H. C. OF A. 1911.

DOLPHIN v. HARRISON, SAN MIGUEL PROPRIETARY LTD.

pay commission for the introduction of a purchaser by the plaintiffs. For these reasons I think the appeal should be allowed.

BARTON J. I am of the same opinion. I think the action was perfectly baseless.

O'CONNOR J. I concur.

Appeal allowed. Judgment appealed from discharged. Judgment for defendant with costs of action, including costs of reference to the Full Court.

Solicitor, for the appellant, *Alan Skinner* for *R. W. Shellard*, Daylesford.

Solicitors, for the respondents, *Madden & Butler*.

B. L.

Appl *Enterprise Gold Mines NL v Mineral Horizons NL (No1)* 52 NTR 13

[HIGH COURT OF AUSTRALIA.]

FEDERAL GOLD MINE LIMITED . . APPELLANTS; DEFENDANTS,

AND

ELIZABETH ENNOR AND OTHERS . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1910.

PERTH, *Oct.* 18, 20.

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

Workers' Compensation Act 1902 (*W.A.*) (1 & 2 *Edw. VII. No.* 5), *sec.* 6—*Accident arising out of and in the course of the employment—Disease—Local Courts Act* 1904 (*W.A.*) (4 *Edw. VII. No.* 51), *secs.* 107, 110, 111—*Appeal on question of fact.*

Sec. 6 of the *Workers' Compensation Act* 1902 (W.A.) provides that an employé, if he suffers personal injury caused by accident arising out of and in the course of his employment, shall be entitled to compensation.

The deceased man (Ennor) was a miner employed on the appellants' mine, and while so employed he was seized with cerebral hemorrhage and died. Many years before he had suffered from lead poisoning, and it was proved at the trial before the Local Court that the effect of such poisoning is to thicken the walls of the arteries, causing them to lose their elasticity, and that cerebral hemorrhage, occurring after a longer or shorter period, is a common consequence.

Ennor had only been employed on the appellants' mine for three days before the seizure. On each of the two first days he had complained of illness, and on the second day he had put his hand to the back of his head as if suffering from pain there. On the third day he went to work at 4 p.m., and had done very little work up to 7.30 p.m., being apparently too feeble to do more. Soon afterwards he and his mate went to a lower part of the mine to have some food, but Ennor did not eat anything. About 8.30 p.m. they returned to the place where they were at work, climbing up twenty-five feet on a ladder. Ennor went to a place about seven or eight feet above the level, where he seemed to be ill at ease. At about 8.45 p.m. his mate handed him up a light piece of timber which he could not hold. He then rolled over, having evidently had the attack of cerebral hemorrhage. The work which he had been doing was of a very light nature, not requiring any great exertion. The Local Court, one assessor dissenting, gave judgment for the plaintiff, and the Full Court refused to disturb the decision.

Held, that these facts proved that the deceased died of cerebral hemorrhage which occurred in the course of his employment, but that they did not affirmatively establish that the hemorrhage was caused by accident arising out of the employment.

Under the *Local Courts Act* of Western Australia (4 Edw. VII. No. 51) an appeal lies to the Supreme Court on questions of both law and fact.

Held, that the appeal was in substance a re-hearing, and that the Judges of the Supreme Court were not bound, there being no question as to the credibility of witnesses, *primâ facie* to regard the decision of the Local Court as right.

Decision of the Supreme Court of Western Australia: *Federal Gold Mines* v. *Ennor*, 12 W.A. L.R., 59, reversed.

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

The facts are fully stated in the judgments hereunder.

Robinson, for the appellants. The burden was on the plaintiffs to prove—(1) that there was an injury; (2) that the injury was an accident; (3) that it arose in the course of the employment; and (4) that it arose out of the employment. The Judges of the

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

Supreme Court intimated that if they had been called upon to decide the matter themselves they would have been unable to say whether the hemorrhage was caused by the work the deceased was doing or whether it was merely the natural result of the disease he was suffering from. They were not satisfied that the plaintiffs had affirmatively established their case, but were of the opinion that they should follow the decision of the Local Court unless it was demonstrably shown to be wrong. [He referred to *Clover, Clayton & Co. Ltd.* v. *Hughes* (1); *Fraser* v. *Victorian Railways Commissioners* (2); *Steel* v. *Cammel, Laird & Co. Ltd.* (3); *Broderick* v. *London County Council* (4); *Ismay, Imrie & Co.* v. *Williamson* (5); *Workers' Compensation Act* (1 & 2 Edw. VII. No. 5), sec. 11; *Local Courts Act* (W.A.) 1904; 4 Edw. VII. No. 51; *Ruegg's Employers' Liability and Workmen's Compensation*, 7th ed., pp. 513, 515.]

Haynes K.C. and *Mayhall*, for the respondents. The question to be decided is whether the inference can be drawn that the death arose out of and in the course of the employment. The facts make it more than probable that the strain of the work contributed to the death. [They referred to *Pomfret* v. *Lancashire and Yorkshire Railway Co.* (6); *Mitchell* v. *Glamorgan Coal Co. Ltd.* (7); *Dearman* v. *Dearman* (8).]

Robinson, in reply.

Cur. adv. vult.

Oct. 20.

GRIFFITH C.J. read the following judgment:—This is an appeal from a decision of the Supreme Court dismissing an appeal from a Local Court on a claim for compensation under the *Workers' Compensation Act* 1902 (W.A.).

Sec. 6 of that Act is as follows:—

"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

(1) (1910) A.C., 242.
(2) 8 C.L.R., 54.
(3) (1905) 2 K.B., 232.
(4) (1908) 2 K.B., 807.
(5) (1908) A.C., 437.
(6) (1903) 2 K.B., 718.
(7) 23 T.L.R., 588.
(8) 7 C.L.R., 549.

be liable to pay compensation in accordance with the Second Schedule hereto."

The language is identical with that of the corresponding section of the English *Workers' Compensation Act.*

The law applicable to the case may be taken to be now settled by the recent case of *Clover, Clayton Co. Ltd.* v. *Hughes* (1) to which I will afterwards refer.

The question to be determined is one of fact. The majority of the Local Court thought that the claimants had established their case. The learned Judges of the Supreme Court thought that they were bound to accept the decision of the Local Court on the question of fact unless it was demonstrably wrong. *McMillan* J. said (2):—"We must start with the presumption that the decision of the lower Court is right, and the appellant has to displace that presumption. If our minds are left in a state of doubt, we have no right to interfere." With all respect I am unable to accept this view of the functions of the Supreme Court.

In England an appeal does not lie in such cases except on points of law. The only question, therefore, which can there arise upon the facts is whether there is any evidence to support the finding. But under the *Local Courts Act* of Western Australia (4 Edw. VII. No. 51) an appeal lies to the Supreme Court on all points, both of law and fact, and the appeal is in substance a re-hearing. In such a case the appellant is entitled to the independent judgment of the Court of Appeal. The rule as stated by *Lindley* M.R. in *Coghlan* v. *Cumberland* (3) has often been quoted in this Court:—"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the material before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong."

If the question turns on the credibility of witnesses other con-

(1) (1910) A.C., 242. (2) 12 W.A. L.R., 59, at p. 64.
(3) (1898) 1 Ch., 704.

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

Griffith C.J.

siderations arise. Here there is no question of credibility. The facts are not in dispute.

I have thought it necessary to say so much because the learned Judges indicated pretty plainly, as I understand them, that if they had felt themselves at liberty to form an independent judgment they would not have agreed with the Local Court upon the question of fact.

In the present case the deceased (Ennor) was a miner employed on the appellants' mine. While so employed on 21st July 1909 he was seized with cerebral hemorrhage and died on the following day. Many years before he had suffered from lead poisoning, and it was proved that the effect of such poisoning is to thicken the walls of the arteries, causing them to lose their elasticity, and that cerebral hemorrhage, occurring after a longer or shorter period, is a common consequence.

In order to succeed the claimants must establish affirmatively that the injury, *i.e.*, the hemorrhage, was "caused by accident arising out of and in the course of the employment." If the evidence leaves it doubtful whether it was or was not so caused they must fail.

In *Clover, Clayton & Co. Ltd.* v. *Hughes* (1) the facts were that a workman, who was suffering from an aneurism, was engaged in tightening a nut with a spanner when the aneurism burst and he died. The arbitrator found as a fact (p. 245) that: "the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal;" and that "the aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion, or strain, would have been sufficient to bring about a rupture." The House of Lords was bound by these findings.

As to the term "accident" it had been already defined by the House of Lords in the case of *Fenton* v. *Thorley & Co. Ltd.* (2) as "an unlooked-for mishap or an untoward event, which is not expected or designed," and this definition was accepted. In *Fenton* v. *Thorley & Co. Ltd.* (3) the distinction taken was between injury caused by accident and injury caused by disease.

(1) (1910) A.C., 242.

(2) (1903) A.C., 443, at p. 448.

(3) (1903) A.C., 443.

The first question for determination in the *Clover, Clayton & Co. Case* (1) was whether the rupture of the aneurism could be regarded as an accident within the meaning of the Act. On this point Lord *Loreburn* L.C. said (2): "No doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may also be something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel. If that occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident. It cannot be disputed that the fatal injury was in this case due to this accident, the rupture of the aneurism under the strain." I note in passing that the learned Lord Chancellor three times uses the expression "may be." Then he says:—"If that occurred when lifting a weight it would be properly described as an accident," showing that his mind was directed to the injury being sudden and unlooked for and contemporaneous with an immediate probable cause. Then he again uses the expression "may be."

Further on he said (3):—"In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and the employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?"

In the present case it appeared upon the undisputed evidence that Ennor was employed on the appellants' mine on three days only. On each of the two first days he had complained of illness,

(1) (1910) A.C., 242.
(2) (1910) A.C., 242, at p. 246.
(3) (1910) A.C., 242, at p. 247.

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

Griffith C.J.

and on the second day had put his hand to the back of his head as if suffering from pain there. On the third day he went to work at 4 p.m., and had done very little work up to 7.30, being apparently too feeble to do more. Soon afterwards he and his mate went to a lower part of the mine to "crib," *i.e.*, took an intermission for food, but he did not eat anything. About 8.30 they returned to the place where they were at work, climbing 25 feet by a ladder. Ennor went on to a place about seven or eight feet above the level, where he seemed to be ill at ease. At about 8.45 his mate handed him up a light piece of timber, which he could not hold. He then rolled over, having evidently had the attack of cerebral hemorrhage. The work which he had been doing was of a very light nature, not requiring any great exertion or strain.

On these facts all that can, in my opinion, be said with any certainty is that Ennor died of cerebral hemorrhage, which occurred in the course of his employment. But this is not enough. The claimants must establish affirmatively that the injury, the hemorrhage, was caused by accident arising out of the employment. Applying the rule laid down by Lord *Loreburn* L.C. I am unable to find affirmatively that the injury was caused by accident at all. On the contrary, the evidence, in my opinion, shows that it was caused by chronic disease. Nor can I find any ground for holding affirmatively that the work which Ennor was doing contributed in any material degree to the happening of the injury at that time. The most favorable way in which the case can be put is that the evidence is equally consistent with either view, but that is not sufficient. If it had appeared that the hemorrhage occurred while Ennor was doing something which required some special exertion a case of more difficulty might be presented. But it is, at the best, mere conjecture. It was suggested that climbing up the ladder, or going up the further distance of seven or eight feet, might have caused a sudden and unusual strain upon his arteries. But the stroke did not follow until a quarter of an hour had elapsed, and he had apparently done similar climbing on the two previous days. In my opinion there is nothing more than conjecture to support the claimants' case.

I am glad to think that my conclusion agrees with that to which, as I understand, the learned Judges of the Supreme Court would have come if they had felt at liberty to do so.

The appeal must therefore be allowed.

BARTON J. The *Workers' Compensation Act* 1902 (W.A.) provides in sec. 8 sub-sec. (1) If any question arise 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 provisions 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 upon such Court. Sub-sec. (2) For the hearing and determination of such question the magistrate shall sit with two assessors appointed in the manner prescribed by regulation: and the decision of the majority of such three persons shall be the decision of the Court.

The claim arising out of the death of Samuel Ennor was dealt with under that section, that is to say, it was dealt with by a Local Court; for although there is the addition of two assessors under the *Workers' Compensation Act*, still the proceeding was one in the Local Court and subject to the incidents and consequences of such a proceeding. Now the *Local Courts Act* 1904 provides, in sec. 107, that any party dissatisfied with the judgment of the Court in any action or matter may appeal to the Supreme Court. By sec. 110 the appeal is to be heard and determined by the Supreme Court on a copy of the proceedings and of the notes of the evidence taken by the magistrate, and such other materials as to the Supreme Court shall seem fit. There is full discretionary power to receive further evidence upon questions of fact, but such further evidence is to be admitted on special grounds only, and not without special leave of the Court. By sec. 111, on the hearing of an appeal the Supreme Court has power to draw inferences of fact, and may order a new trial on such terms as the Court shall think fit, or may order judgment to be entered for any party, or make any other order, on such terms as the Court shall think proper to ensure the determination

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

Barton J

on the merits of the real questions in controversy between the parties, &c.

An appeal under these sections is a re-hearing, and is not to be confounded with proceedings for the setting aside of the verdicts of juries. The position is like that which *Lindley* L.J. dealt with in *Coghlan* v. *Cumberland* (1) in the passage referred to by the Chief Justice. Lord *Halsbury* L.C., in the case of *Riekmann* v. *Thierry* (2), pointed out that where a jury has found a fact, the appeal is not a re-hearing of such a fact, and in such a case the Court can only disturb the verdict where, in their judgment, the jury have not done their duty, but short of that the Court is bound to accept the finding of the jury. "But," added his Lordship, "upon appeal from a Judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the Court from which the appeal proceeds, and that it is not within their competence to say that they could have given a different judgment if they had been the Judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision. The judgment to be pronounced by the Court of Appeal is the judgment that ought to have been pronounced by the Judge of first instance." And his Lordship protested "against the notion that when the Judge of first instance has decided a question he has done something which is binding upon the Court of Appeal, and that unless they think it very wrong they must acquiesce in his judgment." This language is strongly applicable to appeals from the Local Court to the Supreme Court, and embodies, in my opinion, the principle upon which the Full Court should have acted in the present case.

The task of a plaintiff in such an action as this was described by Lord *Collins*, then Master of the Rolls, in the Court of Appeal in *Pomfret* v. *Lancashire and Yorkshire Railway Co.* (3) in these words:—"The burden, and the whole burden, of proving the conditions essential to the obtaining an award of compensation, rests upon the applicant and upon nobody else, and if he leaves

(1) (1898) 1 Ch., 704.
(2) 14 R.P.C., 105, at p. 116.
(3) (1903) 9 K.B., 718, at p. 721.

the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him." That is the *ratio decidendi* in the present case, and was the proper guide to the Local Court, and afterwards equally to the Court of Appeal. What, then, were the facts the proof of which was essential to the plaintiff's right to succeed? She was to prove that the injury was caused to Samuel Ennor by an accident; that such accident arose out of the employment; and that it arose in the course of the employment. (*Workers' Compensation Act* (W.A.) 1902, sec. 6). The injury was beyond doubt cerebral hemorrhage It may be taken that it arose in the course of the employment. Has the plaintiff shown (1) that it was caused by an accident, and, if so, (2) that the accident arose out of the employment in which he was engaged? An accident, as the term is used in the section, has been defined in the House of Lords as "an unlooked-for mishap or an untoward event, which is not expected or designed." *Fenton* v. *Thorley & Co. Ltd.* (1). Now, the deceased had been infected with lead-poisoning which, as he told the doctor who attended him for the cerebral hemorrhage, had come upon him ten or fifteen years before. The effect of that poison would be that his arteries would be thickened, but weakened. They would lose their elasticity and be more likely to give way under a strain. Though the poison itself may be eradicated, its effects will remain. The doctor said that it generally results in permanent harm, and when he said this he had already described the harm. The inability of an artery thus enfeebled to withstand the pressure of the blood upon its walls had, of course, led to the cerebral hemorrhage, and the inability had resulted from the old lead-poisoning. This being the injury, was it caused by an accident? Ennor began to work at the Federal Gold Mine on 19th July 1909. He worked, we are told, three shifts; that is, he worked on one shift each day for three days, the last being the day on which the cerebral hemorrhage set in. He was engaged in boring holes in a stope and firing them. For the boring he was using a brace and an auger bit. On his first shift, that is, on 19th July, he made a

(1) (1903) A.C., 443, at p. 448, *per Lord Macnaghten.*

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

Barton J.

complaint to his mate, Allsopp. We are not allowed to know the particulars of that complaint. But he complained again to Allsopp on the second shift, *i.e.*, on 20th July, and put his hand to the back of his head. That, we may infer, was the seat of the trouble. On the third shift, that is, on 21st July, he had up to "crib" time (8 p.m.) bored only two holes in about four hours, while his mate during the same time had bored and fired two rounds of five or six holes, and in addition to that had come to his assistance and bored three holes for him, after which Ennor fired them, together with the two he had bored himself. Thus we find that Ennor, who was evidently ill and complaining on the 19th and 20th., was on the 21st not able to do more than one-sixth of the work which his mate had performed in the like occupation. Ennor did not eat his "crib." They had both sat down to "crib" at the 100 feet level, to which they had descended from the 75 feet level, and to the latter level they ascended again by ladders after meal time, at about half-past eight in the evening. The ascent then was only 25 feet. After this Ennor was in his stope, but there is no evidence that he actually did any work, except that Allsopp says, "I went in there to assist him, as he wasn't getting on too well." At this time Allsopp had occasion to hand Ennor a piece of light timber, 4ft. x 3in., "a bit of gimlet wood." He could not hold it though he tried, and shortly afterwards rolled over. His mate caught him, observed that he was paralysed, and got him to the surface. He was taken home, and died next day under the circumstances described by the doctor.

I am unable to say that these facts afford any proof that the injury to the deceased was caused by accident. It is not possible to say that the cerebral hemorrhage was brought on by "an unlooked-for mishap or an untoward event." There is no evidence that the artery which undoubtedly gave way did so under any strain arising out of the ordinary work. The facts are not like those in the case of *Clover, Clayton & Co. Ltd.* v. *Hughes* (1), where the arbitrator, whose finding was binding on appeal, had found that the death was caused by a strain "arising out of the ordinary work of the deceased operating upon a condition of body which

(1) (1910) A.C., 242.

was such as to render the strain fatal." Not only is there no such finding here as bound the Supreme Court or this Court, but the essential that the death was caused by a strain is not established, for there is nothing to show that the cerebral hemorrhage would not have occurred as early had Ennor not done the little work he did. His condition on the first and second shifts points strongly to the conclusion that he was ill, and that the rupture of the artery was impending, even before he entered the mine on the 19th. I think, therefore, that it is not established that the death was due to an accident. Nor do I think that under the circumstances it can be said that the accident arose out of the employment.

The criterion which we are bound to adopt is stated by the present Lord Chancellor in the *Clover, Clayton & Co. Ltd. Case* (1) in these words, at p. 247 :—"It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and the employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?" Applying this criterion, and looking at the case broadly, I am unable to say that the illness and the consequent death did not come from the disease alone, but that the employment contributed to it materially. So far as can be seen, it seems probable that the illness and death would have come "all the same" whatever Ennor had been doing.

In my judgment the plaintiff has not discharged the onus which lay upon her, but has left the matter in such a state that it is as consistent with the evidence that the death was not, as that it was, caused by an accident arising out of the employment.

However strongly, then, we may sympathize with the plaintiff, our sympathy must not lead us to sanction her being compensated

(1) (1910) A.C., 242, at p. 247.

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

O'Connor J.

out of other people's money where the legal right to compensation is not established. I agree that the appeal must be allowed.

O'CONNOR J. I am of the same opinion. But as I differ from the view of the learned Judges in the Court below I shall shortly state my reasons. Sec. 6 of the *Workers' Compensation Act* 1902, on which the claim is founded, is identical in its terms with a corresponding section of the English *Workmen's Compensation Act*, which has been the subject of many decisions in England. The interpretation of the section, in so far as its interpretation is necessary in this case, has been authoritatively settled by the latest decision, *Clover, Clayton & Co. Ltd.* v. *Hughes* (1). That case seems to definitely establish the following propositions—the personal injury complained of must have been caused by an accident, and the accident must have arisen out of the employment and in the course of the employment. The following definition of "accident," given by Lord *Macnaghten* in *Fenton* v. *J. Thorley & Co. Ltd.* (2), is that now generally adopted. The learned Lord Justice says:—"I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

Any "physiological injury," to use Lord *M'Laren's* expression in *Stewart* v. *Wilsons and Clyde Coal Co. Ltd.* (3), may amount to an accident—the strain of a muscle, a rupture, the breaking of an artery. Where the workman enters upon his work in a condition of good health the question whether the accident arose out of the employment involves generally a simple issue. But where he enters upon his work with health grievously impaired, where, as in the *Clover, Clayton & Co. Case* (4), and in the present case, he enters upon his work with an arterial system so enfeebled by disease as to be subject to the breaking of some part of it at any time, the inquiry becomes more difficult. Under those circumstances, as Lord *Loreburn* L.C. points out, although the workman's condition of health does not prevent him from recovering, but the tribunal investigating the claim is bound to take an addi-

(1) (1910) A.C., 242.
(2) (1903) A.C., 443, at p. 448.
(3) 5 F., 120.
(4) (1910) A.C., 242, at p. 247.

tional factor into consideration, which he explains as follows:— "It may be said, and was said, that if the Act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?"

Those words of the Lord Chancellor put the issue which must arise in this case very distinctly. There can be no doubt that the deceased entered on his employment with an arterial system so grievously diseased that the rupture of an artery might happen at any time. His work was only ordinary light mining work. He was exposed to no undue strain, and he appears to have done, as compared with his fellow worker, a comparatively slight amount of work up to the time of his seizure. It is conceded that while he was so engaged, and in the course of his work, he did suffer the rupture of a blood vessel, and that from that he died.

Now, there are two ways of looking at those facts. If the rupture was brought about mainly by the disease, though hastened to a slight extent by the work, then the rupture was not an accident within Lord *Macnaghten's* definition. If, on the other hand, the disease alone would not have caused it, but it was contributed to materially by the work, then that was an accident within the meaning of the Act, and one arising out of the employment. That is the case which the plaintiffs attempted to establish, but, on looking at the evidence—and I need not refer to it in detail as the facts have been already fully dealt with by

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

O'Connor J.

both my learned brothers—it appears to me impossible to say that the rupture of the artery was brought about in any material degree by the work which the deceased was doing, on the occasion when the attack seized him. If the case had been established as alleged by the plaintiffs undoubtedly they must have succeeded; but it seems to me that, although this legal position in unanswerable, and justified by the section, they failed to establish the fact upon which their whole case depended, namely, that the work materially contributed to the rupture of the blood vessel, which was the immediate cause of the workman's death. Now, in these cases, as in all other cases where a plaintiff must establish a certain state of facts to entitle him to recover, the onus of proving those facts rests upon him. Where, as in most cases of this kind, the evidence is circumstantial, and the issue must be established by inferences, then the plaintiff must give evidence of facts from which the necessary inferences can reasonably be drawn. If he leaves matters in doubt he must fail. The law as to the onus of proof in such cases is laid down in the case referred to by my brother *Barton*, *Pomfret* v. *Lancashire & Yorkshire Railway Co.* (4). I do not wish to repeat the passage which he has quoted, but merely to say that it states in a concise form the burden of proof which the plaintiff in a case of this sort takes upon himself.

As I view the evidence, the plaintiffs have been unable to establish any facts which lead reasonably to the inference that the rupture was caused or materially brought about by the work rather than by the ordinary progress of long-seated disease, and, having left their case in that condition of uncertainty, it appears to me that they must fail.

The learned Judges in the Court below would, if they had followed their own view of the facts, have come to the same conclusion. They expressed the opinion that, if they had been called upon to decide the matter, they would have found it impossible to say whether the rupture was caused by the work which the deceased was doing, or whether it was merely the natural result of the disease from which the deceased was suffering. But they felt themselves coerced into another conclusion, because they

(1) (1903) 2 K.B., 718, at p. 721.

thought they were bound *primâ facie* to regard the decision of the magistrate in the Local Court as right. He must be taken to have found in the plaintiffs' favour all the facts necessary to entitle them to recover, and they held themselves bound to follow that decision as *primâ facie* right, unless it was shown to be demonstrably wrong. In that the learned Judges, it appears to me, fell into an error. I entirely concur in the observations of the learned Chief Justice as to the duty of a Court of Appeal in investigating facts coming up from the Local Court in a case of this kind. I do not wish to repeat them.

But there is another view of the matter in which this error appears equally clearly. In every case there is a certain quantum of fact which a plaintiff must establish before he is in law entitled to succeed. He must give evidence of facts from which the inference he seeks to draw can be legally drawn. The question whether he has or has not given in evidence that sufficient quantum of facts is a question of law which a Court of Appeal must inquire into and determine for itself. If it were not so, a Court of Appeal could never investigate the question whether there was as a matter of law sufficient evidence to justify the decision of the Court below on a question of fact. With regard therefore to every appeal on a question of fact there must first arise a question of law, namely, whether there was evidence upon which the Court below could legally come to the conclusion at which it arrived. Where, as in this case, the onus of proof is on the plaintiffs, and it is objected that their evidence of facts is as fairly open to an inference against their case as it is to an inference in favour of their case, that is a question of law in the determination of which the Court is bound to decide for itself upon its own independent view of the facts. In this case the learned Judges were bound, in my opinion, to investigate and determine for themselves whether the plaintiffs had given evidence from which an inference could reasonably be drawn that they had brought their case within the section under which the claim was made. As they did not take that course, but followed findings of fact arrived at by the Local Court, which, for the reasons I have stated, were in my opinion erroneous, their judg-

H. C. OF A. 1910.

FEDERAL GOLD MINE LTD. v. ENNOR.

ment must be set aside, this appeal must be allowed, and judgment must be entered for appellants.

Appeal allowed. Judgment entered for appellants.

Solicitors, for appellants, *Haynes, Robinson & Cox*, for *Keenan & Randall.*

Solicitor, for respondents, *Mayhall.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

KINGSMILL AND ANOTHER . . . APPELLANTS; DEFENDANTS,

AND

LYNE . . . . . RESPONDENT. PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1910.

PERTH, *October* 21, 25, 26.

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

Trust—Partnership—Sale by mortgagee of partnership property — Purchase by member of partnership—Uberrima fides.

K., M. and L. were partners in the pastoral industry, and had mortgaged their land to the Bank of New South Wales as collateral security for a cash credit in a current account secured by a joint and several guarantee. The bank closed the account and demanded payment of the advances. L. communicated with K. and M., and offered to pay one-third of the overdraft if they would each pay one-third, but they refused. The property was advertised for sale by auction under the mortgage. K. and M. purchased the land. L. sought a declaration that they must be taken to have purchased as trustees for the partnership.