[HIGH COURT OF AUSTRALIA.]

COAL CLIFF COLLIERIES LIMITED . . APPELLANT;

AND

AUSTIN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 7, 8, 11, 12, 22; *Dec.* 19.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Practice—High Court—Appeal from Supreme Court of State—Appealable amount—Order for payment of weekly sum—Judiciary Act 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 35 (1)—*Workmen's Compensation Act* 1916 (*N.S.W.*) (*No.* 71 *of* 1916), *sec.* 5, *Schedule* 1.

Workmen's Compensation—Accident arising out of employment—Act prohibited by Statute—Direction by employer to do act—Workmen's Compensation Act 1916 (*N.S.W.*) (*No.* 71 *of* 1916), *sec.* 5—*Coal Mines Regulation Act* 1912 (*N.S.W.*) (*No.* 37 of 1912), *sec.* 56A (1)—*Coal Mines Regulation* (*Amending*) *Act* 1913 (*N.S.W.*) (*No.* 11 *of* 1913), *sec.* 22.

On the hearing of an appeal to the High Court from a judgment of the Supreme Court of New South Wales dismissing an appeal from an award of an arbitrator under the *Workmen's Compensation Act* 1916 (N.S.W.), whereby he ordered weekly payments of £2 to be made to a workman during his total or partial incapacity for work or until the payments should be ended, diminished, increased or redeemed in accordance with the provisions of that Act,

Held, by *Barton* and *Gavan Duffy* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the judgment sought to be appealed from was not given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of £300, and did not involve directly or indirectly any claim, demand or question to or respecting any property or any civil right amounting to or of the value of £300, within the meaning of sec. 35 (1) (*a*) of the *Judiciary Act* 1903-1915; and, therefore, that the appeal did not lie as of right.

Sec. 56A (1) of the *Coal Mines Regulation Act* 1912 (N.S.W.), inserted by sec. 22 of the *Coal Mines Regulation* (*Amending*) *Act* 1913, provides that "no

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person, other than an official of the mine or a person employed on the road in connection with the haulage, or a person engaged in carrying out any repairing work requiring to be carried out forthwith, shall, while the haulage is in motion, travel on foot on any haulage road on which the haulage is worked by gravity or mechanical power, except (*a*) where there is provided on one side of the road a clear space of at least two feet in width between the tubs and that side of the road, and the rate of haulage is not more than ten miles an hour; or (*b*) where in the case of a haulage road in which such a clear space as aforesaid is not provided, the rate of haulage is not more than three miles an hour and the gradient does not exceed one in twelve, or in respect of any part of the road not exceeding one hundred yards in length, one in nine, and the space between the tracks of rail, where there is more than one track, is kept clear of obstructions."

The respondent was injured while walking on the haulage road of the appellant's mine. That road was about one mile and one quarter long and its average gradient and its gradient at the point where the accident occurred did not exceed one in twelve but at a distance of more than one hundred yards from the point where the accident occurred the gradient exceeded one in nine for a distance of seventy-five yards. On the hearing of a claim for compensation under the *Workmen's Compensation Act* 1916 the appellant raised the defence that the injury did not arise out of the employment inasmuch as the road was one upon which travelling upon foot was prohibited by sec. 56A (1) of the *Coal Mines Regulation Act* 1912.

Held, that the defence failed: by *Barton* and *Gavan Duffy* JJ., on the ground that the prohibition in sec. 56A did not apply to the road at the point where the accident took place; by *Isaacs* and *Rich* JJ., on the ground that there was evidence upon which the arbitrator might properly find that the respondent was directed by the appellant to travel along the haulage road and that the appellant, having thereby impliedly represented to the respondent that the road was one along which he might lawfully travel, was not entitled to dispute that fact.

Decision of the Supreme Court of New South Wales: *Austin* v. *Coal Cliff Collieries Ltd.*, 19 S.R. (N.S.W.), 186, affirmed.

APPEAL from the Supreme Court of New South Wales.

On an arbitration held under the *Workmen's Compensation Act* 1916 (N.S.W.) in respect of a claim by Thomas Austin for compensation for personal injuries sustained by him through an accident arising out of and in the course of his employment by the Coal Cliff Collieries Ltd., the arbitrator, a District Court Judge, made an award in the following terms:—

I order that the respondent the Coal Cliff Collieries Ltd. do pay to the applicant Thomas Austin the weekly sum of £2 as

compensation for personal injury caused to the said Thomas Austin on 23rd August 1918 by accident arising out of and in the course of his employment as a workman employed by the said respondent such weekly payment to commence as from 23rd August 1918 and to continue during the total or partial incapacity of the said Thomas Austin for work or until the same shall be ended diminished increased or redeemed in accordance with the provisions of the *Workmen's Compensation Act* 1916 And I order that the said Coal Cliff Collieries Ltd. do forthwith pay to the said Thomas Austin the sum of £42 being the amount of such weekly payments calculated from 23rd August 1918 to 11th January 1919 the date of filing the application herein and do thereafter pay the said sum of £2 to the said Thomas Austin on Friday in every week And I order that the said Coal Cliff Collieries Ltd. do pay to the Registrar of this Court for the use of the applicant his costs of and incident to this arbitration such costs in default of agreement between the parties as to the amount thereof to be taxed by the Registrar under the second of the Scales of Costs in use in the District Courts and to be paid by the said Coal Cliff Collieries Ltd. to the Registrar forthwith after the date of such taxation.

From that award the Company appealed to the Supreme Court, and the Full Court dismissed the appeal with costs: *Austin* v. *Coal Cliff Collieries Ltd.* (1).

From the decision of the Full Court the Company now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

On the appeal coming on for hearing, counsel for the respondent moved to strike out the appeal as incompetent, on the ground that the judgment was below the appealable amount. This point and the merits of the appeal were both argued.

Leverrier K.C. (with him *Pitt*), for the appellant. The judgment appealed from is within sec. 35 (1) (*a*) of the *Judiciary Act*. The award of the arbitrator was of the value of £300, for the weekly payments would in the ordinary course of events have gone on until

(1) 19 S.R. (N.S.W.), 186.

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they amounted to £300. It should be presumed that the circumstances which entitle the respondent to the weekly payments will continue to exist. The award is a judgment for all time, unless something happens to put an end to it.

[ISAACS J. referred to *Bailey* v. *Plant* (1).

[RICH J. referred to *George Gibson & Co* v. *Wishart* (2).]

The position is the same as where a weekly sum has been ordered to be paid as alimony *pendente lite* in a suit for divorce, and in that case it has been held that the order would support an appeal to the Privy Council (*Norton* v. *Norton* (3)).

The haulage road does fall within exception (*b*) in sec. 56A of the *Coal Mines Regulation Act* 1912 (inserted by sec. 22 of the *Coal Mines Regulation* (*Amending*) *Act* 1913), for at one part of it the grade was steeper than one in nine, and therefore the prohibition against travelling on any part of the road remains. That prohibition standing, the accident was not one which arose out of the employment. On the evidence there is nothing to support a finding that the respondent was directed to go upon the haulage road. Even if there was such a direction the respondent cannot rely upon it, for sec. 56A is an absolute bar (*Pounteney* v. *Turton* (4)). The prohibition is one which neither the employer nor the employee can waive. [Counsel also referred to *Barnes* v. *Nunnery Colliery Co.* (5); *Plumb* v. *Cobden Flour Mills Co.* (6) ; *Herbert* v. *Samuel Fox & Co.* (7) ; *Maydew* v. *Chatterley-Whitfield Collieries* (8) ; *Warden* v. *Enthoven & Sons Ltd.* (9) ; *McLaren* v. *Caledonian Railway* (10).]

[RICH J. referred to *Thom* v. *Sinclair* (11) ; *Lancashire and Yorkshire Railway* v. *Highley* (12).]

Mocatta (with him *McTiernan*), for the respondent. It lies on the appellant to show that, if the appeal succeed, it would be better off by £300 than if the appeal were entirely unsuccessful (*Beard* v. *Perpetual Trustee Co.* (13)). Under Schedule 1 to the *Workmen's Compensation Act* 1916 the payment is defeasible on the happening

(1) (1901) 1 K.B., 31.
(2) (1915) A.C., 18, at p. 24.
(3) 33 N.S.W.W.N., 16.
(4) 34 T.L.R., 103.
(5) (1912) A.C., 44.
(6) (1914) A.C., 62.
(7) (1916) 1 A.C., 405
(8) (1917) 2 K.B., 742.
(9) 116 L.T., 103.
(10) 5 B.W.C.C., 492.
(11) (1917) A.C., 127, at p. 142.
(12) (1917) A.C., 352, at p. 372.
(13) 25 C.L.R., 1.

of certain events. Nothing appears here except that £300 may be involved. No presumption can be drawn as to when, if at all, the machinery will be put into operation for ending or varying the payment.

[BARTON J. referred to *Crossfield & Sons* v. *Tanian* (1).]

Upon the evidence it could properly be found that the haulage road at the point where the accident happened was within exception (*a*) to sec. 56A. Even if it was not, the prohibition in sec. 56A is not one which prevents a workman who disregards it from recovering compensation from his employer. The section is one which only imposes duties upon the employer as to the construction and maintenance of the mine. (See *David* v. *Britannic Merthyr Coal Co.* (2); *Shaw* v. *Greenacres Spinning Co.* (3); *Groves* v. *Lord Wimborne* (4).) The finding that the respondent was directed to go upon the haulage road is supported by the evidence.

Leverrier K.C., in reply.

Cur. adv. vult.

Aug. 22.

BARTON J. read a judgment in which he stated that he could not see, taking the award itself, that, if freed from the award, the appellant would be better off to the extent of £300, for there was no period involving the payment of £2 a week which must continue until £300 had been paid. He therefore held that the appeal should be dismissed as incompetent.*

ISAACS and RICH JJ. (read by ISAACS J.). The first question we have to consider is whether this is a competent appeal as of right. If it falls within the first sub-section of sec. 35 of the *Judiciary Act* either because under par. (*a*) (1) the judgment appealed from is pronounced in respect of a "matter at issue of the value of £300," or under par. (*a*) (2) the judgment involves directly or indirectly "a question respecting any civil right of the value of £300," the appeal is competent. The judgment sought to be appealed from is one by

(1) (1900) 2 Q.B., 629.
(2) (1909) 2 K.B., 146, at p 165.
(3) 8 B.W.C.C., 35, at p. 36.
(4) (1898) 2 Q.B., 402.

* Owing to circumstances arising out of the death of Sir *Edmund Barton* shortly after the delivery of the final judgment in this case, it was impossible to obtain a copy of his judgment on the preliminary point.—*Ed. C.L.R.*

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which the Supreme Court held that the award of £2 a week during incapacity or until review under the *Workmen's Compensation Act* 1916 (No. 71) should stand. For the respondent, moving to strike out the appeal, it was urged as the real ground that such an award limited, as it must be limited in accordance with the words of the Act and the statutory regulation prescribing the form of award, to the respondent's incapacity, or review, was indefinite in time, and might not be of the value of £300, and no reference to other facts could alter it. *Beard's Case* (1) was relied on to show that £300 at least must be at stake at the present moment. As an alternative argument—naturally put forward with reluctance because, if successful now, it might be used hereafter against the respondent in case of an application for revision—it was contended that if the external facts are relevant they show that less than £300 will be paid. That might mean either that the respondent's injuries are not so severe as to last three years from the time the award begins to operate, or that he is likely to die before the three years. As to the latter possibility, if his early death were to be due to his injuries the liability could not be less (Schedule 1 (1)). So that the second possibility must mean likelihood of death from some other cause. The appellant contends that it is sufficiently shown that the appeal is competent. Mr. *Leverrier* read and relied on the affidavit of 17th June 1919, par. 6 of which says: "The judgment and order was given in respect of a sum exceeding the value of £300 and involves directly a claim and question exceeding the amount of £300." That is distinct, and the deponent has not been challenged or cross-examined. On a preliminary application made by the respondent to strike out the appeal as incompetent, the respondent had no affidavit to the contrary; and so it was ordered that the application should stand over until the hearing of the appeal, when the evidence in the case should be looked at, to determine the question. We start, therefore, with a general statement on affidavit to the effect mentioned. On the hearing the respondent filed an answering affidavit, the negative value of which is important. All it says material to this matter is that the value is not necessarily £300. On the hearing both affidavits were again referred to, and Mr.

(1) 25 C.L.R., 1.

Leverrier, while stoutly maintaining the sufficiency of the award itself until displaced, also referred to the fact of the respondent's age and the absence of any material to counteract the *primâ facie* effect of the facts as showing a continuance which he said the law would presume in the absence of evidence to the contrary. The evidence discloses that Austin is about fifty years of age. Until his accident he was a miner employed by the Coal Cliff Colliery as a roadman, timbering, road laying, building stopings and doing anything he was asked to do. Apparently he was a man in full health and strength, the only previous accident was one to his finger, but apparently that was negligible. It is clear that up to the moment of the accident Austin was a robust and constitutionally sound man. Whatever incapacity he now suffers is the result of the accident.

Now, in the first place, the one tribunal recognized by the law to determine his incapacity has fixed it at the highest possible, namely, as entitling Austin to £2 a week. And that same tribunal is the only one entitled by law to declare any change in that condition. In our opinion, we are required, while that award stands unaltered, and no allegation is made that circumstances as to incapacity have changed, to consider the incapacity as continuing and as entitling the man to the same weekly compensation. The very highest it can be put for the respondent in relation to his preliminary objection is that we are called upon to estimate the chances of circumstances changing and of that tribunal reviewing the award and the extent of that review. Apart from the legal onus of establishing this, in face of the *primâ facie* case of the existing award, it is clear to us that no reasonable doubt can arise on the evidence before us. The accident occurred in August 1918. He was struck in the groin by a skip and knocked backwards; he was then struck by another skip and knocked forwards and rolled in the road clear of the rails. The doctor who attended him gave a vivid account of his severe injuries. Two medical men were examined in February 1919, they having in that month, six months after the accident, carefully examined him. One is the regular medical attendant of the employees, who had attended Austin in the hospital; the other was the Company's adviser specially for this case. A third doctor

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for the Company examined him also, but was not called. In February 1919 his condition is stated by the doctors in effect thus: Movements of right leg at hip joint not normal, impairment of flexion, and some pain; evidence of adhesion, tenderness on pressure on right hip joint and near urethra; probable hip joint trouble; not as good in present condition to do his old work. The Company's doctor added: "My opinion is that he is not able to do laborious work; he is fit for light work; the joint may come against him in the future; rheumatic pain sometimes supervenes."

Now, what is the chance of the incapacity disappearing or diminishing, and the arbitrator saying within reasonable time that the weekly amount is to be diminished—much less ended? What is the reasonable fair-minded conclusion to be drawn from the evidence? We have no hesitation in saying that this evidence—which was adduced by Austin himself on the arbitration for the very purpose of establishing how severe and permanent were his injuries, and on which he got the maximum amount the law allows—is justly to be taken against his present objection, as proving what he then in effect sought to prove against the Company. It seems to us the very essence of unfairness to contend that there is no sufficient evidence to show the probability of a long-continued liability, and therefore to deny to the Company the right of testing the very important and highly debatable effect of the new *Coal Mines Regulation Act*. It is, we think, on the whole an irresistible conclusion of fact that the liability to pay the £2 a week will not end within three years from its date.

If the evidence, as strong from a common-sense standpoint as we find here, is not sufficient—especially as it is in the present case uncontradicted—it is hard to see how any appeal by employer or employee can be competent except the appellant prepares himself with a mass of expert and expensive testimony to support the collateral contest as to value, a course that we think is burdensome to anyone and practically prohibitive to a workman. In the circumstances the decision in *Beard's Case* (1) is not adverse to the appellant. That case, particularly if read with the authorities there cited, supports the view that if the matter at issue or the civil right contested can

(1) 25 C.L.R., 1.

be shown to be of the value to the appellant of £300 that is enough. Now, what is the "matter at issue" or the "civil right" contested here? Is it the total amount which *will* in fact be paid in the future? In our opinion it is not. It is the present *liability* to pay compensation to the respondent, and at the rate of £2 a week, for an indefinite time delimited only by the death of the respondent, or an alteration of the award as to duration or amount on a dispute as to either arising and on proof of changed circumstances during the respondent's lifetime.

Reference to the structure of the Act will make this very plain. The group of sections 5 to 15 inclusive, is headed "Liability of employers." Sec. 5 (1) says that "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be *liable to pay* compensation in accordance with the Schedule 1." Sub-sec. 3 divides the issues into three parts, (*a*) liability to pay compensation, (*b*) amount and (*c*) duration of compensation, and says that all or any of these may be settled by arbitration under Schedule 2. In secs. 7 (1) and 8 (1) and (2) the *liability* to pay compensation is the point dealt with. Sec. 9 is very important in this connection. It allows in certain cases proof to be made in bankruptcy for the liability to be assessed as therein provided; and it is declared to be a "debt"—but the amount is the subject of legislative direction (see *Homer* v. *Gough* (1)). That is entirely opposed to the main argument of the respondent on the preliminary question. Then Schedule 1, in prescribing the amount of compensation, says as to total or partial incapacity "the total liability in respect thereof shall not exceed £750." Par. 16 enables the weekly payment to be ended, diminished or increased, and par. 17 provides that where any weekly payment has been continued for not less than six months, "the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum."

All this shows clearly the *nature* of the matter. If any doubt could possibly exist, it is settled by cases of the highest authority; the latest of which is *Clawley* v. *Carlton Main Colliery Co.* (2),

(1) (1912) 2 K.B., 303. (2) (1918) A.C., 744.

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where the liability of the employer to make the weekly payment representing the compensation is emphasized, and made the point of the decision. That liability, as Lord *Parker* says in *Gibson's Case* (1), is a statutory liability; which is the strongest imaginable.

Then, as to the duration of the liability, par. 8 of the Second Schedule makes the memorandum of an award, when recorded in the District Court, enforceable for all purposes as a District Court judgment. (See *Bailey* v. *Plant* (2).) The cases cited during the argument, particularly the series beginning with *Crossfield's Case* (3) and ending with *Tarr* v. *Cory Brothers & Co.* (4), show that unless the competent tribunal—which is the only tribunal authorized by law to do so—declares under par. 16 of Schedule 1 on proper materials, namely, changed circumstances, that the weekly payment ordered shall be ended or diminished or increased, the liability as standing under the award continues.

In our opinion there is a present liability, and as we think, in the circumstances, a liability that will continue for at least three years from the award to pay £2 a week to Austin.

We think that the preliminary objection should be overruled.

GAVAN DUFFY J. read the following judgment:—Three questions were discussed before us in the course of a somewhat desultory argument. They were these:—(1) Does this appeal lie as of right? (2) If not, should special leave to appeal be given? (3) If the Court entertains the appeal what order should be made on the merits? In the present judgment I propose to consider only the first of these topics. The respondent contended that an appeal does not lie to this Court without special leave because the judgment appealed against is not given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of £300 (*Judiciary Act* 1903, sec. 35 (1) (*a*), cl. 1), nor does it involve directly or indirectly any claim, demand, or question to or respecting any property or any civil right amounting to or of the value of £300 (*ibid.*, cl. 2). These clauses are framed for the purpose of allowing an appeal to a litigant who is able to

(1) (1915) A.C., 18.
(2) (1901) 1 K.B., 31.
(3) (1900) 2 Q.B., 629.
(4) (1917) 2 K.B., 774.

show that he, or those whom he represents, would be pecuniarily benefited to the extent of £300 if his appeal were wholly successful (*Beard* v. *Perpetual Trustee Co.* (1)). The question is whether the appellant here has satisfied the onus which lies on him of showing that his appeal comes within their operation. On 29th February 1919 the respondent obtained an award under the *Workmen's Compensation Act* 1916, the immediately relevant portion of which runs as follows : " (1) I order that the respondent the Coal Cliff Collieries Ltd. do pay to the applicant Thomas Austin the weekly sum of £2 as compensation for personal injury caused to the said Thomas Austin on the 23rd day of August 1918 by accident arising out of and in the course of his employment as a workman employed by the said respondent such weekly payment to commence as from the 23rd day of August 1918 and to continue during the total or partial incapacity of the said Thomas Austin for work or until the same shall be ended diminished increased or redeemed in accordance with the provisions of the above-mentioned Act."

No money has been paid under this award, and the appellant's counsel did not attempt to show us that the respondent's incapacity still exists, or indeed that it continued over any time after the date of the award, and no argument was made founded on the probability of its continuance. It was boldly urged that there was a *primâ facie* presumption that the award and the payment of £2 a week under it would continue until the full sum of £750 permitted by the Act of Parliament had been expended. The nature of such an award is elaborately explained in the case of *George Gibson & Co.* v. *Wishart* (2). It is, as it purports to be, an assessment of the amount payable under the authority of the Act of Parliament during total or partial incapacity. It is operative only during incapacity, and the Act of Parliament authorizes a reassessment or revision of the amount of compensation because of the increase, diminution or cessation of incapacity. In his judgment Lord *Parker* says (3) :—" The agreement or award determining the amount of compensation is not in any sense a judgment or decree, nor does it create any liability. The liability is imposed by the Act, and the agreement or award

(1) 25 C.L.R., 1.

(2) (1915) A.C., 18.

(3) (1915) A.C., at pp. 33-34.

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determines its amount. When, however, the agreement or award is recorded, the liability may be enforced as though it were a liability under a judgment or decree. Now, where the liability is to pay a weekly sum, not for any definite period, but during incapacity, it could not, even if embodied in a judgment of the County Courts in England, be enforced without some further proceeding, in which the Court could be satisfied as to the amount actually due. If in this further proceeding it were alleged by the employer that nothing was due as from a particular date, because on that date the incapacity had determined, it would be the duty of the Court to grant an adjournment so that the dispute as to the duration of the compensation could be referred. If on such reference the arbitrator found that the incapacity had in fact determined on the date alleged, it would be the duty of the Court to refuse to enforce the weekly payment after that date. . . . Passing to the 16th paragraph of the First Schedule, it provides that any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum thereinbefore provided, and the amount of payment is, in default of agreement, to be settled by arbitration. This paragraph contemplates (1) that the weekly sum payable has already been ascertained by agreement or arbitration; (2) that, notwithstanding such ascertainment, a dispute has arisen as to the amount payable under the Act; (3) that this dispute will be itself settled by a new agreement or arbitration; and (4) that the settlement of the dispute may involve the weekly payment originally agreed or awarded being ended, diminished, or increased. The process by which the last-mentioned result is to be effected is called a review, but there is, I think, no magic in the word."

Against this award the present appellant appealed to the Supreme Court of New South Wales. That Court, after hearing argument, dismissed the appeal, and from its order appeal is now made to us. The utmost we could do if the appellant were wholly successful would be to set aside the award, and if we did so the appellant would not necessarily be pecuniarily benefited to the extent of £300. We have no right to presume that the respondent's incapacity or the award founded on it will continue for any specified period, and

I think it is impossible to establish on the evidence before us that a sum of £300 will certainly or even probably be paid to the respondent under the award if the order appealed against stands. I am therefore of opinion that appeal does not lie in this case without special leave.

Counsel for the appellant then applied for special leave to appeal, which was granted.

Cur. adv. vult.

Dec. 19.

The following judgments were read :—

BARTON J. I have had the advantage of reading the judgment which has been prepared by my brother *Gavan Duffy*, and as I agree with him in the construction of sec. 56A of the *Coal Mines Regulation Act* of 1912, I think that the appellant Company's contention on the whole case fails, because the plaintiff, now respondent, was lawfully at the spot in the haulage road where the injury was sustained by him.

Many arguments were adduced to us as to the consequences which might follow the interpretation of this section which has seemed to my brother *Gavan Duffy* and myself to be the right one. I do not believe that those consequences will follow, but I am sure that neither of us has come to a conclusion without giving full weight to the opinion of our learned brothers, who differ from us on this part of the case. But, speaking for myself, I should have been unable to resist that conclusion without feeling that I had failed to appreciate to the full my primary duty of taking the Legislature at its word. If a Judge thinks that the meaning of words used by Parliament is that the legislators have expressed or ordered that which is to his mind absurd, unjust, oppressive or reckless, he is nevertheless bound to give effect to the words unless it is made clear that they were not meant at all or that they were meant in some other than their ordinary sense. He is not to bring them into what he thinks a better sense; for he is not a legislator. Further, the Legislature is not only primarily better qualified than we are to deal with the subject in all its intricacies, but it is matter of common knowledge that it has been the practice of the Legislature to

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take advantage of the experience of practical men and the research of experts, both of which are reflected in much of the legislation of this State as to coal mines. One is faced with a provision which he does not find ambiguous, but finds to have a positive meaning, if the ordinary rules of statutory interpretation are applied to it. In view of what I have said, is it not his proper course to assume that it has been enacted in that meaning by those who are better qualified than he is to estimate its consequence in the actual working of a coal mine? The consequences are for the law-maker to provide for. If he provides insufficiently, it is his to mend the law. But he must be taken to know what provisions, consistent alike with scientific knowledge and practical experience, will conduce to the profitable conduct of the coal-mining industry with the least risk of accident or sickness. It is for us to abide by what the Legislature has ordained.

I think the appeal must be dismissed with costs.

ISAACS AND RICH JJ. (read by ISAACS J.). Special leave having been applied for and granted, we have now to deliver judgment on the merits of the appeal itself. Two contentions are relied on by the appellant, and it is very necessary to make them clear so as to avoid future misapprehension. The first contention is that there was no evidence or no sufficient evidence to entitle the District Court Judge to find that Austin's instructions to find Goss authorized him to proceed along the haulage road. And in the next place the Company contends that, as the accident happened while he—not being an official, a haulage employee, or engaged in repairing the road—was walking along the haulage road, it does not arise out of his employment: that is because the haulage road, about $1\frac{1}{4}$ miles long, included in fact a section about 75 yards long having a gradient of 1 in 8; and it is urged that sec. 56A of the *Coal Mines Regulation Act* 1912 (inserted by the Act of 1913) was thereby necessarily contravened by the respondent, who by disregarding the prohibition placed himself outside the ambit of his employment.

The evidence shows that for about 150 yards continuously the gradient was greater than 1 in 12. It was 1 in 8 for about 75 yards and 1 in 10 for about another 75 yards. The Supreme Court felt

so much difficulty in determining the meaning of par. (*b*) of sub-sec. 1 of sec. 56A that, finding it unnecessary in the circumstances to arrive at any conclusion on the matter, it did not pronounce upon it.

The two opposing essential contentions as to the provision respecting the gradient not exceeding 1 in 12 are set out in the judgment of *Ferguson* J. in these words (1) :—"The contention on the part of the appellants is that that means that he shall not walk on the road at all, if in any part of it the gradient exceeds 1 in 12. The claimant contends that what the section means is that he shall not walk on any part except the part where the gradient does not exceed 1 in 12." The claimant's contention, of course, includes the right to walk on any part not exceeding 100 yards in length and not exceeding in gradient 1 in 9.

Those rival contentions involve the following considerations :— The first contention rests upon the view that the general prohibition in the main enactment of sub-sec. 1 against walking on the road, which is, so to speak, marked "dangerous," is not got rid of by par. (*b*) unless (*inter alia*) either the whole road has a gradient of not more than 1 in 12, not exceeding that gradient at any part, or if, in order to meet practical difficulties it does anywhere exceed that gradient, it does not exceed it anywhere more than 1 in 9, and then for not more than 100 yards. Whether the 100 yards is a totality or a repeatable distance is for this purpose immaterial. So that if, for instance, a road were 1 in 6 for a mile and then 1 in 12 for 500 yards and then 1 in 9 for 100 yards, the prohibition would still extend to the whole road so far as paragraph (*b*) is concerned. The other contention rests on the view that the prohibition is got rid of in par. (*b*) if the actual spot where the person is walking is either not more than 1 in 12, no matter how short the length of road may be ; or if the spot is on a length of road which for not more than a continuous distance of 100 yards has a gradient not exceeding 1 in 9, no matter how steep the rest of the road may be. Thus, if a road were (say) 1 in 6 for half a mile and then 1 in 9 for 100 yards and then 1 in 12 for 10 yards and then 1 in 9 for 50 yards and again 1 in 5 for half a mile and again suddenly 1 in 9 for 10 yards, there is

(1) 19 S.R. (N.S.W.), at p. 199.

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no prohibition so far as the parts of 100 yards, 50 yards and 10 yards are concerned. The result is so startling—particularly if one takes the trouble to plot these distances and gradients on paper —so opposed to the general intention of the section and so dangerous to human life that nothing but the most express language could induce us to adopt the latter contention. If the provision as to gradient consists, as that contention maintains, of two independent alternatives, it would enable the proprietary to make a road a mile in length with a gradient of (say) 1 in 6 everywhere except the last 20 yards, and, provided only that length of 20 yards did not exceed 1 in 9, there would be no protection for the men working there. That seems to us opposed not merely to the main object of the enactment, security for life and limb, but to the language of the Legislature. For example, the word "where," as used in several parts of the section, is indicative not of the locality of the accident but of the existing state of circumstances in relation to the road as a haulage road. You cannot detach the gradient provision from the other requirements of par. (*b*). That paragraph states three conditions of exception necessary to take a road out of the "dangerous" category enacted by the main part of the sub-section. Those three conditions are (1) rate of haulage, which is of course for the whole road; (2) gradient, which as we read it means 1 in 12 *everywhere*, except that it may vary to the extent of 1 in 9 for 100 yards (leaving undetermined whether that means a totality or not) but *not more than* 1 *in* 9 *anywhere*; and (3) it must be clear of obstruction between tracks if there are more than one track, this applying to the whole road. The claimant's contention would lead to this absurdity, that it is lawful to walk, and therefore to send a man to walk, on a 100 yards length not only where all the rest of the road is (say) 1 in 6, but also where the whole space between the tracks is blocked except as to the 100 yards.

We appreciate the reluctance of the Supreme Court to define unnecessarily the exact meaning of par. (*b*). It is, in any case, unnecessary for us to say whether the 100 yards means a totality or a possible series of 100 yards, with the deeper gradient of 1 in 9, but in the circumstances we feel bound to say that, whichever it may be, the unvarying gradient of not more than 1 in 12 must be preserved

except to the extent of never exceeding 1 in 9, and even that at least for a length of not more than 100 yards at a time. In this case the gradient was exceeded beyond 1 in 9 for 75 yards as mentioned, and the road was therefore, in our opinion, still a "dangerous" road and within the prohibition.

But the question still remains whether that necessarily defeats the respondent in this case. The Company did not in the Supreme Court, or in this Court, rely on the respondent's conduct as constituting serious or wilful misconduct. It expressly disavowed that in argument, and relied solely on the point that the accident did not arise out of the employment. The contention in effect is that, even if the arbitrator's finding as to authority in fact cannot be disturbed, the statutory prohibition stands, and that, even assuming both parties agreed, the one giving an order and the other obeying it, that the respondent should go along the haulage road, they could not lawfully so agree, that it was equally a contravention of a statutory prohibition, and such a journey was in law outside the sphere of all lawful employment.

At first it was argued for the respondent—and this may be at once referred to—that the Legislature had fixed a penalty for disobedience, and that was the sole sanction, and the prohibition was not to be taken as limiting the sphere of employment. Apart from other possible considerations, it is, to say the least, extremely doubtful whether there is a penalty provided by the New South Wales Act. Sec. 56 is based on sec. 50 of the English Act of 1887 and followed its terms in this respect, that it penalized contravention of "general rules." But in 1911 the new English Act, which enacted by sec. 43 the provisions now substantially adopted in sec. 56, not as "a general rule" but as a specific and independent enactment, was carefully amended by making sec. 75 (corresponding to the old sec. 50) penalize contravention not of "general rules" only but of that "part of this Act." There is, therefore, in England a distinct sanction in respect of sec. 43, but the corresponding change in sec. 56 of the Act of New South Wales has not been made. Whether that omission was intentional or inadvertent, it is impossible for us to say, but that it lessens the personal security of the miners employed and leaves a dangerous loophole, weakening responsibility for their

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safety, is beyond question. If the omission was inadvertent, Parliament may think fit to rectify it, and we accordingly draw attention to the gap that exists. At all events, we must deal with sec. 56 on the footing that no specific penalty has been provided by the Act for contravention. Nevertheless, there stands the prohibition, and it may be that in the absence of a penalty on the management the only persons it really tells against are the working miners, because it is said that if they walk along a haulage road contrary to sec. 56A and are injured they are injured outside the scope of their employment. (See *Maydew's Case* (1); *Pope* v. *Hill's Plymouth Co.* (2), and *Senior* v. *Brodsworth Main Colliery Co.* (3).)

Sec. 56A is undoubtedly intended to safeguard the lives and limbs of the miners, and, in that view, its primary mandate, one would think, is to the management not to permit a contravention. It also prohibits the men themselves from contravening it. But what constitutes a contravention? Two points are necessary to consider. First, the prohibition, as already stated, is not absolute. It is a prohibition with exceptions, and, where those exceptions exist, travelling is still lawful. But whether those exceptions exist or do not exist at any given moment depends on a variety of facts, some of which are not fixed and some are variable suddenly, but all are under the control and management of the employers, and are presumably *primâ facie* within their knowledge, actual or imputed. Every owner must, *primâ facie* at all events, be taken to know the gradients of his haulage roads; he regulates, and therefore *primâ facie* must be taken to know, the speed of haulage at any given time, and he must in the same way be taken to know whether the roads are obstructed—this last with probably time reservations for cases which occur in special circumstances. But a workman, who perhaps is doing his first day's work on the mine, may not know and cannot be presumed, without more, to know the factors which at a given moment constitute the exceptions. And therefore, unless the Legislature has intended to make the enactment so rigid as to prohibit passage whatever the knowledge or information actual or imputed of a person might be, that knowledge is an important

(1) (1917) 2 K.B., 742. (2) 5 B.W.C.C., 175 (H.L.).
(3) 117 L.T., 496.

feature in deciding whether a contravention has occurred. Is it a correct construction of the section which entails this consequence, that a man, being ordered to go along a haulage road on the assurance of his superior that it is lawful, does so at penalty of discharge if he disobeys, and yet, being injured while so doing, forfeits all claim to compensation because the road being in fact obstructed, or the rate of haulage being in fact 4 miles instead of 3 miles an hour, or the gradient of the road being in fact for more than 100 yards 1 in 11 instead of 1 in 12, his accident did not arise out of his employment? If it were necessary to determine this point now, we should have great hesitation in holding that a miner can be said to contravene the section when, without disregarding any other requirement of the Act, he has fair reason to believe and does believe from a superior that the factors of exception exist. Until the contrary is shown, the fact that a superior official directs or authorizes a workman to walk along a haulage road should be taken to be an assurance that the conditions are such as to make it lawful. In such case it may be that the workman, not knowing otherwise, does not, and the employer or his agents do, contravene the section.

But this case, we think, may be decided on a very clear ground, which involves dealing with the appellant's two points (apart from the construction of par. (*b*)) in the order in which we have stated them.

As to the first point, namely, whether the evidence sustains the finding, it is always to be remembered that the only right of appeal is on a question of law. In *Highley's Case* (1) Lord *Haldane* said: "A Court of appeal ought not to review" the "finding unless it is clear either that there was no evidence to support it, or that the finding was on the face of it erroneous in law." In this case, as in *Herbert's Case* (2), the finding is in terms that do not *ex facie* disclose any error in law. It is undeniable, and indeed undenied, that in direct examination the respondent gave evidence which, taken by itself, would entitle the arbitrator to find that the respondent went along the haulage road in obedience to superior direction. His fellow-workman, Goss, whom he was directed to find, was somewhere, not definitely known, and the evidence in chief left it open

(1) (1917) A.C., at p. 360. (2) (1916) 1 A.C., 405 (see p. 414).

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to conclude that the direction amounted to a direction to go along the haulage road. But it is said the cross-examination of the respondent so weakened that, that the weight of evidence was altogether the other way, and that the Court, as a question of law, ought to hold on that ground that the finding could not be sustained. Now, as Lord *Finlay* L.C. said in *Highley's Case* (1): "It has been often pointed out that it is highly undesirable that findings of fact by the County Court Judge in workmen's compensation cases should be overruled in Courts of appeal." In *Baker* v. *Earl of Bradford* (2) Lord *Haldane* said :—"There is a class of case in which the line of demarcation between law and fact becomes indistinct. That class of case extends to those cases where the applicability of the principle is virtually and entirely dependent upon the precise details and circumstances, and these circumstances can only be appreciated by the Judge who tries the issue of fact. That is the general principle, which is independent of the *Workmen's Compensation Act*. But, in order to carry out the policy of the Act, which was to obtain speedy and inexpensive decisions, it has been applied with particular stringency by this House to the appeals arising under the *Workmen's Compensation Act*. Therefore the question always is whether the learned Judge who has tried the case at first instance, who sits more or less as an arbitrator, has either come to his conclusion without any evidence on which he could act as a reasonable man, or has shown, on the face of his decision, that he fell into an error of law. For, if neither of these two things has happened, his judgment is conclusive." The rule adopted by the House of Lords is no less desirable here. The finding in this case cannot, consistently with the position postulated by the House of Lords, be disturbed by a Court of appeal. That standing, it is clear that the miner proceeded along the road in obedience to a direction to find a fellow-workman, Goss, who, according to the evidence of the respondent who had to act on the direction, could only, with reasonable certainty, be found by proceeding along the haulage road. This evidence was supported by that of Frost, a shiftman, who said that "to learn where Goss was, the only course was for Austin to go along the rope and ask clippers at different

(1) (1917) A.C., at p. 359. (2) 114 L.T., 1144.

junctions. . . . No lights on travelling road. . . . He would have to keep in rope road to find Goss." And, unless it were shown, which is not the case here, that the respondent knew of the gradient of 1 in 8 for the 75 yards or thereabouts that exists at a distance of over 41 chains—that is, more than half-a-mile—away from the place at which he was injured, the direction must, or at least might be, assumed, whatever general prohibition on the part of the management existed, to convey the implication that on that occasion the way could be lawfully walked upon by the respondent, and this more particularly so in view of the evidence that officials had seen him (respondent) on the haulage road and never said a word to him.

Dealing with the appellant's second point, namely, that even assent to contravention cannot avail, the ground upon which our judgment rests is this: that the appellant Company, having impliedly represented to the workman that the condition of the road was such as to make it lawful for him to pass along it, cannot now, after he has acted on that representation to his disadvantage, dispute the fact of that condition. Among the cases which establish that position are *Waugh* v. *Morris* (1), *West London Commercial Bank* v. *Kitson* (2) and *Derry* v. *Peek* (3). Whatever facts might be proved against the respondent by the Crown in any possible public proceeding, the Company is estopped from asserting for its own private interest that the facts were different from its own representation. Consequently the necessary basis for its contention that the Act was contravened by Austin is wanting, and the point raised on behalf of the appellant fails.

The appeal should therefore be dismissed.

GAVAN DUFFY J. The first part of sec. 56A (1) of the *Coal Mines Regulation Act* contains a general prohibition against travelling on foot on any haulage road on which the haulage is worked by gravity or mechanical power. Clause (*b*) contains an exception to the general prohibition, and the question is whether the present respondent comes within that exception. He does so if the conditions

(1) L.R. 8 Q.B., 202, last 6 lines of p. 207 and top of p. 208.
(2) 13 Q.B.D., 360.
(3) 14 A.C., 337, at p. 360, lines 4-9, per Lord *Herschell*.

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as to gradient set out in that clause existed on the haulage road where the accident occurred. It is said that the clause applies only to a haulage road which fulfils two conditions, first, that it has throughout its whole length an average gradient, or, in the alternative, a rough actual gradient, not steeper than 1 in 12, and second, that it has not in any part of its length a steeper gradient than 1 in 9 extending continuously over a distance of more than 100 yards. I think that clause (*b*) is not capable of this meaning. The immediately relevant words in the clause are: "and the gradient does not exceed one in twelve, or in respect of any part of the road not exceeding one hundred yards in length, one in nine." The suggested meaning requires that the word "or" in the passage just quoted should be read "and" and that the word "not" should be struck out from between the words "road" and "exceeding" so that the passage might read: "and the gradient does not exceed one in twelve and in respect of any part of the road exceeding one hundred yards in length one in nine."

In my opinion the clause provides for two distinct cases, and excepts both of them from the prohibition when the other conditions specified are complied with. First, it deals with every portion of a haulage road where the gradient is not steeper than 1 in 12. It is not clear whether the gradient here mentioned is the gradient of the whole road or not, and it is unnecessary to express any opinion on that matter. Secondly, it deals with every continuous portion of a haulage road if the gradient of that portion is not steeper than 1 in 9 and any excess in gradient over 1 in 12 does not extend for a distance of more than 100 yards. The words "any part of the road not exceeding one hundred yards in length" are intelligible if they are read as a description of a place excepted from the prohibition contained in the early part of the sub-section, but are unmeaning if read as a limitation of the use of other parts of the road. A condition that a road should have an average gradient not steeper than 1 in 12 might require to be supplemented by a further condition that no continuous portion of the road exceeding 100 yards should have a steeper gradient than 1 in 9, but it could hardly require to be supplemented by a condition that no continuous portion of the road less than or not exceeding 100 yards should have a gradient

steeper than 1 in 9. In this case the average gradient of the whole of the haulage road on which the respondent was walking, and its actual gradient at and for much more than 100 yards on each side of the spot where the accident occurred, did not exceed 1 in 12, and the case therefore comes within the exception contained in clause (*b*). The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *A. J. McLachlan & Co.*

Solicitor for the respondent, *A. A. Lysaght*, Wollongong, by *Makinson & d'Apice.*

B. L.

Foll *Metro Fire Brigades Board v FCT* 1 ATR 1137

Foll *Metro Fire Brigades Board v FCT* 97 ALR 335

Foll/Appl *Kelly v Municipal Council of Sydney* (1920) 28 CLR 203

[HIGH COURT OF AUSTRALIA.]

SWINBURNE . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

Income Tax (Commonwealth)—Deduction—Gift to public charitable institution—Educational institution—Statute—Interpretation—Exemption from taxation—Matter in doubt—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 18.

Sec. 18 (1) of the *Income Tax Assessment Act* 1915-1918 provides that in calculating the taxable income of a taxpayer there shall be deducted from the total assessable income derived by him from all sources in Australia (*inter alia*) "(*h*) (iii.) gifts exceeding five pounds each to public charitable institutions in Australia."

Held, by *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ., and with doubt by *Knox* C.J., that the term "public charitable institution" should be construed as meaning a public institution which is charitable in the sense that it affords relief to persons in necessitous or helpless circumstances.