[HIGH COURT OF AUSTRALIA.]

HENNESSY . . . . . APPELLANT;
RESPONDENT,

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 5, 6, 9.

MELBOURNE, *Oct.* 8.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Workmen's Compensation—Workman suffering from lead poisoning—Medical Board—Certificate of fitness for employment—Validity—Certificate after examination—Limitation of certificate to effects of lead poisoning—Application by employer to review weekly payments—Evidence as to health of workman—Whether member of Board a competent and compellable witness—Workmen's Compensation Act 1916 (*N.S.W.*) (*No.* 71 *of* 1916), *sec.* 5 (3); *Sched.* I., *cll.* 14, 16—*Workmen's Compensation* (*Broken Hill*) *Act* 1920 (*N.S.W.*) (*No.* 36 *of* 1920), *Sched., Part* V., *cl.* 40, *Part* VI.—*Workmen's Compensation* (*Lead Poisoning—Broken Hill*) *Act* 1922 (*N.S.W.*) (*No.* 31 *of* 1922), *secs.* 4 (3) (*a*), 7, 8 (1), 9 (3)—*Regulations of* 23*rd March* 1923 *under Workmen's Compensation* (*Lead Poisoning—Broken Hill*) *Act* 1922, *reg.* 6 (*b*), (*c*) (*iv.*); *Schedule, Form* 8.

Sec. 8 (1) of the *Workmen's Compensation* (*Lead Poisoning—Broken Hill*) *Act* 1922 (N.S.W.) provides that "If the" Medical "Board, after examination, certifies that a workman who has been employed in or upon a Broken Hill mine, and who has been disabled by lead poisoning, is physically fit to return to employment in or upon a Broken Hill mine his right to compensation shall cease" &c.

Held, (1) that the section contemplates a general physical fitness of the workman, and not a physical fitness so far only as lead poisoning is concerned, and therefore that a certificate that the particular workman was physically fit "in so far as lead poisoning is concerned" was not a valid certificate within the section; (2) that a certificate otherwise within the section was not

invalidated by the fact that the examination of the workman was made pursuant to an application by him for a certificate under sec. 7 (1); and (3) that a second certificate given to cure defects in the first, founded upon the original examination, was, in the circumstances, too remote from the examination, and therefore inoperative.

Held, also, that upon an application, under sec. 5 (3) of the *Workmen's Compensation Act* 1916 (N.S.W.) and cl. 16 of Schedule One to that Act, for the review and termination as from a certain date of the weekly payments payable to a workman who had been certified to be suffering from lead poisoning, the evidence of a member of the Medical Board which had examined the workman at that date was admissible to prove the state of his health at that date.

Decision of the Supreme Court of New South Wales (Full Court): *In re Broken Hill Pty. Co. and Hennessy*, (1925) 26 S.R. (N.S.W.) 67, in part affirmed and in part reversed.

APPEAL from the Supreme Court of New South Wales.

On 18th July 1921 Alfred Hennessy, a miner, who had been employed by the Broken Hill Pty. Co. Ltd. in its mine at Broken Hill, was certified to be suffering from lead poisoning and to be thereby disabled from earning full wages. The amount of compensation was fixed at £3 per week by an unrecorded agreement between the Company and Hennessy. The compensation was paid weekly until March 1924. On 18th March 1924 Hennessy applied to the Medical Board, constituted under the *Workmen's Compensation (Lead Poisoning—Broken Hill) Act* 1922 (N.S.W.), for a declaration pursuant to sec. 7 (1) of that Act that it was unnecessary for him to undergo medical treatment for lead poisoning. On 20th March 1924 the Medical Board examined Hennessy, and on 21st March 1924 issued a certificate purporting to be a certificate under sec. 8 (1) of the Act of 1922, in which it was stated that the Board, having examined Hennessy on 20th March 1924, certified that "he is physically fit to return to employment in or upon a Broken Hill mine in so far as lead poisoning is concerned." Thereupon the Company ceased to pay Hennessy the weekly compensation. On 4th July 1925 the Company by notice in writing requested an arbitration under the *Workmen's Compensation Act* 1916 with respect to the review and termination or diminution as from 20th March 1924 of the weekly payments to Hennessy. The arbitration was held before a District Court Judge in August 1925. Upon the hearing the certificate of

H. C. OF A. 1926.

HENNESSY v. BROKEN HILL PTY. CO. LTD.

21st March was tendered in evidence but was rejected, the arbitrator holding that it was not competent for the Medical Board upon an application under sec. 7 (1) of the Act of 1922 to issue a certificate of physical fitness under sec. 8 (1) and, further, that the certificate itself was invalid on the ground that it was not in conformity with sec. 8 (1) by reason of the addition of the words " in so far as lead poisoning is concerned." Another certificate given by the Medical Board on 17th August 1925 in the same form as that of 21st March 1924, but omitting the words " in so far as lead poisoning is concerned," was also tendered in evidence, but was rejected on the ground that it was *ultra vires* the Board. George Meyer Hains, a legally qualified medical practitioner and one of the three members of the Medical Board who had examined Hennessy on 20th March 1924, was called as a witness and was asked questions with regard to Hennessy's state of health at that time, but the arbitrator rejected the evidence, holding that no member of the Medical Board could be examined or cross-examined as to any certificate that might be given or as to the conclusions arrived at before giving such certificate. The request of the Company for the termination or diminution of the weekly payment was therefore refused. From that decision the Company appealed to the Full Court of the Supreme Court, which allowed the appeal and referred the matter back to the arbitrator for further consideration: *In re Broken Hill Pty. Co. and Hennessy* (1). The majority of the Court (*Street* C.J. and *Campbell* J., *Ferguson* J. dissenting) held that the certificate of 21st March 1924 was authorized by sec. 8 (1) of the Act of 1922 and was valid, and also that the evidence of Dr. Hains was admissible to prove the state of Hennessy's health when the examination was made by the Medical Board.

From the decision of the Full Court Hennessy now, by leave, appealed to the High Court.

E. M. Mitchell K.C. (with him *Cantor*), for the appellant.—The certificate of 21st March 1924 is not authorized by sec. 8 (1) of the *Workmen's Compensation* (*Lead Poisoning—Broken Hill*) *Act* 1922 by reason of the addition of the words " in so far as lead poisoning is

(1) (1925) 26 S.R. (N.S.W.) 67.

concerned." The plain words of that sub-section require that the certificate shall be one of general fitness, and there is no reason for cutting down that meaning (*Powell* v. *Kempton Park Racecourse Co.* (1); *Lukey* v. *Edmunds* (2)). Even if that certificate were valid there is nothing in the legislation which makes it admissible as evidence on proceedings under sec. 5 of the *Workmen's Compensation Act* 1916 for review of weekly payments. Sec. 8 of the Act of 1922 states what its effect is to be, and it has no other effect. A member of the Medical Board may not give evidence as to what conclusion he formed when, in performance of his duty as a member, he made an examination of a workman. The members are in the same position as Judges or arbitrators. The decision of the Board is to be that of a majority, and it would be contrary to public policy that questions might be put which would disclose which of the members, if any, dissented from the decision. The usefulness of the Board might be destroyed if its members were competent and compellable to give evidence, perhaps on contrary sides, as to the conclusions they formed from their examinations. (See *Hugo* v. *H. W. Larkins & Co.* (3); *Duke of Buccleuch* v. *Metropolitan Board of Works* (4); *O'Rourke* v. *Commissioner for Railways (N.S.W.)* (5); *Taylor on Evidence*, 11th ed., sec. 938; *Recher & Co.* v. *North British and Mercantile Insurance Co.* (6); *Bourgeois* v. *Weddell & Co.* (7).)

Lamb K.C. (with him *Delohery*), for the respondent. The certificate of 21st March 1924 was authorized by sec. 8 (1) of the Act of 1922 and was valid. If the Board in fact examines the workman, that is sufficient to support the certificate. There is no means provided by the Act for compelling a workman to submit to examination for the purposes of sec. 8 (1). If the workman does submit himself for examination it is the duty of the Board to give the certificate which fits the facts as the Board finds them. The words "physically fit" in sec. 8 (1) mean physically fit so far as lead poisoning is concerned. A Judge or an arbitrator is exempt from examination only where the examination is as to how he came

(1) (1899) A.C. 143, at p. 157.
(2) (1916) 21 C.L.R. 336, at p. 352.
(3) (1910) 3 B.W.C.C. 228.
(4) (1872) L.R. 5 H.L. 418, at pp. 423, 456.
(5) (1890) 15 App. Cas. 371, at p. 377.
(6) (1915) 3 K.B. 277, at p. 287.
(7) (1924) 1 K.B. 539, at p. 545.

H. C. OF A. 1926.

HENNESSY v. BROKEN HILL PTY. CO. LTD.

to his determination or for the purpose of validating or invalidating that determination (*Duke of Buccleuch* v. *Metropolitan Board of Works* (1)). It cannot interfere with the performance of his duties by a member of the Board that he should be compellable to give evidence as to the state of health of a workman. [Counsel also referred to *Best on Evidence*, 11th ed., par. 187 ; *R.* v. *Gazard* (2).]

[HIGGINS J. referred to *R.* v. *Earl of Thanet* (3).]

The certificate of 17th August 1925 was good and valid. If a certificate is given which in form may not comply with the Act the Board may afterwards give a certificate which does comply with the Act.

E. M. Mitchell K.C., in reply.

Cur. adv. vult.

Oct. 8.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. Hennessy was a miner who had been employed by the Broken Hill Pty. Co. at Broken Hill. He was disabled by lead poisoning and became entitled to compensation under the Workmen's Compensation Acts. It was fixed at a weekly sum under an unrecorded agreement made in July 1921 between Hennessy and the Company. In July 1925 the Company applied to a Judge of the District Court pursuant to the Workmen's Compensation Acts, for an arbitration and a review and termination of the weekly sum as from 20th March 1924.

It was not disputed at the Bar that this proceeding was competent and authorized by the Acts (*Nelson* v. *Summerlee Iron Co.* (4) ; *Pudney* v. *William France, Fenwick & Co.* (5)). The Company tendered in support of its application the certificate under the hand of the Chairman of the Medical Board constituted under the Acts in the following form :—" *Workmen's Compensation* (*Lead Poisoning—Broken Hill*) *Act* 1922, sec. 8 (1).—Certificate of Physical Fitness.—The Medical Board appointed in terms of the above Act having on the 20th day of March 1924 examined Mr. Alfred Hennessy . . . who has been employed in or upon a Broken Hill mine

(1) (1872) L.R. 5 H.L., at p. 457.
(2) (1838) 8 C. & P. 595.
(3) (1799) 27 How. St. Tr. 821.
(4) (1910) S.C. 360.
(5) (1925) 1 K.B. 346.

and who has been disabled by lead poisoning certifies that he is physically fit to return to employment in or upon a Broken Hill mine in so far as lead poisoning is concerned.—For the Medical Board, M. R. Finlayson, Chairman.—Broken Hill, 21st March 1924. —Mr. Alfred Hennessy—Broken Hill Pty. Ltd."

The certificate is inadmissible in evidence unless some statute authorizes its reception. That authority is to be found, it is said, in sec. 8 (1) of the Act No. 31 of 1922. The section provides: "If the Board, after examination, certifies that a workman who has been employed in or upon a Broken Hill mine, and who has been disabled by lead poisoning, is physically fit to return to employment in or upon a Broken Hill mine his right to compensation shall cease unless the mine-owner who last employed him before the commencement of the disablement refuses to re-employ or continue to employ or dismisses the said workman for the reason that the workman has been disabled by lead poisoning."

The Company was willing to and did re-employ Hennessy after the date of this certificate, but Hennessy himself claimed that he was too ill to carry out his work as a miner and insisted upon his compensation. If the certificate be valid and effective, Hennessy's right to compensation had ceased by force of the statute and the proceedings to review and terminate the weekly payments agreed to be paid to Hennessy are unnecessary; but if the certificate be invalid, then the proceedings are necessary and, as already stated, competent.

Two objections were taken to the certificate, one that the examination upon which the certificate was founded was irregular, the other that the certificate did not certify that Hennessy was physically fit to return to employment in or upon a Broken Hill mine. The former objection was based upon Statutory Rules of 1923 which provide for the procedure before the Medical Board. Hennessy applied to the Board for a declaration that it was unnecessary for him to undergo treatment for lead poisoning, whereupon the Board examined him, but, instead of making the declaration sought, certified that he was physically fit to return to work in so far as lead poisoning was concerned. We see nothing

H. C. OF A. 1926.

HENNESSY v. BROKEN HILL PTY. CO. LTD.

Knox C.J. Gavan Duffy J. Starke J.

irregular in this procedure, but in any case the foundation of a certificate under sec. 8 is an examination by the Medical Board and in this case Hennessy was so examined. It matters not how or why the workman came before the Board so long as they proceed to a certificate after examination. That is the foundation of their authority under sec. 8, and this requirement was satisfied in this case.

The other objection depends upon the construction of sec. 8 of the Act No. 31 of 1922. The general rule of construction is that the Courts should adhere to the ordinary meaning of the words used, unless that is at variance with the statute or leads to some repugnancy or inconsistency. Now, the ordinary and natural signification of the words " is physically fit to return to employment in or upon a Broken Hill mine " indicates a fitness generally, and not merely a fitness so far as lead poisoning is concerned. Adherence to that sense of the words works no absurdity, no repugnance and no inconsistency with any other part of the statute. Indeed, the provision is not surprising, having regard to the general supervisory powers of the Medical Board over workmen in the Broken Hill mines and to provisions such as are to be found in the Act 1920 No. 36, Schedule, Part V., cl. 40, and Part VI.

Consequently, we agree with the opinion of *Ferguson* J. that the certificate given in this case did not conform to the provisions of sec. 8 and was therefore inoperative.

The Company tendered in evidence before the Judge of the District Court another document issued by the Medical Board in August 1925 certifying that Hennessy was physically fit to return to employment in or upon a Broken Hill mine ; but no further examination was held, and the Board based it apparently upon the examination in March 1924 which founded the earlier certificate. This examination is so remote that, in our opinion, it cannot be relied upon as an examination under the statute for the purposes of the second certificate.

When these certificates were rejected by the Judge of the District Court, the Company called the members of the Medical Board to prove Hennessy's physical condition and fitness for work as ascertained by them on their official examination in March 1924.

The learned Judge rejected the evidence, but the Supreme Court by a majority held that it was admissible. The objection to the evidence was not based upon any express statutory prohibition but rather upon what was called the policy of the *Workmen's Compensation Act*. That policy may affect either the competency of the proposed witnesses or the extent to which the Company was entitled to examine them in support of its application. No doubt, we think, exists as to the competency of the proposed witnesses. Even Judges are competent witnesses, though they may not be compellable to testify as to matters in which they have been judicially engaged ; but their evidence has been received upon matters which did not involve the exercise of their judicial discretions and powers (*R.* v. *Earl of Thanet* (1) ; *Taylor on Evidence*, 10th ed., sec. 938 ; *Best on Evidence*, 12th ed., p. 179). Arbitrators, too, are equally competent as witnesses, though they cannot be compelled to testify as to the reasons which influenced them in the exercise of their discretionary powers or to explain, vary, contradict or extend their awards (*Duke of Buccleuch* v. *Metropolitan Board of Works* (2)).

Now, the members of the Medical Board are neither Judges nor arbitrators : their functions are administrative and supervisory. To them is confided the duty of ascertaining and certifying whether a workman is or is not suffering from lead poisoning, and whether he should be removed from future exposure to its risks. It is impossible in these circumstances, in our opinion, to deny their competency as witnesses ; but the extent to which they can give evidence of matters coming before them officially is another matter.

In our opinion the evidence tendered is admissible because it is not prohibited or privileged, because it does not seek to invalidate any act of the Board or to explain, contradict or vary any of its certificates or acts or to disclose the manner in which the Board exercised any of its functions, and because it merely seeks the disclosure of existing facts and symptoms and the opinion of expert witnesses who also happened to be members of the Board upon those facts and symptoms.

Consequently, in our opinion, the order of the Supreme Court was right and should be affirmed.

(1) (1799) 27 How. St. Tr. 821.

(2) (1872) L.R. 5 H.L. 418.

H. C. OF A. 1926.

HENNESSY v. BROKEN HILL PTY. CO. LTD.

Isaacs J.

ISAACS J. In my opinion the certificate of the Medical Board, dated 21st March 1924, is not in compliance with sec. 8 (1) of the *Workmen's Compensation (Lead Poisoning—Broken Hill) Act* of 1922, No. 31. The certificate contemplated by that section is a clear certificate that the workman is "physically fit to return to employment in or upon a Broken Hill mine." There are weighty considerations in favour of regarding the object of sec. 8 (1) to be confined to lead poisoning, its past effects and future possible effects. But the words are comprehensive, and the context is not sufficient to cut them down.

I cannot see my way to say that, if the workman lost a leg, or became blind, or strained his heart, or developed some deadly disease, sec. 8 (1) would sanction a certificate that he was "physically fit to return to employment in or upon a Broken Hill mine." That employment has a special danger—lead poisoning; but it has also the usual features of mining operations demanding a vigorous state of health generally. The phrase quoted embraces both.

I do not accede to the objection that the power of certifying under sec. 8 could not be exercised in the circumstances. The condition is "after examination," which means a medical examination by the Board. The Act itself contains no stipulation for an application directed specifically to sec. 8, nor do the regulations make any such condition. The appellant, in pursuance of his own statutory application, submitted to examination, and the Board, in its discretion, thought fit to exercise its powers under sec. 8. They mistook those powers and the certificate was bad, but the occasion was lawful.

The second certificate was too far separated from the examination to have any legal connection with it. The enactment supposes the certificate to have some reasonable relation to the examination in point of time. The occasion was this time unlawful. Consequently, neither certificate was admissible, even if (as to which I offer no opinion) a certificate in conformity with the section would have been admissible.

The evidence of Dr. Hains was, however, admissible to prove, not what his opinion or conclusions might have been in March 1924,

but his present opinion at the time of giving evidence, regarding the condition of the workman in March 1924 or at any later date. This is irrespective of the validity or invalidity of the certificate given. There is no legal reason why a member of the Medical Board is incompetent as a witness to depose to the condition of a workman examined by him officially. No official confidence is violated and there is thereby no lessening of capacity or public confidence in respect of future official functions.

The appeal fails, but, in my opinion, only for the reason stated.

HIGGINS J. In my opinion, the order of the Full Supreme Court should be upheld. The order sets aside the award of the District Court Judge as arbitrator, and remits the application to him for reconsideration. I propose to state the grounds for my opinion, as they are not in all respects the grounds stated by the majority of the Full Supreme Court. Indeed, it is not at all surprising that there should be a difference of opinion as to the interpretation of the Act—the *Workmen's Compensation (Lead Poisoning—Broken Hill) Act* 1922.

The Company applied on 4th July 1925 to the arbitrator for review and termination (or diminution), as from 20th March 1924, of the weekly payments of £3 per week, payable by "unrecorded agreement" by the Company to Hennessy, who had been certified to be suffering from lead poisoning. The application was made as under sec. 5 (3) of the *Workmen's Compensation Act* 1916, and clause 16 of Schedule I. to that Act. The Act of 1922 has to be construed with the general Act of 1916; and no objection has been taken to the application in itself.

The Company tendered, in support of this application, a certificate of the Medical Board (constituted by the Act of 1922) dated 21st March 1924, which stated that the man is physically fit to return to employment in or upon a Broken Hill mine "so far as lead poisoning is concerned." The arbitrator refused to accept this certificate as evidence on the ground that the Board had no power to give such a certificate. The view of the arbitrator was that the Board should not give such a certificate on the mere application made by Hennessy,

H. C. OF A. 1926.

HENNESSY v. BROKEN HILL PTY. CO. LTD.

Higgins J.

under sec. 7 of the Act of 1922, for a certificate that it was unnecessary for him to undergo treatment for lead poisoning. As I understand, the arbitrator thought that on Hennessy's application to the Board the Board could merely grant or refuse Hennessy's application, and could not find that Hennessy was fit to return to employment in a Broken Hill mine. For some time, I regarded this objection to the certificate of 21st March 1924 as being sound. But it is now obvious to my mind that sec. 8 of the Act of 1922 enables the Board, after the employee has been duly examined for any reason, to give a certificate that he was fit to return to employment. The man had *asked* for examination, following the form prescribed in reg. 6 (*b*); and, having examined him, the Board had power to give the certificate that it found to be best suited to the case. The fact that there is no provision made for an application on behalf of the employer to the Board on the subject strongly supports this view; and there is really no hardship to the employee in the nature of surprise, for any evidence tending to show that he is physically fitted would be relevant to show that he need not undergo treatment.

But the Board had no power to limit its certificate of 21st March 1924 by adding the words "so far as lead poisoning is concerned." Sec. 8 of the Act of 1922 contains no such limitation of the words "physically fit"; nor does the form prescribed in the schedule for the certificate of physical fitness (Form 8 in Schedule to Regulations of 23rd March 1923). Where the Legislature means that a man has merely recovered from lead poisoning, it says so expressly (cf. sec. 4 (3) (*a*)); and where it means fitness in all respects, it uses the words without the limitation (cf. sec. 9 (3); and see reg. 14 of Schedule I. to the Act of 1916). Moreover, it would be unjust, and therefore very improbable, that the Legislature would terminate the compensation payable to an employee who has once been disabled by lead poisoning if he has so degenerated in physique by consequent unemployment, that he can no longer do work in the mine; or if he has lost in the meantime a leg or an arm. Even if we admit that conjecture might supply some possible reasons for the other contention, we have no right to add words to sec. 8 which are not necessarily implied.

Therefore, I regard the certificate of 21st March 1924 as unauthorized and invalid.

As for the new certificate given by the Board on 17th August 1925, just before the arbitrator gave his decision—the certificate omitting the words "so far as lead poisoning is concerned." I regard this also as unauthorized and invalid. An authorized certificate must be given "after examination"; but not, as here, 16 or 17 months after examination. If a medical man prescribe that a medicine be taken "after dinner," he does not mean sixteen months after dinner. In this view, I concur respectfully with *Ferguson* J. Moreover, under reg. 6 (*c*) (IV.) of 23rd March 1923, the Chairman of the Board has to cause to be kept a record of the sittings of the Board, as well as of the certificates given, and he has to cause a copy of the record to be forwarded to the Minister at *the end of each month*; and such a provision does not accord with the new certificate made out after the sixteen months.

The certificate having been rejected by the arbitrator, Dr. Hains, a member of the Board, was called by counsel for the Company, and he deposed that he made a full examination of Hennessy before the certificate of 21st March 1924, and that he had come to a definite opinion on the question whether or not the symptoms of lead poisoning had disappeared from the man. Then Dr. Hains was asked "What was your own personal opinion and conclusion upon the question as to whether or not the symptoms of lead poisoning had disappeared?" Objection was taken to this question, and it was disallowed. Even if it were allowed, and if the answer were that the symptoms of lead poisoning had disappeared, it would not (as I have stated) fit the case. But in view of further proceedings I ought to add that in my opinion, there is no law which forbids such a question to be asked and to be answered by one who, as a member of a Board such as this Medical Board, has examined a man, provided that the question is relevant to the inquiry in which the question is asked (see *Duke of Buccleuch* v. *Metropolitan Board of Works* (1); *O'Rourke* v. *Commissioner for Railways* (*N.S.W.*) (2)).

(1) (1872) L.R. 5 H.L. 418.

(2) (1890) 15 App. Cas. 371.

H. C. OF A. 1926.

HENNESSY v. BROKEN HILL PTY. CO. LTD.

The case seems to be still stronger where the supposed certificate of the Medical Board turns out to be invalid (as here).

Appeal dismissed with costs.

Solicitor for the appellant, *Walter P. Blackmore*, Broken Hill, by *Young & Blackmore.*

Solicitors for the respondent, *J. R. Edwards & Son*, Broken Hill, by *Minter, Simpson & Co.*

B. L.

Overr *Piro v W Foster & Co Ltd* (1943) 68 CLR 313

[HIGH COURT OF AUSTRALIA.]

BOURKE . . . . . APPELLANT; PLAINTIFF,

AND

BUTTERFIELD AND LEWIS LIMITED . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 4, 5.

MELBOURNE, *Nov.* 1.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Personal Injury—Employer and Employee—Action for damages—Breach of statutory duty—Dangerous machinery—Duty to fence— Defence—Contributory negligence—Limits of employer's liability—Factories and Shops Act 1912 (*N.S.W.*) (*No.* 39 *of* 1912), *secs.* 33, 53, 56.

Contributory negligence is not a defence to an action to recover damages for personal injury caused by a breach of an absolute statutory duty imposed for the benefit of a class of persons of which the plaintiff is a member.

McKinnon v. *Barnes*, (1912) 12 S.R. (N.S.W.) 129, overruled.

Limits of defendant's responsibility in such a case considered.

In an action by an employee against his employer to recover damages for personal injury to the employee caused by a breach of the duty imposed upon