Appl Sgobino v South Australia 46 SASR 292
Cons Glambed v Federal Commissioner of Taxation 20 ATR 428
Appl Kannis Holdings v Comr of State Tax (WA) (1991) 21 ATR 1576
Foll Marinovski v Zutti Pty Ltd & Panizutti [1984] 2 NSWLR 571
Cons Climaze Holdings Pty Ltd t/as Alan Croll Roofing v Dyson (1995) 13 WAR 487
Cons Green v Victorian Workcover Authority [1997] 1 VR 364
Foll Alice Springs Town Council v Mpweteyerre Aboriginal Corp (1997) 115 NTR 25
Appl Alice Springs T C v Mpweteyerre Aboriginal Corporation (1997) 94 LGERA 330
Foll Bowden & Sons v Chief Comr of State Revenue (2001) 47 ATR 94
Cons Neeshan v Moss (2003) 31 SR(WA) 171
Cons Baird v Queensland (No 1) (2005) 88 ALD 356

[HIGH COURT OF AUSTRALIA.]

ZUIJS . . . . . APPELLANT;
APPLICANT,

AND

WIRTH BROTHERS PROPRIETARY LIMITED . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1955.

SYDNEY, *Nov.* 11, 14; *Dec.* 15.

Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.

Workers' Compensation (N.S.W.)—Worker—Acrobat—Injury—Compensation—Contract of service—Control—Contract for services—Contractor—Trade or business—Workers' Compensation Act 1926-1948 (*N.S.W.*), *s.* 6 (3A).

The fact that the work to be performed under a contract involves the exercise by the party obliged to perform it of a particular art or special skill or individual judgment or action which the other party cannot in fact control or in the performance of which he cannot interfere does not of itself show that the contract is not one of service but an independent contract. The nature of the duties or the circumstances in which they are to be performed may be such as to leave little room for direction or command in detail, but so long as there is lawful authority to command, though the scope for it be limited, the work is performed under a contract of service and not under an independent contract.

Where an acrobat was engaged by the proprietors of an itinerant circus for an indefinite period at an agreed weekly sum to give with a companion an acrobatic display on the trapeze at each performance and to appear in the grand parade,

Held, that a finding that by reason of its nature the work was performed under an independent contract and not under a contract of service could not be sustained.

Section 6 (3A) of the *Workers' Compensation Act* 1926-1948 (N.S.W.) provides: "Where a contract to perform any work exceeding five pounds in value (not being work incidental to a trade or business regularly carried on by the contractor in his own name, or under a business or firm name) is made with the

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contractor, who neither sublets the contract, nor employs workers, the contractor shall, for the purposes of this Act, be deemed to be a worker employed by the person who made such contract with the contractor."

Held, (1) that a contract of indefinite duration for repeated performances of an acrobatic act does not fall within the opening words of the section " a contract to perform any work exceeding five pounds in value."

(2) That the purpose of the exception or exclusion expressed by the words in brackets is 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 business or firm 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 section thus covers men who work for the principal but have no independent trade or business or who, though carrying on an independent trade or business, undertake a contract outside the scope or course of that trade or business.

Humberstone v. *Northern Timber Mills* (1949) 79 C.L.R. 389, per *Dixon* J., at p. 401, approved.

Where by reason of the answer given to a question in a stated case pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1948 (N.S.W.) an award of the Workers' Compensation Commission cannot stand and the appellate court, be it the Supreme Court or the High Court exercising the former's function anew, is unable to say that the tribunal of fact would be bound in law on the evidence to make findings necessary to dispose of the matter, the proper course is for such appellate court to remit the matter to the Workers' Compensation Commission for rehearing or reconsideration in accordance with the answer to the question.

Decision of the Supreme Court of New South Wales (Full Court): *Zuijs* v. *Wirth Bros. Pty. Ltd.* (1955) 55 S.R. (N.S.W.) 368; 72 W.N. 188, reversed.

APPEAL from the Supreme Court of New South Wales.

Constantin Zuijs (hereinafter called the appellant) brought proceedings in the Workers' Compensation Commission of New South Wales to recover compensation pursuant to the *Workers' Compensation Act* 1926-1948 (N.S.W.) in respect of injuries sustained by him on 18th April 1951 when he fell in the course of an act upon the trapeze in conjunction with a fellow acrobat at a performance of a circus conducted by Wirth Bros. Pty. Ltd. (hereinafter called the respondent). The respondent denied liability. The appellant claimed to be entitled to compensation either upon the basis that he was a " worker " within the primary meaning of that word as used in the Act, namely as one employed under a contract of service, or alternatively that he was entitled to the benefit of s. 6 (3A) of that Act, it not being disputed that the appellant

sustained his injuries in the course of the performance of his contract with the respondent.

At the hearing of the application before the Workers' Compensation Commission evidence was given by the appellant and by a medical practitioner on his behalf, and it was noted that one Labans was present and could, if required, give evidence in support of that given by the appellant. Counsel for the respondent did not seek to cross-examine the appellant or his witness nor did he seek to call evidence.

The learned judge of the Workers' Compensation Commission (Judge *Rainbow*) found that the appellant, when injured, was not employed by the respondent under a contract of service and thereby not within the primary meaning of the word "worker" as used in the *Workers' Compensation Act* 1926-1948, and his Honour further rejected the claim of the appellant based upon s. 6 (3A) of such Act.

At the request of the appellant the learned judge stated a case pursuant to s. 37 (4) of such Act for the opinion of the Supreme Court upon the following questions :—Whether on the evidence the commission erred in law in holding : (a) that the appellant was not employed under a contract of service, or (b) that the appellant was not to be deemed to be a worker within s. 6 (3A) of the *Workers' Compensation Act* 1926-1948.

The Supreme Court (*Street* C.J., *Herron* and *Maguire* JJ.) answered both questions in the negative, the appellant not arguing the first of the questions in the case stated.

From this decision the present appeal was brought to the High Court.

The relevant facts as found by the learned judge of the Workers' Compensation Commission and included in the case stated and the relevant statutory provisions are sufficiently set forth in the joint judgment hereunder.

J. H. Wootten, for the appellant. The appellant's case before the commission was put in two ways : first, that he was employed by the respondent under a contract of service, secondly, that he was within s. 6 (3A) of the *Workers' Compensation Act* 1926-1948. The first point was not argued in the court below and it is not proposed to argue it here.

[WILLIAMS J. Why do you give up the first point ? Have you read *Sun Newspapers Ltd.* v. *Whippie* (1) ?]

The view was taken that it was only necessary for there to be some evidence on which the commission could come to a conclusion against the appellant to preclude the point being relied upon.

(1) (1928) 28 S.R. (N.S.W.) 473 ; 45 W.N. 126.

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On the first point, the evidence establishes a contract of service and shows that the necessary degree of control was exercised over the appellant by the respondent. If the evidence does not establish a contract of service, then he necessarily falls within s. 6 (3A) in that he was employed to perform work exceeding five pounds in value. The view taken by the commission of that section was erroneous. The correct view of that section is illustrated by *Humberstone* v. *Northern Timber Mills* (1), per *Fullagar* J. (2), per *Dixon* J. (as he then was) (3); *Becker* v. *Carthew and Davies* (4); *Hutchinson* v. *Insurance Commissioner* (5). The section only requires that the work to be performed must exceed five pounds in value, but not that there is to be any definite piece of work. Each week's work here exceeded that amount in value, the week being the smallest unit which ought to be taken. The trade or business must exist independently of the particular contract and the basis of the section implies that there is a trade or business independent of this work, because the work is incidental to it. The appellant had nothing that could be termed a trade or business, having only his contract with the respondent. There is no basis in the section for differentiating between work which can be done by one man alone and work which requires the co-operation of several, as was said in the court below. Merely because the work is of such a character that it cannot be sub-let or workers employed to perform it does not take it out of s. 6 (3A). The section requires that the work must not be done by sub-letting or the engagement of labour, but does not require that it shall be capable of being done in that way before its benefits are attracted. The section does not contemplate the production of a concrete result exceeding five pounds but only that the work being done shall be of that value.

C. L. D. Meares Q.C. (with him *H. H. Gibson*), for the respondent. This appeal is limited to a pure question of law and any question as to the weight of evidence cannot be raised. The sole question for determination on the matter of the existence of a contract of service is whether there was any evidence to support the findings made. [He referred to *Clark* v. *Flanagan* (6); *McPhee* v. *S. Bennett Ltd.* (7); *Becker* v. *Carthew and Davies* (8).] On the evidence the contract proved was one for services and the findings made were justified, having regard to the absence of evidence as to

(1) (1949) V.L.R. 351; 79 C.L.R. 389.
(2) (1949) V.L.R., at pp. 359, 360.
(3) (1949) 79 C.L.R., at pp. 401, 402.
(4) (1952) V.L.R. 248, at pp. 251, 252.
(5) (1953) 47 Q.J.P. 123.
(6) (1934) 52 C.L.R. 416.
(7) (1934) 52 W.N. (N.S.W.) 8.
(8) (1952) V.L.R. 248, at pp. 251, 252.

control, and they cannot be disturbed. [He referred to *Clark* v. *Flanagan* (1).] Section 6 (3A) is not here applicable. The section envisages the undertaking of a definite task for a fixed sum exceeding five pounds in value. The appellant, to bring himself within the section, is forced to attempt some valuation of the work done in relation to one week's wages, but this strains the opening words of the section beyond their proper limits. The appellant was carrying on the trade or business of a trapeze artist and that none the less because he could make only successive as opposed to concurrent contracts, and the work here being done was incidental to that trade or business and therefore outside s. 6 (3A). *Latham* C.J. in *Humberstone* v. *Northern Timber Mills* (2) considered that a person could within the exception to the section carry on trade or business even though he was performing work for only one man, and in order to carry on business it is unnecessary for the person concerned to hold himself out to the public as so doing.

[DIXON C.J. On the question of contract of service *Armour* v. *British International Pictures* (3) would appear to be in your favour.]

That case and *Simmons* v. *Heath Laundry Co.* (4) show that the question of contract of service or for services is one of fact for the trial judge and cannot be interfered with by an appellate court. What is a question of fact, of mixed law and fact, and of law was dealt with by *Jordan* C.J. in *Australian Gas Light Co.* v. *Valuer-General* (5). Whether a particular set of facts is within the description of a word or phrase in a statute is a question of fact. [He referred to *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (6); *Shepherd* v. *Felt & Textiles of Australia Ltd.* (7).] These authorities show that the point is not open to the appellant in default of him showing that there was no evidence to support the findings. On a consideration of s. 6 (3A) as a whole the onus is on the applicant before the commission to show that the work being performed is not "work incidental to a trade or business regularly carried on by the contractor etc." The general principles applicable on a question of this nature appear in *Vines* v. *Djordjevitch* (8).

J. H. Wootten, in reply. The appellant is entitled to argue the first question: *Groom* v. *City of Port Adelaide* (9). Quite apart from the question of control the evidence revealed other *indicia* of the

(1) (1934) 52 C.L.R., at pp. 428, 429.
(2) (1949) 79 C.L.R., at p. 398.
(3) (1930) 23 B.W.C.C. 367.
(4) (1910) 1 K.B. 543, at pp. 548, 549, 553.
(5) (1940) 40 S.R. (N.S.W.) 126; 57 W.N. 53.
(6) (1950) 81 C.L.R. 188, at p. 191.
(7) (1931) 45 C.L.R. 359, at p. 373.
(8) (1955) 91 C.L.R. 512.
(9) (1922) 31 C.L.R. 109.

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master and servant relationship sufficient to make out a prima facie case for the existence of such relationship. [He referred to *Performing Rights Society* v. *Mitchell & Booker (Palais de Danse) Ltd.* (1); *Stevenson Jordan & Harrison Ltd.* v. *Macdonald & Evans* (2).] Section 6 (3A) is designed to deal with persons who are in substance an integral part of the business, just as a servant, and this is indicated by the exclusion of such independent contractors as carry on a separate business of their own. On the uncontradicted evidence the proper conclusion to have been drawn was that the appellant was an employee, and the contrary finding was an error of law: *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (3).

Cur. adv. vult.

DEC. 15.

The following written judgments were delivered:—

DIXON C.J., WILLIAMS, WEBB and TAYLOR JJ. The respondents to this appeal are circus proprietors who in the Workers' Compensation Commission and in the Supreme Court of New South Wales have successfully resisted the claim of an acrobat for compensation in respect of injuries suffered in the circus. The acrobat, who is the appellant, performed upon the trapeze in conjunction with a colleague. During a performance in which the latter hung from a rope with his hands while the appellant grasped his feet and was thus suspended beneath him, his colleague slipped from the rope so that both fell, his companion falling on top of the appellant. It was in this way that the appellant sustained his injuries and there is no question that they arose out of, as well as in the course of, the work he was doing for the respondents. The ground upon which the respondents have escaped liability is that the appellant was not employed under a contract of service with the respondents and that he did not fall within any special provision bringing him within the *Workers' Compensation Act* 1926-1948 (N.S.W.). Of these special provisions the appellant relied only upon one, namely s. 6 (3A). The fellow acrobat whose insecure grasp of the rope caused the accident had only lately joined the appellant in the act they performed. In fact it was their fourth performance together. He had come, at the appellant's instance, to take the place of a former coadjutor, by name Labans, who had relinquished the trapeze for matrimony. All three men were Latvians. The appellant had come to Australia two years before the accident.

(1) (1924) 1 K.B. 762, at pp. 767-769.
(2) (1952) 1 T.L.R. 101, at pp. 110, 111.
(3) (1950) 81 C.L.R., at p. 191.

During a life in Europe marked by vicissitude and peril he had been among other things an acrobat. When he arrived in Australia he was at first put to work at a glass factory. But a reunion with Labans, who also had been an acrobat, led to their together taking an engagement with the respondents to perform on the trapeze. They moved from place to place with the circus and performed together for about a year. Then Labans retired from acrobatics, and was replaced by the man who fell on top of the appellant owing to his hand slipping. The question being whether the appellant was entitled to compensation either because he performed under a contract of service with the respondents or because the case fell within s. 6 (3A) of the Act, the evidence relevant to those issues was presented to the commission with an unfortunate economy of detail. The appellant of course gave evidence. After a lengthy account of his life in Europe he turned to the more relevant but less absorbing topic of the terms of his engagement with the respondents. Apparently he found Labans working in some capacity at the respondent's circus and there they practised the trapeze. As they practised, someone having authority saw them and said that may be they would like to take a job in the circus. The appellant expressed his desire for one and in answer to an inquiry about his then employment explained that he was at the glass factory under direction. He was sent to a solicitor who saw his contract as a migrant and said that he would endeavour to obtain permission for his transfer to the circus. Later he informed the appellant that permission had been granted. All this took place in Melbourne. The respondents then paid his fare to Sydney where he saw first Miss Doris Wirth and then Mr. Phillip Wirth. It was assumed rather than proved that they managed the circus. Miss Wirth interviewed the appellant and Labans and said that she wished to see what they could do. After an exhibition, the appellant's evidence continues : " She said we could stay for £30 each, she would pay for us. We could stay in Sydney. The season here was about three months and after we finished Mr. Phillip Wirth came and asked if we would like to continue." His evidence goes on that nothing was said as to how long they were employed for, that they began at thirty pounds a week each and at every performance of the circus gave an act together of about ten minutes' duration. There were two performances on Wednesday and Saturday and one on other week days. They both also came on in the grand parade. They each received a weekly envelope containing twenty-three pounds, a deduction of seven pounds being made for tax. Later, probably at the close of the Sydney season,

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Mr. Phillip Wirth asked them if they would stay on in the circus at twenty pounds a week each. They each agreed and they toured the other capital cities and many towns in Australia. The appellant and his companion were obliged to rehearse and be at the circus before the opening of the circus performance, march in the grand parade and do their act, but they were not required to do any other work. When in March 1951 Labans announced that he would not continue because he was marrying, Mr. Phillip Wirth asked the appellant if he could get somebody who would replace Labans. On the appellant's replying that he had one, a good gymnast in Adelaide, Wirth said he would like to see him, and asked the appellant to write to him. The man came to Sydney, they practised together for a fortnight during which they received no pay, and then gave an exhibition before Wirth who discussed the matter with Miss Wirth and then sent for the appellant. What occurred is stated by the appellant as follows : " He said if we liked we could stay and work at the same job as we had but he could not pay us £20 each, he would pay less because this act was not as good. He would pay only £17 10s. 0d. each. I told him that is not good enough because something could happen. He said I should not worry about that because everybody is insured in this business." Eventually they agreed to carry on at the wages offered. There was no cross-examination and no other testimony. On the facts disclosed by this evidence the learned judge who heard the case when it was before the Workers' Compensation Commission considered that it was clear that there was no contract of service : " I think ", said his Honour, " it was an independent contract act. Many of these factors to be considered are very often neutral or common to the existence of contract of service or for services. The right, not necessarily the exercise of it, the right to control the manner of the work as against the general notion that you hire a tradesman or a skilled man to produce a particular result for you is an important consideration. Upon any test and so far as any of the other factors—times and methods of payment—throw any light upon the interpretation of the relationship, I think from all points of view Mr. Zuijs and his partner were an act bought by Wirth's Circus upon a particular monetary basis and that there was no contract of service." One of the two questions which, pursuant to the appellant's request, his Honour reserved for the decision of the Supreme Court was whether he erred in holding that the appellant was not employed under a contract of service. But before the Supreme Court the undoubted truth that the issue whether a man was or was not employed under a contract of service is one of

fact seems to have formed a consideration which discouraged the appellant's counsel from pressing the question. In this Court it formed one of the grounds of appeal but, had it not been for what fell from the Bench, doubtless it would not have been supported. Yet when the reasons which his Honour gave for his finding are considered it is not easy to see how it was arrived at except upon a basis of law that is open to question. It is not a mere refusal to reach a positive conclusion because there are possibilities which the meagre proofs do not definitely exclude. It is an affirmative finding that the work was done under an independent contract and that clearly there was no contract of service.

What foundation does the evidence afford for such a conclusion ? Here is a man engaged indefinitely at so much a week, by the proprietors of a circus that goes from place to place, to give with a companion an acrobatic act at every performance and to appear in the grand parade. That is in effect all you know that matters. What is there in it that points to an independent contract ? A weekly hiring for an indefinite period to do a defined task on the premises of the other party as an integral portion of a spectacle under his general management and control would appear to present elements characteristic of a contract of service. It is evident that the foundation of his Honour's finding must lie in the nature of the task, an act by two men upon a trapeze. For there is nothing else to found it. That is the significance of the learned judge's statement that he thought " from all points of view Mr. Zuijs and his partner were an act bought by Wirth's Circus upon a particular monetary basis." There are in the New South Wales Workers' Compensation Reports one or two cases in which engagements of persons to take part in contests either as performances or exhibitions of skill at public entertainments or in the course of instructing others have been held to be no contracts of service for reasons which seem to have been taken to depend chiefly on the fact that what was done consisted either in the display or use of personal skill or in an individual act and therefore amounted to work which did not lend itself to the control by the employer which is looked for as distinctive of a contract of service. There is the case of the boxer engaged as a preliminary fighter at a stadium : *Reid* v. *Leichhardt Stadiums Ltd.* (1). There is the wrestling instructor : *Roberts* v. *Withrow* (2) and there is the jockey : *Carter* v. *Murray* (3). A contrast may be found in two other cases in the same series of reports but perhaps the contrast only served to emphasize the point made

(1) (1929) 3 W.C.R. 139.
(2) (1929) 3 W.C.R. 137.
(3) (1937) 11 W.C.R. 231.

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in the other cases, with which no doubt the learned judge was familiar. The two cases are *Flett* v. *Sharman* (1) in which a professional boxer who combined exhibitions of his art with the perhaps kindred duties of an usher at a side show was held to be under a contract of service, and *Odgers* v. *Union Theatres Ltd.* (2), where it was decided that a chorus girl sang and danced with the *corps de ballet* under a contract of service. Be those cases right or wrong upon the facts, a false criterion is involved in the view that if, because the work to be done involves the exercise of a particular art or special skill or individual judgment or action, the other party could not in fact control or interfere in its performance, that shows that it is not a contract of service but an independent contract. It is the view which *MacKinnon* L.J. in *Wardell* v. *Kent County Council* (3) treated as an error when, speaking of a nurse performing duties in a county hospital, he said: "Apart from authority, I should have thought it clear that the applicant was working under a contract of service with the respondents as her employers within the terms of that definition. It is true that she possessed the skill of a trained and qualified nurse, and no doubt impliedly agreed to exercise that skill in return for her weekly wage, but many a person who is clearly a workman within the definition possesses, and is engaged to exercise, some qualification of skill, e.g., a chef, or a cabinet-maker, or a compositor, or even a professional football-player" (4). His Lordship then referred to the arbitrator's decision that the nurse was working under a contract of service to be rendered by her and not under a contract of service and said: "He likens her status as a nurse to that of the doctors or dentists attending the patients in the hospital. I cannot agree with this conclusion. A teacher in a school has, or ought to have, at least as high a degree of skill of his own sort as a trained hospital nurse has of hers. That he should be a workman, under a contract of service, and she in the more glorified position of a professor condescending to render services, and thereby beyond the protection of the Act, seems to be a totally wrong application of the principle indicated by Sir *H. H. Cozens-Hardy*, M.R." (4) (*scil.* in *Simmons* v. *Heath Laundry Co.* (5)). In *Gold* v. *Essex C.C.* (6) *MacKinnon* L.J. spoke of the principle that one who employs a servant is liable to another person if the servant does an act within the scope of his employment so negligently as to injure that other and said: "That principle applies even though the work which the servant is employed to do is of a

(1) (1937) 11 W.C.R. 173.
(2) (1931) 5 W.C.R. 99.
(3) (1938) 3 All E.R. 473.
(4) (1938) 3 All E.R., at p. 481.
(5) (1910) 1 K.B. 543.
(6) (1942) 2 K.B. 293.

skilful or technical character as to the method of performing which the employer is himself ignorant, for example, a shipowner and the certified captain who navigates his ship " (1). *Harvey* C.J. in Eq. had no difficulty in applying the test to a contract for work no doubt widely regarded as the product of individual or idiosyncratic skill. It was a case in which a newspaper contracted with an artist or cartoonist for a regular contribution of pictures of a not unfamiliar class showing the adventures of a character or characters whose age, attributes and appearance seemed to persist unaffected by time. As was said in this Court in *Associated Newspapers Ltd.* v. *Bancks* (2) : " He was not an ordinary employee of the plaintiff. He was employed as a comic artist and his true work was to produce this weekly drawing. It was for this production that his substantial weekly salary was principally payable. It was what he was really engaged to do " (3). His Honour held this to be a contract of service : *Sun Newspapers Ltd.* v. *Whippie* (4). The law does not use the test in order to ascertain whether in fact the employee's work to be done is susceptible of control and direction by the employer : it is in order to ascertain whether a relation exists between the two men. The terms of the often repeated statement of *Bramwell* L.J. are : "A servant is a person subject to the command of his master as to the manner in which he shall do his work " : *Yewens* v. *Noakes* (5).

The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters. Even if Mr. Phillip Wirth could not interfere in the actual technique of the acrobatics and in the character of the act, no reason appears why the appellant should not be subject to his directions in all other respects.

Assuming that the terms of the engagement fixed the character of the act and that from its very nature an acrobatic performance must be executed upon the unhampered responsibility of the performers, that does not remove the relationship from the category of master and servant. There are countless examples of highly specialized functions in modern life that must as a matter of practical

(1) (1942) 2 K.B., at p. 305.
(2) (1951) 83 C.L.R. 322.
(3) (1951) 83 C.L.R., at p. 337.
(4) (1928) 28 S.R. (N.S.W.) 473, at p. 478 ; 45 W.N. 126, at p. 128.
(5) (1880) 6 Q.B.D. 530, at pp. 532, 533.

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necessity and sometimes even as a matter of law be performed on the responsibility of persons who possess particular knowledge and skill and who are accordingly qualified. But those engaged to perform the functions may nevertheless work under a contract of service. In the present case what has been proved in evidence all points to the conclusion that the relation between the parties was that of master and servant. If the power of selecting the person engaged must exist in the master in order that the contract may be one of service, that element was certainly present. If the fact that the remuneration takes the form of wages is a mark of the relationship, that was the case here. If a right in the master to suspend or dismiss for misconduct is something to be looked for, then again there could be little doubt that the appellant was subject to that discipline. If a right to superintend and control the manner in which the servant fulfils his obligation must exist in some degree, a little consideration will show that the daily relations of a performer playing a regular part in the work of such an organization as a travelling circus would demand a large measure of control and superintendence. With reference to the act itself there are many subsidiary matters. The place it took upon the programme, the measures of safety to be observed, the number, time and manner of the rehearsals, the costume of the performers, the place where they dressed and their conduct both before the audience and otherwise, these are all matters naturally calling for control. The grand parade doubtless involved no inherent difficulty but one may suppose that it was necessary to exercise control and direction as to the manner in which it was done. Apart from the two central duties of performing the act and taking part in the grand parade, the incidents of the relation between a regular performer and a touring circus must cover a wide field of conduct calling for superintendence and control. No doubt it might all be dealt with by a contract for services, but unless the express terms of the contract of engagement specified the obligations of the performer in great detail in order to avoid reserving an extensive power of control, it would be likely to be treated as a contract of service as is illustrated by the interesting case of *Stagecraft Ltd.* v. *Minister of National Insurance* (1). That was a case of two comedians who gave acts together in a variety show. They performed under a written contract which was, however, held to be a contract of service. The Lord Justice Clerk, Lord *Thomson*, said that the crux of the matter lay in the extent of the control exercised by the management. His Lordship continued : " Broadly speaking, there can be no

(1) (1952) S.C. 288 ; (1952) S.L.T. 309.

doubt that in some respects an artiste is beyond the control of the management. It is his own individuality and personality that makes or mars him as an artiste. However much he may be instructed or directed, it is the natural gift which counts. But the fact that the performance of a task depends on a natural gift or on some laboriously acquired accomplishment does not necessarily mean that the performer cannot be a servant. It is only in the most mechanical of operations that anyone can dictate absolutely the mode of performance. The nature of the task is not conclusive. An artisan may be an independent contractor while the most highly skilled technician is a servant. A skilled craftsman may have highly individual gifts and yet be under a contract of service. His value as a servant lies in his individuality and he is frequently employed just because he can exercise specialized skill which the employer does not possess. The employer of such a servant can direct the objective to which the servant's skill is to be addressed but he is powerless to control the manner in which the servant's skill is exercised. It seems to me therefore to be beside the point to argue that an artiste, because he gives a unique individualistic performance which expresses his own personality, cannot be under such control by his employer as to make him a servant " (1).

Enough has been said to show that in the character of the performance no foundation can be found for the conclusion affirmatively stated by the learned judge that it was " an independent contract act ". And the evidence discloses nothing else upon which such a conclusion could be formed. It is not as if his Honour had refused to act on the appellant's evidence because it failed to fill in details of the picture. If that had happened it might have been urged that the decision meant no more than a failure to prove the issue to the reasonable satisfaction of the tribunal of fact. On the contrary, it seems clear enough that the decision can be accounted for only by error in law.

The first question which is reserved in the case stated should therefore be answered that upon the evidence before the commission the commission did err in law in holding that the applicant was not employed under a contract of service. The second question inquires whether the appellant was not to be deemed to be a worker within the meaning of s. 6 (3A) of the *Workers' Compensation Act* 1926-1948. That provision is as follows :—" Where a contract to perform any work exceeding five pounds in value (not being work incidental to a trade or business regularly carried on by the contractor in his own name, or under a business or firm name) is made with the

(1) (1952) S.C., at p. 297 ; (1952) S.L.T., at p. 312.

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contractor, who neither sublets the contract, nor employs workers, the contractor shall, for the purposes of this Act, be deemed to be a worker employed by the person who made such contract with the contractor."

In our opinion this provision is entirely inappropriate to the kind of contract in question in this case. That is shown by the opening words, " Where a contract to perform any work exceeding five pounds in value ". You cannot satisfy this condition by a contract of indefinite duration for repeated performances of an act on a trapeze. As to the bracketed words we are prepared to apply to them the explanation which *Dixon* J. (as he then was) gave in *Humberstone* v. *Northern Timber Mills* (1) of the similar provision of the Victorian legislation. But that does not make the provision any more appropriate to such a contract as the present. The second question in the case should be answered : No.

It remains to consider what order should be made. The nature of the proceeding before the Supreme Court under s. 37 (4) of the *Workers' Compensation Act* 1926-1948 was discussed in *Smith* v. *Mann* (2) where it was pointed out that the statement of a case after award is a means of invoking the jurisdiction of the Supreme Court so that it may revise or reconsider within the limits of the question of law raised the determination of the commission. " If the decision of the Supreme Court upon any of those questions means that the order or award of the Commission was erroneously made, that order or award can no longer remain in operation as a determination of the proceedings before the Commission " (3). On an appeal to this Court, we exercise the function of the Supreme Court anew. The passage quoted describes the position in the present case. The finding that there was no contract of service but an independent contract for the performance of an act cannot stand. For it has an erroneous basis. But what should now be done ? There has been no finding that there was a contract of service and although all the facts proved point to that conclusion, the evidence is so bare and meagre that to say that the tribunal of fact was bound in point of law to be satisfied of the issue may be going too far. Sections 37 (4) and (7) are expressed very compendiously but there seems no reason to suppose that the powers of the Supreme Court do not extend to what is incidental to giving effect to the decision. In the present case the proper course is to answer the questions as stated and to remit the case to the commission with a direction that the application be reheard by the commission.

(1) (1949) 79 C.L.R. 389, at pp. 401, 402.
(2) (1932) 47 C.L.R. 426.
(3) (1932) 47 C.L.R., at p. 446.

McTIERNAN J. I agree.

The question whether the appellant was working under a contract of service is a matter of inference from statements made by the management to him concerning his remuneration and the evidence of the appellant's attendances at the circus in order to perform his role of trapezist. The payment was a weekly rate. It does not appear that the appellant's remuneration depended upon the number of performances which he gave. According to evidence the appellant "joined the circus" early in March 1950 and "stayed" with it until he was injured. The accident happened on 18th April 1951. The evidence proves that the appellant appeared in his role as trapezist at all the shows given by the circus during that period whether in the city or country. There was an interval of two weeks, shortly before the accident, during which he did not appear because his associate acrobat left the circus and he could not give his particular exhibition without him. The respondent itself appointed and paid the two acrobats who performed in company with the appellant. There is no evidence of any express term of the engagement of the appellant by the respondent except the rate of payment. Was the appellant a contractor or a servant? The Workers' Compensation Commission found that he was the former.

The first question in the stated case is whether the commission erred in holding that he was not a servant of the respondent. I think that the evidence does not support the finding that the appellant was an independent contractor. The finding is that "from all points of view Mr. Zuijs and his partner were an act bought by Wirth's Circus upon a particular monetary basis and that there was no contract of service." I think that it is not correct that all the evidence pointed away from a contract of service. The finding made by the commission has nothing less to support it but an implication arising from the fact that he was employed to exercise skill and an independent judgment in performing upon the trapeze. The nature of his employment could, it may be assumed, raise that kind of implication. But it is obvious that in order to carry out his engagement he would be required to comply with the orders of the management in respect of such matters as the time at which he should attend the circus, the length of time allowed for his act, the frequency of his appearances, and whether he should "go on tour" with the circus. Besides, it was part of the business of the respondent to provide trapeze exhibitions for its patrons and it may be assumed that these exhibitions, like other feats in the circus tent, were done under the eye of the management. I do not see anything in the evidence showing that the management

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had no power or right to order the appellant, for example, not to repeat a particular feat on the trapeze if it were considered dangerous to him or the audience. The evidence was in my opinion sufficient in law to prove a contract of service. However, it is not within the province of this Court to make a finding on the issue. Such a finding would involve weighing inferences of fact arising from the nature of the employment as to the right or power of the respondent to control the appellant, and considering whether such inferences rebutted the proof of the relationship of a servant. I think that the first question should be answered : Yes, because the commission erred in holding, as I understand the finding, that the evidence conclusively proved that the relationship of the appellant to the respondent was that of an independent contractor.

As regards the second question I agree with the opinion expressed in the joint judgment as to the limiting effect of the words " where a contract to perform any work exceeding five pounds in value " and by reason of those words the appellant is not a worker within the meaning of s. 6 (3A) having regard to the evidence.

I agree with the order proposed in the joint judgment.

Appeal allowed with costs. Discharge the order of the Supreme Court. Order that in lieu thereof par. (a) of the question in the stated case be answered Yes and par. (b) thereof No and that the appeal to the Supreme Court be allowed with costs and that the cause be remitted to the Workers' Compensation Commission of New South Wales with a direction that the said commission do rehear or reconsider the appellant's application and deal with it as may be right consistently with this order.

Solicitors for the appellant, *Boyland, McClelland & Co.*
Solicitors for the respondent, *Hunt & Hunt.*

R. A. H.