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appearing at the time material, and, in the opinion of the magistrate, not material, had not been taken down.

I agree with what has been said as to the authority of the case cited by my learned brother the Chief Justice in which *Erle J.* gave a decision on this point. But, apart altogether from that, it appears to me that, the question as to the compliance with sec. 409 being the only question to be decided, and being properly decided by the Judge at the trial, the deposition was rightly admitted, and the conviction ought to have been affirmed.

Appeal allowed. Judgment reversed. Conviction affirmed.

Solicitor, for appellant, *The Crown Solicitor for New South Wales.*

Solicitor, for respondent, *S. M. Stephens.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

THOMAS BROUGHALL APPELLANT;

AND

JAMES THOMAS WATSON RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Coal Mines Regulation Act (N.S.W.) (No. 73 of 1902), sec. 47, rule 1*—Ventilation of mine—Adequate amount—Minimum quantity of air to be supplied—Temporary cessation of work—Interval between working hours—“Each man, boy, and horse employed in the mine”—Construction.*

April 11, 12,
30.

Griffith C.J.,
Barton and
O'Connor JJ

* The first general rule 1, contained in sec. 47 of the *Coal Mines Regulation Act* (No. 73 of 1902), so far as is material, is as follows:—
“An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that

the working-place of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from those working places shall be in a fit state for working and passing therein. The ventilation so produced shall be the supply of air in quantity not less than one hundred cubic feet per

By general rule 1 of sec. 47 of the *Coal Mines Regulation Act* 1902, an adequate amount of ventilation must be constantly produced in every mine so that the working places and travelling roads of the mine shall be in a fit state for working and passing therein; and the amount of ventilation so produced is to be not less than one hundred cubic feet of pure air per minute for each man, boy, and horse employed in the mine, which must sweep along the airways and be forced into each and every working place where man, boy, or horse is engaged or passing.

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The manager of a mine, which was adequately ventilated during working hours by artificial means, stopped the ventilating machinery at a time when all the men and boys who had been at work in the mine had left the mine for the day and only a few horses remained. He was charged with having committed a breach of rule 1. It appeared from the evidence that the natural ventilation, which went on unchecked in the intervals between working hours, kept the air in the mine pure and free from noxious gases, and fit for working, and was more than sufficient, according to the standard prescribed by the rule, for the number of horses remaining in the mine, though it fell below the quantity which by that standard would have been necessary for the number of men, boys, and horses who had been employed during the working hours of that day, and would probably return to the mine when work was resumed.

Held, that there had been no breach of the rule.

The minimum of ventilation required to be "constantly" produced is not one hundred cubic feet of pure air per minute for each man, boy, and horse ordinarily employed in the mine, but so much per minute for each man, boy, and horse actually at work in the mine at the time, or for the time being.

Decision of the Supreme Court, *Watson v. Broughall*, (1905) 5 S.R. (N.S.W.), 550, reversed.

APPEAL from a decision of the Supreme Court of New South Wales on a special case stated under the *Justices Act* 1902.

The appellant, the manager of the Vale of Clwydd Colliery, was proceeded against by an inspector of coal mines for a breach of general rule 1, sec. 47, of the *Coal Mines Regulation Act* 1902, for failing to comply with that rule in that, by reason of the ventilating fan in the mine not being kept running an adequate amount of ventilation was not constantly produced in the mine as required by the rule. The mine was ventilated during working hours partly by a ventilating fan and partly by

minute for each man, boy, and horse employed in the mine, which air in that proportion, but with as much more as the inspector shall direct, shall sweep along the airways and be forced

as far as the face of and into each and every working-place where man, boy, or horse is engaged or passing, main return airways only excepted."

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natural means. On a certain Friday in February 1905, at an hour when the men and boys had left the mine for the day, and only a few horses remained there, the ventilating fan was stopped, and the mine was left with the natural ventilation only, which, admittedly, would not have been sufficient if the men and boys employed during the earlier part of the day had been still at work in the mine. The men did not work on the Saturday or the Sunday, and it was the practice to start the fan working each day an hour before they returned to work. The magistrate found that the ventilation supplied at the time in question was sufficient for the horses remaining in the mine, and that therefore no offence had been committed, and dismissed the information.

On a special case stated by the magistrate, the Supreme Court held that the decision of the magistrate was erroneous in point of law, and remitted the case to him : *Watson v. Broughall* (1).

It was from this decision that the present appeal was brought, by special leave.

A full statement of the findings of the magistrate, and the material portions of the evidence, will be found in the judgment of *Griffith C.J.*

Dr. Cullen K.C., and *Broomfield*, for the appellant. The findings of the magistrate as to questions of fact must be accepted as correct. He found that the ventilation was adequate. The question whether he construed the rule correctly turns mainly on the meaning of the word "constantly." The magistrate rightly construed the rule as meaning that the ventilation was to be constantly kept up, whether by natural or artificial means, in proportion to the number of men, boys, and horses actually engaged in the mine at the time. If the number is greater the supply must be greater; if less, less. *Knowles v. Dickenson* (2), which was relied upon in the Supreme Court, is not in point. The rule in that case contained no prescribed basis of measurement; and the evidence showed that at certain times when the workmen were in the mine there was not adequate ventilation. It is unsafe to follow cases on construction unless the words are

(1) (1905) 5 S. R. (N.S.W.), 550.

(2) 2 El. & E., 705.

clearly identical in meaning, and not merely similar in general sense: *Aspden v. Seddon* (1). In the present case the legislature has specified what is to be regarded as the minimum adequate amount, that is 100 cubic feet per minute for each man, boy, and horse "employed in the mine." The magistrate found that there was at the time in question more than that amount in proportion to the number of horses then in the mine, that the mine was fit for working, and therefore that the rule had been complied with. That involves the question, what is the meaning of "employed in the mine?" The appellant contends that those words mean what the magistrate took them to mean, "actually employed in the mine." Some time must be referred to by the word "employed," and if the particular time at which the test is applied is not to be taken as the material time, it is impossible to obtain any finality. That is the natural and ordinary construction of the words in this context. This is a rule applying to all mines. There are special sections and rules applicable to dangerous mines and to meet particular dangers. The dangerous nature of the mine would not depend upon the number of men employed in it. This rule must have been aimed at securing healthy working-places for the miners and animals engaged in the mine, rather than at preventing the accumulation of explosive gases. If that is so, the number of men who might at some future time enter the mine, is quite immaterial, provided that, when they enter it, it is in a proper state for them to work in. The words at the end of the rule tend to show that it is the number of men actually there which is to be the basis of calculation, viz., "working-place where man, boy, or horse is engaged or passing." Those words would be quite inappropriate if the reference was to the number of men "ordinarily" employed, or employed "on the average." On the evidence the air was pure. If the system of ventilation results in an accumulation of noxious gases, which may cause danger to the men who will later on be employed, the inspector has it in his power to order that the supply be increased. But that was not the case here. "Constantly" means little more than "always." It cannot mean that the supply is to be uniform in point of quantity, for that would be inconsistent with the latter part of the rule, whatever construction is put upon

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(1) L.R. 10 Ch., 396 (note).

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the words "employed in the mine." The proper construction of the word "adequate" is to be gathered from the whole of the rule, not from the first part alone. [They referred to *Ex parte Ross* (1).]

The English rule required that the mine should be constantly in a fit state for working, without any limitation, whereas the whole scheme of our rule is to protect the men, boys, and horses engaged in the mine, or passing along the ways, at the time.

Watt, for the respondent. The object of the rule is simply to ensure proper ventilation of the mine. The second part of the rule is not explanatory of the first explicit direction, it merely fixes a minimum. That leaves the first sentence to be construed by itself, and it should be construed in the same way as the same words in the English rule. The supply must be constant: *Knowles v. Dickenson* (2); *Baddeley v. The Earl Granville* (3); *Wales v. Thomas* (4); *Ex parte Ross* (5); *Peace on the Coal Mines Regulation Act 1887*, 2nd ed., p. 317. The presence of the word "passing" in the latter part of the section is aimed at those men who would not be at work, but passing to or from work, as in changing shifts. [He referred to the Acts 18 Vict. No. 32, 26 Vict. No. 17, and 39 Vict. No. 31.] Thus the whole number of men likely to be in the mine at any time is covered, that is, the number of men "employed in the mine," the full working complement. The legislature must be presumed to have taken into consideration all the conditions existing or likely to exist in coal mines, and to have calculated that the minimum fixed is sufficient to render the whole mine fit for working. But it must be constantly kept fit for working, and therefore the amount calculated as the lowest consistent with safety must always be supplied. There is no justification for the assumption that the object of the rule was merely to make the air in mines healthy; the existence of dangerous gases was known, and was just as much to be guarded against as merely foul or unhealthy air. It is not so much air *for each man* that is to be provided, but a total quantity

(1) 17 N.S.W. L.R., 212.
 (2) 2 El. & E., 705.
 (3) 57 L.T.N.S., 268.

(4) 16 Q.B.D., 340.
 (5) 17 N.S.W. L.R., 212.

calculated on a *per caput* basis. Accumulations of explosive gases could not be avoided except by keeping up the ventilation constantly; the presence of the men and the number of working-places in the mine would have no relation to the degree of danger from explosive gas.

[GRIFFITH C.J.—Of course, if the mine cannot be kept fit for working without constant artificial ventilation it must be kept up, but there is no suggestion here that the mine was unfit for working or likely to become so.]

It would have been unfit according to the standard given in the rule, for the number of men “employed in the mine,” if they had gone to work. Those words mean “ordinarily employed.” That is a natural construction, and it brings about the result aimed at by the legislature, that the risk of accumulation of gases during the suspension of work is avoided.

[O’CONNOR J.—But if there were any such risk, the obligation would be on the mine owner to keep the air pure and fit for working, and he would be bound to have it ready for the men before work began.]

That leaves “constantly” out of consideration. The second portion of the section refers to the same ventilation as the first part. It speaks of the “ventilation so produced.” That can only refer to “constantly” in the first part; the result is that the “ventilation constantly produced” in the mine “shall be the supply of air in quantity not less than,” &c. Then comes the measure of what must be constantly there. If it varies there can be no constancy. Any words capable of two meanings in the second part of the rule must be governed by the predominant idea of constancy running through the first part. That necessitates the construction of “employed” as “ordinarily employed,” because the ordinary number of men is fixed and can be stated by the owner at any time. If more ventilation than that is required, the inspector orders more, and it must be produced. If the legislature had intended to refer to the men employed at any time, or for the time being, they could, and probably would, have said so, as they have done in sec. 45, sub-sec. *b* (ii). That is a distinct limitation of the ordinary meaning of the words, and in an Act intended to provide for the safety of human life the

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Court should not cut down the meaning of words in the direction of increasing the danger which the legislature has sought to prevent. The number of men ordinarily employed would bear a relation to the size of the mine, and the number of working-places, and the amount of gas generated from the coal would be in proportion to them rather than to the number of men actually at work. The whole mine must be ventilated: *Brough v. Homfray* (1), not merely the parts where working is going on: *Cowie v. Berry Consols Extended Gold Mining Co. No Liability* (2); and consequently, if the supply was reduced to a few hundred feet when the number of men had diminished, the air at any one place might still remain impure, and unfit even for the small number of men at work. Again, inspection would be of little use unless it were possible for the inspector at any time to apply the test to discover whether proper provision was being made for the men ordinarily employed in the mine.

Dr Cullen K.C. in reply. The meaning of the words in the original Act, or the English Act, which contained no provision for a basis of measurement, is not to be considered in construing the present Act. The rule must be construed as if it always stood in the present form.

“So produced” cannot mean constantly produced in the sense that the amount is to be constant, because the following words indicate a basis upon which the amount must be a varying quantity. The number of men “ordinarily” employed would not afford a safe basis, because that would be a fixed number for any particular mine, and it might be considerably below the actual working capacity of the mine, and the mine would therefore be insufficiently ventilated. The individuals in the mine are the persons whose health and safety is to be considered, and so long as they are adequately supplied, whether the necessary quantity is 100 cubic feet per man or greatly in excess of that, the rule is complied with. The rule does not say that if that amount is supplied the ventilation is adequate, but that there is never to be less than that amount supplied, whatever an adequate amount may be. In

(1) L.R. 3 Q.B., 771; 9 B. & S., 492.

(2) 24 V.L.R. (L.), 319; 20 A.L.T., 124.

this case the minimum was supplied and the air was in fact pure. It is unnecessary to consider what might have been the case if the conditions of the mine as regards gas generation had been different.

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Cur. adv. vult.

April 30th.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of New South Wales allowing an appeal from a justice who had dismissed a complaint brought against the appellant by the respondent, upon a charge that, being the manager of a certain mine to which the *Coal Mines Regulation Act* 1902 applied, he "did unlawfully fail to comply with General Rule 1 in sec. 47 of the said Act in that, by reason of the ventilating fan not being kept running, an adequate amount of ventilation was not constantly produced in the said mine to dilute and render harmless noxious gases to such an extent that the working-places of the shafts, levels, stables, and workings of the said mine, and the travelling roads to and from these working-places should be a fit state for working and passing therein, contrary," &c. The rule under which the charge was laid is as follows: [His Honor read the rule and proceeded:]

Before the justice evidence was given to show that on Friday, 24th February, the day on which the offence was alleged to have been committed, after all the men who had been working had left the mine, only a few horses remaining there, the ventilating fan was stopped, and that during some hours afterwards, on the remainder of that day, the natural ventilation produced was more than one hundred cubic feet of air per minute for each man, boy, and horse then in the mine, but not as great a quantity as would have been necessary for the number of men who had been employed in the mine during that day.

The case for the complainant was this. The number of men and boys employed in the mine was 52, with a certain number of horses. They were employed in the mine on the Friday, and probably would be again employed on the Monday. Therefore, the same quantity of air for the purpose of ventilation that was necessarily supplied during the working hours of Friday must be kept up during the idle hours of Friday, Saturday and Sunday, and

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at the same rate as if the men were there. It was not suggested that the mine was not properly ventilated, apart from the arbitrary rule contained in sec. 47. The Justice found as a fact that "an adequate amount of ventilation was, on 24th February 1905, constantly produced by means partly of a ventilating fan and partly by natural ventilation to dilute and render harmless the noxious gases to such an extent that the working-places of the shaft, levels, stables, and workings of the mine, and the travelling roads to and from the working-places were in a fit state for working and passing therein," following the words of the Statute. He found also that "for one hour before the time of the men, boys, and horses actually starting work until all the men and boys had left the mine . . . 'the ventilation' was produced by means of a ventilating fan and supplied pure air in a quantity not less than one hundred cubic feet per minute for each man, boy, and horse then employed in the mine, which air in that proportion, swept along the airways and was forced as far as the face of and into each and every working-place where man, boy, and horse were then engaged or passing," and "that for the remainder of the hours of the 24th February 1905, . . . there were only five horses in the mine and that the ventilation was produced by the natural ventilation of the mine itself and supplied pure air in a quantity not less than one hundred cubic feet per minute for each horse then in the mine, which air in that proportion swept along the airways and was forced as far as the face of and into each and every working-place where the said horses were then engaged or passing." As a matter of fact a great deal more ventilation was produced than was sufficient at the prescribed rate for the five horses then in the mine. On appeal to the Supreme Court the decision of the magistrate was reversed and the case remitted to him with a direction to convict.

The Supreme Court relied to a great extent on the case of *Knowles v. Dickinson* (1). That was a prosecution under a section substantially the same as the first part of Rule 1, and the charge was that the defendant, the principal agent of a colliery company, unlawfully neglected and wilfully violated one of the rules provided by sec. 4 of the Act 18 & 19 Vict., c. 108, "in

(1) 2 El. & E., 705; 29 L.J.M.C., 135.

not causing an adequate amount of ventilation to be constantly produced at the said coal mine and colliery to dilute and render harmless noxious gases to such an extent that the working-places of the pits and levels . . . should, under ordinary circumstances be in a fit state for working," &c. The facts were that the ventilation had been stopped altogether, and the result was an accumulation of noxious gases and a serious accident. The charge followed the words of the Statute, and according to the evidence the defendant had obviously done what he was charged with doing, and the learned Judges of the Court of Queen's Bench held that he had offended against the provisions of the Statute. *Cockburn C.J.*, said (1): "This is a general provision, and must apply to all coal mines and collieries which are in course of being worked. The first of the rules in question requires that an adequate amount of ventilation shall be constantly produced at all collieries, so as to assure that the pits and levels shall under ordinary circumstances be in a fit state for working. So long, therefore, as a colliery is being worked, with but temporary intervals of cessation, as, for rest at night or on a Sunday, the Statute requires adequate and constant ventilation to be kept up in it. To allow a suspension of the proper means of ventilation to take place during the few hours that workmen are not actually engaged in the colliery, merely because no one is during that period actually at work there, would involve very dangerous consequences." *Blackburn J.* (2), pointed out that sufficient ventilation must be "constantly" produced, "to be kept up continuously, that is to say, so long as the colliery is being worked in the ordinary sense of the term. And a colliery is not the less being worked, although the miners suspend work between Saturday night and Monday morning." Well, with all that, if one may say so respectfully, I thoroughly agree. The requirement of the rule was that the ventilation must be constant. In that rule the word "constantly" is an adverb of time not of quantity. In that case, however, no ventilation had been produced at all. In the present case the magistrate who investigated the matter found as a fact that there was a constant supply of ventilation during the whole period, and the least quantity at any time was more than sufficient, measured by the number

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(1) 2 E. & E., 705, at p. 710.

(2) 2 E. & E., 705, at p. 711.

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of men and horses actually working at the time. The real question in this case is whether in the construction of this rule the word "constantly" is to be taken as importing the necessity for a supply constant in quantity as well as a supply continuous in point of fact. The learned Judges of the Supreme Court assumed that the meaning was that the quantity should be constant, so that if a specific quantity was required, according to the rule, on Friday, and the same quantity would probably be required on the Monday, then the same quantity must be supplied in the interval. That may be the proper construction or it may not. But the case of *Knowles v. Dickenson* (1) has no bearing on the point. What we have to do is merely to construe the language of the legislature as we find it. The word "constantly" may import an element of quantity, although I do not know of any instance where the adverb is so used. The provision is this: [His Honor read the first part of rule 1, and proceeded:] The magistrate found that that had been done. The section goes on—and it is on these words that the question arises—"The ventilation so produced shall be the supply of air in quantity not less than one hundred cubic feet per minute for each man, boy, and horse employed in the mine." What is the meaning of the words "employed in the mine"? They must obviously refer to some period of time. This is a test to be applied from time to time. It does not depend on the actual cubic capacity of the mine or the number of working-places, but on the number of men, boys, and horses employed in the mine, and the question is, when employed? To this there are two possible answers—ordinarily employed, or employed for the time being. No other meaning was suggested in the course of the argument. The expression "ordinarily employed" was used in a double sense. It was put as high as this by the respondent, that it meant the total number of men who were engaged in the underground workings, even though they might be employed in separate shifts. The other construction suggested was that it meant the number of men employed underground at any one time as a general rule. That cannot be the right construction, for these reasons. If you take the average number, the supply may in a particular instance be inadequate. On some days fifty men might be

(1) 2 E. & E., 705; 29 L.J.M.C., 135.

employed, on other days sixty men or more. If on a day when there were a larger number of men employed ventilation sufficient only for the average were supplied, could it be contended that that was a compliance with the rule? Take another case. A mine ordinarily employs eighty men. On Monday morning eighty men go down the mine. Obviously it is necessary on that day to supply not less than eight thousand cubic feet of air per minute. On Tuesday sixty men go down the mine. Must you still supply eight thousand feet, or will six thousand be sufficient? On Wednesday forty men go down the mine, and on Thursday twenty. Which number are you to take then as the basis of calculation, eighty, sixty, forty, or twenty? On Friday possibly no men at all go down. Which figure are you to supply then? It seems impossible to contend that you must be governed by the number of men who were employed on Monday, or the number who it is expected will go down the mine on the next day. It was, in my opinion, intended by the legislature in this rule to supply an answer to a question which the person in charge of the ventilation could ask at any moment. That person is bound to inquire how many men are employed in the mine. It is clearly necessary that there should be a possibility of giving an answer at the time when the question is asked, and that the rule should afford a test that may be applied from time to time for the purpose of answering a simple question, the answer to which must be in the knowledge of the person called upon to answer it. The only construction that will not lead to an absurdity is that the words "employed in the mine" must mean the persons employed in the mine for the time being, and, if that meaning is applied, in the present case there has been no breach of the rule. But that in no way limits the operation of the preceding part of the rule. If the supply is continuous, unintermittent, and adequate, the requirements of the rule are satisfied. If the supply fails, or is not constant or not adequate, there is a breach of the rule. So long as it is adequate and constant, no complaint can be made, provided that it is not less in quantity than one hundred cubic feet per minute for every man, boy, and horse employed in the mine for the time being. After considering the matter very carefully in the interval that has elapsed since the argument,

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although I have endeavoured to see my way to a contrary construction, I am quite unable to do so. The construction that I have put upon the rule is supported by the concluding words, which provide that the air "shall sweep along the airways and be forced as far as the face of and into each and every working-place where man, boy, or horse is engaged or passing, main return airways only excepted." That is to say, the rule speaks of the men, boys, and horses engaged or passing in the mine, as those for whose benefit the air is to be supplied.

For these reasons I am compelled to come to the conclusion that the magistrate was right, and that the appeal should be allowed.

BARTON J. Owing to the exhaustive manner in which my learned brother the Chief Justice has dealt with the construction of the rule in question I shall add only a few words.

The enactment under consideration is sec. 47 of the *Coal Mines Regulation Act 1902*, and the precise matter with which we have to deal is the meaning of Rule 1 under that section. The words "employed in the mine" are capable of being read in more than one sense, and, as there is an ambiguity, one must look for its solution to the scope of the enactment, and the context. When I look carefully at the context, I find there is an absence of continuity in the meaning of this and analogous expressions, and other sections do not afford much guidance as to the sense in which the words are used. Having regard, then, to what His Honor the Chief Justice has said as to the scope and object of this part of the Statute, and agreeing with him that the real object is that the supply should be adequate and constant subject to the condition that it must not at any moment fall below one hundred cubic feet for every man, boy and horse "employed in the mine," I find those words capable of two constructions. Construed in one way they amount to a command that there should be produced a quantity of ventilation which, being sufficient when the mine is working up to its full capacity, shall also be of that degree or amount when work is not going on in the mine at all. Ordinarily speaking, the expression "employed in the mine" may mean that; it may mean that at all times, whether all hands

or none are below ground, there must be "adequate" ventilation, being pure air in the constant minimum proportion of one hundred cubic feet per minute for each man, boy, and horse on the books of the mine, or as much more as the inspector shall direct. That is one construction. The other is that the quantity so measured is the quantity to be supplied at all times to such men, boys, and horses as are working in the mine at the time. The expression "employed in the mine" may mean "ordinarily employed in the mine" or "actually engaged in working at the time." If the object of the legislature was to cause a supply of air to be kept up which would amount to a purposeless blast, in the case of the number engaged being a mere fraction of the number ordinarily employed, that being a very strong construction, one would expect to see something else in the Act that could warrant that construction, or such as would, as between that and a more moderate construction, afford a guide to the intention of the legislature that these words should be interpreted in the strongest way. I find no such guide anywhere outside the section. To construe the words as meaning "actually employed in the mine at the time" appears to me to be altogether more reasonable. "Employed in the mine," as I have pointed out already, means either ordinarily employed, or actually employed at the time. There is no *tertium quid* suggested in the course of argument or supplied by the words of the Act. But if the expression "employed in the mine" means "ordinarily employed in the mine," then, instead of its leading to an adequate supply being present on all occasions, there might be circumstances in which there would be a very great difficulty, because the supply required would vary in accordance with the number of men ordinarily employed in the mine. A mine may ordinarily employ only fifty men in one month, and one hundred in another. That would lead to the production of a supply which would vary with those ordinarily employed, so as to give rise to a difficulty in attaching to the word "constant" the meaning contended for by the respondent. On that construction, if at any time there should be more men engaged than the ordinary number, the word "constant" being construed as referring to quantity and not time, there need be no increase in the amount of air supplied, and there would be greater

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danger to those working in the mine than Parliament intended. The difficulty would be increased, and the danger would be manifest, if we not only construed "employed" as meaning "ordinarily employed," but took that phrase as relating to an average number as the ordinary number. It is clear that there must be enough air at all moments at which men and boys are asked to work in the mine, with the necessary horses, to dilute and render harmless the noxious gases present in the mine, and make the working-places fit for working and passing. The construction contended for by the appellant seems to me absolutely compatible with that requirement being fulfilled, while the construction adopted by the respondent seems to tend to a result which would defeat the object of the construction, and therefore that view does not present itself to me as being as reasonable as the other. Admitting that at all moments and for every man, boy, and horse in the mine, there must be an adequate and continuous ventilation sufficient to render the working-places fit for working and passing, and that it should in no case be less than one hundred cubic feet of pure air per minute, or as much more as the inspector shall require for each of such men, boys, and horses, I cannot find in the section any words of requirement that the supply should go beyond that, though I find expressions which can be construed in both ways. There being no context which would require the adoption of the less reasonable construction, I think we should follow the ordinary rule which requires that in such a case the more reasonable construction should be adopted. Applying that rule, I think that the magistrate was right and that the appeal should be allowed.

O'CONNOR J. I am of opinion that the Police Magistrate came to a right conclusion as to the meaning of Rule 1 of sec. 47. Taking the requirement of the Rule generally it is that the ventilation in every mine shall be adequate and constant. There is no difficulty in interpreting the word "constant" in this connection. Whatever supply is required under the description of "adequate" must be produced continuously. If, as the appellant contends, the quantity to be supplied depends upon the number of men, boys, and horses actually working in the mine from time to

time, the required quantity must be produced continuously while they are at work. On the other hand if, as the respondent contends, the required quantity does not vary with the number of men, boys, and horses actually at work, but is to be determined by the number of men, boys, and horses ordinarily employed in the mine, whether at work or not, then it may well be admitted that the quantity of ventilation so determined is to be continuously produced as long as the mine is a working mine. The real difficulty is in ascertaining what is the minimum quantity of ventilation which is fixed as "adequate" within the meaning of the Rule. The solution of that difficulty is in finding the right interpretation to be placed upon the words "employed in the mine." The appellant's interpretation is in accordance with the ordinary grammatical meaning and needs no interpolation of words to make it effective. The respondent puts upon the words a meaning, which, although not the ordinary meaning, is one which they are capable of bearing if the word "ordinarily" is to be read into the section. In which sense have the words been used by the legislature? To obtain light on that question it will be useful to consider the object which the legislature had in view, the history of the enactment, and the context in which the words are found. The object of the legislature was clearly to ensure that the health and lives of persons actually working in the mine should be as little as possible exposed to danger. That is apparent from the provisions of the Rule under consideration. The ventilation is to be such as to put, not the whole mine, but the working-places of the mine and the travelling roads to and from the working places "in a fit state for working and passing therein." Again, the required ventilation must be forced "as far as the face of and into each and every working-place where man, boy, and horse is engaged or passing." Further, Rule 4 of the same section makes provision for the inspection of the workings, as to ventilation amongst other things, by a competent officer of the mine owner before the commencement of each shift, and no miner is allowed to go to his work in that shift until the working-place has been declared safe by that officer. Such being the object of the legislature, by what method has it sought to attain that object? No doubt one way would be to provide that the mine, whether in

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full work or not, should be kept continuously ventilated up to the standard required for the safety of the number of men ordinarily working in the mine. The question is whether the legislature has used words showing an intention to carry out its object by that method. Rule 1 of sec. 47 is in itself an accretion of successive enactments. An examination of these enactments may throw some light on the meaning of the section in its present form. The first provision was in the 26 Vict. No. 17, sec. 9 (2), which was in the following words:—

“Ventilation shall be constantly produced of adequate amount to dilute and render harmless all noxious gases and to such an extent that all working-places of the pits levels and workings of the colliery and the travelling road to and from such working-places shall be so ventilated except in the case of such colliery being abandoned as hereinbefore referred to.”

The amount of ventilation or quantity of air to be supplied was thus not defined. The only direction was that the ventilation was to be of amount adequate to render the noxious gases harmless at the working-places and travelling roads. It will be noted that it gave no standard or practical guide to either mine owner or inspector as to the quantity of air to be supplied. Then followed 39 Vict. No. 31, which in sec. 12, Rule 2, added the direction that the ventilation was to be adequate to render harmless the noxious gases to such an extent that the working-places and travelling roads should be “in a fit state for working and passing therein.” Further, Rule 3 of the same section laid down a practical working standard of adequate ventilation in the following terms:—“An adequate amount of ventilation shall mean not less (as a minimum) than one hundred cubic feet of pure air per minute for each man, boy, and horse, which shall sweep undiminished along the airway past each working-place.”

Here for the first time was supplied a working standard and guide, which was a supply of 100 cubic feet of pure air per minute for each man, boy and horse, and, although the Rule does not expressly so state, it is evident that it is the men, boys, and horses working in the mine who are to be the basis of the calculation. That Act was repealed, and followed in 1896 by the 60 Vict. No. 12, which re-enacted Rules 2 and 3 last referred to with some

additions. It was made clear that the men, boys, and horses referred to were those employed in the mine, the inspector was empowered to direct an increased supply of air beyond the minimum fixed by the Rule, and the air supply was to be forced into each and every working-place "where man, boy, or horse is engaged or passing." Further showing that the requirements of ventilation were for the safety of those actually at work and while at work. The Rule then had reached its present form, and when the *Consolidating Act* of 1902 was passed it was incorporated therein in identical terms. That is now Rule 1 of sec. 47 which is the subject of this appeal. The history of the section would seem to indicate very clearly, first, that the object of the legislature was to make the mine as safe as possible for those working in it, while at work, and secondly, it was found desirable to define and fix the minimum quantity of pure air which should be deemed adequate, and that the minimum was fixed as one would naturally suppose with reference to the requirements of the persons actually working in the mine, and thus based on a factor at any time ascertainable by those responsible for the air supply or by the inspector, namely the number of men, boys, and horses at the time actually at work in the mine. Taking the Rule therefore in its present form, and having regard to the object of the enactment and its history, its meaning is in my opinion sufficiently clear. The first portion imposes on the mine owner the duty of ventilating the working-places and roads with a supply of air adequate to render noxious gases harmless to such an extent that the working-places and roads shall be in a fit state for men, boys, and horses to work in and pass along them. The second portion declares that, in order to fulfil that obligation, the mine owner shall produce a supply of air in quantity not less than 100 cubic feet per minute for each man, boy, and horse actually at work, and that the supply to that amount shall be continuous and constant. If a larger number are employed in one shift than in the previous shift, a proportionate increase in ventilation must take place; if the numbers are reduced, the quantity of air supplied may be proportionately reduced. During an interval between working days, such as that which occurred in this case, the ventilation must be propor-

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tionate to the requirements of the men, boys, or horses, if any, left in the mine. It will, however, be noted that the ventilation must be adequate according to the standard when the men are ready to begin work, and, if from the nature of the mine or the position of the workings, foul air is likely to accumulate during an interval between work, it will be the duty of the mine owner to take such steps as may be necessary to have his mine adequately ventilated according to the standard, even although that might involve the necessity of keeping up the full ventilation during the interval. On the interpretation which the Supreme Court placed upon the Rule it is difficult to see how to obtain a fixed or ascertainable basis for the calculation of the quantity of air to be supplied at any particular time. Whichever interpretation is adopted, it must be admitted that the number of men, boys, and horses in the mine is to be the basis. Reading the words "employed in the mine" in the natural sense of "then working in the mine," you have at once a fixed ascertainable quantity as a basis for calculation. If we depart from the natural sense of the words taken grammatically, in what sense are we to take them? Are the words "employed in the mine" to be taken as including all the men, boys, and horses employed on the mine then in the Company's employ who might be put to work in the mine. In the ordinary case of working by shift, if that were the standard, it would necessitate a supply of air probably double what was necessary. It is argued that the words must be read as "ordinarily employed." But what reason is there to justify the insertion of the word "ordinarily." And if there were any reason to justify the insertion of that word, that meaning would not carry out the obvious intention of the legislature, namely, to make the mine safe for those who are actually working in it. If a larger number of men than those ordinarily employed were for some reason set to work at any time, it is clear that the supply sufficient for the ordinary number employed would be insufficient when the ordinary number was exceeded. If therefore the grammatical meaning of the words "employed in the mine" is rejected, it is difficult to see how any meaning can be put upon the words which will give a definite easily ascertainable factor for the calculation which must be made whenever it is necessary to ascertain whether a supply adequate according to

law is being produced in the mine. The case of *Knowles v. Dickenson* (1) was strongly relied on by the learned Chief Justice in the Court below. But, in my view, the facts in that case were widely different from those in this. It was clear in that case that the mine was not adequately ventilated when the men went to work, and also that, in order to have the mine adequately ventilated when it was working, it was necessary to keep it ventilated in the interval when it was not working. Under similar circumstances the mine owner would be liable under the section which is the subject of this appeal. On the facts in that case the position which we have to consider here could not arise, and, having regard to the difference between the section of the English Act and the Statute we are considering, too much weight must not be attached to expressions in that judgment as to the meaning of particular words.

I agree, therefore, that the Police Magistrate's decision was right, and ought to have been upheld by the Supreme Court, and that therefore this appeal must be allowed.

Appeal allowed and order appealed from discharged. Appeal from the magistrate dismissed with costs. Respondent to pay the costs of this appeal.

Solicitor, for appellant, *S. M. Stephen*.

Solicitor, for respondent, *The Crown Solicitor for New South Wales*.

C. A. W.

(1) 2 El. & E., 705; 29 L.J., M.C., 135.

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