[HIGH COURT OF AUSTRALIA.]

LIGHT . . . . . APPELLANT;
RESPONDENT,

AND

MOUCHEMORE . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Employer and Worker—Compensation—Injury to worker—Accident arising out of and in course of employment—Serious and wilful misconduct of worker—Liability of employer—Evidence—Workers' Compensation Act 1912 (*W.A.*) (*No.* 69 *of* 1912), *sec.* 6 (1), (2) (*c*).*

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PERTH, *Oct.* 22, 26.

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

Where it was part of the duty of a deceased worker, who was employed in assisting to blow up stumps, to be near a stump about to be blown up and prepare it for explosion, and then to seek shelter before another worker fired the charge and to come back to the same place after the explosion had occurred; and the uncontradicted evidence was that the deceased, having acknowledged the receipt of the usual signal that the charge was about to be fired, walked away as if going for shelter, but after the explosion was found to have been killed by it, and from the nature of his injuries it appeared that he must have been close to the stump at the time of the explosion:

Held, that the fatal injury to the deceased arose out of and in the course of his employment within the meaning of sec. 6 of the *Workers' Compensation Act* 1912, and that his employer was not relieved of liability to pay compensation under that section as he had failed to discharge the onus of proving that

* By sec. 6 of the *Workers' Compensation Act* 1912 (W.A.) it is provided that "(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall, subject as hereinafter mentioned, be liable to pay compensation . . . (2) Provided that . . . (*c*) If it is proved that the injury to a worker is attributable to the serious and wilful misconduct of that worker, any compensation claimed in respect of that injury shall be disallowed."

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such injury was attributable to the serious and wilful misconduct of the deceased.

Decision of the Supreme Court of Western Australia: *Mouchemore* v. *Light*, 17 W.A.L.R., 139, affirmed.

APPEAL from the Supreme Court of Western Australia.

An application was made to a Magistrate in the Local Court at Albany by Estelle Thurza Mouchemore, the legal personal representative of her deceased husband, Paul William Brookes Mouchemore, acting on behalf of the dependants of the deceased, for an order for the payment to such dependants of compensation under the *Workers' Compensation Act* 1912, by Ernest E. Light, for personal injury resulting in the death of Mouchemore, a worker in Light's employ, by an accident which the applicant alleged arose out of and in the course of the employment of the deceased, and which happened whilst the deceased and Light's farm manager (George Arthur Fleay) were engaged in clearing Light's land. The respondent, Light, denied that he was liable to pay compensation on the grounds that (1) the injury to the deceased was not caused by an accident arising out of and in the course of his employment, and that (2) the injury was attributable to the serious and wilful misconduct of the deceased. Holding that the applicant had not discharged the onus of proving that the accident arose out of and in the course of deceased's employment, and that the respondent had proved that the injury was attributable to the serious and wilful misconduct of the deceased, the Magistrate dismissed the application with costs to the respondent. The Supreme Court (*McMillan* C.J. and *Burnside* J.), on appeal by Mrs. Mouchemore, held that in respect of both findings the Magistrate was wrong, and allowed her appeal with costs and referred the matter back to the Magistrate for assessment of compensation: *Mouchemore* v. *Light* (1).

From this decision Light now appealed to the High Court.

Further material facts are set out in the judgment of *Griffith* C.J. hereunder.

Pilkington K.C. (with him *Keall*), for the appellant. There was evidence before the Magistrate which justified his findings,

(1) 17 W.A.L.R., 139.

and the Supreme Court should not have interfered with his decision. [Counsel referred to the following:—*Workers' Compensation Act* 1912 (W.A.), sec. 6 (1), (2) (c); *Local Courts Act* 1904 (W.A.), secs 107, 109, 111, 118; *Federal Gold Mine Ltd.* v. *Ennor* (1); *Coghlan* v. *Cumberland* (2); *Plumb* v. *Cobden Flour Mills Co. Ltd.* (3); *Astley* v. *R. Evans & Co. Ltd.* (4); *Bist* v. *London and South Western Railway Co.* (5).]

[RICH J. referred to *Johnson* v. *Marshall, Sons & Co. Ltd.* (6).]

Robinson K.C. and *Jackson*, for the respondent, were not called on.

GRIFFITH C.J. The learned Magistrate was of opinion upon the evidence that the accident by which the deceased man met his death did not arise out of his employment, and also that the injury was attributable to his own serious and wilful misconduct. He thought that the story told by the only person (Fleay) who was present at the accident, though highly improbable, was not incredible. The learned Judges of the Supreme Court appear to have thought that it was incredible, and I have had some difficulty in discovering upon what view of the facts they acted, for, if Fleay's evidence was wholly rejected, there was no case at all. The rule on which this Court should act on the hearing of an appeal upon questions of fact determined on oral testimony has been laid down in the well known case of *Coghlan* v. *Cumberland* (2), and in this Court in the case of *Dearman* v. *Dearman* (7), and other cases. Although not bound by the findings of the lower Court, it should not disregard them altogether but should carefully weigh and consider them in arriving at its own independent conclusion. As will appear, however, no such question arises in this case.

The deceased man was employed in the work of blowing up stumps. According to Fleay's evidence, which gives all the information we possess on the point, the method adopted was as follows:—Holes were bored in the stumps to be destroyed, and

(1) 13 C.L.R., 276, at p. 279.
(2) (1898) 1 Ch., 704.
(3) (1914) A.C., 62.
(4) (1911) 1 K.B., 1036.
(5) (1907) A.C., 209.
(6) (1906) A.C., 409, at p. 411.
(7) 7 C.L.R., 549.

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charged with an explosive to be fired by electricity, the charge being tamped with water or clay. Wires were laid connecting the several charges, and afterwards themselves connected with a cable, which was laid for a distance of about a hundred yards to a place where a galvanometer and firing battery were provided.

The duty of the deceased was confined to boring the holes, laying out the cable, and connecting the wires to it, the rest of the operations, including the firing, being conducted by Fleay himself. When the wires had been duly connected with the cable, it was itself connected with the galvanometer in order to ascertain that the circuit was complete. When this had been ascertained, Fleay, by holding up his hand, signalled to the deceased to indicate that the cable was about to be connected with the battery. In the ordinary course the deceased would then leave the stump and seek shelter. After an interval of about a minute, occupied in making connection with the battery, Fleay would fire the charge.

Fleay says that on the occasion of the fatal accident this practice was followed, and that on his making the usual signal the deceased acknowledged it, and walked away as if going for shelter. Fleay also says that just before firing he looked towards the stump and could not see him.

After the explosion took place the deceased was found to have been killed by it. It appeared from the nature of his injuries that he must have been close to the stump at the time of the discharge.

Upon these facts, which are not in dispute, it is contended that the fatal injury to the deceased did not arise out of his employment.

Mr. *Pilkington* relied upon the case of *Plumb* v. *Cobden Flour Mills Co. Ltd.* (1), in which two tests were suggested by Lord *Dunedin* as aids to assist in solving the question. The first relates to the case in which the injury has occurred in consequence of the disobedience of the workman to an order of his employer, and is put in this way: Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things or to do them in a certain

(1) (1914) A.C., 62.

way within the sphere of the employment? Applying this test to the present case, it is to be observed that it is not a case of disobedience to express orders. It was, no doubt, part of the duty of the deceased to be near the stump, to prepare it for the explosion, to seek shelter before the explosion took place, and to come back to the stump. All this was within the sphere of his employment. The duty to take shelter did not arise from any explicit direction, but was a matter of common prudence, and failure to observe it was, at worst, negligence, perhaps amounting to recklessness, and possibly even to misconduct, in the performance of his duty. This test does not therefore exclude the case from the benefit of the Statute.

The other test suggested in *Plumb's Case* is whether the risk was one incidental to the employment. It is manifest that in this case injury from explosion was a risk incidental to the employment. So also was injury from the forgetfulness or negligence on the part of the employee himself in the performance of his duties. On this point I may read the observations of Lord *Atkinson* in the case of *Barnes* v. *Nunnery Colliery Co. Ltd.* (1): "In these cases under the *Workmen's Compensation Act* a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held in most cases rightly to be a risk incidental to his employment."

If Fleay's story be true, the accident in this case arose from some negligence or recklessness on the part of the deceased in failing to seek shelter, or abandoning it after he had found it. We are asked to say that this negligence or recklessness prevented the accident from arising out of his employment. We cannot say so. We think, on the contrary, that, whether Fleay's story be accurate or not, it establishes affirmatively that the injury did arise out of the employment.

It was further contended that the plaintiff cannot recover because the accident was attributable to the serious and wilful

(1) (1912) A.C., 44, at p. 49.

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misconduct of the deceased. So to decide would practically involve a finding that he deliberately courted death by approaching the stump when he knew the explosion was about to take place. The onus of establishing this defence is on the appellant. The suggestion that he courted death was disclaimed by Mr. *Pilkington*, and there is no foundation for it. It is, however, sufficient to say that the defendant has failed to discharge the onus.

The result is that, whatever view is taken of the accuracy of Fleay's story, the accident is shown to have arisen out of and in the course of the employment of the deceased, and, as the defendant has failed to establish that it was attributable to his serious and wilful misconduct, the appeal must be dismissed.

GAVAN DUFFY J. I concur.

RICH J. I concur.

Appeal dismissed with costs.

Solicitors, for the appellant, *Stawell & Keoll.*

Solicitors, for the respondent, *Haynes, Robinson & Cox*, for *A. C. Braham*, Albany.

R. G.