[HIGH COURT OF AUSTRALIA.]

HUMBERSTONE . . . . . APPELLANT
APPLICANT,

AND

NORTHERN TIMBER MILLS . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1949.

MELBOURNE, *Oct.* 24, 25.

SYDNEY, *Nov.* 16.

Latham C.J., Rich and Dixon JJ.

Workers' Compensation (Vict.)—"Worker"—Person regularly and exclusively engaged in carrying goods in own truck for one firm—Payment on weight-mileage basis—Whether servant or independent contractor—Contractor agreeing to perform work not incidental to trade or business regularly carried on by him—"Enters into a contract"—Statute—Retrospective operation—Workers' Compensation Act 1928-1946 (*No.* 3806—*No.* 5128) (*Vict.*), *s.* 3 (1), (6).

Section 3 of the *Workers' Compensation Act* 1928-1946 (Vict.) provides:—By sub-s. (1), that (subject to certain exceptions) "'worker' means any person . . . who has entered into or works under a contract of service or apprenticeship or otherwise with an employer." By sub-s. (6) (which was inserted in the Act in 1946): "Notwithstanding anything in this Act or any law where any person (in this sub-section referred to as 'the principal') in the course of and for the purposes of his trade or business enters into a contract with any other person (in this sub-section referred to as 'the contractor')—(*a*) under or by which the contractor agrees to perform any work not being work incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name; and (*b*) in the performance of which the contractor does not either sublet the contract or employ workers or although employing workers actually performs some part of the work himself—then for the purposes of this Act the contractor shall be deemed to be working under a contract of service with an employer and the principal shall be deemed to be that employer."

Held that s. 3 (6) applies only to contracts entered into after it came into operation in 1946.

H. had originally held himself out as a carrier, prepared to carry for any person who sought his services. Since 1924, however, he carried goods solely

H. C. OF A. 1949. HUMBERSTONE v. NORTHERN TIMBER MILLS.

for the respondent firm, except in a few instances in which, after having delivered the respondent's goods to its customers, he carried back loads at their request. He mentioned to the respondent that he was doing so, but he did not account for any moneys that he might have received on account of the back loads. In his work for the respondent he used his own motor truck, and he bore the cost of its maintenance, including the cost of the petrol consumed. He took out a carrier's licence annually in his own name and had painted on his truck his own name with the description "Carrier." On each working day he attended at the respondent's premises at the same time and worked substantially the same number of hours, but there was no evidence that he was bound to do so. He was paid weekly on a weight-mileage basis.

Held that the facts did not warrant the conclusion that H. was a "worker" within the meaning of the Act. They did not show that he was employed under a contract of service with the respondent so as to bring him within the definition of "worker" in s. 3 (1). Regarded as an independent contractor, the proper view of the facts was that he had a continuing contract with the respondent which was entered into before s. 3 (6) of the Act came into operation, and therefore that sub-section could not apply to his case even if he was otherwise within its terms.

Meaning and effect of s. 3 (6) of the Act considered.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

On 2nd December 1947 W. R. C. K. Humberstone suffered injury by accident while effecting repairs to his motor truck, which he had been using to carry goods for the respondent firm. He died next day. Under the *Workers' Compensation Acts* 1928-1946 (Vict.) his widow applied to the Board constituted under the Acts for an award of compensation as against the respondent. The Board made an award but, at the request of the respondent, stated a case for the Full Court of the Supreme Court of Victoria. Annexed to the case were the Board's notes of the evidence given before it and also the Board's written reasons for the award. In the reasons the evidence as viewed by the Board was summarized, and its findings were stated, substantially as follows:—

In 1924 the deceased, who had a motor truck, commenced to do carrying work for the respondent and until the date of his death carried logs, timber, boxes and the like in connection with the respondent's business. At the time of his death deceased owned and drove a truck which he had for some years and in respect of which he always had paid for the repairs, the carrier's licence, registration fees, petrol, oil, &c. He had no telephone, did not advertise and for many years prior to the war had not carried goods

for anyone else. It was customary for him to report at the respondent's premises for duty at approximately 7.30 a.m. and to cart whatever goods to whatever destination he was directed, to take an hour off for lunch and to finish work between 4 p.m. and 5 p.m. each afternoon. He was paid on a weight-mileage basis according to a table kept by the respondent, who at the end of the week made up the amount of money due to the deceased and deducted from the total an amount in respect of the petrol taken by the deceased from the respondent's bowser into his truck. The deceased was expected to work exclusively for the respondent, and, on an occasion when a customer of the respondent to whom he had delivered goods asked him to cart some chattels for him, the deceased asked permission of the respondent. He was also expected to be on time, and not to waste time on the journeys. If he were longer than expected he would be asked for an explanation. On 2nd December 1947 he had a puncture and called at his home on the way back from a job to change the wheel. He then tried unsuccessfully to remove the tyre from the wheel and exerted himself strenuously to do so; he became ill and subsequently lapsed into a coma, from which he did not recover. The respondent resisted the applicant's claim on three grounds; firstly, that the deceased was not a worker within the meaning of the Acts but in fact carried on the business of a carrier. Taking into account all the facts of this case, including the fact that the deceased solicited no other work, he did not render accounts, he attended at the place of employment regularly and at a regular time, there was a certain recognition of control by the respondent in the mode and time of the deceased's work, that he was expected to work exclusively for the respondent and did so for a great number of years, the Board was of opinion that, although the deceased might have commenced business as a carrier some twenty-four years ago, for a great number of years he was in fact a worker, performing a contract of service with the respondent and being paid by results—he to supply the truck and keep it moving. The second ground of resistance to the claim was that there was no evidence of injury by accident which resulted in death. In effect, that the deceased died from natural causes. The third ground of resistance was that each load of wood the deceased delivered was a separate and distinct contract and that, if exertion precipitated his death, it was the changing of the tyre and this occurred between loads and after one contract had been completed and before another commenced. The Board was of opinion that the contract was for the deceased to supply a truck, to keep it in condition to cart for the respondent and to drive it. The Board

H. C. OF A. 1949. HUMBERSTONE v. NORTHERN TIMBER MILLS.

regarded the arrangement as a contract of service out of which arose the deceased's obligation to return to the employer's premises for the next load. Part of the contract also was to keep the wheels moving, and incidental to it was the changing of wheels and tyres. In the Board's view the accident not only arose out of, but occurred in the course of, the deceased's contract of service.

Further facts appearing in the evidence annexed to the case are set out in the judgments hereunder.

The question material to this report which was submitted for the determination of the Supreme Court was—

Whether there was evidence upon which the Board could find that the deceased was a "worker" within the meaning of the *Workers' Compensation Acts*.

The Supreme Court answered this question: No.

From this decision the applicant appealed to the High Court.

E. F. Hill (with him *J. Lurye*), for the appellant. There was ample evidence to justify the finding of the Board that the deceased worked under a contract of service with the respondent and was therefore a "worker" within the definition in s. 3 (1) of the Act. [He referred to *Ritchie* v. *Swan Hill District Hospital* (1).] The outstanding fact in support of the finding is that the deceased worked regularly for the one firm and, apart from the few instances in which he carried back loads for the firm's customers, worked exclusively for that firm. He did not solicit any other work. That fact might be equivocal if it stood by itself, but, when all the elements in the case on which the Board based its finding are taken into account, the finding is fully warranted. The fact that the deceased sought the firm's approval of his carrying back loads is significant on the question of control exercised by the respondent. The further fact that on each working day the deceased attended the respondent's premises at approximately the same time and worked substantially the same number of hours points strongly to the relationship of master and servant. So far as control of the "mode" of executing the work is concerned, it would be practically impossible for a master to give intermediate directions during the journeys undertaken in carrying the goods. That the deceased had his own licence as a carrier is not of consequence when the other facts of the case are regarded. It is not inconsistent with the relationship of master and servant that the deceased used his own truck or that he described himself as a carrier. [He referred to *Willis* on *Workmen's Compensation*, 32nd ed., pp. 171-173;

(1) (1931) V.L.R. 57.

Simmons v. *Heath Laundry Co.* (1); *McHale* v. *Park Royal Woodworkers, Ltd.* (2).] Even if the deceased was not within the actual terms of the definition of worker in s. 3 (1), he was brought within it by s. 3 (6). It is not necessary here to consider whether s. 3 (6) applies only to contracts entered into after it came into operation in 1946. The facts relevant to this point supervened on the coming into operation of the sub-section. The rejection of the appellant's first argument would mean that the deceased must be regarded as an independent contractor; on that footing, there is nothing in the evidence which (as was thought in the Supreme Court) points to the deceased's having had a continuing contract with the respondent which originated before 1946. The proper conclusion on the evidence is that there was a separate contract of carriage in respect of each load carried by the deceased. This brings the relevant contract within the terms of s. 3 (6), and the deceased was otherwise within its terms. The sub-section covers a person such as the deceased, who had no business of his own at all independently of the work which he did for the respondent. As the deceased had no business of his own, the work done by him for the respondent was, within the literal meaning of s. 3 (6) (*a*), "not . . . incidental to a trade or business regularly carried on by the" deceased. This is eminently the type of case which s. 3 (6) was intended to meet. No doubt, the sub-section would cover the type of case suggested by the respondent in the court below, in which a person carrying on a business of his own as, for instance, a plumber, contracts to perform the work of a carpenter, but it would be highly artificial to read the section as confined to such cases. The primary intention of the sub-section must have been to deal with "border-line" cases such as is the present case on the assumption—which must be made for the purposes of this branch of the argument—that the deceased did not work under a contract of service. The respondent was within the words of s. 3 (6) (*a*), "agrees to perform . . . work." That he also agreed to provide a truck is immaterial. There is nothing in the sub-section to suggest that, because of this addition to the contract, the deceased is to be regarded as not having agreed to perform work. Indeed, that was not suggested by the respondent. What was suggested was that the sub-section would be unworkable in such a case because of the difficulty of computing the "average weekly earnings" on the basis of which compensation is assessed. This presents no real difficulty; certainly no greater difficulty than in

(1) (1910) 1 K.B. 543, at pp. 548, 550.

(2) (1947) 40 B.W.C.C. 14.

H. C. OF A. 1949. HUMBERSTONE v. NORTHERN TIMBER MILLS.

the cases covered by sub-s. (5). It affords no good reason for giving an artificial meaning to sub-s. (6). If it is necessary to consider the question, it is submitted that the language of s. 3 (6) is apt to describe a subsisting contract, whether entered into before or after the sub-section come into operation.

T. W. Smith K.C. (with him *H. A. Winneke*), for the respondent. The facts relied on by the Board as showing the relationship of master and servant are, as the Supreme Court found, all equivocal, and therefore the appellant did not discharge the burden of proving the relationship. There was no evidence of any such control by the respondent over the deceased as is necessary to show a contract of service. Although the deceased attended regularly at the respondent's premises and observed regular hours of work, there is no evidence that he was bound to do so. In the absence of proof that he was so bound, the facts relied on are colourless. The method of computing the deceased's remuneration does not show a contract of service; it rather points the other way, as do other facts appearing in evidence. Notwithstanding that, so far as the evidence shows, the deceased seems to have worked almost exclusively for the respondent, his work was within the words of s. 3 (6) (*a*), "incidental to a trade or business regularly carried on by the" deceased "in his own name." The work done was the regular carrying on of the business of a carrier who confined his work mainly, or entirely, to carrying the goods of the respondent. Where a person does no other work but that of carrying goods, it cannot be said that the work is not incidental to his trade. The deceased carried on a business "in his own name," as is shown by the fact that he had his own licence as a carrier and by the further fact—as the evidence shows—that his name, followed by the description "Carrier," was painted on his truck. These facts are significant on both branches of the argument. The contractor to whom s. 3 (6) (*a*) applies is one who "agrees to perform . . . work," not one who agrees to supply a truck. A contract which includes the supply of plant does not fit readily into the scheme of the Act. It would create a real difficulty in relation to "weekly earnings." Section 3 (5) contains a special provision to meet the like difficulty in the cases which it covers; the absence of such a provision from s. 3 (6) supports the respondent's argument. Section 3 (6) contemplates that the contractor has a regular trade or business of his own and that the work which he "agrees to perform" is of a different kind—in a different vocation—from his regular work. The words of s. 3 (6), "enters into a contract" show that the sub-section

applies only to contracts made after the sub-section came into operation. The true view of the present case is that taken in the Supreme Court, namely, that there was a continuing contract which originated long before 1946.

E. F. Hill, in reply.

Cur. adv. vult.

Nov. 16.

The following written judgments were delivered :—

LATHAM C.J. W. R. C. K. Humberstone died on 3rd December 1947 as the result of over-exertion in an effort to remove a punctured tyre from a wheel which he had taken off his motor truck. His widow made a claim against the respondent firm, Northern Timber Mills, under the *Workers' Compensation Act* 1928 (Vict.) as amended. The firm denied liability. The Workers' Compensation Board held that the deceased was a worker within the definition of " worker " contained in s. 3 of the *Workers' Compensation Act* 1928, holding that he worked under a contract of service with the firm as his employer. The Board also held that his injury arose out of and in the course of his employment by the firm. The Board proposed to make an award in favour of his widow, the claimant, for £1,000 with costs. The Board stated a case under s. 9 (3) of the *Workers' Compensation Act* 1937 for the determination of the Full Court of the Supreme Court upon the following questions of law :—" (1) Whether there was any evidence upon which the Board could find that the deceased was a ' worker ' within the meaning of the Acts. (ii) If the answer to (i) is Yes, whether there was any evidence on which the Board could find that the injury by accident arose out of or in the course of the employment." The Full Court answered the first question " No " and accordingly it became unnecessary to answer the second question. The claimant appeals to this Court.

The evidence showed that Humberstone had been working since 1924 in carrying timber, boxes and sometimes logs from the North Fitzroy Railway Siding. Originally he held himself out as a carrier for general employment. There was a signboard at his residence and he used to carry furniture and provide transport for picnic parties. But for twelve or fourteen years he had, with only occasional exceptions, done work only for the respondent firm. He attended at the firm's timber mills at a regular hour in the morning and carried timber &c. as required by the firm. He stopped work at a regular hour in the evening and at a regular time for lunch. On occasions he carried for some other persons when otherwise he would have returned with an empty truck, but he then mentioned

H. C. OF A. 1949.

HUMBERSTONE v. NORTHERN TIMBER MILLS.

Latham C.J.

the proposal that he should do such work to the management of the firm. Apparently he retained for himself payments by other persons on these infrequent occasions.

The truck which Humberstone used belonged to him. It was not owned by the firm. The *Carriers and Inkeepers Act* 1928 (Vict.), s. 13, provides that " Every person . . . who carries on business as a carrier by land for hire without having obtained a licence shall be liable to a penalty of not more than fifty pounds " and in default of payment to imprisonment. Section 14 provides for application for licences to be made to two justices who must be satisfied that the applicant is a fit person to be licensed to carry on business as a carrier. Humberstone annually took out a licence under the Act and paid for it. " K. Humberstone Carrier," not the name of the firm, was painted on the truck. He obtained petrol from the firm but paid for it himself. He paid for insurance and maintenance of the truck. The truck was under his own management and control. He was paid on a weight and mileage basis for each job that he did. The firm prepared weekly accounts showing what was due to him, deducting the money due for petrol supplied to him. The payment made to him covered payment for his services in carrying and therefore for the use of the truck for that purpose.

The distinction between a servant and an independent contractor was explained in the case of *Performing Right Society, Ltd.* v. *Mitchell & Booker (Palais de Danse) Ltd.* (1). If the work done by one person for another is done subject to the control and direction of the latter person as to the manner in which it is to be done the worker is a servant and not an independent contractor. If, however, the person doing the work agrees only to produce a given result but is not subject to control in the actual execution of the work he is an independent contractor. This principle was applied in this Court in the case of *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (2). Humberstone was in my opinion a carrier in business on his own account but found that the requirements of the firm kept him fully occupied with all the work which he wished to do. The firm utilized his services on the same basis as that upon which any carrier is ordinarily employed, payment being based on the weight or some other characteristic of the goods carried and the distances for which they were carried. There is no evidence of any control exercised or exerciseable by the firm as to the manner in which the work was to be done.

(1) (1924) 1 K.B. 762.

(2) (1945) 70 C.L.R. 539.

I am therefore of opinion that Humberstone was an independent contractor, and that there is no evidence to support a finding that he worked under a contract of service with the firm so as to show that he was a worker within the definition of that term contained in s. 3 (1) of the 1928 Act.

But the claimant relies upon s. 3 (6) of the Act, which was added to the principal Act by the *Workers' Compensation Act* 1946. This provision is in the following terms :—" Notwithstanding anything in this Act or any law where any person (in this sub-section referred to as ' the principal ') in the course of and for the purposes of his trade or business enters into a contract with any other person (in this sub-section referred to as ' the contractor ')—(*a*) under or by which the contractor agrees to perform any work not being work incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name ; and (*b*) in the performance of which the contractor does not either sublet the contract or employ workers or although employing workers actually performs some part of the work himself—then for the purposes of this Act the contractor shall be deemed to be working under a contract of service with an employer and the principal shall be deemed to be that employer."

The idea of this provision is evidently to extend the benefits of the Act to persons who agree to do work which is not work belonging to a trade or business carried on by them, even though they may regularly carry on a trade or business. In the first place, there must be an agreement by B (a contractor) to perform some work for A (a principal). Next, B may or may not regularly carry on a trade or business in his own name or under a firm or business name ; that is, on his own account. If he does regularly carry on any such business, then the work agreed to be performed must be work which is not incidental to that business. If B, however, undertook for A a job which was quite different from, so as not to be incidental to, any of the work which belonged to a trade or business regularly carried on by him, then, in relation to any such work agreed to be done by him he would be deemed to be working under a contract of service with A. But if B did not carry on any trade or business of any kind on his own account, then no work which he agreed with A that he should do could be work incidental to a trade or business being carried on by him. Therefore in such a case if B agreed to do any work at all for A he would come within the section. The position would be the same if he carried on some trade or business but did not carry it on regularly and the work which he agreed to do fell outside work incidental to that trade or business. I illustrate

H. C. OF A. 1949.

HUMBERSTONE v. NORTHERN TIMBER MILLS.

Latham C.J.

my understanding of the sub-section by taking the case of a man who is a plumber. Such a man may be employed as a servant, and then he works under a contract of service and is a worker within the definition of " worker " contained in s. 3 of the principal Act. But if he carries on business on his own account as a plumber and agrees to do plumbing work for a person A he is prima facie an independent contractor and not a servant of A. If, however, he agrees with A to do any work for A other than plumbing (e.g. carpentry) then he is to be treated as a worker within the meaning of the Act by virtue of s. 3 (6), whether or not he carries on business on his own account as a plumber and whether or not he carries on that business regularly. If s. 3 (6) applies to him, then A becomes liable under the Act as his employer to pay compensation for personal injury by accident arising out of or in the course of his employment: Principal Act, s. 5 as amended by *Workers' Compensation Act* 1946, s. 3 (*a*).

In order that s. 3 (6) should apply it is necessary in my opinion that the work agreed to be done should be work which is outside any trade or business regularly carried on by the person described as a contractor. In this case Humberstone did carry on a trade or business as a carrier. He spent his whole working time in that trade or business and he carried it on regularly. The work which he did for the firm was carrying work. It was not outside the trade or business which he carried on with his registered truck—it was that business itself. He was in the same position as the plumber in the example given where a plumber who carries on trade or business on his own account agrees to do plumbing work. For these reasons in my opinion s. 3 (6) does not apply to the present case. In my opinion the result is the same whether the case is considered as depending upon a contract made about 1924 between the parties which was performed during the subsequent years or upon separate contracts for separate carrying jobs made from day to day or upon a contract not necessarily the same as that originally made in 1924 but to be inferred from the course of conduct of the parties in the last twelve or fourteen years. In my opinion the last-mentioned view is to be preferred. But upon any view of the contract it was a contract for doing the work of carrying which was work in a business which Humberstone regularly carried on upon his own account.

Upon a further ground the application of s. 3 (6) is in my opinion excluded in the present case. The extension of the application of the Act enacted by s. 3 (6) applies only where a " principal " " enters into a contract " with a " contractor." The words are not " has

entered into a contract." A statute is prima facie prospective: *Gloucester Union* v. *Woolwich Union* (1), and see *In re School Board Election for Parish of Pulborough* (2)—"It is a well-recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended." The words in s. 3 (6) are where a person "*enters* into a contract." These words in my opinion refer to contracts entered into after the statute had come into operation and they should not be given the same effect as if the words were "where any person *has entered* into a contract." For this reason also s. 3 (6) does not apply in favour of the claimant in the present case. The contract in this case should, as I have said, be regarded as a contract which existed before the 1946 Act was passed and continued in existence thereafter. For this reason s. 3 (6) does not in my opinion apply in favour of the claimant. The only means of escaping this conclusion would be to hold that each carrying job constituted a new and separate contract so that many new contracts were made from day to day after the 1946 Act came into operation. But upon this view it could hardly be argued that Humberstone was a servant of the firm—he would most obviously be in the same position as any carrier which the firm might use from time to time so that he would not be acting under a contract of service: and s. 3 (6) would not apply for reasons already given.

I am therefore of opinion that the decision of the Full Court was right and that the appeal should be dismissed.

RICH J. In my opinion sub-s. 6 of s. 3 of the *Workers' Compensation Act* (Vict.) as amended is not framed so as to give it a retrospective operation. The facts in the case lead to the failure to establish that the firm had such control of the acts of the deceased as would constitute the relation of master and servant. The tests applicable in such a case were discussed in *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (3); and cf. *Dowd* v. *W. H. Boase & Co., Ltd.* (4). I consider that on the facts the Board should have held that the contract in question was an independent contract.

I would dismiss the appeal.

DIXON J. The appellant sought to establish, before the Workers' Compensation Board, that her deceased husband fell within sub-s. (6) of s. 3 of the Victorian *Workers' Compensation Act* as amended.

(1) (1917) 2 K.B. 374.
(2) (1894) 1 Q.B. 725, at p. 737.
(3) (1945) 70 C.L.R. 539, at p. 548.
(4) (1945) 1 All E.R. 605.

H. C. OF A. 1949.

HUMBERSTONE v. NORTHERN TIMBER MILLS.

DIXON J.

By that provision, where any person (to whom the sub-section refers as the principal) in the course of and for the purpose of his trade or business enters into a contract with any other person (in the sub-section called the contractor) (*a*) under or by which the contractor agrees to perform any work not being work incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name; and (*b*) in the performance of which the contractor does not either sublet the contract or employ workers or although employing workers actually performs some part of the work himself—then for the purposes of the Act the contractor shall be deemed to be working under a contract of service with an employer and the principal shall be deemed to be that employer. This sub-section came into operation on 1st September 1946.

The appellant's husband died on 3rd December 1947 as a result of encephalitis and scattered cerebral haemorrhages which have been held to have been more immediately caused by the exertion and emotional upset associated with an attempt by the deceased on the previous day to remove a tyre from a wheel which he had taken from his carrier's motor truck.

The deceased was licensed under s. 14 of the *Carriers and Innkeepers Act* 1928 (Vict.) to carry on business as a carrier. He owned a two-ton truck the off-side door of which appears to have borne the inscription "K. Humberstone Carrier 118 Blyth Street tare L.C. 17 cwt." The name was that of the deceased and L.C. means licensed carrier. Many years before he had displayed a sign at 118 Blyth Street and apparently he had carried goods for anybody who hired him. But for a very long time, perhaps twenty-five years, his work had been substantially confined to carrying logs, timber and boxes for the respondents, the Northern Timber Mills. There had been probably a few occasions in that period when he did some particular job in the course of a return journey; but there was evidence that he had asked whether the respondents minded his taking a back load from one of their customers. No longer did he hold himself out as a carrier ready and willing to lift the goods of others. He had no telephone and he exhibited no business sign or advertisement. He attended at the premises of the respondents about half-past seven in the morning of every working day except Saturday. He took whatever load he was requested and delivered it at the destination to which it was consigned, though for a time he did not carry logs because he found the work too heavy for him. He was paid at a rate calculated upon the weight of the load and the distance it was carried. The amount due to him was made up

weekly by the respondents from their records. He bore the cost of the petrol, though he obtained it from the respondents' pumps, and he paid for the upkeep and licensing of his vehicle.

The Workers' Compensation Board did not decide whether the deceased fell within sub-s. (6) of s. 3 as the appellant had contended. The Board preferred to place its decision upon a finding that the relation between the respondents and the deceased was actually that of master and servant.

I agree with the judges of the Supreme Court in the opinion that such a finding was not reasonably open to the Board. I shall state briefly why I concur in this opinion but before doing so I shall deal with the difficult question of the application to the facts of the case of sub-s. (6) of s. 3.

There are two difficulties in applying the provision to the facts. The first is to say whether, upon the true meaning of the phrase in the sub-section, the work the deceased performed for the respondents was or was not " work incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name." If an affirmative answer is given to this question, the second difficulty arises. That difficulty is to say whether the deceased was working under a contract entered into with him by the respondents before 1st September 1946, when the sub-section came into operation, and if so whether the provision applies to a contractor unless the contract between the principal and him has been entered into after the date of the commencement of the enactment.

In my opinion the work which the deceased was performing for the respondents was not work incidental to a trade or business regularly carried on by him in his own name within the meaning of the sub-section and of course no such trade or business was carried on by him under a firm or business name. I think that the purpose of the exception or exclusion expressed by the words in question was to confine the benefit of the conclusive presumption which it establishes to persons who do not conduct an independent trade or business, who are not holding themselves out to the public under their own or a firm or business name as carrying on such a trade or business and who do not in the course of that trade or business, as an incident of its exercise, undertake the work by entering into the contract. The provision will thus cover men who work for the principal but have no independent business or trade and men who though carrying on an independent trade or business undertake a contract outside the scope or course of that trade or business. The word " trade " is capable of including any handicraft and in that

H. C. OF A. 1949.

HUMBERSTONE v. NORTHERN TIMBER MILLS.

Dixon J.

sense it may seem to lack the element of systematic practice or holding out which the idea of openly conducting a distinct or independent trade or business and seeking custom implies. But a consideration of the policy of the provision as well as of its text appears to me to show that the distinction it seeks to draw is between on the one hand an independent contractor whose relation with the principal is special or particular either because it is outside the course of the general business of the contractor or the general practice of his trade or because he has no such general business or is not a general practitioner of his trade, and on the other hand an independent contractor who performs work successively or perhaps concurrently for his customers or others in the course of a definite trade or business carried on systematically or who holds himself out as ready to do so. The language of the sub-section is derived from the provision that stands as s. 14 (1) (*a*) of the Victorian *Workers' Compensation Act* 1928, where the words are "where any person . . . in the course of or for the purposes of his trade or business contracts with any other person." The suggestion which this language conveys of the existence of a business or the practice of a trade is much strengthened in sub-s. (6) by the words "carried on," "regularly" and "in his own name or under a firm or business name." These all indicate a business or trade conceived as independently existing or exercised by a person holding himself out to the public under a name or style. No doubt the policy is a matter of inference but it seems reasonable to suppose that it was considered proper that a person conducting a business in the course of which he contracted to perform work should himself carry the risk of personal injury as one of the hazards of his business, while the man who worked under contract but only for the employer or without any general trade or business or outside his trade or business should, like an ordinary employee, be insured by the Act against the risk of injury in his work.

Clearly enough at the time of the accident the deceased was not conducting an independent trade or business and was not holding himself out as ready to carry goods for anyone but the respondents and it was very many years since he had done so. If it appeared that he was still carrying the respondents' goods under a contract made in the course of his early business when his sign was up and he held himself out as a carrier generally open to hire his case might fall outside sub-s. (6) and this was the view taken by the Supreme Court. There is no finding upon the point by the Workers' Compensation Board and it is not our function to make one. But it is evident that in the long period of years during which he worked for

them the relation between the deceased and the respondents, in whatever arrangement it may have originated, came to depend upon a mutual course of dealing, and I doubt whether it would be right to go back to the original arrangement and the state of affairs that then existed as if a contract had then been made once for all.

On the view that the deceased's case otherwise would fall within sub-s. (6) it is necessary to turn to the question whether the deceased carried the respondents' goods under a contract, express or implied, entered into before 1st September 1946 and if so whether that excludes the application of the sub-section.

The choice must be made between interpreting the relation between the two parties in one of two ways. First it may be interpreted as depending upon a continuing contract requiring the deceased, unless prevented by sickness or other exceptional cause, to attend daily to receive and carry the respondents' goods upon the terms fixed from time to time. That would mean an implied term that the contract should continue until a reasonable notice of termination was given on one side or the other, perhaps a week's notice. Secondly the relation may be interpreted as nothing but a standing offer on the part of the respondents to hire the deceased upon the terms fixed, an offer accepted by his receipt of each load. If so there would be no general or continuing contract but a particular or separate contract for each load.

I think that the first is the correct interpretation of the relationship. It appears that there were three or four carriers, including the deceased, who did the work of the respondents and upon the same terms. The respondents obviously depended from day to day upon these carriers carrying goods to and from the respondents' premises. The carriers attended regularly at or about fixed times and relinquished work at the same hour. This went on as a routine. It is reasonable to imply a contractual engagement upon terms impliedly requiring reasonable notice of termination.

That being so, is there any reason to doubt that the contract subsisted before 1st September 1946 and continued up to the deceased's death without change and without interruption and renewal ? I think that it is impossible to hold otherwise.

It remains to consider whether sub-s. (6) of s. 3 can apply to a case in which the contract was entered into by the principal with the contractor before the commencement of the sub-section. In deciding this question it is necessary to remember that a case such as the present, where a continuing contract of indefinite duration bound the parties, although no doubt within the words of the sub-section is not the typical case for which it provides. The typical

H. C. OF A. 1949.

HUMBERSTONE v. NORTHERN TIMBER MILLS.

DIXON J.

case provided for is an express contract for the carrying out of a definite piece of work involving not a continuing relation or a succession of services but the producing of a given result once for all. It would be natural to frame such a provision as sub-s. (6) so as not to affect contracts which had been made and were in course of performance at the time the enactment came into operation. For the provision would vary the responsibilities which arose from the contract.

When you turn to the language of the sub-section you find that it is expressed in a way to suggest an operation only on contracts afterwards to be made. The material expression is " where any person . . . enters into a contract." This surely is a prospective description representing what formerly would have been written —" where any person . . . shall enter or shall have entered into a contract," and not " has entered into a contract."

So interpreting sub-s. (6) I am of opinion that the case falls outside its operation, as I have already said.

I am unable to adopt the view of the Board that in any case the relation of master and servant subsisted between the respondents and the deceased. For a case like the present, the test of the existence of the relation of master and servant is still whether the contract placed the supposed servant subject to the command of the employer in the course of executing the work not only as to what he shall do but to how he shall do it. The regulation of industrial conditions and other laws have in many respects made the classical tests difficult of application and it may be that ultimately they will be re-stated in some modified form: cf. per Lord *Thankerton*, *Short* v. *Henderson* (1). But the present case is free from such difficulties.

The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions. In the present case the contract by the deceased was to provide not merely his own labour but the use of heavy mechanical transport, driven by power, which he maintained and fuelled for the purpose. The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplied. The essence of a contract of service is the

(1) (1946) 174 L.T. 417, at p. 421; 62 T.L.R. 427, at p. 429.

supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. There is no ground for imputing to the parties a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents.

In essence it appears to me to have been an independent contract and I do not think that it was open to the Board to find otherwise.

The subject has recently been dealt with in this Court in *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (1). As in that case the contract is one for the performance of a service for one party by another who is to employ plant for the purpose and to be paid by the results. Perhaps to that case a reference may be added to *Templeton* v. *Parkin* (2).

I think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Slater & Gordon.*

Solicitors for the respondent: *Abbott, Stillman & Wilson.*

E. F. H.

(1) (1945) 70 C.L.R. 539.

(2) (1929) 140 L.T. 519.