READY MIXED CONCRETE (SOUTH EAST) LTD. *v.* MINISTER OF PENSIONS AND NATIONAL INSURANCE

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D

Master and Servant—Contract of service—Service of, or for services—Owner-driver—Payment on mileage basis—Provision of exclusive use of vehicle for company's deliveries—Vehicle to be driven by owner—Power to hire competent driver with company's consent—Vehicle and driver to wear company's livery—Company's rules to be complied with—Freedom of owner in performance of obligations—Whether sufficient control to create master and servant relationship—Whether contractual terms inconsistent with contract of service—Relevance of ownership of assets and bearing of financial risk—Declaration that owner-driver independent contractor—Whether conclusive—Whether "employed person"—Whether independent contractor—National Insurance Act, 1965 (*c.* 51), *ss.* 1 (2), 3 (*b*).

E

F

National Insurance—Insurable employment—Owner-driver—Contract to carry company's concrete—Payment on mileage basis—Exclusive use of vehicle for company's deliveries—Vehicle to be driven by owner but power to hire driver with company's consent—Company's rules to be complied with—Whether a "contract of service"—Whether owner-driver independent contractor—Whether "employed person"—National Insurance Act, 1965 (*c.* 51), *ss.* 1 (2), 3 (*b*).

G

A written contract between a company marketing and selling concrete and L., which declared L. to be an independent contractor, provided, inter alia, that for payment at mileage rates L. at his own expense would carry concrete for the company and make available throughout the contract period a vehicle bought by him

[Reported by MRS. JENNIFER WINCH, Barrister-at-Law.]

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from a finance organisation associated with the company. He was to obtain an A carriers' licence and was to maintain, repair and insure the vehicle (which was to be painted in the company's colours) and an attached mixing unit belonging to the company, and to drive the vehicle himself, but might with the company's consent hire a competent driver if he should be unable to drive at any time. L. was obliged to wear the company's uniform and to comply with the company's rules and was prohibited from operating as a carrier of goods except under the contract. The company had control over major repairs to the vehicle and power to ensure that L.'s accounts were prepared by an accountant in a form approved by the company.

The Minister of Pensions and National Insurance determined that L. was within the class of employed persons under section 1 (2) of the National Insurance Act, 1965,[1] as being an "employed person" under contract of service with the company under section 3 (*a*).

On appeal, on the contentions that the contract was not a contract of service, and that L. was an independent contractor:—

Held, allowing the appeal, (1) that the inference that parties under a contract were master and servant or otherwise was a conclusion of law dependent on the rights conferred and duties imposed by the contract and if the contractual rights and duties created the relationship of master and servant, a declaration by the parties that the relationship was otherwise was irrelevant (post, pp. 512G—513A).

(2) That a contract of service existed if (a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master, (b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master, and (c) the other provisions of the contract were consistent with its being a contract of service (post, p. 515C–D); but that an obligation to do work subject to the other party's control was not invariably a sufficient condition of a contract of service, and if the provisions of the contract as a whole were inconsistent with the contract being a contract of service, it was some other kind of contract and the person doing the work was not a servant (post, p. 517A); that where express provision was not made for one party to have the right of control, the question where it resided was to be answered by implication (post, p. 516A); and that since the common law test of the power of control for determining whether the relationship of master and servant existed was not restricted to the power of control over the manner of performing service but was wide

[1] National Insurance Act, 1965, s. 1 (2): ". . . insured persons shall be divided into the following three classes, namely (*a*) employed persons, that is to say, persons gainfully occupied in employment . . . being employment under a contract of service . . ."

S. 3 (*b*): "Every employer of an employed person . . . shall be liable to pay weekly contributions in respect of that person . . ."

enough to take account of investment and loss (post, p. 522F), in determining whether a business was carried on by a person for himself or for another it was relevant to consider who owned the assets or bore the financial risk (post, p. 520G—521A).

Dicta of Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161, 167, P.C.; and *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441; [1963] 1 All E.R. 864, applied.

Dictum of Denning L.J. in *Bank voor Handel en Scheepvaart* v. *Slatford* [1953] 1 Q.B. 248, 290; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779 and *Short* v. *J. and W. Henderson Ltd.* (1946) 62 T.L.R. 427, H.L. considered.

(3) That the rights conferred and the duties imposed by the contract were not such as to make it a contract of service, and that L. had sufficient freedom in the performance of the obligations to qualify him as an independent contractor.

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APPEAL against a decision of the Minister of Pensions and National Insurance.

The following case was stated by the Minister of Social Security (formerly the Minister of Pensions and National Insurance) under section 65 of the National Insurance Act, 1965 and R.S.C. Ord. 111.

1. On November 15, 1965, a company, Ready Mixed Concrete (South East) Ltd., applied for determination by the Minister under section 64 of the National Insurance Act, 1965, of the question whether Thomas Henry Latimer was by virtue of a contract between himself and the company dated May 15, 1965, an employed or self-employed person for the purposes of the National Insurance Act, 1965, during the week commencing November 8, 1965: and also whether the company was liable for payment of flat rate contributions in respect of Mr. Latimer for the purposes of section 3 of the Act, during that week.

2. The Minister appointed Mr. M. W. M. Osmond, Barrister-at-Law and member of the Legal Department of the Ministry of Pensions and National Insurance to hold an inquiry into questions arising on the application and to report to her thereon. Mr. Osmond accordingly held an inquiry in London on January 11 and 12, 1966, and both Mr. Latimer and the company were represented at the inquiry by Mr. G. Slynn, of counsel.

3. Subject to all questions of relevance and admissibility the Minister accepted the evidence led at the inquiry as establishing the following facts.

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(1) Ready Mixed Concrete (United Kingdom) Ltd. (hereinafter referred to as "Ready Mixed"), carried on the business of making and selling ready mixed concrete and similar materials, and operated through a number of wholly or partly owned subsidiary companies, one of which was the company.

(2) The company was incorporated in 1963 and operated at eight plants at various places in the South East of England one such plant being at Crayford, Kent.

(3) It was, and always had been, the policy of the Ready Mixed Group that the business of making and selling concrete should be carried on as far as possible separately from the business of delivering the concrete to customers, and in furtherance of that policy, on commencing trading some ten years ago, Ready Mixed entered into a contract for the delivery of concrete with an independent company of haulage contractors. In 1959, being dissatisfied with the operations of the independent company, Ready Mixed determined the contract and introduced a scheme of delivery by drivers (hereinafter referred to as "owner-drivers") working under contracts similar to, but not identical with, a form of agreement known as agreement "D" (a copy whereof was annexed to the case). It was considered that not only would the scheme further the policy of keeping the making and selling of concrete separate from its delivery, but that the scheme would benefit the Ready Mixed Group by stimulating speedy and efficient cartage, the maintenance of trucks in good condition, and the careful driving thereof, and would benefit the owner-driver by giving him an incentive to work for a higher return without abusing the vehicle in the way which often happened if an employee was given a bonus scheme related to the use of his employer's vehicle.

(4) In a letter dated September 6, 1962, addressed to Ready Mixed, the Ministry of Pensions and National Insurance expressed the opinion that agreements in the form of agreement "D," being one of a series of agreements by which the owner-driver scheme was given legal effect, did not constitute contracts of service between members of the Ready Mixed Group and owner-drivers, who were accordingly to be regarded as self-employed persons for the purposes of the National Insurance Act, 1946.

(5) It was, and always had been, since the introduction of the owner-driver scheme in 1959, the intention both of the Ready Mixed Group and of the owner-drivers that the latter should be treated as independent contractors, and not servants of member

companies of the Ready Mixed Group. Some owner-drivers had, in addition to delivering concrete in pursuance of contract with such members, carried on other remunerative occupations. A few owner-drivers had an interest in more than one truck, themselves employing drivers to work for them, and the company was willing to allow suitable owner-drivers to own more than one truck.

(6) Notices under the Contracts of Employment Act, 1963, were not issued to owner-drivers. Income Tax was paid by owner-drivers under Schedule D of the Income Tax Act, 1952. Contributions were paid by owner-drivers as self-employed persons under the National Insurance Act, 1946, until March, 1965, when the Ministry of Pensions and National Insurance requested the payment of contributions by and in respect of them as employed persons.

(7) Mr. Latimer became employed under a contract of service by a member of the Ready Mixed Group in 1958 as a yardman batcher at Northfleet. In 1960 he was transferred to the plant at Crayford as a batcher. In 1963 he entered into a contract with the company whereby he agreed to collect, carry and deliver concrete as an owner-driver for two years. At the same time he entered into a hire purchase agreement relating to a Leyland lorry. He finished paying for that in about one year, and the vehicle then became his property. On May 15, 1965, he entered into a contract (hereinafter referred to as "the contract") with the company whereby he agreed to collect, carry and deliver concrete as an owner-driver for a further period of five years. (A copy of the contract was annexed to the case.†)

On June 17, 1965, he entered into a hire purchase agreement with Readymix Finance Ltd. whereby in place of his other vehicle which he sold he agreed to purchase a Leyland vehicle, EUW 152 C, by means of 48 consecutive monthly instalments of £62 19s. 6d., the first instalment being payable on July 1, 1965.

(8) From May 15, 1965, Mr. Latimer collected, carried and delivered concrete at and from the company's plant at Crayford and was paid an allowance in accordance with the contract. In particular the company had made the payments in respect of earnings to Mr. Latimer required by clause 20 of the contract. Such payments were estimated to amount to approximately £4,500 a year. For the years ending June 30, 1964 and June 30, 1965, Mr. Latimer received £4,204 and £4,512 respectively from the com-

† The terms scheduled to the contract are set out as an appendix to this report, post, pp. 527–534.

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pany under the contract between them then in force. After the payment of all expenses the net amount of remuneration remaining in Mr. Latimer's hands for the two years was £3,327 and £2,004 respectively.

(9) In November 1965, 709 persons were employed as owner-drivers under contracts with the Ready Mixed Group, 58 persons were so employed with the company, and eight persons in addition to Mr. Latimer were so employed at the company's Crayford plant.

(10) The method of collecting, carrying and delivering concrete in operation at the Crayford plant was as follows. Loading commenced each day at a time fixed by the plant manager and proceeded in accordance with a system organised by the nine owner-drivers whereby the truck which was loaded with concrete first on one day was loaded last the next day and so on in rotation. Owner-drivers awaited the announcement by loudspeaker of their turn for loading in a room known as the mess room. Before leaving the plant with a load of concrete each driver obtained from the ticket office four tickets upon which appeared such details as the quantity and quality of the concrete or other material to be delivered, its destination and the time of loading. One ticket was retained in the office and one by the owner-driver: the other two were signed by the customer as a receipt for the load, one being then retained by the owner-driver and the other being returned to the office. Having delivered his load, the owner-driver returned to the plant to collect a further load and so on throughout the day. Owner-drivers did not work set hours, and there were no fixed meal breaks. While on the plant premises owner-drivers were expected to comply with, and did comply with, directions given on behalf of the company for the purposes of securing an orderly and safe system of loading, parking and driving of the vehicles. No instructions were given on behalf of the company to owner-drivers concerning the method of driving trucks from the plant to the place of delivery, and in particular owner-drivers were not instructed as to the routes which they were to follow. No instructions were given on behalf of the company to owner-drivers as to how to discharge the concrete at the delivery site. While on the delivery site owner-drivers complied with instructions of the site foreman concerning the discharge.

(11) Holidays were taken by nine owner-drivers employed at the company's Crayford plant on dates arranged between themselves so as to ensure as far as possible that no more than one owner-driver was on holiday at any one time.

(12) A relief truck driver was employed by the nine owner-drivers who carried from the company's Crayford plant with the knowledge and approval of the company. The relief driver was paid a wage of £25 a week out of funds provided equally by the owner-drivers. The relief driver was employed to take over the operation of any vehicle whose regular owner-driver was absent through sickness or being on holiday or any other reason. The relief driver received his wage each week irrespective of whether or not he had been required to take over the operation of a vehicle in that week.

(13) Three or four drivers were employed by the company under contracts of service during the months of March to September in each year when the demand for and production of concrete was high. Those drivers had fixed hours of work from 8 a.m. until 5.30 p.m. and the length and time of their holidays was controlled by the company. They were paid at the rate of 5s. 11d. per hour, with an addition for overtime. An average weekly wage for such an employee was between £18 and £20. They paid income tax by means of P.A.Y.E. and contributions as employed persons were paid by and in respect of them under the National Insurance Act. They were not responsible for the maintenance or running costs of the trucks. If not occupied during working hours in delivering concrete they were, unlike owner-drivers, required to perform other tasks about the plant. They were instructed by the plant manager as to the routes which they were to follow between the plant and delivery site.

(14) Owner-drivers who carried from the company's Crayford plant were free to purchase fuel for their trucks either from a pump on the plant premises or from any supplier elsewhere. It was not the practice of Mr. Latimer to purchase fuel from the plant pump. The drivers employed by the company were required to draw fuel from the plant pump; owner-drivers could use truck maintenance facilities available at the plant, or if they preferred make use of any garage of their choice. If owner-drivers used the company's maintenance facilities they were charged for all the work done to their vehicles.

(15) No rules, regulations or requirements of the kind envisaged by clause 14 (b) of the schedule to the contract had been issued by the company, other than for securing orderly and safe working at the plant. One such rule issued recently prohibited the presence of children on the plant premises.

(16) If any person acting on behalf of the company had sought

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to instruct Mr. Latimer how to deliver concrete or how to drive his truck, Mr. Latimer would have told that person to mind his own business. No such person so instructed Mr. Latimer.

(17) Mr. Latimer caused accounts to be prepared by a professional accountant as required by clause 25 of the contract. Such accounts were headed "T. H. Latimer, Esq., Haulage Contractor, Ready Mixed Concrete, 13 Morgan Drive, Stone, Kent."

(18) Mr. Latimer was, and had been during the week commencing November 8, 1965, the holder of an "A" licence issued for the purposes of section 166 (2) of the Road Traffic Act, 1960.

(19) The cost of the concrete mixing or agitating unit, referred to in the contract as "the equipment" was £2,000 or thereabouts.

(20) Clause 6 of the schedule to the contract had never been operated.

4. It was contended on behalf of Mr. Latimer and the company that the contract between the parties was not one of service. It was submitted:

(1) in relation to clauses, 2, 3, 4, 7, 8, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27 and 32 of the schedule to the contract that they were inconsistent with the master/servant relationship, and, in particular, that the obligation to purchase, maintain, licence and insure the vehicle would, though sitting lightly upon an independent contractor, be impositions upon a servant, and further that while clauses of that nature are not usually to be found in "independent contractor" contracts, they were implied.

(2) in relation to clauses 5, 6, 9, 14, 17, 25, 26, 29 and 31 of the schedule: (a) That if the clauses were construed, as they should be, in the context of the contract as a whole, their true meaning was not inconsistent with the relationship of principal and independent contractor. In particular the obligations to carry out orders, rules, regulations or requirements (whether or not in terms qualified by the word "reasonable") could only be obligations to obey orders etc. which might properly have been given by a principal to an independent contractor, and although the obligations to obey were expressed to exist at all times when operating the truck, the words "at all times" had to be interpreted as limited to those times when it would have been proper for a principal to give an order to a sub-contractor. (b) That if, contrary to the company's and Mr. Latimer's contention, a wide degree of control was envisaged by the working of the contract, the evidence showed such control was not exercised. As regarded collecting and delivering the only control exercised by the company and the

customer respectively was that which must of necessity be exercised over servant and independent contractor alike, to ensure safe and orderly working. As to carrying, no control was exercised at all, and any attempt to exercise control would have been bitterly resented by Mr. Latimer in particular, and owner-drivers in general, as being an interference with the manner in which he conducted his own business and looked after his own property. (c) That the kind of control which was exercised in fact was the only kind which the company was entitled under the contract to exercise. (d) That the use of the words " as if he were an employee " in clause 14 (e) of the contract emphasised that in truth Mr. Latimer was not a servant. The provision enjoined Mr. Latimer to obey orders of the kind, but only of the kind, which might properly be given to an independent contractor as faithfully and fully as if he were an employee. (e) That even if the clauses did bear their prima facie meaning and entitled the company to exercise a stringent control over Mr. Latimer, control was neither the only nor the conclusive test. It was merely one factor among many to be considered.

(3) in relation to clauses 10, 11, 12 and 13 which relate to Mr. Latimer's right to employ, with the company's consent, a deputy driver, that they were wholly inconsistent with the master/servant relationship.

(4) In relation to clauses 7 and 15, that they merely imposed upon Mr. Latimer a contractual obligation to comply with certain statutory requirements.

(5) In relation to clause 30, which declared Mr. Latimer to be an independent contractor that the clause conclusively determined the status of the parties to the contract as between themselves and that such a declaration as to status was binding upon the Minister unless it were shown that the contract as a whole was a sham, entered into with the deliberate intention of deceiving third parties, and this could not be shown. If clause 30 was not decisive of the issue, on a proper construction of the whole contract including clause 30, alternatively of the remaining clauses, the contract was one for services and not of service. Alternatively if the Minister was entitled to go behind clause 30, all the facts and circumstances should have been looked at, including the intention and behaviour of the parties.

5. The Minister, having regard to the fact that the contract had been reduced to writing, considered as irrelevant so much of the evidence given at the inquiry as related:

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(1) to the Ministry's informal expression of opinion as to the nature of a contract between members of the Ready Mixed Group and owner-drivers, and generally to the evolution of the contract;

(2) to the opinions professed by the solicitor employed by Ready Mixed, the General Manager of the company, and by Mr. Latimer as to the true meaning and effect of the contract and to any action which had been or might have been taken in reliance upon any such opinions;

(3) to the intentions of the company and of Mr. Latimer as to the relationship to be created inter se by the contract;

(4) to the way in which statutory provisions other than the National Insurance Act were regarded as applying to Mr. Latimer and other owner-drivers;

and, accordingly, for the purpose of arriving at her decision the Minister disregarded the following: (i) Correspondence passing on various dates in July, August and September, 1962, between Ready Mixed Concrete (United Kingdom) Ltd. and the Ministry of Pensions and National Insurance concerning the classification of owner-drivers for the purpose of the National Insurance Act; (ii) Copy form of agreement, known as agreement "D" between the company and an owner-driver; (iii) All in paragraph 3 (4) of this case; (iv) All in the first sentence of paragraph 3 (5) of this case; (v) All in paragraph 3 (6) of this case; (vi) All in paragraph 3 (16) of this case.

6. The Minister considered that she could have regard to the remaining facts set out in paragraph 3 of the case, as they showed the surrounding circumstances in which the contract came to be made.

7. The Minister was of the opinion that the contention put forward on behalf of Mr. Latimer and the company that the contract was not a contract of service was wrong, and, in particular, rejected the following submissions referred to in paragraph 4 of this case; namely that contained in sub-paragraph (1), sub-paragraph (2) (a), sub-paragraph (2) (c), sub-paragraph (2) (d), sub-paragraph (3) and sub-paragraph (5) of paragraph 4.

8. Accordingly, the Minister decided that: (a) Thomas Henry Latimer of 13, Morgan Drive, Horns Cross, Stone, near Greenhithe, Kent, was included in the class of employed persons for the purposes of the National Insurance Act, 1965, during the week commencing Monday, November 8, 1965; and (b) the company, as the employer of the said Thomas Henry Latimer, was liable to pay

a flat rate contribution in respect of him under section 3 (b) of the said Act for the said week.

MINISTER OF SOCIAL SECURITY *v.* GREENHAM READY MIXED CONCRETE LTD. AND ANOTHER

REFERENCE by the Minister of Social Security.

The Minister, by notice of motion in accordance with R.S.C., Ord. 111, referred to the court for an order a question concerning a contract between John King and Greenham Ready Mixed Concrete Ltd. A case was stated by the Minister. The facts do not call for report.

MINISTER OF SOCIAL SECURITY *v.* READY MIXED CONCRETE (SOUTH EAST) LTD. AND ANOTHER

REFERENCE by the Minister of Social Security.

The Minister, by notice of motion in accordance with R.S.C., Ord. 111, referred to the court for an order a question as to the construction of a written contract dated December 6, 1965, between Arthur William Bezer and Ready Mixed Concrete (South East) Ltd., namely whether his employment was under a contract of service for the purposes of section 1 (2) (*a*) of the National Insurance Act, 1965. A case was stated by the Minister. The facts do not call for report.

The three cases were listed and heard together. In each case the question was whether the contract was a contract of service. The parties were agreed that, if the contract between the company and Latimer was not a contract of service, the contracts of King and Bezer respectively were not contracts of service.

Roger Parker Q.C. and *Gordon Slynn* for Ready Mixed Concrete (South East) Ltd. and Bezer.

H. A. P. Fisher Q.C. and *Adrian Hamilton* for Greenham Ready Mixed Concrete Ltd. and King.

Nigel Bridge for the Minister of Social Security formerly the Minister of Pensions and National Insurance.

The following cases, in addition to those cases referred to in the judgment, were cited in argument: *Morren* v. *Swinton & Pendlebury Borough Council* [2]; *Performing Rights Society* v. *Mitchell &*

[2] [1965] 1 W.L.R. 576; [1965] 2 All E.R. 349, D.C.

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Booker (Palais de Dance) Ltd.[3]; *Denham* v. *Midland Employers' Mutual Assurance Ltd.*[4]; *O'Reilly* v. *I.C.I. Ltd.*[5]; *Gould* v. *Minister of National Insurance*[6]; *In re Hughes (G. W. & A. L.) Ltd.*[7]; *Whittaker* v. *Minister of Pensions and National Insurance*[8]; *Stevenson Jordan & Harrison* v. *MacDonald & Evans*[9]; *Short* v. *Henderson Ltd.*[10]; *Simmons* v. *Heath Laundry Co.*[11]; *Braddell* v. *Baker*[12]; *Binding* v. *Great Yarmouth Port & Haven Commissioners*[13]; *Century Insurance Co.* v. *Northern Ireland Road Transport Board*[14]; *Mersey Docks and Harbour Board* v. *Coggins & Griffith*[15]; *Watcham* v. *Attorney-General of East Africa Protectorate*[16]; and *Rolls Razor Ltd.* v. *Cox.*[17]

Cur. adv. vult.

December 8. MACKENNA J. read the following judgment. The first of these three cases is an appeal against a decision of the Minister of Pensions and National Insurance, now the Minister of Social Security, by which she determined that Thomas Henry Latimer was included in the class of employed persons for the purposes of the National Insurance Act, 1965, during the week commencing November 8, 1965, and that Ready Mixed Concrete (South East) Ltd. were his employers and liable under section 3 (*b*) of the Act to pay in respect of him a flat rate contribution for that week. The company required the Minister to state a case setting forth her decision and the facts on which it was based, which she has done, and that case comes before me on appeal.

An employed person means for the purposes of the Act one employed under a contract of service, and the question raised by the appeal is whether Latimer was employed under such a contract. The Minister has found that he was; the company say that he was not.

[3] [1924] 1 K.B. 762; 40 T.L.R. 308.
[4] [1955] 2 Q.B. 437; [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561, C.A.
[5] [1955] 1 W.L.R. 839, 1155; [1955] 2 All E.R. 567.
[6] [1951] 1 K.B. 731; [1951] 1 T.L.R. 341; [1951] 1 All E.R. 368.
[7] [1966] 1 W.L.R. 1369; [1966] 2 All E.R. 702.
[8] [1967] 1 Q.B. 156; [1966] 3 W.L.R. 1090; [1966] 3 All E.R. 531.
[9] [1952] 1 T.L.R. 101, C.A.
[10] (1946) 174 L.T. 417; 62 T.L.R. 427, H.L.
[11] [1910] 1 K.B. 543; 26 T.L.R. 326, C.A.
[12] (1911) 27 T.L.R. 182, D.C.
[13] (1923) 128 L.T. 743, C.A.
[14] [1942] A.C. 509; [1941] 1 All E.R. 491, H.L.
[15] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345, H.L.
[16] [1919] A.C. 533; 34 T.L.R. 481, P.C.
[17] [1967] 1 Q.B. 552; [1967] 2 W.L.R. 241; [1967] 1 All E.R. 397, C.A.

The company are one of the Ready Mixed Group and are engaged in the business of making and selling concrete. On May 15, 1965, Latimer and the company entered into a written contract which was in force at the material time. The circumstances preceding the making of that contract were described in the case.

Latimer began to work for the company in 1958 as a yardman batcher. In that capacity he served them first at Northfleet and later at Crayford, two of the eight plants which they operated. At the time when he entered their service they delivered the concrete to their customers through an independent company of haulage contractors. In 1959, being dissatisfied with the operations of these contractors, they determined their contract with them, and introduced a scheme of delivery by owner-drivers. It is stated in the case that the provisions of the company's contract with the owner-drivers, when the scheme was introduced, were similar to those of the contract in force at the material time, to which I shall come presently, though not identical with them. The case also states that it is, and always has been, the policy of the group "that the business of making and selling concrete should be carried on as far as possible separately from the business of delivering the concrete to the customers," and that the owner-driver scheme was introduced to further that policy, in the belief that it would stimulate

> "speedy and efficient cartage, the maintenance of trucks in good condition, and the careful driving thereof, and would benefit the owner-driver by giving him an incentive to work for a higher return without abusing the vehicle in the way which often happens if an employee is given a bonus scheme related to the use of his employer's vehicle."

This was in 1959. In 1963 Latimer ceased to be employed as a batcher and agreed to work for the company as an owner-driver. He entered into a contract for the carriage of concrete, presumably in the form used at the inception of the scheme, and also into a hire-purchase contract relating to a Leyland lorry. The first-mentioned contract continued for two years, during which time Latimer became the owner of the lorry. At the end of the two years the contract was determined, and the Leyland lorry was sold. On May 15, 1965, he entered into a new contract with the company, and, a month later, into a hire-purchase contract relating to another vehicle, a new Leyland, EUW 152 C. The hire-purchase company are Ready Mixed Finance Ltd. They are, as their name indicates, one of the group.

There are other facts which I must mention, but before doing

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so it is convenient that I should summarise the provisions of the new contract between the company and Latimer. The commencement date was June 1, 1965, and the termination date April 30, 1970. The company are to procure that the hire-purchase company will offer to sell the Leyland to Latimer on credit terms, painted in colours and with distinguishing signs selected by the company, and adapted to carry the company's concrete-mixing unit, fleet number 52140, which the company will fix to the Leyland, and he is to buy the Leyland from the hire-purchase company. The contract refers to the Leyland as "the vehicle," and to the Leyland with the mixing unit attached as "the truck," and I shall use these descriptions. If required to do so he must at his expense instal radio equipment on the vehicle. He is to procure an "A" contract licence under the Road Traffic Act, 1960, covering the use of the truck.

Clause 5 is in these terms:

> "The owner-driver shall at all times of the day or night during the term of this agreement (excepting only in accordance with the terms hereof) make available the truck to the company for the purpose of collecting carrying and delivering the materials used for or in connection with the business of the company (not being a business of carrying or arranging for the carriage of goods) whenever and wherever so required by the company whether such requirement is notified to the owner-driver or to his servants or agents and shall duly and promptly collect carry and deliver such quantity or quantities of the materials as and when required in the manner at the time and to the destination directed by the company, and it is further provided that the truck shall be used exclusively for the purposes set out in this agreement and for no other purpose. In furtherance of the terms of this clause the owner-driver shall if so required by the company at his own expense ensure that the company is able to contact him by telephone at his usual residence or residences."

The company can call on him to make the truck available for delivering the materials of any other group company, subject to his obtaining a "B" licence, which he must in that case try to get. He must comply with the conditions of his licences and obey any other rules or regulations, parliamentary, local or parochial. Under clause 10 he may, with the company's consent and subject to clause 12, appoint a competent driver to operate the truck in his place. He must pay this driver National Joint Council wages or better, and, if the company are dissatisfied with the driver, he must provide another. Clause 12 is in these terms:

"Notwithstanding the provisions of clause 10 of this schedule the company shall be entitled to require the owner-driver himself to operate the truck on every or any day up to the maximum number of hours permitted under the provisions of section 73 of the Road Traffic Act, 1960, or any statutory amendment or re-enactment thereof and the owner-driver shall comply with such requirement unless he shall have a reason for not so doing which would have been valid had he been the employed driver of the company and shall have notified the company in advance of such reason and shall be able to produce and upon the request of the company in fact produce evidence to substantiate the same. The owner-driver shall not himself be obliged to operate the truck during such holiday times and periods (not extending for more than two weeks in any calendar year) as have been agreed by the company in writing."

I read clauses 10 and 12 to mean that Latimer must drive himself if required to do so by the company, unless he has an excuse which would be valid in the case of a servant.

He must not operate as a haulier or carrier of goods except under the contract. If he fails to operate the truck himself or to cause another driver to do so, the company may appoint a driver on his behalf, and he must pay that driver's wages, and that driver shall be deemed to be in his employment.

He must wear the company's uniform, complying with all the company's rules, regulations or requirements (clause 14 (b)), carry out all reasonable orders from any competent servant of the company "as if he were an employee of the company," and by his conduct and appearance "including the speed and manner in which he operates the truck" use his best endeavours to further the good name of the company. He must not alter the truck without the company's consent. He must keep it freshly painted in the colours and with the signs directed by the company. He must keep it washed, cleansed, oiled, greased, maintained and in good and substantial repair. This obligation extends to the company's mixing unit, whose worn parts he must, with certain exceptions, renew if the need for renewal is due to fair wear and tear. All these things are to be done at his expense. Where the repairs would cost more than £50 or take more than a day to execute, the company may require the work to be done by a named group company or by someone else of the company's choice. The company may specify any repair work which they think should be done, and he must do it.

For all these services he is to be paid 8s. 6d. per cubic yard for the first radial mile and 1s. 1d. per cubic yard for each mile

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thereafter. Provision is made for minimum annual earnings: £1,500 x $\frac{280-Y}{280}$, where Y represents the number of days in excess of 85 when the truck and a driver were not available for at least four hours. Those rates are to be revised at the request of either party if there is any alteration in the National Joint Council's rates of wages or in the cost of fuel, or at his request "in the event of any substantial reduction in the profitability of the agreement to the owner-driver by reason of any levy or tax imposed by Parliament on carriers of goods by road transport generally."

He is to pay all the running costs. He may not charge the vehicle or the mixing unit or make them subject to any lien except under the hire-purchase contract. The company, if they wish, may pay the hire-purchase instalments direct, and debit them to him. If he does not pay his bills, the company may pay them for him. He must have his accounts prepared in a form and by an accountant approved by the company. If any provision is made in the account, he must set it aside in a manner approved by the company.

The company are to insure the vehicle in his name and the mixing unit in his or theirs, in each case in such form and for such amounts as they think fit but at his expense, debiting his account with the charges which he authorises them to pay. He must spend any money he receives under these policies in repairing or replacing the insured property. He must, if required to do so, assign to the company any rights he may have under the policies.

The company are given the right to acquire the vehicle on the expiration or determination of the contract.

Either party may determine the contract by notice after April 30, 1970. Before that date the company may determine it by 28 days' notice if he has been incapacitated for 60 days, and summarily if (i) he commits a breach of any term of the contract, or (ii) is guilty of conduct tending to bring the company into disrepute, or (iii) commits an act of bankruptcy, etc., or (iv) if he, "having been warned by the company of any grounds for dissatisfaction it may have in respect of the operation of the truck shall not within a reasonable time have removed the cause of such dissatisfaction."

Clause 30 of the contract declares him to be an independent contractor.

It may be stated here that whether the relation between the

parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention.

So much for the contract between the company and Latimer.

There is nothing unusual in the provisions of the hire-purchase contract. The cash price of the vehicle is £2,380 11s. 6d.; the charges are £642 3s. 6d.; and the money is payable by 48 monthly instalments of £62 19s. 6d. The hire-purchase company are given the right to determine the contract if these instalments are not paid and in certain other events. Latimer is described in the contract as a "contractor self employed."

The Minister has found a number of facts which she has stated in the case.

(a) Payments to Latimer under the previous agreement for the year ended June 30, 1964, were £4,204. After the payment of all his expenses he was left with £3,327. The corresponding figures for the year ended June 30, 1965, were £4,512 and £2,004. (b) In November, 1965, the group employed 709 persons as owner-drivers, of whom nine, including Latimer, were employed at the company's Crayford plant. (c) Loading at that plant begins at a time fixed by the plant manager. The nine owner-drivers have established a system under which the truck first loaded today will be last loaded tomorrow and so on in rotation. The owner-driver waits in a mess room until a loudspeaker calls him for loading. When he has delivered his load he returns to collect another, and so on through the day. He does not work set hours and has no fixed meal break. While on the plant premises he is expected to comply with directions given on the company's behalf to secure an orderly and safe system of loading, parking and driving, and he does comply with them. The company give no instructions to owner-drivers about the method of driving the trucks from the plant to the place of delivery or of discharging the concrete, and do not tell them what routes to take. While on the delivery site they follow the site foreman's instructions about discharge. (d) The nine owner-drivers arrange the dates of their holidays so as to ensure as far as possible that no more than

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one driver is on holiday at any one time. With the knowledge and approval of the company they employ between them a single relief driver, contributing equally to his weekly wage of £25. He takes over the operation of any vehicle whose regular owner-driver is absent through sickness, or because he is on holiday, or for any other reason. (e) During the busy season the company employ three or four additional drivers under contracts of service. Those men work fixed hours and are paid at the hourly rate of 5s. 11d. Their wages (with overtime at a higher rate) average between £18 and £20 a week. They are not responsible for the maintenance or running costs of the trucks they drive. When not engaged in delivering concrete, they, unlike the owner-drivers, do other jobs. They are told what routes to take. (f) The owner-drivers can, if they wish, buy their petrol from a pump on the plant premises. Latimer does not. The drivers mentioned in (e) must take their supplies from the pump. Owner-drivers are allowed to use the company's maintenance facilities, but they are charged for all work done to their vehicles. (g) The company have made no "rules, regulations or requirements" under clause 14 (b) of the schedule except for securing orderly and safe working at the plant. (h) If anyone acting for the company sought to instruct Latimer how to deliver concrete or how to drive his truck, he would tell that person to mind his own business. Nobody has sought to instruct him. (i) The accounts prepared for him by his accountant in accordance with the requirements of the contract are headed "T. H. Latimer, Esq., Haulage Contractor, Ready Mixed Concrete, 13 Morgan Drive, Stone, Kent." (j) Latimer holds an "A" licence. (k) The cost of the mixing unit is £2,000. (l) Latimer has not been required to deliver materials for other group companies. (m) In 1962 the Ministry of Pensions and National Insurance expressed the opinion that the form of contract then used by the company was not one of service. (Many of the provisions of the later form of contract are not present in the earlier.) Owner-drivers have been treated under other Acts (including the National Insurance Act, 1946) as self-employed persons. (n) It is, and always has been since the introduction of the owner-driver scheme in 1959, the intention both of the Ready Mixed Group and of the owner-drivers that the latter should be treated as independent contractors, and not servants of member companies of the Ready Mixed Group.

It is stated in the case that the Minister disregarded the facts summarised in (h), (m) and (n). In my opinion this was rightly

done. (h) is irrelevant: it is the right of control that matters, not its exercise. As to (n), I have already said that whether the relation between the parties to a contract is that of master and servant is a conclusion of law dependent upon the provisions of the contract. If the rights conferred and the duties imposed by the contract are such that the relation is that of master and servant, it is irrelevant that the parties who made the contract would have preferred a different conclusion. As to (m), opinions expressed by Ministries on the question which I have to decide, and any action taken on those opinions, are also irrelevant unless they create an estoppel in the company's favour, and it is not argued that they do.

I must now consider what is meant by a contract of service.

A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

I need say little about (i) and (ii).

As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

> "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."—*Zuijs* v. *Wirth Brothers Proprietary, Ltd.*[1]

[1] (1955) 93 C.L.R. 561, 571.

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To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.

(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.

(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.

(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.

(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance.*[2]

I can put the point which I am making in other words. An

[2] [1963] 1 W.L.R. 441, 451, 452; [1963] 1 All E.R. 864.

obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.

I find authority for this way of dealing with the case in the judgment of Dixon J. in *Queensland Stations Proprietary Ltd.* v. *Federal Commissioner of Taxation.*[3] There the question was whether a payment made by the company to a drover was "wages" within the meaning of a Pay-roll Tax Assessment Act, which depended on whether the relation between the company and the drover was that of master and servant. The drover was employed under a written contract to drove 317 cattle to a destination. The contract provided that he should obey and carry out all lawful instructions and use the whole of his time, energy and ability in the careful droving of the stock, that he should provide at his own expense all men, plant, horses and rations required for the operation, and that he should be paid at a rate per head for each of the cattle safely delivered at the destination. He was held to be an independent contractor. This passage comes from the judgment of Dixon J.[4]:

> "There is, of course, nothing to prevent a drover and his client forming the relation of employee and employer. . . . But whether they do so must depend on the facts. In considering the facts it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed and the cattle are handled. For instance, in the present case the circumstance that the drover agrees to obey and carry out all lawful instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered. That a reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract appears from . . ."

There follows the citation of a number of English cases, including *Hardaker* v. *Idle District Council*,[5] the building contractor's case.

[3] (1945) 70 C.L.R. 539.
[4] Ibid. 552.
[5] [1896] 1 Q.B. 335; 12 T.L.R. 207, C.A.

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If the independent contractor need not be free from the other party's control "in the performance of the task," what freedom must he possess if he is to be called "independent"? Must he be free to choose the plant, equipment and materials as he wishes, or can he submit to some control in these respects too without affecting the substance of his independent contract? I do not see why not. In practice there will always be some scope for independent action by the man who undertakes to provide the means of performance and to accomplish the result for which he is to be paid.

I compare, and to some extent contrast, with this judgment of Dixon J.[6] another judgment of the same judge in *Humberstone* v. *Northern Timber Mills*.[7] There the question was whether the owner-driver of a truck was a servant under a contract of service so as to be covered by a Workmen's Compensation Act. For a number of years the owner had taken his truck at about the same time each day to the respondents' factory where he had been given goods to deliver to their customers. He carried on delivering goods until about the same time each evening when he knocked off. He maintained the truck and supplied the fuel at his own expense, and was paid for goods carried at a rate per car-mile. From these facts it was inferred that there was a continuing contract between the respondents and the owner which was not a contract of service. For this last conclusion Dixon J. gave these reasons[8]:

> "*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 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*

[6] 70 C.L.R. 539.
[7] (1949) 79 C.L.R. 389.
[8] Ibid. 404.

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 Proprietary Ltd.* v. *Federal Commissioner of Taxation.*[9] 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."

Were it not for the words which I have italicised I would have said that the reasoning here was the same as in the earlier case. Because of the driver's obligation to provide the truck, to maintain and fuel it, and to accept payment by results, it was a contract for the transportation of goods and not a contract of service. But the italicised words seem to make the consignor's right of control (if it existed) a sufficient condition of a contract of service, and to treat the owner-driver's obligation to provide the truck, etc., merely as evidence, making difficult, or precluding, the imputation of an intention to the parties that he should be subject to control. If the obligation to provide the truck, etc., were relevant only as evidence of intention in the matter of control, it would cease to be relevant where the parties had expressed their intention in that matter, and if, as in the *Queensland* case, the contract expressly provided that the driver should be subject to the other party's control, he would be a servant. But the *Queensland* case decided that the driver's was an "independent contract": his obligation to provide the men, the horses, etc., determined its nature and made it, notwithstanding his submission to control, something other than a contract of service.

If there is in this respect a difference between the two judgments, I prefer the earlier.

The opinion of Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.*,[10] forgotten by at least one of the counsel who argued the case, and discovered by Mr. Atiyah, must be mentioned here. There were two questions in that case; whether a corporation was the occupant of an armaments factory so as to be liable to pay an occupation tax, and whether it was carrying on a business in the factory so as to be liable to pay a business tax. The answer to both questions depended on whether the corporation was acting

[9] 70 C.L.R. 539.

[10] [1947] 1 D.L.R. 161, P.C.

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as the government's agent in the manufacture of the armaments or as an independent contractor. All the funds necessary for the enterprise were provided by the government, which bore all the financial risks. The corporation was subject to the government's control in making the armaments and received a fee for each unit of production. It was held on these facts that the corporation was not liable to pay the taxes. Mr. Atiyah cites the following passage from Lord Wright's opinion [11]:

> "In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

In Lord Wright's first illustration of the shipowner, the charterer and the shipmaster, control is shown in two ways not to be conclusive. Though the shipowner had delegated to the charterer his right to give directions to the shipmaster, and in that limited sense no longer had control, he was still the master. Again, though the charterer had the power of giving directions, and in that sense had control, he was not the master. The second illustration shows that a right of control limited by law or by trade union regulations may be sufficient for the relation of master and servant. This does not take us very far in the direction of a fourfold test. It is easier to relate Lord Wright's (2), (3) and (4) to the case mentioned in the last sentence of the quotation. If a man's activities have the character of a business, and if the question is whether he is carrying on that business for himself or for another, it must be

[11] [1947] 1 D.L.R. 161, 169, P.C.

relevant to consider which of the two owns the assets ("the ownership of the tools") and which bears the financial risk ("the chance of profit," "the risk of loss"). He who owns the assets and bears the risk is unlikely to be acting as an agent or a servant. If the man performing the service must provide the means of performance at his own expense and accept payment by results, he will own the assets, bear the risk, and be to that extent unlike a servant. I should add that there is nothing in the Canadian case, *Montreal* v. *Montreal Locomotive Works Ltd.*,[12] to support the view that the ownership of the assets is relevant only to the question of control. Lord Wright treats his three other tests as having a value independent of control in determining the nature of the contract.

U.S. v. *Silk* [13] was the most important of the American cases cited to me. The case disposed of two suits raising the question whether men working for the plaintiffs, Silk and Greyvan, were "employees" within the meaning of that word in the Social Security Act, 1935. The judges of the Supreme Court agreed upon the test to be applied, though not in every instance upon its application to the facts. It was not to be what they described as "the common law test," viz., "power of control, whether exercised or not, over the manner of performing service to the undertaking." The test was whether the men were employees "as a matter of economic reality." Important factors were said to be "the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation."

Silk sold coal by retail, using the services of two classes of workers, unloaders and truck drivers. The unloaders moved the coal from railway vans into bins. They came to the yard when they wished and were given a wagon to unload and a place to put the coal. They provided their own tools and were paid so much per ton for the coal they shifted. All the nine judges held that these men were employees [14]:

> "Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the

[12] [1947] 1 D.L.R. 161.
[13] (1946) 331 U.S. 704.
[14] Ibid. 716.

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Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases."

Silk's drivers owned the trucks in which they delivered coal to Silk's customers. They paid all the expenses of operating their trucks including the wages of any extra help they needed or chose to employ. They came to the yard when they pleased and were free to haul goods for other people. They were paid for their deliveries at a rate per ton. Greyvan carried on a road haulier's business. Their drivers too owned their trucks and were required to pay all the costs of operation. They were not allowed to work for anyone else but Greyvan, and had to drive the trucks themselves or, if they employed a relief driver, to be present when he drove. They had to follow all the rules, regulations and instructions of Greyvan. They were paid a percentage of the tariff which Greyvan charged the customers.

By a majority of the court both sets of drivers were held to be independent contractors [15]:

> ". . . where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

This reasoning apparently requires that there should be some power of control vested in the driver if he is to qualify as an independent contractor. That the power need not be very extensive appears from the facts in *Greyvan's* case. The driver's investment, and the risk undertaken by him, seem to be the important things.

The authorities I have already cited (the judgment of Dixon J. and the opinion of Lord Wright in the Canadian case) show that the common law test is not to be restricted to the power of control "over the manner of performing service," but is wide enough to take account of investment and risk.

Section 220 (2) of the American Restatement, Agency 2d, includes among the relevant factors:

[15] (1946) 331 U.S. 719.

A "(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work."

The comment on the first part of this paragraph is in these words:

B "*Ownership of instrumentalities.* The ownership of the instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This C fact is, however, only of evidential value."

This says in effect that the employer's ownership of the instrumentalities is relevant only because of a rebuttable presumption that the parties meant him to control the use of his own property. It also says that the worker's ownership is evidence that he is not a servant, but it does not say why. If the reason is the same in D both cases, and the worker's ownership is evidence only because of its bearing on control, it is plain from what I have already said that I do not agree.

The point is discussed in Mr. Atiyah's book at pp. 64, 65. I quote these three sentences:

E "It seems, therefore, that the importance of the provision of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor he expects the contractor to provide all the necessary tools and equipment. . . . Indeed, it may well be that little weight can today be put on the provision of tools of a minor character, as opposed to the provision of plant and equipment on a large scale. In the latter case the F real object of the contract is often the hiring of the plant, and the services of a workman to operate the plant are purely incidental."

I have had these sentences in mind when framing my five examples.

I note a United States decision later than *Silk's* in which a G Federal Court of Appeal held that an owner-driver was a servant, stating that his ownership of a trailer merely raised an inference about control which was rebutted by the express terms of the contract: *National Labour Relations Board* v. *Nu-Car Carriers Inc.*[16-18]

I have almost completed my review of the authorities. There

[16-18] (1951) 189 Fed. 2d 756.

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is, as well, the dictum of Denning L.J. in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*,[19] repeated in his Hamlyn Lectures:

> "In this connection I would observe that the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation."

This raises more questions than I know how to answer. What is meant by being "part and parcel of an organisation"? Are all persons who answer this description servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders? Though I cannot answer these questions I can at least invoke the dictum to support my opinion that control is not everything.

Then there are "the four indicia" of a contract of service, first mentioned in *Park* v. *Wilsons and Clyde Coal Company Ltd.*[20] and repeated by Lord Thankerton in *Short* v. *J. and W. Henderson Ltd.*[21]:

> "(a) The master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal."

It seems to me that (a) and (d) are chiefly relevant in determining whether there is a contract of any kind between the supposed master and servant, and that they are of little use in determining whether the contract is one of service. The same is true of (b), unless one distinguishes between different methods of payment, payment by results tending to prove independence and payment by time the relation of master and servant. Reference to the facts in *Park* v. *Wilsons and Clyde Coal Company Ltd.*[22] shows the use for which these tests were devised. Park had contracted with the company to drive a stonemine at a money rate per fathom, and he had engaged Haggerty to help him. Park and Haggerty had been injured by the negligence of other men admittedly in the company's service. The question was whether Park and Haggerty were fellow-servants of those whose negligence had injured them, so as to be caught by the doctrine of common employment. In deciding whether Haggerty was a servant of the company or of Park, it was obviously relevant to inquire who had

[19] [1953] 1 Q.B. 248, 295; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779.
[20] 1928 S.C. 121, 159.
[21] (1946) 62 T.L.R. 427, 429, H.L.
[22] 1928 S.C. 121.

A selected him, who paid his wages and who had the right of suspending or dismissing him, and if Park did (or could do) these things otherwise than as the company's agent, he himself was unlikely to be their servant.

Three workmen's compensation cases in Ireland raised the question whether men whose work was carrying goods and B materials were employed under contracts of service: *Moroney* v. *Sheehan* [23]; *O'Donnell* v. *Clare County Council* [24]; and *Clarke* v. *Bailieborough Co-operative Agricultural and Dairy Society Ltd.* [25] It appears from the statement of facts in each case that the workman had his own horse and cart, but this is not referred to either in the arguments or in the judgments which held that the men C were employed under contracts of service. *Doggett* v. *Waterloo Taxi-Cab Co. Ltd.* [26] is an English case under the Workmen's Compensation Act, 1906, in which it was held that the owners of a taxi-cab, hired by them to a driver in consideration of a share in the takings, were not his employers under a contract of service. I mention these cases to show that they have not been overlooked.

D I mention also, and for the same reason, an argument addressed to me by Mr. Parker, on the provisions of the Road Traffic Act, 1960. The argument, founded on section 164 (1) and (3), was to the effect that when Latimer was driving his truck a licence was needed under this part of the Act only if he was carrying on his own business. If he was merely the company's servant E employed by them to drive his own vehicle on their business, no licence was needed. This cannot have been intended. The draftsman must have considered that a man in Latimer's position would always be an independent contractor, and if he did so he was probably right. That was the argument. But one cannot be sure that F he considered the point, and if one is not sure of that the argument proves nothing.

It is now time to state my conclusion, which is that the rights conferred and the duties imposed by the contract between Latimer and the company are not such as to make it one of service. It is a contract of carriage. G

I have shown earlier that Latimer must make the vehicle available throughout the contract period. He must maintain it (and also the mixing unit) in working order, repairing and replacing

[23] (1903) 37 Ir.L.T. 166.
[24] (1913) 47 Ir.L.T. 41.
[25] (1913) 47 Ir.L.T. 113.
[26] [1910] 2 K.B. 336; 26 T.L.R. 491, C.A.

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worn parts when necessary. He must hire a competent driver to take his place if he should be for any reason unable to drive at any time when the company requires the services of the vehicle. He must do whatever is needed to make the vehicle (with a driver) available throughout the contract period. He must do all this, at his own expense, being paid a rate per mile for the quantity which he delivers. These are obligations more consistent, I think, with a contract of carriage than with one of service. The ownership of the assets, the chance of profit and the risk of loss in the business of carriage are his and not the company's.

If (as I assume) it must be shown that he has freedom enough in the performance of these obligations to qualify as an independent contractor, I would say that he has enough. He is free to decide whether he will maintain the vehicle by his own labour or that of another, and, if he decides to use another's, he is free to choose whom he will employ and on what terms. He is free to use another's services to drive the vehicle when he is away because of sickness or holidays, or indeed at any other time when he has not been directed to drive himself. He is free again in his choice of a competent driver to take his place at these times, and whoever he appoints will be his servant and not the company's. He is free to choose where he will buy his fuel or any other of his requirements, subject to the company's control in the case of major repairs. This is enough. It is true that the company are given special powers to ensure that he runs his business efficiently, keeps proper accounts and pays his bills. I find nothing in these or any other provisions of the contract inconsistent with the company's contention that he is running a business of his own. A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.

A comparison of Latimer's profits with the wages earned by men who are admittedly the company's servants confirms my conclusion that his status is different, that he is, in the words of the judgment in *Silk's* case, a "small business man," and not a servant.

That is all I need to say about *Latimer's* case.

Happily I need say less about the two other cases, *King's* and *Bezer's*. In each of these the question is whether the man's contract is one of service. The parties are agreed that if Latimer's

contract is not one of service, neither is King's nor Bezer's. I agree, and these two cases will be decided accordingly.

Appeal allowed with costs.
On references orders accordingly.
Costs against Minister.

Solicitors: *Linklaters & Paines; McKenna & Co.; Solicitor, Ministry of Social Security.*

APPENDIX

The schedule to the contract, annexed to the case stated, provided: "1. This agreement shall be operative as from the commencement date.

2. On or before the commencement date: (a) The company shall procure that the hire purchase company will effect all structural alterations and additions to the vehicle (including any power take off unit or front-end modification to the engine) necessary to the operation thereon of the equipment and shall paint the vehicle in the colour or colours and with the distinguishing signs and marks specified by the company and shall then offer the vehicle for sale to the owner-driver. (b) The owner-driver shall purchase the vehicle from the hire purchase company. (c) The company shall ensure that credit facilities are available to the owner-driver for the purchase of the vehicle from the hire purchase company.

3. On or before the date of the purchase and sale referred to in the preceding clause the company shall at its own expense provide and fit the equipment to the vehicle. The equipment shall at all times remain the property of the company and shall not be removed from the vehicle except in accordance with the terms of this agreement.

4. The owner-driver shall forthwith upon the exchange of this agreement obtain an "A" contract licence based upon this agreement covering the use of the truck hereunder.

5. The owner-driver shall at all times of the day or night during the term of this agreement (excepting only in accordance with the terms hereof) make available the truck to the company for the purpose of collecting carrying and delivering the materials used for or in connection with the business of the company (not being a business of carrying or arranging for the carriage of goods) whenever and wherever so required by the company whether such requirement is notified to the owner-driver or to his servants or agents and shall duly and promptly collect carry and deliver such quantity or quantities of the materials as and when required in the manner at the time and to the destination directed by the company and it is further provided that the truck shall be used exclusively for the purposes set out in this agreement and for no other purpose. In furtherance of the terms of this clause the owner-driver shall if so required by the company at his own expense ensure that the company is able to contact him by telephone at his usual residence or residences.

6. The company may require the owner-driver to make the truck available to any associated company for the purpose of collecting, carrying and delivering the materials of such associated company and the owner-driver shall subject to his obtaining a "B" licence as hereinafter mentioned comply with such requirement in accordance with the terms of the preceding clause. If any such requirement is made by the company the owner-driver shall use his best endeavours to obtain in substitution for the "A" contract licence the grant of a "B" licence covering the use of the truck from any plants both of the company and of such associated company. The parties hereto hereby agree that unless a "B" licence is obtained by the owner-driver in accordance with this clause the truck

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will not be used for or in connection with the carriage of any goods of any parent or subsidiary company of the company.

7. The owner-driver shall at all times ensure that he holds a licence in accordance with clause 4 or clause 6 of this schedule and that the operation of the truck at all times falls within the provisions of such licence and shall further comply with all conditions, provisions, regulations and rules for the time being in force . . . in any way relating the vehicle or its use or operation and shall indemnify the company against all actions proceedings claims demands and expenses and other liabilities incurred by the company in respect of any breach of this provision.

8. The owner-driver shall not during the continuance of this agreement or within 14 days after its termination (howsoever caused) without the prior written consent of the company (except in the case of any hire purchase agreement with the hire purchase company) charge or sell or purport to charge or sell the vehicle or the equipment or in any manner permit or allow the same or purport to allow them to become subject to any lien charge or incumbrance.

9. Where the truck is not or will not be available to the company in accordance herewith for any reason whatsoever the owner-driver shall so notify the company by at least seven days' notice or by such shorter notice as in the circumstances be reasonable.

10. The owner-driver shall with the consent of the company be entitled (subject to clause 12 . . .) to appoint a competent and suitably qualified driver to operate the truck in place of him. If any such other driver is so appointed the owner-driver shall ensure that such other driver complies with all the terms conditions and obligations of this agreement applicable to the operation and use of the truck. If the company has reasonable grounds for dissatisfaction with any driver appointed by the owner-driver it shall be entitled to give notice of this to the owner-driver and the owner-driver shall forthwith provide a suitable and acceptable driver in lieu of such driver and shall not permit such driver to operate the truck.

11. Any driver employed by the owner-driver to operate the truck shall be employed on conditions of employment and at rates of wages no less favourable to such driver than those for the time being laid down by the National Joint Council for the Ready Mixed Concrete Industry.

12. Notwithstanding the provisions of clause 10 . . . the company shall be entitled to require the owner-driver himself to operate the truck on every or any day up to the maximum number of hours permitted under section 73 of the Road Traffic Act, 1960, or any statutory amendment or re-enactment thereof and the owner-driver shall comply with such requirement unless he shall have a reason for not so doing which would have been valid had he been the employed driver of the company and shall have notified the company in advance of such reason and shall be able to produce and upon the request of the company in fact produce evidence to substantiate the same. The owner-driver shall not himself be obliged to operate the truck during such holiday times and periods (not extending for more than two weeks in any calendar year) as have been agreed by the company in writing.

13. If at any time the owner-driver shall fail both to operate and to cause any other driver to operate the truck in accordance herewith then without prejudice to any other rights of the company arising from such breach the company shall be entitled to appoint a driver or drivers to operate the truck in accordance with this agreement on behalf of the owner-driver for such period as the company may at the time of such appointment consider reasonable and to revoke any such appointment: and the owner-driver hereby irrevocably authorises the company to make or revoke any such appointment or appoints and undertakes to be responsible for all wages earnings and liabilities earned or incurred by any driver so appointed by the company and hereby agrees that for all purposes such driver or drivers shall be deemed to be in the exclusive employment of the owner-driver.

14. The owner-driver shall at all times while operating the truck:

(a) Wear a clean and presentable uniform of the pattern and colours prescribed by the company which shall be provided by and at the expense of the owner-driver. (b) Comply with all rules regulations or requirements of the company. (c) Ensure that no water or other substance is added to the materials unless the customer to whom the materials are being delivered or a responsible person on behalf of such customer insists upon such an addition and completes the appropriate part of the delivery docket. (d) Ensure that none of the details on any delivery docket is altered. (e) Carry out all reasonable orders from any competent servant of the company as if he were an employee of the company. (f) Where so requested by the company be responsible for the collection of and transmission to the company of any moneys to be paid to the company on the delivery of any of the materials. (g) By his conduct and appearance (including the speed and manner in which he operates the truck) use his best endeavours to further the good name of the company.

15. The owner-driver shall not do anything which might cause a contravention of the Road Traffic Act, 1960 (and especially of sections 4, 24 and 73 the provisions of which have been brought to the notice of the owner-driver), or of any statutory amendment or re-enactment thereof or of any rules or orders thereunder for the time being in force and he shall not accept or carry out any orders or instructions given to him which would result in any such contravention.

16. The owner-driver shall at all times hold a current driving licence valid for the class of vehicles into which the truck falls.

17. The owner-driver shall not carry out or permit to be carried out any alteration to the truck except with the written consent of the company.

18. (a) The owner-driver shall at all times to the satisfaction of the company: (i) Keep the truck well and freshly painted and signwritten in the colours and in the manner directed by the company. (ii) Wash cleanse oil grease and maintain the truck (including in particular the internal cleansing of the drum forming part of the equipment and the removal of all residual concrete and other solids therefrom) both mechanically and otherwise (including the replacement or reconditioning of all worn damaged or defective parts thereof) with the exception only of the replacement of the main drum and cradle (excluding accessories attached thereto and in particular excluding drum blades) of the equipment where the need for such replacement or reconditioning is due only to fair wear and tear. (iii) Generally keep the truck in good and substantial repair and condition.

(b) The works to be carried out by the owner-driver under (a) of this clause shall be carried out in such a manner that the truck shall cease to be available to the company for as short a time as possible and shall on each occasion that the truck will not be available to the company in accordance herewith notify the company as soon as possible specifying the precise nature of the works to be carried out and of any defect making necessary such works.

(c) Where the owner-driver is about to carry out any replacement or reconditioning of or any major repair on the vehicle of the equipment or any other works whose cost exceeds £50 or which would result in the truck being unavailable to the company in accordance herewith for more than twenty-four hours the company shall have the option to require that the work shall be carried out for and at the expense of the owner-driver by Readymix Transport Ltd. or by any other person firm or company nominated by the company.

(d) The owner-driver may with the consent of and shall upon the written requirement of the company without charge maintain wash down and garage the truck in the open air or otherwise at any plant from which it is operating Provided that the company may at any time and without assigning any reason therefor withdraw such consent or requirement And Provided Also that the owner-driver shall at no time be entitled as of right to use any of the company's facilities or equipment for such maintenance washing down or garaging.

(e) The owner-driver shall if so required by the company cause the truck to be available for inspection by the company or by any person firm or company and at any place nominated by it and if after such

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inspection or at any other time the company considers that the condition of the truck is such that the provisions of this agreement have not been complied with the company may thereupon require the owner-driver forthwith to put in hand and complete such works as may be specified by the company and the owner-driver shall comply with such requirement. If the owner-driver shall fail forthwith to put in hand or to complete such works as aforesaid the company shall without prejudice to any other right which it might have by reason of such breach be entitled forthwith to carry out such works or to nominate any person firm or company to carry out such works on its behalf and the owner-driver shall forthwith repay to the company the cost of such works.

(f) The company may at any time serve notice on the owner-driver that it wishes to replace the equipment or the main drum the cradle or any other part thereof and thereupon the owner-driver shall forthwith make the truck available for such purpose as when and where requested by the company and the company shall carry out or have carried out such replacement at its own expense with all reasonable speed.

19. The owner-driver shall in addition to the other obligations referred to in clause 18 . . . be responsible for the wear and tear on the equipment with the exception of fair wear and tear on the main drum and cradle thereof (excluding accessories attached thereto and in particular excluding drum blades) and upon any replacement thereof whether in accordance with clause 18 (f) . . . or otherwise or upon the termination of this agreement (howsoever caused) shall pay to the company such a sum calculated with reference to the expired portion of the estimated life of the equipment (other than as aforesaid) or of the separate component parts thereof as is certified by the company to be due in respect of such wear and tear.

20. (a) Subject as hereinafter mentioned the owner-driver shall be entitled to earnings for the services provided hereunder calculated as follows: (i) At (subject to (c) of this clause) the rates for each delivery of the materials on the basis that the quantity of the materials constituting each delivery was not less than the minimum delivery Provided that in the case of concrete which weighs less that 138 pounds per cubic foot (known as "Lightweight Concrete") such calculation shall be on the basis that the quantity of the materials constituting each delivery was not more than the capacity of the equipment referred to in clause 2 (c) of this agreement. (ii) At the waiting period rate for all the time in excess of the waiting period during which the truck is while delivering the materials delayed on a site through no act or default of the owner-driver. Provided that a statement showing the length of such delay and signed by the customer to whom the materials are being delivered or by a responsible person on behalf of such customer or on behalf of the company is on the day of such delay passed to "shipper" at the plant from which the materials were dispatched.

(b) (i) The rates have been calculated on the basis that the truck will operate from the specified plants: during such time as the truck operates from any other plant than the specified plants then (a) of this clause shall be read as if the reference to "the rates" were a reference to "the current rates of payment from time to time paid by the company to new owner-drivers at the plant from which the truck is operating." (ii) For the purpose of any calculation under (a) of this clause the number of radial miles in each delivery of the materials shall be taken from the radial mile map at the plant from which the delivery is made by the "shipper" or other employee of the company responsible for deliveries at the said plant. If any dispute shall arise as to the number of radial miles in any delivery notice thereof shall be given to the owner-driver or the company as the case may be within seven days of the day of the delivery concerned. Such dispute shall be referred to a senior executive of the company whose decision shall be final.

(c) (i) Within seven days from the end of each week the owner-driver shall submit to the company invoices in the form specified by the company showing in respect of that week the quantity of the materials delivered by the truck during that week and the amounts due in respect of such deliveries in accordance with the previous provisions of this clause.

(ii) Within seven days after the end of each calendar month the owner-driver shall render to the company a detailed statement of such invoices as relate to that month in the form specified by the company. (d) The company shall (subject to the right of the company to make any deductions retentions or to obtain reimbursement from the owner-driver under any other provision of this agreement) by the end of the month following that in respect of which the detailed monthly statement is rendered to the company make payment of the amount found to be owing in respect thereof and notice by the owner-driver of any dispute arising from any such payment shall be given to the company within seven days thereof.

21. The owner-driver shall be entitled to receive in respect of each minimum earnings period (having regard to all sums laid out by the company on behalf of the owner-driver) at least such a sum as is obtained from the calculation of minimum earnings. Minimum earnings are based on a working year of two hundred and eighty days and "y" represents the number of days (if any) in excess of 85 days in any minimum earnings period on which the truck and a driver to operate it were not available to the company for the carriage of the materials in accordance with this agreement (otherwise than as a result of any action on the part of the company) for a period in any one day of at least four hours. Calculations of minimum earnings shall be prepared by the owner-driver at his own expense and submitted to the company within six weeks after the end of any minimum earnings period and if the amount found to be owing under this clause is in excess of the amount actually earned by the owner-driver under this agreement during the minimum earnings period in question then the company shall within three months after the end of such minimum earnings period pay the deficit to the owner-driver.

22. Either party hereto shall be entitled to have the rates increased or decreased by the amount (to the nearest penny) appropriate to allow for any variations in the following expenses at the date hereof: (a) The cost at which the owner-driver is able to provide drivers for the truck (including for all times at which the truck is operated by the owner-driver the wages to which the owner-driver would have been entitled had he been an employee) in accordance with the conditions of employment and rates of wages laid down by the National Joint Council for the Ready Mixed Concrete Industry. (b) The cost at which the owner-driver is able to purchase fuel lubricating oils and tyres for use on the truck and it is further provided that the rates shall at the request of the owner-driver be subject to review in the event of any substantial reduction in the profitability of this Agreement to the owner-driver by reason of any levy or tax imposed by Parliament on carriers of goods by road transport generally.

23. (a) The company shall be entitled to pay (and until it shall have given to the owner-driver 14 days' notice in writing shall pay) any instalments due from the owner-driver under the terms of any hire purchase agreements between the hire purchase company and the owner-driver as the same fall due and to charge the same to the owner-driver. (b) Subject to (a) of this clause the owner-driver shall pay all debts and liabilities and perform all obligations in respect of the truck and any goods or materials supplied or work carried out in connection therewith (including where the company shall have given notice to the owner-driver in accordance with (a) of this clause all instalments due under any such hire purchase agreement and also including all debts and liabilities under any such hire purchase agreement) as the same fall due and shall not allow the vehicle or the equipment to become subject to any charge or lien (other than any such hire purchase agreement) and if the driver shall not after a reasonable time have remedied any breach of this sub-clause the company shall be entitled without prejudice to any other rights of the company arising from such breach to pay such debts or liabilities or meet such obligations on behalf of the owner-driver and to recover any moneys so expended by deduction from any payments from time to time due to the owner-driver from the company or from the reserve fund or otherwise.

24. The company from time to time shall notwithstanding anything else herein contained be entitled to retain from the earnings of the owner-driver

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for any month a sum not exceeding the sum resulting from the calculation of the deduction rate so that at any time it holds a balance up to but not exceeding the amount of the reserve fund and shall hold such moneys as security for the proper performance of all the obligations of the owner-driver hereunder. The company shall be entitled to retain the reserve fund free of interest and at any time to draw upon it to meet any debts liabilities or obligations of the owner-driver hereunder whether to the company or otherwise and shall account to the owner-driver for any such drawings made in any calendar month at the same time as it makes payment of his earnings for that month. After the termination of this agreement the company shall render its final account in respect of the reserve fund and any such drawings at the same time as making the last payment of earnings hereunder Provided that if the company has reasonable grounds for believing that any of the obligations of the owner-driver hereunder has not been performed it shall be entitled to continue to retain and if necessary to draw on a reasonable proportion of the reserve fund for a reasonable time thereafter.

25. The owner-driver shall at his own expense and to the satisfaction of the company cause to be maintained by a professional accountant or firm of accountants approved by the company in a form approved by the company profit and loss accounts for each period of three months ended on the last day of February May August and November in each year or for any shorter period commencing on the commencement date and ending on the next of such dates thereafter and balance-sheets as at the end of each of such periods relating to the business carried on by the owner-driver hereunder and the owner-driver shall in any manner specified by the company set aside any provision made in such accounts. The owner-driver shall submit such accounts and balance-sheets to the company by the end of the month following the period covered thereby.

26. (a) On or before the date of the purchase and sale referred to in clause 2 of this schedule the company shall negotiate for and use its best endeavours to effect on behalf of in the name of and at the expense of the owner-driver a policy (which expression shall in this clause include the plural) of motor insurance on the vehicle. The policy shall be in such form for such amounts through such insurance brokers with such insurance company and on such terms and conditions and subject to such limitations and exceptions as the company may require. Such policy shall have indorsed thereon the interest of the company as owners of the equipment and where applicable both the interest of the hire purchase company as owners of the vehicle under any hire purchase agreement with the owner-driver and the interest of the owners of the radio equipment. Where such policy is effected through insurance brokers the company shall not be entitled to any commission fee or other brokerage from the owner-driver for effecting or maintaining the same nor shall it be entitled to claim any reimbursement of its own administrative expenses from the owner-driver. The owner-driver hereby irrevocably authorises the company during the term of this agreement to effect or on the termination of this agreement to cancel such policy on his behalf and agrees that no alteration or amendment thereto shall be made without the written consent of the company. The owner-driver further irrevocably authorises the company during the terms of this agreement to pay on his behalf all premiums due under such policy as and when they fall due and to deduct the amount thereof from any payments from time to time due to the owner-driver from the company or from the reserve fund and to collect and in due course to account to the owner-driver for any return premium due on the cancellation of any policy as aforesaid. (b) The company shall negotiate and effect a policy of insurance on the equipment on the same terms as those contained in (a) of this clause relating to the vehicle save that the policy may at the option of the company be in the name of the company and save that if a policy is so effected in the name of the company it shall not bear the indorsements referred to in (a) of this clause. (c) The company shall at all times during the continuance of this agreement use its best endeavours to keep in force any policy effected in accordance with (a) and (b) of this clause or to effect and keep in force an

alternative policy in accordance therewith. (d) In the event that the company is unable to effect or to keep in force a policy in accordance with (a) (b) and (c) of this clause whether by reason of the driving or claims record of the owner-driver or of any drivers appointed by him or otherwise the company shall forthwith notify the owner-driver accordingly and thereupon the owner-driver shall endeavour to negotiate for and to obtain at his own expense a policy on the insured goods through such insurance brokers such insurance company in such form and upon such terms and conditions and subject to such limitations and exceptions as the company may in their absolute discretion approve and in the event of the owner-driver failing to effect a policy so approved by the company within 14 days of such notification or at any time failing to keep such policy in force then this agreement shall thereupon terminate. Any policy effected by the owner-driver hereunder together with all renewal notes and receipts for premiums shall at all times be available to the company and the owner-driver shall produce the same to the company for inspection within three days of being required in writing so to do. (e) In the event either of the total loss of or any damage to the insured goods or any of them the owner-driver shall forthwith lay out any insurance moneys received by him in respect thereof on repairing reinstating or replacing the same Provided that the owner-driver shall if so required by the company forthwith and at his own expense assign to the company all rights claims and benefits under any such policy in his name And Provided Also that any moneys payable under any such policy in his name in respect of loss of or damage to the insured goods shall if so required by the company be paid by the insurance company to the company and the owner-driver hereby irrevocably authorises the company to give a good discharge for the receipt of such moneys. The company shall deal with any rights claims and benefits assigned to it or any moneys paid to it under the provisos aforesaid in accordance with the obligations of the owner-driver hereunder. (f) The owner-driver shall comply with the terms and conditions of any policy effected hereunder and in particular in the event of any loss of or damage to the insured goods or of the insured goods being involved or concerned in any loss damage or accident the owner-driver shall forthwith give notice thereof in writing both to the company and to the insurance company or where applicable to the insurance brokers in the manner laid down therein.

27. The owner-driver at his own expense shall forthwith if required so to do by the company in writing provide and instal radio equipment on the vehicle and shall at all times at his own expense maintain the radio equipment in good and substantial repair and condition and shall pay a licence fee which may be required. The owner-driver shall operate the radio equipment in accordance with any rules regulations and laws appertaining thereto whether of the company or otherwise.

28. This agreement shall be personal to the owner-driver and the owner-driver shall not be entitled to assign the benefit hereof.

29. The owner-driver shall not without the written consent of the company at any time during the continuance of this agreement except as herein provided engage or be concerned in any employment business or trade as a haulier or carrier of any goods or materials of whatever description.

30. The owner-driver is hereby declared to be an independent contractor.

31. Any rule or regulation of the company referred to in this agreement shall be deemed to include any rule or regulation of any of the plants of the company or of any associated company from which the truck is operating . . . and any order or requirement of the company referred to in this agreement shall be deemed to include any order or requirement of any competent servant of the company or of any associated company (whether such requirement is in writing or otherwise).

32. (a) On the expiration or sooner determination of this agreement (howsoever caused) the company shall for seven days have the option to purchase the vehicle free from all liens charges or encumbrances at the market price thereof (as if the equipment were not mounted thereon)

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such price to be determined in default of agreement by an independent valuer. The owner-driver shall take any action or pay any sums necessary to release the vehicle from any such liens charges or encumbrances and in default of his so doing the owner-driver hereby irrevocably authorises the company to do so on his behalf. Such option shall be exercisable by the company by the service of notice in writing to that effect on the owner-driver and upon the service of such notice the property in the vehicle (whether or not it is subject to any charge) shall pass to the company. (b) If the company shall not exercise the option referred to in (a) of this clause, the owner-driver shall within eight days from the termination of this agreement (howsoever caused) or within 24 hours of such sooner time as the company shall inform the owner-driver that it does not intend to exercise such option make the vehicle available to the company for not less than three working days so that the company may remove the equipment from the vehicle. In default of the owner-driver making the vehicle available in accordance herewith the company in addition to any other rights arising as a result of such default shall be entitled to drive the vehicle and to take it away for up to six working days for the purpose aforesaid.

33. This agreement shall remain in force until determined by either party giving to the other not less than 28 days' previous notice in writing expiring on or at any time after the termination date Provided that this agreement shall be subject to termination by the company—(a) By not less than 28 days' notice in writing given at any time while the owner-driver shall have been incapacitated from driving the truck in accordance herewith by reason of ill health or accident for a total period of 60 days in the preceding six months. (b) By a summary notice in writing if the owner-driver shall have committed a breach of any of the covenants and conditions on his part herein contained or shall have been guilty of conduct tending to bring himself or the company or any associated company into disrepute or shall have committed an act of bankruptcy or entered into any arrangement or composition with his creditors or suffered execution to be levied on his property. (c) By a summary notice in writing if the owner-driver having been warned by the company of any grounds for dissatisfaction it may have in respect of the operation of the truck shall not within a reasonable time have removed the cause of such dissatisfaction.

34. The expiring agreement shall terminate on the commencement date and where the expiring agreement provided for the payment of any sum by way of minimum earnings in a similar manner to the provisions of clause 21 of this schedule minimum earnings hereunder shall be calculated as if the commencement date were the calculation date and as if his earnings under the expiring agreement from the calculation date to the commencement date had been earned under this agreement.