[HIGH COURT OF AUSTRALIA.]

O'DONEL . . . . . APPELLANT;
APPLICANT,

AND

THE COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (NEW SOUTH WALES) . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1937, *Nov.* 17, 18.

MELBOURNE, 1938, *Mar.* 25.

Latham C.J., Evatt and McTiernan JJ.

Estoppel—Estoppel by judgment—Transport worker—Injury—Action under special Act against employer—Judgment for worker—Issues proved—Claim for workers' compensation in respect of subsequent period.

In an application for workers' compensation as from 15th February 1935, the applicant claimed that his incapacity, i.e., blindness, resulted from an injury arising out of and in the course of his employment with the respondent and suffered by him on 19th March 1933. In previous proceedings in the Supreme Court of New South Wales taken by the applicant against the respondent under sec. 124 of the *Transport Act* 1930 (N.S.W.) (which provides that, where any officer receives personal injury arising out of and in the course of his employment, he shall be entitled during the period of his disablement resulting from the injury to receive the salary he was receiving at the date of the injury), the applicant had recovered judgment for his salary for the period from 14th September 1934 to 15th February 1935, his claim being based upon his blindness during that period resulting from the aforesaid injury.

Held that the judgment of the Supreme Court, although it created an estoppel in respect of the cause of the applicant's blindness during the period from 14th September 1934 to 15th February 1935, did not estop the respondent from proving that the applicant's blindness after 15th February 1935 was not caused by the injury of 19th March 1933, but was solely due to other causes.

An estoppel as to one proposition cannot operate to establish by estoppel a second proposition which follows from the first proposition only when such first proposition is combined with additional evidence, however strong that evidence may be.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPEAL from the Supreme Court of New South Wales.

A claim for compensation was made under the *Workers' Compensation Act* 1926-1929 (N.S.W.), on 5th February 1936, by William O'Donel against the Commissioner for Road Transport and Tramways, in respect of incapacity, namely, total blindness, alleged to have been caused by an injury received by the applicant on 19th March 1933, whilst employed by the respondent as a tram conductor. In his particulars the applicant admitted that, as the result of proceedings taken by him in the Supreme Court of New South Wales under sec. 124 of the *Transport Act* 1930 (N.S.W.), he had received full wages for the period of his incapacity between 19th March 1933 and 15th February 1935, and stated that he had not received any payment, allowance or benefit from the respondent since the last-mentioned date.

The Workers' Compensation Commission found that " the injury arising out of and in the course of the applicant's employment with the respondent on 19th March 1933 did not cause him any incapacity for work after 15th February 1935, such incapacity being solely due to the progress of pre-existing disease which had no causal connection with his employment." An award was made in favour of the respondent.

At the request of the applicant the commission stated, for the opinion of the Supreme Court of New South Wales, a case which was substantially as follows :—

1. This case is stated at the request of the applicant for the decision of the Supreme Court of New South Wales upon certain questions of law which arose during the proceedings before the commission between the applicant and the respondent on 1st, 3rd and 4th September and 3rd November 1936.

2. The applicant was employed by the respondent as a tram conductor and on 19th March 1933, while in the course of his employment

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collecting fares on the footboard of a tram in Anzac Parade, Kensington, was struck across the face by a palm leaf.

In September 1934 blindness in both eyes caused him to cease work. In these proceedings he claimed that such blindness resulted from the injury arising out of and in the course of his employment on 19th March 1933, and claimed compensation from 15th February 1935.

3. By writ of summons issued in the Supreme Court on 25th March 1935 the applicant claimed from, and on 27th November 1935 recovered judgment against, the respondent in respect of wages under sec. 124 of the *Transport Act* 1930, for periods of incapacity prior and up to 15th February 1935. In the claim for compensation herein compensation under the *Workers' Compensation Act* 1926-1929 was claimed in respect of incapacity subsequent to 15th February 1935.

4. The respondent denied liability upon the grounds as set forth in par. 5 hereof. It was not disputed that the applicant did receive an eye injury arising out of and in the course of his employment on 19th March 1933, the main issue before the commission being as to the nature of that injury and its results.

5. After hearing the evidence adduced and the submissions made on behalf of the parties the commission made the findings and award set out in its judgment which was delivered on 3rd November 1936. That judgment was as follows :—" The applicant is a single man aged 34 years who is now unfortunately blind. He claims £3 per week compensation from respondent as from 15th February 1935 on the ground that his blindness results from injury arising out of and in the course of his employment on 19th March 1933. The respondent denies liability on the following grounds :—' (1) That the claim for compensation was not made on the respondent within the time limited by the Act. (2) That the incapacity of the applicant is not due to personal injury arising out of and in the course of his employment. (3) That the applicant, having received benefits under another Act, namely, the *Transport Act* 1930, is not entitled to receive benefits or compensation under this Act. (4) That the applicant's condition, apart from the alleged injury, would have caused him to have sustained the disability from which he suffered prior to 15th February

1935.' While a prisoner of war in Germany between 1917 and 1918 applicant contracted syphilis and for that disease he received an incomplete course of anti-syphilitic treatment in Germany and England prior to leaving England for Constantinople on army service. On returning to New South Wales in 1926 he entered the respondent's tramway service and sought further treatment at the New South Wales Board of Health, which treatment he was receiving periodically up to and after the time of the happening of the incident on which his claim for compensation is based. This incident occurred on Sunday, 19th March 1933, about 1.55 p.m., while standing on the footboard collecting fares from passengers when the tram was travelling along Anzac Parade near Todman Avenue, Kensington ; a leaf of one of the palms growing in Anzac Parade was swept across applicant's face as he passed it on the moving tram. He reported the injury to the respondent that day in the following terms :—' One of the palms alongside tram caught me across the face, blinding me for the moment. After doing another trip I noticed my eye sore and headache. I got relief.' The applicant went home, bathed his right eye, and rested, and on the Monday and Tuesday attended St. Vincent's Hospital for treatment of his right eye, but the treatment there prescribed was for the above-mentioned disease. His injured right eye was examined by the respondent's medical officer, Dr. Finlayson, on 22nd March, but he found no evidence of the injury caused by the palm leaf three days before. There was no sign of any abrasion in any part around the eye or of the eyeball itself. There was no visible redness in the eye, but on looking under both upper lids he found there was a sub-acute conjunctivitis. Applicant's vision was then 6/6. Dr. Finlayson told applicant he could resume duty the following day but for safety had better stay off the footboard for a few days. The applicant resumed duty on 23rd March 1933, and continued at work without complaint to respondent until 8th February 1934, when he temporarily ceased work for eye treatment. On the Tuesday after the palm leaf incident and on every following Tuesday applicant attended at St. Vincent's Hospital for further anti-syphilitic and eye treatment, and while receiving this treatment at St. Vincent's Hospital he also received eye treatment on Fridays

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at the South Sydney Hospital and anti-syphilitic treatment at periodic intervals at the Board of Health without disclosing to either institution that he was receiving similar treatment elsewhere. He stated that he had followed this practice for nearly two years. Applicant's evidence on matters relevant to the onset of the disease in his eyes is not convincing. He stated that on his first complaint to the Board of Health about his eyes he was told to see an eye specialist; an analysis of his evidence as to the year and month, and as to which hospital and doctor he visited as a consequence, results in contradiction. On the question of when he first sought treatment for his eyes his evidence in chief suggests that he first went to St. Vincent's Hospital, but under cross-examination when asked why he attended both St. Vincent's and South Sydney Hospitals at the one time, he said that he first went to South Sydney Hospital but its eye specialist was on vacation for some months, and it was because of that he went to St. Vincent's Hospital. Further, that his visit to Dr. Blakemore at Lewisham Hospital, whom applicant first saw in May 1934, was in consequence of the Board of Health reference. There is no medical evidence before the commission of applicant having received treatment to his eyes prior to 20th February 1934, when he was admitted to St. Vincent's Hospital suffering from acute choroiditis. Dr. R. J. J. Speight, medical superintendent of the hospital, who produced the relevant records of the hospital, agreed that this condition could be a *sequela* of syphilis. The applicant was discharged from St. Vincent's Hospital on 12th May 1934, and on 25th idem he went to Lewisham Hospital and consulted Dr. Blakemore, who gave evidence on his behalf. The applicant attended at Lewisham Hospital for six months, but did not tell Dr. Blakemore that he (applicant) was then receiving treatment at both St. Vincent's and South Sydney Hospitals. He did tell Dr. Blakemore that he was receiving anti-syphilitic treatment at the Board of Health, and on Dr. Blakemore's suggestion such treatment was temporarily suspended. Dr. Blakemore found that the applicant had iridocyclitis, or inflammation of the iris and ciliary body, and choroiditis and a detached retina in the right eye which was secondary to the iridocyclitis. The right eye was practically blind, and the left eye was affected. Dr. Blakemore agreed

that mercury and arsenic are used in anti-syphilitic treatment and that too much of such treatment might quite possibly be detrimental. Optic atrophy could result from an excess of arsenic, but that condition was not then present in applicant's eyes—the condition of his eyes at that time, however, was practically hopeless. It appeared as if blindness could quickly supervene. While attending Lewisham Hospital for eye treatment the applicant resumed light duty with the respondent on 14th June 1934, but the left eye became blind, and he was compelled to finally cease work on 14th September 1934, and was later retired from the respondent's service as from 15th February 1935. Applicant claimed full wages from the respondent between 14th September 1934, and 15th February 1935, under sec. 124 of the *Transport Act* 1930, which provides: 'Where any officer receives personal injury arising out of and in the course of his employment he shall, except where the injury was caused by his own gross negligence or wilful and wrongful act, be entitled during the period of his partial or total disablement arising from the injury, to receive, unless and until he is retired or retires from the service of the trust, the salary he was receiving at the date of the injury.' An action was brought in the Supreme Court on 25th March 1935 by the applicant against the respondent, the question in dispute being the adequacy of the amount of salary which the respondent had paid the applicant during a period of disablement prior to his retirement from the tramway service, and applicant recovered judgment on 27th November 1935, for £23 9s. 1d., in addition to £115 paid into court. The contention on behalf of the applicant that the respondent was estopped by the Supreme Court judgment from contesting the matters in dispute in these proceedings cannot be sustained for the reason (among others) that the subject matter is different (*Broken Hill Pty. Co.* v. *Broken Hill Municipal Council* (1)). The commission is quite satisfied that the applicant did receive an injury arising out of and in the course of his employment with the respondent on 19th March 1933, when he came into contact with a palm leaf, the injury thus caused being minor in character and one which temporarily affected his right eye. The real question in this case is whether that injury contributed in any material degree to the blindness

(1) (1926) A.C. 94; 37 C.L.R. 284; 26 S.R. (N.S.W.) 320.

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which he has suffered on and from 15th February 1935, a period not covered by the provisions of the *Transport Act*. Even the applicant's medical witness, Dr. Blakemore, was definite that the condition which has caused his blindness could result from the toxins of syphilis from which applicant suffers, without any accident at all. His view, based on the history the applicant had given, was that the injury the applicant received from the palm leaf was the activating cause of the disease resulting in his blindness. He admitted that it was only possible that the applicant would have retained his eyesight but for that happening. The history given him, however, did not disclose that the applicant had gone back to work two days after the palm leaf happening and had continued at work from 23rd March 1933 until 8th February 1934. For the respondent, evidence was given by Dr. A. Dunlop that he had examined the applicant on 24th April 1935. He expressed the opinion that there was no connection at all between the applicant's blindness and the happening on 19th March 1933. He stated that there is evidence of sufficient disease in the eyes to have caused blindness without any history of injury at all: he would be inclined to blame the accident for some aggravation of a pre-existing eye disease if difference in the diseased eye were noticed within days or hours, but if difference were only noticed in months he would disregard the accident. He said it would be extremely unlikely to see acute choroiditis develop from trauma. He stated that there are cases of uniocular syphilis. Given an extensive toxic disease in one eye, it is not surprising to find it later in the other. He did not think a blow on the applicant's right eye would have affected the left. Dr. N. McA. Gregg, in giving evidence for the respondent, stated that he saw the applicant at St. Vincent's Hospital in April 1934. He was then recovering from acute inflammation of the right eye—acute uveitis, and very marked signs of choroiditis in the left eye. His opinion was that the cause of the disease in applicant's eyes was syphilis and he said that unfortunately one sees quite a lot of such cases. A blow on the right eye might have had some possible effect in making the detachment of the retina in the right eye a bit worse than it was otherwise, but quite apart from the detachment of the retina, applicant would have been blind. The blow did not

cause his blindness—it was due to the disease from which he suffered. When Dr. Gregg saw applicant in March 1935 he was at that time blind for all practical industrial purposes. The commission's consideration of this expert medical evidence is that its weight is definitely in favour of the respondent's contention that there was no causal connection between the injury which the applicant received on 19th March 1933, and the blindness which he has suffered since 15th February 1935. The commission's finding is that the injury arising out of and in the course of the applicant's employment with the respondent on 19th March 1933 did not cause him any incapacity for work after 15th February 1935, such incapacity being solely due to the progress of pre-existing disease which had no causal connection with his employment. An award is, therefore, made for the respondent."

The questions for the decision of the Supreme Court were as follows :—

1. Whether the applicant was entitled to recover the compensation claimed.
2. Whether the commission was in error in holding that the question of whether the applicant during the period for which compensation was claimed was suffering incapacity as the result of an injury received on the nineteenth day of March One thousand nine hundred and thirty-three arising out of and in the course of his employment was not *res judicata* between the parties.

The Full Court of the Supreme Court answered both questions in the negative.

From that decision the applicant appealed to the High Court.

Miller, for the appellant. Once there is a determination between the parties that an injury has resulted in a certain incapacity and the injured worker remains disabled, a subsequent incapacity arising out of that injury cannot be re-litigated ; it is *res judicata* (*Hoystead* v. *Commissioner of Taxation* (1) ; *Nicholson* v. *Piper* (2)). The blindness suffered by the appellant after 14th February 1935 is the same blindness as that suffered by him prior to that

(1) (1926) A.C. 155 ; 37 C.L.R. 290. (2) (1907) A.C. 215.

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date. It having been determined between the parties in the proceedings in the Supreme Court under sec. 124 of the *Transport Act* 1930 that the appellant's incapacity was in fact blindness which he had suffered prior to 14th February 1935 and which had resulted from injury arising out of the course of his employment, it was not open to the Workers' Compensation Commission in the present proceedings to find that the injury which the appellant did in fact sustain was trivial in character and had no part in the causation of the blindness from which he now suffers ; it was not open to the commission to inquire into what was the cause of the incapacity after 14th February. By reason of the proceedings in the Supreme Court the respondent is precluded from denying that the total disability, that is, total blindness, existing in February 1935, and which had existed for some time previously, was due to an injury arising out of and in the course of his employment. There is no new cause to explain the continuance of that blindness, therefore the conclusion must be that that blindness was due to the injury incurred during the course of the appellant's employment. Unless and until that new cause is established the appellant is entitled to compensation as a matter of law.

Bowie Wilson (*Lamb* K.C. with him), for the respondent. In the circumstances the respondent is not estopped by the judgment given in the proceedings in the Supreme Court (*Cleverley* v. *Gas, Light and Coke Co.* (1)). Estoppel by record as a matter of law applies only to the period up to 14th February 1935. The moment it becomes necessary to go into any form of evidence to carry the matter beyond that period, then it becomes a question of evidence and not a question of law, and the whole of the evidence may be inquired into. The matter is not *res judicata* ; each succeeding period may be dealt with independently (*Sharman* v. *Holliday & Greenwood Ltd.* (2) ; *Radcliffe* v. *Pacific Steam Navigation Co.* (3)). There is not any estoppel *qua* blindness ; the estoppel is only *qua* incapacity, that is to say, although the respondent was estopped in respect of some of the necessary ingredients in these proceedings,

(1) (1907) 24 T.L.R. 93. (2) (1904) 1 K.B. 235.
(3) (1910) 1 K.B. 685.

the appellant must prove by evidence the other ingredient or ingredients. In respect of that evidence the respondent was entitled to call evidence in rebuttal (*Halsbury's Laws of England*, 2nd ed., vol. 13, p. 441). A party is entitled to show that the earlier proceedings were based on an erroneous belief as to the cause (*Davies* v. *Midland Railway Carriage and Waggon Co. Ltd.* (1)). There is no similarity between this case and *Williams* v. *Guest, Keen & Nettlefolds Ltd.* (2). The presumption of continuance is rebuttable by evidence.

[McTIERNAN J. referred to *Barrs* v. *Jackson* (3).]

That case deals with the question which is not disputed here. The respondent does not dispute that the fact of employment, the fact of injury and the fact of incapacity for a certain period, are binding.

[LATHAM C.J. As the respondent did not in the action in the Supreme Court under sec. 124 of the *Transport Act*, raise the defence, which was open to him, that the appellant's incapacity was not in any way attributable to the striking of his eye by the palm leaf, is not the respondent now precluded from raising that defence ? (See *Humphries* v. *Humphries* (4) and *Cooke* v. *Rickman* (5).)]

Those cases do not bear on the present position ; they are on a direct line with *Hoystead* v. *Commissioner of Taxation* (6), and in both cases there was a definite adjudication upon the particular matter, as here, e.g., that the appellant was an employee of the respondent, or met with an injury, which is not now disputed. Distinctions on this point are made in *Inland Revenue Commissioners* v. *Sneath* (7).

[McTIERNAN J. referred to *Howlett* v. *Tarte* (8).]

The main principles are discussed in *Halsbury's Laws of England* 2nd ed., vol. 13, pp. 408-410, 441-443, pars. 464, 495-497. The doctrine of estoppel must be guarded with great strictness so as not to operate to exclude the truth (*Taylor* on *Evidence*, 11th ed.

(1) (1926) 19 B.W.C.C. 69.
(2) (1925) 133 L.T. 111 ; 18 B.W.C.C. 68.
(3) (1842) 1 Y. & C.C.C. 585 ; 62 E.R. 1028 ; (1845) 1 Ph. 582 ; 41 E.R. 754.
(4) (1910) 2 K.B. 531.
(5) (1911) 2 K.B. 1125.
(6) (1926) A.C. 155 ; 37 C.L.R. 290.
(7) (1932) 2 K.B. 362.
(8) (1861) 10 C.B. N.S. 813 ; 142 E.R. 673.

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(1920), vol. 1, p. 95). Here, the issue is : Was the appellant incapacitated on 15th February 1935 ? That issue was not litigated in the proceedings in the Supreme Court ; it is not *eadem quaestio*, therefore the principle of *res judicata* does not apply (*Broken Hill Pty. Co. Ltd.* v. *Broken Hill Municipal Council* (1)). Any incapacity that had resulted to the appellant from the blow by the palm leaf had entirely ceased by 15th February 1935. The decisions in *Hoystead's Case* (2) and *Broken Hill Pty. Co. Ltd.* v. *Broken Hill Municipal Council* (1) are reconcilable by the principles (*a*) that an Act of Parliament was under consideration, and (*b*) that an estoppel cannot be used so as to impose or enforce an illegality. Although there has been no physical change in the person concerned, evidence may be called to prove that he either shows incapacity or no incapacity, or a different incapacity (*Sharman* v. *Holliday & Greenwood Ltd.* (3) ; *Radcliffe* v. *Pacific Steam Navigation Co.* (4)).

Miller, in reply. The inquiry by the commission was not limited to whether the appellant's blindness after 15th February 1935 had an origin different from the blindness which it was admitted he had prior to that date. The case stated shows that the commission embarked on an inquiry *ab initio* as to the cause of the appellant's blindness. It was open to the appellant to identify the injury for which he claimed in the proceedings in the Supreme Court, and also to identify the incapacity (*Irish Land Commission* v. *Ryan* (5) ; *Heath* v. *Weaverham Overseers* (6)).

Cur. adv. vult.

1938, Mar. 25

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales upon a case stated by the Workers' Compensation Commission under sec. 37 (4) of the *Workers' Compensation Act* 1926-1929.

(1) (1926) A.C. 94 ; 37 C.L.R. 284 ; 26 S.R. (N.S.W.) 320.
(2) (1926) A.C. 155 ; 37 C.L.R. 290.
(3) (1904) 1 K.B., at p. 239.
(4) (1910) 1 K.B. 685.
(5) (1900) 2 I.R. 565, at p. 583.
(6) (1894) 2 Q.B. 108, at pp. 113, 115.

The applicant for compensation, William O'Donel, claims compensation for incapacity, namely, total blindness, alleged to have resulted from a personal injury arising out of and in the course of his employment by the respondent, the Commissioner for Road Transport and Tramways. The injury was suffered on 19th March 1933. O'Donel was employed as a tram conductor, and, while collecting fares on that day on the footboard of a tram in Anzac Parade, was struck across the face by a palm leaf and his right eye was injured. In the workers' compensation proceedings, the commissioner has raised the defence that the blindness was not caused by this injury. It is contended for the applicant that the commissioner is estopped from raising this defence because the question which the defence has raised has already been determined adversely to the commissioner in previous litigation between the same parties.

Sec. 124 of the *Transport Act* 1930 provides as follows: "Where any officer receives personal injury arising out of and in the course of his employment he shall, except where the injury was caused by his own gross negligence or wilful and wrongful act, be entitled during the period of his partial or total disablement arising from the injury, to receive, unless and until he is retired or retires from the service of the trust, the salary he was receiving at the date of the injury."

After the injury received on 19th March 1933 O'Donel was absent from work for a few days, but he resumed duty on 23rd March and worked without any trouble from his eyes or otherwise until 8th February 1934. On 20th February 1934 he received medical treatment for serious eye disease. He was on light duty for a time, but his left eye became blind and he ceased work finally on 14th September 1934. He was retired from the service of the commissioner on 15th February 1935. By this time he had become totally blind. He sued in the Supreme Court for salary under sec. 124 of the *Transport Act*, claiming that he had been underpaid. A question arose as to whether he was entitled to receive an altered award rate during his period of incapacity or the rate of wages he was receiving at the time of the accident, and another question arose as to whether he was entitled to recover for a period of more than twelve months under this provision. The commissioner paid £115 into court, which represented the difference between the rate of wages paid and the

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rate claimed during twelve months, and judgment was given against the commissioner for a balance representing the amount referable to a period before the twelve months. The claim now made before the Workers' Compensation Commission relates to the period subsequent to 15th February 1935.

The appellant contended that the respondent was estopped from tendering evidence as to the cause of his incapacity, i.e., the cause of his blindness. He claimed that it had already been determined in the Supreme Court proceedings that his blindness was caused by his being struck by the palm leaf, and that it was not open to the commissioner to litigate that question again. The Workers' Compensation Commission rejected this contention and received evidence which established to the satisfaction of the commission that the blow received from the palm leaf did not cause the blindness, but that his blindness was due to a particular disease from which he was undoubtedly suffering. The finding of the commission was expressed in this statement and in the further statement that the commission found in favour of the respondent's contention that "there was no causal connection between the injury which the applicant received on 19th March 1933 and the blindness which he has suffered since 15th February 1935." The result of this finding was that the commission held that the injury arising out of and in the course of the employment on 19th March 1933 did not cause him any incapacity for work after 15th February 1935. Accordingly, the commission made an award for the respondent. The question raised by the case stated by the commission is whether the respondent was entitled to give any evidence as to the cause of the incapacity now existing.

The claim made by the applicant under the *Workers' Compensation Act* is a different claim from that which he made under sec. 124. It cannot be said that the claim for the benefits under the *Workers' Compensation Act* has already been determined by any court, and therefore the matter is not *res judicata*. The appellant depends upon the law with respect to issue-estoppel, contending that, though the cause of action is different, a particular point or issue of fact has already been decided between the parties so as to preclude either of them from contending to the contrary of that matter or

fact (See per *Higgins* J. in *Hoysted* v. *Federal Commissioner of Taxation* (1), in a judgment approved by the Judicial Committee of the Privy Council (2)). It is argued that a determination as to the cause of the appellant's blindness was fundamental to the decision given in the action in the Supreme Court. It is true that the commissioner did not in that action contest the allegation that the then incapacity of the appellant (the then plaintiff) was caused by an injury arising out of and in the course of his employment. But an estoppel is created " where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed " (*Hoystead's Case* (3)). Where a defendant could have raised a defence in an action, but, for whatever reason, elected not to raise it and the decision goes against him, he is precluded from raising that defence in subsequent litigation between the same parties (*Humphries* v. *Humphries* (4) ; *Cooke* v. *Rickman* (5)).

In order to ascertain what was determined in a legal proceeding it is necessary to look at the record, if there is a record (*Robinson* v. *Duleep Singh* (6)). When reference is made to the pleadings in the action in the Supreme Court it is seen that the plaintiff alleged in his declaration that he was at all material times an officer employed by the defendant within the meaning of sec. 124 of the *Transport Act* 1930 and that the plaintiff as such officer received personal injury arising out of and in the course of his said employment and remained for a long time disabled as a result of the aforesaid injury. The plea of the defendant was, as to £115, a payment into court, and there was a second plea of never indebted based upon certain statutory provisions as to limitation of proceedings against the commissioner. The judgment in favour of the plaintiff determined as against the defendant that the plaintiff received personal injury arising out of and in the course of his employment and that the plaintiff was disabled as a result of that injury. The pleading does not show that the injury was received by being struck across the face by a palm leaf, or that the disablement was blindness. But

(1) (1921) 29 C.L.R. 537, at p. 561.
(2) (1926) A.C. 155 ; 37 C.L.R. 290.
(3) (1926) A.C., at p. 166 ; 37 C.L.R., at p. 299.
(4) (1910) 2 K.B. 531.
(5) (1911) 2 K.B. 1125.
(6) (1879) 11 Ch. D. 798.

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oral evidence is admissible to show what facts were in issue in proceedings (*Irish Land Commission* v. *Ryan* (1); and per *Higgins* J. in *Hoysted's Case* (2), and cases there cited). When evidence is given to show what the disablement was to which reference was made in the plaintiff's declaration in the Supreme Court action it is shown that the disablement consisted of blindness, and the evidence also shows that the injury there referred to was the injury consisting in being struck across the face with the palm leaf. The evidence shows that the disablement was "incapacity" (to use the term used in the *Workers' Compensation Act*) existing on and before 15th February 1935. It has, therefore, been conclusively determined as between the parties that the total blindness existing on and prior to the date mentioned was an incapacity due to personal injury arising out of and in the course of his employment. This is a determination as to a past fact, namely, the cause of the then existing blindness. When the matter came at a later date before the Workers' Compensation Commission the continued existence of total blindness was proved. It is an easy inference to conclude that the blindness existing at the later date had the same cause as the blindness which existed at the earlier date. It is, as it appears to me, at this point that the real difficulty of the case appears. How far can an estoppel be extended by inference ?

In the *Duchess of Kingston's Case* (3), long a leading authority on estoppel, it was said : "Neither the judgment of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Now it cannot possibly be said that the Supreme Court, by a judgment relating only to a period which ended on 15th February, thereby made any direct or actual decision or determination as to any matter or state of affairs whatever which existed at a later date. That judgment did create an estoppel as to one proposition—but that estoppel cannot operate to establish by estoppel another proposition which follows from the former

(1) (1900) 2 I.R., at p. 583.
(2) (1921) 29 C.L.R., at p. 563.
(3) (1776) Smith's Leading Cases, 13th ed. (1929), vol. II., p. 645.

proposition only when that proposition is combined with others the establishment of which depends upon evidence or assumption.

In this case the relevant propositions are as follows :—(*a*) That the total blindness existing before and on 15th February was caused by a palm leaf striking the plaintiff across the face. (As to this proposition there is an estoppel.) (*b*) That the blindness existing after 15th February 1935 and in respect of which the claim under the *Workers' Compensation Act* is made, is the same blindness as existed prior to and on that date. (This proposition depends entirely upon evidence and is not affected by estoppel. It is possible for a person to have a second attack of blindness, due to a new cause and not connected in any way with a first attack. At least, it requires evidence to exclude this as a possibility.) (*c*) That therefore the latter blindness had the same cause as the former blindness. (This is an inference based upon the unexpressed assumption that one and the same state of facts must have one and the same cause, upon proposition *a*, established by estoppel, and upon proposition *b*, established by evidence.)

Thus it is necessary to add propositions to the proposition actually decided by the Supreme Court before it is possible to reach the desired conclusion as to the cause of the blindness which is the foundation of the plaintiff's present claim. Therefore the Supreme Court did not decide the very question which is now raised. The question which it decided is, as the Full Court of the Supreme Court said, not *eadem quaestio*. In my opinion the plaintiff's contention therefore fails.

It should be observed that there is no inconsistency between this view and the rule stated by the Privy Council in *Hoystead's Case* (1). That case shows that there is an estoppel as to what was necessarily decided between the parties in a litigious proceeding between them. But it does not lay down any principle to the effect that an estoppel can be created by means of a logical argument depending upon premises some of which are not established by any estoppel. In *Hoystead's Case* (1) it was held that a prior decision of a court necessarily involving, though not expressly stating, a decision as to the

(1) (1926) A.C. 155 ; 37 C.L.R. 290.

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construction of a will, given in a land tax appeal, created an estoppel as to the construction of the same will in a subsequent land tax appeal between the same parties but in respect of a later year. The view of the Privy Council was expressed and, I think, fully expressed, in the following words :—" If in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the *ratio* of and fundamental to the decision " (1). In the present case there was not any decision by the Supreme Court as to the question which now arises in the workers' compensation proceedings, namely, the cause of the blindness now existing and existing since 15th February 1935 ; and no assumption or admission as to this point could possibly have been involved in the earlier decision.

It is not necessary in this case to endeavour to reconcile the decisions of the Privy Council in *Hoystead's Case* (2) and *Broken Hill Pty. Co. Ltd.* v. *Broken Hill Municipal Council* (3). It was held in the latter case that a prior decision of a court, expressly made, with respect to the construction of a statute, and given in a local-government taxation appeal, did not create any estoppel as to the construction of the same statute in a subsequent similar appeal between the same parties but in respect of a later year. The Privy Council said that the second case related to a new question, namely, the valuation for a different year and the liability for that year. This case was relied upon by the Supreme Court in the present case. In view of what I regard as the difficulty of reconciling the two cases mentioned, I prefer to put my decision upon the ground already stated, namely, that the relevant rule of estoppel applies to what must be regarded as having been decided in prior proceedings, but that it does not apply to a proposition inferred from premises some only of which are the subject of estoppel.

In my opinion, for the reasons given, the appeal should be dismissed with costs and the judgment of the Full Court should be affirmed.

(1) (1926) A.C., at p. 170 ; 37 C.L.R., at p. 303.
(2) (1926) A.C. 155 ; 37 C.L.R. 290.
(3) (1926) A.C. 94 ; 37 C.L.R. 284 ; 26 S.R. (N.S.W.) 320.

EVATT J. This appeal relates to a claim for compensation by the worker against the employer before the Workers' Compensation Commission. Previously the worker had proceeded against the same employer in the Supreme Court by action based upon sec. 124 of the *Transport Act* 1930.

In order to recover judgment under sec. 124 the worker was required to succeed upon three issues, viz., (*a*) that he was an officer, (*b*) that he had received personal injury arising out of and in the course of his employment, and (*c*) disablement arising out of such injury. Upon proof of all these issues, the plaintiff became entitled to receive from the employer the salary he had been receiving at the time of his injury, and to continue in such receipt during the period of disablement unless and until he retired from the service.

The worker succeeded in his action under sec. 124 and, in the present proceedings, the employer expressly admitted that in the action, the worker had recovered "full pay up to 15th February 1935, the date on which he was retired from the service." It is also admitted or proved that the disablement or incapacity which afflicted the worker for the period ending on February 15th 1935 was total blindness, and that the personal injury which was the foundation of the worker's successful action under sec. 124 consisted in his right eye being struck by a projecting palm tree, such injury having arisen out of and in the course of his employment.

On the present application for compensation under the *Workers' Compensation Act*, the worker relied upon the estoppel created by the judgment in the Supreme Court action. The doctrine of estoppel by judgment is not prevented from operating because the unsuccessful party has not chosen to fight every issue. Further, in order to apply the doctrine to the issues fundamental to a cause of action, the parties are enabled to show by evidence on what issue a verdict or judgment was given, and what was the issue. As *Higgins* J. said, "but though such evidence may be given to supplement the information given by a formal judgment, it has never been held that evidence may be given to contradict the judgment or to show that a specific issue presented to the court, being essential to its judgment, was not sufficiently argued or argued at all" (*Hoysted's Case* (1); cf. *Flitters* v. *Allfrey* (2)).

(1) (1921) 29 C.L.R., at p. 563.

(2) (1874) L.R. 10 C.P. 29.

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Before us, the employer admitted that the judgment of the Supreme Court was conclusive of workers' compensation liability in respect of incapacity up to February 15th 1935. He contended that it was not conclusive in respect of incapacity in relation to any subsequent period, because the question of liability in respect of the second period involves a different question. And, so stated, the contention is plainly correct. Further, it appears that before both the Workers' Compensation Commission and the Full Court the worker identified his argument with the principle of *res judicata*. But, as *Owen* J. pointed out, the issue or *res* before the Supreme Court in the sec. 124 action was not identical with the present issue or *res* before the Workers' Compensation Commission. Before this court, however, the worker practically abandoned his contention that there was a *res judicata* and relied upon the doctrine of issue-estoppel.

The judgment of the Supreme Court in the action under sec. 124 conclusively determined: (*a*) that the disablement or incapacity from which the worker was suffering on, and for some time prior to, February 15th 1935, was due to blindness, and (*b*) that such blindness was caused by personal injury arising out of and in the course of his employment. The worker has contended before this court that, in the subsequent workers' compensation proceedings, the employer was precluded from attempting to establish the contrary of either of the two propositions above stated, and that, commencing with both issues established in his favour, the worker could establish a further estoppel. The contention is that the worker established an estoppel by proving one additional fact, viz., that the incapacity caused by blindness did not terminate on February 15th 1935 but continued during the period in respect of which the present claim was made.

The employer did not contend and the Workers' Compensation Commission did not find that the incapacity for blindness existing after February 15th 1935 was a different incapacity or blindness to that existing on or before that date. But the appellant is not able to proceed in this way by adding to the facts necessarily determined in his favour by the Supreme Court judgment the undoubted fact that, before the Workers' Compensation Commission, there was

no evidence of a different injury or blindness subsequent to February 15th 1935. The argument involves and is based upon the fallacy that, where an issue between A and B relates to a state of things which is capable of subsequent alteration, the conclusive determination in A's favour of that state of things as at one day *plus* conclusive proof that up to a later day there has been no alteration of such state of things establishes in A's favour as against B an estoppel as to the state of things existing at the later day. If, for instance, a court held that, on June 30th, 1935, the value of Blackacre was £50,000, and if, in subsequent proceedings between the same parties to determine the value of Blackacre as at June 30th, 1936, it was also proved that there had been no increase or decrease in the value of Blackacre between June 30th, 1935 and 1936, a court which has jurisdiction to determine the value as at the second date is not bound to find that there is an estoppel as to the value of Blackacre as at the second date. Similarly here. What the appellant is trying to do is to eke out a conclusive determination that incapacity through blindness as at an anterior point of time can, by additional proof of absence of any change in the meantime, be converted into a conclusive determination of incapacity through blindness at a later point of time. But this method, though logically sound, is not permitted by law. Estoppel by judgment estops not only as to the *res* determined but also as to the fundamental issues necessarily involved in the determination, but it does not authorize the use of each issue originally determined merely as the first but unbreakable link in establishing a separate and independent issue. In other words, as against a successful party the unsuccessful party is bound by the authoritative determination of every fundamental issue but when a distinct and separate issue arises subsequently, he is not bound to submit to the second issue being established by the combination of a former issue with additional evidence, no matter how strong such evidence may be.

The result is that the appeal should be dismissed.

McTiernan J. It appears from the particulars accompanying the appellant's application to the Workers' Compensation Commission that the following questions of fact were raised, firstly, whether

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a palm leaf struck his right eye on 19th March 1933 when he was engaged collecting fares on a tram proceeding along Anzac Parade, Kensington, secondly, whether injury was thereby caused to his right eye resulting in blinding in both eyes, thirdly, whether total incapacity for work, with the exception of a brief interval about the middle of 1935, resulted from the injury alleged, and, fourthly, whether the total incapacity alleged to have been caused by the injury continued after 15th February 1935, up to which date the appellant had been paid full wages under sec. 124 of the *Transport Act* 1930 in respect of his incapacity between that date and 19th March 1933. The commission dismissed the application. It found that on 19th March 1933 the appellant, who was a tram conductor in the respondent's service, was collecting fares on the footboard of a tram travelling on the street mentioned in the particulars of claim, and that a leaf of one of the palms growing in that street swept across the appellant's face as he passed it on the moving tram. The commission found that the appellant did on that date receive an injury arising out of and in the course of his employment with the respondent, but that the injury thus caused was "minor in character and one which temporarily affected his right eye." The commission said that "the real question in this case is whether that injury contributed in any material degree to the blindness which he suffered on and from 15th February 1935, a period not covered by the provisions of the *Transport Act*." The appellant was retired from the respondent's service as from that date. The commission decided that question against the appellant. The evidence showed that the appellant had become blind before that date. But the commission found that there was no causal connection between the injury which the appellant received on 19th March 1933 and the blindness which he suffered since 15th February 1935.

Its definitive finding on the issue whether incapacity resulting from the injury continued after 15th February 1935, up to which date the appellant was paid full wages under sec. 124 of the *Transport Act* 1930, was "that the injury arising out of and in the course of the applicant's employment with the respondent on 19th March 1933 did not cause him any incapacity for work after 15th February

1935, such incapacity being solely due to the progress of the pre-existing disease which had no causal connection with his employment." At the appellant's request the commission stated a case for the decision of the Supreme Court raising two questions :— (*a*) Whether the applicant was entitled to recover the compensation claimed. (*b*) Whether the commission was in error in holding that the question of whether the applicant during the period for which compensation was claimed was suffering incapacity as the result of an injury received on 19th March 1933, arising out of and in the course of his employment, was not *res judicata* between the parties. The determination by the Workers' Compensation Commission of the first question adversely to the applicant could not be set aside, there being ample evidence to support it, unless the respondent was estopped from putting in controversy the issue of incapacity stated in the second question. It is necessary to state more of the facts of the case before considering whether the respondent is estopped from litigating the question whether the appellant was from 15th February 1935 suffering from incapacity which resulted from an injury arising out of and in the course of his employment. The judgment which is relied upon to create the estoppel was recovered by the appellant against the respondent on 27th November 1935, before the application to the commission. The writ in the action was issued on 25th March 1935. The declaration shows that the respondent was sued under sec. 124 of the *Transport Act* 1930. That section is in these terms : " Where any officer receives personal injury arising out of and in the course of his employment he shall, except where the injury was caused by his own gross negligence or wilful and wrongful act, be entitled during the period of his partial or total disablement arising from the injury, to receive, unless he is retired or retires from the service of the trust, the salary he was receiving at the date of the injury." The declaration was framed as follows : " For that the plaintiff was at all material times an officer employed by the defendant within the meaning of sec. 124 of the *Transport Act* 1930 and the plaintiff as such officer received personal injury arising out of and in the course of his employment and remained for a long time disabled as a result of the aforesaid injury yet the defendant since the date of the said injury and prior

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to the retirement of the plaintiff from the service of the defendant did not continue to pay to the plaintiff the salary which he was receiving at the date of the said injury but paid him less than the said salary and the plaintiff claims the difference between the amount actually paid to him and the amount which he would have and should have received had such salary as aforesaid been paid to him."

By a plea of payment into court the respondent said: "The defendant as to one hundred and fifteen pounds fourteen shillings and two pence (£115 14s. 2d.) parcel of the money claimed brings into court the sum of one hundred and fifteen pounds fourteen shillings and two pence (£115 14s. 2d.) and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to." For a second plea the respondent said: "The defendant as to the residue of the money claimed says that it never was indebted as alleged."

The plea of payment into court is authorized by sec. 80 of the *Common Law Procedure Act* 1899 of New South Wales, but it was open to the respondent under rule 89A of the General Rules of the Supreme Court to have paid the money into court with a denial of liability.

The appellant replied to the first plea that "he accepts the money paid into court in full satisfaction of the parcel in respect of which it is pleaded." By a second replication issue was joined on the second plea.

"A plea of payment into court has important effects by way of admission. It admits all material allegations in the declaration which the plaintiff might be compelled to prove in order to recover the money paid in" (*Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 666).

The appellant, on 27th November 1935, recovered judgment in the action for the sum of £23 9s. 1d. in addition to the sum paid into court. The notes of the learned judge who tried the action are short and show the limits of the contest between the parties at the trial:—"By consent the jury dispensed with. The defendant admitting that during the period prior to twelve months before the issue of the writ the plaintiff was short paid under the provisions of

the Act by an amount of £23 9s. 1d. and both parties consenting to my ruling on the validity of the plea, I hold that it is no answer to the claim for £23 9s. 1d. I therefore enter a verdict for the plaintiff for £139 3s. 1d., including the amount paid into court. Judgment accordingly. Leave to defendant to move in chambers to vary form of the verdict. Stay of proceedings on the usual terms'"

The record of the action was put in evidence on behalf of the appellant at the hearing of his application before the commission, and there the respondent by its counsel admitted that the appellant was totally incapacitated from 14th September 1934, that the above-mentioned action was brought under sec. 124 of the *Transport Act* 1930 for full pay from that date until 15th February 1935, the date on which he was retired, and that he recovered judgment in the sum already mentioned.

By its plea of payment into court, the respondent admitted the allegations in the declaration and that he was entitled to recover payment. None of the matters alleged became *res judicata* in the strict sense, for none was actually decided by the Supreme Court. But in addition to a matter which is strictly *res judicata*, a party may be estopped from controverting a matter which, although not actually decided, formed part of the groundwork of the judgment recovered against him, and evidence may be led to prove the identity of the matter which is *res judicata* or as to which the judgment creates the estoppel. The issues raised by the allegations in the appellant's declaration were fundamental to his claim in the action. Evidence was rightly led before the commission to identify the matters involved in the appellant's action and concluded by the judgment in his favour. The allegations made in the declaration were general in form. Upon hearing evidence the commission made findings which identified the injury and the disability which were the subject matter of the allegations. The findings were that, on 19th March 1933, when the appellant was a conductor in the respondent's service, he was struck by a palm leaf in the right eye, causing an injury which was "minor in character and temporarily affected his right eye, and that the injury arose out of and in the course of his employment." The issues concluded by the judgment

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were that the appellant had met with this injury, which resulted in the disability described in the findings, while on duty as a tram conductor in the respondent's service. It may well be that the respondent was estopped from contesting before the commission whether that injury arose out of and in the course of the appellant's employment and disabled him. But the appellant seeks to take a further step and say that the respondent is estopped from contesting that this injury resulted in blindness. But that is a conclusion which is to be reached, if at all, by reasoning from the matters as to which the judgment in the action creates an estoppel. The estoppel does not bar the respondent from contesting the inference which the appellant seeks to draw from these matters. If they were the only facts to be taken into consideration it may be a natural inference, perhaps an irresistible one, that the appellant's blindness should be attributed to the blow in the eye which the appellant got on duty. But what was concluded by the action did not estop the respondent from introducing evidence repelling the inference which the appellant sought to draw. The facts show that it would be an erroneous inference. After a careful inquiry, in which it had the assistance of medical witnesses, the commission came to the conclusion that the sole cause of the blindness was a disease which the appellant contracted on military service. But, in any case, if it should be assumed that an issue concluded by the action in the Supreme Court was that the injury of 19th March 1933 did result in blindness because of the existence of that condition during the period covered by the judgment, it should be remembered that there was no issue in the action as to the condition of the appellant after that date. It is not contradictory of the judgment or of any issue concluded by the action to say that the disability, whatever it was, in respect of which the action was brought, ceased on 15th February 1935, and that the blindness after that date had an entirely new origin and was the sequel of the disease and that nothing except the disease contributed to it.

It was a condition precedent to the appellant's right to recover compensation under the *Workers' Compensation Act* to prove that the injury which he received on 19th March 1933 contributed to his

incapacity after 15th February 1935. The issue in the action was whether an injury arising out of and in the course of the appellant's employment, which he received on 19th March 1933, disabled him during a period ending on 15th February 1935. I am unable to agree that the respondent was estopped before the Workers' Compensation Commission from contesting the question whether the appellant's condition of blindness after 15th February 1935 resulted from any injury arising out of and in the course of his employment.

In my opinion the answer of the Supreme Court to each of the questions in the special case was correct and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Abram Landa & Co.*

Solicitor for the respondent, *Fred. W. Bretnall*, Solicitor for Transport.

J. B.