*charged except so far as it discharged the direction to the defendants Nissen and Pallin to repay the sum of* £42 15*s. paid by them in respect of certain shares. Judgment of àBeckett J. restored with this exception. Plaintiffs' appeal to the Supreme Court dismissed with costs against the next friend. Deposit of* £25 *to be paid to defendants towards such costs. Defendants to have their costs out of the estate so far as not recoverable from next friend. Respondents' next friend to pay costs of appeal. Appellants to have them out of the estate so far as not recoverable from him.*

Solicitor, for the appellants, *J. Woolf.*
Solicitors, for the respondents, *R. E. Lewis & Son.*

B. L.

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[HIGH COURT OF AUSTRALIA.]

FOOTSCRAY QUARRIES PROPRIETARY LIMITED . . . . . } APPELLANTS;
DEFENDANTS,

AND

NICHOLLS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.



*Negligence—Employer and employé—Evidence—Employers and Employés Act* 1890 (*Vict.*), (*No.* 1087), *sec.* 38.

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Sec. 38 of the *Employers and Employés Act* 1890 provides that where personal injury is caused to a workman (*inter alia*)—"(2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or (4) by reason of the act or omission of any person in the service of the employer done or made . . . in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf;" —the workman or his representative "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

In an action under that section by the representative of a man who was killed by the explosion of a charge during blasting operations at a quarry,

*Held*, on the evidence, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that the plaintiff was properly nonsuited.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

Amy Auburn Nicholls, the widow and administratrix of Charles Ernest Nicholls, deceased, brought an action in the County Court against the Footscray Quarries Proprietary Limited claiming damages in respect of the death of her husband which she alleged was caused (*inter alia*):—(*b*) by reason of the negligence of a person in the defendants' service who had superintendence entrusted to him whilst in the exercise of such superintendence; (*c*) by reason of the negligence of a person in the defendants' service to whose orders or directions C. E. Nicholls at the time he sustained injury and was killed was bound to conform and did conform and such injury and death resulted from his having so conformed; (*d*) by reason of the Act or omission of a person in the defendants' service done or made in obedience to the defendants' rules or by-laws or in obedience to particular instructions given by a person delegated with the defendants' authority in that behalf.

At the conclusion of the plaintiff's case the Judge of the County Court nonsuited the plaintiff, and he subsequently refused an application by the plaintiff for a new trial. On appeal, the Full Court of the Supreme Court by a majority (*Hood* and

*Cussen* JJ., *Madden* C.J. dissenting) allowed the appeal and ordered a new trial.

From that decision the defendants now by leave appealed to the High Court.

The facts are fully stated in the judgments hereunder, where also the nature of the arguments appear.

*Schutt*, for the appellants.

Dr. *McInerney* (with him T. M. *McInerney*), for the respondent.

The following authorities were referred to during argument:—*Lothian* v. *Rickards* (1); *Metcalf* v. *Great Boulder Proprietary Gold Mines Ltd.* (2); *Dixon* v. *Bell* (3); *David* v. *Britannic Merthyr Coal Co.* (4).

*Cur. adv. vult.*

GRIFFITH C.J. This action was brought by the respondent as administratrix of her deceased husband, who was killed by an accident at the appellants' quarry on 1st September 1910. It is founded upon the *Employers and Employés Act* 1890. It has not been contended before us that at common law the action could be maintained. The effect of that Act, as is well known, is to exclude the common law defence of common employment in certain specified cases and in no others.

Before referring to the provisions of the Act which are relied upon by the plaintiff, I will briefly state the facts of the case as they appear upon the plaintiff's evidence, upon which she was non-suited.

The deceased man, Nicholls, was one of a party who were working at the defendants' quarry under the general supervision of one Whitton, who seems to have been a working foreman. On 1st September there was a face on the quarry about 40 feet high which was being worked backwards. On the previous day a hole about 12 feet deep had been drilled on the top of the face five feet from the edge, with the intention, of course, of blasting

(1) 12 C.L.R., 165, at p. 176.
(2) 3 C.L.R., 543.
(3) 5 M. & S., 198.
(4) (1909) 2 K.B., 146.

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out the face of the quarry. At about a quarter to eight in the morning the party started work. One of them, McDonough, who described himself as a "powder monkey" and was in charge of the blasting work, charged the big hole on the top of the face, and another man, McKay, drilled five small holes, three of which were on the floor of the quarry and two about eight or ten feet up the face. These were called "poppers." It was originally intended by Whitton to fire all the holes at once. Afterwards he changed his mind and postponed the firing of the big hole until twelve o'clock. McKay was then sent up to the top of the face to drill another hole with a compressed air machine, and had to take up a hose for that purpose. The small holes would explode about four minutes, and the big hole about eight or ten minutes, after being fired. The small holes having been charged, McDonough at about nine o'clock called out "Clear out tools," which was the signal for the men working near the bottom of the face to get out of danger. Then he lit the fuses of three of the small holes and called out "Fire." Just before or just after doing that—he says before—he looked up to the top of the face and saw McKay standing about ten or fifteen feet from the big hole. The place he was in was one of danger, and McDonough waved his hand to him to go back. McDonough then, as he says, proceeded to light the fuses of the three small holes and called out "Fire." McKay said that before McDonough called out "Fire," he, McKay, called out to McDonough "Will I light this hole, Jack?" that McDonough took his hand out of his pocket with a box of matches in it, and waved towards the big hole; that he, McKay, took that to be an instruction to light the big hole, and lit it accordingly. After the holes lit by McDonough had exploded he called out "All is over," which is understood to be the signal that the men might safely return to work at the face. They, accordingly, all went back under the face. Two minutes afterwards the charge in the big hole exploded and Nicholls was killed.

That was the plaintiff's evidence and, of course, as the non-suit was granted, none was given by the defendants. The plaintiff must succeed on the strength of her own case and not on benevolent conjecture. There is no doubt on this evidence

that the cause of the accident was McKay's mistake in taking McDonough's waving of his hand, which was intended to be a warning to go back, as a direction to light the fuse of the big hole. It appears that it was not McKay's duty to light fuses at all, except when directed by McDonough. He had on a previous occasion or occasions been directed to fire two holes, and had done so, but had never received directions by signal. As to the box of matches, which seems to have been relied upon as part of the signal to light the fuse, that is at best ambiguous. One explanation is that McDonough was going to light his pipe in order to smoke while waiting for the explosions. The other explanation is, if his evidence that he waved his hand before lighting the fuses of the small holes is correct, that he naturally would have a matchbox in his hand in order to light them. It must be remembered that McKay was speaking downwards from a height of 40 feet when he says he called out to McDonough, and we all know the difficulty there sometimes is in making the voice carry directly downwards. Upon this version of the facts it is quite clear that it did not enter into McDonough's mind that the big hole had been fired. If it had, it is quite certain that he would not himself have gone back and stood in danger under the face. The learned Judge who heard the case nonsuited the plaintiff. In the Supreme Court the learned Chief Justice thought that the plaintiff was rightly nonsuited, but the majority of the Court were of a different opinion.

These being the facts I will now refer to the provisions of the Statute. By sec. 38 of the Act a workman or his representative is entitled to compensation, notwithstanding what would have previously been a good defence, *i.e.*, common employment, where injury is caused to the workman in one of five cases. The first is immaterial. The second is where the injury is caused "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence." The words "person who has superintendence entrusted to him" are defined by sec. 37 as meaning "a person whose sole or principal duty is that of superintendence." It is contended, first, that Whitton was a person who had superintendence entrusted to him, and I will assume that that is so. Then

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it is said that Whitton was guilty of negligence, the negligence imputed to him and accepted by the majority of the Judges being that, having changed his mind, that is, having determined to postpone the firing of the big hole from nine o'clock to twelve o'clock, he did not have the hole covered up with timber or spalls so as to prevent any casual wanderer from firing it. It is said that, when a hole is prepared for firing and is not intended to be fired immediately, it should always be covered up because there is always a possibility that it may be fired. It is the duty of a man in charge of such operations to take precautions against dangers which may reasonably be expected to occur. Was it reasonable under the circumstances to anticipate that the hole might be fired by some stranger? In a street or thoroughfare, or in a place where sparks were likely to fall upon the fuse such a risk might reasonably have been anticipated, but here the hole was on the top of a quarry and the only man near it—or likely to be near it—was McKay, who had nothing to do with the firing, but had been sent up there to drill another hole. Why, under these circumstances, Whitton should have had the hole covered up for the three hours and then uncovered I fail to see, and I am unable to see any negligence in his not doing so. Moreover, if that was negligence, it is quite clear that it was not the cause of the accident. It was faintly suggested by *Dr. McInerney* that Whitton was negligent in another respect, that is, in changing his mind several times. I am quite unable to appreciate that argument. So far, then, as the case depends on the negligence of Whitton the case fails, and that is the only negligence to which the majority in the Supreme Court adverted.

Then it was contended that McDonough was negligent, and the negligence imputed to him is that waving his hand to McKay was an ambiguous act. It might have been a direction to McKay to fire the big hole, or it might have been—as it was—a warning to him to go out of danger. It is said that as it was ambiguous, the jury might have found that McDonough was negligent because he ought to have known that McKay might reasonably take it as a direction to fire the hole. That must depend on the circumstances of the case. McKay had nothing to do with firing holes except when directed. He had twice done it under direction

given, not by signal, but by word of mouth. The waving of the hand to a man who knows that danger is near is a gesture which has, I suppose, been known from the earliest historical times, and probably long before, as the most natural way of giving warning. Under these circumstances can it be imputed to McDonough that he ought to have known that McKay might reasonably have interpreted his warning as a direction to fire the big hole? The analogy is put of a conversation. If a man uses language which is capable of being understood in two senses, and his interlocutor accepts what he says in one of those senses, the former may be bound. But the inference must be one that may reasonably be drawn from what he says. I, therefore, fail to see that the waving of his hand by McDonough could reasonably be interpreted to be a direction to fire the hole. Another answer is that McDonough was not a person having any superintendence entrusted to him, that is to say, he was not a person whose sole or principal duty was that of superintendence. From the evidence it appears that his duty was when a hole was drilled to prepare it for firing, that is, to enlarge the bottom of it and charge it, and finally to fire it or direct somebody else to fire it. So that he was not a person whose sole or principal duty was that of superintendance. That argument, therefore, fails.

The next case provided for by sec. 38 of the Act is where injury is caused "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed." That, at most, can only be put on the ground of negligence in McDonough in calling the men back to work, or telling them they might safely return. Before dealing with it I will mention the fourth case. It is where the injury is caused "by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf." Now I will assume that McDonough was a person to whose directions Nicholls was bound to conform by coming back to work, or that these were particular instructions to that

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effect given by McDonough and that McDonough was a person delegated with the authority of the employer in that behalf. I have great doubt whether either of those propositions can be sustained, but assuming that they can, the foundation in either of those instances is negligence—negligence in calling the men back to work. The negligence suggested in this case is the failure to take reasonable precautions to protect the men. If McDonough had reasonable ground for thinking that the big hole had been fired, of course he ought not to have called the men back to work until it had exploded. But the real contention is that McDonough ought to have known that McKay might have thought that he had been told to fire the hole, that, therefore, he had a duty to inquire whether McKay did think so, and that having failed to make the inquiry he was guilty of negligence. On that the learned Chief Justice made these observations :—" It would be going a long way to impute to McDonough the duty of imagining that something quite out of the ordinary course of practice at the quarry had been occurring. He had no reason to suppose that there was the least danger when he sent them back to work." I entirely agree. Indeed, the argument seems to me fantastic. It was not adverted to by the other learned Judges. If such an argument were to be adopted it seems to me the real measure of the duty sought to be imposed would be that described by *Bowen* L.J. in the well-known case of *Thomas* v. *Quartermaine* (1) as " the benevolence of a jury at the expense of the pockets of other people." While we may sympathize with the plaintiff, and regret that the law of Victoria is not in the same position as in other States, we must remember that we are bound to administer the law as we find it. I am totally unable to find any evidence that any person for whose acts the defendants were responsible was guilty of any negligence, and I therefore think that the appeal should be allowed.

BARTON J. read the following judgment:—It is plain, and is practically conceded, that the appellants are under no liability at common law, as the case is clearly within the doctrine of common employment. The respondent's claim really rests on sec. 38 of the

(1) 18 Q.B.D., 685, at p. 693.

*Employers and Employés Act* 1890. The question whether the nonsuit was right depends on what passed between McDonough and McKay. For, even conceding that it was negligence on the part of Whitton to leave the "big hole" unfired and unprotected from 9 to 10 o'clock, there is positively no evidence that the injury resulted from any such negligence. Whitton's conduct then cannot avail the plaintiff. But Whitton was the only person having superintendence—that is, he was the only person whose sole or principal duty was that of superintendence. McDonough was the powder monkey. His primary duty was to charge and fire holes that had been bored. For that purpose he had control of the explosives. Before firing any hole it was his duty to give warning to the men "clear tools"—as an order to collect their tools—and "fire"—to announce the immediate intention to fire a charge, and that the workmen must withdraw to safety. When the explosions were over it was the practice for the powder monkey to call out "all over," as an instruction to the men that they might safely return to work. It is plain that McDonough was not a person to whom superintendence had been entrusted. Hence, even if McDonough was negligent, the case is not within sub-sec. 2 of sec. 38. As to sub-sec. 3, assuming that McDonough was a person to whose orders Nicholls was at the time of the injury bound to conform, it is said that Nicholls' death was caused by his returning to his work at the face when McDonough had called out "all over." But then there is no evidence that the call was negligently given. The question of such negligence depends on the facts known to McDonough when he made the call. He had himself fired the three "pops" that Whitton had told him to fire. He had himself received Whitton's order that the "big hole" was not to be fired until dinner time. He could not have had any idea that McKay had lighted the "big hole." He had, indeed, every reason to believe that McKay had left the "big hole" alone, as he had no business to touch it without distinct orders. McDonough could not suppose that McKay would interpret his wave of the arm—even if he had a box of matches in his hand—as an order to light the fuse. McDonough was attending to the firing himself. Signals had never been used as orders to fire. McKay himself says he never fired a shot pursuant to any signal.

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When, therefore, McDonough called out "all over," he not only believed, but was perfectly justified in believing, that no holes had been lighted save the "three pops," which he himself had fired, and the explosions of which he had heard. Under these circumstances it cannot be said that McDonough's call of "all over" was negligently given. The case, therefore, is not within sub-sec. 3.

As to sub-sec. 4, it is said that the injury was caused by the act of a person (McKay) in the service of the employers done in obedience to particular instructions given by a person (McDonough) delegated with the authority of the employers "in that behalf." Assuming McDonough to have been such a "person," the plaintiff has not shown that McKay's act in firing the big hole was done in obedience to any instructions given by McDonough. It is clear that McKay misinterpreted the wave of McDonough's arm. On the plaintiff's case a jury could not reasonably conclude that McDonough had ordered McKay to fire the "big hole." The question here is not what McKay thought, but what McDonough did. If a jury thought that McKay did not act unreasonably in supposing that McDonough had ordered him to fire the hole, that would not justify a finding under sub-sec. 4. It would be necessary for them to be satisfied that McDonough did give such an order. On McDonough's evidence it is not possible to come to such a conclusion, and McKay's evidence only shows the mistaken though honest interpretation he placed upon a gesture which was certainly no order to light the fuse. The case, therefore, does not fall within sub-sec. 4.

Neither at law nor under the Statute did the plaintiff, in my opinion, make out a case to go to the jury.

I regret to have to come to such a conclusion. The plaintiff's position is one of hardship—due to the absence of a *Workers' Compensation Act*—but as the law stands she is not entitled to succeed upon the facts in evidence.

ISAACS J. read the following judgment:—I am compelled to take the contrary view. In my opinion, the judgments of *Hood* J. and *Cussen* J. were correct, that this case ought not to have

been withdrawn from the jury, though I would somewhat modify their reasons.

The first essential, having regard to the line of argument, in order to arrive at a proper conclusion is to eliminate from consideration all question of what was Whitton's intention or McDonough's intention with respect to the time of firing the big hole. If Whitton had adhered to his original design of firing all the holes at once, and if McDonough, when giving the signal, had consequently intended to carry out the original design, it is conceded there would have been at least a case to go to the jury. If not it must be because the actual intention made no difference, inasmuch as notwithstanding the conceded intention to fire the hole, the silent signal given was not in itself calculated to convey that intention, and so there was in fact no direction to McKay to do so. The change of intention was secret, that is, confined to Whitton and McDonough, and there was nothing but the actual signal to interpret by the light of surrounding circumstances. I therefore lay aside as useless and misleading the inner and undisclosed intentions of Whitton and McDonough to delay firing, and I look only to their conduct as manifested to those around them. It is trite law that whatever a man's real intention may be, if he so conducts himself that a reasonable man might honestly believe he had some other intention, and does honestly believe and act accordingly, the first is as much bound towards those whom his conduct is intended or calculated to affect, as if his understood intention were his real one. And Nicholls was one of the persons intended or calculated to be affected by the conduct of Whitton and McDonough. I couple them, because whatever McDonough did, Whitton superintended, and if the case is brought under sub-sec. 3 it is necessarily brought also under sub-sec. 2.

Now, McDonough, by the use of the usual phrase, "all is over," ordered Nicholls back to work. This was an order or direction to which he was bound to conform, and did conform, and which led to his death. As I view the facts, this order might well be regarded by a jury as negligently given; but I shall deal with it as being in itself either negligent or non-negligent.

If Whitton had kept to his first idea, and McDonough had

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expressly told McKay to fire the big hole, that would not have been negligent. They had a perfect right to do so, but they would have been bound to take care not to order the men back before seeing the hole had exploded. If not keeping to the first idea, Whitton and McDonough so conducted themselves as to give what in the circumstances might be and was understood and acted on as an order to fire the hole, they and—as the fellow-servant doctrine has no application—their employer are in the same position as if the order were express. No one can be heard to say: "True it is I conducted myself so that a reasonable man might and did understand me in one particular way, but I am not to be taken to know how a reasonable man is expected to act or bound to ascertain how he did act." Such a doctrine would strike at the root of most of the relations of life, and any argument built on it rests, in my opinion, upon a foundation of sand. Regarding it as from the standpoint of negligence, I apprehend a duty lay upon those whom the employer placed in command to observe care in the manner of communicating directions connected with so hazardous an undertaking, and when McDonough, instead of sending up or going up, or calling McKay down, contented himself with a hasty act open to misconstruction, it can, I think, scarcely be said it is not open to a jury to declare there was not sufficient care taken to make the order clear, and to entitle Whitton and McDonough to rely on it as being clear.

So that upon one condition there is room for a finding of negligence, either in the original direction given to McKay, or in the subsequent order without inquiry to Nicholls to resume work.

That condition is, that in the circumstances McKay might reasonably accept the dumb motion of McDonough as a direction to fire the big hole.

First let us see what McKay's position was. He had assisted to prepare four of the holes that morning. While he was boring them he knew that McDonough was loading the big hole on top. He saw that hole on top, with some inches of fuse protruding, and with a piece of gelignite attached ready for lighting. It needed only a match to be applied. He knew it was the practice never—so far as we know—departed from, to fire all prepared holes together. He knew that when McDonough fired those on

the bottom some one else did the firing above. He had no suspicion that any change of intention had taken place. No doubt he had no right to act without specific direction; but the condition of the top hole, with its fuse and gelignite, was indicative that the ordinary practice was intended, and it invited enquiry. This because it was, as is recognized, a most dangerous thing at any time to leave a hole in that state unguarded; and more especially when an explosion from below was about to take place. Therefore he called out "Shall I light this hole Jack?" McDonough says he did not hear the question. A jury might think in the circumstances he ought to have taken care to find out what McKay said. But many circumstances exist which would entitle a jury to disbelieve him—if that were necessary. McKay was within 35 feet of him laterally—no great distance—even though 40 feet higher. McKay heard McDonough cry "fire," and McDonough must have thought he did or could hear him, because McKay's position was admittedly perilous, and to fire the bottom holes without warning him would have been criminal neglect. McKay, when he appeared to McDonough, was, from McKay's outlook, 15 feet on the right of the big hole. Probably underneath that hole were the ones to be fired. McDonough, as a response to McKay, put his hand in his pocket, pulled out a box of matches and pointed towards the hole. What was McKay to understand by that significant pointer? Was he to understand that McDonough was about to have a quiet smoke, or that matches were not to be used by McKay, but were to be used by McDonough. In short, what would any reasonable person in McKay's situation naturally think. Is that not a fair question for a jury? If McDonough wished McKay to understand he was simply to move out of danger, he would rather have pointed the other way; he would probably not have used the match box as an indicator which McKay was near enough to distinguish, and, what is very material, he would probably have called out, just as he called out "fire." As *Day* J. said in *Millward* v. *Midland Railway Co.* (1) an order may be implied from the circumstances.

All these circumstances are material, and, on the face of the

(1) 14 Q.B.D., 68, at p. 71.

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whole of the occurrences, and though I feel the weight of the contrary opinions entertained by my learned brothers, these facts press so strongly upon my mind as to leave no doubt that the case is a proper one for the jury, and that the judgment of the majority of the Full Court of Victoria ought not to be disturbed.

*Appeal allowed. Judgment appealed from discharged. Appeal from the County Court dismissed with costs.*

Solicitor, for the appellants, *A. Phillips.*

Solicitors, for the respondent, *McInerney, McInerney & Wingrove.*

B. L.

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[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX, SYDNEY . . . } APPELLANT;

AND

HINDMARSH AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM DISTRICT COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *May* 15, 17.

Griffith C.J., Barton and Isaacs JJ.

*Land Tax—Deductions—Annuity—Uncertain sum—Land Tax Assessment Act* 1910 (*No.* 22 *of* 1910), *sec.* 34.

A testator who died in 1908 directed his trustees to pay to the guardian of his children "a fair and reasonable allowance for their maintenance education and support not exceeding in the whole the annual sum of £200"—

*Held*, by *Barton* and *Isaacs* JJ. (*Griffith* C.J. dissenting) that this provision for the children's maintenance, &c., was not an "annuity" within the