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of the Chief Justice, and I concur in it and in the reasons given for it.

RICH J. I agree that the appeal should be dismissed. It is unnecessary to express any opinion as to the applicability of the doctrine of *Rylands* v. *Fletcher* (1), as I hold that the defendants are not responsible for the acts of McTavish.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. T. Keane.*

Solicitor, for the respondents, *Guinness*, Crown Solicitor for Victoria.

B. L.

(1) L.R. 3 H.L., 330.

Cons/Foll *Commonwealth* v *Connors* 86 ALR 247

Foll *Tracy Village Sports & Social Club* v *Walker* (1992) 111 FLR 32

Dist *HIH Casualty & General Ins Ltd* v *Territory Ins Office* (1998) 120 NTR 24

Foll *Entrad Tyres Pty Ltd* v *Hollingsworth* 83 FLR 1

Refd to *Roycroft & Telstra Corporation, Re* (1996) 44 ALD 732

Dist *HIH Casualty & General Ins Ltd* v *Territory Ins Office* (1998) 120 NTR 24

Refd to *Woodruffe* v *Northern Territory of Aust* (2000) 10 NTLR 52

Appl *Brady & Australain National Railways Commission, Re* (1987) 13 ALD 187

Appl *Telstra Corporation* v *Roycroft* (1997) 47 ALD 671

Refd to *Harbutt & Dept of Defence, Re* (1998) 51 ALD 159

Appl *McCarthy & Comcare, Re* (2002) 66 ALD 751

Appl *Willis & ATC, Re* 19 ALD 665

Foll *Remington Products Inc, Re application by* 18 IPR 251

Appl *Entrad Tyres Pty Ltd* v *Hollingsworth* (1985) 62 ACTR 43

[HIGH COURT OF AUSTRALIA.]

MURRAY . . . . . APPELLANT;
PLAINTIFF,

AND

BAXTER AND OTHERS. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 2, 3, 15.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Employer and Workman—Compensation—Delay in bringing proceedings—"Mistake" — "Other reasonable cause" — Workmen's Compensation Act 1910 (*N.S.W.*) (*No.* 10 *of* 1910), *sec.* 12.

Sec. 12 of the *Workmen's Compensation Act* 1910 provides that "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable . . . unless the proceedings for recovering compensation

with respect to such accident have been commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: Provided that . . . (*b*) the failure to commence proceedings within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from New South Wales, or other reasonable cause."

Held, by *Isaacs* and *Gavan Duffy* JJ. (*Griffith* C.J. dissenting), (1) that where proceedings for compensation have not been commenced for a longer period than the six months above specified, the period in respect of which an excuse is required is that period of six months, and that any delay after the expiration of that period and before the commencement of proceedings cannot be taken into consideration; (2) that the "mistake" referred to in that section includes a mistake of law, or of mixed law and fact, as well as a mistake of fact, and a mistake having been established no question of the reasonableness of that mistake arises.

Decision of the Supreme Court of New South Wales: *Murray* v. *Baxter*, 13 S.R. (N.S.W.), 602, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was on 10th September 1913 instituted in the District Court at Sydney by Emily Murray, administratrix of the estate of James Murray, deceased, against Sarah Elenor Baxter, Harold Baxter and Alexander Watt, executrix and executors of James Baxter, deceased, in which the plaintiff alleged that James Murray had been a workman within the meaning of the *Workmen's Compensation Act* 1910, and as such had been employed by James Baxter in an employment to which that Act applied; that in the course of such employment Murray had met with an accident arising out of such employment which resulted in his death; and that the dependents of Murray were at the time of his death wholly dependent on his earnings and were then resident in New South Wales whereby the plaintiff, as such administratrix, became and was entitled to compensation from the defendants. The plaintiff claimed £400. The accident in question happened on 1st May 1912 and James Murray died on the same day.

One of the defences taken was that proceedings for the recovery of compensation were not taken within six months after the death of James Murray. The District Court Judge found that there was a reasonable excuse for the delay in

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commencing proceedings, and he found a verdict for the plaintiff for the amount claimed.

On appeal the Full Court set aside the verdict, and entered a verdict for the defendants: *Murray* v. *Baxter* (1).

From that decision the plaintiff now appealed to the High Court.

The material facts appear in the judgments hereunder.

Bonney, for the appellant.

Brissenden, for the respondents.

During argument reference was made to *Lowe* v. *M. Myers & Sons* (2); *Roles* v. *Pascall & Sons* (3); *Egerton* v. *Moore* (4); *Attorney-General for New South Wales* v. *Metcalfe* (5); *Wright* v. *John Bagnall & Sons Ltd.* (6); *Ravenga* v. *Mackintosh* (7); *Roberts* v. *Crystal Palace Football Co. Ltd.* (8); *Rendall* v. *Hill's Dry Docks and Engineering Co.* (9).

Cur. adv. vult.

Dec. 15.

GRIFFITH C.J. read the following judgment:—This case raises for decision an interesting question as to the meaning of the proviso to sec. 12 of the *Workmen's Compensation Act* 1910, which is in the same terms as sec. 2 of the English Act of 1906. The appellant, who is the widow of a workman who died on 1st May 1912 in consequence of an accident which occurred on the same day, arising out of and in the course of his employment by the respondents' testator, did not commence proceedings within the prescribed limit of six months from the time of death, and the question is whether she has established that her failure to do so was occasioned by mistake or other reasonable cause. The facts relied upon to establish this conclusion are that in consequence of two conversations, one with the employer himself and the other with one of his personal representatives, after her husband's

(1) 13 S.R. (N.S.W.), 602.
(2) (1906) 2 K.B., 265, at p. 271.
(3) (1911) 1 K.B., 982.
(4) (1912) 2 K.B., 308.
(5) 1 C.L.R., 421, at p. 427.
(6) (1900) 2 Q.B., 240.
(7) 2 B. & C., 693.
(8) 3 Butterworth's W.C.C., 51.
(9) (1900) 2 Q.B., 245.

death, she was led to understand that her right to the maximum amount of compensation would not be disputed, and that this state of things continued for about five months after the death, that she was then informed by her solicitor that she had no claim, that he gave a reason for this opinion which she did not understand, that she then said she would go further into the matter, but he said that he would not go on with it. She did not in fact take any further steps until thirteen months after the death, when she was told by a friend that he thought she had a good chance of success. On 30th July 1913 she consulted her present solicitors, but did not commence proceedings until 10th September.

Sec. 12 of the Act provides that proceedings for recovery of compensation shall not be maintainable unless notice of the accident is given "as soon as practicable" after it happens, and before the workman voluntarily leaves the employment, and unless the proceedings for recovering compensation have been commenced within six months from the accident, or, in the case of death, within six months from the death. Then follow two provisoes: (*a*) that "the want of . . . notice shall not be a bar if it is found in the proceedings that the employer is not or would not, if a notice . . . were then given . . . , be prejudiced in his defence by the want" (of notice), ". . . or that such want . . . was occasioned by mistake, absence from New South Wales, or other reasonable cause;" and (*b*) that "the failure to commence proceedings within the period above specified" shall not be a bar if it is found that "the failure" was occasioned by "mistake, absence from New South Wales, or other reasonable cause." The words denoting the possible excuses are the same in both cases.

The appellant contends that the facts relied upon by her are sufficient to establish either a case of mistake or a case of reasonable cause, or both, which occasioned the failure to commence proceedings within the six months, and that, that period having once elapsed without her right being barred, she is not subject to any further limitation other than such as may be found in any general Statute of Limitations, if there is any such Statute applicable to the case, which is, at best, open to grave doubt.

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This argument is founded upon a supposed literal reading of the words "failure to commence proceedings within the period above specified." It is contended that at the expiration of that period the failure is *eo instanti* complete, so that inaction after the six months is not within the words "the failure" which are the subject of the succeeding sentence. In each proviso three grounds of excuse for want of notice are given, one of which is absence from New South Wales. It can hardly be contended that if after the accident or the death the workman or his representative is absent from New South Wales for six months, notice is excused altogether. Yet in that case the words of proviso (*a*) would have been literally complied with, since the words "want of notice," as used in the enacting part, mean failure or omission to give notice as soon as practicable. In *Egerton* v. *Moore* (1) it was held that the excuse for not giving notice must last as long as the omission continues. The word "failure," like the word "default," used without a controlling context, merely signifies omission to do an act which may or ought to be done. A person who has a right of action and delays to commence proceedings may, at least colloquially, be said to "fail" to bring the action until he actually brings it. In the phrase "failure to commence proceedings within the period above specified" the last five words are, in one view, not more than words of description or reference, rounding off the sentence, but not qualifying the meaning of the word "failure," in the sense of omission. The words "the failure" may be construed either in the same general sense or in the limited sense contended for without any straining of the apparent meaning of the proviso. Having regard to the nature and object of the limit, which is imposed for the protection of the employer against stale claims, and to the nature and object of the privilege, which is conferred for the benefit of the workman, I think that the construction adopted should be that which will best give effect to the intention. I am therefore of opinion that the words "the failure" mean the actual period of delay before commencing proceedings, and that the whole of such delay must be excused. I cannot find any excuse for delay after, at latest, a few days after 30th July 1913.

(1) (1912) 2 K.B., 308.

Assuming, however, that I am wrong in my construction of the words "the failure," I think that the appellant's original delay was excused by her conversations with the respondents or those whom they represent, and that this excuse continued up to the time when she was definitely informed by her solicitor that her claim was repudiated. As to the delay after that date, she said that it was caused because she believed that she had no claim. She said that her solicitor gave her some reason which she did not understand. We do not know what it was. In my opinion this, if it was a mistake at all, was a mistake of law. In *Roles* v. *Pascall & Sons* (1) it was held by the Court of Appeal that ignorance of the existence of the Act was neither a mistake nor a reasonable cause for omission to make a claim within six months. This decision was followed in *Judd* v. *Metropolitan Asylums Board* (2). In *Egerton* v. *Moore* (3) *Cozens-Hardy* M.R. treated it as a decision that a mistake of law was not a mistake within the meaning of the Act. I am unable to distinguish between ignorance of the existence of a law and a misunderstanding of its provisions or a misunderstanding as to the validity of an asserted defence to a claim under it. I am therefore unable to distinguish *Roles* v. *Pascall & Sons* (1) from the present case, unless the excuse already mentioned, which operated for five months, continued to operate after discovery of the facts. I regret that I cannot think so. If, therefore, the determination of the case rested with me I should be reluctantly compelled to give effect to this objection apart from the other points with which I have dealt. But I understand my learned brothers see their way to come to a different conclusion.

I should, however, hesitate to hold that every error which might for some purposes be held to be a mistake of law must also be held not to be a mistake within the meaning of the section. See the dictum of *Buckley* L.J. in *Griffiths* v. *Atkinson* (4), decided just six days before the decision in *Judd's Case* (2), to which he was a party.

The judgment of ISAACS and GAVAN DUFFY JJ. was read by

(1) (1911) 1 K.B., 982.
(2) 5 B.W.C.C., 420.
(3) (1912) 2 K.B., 308.
(4) 5 B.W.C.C., 345.

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ISAACS J. The Supreme Court upheld the appeal on the ground that the circumstances relied on by the plaintiff as reasonable cause constituted, as to the last of the six months, only mistake in law, and that a mistake in law is not included in the term "mistake" in par. (*b*) of sec. 12 of the Act. As both steps are of great importance in the administration of the Act, it is desirable to state the law with regard to each of them.

The relevant circumstances may be thus stated. James Murray was the employee of James Baxter, a contractor, and on 1st May 1912 was killed by accident in the course of his employment. Due notice of the accident was given, and a claim for compensation was duly made shortly after the workman's death. The employer, Baxter, admitted liability, and promised that the full amount claimable, £400, would be paid. Mr. Baxter died, and his son Harold Baxter became an executor. He also told her she was entitled to the money, and referred her to Mr. Hepburn, the manager of the business. About five months after her husband's death elapsed, she had another interview with Hepburn in the presence of the firm's solicitor. Mrs. Murray had already employed a solicitor in the matter, Mr. Simpson, and instructed him to comply with Hepburn's requirements to send in a claim through his office at once. It is quite plain that "through his office" meant to the insurance company with whom Baxter had insured Murray. Simpson got into communication with the insurance company, and, as a result, told Mrs. Murray, still about five months after her husband's death, that she had no claim. She asked him the reason, and he said there was a mistake in one of the clauses. He did not further explain the matter to her. She said she would go further into the matter, but he said he would not go on, as she would lose the case. She believed that, and did not sue until September 1913, having learnt in the meantime that she had the right to sue. Now, it is obvious that the action of defendants' manager in turning her on to the insurance company, instead of paying the liability and dealing with the insurance company, naturally led her to believe she was dependent on the terms of the insurance policy. Unless she thought her husband was a party to or in some way connected with the insurance contract, it is difficult to understand how she

could believe the provisions of one of the clauses could stand in the way. Between employer, and employer's executor, and his manager, and his solicitor, and her own solicitor, and the insurance company, there is scarcely any wonder the woman became confused, and her inability to state in legal language the exact nature of her mistake, is not to be marvelled at. But it was a mistake so largely made up of intricate facts, unexplained to her, and the law of the matter so much depends upon the facts, that it seems impossible to call it a mere mistake of law.

The example stated by Sir *George Jessel* M.R. in *Eaglesfield* v. *Marquis of Londonderry* (1) shows how facts and law are sometimes inextricably mingled. The present instance also exemplifies it. Being a mistake of fact or mixed law and fact, which for this purpose is the same thing, no further question of reasonableness arises. A mistake once established is itself an excuse for the failure to commence proceedings within the prescribed time. So when there is absence from New South Wales. Absence once established as a fact, there is no issue as to reasonableness. The Statute assumes these two circumstances to be reasonable cause. It is only when neither mistake—to which the failure is truly attributable—nor absence can be proved, that some "other reasonable cause" has to be shown. Where the defendant's own act contributes to a mistake of law, even though, as mere mistake, it were not enough, it cannot but by reason of the added circumstance be a reasonable cause of delay so far as he is concerned. The Supreme Court apparently treated the inaction of the plaintiff during the latter part of the six months as if it were wholly independent of any conduct of the defendants.

Assume, however, the mistake is one of law, it is still a "mistake." The Act uses the one word "mistake," and not the phrase "mistake of fact." Why, then, should it be so restricted by adding words which the legislature has not used, and which it could so easily have used had it intended them? To exclude all mistakes of law, whether contributed to by the defendant or not, would exclude also the case where such a mistake was the result of the defendant's own misapprehension on the subject stated to, and accepted by, the plaintiff. If, then, the restrictive

(1) 4 Ch. D., 693, at pp. 702, 703.

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words are to be inserted at all, there must be some inherent principle requiring their implication. But where is there such a principle? It is true that money paid voluntarily cannot as a rule be recovered back for mistake in law. But that is not a universal rule for all cases. As the Privy Council said in *Daniell* v. *Sinclair* (1), "in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn," and instances are there given. One instance is very much in point. "In *M'Carthy* v. *Decaix*" (2), said Sir *Robert Collier*, "where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the Lord Chancellor observes, 'What he has done was in ignorance of law, possibly of fact; but, in a case of this kind, this would be one and the same thing.'" "Ignorance" there meant obviously misconception, not simply passivity of thought owing to the absence of any conception on the matter.

But it was argued that two English cases favoured the view that mistakes of law are not within the provision as to "mistake." *Roles* v. *Pascall & Sons* (3) decided that the workman's absolute ignorance that the *Workmen's Compensation Act* existed at all was not a "mistake." The workman did not know there was such an Act, and consequently he did not know he was entitled to compensation under it, and *ex necessitate* his omission to give the written notice required by the Act could not by any reasonable stretch of the imagination have been said to be due to mistake. In that case, however, *Cozens-Hardy* M.R. himself said (4):—"A mistake means that a man takes a wrong view as to the construction or effect of an Act of Parliament, if it be a mistake of law. A mistake of fact may be that the notice is given to some person whom the workman believed to be an agent or a person entitled to receive the notice when he was not. Many instances of that kind may be given. But mistake is not identical with ignorance. That is really what the argument for the respondent means." Then, passing from "mistake," the learned Master of the Rolls deals with "reasonable cause," which he also says does not comprehend ignorance of the existence of the Act.

(1) 6 App. Cas., 181, at p. 190.
(2) 2 Russ. & My., 614.
(3) (1911) 1 K.B., 982.
(4) (1911) 1 K.B., 982, at p. 985.

But it is beyond question that the Master of the Rolls included both mistakes of law and mistakes of fact as possible under the Act.

Fletcher Moulton L.J. and *Buckley* L.J. most pointedly rested on the doctrine that ignorance of the existence of the Act could not be "mistake." *Buckley* L.J. said (1):—"A mistake exists when a person erroneously thinks one state of facts exists when, in reality, another state of facts exists; this man was not in that position. He did not think that there was not such an Act as the *Workmen's Compensation Act*, or make any mistake as to its contents or effect. He thought nothing at all about Acts of Parliament. His condition of mind was one not of mistake, but of ignorance." In other words, the decision was as to the state of the man's mind, not as to the nature of any mistake he made. It is impossible to reconcile the words of *Buckley* L.J.—and equally those of the Master of the Rolls—with the view that the Court held that mistakes of law were outside the purview of the section.

In *Egerton* v. *Moore* (2), however, there is an observation which Dr. *Brissenden* greatly relied on. As it stands there, he was quite entitled to do so. The observation occurs on p. 313, and what the learned Master of Rolls said was this: "'Mistake' we have held does not mean mistake of law;" and his Lordship goes on to show that he was referring to *Roles* v. *Pascall & Sons* (3), and to the state of things existing in that case. In *Egerton* v. *Moore* (2) the man had sustained an accident in July 1910. In February 1911 serious symptoms appeared, but the notice for the case, which was one of notice to be given not within a fixed time, but "as soon as practicable," was not given until the middle of July, that is, about five months. The only reason given for delay was that the man did not think the injury so serious as it afterwards turned out to be. The Court held it was not a mistake of fact because he knew by February he had sustained an injury, and if he intended to claim at all, he should have done so before July. The question of mistake of law did not arise. The observation referred to, unless qualified—as doubtless the Master

(1) (1911) 1 K.B., 982, at p. 987. (2) (1912) 2 K.B., 308.
(3) (1911) 1 K.B., 982.

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of the Rolls intended it should be qualified—by the following sentence, limiting it to *Roles* v. *Pascall & Sons* (1) would go beyond anything the Court had decided.

But there is one circumstance which seems to set at rest any possible doubt that might otherwise exist. *Egerton* v. *Moore* (2) was decided on 13th March 1912, the Court consisting of *Cozens-Hardy* M.R., *Fletcher Moulton* and *Buckley* L.JJ. Two days later, 15th March 1912, the Court constituted by the same three learned Judges determined the case of *Griffiths* v. *Atkinson* (3). Mistake was set up as a reason for delay in giving notice. The Master of the Rolls says (4):—"What is the mistake suggested? He does not say, 'I did not know that the Act required notice.'" That observation would be meaningless if the learned Master of the Rolls meant in the prior case that such an excuse would be outside the Act. *Fletcher Moulton* L.J. says:—"It is not a mistake to be ignorant of the requirements of the Act, you must perform this condition precedent." That is, the mistake which is an excuse for non-compliance with the condition precedent cannot be merely ignorance of the very existence of that condition precedent. That is really *Roles* v. *Pascall & Sons* (1) again. See also *Ex parte Hannan* (5). But *Buckley* L.J. is clear beyond any possible question. He says:—"The Statute uses the word mistake. A mistake may be in fact or law."

It appears, therefore, impossible to say that the English Courts have decided this question in favour of the respondents. They appear, on the whole, to have assumed the contrary, and there is therefore nothing to qualify the natural meaning of the unrestricted language used by the legislature.

Dr. *Brissenden* raised a further point of considerable importance. He contended that the whole period from the termination of the five months—that is, from about the beginning of October 1912—to the date when the action was commenced—viz., September 1913—must be covered by the plaintiff's excuse. To sustain that, it was necessary to contend, and learned counsel did contend, that "the failure" secondly mentioned in paragraph (*b*) of sec. 12

(1) (1911) 1 K.B., 982.
(2) (1912) 2 K.B., 308.
(3) 5 B.W.C.C., 345.
(4) 5 B.W.C.C., 345, at p. 347.
(5) 18 N.S.W. L.R., 422.

meant "the failure to commence proceedings before their actual commencement." But that is an impossible construction of the words of the paragraph, unless we proceed to virtually legislate. "The failure" secondly mentioned refers to "the failure" just previously mentioned, and that is "the failure to commence proceedings within the period above specified." You cannot imply a period where one is expressly "specified." The "period above specified" for the commencement of an action is expressly stated to be "within six months from the time of death"; and "within" does not include a period "beyond." The Act distinctly states and limits within fixed termini a condition precedent; it permits that condition to be excused; if it is excused its effect ceases, and if we were to extend the limits specified we should be creating a different condition.

The appeal ought, in our opinion, to be allowed.

Appeal allowed. Judgment appealed from discharged. Appeal to the Supreme Court dismissed with costs. Respondents to pay costs of appeal up to date of order giving leave to proceed in formâ pauperis.

Solicitors, for the appellant, *Sly & Russell.*

Solicitors, for the respondents, *C. A. Coghlan & Co.*

B. L.