[HIGH COURT OF AUSTRALIA.]

FOGARTY . . . . . APPELLANT;
APPLICANT,

AND

DOWERIN ROAD BOARD . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1935.

PERTH, *Aug.* 21, 27,

Rich, Starke, Dixon, Evatt and McTiernan JJ.

*Workers' Compensation—Injury by accident—Worker's services temporarily lent—Accident while doing work for which lent—Worker employed by Road Board—Work not within scope of Board's statutory power—Road Districts Act* 1919-1933 (*W.A.*) (*No.* 38 *of* 1919—*No.* 6 *of* 1933)—*Workers' Compensation Act* 1912-1927 (*W.A.*) (*No.* 69 *of* 1912—*No.* 34 *of* 1927), *secs.* 4, 6.

The definition of "employer" in sec. 4 of the *Workers' Compensation Act* 1912-1927 (W.A.) provides that where the services of a worker are temporarily lent or let on hire to another person by the person with whom the worker has entered into a contract of service, the latter shall for the purposes of the Act be deemed to be the employer of the worker whilst he is working for that other person, but shall be entitled to be indemnified by that other person to the extent of any compensation paid under the Act by the employer in respect of any injury received by the worker while he is working for that other person.

*Held*, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., that (1) when the services of the worker are lent by the employer the work he is lent to do is for the time being the measure of his duties and his employment by the borrower must be regarded for the purpose of ascertaining whether an accident arises out of or in the course of the employment: (2) the loan of an employee's services is a popular rather than a legal conception; the services may be lent although he is paid by the borrower and comes under his direction and control; the important consideration is whether the contract of service with the original employer continues: (3) the diversion of the services of the worker may

amount to a loan although his contract of service may be terminated without notice and he is paid time wages calculated by the day, if there is no intention on either side to terminate the employment even temporarily.

A road board in a country district had employed a worker regularly for some years. His work included the repair of motor vehicles. A local resident wished some repairs done to his motor vehicle and informed the secretary of the board that he wanted the worker to do them. The secretary said he was the best man for the purpose available. At that time his services were not immediately required by the board, and acting under the secretary's authority the foreman directed the worker to do the repairs to the car. The board had from time to time made its plant and workmen available to bodies and persons requiring services which otherwise could not be locally obtained. While repairing the car the worker suffered injury by accident.

*Held* (1) that his services had been "lent"; (2) (*Starke* J. dissenting) that they were lent by the foreman, at the instance of the secretary, acting within the scope of his authority; as the worker was to be paid by the person to whom his services were lent and as at the time the board did not immediately require his services although employing him at work, it was incidental to its general powers to lend his services and it was not an *ultra vires* act; and consequently the board was liable to him for worker's compensation.

Decision of the Supreme Court of Western Australia (Full Court) reversed.

APPEAL from the Supreme Court of Western Australia.

Joseph Patrick Fogarty was employed for some years by the Dowerin Road Board driving and repairing motor vehicles and performing such other duties as the Board directed. In September 1933 one Harley requested the Board's secretary to let him have Fogarty's services to repair his (Harley's) motor car. The secretary agreed to do so and instructed the foreman under whom Fogarty was working to direct him to undertake the repair of the car. At this time Fogarty was engaged in clearing a road: he had been driving a tractor, but it had broken down, and he was put to other work pending a decision by the Board as to the repair of the tractor. After a conversation with the foreman Fogarty commenced work on Harley's car on 21st September and while engaged in that work suffered injury by accident. He claimed of the Board compensation for the injury under the *Workers' Compensation Act* 1912-1927 (W.A.) on the basis that his services had been temporarily lent to Harley within the definition of "employer" in sec. 4 of the Act and therefore

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the Board was bound to compensate him. The Board denied liability and Fogarty applied to the Local Court at Goomalling to have the questions in dispute determined. The magistrate who constituted the Court decided in favour of the applicant. On appeal by the Board the Full Court of the Supreme Court of Western Australia reversed that decision.

From the decision of the Supreme Court the applicant now appealed to the High Court.

*S. Howard-Bath*, for the appellant. Although the Board has no statutory power under the *Road Districts Act* 1919-1933 (W.A.) to engage in repairing motor vehicles for private persons, it cannot be contended that the worker on this account was not engaged in any employment under the Board. The most that can be said is that he was engaged in employment which the Road Board had no statutory power to instruct him to do. The mere fact that the workman was directed to do some work which the Board had no statutory power to carry out does not invalidate the contract of service. Even if the foreman was acting outside the scope of his authority in giving instructions, this should not affect the worker's claim.

[McTIERNAN J. referred to *Brassett* v. *Stephens* (1).]

A worker is acting within the scope of his employment when he obeys the directions of a superior employee whose orders he is accustomed to obey (see *McDonalds' Law Relating to Workers' Compensation in New Zealand*, 2nd ed. (1934), p. 261, par. 494; *Halsbury's Laws of England*, 1st ed., vol. 20, pp. 142-144). The principle is not affected by the fact that in giving such orders or directions such superior officer was acting in breach of instructions given to him by the employer or by another servant of higher rank (see *Risdale* v. *Owners of S.S. Kilmarnock* (2)). [Counsel also referred to *Williamson* v. *Ross and Atkins* (3); *Mulrooney* v. *Todd* (4); *Ireland* v. *Livingstone* (5); *Dugdale* v. *Lovering* (6); *Sheffield Corporation* v. *Barclay* (7); *Geary* v. *Ginzler & Co.* (8); *Smith* v. *Fife Coal Co.* (9);

(1) (1907) 10 G.L.R. (N.Z.) 88.
(2) (1915) 1 K.B. 503; 8 B.W.C.C. 7.
(3) (1933) N.Z.L.R. (Supp.) 186.
(4) (1909) 1 K.B. 165.
(5) (1872) L.R. 5 H.L. 395.
(6) (1875) L.R. 10 C.P. 196, at pp. 197, 200.
(7) (1905) A.C. 392, at p. 397.
(8) (1913) 6 B.W.C.C. 72.
(9) (1914) 7 B.W.C.C. 253, at pp. 255, 259.

*Lane* v. *W. Lusty & Son* (1); *Marshall* v. *Joseph Rogers & Sons Ltd.* (2); *Cars* v. *Vickers Ltd.* (3); *Clarke* v. *Anderson and Andersons* (4); *Finn* v. *Shelton Iron, Steel and Coal Co.* (5); *Tobin* v. *Hearn* (6).]

*F. Leake* and *Crawcour*, for the respondent. Assuming that the appellant was still in the Board's employment after 21st September and that he was expressly authorized by the Board's foreman to do work on Harley's car, it does not follow that the Board is liable. There is no evidence to show that the Board lent the appellant to Harley to do the work on his car. All the evidence is against such a contention. The Board did not expressly authorize the appellant to do the work and there can be no implied authority for its foreman to give instructions to the appellant to do work which the Board had no power to do (see *Poulton* v. *London and South Western Railway Co.* (7) ).

*S. Howard-Bath*, in reply.

*Cur. adv. vult.*

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. This is an appeal from an order of the Supreme Court of Western Australia by which a judgment of the local Court at Goomalling was set aside. The judgment of the Local Court awarded to the appellant worker's compensation and medical expenses in respect of personal injury by accident sustained by him while at work repairing a motor car. The motor car did not belong to the respondent, the Dowerin Road Board, but to a veterinary surgeon named Harley.

The question in the case is whether the Road Board is liable for compensation for an injury so sustained. The question depends upon the application of the statutory provision occurring in the definition of "employer," which enacts that, where the services of a worker are temporarily lent or let on hire to another person by

(1) (1915) 3 K.B. 230; 8 B.W.C.C. 518.
(2) (1917) 10 B.W.C.C. 588.
(3) (1919) 12 B.W.C.C. 27.
(4) (1918) 12 B.W.C.C. 74.
(5) (1924) 17 B.W.C.C. 69.
(6) (1910) 2 I.R. 639.
(7) (1867) L.R. 2 Q.B. 534.

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the person with whom the worker has entered into a contract of service, the latter shall for the purposes of the Act be deemed to be the employer of the worker whilst he is working for that other person, but shall be entitled to be indemnified by that other person to the extent of any compensation paid under the Act by the employer in respect of any injury received by the worker while he is working for that other person.

The appellant's case is that he was temporarily lent by the Road Board to Harley for the purpose of repairing his car. If this be correct no difficulty exists as to the requisite relation between the accident and the employment. Sec. 6 (1) of the *Workers' Compensation Act* 1912-1927 (W.A.) provides that an employer shall be liable to pay compensation if the accident arises out of or in the course of employment or whilst the worker is acting under the employer's instructions. When the services of the worker are lent by the employer, the work he is lent to do is for the time being the measure of his duties. His employment by the borrower, in other words, must be regarded for the purpose of ascertaining whether an accident arises out of or in the course of the employment. But, in any case, amongst the duties which the Road Board employed the appellant to perform was the repair of its motor vehicles. In most cases arising under the provision for the loan of services the difficulty will be found to lie in determining whether the services of the worker have in fact been lent by the employer, or have become available to the other person without any loan, either because there has been a termination of the first employment, or because the employer has not authorized the performance of the work, or for some other reason. The loan of an employee's services is not a transaction which the law precisely defines. It is rather a popular than a legal conception. The services of a worker may be lent although he is to be paid by the borrower (*Reed* v. *Smith Wilkinson & Co.* (1)). The important consideration is whether the contract of service with the original employer continues. If it subsists and is a continuing contract, the diversion of the worker's services by or under the authority of his employer may amount to a temporary loan (*Murphy* v. *Henderson & Glass* (2)). Consistently with the loan of services he may come under the direction

(1) (1910) 3 B.W.C.C. 223.

(2) (1930) 23 B.W.C.C. 91.

and control of the person borrowing his services and that person may deal directly with him in respect of wages (*Murphy* v. *Henderson & Glass* (1)). Indeed, a loan upon terms that the borrower pays the wages and controls the performance of the work may be considered typical of a lending. The Act distinguishes between letting on hire and lending. The first will usually involve a payment to the employer who lends. The second will not, and, therefore, unless the employer who lends is prepared to bear the cost of the work, a direct payment to the employee may be expected.

In the present case many of the material facts were in dispute; but the findings of the resident magistrate, who constituted the Local Court, appear with one exception to be founded upon evidence which he was entitled to accept. The circumstances of the case must be taken to be those which appear from his judgment and from the evidence which he believed.

The appellant had been employed by the respondent Road Board for some length of time. His work varied in character, but usually he drove a tractor or some other motor vehicle of the Board. He had worked for the Board for about six years. He was paid fortnightly at the rate of £3 a week or 10s. a day. His wages were calculated according to the time actually worked, and he entered on a time-sheet supplied to him his hours of labour and the nature or locality of the work. His employment had not been continuous. There had been some suspension of work in the summer months. But for some weeks before the accident there had been no interruption.

The Board's implements were found useful for other purposes besides road-making, particularly for making tennis courts; sports clubs and others had sometimes obtained from the Road Board the services of the tractor and the grader and of the men who worked them, including the appellant. For the most part the grounds of the bodies to whom the men and implements were made available were under the control of the Road Board. But in three instances this was not so. One of these instances seems to have occurred after the accident. In one of them a private person obtained the use of the men and the implements, but in return did some work for the Road Board. The third case was that of a church tennis court.

(1) (1930) 23 B.W.C.C., at pp. 102, 103.

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When the Board's motor vehicles needed repair or adjustment the appellant did the work so far as he could, and he seems to have been regarded as possessing some skill in such work. At any rate, the secretary of the Road Board had paid him to repair his own car. At that time the appellant was not employed by the Road Board, which then had no work for him to do.

Shortly before the accident, which occurred on 25th September 1933, the tractor driven by the appellant had broken down, and, as the necessary repairs would be costly, it had been laid up until the Board decided what should be done. In the meantime the appellant was put to other work upon the roads, such as levelling off, sanding and clearing.

Harley lived next door to the Road Board's office. His car was of the same kind as the secretary's. On Sunday 17th September he met the appellant in the street and asked him to examine the car, which was out of order. The appellant did so and said that it needed a new gasket. Next day Harley saw the secretary, with whom he was friendly, and arranged that he should obtain for him the necessary spare parts. The secretary asked Harley whom would he get to do the job. He replied that he thought of getting the appellant to do it. The secretary said that he would be a good man for the purpose. The spare parts arrived from Perth on the morning of Thursday 21st September. On that day the appellant was at work clearing a road some distance away. Harley came to him while at work and told him that the parts of his car had arrived and that he expected him to do the work. The appellant replied that he would not do it until he received instructions from the Road Board. On the same morning the secretary told the foreman of the Road Board that he had recommended Harley to get the appellant to repair his car and that he, the secretary, had no objection to his doing it. The foreman went out to where the appellant was working. He says he went there to see the work because of a complaint he had received about it. However that may be, he told the appellant that there was a job for him to do on Harley's car, which was waiting for him. He told him to come in and do it. The appellant said that Harley had seen him that morning and that he had intended to come in and see the foreman at dinner time. The work which the

appellant was doing would occupy him for another ten days or more. He asked the foreman whether he should leave his tools behind a bush. The foreman said that the car might take longer than he expected and it would be better to bring them in. He went in with the foreman and began work on Harley's car that afternoon. He worked at it on the next day, Friday, but did not complete it. On Monday he again worked at it, and on that day the accident occurred.

Nothing was said by the foreman, when he told the appellant to come in to do the repairs, about his wages and Harley said nothing to him about remuneration. As the discussion about the tools showed, both the appellant and the foreman intended that, when the repairs were done, the appellant should resume his work at clearing the road.

The resident magistrate inferred that the appellant would be paid for the work upon Harley's car by the Road Board. But the secretary, the foreman, Harley and the appellant must have been well aware that such a course would be irregular. The appellant did not enter the work up on the Road Board's time-sheet. No such arrangement was proved by direct evidence to have been made by the secretary and Harley. Probably the appellant was uncertain what was the position and left the time-sheet blank for that reason. No doubt in a small town it was not easy to obtain the services of a mechanic and for that reason the secretary and the foreman were ready to make him available to Harley. He, on his part, was accustomed to follow their instructions and to rely upon them, and desired only to be sure that he did not act except with their authority. On the whole the inference that his wages were to be paid by the Road Board does not appear to be warranted. With this one exception, however, the resident magistrate's findings are fully justified by the evidence.

The first question which arises upon this state of facts is whether the appellant's employment with the Road Board was terminated. It may be taken that either he or the Board might have put an end to the relationship without notice. He was employed upon time wages at a daily rate, and, although he was paid fortnightly, no sufficient foundation appears for treating his hiring as fortnightly or weekly. But a relationship of master and servant subsisted and

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continued from day to day unless and until one side or the other terminated it. He was not discharged at the end of each day's work and re-engaged on the following day. His was a continuing employment. His refusal to work at Harley's car until he was instructed by the Road Board indicates that he was not willing to terminate his employment, even for a temporary purpose. The foreman on his side took it for granted that he would resume his work at clearing the road as soon as the car repairs were finished. No doubt no one was alive to the distinction between suspending the work he was doing and interrupting his employment by the Road Board. It was a distinction which had no practical significance. But, upon the facts found, the inference appears almost inevitable that an actual intention to end his employment with the Road Board existed on neither side. The resident magistrate made a finding that the appellant did the work on Harley's car at the express instructions of the foreman of the Road Board, and that he remained under the control of the Board so that, if the necessity appeared and the Board desired his services elsewhere, it could and would have called upon him for the purpose. This finding is sufficiently supported by evidence. It follows that, if the transfer to Harley of the appellant's service was made with the lawful authority of the Road Board, it would amount to a temporary loan by his employer of his services to another person.

But the question remains whether the loan of his services should be considered the act of the Road Board. This question divides itself into two heads. The loan cannot be considered the act of the Road Board unless it was made by or under the direction of a servant or agent possessing a *de facto* authority sufficiently wide to include it. But it is further necessary that an act done on behalf of the Road Board should be within its own legal powers before it can be treated as the act of the Board. Whether the loan of the appellant's services was within the scope of the authority of the foreman, upon whose instructions the appellant acted, is primarily a question of fact. He appears to have had the direction and control of the labour employed by the Road Board subject to the secretary, the Board's executive officer. In handing over the appellant's services, he acted altogether as a result of a conversation with the secretary.

The accounts given of that conversation in their evidence are indefinite and not very satisfactory. But the resident magistrate appears to have considered that the foreman acted with the full authority of the secretary and this certainly seems a probable conclusion which is fairly open on the evidence. At the time when the services of the appellant were lent, he was at work to which he would not have been put if his tractor had not broken down. He could readily be spared. The Board itself had made its men and its implements available to others on the occasions which have been mentioned. Where labour or services of a special kind are not easily obtainable it is natural for a public body to do what it can consistently with its own powers and its own requirements to put them at the disposal of persons residing in its district in need of them. The general authority of the secretary is wide enough to enable him to lend a Road Board workman to another person, if the workman's labour is not for the time being required by the Board and his remuneration is not to be met out of the Board's funds.

The answer to the second question, namely, whether the Board's powers extend to such a loan of services, is influenced by the same considerations. The *Road Districts Act* 1919-1933 (W.A.) does not appear to confer upon road boards power to contract with private persons for the performance of work on their behalf. It does not give any general authority to road boards to hire out their servants or plant. For the Road Board to put at the disposal of a private person the services of an employee whose remuneration was defrayed from its funds might well be held an *ultra vires* act. But it is an altogether different thing for the Road Board to lend the services of an employee without terminating his employment when the Board itself does not immediately need his services and the terms of the loan do not involve the Road Board in responsibility for his wages. Such a transfer of services may conduce to the more convenient carrying on of the work of the Board and should be regarded as fairly incidental to the exercise of its functions.

It is unfortunate for the Road Board that the legislation makes the employer lending, and not the employer borrowing, primarily liable for compensation in such a case. But this consideration cannot affect the question of power. The ultimate responsibility is thrown by the Act

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on the employer who borrows. The purpose of the Act in placing the primary and direct liability for compensation upon the employer lending the services is to relieve the worker of a dilemma in which otherwise the loan of his services might place him. For he might be unable to decide which was his employer for the purpose of claiming compensation. It resolves the dilemma arbitrarily and artificially by selecting the original employer. Indeed, according to a text book, the Court of Appeal has decided that, in making the original employer liable to the worker, the Act has excluded direct liability to him on the part of the person who borrows his services (*Richards* v. *Payne* (1), cited, *Halsbury's Laws of England*, 1st ed., vol. 20, p. 191, note *t*). It follows from the reasons given that the respondent Road Board is liable to the appellant for workers' compensation and medical expenses and that the judgment of the Local Court was right.

In the Supreme Court, which reversed that judgment, two grounds were relied upon. *Northmore* C.J. said that he found it extremely difficult to understand how the magistrate came to the conclusion that the appellant thought that the foreman was instructing him to go and do the repairs as an employee of the Board, and that he had no doubt that the appellant knew perfectly well that he was going to do the work for Harley and not for the Board. In so far as his Honor's view implies that the appellant's employment by the Board was terminated, reasons have already been given for treating the contrary view as the correct conclusion from the facts found by the resident magistrate. In disagreeing with the magistrate's finding of fact, his Honor gave effect to a view of the evidence which to a great extent depends upon the credibility of witnesses. If the magistrate, who heard and saw them, adopted that view, no doubt it would have been sustained in an appellate Court. But, as he adopted the contrary view, the question is whether it is opposed to the evidence. In fact it is, for the reasons already stated, a view well supported by evidence which was open to the resident magistrate to believe. The second ground relied upon in the Supreme Court was that it was beyond the foreman's authority to instruct the appellant to undertake the job of repairing Harley's car. If, as appears to

(1) (1908) Unreported.

be the case, this conclusion assumes that the services of the appellant were to be paid for by the Board, although diverted to Harley's work, it may well be correct. But on the contrary assumption, the authority of the foreman acting under the secretary's instructions seems wide enough to lend the appellant's services while the Board did not immediately require them.

For these reasons the appeal should be allowed and the judgment of the Local Court restored. The respondent should pay the costs in this Court and in the Supreme Court.

Rich J.
Dixon J.
Evatt J.
McTiernan J.

STARKE J. The appellant, Fogarty, has been employed for some years by the Dowerin Road Board driving a tractor and other motor vehicles, and his duties included keeping these vehicles in repair. He was paid fortnightly, at the rate of ten shillings per day, but deductions were made for broken time. The tractor which Fogarty was driving got out of order, and, pending the decision of the Board whether the tractor should be repaired at considerable expense, Fogarty was employed by the Board on odd jobs, such as clearing roads. He was employed for this class of work by the day, and paid for the time worked at 1s. 4½d. per hour. On 19th, 20th and 21st September he was so employed clearing Cemetery Road for five, eight, and four hours respectively. One Harley, a veterinary surgeon, owned a motor car, which was out of repair. Harley asked Fogarty to look at the car ; he did so, and suggested certain repairs. Later, Harley saw Sargent, the secretary of the Dowerin Road Board, whom he knew and who also owned a motor car of a kind similar to Harley's. He asked Sargent to order certain spare parts for his motor car, and said he would get Fogarty to repair his car. Sargent replied that Fogarty was a good man for the job. Sargent ordered the spare parts for Harley, but in so doing he was not acting for or on behalf of the Board. Sargent saw one Foreman, who, as the foreman of the Dowerin Road Board, superintended the clearing on Cemetery Road and other jobs. On 21st September Sargent told him that he had recommended Fogarty to Harley as a good man to repair his car. Foreman went out on the same day to inspect the clearing on Cemetery Road, and saw Fogarty. According to Foreman, the following conversation took place :—Foreman : " I

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believe Harley is after you to do the job on his car." Fogarty: "Yes. I was coming in to see you at dinner time." (He also told Foreman that he had seen Harley in the morning.) Foreman: "Oh well Pat, if you are going to do that job, you can come along with me as I am going back to lunch now." Fogarty: "What will I do with my tools, leave them behind this bush?" Foreman: "No. You had better bring them in, in case you are longer than you think on the job." According to Fogarty, Foreman came to him whilst he was engaged on Cemetery Road, and said he was to go down and do Harley's car, that the job was waiting for him, he was to leave the clearing work and do the car. He also told him to take his tools and go back with him. Both admittedly returned to the Road Board yard, where Fogarty placed his tools in the shed. Fogarty deposed to another conversation, between his solicitor and Foreman, in which Foreman denied that he instructed Fogarty to repair Harley's car but said he was agreeable that he should do it. Ultimately, according to Fogarty, Foreman said at this interview that he was agreeable that Fogarty should be lent to Harley for his job. But a written statement procured from Foreman at the time does not bear out the latter assertion. According to Harley, Fogarty told him that he would not do his job until he received instructions from the Road Board. Fogarty proceeded to repair Harley's car, which was on Harley's premises next the Road Board premises. He was so engaged for several days, and whilst so engaged some spirit in a tin burst into flame, and Fogarty was thereby seriously injured. He claimed compensation from the Dowerin Road Board, pursuant to the provisions of the *Workers' Compensation Act* 1912-1927 of Western Australia.

The magistrate of the Local Court before whom the claim was heard determined that compensation in the sum of £750 was payable to Fogarty, together with certain medical expenses and costs. The magistrate found that Fogarty did work on Harley's car upon the express instruction of the foreman of the Road Board. He considered that though Fogarty was working on Harley's car, he was still under the direct control of the Board, and that if the necessity had appeared and the Board had desired his services elsewhere, it could and would have called upon him for that purpose. The Supreme Court of

Western Australia reversed this determination. It dissented from the finding of the magistrate that Fogarty was working under the instructions of the foreman of the Road Board upon the repair of Harley's car; but it added that if the foreman did so instruct Fogarty to go and undertake the job of repairing Harley's car, then he was acting entirely outside the scope of his authority and could not bind the Board. From that decision an appeal is now brought to this Court.

The appeal depends upon the provisions of the *Workers' Compensation Act* 1912-1927 of Western Australia. By sec. 6 (1) it is provided: "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions, is caused to a worker, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule." Fogarty was a worker within the meaning of this section (see sec. 4). "'Employer' includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer, and, where the services of a worker are temporarily lent or let on hire to another person by the person with whom the worker has entered into a contract of service or apprenticeship the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the worker whilst he is working for that other person, but shall be entitled to be indemnified by that other person to the extent of any compensation paid under this Act by the employer in respect of any injury received by such worker whilst he is working for that other person."

It is not within any power or function conferred upon a road board under the *Road Districts Act* 1919-1933 of Western Australia to undertake the repair of motor vehicles for private persons. But it is contended that Fogarty was acting under the Road Board's instructions in the present case because its foreman instructed him to repair Harley's car. There is much to be said for the view of the Full Court that Fogarty was not, in repairing Harley's car, obeying any order of the Board's foreman, but was simply doing the work for Harley and upon his request. Assuming, however, that the magistrate was entitled upon the evidence to find Fogarty did work

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upon Harley's car upon the express instruction of the foreman of the Road Board, how does it become the employer's—the Board's—instruction, or involve the Board in liability? The *Road Districts Act* gave it no power or authority to do any such act, and in fact the Board itself gave no such instruction. The foreman was a person in authority so far as Fogarty was concerned: his duty was to supervise work for the Board. But the scope of his employment cannot warrant instructions or directions to do work which was beyond the functions of the Board, and for a private person. It may be that a foreman can in some degree enlarge the sphere of a worker's employment with his employer, but that is very different from directing a worker to do work for some other person than his employer.

The main argument for Fogarty, however, was founded upon the provision of the statute (sec. 4) that where the services of a worker are temporarily lent, or let on hire, to another person by the person with whom the worker has entered into a contract of service or apprenticeship, the latter shall for the purposes of the Act be deemed to continue to be the employer of the worker whilst he is working for that other person. "There must be a subsisting contract of service between the employer who lends or lets on hire, and the workman who is lent or let on hire at the time of such lending or letting, to make the former liable" (see *Elliott, Workmen's Compensation Acts*, 9th ed. (1926), p. 161). The evidence in the present case is sufficient, I think, to establish such a contract. And there was also evidence, I think, to support the finding of the magistrate that the secretary of the Board and its foreman "lent" Fogarty to do Harley's job—though, like the Full Court, I should not myself have reached that conclusion. But it must be the employer—the Road Board in this case, or some person with its authority—who lends or lets on hire the worker to such other person. The Road Board itself did not sanction the lending of Fogarty to Harley. So his loan depends upon the acts of the secretary and the foreman. Both these officers of the Board assert upon oath that they had no authority from the Board to make any such arrangements. And there is no evidence warranting the conclusion that it was within the scope of the authority of the executive officers of the Board to lend servants

or officers of the Board for work wholly unconnected with any powers or functions of the Board, and indeed it would be strange if it were so. It is not true, said the secretary of the Board, that it is in the habit of lending its men to do private jobs. There is evidence of a practice on the part of the Board, upon application made to it and upon conditions sanctioned by it, to grade and do other work upon tennis courts, football and show grounds, and race tracks, in its district; but there is no evidence that its executive officers themselves ever sanctioned such works or were allowed to do so. The conclusion to my mind is clear that neither the Road Board nor any person with its authority ever lent Fogarty to Harley for the purpose of repairing his motor car.

In my opinion, the decision of the Full Court of Western Australia was right and ought to be affirmed.

*Appeal allowed. Judgment of Local Court restored. Respondent should pay the costs in this Court and in the Supreme Court.*

Solicitor for the appellant, *S. Howard-Bath.*

Solicitor for the respondent, *M. Crawcour.*