[HIGH COURT OF AUSTRALIA.]

O'CONNOR . . . . . APPELLANT;
PLAINTIFF,

AND

S. P. BRAY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936-1937.

SYDNEY, 1936, *Aug.* 13, 14, 17. 1937, *April* 30.

Starke, Dixon, Evatt and McTiernan JJ

Workers' Compensation—Compensation received by worker—Worker certified fit for work—Payments of compensation stopped—Claim by worker—Rejected by Workers' Compensation Commission—Action for damages by worker against employer—Alternative remedies—Option—Knowledge of worker—Workers' Compensation Act 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *sec.* 63.*

Action—Statutory duty—Breach—Person injured thereby—Right of action—"Service lift"—Scaffolding and Lifts Act 1912 (*N.S.W.*) (*No.* 38 *of* 1912), *Second Schedule, reg.* 31 (*b*).

After an accident in December 1930, the appellant for some time received compensation under the *Workers' Compensation Act* 1926-1929 (N.S.W.). Late in 1931 a medical board certified that he was fit for light work, and finally, in December 1933, the weekly payments made on the part of the employer, the respondent, were brought to an end. The appellant then took proceedings before the Workers' Compensation Commission to establish that his incapacity continued. An award was made in favour of the respondent on the ground that the appellant had recovered from his incapacity. In an action at common law commenced in August 1934 by the appellant against the respondent in respect of the same injury, the jury was directed that a question it had to consider was whether, when the appellant took compensation and proceeded under the *Workers' Compensation Act*, he was aware that he might instead sue at common law. The jury found a general verdict for the appellant, a deduction being made from the damages awarded of the amount received by him as compensation.

* The provisions of this section are set out at p. 422, *ante*.

Held, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting) that, as the jury by its verdict had found that when the appellant received compensation and proceeded under the *Workers' Compensation Act* he was not aware of his alternative rights under sec. 63 of that Act, he was entitled to maintain an action at common law in respect of the same injury.

Latter v. *Muswellbrook Corporation*, *ante*, p. 422, applied.

Reg. 31 (*b*) under the *Scaffolding and Lifts Act* 1912 (N.S.W.) prescribes that safety gear must be provided for all lifts excepting direct-acting lifts, and service lifts, in which no person travels.

Held, by *Dixon*, *Evatt* and *McTiernan* JJ., that a person injured as a result of the non-observance of the statutory duty thus imposed has a cause of action against the person responsible under the regulation for the care, control and management of the lift.

Meaning of the expression "service lift" considered.

Decision of the Supreme Court of New South Wales (Full Court): *O'Connor* v. *S. P. Bray Ltd.*, (1936) 36 S.R. (N.S.W.) 248; 53 W.N. (N.S.W.) 72, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales Cornelius O'Connor sought to recover from S. P. Bray Ltd., his employer, the sum of £3,000 for injuries sustained by him at his place of employment. The defendant company carried on the business of a caterer and pastrycook in certain premises in which it had installed a lift which was used for the transport of goods between the lower floor and the upper floor. The plaintiff was employed by the defendant as a cleaner, and in that capacity made use of a shovel. On the day on which the accident occurred the plaintiff found this shovel jammed between the upright of the lift and the upper floor. He had not put it there. He walked on to the lift and pulled at the shovel. Thereupon the lift fell a distance of about ten feet to the lower floor and he sustained the injuries in respect of which he brought the action.

The following statement of facts is substantially as it appears in the judgment of *Jordan* C.J.:—The facts are that the accident happened on 19th December 1930. On the same day the plaintiff gave notice under the *Workers' Compensation Act*, and from the date of his injury until 10th November 1931, he received from his employer, the defendant, the compensation payable to him under the Act. This compensation was paid upon the claim being made,

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

and without his being required to institute litigious proceedings before the commission for the purpose of obtaining it. A medical board then certified that he was fit for light work, upon an application being made under sec. 51 (4) of the Act, and from 10th November 1931 he received the compensation to which he was entitled on that basis. Soon after this, the plaintiff applied to be again examined by a medical board, and, an order for that purpose having been made under the Act, the board on 27th January 1932 reported that he was fit for light work and that such work would be beneficial. Payments were continued on this basis until 24th November 1933, when they were terminated, apparently upon a contention that there was then no longer any incapacity referable to the injury. The plaintiff then on 27th December 1933 instituted proceedings under the Act to have questions determined as to the liability of the defendant to pay compensation and medical benefits to the plaintiff, and as to the amount and duration of compensation and medical benefits so payable. Particulars were filed on behalf of the defendant denying further liability on the ground that the incapacity had ceased on 24th November 1933. The matter was adjudicated upon by the Workers' Compensation Commission, which on 12th March 1934 made its award in favour of the defendant on the ground that the plaintiff had recovered his capacity for work on 24th November 1933. The plaintiff commenced the present action on 31st August 1934. There were originally four counts in the declaration, but at the hearing the first two counts were abandoned and the other two were amended, so that ultimately the case went to the jury upon a new third count and an amended fourth count. By the new third count, the plaintiff alleged in effect damage through injury sustained by reason of the breach by the defendant of a statutory duty to provide safety gear for the lift, imposed by the *Scaffolding and Lifts Act* 1912. By the amended fourth count, the plaintiff alleged that he was lawfully on premises of which the defendant was occupant, as employee of the defendant, and that the lift became and was unsafe through negligence of the defendant in the care, control and management of the premises, whereby the plaintiff sustained injury. The defendant put these allegations in issue ; and by its second plea alleged that in respect of the injuries the plaintiff had proceeded

against the defendant under the *Workers' Compensation Act* and had obtained under that Act full satisfaction for his injuries. With respect to the third count, the *Scaffolding and Lifts Act* 1912, by sec. 10, prohibits any person from commencing to erect a lift in a district until the expiry of twenty-four hours after service upon an inspector of notice of intention so to do. By sec. 3 of the Act " lift " is defined to mean apparatus or contrivance within or attached to a building, worked by any power other than hand, by which persons or goods are raised or lowered, and includes any machinery used for working the lift. Sec. 8 provides that the regulations in the second schedule shall be the regulations under the Act. These regulations extend to lifts. The Governor is by sec. 8 empowered to proclaim regulations relating to, *inter alia*, the proper construction and use of scaffolding, lifts, engines and steam cranes, and to annul, amend, or add to the regulations under the Act. The regulations, which are detailed and elaborate, are directed to ensuring safety. Reg. 31 (*b*) is in the following terms : " Safety gear to be provided for all lifts excepting direct-acting lifts, and service lifts in which no person travels." It was under reg. 31 (*b*) that the statutory duty to the plaintiff was alleged to have arisen. There was no dispute that no such duty arose if the lift in question was one " in which no person travels." There was no suggestion in the plaintiff's case that anyone ever travelled in the lift. When the plaintiff was asked whether he suggested that it was a passenger lift, he replied that he said it was a goods lift, and that he knew it was supposed to be for goods only. When asked by a juryman whether he was always in the habit of riding on the lift, he said that he had never ridden on it. The plaintiff's expert said that he would not for a moment suggest that it was a passenger lift. A director of the defendant company was asked by a juryman whether it was customary for any employee to accompany the load up and down in the lift. He replied : " No, and there is no need for it." The trial judge then asked the question, " Did you ever see it happen ? " and the witness replied :— " I am not about the factory very much. I am the outside representative. I have seen at times, at very odd intervals, a boy in the lift, but he was told that the lift was not a lift used in that capacity, and to get out of the lift." The evidence is all one way, that the

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

lift was a goods lift in which no one travelled, and it is impossible that reasonable men could have come to any other conclusion on the evidence. The lift was used for sending racks of pastry from the lower to the upper floor. The lift was set in motion from below, and the employee who was using it then went up by the stairs and unloaded it on the upper floor. There was no device for preventing the lift from being brought down by anyone on the lower floor.

In the course of his summing up the trial judge said that if the jury found the matters in the plaintiff's counts made out, then the cause of action was so far made out against the defendant, but they then would have to consider whether the plaintiff was excluded from bringing the action against the defendant by reason of the steps that he took under the *Workers' Compensation Act*. Proceedings were taken by him under that Act. The question was :—Were those proceedings taken in such a way and to such an extent that they indicated that he was proceeding in that jurisdiction so as to adopt that as the jurisdiction he was going in as against the alternative right that he had of going to the Supreme Court. Did he elect to go to the Workers' Compensation Commission instead of to the Supreme Court, and, if he did so elect, did he do so with an awareness of his rights ? Was he aware that the sort of thing which caused the accident was the class of thing which ordinarily gave a person a right of proceeding in an action of negligence in a civil court ?

The jury, by a majority, gave a verdict for the plaintiff for £950, less £398 14s. 6d., which he had received under the *Workers' Compensation Act*, and judgment was entered accordingly for £551 5s. 6d.

On an appeal by the defendant the Full Court of the Supreme Court set the verdict aside, and judgment was entered for the defendant : *O'Connor* v. *S. P. Bray Ltd.* (1).

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgments hereunder.

Evatt K.C. (with him *W. Collins*), for the appellant. The lift is not a " direct-acting lift " nor is it a " service lift " within the meaning of reg. 31 (*b*) ; therefore it should have been equipped with safety devices as required by that regulation. It is a " goods lift,"

(1) (1936) 36 S.R. (N.S.W.) 248 ; 53 W.N. (N.S.W.) 72.

and the proper performance of his duties rendered it necessary for the appellant to go on to it. The injuries sustained by the appellant were due to the failure of the respondent to comply with the regulation, and, therefore, it is liable in damages. Apart from the fact that there was evidence to support each count, or alternatively, one or other of the counts, the damages must necessarily be the same under each count; therefore the principle enunciated in *Cutts* v. *Buckley* (1) does not apply. It is obvious that the general verdict was returned by agreement between, or without any objection by, either of the parties. Not having been taken in its notice of appeal to the court below, the point is not now open to the respondent (*Lang* v. *Willis* (2)). The only feature in this case additional to the features present in *Union Steamship Co. of New Zealand* v. *Burnett* (3) is that the Workers' Compensation Commission made an award against the appellant. The jury found that at the material times the appellant was ignorant of his right to proceed at common law. The fact that the appellant made an application under the *Workers' Compensation Act*, and that that application was determined by the commission, does not preclude him from proceeding at common law. The commission's award is not conclusive that the appellant had completely and permanently recovered from his injuries. This is evidenced by the provisions of sec. 36 (3) of the Act, by virtue of which applications frequently are reopened by the commission.

Monahan K.C. (with him *Wallace*), for the respondent. The duty of an employer is to take reasonable steps to make his premises safe. He is not liable if premises otherwise safe are rendered unsafe by an improper or unlawful act of an employee unless that act was one which was known by him, or, by reason of lapse of time or otherwise, ought to have been known by him and he allowed the premises to remain unsafe. Here, the fact that the lift had been jammed was neither known nor, in the circumstances, could have been known to the respondent, and, therefore, it had no opportunity of rectifying the cause of the trouble. There is no evidence from which the jury

(1) (1933) 49 C.L.R. 189. (2) (1934) 52 C.L.R. 637.
(3) *Ante*, p. 450.

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

could infer that the accident sustained by the appellant was the direct consequence of the negligence charged in the count. A third party was the real cause of the accident. The evidence given by and on behalf of the appellant is mainly conjecture. There is no evidence that the lift was kept in position by a shovel placed there by an employee; even if it were so placed it would be outside the scope of that employee's authority. The object of the *Scaffolding and Lifts Act* is to create a duty in respect of the community as a whole, and not to individual members of that community (*Phillips* v. *Britannia Hygienic Laundry Co.* (1); *Monk* v. *Warbey* (2)). That object or intention appears upon a consideration of the statute as a whole (*Whittaker* v. *Rozelle Wood Products Ltd.* (3)). The statute does not confer any rights on any individuals. This view is supported by the intention of the legislature to limit the sanction for contravention of the statute, or the regulations thereunder, to the penalties prescribed therein. The onus is upon the appellant to show that he is entitled to the benefit of the *Scaffolding and Lifts Act*. Reg. 31 (*b*) was intended to apply only to lifts on which persons travel either with or without goods. The respondent's lift is not such a lift. The whole object of the regulations is to protect against damage. The question whether there is any difference between a goods lift and a service lift was not raised in the courts below. The lift was not constructed to carry passengers, and, on the evidence, it was never intended in the ordinary course of business that any person should travel in the lift. There is no evidence that any person did so. A master is not liable for an unauthorized act of his servant. The evidence does not show whether the shovel was placed in position by a fellow employee or by a stranger, and the jury was not entitled to infer that it was so placed by a fellow employee. The word "option" in sec. 63 of the *Workers' Compensation Act* means that a right to proceed under the Act and a right to proceed at common law shall be available to a worker, and that he is entitled to choose one of those rights; but he is not to be entitled to the benefits of both. The legislature did not intend that a worker

(1) (1923) 2 K.B. 832, at pp. 840, 841.
(2) (1935) 1 K.B. 75, at pp. 84, 85.
(3) (1936) 36 S.R. (N.S.W.) 204, at p. 207; 53 W.N. (N.S.W.) 71, at pp. 71, 72,

should have a double benefit. It may even be that he may discontinue preliminary proceedings taken in pursuance of one right and then pursue the alternative right, but where, as here, he has pursued his remedy and received all that he was entitled to under the Act a right of action at common law is no longer available to him. The award entered against the appellant by the commission is final (*Nicholson* v. *Piper* (1); *Taylor* v. *London and North Western Railway* (2); *Green* v. *Cammell, Laird & Co. Ltd.* (3)). If the appellant had doubted the completeness and permanency of his recovery, that position could have been met by a declaration and an adjournment of the matter, or the award could have been kept on foot by its being reduced to a nominal amount (*King* v. *Port of London Authority* (4)). Sec. 36 (2) does not confer upon a worker an absolute right to have an award reopened; it is a matter entirely within the discretion of the commission. When the appellant commenced the action at common law he had exhausted his rights under the Act. The making of a claim under the Act, and the issuing of a writ at common law are "proceedings." Notwithstanding what was said in *Harbon* v. *Geddes* (5), ignorance of the law is no excuse; a person cannot be put into a better position because of his ignorance of the law. In this case no question of election under sec. 63 can arise. A right of election can be exercised only as between two or more things. Here, at the time of the alleged election only one remedy was in existence, the other having been exhausted. Having received satisfaction under the Act, the appellant is not entitled to damages at common law. A general verdict was returned; therefore, if the court is of opinion that either count is not supported by the evidence, there must be a new trial at least (*Cutts* v. *Buckley* (6)).

Evatt K.C., in reply. Although the *Scaffolding and Lifts Act*, and the regulations thereunder, may have been intended for the benefit of the community as a whole, individuals, such as the appellant, are entitled, in respect of injuries sustained by them as a result

(1) (1907) A.C. 215.
(2) (1912) A.C. 242, at p. 245.
(3) (1913) 3 K.B. 665, at pp. 668, 670, 672-674.
(4) (1920) A.C. 1.
(5) (1935) 53 C.L.R. 33, at p. 53.
(6) (1933) 49 C.L.R. 189.

H. C. OF A. 1936-1937. O'CONNOR v. S. P. BRAY LTD.

of non-observance, to maintain an action at common law against the person or persons charged under the Act and regulations with the duty of compliance (*Watkins* v. *Naval Colliery Co.* (1897) *Ltd.* (1)). Sec. 36 (2) of the *Workers' Compensation Act* was considered in *Hall* v. *Metropolitan Water, Sewerage and Drainage Board* (2). Sec. 63 was designed to prevent a worker pursuing contemporaneously the remedy under the Act and the remedy at common law.

[McTIERNAN J. referred to *Barker* v. *Stoneham and Wilson* (3) and *Erickson* v. *Australian Steamships Ltd.* (4).]

The matter was considered also in *Connell* v. *Union Steamship Co.* (5).

As to a suspensory award, or the reduction of an award to a nominal amount, see *Vickers-Armstrongs Ltd.* v. *Regan* (6) and *Willis's Workmen's Compensation*, 30th ed. (1936), p. 311. The fact that a worker has received all that he can get under the *Workers' Compensation Act* does not debar him from proceeding at common law in respect of the same injury.

Cur. adv. vult.

1937, April 30. The following written judgments were delivered :—

STARKE J. In this action, the plaintiff—the appellant—sought to recover damages from the defendant—the respondent— in respect of injuries sustained by him in a lift accident at the defendant's premises, where he was employed. By its second plea the defendant alleged that in respect of the injuries of which the plaintiff complained he had exercised his option of proceeding under the *Workers' Compensation Act*, and claimed, proceeded and was paid compensation under the said Act, in full satisfaction for the injuries so sustained by him. A verdict was found for the plaintiff, but the Supreme Court of New South Wales set aside the verdict and entered judgment for the defendant. The plaintiff now appeals from that decision to this court.

The learned Chief Justice of the Supreme Court thus states the facts relevant to the second plea :—" The accident happened on 19th

(1) (1912) A.C. 693.
(2) (1927) 1 W.C.R. 156.
(3) (1922) 22 S.R. (N.S.W.) 512 ; 39 W.N. (N.S.W.) 183.
(4) (1919) 19 S.R. (N.S.W.) 132 ; 36 W.N. (N.S.W.) 132.
(5) (1928) 28 S.R. (N.S.W.) 242 ; 45 W.N. (N.S.W.) 62.
(6) (1933) 1 K.B. 232.

December 1930. On the same day the plaintiff gave notice under the *Workers' Compensation Act*, and from the date of his injury until 10th November 1931 he received from his employer the compensation payable to him under the Act. This compensation was paid upon the claim being made, and without his being required to institute litigious proceedings before the commission for the purpose of obtaining it. A medical board then certified that he was fit for light work, upon an application being made under sec. 51 (4) of the Act, and from 10th November 1931 he received the compensation to which he was entitled on that basis. Soon after this, the plaintiff applied to be again examined by a medical board, and, an order for that purpose having been made under the Act, the board, on 27th January 1932, reported that he was fit for light work and that such work would be beneficial. Payments were continued on this basis until 24th November 1933, when they were terminated, apparently upon a contention that there was then no longer any incapacity referable to the injury. The plaintiff then, on 27th December 1933, instituted proceedings under the Act to have questions determined as to the liability of the defendant to pay compensation and medical benefits to the plaintiff and as to the amount and duration of compensation and medical benefits so payable. Particulars were filed on behalf of the defendant denying further liability on the ground that the incapacity had ceased on 24th November 1933. The matter was adjudicated upon by the Workers' Compensation Commission, which on 12th March 1934, made its award in favour of the defendant on the ground that the plaintiff had recovered his capacity for work on 24th November 1933." He was "then no longer incapacitated for work by the injury which he had received on the nineteenth day of December 1930 arising out of and in the course of his employment with the respondent," and the commission ordered and awarded "that the award of the commission be made in favour of the respondent."

In my opinion, which I have stated at length in *Union Steamship Co. of New Zealand Ltd.* v. *Burnett* (1) and shall not repeat, the *Workers' Compensation Act*, on its proper construction, protects the employer against two sets of proceedings. The worker has an

(1) *Ante*, p. 450.

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Starke J.

option "to do one of two things, to proceed either under the Act or independently of the Act, and the exercise of the option in one way must exclude its exercise the other way." In the present case, the facts make it clear that the plaintiff exercised his option to proceed under the Act, and indeed that his claim under that Act was fully satisfied. It follows that the plaintiff cannot proceed independently of that Act against the defendant for injury caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is liable—which is what he is endeavouring to do in the present action.

The decision of the Supreme Court was right, and this appeal should be dismissed.

DIXON J. This appeal arises out of an action for personal injuries brought by an employee against his employers. The accident by which he was injured took place on 19th December 1930. He was employed as a cleaner in a factory where his employers, who are caterers, produced their wares. On that day in the course of his work he found that he needed a shovel. In search of one he went from the basement where he was at work upstairs to the ground floor. There he found the shovel stuck in the side of an open goods lift or hoist which travelled between the two floors. The blade of the shovel seems to have been inserted between the wall and the platform of the lift, with the handle against the wall. On the other side of the lift was a window or an aperture in the wall, through which goods might be passed from the street outside. Before taking the shovel he stepped on to the lift to look through this aperture for a garbage truck in whose movements he was interested. He then turned round and took out the shovel. The lift immediately fell to the basement, a distance of a little less than ten feet. It was in this way that he sustained his injuries. It appears that the lift was held in position by the shovel only. Evidently while it was so held the gear of the lift had been set in motion and the chain by which it was suspended had paid out to its full extent. The lift was really only a platform, surmounted by a cross-beam or wooden arch, called a "car-bow," to which the chain was anchored. On the car-bow was a box to receive the chain. It paid into the box

and did not descend to the floor of the lift or hang down in a loop visible to the plaintiff. The purpose of the lift was to take goods prepared in the basement to the ground floor above. It took, it is said, two racks of pastries. The floor of the lift was approximately five feet by four in area and the height to the car-bow was six feet or under. It was worked by a control line which could be operated from the basement or the ground floor. It could be operated also by anyone standing on the lift itself. But the lift was not intended for passengers and the only evidence that anyone travelled by it was to the effect that a boy had been seen on it at times, " at very odd intervals . . . but he was told that the lift was not a lift used in that capacity and to get out of the lift." The under side of the lift was not furnished with any safety gear and there was no device for cutting off the power in the event of the lifting rope or chain becoming slack or breaking.

After the accident the plaintiff received workers' compensation for some time. Late in the following year a medical board certified that he was fit for light work, and finally, on 24th December 1933, the weekly payments made on the part of the employer were brought to an end. The plaintiff then took proceedings before the Workers' Compensation Commission to establish that his incapacity continued, at any rate partially. He was then sixty-one years of age. The proceedings failed. The commission made an award in favour of the employer, the now defendant, on the ground that the plaintiff had recovered from his incapacity. He began the present action on 31st August 1934.

Of the counts contained in his declaration two were submitted to the jury, or at least two independent causes of action which those counts, as amended, were respectively supposed to declare upon. One was for a breach of a statutory duty imputed to the defendants, a duty of providing the lift with safety gear. The other was for negligence on the part of some fellow servant in leaving the lift held or supported by the shovel. In New South Wales the defence of common employment is abolished. The defendants denied the facts necessary for a cause of action under either count, but they also pleaded as an independent answer that the plaintiff had exercised his option of proceeding under the *Workers' Compensation Act*

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Dixon J.

1926-1929. Upon this plea the chief question left to the jury was whether when the plaintiff took compensation and proceeded under that Act he was aware that he might instead sue at common law. The jury found a general verdict for the plaintiff for £551 5s. 6d., being £950 damages reduced by £398 14s. 6d., the amount received for workers' compensation.

For my part, if I were at liberty to give effect to my own opinion, I should think that the action was barred on the ground that the plaintiff had proceeded under the *Workers' Compensation Act*. In *Harbon* v. *Geddes* (1) and in *Latter* v. *Muswellbrook Corporation* (2) I have expressed my views of the meaning and application of sec. 63 (2) of that Act. To explain why for myself I should think that the plaintiff was precluded under the sub-section, it is enough to refer to what I said in those cases and, subject to one additional matter of law, to give my reason for saying that the facts would fall within the provision if thus interpreted. The matter of law is that the words in sec. 63, " personal negligence or wilful default," have been held to cover a breach of statutory duty (See *Lochgelly Iron & Coal Co.* v. *M'Mullan* (3)). As to the facts, the plaintiff received weekly payments of compensation and then took proceedings before the Workers' Compensation Commission to obtain further compensation. The award of the commission determining that the plaintiff had recovered his capacity for work and was no longer incapacitated by the injury which he had received amounted to a decision that the plaintiff had obtained all the compensation to which he was entitled under the Act. It thus appears, in my opinion, that the plaintiff has enjoyed in full his right to compensation under the Act and that the liability of his employers thereunder has been satisfied. It is, of course, conceivable that a new or further liability to pay compensation may arise if, notwithstanding the determination, incapacity attributable to the injury should again occur. But this is a contingency and all actual liability has been discharged. A complete discharge of all liability subsisting under the Act appears to me to exhaust one of the two sets of rights referred to in sec. 63, and therefore, as I interpret the section, to exclude the other. But,

(1) (1935) 53 C.L.R. 33.
(2) *Ante*, p. 422.
(3) (1934) A.C. 1.

since the decision of the court in *Latter* v. *Muswellbrook Corporation* (1), I do not think that I am any longer at liberty to give effect to my own opinion as to the meaning and operation of sec. 63 (2). It is true that the present case was argued before that case was heard and decided. But, as a larger number of judges took part in its decision, it was thought right that judgment in this case should await its determination. In the circumstances I think that the decision of the court in *Latter's Case* (1) forms a precedent to which the present appeal is subject. According to the judgments of the Chief Justice, *Evatt* J. and *McTiernan* J., in that case, sec. 63 (2) does not exclude an action at common law unless the plaintiff in proceeding under the Act exercised an election with a knowledge of his alternative rights. Such a knowledge the jury's verdict negatived in the present plaintiff. Accordingly the defendant's plea based upon sec. 63 of the *Workers' Compensation Act* 1926-1929 must fail. It, therefore, becomes necessary to consider the plaintiff's causes of action and to decide whether upon the evidence they or either of them were made out.

The cause of action for breach of statutory duty is founded upon clause 31 (*b*) of the regulations contained in the second schedule to the *Scaffolding and Lifts Act* 1912 (N.S.W.). That clause prescribes that safety gear must be provided for all lifts excepting direct acting lifts, and service lifts in which no person travels. It is a question of some difficulty whether a civil remedy is given to a person injured in consequence of the breach of that clause. Such a person may, of course, maintain an action of negligence and rely upon the failure to comply with the statutory regulations as evidence of negligence. But it is a different question whether the enactment itself confers a distinct cause of action. The received doctrine is that when a statute prescribes in the interests of the safety of members of the public or a class of them a course of conduct and does no more than penalize a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an interpretation of the statute, according to ordinary canons of construction, will

(1) *Ante*, p. 422.

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Dixon J.

rarely yield a necessary implication positively giving a civil remedy. As an examination of the decided cases will show, an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of law or the application of any definite rule of construction. An illustration may be found in a comparison of the decision and reasoning in *Phillips* v. *Britannia Hygienic Laundry Co.* (1) with those in *Monk* v. *Warbey* (2). Perhaps in the end, a principle of law will be acknowledged as the foundation of the cases. In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognized by the general principles of the common law. After the full discussion of the authorities by *Jordan* C.J. in *Martin* v. *Western District of the Australasian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department)* (3) and *Whittaker* v. *Rozelle Wood Products Ltd.* (4), it would be superfluous to refer to them. Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on.

The difficulty in applying this view to clause 31 (*b*) of the schedule to the *Scaffolding and Lifts Act* 1912 arises from the

(1) (1923) 2 K.B. 832.
(2) (1935) 1 K.B. 75.
(3) (1934) 34 S.R. (N.S.W.) 593, at p. 596 et seq ; 51 W.N. (N.S.W.)203, at p. 204.
(4) (1936) 36 S.R. (N.S.W.), at p. 207 et seq ; 53 W.N. (N.S.W.), at pp. 71, 72.

fact that it is only one of many provisions widely differing in scope and character for the regulation of scaffolding and lifts. A great number of these provisions clearly does not create any private right. A civil remedy would be inappropriate to the duties prescribed by many of them and opposed to the general sense of many others. But I think that the nature of the specific duty imposed by clause 31 (*b*) makes the general rule prima facie applicable and that the fact that side by side with it are regulations creating no private right is no sufficient reason for denying a civil remedy for a breach of clause 31 (*b*). *Jordan* C.J. in the Supreme Court said that he was disposed to think that a statutory duty was created by clause 31 (*b*) if the facts showed that the clause was applicable. I agree in this opinion.

But the question remains whether the clause is applicable. It expressly excepts from its operation direct-acting lifts and service lifts in which no person travels. The lift was not a direct-acting lift, but a question arises whether it was a service lift in which no person travelled. The expression " service lift " is, I think, capable of a wide or narrow application, and, upon the hearing of the appeal, we expressed doubt as to its meaning. It appears, however, that neither at the trial nor upon the appeal to the Full Court of the Supreme Court was any question raised upon the expression " service lift." The parties seem to have accepted the view that it covered the lift in the present case. The question left to the jury was whether it was a lift in which no person travelled. I agree in the view of the Supreme Court that upon that question the jury were not entitled to find for the plaintiff. The size, nature and purpose of the lift make it clear that it was not intended that any person should travel upon it either with the goods it raised or otherwise. The mere fact that occasionally a boy rode upon it without the authority of his employers cannot take it out of the exception in the definition. The words " in which no person travels " refer to the use to which the lift is adapted or put as a matter of function.

The question whether the lift could fall within the description " service lift " has caused me more difficulty. The expression is used in three other places in the regulation but not much help is given as to its application. Service lifts are excepted from the

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Dixon J.

requirements that signal bells shall be provided (clause 31 (*c*)). They must be enclosed to the approval of the inspector (clause 33 (*c*)). Electrically driven lifts operated by a winding drum must be fitted with a device for automatically cutting off the current if the lifting rope becomes slack, but an exception is made of service lifts in which no person travels (clause 40 (*f*)). All goods lifts are not service lifts but it does not follow that the description is confined to the boxes travelling from kitchen to dining room or floor to floor at restaurants, hotels and the like. It is capable of a wider application and may include lifts and hoists used in any establishment exclusively for the purpose of serving the staff in the performance or course of their work, as opposed to a goods or passenger lift for general use. It is to be noticed that when the exception in clauses 31 (*b*) and 40 (*f*) requires not only that the lift shall be a service lift but that it shall be one in which no person travels, it implies that a service lift is not necessarily restricted to the carriage of goods and this tells in favour of the wider meaning. The only definition of the expression " service lift " that I have been able to obtain is contained in a technical work, published in London in 1923, *Electric Lift Equipment for Modern Buildings* by *Grierson*. The author devotes a chapter to " Service Lifts and Dumb Waiters." The first section is as follows :—

Definition and Field of Application.—A service lift or dumb waiter is practically a goods lift in miniature. So far as it has been possible to trace there is no generally accepted definition of the term, although it is, as a rule, understood to refer to a lift that is too small for an attendant to ride in the car. Under these circumstances the safety consideration is not so important, and the majority of safety devices are, as a rule, therefore not fitted. The principal field in which service lifts are employed is the cafe, restaurant, or hotel, for conveying food from the kitchen or wine from the cellar to the still or service rooms adjoining the restaurant grill room, coffee room, dining room, etc. Other applications are business premises for the conveyance of small stock between the stock room and the sales counter, and in factory buildings for conveying trays of small parts from one department to another located on different floors " (at p. 114).

In the present case very little was proved as to the purpose served by the lift in relation to the defendant's business. The course of operations carried on at the premises was not described. All we know is that they are caterers, that the premises are a "factory," that pastries are partly "manufactured" in the basement and carried in trays to the ground floor by the lift, and that the plaintiff himself used the lift for his garbage. In the definition I have quoted it will be seen that the expression "service lift" is said to include lifts in factory buildings for conveying trays of small parts from one department to another located on different floors. The defendant's lift appears on the facts, as far as we know them, to be of this description. In all the circumstances, I think we ought to give effect to the view tacitly adopted by the parties until they reached this court, a view which does not appear necessarily to be wrong. It follows that proof was not given of a breach of the clause of the regulations upon which the count was framed, and the plaintiff was not entitled to recover on this cause of action.

The plaintiff's second cause of action depends upon proof that the conditions which led to the fall of the lift when the plaintiff withdrew the spade were caused by the negligence of a servant of the defendants acting within the course of his employment. From the facts I have stated the plaintiff contended that an inference to this effect should be drawn. The suggestion is that, in order to hold the lift at the ground floor for the purpose of his work, some employee had inserted the shovel and then that another, or possibly the same one, had set the machinery in operation to bring down the lift and, although it did not descend, had taken no other step either to wind up the lift chain or release the lift. The question is entirely one of the sufficiency of circumstances to found an inference. In my opinion the probability of this being the true explanation of the facts is sufficiently high to support the inference. The conduct involved appears to me open to a finding of negligence.

I agree in the view adopted by the Supreme Court that there was evidence to support this, the fourth count.

But a difficulty in upholding the verdict then arises. For a general verdict was taken without discriminating between the counts. It is true that the damages would, or ought to, be the same on each

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

DIXON J.

count. But the difficulty goes deeper than damages. For anything that appears, the jury may have based the verdict upon the defendants' failure to provide the safety gear prescribed by the clauses in the regulations, and not at all upon a finding that an employee was negligent in leaving the lift supported only by the shovel.

In my opinion it follows that the verdict cannot stand and there must be a new trial.

EVATT AND MCTIERNAN JJ. This is an appeal by the plaintiff from the judgment of the Full Court of New South Wales, which set aside the jury's verdict for the plaintiff and entered a verdict for the defendant.

The issues raised in the action were submitted to the jury as two separate causes of action; the first being for injury caused as a result of breach by the defendant of a statutory duty alleged to have been created by reg. 31 (*b*) contained in the New South Wales *Scaffolding and Lifts Act* 1912, and the second being based upon the alleged negligence of a fellow employee of the plaintiff in the circumstances we describe below. In New South Wales, the doctrine of common employment cannot be used to defeat the plaintiff in an action of negligence (*Workers' Compensation Act* 1926, sec. 65).

The manner in which the injury occurred was clearly established by the evidence. The plaintiff was employed in the defendant's pastry factory as a cleaner. He was working on the basement floor collecting the factory refuse before its removal. The plaintiff, requiring a shovel for his work, ascended the stairs from the basement to the ground level, and, seeing the shovel placed at the side of the lift, walked on to the lift to get it. He found it jammed between the lift and the wall of the lift well. But, when he released the top of the shovel, the lift suddenly collapsed on to its concrete bed below basement level. As a result, the plaintiff sustained a severe spinal injury.

The lift had been installed by the defendant for lifting goods between the level of the basement and the ground floor—a height of ten feet. Notwithstanding the statutory provisions, no notice of the erection of the lift had been given to the chief inspector, nor

had the necessary permit to erect it been obtained. The lift was used for hoisting pastry and similar goods, its capacity being six cwt. The lift measured approximately five feet by four feet on the floor area, and it was six feet in height.

Inspection after the injury to the plaintiff disclosed that there had been wholesale breaches of the lift regulations, viz., (i.) no safety gear had been fitted to the underside of the car; (ii.) no slack cable device had been provided for cutting off the power in the event of the lift rope or chain becoming slack or broken; (iii.) a hand rope lock was not provided for the locking of the control line; (iv.) a three feet clear overrun was not provided for the car at the top of the lift well; (v.) at the basement level no enclosure gate was provided; (vi.) at the upper, or first floor, level, the enclosure gate was not arranged to close or lock automatically when the car moved fifteen inches from the floor level; (vii.) no safety devices whatever had been provided for the lift, except the small gate at the upper level.

We will now refer to the cause of the accident suggested on behalf of the plaintiff. The lift could only be started from the basement level. When it had been used for lifting goods up to the ground floor level, no mechanical contrivance existed for preventing the lift from being immediately brought down by any employee in the basement to that level. The purpose, and the only possible purpose, any employee could have had in jamming the shovel between the lift and the wall of its own well at the upper level was to prevent the lift from being lowered to the basement level, there being no self-operating contrivance which would achieve the same result. Accordingly, if an employee was engaged in unloading goods from the lift at the upper level, and desired to hold the lift there until unloading was finished, he had to devise a method of resisting any pull on the lift from the lower level. But any such pull, though ineffective to overcome the resistance caused by the shovel, necessarily had the effect of putting out of action the main supporting chain, the chain paying into its box and leaving the lift supported only by the shovel.

The Full Court appeared to find a little difficulty in dealing with the question whether the cause of the lift being rendered so great a peril to the unsuspecting plaintiff was the combined action of

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Evatt J. McTiernan J.

employees, viz., (*a*) the employee using the shovel on the upper floor and (*b*) the employee on the basement floor endeavouring to lower the lift to that level. But no other explanation of the proved and admitted facts can reasonably be advanced. The probability of a suggested inference is always relative to the probability of other competing inferences (*Martin* v. *Osborne* (1)). It is certain that, upon the withdrawal of the shovel by the plaintiff, the lift did collapse, there being no safety gear under it, nor any slack cable device for retaining its only overhead support. Incidentally, it is clear that, if either of these two safety provisions had been observed, the lift would not have collapsed. Further, the only feasible way in which the chain supporting the lift from above could have been prevented from exerting its supporting function was by some person on the basement floor endeavouring to bring the lift to him. Therefore, no conjecture is involved in the above explanation of the occasion of the accident. The only remaining question is whether it was a fellow servant of the plaintiff who was responsible for using the shovel in order to retain the lift at the upper level. No sense or meaning can be attributed to the jamming of the shovel, unless the person responsible was an employee of the defendant, desirous of retaining his load within the lift until it was unloaded. No other reasonable hypothesis could be suggested which will fit the facts. Therefore, although the matter was one for remission to the jury, we can hardly understand a jury's drawing any other inference as to the cause of the lift's collapsing. Further, the question whether the conduct of the employee who used the shovel amounted to negligence was also a question for the jury; but it can hardly be imagined that any jury would acquit of grossly culpable negligence any sane person who so interfered with the operation of a machine so latent with danger.

But the plaintiff's main cause of action was based upon the defendant's alleged breach of the *Scaffolding and Lifts Act* 1912, which embodies within itself a number of important safety regulations. The Act is a consolidation of earlier Acts. It is a matter of notoriety that, in 1902, lifts were comparatively few in number. But, by the time of the 1908 legislation, they had, to use the words of his Honour

(1) (1936) 55 C.L.R. 367.

Judge *Heydon*, commissioner for consolidating the New South Wales statute, " so greatly increased in kind, number and use, that their regulation had become a matter of very great public concern." The commissioner also pointed out that the policy of the legislation " had entirely changed in the six years elapsing between the passing of the two Acts " (in 1902 and 1908). Under the 1902 Act, the scheme was " to throw upon the inspector the responsibility of securing the observation of the Act and regulations," but, " the policy of the latter Act is wholly different. Its enactments and regulations are to be observed upon pain of the penalties provided. If a person did not obey this latter law he became liable whether an inspector interposed or not." It is clear that, under the consolidation of 1912, the more drastic scheme of the 1908 Act has " been treated as dominant." One of the overriding purposes stamped upon the present legislation is the necessity of securing the safety of persons using lifts. Sec. 8 provides that the regulations contained in the second schedule of the Act shall be the regulations under the Act, and, in addition, the Governor may proclaim regulations relating to the proper construction and use of lifts, and the enforcement of such regulations by penalties not exceeding £20. The regulations so scheduled contain many provisions as to the construction and erection of lifts. A permit must be obtained from the chief inspector after a plan has been submitted giving a full description and particulars of the lift machines and their enclosures. Reg. 28 provides that every suspended " passenger or goods lift " shall be provided with ropes of specified minimum breaking strain. Reg. 31 (*b*), upon which the plaintiff particularly relies, provides: " Safety gear to be provided for all lifts except direct-acting lifts, and service lifts, in which no person travels."

A preliminary question upon this part of the plaintiff's case is whether a breach of reg. 31 (*b*) is a sufficient foundation for an action for damages for breach of a statutory duty. In determining this question, the scope and object of the duty imposed and the probability or certainty that a breach of the duty will be likely to cause death or injury are factors to be considered. Here the regulation, upon its own face, establishes its own object and purpose. For it provides that the " safety gear " must " securely hold the car or

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Evatt J. McTiernan J.

platform in position " in the event of the suspension ropes breaking or becoming detached. Further, the " safety gear " must be such that " the possibility of the car falling is obviated, should the hoisting machinery become deranged or broken." In plain terms, the legislative authority has said :—" You must secure the safety of persons using the lift. Your safety device must prevent the lift from falling. We place upon you the duty of preventing the disaster of such a fall."

We do not think that the comparative smallness of the statutory penalty operates as a factor against the possibility of an action for breach of statutory duty. In *Cofield* v. *Waterloo Case Co. Ltd.* (1) *Isaacs* J. said that the only penalty provided under sec. 33 of the *Factories and Shops Act* 1912 was one not exceeding £10, and asked: " Is that a real enforcement of sec. 33, having regard to the temptation of material interests ? " He repeated these observations in the later case of *Bourke* v. *Butterfield & Lewis Ltd.* (2). But the legislature may well have regarded the existence of the action for breach of statutory duty as itself providing an additional and more important sanction than the statutory penalty. Upon an analogous view, it is hardly to be supposed that the New South Wales legislature intended that a breach of so fundamental a safety provision as reg. 31 (*b*), although directly causing death or serious disablement, should be visited only by liability to a penalty not exceeding £20 and not less than 10s.

Although it is not possible to lay down any definitive rule as to whether the legislature is intending merely to impose a duty for which the only sanction is a small, even nominal, fine, or whether its intention is to make the duty " one which was owed to the party aggrieved as well as to the State " (*Phillips* v. *Britannia Hygienic Laundry Co.* (3)), it seems to us that, in the case of reg. 31 (*b*), it is reasonably clear that the legislature was creating a duty, not only to the State, but to all persons who might lawfully be using the lift. Its paramount concern is that persons using the lift shall be protected from the danger of the lift's falling. We agree that cases of actions for breach of statutory duty cannot be confined to instances where the plaintiff belongs to some so-called " special class of the

(1) (1924) 34 C.L.R. 363, at p. 371. (2) (1926) 38 C.L.R. 354, at pp. 362, 363.
(3) (1923) 2 K.B., at p. 841.

community" (*Phillips* v. *Britannia Hygienic Laundry Co.* (1)). Here the dominant consideration is prevention of danger to all persons brought into proximity to a specific peril which can easily be avoided if the regulation is observed. If the duty is not observed, we consider that persons injured as a result of such non-observance have a good cause of action against the person responsible under the regulation for the care, control and management of the lift.

The next question is whether the regulation applied in the case of the lift of the defendant. In our opinion, the correct interpretation of reg. 31 (*b*) has been confused by leaving to the jury the irrelevant question whether the lift was used for travelling. The main command of the regulation is that safety gear shall be provided for "all lifts." Then two classes of lifts are excepted. The first consists of "direct-acting lifts," where the lift will be supported from below and pushed up or allowed to go down by the direct thrust of its support. In such a case it is not possible that the platform can "fall," so that the specified safety gear will not be necessary. The second class consists of "service lifts in which no person travels." Service lifts are not defined in the regulations, but reg. 28 (*a*) sharply distinguishes in its terms between "goods" lifts and "service" lifts. Clearly, the "service lifts" referred to in reg. 31 (*b*) are very small lifts, and even then, if persons travel in them, the safety gear must be provided. Unfortunately, at the trial and in the Full Court, the case was argued as though reg. 31 (*b*) excepted from its operation all lifts, provided only that they were "lifts in which no person travels." The implied interpretation misconceives the purpose of the regulation.

The point is whether the defendant's lift was a "goods" or "service" lift. In the former event the regulation applied. In our opinion, the evidence clearly established that the defendant's lift was a "goods" lift, and not a "service" lift. The Inspector of Lifts gave evidence that the lift was a "goods" lift in which no one travelled. Further, *Jordan* C.J. said: "The evidence is all one way, that the lift was a goods lift in which no one travelled, and it is impossible that reasonable men could have come to any other

(1) (1923) 2 K.B., at p. 841.

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Evatt J. McTiernan J.

conclusion on the evidence" (1). But the conclusion from this view (with which we agree) is that the lift was not excepted from reg. 31 (*b*), but was included within its scope.

Holding as we do that the defendant's lift was governed by the regulation, the evidence of the inspector established conclusively that, if the required safety gear had been provided, the lift would not have fallen. Accordingly, on the cause of action for breach of statutory duty, the plaintiff was entitled to a verdict.

As we have already noted, the second cause of action relied on by the plaintiff was based upon the negligence of a fellow employee acting in the course of his employment, the act of negligence being the use of a shovel for holding the lift at the ground floor. As already suggested, we think that, on this point also, the plaintiff's case was practically unanswerable. But it is unnecessary for us to determine whether the jury could reasonably have found for the defendant upon this issue, because it is, in our opinion, plain that the cause of action for breach of statutory duty was established beyond all possible doubt. Accordingly, if nothing more remained, the Full Court should have allowed the verdict for the plaintiff to stand, inasmuch as the damages under either of the two causes of action were precisely the same.

But, on the remaining question, the Full Court pronounced against the plaintiff. That question is whether, notwithstanding his success in establishing his cause of action against the defendant, sec. 63 of the *Workers' Compensation Act* precludes the plaintiff from recovering damages at common law. The evidence shows that the plaintiff received from the defendant certain payments by way of worker's compensation in respect of his injury, and, being dissatisfied with the defendant's repudiation of further liability on the ground that incapacity had ceased, he brought the question of further liability before the Workers' Compensation Commission. The commission found that the plaintiff's incapacity had ceased. Under the *Workers' Compensation Act*, such a finding by the commission does not exhaust the possibility of recovering further compensation, for the question of incapacity may subsequently be litigated, and, in any event, a

(1) (1936) 36 S.R. (N.S.W.), at p. 254.

case may always be reopened if the commission thinks fit. But the opinion of the Full Court was adverse to the plaintiff, because his right to proceed under the *Workers' Compensation Act* had been " fully satisfied, so far as it was possible to satisfy it by either litigious or non-litigious proceedings." Accordingly it was held that the common law remedy was no longer available to the plaintiff. The same method of interpreting sec. 63 was adopted by the Full Court in the case of *Burnett* v. *Union Steamship Co. of New Zealand Ltd.* (1), which is also under appeal to this court. The judgment of the Full Court involves the conclusion that, merely by obtaining " satisfaction " under the *Workers' Compensation Act*, a worker must necessarily be regarded as having " at his option " proceeded under the *Workers' Compensation Act* so as to preclude himself from enforcing the civil liability of the employer expressly preserved by sec. 63 (1). In our opinion this conclusion is not justified. In *Harbon* v. *Geddes* (2) and in the recent case of *Latter* v. *Muswellbrook Corporation* (3) we expressed the opinion (which was the *ratio decidendi* of the latter case) that, before a worker can be debarred from his common law right and remedy preserved by sec. 63 (1) of the Act, it has to be shown that the worker did exercise a real choice or option between alternative rights, in other words, that the worker, " knowing that he had a right to bring proceedings at common law in respect of the same injury, chose to prefer the benefits obtainable under the Act " (*Harbon* v. *Geddes* (4)). In coming to that conclusion, English decisions upon a section *in pari materia*, and the terms of which were not distinguishable from those of the New South Wales legislation, were followed. More recently, in *Latter's Case* (3), *Latham* C.J. pointed out the significant fact that sec. 39 (*a*) of the *Workers' Compensation Act* actually cast an administrative duty upon the commission to inform persons as to their rights upon the occurrence of employment injuries.

It is necessary, therefore, to determine whether, in the present case the jury were entitled to find that the plaintiff did not " at his option " proceed under the Act. The jury must have found this

(1) (1936) S.R. (N.S.W.) 119; 53 W.N. (N.S.W.) 38.
(2) (1935) 53 C.L.R. 33.
(3) *Ante*, p. 422.
(4) (1935) 53 C.L.R., at p. 52.

H. C. OF A. 1936-1937.

O'CONNOR v. S. P. BRAY LTD.

Evatt J. McTiernan J.

issue in favour of the plaintiff. In our opinion, the learned trial judge directed the jury with substantial correctness upon the relevant aspect of sec. 63 (2). He pointed out that the defendant must show on the plaintiff's part some awareness that he could proceed at common law against the defendant. The issue before the jury was whether, at the time of the plaintiff's proceeding before the Workers' Compensation Commission, he was or was not aware of the fact that he could enforce rights independently of the statute. The trial judge also pointed out that the plaintiff's evidence that, at the material time, he was unaware of his alternative rights, did not necessarily bind the jury to accept his statement, and that it was for them to determine whether such evidence was true.

The jury have found for the plaintiff on this issue, and we think that they were entitled upon the evidence so to find. Therefore the case should now be dealt with on the footing that the defendant failed to establish this special statutory defence.

The jury also found that the plaintiff was entitled to recover in respect of injuries the sum of £950, but that, as the plaintiff had received in respect of workers' compensation payments £398 14s. 6d. the verdict entered should be for the difference, viz., £551 5s. 6d. A further question was raised as to the amount of hospital and medical expenses under the *Workers' Compensation Act* of which the plaintiff in fact received the benefit. At the trial, counsel for the plaintiff offered to have the verdict reduced by the sum of about £38 in respect of such expenses, and, in our view, the verdict for the plaintiff should be restored, but only to the amount of £551 5s. 6d., less the agreed amount in respect of hospital and medical expenses.

In our opinion, therefore, the appeal should be allowed, the judgment of the Full Court set aside, and judgment should be entered for the plaintiff for the amount mentioned above.

In view, however, of the divided opinion of members of the court, we are content that there should be an order for a new trial upon the issues raised under the two counts previously submitted to the jury ; the defendant being, of course, concluded by the prior finding of the jury in respect of the defence raised under sec. 63 (2) of the *Workers' Compensation Act.*

Appeal allowed. Order of Full Court discharged and in lieu thereof order that a new trial be had upon all the issues raised under the third and fourth counts of the declaration except the issue raised by the second plea. Respondent to pay the costs of the appeal to this court. Costs of the first trial and of the appeal to the Full Court to abide the event of the new trial.

Solicitors for the appellant, *Rosendahl & Devereux.*

Solicitors for the respondents, *J. W. Maund & Kelynack.*

J. B.

[HIGH COURT OF AUSTRALIA.]

AITKEN AND ANOTHER . . . . . Appellants;

AND

THE FEDERAL COMMISSIONER OF TAXATION Respondent.

Income Tax (Cth.)—Taxing Act passed after death of taxpayer—Liability of executors—Income Tax Act 1934 (*No.* 31 *of* 1934)—*Income Tax Assessment Act* 1922-1934 (*No.* 37 *of* 1922—*No.* 18 *of* 1934), *secs.* 13, 62.

A taxpayer whose returns of income for the purposes of Federal income tax were made up for an accounting period of 1st January to 31st December died in April 1934. His last payment of tax was for the financial year 1933-1934, based on his income for the year ending 31st December 1932. The *Income Tax Act* 1934, imposing income tax for the financial year 1934-1935, did not come into operation until after the taxpayer's death. The taxpayer's estate was liable to estate duty under the *Estate Duty Assessment Act* 1914-1928.

Held that, under sec. 62 of the *Income Tax Assessment Act* 1922-1934, the taxpayer's executors were liable to pay income tax for the financial year 1934-1935 in respect of the income derived by the taxpayer during the calendar year 1933.