[HIGH COURT OF AUSTRALIA.]

McKERLIE . . . . . APPELLANT;
PLAINTIFF,

AND

LAKE VIEW AND STAR LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1937.

PERTH, *Oct.* 7.

SYDNEY, *Dec.* 10.

Latham C.J., Dixon and McTiernan JJ.

Industrial Arbitration—Award—Mining—Piece-work—Wages—Supply of stores by mine owner at cost—Actual cost to mine owner—Deduction of cost of stores—Limitation of action—Industrial Arbitration Act 1912-1925 (*W.A.*) (*No.* 57 *of* 1912—*No.* 50 *of* 1925), *sec.* 153.*

An industrial award governing mining provided that in contracts for piece-work a term should be implied to the effect that in calculating the net remuneration of piece-workers the price deducted in respect of articles supplied by the mine owner for the use of the piece-worker should in no case exceed the cost or price of the article to the employer at the place of supply.

Held:—

(1) That this meant the final cost payable for the article by the employer, and that the price of explosives bought by the employer under a general

* Sec. 153 of the *Industrial Arbitration Act* 1912-1925 (W.A.) provides, by sub-sec. 1, that "no person shall be freed or discharged from any liability or penalty or from the obligation of any industrial award or agreement by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award or agreement, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled," and, by sub-sec. 2: "Every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of such amount must be commenced within twelve months from the time when the cause of action arose."

contract with the manufacturer providing for fixed provisional prices subject to periodical adjustment for the ascertainment of a price based on costs of production &c. was not, for the purpose of charging the piece-worker, the fixed provisional price but the final price so adjusted.

(2) That, in calculating the cost or price at the place of supply, there should be included the actual labour costs incurred in distributing the articles to the piece-workers at the point where they received them in the mine, such costs being ascertained by a dissection or apportionment where more than one task was performed by the workmen concerned in such distribution, but that general overhead costs, standing charges and other expenditure incurred in carrying on the mine as a going concern should be excluded.

(3) That an action by a piece-worker to obtain an account of deductions charged at prices in excess of those allowed by the award and to recover the amount found due was a proceeding for the recovery as wages of an amount to which he was entitled to be paid by his employer in accordance with an industrial award, and must, under sec. 153 (2) of the *Industrial Arbitration Act* 1912-1925 (W.A.), be brought within twelve months from the time when the cause of action arose.

Decisions of the Supreme Court of Western Australia: (*Northmore* C.J.) varied; (*Dwyer* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

Robert Taylor McKerlie was employed under a verbal contract from 1st January 1933 on piece-work at the mine of Lake View and Star Ltd. He was to be paid fortnightly and was entitled to be supplied by the company with tools, explosives and other stores, which were to be paid for by him out of his earnings. By virtue of an award of the Court of Arbitration of Western Australia the following term was to be implied in the contract of employment: "The price of any article supplied by the employer for the use of the worker during the period of his engagement shall not be increased during the period, and shall in no case exceed the cost or price of the article to the employer at the place of supply." The words "place of supply" were, by an order of the Court of Arbitration under sec. 88 of the *Industrial Arbitration Act* 1912-1925 (W.A.), declared to mean "the place where the article is furnished or delivered to the worker at whatever part of the mine that may be." It was the practice of the company to deliver to employees fortnightly statements showing the measurements of the work done during the fortnight, the remuneration therefor, and the deductions

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made for stores supplied; McKerlie was paid fortnightly on the basis of such statements. He brought an action against the company in the Supreme Court of Western Australia, in which he alleged that throughout the period of his employment the deductions made for stores were in excess of the cost or price to the company; he claimed accounts and payment to him of the amount found to have been charged in excess. By its defence the company denied that there had been any overcharge and also alleged that, if there had been any overcharge, the right of the plaintiff to sue for it, in so far as the overcharge was made more than one year before the issue of the writ, was barred by sec. 153 (2) of the *Industrial Arbitration Act* 1912-1925. The matter of the cost of stores supplied was referred to the Master of the Supreme Court for inquiry and report under sec. 50 of the *Supreme Court Act* 1935 (W.A.). As to explosives supplied, it appeared that the company purchased these under a contract whereby a provisional price was charged in the first instance and was subject to periodical adjustment when a price arrived at by reference to the costs of production had been ascertained. The deductions made from the plaintiff's remuneration were at the provisional price, and, although, as the master found, that price was in excess of the subsequently adjusted price, and the company received rebates, no further amount was paid to the plaintiff. The master allowed the plaintiff a sum in respect of the rebates, but on a motion for the approval and adoption of the master's report *Northmore* C.J. disallowed that sum. In ascertaining the cost of stores generally, the company claimed that there should be taken into account what the master described as "a computed amount based upon 'general expenses,' depreciation, London office expenses, colonial register expenses, underground supervision, holiday pay and cost of distribution from defendant's store or magazine." The master wholly disallowed this claim. *Northmore* C.J. approved of the disallowance except in respect of the cost of delivering the stores from the defendant's store to the plaintiff at the place of supply, as to which he remitted the matter to the master for reconsideration. Questions of law directed to be argued before the trial of the action included the following: "Whether or not sec. 153 (2) of the *Industrial Arbitration Act* 1912-1925 is applicable to the plaintiff's cause of

action, and is an effective bar to the proceedings so far as the plaintiffs' claim is in respect of overcharges made more than one year before the commencement of this action." *Dwyer* J. answered this question as follows: "The said sub-section is applicable to the plaintiff's cause of action."

From the decision of *Northmore* C.J., in so far as it related to the matters above mentioned, and from the decision of *Dwyer* J. the plaintiff, by leave, appealed to the High Court.

Villeneuve Smith K.C. and *Cleland*, for the appellant. The cost or price of stores to the employer is the actual amount by which the employer is out of pocket in getting the article to the worker at the place of supply. The employer must not make any profit on the supply of stores. [Counsel referred to *Peachy* v. *Holmes Bros.* (1); *Ivanhoe Gold Corporation Ltd.* v. *Wood* (2); *President and Members of the Court of Arbitration (W.A.)* v. *Nicholson* (3); *Evans* v. *Gwendraeth Anthracite Colliery Co. Ltd.* (4); *Jones* v. *International Anthracite Collieries Co.* (5).] By not passing on the rebates and in charging costs of distribution the respondent was in fact making a profit. It is clear that the defendant was not out of pocket in regard to the delivery of the explosives from the magazine to the place of supply. Therefore, in passing on to the piece-workers a charge for the costs of distribution and in failing to account to the plaintiff in respect of rebates, the defendant was making a profit, which it is not entitled to do. The award simply provides for certain conditions to be taken into and implied in every contract with a piece-worker: it takes piece-workers out of the award. Apart from the implied conditions provided by the award, the piece-worker can make whatever contract he likes with an employer. It is a common-law contract, and sec. 153 (2) of the *Industrial Arbitration Act* does not operate against the plaintiff (*Fagan* v. *Public Trustee* (6); *Josephson* v. *Walker* (7); *Collie Coal Co. Ltd.* v. *Watts* (8); *Turnbull* v. *Forbes* (9)).

(1) (1904) 7 W.A.L.R. 89.
(2) (1925) 27 W.A.L.R. 120.
(3) (1906) 4 C.L.R. 362.
(4) (1914) 3 K.B. 23.
(5) (1919) 1 K.B. 156.
(6) (1934) 51 W.N. (N.S.W.) 99.
(7) (1914) 18 C.L.R. 691.
(8) (1913) 15 W.A.L.R. 97.
(9) (1924) 26 W.A.L.R. 59.

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Keenan K.C. and *E. W. Leake*, for the respondent. *Evans* v. *Gwendraeth Anthracite Colliery Co. Ltd.* (1) decides that the sum assessed for stores should include the cost of distribution, the actual cost to the respondent. The stores had to go through a number of hands before they reached the miner at the place at which he was working in the mine. This service is not to be free merely because no workman was employed entirely on this work. The provisional price for explosives was properly deducted. As the plaintiff had to be paid fortnightly and the deductions had then to be made, it would not have been practicable to deduct any other sum as the price. The plaintiff's claim is founded on the award, and not merely on a contractual obligation. In bringing an action on the award he is limited by sec. 153 (2) of the *Industrial Arbitration Act* to claims arising within twelve months before the commencement of the action. [Counsel referred to *Josephson* v. *Walker* (2).]

Cleland, in reply.

Cur. adv. vult.

Dec. 10.

The following judgments were delivered :—

LATHAM C.J. The plaintiff was a piece-worker employed by the defendant company ; that is, he was employed under a contract according to which he was to be paid according to the amount of work which he did and not according to the time during which he was engaged in work. The contract of employment is alleged in the statement of claim and admitted in the defence to be verbal in character, and to be a contract under which the plaintiff was entitled to be paid fortnightly. Under the contract the plaintiff was also entitled to be supplied with certain articles, such as explosives, for the purpose of his work. He claims that he has been underpaid for a period beginning in December 1932. The underpayment is alleged to be due to overcharges by the defendant for explosives &c. supplied to the plaintiff. Two awards of the Court of Arbitration of Western Australia were applicable during the relevant period of employment. They contained clauses relating to piece-workers. One of the clauses provided that " the price of

(1) (1914) 3 K.B. 23.

(2) (1914) 18 C.L.R. 691.

any article supplied by the employer for the use of the worker during the period of his engagement shall not be increased during the period, and shall in no case exceed the cost or price of the article to the employer at the place of supply."

An order was made under sec. 50 of the *Supreme Court Act* 1935 referring various questions to the Master of the Supreme Court for inquiry and report. Upon the report of the master being made, the plaintiff moved for the adoption of the report, and the defendant for the variation of the report in certain particulars. The learned Chief Justice dealt with two questions which arise, namely, costs of distribution of explosives &c., and a question relating to rebates, and *Dwyer* J. dealt with a contention of the defendant that, by reason of sec. 153 of the *Industrial Arbitration Act* 1912-1925, the plaintiff was limited in his claim to a period of twelve months before the issue of the writ. It may be mentioned that there are some hundreds of claims similar to that of the plaintiff in this case and that large sums of money are involved. For example, the rebates which the plaintiff and those in similar positions allege to have been wrongly deducted from their wages amount to over £9,000 in the relevant period. This court granted special leave to appeal from the orders made by the learned Chief Justice and *Dwyer* J.

The first question is whether the company is entitled to charge what is alleged to be the cost of taking explosives and other articles to the place where they are actually delivered to and made available for the use of the worker. The Court of Arbitration was asked to interpret the award made under the *Industrial Arbitration Act* 1912-1925, and in pursuance of the powers conferred on the court by sec. 88 the court declared that the words " place of supply " in the clause which I have quoted meant " the place where the article is furnished or delivered to the worker on whatever part of the mine that may be." This interpretation is binding as between the parties and, if I may be allowed to say so, is obviously right. Thus, the company is entitled to charge under the award the cost of distributing the articles to the worker at the place where the worker happens to be working at the relevant time. This proposition is not disputed by the plaintiff. The report of the master shows that many employees of the defendant take part in distributing the explosives

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&c. and in doing the necessary work of recording the distributing. It is alleged on behalf of the plaintiff that the company incurs no cost in distributing the articles because the employees doing the work of distribution would be employed in any event by the company for other purposes. It is argued that therefore the company distributes them without any cost to the company. In my opinion this contention is quite untenable. Many examples could be used for the purpose of illustrating the proposition that the fact that a person would in any event be employed for the purpose of performing several functions does not show that he is employed without cost for the purpose of performing each of the functions. It might as well be argued that all passengers after the first upon a tram or train are carried without any cost to the tramway or railway authority. In my opinion the judgment of the Chief Justice was right upon this question.

The second question arises from the fact that the company purchased its explosives under an agreement with Nobel (Australasia) Ltd. under which the company paid a provisional price which was fixed under the terms of the purchase agreement for six calendar months at a time. The contract also provides that the provisional price shall be readjusted retrospectively for each year as soon as what is called the final selling price shall have been determined. The final selling price is calculated by taking many elements into consideration, including the Australian manufacturing cost of certain explosives during the year of supply. This cost and other factors which enter into the calculation cannot be ascertained until after the expiry of the year of supply. The contract provides that the final selling price is to be communicated to the purchaser on 30th April each year for the year immediately preceding. When the final selling price is ascertained the necessary adjustments are made between the defendant and Nobel (Australasia) Ltd. During the period in question in this action it has happened that the final selling price was lower than the provisional price, so that the defendant received sums by way of rebates amounting in all to over £9,000. It is possible, however, that the result of the adjustment would be that the defendant, instead of receiving money from the vendor company, would be required to pay moneys to the vendor company.

The question as between the plaintiff and the defendant should be considered in the light of this possibility as well as in the light of what has actually happened in the present case.

The plaintiff has pleaded and the defendant has admitted that under the contract of employment the plaintiff was entitled to be paid fortnightly. It is also common ground that the plaintiff was entitled to determine his employment at any time, and there appears to be no doubt that the defendant similarly could determine the employment of the plaintiff at any time. There is nothing in the terms of the contract as admitted by the parties to show that any payment to which the plaintiff was entitled could lawfully be postponed beyond the fortnightly pay days which were established by the course of conduct of the parties. It would appear to follow that the cost or price of articles supplied to the plaintiff which the defendant was entitled to deduct from the earnings payable to the plaintiff must necessarily be a sum which could be ascertained on each fortnightly pay day. If this be the true position, then the defendant was entitled to deduct the provisional price. But the result would then be that, in the circumstances as they exist, the defendant would have deducted a larger sum than the ultimate true cost. Such a result should be avoided, if possible. A solution of the difficulty can I think, be found when due weight is given to the actual terms of the award. They are: "The price . . . *shall in no case exceed* the cost or price of the article to the employer at the place of supply." The award does not fix the charge to be made. It fixes a maximum for such a charge. It is for the employer to see that he does not exceed the maximum. If he chooses to purchase explosives upon such terms that he cannot specify the precise price when he comes to pay a workman and to make deductions for stores, that is a circumstance for which he is responsible and it cannot excuse him from obeying the award. If the employer makes a deduction without knowing the cost or price which constitutes the maximum allowable deduction, he acts at his risk. If events show, as in this case, that he has deducted too much, he must pay the excess deductions to the piece-workers. On this part of the case, therefore, I think that the order of the Chief Justice should be varied and that the report of the master should be left unchanged.

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The next question which arises upon this appeal depends upon sec. 153 (2) of the *Industrial Arbitration Act*, which is in the following terms : " Every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose."

It is contended by the defendant that the concluding words of sub-sec. 2 prevent the plaintiff from recovering any amount alleged to be short-paid to him unless his cause of action for the recovery of that amount arises within twelve months of the issue of the writ. The plaintiff, on the other hand, contends that his cause of action depends upon a common-law contract of employment the terms of which depend upon an agreement between the parties and not upon any rates of pay fixed by an award. The only provision in the award directly relating to rates of pay provides that " the actual remuneration paid for the work done shall not be less than the amount which the worker would have received for the period of his work if he had been working for that period at the rate of wages fixed by this award for the work done."

Thus the award does not fix any rates of remuneration but only prescribes a minimum in the clause mentioned. The award, however, does bind the parties by the provision preventing the company from charging more than the cost price of articles supplied to the worker. The contention for the plaintiff is that he is suing under a common-law contract which entitles him to be paid certain sums by way of wages, that the defendant has not paid the agreed wages in full, that the question upon the award limiting the price to be charged for articles supplied arises only by way of defence, and that therefore the plaintiff does not in these proceedings rely upon the provision of sec. 153 which entitles him to wages to be paid in accordance with an award without deduction. If this argument is right, then the period of limitation applicable to the claim is a six-years' period under the Statute of Limitations applying to simple

contracts. What then is the basis of the actual claim made by the plaintiff ?

The plaintiff sues for accounts and payment of the amount found due after deduction of the true cost price (whatever that may be) of articles supplied to him by the company. His claim is not a claim for wages without any deduction at all. The claim is based upon the clause in the awards which produces the result that, notwithstanding any agreement to the contrary between the parties, only the true cost price shall be charged. Thus, the plaintiff is able to prevent the defendant from relying upon any settled account, or upon any agreement in any form which would allow him to be charged more than the true cost price. The plaintiff is in this position by reason of the terms of sec. 153. Sub-sec. 1 prevents any contract inconsistent with the awards from having any effect. Sub-sec. 2 confers on the plaintiff the right to be paid " in accordance with " the awards notwithstanding any contract or pretended contract to the contrary. The plaintiff is exercising this right. His claim is based on the clause in the award, and not on any agreement between him and the company that the company shall be bound by the award. Such an agreement would be quite nugatory. An award binds parties to which it applies quite independently of any agreement by them to be bound by it. The relation of employer and employee is constituted by an agreement—but the terms of that relation, so far as they are fixed by an award, depend upon the award and not upon any agreement of the parties. Thus, the plaintiff's claim in this case, as to the only matter in dispute, depends upon the awards to which effect is given by sec. 153. His claim is founded on the provision of sec. 153 (2) that " he is entitled to be paid in accordance with the award." He claims to " recover as wages the amount to which he is declared entitled " by virtue of the section. Such a claim is, by sub-sec. 2, made subject to a twelve-months' period of limitation. I am, therefore, of opinion that, in this action, the plaintiff can recover only in respect of any moneys short-paid as wages which fell due to him within twelve months of the issue of his writ.

The plaintiff wishes to raise questions of concealed fraud and of the application of the *Truck Act*. *Dwyer* J. answered the question

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in such a form as not to exclude such argument upon those questions as might be available to the plaintiff after the question depending upon sec. 153 had been answered in a manner unfavourable to him. I agree that the answer should be framed so as not to prejudice the plaintiff by appearing to deal with these questions, and I am therefore of opinion that the judgment of *Dwyer* J. should be affirmed.

DIXON J. This appeal arises out of an action brought against the owner of a mine by a miner employed in the mine as a piece-worker. The miner, who is the appellant, seeks in the action to recover from the mine owner, the respondent company, sums deducted from his pay or remuneration in excess, as he alleges, of the amounts allowable.

The contract of employment was oral and the terms and conditions were those prevailing in the industry. Piece-work is done in parties, sometimes of two, sometimes of four. Twice a month the work done by the party is measured and the rates of pay are calculated at so much a foot or a fathom. The mine owner supplies the party with certain things used in the work, such as explosives, rods of fuse, clay tamping for use in blasting, lubricants, and carbide and other requisites for lighting. These articles are collectively described as stores. The cost of stores is borne by the piece-workers, and from the amount otherwise payable to a party for a fortnight's work the mine owner deducts the amount charged for the stores supplied during the period. The periods taken for calculating the remuneration are from 1st to 15th and from 15th to the end of every month, and the earnings are paid on the 3rd and 18th of the month. Statements showing how the amount is made up are furnished to the men; and showing, too, how the amount earned by the party is to be divided among the members, a division based upon the number of shifts worked by each of them. An industrial award or awards of the Court of Arbitration of Western Australia regulate wages and conditions of employment upon the goldfield, including in some respects the terms of employment of piece-workers. Among other things, the awards require a number of implications in every contract in which a worker is engaged to perform work at a remuneration other than the rates of wages fixed. The implications required

include a term that the price of every article supplied by the employer for the use of the worker during the period of his engagement shall in no case exceed the cost or price of the article to the employer at the place of supply. By an order of the Arbitration Court the words " place of supply " have been declared to mean the place where the article is furnished or delivered to the worker at whatever part of the mine that may be.

The decision of the question whether the plaintiff has been underpaid, as he claims, turns upon the correct mode of ascertaining the cost or price to the defendant company of certain of the stores as at the place of supply so defined. The question falls into two parts. In the case of explosives, the defendant company charged the men a price based upon a provisional price payable by the company to the manufacturers from whom the company bought the explosives. But periodical adjustments of the provisional price took place between the manufacturers and the defendant company, and during the period covered by the claim the adjustments led to a rebate to the company. The plaintiff claims that he is entitled to the benefit of the rebate in the computation of the price to him, which, he says, should not have been based on a merely provisional price payable by the defendant company.

The like claim is made by a large number of other piece-workers similarly situated, and the action was commenced by the present plaintiff to establish the correctness of the contention upon which all their claims depend. This led the defendant company to reconsider the various ingredients of the charges for stores made to the men, and, as a result, the company raised a counter contention that in the statements furnished to the men costs of stores were put down by the company which were too low because they did not include the full charge which the company was entitled to make as the cost of the articles at the place in the mine where they were delivered to the piece-workers. The result was to open up altogether the calculation of the charges for stores. On the subject of how it should be done, the parties remain at issue on the question whether items may be included representing an apportioned or dissected cost of distributing the stores from the store or magazine on the surface to the men below ground. The proper mode of calculating

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these costs of distribution forms the second branch into which the main question is divided.

In answer to the plaintiff's claim, the defendant company has objected that, under statute, an action will not lie for the recovery of wages in accordance with an industrial award unless brought within twelve months from the time when the cause of action arose, a period outside which the greater part of the plaintiff's claim falls. This objection raises the question whether the plaintiff's claim is of a nature to which the statutory limitation applies. But, before considering the validity of the objection, which does not go to the whole action, it is necessary to decide the questions affecting liability. Of these, the first is that of the rebates with respect to explosives. The explosives are obtained by the defendant company under a contract for the supply of its requirements for a period of years. The suppliers are manufacturers who have a factory in Victoria, and the contract binds the company to obtain its explosives from no one else. The prices to be obtained for the various kinds and grades supplied are dealt with by elaborate clauses. At the beginning of every half year the sellers are to intimate to the buyer the sellers' provisional prices, and during the half year the explosives supplied are to be invoiced to the buyer at those prices, which are payable in the month following that of delivery. The delivery is to be made free on rails at Fremantle, but, at the request of the buyer, the sellers are to undertake the arrangement of transportation to some other point at the buyer's expense and risk. At the end of every year, the final prices are to be ascertained and communicated to the buyer before the end of the following April. The necessary adjustment of the provisional prices is to be made, and the amounts found due by or to the buyer are to be paid during the ensuing month. The final selling prices are calculated according to a system prescribed in detail by the contract, which, briefly, consists in ascertaining the cost of the article to the seller in the manner provided, and adding a proper proportion to cover interest, profit and risk. It is evident that, buying under such a system, the defendant company was necessarily placed in a difficulty when it came to apply to explosives the provision of the industrial award against charging for articles supplied to piece-workers an amount

exceeding the cost or price of the article to the employer at the place of supply. Under the usual terms of employment remuneration must be calculated and paid without waiting to discover what the final prices payable to the manufacturer might be. The award makes no provision for a tentative ascertainment of the cost to the employer subject to subsequent revision and adjustment. A system of adjustment which might call on piece-workers to make repayments to the employer would, no doubt, prove unworkable. The practical necessity of paying wages or piece-work rates at short and regular intervals is a matter which, doubtless, the award did not intend to disregard, and it may properly be considered in construing and applying that instrument. The ordinary facts of business accounting may be taken as circumstances relevant to its interpretation. For example, I should think that the exigency of accounting supplies a confirmatory reason for the conclusion of the Supreme Court that the expression relating to price or cost does not contemplate an allocation to the stores of a proportion or percentage of the company's expenses for the current year incurred in London at the company's head office, or indeed, other administrational and overhead expenses. For, apart from the fact that the clause in the award appears to be concerned with the particular outlay falling upon the company because of its undertaking the supply to the piece-worker of the means of performing his work, the delay and complexity involved in taking into account such items make it incredible that "cost" was used in such a sense as to require it. But the inability of the defendant company to ascertain at once the prices which the explosives actually cost is not inherent, nor does it depend on notorious facts which the award may be considered as contemplating. It arises out of a very special arrangement the existence of which the court making the award probably neither knew or thought of as a possibility.

The purpose of the clause in the award is to control and limit the freedom of the mine owner in fixing a charge. The award itself does not fix the charge but limits the amount. There are, in effect, two restrictions, as will appear from the full text of the clause, which is as follows: "The price of any article supplied by the employer for the use of the worker during the period of his engagement shall not

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be increased during the period and shall in no case exceed the cost or price of the article to the employer at the place of supply." The prohibition against increasing the price of the article is, no doubt, meant to give security to the piece-worker. The purpose of restricting the price to cost is evident. The mine owner may recoup himself, but he must not profit by the transaction. The words " shall in no case " are emphatic. The alternative " price or cost " is used for the purpose, apparently, of covering both the case where an article is obtained as an entirety for a definite price payable by the mine owner and the case where it is made or produced and the expenditure involved must be ascertained. The distinction would be important and necessary if cases could occur in which the mine owner incurred no further expenditure beyond the price of the article, but when the words " at the place of supply " were interpreted as referring to the actual part of the mine where the piece-work was done, such a case became practically impossible. For, although the seller of explosives, for example, might be prepared to deliver them to the mine owner's store or magazine on the surface at a price covering the costs of delivery, the subsequent distribution underground must be done by the mine owner and at his expense. But the use of the word " price " suggests that the standard intended is the actual out-of-pocket expenditure caused by procuring the stores for the use of the piece-worker. Subject to the restrictions it imposes, the clause leaves to the mine owner the fixing of the actual charge he makes. But that he may not go beyond the true cost of the article to him appears to me to be made very clear by the provision. If at the moment when he comes to make the deduction the mine owner is uncertain what that is, then he is left in the unfortunate position of having to make an estimate at his own risk. He is at liberty to charge a price of his own fixing, but if it turns out that it exceeds the real cost to himself, then he has contravened the award and he is liable to the piece-workers for the amount short-paid.

The question remains whether the provisional price charged by the suppliers of explosives to the defendant company can be considered the true cost to the company of the article, that is, at the point where it is delivered to the company. In my opinion it cannot. On the terms of the contract between the defendant

company and the suppliers of explosives, the provisional price is not the price. It is a tentative or provisional payment pending the ascertainment of the true price. The contract is not one for sale at a definite price with a stipulation for a distribution of, for instance, a bonus calculated on profits. The subsequent repayment is the refund of an amount paid in excess of the contract consideration for the goods (Cp. *Shelley* v. *Commissioner of Taxation* (1)).

I am unable to agree in the opinion of *Northmore* C.J. that the defendant company is entitled to include the full provisional price in the calculation of the charge for explosives notwithstanding the subsequent rebates or refunds. Upon this point I think the master was right and his report ought not to be varied.

The second matter in controversy upon this appeal concerns the items which the defendant seeks to include in the calculation of the charge for stores, particularly for explosives, on account of the work of distributing the stores to the men underground. In the course of the master's report he gives the contention of the defendant company as to the mode of computing the cost to it of stores. He says: "For the defendant it is contended that in addition to the cost price, that is the vendor's invoice price to the defendant company, plus railage and carriage to the defendant's mine, there must be added a computed amount based upon 'general expenses,' depreciation, London office expenses, colonial register expenses, underground supervision, holiday pay and cost of distribution from defendant's store or magazine." The master disallowed all the items which the defendant company claimed to add to the cost of the stores delivered at the mine.

Upon motion by the defendant company to vary the master's report, *Northmore* C.J. made an order approving and adopting the report so far as it related to the overhead charges and to the master's disallowance of the same. From that approval and adoption the defendant company does not cross-appeal. But the learned Chief Justice's order then proceeds to vary what it describes as "the report and finding that the defendant company was not entitled to deduct from the plaintiff's remuneration distribution costs in delivering the stores to the plaintiff at the place of supply other

(1) (1930) 43 C.L.R. 208, at pp. 222, 224, 225.

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than the invoice cost or price of the said stores together with the cost or price incurred by the defendant company for rods" (i.e., fuses) "and tamping." His Honour's order first states that it is the opinion of the court that some amount ought to have been allowed for distribution costs; then, after giving an opportunity to the parties to agree upon the amount, it orders that, in default of such agreement, the report be referred back to the master "for further inquiry and report as to what sum or sums should be allowed for the cost to the defendant company in delivering stores from the defendant company's store to the plaintiff at the place of supply." From this part of the order of *Northmore* C.J. the plaintiff appeals. The master's reason for deciding that the items claimed ought not to be allowed was, in effect, that none of them represented expenditure the sole cause of which was the distribution of the stores. He took explosives as the chief example and briefly traced the course pursued in taking them from the magazine above ground to the place of supply below and in recording the transaction. It is unnecessary to discuss the sufficiency of the master's description, nor again to state the process of distributing the materials. It is enough to state that the stores always passed through the hands of employees whose chief work consisted in other duties, though often of an analogous character. The claim brought in by the defendant company consisted in proportioned items. Most of these items represented the proportionate cost of the estimated time devoted by an employee in the aggregate to the distribution of the explosives. Some of the items included an estimated proportion of holiday pay, of insurance and of contribution to the mine workers' relief fund. These three items, I should think, would be rejected as being of the same nature as overhead charges. I think that, when the clause of the award speaks of cost or price to the employer, it regards the employer, the mine owner, as carrying on an enterprise as a going concern, and accordingly means only the additional cost thrown upon him by reason of his undertaking the supply of the materials needed by the piece-worker instead of allowing the burden of obtaining them to rest upon the piece-worker, as perhaps in a more primitive organization of the industry it might have done. This, I take, is the basal

reason for the disallowance of all items obtained by an apportionment of standing or overhead charges. It may be that it would justify the rejection of the amount said to be referable to the service performed by the winding engine. That, however, rests rather upon the facts, and they were not gone into. But I think that the master carried the principle beyond its logical application when he refused to include in the calculation of the amount chargeable for the explosives any sum for labour costs. Labour costs necessarily or naturally vary with the amount of work done. It is quite evident that the distribution of the materials to the piece-workers involved a use of labour, and possibly of power also, which was reflected in the defendant company's expenditure. If a man is employed in a succession of tasks, one cannot be regarded as involving no additional cost simply because the others rendered his employment necessary. And when one operation produces several results, one result cannot be treated as an accidental concomitant of the others, which, therefore, should be regarded as involving the whole cost. In some circumstances it is conceivable that the main function is so far removed from the incidental advantage taken of a piece of work or mechanical operation that it should be disregarded. But this is a question of degree and of fact. I think, however, that the master was mistaken in the manner in which he applied such reasoning and that, on this point, the learned Chief Justice made a proper order in remitting it for the master's reconsideration.

It remains to deal with the objection that part of the plaintiff's cause of action falls outside a statutory limitation of twelve months. The objection is founded on sec. 153 (2) of the *Industrial Arbitration Act* 1912, as amended. It was raised as a point of law before *Dwyer* J., but he was not asked to decide whether as a result the action failed so far as it related to underpayments made more than twelve months before the date of the writ. His decision was confined to the question whether, so far as the cause of action was founded upon the allegation that more had been charged for stores than the award allowed, sec. 153 (2) applied. It appears that the plaintiff relies upon the *Truck Acts* 1899-1904 (63 Vict. No. 15—No. 38 of 1904) (W.A.), for an alternative cause of action and also sets up concealed fraud by way of reply to the defendant's plea of sec. 153 (2). These matters were

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not before *Dwyer* J. He decided that sec. 153 (2) did apply, and an appeal from that decision is included in the present proceedings before this court. In my opinion the decision is correct. The effect of the sub-section, the terms of which I shall not set out, is to confer an absolute right upon a worker to be paid by his employer in accordance with an industrial award; to enable him to recover as wages the amount to which the provision thus gives him a title; but to limit the time within which he may sue to twelve months from the accrual of the cause of action so given to him. The sub-section, therefore, applies to proceedings for the recovery of an amount payable in accordance with an award if the title to recover rests upon the award. The expression " as wages " does not appear to me to form an essential part of the description of the form of action to which the application of the limitation of time is confined. I presume that, in enacting that the amount may be recovered as wages, it was intended to allow the use of a common money count and also to enable any court with jurisdiction over a proceeding for the recovery of wages to entertain the action. The substance of so much of the provision as imposes a time bar is to give that protection to employers against actions for payment of remuneration for work if the claim invokes the paramount authority of an industrial award and depends upon an allegation that payment for the work has not been made " in accordance " with its terms.

If it were the case that the claim of the present plaintiff rested upon a simple contractual right to remuneration at the agreed rates for piece-work, the sub-section, in my opinion, would not apply and it would be nothing to the point that the defendant sought to raise a set-off which, apart from the award, might be available and that thereupon the plaintiff invoked the award as prohibiting the set-off. This is the complexion which the plaintiff contends that the proceedings wear. But I do not think the deductions operate simply as the effectuation of a set-off of one debt against another. The contract of employment does not give to the piece-worker a right to payment of remuneration at the full amount and to the employer a right to payment for stores as two independent liabilities, each of which might be sued upon, and then provide for a set-off. What the contract of employment appears to me to do is to provide for the

calculation of the remuneration for piece-work by defining the factors in the sum. One factor is the work done at so much per foot or per fathom. Another factor is the amount or value of the stores supplied. No right is given to anything but the product when the calculation has been made. Then the award steps in and regulates one of the factors by limiting in favour of the piece-worker the amount at which it may be taken into account. It is upon this limitation that the right set up by the plaintiff depends, and he sues for the difference between the product obtained by calculating his remuneration in disregard of the limitation imposed by the award and the product obtained by calculating it in accordance with the award. An action for this difference is, in my opinion, a proceeding for the recovery of an amount which is payable in accordance with the award and not otherwise.

The result is that, in my opinion, the appeal from the order of *Dwyer* J. should be dismissed. The appeal from the order of *Northmore* C.J. should be allowed, and so much of the order as varies the report of the master as to rebates, that is, the paragraph or clause of the order numbered three, should be discharged.

McTIERNAN J. I agree.

Appeal from the order of Northmore C.J. allowed in part and such order varied by striking out clause 3 *thereof and by inserting in lieu thereof an order that portion of the report of the master relating to rebates and in particular the answer to question* 3 *in the order of the Supreme Court made on the* 19*th June* 1936 *directing the answer to be made by the master and appendices C, I and K so far as they relate to rebates be approved and adopted and appeal from the order of Northmore C.J. otherwise dismissed and appeal from the order of Dwyer J. dismissed. No order as to costs of appeal to this court.*

Solicitors for the appellant, *Villeneuve Smith & Keall.*
Solicitors for the respondent, *Jackson, Leake, Stawell & Co.*