Aff
Lake View & Star Ltd v Cominelli & Bonazzi
(1937) 56 CLR 283

[HIGH COURT OF AUSTRALIA.]

COMINELLI AND BONAZZI . . . . APPELLANTS;
PLAINTIFFS,

AND

THE LAKE VIEW AND STAR LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 6, 12.

Rich, Dixon and McTiernan JJ.

Gold Mining—Company—Tributers—Claim by tributers—Premium on sale of gold—Agreement in substitution for provisions of the Act—Mining Act 1904-1923 (*W.A.*) (*No.* 15 *of* 1904—*No.* 12 *of* 1923), *sec.* 152*.

On the hearing of a plaint issued out of the Warden's Court by certain tributers against a gold mining company, it was ordered that an account be taken of all ores purchased by the company from the tributers. The company, as a result of the fall in value of Commonwealth notes in terms of sterling, had obtained not only an increased price for the gold, but also varying additional amounts by reason of the rates of exchange between Australian currency and sterling. The tributers had demanded 50 per cent of these increases as a "premium" received by the company on the sale of gold as provided by the *Mining Act*. An agreement of compromise was drawn up by the company and presented to the tributers, who accepted it. By the agreement the tributers waived their demands, and accepted a considerably smaller percentage than they were entitled to under the *Mining Act* 1904-1923 (W.A.).

* *Mining Act* 1904-1923, sec. 152, provides as follows:—"In all contracts between a tributer and the owner of a treatment plant (whether the lessee of the mine under tribute or not) relating to the treatment of gold ore, the following provisions shall apply:—(*a*) It shall be obligatory on the part of the owner of such plant, when the ore is purchased on assay value, to account for all ores received by him from the tributer for treatment on the basis of not less than ninety per centum extraction of the assayed value of the ore; . . . (*b*) The owner of the treatment plant shall also account for and pay to the tributer not less than fifty per centum of any premium received by such owner on the sale of the gold obtained from the ore treated."

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Held, that the agreement into which the tributers had entered was an attempt to substitute an entirely different method of remunerating the tributers for the gold won, and sold by the company, and that the agreement was ineffectual and contrary to the terms of sec. 152 (*b*) of the *Mining Act* 1904-1923 (W.A.), and that the order of the Warden be restored.

Decision of the Supreme Court of Western Australia (*Northmore* C.J.): *Lake View and Star Ltd.* v. *Cominelli*, (1934) 36 W.A.L.R. 107, reversed.

APPEAL from the Supreme Court of Western Australia.

The appellant Cominelli and his partner Martino Bonazzi were tributers of the respondent company under agreements dated 15th May 1930; they worked on the company's mines, and delivered and sold ore to the company from February 1930 to April 1932 both inclusive. Bonazzi died on 26th August 1933, and letters of administration with the will annexed were granted in October 1933 to the appellant Maria Bonazzi. From the date of the tribute agreements till the month of September 1931, when England went off the gold standard, the company had received, in addition to the price of the gold extracted from the ores purchased from the tributers, varying sums by way of exchange,and in the last four months of 1931 had received an increased price per ounce for the gold sold, in addition to the exchange. In December 1931 the tributers, claiming that the amounts received for exchange and for the increased price of gold were premiums, demanded 50 per cent of such premiums as provided by sec. 152 (*b*) of the *Mining Act* 1904-1923 (W.A.). The company denied that the amounts resulting from exchange and the increased price of gold were premiums within the meaning of the Act, and asserted that, in consequence, the tributers were not entitled to any portion of such amounts.

In these circumstances, on 18th March 1932, an agreement was entered into between the company and the tributers, whereby the company waived its contention that the tributers were not entitled to any portion of the sums received for exchange and for the increased price of gold, and the appellants agreed to accept in full settlement of their claims 20 per cent of the sums received by the company for exchange, and 50 per cent of the increased amount received for the gold, and to release the company from all liability for any payment in respect of bounty and/or premium of any amounts in excess of

those provided for by the agreement. On 19th October 1933 the appellants initiated proceedings in the Warden's Court at Kalgoorlie, and therein alleged that the company between 6th February 1930 and 21st September 1931 had received premiums on the sale of gold within the meaning of sec. 152 (*b*) of the *Mining Act* 1904-1923, being moneys received owing to the ruling rates of exchange and/or the increased price of gold on such sale, and had refused and neglected to account for and pay at least 50 per cent of such premiums as provided by sec. 152 (*b*). They further alleged that between 21st September 1931 and 20th April 1932 the company had received from the appellant Cominelli and his partner all ores raised by them, and had refused and neglected to account and pay for the gold extracted at the market value in Australian currency ruling at the respective dates of purchase. The appellants claimed an account and/or payment of all sums due by the company, representing 50 per cent of all premiums received by it, in accordance with sec. 152 (*b*), with interest thereon at 6 per cent, and further claimed an account of all ores purchased from the appellant Cominelli and his partner, and payment for the same with interest thereon at 6 per cent. The company in its notice of defence relied on the agreement and release of 18th March 1932, and alleged that all sums due under the agreement had been paid to and accepted by the appellant Cominelli and his partner in full settlement of all their claims. The Warden came to the conclusion that the agreement and release of 18th March 1932 was void by virtue of sec. 152 of the *Mining Act*, and gave judgment for the appellants accordingly. From that decision the company appealed under the *Mining Act* to the Supreme Court of Western Australia by way of special case, alleging that the agreement and release of 18th March 1932 was a valid and legal agreement, and was not void or illegal by virtue of sec. 152 of the *Mining Act*.

Northmore C.J. allowed the appeal and set aside the judgment of the Warden on the grounds that, so far as the agreement related to past transactions, it was a compromise of a claim by the appellants, and was valid; so far as it related to future transactions it was in contravention of sec. 152 (*b*) of the Act, but that, by reason of the agreement, and the receipt by appellants of an amount arrived at

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in accordance with the agreement, they were estopped from alleging that any further moneys were due to them: *Lake View and Star Ltd.* v. *Cominelli* (1).

From that decision appellants now appealed to the High Court.

Villeneuve Smith K.C. (with him *Keall*), for the appellants. The effect of sec. 156 of the *Mining Act* is to prohibit contracting out of sec. 152. It is a question of public policy which cannot be waived by the parties (*Maxwell, On the Interpretation of Statutes*, 4th ed. (1905), pp. 484, 581. [Counsel was stopped.]

Jackson K.C. (with him *Leake*), for the respondent. Sec. 152 of the *Mining Act* 1904 does not in terms prohibit contracting out. The section writes certain terms into the contract, and it is not against public policy that the tributers should waive their rights under the section (*Equitable Life Assurance of the United States* v. *Bogie* (2)). The penal provisions of sec. 156 apply only to breach of the Act No. 50 of 1920. In any case no charge could be laid against the respondent for contravention of the Act. There is a distinction between compromising a claim under a statute and contracting out (*Haydock* v. *Godier* (3)). The decision in *Great Fingall Consolidated Ltd.* v. *Sheehan* (4) and the judgment of Lord *Carson* in *Russell* v. *Rudd* (5) are still good law, and do not conflict with the actual decision in *Russell* v. *Rudd*, which was decided upon the special terms of the *Workers' Compensation Act*. Counsel referred also to *McIlwraith McEacharn Ltd.* v. *Sweetman* (6). The law encourages compromises, and upholds the rights of persons of full capacity to contract as they think fit (*Rowbottom* v. *Wilson* (7); *Rumsey* v. *N.E. Railway Co.* (8); *Printing Registry Co.* v. *Sampson* (9)). The decision in *Great Boulder Proprietary Gold Mines Ltd.* v. *Scriven* (10) does not necessarily apply since England abandoned the gold standard, and it is still open to the respondent to contend that there has been no premium since then. If this litigation were

(1) (1934) 36 W.A.L.R. 107.
(2) (1905) 3 C.L.R. 878.
(3) (1921) 2 K.B. 384, at p. 386.
(4) (1905) 3 C.L.R. 176.
(5) (1923) A.C. 309.
(6) (1930) 44 C.L.R. 116, at p. 129.
(7) (1857) 8 E. & B. 123, at p. 151; 120 E.R. 45, at p. 56.
(8) (1863) 14 C.B.N.S. 641; 140 E.R. 596.
(9) (1875) L.R. 19 Eq. 465.
(10) (1932) 36 W.A.L.R. 101.

compromised now, the compromise would be binding on the appellants, and the agreement is none the less binding because litigation between these parties had not then commenced. If the agreement were not binding as to transactions then *in futuro*, the subsequent acceptance of moneys due on the basis of the agreement and release, evidenced by receipts in full discharge, can be supported as a fresh agreement of compromise.

Keall, in reply. Parties cannot compromise a claim when it amounts to a contracting out of a statute intended for their protection against their own voluntary acts (*Russell* v. *Rudd* (1), which in effect overrules *Great Boulder* v. *Sheehan* (2)). (See *McIlwraith McEacharn Ltd.* v. *Sweetman* (3).) The decision of the learned Chief Justice of Western Australia was based on *Hadock* v. *Goodier* (4), which was overruled by *Russell* v. *Rudd*. Parties cannot contract out of a statute by a separate agreement (*Williams* v. *Smith* (5)). The guiding principle was laid down in *Jeffries* v. *Alexander* (6).

Cur. adv. vult.

Sept. 12.

THE COURT delivered the following written judgment :—

In the Warden's Court at Kalgoorlie upon the complaint of the appellants, a tributer and the administratrix of his deceased partner, an order was made that an account be taken of all ores purchased by the respondent company from the appellant and his partner. The period of the account is from 15th May 1930, the date of the commencement of two tribute agreements between them and the respondent company, until 20th April 1932. The order required the respondent company to pay the amount found to be due on taking such account with interest. The account was ordered because the Warden was of opinion that, notwithstanding an agreement set up by the respondent company as a discharge of the claims of the tributers, they were entitled under sec. 152 (*b*) of the *Mining Act* 1904-1923 (W.A.) to all premiums

(1) (1923) A.C. 309.
(2) (1905) 3 C.L.R. 176.
(3) (1930) 44 C.L.R. 116.
(4) (1921) 2 K.B. 386.
(5) (1934) 2 K.B. 158.
(6) (1860) 8 H.L. Cas. 594; 11 E.R. 562.

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received by the respondent company on the sale of gold obtained from the ore delivered by the tributers and treated by the respondent company. The Warden appears to have considered that sums received by the respondent company for which it had not accounted answered the description "premium."

Upon appeal to the Supreme Court this order was set aside by *Northmore* C.J. upon the ground that the claim of the tributers had been discharged as a result of their acceptance of sums of money paid under the agreement relied upon by the respondent company. That agreement was dated 18th March 1932, and separately made between each of them and the respondent company. From the decision of *Northmore* C.J. an appeal is now brought to this Court. We are told that the question whether his decision is right concerns others besides the parties to the appeal, because a number of tributers entered into the form of agreement and signed the form of acknowledgment upon which the judgment of *Northmore* C.J. proceeds.

The provision upon which the tributers base their claims to a half share of the premiums upon the sale of the gold recovered by the respondent company from the ore, viz., sec. 152 of the *Mining Act*, was enacted in 1921, when a greater amount of Australian currency was obtainable upon the disposal of bullion than its equivalent in sovereigns. In 1915, the export of gold from Australia was prohibited except with the consent of the Treasurer. It became possible to obtain upon the sale of gold abroad a price which when converted into Australian currency exceeded the amount of £3 17s. 10½d. per ounce of standard gold, or the equivalent of £4 4s. 11.45d. per ounce of fine gold, which represents the relation of sovereigns to bullion fixed by the gold content. At the beginning of 1919, a Gold Producers' Association was formed and registered as a limited company, and this body was permitted by the Treasurer to export gold for the purpose of obtaining the increased return in Australian currency for its members, who constituted over 90 per cent of the gold producers of the Commonwealth. The course adopted in the disposal of gold at that time is stated in *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.)* (1)

(1) (1923) 33 C.L.R. 76, at pp. 82-85 and 98-104.

and *Dickson* v. *Commissioner of Taxation* (*N.S.W.*) (1). It appears from the documents quoted in the judgment of *Rich* J. in the first of these cases (2) that the excess sum obtained by the association on the sale of the gold was described as a premium, that for one period it amounted to 15s. 7d. per standard ounce sold, and that of the total sum the greater part accrued to the producers of gold in Western Australia.

In 1920, some tributers at Kalgoorlie who, according to the terms of their tributing contract as registered by the Warden, were entitled to the net proceeds of the gold after the deduction of royalty and other moneys payable by them to the mine owner treating the ore, failed to obtain the advantage of the excess amount of Australian currency obtainable for gold, because of their tacit acceptance of a further term upon which they delivered ore, viz., that the mine owner treating it should account for the gold on the basis of £4 per ounce on 90 per cent of the gold content as determined by agreed assay. A decision to this effect by *Northmore* J. was upheld in this Court in September 1920 by *Knox* C.J. and *Gavan Duffy* J., *Isaacs* and *Rich* JJ. dissenting (*Smith* v. *The Great Boulder Perseverance Gold Mining Co.* (3)). In December of the same year the *Mining Act Amendment Act* 1920 (W.A.) was passed, containing provisions giving a greater control over the terms of tributing agreements. Sec. 27 (*d*) required that, before registering such an agreement, the Warden should satisfy himself that it contained, among other things, a provision to the effect that the proceeds of the gold should be accounted for at the prices actually received on the sale of such gold. In the following year, by the *Mining Act Amendment Act* 1921, this provision was repealed, and that which became sec. 152 in the *Mining Act* 1904-1923 was enacted. Sec. 152 is as follows :—" In all contracts between a tributer and the owner of a treatment plant (whether the lessee of the mine under tribute or not) relating to the treatment of gold ore, the following provisions shall apply :—(*a*) It shall be obligatory on the part of the owner of such plant, when the ore is purchased on assay value, to account for all ores received by him from the tributer for treatment on the basis of not less

(1) (1925) 36 C.L.R. 489, at pp. 491, 492.

(2) (1923) 33 C.L.R., at p. 103.

(3) (1920) 28 C.L.R. 359.

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than ninety per centum extraction of the assayed value of the ore; unless on an application to the warden it shall be otherwise determined, on proof to his satisfaction, that the ore is of so refractory a nature that ninety per centum of the assayed value cannot be extracted; and (*b*) The owner of the treatment plant shall also account for and pay to the tributer not less than fifty per centum of any premium received by such owner on the sale of the gold obtained from the ore treated."

It is evident, upon an inspection of the two paragraphs of this provision, that the " assay value " of the gold content of the ore is considered as having a definite money equivalent for which the owner of the treatment plant will account, and that it is expected that an amount of currency may be obtained per ounce on the sale of the gold recovered which will leave a surplus over this money equivalent and so constitute a " premium." But it does not appear from the terms of the section whether the money equivalent is regarded as established by the agreement of the parties, by the relation of gold currency to fine gold, or by a tradition or convention resulting from the long existence of that relation notwithstanding the suspension in economic fact during and after the war of a fixed relationship between currency and gold. It seems undeniable, however, that the provision was intended as a substitute for the requirement that the proceeds of the gold would be accounted for at the prices actually received. Its purpose appears to be to enable the owner of the treatment plant to retain half the amount described as a premium. It seems unlikely that it would be left to the agreement of the parties to fix the sum which should constitute the price of the gold that would be the base for the calculation of the excess called the premium.

As time went on questions relating to premiums from the sale of gold ceased to be important, and, probably, from the return of Great Britain to the gold standard in 1925 until the rise in Australia of the rate of exchange upon London, little or no premium was obtainable. But, as a result of the fall in value of Commonwealth notes in terms of sterling, a greater return in Australian currency was obtained upon the disposal of gold. Claims were then made by tributers upon the proprietors of treatment

plants to share under sec. 152 (*b*) in the increased amount upon the footing that the increase constituted a premium within the meaning of that provision. These claims were resisted, and, in November 1930, an action was brought in the interest of the tributers in the name of one Scriven against the Great Boulder Proprietary Gold Mines Ltd. This action was heard by *Northmore* A.C.J., as he then was, and, on 3rd August 1931, he decided the question in favour of the tributers. His Honor said :—" There is no doubt that the excess that was paid by the mint was due to the exchange rate between Australia and London, but none the less the result was that any person who had gold for sale was in a position to demand and obtain for it a sum in excess of the value of the standard gold and that seems to me another way of saying that anyone who had gold to sell could obtain a premium on its sale."

On 20th October 1931, the defendant in that action obtained leave to appeal from this decision to His Majesty in Council. The appeal was not decided by the Judicial Committee until 22nd November 1932. The appeal was dismissed. In their Lordships' judgment (*Great Boulder Pty. Gold Mines Ltd.* v. *Scriven* (1)), which was delivered by Lord *Macmillan*, reliance was placed upon the practice of the mint in distinguishing between the value of gold upon " a standard gold content at £3 17s. 10½d. per ounce " and the premium on gold offered " owing to the exchange position " by banks in Western Australia. After referring to it, the judgment proceeds :—" It should be explained that standard gold used for minting sovereigns is an alloy of pure or fine gold, and that the value of £3 17s. 10½d. per ounce for standard gold corresponds to £4 4s. 11½d. per ounce for fine gold. During the whole of the period in question English currency was on the gold standard.

" The appellants submitted that, notwithstanding the reiterated designation of the sums in question as ' premiums ' in the relative official documents of the mint, these sums, though paid to and received by them under that designation, were not ' premiums ' within the meaning of the statute. The argument, as their Lordships understand it, is that gold cannot be accurately described as being at a premium unless its price or value in the world market,

(1) (1932) 36 W.A.L.R. 101.

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i.e., the London price in sterling, is in excess of £4 4s. 11½d. for fine gold or £3 17s. 10½d. for standard gold, and that as the appellants have not received in Australian currency for the gold in question more than the equivalent at the prevalent exchange rate of £3 17s. 10½d. sterling per ounce of standard gold, they have not in fact received any premium at all. A premium, they say, denotes a payment in excess of par, and the payment received by them has not been in excess of the only par applicable, namely, the London sterling price.

"Their Lordships recognize the cogency of the appellants' contention as applied to the world market for gold, but what has to be sought in the present instance is the meaning to be attached to the term 'premium' as used in a particular statute of the legislature of Western Australia. When in official documents of Western Australia dealing with transactions in the sale of gold their Lordships find the term 'premium' used to describe certain payments it becomes exceedingly difficult to hold that the same term has a different meaning in a statute of the same State dealing with the same transactions. The whole business out of which this controversy has arisen has been conducted in Australian currency; the £4 paid by the appellants to the respondent on the purchase of the ore was payable in Australian currency, the legal tender of the country; the costs of mining, treatment and realization, the wages of the tributers fixed at £3 10s. per week, the royalties payable to the appellants, and the mint charges are all reckoned in terms of Australian currency. If in Western Australia gold is paid for at more than £3 17s. 10½d. per standard ounce in Australian currency, it is appropriately described in the vernacular of commerce as being at a premium in the Australian market, although the increased payment is due to the depreciation of the Australian currency rather than to the appreciation of gold in the world market. Section 152 of the *Mines Act* is designed for the protection of persons in the position of the respondent in their contracts with persons in the position of the appellants, and when it requires the owner of a treatment plant to account for and pay to the tributer not less than 50 per cent of any premium received by such owner on the sale of gold obtained from the ore treated, their Lordships are satisfied that it is the conditions

of the local market that are in contemplation. Accordingly, as the value of gold, measured by the standard of the legal tender currency of Western Australia was during the material period at a premium and was so described in the official language of those concerned there with this class of business, their Lordships reach the conclusion that the sums of money in question were premiums within the intendment of the statute" (1).

It is to be noticed that their Lordships particularly refer to the fact that during the whole of the period in question English currency was on the gold standard. This fact was important to the understanding of the argument which the appellant submitted to the Board and their Lordships proceed to restate. It is suggested, however, that the existence in England of a gold standard forms the basis of the judgment. But we do not find it easy to see what materiality it can have to the view adopted by their Lordships as the alternative to that argument which their Lordships stated only to reject. They interpreted sec. 152 (*b*) as referring to the excess in Australian currency over the sum of £3 17s. 10½d. per ounce of standard gold obtained upon the sale of gold. It is not apparent how the fact that English currency did or did not remain on the gold standard could affect the application of the Western Australian statute so construed to the amount by which the Australian currency obtainable for gold exceeded the amount of currency in the form of sovereigns equivalent to the standard gold contents of the metal sold.

Before the decision of the Privy Council in *Scriven's Case* (1) was given, the respondent in the present appeal took measures to dispose of the claims of tributers winning ore from its mine and delivering it for treatment in its plant. It prepared a form of agreement which recited that the value of gold had lately increased owing to the operation of various causes, that the company had received or would, or might receive, the benefit of the increased value and a bounty under the Commonwealth *Gold Bounty Act* 1930-1931, that the tributer claimed 50 per cent of the premium on all such gold sold by the respondent company as well as the bounty on a proportion thereof, that the company exported the gold for sale in England, that the company was paid exchange by its bankers, and that

(1) (1932) 36 W.A.L.R., at pp. 105, 106.

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disputes and differences had arisen between the company and the tributers as to the meaning of "premium," and concerning the amount which the tributer was entitled to receive from the company in respect of premium and bounty on the gold. It then recited that litigation was pending or threatened by the tributer against the company, and that the company and the tributer had mutually agreed to compromise and settle their differences. The operative part of the agreement expressed an agreement on the part of the tributer to accept from the company in full satisfaction of any claims which he might or should have or might have had against it to premiums and bounty (*a*) 50 per cent of the bounty, (*b*) 20 per cent of the amount received by the company in Australia on the value computed at £4 4s. 11½d. per ounce of fine gold, and (*c*) 50 per cent of the difference between the value of the gold computed at that price per fine ounce in Australian money and the value of the gold computed at the price actually received in England as though such price were Australian money. The agreement contained a covenant on the part of the company to pay these amounts in respect of each parcel of gold sold or to be sold by it, and on the part of the tributer, not to prosecute any claim which had arisen or might arise in respect of these matters. It ended with a release by the tributer of such claims. It may be remarked that from 6th August 1931 under the law of the Commonwealth the owner of the treatment plant was required to account for and pay to the tributer 50 per cent of any bounty received by such owner on account of the gold obtained from the ore treated (sec. 6, Act No. 15 of 1931).

A meeting of the tributers of the respondent company was called by it and they were individually requested to enter into the agreement proposed by the company. The tributers Cominelli and Bonazzi, with whom this appeal is concerned, ultimately consented to do so. Notice of termination was given by the respondent company under the tributing agreements of those tributers who refused to enter into such a contract.

Upon the assumption that the construction given to sec. 152 by the Privy Council applies after 21st September 1931, when Great Britain went off the gold standard, 50 per cent of the excess over £3 17s. 10½d. per standard ounce received by the company would

be payable to the tributers, whether ascribed to exchange or simply to the appreciation of gold in terms of Commonwealth notes. The agreement, therefore, purports on this assumption to deprive the tributers of a considerable part of what would be payable to them under the statute. It also purports to govern the relations of the tributers and the respondent company prospectively. In fact the tributers, Cominelli and Bonazzi, who had been delivering ore since 15th May 1930, continued to deliver ore for treatment until 20th April 1932. *Northmore* C.J. was of opinion that the agreement lawfully operated as a discharge of the claims of the tributers which had accrued prior to its date. He decided, however, that it could not overcome the force of the section in respect of the subsequent relations of the parties. In this his Honor was clearly right. The terms of the section are imperative and its provisions must govern the relations of the parties notwithstanding any executory agreement to the contrary. So far as the agreement operated in respect of future deliveries of ore, it amounted to no more than an executory contract imposing conditions inconsistent with those imputed by the statute. But in respect of the ore delivered after the agreement, the respondent company actually paid the tributers according to its provisions and they signed acknowledgments of the receipt of the amounts so paid " in full settlement of our claims as set out in agreement with " the respondent company. His Honor considered that these payments so acknowledged operated to discharge the claims accruing after the agreement. It is open to doubt whether any intention on the part of the tributers to agree to the discharge of claims since accrued actually existed or was expressed. The acknowledgment seems to refer rather to payments pursuant to the agreement of 18th March 1932, than to a settlement of claims existing notwithstanding that agreement. This ground alone would be enough to displace the inference that the claims arising after the agreements were discharged by accord and satisfaction. But we think that the whole agreement is contrary to sec. 152 (*b*), and cannot be supported whether in respect of the antecedent or subsequent claims. The provision forms part of a carefully framed enactment for the protection of tributers. That enactment controls their freedom of contract in their interest. It places their contracts

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under the supervision of the Warden, and requires that they be approved by him and registered. The enactment originally included an express requirement that the proceeds of the gold should be accounted for at the prices actually received on its sale. In substitution for this provision, sec. 152 was passed. In terms, par. (*b*) directs that the owner of a treatment plant shall account for and pay 50 per cent of the premium. The agreement of the 18th March 1932, under colour of settling differences, attempts to substitute an entirely different method of remunerating the tributer for his gold. It altogether deserts the basis adopted by the section. The rule of the statute, to adopt the language of Lord *Watson*, in *Anctil* v. *Manufacturers Life Insurance* (1), " is one which rests upon general principles of public policy or expediency, and which cannot be defeated by the parties." The argument that, although the statute may be paramount in annexing its terms to the agreement of the parties, yet it does not exclude a compromise of disputed claims arising under the statute, neglects the character of the duty which the statute imposes. That duty is to account for and pay to the tributer an ascertainable sum. To pay another sum because the person upon whom the duty lies disputes the true interpretation of the statute governing the ascertainment of the amount is to violate the duty, not to pursue it *sub modo*.

For these reasons the judgment of the Supreme Court ought to be reversed and the order of the Warden restored. That order does not declare that the amounts obtained by the respondent company in respect of the gold in excess of £3 17s. 10½d. per ounce of standard gold are premiums. Although we do not doubt that that was the Warden's opinion, yet we agree with the contention of the respondent that, under the order made, it remains open to the respondent company to contend on the taking of accounts that some or all of this excess does not constitute a premium, notwithstanding the decision of the Privy Council in *Scriven's Case* (2). We do not desire to encourage this contention, but as counsel for the respondent company submitted that the question did not arise upon this appeal, which concerned only the order made by the Warden, and that we ought not to decide the question so as to conclude the parties, and,

(1) (1899) A.C. 604, at p. 609.

(2) (1932) 36 W.A.L.R. 101.

as he did not argue it fully before us, we refrain from expressing any final opinion upon it. For the future the question has been set at rest by the *Mining Act Amendment Act* 1932 (W.A.).

The appeal should be allowed with costs.

The order of the Supreme Court should be set aside. In lieu thereof it should be ordered that the appeal from the Warden be dismissed with costs, and the order of the Warden restored.

Appeal allowed with costs. Order of the Supreme Court set aside. In lieu thereof order that the appeal from the Warden to the Supreme Court be dismissed with costs and the order of the Warden restored.

Solicitors for the appellants, *Villeneuve Smith & Keall.*

Solicitors for the respondent, *Jackson, Leake, Stawell & Co.*