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Isaacs J.

find no justification in the minds of reasonable men, the Court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded."

The reluctance of the Court to declare void for unreasonableness a regulation made by a public authority, having no possible object but the general welfare, naturally approaches its extreme limit when the regulation, as here, is required by the legislature to be approved by the highest executive authority of the State, and to be brought under the direct notice of Parliament itself.

When all the circumstances are borne in mind the objection of invalidity for unreasonableness is in my opinion impossible to sustain.

Case remitted to Magistrate.

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

Solicitors, for respondent, *Sly & Russell.*

C. A. W.

Dist *Aust Industrial Relations Comm, Re; Ex p Metal Trades Industry* (1995) 130 ALR 63

Cons *AIRC, Re; Ex p Metal Trades Industry* (1995) 1 IRCR 542

[HIGH COURT OF AUSTRALIA.]

SMITH AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

WATSON . . . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1906.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Dec.* 11, 12, 13.

Miners' Accident Relief Act (*N.S.W.*) (*No.* 42 *of* 1900), *sec.* 6—*Miners' Accident Relief* (*Amendment*) *Act* (*N.S.W.*) (*No.* 71 *of* 1901), *sec.* 10—*Allowance to miner permanently disabled—Discretion in committee—Construction of word "may" in Statute—Action of mandamus—Interpretation Act* (*N.S.W.*) (*No.* 4 *of* 1897), *sec.* 23.

Griffith C.J., Barton and Isaacs JJ.

The *Miners' Accident Relief Act* 1900, which was passed for the purpose of providing for allowances to persons injured by mining accidents, and for that purpose to provide for contributions by mine owners and miners, and out of the Consolidated Revenue, and further incidental purposes, provides for the constitution of a committee for each mine, who, by sec. 6, "may grant allowances in accordance with the Schedule" out of the fund provided for by the Act in case of the death or disablement of any person employed in or about the mine by accident in the working of the mine, and may from time to time vary the amount so granted, but so that such amount do not exceed that specified in the Schedule, and may stop the payment of any such allowance. The Schedule, as amended by a subsequent Act of 1901, provides: "The allowances under this Act shall be as follows:" and then specifies the sums to be paid in the various cases that may arise as the result of accident, including, in the case of permanent disablement, a specified weekly sum to the person disabled, and a further specified weekly sum in respect of each of his children, if any, payable to the person disabled.

A miner who had been permanently disabled, and who had been granted by the committee of the mine the weekly sum prescribed by the Schedule to be paid to the person disabled, brought an action against the committee claiming a writ of mandamus to compel them to grant him, in respect of each of his children, the further weekly sum prescribed by the Schedule, which the committee had refused to grant. He also claimed the same amount as a debt from the committee personally.

Held (*Isaacs* J. dissenting), that the action would not lie, inasmuch as the committee had a discretion to grant or refuse an allowance, and also as to the amount of the allowance granted, subject to the maximum prescribed in the Schedule. Even if the committee were of opinion that the case was one of permanent disablement, they were not bound to grant an allowance at all, nor, if they granted the allowance prescribed for the person disabled, were they bound to grant any sum at all in respect of the children.

The Queen v. *Vestry of St. Pancras*, 24 Q.B.D., 371, considered and applied.

Per Isaacs J.—The context of the word "may" in sec. 6 and the general scheme of the Act indicate that the power conferred upon the committee is coupled with a trust or duty to pay when the proper occasion arises, and as part of a general scheme for the relief of miners against the perils of their occupation, and, therefore, they are bound to grant an allowance at the full rates specified in the Schedule in every case where they are satisfied that the facts exist which bring the claimant within one of the classes of persons for whom provision is made by the Act.

Quære (*per totam curiam*) whether, if the committee were bound to make the grant, the proper remedy would be to proceed by action of mandamus or to apply for a writ of mandamus at common law.

Decision of the Supreme Court: *Watson* v. *Smith*, (1906) 6 S.R. (N.S.W.), 317, reversed.

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APPEAL from a decision of the Supreme Court of New South Wales.

The appellants were the members of a committee appointed under the *Miners' Relief Acts* of 1900 and 1901. The respondent, a miner, having been permanently disabled by an accident in the mine, applied for and was granted an allowance of twelve shillings a week.

Sec. 6 of the Act of 1900 gives the committee of a mine, appointed under the Act, power to grant allowances in accordance with the Schedule in case of death or disablement of a miner.

By sec. 10 of the amending Act of 1901 the Schedule of the Principal Act was amended by providing, in the case of permanent disablement resulting from the accident, for an allowance of twelve shillings a week to the miner himself, and two shillings and sixpence in respect of each of his children until the child should attain the age of fourteen years or die.

The respondent accordingly brought an action in which he claimed a writ of mandamus, commanding the appellants as the committee to grant the further weekly sum of two shillings and sixpence in respect of each of his five children, the total amount claimed being £113 12s. 6d. There was also a count claiming the same sum as a debt from the appellants.

The appellants demurred to both counts, on the grounds that the committee had a discretion as to the amount of the allowance up to the limits mentioned in the Acts, and therefore there was no legal right to a writ of mandamus, and no right of action for the amount claimed.

The Supreme Court (consisting of *Darley* C.J., *Cohen* J. and *Pring* J.) by a majority (*Pring* J. dissenting), were of opinion that both counts of the declaration were good, and overruled the demurrer: *Watson* v. *Smith* (1).

From this decision the present appeal was brought by special leave.

The pleadings and the various sections referred to are sufficiently set out in the judgments.

(1) (1906) 6 S.R. (N.S.W.), 317.

Stephen K.C. (*H. M. Stephen* with him), for the appellants. The committee have a discretion not only as to the granting of an allowance in the first place, but also as to the amount. The Schedule, read in conjunction with sec. 6 of the Principal Act of 1900, fixes the limit of the amount, but does not otherwise control the discretion of the committee. They are bound to inquire into the matter of the application, but they may come to the conclusion that under the circumstances no grant should be made, even though they find that the applicant was permanently disabled. There is nothing in the Act to compel them to make the allowances for the children.

The use of the word "may" in sec. 6 indicates that the committee are to exercise a discretion: *Julius* v. *Lord Bishop of Oxford* (1). The matter is made still clearer by sec. 23 of the *Interpretation Act* 1897, which provides that whenever a power is conferred on any person by the use of the word "may" the power is to be exercised at the discretion of that person. Sec. 6 provides that the committee may vary the amount granted "but so that such amount do not exceed that specified in the schedule," which obviously implies that less than the scheduled amounts may be granted in the first instance. If the committee may vary the amount granted, and even stop the payment altogether, it is difficult to suppose that the legislature intended to withhold from them the power to grant a less amount in the first instance. Similar provisions were held to confer a discretion as to the amount as well as the granting of an allowance in *The Queen* v. *Vestry of St. Pancras* (2), overruling *The Queen* v. *Vestry of St. George's, Southwark* (3). Mandamus will not lie, whether by action or prerogative writ, to compel a body to exercise its discretion in any particular way: *Allcroft* v. *Lord Bishop of London* (4). Even if there might have been a prerogative writ, an action of mandamus will not lie unless it is ancillary to some right of action. This is a quasi-judicial tribunal. The action of mandamus is simply an additional remedy given by the *Common Law Procedure Act* for enforcement of a right of action that existed independently, a remedy in the

(1) 5 App. Cas., 214, at p. 225.
(2) 24 Q.B.D., 371.
(3) 19 Q.B.D., 533.
(4) (1891) A.C., 666.

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nature of specific performance. Where a prerogative writ would lie, the action would not. [He referred to *Smith* v. *Chorley District Council* (1); *The Queen* v. *Vestry of St. George's, Southwark* (2); *Baxter* v. *London County Council* (3); *Partridge* v. *General Council of Medical Education and Registration of the United Kingdom* (4).] The Supreme Court had no power to review the discretion of the committee.

Bavin (*Holman* and *McWilliam* with him), for the respondent. The declaration should be read as if it alleged that the plaintiff was permanently disabled. If necessary, an amendment should be allowed: *Jacobs* v. *Smith* (5). The committee treated him on that basis, and the case was argued in the Supreme Court as if that had been admitted. The committee were bound to grant the sums fixed by the Schedule, both for the applicant himself and his children. The fact and nature of the disablement were matters upon which the committee might exercise their judicial discretion, and, unless their finding was obviously a denial of justice, it would have been conclusive. But the Act fixes the amounts. The word "may" is only permissive as to the granting —it is imperative as to the amount. The provisions for varying the amounts granted and stopping the payment are inserted to enable the committee to rectify a mistake or to modify the allowances in accordance with changes of conditions that may subsequently arise. The fund formed by the subscriptions is really an insurance fund, in which all persons of certain classes are entitled to participate in specified degrees. The power given to the committee is coupled with a duty, and leaves the committee no discretion. [He referred to *In re Municipal District of Lambton* (6); *Ex parte Reay* (7).] Sec. 23 of the *Interpretation Act* 1897 does not apply. Here the only question is, whether the section imposes a duty or a power, and sec. 23 is not to be used except in cases where the words confer a power only. It does not provide that the word "may" always confers a discretion. Moreover, it is only to be applied where the context

(1) (1897) 1 Q.B., 532.
(2) 67 L.T., 412.
(3) 63 L.T., 767.
(4) 25 Q.B.D., 90.
(5) 8 N.S.W. L.R., 21.
(6) 20 N.S.W. L.R., 378.
(7) 14 N.S.W. S.C.R., 240.

does not otherwise require. Here the whole of the context points to the conclusion that an absolute duty is imposed upon the committee. [He referred to a number of sections of the Statute; to *Macdougall* v. *Paterson* (1); and *Julius* v. *Lord Bishop of Oxford* (2).] *The Queen* v. *Vestry of St. Pancras* (3), applies only to the particular Statute then in question. Sec. 14, providing for an actuarial calculation at certain periods, plainly suggests that fixed amounts were to be granted; it gives the Government power to increase the amounts if it is found that the fund is able to bear it. No such calculation could be profitably made, or would be necessary, if the committee might arbitrarily reduce the amounts. The provision in sec. 6 that the allowances shall be in addition to any payment under the rules of a friendly society would also be rendered nugatory.

This is a case for an action of mandamus. It has been held to lie to compel registration by a company: *Norris* v. *Irish Land Company* (4), and to compel payment of money: *Ward* v. *Lowndes* (5); *Webb* v. *Herne Bay Commissioners* (6).

[GRIFFITH C.J. referred to *Bush* v. *Bevan* (7).]

There may be cases in which a prerogative writ would lie as well as an action, though the Court will not grant the former where the latter is open. It will lie although there is not a right of action existing independently; it is not ancillary to a right of action for damages: *Fotherby* v. *Metropolitan Railway Company* (8). [He referred also to *Common Law Procedure Act* (N.S.W.) 1899, sec. 173; *Bullen & Leake, Precedents of Pleadings*, 3rd ed., p. 356; *Smith* v. *Chorley District Council* (9); *The Queen* v. *Lambourn Valley Railway Co.* (10); *Ex parte Bourchier* (11)]. The effect of the earlier authorities is that the action for mandamus was given as a remedy for the neglect by any person or body to fulfil a statutory duty, and was intended to be exercised by any person for whose benefit the statutory duty was imposed. Cases since the *Judicature Act* in England have not cut down the authority of the earlier cases.

(1) 21 L.J.C.P., 27, at p. 31.
(2) 5 App. Cas., 214, at pp. 222-226, 232.
(3) 24 Q.B.D., 371, at p. 376.
(4) 8 El. & Bl., 512.
(5) 1 El. & El., 940.
(6) 5 Q.B., 642.
(7) 32 L.J. Ex., 54.
(8) L.R. 2 C.P., 188.
(9) (1897) 1 Q.B., 532, at p. 539.
(10) 22 Q.B.D., 463.
(11) 13 N.S.W. L.R., 105, at p. 110.

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[ISAACS J. referred to *Glossop* v. *Heston and Isleworth Local Board* (1); *The Queen* v. *London and North Western Railway and Great Western Railway* (2); *Morgan* v. *Metropolitan Railway Company* (3); *The Queen* v. *Commissioners of Inland Revenue*; *In re Nathan* (4).]

Stephen K.C. in reply.

Cur. adv. vult.

GRIFFITH C.J. The *Miners' Accident Relief Act* 1900 (No. 42 of 1900), is entitled "an Act to provide for allowances to persons injured by mining accidents and the relations of persons killed or injured by such accidents; for that purpose to provide for contributions by owners of mines and persons employed in or about mines, and out of the Consolidated Revenue Fund; and for purposes incidental to or consequent upon those objects." The scheme of the Act is this. Sec. 4 provides that:—"For each mine there shall be a committee consisting of—(*a*) an inspector of mines appointed by the Minister; and (*b*) three persons employed in or about the mine and appointed for the prescribed period by the persons so employed; and (*c*) two persons who may be appointed by the owner of the mine, or his representative, if he thinks fit. Such committees shall have the powers and duties prescribed, and may exercise those powers or perform those duties although the committee does not consist of the full number of members." Sec. 5 provides that the owner or manager of a mine shall deduct from the wages of each miner employed in the mine fourpence halfpenny per week, "and shall when and as prescribed pay the aggregate of such sums to the committee for the mine." Sec. 6 provides that the committee "may grant allowances in accordance with the Schedule to this Act, in case of the death or disablement of any person employed in or about the mine" by accident in the working of the mine, "and may from time to time vary the amount so granted, but so that such amount do not exceed that specified in the Schedule, and may stop the payment of any such allowance." The section contains other provisions to which I will call attention afterwards, and goes on to provide that—"(2)

(1) 12 Ch. D., 102.
(2) 65 L.J. Q.B., 516.
(3) L.R. 3 C.P., 553.
(4) 12 Q.B.D., 461.

the committee shall pay any allowances so granted by it out of any moneys deducted as aforesaid from wages and paid under this Act to the committee, and, so far as such payments are insufficient, out of any moneys paid for that purpose to the committee by the board constituted under this Act, and shall each fortnight pay any moneys in its hands not required for such allowances into the fund constituted by this Act." The Board is constituted under sec. 8. Sec. 12 provides that there shall be "constituted a fund vested in and to be administered by the board and called the 'New South Wales Miners' Accident Relief Fund'." Towards the fund the owner of every mine is to pay a specified sum, and there is to be paid out of the consolidated revenue an amount equal to the aggregate amount paid by owners under this section, and also by the committees the moneys received by them not required for allowances granted under sec. 6. Sec. 14 provides for an actuarial examination of the fund in order to ascertain its solvency being made once in every five years and at such other times as the Minister thinks fit, and upon the certificate of the person making the examination the Governor may, if circumstances warrant it, increase the allowances by proclamation in the *Gazette*, or, if it appears that the fund is likely to be insufficient, he may reduce the allowances if necessary, and subsequently increase them *pro rata*, provided that they do not exceed those prescribed. The Schedule is headed "Scale and conditions of allowances." Then it goes on: "The allowances under this Act shall be as follows:—(1) Where death results from the accident—(*a*) if the deceased was married—(i.) a weekly sum of eight shillings payable to the widow, if any, while unmarried; (ii.) a weekly sum of two shillings and sixpence in respect of each child, if any, of the deceased until such child attains the age of fourteen years, or dies," payable to the widow or guardian; "(iii.) a weekly sum of eight shillings per week payable to the guardian of the motherless children of the deceased until no child is below the age of fourteen years; (iv.) a sum of twelve pounds in respect of the expenses of the funeral of the deceased." Then follow provisions as to the amounts to be paid where the deceased was unmarried, and as to the persons to whom they are to be payable. In specifying the sums to be paid the Schedule nowhere

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uses the words "not exceeding." In case of disablement the words are "a weekly sum of twelve shillings payable to the person disabled." Then these words are added: "A person shall be deemed to be disabled when he is wholly incapacitated from attending to his ordinary occupation."

By an Act passed in the following year (No. 71 of 1901, sec. 10 (3)), the Schedule was amended by adding these words:— "Where permanent disablement results from the accident—(*a*) a weekly sum of twelve shillings payable to the person disabled;" (that is, the same as where the disablement is not described as permanent); "(*b*) a weekly sum of two shillings and sixpence in respect of each child, if any, of the person disabled until such child attains the age of fourteen years, or dies, payable to the person disabled."

In the present case the plaintiff brought an action against the committee of a mine alleging that he was a person employed in and about a mine within the meaning of the *Miners' Accident Relief Act* and the Acts amending it, and had suffered permanent disablement by an accident (following the words of the principal Act) whereupon the defendants as such committee granted him an allowance of a weekly sum of twelve shillings as "an allowance payable to the plaintiff being a person disabled within the meaning of the Schedule to the said '*Miners' Accident Relief Act* 1900' as amended . . . and did not at any time vary the amount of the allowance so granted and paid the said allowance to the plaintiff from time to time and did not at any time stop the payment thereof," "and there were living at the time of the said grant five children of the plaintiff" who were "still living . . . and under the age of fourteen years," as the defendants knew. It then went on to allege that the plaintiff "demanded from the defendants that they should grant to the plaintiff a further weekly sum of two shillings and sixpence in respect of each such child, nevertheless the defendants neglected and refused to grant such allowance . . . and all conditions were fulfilled &c. to entitle the plaintiff to the granting of the said further weekly sums . . . and to claim a writ of mandamus in that behalf and the plaintiff claims a writ of mandamus commanding the defendants to grant the said further weekly sums," &c. The

second count of the declaration claimed the same amount as a personal debt on the part of the defendants. The defendants demurred to the declaration substantially on the ground that under the Act the duty of the committee is discretionary only, that they have a discretion to make a grant or not to make it, and if they make it they may make it of such sum as they think fit. The short question is, what is the true construction of the Act?

Before further dealing with the language of the Statute, I should refer to the *Interpretation Act* 1897 (No. 4 of 1897), which by sec. 23 provides that:—"Whenever in an Act a power is conferred on any person by the word 'may,' such word shall mean that the power may be exercised, or not, at discretion; but where the word 'shall' conveys the power such word shall mean that the power must be exercised." So far, therefore, as that Act applies, whenever the word "may" is used in conferring a power, it must be read as if it were "may at their or his discretion." But it cannot be disputed that the particular Act conferring the power may, from its general scope, show that the duty must be exercised, and that there is not an arbitrary discretion. In that respect the *Interpretation Act* does not alter the general rule of construction, which was much discussed in the case of *Julius* v. *Lord Bishop of Oxford* (1). In that case Lord *Selborne* said (2):—"The language, (certainly found in authorities entitled to very high respect,) which speaks of the words '*it shall be lawful*,' and the like, when used in public Statutes, as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects,

(1) 5 App. Cas., 214. (2) 5 App. Cas., 214, at p. 235.

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of the enactment conferring the power." In the present case, therefore, since the passing of the *Interpretation Act* just as before it, the meaning of the legislature is to be ascertained from the whole of the language used. I turn again to the words of sec. 6 of the Act of 1900. It begins with the words "the committee of any mine may grant allowances in accordance with the Schedule to this Act." It is, therefore, in the discretion of the committee to say whether they will grant an allowance or not. It is not disputed that they have a discretion to this extent, if it may be properly called a discretion. There is a clear duty incumbent upon them to inquire whether the facts exist to entitle the applicant to an allowance, but, if they come to the conclusion that they do not exist, they are not bound to grant an allowance. If, however, they are of opinion that these facts do exist, it is to be assumed that they will grant an allowance. If they decline to entertain the application, then, notwithstanding the discretionary words of the section, they will be compelled by the Court to do so. The question still remains whether, if they come to the conclusion that it is a case of disablement, they are bound to grant an allowance at all, and, if so, whether they are bound to grant it to the full amount stated in the Schedule. The difficulty arises from the use of the words "in accordance with the Schedule to this Act," and the words in the Schedule itself. The committee may grant the moneys in accordance with the Schedule, and the Schedule, as I have pointed out, says: "the allowances under this Act shall be as follows:" and then proceeds to state a fixed sum in the various cases. If there were no more in the Act, this would afford a very strong argument that the duty of the committee is simply to inquire whether the facts exist, whether it is a case for the granting of an allowance, and, if it is, to grant the allowance in precise accordance with the Schedule, no more and no less. But that is not all that there is in the Act. Sec. 6 goes on to say that the committee may "from time to time vary the amount so granted." I stop there for a moment. *Primâ facie*, the words of the section are to have their ordinary meaning. Where there is a power to make a grant and to vary the amount granted, that must mean, *primâ facie*, by increase or reduction of the amount. If there is power to make a

grant and to vary its amount, and no more is said, then there is clearly a power to increase or to reduce the amount granted. But the section goes on "but so that such amount do not exceed that specified in the Schedule." That rather fortifies than diminishes the force of the argument from the *primâ facie* meaning of the words. But, if the committee have power to increase the amount so as not to exceed the amount specified in the Schedule, obviously they must have power to grant a less amount in the first instance. The section goes on to say: "and may stop the payment of any such allowance." That certainly seems to suggest that they are not bound to grant an allowance to a person disabled unless they think the case one in which they ought to grant it.

I turn to the Schedule again to see if there is anything there to throw light upon the matter. I find there that amongst the allowances are those for burial expenses, which are the same in the case of a married man as in the case of one who is unmarried. In each case the words are as follows:—"A sum of twelve pounds in respect of the expenses of the funeral of the deceased," payable to some person approved by the committee. *Primâ facie*, it is improbable that it was intended that there should be a fixed obligation to pay exactly twelve pounds for the expenses of a funeral in every case, when it is extremely probable that the expenses of the funeral of one man would be greater than those of another: for instance, the funeral expenses of a married man with a family and marriage connections would probably exceed those of an unmarried man with no connections. But, according to the contention for the respondents, the committee must grant twelve pounds or nothing. Why they should be bound to grant an allowance for such expenses, if there are no expenses at all, I find very hard to understand. Yet, if the argument is taken to its fullest extent, as soon as the committee find that a man has been killed by accident in the working of the mine, they are bound to grant a sum of twelve pounds for his funeral expenses. These considerations seem to negative the idea that the Statute imposes an absolute duty to grant the fixed sum stated in the Schedule.

Two other provisions to which I will call attention seem to

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throw some more light, though perhaps not a great deal, upon the construction of the Statute. One of these is in sec. 6, part of which I did not read before. "Any such allowance shall be in addition to any payment under the rules of any friendly society; and the amount of any such payment shall not be affected by the grant or payment of an allowance under this Act." It is suggested in favour of the defendants' view of the construction of the Act, that in determining the allowance the committee will make, they would naturally take into consideration the fact that provision has been made for the applicant from the funds of a friendly society, and that therefore it is only right that a friendly society should not be entitled to have the benefit of any allowance made under the provisions of the Act to the person injured. The committee might well consider whether, when they find that a man is already well provided for, they must grant the full allowance provided by the Act. The other provision to which I refer is in sec. 7, which provides that:—"In the determination of the amount of compensation payable by the owners of a mine in any action under the *Employer's Liability Act* of 1897, any allowances granted under this Act in respect of the injury complained of shall be taken into consideration." That may suggest that allowances under this Act are fixed and definite; and that, considering that, in this view, the employer has already contributed to a certain extent under this Act, regard should be had to that fact in reduction of the amount that should be awarded as compensation by a jury. Certainly that suggestion is open. But, strangely enough, the legislature in the following year altered that provision by substituting the word "no" for "any," so that the provision then became that *no* allowances granted under the Act could be taken into consideration by a jury in such an action, which suggests that the legislature, having had their attention drawn to the fact that the allowances granted under this Act were of an uncertain nature, thought it most unfair that they should be taken into consideration in estimating the amount of compensation under the *Employer's Liability Act*. It was suggested that the legislature, having had their attention drawn to this view of the Act, made a provision more in accordance with fairness and justice.

These being the arguments on the two sides, the question remains whether the *primâ facie* interpretation that the power given to the committee is discretionary is excluded by necessary implication by the words of the Schedule. In answering that I derive some assistance from the decision of the Court of Appeal in *The Queen* v. *Vestry of St. Pancras* (1). That was a case in which officers of the vestry were entitled on retirement to a retiring allowance. Sec. 1 of the Act 29 & 30 Vict. c. 31, under which the allowance was made, provided that the vestry of a parish might, "at their discretion, grant to any officer in their respective services," under certain circumstances, "an annual allowance, not exceeding in any case two-thirds of his then salary, regard being had to the scale of allowances" contained in the Act. Sec. 4 provided that the allowance to officers, whatever the nature of their remuneration might have been, should be "as follows; (that is to say), To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths" of his salary and an addition of one-sixtieth for each additional year of service until the completion of forty years, when the annual allowance of forty-sixtieths might be granted. The Court of Queen's Bench held that the vestry must grant the amount stated in those sections or nothing, but the Court of Appeal held that the power of the vestry was not so limited, but that they had a discretion, and might grant any amount they thought fit, provided it did not exceed the prescribed maximum. The words were "shall be as follows," but the Court held that the section should be treated as merely providing a maximum. That case, however, only throws a side light on the question, and after all no authority is necessary for the proposition that you must have regard both to the Act and the Schedule. Having regard to the consideration to which I have called attention, that the words *primâ facie* confer a discretionary power to vary the amount granted, which, I think, includes power to increase, I cannot see my way to come to the conclusion that the committee are bound to grant an allowance at the fixed rate specified in the Schedule, or that they are bound to grant an allowance at all with respect

(1) 24 Q.B.D., 371.

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to the children of the person injured, if they think it is not a case in which they ought to do so. I think, therefore, that the case for the plaintiff fails substantially.

I express no opinion on the difficult point whether, if the plaintiff's case were good, it would be a case for an action of mandamus or for a writ of mandamus at common law. It is quite clear that the second count is bad.

I should add that I concur in the reasoning of *Pring* J., who did not agree in the judgment of the majority of the Supreme Court. In my opinion, judgment should be entered for the defendants on the demurrer.

I should add this also. It was suggested that the declaration should be read as if it alleged that the defendants had determined that the plaintiff was a person who had been permanently disabled. That is not alleged in fact, and, in my opinion, for the reasons I have given, it would not follow that, if the committee had come to the conclusion that the plaintiff was permanently injured, they were bound to grant an allowance in respect of each of the children. It is quite clear that, until the committee have determined that a man is permanently disabled, he has no claim under the *Miners' Relief (Amendment) Act*, which gives the right to an allowance in respect of the children of a person who is permanently disabled. So far as he himself is concerned, the allowance is the same whether he is permanently disabled or not: the only condition is disablement.

BARTON J. I do not propose to refer in detail to the sections of the principal and amending Acts involved in this case, seeing that His Honor the Chief Justice has already so fully stated them.

I will, first of all, read the claim made by the plaintiff. [His Honor read the material portions of the declaration, and continued.] The defendants by their demurrer assert as a matter of law that the first count is bad, because no action lies against the committee for an amount in excess of that actually granted by them, and that, under the circumstances stated in the first count, a mandamus cannot be claimed to compel the committee to exercise their discretion in any particular way, and that the second count is bad because it discloses no cause of action, nor

any right to sue the committee for any allowances in excess of those granted by them, and that under the Act the committee had a discretion as to the amount of the allowances granted by them up to the limit mentioned in the Acts, and an action will not lie against them in respect of the exercise of that discretion. The question, therefore, is whether the committee have the discretion they claim, and this depends on the construction of these Statutes, and particularly of sec. 6 of the principal Act together with the Schedule.

It is argued that great weight is to be given to the fact that the deductions from the miners' pay, though paid into the fund, and made part of it, are, before they fall into the fund, reducible, (sec. 6 sub-sec. (2)) by the amount of any allowances granted by the committee. It is suggested that they thus become an insurance fund specially for the benefit of the miners or their families in case of death or disablement, and that this consideration goes far to show that, as the deductions are of fixed amount, it is intended that the allowances shall be fixed also, so that any discretion as to their *quantum* within and up to the prescribed limit is not allowed to the committee. But the scheme of the Act as a whole deprives this suggestion of the weight it seems at first sight to possess. The committee, under secs. 5 and 6 (2) of the principal Act, may, no doubt, pay allowances out of these deductions, handing the balance over to the fund. But if the deductions are insufficient for that purpose, the deficiency is to be made up out of the fund, which consists of the balances of deductions, the owners' contributions (one half those of the miners), and the Government contributions, equal to those of the owners. So that the fund consists of one half contributed by miners, a fourth contributed by owners, and the remaining fourth contributed by the Government, with first recourse for payment of allowances against the miners' half, but general recourse against the whole. And in the composition both of the committees and of the board, the owners and the Government are represented as well as the men. The argument, therefore, founded on the primary recourse to the deductions from pay becomes a very slender one, and almost speculative, for we see that the mine owners and the public are primarily concerned, as well as the

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miners, and that the entire fund from all sources is really for the provision of allowances, and half of it at least is held in reserve to meet emergency claims. Its administration is not only in the hands of the miners' representatives, but also in the hands of the representatives of the owners and the Government. Possibly it might have been more just to make the whole fund in amalgamation answerable indiscriminately for the allowances, and to give the employés half the representation on the board, just as they have half in the committee. But these are considerations for the legislature and not for the Court.

Adverting then to the construction of sec. 6. If the committee are right in contending that they have a discretion to determine, not only the preliminary fact of permanent disablement, but also the question whether there shall be any allowance, an action will not lie by reason of their exercise of that discretion, however erroneous the particular use of it may have been.

Now, I will pass over the discussion that took place on the merely technical point involving the sufficiency of the prefatory averments in the declaration as to the permanency of the plaintiff's disablement, and as to the fact that the committee had determined it to be of that nature. I will treat the declaration as sufficient in these respects, and deal with the broader questions in controversy. The plaintiff, then, says:—"You decided that I was permanently disabled. It then became your duty to grant me an allowance of twelve shillings a week for myself, and two shillings and sixpence a week for each of my children. The law gave you no option. But you gave me only part of my due. You have granted and paid me the twelve shillings a week on my own account, but you have not granted me on account of my children the other twelve shillings and sixpence a week or any part of it. I am entitled to a writ of mandamus compelling you to grant me two shillings and sixpence a week, no more and no less, on account of each child, and I am also entitled to a verdict against you for payment of the amount which you ought to have granted on their account—twelve shillings and sixpence per week, no more and no less. When you decided that I was permanently disabled, it was your statutory duty to grant me both the twelve shillings and the

twelve shillings and sixpence as one entire and fixed allowance."

Thus it appears to be common ground that the committee, now the appellants, have a discretion to determine whether a person is disabled, and whether, if so, the disablement is permanent. The first real dispute is whether, given that initial fact, the committee is absolutely bound to make some allowance. If they are not, *cadit quæstio*. If they must grant some allowance, but have a discretion as to its amount, again the plaintiff fails, for he claims that he is entitled absolutely, not only to have an allowance granted, but to have it granted as a fixed sum of two shillings and sixpence for each of his five children. It must be granted, and is not to be an allowance of anything within two shillings and sixpence a week for each, but just that two shillings and sixpence a week each.

Let us see, then, whether, taking the declaration as duly framed for the assertion of these claims and as being also true in fact, the statutory law is such as to support it. Must the committee willy-nilly do both of two things: (1) grant an allowance; (2) make that allowance precisely two shillings and sixpence a week for each child? Failing one of these requirements, the plaintiff is out of Court.

As to the first, sec. 6 says that the committee for the mine "may grant allowances," &c. Of course, at first sight this does not look as if they must grant them. Nor does the *Acts Interpretation Act* help the plaintiff, but rather the committee, if it helps either party. It says, in sec. 23—[His Honor read the section and continued.] The meaning of that is clear enough. But then it is only presumptively a rule, for it is to apply "unless the contrary intention appears." It is a rule of construction, and not of law. See *Hardcastle on Statutory Law*, 5th ed., p. 10: "A rule or canon of construction, whether of will, deed, or Statute, is not inflexible, but is merely a presumption in favour of a particular meaning in case of ambiguity." If then there is an ambiguity we may call this section in aid. If there is none, it is either superfluous, by the clearness of the concurrent intention, or excluded by the clearness of the contrary intention. In *London and North Western Railway Company* v. *Evans* (1)

(1) (1893) 1 Ch. 16, at p. 27.

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Bowen L.J. said :—" When we pass from private grants between individuals to titles and rights created by an Act of Parliament, the exact subject-matter is altered, but similar rules of good sense and law obtain when we have to interpret sections which do not expressly decide the matter. These canons do not override the language of a Statute where the language is clear ; they are only guides to enable us to understand what is inferential. In each case the Act of Parliament is all-powerful, and, when its meaning is unequivocally expressed, the necessity for rules of construction disappears and reaches its vanishing point." Adopting this lucid statement, we find that if the Act in unequivocal language not only gives the committee the power, but charges them with the duty of granting allowances, when they have ascertained the fact of disablement, this section (23) cannot change the plain English of the Act now in question, nor can it change the plain English of the Act in the other event of its language clearly leaving the committee with the mere duty of the *bonâ fide* exercise of their discretion. In these cases statutory canons of interpretation are excluded as superfluous even if admissible. But in the third event of our finding the enactment obscure, this rule of construction will be applied, and its effect, if the meaning of the phrase in sec. 6 is obscure, is to solve the matter in favour of the committee.

Let us turn to what was laid down in the case of *Julius* v. *Lord Bishop of Oxford* (1). The question was whether the Bishop could be compelled by mandamus to issue a commission to inquire into the conduct of a clerk in holy orders, by force of a Statute which prescribed that in certain events it should be lawful for the Bishop of the diocese to issue such a commission. In holding, as the Lords did unanimously, that this enactment gave the Bishop complete discretion to issue or decline to issue such a commission, Lord *Selborne* said (2) :—[His Honor read the passage already set out in the judgment of *Griffith* C.J., and continued.] Earl *Cairns* L.C. was no less explicit. He said (3) :—" The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words ' it shall be lawful ' might have

(1) 5 App. Cas., 214.
(2) 5 App. Cas., 214, at p. 235
(3) 5 App Cas., 214, at p. 222.

a different meaning, and might be differently interpreted in different Statutes, or in different parts of the same Statute. I cannot think that this is correct. The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." Lord *Penzance* in his speech pointed out that in some of the cases cited, although the Statute in terms had only conferred a power, the circumstances were such as to create a duty, and he said (1):—"I entirely agree with what has fallen from the Lord Chancellor as to the proper and legitimate way of stating the question here involved. The words 'it shall be lawful' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the Statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it."

The words, "it shall be lawful" and the word "may," when used in a Statute, are, I think, equivalent in meaning, and all that I have quoted of the one applies to the other. As used in this enactment, therefore, they are unambiguous. The question is whether the context, the subject-matter, the class of person for whose benefit the power may have been intended to be conferred, add to this power a duty enforceable by action for debt or damages, or by mandamus, not merely to entertain applications

(1) 5 App. Cas., 214, at p. 229.

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for grants of allowances, but to make them whenever the fact of permanent disablement, (for example) is ascertained by the committee, no matter how strong the reasons may be against any grant. Now, I confess that, after a searching examination, I cannot find anything to evince the creation of the particular duty asserted. There is everything to show that the power to grant or refuse was one intended to be exercised, but there is nothing in the context or the subject-matter to show that the committee are, once the initial fact is found by them, to be thenceforth mere *automata* to register the grant of the allowance. The fact that the power, when exercised, must be exercised for the benefit of the members of the class particularly subject to accidents in mines, does not show any other duty than that of examining into each case, discovering with judicial fairness whether a grant is justly allowable or not, and as we shall presently see, fixing its amount when granted.

If the matter rested here, the plaintiff would, in my opinion, have failed to establish his case. But he claims, not only the grant of the allowance as a matter of course, but that he is entitled to it for his five children at the precise rate mentioned in the Schedule; that the committee have no discretion to fix the amount. Though it may not be incumbent on me to give an opinion on this part of the case, since I do not see any enforceable duty in the committee to grant any allowance at all, still it will be for the advantage of the class concerned and the public that our opinions on the question raised should be made known, and, as we heard full argument upon it, I proceed to offer mine.

Now, in the first place, the existence of a discretion to make or withhold a grant strengthens any implication that the words as to its amount will bear, that there is also a discretion as to that amount, because, unless the language is plain, it would not seem very reasonable to give a committee power to say "no" altogether, and yet to withhold from it power, if it says "yes," to say how much, up to a maximum, it will give. But that is a consideration which cannot apply if the language is clear. "The committee . . . may grant allowances in accordance with the Schedule to this Act . . . and may from time to time vary the amount so granted, but so that such amount do not exceed that

specified in the Schedule, and may stop the payment of such allowance," &c. The Schedule begins:—"The allowance under this Act shall be as follows": and then, as amended, goes on to specify the fixed sums applicable in the several events of death, disablement and permanent disablement. It is argued that because allowances, which may have to be granted, are to be "in accordance with" the Schedule, and because by the Schedule the allowance under the Act "shall be as follows," all discretion to grant in the first instance any sum except the full amount is taken away. That construction would be very reasonable were the committee not empowered to "vary the sum" when granted, so long as they see to it that "such amount do not exceed that specified in the Schedule," and were the committee not also empowered to stop the payment of any allowance. The injunction not so to vary any amount granted as to make it exceed that in the Schedule, makes it clear to me that the amounts "specified" in the Schedule are in each case indications of a maximum, which is the ordinary meaning of a sum not to be exceeded. If the Act requires the grant of the maximum, then the word "vary" must be twisted from its usual sense and made to mean only "reduce;" and then the further absurdity would occur that if "vary" means only "reduce" then there is power to reduce the amount so granted but so as not to exceed the only amount to be granted, which would necessarily imply a power to make an original grant exceeding the maximum which is nevertheless not to be exceeded. On the other hand, if the power to grant or (as I urge) to withhold, is also a power to grant anything up to that specified in the Schedule, *i.e.* anything up to the maximum, then the power to vary carries its natural meaning, viz., to increase or reduce, the limits for its exercise being clearly set. And only in this way can any sense or meaning be given to the proviso that an amount when varied shall not exceed that specified in the Schedule. The result of this construction is that the amount specified in the Schedule is the amount not to be exceeded, *i.e.* the maximum, and in that light the power to grant allowances "in accordance with the Schedule" is reconciled with every other part of the Schedule. In *The Queen* v. *The Vestry of St.*

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Pancras (1) a similar construction was adopted by the Court of Appeal. The Act under construction was 29 & 30 Vict. c. 31. There was a section giving the vestry power "at their discretion" to grant to officers in certain cases retiring allowances "not exceeding in any case two-thirds" of their then salary, "regard being had to the scale of allowances" thereinafter contained. The scale was in a subsequent section, which enacted that "subject to the provisions" therein contained "the allowance . . . . shall be as follows." Then followed the allowances, beginning at ten-sixtieths and adding one-sixtieth for each year up to a service of forty years, which gave forty-sixtieths. Of course it was held that the vestry had a discretion as to granting or refusing a retiring allowance. But it was also held that, notwithstanding the apparently rigid terms of the section (like the Schedule here) ordaining the *quantum* of the allowance, there was a discretion in the vestry to fix the amount, subject only to the two-thirds restriction and the scale set out in the same section, which their Lordships held, basing their decision largely on the words "not exceeding," was to be treated as a mere maximum. A mandamus was issued to the vestry, not certainly to grant a fixed retiring allowance, but to consider and determine the application made by the officer. And that I hold to be the limit of the duty of the appellants' committee in this case, believing with *Fry* L.J. in the case cited, that "the discretion is infused into both the questions whether there shall be a grant and what shall be the *quantum* of the grant" (2).

I cannot find anything in the current of authorities opposed to the view I take, but authorities might be freely cited in its favour.

Reference was made in argument to two other sections of the principal Act. The first of these was sec. 14, cited for the plaintiff. It provides for an actuarial examination of the fund to be made every five years; and that the Governor acting upon an actuarial certificate, in the one event of the sufficiency of the fund, and in the other of the insufficiency of the payments and deductions for the maintenance of the specified scale of allowances, may in the former case by proclamation "increase the allowances for such period and to such rate as he may deem

(1) 24 Q.B.D., 371. (2) 24 Q.B.D., 371, at p. 379.

expedient"; or may in the latter case, by like proclamation "reduce *pro rata* all allowances granted and to be granted from such date for such period and to such extent as he may deem expedient." But the Governor may by proclamation "increase *pro rata* such allowances so reduced, but so that they do not exceed those prescribed." It was argued that this section showed that the allowances under what may be called the normal state must be those and those only stated in the Schedule. I have been unable to follow that argument, and my opinion is not shaken that the allowances specified in the Schedule denote the maximum amounts to be awarded where sec. 14 is not put in operation.

The remaining provision specially mentioned in argument was sec. 15 (*b*), reading thus:—"The Governor may make regulations prescribing the applications and inquiries to be made before allowances are granted, and regulating the procedure at such inquiries." This enactment certainly points at an intention in the Act that applications for allowances are to be the subject of inquiry according to some method of procedure—that is, an inquiry of a judicial kind. It is an inquiry precedent to the grant of an allowance. The plaintiff urges that it relates merely to the finding of such a fact as disablement. But it is of much more importance than that. The ascertainment of such a fact is nowhere in the Act described as the grant of an allowance, nor can I find any words to justify such a construction. The inquiry must be as to the whole question of the granting of an allowance. That being so, whether it includes the question of the *quantum* or not, as I think it must, it in any case strongly assists a construction fatal to the plaintiff's contention.

I am of opinion that the plaintiff's declaration does not disclose any case on which he can succeed in this action, either as to the claim of a mandamus, or as to his money claim; and that the appeal ought, therefore, to be upheld, and the appellants' demurrer allowed.

ISAACS J. For the purposes of this case, which arises upon a demurrer to the declaration, the following facts must be assumed. The plaintiff is a miner, and was in fact permanently disabled

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primarily by an accident occurring in or about the working of the mine, and the defendants, who are the committee for the mine constituted under the *Miners' Accident Relief Act* 1900, granted him an allowance of twelve shillings per week as a disabled person, but have refused to grant him anything in respect of his children under the age of fourteen years. The plaintiff claims a mandamus to compel the defendants to grant the allowance for the children, or alternatively the money. The defendants by their demurrer object that the declaration discloses no cause of action. As the pleadings stand I agree with the defendants' contention on the ground that it is not alleged by the declaration that the defendants have determined as a matter of fact that the plaintiff's disablement is permanent.

The Act, as amended, draws a distinction between disablement and permanent disablement—in the one case the allowance is twelve shillings per week for the man himself, and two shillings and sixpence per week for each child until the child reaches 14 years or dies. As I shall more precisely indicate further on, the Act leaves it to the committee to decide as to the disablement, its extent and cause, and, until the committee has decided in favour of the person injured, he has no right to any allowance; until therefore the committee decides that the plaintiff is permanently disabled he has not, in my opinion, any right to an allowance in respect of his children; strictly speaking therefore the demurrer should succeed on the pleadings as they stand. This, however, was not the point aimed at by the demurrer, nor the question debated in the Court below. Mr. Bavin for the plaintiff asked for leave to amend by alleging substantially that the committee had decided that the plaintiff was permanently disabled. The argument proceeded, and we have now to determine this case on the assumption that the suggested amendment was made. It may be that the amendment should have included other findings by the committee as to the number and age of the children. But, on the hypothesis that all such amendments are made, the broad question that presents itself is this:—Assuming a mine committee finds as a fact that a miner is killed or disabled primarily by an accident in a mine, are the allowances mentioned in the Act then a matter of right, or a matter of grace to be given or withheld

at the uncontrollable will of the committee? My difficulty in answering this question arises from the imperfect way in which the legislative intention has been expressed. The defendants contend that the allowances are in such a case a pure matter of grace. They rely greatly on the word "may" in sec. 6 of the Act of 1900.

The first argument to support their contention as to this consists of a reference to sec. 23 of the *Interpretation Act* 1897, which is said to control the matter, and is as follows—[His Honor read the section and continued]. It will be observed that this section is limited in its application to the grant of a power, and not to a duty or trust which may accompany a power. If sec. 6 of the *Miners' Accident Relief Act* 1900 confers merely a power unaccompanied with a trust or duty, then the word "may" in that section would probably be affected by sec. 23 of the *Interpretation Act*. The contention I am dealing with is also rested on the ordinary rule of interpretation as laid down in the case of *Julius* v. *Lord Bishop of Oxford* (1). But though the word "may" is in itself potential merely, the words of Earl *Cairns* L.C. (2) are quite in point here. His Lordship says, speaking of the words "it shall be lawful":—"They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." Every word of that passage appeals to me as singularly appropriate to the present case. The real question to my mind therefore is, does sec. 6 of the *Miners' Accident Relief Act* 1900, taken in connection with the rest of the legislation on the subject, simply confer a bare power, or does it confer a power to be exercised as a trust or duty to pay when the proper occasion arises, and as part of a general scheme for the relief of miners against the perils of their occupation—a scheme analogous in

(1) 5 App. Cas., 214. (2) 5 App. Cas., 214, at pp. 222, 223.

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some respects to what is sometimes known as a scheme of management ? The distinction is well established in equity. I may refer to some authorities to illustrate the distinction adverted to. In *Lewin on Trusts*, 11th ed., p. 749, the following passage occurs :—" Where the power is accompanied with a duty, and meant to be exercised (as a power of leasing) the Court will compel the execution or execute it in the place of the trustees."

Of course in this case the Court cannot itself execute a statutory duty expressly deputed to the special body created by the legislature for the purpose. The passage continues :—" So where the trustees had a power of sale ' if they should consider it advisable, but not otherwise,' it was held that the power, though discretionary in form, was given to the trustees for the purpose of the will, and if those purposes could not be effected without the exercise of the power, they were bound to exercise it." The case in which that was held was *Nickisson* v. *Cockill* (1), a decision of Lord Chancellor *Westbury*. *Tempest* v. *Lord Camoys* (2), was a case where a testator gave to his trustees a special power of leasing at their absolute discretion, which formed part of a special scheme of management of his mansion house and estate for a limited period. It was held by Earl *Cairns* L.C., in a suit for the execution of the trusts of the will, that the Court would compel the trustees to exercise the power of leasing. Some years later in 1882 a case arose between the same parties, reported also as *Tempest* v. *Lord Camoys* (3), where *Jessel* M.R. said :—" In all cases where there is a trust or duty coupled with a power the Court will then compel the trustees to carry it out in a proper manner within a reasonable time." *In re Courtier*; *Coles* v. *Courtier* (4), was a case on the other side of the line. Trustees were given authority, provided they should deem it advisable, to sell certain leaseholds, invest the proceeds, and allow the widow of the settlor to receive the income during her life. *Cotton* L.J. said (5) :—" This power is not a part of a general trust for the management of the estate ; it is a mere discretion given to the trustees. It is true that in such cases as *Nickisson* v. *Cockill* (1) and *Tempest* v. *Lord Camoys* (2), where there was

(1) 3 De G. J. & S., 622.
(2) 21 Ch. D., 576.
(3) 21 Ch. D., 571, at p. 578.
(4) 34 Ch. D., 136.
(5) 34 Ch. D., 136, at p. 140.

what appeared to be a discretionary power, the Court dealt with it as part of a trust for management of the estate, and interfered with the trustees discretion. But those cases were decided on the special terms of the will; the Court considered the power introduced in the trust for management, as part of the trust. But it is clearly settled law that where the trustees have a power as distinguished from a trust, although the Court will prevent them from executing the power unreasonably, it will not oblige them to exercise it." And *Bowen* L.J. said (1):—"Ought we to direct the surviving trustee to exercise the power of sale given to the trustees by the will? Is the authority part of a general trust of management? If so, it might fall within the principle of *Tempest* v. *Lord Camoys* (2). One can understand where the machinery for management of the estates is given to the trustees by will, and the Court undertakes to enforce the trusts for management, it is right for it to compel the trustees to utilize the machinery entrusted to them. It does not appear to me that this is a case like that; it is clearly a mere discretion given to the trustees with which the Court will not interfere."

I proceed now to consider to which class this case belongs, "a bare and naked power; or a power coupled with a trust or duty." The Act No. 42 of 1900 is intituled "An Act to provide for allowances to persons injured by mining accidents and the relations of persons killed or injured by such accidents; for that purpose to provide for contributions by owners of mines and persons employed in or about mines, and out of the Consolidated Revenue Fund; and for purposes incidental to or consequent upon those objects."

By sec. 2 "wages includes all earnings by persons arising from any description of piece or other work, either above or below ground, in or about the mine." Sec. 4 provides for a constitution of committees. Sec. 5 provides:—"The owner or manager of each mine shall, on pay day, deduct from the amount then payable for or on account of wages in respect of the employment at any time since the next preceding pay day of any person in or about the mine the sum of fourpence halfpenny for each week of such employment, and shall when and as prescribed pay the aggregate

(1) 34 Ch. D., 136, at p. 141. (2) 21 Ch. D., 576.

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of such sums to the committee for the mine." It will be observed that the deduction is compulsory both on the owner and the miner; the one to deduct and pay over to the committee, the other to suffer the deduction of money then payable for wages. The sum fixed for deduction is fourpence halfpenny per week. The section as a whole bears the impress of an opinion or calculation of the legislature that the sum fixed would be sufficient to assure certain benefits to the miners, and the compulsive character of the deduction naturally connotes a right to some definite return or consideration for it. That return or consideration appears in the next section. Sec. 6 begins by providing that "the committee for any mine may grant allowances in accordance with the Schedule to this Act, in case of the death or disablement," &c. If the section stopped there, I think it would be beyond argument that, once the committee granted allowances at all, they would have to grant them "in accordance with the Schedule" to the Act, neither more nor less. Turning to the Schedule, we find it is headed "Scale and conditions of allowances." It then proceeds to state :—"The allowances under the Act shall be as follows;" and then it proceeds to describe the allowances. The scale is divided and subdivided; there were under the original Act two main divisions—the first applied in case of death, the second in case of disablement. The case of death is subdivided according to whether the deceased was married or unmarried. The allowances in the case of a married man who was killed are again apportioned between his widow (if any), his children under 14 (if any), the guardian of his motherless children until the youngest is 14; and lastly funeral expenses, specific sums being mentioned in the Schedule. If the deceased were unmarried, the allowances are in certain cases to his mother, or, if she be dead, or if she, in the words of the Schedule, "is not entitled to an allowance," then to his sister or sisters, also to the children of his mother or sister or sisters up to 14 in certain cases; and we find lastly funeral expenses.

In the case of disablement there is provided simply a weekly sum of 12s. for the disabled person.

Under the amending Act a further division is made, namely, where the disablement is permanent, and in that case, besides the

12s. payable to the person disabled, there is the weekly sum of 2s. 6d. for each child up to 14 as already mentioned. The sums are specifically fixed in the Schedule for each person or group of persons indicated as beneficiaries, consequently, if the section went no further than enabling a grant to be made in accordance with the Schedule, it seems to me a hopeless argument that a grant of a less amount would be in accordance with the Schedule. The defendants contend, however, that they are at liberty to make a grant of a smaller allowance than that enacted by the Schedule, and yet they say that it will be in accordance with the Schedule. They also contend that, notwithstanding the compulsory payment previously referred to, and notwithstanding they arrive at the conclusion that a man suffered death or disablement from the cause specified in the Act, they may, if they choose, abstain from making any grant at all. This argument is rested on the word "may" and also on the provision in sec. 6 that they "may from time to time vary the amount so granted but so that such amount do not exceed that specified in the Schedule and may stop the payment of any such allowance." These words taken by themselves are undoubtedly very large, and, apart from the rest of the Act, would clearly be open to the construction the defendants put upon them, namely:—That the committee are placed in a position of absolute discretion, with no check imposed by law except that of good faith and the prohibition against exceeding the amount in the Schedule, with no guiding principles indicated to them upon which they ought to act in varying the allowances, with no standard or rule suggested by the Act, with nothing in fact except their own personal view and opinion of the situation to regulate their stoppage of all payments whatever. That would assuredly lead not only to uncertainty in each mine, but to difference of treatment in different mines, instead of comparative certainty and equality of benefits where there was similarity of the conditions contemplated by the Act.

The second sub-section of sec. 6 may I think bear a double aspect. It may be regarded in a light favourable to the defendants; but it may also be used as an argument for the plaintiff as indicating the intention of Parliament that the allowances under this Act were to be real additional benefits, and not to be

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cut away by deductions under Friendly Society rules. Looking at the Act as a whole, and feeling the full force of the opinions expressed by my learned brethren, I find myself unable to arrive at the same conclusion. I do not think it is a sufficient answer to the difficulties I have outlined to say that the committee may be expected to do what is fair in the circumstances. In the first place, only half of the committee consists of the miners' representatives, and the appointees of the owners and the Government are to some extent representing adverse interests. Next, the legislature has made such elaborate provisions in the Schedule that it can hardly be supposed they were put there to be completely departed from, if the committee for their own reasons thought fit. I think ample meaning can be given to the provisions for the variation and stoppage of allowances, if we apply to the power to vary or to stop the same rules as I apply to the grant. The committee is the sole and supreme judge as to matters of fact; they alone have to determine whether death is the result primarily of an accident in the working of the mine. Similarly as to whether a man is wholly incapacitated, and, if so, whether permanently, and in either case whether the result has arisen from the cause specified in the Act, and also whether, in the respective cases, relatives exist, and generally as to the existence or non-existence of the conditions enumerated in the Schedule. According as they find these facts in the first instance they grant or refuse to grant the prescribed allowances "according to the Schedule," and according as they find it necessary from time to time to correct their view of the facts, or as they find the facts alter, such as the recovery from disablement or the marriage, death or attainment of 14 years, &c., of the various parties specified, they may vary from time to time the amount, which I take to be the total amount granted previously, subject to and not exceeding the prescribed schedule amount, or, if the prescribed circumstances justify it, they may stop the payment altogether. Broadly speaking, I think the conditions of a grant, of a variation, or of a stoppage, have been impliedly determined by the legislature, and the committee has a power and a duty to ascertain those conditions and then to act accordingly. I find in the Act itself some certain provisions which to my mind strongly

support this view. Sec. 7 of the principal Act as it originally stood was in these terms :—In the determination of the amount of compensation payable by the "owner of a mine in any action under the *Employers' Liability Act* of 1897, any allowances granted under this Act in respect of the injury complained of shall be taken into consideration." I find it difficult to understand why the legislature should have insisted upon deducting permanently and in full an allowance which might be varied to a nominal sum or taken away altogether. For instance, in calculating the compensation under the *Employers' Liability Act*, if the estimated earnings of a person in the same grade were arrived at upon the basis of a wage of £2 12s. a week, and the plaintiff were granted an allowance of 12s. a week under the *Miners' Accident Relief Act*, the Court would be compelled by sec. 7, as it originally stood, to make a deduction on account of the grant of 12s. a week, and would have to calculate the plaintiff's compensation in the action on the assumption of his receiving the allowance of 12s. a week. An allowance granted is not synonymous with an allowance paid, as will be seen by reference to sec. 6 of the principal Act and sec. 7 of the amending Act. Can the legislature have intended that, after that deduction was made, the committee should have power next day, without any other reason than its own resolve, actuated if you like by its own highest sense of fairness, to strike off and disallow for the future the 12s. a week which would then be practically deducted for the second time. The legislature must, as it seems to me, have considered that, so long as the committee believed the man was disabled, they were bound to pay him the allowance of 12s. a week. The subsequent amendment of that section alters the result, but does not alter the interpretation of the rest of the Act. Then sec. 14 of the principal Act appears to me to militate strongly against the defendants' view. That section insists upon periodical actuarial examinations as to the solvency of the fund. Reading that section with secs. 4, 6 and 12 of the principal Act, and the Schedule of that Act, and sec. 7 of the amending Act, I am forced to this conclusion that the legislature intended to establish a scheme of compulsory insurance against accidents in mines, quite irrespec-

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tive of any person's negligence; that the whole matter was the subject of actuarial calculation or careful estimate before the Act was passed; that the premium for insurance was fixed at fourpence halfpenny per week because it was thought that sum would probably be sufficient to provide the necessary funds for the stipulated benefits, and that the amount and conditions of benefit secured by the premiums were fixed as set out in the Schedule; that the events upon which insurance was to be paid were death or disablement from the specified cause; that the existence or non-existence of these events should be ascertained, not by the clumsy and expensive process of a Court of law, but by a domestic expert tribunal; that, as the employés were the persons primarily and directly protected, the fund out of which they should be relieved should be first of all that of their own providing, and that then if necessary the mine-owners, whose returns depended upon the exertions of the miners and who were to some extent relieved from liability under another Act, should help to make up by proportionate contributions a possible deficiency, and that the State, itself deriving rents or royalties from the working of coal or other mines, should similarly in case of necessity partially assist, and that the Minister should watch over the general fund and see that it was kept solvent from an actuarial standpoint, just as every other insurance fund is required to be kept solvent. But all these elaborate precautions seem to me quite inconsistent with the short and simple position taken up on behalf of the defendants, namely, that the committee of the mine may, without assigning any reason, decline in its discretion to pay any allowance whatever, and, if any allowance has been granted, may equally in its discretion reduce or stop it, and nothing can be done.

Reading the Act as a whole I have come to the conclusion that the extreme view presented for the defendants would entirely defeat the intention of Parliament as appearing from the Statute. The wording is not as clear as it might have been; but to adopt the defendants' view appears to me to do more violence to the language than to follow that of the plaintiff.

I regret that I have the misfortune to differ on the main question from the weighty and powerful opinions already ex-

pressed by my learned brethren. In my judgment the plaintiff, assuming the necessary amendments made, should succeed. Whether the appropriate remedy is a mandamus it is not necessary now to determine; but I do not see how the Court could itself act as it would in a private trust because the legislature has created a special tribunal for the purpose.

Appeal allowed. Judgment for the plaintiff discharged and judgment entered for the defendants on the demurrer. In accordance with the undertaking given by the appellants in asking for special leave to appeal, appellants to pay the costs of the appeal.

Solicitor, for the appellants, *The Crown Solicitor of New South Wales.*

Solicitor, for the respondent, *N. W. Montagu.*

C. A. W.

Cons *Dawson* v *Westpac Banking Corporation* (1991) 104 ALR 295 | Foll *Trade Practices Commission* v *TNT Management Pty Ltd* (1984) 56 ALR 647 | Foll *Niaa Corporation Ltd (in liq) Re* (1993) 33 NSWLR 344 | Refd to *Selby* v *Pennings* (1998) 102 LGERA 253

[HIGH COURT OF AUSTRALIA.]

McLEAN BROS. & RIGG LTD. . . . APPELLANTS;
PLAINTIFFS,

AND

JAMES GRICE AND ANOTHER . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1906. MELBOURNE, *Feb.* 19, 20, 21, 22, 25, 26; *March* 4. Griffith C.J., Barton and O'Connor JJ

Companies Act 1890 (*Vict.*) (*No.* 1074), *secs.* 52, 67, 114, 115, 118—*Company—Voluntary liquidation—Extraordinary resolution—Presence of quorum at meeting—Evidence—Presumptive evidence—Agreement to release liability in respect of shares.*