Questions of law decided in favor of the defendant. Demurrer to stand over. Plaintiff to have liberty to amend. Costs reserved. Liberty to apply.

Solicitors, for appellant, *Rigby & Fielding*, Melbourne.

Solicitor, for respondent, *Powers*, Crown Solicitor for Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

METCALF . . . . . APPELLANT;
PLAINTIFF,

AND

THE GREAT BOULDER PROPRIETARY GOLD MINES, LIMITED . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Appeal—Master and servant—Employers' liability—Negligence—Accident—Condition of ways—Defect—Person to whose orders or directions workman bound to conform—Shaft—Excavation—Employers' Liability Act 1894 (*W.A.*), (58 *Vict. No.* 3), *sec.* 3 (1)—*Mines Regulations Act* 1895 (*W.A.*) (59 *Vict. No.* 37), *secs.* 4, 23, *rr.* 8, 20, 28.

"Defect in condition," in sec. 3 (1) of the *Employers' Liability Act* (W.A.), means a defect in original construction or subsequent condition, rendering the appliance in question unfit for the purpose to which it was applied, when used with reasonable care and caution, and does not cover the negligent use of a properly constructed appliance.

The words "good order and condition," in the *Mines Regulation Act*, sec. 23, rule 20, and "securely protected and made safe" in rule 8 refer to the same qualities.

A person employed in a mine, whose duty it was to notify by signal when conditions were such that work, which the miners were bound to do, might

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be safely proceeded with, is not a person "to whose orders and directions a workman is bound to conform," within the meaning of the *Employers Liability Act*.

Semble, a shaft, in which the work of excavation is finished, is not an excavation within the meaning of the *Mines Regulation Act* (W.A.), sec. 23, rule 8.

APPEAL from a decision of the Supreme Court of Western Australia.

The following statement of facts is taken from the judgment of *Griffith* C.J.:—

This was an action for damages sustained by the plaintiff, who was a workman in the employment of the defendants, by reason of alleged negligence and breach of duty by persons for whose acts the defendants were responsible. The case was originally presented in three ways—(1) as an action for breach of the common law duty of the defendants to use due care; (2) as a claim under the *Employers' Liability Act* of Western Australia (58 Vict. No. 3, assented to 10th October, 1894); and (3) as a claim for damages for injuries arising by reason of breaches of statutory duty imposed by the *Mines Regulation Act* (59 Vict. No. 37). The facts, which were not in dispute, may be shortly stated. The defendants are the owners of a gold mine at Kalgoorlie, in which there is a shaft about 2,000 feet deep, into which several levels open at various depths. Communication with the mine is maintained in the usual manner, by cages, with winding gear worked from the surface. At each level there are two frames, called chairs, attached to opposite sides of the shaft by hinges. When mineral is being taken from a level, it is the practice to let down the chairs so as to form a fixed bed for the cage to rest upon, instead of remaining suspended from the rope. The duty of attending to these chairs was entrusted to one Woodward, who was called the "platman," and whose duty it was, as soon as work was finished at the level, to signal to the engine-driver to lift the cage a little, so as to take the weight off the chairs, then to raise the chairs on their hinges, so as to leave the shaft free for a cage descending to a lower level, and then to give a signal that the shaft was clear. The plaintiff was employed to collect tools in the mine, take them to the surface for re-sharpening, and take them back again. On

the occasion in question the cage had been taking in mineral at the 1,100 feet level. This work being finished, it was drawn up to the surface, and Woodward signalled that the shaft was clear, but omitted to raise the chairs. Shortly afterwards, and before anything further had been done in the shaft, it was plaintiff's duty to descend with tools to the 1,750 feet level, which he started to do. Woodward, who was at the surface, told him that he would find everything all right, and that the cage was to stop at the 700 feet level to pick up another workman. The cage then started, stopped at the 700 feet level as directed, and proceeded downwards, until it reached the 1,100 feet level, when it came violently upon the chairs which had not been raised, and the plaintiff sustained serious injuries.

Villeneuve Smith (with him *Lavan*), for the appellant.

The appellant was a tool-carrier, and his duties required him to descend the shaft at "crib time" and visit every level. One Woodward was in charge of the shaft and the chairs at each level. He was in every respect entrusted with the duty of seeing that the ways, works, machinery and plant were in proper condition. He left the chairs protruding at the 1,100 feet level and signalled "shaft clear." On that signal the tool carrier descended. *The Mines Regulation Act* 1895, (W.A.) 59 Vict. No. 37, requires (sec. 23 (8)) "that every drive and every excavation of any kind in connection with the working of a mine shall be securely protected and made safe for persons employed therein," and the word "mine" in that section includes shaft. *The Employers' Liability Act* 1894, (W.A.) 58 Vict. No. 3, sec. 3, gives a right of compensation to a workman who has been injured by reason of "any defect in the condition of the ways, works, machinery, or plant connected with, or used in, the business of the employer." The way could not be said to be defective by reason of the introduction into it of anything which did not ordinarily form part of it; but here the chairs were just as much part of the way as were the walls of the shaft, and the fact that they were in a dangerous position constituted a defect in the way.

[GRIFFITH C.J.—What is meant by a defect? If the points in a railway line were put the wrong way, would that be a defect?]

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Yes, and it would also be a defect in machinery if a nut were missing from it.

[O'CONNOR J.—Where machinery is of the best possible quality, can it be said to be defective because it has been mismanaged?]

"Defect in the condition of the way" is a wider expression than "defect in the way": *McGiffin* v. *Palmer's Shipbuilding Co.* (1). The chairs here were incorporated with the shaft and it was a defect to have them sticking out: *Giles* v. *Thames Ironworks Shipbuilding Co.* (2). The absence of a guard from a circular saw was held to be a defect in the condition of the machinery: *Tate* v. *Latham & Son* (3).

[O'CONNOR J.—In that case the guard had been out of its place for a considerable time.]

He referred to *Stanton* v. *Scrutton & Sons* (4); *Morgan* v. *Hutchins* (5).

The term "way" has received a judicial interpretation in *Willets* v. *Watt & Co.* (6). A way is defective when it is not safe for persons employed in it. [He referred to *Walsh* v. *Whiteley* (7); and *Milne* v. *Bonnie Dundee Goldmines Ltd.* (8).]

The way should be in a condition to admit of the free passage of the cage whenever the signal is given "shaft clear." The conditions of "seaworthiness" are analogous: *Gilroy Sons & Co.* v. *Price & Co.* (9). A mine owner is in the position of an insurer: *Eaton* v. *Caledonian United and New Zealand Gold Mining Company Ltd.* (10).

The defendants are also liable under the *Employers' Liability Act*, sec. 3 (3). Woodward was a person in the service of the employer to whose orders and directions the plaintiff was bound to conform, and did conform. *Snowden* v. *Baynes* (11) was a case where the plaintiff was voluntarily working overtime. Here the plaintiff was working in obedience to the orders of Woodward. [He referred to *Millward* v. *Midland Railway Co.* (12).]

(1) 10 Q.B.D., 5, at p. 9, per *Stephen* J.
(2) 1 T.L.R., 469.
(3) (1897) 1 Q.B., 502.
(4) 62 L.J. Q.B., 405.
(5) 59 L.J. Q.B., 197.
(6) (1892) 2 Q.B., 92, at p. 98, *per* Lord *Esher*, M.R.
(7) 21 Q.B.D., 371.
(8) (1903) Q.S.R., 303, at p. 307, *per Griffith* C.J.
(9) (1893) A.C., 56.
(10) 8 Q.L.J., 3.
(11) 24 Q.B.D., 568; 25 Q.B.D., 193.
(12) 14 Q.B.D., 68.

The direction as to getting into the cage and the time to go down were given by Woodward.

[GRIFFITH C.J.—The platman, Woodward, was rather a messenger. He had no authority to direct in what level gangs should work. That was the duty of the mine manager.]

The lowest grade worker on the mine has authority to give direction in certain cases.

[O'CONNOR J.—The platman merely takes the cage down. The plaintiff was obeying the order of the manager, and not of the platman.]

The *Mines Regulation Act* (59 Vict. No. 37) imposes upon the owner of a mine, the duty of keeping every drive and excavation "securely protected and safe," and all machinery in "good order and condition." Sec. 23 (8) and (20). Where injury has been caused to any person by the negligence of the mine owner or his agent, an offence has been committed under the Act (sec. 28). "Agent" is defined (sec. 4) as "a person having, on behalf of the owner, the care and direction of a mine or of any part thereof." A shaft is an excavation under sec. 23 (8). "Mine" includes shaft (sec. 4). Here Woodward was an "agent" within the meaning of sec. 4. An employer must take precaution against accidents to workmen from dangerous works: *Groves* v. *Lord Wimborne* (1). It was the duty of the employer to maintain the shaft in proper condition to enable the cage to travel safely.

Pilkington, for the respondents. There was no defect in the ways, works, plant, or machinery. It was negligence in signalling which caused the accident. What is not a defect at one moment cannot become one the next moment merely because the platman gives a wrong signal: *Walsh* v. *Whiteley* (2). The platman signalled from the 1,100 feet level that the chairs were put back. The interruptions were safe and proper provided the engine-driver knew of them. An obstruction in a way is not necessarily a defect in the condition of the way: *McGiffin* v. *Palmers' Shipbuilding Co.* (3). If an action lay because a gate was shut, it would lie because it was negligently shut, and not because it constituted a

(1) (1898) 2 Q.B., 402.
(2) 21 Q.B.D., 371, at p. 378, *per Lopes* L.J.
(3) 10 Q.B.D., 5, at p. 9, *per Field* J.

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defect in the way. If a temporary obstruction, which should never have been there at all, is not a defect, then *à fortiori* an obstruction which ought to have been there under certain circumstances is not a defect. The fact of railway signals being wrong does not constitute a defect in the way. This is proved by the fact that this very case is provided for in the *Employers' Liability Act*, sec. 3 (5). The defect must be a permanent one: *Pegram* v. *Dixon* (1). A temporary obstruction arising from the misuse of proper appliances is not a defect in the condition of the ways: *Willetts* v. *Watt & Co.* (2). *Tate* v. *Latham & Son* (3) is distinguishable. "Defect" means a lack or absence of something essential to completeness. This machine was complete, but was negligently used for the wrong purpose. The cases of *Morgan* v. *Hutchins* (4) and *Stanton* v. *Scrutton & Sons* (5) were cases where the machinery itself was defective.

The *Mines Regulation Act* gives no right of action against an owner except for his personal neglect or breach of duty. Sec. 27 was repealed by the *Workers' Compensation Act*. Under sec. 16 the manager only is responsible. [He referred also to secs. 17 and 23.]

If there was no defect within the meaning of the *Employers' Liability Act*, there was none within the meaning of the *Mines Regulation Act*. The shaft was "securely protected and made safe for persons employed therein." The cause of the accident was the misapprehension of the engine-driver. It was due to his state of mind, and not to the condition of the shaft.

The term "excavation" cannot include "shaft." Shaft is expressly provided for throughout the Act: Sec. 23, sub-secs. (6), (7), (9), (10), (11), (12), (13), (15), (18), &c..

Villeneuve Smith, in reply.

Cur. adv. vult.

Melbourne, November 25.

GRIFFITH C.J. (after stating the facts) proceeded: On these facts it is not disputed that the injury resulted from the negligence

(1) 55 L.J.Q.B., 447.
(2) (1892) 2 Q.B., 92.
(3) (1897) 2 Q.B., 502, at p. 506.
(4) 59 L.J.Q.B., 197.
(5) 62 L.J.Q.B., 405.

of Woodward, and the question is whether defendants are responsible in this action for that negligence.

It was conceded by the appellant's counsel that, so far as regards the claim at common law, the defence of common employment was fatal to his case. With regard to the other bases of the claim, it is necessary to examine carefully the provisions of the Statutes relied upon.

The *Employers' Liability Act* provides (sec. 3) that "where after the commencement of the Act, personal injury is caused to a workman—(1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer nor engaged in his work." It is manifest, from the language of this section, that, as in the corresponding provisions of the English *Employers' Liability Act* 1880, the intention of the legislature was to alter the law by excluding the defence of common employment in certain specified cases, and those cases only. The question in each case must be whether it is within the statutory exception from the rule. The present case would apparently fall within sub-sec. 2 of sec. 3, but for the definition contained in sec. 2 of the term, "person who has the superintendence entrusted to him," which is defined to mean "a person whose sole and principal duty is that of superintendence, and who is not ordinarily engaged in manual labour." It appeared that Woodward was a working man, doing manual labour at a daily wage, and it was, therefore, not contended that the plaintiff could rely on this exception. But it was strenuously contended that the case fell within both sub-sec. (1) and sub-sec. (3). It is necessary, therefore, to consider what is meant by the words, "defect in the condition of

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the ways, &c." It was not seriously disputed that a shaft is a "way" within the meaning of the Act, but it was contended for the respondents that the term "defect in the condition" imports something wrong in the appliances themselves, and does not cover the case of a negligent use of a properly-constructed appliance. On the other hand it was contended that, when a way—in this case a shaft—is obstructed by an obstacle, which prevents the passage of a cage to a particular part of it, this is a defect in the condition of the shaft, regarded as a way or means of approach to that part. It is not suggested that there was any defect in the condition of the shaft *quâ* shaft, or in the chairs *quâ* chairs, or that the chairs were not proper appliances to be used for the purpose already explained. The alleged defect, therefore, consists in the accidental leaving of the chairs lowered instead of raised. Before adverting to the decisions on this section, which in my judgment conclude the matter, I will refer to sec. 4, which provides that a workman shall not be entitled to any right of compensation or remedy under sub-sec. (1) of sec. 3, "unless the defect therein mentioned arose from or had not been discovered owing to the negligence of the employer or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, &c., were in proper condition." This language suggests that what is meant by "defect in condition" is something which may be guarded against by periodical inspections, *i.e.*, some quality or defect inherent for the time being in the appliance in question, rather than a temporary unfitness arising from accident or negligence. I will now refer to the cases.

In *McGiffin* v. *Palmer's Shipbuilding Co.* (1), which was decided very soon after the passing of the English Act, it was held that a temporary obstruction, caused by a piece of iron which had negligently been allowed to project into a roadway used by workmen, was not a defect in the condition of the way within the meaning of the Act. *Field* J., said (2):—"Here the defect is not in the way, the defect is that some person carelessly put something on the way which he ought not to have put there. This was an obstruction. In a grant of right of way, if such a case were brought forward, the declaration would not have been that the way

(1) 10 Q.B.D., 5.

(2) 10 Q.B.D., 5, at pp. 8, 9.

was defective, but that it was obstructed." He gave as an illustration a bucket left on a dark night in a dark passage. *Stephen* J. said:—"It" (*i.e.*, a defect in the condition of the way), "means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use." In *Walsh* v. *Whiteley* (1), *Lopes* L.J., delivering the considered judgment of himself and *Lindley* L.J., said:—"To determine the meaning of the words 'defect in the condition of the machinery,' we must look, not only at sec. 1 sub-sec. (1)" (corresponding to sec. 3 of the Western Australian Statute) "but also at sec. 2 sub-sec. 1" (corresponding to the provisions of sec. 4, which I have quoted). "Reading these sections and sub-sections together we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element, without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark, but it is essential that there should be evidence of negligence of the employer or some person in his service entrusted with the duty of seeing that the machine is in a proper condition. It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer." In *Willetts* v. *Watt & Co.* (2), a case in which the lid of a catchpit in a way used by workmen had been properly removed for some necessary purpose, but, no notice of the fact having been given to the workmen, injury to one of them had ensued. Lord *Esher* M.R. (after remarking with reference to the way in which the case was presented, that it must be considered only under sub-sec. 1), said (3) that "no defect in the way is shown, but only a negligent user." *Fry* L.J. said (4): "It appears to me that the language of sub-sec. 1 points to a defect

(1) 21 Q.B.D., 371, at p. 378.
(2) (1892) 2 Q.B., 92.
(3) (1892) 2 Q.B., 92, at p. 98.
(4) (1892) 2 Q.B., 92, at p. 100.

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of a chronic character and not to a defect arising from negligent user, and that view is supported by the judgment of the majority of this Court in *Walsh* v. *Whiteley* (1), where a defect of condition is contrasted with negligent user." *Lopes* L.J., said (2): "The true mode of stating the facts of the case is that there was no defect in the condition of the way, but a negligent user of it." This decision was given in May, 1892, shortly before the passing of the Western Australian Statute. I am not aware of any later decision of the English Courts tending to throw doubt upon the construction put upon the Act by the Court of Appeal in these cases. Under these circumstances, I think that, even if we are disposed to take a wider view of the term "defect in condition," which I for one am not, we should be bound by the authority of the cases I have cited to hold that the term "defect in condition" means a defect in original construction or subsequent condition, rendering the appliance unfit for the purpose to which it is applied, when used with reasonable care and caution. The evidence in the present case does not establish any such defect.

Reliance was also placed on sub-sec. 3. On this point the plaintiff put his case in this way:—"It was the duty of the platman to look after the chairs, to see that all was clear, and tell us that all was clear, and it was then our duty to go to work." Other witnesses gave evidence to the same effect, *i.e.*, that upon Woodward telling them that the shaft was clear, they had to go down; that they relied on his directions, and that he had full charge of the shaft. This evidence, it was said, showed that Woodward was a person to whose orders the plaintiff was bound to conform. I do not so read the sub-section. In my opinion, the words "orders and directions" relate to the time, mode and place for doing work, as to which a workman must receive directions from someone, but do not include a mere notification that the workman may safely proceed to carry out orders or directions already given him by his immediate superior. If a workman did not go to work when Woodward told him the shaft was safe, he would not be disobeying Woodward's orders or directions, but those of the foreman or ganger under whom he was working. I

(1) 21 Q.B.D., 371. (2) (1892) 2 Q.B., 92, at p. 101.

agree with the learned Judges of the Supreme Court, that, in substance, Woodward's duty, so far as regards this point, was not to give orders or directions, but to give a signal. It appears from sub-sec. (5) of sec. 3, that the legislature did not think that a signalman, who gives the signal that an order already given by someone else may be safely obeyed, is himself a person "to whose orders and directions a workman is bound to conform," for by that sub-section they make a special exemption of the case of the negligence of a person in the service of the employer who has charge or control of signal points on a railway.

I think, therefore, that the plaintiff has failed to bring his case within any of the exceptions in the *Employers' Liability Act*.

I turn now to the case made under the *Mines Regulations Act*. The plaintiff charges infractions of Rules 8 and 20 of sec. 23, which are as follows:—8. "Every drive and every excavation of any kind in connection with the working of a mine shall be securely protected and made safe for persons employed therein:" 20. "All machinery, whether above or below ground, shall be kept in good order and condition." So far as regards this last rule, I am of opinion that the term "good order and condition" refers to the same qualities that are referred to in the term "defect in condition," in the sense in which that term is used in the *Employers' Liability Act*, and which I have already explained. For the reasons given with regard to that branch of the case, I think that there was no evidence of any such want of good order and condition in the machinery and appliances of the shaft. With regard to Rule 8, I am disposed to think that a shaft in which the work of excavation is finished is not an excavation within the meaning of the rule. Several rules (6, 7, 9, 10, 11, 13, 28, 29) specifically deal with particular precautions to be taken to prevent accidents in working shafts, and show that the legislature did not omit to apply their minds to that subject. Rule 20, on the other hand, deals with "drives and other excavations," *primâ facie ejusdem generis*, "and with persons employed therein," *i.e.*, I think, persons employed in making them or doing work in them. But even if the word "excavation" does include "shaft," I think that the words "securely protected and made safe" refer to the condition of the shaft in the sense in which that term is used in

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Rule 20, and in the *Employers' Liability Act*. This was also the opinion of the Supreme Court, in which I fully concur.

For these reasons, I agree with the Full Court in their conclusions, and think that the appeal fails, and must be dismissed.

BARTON J. I concur.

O'Connor J.

O'CONNOR J. I entirely concur in the judgment read by my learned brother the Chief Justice. The only question in the case which created any difficulty to my mind was whether the projection of the chairs into the shaft at the 1,100 feet level, at the time when the cage was descending to a level below that, was a defect in the condition of the "way," for which the defendants were liable under sec. 3 sub-sec. 1 of the *Employers' Liability Act*. To that aspect of the case only I shall advert. It appears that the chairs were part of the proper and necessary equipment of the shaft; that no fault was found with their construction, or with the method by which they were projected into the shaft, or drawn back, as occasion required, or with the mode in use for signalling to the driver of the winding engine that the shaft was clear for the descent of the cage to the different levels. In the ordinary working of the mine the chairs were properly projected under the cage while it was being loaded at the 1,100 feet level. When the cage left that level it was the platman's duty to draw back the chairs, and so clear the shaft for the levels below, or, if he did not do that, to signal the driver of the winding engine that the shaft was not clear below that level. Unfortunately, the platman was guilty of a double negligence. He failed to draw back the chairs when the cage went up from the 1,100 feet level, and he informed the engine-driver that the shaft was clear below that level. On this erroneous information, the cage containing the plaintiff and other workmen was sent down, and on its way to a level below the 1,100 feet level, violently struck the projecting chairs, and so caused the plaintiff's injuries. On these facts the plaintiff contends that the projection of the chairs while the cage was thus descending was a defect in the condition of the shaft or "way," for which the defendants were liable under the section I have mentioned. The defendants, on the other hand, maintain that it was the

platman's negligence, for which it is admitted they were not legally responsible, that caused the plaintiff's injury, and that the obstruction of the shaft while the cage was descending caused by that negligence was not a defect in the condition of the shaft or "way," for which they could be made liable under the *Employers' Liability Act*. I am satisfied that the plaintiff's contention cannot be supported. His counsel, Mr. Villeneuve Smith, relied very strongly upon *Tate* v. *Latham & Son* (1). But that case is clearly distinguishable. The defect there complained of was the absence of a guard under a saw bench in which a machine saw was working. The guard had been supplied by the employer, but an employé working at the saw bench had, before the accident, removed the guard, and negligently omitted to replace it. The saw, thus without guard, was the cause of the accident. The Court held that the machinery was defective in having no guard under the saw bench. Mr. Justice *Wright*, having stated that it was no answer to say the owner had provided a guard if it was not used, said (2):—"When it was left out of its proper place its absence was as much a defect as if it had never been provided at all," and later on in his judgment, he distinguishes the case from *Willets* v. *Watt & Co.* (3)—Where there was no defect in the condition of the way, but a negligent user of it. On the same ground, *Tate* v. *Latham & Son* is distinguishable from this case. Here there was no defect in the condition of the way. It was properly equipped in regard to its machinery, appliances, and system of working. The injury was caused by the negligent use of the machinery, appliances, and system of working. The principle of *Willetts* v. *Watt & Co.* applies exactly. That principle may be gathered from Lord Justice *Fry's* statement of the grounds of his decision (4):—"The way was properly constructed for a two-fold purpose—the well or catchpit might be used when required, or the place might be used for general purposes, including that of a way. It was properly adapted to subserve both these purposes, and the cause of the accident was not deficient construction, but that it was negligently used for one of the purposes without notice to persons who were using it for the other." So

(1) (1897) 1 Q.B., 502.
(2) (1897) 1 Q.B., 502, at p. 505.
(3) (1892) 2 Q.B., 92.
(4) (1892) 2 Q.B., 92, at p. 100.

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here, the shaft may be regarded as the way provided by the employer by which the men went to their working places in the several levels. The way was without defect; it was properly equipped; the cage and other apparatus for carrying the men were properly appointed and furnished with all necessary appliances for carrying the men safely; the system of working the way was not complained of. But the way, the cage, the signals, and other appliances no matter how perfect in themselves, must be worked with reasonable care, otherwise accidents are very likely to happen. Where the injury complained of has been caused to a workman by the negligent working of a "way," cage, signals, or other appliances in themselves without defect, and the negligence was that of a fellow-servant, not within the class of persons for whose negligence the Act has made the employer liable, the plaintiff cannot succeed. Upon the facts in this case, therefore, the plaintiff must fail in his claim under the *Employers' Liability Act*. His case upon the other causes of action must equally fail; nor do I see any way in which the legal defects of his position in regard to any of his causes of action could be remedied in another trial. The Supreme Court of Western Australia were, therefore, right in directing the verdict to be entered for the defendants. I agree that the appeal must be dismissed.

Appeal dismissed, with costs.

Solicitor, for appellant, *Villeneuve Smith*.

Solicitor, for respondent, *Darbyshire*.

H. E. M.