[HIGH COURT OF AUSTRALIA.]

IVANHOE GOLD CORPORATION LTD. . APPELLANTS; DEFENDANTS,

AND

SYMONDS . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1906.

PERTH, *Nov.* 1, 2, 13.

Griffith C.J., Barton and Higgins JJ.

*Workers' Compensation Act* (*W.A.*), (1902, *No.* 5), *sec.* 9—*Duty to assess Compensation under Act on failure of action not under Act—Time when assessment may be demanded—Election of remedy for injury—Amendment of judgment.*

To an action in the Supreme Court of Western Australia by a workman against his employers, owners of a mine, for damages under the *Employers' Liability Act* 1894, and the *Mines Regulation Act* 1895, and at common law, for injuries sustained by him in the mine, the defendants pleaded by way of estoppel that the plaintiff had made a claim for compensation under the *Workers' Compensation Act* 1902, and that an agreement had been made between the plaintiff and the defendants for payment of certain compensation, which agreement had so far been carried out. At the trial the Judge held that this plea was proved, and gave judgment that the plaintiff recover nothing from the defendants. This judgment was duly passed and entered, and an appeal against it to the Full Court was dismissed. No application was made at the trial or on the appeal that the jurisdiction under sec. 9 of the *Workers' Compensation Act* should be exercised. Subsequently to the appeal the defendants moved the Judge of first instance to assess compensation and as to costs, and he made an order accordingly. An appeal to the Full Court from this order was allowed.

On appeal to the High Court :

*Held*, (1) that sec. 9 of the *Workers' Compensation Act* 1902 applies to all cases in which the plaintiff's action fails, provided that he is otherwise entitled to the benefit of the Act, and therefore applies to a case where the successful defence is a confession and avoidance :

(2) The motion made for assessment of compensation might, if necessary, be treated as an application to the Court by originating motion to exercise its statutory jurisdiction by way of supplement to its original order which was incomplete, in which case the Court could order the costs awarded in the original action to be set off against the compensation when assessed :

(3) Every action to which sec. 9 applies includes, in effect, a claim for compensation under the Act as an alternative claim which the Court is bound to dispose of in the action, and, if the original claim fails, the whole action is not disposed of until that alternative claim is disposed of :

(4) If at a trial in the Supreme Court of an action in which two claims are joined, one only is tried, and, without the fault of either party, judgment is entered on the whole case, the judgment can be amended both under Order XXVIII., r. 11, and under the inherent jurisdiction of the Court.

*Held*, therefore (*Higgins J.* dissenting as to (4)), that the order for assessment of damages and as to costs was properly made.

*Per Higgins* J. :—(*a*) The Court has no jurisdiction to alter a final judgment which is not under appeal, after it has been passed and entered, unless there has been an accidental slip in the judgment as drawn up, or unless the judgment as drawn up does not correctly state what the Court actually decided.

(*b*) "Accidental" slip does not include an error which is the result of a deliberate finding. Such an error is matter for appeal.

(*c*) The judgment of *McMillan* J. was final, and meant to be final, not interlocutory ; it was affirmed, without variation, by the Full Court ; it decided that the plaintiff could recover nothing in the action, whether under the *Workers' Compensation Act* or otherwise ; and the application to assess damages was therefore wrong.

Judgment of Full Court (*Symonds* v. *Ivanhoe Gold Corporation Ltd.*, 8 W.A.L.R., 103), reversed.

APPEAL from the Supreme Court of Western Australia.

An accident within the meaning of the *Workers' Compensation Act* (W.A.) (1902, No. 5), happened to the plaintiff; notice of injury was given under sec. 11 (1) (*a*) of the Act in proper time ; and a claim for compensation served under sec. 11 (1) (*b*). The appellants admitted their liability, and paid compensation accrued since the date of the injury at the maximum rate fixed by the Act, and continued to pay compensation for some weeks, until a writ was taken out by plaintiff for damages under the *Mines Regulation Act* (1895, No. 37), and the *Employers' Liability Act* (1894, No. 3), and at common law. A verdict was found for defendants in the action, the Judge holding that the plaintiff had agreed to accept compensation under the *Workers' Compensation Act* ; and

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

the Full Court upheld the nonsuit on the ground, not of agreement, but of election (1). For the purposes of the appeal to the Full Court the Judge entered formal judgment for the defendants, and granted a stay of proceedings, but did not then assess compensation under sec. 9 of the *Workers' Compensation Act.* After the Full Court's decision the defendants moved the Judge to assess compensation and deduct therefrom the costs of the plaintiff's abortive action, which he proceeded to do, holding that the application fell within sec. 9. This order was discharged by the Full Court on the grounds that the case did not fall within sec. 9, because the Judge did not find that the defendants would have been liable to pay compensation under the *Workers' Compensation Act*, and, further, that the application should have been made at the trial and was too late after judgment had been entered and the Judge became *functus officio.* [*Symonds* v. *Ivanhoe Gold Corporation Ltd.* (2).]

*Villeneuve-Smith* and *Phillips*, for the appellants. The Judge at the trial found that the injury was not one for which the employer was liable in such action, and that there was an agreement under which the defendants would be liable to pay compensation under the Act. This finding completely satisfied the requirements of sec. 9, and gave him jurisdiction to assess compensation. But as an appeal was contemplated to the Full Court the Judge entered up formal judgment, and stayed proceedings pending the appeal. The proceedings having been stayed, the matter of assessment was still *penes curiam.* It was not necessary that application should at once be made for assessment as soon as the Judge dismissed the action. The cases on the English Act, which decide to that effect, turn upon very different words to those of sec. 9; see 60 & 61 Vict. c. 37, sec. 1 (4); *Minton-Senhouse and Emery on Accidents to Workmen*, pp. 114-115. Sec. 9 was intended to protect the defendants' claim against the plaintiff for costs of the abortive action; yet if the plaintiff's contention is right, the defendants cannot get their costs if the Judge is not allowed to assess compensation when the action is finally defeated, because condition 9 of Schedule II. of the Act

(1) 7 W.A.L.R., 69. (2) 8 W.A.L.R., 103.

provides that no compensation paid under the Act shall be assigned, taken in execution or attached, nor any set-off allowed against it. Unless the defendants' costs are deducted from the compensation assessed under sec. 9, they cannot be used as a set-off against the plaintiff's claim by separate action under the Act after his action apart from the Act has been defeated.

If it was a case in which assessment should have been made, the Judge, if compensation must be at once assessed, should have incorporated an assessment finding in the formal judgment that he then drew up. The appellants are entitled to have that judgment amended into the proper form, and the application for this purpose cannot be too late ; it has been made in reasonable time, and nothing has intervened to make it unfair. The agreement made between the plaintiff and the defendants did not oust the operation of the Act; on the contrary, it brought them within the provisions of the Act: *Jones* v. *Great Central Railway Co.* (1); *Thompson & Sons* v. *North Eastern Marine Engineering Co. Ltd.* (2); *Oliver* v. *Nautilus Steam Shipping Co.* (3). The worker had an option as to how he should proceed in respect of his injuries, and he exercised his option decisively to proceed under the *Workers' Compensation Act.* [They referred to *Tong* v. *Great Northern Railway Co.* (4); *Rouse* v. *Dixon* (5); *Campbell* v. *Caledonian Railway Co.* (6); *Isaacson* v. *New Grand (Clapham Junction), Ltd.* (7); *Neale* v. *Electric and Ordnance Accessories Co. Ltd.* (8).] The Full Court relied upon *Edwards* v. *Godfrey* (9), which decided that the application for assessment must be made at once. But that decision was dissented from by the Irish Court of Appeal in *Beckley* v. *Scott & Co.* (10), and the general opinion of English text-writers is that the reasoning of the latter case is unanswerable.

The judgment entered under sec. 9 is the judgment of assessment which is to be considered afterwards in the Local Court when it is sought to review or alter or make a lump sum of the compensation assessed. It was not the appellants' fault that

(1) 3 W.C.C., 50.
(2) 5 W.C.C., 71.
(3) (1903), 2 K.B., 639.
(4) 86 L.T., 802.
(5) (1904), 2 K.B., 628.
(6) 36 Sc. L.R., 699.
(7) (1903), 1 K.B., 539.
(8) 22 T.L.R., 732.
(9) (1899), 2 Q.B., 333.
(10) (1902), 2 I.R., 504.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

judgment was drawn up in an incomplete form; that was only a formality for the purposes of the appeal; and the Judge retained seisin of the proceedings by ordering a stay. It is therefore the appellants' right to demand that the judgment should be completed, now that the question of liability has been finally decided by the Supreme Court.

*Northmore* and *Penny*, for the respondent. This is not a case that falls within the ambit of sec. 9. To apply that section, the Judge must find, not that the employer escapes liability on any ground of defence he may establish, but that the injury by reason of its quality and its surrounding circumstances did not render the employer liable. In the present case the Judge did not make any such finding; he found that the workman's action was defeated, not by a defence of traverse, but by a defence of confession and avoidance: that is to say, that the employer was liable on causes of action apart from the *Workers' Compensation Act*, but the workman was estopped from proceeding thereon by reason of an agreement or election to take compensation under that Act. An analogous case would arise where the workman's action, apart from the Act, was defeated by defective notices under the *Employers' Liability Act*, or by some *Statute of Limitations*, or by release, or accord and satisfaction. No assessment could under such circumstances be made under sec. 9; it must first be found that there was no right of action upon any grounds except those under this Act.

The findings required by sec. 9 must be satisfied before compensation may be assessed. The words of sec. 9 are clear that "the employer is not liable in such action" means "in that class of action," and not "in that particular action"—*e.g.*, a plaintiff under the *Employers' Liability Act* must prove negligence of the employer and notice of injury as of the essence of his cause of action. A defence of confession and avoidance is common to all classes of actions; sec. 9 refers on the other hand to defences peculiar to the quality of the injury sued upon. Further, the assessment must be made at the time of the trial; the Judge was *functus officio* when he gave his judgment which was upheld on appeal.

The Courts below decided that the plaintiff could not succeed in his action because his election to follow a certain remedy estopped him from any other remedy.

[GRIFFITH C.J.—Can we go behind the Judge's finding that it was determined in the action that the injury was one for which the employers were not liable, but that they would have been liable to pay compensation under the Act, and seek to discover the real reasons for which the action failed ?]

Yes, the Court can open up all facts and proceedings: *Flitters* v. *Allfrey* (1).

[GRIFFITH C.J.—Then the whole of the proceedings are open to review, and the correctness of the formal judgment can be attacked by the appellants: *Maharajah Moheshur Sing* v. *Bengal Government* (2); *English Judicature Rules* 1883, Order XXVIII., r. 11: Errors arising in judgments from accidental omission may at any time be corrected.]

The same rule is in force here. But the Judge's omission could not have been in any way accidental. It never was his duty to make an assessment. The order as it stands was what he intended to make, without any mistake, and such an order cannot be altered: *Preston Banking Co.* v. *Allsup & Sons* (3).

The respondent's right to recover compensation in the local Court is not barred by his not having asked for an assessment under sec. 9; that assessment is not a substituted remedy, it is only a protection to the defendants if the action is misconceived; there is no duty on the respondent to resort to sec. 9, and if the defendants did not do so they are in no worse position than any other person who cannot get his costs out of the plaintiff.

*Villeneuve-Smith* in reply. If sec. 9 means that an assessment can only be made if the workman is defeated on a defence of traverse, not of confession and avoidance, the purpose of the Act, to protect the workman from losing all remedy when beaten in an action wrongly brought, would be nullified. If the respondent's interpretation of sec. 9 is correct, then this absurd result follows:—If a workman sued on causes of action

(1) L.R. 10 C.P., 29.
(2) 7 Moo. Ind. App., 283, at p. 302.
(3) (1895) 1 Ch., 141.

H. C. OF A 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

apart from the *Workers' Compensation Act*, and did not put in his claim for compensation under that Act in due time, and was defeated by a defence not of traverse but of confession and avoidance, he would lose all remedy, because the employer was not liable in such action. Sec. 9 was really intended to remedy such a case, where, but for its assessment provisions, the workman would lose all remedy.

If *Edwards* v. *Godfrey* (1) is good law, then its decision that an unsuccessful plaintiff under the *Employers' Liability Act* cannot revert to the *Workers' Compensation Act*, is binding on the respondent, and he must take the compensation assessed under sec. 9, or nothing.

It is impossible to require of parties that on judgment being given an assessment should be immediately demanded; for this would estop the party demanding assessment from any appeal against the judgment, as it would be held to be an election of assessment.

It was not obligatory to ask for assessment until the proceedings pending the appeal were definitely decided. Upon the decision of the Full Court, the requirements of sec. 9 were satisfied, and the Judge was the proper person to make the assessment.

*Cur. adv. vult.*

The following judgments were read:—

November 13th.

GRIFFITH C.J. This is an appeal from an order of the Full Court discharging an order made by *McMillan* J. dated 9th December 1904. By this order, which purports to be made in an action, No. 82 of 1903, between the respondent as plaintiff and the appellants as defendants, it was ordered that the compensation due to the plaintiff under the *Workers' Compensation Act* 1902 should be assessed as therein specified, and that the defendants' costs occasioned by the plaintiff's bringing the action in the Supreme Court instead of taking proceedings under the Act should be deducted from the amount of such assessment.

Sec. 4 of the *Workers' Compensation Act* provides that the Act shall apply only to injuries of workers employed by employers

(1) (1899) 2 Q.B., 333.

in certain specified employments. Sec. 5 excepts certain injuries, but no question now arises upon it.

Secs. 6 and 7 are as follows:—"(6) If, in any employment as aforesaid, personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the Second Schedule hereto. (7) (1) Nothing herein shall affect any civil liability of the employer independently of this Act where the injury is caused by the negligence of the employer or of some person for whose act or default the employer is responsible. (2) The worker may claim compensation under this Act or take the same proceedings as are open to him independently of this Act, but the employer shall not be liable to pay compensation independently of and also under the Act."

The first paragraph of sec. 8 provides that:—"If any question arises as to liability to pay compensation under this Act, or as to the amount or duration of such compensation, the question, if not settled by agreement, shall, subject to the provision of the Second Schedule hereto, be heard and determined by the Local Court of the district within which the injury happens; and for all such purposes jurisdiction is hereby conferred on such Court."

Sec. 9 is as follows:—"If, within the time limited by section eleven, an action is brought to recover compensation, independently of this Act, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under this Act, the Court in which the action is tried shall assess such compensation, and shall deduct therefrom all the costs which have been caused by the plaintiff bringing the action instead of taking proceedings under this Act, and shall enter judgment accordingly."

Sec. 11 provides that proceedings under the Act shall not be maintainable unless notice of the accident is given as soon as practicable after it happens, nor unless the claim for compensation is made within six months from the accident, or, in the case of death, within six months from the death.

The action was brought in the Supreme Court for damages for negligence, the claim being based (1) on negligence for

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Griffith C.J.

which the defendants were liable at common law; (2) on negligence of a person for whose default they were liable under the *Employers' Liability Act* 1894; and (3) on negligence alleged to be established by non-compliance with the statutory rules prescribed by sec. 23 of the *Mines Regulation Act* 1895. The defendants, besides other defences, pleaded by way of estoppel that the plaintiff had made a claim against the defendants under the *Workers' Compensation Act*, and that in pursuance of such claim the plaintiff and defendants had entered into an agreement by which the defendants agreed to pay a stipulated sum to the plaintiff by way of compensation under the Act during his incapacity for work, and that the plaintiff had received payments under the agreement, which the defendants had always been ready and willing to carry out. At the trial before *McMillan* J. with a jury in November 1903, the learned Judge at the close of the plaintiff's case directed judgment to be entered for the defendants on the ground that this plea was proved. He also expressed an opinion, *obiter*, that the action would not lie under the *Employers' Liability Act* from want of due notice of injury under that Act. It was intimated that an appeal would be made from his decision, and he stayed proceedings on the judgment for the purpose of facilitating the appeal. No application was then made by either party to the learned Judge to exercise the jurisdiction conferred upon him by sec. 9 of the Act, and it is clear, in my opinion, that he did not apply his mind to the question of the exercise of that jurisdiction. The appeal to the Supreme Court came on for hearing in the following August, and by an order, dated 10th October 1904, it was dismissed with costs. The learned Judges who heard the appeal (*Parker* Acting C.J., and *Burnside* J.) were of opinion that the defence of estoppel was made out, the plaintiff having elected to take advantage of the *Workers' Compensation Act*, and received compensation under it. This, they thought, brought the case within the prohibition of sec. 7, sub-sec. 2, whether there was or was not a binding agreement between the parties as alleged. No application was then made to the Court to remit the case for assessment of compensation under sec. 9, but four days afterwards, on 14th October, the defendants gave notice of a motion before *McMillan* J. to assess

such compensation. The motion was heard on the 9th December, when the learned Judge made the order of that date already quoted. An appeal to the Full Court from this order was allowed on the ground that the application to assess compensation should have been made at the trial, that the judgment of 2nd November 1903 was final, and that the learned Judge had no authority to re-open it or supplement it (1). *Burnside* J. was also of opinion that the learned Judge had not decided at the trial that the injury was one for which the plaintiff could not recover in the action.

This appeal is from that order.

On the hearing of the appeal the same two points were taken, namely :—(1) That the case does not fall within the terms of sec. 9 of the *Workers' Compensation Act*, because it was not determined, within the meaning of that section, that the injury was "one for which the employer is not liable in such action but that he would have been liable to pay compensation under this Act." (2) That the application was made too late, *i.e.*, after final judgment in the action.

It is clear that the Supreme Court, before assessing compensation under sec. 9, is bound to ascertain whether the necessary statutory conditions preliminary to the exercise of that jurisdiction exist. And, if the second objection is not fatal, the decision of *McMillan* J., who must be taken to have held that they did exist, and that of the Full Court, whether they agreed with that view or not, are both open to review on this appeal. For on an appeal from a final judgment any previous judgment or order of an interlocutory nature, *i.e.*, as I understand it, a judgment or order which does not finally dispose of the questions raised for decision in the action is open to review by a Court of final appeal : *Maharajah Moheshur Sing* v. *Bengal Government* (2).

For the respondent it is contended that the necessary conditions do not exist unless it has been formally determined in the action that the action does not lie by reason of the nature of the injury itself or the circumstances under which it happened ; that is, that the words "one for which" &c. refer to the nature and quality of the cause of action, and that, if the defendants succeed on a defence by way of confession and avoidance, the section has

(1) 8 W.A.L.R., 103. (2) 7 Moo. Ind. App., 283.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Griffith C.J.

no application. This construction involves two consequences of a remarkable character:—(1) That, although the plaintiff fails on a defence by way of confession and avoidance, it is necessary nevertheless for the Court to proceed to determine whether, but for that defence, he would have succeeded in the action, and (2) that if a plaintiff is defeated by such a defence, and has failed to make a claim within the time prescribed by sec. 11, he is absolutely without remedy.

The appellants contended, on the other hand, that the meaning of sec. 9 is that, if the plaintiff fails, for whatever cause, to maintain his action, he shall nevertheless be entitled to compensation under the Act provided that he has brought his action within six months, the time limited for making a claim under the Act; and that on the other hand the employer shall be indemnified against the costs to which he has been put by the plaintiff's mistake. I think the words to be supplied in the elliptical phrase "would have been liable to pay compensation" are "if proper notice and claim had been given and made under sec. 11."

In my opinion, the latter construction is the more natural one, and gives a fuller effect to the apparent intention of the legislature that a claim shall not be defeated by a mere error in procedure. It further avoids the extraordinary anomaly of requiring a Court to determine a question which has become immaterial except for the purpose of ascertaining whether compensation (the scale of which is fixed by the Act itself) is to be computed in one Court or another. The determination of such an abstract point might involve difficult questions of law and lead to protracted litigation, which it is certainly not likely that the legislature intended to require for so idle a purpose. I am therefore of opinion that sec. 9 applies in all cases in which the plaintiff's action fails, provided that he is otherwise entitled to the benefits of the Act.

I pass to the second objection, the validity of which, in my opinion, depends upon the construction to be placed on the language of sec. 9 regarded from a different point of view from that with which I have been dealing. The words of the section are imperative: "the Court in which the action is tried shall assess such compensation," *i.e.*, that Court, and not the Local

Court, shall do so. The effect is that the jurisdiction of the Local Court in such cases is ousted, and, unless the Court first selected by the plaintiff can give relief, he is without remedy (see *Pasmore* v. *Oswaldtwistle Urban District Council* (1)), I think that it was probably contemplated that the application to assess compensation should be made in the same action, but I do not think this an essential condition. When a Supreme Court is required to exercise a new jurisdiction, the obligation to do so cannot be avoided by mere technical rules of practice devised *alio intuitu*. I think, therefore, that, if necessary, the order of 9th December should be treated as made on an application to the Court by originating motion to exercise its statutory jurisdiction by way of supplement to its original judgment which was incomplete. There would be no difficulty in such a case in ordering the costs payable under one judgment to be set off against a sum payable under another judgment in the same Court. The Rules of this Court make express provision for such a case: Order XLVI., r. 8.

As, however, the point has been elaborately argued on the narrower view that the application must be made in the original action, I will deal with it on that basis. So regarded, it follows that in all cases to which sec. 9 applies the Court is expressly directed (*i.e.*, at the instance of any party entitled to invoke its jurisdiction) to proceed to assess compensation.

It also follows that every such action includes in effect, or carries *in gremio*, a claim for compensation under the Act as an alternative claim which the Court is required to dispose of in the action, and further, that, if the original claim fails, the whole action is not disposed of until the alternative claim has been dealt with.

If the Court chosen by the plaintiff is an inferior Court and inadvertently gives judgment, in form final, without disposing of the alternative claim, and persists in its error, it is clear that a mandamus would lie to it to enter an adjournment and to proceed to assess compensation. In the Supreme Court the remedy is not by mandamus. Yet there must be some remedy, which must be either by way of appeal or by application to the Court itself to correct its error, under the inherent power which every

(1) (1898), A.C., 387.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Griffith C.J.

Court has to control and correct its records, or else under the express provisions of Order XXVIII., r. 11. If, on the other hand, the Court having proceeded to entertain the implied claim for compensation has dismissed it, the remedy is by way of appeal. What then are the facts in this case? Did *McMillan* J. at the original trial in fact entertain and dismiss the implied claim to have the compensation assessed? And if he did so, did the Full Court on appeal affirm that dismissal? To my mind it is clear beyond controversy that *McMillan* J. did not apply his mind to this aspect of the matter at all. It is true that he seems to have thought that the plaintiff had obtained from the defendants a valid agreement which would give him equivalent benefits, in which view he may have been right or wrong. But I think that his order of 2nd November 1903 ought to be regarded, and indeed construed, if the law will allow us to do so, as what it was in fact, *i.e.* a dismissal of the plaintiff's claim as set out in his pleadings.

If, on the other hand, we are at liberty to regard the truth as to the judgment of the Full Court, which in form merely dismissed the appeal, but which was in law a rehearing, it is abundantly clear that they did not apply their minds to the question.

The motion to *McMillan* J. following on their decision should, perhaps, have formally included an application to amend the judgment in the action by limiting it to the causes of action set out in the statement of claim, with a reservation of the question of assessment of compensation under the Statute. But this is a mere formal omission. In substance the point was involved in the motion actually made, which was based on the assumption that the order was incomplete.

I agree, as I have said, that, if *McMillan* J. or the Full Court have applied their minds to the point and decided it, the only remedy is by way of appeal. Fictions of law have in their time done good work. But I am not disposed to invent a new one, and to hold that a Court is bound to pretend to believe that something happened in the course of proceedings before it, when it knows that it did not happen. Is there, then, any authority to compel us to take this course, and to invent a fiction not for the purpose of doing but of denying justice?

In *Fritz* v. *Hobson* (1) an application was made to *Fry* J. to amend a final judgment, after it had been formally passed and entered, by including a direction as to the costs of an interlocutory motion which had been adjourned to the trial. It was objected that the application was too late. The learned Judge thought that he had jurisdiction to make the order asked for, either under the liberty to apply reserved by implication in the order on the motion, or under the liberty expressly reserved in the judgment. He added (2):—"There is another ground on which, in my opinion, I have jurisdiction to make the order asked for, viz., under Order 41A. In my view the error in the present case has arisen from the accidental omission of counsel to call my attention to the adjourned motion when I pronounced my judgment, an omission very natural at a time when counsel's attention was directed to matters of greater importance."

In my opinion, if, at the trial of an action in which two claims are joined, one only is tried, and without the fault of either party judgment is entered on the whole case, it can be amended both under this rule and under the inherent power of the Court. This doctrine applies *à fortiori* when a Statute expressly requires both causes of action to be disposed of. But, apart from this express rule, the point is, in my opinion, concluded by decisions of the highest authority.

In *In re Swire*; *Mellor* v. *Swire* (3) an application was made to the Court of Appeal to vary a judgment which had been passed and entered, *Cotton* L.J. said (4):—"What we intended to decide, and did decide, was simply the construction of the will, which, of course, would apply to that which the testator had at the time of his death, and anything which is to be treated as if it had been his at the time of his death. If there is any question as to what is to be so treated we did not decide it. I doubt whether the order as passed and entered could be construed as deciding any of those questions, but as it is considered to be doubtful whether it does not, we ought not, in my opinion, to allow this record to stand in such a form as that it may be contended that

(1) 14 Ch. D., 542.
(2) 14 Ch. D., 542, at p. 561.
(3) 30 Ch. D., 239.
(4) 30 Ch. D., 239, at p. 244.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Griffith C.J.

it has decided questions which were never before us, and which we never meant to decide."

*Lindley* L.J. said (1):—"This case has raised a discussion of some importance, because it was contended that when once the order of the Court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against any such notion. There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the records set right, but must go to the House of Lords by way of appeal. According to the old practice there was no difficulty, because the ordinary practice in the Chancery Division was, that after a decree or order had been passed and entered, any error could be put right by an application to rehear, unless the order had been inrolled. After inrolment the Court had no power over its decree. But even then there was power to vacate the inrolment on proper grounds, and when that had been done the Court again had power over its own decree. Now, rehearing has been abolished, and inrolment has become obsolete, but does it follow from that that the Court cannot correct a blunder of the kind I have assumed? I maintain that it has such a power, and I am glad to find that Lord *Penzance* and the House of Lords have asserted it. It appears to me, therefore, that if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not."

*Bowen* L.J., said (2):—"But suppose the proper practice has not been followed, is it a consequence of that that this Court has no jurisdiction over the matter to set wrong right? I think the true view is, as stated by the Lord Justice *Cotton*, that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the

(1) 30 Ch. D., 239, at p. 246. (2) 30 Ch. D., 239, at p. 247.

error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice. The Lord Justice *Lindley* has pointed out that this power which we are now asserting is a power which was always possessed by the Courts of Chancery under the old system. On that point I say nothing. But I venture to add this, that it is a power which has been exercised for hundreds of years by the Common Law Courts, and it would indeed be strange if the power were found to have disappeared when the Court of Appeal was created by the *Judicature Act*. Lord *Penzance*, speaking as a common law lawyer, was well justified, as one would expect from a Judge of his great distinction, in saying that at common law it was always understood that the Court had the power to make these corrections. When there was any mistake which could be ascribed to the officers of the Court, judgments at common law could always be amended in the term, and in some cases after the term in which they were pronounced.

"It seems to me that there is inherent power in this Court to do what is asked. I do not think it is necessary to fall back upon the rules, though I think rules might be discovered which would be found to assert the existence of this power in the Court."

The case referred to by *Lindley* and *Bowen* L.JJ. is *Lawrie* v. *Lees* (1) in which Lord *Penzance*, moving the judgment of the House of Lords, said:—"The motion which I shall make to the House will be that the judgment of the Court below be affirmed with costs, and that that be done without prejudice to any application which the appellant may be advised to make to the Court below to vary this order for the purpose of making its meaning more plain. I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the *Judicature Act*, every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out

(1) 7 App. Cas., 19, at p. 34.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Griffith C.J.

its own meaning, and where language has been used which is doubtful to make it plain. I think that power is inherent in every Court. Speaking of the Courts with which I have been more familiar all my life, the Common Law Courts, I have no doubt that that can be done, and I should have no doubt that it could also be done by the Court of Chancery. Moreover, having regard to the orders made under the *Judicature Act*, I should myself have thought that it would very well have come under those orders. I recommend your Lordships not to make any variation of this order, but to affirm it as it stands without prejudice to any such application to the Court below." In *Hatton* v. *Harris* (1) an application was made to correct a decree pronounced in 1853. Lord *Watson* said (2):—"I can hardly conceive that the learned Judge who made the decree could have had any one of these things in his contemplation. A perusal of the decree itself satisfies me that he never dealt or meant to deal with any question of extending interest, or of varying the rights of creditors, and that he intended his decree to be drawn up in conformity with the legal rights of the creditors as these appeared in the report of the Master and relative schedules.

"When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce. The correction ought to be made upon motion to that effect, and is not matter either for appeal or for rehearing. The law upon this point was fully and satisfactorily discussed by the late Lord Justice *Cotton* in *Mellor* v. *Swire* (3), an authority which appears to me fully to bear out the proposition I have just stated."

Finally, in *Milson* v. *Carter* (4), Lord *Hobhouse*, delivering the opinion of the Privy Council, said:—"Their Lordships do not doubt that the Court has power at any time to correct an error in a decree or order arising from a slip or accidental omission, whether there is or is not a general order to that effect. A recent instance of the exercise of this power occurred in a case of

(1) (1892) A.C., 547.
(2) (1892) A.C., 547, at p. 560.
(3) 30 Ch. D., 239.
(4) (1893) A.C., 638, at p. 640.

*Hatton* v. *Harris* (1) before the House of Lords, where an error arising from an accidental omission was corrected after the lapse of forty years. The House of Lords in that case approved the views expressed by the Court of Appeal in *Mellor* v. *Swire* (2)."

I am, therefore, of opinion that the Supreme Court had power to correct the original judgment as drawn up, and that *McMillan* J. was therefore right in proceeding to assess the compensation.

If, however, the objection were otherwise fatal, leave should be given to appeal from the order of the Full Court affirming the judgment of November 1903. But the necessity as well as the propriety of this course was denied in *Laurie* v. *Lees* (3) and in *Hatton* v. *Harris* (1).

The only answer that can be made to such an application is that the applicant had by conduct or by laches lost his right. No such suggestion can be made in this case. I am, therefore, of opinion that the order appealed from should be discharged, and the order of *McMillan* J. restored.

BARTON J. I am of the same opinion, though on one point on slightly different grounds. I will first discuss the argument that the words in sec. 9 :—"The injury is one for which the employer is not liable in such action," apply solely to cases in which the kind of injury for which the action is brought is not actionable ; that where the plaintiff would be entitled to succeed if the matter rested solely upon the injury and the surrounding circumstances, such as negligence, but there is a defence by way of confession and avoidance, founded on facts apart from the injury, and judgment is given for the defendant, the case does not come within the words of the section so as to entitle the Court afterwards to assess compensation, if, in its opinion, the defendant would have been liable to pay compensation under the *Workers' Compensation Act*. I am not able to agree with that argument, and for this reason, as I put it during the progress of the case. It is true that the words :—"The injury is one for which the employer is not liable in such action," are open to two constructions. It is true also that the construction for which Mr.

(1) (1892) A.C., 547. (2) 30 Ch. D., 239.
(3) 7 App. Cas., 19.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Barton J.

Northmore contended is one quite within the words of the section. Whether it should be adopted or not, it seems to me, depends on the consideration, that, where you find an ambiguity in an Act and have a difficulty in solving it by the context, you have to decide which of the constructions open to you is the more reasonable, and choose that one. I have not been able to find any reason why the legislature should be held to have limited its gift in the way contended for. If the liability were thus restricted, then it seems to me that the remedial intention of the legislature, as evidenced in the whole purview of the Act, would not be fulfilled. It is an Act which (although it contains some sections of repeal) nevertheless very largely extends the rights and remedies of the worker. In proceedings taken under the Act a number of the defences which used to beset him, some technical, some substantial, are cut away, and, upon certain observances by way of notice and the time of bringing his suit, the Act enables him to claim those rights, subject to certain limits as to the scale of compensation. Looking at the whole scope of the Act, its purpose is to enable the worker, in spite of difficulties, to obtain those rights so long as he has adopted the procedure laid down. Then we have sec. 9, designed, as I think, to secure him compensation assessed under the Act where he would have succeeded by taking advantage of it instead of mistakenly pursuing another remedy. If the construction were limited to the degree contended for by Mr. Northmore, we should have this result. Suppose a workman brings an action to recover compensation independently of the Act, thinking, rightly or wrongly, that he can do better by proceeding under the *Employers' Liability Act* or by an action at common law for negligence. It is alleged against him and proved that he has agreed with his employer, or has elected—perhaps only in a technical sense—to take his amends under the *Workers' Compensation Act* instead of by the independent action he has brought. Then he is to be precluded from claiming assessment under the *Workers' Compensation Act*; while if he had been defeated by the application of the maxim *volenti non fit injuria*, or the doctrine of common employment, he would nevertheless have been entitled to claim under the *Workers' Compensation Act*. I cannot think that

the legislature intended such a limitation, nor can I see why we should say that such a circumstance as his having apparently preferred compensation under the Act debars the Court in which he has proceeded from assessing such compensation, notwithstanding the failure of the independent action. The section itself certainly gives one no reason why the question should be settled by inquiring whether the defence is one of the old common law defences, or whether it is one that arises under this Act in respect of the independent action, and I find no words in the rest of the Act which show that such a criterion ever presented itself to the legislature. Between the two constructions, then, I adopt that which appears to be the more reasonable, and on that part of the section I think that the argument of Mr. Northmore cannot succeed. As to the other question, that is to say, the question whether *McMillan* J. was right in assessing compensation when he did so, I have carefully considered the reasons which His Honor gave for his judgment at the trial, and have come to the conclusion that in then deciding that there had been an agreement between the plaintiff (now respondent) and the defendant company (now appellants) that the former should receive compensation under the *Workers' Compensation Act*, the learned Judge was expressing (1) the opinion that the action did not lie, and (2) the further opinion that the appellant company would not have been liable to pay compensation under the Act, for the reason that the agreement had ousted the jurisdiction of the Court under sec. 8, and also his own jurisdiction to assess compensation under sec. 9. If I am right in this conclusion, then the judgment entered is so far a correct record of the "determination" of the Court. On that determination and at that stage it was not for *McMillan* J. to assess compensation. The respondent then appealed to the Full Court by way of new trial motion, and his appeal was defeated; the Court ordering "that the judgment obtained in this action should stand and the said motion for a new trial should be dismissed." But the Court upheld the decision on grounds different from those which had commended themselves to *McMillan* J. They did not think it necessary to decide whether there had or had not been an agreement between the parties. Seeing that the respondent had, after due notice and

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Barton J.

within the prescribed time, "claimed compensation payable under the conditions of the *Workers' Compensation Act*, in respect of personal injury sustained, and that he had received, and given receipts for, a number of payments at the rate of half the weekly payments he should have earned," being the maximum rate recoverable under the Act, their Honors held that, being put to an election by sec. 7, he had made his election to take compensation under the Act, and that therefore "the injury was one for which the employer was not liable" in an action independently of the Act.

But the decision that the respondent had made his election was a decision that the action for negligence must fail because the only liability of the appellant company was to pay compensation under the Act. If there was no agreement, and their Honors declined to say that there was one, then the claim under the Act was not barred. Consequently their order was in form obviously incorrect and defective. Either they did not apply their minds to sec. 9 at all, which should not be lightly inferred, or they must have determined under that section (1) that "the injury was one for which the employer was not liable" in the action, and (2) that he would have been liable to pay compensation under the Act. And as this was the necessary meaning of their determination, either they should have embodied it in their order or they should afterwards have held it to be their meaning.

Now I have already said that, in my view, *McMillan* J. decided that there was an agreement which would bar both the action for negligence and the claim for compensation. Having come to that decision, how could he possibly have assessed compensation at that stage—the close of the trial? Up to then the Court had not determined that the employer "would have been liable to pay compensation under the Act." It was not entitled to assess such compensation until there was such a determination. Therefore it was only when the Full Court had decided that the respondent had elected his remedy, and that therefore his action for negligence must fail, that it became apparent that there was no possible defence to his still subsisting claim for compensation under the Act, and it was not until then that it became the duty of "the Court in which the action was tried" to assess the com-

pensation. Now, it is well to remember at this stage that this judgment of the Full Court has not been appealed from by either party. The present appeal is from a subsequent decision of the Full Court which arose thus:—In view of the words in sec. 9, "the Court in which the action is tried shall assess such compensation," which, as they occur in this Act, are not dependent on the exercise by the plaintiff of an option, as in the English Act, it was equally open to either party to apply for assessment after the judgment of the Full Court on the first appeal. The company applied to the Court in which the action was tried to assess that compensation. *McMillan* J., after hearing argument, interpreted the reasoning of the Full Court correctly, and assessed compensation on the basis of the payments which the plaintiff had already received, the basis laid down by the Second Schedule of the *Workers' Compensation Act*. From the compensation so arrived at His Honor deducted the company's costs of the action in which Symonds had failed, and ordered judgment to be entered for the balance. Again there was an appeal to the Full Court, and the Full Court held that there could be only one judgment, that the application to assess was too late, and that at that stage of the proceedings, judgment having been entered up before the agreement, the appellant company were barred from having compensation assessed. As so often happens in Courts of Justice, the present fight really, though not outwardly, turns largely on a question of costs, as a reference to the concluding words of sec. 9 will suggest. But the question for this Court is much more important than that. A right is given to the plaintiff under sec. 9. If we decide that in such circumstances compensation may not be assessed, we shall be going far to frustrate the efforts of the legislature to prevent a circuity of action the continuance of which may be very harassing to the class for whom the protection of this Act is designed. Now, the first thing that strikes one in relation to the judgment on the second appeal is, as I have put it, that the Full Court, upon the judgment on the first appeal, either had not applied their minds to the operation of sec. 9, or must be taken to have decided, though they were determining an appeal which applied solely to the action for negligence, that the claim for compensation was still

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Barton J.

open. Whichever way we take that, it seems to me there is equal chance of justice being defeated. I shall not traverse the decisions to which His Honor has referred—which I have carefully considered—but I point to this, that the Court in which the action is tried is bound in my judgment to assess the compensation whichever party applies for it. It is not, as in the case of *Edwards* v. *Godfrey* (1), necessary under this Act that the claim for compensation should be made immediately after the decision in the action. That decision of *Edwards* v. *Godfrey* (1) was, I think, founded upon words which are not contained in this Act, "shall proceed to assess such compensation." Therefore, in my view, it is not necessary that the application to assess compensation should be made immediately upon the judgment in the Court of first instance. In fact, if it were necessary here, this curious result would follow, that where the Judge decides that an action fails, not only as an action independent of the Act, but also as a claim under the Act, then if he is right as to the first, but wrong as to the second, compensation cannot be assessed at all, even if he is set right on appeal; if it must be assessed at the trial or not at all, then the right given under sec. 9 is absolutely taken away in such a case. That was never the meaning of the legislature. But if it is not necessary in law to assess the compensation immediately upon the decision of the Court of first instance, then it is open to assess it later on. At what time then is the right to assess compensation barred? Is it barred even when the Court of first instance—"the Court in which the action was tried"—has been applied to as soon as possible, after it has been set right on appeal? I am clearly of opinion that it is not so barred, and that the Act must be observed. But it is said there was a judgment standing in the way because the judgment of the Court of first instance (arrived at no doubt upon grounds which barred both the independent action and the claim for compensation) was allowed to stand by the Court of Appeal on grounds which only applied to the written statement of claim and not to the right of recovery given (notwithstanding that statement of claim) by sec. 9. Technically there was one judgment; technically also—if we look at sec. 9—the time for enter-

(1) (1899) 2 Q.B., 333.

ing final judgment is after the assessment of compensation and not before it. A hyper-technical construction is likely to defeat the Act in every way, but as the Court has a statutory duty to assess compensation, I am of opinion that any order drawn up which, in form, would prevent the performance of that statutory duty must not be allowed to stand in the way of the doing of complete justice between the parties by a Court of final resort. Where the Act says that after a determination—whether you call it a judgment or not, or whether you draw up a judgment at a stage when you ought not to have drawn it up in the Court of first resort—there is still nevertheless a right of compensation, then the proceedings in the whole action are not complete until assessment is made. It seems to me that the first judgment, even if drawn up, is in the position of an interlocutory order within the meaning of the decision in the case of *Maharajah Moheshur Sing* v. *Bengal Government* (1), cited by His Honor, and therefore that that order could be corrected. Again, on the authorities cited, the Court, in my judgment, on the second appeal, ought itself to have corrected its order made on the first appeal. It had ample authority to do so, if there is any meaning in the cases which His Honor has just cited. But if the Court ought to have so corrected its order that, notwithstanding the fact of its having been drawn up, the obligation of the Court to assess compensation would be discharged, then this Court has a further right under sec. 37 of the *Judiciary Act* 1903, which enacts that "The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance." Now, "in the first instance," I take it, for the purpose of this section, means in the order appealed from. It was, in my opinion, the duty of the Full Court, on appeal, to correct its own prior order if that course became necessary for the purpose of seeing that justice was done, instead of allowing the second appeal upon what seem to me the highly technical grounds on which it was allowed. It was open to them to choose between the allowance of that technicality and the making of a corrective order within an established jurisdiction. If the latter ought to have been done—and I am of opinion

(1) 7 Moo. Ind. App., 283.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Barton J.

it ought—then under sec. 37 of the *Judiciary Act* 1903 it is open to us now to give such judgment, and so correct the proceedings that the technicality may fail, and that the record of the Court may so stand that final justice may be done by the Court of Appeal. For these reasons I agree with the learned Chief Justice.

HIGGINS J. I regret that I cannot see this matter in the light in which my learned colleagues see it. My only satisfaction is in feeling that the circumstances are so complicated and exceptional that the same precise difficulty is not likely to occur again. This is an appeal from a decision of the Full Court on a motion by a defendant employer to assess compensation for an injury resulting to an employé from an accident. It is the irony of this unfortunate litigation that the employer seeks to have damages assessed against himself, and that the employé opposes the attempt. I understand that the employer's object is to get a deduction from the compensation (by virtue of sec. 9 of the *Workers' Compensation Act* 1902), of the extra costs caused by the employé bringing an ordinary action in the Supreme Court instead of instituting proceedings in the Local Court under sec. 8. Apparently, the employé believes that he can even now proceed in the Local Court under sec. 8, and that the costs of the action in which he has failed cannot be set off against the compensation to be awarded. The struggle on this motion raises, to my mind, certain points of fundamental importance to the administration of justice; and I am strongly opposed to any order being made tending to weaken that certainty and finality, as between litigants, which pertains to the written judgments of a Court, as passed and entered or otherwise completed, and as to which neither party has appealed.

An ordinary action was brought by Symonds against the Ivanhoe company, his employers, for injuries received in the course of his employment; and the trial took place before *McMillan* J. with a jury. On the close of the plaintiff's case, the learned Judge gave an ordinary judgment for the defendants with costs. This judgment was final in form: "That the plaintiff recover nothing against the defendants"; and if one may look at the reasons given by the Judge, it was meant to be final

and conclusive for all purposes—subject to the usual right of appeal. He meant to finally dispose of the case, so far as he was concerned. *McMillan* J. found that the parties had made an agreement for an amount to be paid to the plaintiff, and that payments had been made under the agreement; and such an agreement would be an effective answer to any claim which the plaintiff might make, whether at common law, or under the *Employers' Liability Act*, or under the *Workers' Compensation Act*. This judgment was duly drawn up, and passed and entered. If anything further ought to have been done, the decision was wrong, and the plaintiff had a right of appeal. The Judge had determined that the agreement rendered it unnecessary for him to inquire whether the conditions prescribed in sec. 9 of the Act had been fulfilled. If he was wrong in this determination, the remedy was appeal. The plaintiff moved the Full Court for a new trial; and the Full Court ordered that the judgment should stand, and that the motion for a new trial should be dismissed. The order of the Full Court is dated the 10th October 1904; and no appeal has been made therefrom to the High Court. The judgment of *McMillan* J. is therefore binding on both parties, absolutely. I need hardly qualify this statement by referring to the possibility of getting special leave to appeal from the judgment to the High Court notwithstanding that the prescribed time for such an appeal has elapsed; or to the possibility of an action of review, on the ground of a mistake or miscarriage. There has not been any application for special leave to appeal from the judgment; and we have not to deal with any action of review. Such an application, or such an action, if successful, could reopen the whole judgment on its merits, and would enable the plaintiff to impugn the adverse rulings of *McMillan* J., and of the Full Court. The defendant company prefers to stand upon its rights under sec. 9 of the *Workers' Compensation Act*.

Before passing to the consideration of this section, I ought to say that according to the report of the application to the Full Court for a new trial (1), the Judges seem to have affirmed the judgment on the ground, not that an agreement for compensation had been proved, but that by giving notice of accident and

(1) 7 W.A. L.R., 69.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Higgins J.

making a claim under sec. 11 of the *Workers' Compensation Act*, and by receiving payments from the employer, the plaintiff had elected to take compensation under the Act, and was consequently precluded from all other remedy. If we are on the present application to take these grounds, as well as the written order on appeal, into consideration, I can only say that the Full Court ought to have been asked to vary the judgment so as to meet their view of the position, and so as to permit of compensation being assessed. But the judgment of *McMillan* J., was allowed to stand without variation—"that the plaintiff recover nothing against the defendants." The order of the Full Court was duly passed and entered or otherwise completed; but, although the defendants allowed the judgment and the order of the Full Court to stand, they promptly applied to *McMillan* J. to assess the compensation.

Now, sec. 9 is as follows. [His Honor read the section and continued.] The learned Judge did assess the compensation, on the motion of the defendants, but on appeal to the Full Court from his order, his order of assessment was discharged, on the grounds (1) that sec. 9 contemplates one judgment, and one only, and there is no power to assess damages on application after judgment; and (2) that it had not been determined in the action that the injury is one for which the employer is not liable in such actions, but that he would have been liable to pay compensation under the Act. If it were necessary to determine these points, I should be inclined to think that the Full Court is right. To my mind, it is perfectly clear that the legislature intended to permit one judgment only in such action, and to prevent the expense which would be occasioned by successive legal proceedings. The machinery provided by the legislature in the section is definite and rigid; and, as *Burnside* J. well says, it is much better in construing a piece of legislation of this kind to follow the strict wording of the Act than to follow a method of procedure which to one's own mind may seem very desirable, but which the legislature has not thought fit to provide. But I prefer to base my decision on this ground—that the judgment of the primary Judge dated the 2nd November 1903, and affirmed by the Full Court on the 10th October 1904, has

long since become binding on the parties to the litigation, and no attempt is made now to impeach it. The defendants know that, if it were set aside, it must be set aside as a whole; and this result the defendants probably do not desire. I take the judgment to mean, on its face, that the plaintiff is not entitled to recover anything in the action, whether by way of ordinary damages for negligence, or by way of compensation under the *Workers' Compensation Act*. I cannot see what jurisdiction this Court has, on an appeal from an order on a motion to assess compensation, to alter a previous judgment, as to which neither party has appealed to this Court. We are not, in my opinion, at liberty on the present application to question the decision embodied in the previous judgment; *Attorney-General* v. *Tomline* (1). This judgment of the 2nd November 1903 was not a mere interlocutory order, such as would bring the case within Order LVIII., r. 14. The Supreme Court itself has inherent power to rectify the judgment, even though it has been passed and entered, if it does not truly represent the decision which the Court pronounced. But it cannot be pretended that the Supreme Court, speaking through *McMillan* J., did not pronounce to the effect that the plaintiff was not entitled to recover anything in this action, or that the Full Court did not pronounce to the effect that the judgment should stand. The Supreme Court has power also, on motion or summons, to correct clerical mistakes in judgments, or errors arising therein from any accidental slip or omission (Order XXVIII., r. 11). But this rule does not, in my opinion, apply to this case. The learned Judge deliberately came to the conclusion that there was an agreement between the parties which deprived the plaintiff of all rights of action for the injury; and I do not think that this Court, wide as are its powers, should take upon itself to say that there has been an error in the judgment arising from any accidental slip or omission. If there was an error, it was not accidental: it was the result of a deliberate finding; and the Judge intended the judgment to be in the form in which it now stands. In one sense, it is true that all mistakes of a Judge are "accidental"; but that is not the sense in which the word is used in the rule.

(1) 5 Ch. D., 750; 15 Ch. D., 150.

H. C. OF A. 1906.

IVANHOE GOLD CORPORATION LTD. v. SYMONDS.

Higgins J.

If it were, no one could feel any confidence in acting on the formal, written judgment of the Court. If the Judge has made a mistake in his decision, the remedy is appeal; and if no appeal be brought, or if the appeal be dismissed, the litigants are bound by the decision, even though wrong. The authorities are well considered by *Romer* J. in *Ainsworth* v. *Wilding* (1). In that case, the learned Judge says:—"The Court has no jurisdiction, after the judgment at the trial has been passed and entered, to re-hear the case. That is clear. Formerly the Court of Chancery had power to re-hear cases which had been tried before it even after the decree had been entered; but that is not so since the Judicature Acts. So far as I am aware, the only cases in which the Court can interfere after the passing and entering of the judgment are these:—(1) Where there has been an accidental slip in the judgment as drawn up—in which case the Court has power to rectify it under Order XXVIII., r. 11; (2) When the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended." Probably also, he says, the Court can act by the consent of the parties: *In re Swire*; *Mellor* v. *Swire* (2). The decision actually pronounced was as to the profits of collieries in which the testator was interested at his death, but the order as drawn up applied, or might be construed as applying, to the profits of new concerns acquired after the death. In *Hatton* v. *Harris* (3) the whole difficulty arose "from a mere slip of the registrar or the registrar's clerk." In *Lawrie* v. *Lees* (4) Lord *Penzance* merely said that "every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain." *Milson* v. *Carter* (5) was a mere case as to costs, which, in the circumstances of the case, had not been provided for. The order of the Supreme Court, in allowing an appeal to go to the Privy Council, had provided that the costs should abide the judgment of the Privy Council, but had not provided for the case, which happened, of the appeal being

(1) (1896) 1 Ch., 673, at p. 676.
(2) 30 Ch. D., 239.
(3) (1892) A.C., 547, at p. 563, *per* Lord *Macnaghten*,
(4) 7 App. Cas., 19, at p. 35.
(5) (1893) A.C., 638.

dismissed for want of prosecution. And see also *Preston Banking Co.* v. *Allsup & Sons* (1). If the learned Judge made an error in his judgment, the remedy was by appeal to the Full Court; and if the Full Court made an error in affirming the judgment, or in affirming it without variation, the remedy was by appeal to the High Court: *Charles Bright & Co. Ltd.* v. *Sellar* (2). I can find no instance, after searching *Daniell's Chancery Practice*, and the *Annual Practice of* 1906, of any case which goes so far as to allow a final judgment duly passed and entered, or otherwise completed, to be corrected as proposed by this motion. The judgment was given deliberately; the written judgment duly expressed what the Judge meant to pronounce; the new order proposed to be added does not deal with items of costs or the computation of interest, or matters purely incidental to and within the scope of the judgment, as in *Fritz* v. *Hobson* (3), and other such cases; and *McMillan* J. himself, even if he had been asked to alter his judgment on the ground of error, would have had, in my opinion, no jurisdiction to do so.

In such a case as this, I should be strongly inclined to give special leave to appeal from the judgment if either party desired it. I think that the High Court has power to give such leave, notwithstanding the lapse of so long a time, under sec. 35, (1.) (*b*), of the *Judiciary Act* 1903. But this Court will not give such privilege if unsought. As for the present application, which is practically to correct a final judgment on the ground that the Judge ought to have given a judgment materially and substantially different, I cannot see the fairness of treating the judgment as binding on one litigant if it is not to be binding on the other. The judgment as it stands should be taken "with all faults" (if any).

For these reasons, I am compelled to differ from the opinion of my colleagues; and I concur with the opinion of the Full Court of this State, that the order made on the motion should be discharged.

*Appeal allowed; order of Full Court discharged with costs. Appeal to Full Court dis-*

(1) (1895) 1 Ch., 141.
(2) (1904) 1 K.B., 6.
(3) 14 Ch. D., 542.