that the plaintiffs were entitled to recover on a *quantum meruit*, since although the contract was special and unperformed, a new contract could be implied from the circumstances under which the defendant allowed the plaintiffs without any objections to split the wood to widths greater than six inches and subsequently disposed of the wood.

Held, further, that as the contract price was higher than the rate prescribed by an industrial award the Supreme Court had jurisdiction to determine the matter.

Coakley v. *Groth* ((1935) Q.S.R. 220) and *Bustin* v. *Bustin* ((1928) 22 Q.J.P.R. 71), approved.

Effect of reg. 15 (1) of the *National Security* (*Economic Organization*) *Regulations* considered.

Decision of the Supreme Court of Queensland (Full Court), varied.

APPEAL from the Supreme Court of Queensland.

The respondents to the appeal, Mario Tardiani, Marina Pola and Alfio de Mauro, were three Italian internees, who, by an order made pursuant to the provisions of the *National Security* (*Aliens Control*) *Regulations*, had been released from internment and permitted to accept employment from the defendant Edward Beevor Steele. They sued Steele in the Supreme Court of Queensland for £762 being the balance of moneys claimed to be due for cutting firewood on the defendant's property and for erecting a fence. The particulars filed with the writ showed that the claim was for cutting 2,000 tons of firewood into six feet lengths at eight shillings per ton. Credit was given for payment on account of £43.

The plaintiffs alleged that in January 1943, they agreed with the defendant to cut firewood on his property into lengths of six

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feet and with a diameter of twelve inches. They further alleged that payment was to be at the rate of eight shillings per ton. At the trial before E. A. Douglas J., without a jury, the plaintiffs gave evidence that they had cut 2,000 tons of firewood in accordance with the terms of their contract.

By his defence the defendant denied that the rate of payment agreed upon was eight shillings per ton, and alleged that the employment of the plaintiffs was in accordance with the provisions of the *Firewood Cutting and Charcoal Burning Award—Southern Division* made by the Industrial Court (Q.) on 23rd April 1942, which provided for a minimum rate of six shillings and one penny per ton for cutting firewood of lengths not less than five feet six inches and that extra work should be paid for at an additional rate as mutually arranged between the employer and his employees. The defendant further alleged that the terms of the contract provided that the diameter of the firewood was to be six inches, and not twelve inches as claimed by the plaintiffs. The defendant claimed that the work was not performed in accordance with the terms of the contract, or the provisions of the award, and that as the work was covered by an award the matters in dispute were within the exclusive jurisdiction of the Industrial Court (Q.). At the trial the defendant denied that the plaintiffs had cut the amount of wood that they claimed to have cut.

Section 17 of *The Industrial Conciliation and Arbitration Acts* 1932 *to* 1942 (Q.) is as follows: "The jurisdiction of the Court in all industrial causes, whether original or by appeal, conferred on it by this Act shall be exclusive."

An "industrial cause" is defined by s. 4 to include industrial matters and industrial disputes. By the same section the term "industrial matters" means *inter alia* matters or things affecting or relating to work done or to be done or the privileges rights or duties of employers or employees and includes all or any matters relating to wages allowances or remuneration of any person employed or to be employed.

The trial judge found that the contract was to cut firewood six feet in length and six inches in diameter. He also found that payment was originally to be at the rate of six shillings per ton, but that, after three weeks, the rate was increased by agreement to eight shillings per ton. He also found that the amount of timber cut by the plaintiffs was 1,500 tons, split in diameters that varied from six inches to fifteen inches.

It appeared from the evidence that the defendant considered that the plaintiffs were bound by the restrictions imposed upon them

to go on working for him, that he allowed them to continue cutting timber of a diameter of more than six inches and raised no objection; that, notwithstanding this disconformity with the terms of the contract, he afterwards promised to pay for the wood cut if and when it was delivered to a buyer; that he suffered them to leave his employment without informing them that they must split the firewood again in order to reduce its diameter, if they were to be paid, he then having reason to suppose that they did not consider that he was insisting upon this requirement.

The trial judge made an allowance for the cost of reducing to six inches the timber which was of a greater diameter, and awarded an amount of £320 13s. 4d. as a fair estimate of the plaintiffs' work. He held that the defendant was liable under the contract to accept and pay for the firewood which was cut to the proper dimensions, and that he was liable to pay a fair price for the other firewood because he in fact accepted the benefit of the plaintiffs' work by taking possession of the firewood and selling it.

The plaintiffs also succeeded on a claim for the erection of a fence, and judgment was entered for the plaintiffs for the sum of £367 17s. 10d.

On appeal, the Full Court accepted the finding of 1,500 tons as the quantity cut by the plaintiffs. A majority of the Court, *Philp* and *Mansfield* JJ., examined the evidence given at the trial and came to the conclusion that the evidence of the plaintiff Tardiani should be preferred to that of the defendant wherever there was a conflict and found that the contract was to cut firewood for an indefinite period in varying lengths and widths at eight shillings per ton, each ton so cut to be paid for within a reasonable time. The majority accordingly held that the plaintiffs had substantially performed their obligations under the contract, and fixed the amount properly awardable to them at £447. *Stanley* A.J. was of the opinion that the amount of the judgment should not be increased.

From that decision the defendant appealed to the High Court.

Real (with him *Jeffriess*) for the appellant. On the evidence the trial judge should have found for the defendant. He disbelieved the plaintiff Tardiani in material matters and should not have accepted any of Tardiani's evidence. The Full Court was wrong in making findings different from those of the trial judge and in increasing the amount of the judgment. There was a special contract to cut firewood in certain lengths and to a certain diameter, which the trial judge found to be six inches. Most of the timber cut was not

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six inches in diameter. The plaintiffs were not entitled to any remuneration until all wood was split to that diameter (*H. Dakin & Co. Ltd.* v. *Lee* (1); *Eshelby* v. *Federated European Bank Ltd.* (2); *Horton* v. *Jones* (*No.* 2) (3)). The claim is an industrial matter and is within the exclusive jurisdiction of the Industrial Court. (*Industrial Conciliation and Arbitration Acts* 1932 *to* 1942 (Q.), ss. 4, 7, 17, 68; *Coakley* v. *Groth* (4); *Bustin* v. *Bustin* (5)). Under the *National Security* (*Economic Organization*) *Regulations*, reg. 15 (1), it was unlawful for the defendant to employ the plaintiffs at a rate higher than that prescribed by an industrial award. From the award in evidence it could be inferred that there was an award in force on 15th February 1942, which governed firewood cutting at rates less than eight shillings per ton. Therefore the only remedy open to the plaintiffs is the recovery in the Industrial Court of wages due under the award.

Julius, for the respondents. The *National Security* (*Economic Organization*) *Regulations* do not apply. The defendants are independant contractors. The relationship was not that of employer and employee. It is founded on contract, and as the contract price is higher than the award rate it may be recovered by an action in the Supreme Court. The matter does not come within the exclusive jurisdiction of the Industrial Court. (*Bustin* v. *Bustin* (6); *Coakley* v. *Groth* (4); *Tardiani* v. *Steele* (7)). The award provides for the cutting of firewood, but makes no provision for splitting. That would be extra work, the rate for which would be a matter for agreement, thus taking it out of the award and making the basis of the plaintiffs' claim in contract. If the *National Security Regulations* did apply their effect would be to prevent the plaintiffs recovering in the Supreme Court any more than the award rate. There is ample evidence upon which the Full Court could make its findings and these should not be disturbed. If the contract were for splitting to six inches in diameter, it has been substantially performed and the plaintiffs are entitled to recover. The transaction could be regarded as a number of contracts, entitling the plaintiffs to sue on those performed.

Real in reply.

Cur. adv. vult.

(1) (1916) 1 K.B. 566, at pp. 581, 582.
(2) (1932) 1 K.B. 254, at p. 423.
(3) (1939) 39 S.R. (N.S.W.) 305, at p. 319.
(4) (1935) Q.S.R. 220.
(5) (1928) 22 Q.J.P.R. 71.
(6) (1928) 22 Q.J.P.R. 71, at p. 75.
(7) (1943) Q.S.R. 268.

The following written judgments were delivered:—

LATHAM C.J. The respondents to this appeal are three Italian internees who were released from internment and permitted to accept employment from the defendant E. B. Steele. They sued Steele for money claimed to be due for cutting firewood on his property at Landsborough and for erecting a fence. The learned trial judge, *E. A. Douglas* J., gave judgment for the plaintiffs for £367 17s. 10d.—allowing £320 13s. 4d. for cutting firewood and £47 4s. 6d. for erecting the fence. Upon appeal by the defendant to the Full Court the amount of the judgment was increased to £400. The defendant appeals to this court. I propose to deal first with the claim for cutting firewood.

In the endorsement on the writ which stood as a statement of claim the plaintiffs claimed £762 as the balance owing for work and labour done on the defendant's property under a contract of employment made on or about 30th January 1943. The particulars given showed that the claim was for cutting 2,000 tons of firewood into six feet lengths at eight shillings per ton. Credit was given for a payment on account of £43. There was a further claim of £5 for the cost of building a saw bench which the learned judge disallowed.

In his defence the defendant alleged that the employment was in accordance with the provisions of a *Firewood Cutting and Charcoal Burning Award—Southern Division*, made by the Industrial Court of Queensland, and that the plaintiffs refused to comply with the provisions of the award and failed to perform the work in accordance with the award. He alleged that he paid £45 on account and was not indebted to the plaintiffs in any further sum and that the work performed by the plaintiffs was done so negligently and improperly that it was of no value to him. The defendant further relied upon the defence that the plaintiffs' claim, if any, for cutting firewood was covered by an industrial award and was within the exclusive jurisdiction of the Industrial Court of Queensland.

There was a conflict of evidence as to the terms upon which the plaintiffs were employed, as to the performance of the contract in respect of the dimensions of the firewood cut, and as to the quantity cut. The learned judge found that the agreement was originally for six shillings per ton, but that after three weeks the parties agreed that the price should be increased to eight shillings per ton. The price of six shillings per ton was regarded as being the price fixed by an award and for this reason the claim at this rate was treated as falling within the exclusive jurisdiction of the Industrial Court. On this ground the plaintiffs abandoned the claim for the first three weeks. The price of eight shillings per ton was in excess of the price fixed

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for cutting firewood under the award, and it was contended for the plaintiffs that the claim was therefore not within the exclusive jurisdiction of the Industrial Court and was within the jurisdiction of the Supreme Court.

The defendant denied that he agreed to pay eight shillings per ton, but the learned trial judge accepted the evidence of the plaintiff Tardiani on this matter.

There was no dispute as to the lengths into which the firewood was to be cut, namely about six feet. There was, however, a direct conflict of evidence as to the diameter to which the firewood was to be split. There was evidence for the plaintiffs that originally the agreement was that it was to be split to twelve inches in diameter and that later the defendant varied the dimensions from time to time and that the plaintiffs split the firewood in accordance with the orders so given by the defendant. The defendant, on the other hand, gave evidence that at all times the agreement was that the firewood was to be cut to a diameter of six inches. The learned judge on this issue preferred the evidence of the defendant. He accordingly found that the contract was to cut firewood to a length of about six feet and to split it to a diameter of six inches.

There was also a conflict of evidence as to the quantity which the plaintiffs cut. The estimates of witnesses varied from 560 tons to 1,200 tons, 1,500 tons and 2,000 tons. The learned judge found that the plaintiffs cut 1,500 tons, but that most of it was not split to a diameter of six inches. He made an allowance for the cost of reducing to six inches the timber which was of a greater diameter, and thus reached an amount of £320 13s. 4d. as a fair estimate of the value of the plaintiffs' work. He held that the defendant was liable under the contract to accept and pay for the firewood which was cut to the proper dimensions, and that he was liable to pay a fair price for the other firewood because he in fact accepted the benefit of the plaintiffs' work by taking possession of the firewood and selling it.

In the Full Court *Philp* and *Mansfield* JJ. examined the evidence and came to the conclusion that the evidence of the plaintiff Tardiani should be preferred to that of the defendant Steele wherever there was a conflict. This conclusion was principally based upon what was regarded as the improbability of the defendant allowing the plaintiffs to go on cutting firewood to dimensions which were not in accordance with his wishes from time to time. *Philp* and *Mansfield* JJ. were also of opinion that Steele was attempting to exploit the plaintiffs, who were foreigners with an imperfect acquaintance with the English language. All the learned judges in the Full Court accepted the estimate of 1,500 tons as being the quantity cut by the

plaintiffs, and *Philp* and *Mansfield* JJ. held that the plaintiffs substantially performed their contract and, assessing the sum due as a jury, fixed the amount properly awardable to the plaintiffs at £400.

It is clear that the plaintiffs were not employed to cut any particular quantity of timber. They were to cut timber at a price per ton and either party was entitled to terminate the employment at any time. Such a termination could not be regarded on either side as a breach or repudiation of the contract.

There was evidence to support the finding of the learned trial judge that the agreement was varied as to price after the first three weeks. Upon this matter the learned judge accepted the evidence of Tardiani and rejected that of Steele. With respect to the diameter of the timber, the learned judge preferred the evidence of Steele to that of Tardiani. In my opinion it is unsatisfactory to disturb such a finding upon the view of an appellate court based upon the probability of the defendant allowing the plaintiffs to go on cutting the firewood otherwise than in accordance with his wishes (as alleged by him but denied by the plaintiffs) stated from time to time. This aspect of the case is a matter which would affect any decision as to the credibility of the parties, but there is no reason to believe that so obvious a matter was not taken into account by the learned trial judge in forming his estimate of credibility.

The evidence as to the quantity cut consists of varying estimates, and is obviously lacking in precision, but it is clear that the plaintiffs did cut a large quantity of timber, and the learned judge did his best in arriving at 1,500 tons as the quantity cut. There is no satisfactory reason for disturbing this finding.

The principle of law applicable is shortly stated in *Bullen & Leake, Precedents of Pleadings*, 3rd ed. (1868), at p. 41 :—" Where work is done by one party under a special contract, but not according to its terms, the other may refuse to accept it (*Ellis* v. *Hamlen* (1)) ; but if he does accept it and takes the benefit of it, he may be sued for the value in this count [that is, the common indebitatus count for work done]. (*Burn* v. *Miller* (2)). (*Farnsworth* v. *Garrard* (3))."

The appellant pressed upon the court the rule established in *Cutter* v. *Powell* (4) (and see *Sumpter* v. *Hedges* (5)), that if work is done under a special contract no payment can be recovered under the contract until the work is completed. The application of this principle to the present case means that under the contract found to

(1) (1810) 3 Taunt. 52 [128 E.R. 21].
(2) (1813) 4 Taunt. 745 [128 E.R. 523].
(3) (1807) 1 Camp. 38 [170 E.R. 867].
(4) (1795) 6 T.R. 320 [101 E.R. 573].
(5) (1898) 1 Q.B. 673.

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have been made between the parties the plaintiffs cannot recover any payment for any firewood not cut in accordance with the terms of the contract, that is, split to a diameter of six inches. In order to recover any payment in respect of such firewood the plaintiffs must claim upon a *quantum meruit* and such a claim cannot be allowed unless there is evidence of a fresh contract to pay for that firewood. It was strongly (and rightly) argued that the plaintiffs could not put the defendant in the position of having to pay for firewood not in accordance with the contract merely because he used or sold that firewood. Such use or sale is not in itself evidence of a new contract. The plaintiffs could not impose a new contract upon the defendant upon the basis that, unless he left the firewood to decay upon the ground, he became bound to pay them as if he had employed them on other than the contractual terms. But there is, I think, sufficient evidence to support an inference of a new contract in the present case. The relevant facts have been carefully analysed by my brother *Dixon* in his reasons for judgment and I agree with the conclusion upon this matter which he has reached. The learned trial judge calculated the value of the work by making an estimate of the quantity of firewood which was in accordance with the contract and of the quantity which was not in accordance with the contract and made a deduction from the contract price in respect of the whole quantity by making an estimate of the work which would be necessary to make all the firewood accord with the contract. Such an estimate could not be precise, but there was evidence to support the finding made and the judgment on this part of the case should, in my opinion, be allowed to stand.

It is contended, however, that the Supreme Court had no jurisdiction to entertain the claim because the *Industrial Conciliation and Arbitration Act of* 1932 (Q.) provides in s. 7 that the Industrial Court shall have jurisdiction to hear and determine all questions arising under the Act and any question arising out of an industrial matter. " Industrial matter " is defined (s. 4) to mean (*inter alia*) matters or things affecting or relating to work done or to be done. Section 17 provides that the jurisdiction of the Industrial Court in all industrial causes shall be exclusive. " Industrial cause " includes an industrial matter (s. 4). Section 68 provides that an award prevails over any contract so far as the contract is inconsistent with its terms.

The plaintiffs seek to avoid the application of these provisions by two arguments. In the first place it is argued that the award does not provide for splitting timber to a diameter, but only for cutting into lengths, and that splitting is extra work under the award for

which no rates are fixed, so that the parties are free to make their own agreement as to rates. The only award in evidence (dated 23rd April 1942) provides minimum rates of pay per cord for employees engaged in cutting firewood on piece-work as follows :—

"(*a*) Assisting to load once only into drays, waggons, or trucks ; or

(*b*) Stacking at the stump— s. d.

Where wood is cut into lengths of not less than 5 feet 6 inches 12 2

Where wood is cut into lengths less than 5 feet 6 inches 13 9

Where employees are employed to cut wood by the ton, [as in the present case] the rate per ton shall be one-half the rate per cord.

Any extra work shall be paid for at an additional rate to be mutually arranged between the employer and his employees."

The argument for the plaintiffs is that the award deals only with cutting, loading or stacking in respect of wood cut into particular lengths, and that where wood is to be split to a particular diameter the splitting is extra work not falling within the award provisions as to rates of pay. In my opinion this contention should not be accepted. The award fixes rates in relation to the lengths into which wood is to be cut, irrespective of diameter. Whatever may be the lengths into which any wood is cut, it must be of *some* diameter, and there is no reason for regarding splitting to some particular diameter as extra work as compared with splitting to some other diameter. Accordingly, I am of opinion that the rates prescribed by the award apply whatever the arrangement may be as to the diameter into which the wood is to be split. Accordingly this argument for supporting the jurisdiction of the Supreme Court should not, in my opinion, be accepted.

The second argument of the plaintiffs is founded upon the decisions in *Coakley* v. *Groth* (1) and *Bustin* v. *Bustin* (2), that where the amount claimed for work to which an award applies is an amount greater than that provided for by the award the Supreme Court has jurisdiction. Both parties accepted the principle which was worked out in these cases.

One half the rate per cord (twelve shillings and twopence) where the wood is cut into lengths of not less than six inches would be six shillings and one penny, and that is therefore the rate per ton fixed by the award. Here the contract rate was eight shillings per ton, and therefore the claim is a claim for moneys payable under an agreement

(1) (1935) Q.S.R. 220. (2) (1928) 22 Q.J.P.R. 71.

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at a rate in excess of the rate prescribed by the award, and in accordance with the decisions of the Queensland Supreme Court to which reference has already been made the Supreme Court had jurisdiction to entertain the claim—unless the defendant should succeed upon a contention now to be stated.

It is contended for the defendant that the *Economic Organization Regulations* made under the *National Security Act* 1939-1943 prevent the employer paying and the employee receiving any sum higher than the award rate : See reg. 15. But reg. 15 (1), to use the ordinary phrase, " pegs " wages at the rates fixed by awards in force on 10th February 1942 (par. (*a*)) or at other ruling rates in force on that date (par. (*b*)). In the present case there is no evidence as to the rates which on 10th February 1942 were in force by virtue of an award or otherwise. Accordingly the objection based upon the *Economic Organization Regulations* fails, and it was rightly held by the learned trial judge and the Full Court that the Supreme Court was not deprived of jurisdiction.

There was a conflict of evidence as to the contract for building the fence. The main objection of the defendant was based upon the fact that the fence was erected not upon his property, but upon the property of one Frizzo, which property was separated from the defendant's property by a road, and that he did not give any orders for a fence to be erected on Frizzo's property. The learned judge, however, inspected the *locus in quo* and found that the defendant had in effect taken an unused road into his property. This fact displaces the *a priori* improbability that the defendant gave an order for building the fence in the position in which it was in fact placed. The learned judge upon a conflict of evidence found for the plaintiffs, and there is no reason to displace this finding.

I am therefore of opinion that the judgment of the learned trial judge should be restored and the order of the Full Court varied accordingly. The result is that the defendant has gained by the appeal a sum of £22 2s. 2d.—the difference between £377 17s. 10d. and £400.

In my opinion justice will be done on the whole by directing that the order of the Full Court be varied only in the manner stated (so that the plaintiffs will have their costs of the action and of the appeal to the Supreme Court) and that the parties abide their own costs of the appeal to this court.

DIXON J. The plaintiffs, who are the respondents upon this appeal, are three Italians who, in 1942, were interned in Queensland. The appellant, who is the defendant in the action, described himself as

" a solicitor and registered firewood producer." It is in the latter capacity that he has been sued, though it is conceivable that but for the former capacity he might not have claimed to be aggrieved by the judgments pronounced against him by the Supreme Court of Queensland upon the trial of the action and upon appeal.

A place at which he produces firewood is called " Glenview " and is situated about seven or eight miles from Landsborough. About 6th January 1943, the Deputy Director of Security for Queensland acting under delegations pursuant to the *National Security (Aliens Control) Regulations*, imposed upon the three Italians, as an incident of their release from internment, certain restrictions, one of which was that they should be employed by the defendant on his property known as Glenview via Landsborough and nowhere else without the permission of the Deputy Director of Security first had and obtained.

About 30th January 1943, the defendant saw two of the plaintiffs, Tardiani and Pola, together with a compatriot named Pelleri. He employed the three plaintiffs to cut firewood at a price per ton. There is a dispute between the parties as to the terms of the employment.

According to the defendant they were employed at the award rate, which was six shillings and one penny per ton, and were required to cut wood in lengths of six feet and split it into sections six inches wide, or six inches " in diameter " and to stack it, and, if necessary, to load it ; payment was to be upon railway weights. He says that he subsequently told the third plaintiff, de Mauro, that the terms were " award rates and conditions."

For the most part the plaintiffs did not split the wood into pieces of six inch section or diameter and they did not stack it and their case is that no section was specified as part of their contract and there was no express stipulation for stacking. Dimensions were matters depending upon particular instructions which were given and varied from time to time, though the initial instruction was to cut six feet long and no more than twelve inches wide.

The three plaintiffs worked at Glenview cutting wood from 1st February until 5th June 1943, or possibly a little longer. Pelleri went off to other work. During that period they received few payments. On 8th April, the defendant paid them a cheque for £20 on general account, and, on 8th May, another cheque on general account and £16 in respect of a specified delivery of wood to buyers named John Fischle & Sons of Bald Hills. According to the defendant, about 6th May, Tardiani asked him for money, saying that he had five hundred tons of the required dimensions, and he, the defendant, speaking in reference to the order from John Fischle &

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Sons, said that, if the plaintiffs showed him fifty tons which could be loaded for that firm, he would pay the plaintiffs £20, as well as £16 for the wood taken. In fact, he says, they delivered only forty-two tons. No further payments were made, except small sums amounting to £5.

The defendant's version is that he refused to pay them until the wood could be removed and that he told them that a lot was over twenty feet in length and that it would all have to be cut to six feet and that a lot was a foot and over in diameter and it would all have to be split six inches wide. The plaintiffs' case was that no such complaint was made, but that the defendant said he would pay them as and when the wood was delivered to buyers.

At length, at the end of May 1943, Tardiani and the other plaintiffs desired to leave the defendant for other employment. The latter made some attempt to place Tardiani with a friend and neighbour, but, according to Tardiani, the defendant maintained that they could not leave him, they were to serve him for the duration of the war. However, the defendant took Tardiani down to Brisbane on Saturday 29th May and, on the Monday, he and Tardiani together interviewed the officers of the Deputy Director of Security. The latter raised no obstacle to Tardiani's changing his employment and left him free to go elsewhere.

While the defendant swore that at this stage he expressly maintained his refusal to pay any more to the plaintiffs until the wood was cut properly, Tardiani swore that the defendant offered him £120 for himself payable at £8 a week, if he would stay on, and offered it as a payment to be suppressed from Pola and de Mauro. The defendant also said that, after the plaintiffs had left, he told Tardiani that, if they would come back and cut the wood properly for him, he " would pay them as it went away." However, they took up other employment. What quantity of cut wood they left at Glenview and in what condition was a matter of wide dispute.

The defendant gave evidence of precise quantities disposed of by him and did so on the footing that these quantities accounted for the whole : viz. (*a*) ninety-eight and a half tons which he caused to be cut to six feet and split to six inches at a cost of four shillings and sixpence a ton and consigned in July and August to Enoggera ; (*b*) two hundred and thirty-two tons similarly cut and split between 3rd October and 22nd December 1943 and consigned to the United States Army, Roma Street Railway Station, Brisbane ; (*c*) ten tons included in a parcel similarly dealt with between 3rd and 11th January 1944 ; (*d*) two tons likewise consigned to the United States Army on 4th December 1943 ; (*e*) ten tons rejected by the United

States Army and still on the ground. According to this the plaintiffs had left on the ground only a total of three hundred and fifty-two and a half tons. But the defendant called a witness whose evidence, if accepted, would make this total impossibly high. He was an industrial inspector whom the defendant had invoked to settle the dispute and who had inspected the timber on 24th July 1943. The book, which this witness produced, purported to record an amount only of twelve and a half cords and sixteen hundred and eighty-nine pieces.

On the other side, Tardiani estimated the timber they had cut at two thousand tons; and the sergeant of police to whom the plaintiffs were bound to report deposed that he saw a large amount of timber cut into lengths of about six feet which was later removed either to Landsborough railway station or by United States Army trucks and that he estimated the quantity at fifteen hundred tons. Pelleri said that in August 1943 there were twelve hundred tons lying on the ground. The plaintiffs also called a witness who had been taken by their solicitor as an expert to examine the timber. The solicitor and the expert went there on 12th August 1943, about a month after the issue of the writ. De Mauro showed them round. The expert, whose evidence the trial judge described as most reliable, said that he saw the cut wood lying thickly all over the paddocks and saw many hundreds of places whence timber had been removed, the marks of which showed its length. He estimated the quantity at two thousand tons and said that the lengths were six feet mostly. There were a few of twenty feet, but he had not included them in his estimate. The widths were six inches to fifteen inches, mostly about twelve inches.

There was also evidence that the average woodcutter works at the rate of about six tons a day of such wood. The plaintiffs had cut wood five and a half days a week during their sojourn with the defendant.

The parties were irreconcilably at issue not only about the quantities cut and about the original terms and conditions; there was also a sharp contradiction concerning an increase of price. Tardiani swore, and the defendant denied, that three weeks after the work had begun the defendant, in response to Tardiani's representations, had agreed to increase the rate by two shillings a ton, which, on Tardiani's view, made it eight shillings a ton.

E. A. Douglas J., who tried the action, appears to have resolved most of the foregoing conflicts in favour of the plaintiffs and it is plain that, in the main, he did not accept the defendant's version of the transactions between him and the plaintiffs. He found that

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the rate had been increased to eight shillings a ton and he found that the plaintiffs had cut fifteen hundred tons of wood and that there was very little of it that was substantially more than six feet in length. But in one respect he accepted the defendant's view; he found that the contract was to split to a width or "diameter" of six inches. The explanation of his Honour's acceptance of the defendant upon this point is doubtless to be found in an answer given by Pelleri in his cross-examination, which, although as recorded, it betrays some confusion, may well have meant that Pelleri was present at the first interview between Tardiani and the defendant and that the latter then said that the plaintiffs were to cut the firewood to a length of six feet and a diameter of six inches.

In the Full Court, the majority of the learned judges were of opinion that the finding that a width or diameter of six inches was stipulated as part of the contract ought not to stand. Their Honours set out some considerations of fact leading to this opinion, considerations the weight of which can hardly be denied. They, accordingly, treated the contract as containing no specification of the width to which the plaintiffs were to cut firewood. The consequence was that the chief difficulty in the way of recovery by the plaintiffs disappeared from the case, namely their failure to do the work in conformity with the terms of the special contract to which, prima facie, their title to remuneration should be referred. But, notwithstanding the strength of some of the reasons given in the Full Court for their Honours' refusal to believe that a width of six inches was specified as a condition of the contract, I have come to the conclusion that the finding by the primary judge that the contract did include such a term should not be disturbed. It rests on his acceptance of oral testimony and in particular of his appraisal of the true meaning and reliability of the answers given by Pelleri on the specific subject during his cross-examination. The case is, I think, completely within the rule of caution by which Lord *Sumner*, in the case of *S.S. Hontestroom* v. *S.S. Sagaporack* (1) qualifies his striking statement that to treat an appeal as a rehearing is a matter of justice and of judicial obligation. "None the less," he says, "not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

(1) (1927) A.C. 37, at p. 47.

Taking, therefore, the defendant's contract to have been to pay so much per ton for firewood cut to a length of about six feet and to a width or diameter of about six inches, it is clear that, for the greater part of the wood they cut, the plaintiffs failed to split the wood to the required width. Upon what basis then can they recover remuneration in respect of work incompletely performed ? It is true that they were not employed to do a single piece of work under one entire contract so that, until the whole had been substantially performed, they would obtain no right to any payment. In that sense, it is not like the contract to build two houses for a single lump sum made by the unsuccessful plaintiff in *Sumpter* v. *Hedges* (1). The contract made by the three released Italians in the present case is infinitely divisible. For I assume that the amount per ton fixed, whether six shillings or eight shillings, is but a rate of remuneration to be applied to the actual firewood cut according to the requirements of the contract, even to hundredweights and quarters. I should not think that to-day a contract to produce paper at a rate per quire would be treated as giving no remuneration for part of a quire, as it was in the seventeenth century in *Needler* v. *Guest* (2). Moreover, it would seem that the plaintiffs were employed under a contract of service and one continuing until terminated by either side : See *Sadler* v. *Henlock* (3) and *Blake* v. *Thirst* (4) and contrast *Queensland Stations Pty. Ltd.* v. *Commissioner of Taxation* (5). But it can hardly be denied that the consideration which the employees were to give for the remuneration is firewood cut according to contract and, so to speak, only those billets or sticks can be counted which qualify by substantial or reasonable compliance with the specifications. In this sense the terms of remuneration are " entire," or, in other words, each divisible application of the contract is entire and is only satisfied by performance, not partial, but substantially complete. For such a case falls within the general proposition stated in *E. V. Williams' Notes to Saunders*, 6th ed. (1845), vol. I. : *Pordage* v. *Cole* (6) :— " Where the consideration for the payment of money is entire and indivisible, as where the benefit expected by the defendant under the agreement is to result from the enjoyment of every part of the consideration jointly, so that the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury, no action is maintainable, if any part of the consideration has failed ; for, being entire, by failing partially, it fails altogether."

(1) (1898) 1 Q.B. 673.
(2) (1647) Aleyn. 9 [82 E.R. 886].
(3) (1855) 4 El. & Bl. 570 [119 E.R. 209].
(4) (1863) 2 H. & C. 20 [159 E.R. 9].
(5) (1945) 70 C.L.R. 539.
(6) (1669) 1 Wms. Saund. 319*l*, at pp. 320*d* and *e*.

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It is impossible, therefore, for the plaintiffs in respect of timber not split to about six inches in width to recover upon the special contract while it remains thus open and unperformed; unless, that is, there are grounds in the facts of the case for treating them as dispensed from the necessity of splitting the wood to such a width as a condition of payment. To recover under a *quantum meruit* for wood split to substantially different widths from that required, the plaintiffs must show circumstances removing their right to remuneration from the exact conditions of the special contract. For, if no more appears, the fact of such a contract, open and, to that extent, unperformed, excludes any implied obligation on the part of the defendant to pay a fair and reasonable remuneration for the work done by the plaintiffs in cutting his timber to dimensions outside those allowed by the contract. It is not enough that the work has been beneficial to him by turning his standing timber into the more valuable form of firewood. "It is a commonplace of the law that there can be no implied contract as to matters covered by an express contract until the express contract is displaced. . . . But where work is done outside the contract, and the benefit of the work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration, and the terms of the express contract may remain binding in so far as they are not inconsistent with the implied contract": per *Scrutton* L.J., *Steven* v. *Bromley & Son* (1). But, "taking the benefit of the work" means that the defendant has done so in the exercise of some choice that was actually open to him. As it is put in a recent treatise, "An implicit promise to pay connotes a benefit received by the promisor, but the receipt of the benefit is not in itself enough to raise the implication. No promise can be inferred unless it is open to the beneficiary either to accept or to reject the benefit of the work": *Law of Contract* by *Cheshire and Fifoot*, 1st ed. (1945), pp. 352, 353. The chief example of work of which the advantage must be received and in that sense accepted by the person for whom it is done, is that of the erection or repair of a building upon the land of the person benefiting, but not erected or repaired according to the conditions of the contract: see *Bullen & Leake*, 2nd ed. (1863), p. 33; 3rd ed. (1868), p. 41. Of such a case Lord *Campbell* C.J. speaks as follows in *Munro* v. *Butt* (2):—"Now, admitting that in the case of an independent chattel, a piece of furniture for example, to be made under a special contract, and some term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was to be made had yet

(1) (1919) 2 K.B. 722, at p. 727.

(2) (1858) 8 El. & Bl. 738, at pp. 752, 753 [120 E.R. 275, at p. 280].

accepted it, an action might, upon obvious grounds, be maintained, either on the special contract with a dispensation of the conditions alleged, or an implied contract to pay for it according to its value; it does not seem to us that there are any grounds from which the same conclusion can possibly follow in respect of a building to be erected, or repairs done, or alterations made, to a building on a man's own land, from the mere fact of his taking possession."

It is to be noticed that Lord *Campbell* referred to recovery in the case he contemplates on the special contract on the ground of dispensation with exact performance and to recovery upon a *quantum meruit* on a new contract implied or imputed. To these two positions he again referred, after describing the dilemma in which a building owner is placed by an incomplete execution of the contract. The Lord Chief Justice said (1): "How then does mere possession raise any inference of a waiver of the conditions precedent of the special contract, or of the entering into a new one? If indeed the defendant had done any thing, coupled with the taking possession, which had prevented the performance of the special contract, as if he had forbidden the surveyor from entering to inspect the work, or if, the failure in complete performance being very slight, the defendant had used any language, or done any act, from which acquiescence on his part might have been reasonably inferred, the case would have been very different."

No doubt the instances given by Lord *Campbell*, *scilicet* such things as conduct betokening actual acquiescence and acts calculated to prevent completion, were in the mind of *Collins* L.J. in *Sumpter* v. *Hedges* (2) when he said: "Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract. . . . The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no grounds for such an inference."

It is upon these principles that the defendant relies in support of his appeal against the decision by which he has been held liable to the plaintiffs for the value of the work done by them in cutting firewood to the quantity estimated, nearly all of it being in excess of the contract width or diameter. The defendant says that his trees were cut upon his land and the firewood left lying there was his. What was he to do? By what step could he actively "reject" the

(1) (1858) 8 El. & Bl., at pp. 753, 754 [120 E.R., at p. 280].

(2) (1898) 1 Q.B. 673, at p. 676.

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advantage which the transmutation of his standing trees into firewood necessarily gave him, however unsuitable to his purpose might be the actual lengths and widths ? Was he to allow the wood to rot on the ground ? What practical choice had he except to make it clear to the plaintiffs that, to obtain payment, they must split the wood to the contract width, and, when they refused or failed to do so, to employ other labour for the purpose of reducing its width or " diameter " so far as otherwise he was unable to dispose of the firewood. Why should he be precluded from selling his wood in the shape the plaintiffs wrongfully left it ? It was his wood and why should his dealing with it imply a new contract with the plaintiffs ?

If it were true that he made it clear to the plaintiffs before they departed that they must complete their contract by splitting the wood to the specified width, these considerations would indeed place him in a strong position. If his evidence were accepted, the plaintiffs would occupy the situation of a party who abandons a special contract to perform work on the property of another before completing the work and leaves that other party no effective choice in accepting or rejecting the benefit. But the defendant's evidence was not accepted by the judge at the trial, who, on the contrary, held that, as the timber cut, whether over six feet or not in length and whether over six inches or not in width, was sold by the defendant, he must pay a reasonable sum for that which he took and sold, even though it did not strictly comply with the terms of the original contract. What detailed facts the learned judge found on which to base this conclusion there is no express statement to show. But the rejection of the defendant's testimony generally is involved in other findings and I think that we must take it that the defendant did not base his refusal or failure to pay the plaintiffs on their failure to split the wood to the specified width, or, at all events, did not express to the plaintiffs his insistence or desire that they should so cut it. Indeed, even in his pleading, the defendant did not take the point as to diameter or width and it was only during cross-examination that it was developed as part of the defence.

On the other hand, there is evidence, which his Honour may have accepted, and which the learned judges of the Full Court certainly treated as representing fact, which would authorize a conclusion adverse to the defendant. Upon the evidence it would be open to conclude that the defendant considered that the plaintiffs were bound by the restrictions imposed upon them to go on working for him and that it was for this reason that he did not pay them regularly, that he allowed them to continue cutting timber and splitting it to a

width of more than six inches and raised no objection, that notwithstanding this disconformity with the direction or stipulation he had originally given or made, he afterwards promised to pay for the wood cut if and when it was delivered to a buyer or buyers, that he suffered them to leave his employment without informing them that they must split the firewood again in order to reduce its diameter, if they were to be paid, he then having reason to suppose that they did not consider that he was insisting on this requirement and, indeed, that his reliance upon diameter or width was an afterthought. In such circumstances, it would be proper to treat the failure in complete performance as possessing little importance to the defendant and as acquiesced in by him, with the consequence that the subsequent sale of the firewood might rightly be regarded by the learned judge as a taking of the benefit of the work and so, as involving either a dispensation from precise performance or an implication at law of a new obligation to pay the value of the work done.

The actual finding made by the judge at the trial is general, but as it is consistent with his Honour's having proceeded on the foregoing views of the facts, which are open on the evidence, I do not think the defendant should succeed in his attack upon the conclusion that he is bound to pay a fair and reasonable rate of remuneration in respect of the timber actually cut, even though much of it exceeded the stipulated width.

The finding that during their period of employment the plaintiffs had cut fifteen hundred tons of timber was also attacked on the part of the defendant. But it must be taken that the learned primary judge refused to accept the testimony given by and for the defendant that a much smaller quantity lay on the ground and was disposed of, and on the evidence adduced for the plaintiffs, the estimate of fifteen hundred tons was, in my opinion, reasonably open.

In assessing the rate to be paid by the defendant for the work actually done, his Honour proceeded in accordance with the judgment of *Parke* B. in *Mondel* v. *Steel* (1) and I do not think that any valid complaint can be made of the value placed upon the work done.

So far I have dealt with the case as a matter of simple contract. But in fact a State industrial award existed prescribing minimum rates and conditions for firewood cutting. The award took effect as from 4th May 1942 and seems to have been in operation throughout the period of the plaintiffs' work. It prescribed a minimum piece work rate of six shillings and one penny a ton for cutting and assisting to load once into trucks or stacking at the stand where the firewood is cut into lengths less than five feet six inches. As the terms of the

(1) (1841) 8 M. & W. 858, at pp. 871, 872 [151 E.R. 1288, at p. 1293].

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employment, according to the finding, included splitting to a dimension, but did not perhaps include stacking, it is not easy to apply this award, and the difficulty is not lessened by a provision for an additional rate " to be mutually arranged " for extra work and another for cases in which no piece work rate is fixed. In the latter case a piece work rate may be mutually arranged which will enable the employee, if of average competence, to earn twenty per cent above the minimum weekly wage rate fixed by the award, but in no case is the employee to be paid less than the minimum rate fixed by the award. Presumably the last reference is to the piece work rate and not the weekly wage rate. Section 17 of the *Industrial Conciliation and Arbitration Act of* 1932 (Q.) provides that the jurisdiction of the Industrial Court in all industrial causes shall be exclusive, and, as a result of s. 7 and of the definitions in s. 4 of " industrial cause " and " industrial matter," that jurisdiction is widely expressed. But by construction it has been limited : " Obligations arising outside the . . . Act and flowing from agreements between the parties are left . . . to be enforced by the existing remedies uninterfered with by the Arbitration Acts " : per *Macrossan* J. in *Bustin* v. *Bustin* (1). The distinction is maintained between rights depending upon awards and other statutory instruments and those arising *ex contractu*. Accordingly it has been held that to establish want of jurisdiction in a civil court over a claim for remuneration, it must be shown that the rate given by the contract was not more than that given by an award (*Coakley* v. *Groth* (2)).

This interpretation adopted by the Supreme Court has not been attacked and prima facie, established as it has been for so long, we should accept it as representing the law of the State. It was objected, however, that, upon the proper application of that law, the Industrial Court alone had jurisdiction over the present case. In respect of the period of the first three weeks of the contract, during which the original rate, said to be six shillings, may have prevailed, there seemed so much ground for contending that the contract rights of the plaintiffs merged, so to speak, in their award rights, that their counsel abandoned the claim in respect of that period. Whether he was right or wrong in feeling impelled to this course we need not consider. For I think that, when the rate was raised to eight shillings, that variation of the contract brought the matter within the principle of the decisions of the Supreme Court under which the ordinary civil Courts of the State retain jurisdiction over contracts

(1) (1928) Q.J.P.R. 71, at p. 75. (2) (1935) Q.S.R. 220.

between employer and employee for the payment of wages or piece work rates exceeding the minima prescribed by awards.

I am not impressed with the suggestion that because the award under consideration provides for the fixing by mutual arrangement of piece work rates where the award fails to fix one, all contracts for piece work in the industry dealt with by the award, must, if the precise task has no piece work rate assigned to it, fall within the award and receive a statutory force. I do not think that is the meaning of the clauses I have mentioned. They intend to do no more than express the fact that the parties are at liberty to work at piece work rates in cases for which nothing but a weekly minimum is provided, subject however, to the condition that the rates shall not spell a remuneration falling below the standards the clause attempts to describe.

I am, therefore, of opinion that the Supreme Court possessed jurisdiction over the claim for remuneration for cutting firewood.

But the fact that the rate exceeded that prescribed by the award led to an argument that the contract was unlawful and void under reg. 15 of the *National Security* (*Economic Organization*) *Regulations*. Unfortunately for this objection, the requisite foundation of fact was not laid. The critical date under the *Economic Organization Regulations* is 10th February 1942 and it is the rates prevailing on or before that date which must not be exceeded. We have no evidence of what those rates were. It does appear that an award, dated 10th December 1936, and variations thereof were in force, but there is not information as to what those instruments contained. This point, therefore, fails.

The abandonment by the plaintiffs' counsel of their claim in respect of the period anterior to the raising of the rate per ton to eight shillings gave additional importance to the discrimination between the work done in the earlier and that in the later period and the remuneration for the one and for the other period. Unfortunately there was no way of deciding how much wood was cut in the earlier period and how much in the later period except by apportioning the total of fifteen hundred tons according to time, which, in effect, means by presuming that, as the plaintiffs worked in the same way over the whole period, their output would be regular. *E. A. Douglas* J. acted upon such a view and attributed two hundred and fifty tons to the first three weeks and twelve hundred and fifty to the remaining fifteen weeks. I do not see what ground of complaint the defendant can have against this course. It seems to me to be a reasonable solution of an ordinary difficulty of fact. On the other hand, the defendant appears to me to have obtained some

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advantage from the corresponding ratable attribution of the payments of £45 to the two periods. There is much to be said for ascribing the payments to the earlier indebtedness.

The statement of claim included an independent demand in respect of the erection of a fence, work done by the plaintiffs on Saturday afternoons and Sundays. On this, too, there was a finding for the plaintiffs and that finding is impugned here on appeal. The matter was, in effect, disposed of during the argument and it is enough now to say that I can see no reason for disturbing the conclusion adopted concerning it by the learned judge at the trial.

For the foregoing reasons, I think that the appeal should be allowed in part and the judgment of *E. A. Douglas* J. restored. I would allow this appeal, making no order as to the costs of the appeal, and vary the order of the Full Court by discharging so much thereof as ordered that the judgment pronounced by *E. A. Douglas* J. on 8th November 1944 be varied by striking out the words and figures £367 17s. 10d. wherever such appear in the said judgment and by inserting in lieu thereof the words and figures £447 4s. 6d.

McTIERNAN J. I agree that the appeal should be allowed in part, and the judgment of the learned trial judge restored.

I have had the advantage of reading the judgment of my brother *Dixon* and agree with the reasons there stated, and have nothing to add.

Order of Supreme Court varied by discharging so much thereof as ordered that the judgment of E. A. Douglas J. be varied. Appeal otherwise dismissed. No order as to costs of appeal to this court.

Solicitors for the appellant, *Chrystal & Maguire.*
Solicitors for the respondents, *Cyril Murphy & Mitchell.*

B. J. J.