[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANT;

AND

WRIGHT . . . . . RESPONDENT.

H. C. OF A. 1956.

SYDNEY, *Aug.* 21-23; *Dec.* 14.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Workers' Compensation—Armed forces—Member—Employment—Place of employment—Place of abode—Camp—Duties—Specific—Rostered—Leave—Absence from camp—Member returning to camp—Walking on highway—Member killed by approaching motor car—"Travelling to his employment by the shortest convenient route"—"Action"—Appeal—Court—Quaere, as of right—Commonwealth Employees' Compensation Act 1930-1954, *ss.* 4 (1), 4A (2), 9, 9A, 20—*Judiciary Act* 1903-1955, s. 39 (2) (*b*)—*District Courts Act* 1912-1955 (*N.S.W.*), *ss.* 3, 142.

A soldier of the permanent forces served in the Training Centre, Bandiana Military Camp, Victoria, where he lived, upon duties concerned with the checking and logging of trucks and tanks coming in for repair, and was liable to be rostered for other camp duties but unless so rostered was off-duty from 4.30 p.m. until 7.25 a.m. on the following day and from 4.30 p.m. on each Friday until 7.25 on the following Monday morning. On a Saturday morning, not having been so rostered, the soldier proceeded to and arrived at Albury distant some eight miles from the camp. At 6.45 that evening, while walking on the Murray Valley Highway towards, and some two miles distant from,

Section 9A of the *Commonwealth Employees' Compensation Act* 1930-1954 provides:—

"9A.—(1.) Where personal injury by accident is caused to an employee while he is travelling to or from—(*a*) his employment by the Commonwealth (including any school in relation to which sub-section (2.) of the last preceding section applies); . . . the Commonwealth shall, subject to this Act, be liable to pay compensation in accordance with this Act as if the accident were an accident arising out of or in the course of his employment.

(2.) In this section, 'travelling' means travelling by the shortest convenient route for the journey and does not include travelling during or after any substantial interruption of the journey or any substantial deviation from the route made for a reason unconnected with the employee's employment, attendance at the school or obtaining the certificate, treatment or compensation, as the case may be: Provided that the Commissioner may, on behalf of the Commonwealth, accept liability, if he considers that in the circumstances of any particular case the nature, extent, degree and content of the risk of accident was not materially changed or increased by reason only of any such interruption or deviation."

the camp he was run down by a motor car and killed. A claim by the soldier's mother, a widow, for compensation under s. 9A of the *Commonwealth Employees' Compensation Act* 1930-1954 was disallowed by the commissioner's delegate. Upon an appeal against that decision heard in the Sydney Metropolitan District Court the judge found that at the time of the accident the soldier was " travelling to his employment by the shortest convenient route ", allowed the appeal and awarded £750 compensation to the mother. The Commonwealth appealed to the High Court as of right.

Held, by *Webb*, *Fullagar* and *Kitto* JJ. (*Dixon* C.J. and *McTiernan* J. dissenting), that it was not proved that at the time of the accident the soldier was " travelling to his employment " and therefore the appeal should be allowed.

" Employment " of a member of the armed forces, discussed.

Per Dixon C.J.: (1) Notwithstanding the wide definition of the word " action " in s. 3 of the *District Courts Act* 1912-1955 (N.S.W.) it may well be doubted whether a proceeding under s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1954 (Cth.), involving a new and very special jurisdiction, is *ipso jure* covered by s. 142 of the *District Courts Act* 1912-1955 (N.S.W.) and the operation thereon of s. 39 (2) (*b*) of the *Judiciary Act* 1903-1955: *Quaere* whether the appeal to the High Court should have been as of right or by special leave.

(2) It is a matter of doubt whether the words of s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1954, combined with the definition of " County Court " mean that a claimant may appeal to any court in Australia of the defined description at his or her own choice independently of the locality in which the death or accident occurs or of the place of employment.

Decision of the Metropolitan District Court, reversed.

APPEAL from the District Court, Sydney, New South Wales.

A claim made by Charlotte Irene Wright, of Waterloo, Sydney, under s. 9, and, alternatively, s. 9A of the *Commonwealth Employees' Compensation Act* 1930-1954 (Cth.) for compensation in respect of the death of her son, Chester George McLean, a private soldier of the permanent military forces, who was killed accidentally by a passing motor car while he was walking along the Murray Valley Highway towards the Bandiana Military Camp, Victoria, was rejected by the delegate of the commissioner appointed under the Act.

An appeal by the claimant to the District Court at Sydney was allowed and she was awarded compensation in the sum of £750.

From that decision, being a judgment of a District Court exercising federal jurisdiction under s. 20 of the Act, the Commonwealth appealed to the High Court.

Further facts and relevant statutory provisions appear in the judgments hereunder.

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N. A. Jenkyn Q.C. (with him *J. H. Staunton*), for the appellant. The journey in course of employment referred to in s. 9A should be restricted to a journey or a travelling which is being made by the employee in his capacity or status of employee and not in his capacity or status of an ordinary citizen travelling from one part to another. It should be between the place of abode and the place of employment. It should be limited to such journeys as were reasonably within the contemplation of the master as being a journey relating to the fact of employment. The test is one of reasonableness (*Humphrey Earl Ltd.* v. *Speechley* (1)). The travel on the subject occasion was not a travel to employment. The deceased was on leave and was not returning to employment within the meaning of s. 9A ; he was merely going back to fill in the balance of his leave and to sleep in the camp.

[DIXON C.J. referred to *Slazengers (Australia) Pty. Ltd.* v. *Burnett* (2).]

" Travelling to employment " means going to resume duties, and not merely for the purpose of spending leisure time at the camp. The test is not whether he has got a right to be in the camp but whether being there at any particular time he is there in the discharge of his duty to his master or something incidental to it. Words of complete application to the proposition now before the Court are to be found in *Stewart* v. *Metropolitan Water, Sewerage and Drainage Board* (3) ; see also *Parker* v. *Owners of Ship Black Rock* (4) ; *Lawrence* v. *George Matthews* (1924) *Ltd.* (5) and *Weaver* v. *Tredegar Iron & Coal Co. Ltd.* (6). The question is not what may be the deceased's right to be on these premises, in this camp and sleeping, but whether he could fairly be said to be under a duty to his employer, the Commonwealth, to be there (*St. Helens Colliery Co. Ltd.* v. *Hewitson* (7)). There was not any duty on the part of the deceased to be in the camp, or to sleep in the camp, on the Saturday, or the Sunday, or that week-end, and it is of no consequence that by being in the camp he may have subjected himself to the possibility of receiving orders. The decision in *Hewitson's Case* (8) was dealt with in *London & North Eastern Railway Co.* v. *Brentnall* (9) ; see also *Charles R. Davidson & Co.* v. *M'Robb* or *Officer* (10) ; *Gane* v. *Norton Hill Colliery Co.* (11) ; *John Stewart & Son* (1912) *Ltd.* v. *Longhurst* (12) and *Armstrong, Whitworth &*

(1) (1951) 84 C.L.R. 126.
(2) (1951) A.C. 13, at pp. 21, 22.
(3) (1932) 48 C.L.R. 216, at p. 232.
(4) (1915) A.C. 725, at p. 732.
(5) (1929) 1 K.B. 1.
(6) (1940) A.C. 955, at pp. 975, 976.
(7) (1924) A.C. 59, at pp. 91-94.
(8) (1924) A.C. 59.
(9) (1933) A.C. 489, at pp. 491, 492.
(10) (1918) A.C. 304, at pp. 318, 319, 335.
(11) (1909) 2 K.B. 539.
(12) (1917) A.C. 249, at p. 256.

Co. Ltd. v. *Redford* (1). To return to the camp is not necessarily to return to the employment. General principles were laid down in *Henderson* v. *Commissioner of Railways* (*W.A.*) (2); *Humphrey Earl Ltd.* v. *Speechley* (3); *Whittingham* v. *Commissioner of Railways* (*W.A.*) (4); *Pearson* v. *Fremantle Harbour Trust* (5) and *Davey* v. *Union Steamship Co. of New Zealand Ltd.* (6).

R. T. H. Barbour, for the respondent. A continual relaxation and expansion of the scope of the Act is to be found in the amendments from 1944 to 1951 inclusive. A test involving a concept of purpose is not a necessary implication in this Act. It is sufficient if the employee is returning to the sphere of his employment, so that were he injured in the period following his return it could be said that the injury arose out of the employment but not necessarily that the injury also arose in the course of his employment. It is necessary only to say that the employee is travelling to a place where only one test would be required, that is " arising out of ". In this case it can be said that when the deceased was going back to the camp he would, on his arrival at the destination, immediately have been qualified to say at least that any injury would arise out of the employment, even if it were not possible to say that the injury was " arising in the course of ". " Place of abode " cannot be supplied as a reasonable terminus for the journey. That expression was expressly removed from the Act in 1948. The intention of the legislature when it made the change in 1951 was not to tighten up the travelling provisions but, rather, to relax them. The deceased was liable to be called up at any time while he was in camp and he was subject to all the incidence of a soldier's service during the whole of the time he was in camp. By going on leave and going out of the camp he merely interrupted the course of his employment. His normal sphere of employment was the camp. The inappropriateness of the employment to the army services was raised in *The Commonwealth* v. *Quince* (7) and *Attorney-General* (*N.S.W.*) v. *Perpetual Trustee Co.* (*Ltd.*) (8).

[McTIERNAN J. referred to *Robertson* v. *Allan Bros. & Co.* (*Liverpool & London*) *Ltd.* (9).]

The onus would be on the appellant to show a deviation and also that the journey was undertaken for the deceased's own private

(1) (1920) A.C. 757, at pp. 767, 769, 773.
(2) (1937) 58 C.L.R. 281, particularly at p. 294.
(3) (1951) 84 C.L.R., at pp. 133, 137.
(4) (1931) 46 C.L.R. 22, at p. 29.
(5) (1929) 42 C.L.R. 320, at pp. 329-333.
(6) (1953) S.A.S.R. 35, at p. 37.
(7) (1944) 68 C.L.R. 227.
(8) (1955) 92 C.L.R. 113; (1952) 85 C.L.R. 237.
(9) (1908) 98 L.T. 821.

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purposes. By making the change in 1948 from " to or from work " to " to or from his place of employment " the legislature, doubtless, intended to benefit servicemen who normally live in camps. The intention was to leave the matter flexible in the hands of the judge. The general words are to be given their broadest possible meaning. There is ample connexion between the purpose of his journey and the nature of his employment or occupation. It is not, however, necessary that the travelling should be related to the employment. *London & North Eastern Railway Co.* v. *Brentnall* (1); *Armstrong, Whitworth & Co. Ltd.* v. *Redford* (2) and *St. Helens Colliery Co. Ltd.* v. *Hewitson* (3) fall considerably short of covering the amount of scope which is now given to the course of employment. " Duty " has long since been supplemented (*Humphrey Earl Ltd.* v. *Speechley* (4)), see also *McColl* or *McLean* v. *David Macbrayne Ltd.* (5). The presumption is in favour of travelling to employment for the purpose of taking up duties. While still travelling he may be, possibly, able to claim that his injury was something that arose out of his employment, inasmuch as he would not have been on that particular spot on that particular road had it not been for the requirement of his employment, i.e. he was to go back to resume duty at some time.

N. A. Jenkyn Q.C., in reply.

Cur. adv. vult.

Dec. 14.

The following written judgments were delivered :—

DIXON C.J. This is an appeal from an order of the District Court at Sydney exercising federal jurisdiction. The federal jurisdiction exercised by the District Court depends upon s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1954. Under that Act an employee of the Commonwealth, an expression which applies, with certain exceptions, to members of the Armed Services, may claim compensation for personal injury by accident arising out of or in the course of his employment or caused while travelling to or from his employment and certain other places. If such a claim is made, then, in the first instance, it is determined administratively by an officer appointed under the Act called the Commissioner for Employees' Compensation. But s. 20 gives to any person affected by his determination an appeal to a county court. The county court has jurisdiction to hear and determine the appeal, which may be in the nature of a rehearing. By definition " county court "

(1) (1933) A.C. 489.
(2) (1920) A.C. 757.
(3) (1924) A.C. 59.
(4) (1951) 84 C.L.R., at pp. 133, 137.
(5) (1916) Sess. Cas. 338.

means a county court, district court, local court or any court exercising a limited civil jurisdiction and presided over by a judge or a police stipendiary or special magistrate of a State or a Territory of the Commonwealth: s. 4 (1).

In the present case the claimant, who is the respondent in the appeal to this Court, is the mother of a soldier who was killed accidentally by a passing motor car while he was walking along the Murray Valley Highway towards the Bandiana Military Camp. She claimed compensation under the Act but her claim was rejected by the commissioner. She happened to reside in Waterloo and she appealed to the District Court at Sydney. The District Court allowed her claim but from the order of the District Court the Commonwealth has appealed to this Court.

Before dealing with the merits of the appeal it may be desirable to mention two points of procedure. In the first place, it may be doubted whether the wide words of s. 20 combined with the definition of county court mean that a claimant may appeal to any court in Australia of the defined description at his or her own choice independently of the locality in which the death or accident occurs or of the place of employment. There is something to be said for the view that in this case the appeal under s. 20 should have been made to the appropriate Victorian County Court. In the next place, the Commonwealth has appealed as of right and not by special leave, although the amount involved is less than £1,500. That has been done presumably on the footing that s. 39 (2) (*b*) of the *Judiciary Act* 1903-1955 applies and that the matter was one in which an appeal would lie to the Supreme Court. It is only under s. 142 of the *District Courts Act* 1912-1955, that an appeal would lie to the Supreme Court. But notwithstanding the wide definition of the word " action " contained in s. 3 of that Act, it may well be doubted whether a proceeding under s. 20, involving a new and very special jurisdiction, is *ipso jure* covered by s. 142 of the *District Courts Act* and the operation thereon of s. 39 (2) (*b*) of the *Judiciary Act*. But that would mean only that the present appeal should have been brought by special leave. Neither party relied upon or adverted to these matters and the only purpose of mentioning them is lest, if they be passed over *sub silentio*, we should be taken as having necessarily decided that the procedure in this case has been regular.

The deceased, whose name was Chester George McLean, was a private soldier of the permanent forces. He served in the R.A.E.M.E. at the Training Centre, Bandiana Military Camp. At the time of his death he was attached to the Southern Command Workshops in the Receipt and Issue Section. There his duties were

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concerned with the checking in and logging of trucks and tanks coming into the workshops for repair. He was liable to be rostered for other duties, such as telephone picquet and kitchen duties and the like. And while in the camp he was, of course, under military discipline. He lived in the camp. Unless specially rostered he was off duty from half-past four in the afternoon on Fridays until twenty-five minutes past seven on Monday mornings. During that period he was entitled to go and come as he chose from the camp. The relevant provision of the Military Board Instructions says: "Subject to any conditions imposed by a commanding officer, local leave may be granted to a member who is living in for periods during which he is off duty. This leave will not exceed the normal off duty periods of members living out." Under this instruction soldiers living in the camp who were not rostered for duty were allowed, without any leave pass, to go in and out of the camp during the period off duty between Friday afternoon and Monday morning. They were not to go more than one hundred miles away and, if they did return to the camp for the night, they must be in before midnight. If, for some emergency or other reason, they were unexpectedly required at the camp they might be summoned back. But otherwise they were free until 7.25 a.m. on Monday.

On Saturday morning, 17th July 1954, the deceased appears to have left the camp at 9.30 a.m. for Albury. He was seen in Albury about 11 o'clock in the morning. From that time the evidence does not show what his movements were during the day, but at 6.45 p.m. on that evening on the Murray Valley Highway he was run down by a motor car driving towards Wodonga and was killed. It may be taken that he was walking towards the camp. The point at which he was killed was two miles from the entrance to the camp.

It would be difficult to regard this accident as arising out of or in the course of the deceased's employment. But the question is whether it falls within the provisions of the Act which give compensation in a case where an employee sustains personal injury by accident while travelling to his employment. The present form of these provisions of the Commonwealth Act is the result of repeated amendment. The relevant section is s. 9A and it is desirable to set it out in full as it now stands:

"(1) Where personal injury by accident is caused to an employee while he is travelling to or from—(*a*) his employment by the Commonwealth (including any school in relation to which sub-s. (2) of the last-preceding section applies); or (*b*) any place which it is necessary for him to attend to obtain a medical certificate or to receive medical treatment or compensation in respect of a previous injury,

the Commonwealth shall, subject to this Act, be liable to pay compensation in accordance with this Act as if the accident were an accident arising out of or in the course of his employment.

(2) In this section 'travelling' means travelling by the shortest convenient route for the journey and does not include travelling during or after any substantial interruption of the journey or any substantial deviation from the route made for a reason unconnected with the employee's employment, attendance at the school or obtaining the certificate, treatment or compensation, as the case may be:

Provided that the Commissioner may, on behalf of the Commonwealth, accept liability, if he considers that in the circumstances of any particular case the nature, extent, degree and content of the risk of accident was not materially changed or increased by reason only of any such interruption or deviation."

When par. (*a*) of sub-s. (1) of the foregoing refers to a school in relation to which sub-s. (2) of the preceding section applies it extends the protection which sub-s. (1) gives in a way which is not immaterial. The extension will be seen if s. 9 (2) is set out. It is as follows:— "9 (2). Where an employee is required by the terms of his employment by the Commonwealth, or is expected by the Commonwealth, to attend a trade, technical or other training school, he shall, for the purposes of this Act, be deemed to be employed by the Commonwealth while he is attending that school."

The words "medical treatment" which occur in par. (b) of s. 9A (1) (*b*) are defined by s. 4 to mean: "(*a*) medical or surgical treatment by a duly qualified medical practitioner; (*b*) treatment by a registered dentist, a registered physio-therapist or a registered masseur; (*c*) the provision of skiagrams, crutches, artificial members and artificial replacements; (*d*) treatment and maintenance as a patient at a hospital; or (*e*) nursing attendance, medicines, medical and surgical supplies and curative apparatus supplied or provided in a hospital or otherwise."

The extension of the Act to include soldiers is effected by the combined operation of direct enactment and definition. Section 4A (2) provides: "Except as provided by this section, this Act applies to and in relation to a member of the Defence Force". The definition in s. 4 (1) of "employee" includes a member of the Defence Force to and in relation to whom the Act applies. The exceptions are not material to this case.

The precise problem in the present case is to say whether or not McLean was "travelling to his employment" when he was run down and killed, applying, of course, the definition in sub-s. (2) of

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" travelling ". But the difficulties of the expression " travelling to his employment " and of that definition cannot be fully seen from the text alone of the provision as it now stands. It is necessary to understand some of the amendments which have been made. In the first place it is an important consideration that in the form in which s. 9A was introduced, by Act No. 8 of 1944, s. 5, the expression was " travelling to and from work " and this expression was defined by sub-s. (2) in terms which required that one terminus of the journey should be the employee's place of abode and the other his place of employment or the trade, technical or training school. This was replaced with a new s. 9A by Act No. 61 of 1948, s. 4, in which the expression became " to and from his place of employment by the Commonwealth ". Sub-section (2) was significantly changed. The expression it defined was reduced to the word " travelling " and from the definition all reference to the place of abode was removed; the definition which still stands retains no purpose except to require a direct and unbroken journey. The result was to leave one terminus of this direct and unbroken journey " the place of employment " and to leave the other terminus both unascertained and unascertainable. The dropping of " place of abode " as a test is decisive of one matter. If it were not for that it might be tempting to make an implication and interpret sub-s. (2) so that both ends of the journey might be known and a not unnatural implication might have fixed on the place of abode. But it is clear that, because of the difficulties and of the restrictive effect of this conception, that particular terminus of the journey was eliminated from the provision: cf. *Bowden* v. *Murdoch's Ltd.* (1) as an example. How you are to know whether a journey was pursued by the shortest convenient route without substantial interruption if you know only where it was to begin and not where it might end or only where it was to end and not where it might begin is a question that may well be asked. But the problem cannot be answered by devising a *terminus a quo* or a *terminus ad quem* by implication; for the legislature has deliberately cut off one terminus of the postulated journey as not a subject of definition. In other words, the law now abstains from appointing more than one of the two ends of the journey. Perhaps it is too much to say that the law leaves the other end of the journey so that it will be as it may turn out. But it almost amounts to that.

The amendment of the definition of the journey did not stop at this point. Up to that point you had, at least, the place of employment as one fixed terminus and in the case of a sailor, soldier or

(1) (1951) 51 S.R. (N.S.W.) 423; 68 W.N. 283.

airman you had the further advantage of a definition of that expression. For sub-s. (3) of s. 9A provided as follows :—" (3) For the purpose of the application of the provisions of this section to and in relation to a member of the Defence Force who is an employee, the place at which the employee performs naval, military or air-force duty, training, practice or exercise shall be deemed to be the place of his employment by the Commonwealth." But by Act No. 27 of 1951, s. 4, sub-s. (3) was omitted and from sub-s. (1) (*a*) the words " place of " were removed. So that you have now " the employment ", an abstract conception, as the remaining terminus of the direct and uninterrupted journey and, in the case of a serviceman, nothing to define the abstract conception.

It is this that lies at the centre of the difficulty in the present case. No doubt the reason why the words " place of employment " were discarded in favour of " employment " simply, is to be found in a fear lest an employee might, fortuitously or for some purpose of his own and independently of his duties, pay a visit to his place of employment and in the course of the journey sustain an injury. But the removal of " place " seems to leave little else than some rather vague notion of purpose or cause of the man's movement. Travelling to the employment involves some movement by reason of the employment. Travelling from the employment means that the direction from which the man proceeds must in some way be determined by his employment. The same kind of thing can in a general way be seen in relation to medical treatment and compensation under par. (*b*) of sub-s. (1) of s. 9A. The movement must be to or from the place which it is necessary for him to attend for the purpose of receiving the treatment of a doctor, a dentist, a physio-therapist or a masseur, or to secure the provision of skiagrams, crutches &c. or medicines and so on. It is apparent that for many of these things a man, not rendered inactive by his injury, might reasonably go out of his otherwise normal course but a short distance. In such a case, purpose must be the decisive consideration.

But the conception of " the employment " as an object, although in the greater number of cases it may readily be applied, is not precise or certain enough to furnish a guide in all circumstances, even in the case of civil employment. When it is attempted to apply it to the relation to the Crown of members of the armed services, it becomes peculiarly difficult to be sure of the intended operation of the provision. The phrase " travelling to or from his employment by the Commonwealth " seems hardly at all to fit soldiers in barracks or in camp, or naval ratings in a ship or a naval establishment. That it is inappropriate to their case may appear

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to warrant the conclusion that the provision contemplates something else altogether, namely offices, workshops, construction works and the like, and from which the labour force travels for the purpose of the day's work or the shift. In a sense the provision was framed in contemplation of that form of movement. For its primary concern was civil employment. Naval, military and air service was brought into legislation originally framed without regard to the nature of that service. But for that very reason it is not possible to treat the inappropriateness of such a provision as a ground for rejecting its applicability to such commonplace aspects of that service as the incidents of camp, barrack and ship life. Rather the provision must be understood in a sense that ensures its application. This means that the conception of employment must be moulded to fit the service of the Crown in the Navy, Army and Air Force. Now even in civil employment that conception in relation to compensation for injuries is far wider than the actual performance of duties by the employee. It covers whatever is incidental to the performance of the work, all that the employee is reasonably required, expected or authorised to do with a view to carrying out his actual duties. Civil employment, however, seldom if ever can reproduce or include what is frequently an essential part of service of the Crown in the armed services, that is to say, speaking in terms of the army, that troops in camp are under military discipline, whether actually on duty or not. That, as it seems to me, must be included in what is meant by the word "employment" when that rather unsuitable term is used in relation to the armed services. To apply s. 9A (1) to a case of an inward journey with respect to civil employment one might well begin by asking, was the injured man or deceased upon a journey for the purpose of taking his place in his employer's service; was he travelling in order that he might resume his capacity of employee? But the significance of such a question when the "employment" is military service is by no means the same as it would be in the case of the civil employees of the Crown or of some instrumentality of government. But the fact that the significance of the question is different affects only the manner in which the question applies as a test. It still provides a test which will determine the right to compensation.

In the present case there is no dispute that McLean was proceeding to the camp when he was killed. Is not this enough to satisfy the phrase "travelling to his employment"? If he had reached the camp he would have been at once under military discipline. He would be off duty, but not on leave. There would, he might be certain, be no work to perform until he went on duty thirty-six

hours later. But still he would have been in camp in his capacity of a soldier forming one of the troops under the discipline of the camp, and, theoretically at least, liable to be put to special duty, if reason arose. Service does not consist only of the active performance of regular duties and I do not think that the word " employment " should, for the purposes of this statute, be applied to the armed services as if it comprised only the active discharge of duties and what is immediately ancillary thereto.

For these reasons I am of opinion that the appeal should be dismissed.

McTiernan J. I am of the same opinion as the Chief Justice and I entirely agree with his Honour's reasons.

The respondent made this claim in her right as dependant. The claim was made under s. 9 and alternatively under s. 9A. She succeeded in the District Court upon the basis that the Commonwealth was liable under the latter section. There was no judgment in that court upon her claim under s. 9. It is submitted for the Commonwealth that the facts which she proved and it admitted before the District Court are insufficient to sustain the adjudication in her favour upon the claim under s. 9A. The Commonwealth called no evidence. All the important facts are stated in the judgment of the Chief Justice.

Section 9A applies to any person who, by s. 4, is an " employee ". An " employee " includes " a member of the Defence Force to and in relation to whom this Act applies ". The Defence Force is constituted under Pt. III of the *Defence Act* 1903-1953. The deceased man was a soldier serving in the Australian Regular Army. This is part of the Defence Force. He was not in any category of members of the Defence Force whom s. 4A of the *Compensation Act* excludes. It follows that he was an " employee " and that s. 9A applied to him. So did s. 9. Section 31 of the *Defence Act* says that soldiers enlisted in the Australian Regular Army " are bound to continuous military service during the continuance of their engagement ".

It was argued for the Commonwealth that the word " employment " is apt in the case of civilians but not of members of the Defence Force. According to this argument, " employment " means, in the case of an employee in the latter class, only those duties which he was under orders to perform during specific periods, because, so it was argued, those duties are analogous to duties of a civilian character. In my opinion there is nothing in the Act to warrant such a qualification of its application to members of the

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Defence Force. An employee is protected in respect of "his employment by the Commonwealth". If he is a member of the Defence Force that employment is the service for which he enlisted. The Act gives protection to a member of the Defence Force as such. In that capacity, s. 4 makes him an "employee". The employment of the deceased soldier cannot be treated, for the purpose of the Act, as if it were merely clerical work to be done during specified hours in the Southern Command Workshops. That supposition is contrary to fact. But it is a result to which the argument would lead, if it were adopted. The consequence of extending this Act to members of the Defence Force cannot be so avoided.

Section 9A does not expressly say from where the employee must start travelling to his employment or to where the journey from his employment must be taking him, if he is to enjoy protection. It is plain from the history of the provision, unfolded by the Chief Justice, that the abode of the employee cannot be supplied by implication as the starting or finishing point. Presumably, the section was made flexible to avoid hard cases. The section leaves the employee free to begin the journey to his employment at any place he chooses. Of course he would be under the practical necessity of not starting it at a place so far away that he could not arrive at his employment on time. The question whether the journey satisfied s. 9A (2) is one of fact. It is to be decided by the criteria laid down in this sub-section. These criteria would make relevant the evidence concerning the first point from which he began the return to his employment, the question of whether or not he stopped anywhere en route, and the route he travelled to the place of the accident. In the case of outward travelling, a relevant question may be what was the place which would have marked the end of the first distinct journey from the employment if the employee had arrived there and halted or stopped without meeting with an accident.

The present case is concerned with alleged travelling to employment. The facts raise an inference that the deceased began the journey in the course of which he was killed from Albury. The learned District Court Judge found that the deceased was travelling by the shortest convenient route from Albury to the military camp at Bandiana. This finding is clearly in accordance with the evidence relevant to the issue.

The Commonwealth admitted in argument that the evidence proving that the deceased was run down on the road to the camp at a spot two miles from its entrance, was sufficient to establish

that he was then walking to the camp. Arguing upon the erroneous basis that the relevant employment was confined to his activities in the workshops, the Commonwealth contended that he was travelling to the camp much too long before he was due to resume those activities to justify a finding that he was travelling to his employment with the Commonwealth. It is shown that the accident happened at 6.45 p.m. on Saturday, 17th July 1954. The time fixed by order of the Commanding Officer for the resumption of the activities in the workshops was 7.25 a.m. on the next Monday. If the deceased had been a civilian employed to carry out those activities, but living outside the camp or in private quarters allotted to him within its confines, the contention of the Commonwealth would be formidable. In that case it could properly be held that the civilian was travelling to his place of employment but not to his employment. The condition of liability is that the employee was travelling to the latter objective when the accident happened. The difference which is made by the fact that the deceased was a soldier and the other circumstances of the case, is expounded by the Chief Justice and I agree with what he says.

The deceased was stationed at the camp and that was " his place of duty "—Military Board Instructions (Standing Orders regarding Leave) par. 14 (Ex. K.). His duties were not performed in the workshops only. He was bound by orders to live in the camp : he lived in barracks with other soldiers, not as a tenant or a lodger but in the capacity of a soldier. The barracks, like the workshops, were a part of this total military establishment called the Bandiana Camp. A soldier stationed at the camp was not free to go away from it without leave. This is shown by the parts of the Standing Orders relating to leave which are summed up by the Chief Justice. There were duties in addition to attending in the workshops, which the deceased could have been ordered to perform when the workshops were not open or in lieu of attending there. The deceased was completely within his rights as a soldier stationed at the camp to return to it at the time he would have arrived there on the Saturday evening in question if he had not been killed. He was not obliged to leave the camp for any period or at all between the time the workshops closed on the previous Friday afternoon and the time they would open on the following Monday morning. Clearly the deceased was not returning in defiance of orders. He was perfectly entitled to go back to the camp on Saturday evening to occupy his leisure hours there in resting or in any other way, if he did not break any rules. I cannot see that the deceased would not have been at his employment when he entered the camp, if in fact

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he had arrived there. Surely he would then have been within the protection which the Act gives in respect of personal injury caused by accident arising out of or in the course of the employment: cf. *Robertson* v. *Allan Bros. & Co. (Liverpool & London) Ltd.* (1), a case concerning a steward who met with a fatal accident upon returning to his ship. It is, in my opinion, an unjustified limitation of the scope of s. 9A to exclude the respondent from any benefit because the deceased soldier was travelling to the camp on Saturday evening instead of on the next day. The actual travelling to the camp after leave to go outside it was a natural and normal incident of the employment by the Commonwealth. I think that it is erroneous to act upon a conjecture or a guess that the deceased was travelling to the camp for a purpose extraneous to his employment by the Commonwealth or with any wrong intention: cf. *Astley* v. *R. Evans & Co. Ltd.* (2) and upon appeal (3); also *Simpson* v. *L. M. & S. Railway Co.* (4). These cases expound a just principle to which I think regard ought to be had in the circumstances of the present case.

I think that the appeal should be dismissed.

WEBB J. I would allow this appeal.

A permanent soldier was killed by accident on Saturday 17th July 1954 when returning to the military camp at Bandiana. He was then on leave and had been on leave since the previous afternoon, and as far as the evidence reveals he would have been on leave until the following Monday. On that Saturday morning he had left the camp by omnibus and had travelled to Albury eight miles away. He was killed late that afternoon at a place two miles from the camp, apparently when returning to the camp, where for the time being he had been doing clerical work. He was at liberty to eat and sleep in the camp when on leave. The question for decision is whether his dependant mother is entitled to compensation under the *Commonwealth Employees' Compensation Act* which has been extended to members of the defence forces without making any special provision to meet the peculiar circumstances of the soldier's service. The relevant provisions of this legislation, both those repealed and those still in force, are set out in the judgment of the Chief Justice.

If a permanent soldier as such is always on service, still it does not follow that whenever and wherever he is injured or killed by

(1) (1908) 98 L.T. 821.
(2) (1911) 1 K.B. 1036, at pp. 1044, 1045.
(3) (1911) A.C. 674, at pp. 687, 688.
(4) (1931) A.C. 351, at p. 377.

accident he or his dependants are entitled to compensation under the Act, which in the case of a civilian links the right to compensation with employment, and, in my opinion, necessarily links it with service in the case of a soldier, but which does not make any other distinction between the civilian and the soldier. To support a claim for compensation the accident to a civilian employee must have arisen out of or in the course of his employment, or when travelling to or from his employment, that is to say, to or from a state of activity called " employment ", as distinct from the place where that activity takes place. And so I think it is a proper inference from the Act that to support a claim for compensation the accident to a soldier must have arisen out of or in the course of his service, which would include travelling on that service to or from a military camp, and when going on leave from the camp or returning to the camp on the expiration of leave ; but not otherwise for personal reasons. Neither a permanent civilian employee, even one liable as is a permanent soldier to be called upon to perform his duties at any time, e.g. a fire brigade employee, nor a permanent soldier is entitled to workers' compensation if injured, say whilst taking part in a hotel brawl, on the ground that he is always in employment or service.

Such being, in my opinion, the effect of the legislation I revert to the facts to see whether they support the claim. I readily conclude that they do not, for the reasons that when the deceased was killed he might have been returning to the camp intending to eat or sleep there, and not to resume his duties but to continue on leave and to depart from the camp again and to return to it before Monday, as he was at liberty to do provided his leave was not cancelled and he did not go more than one hundred miles from the camp ; or he might have been returning intending to terminate his leave and resume his military duties. There is no presumption in favour of an intention to resume his military duties, as there would be if he had been killed on the Sunday night when returning to the camp. Then one intention was as likely to have been entertained by the deceased as was the other, and so the claimant failed to discharge the onus of proof that rested on her, and her claim was rightly rejected by the delegate.

I have not overlooked the case of the domestic servant, as to which see *St. Helens Colliery Co. Ltd.* v. *Hewitson* (1), per Lord *Atkinson*. But, apart from any difference between the status of a domestic servant and that of a soldier and between the terms of their respective engagements, the association of the servant with

(1) (1924) A.C. 59, at p. 75.

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the domestic establishment exclusively for its purposes is different from that of a soldier with a military camp, which merely happens to be the place where he is quartered for the time being in the course of rendering military service.

FULLAGAR J. The facts of this case are fully stated in the judgment of the Chief Justice, in which also the relevant statutory provisions are set out and reference is made to the amendments enacted from time to time. The difficulty of the case derives ultimately from the fact that, when in 1948 the legislature decided to extend the benefits of employees' compensation to members of the naval, military and air forces, it did so by simply including members of those forces in the definition of the word " employee " in s. 4 of the Act. It thus attempted to assimilate two things which are not in all material respects analogous—the employment of a civilian public service and the service of members of the defence force.

The case cannot, in my opinion, be brought within s. 9 of the *Commonwealth Employees' Compensation Act* 1930-1954. It could not be said on the evidence that the accident which caused McLean's death arose either out of or in the course of his employment by the Commonwealth. But s. 9A (1), as amended, makes the Commonwealth liable to pay compensation also in a case where personal injury by accident is caused to an employee " while he is travelling to or from his employment by the Commonwealth ". Although the sub-section ends with the words " as if the accident were an accident arising out of or in the course of his employment ", it seems to me clear enough that it was intended to create, and does create, a new and distinct category of compensatable injury. I do not think, therefore, that much light is thrown on the present problem by the cases in which the question has been whether an accident to a worker who has just left or is just approaching the actual place of his employment is an accident arising out of or in the course of his employment. At the same time, I think that there must be a real connexion between the journey and the employment in the sense that the immediate purpose of the employee in making the journey must be either to enter upon the duties which his employment imposes upon him or to absent himself temporarily from those duties.

Before the amendments of 1951, s. 9A (1) spoke of travelling to or from the " *place of* employment ". The material " travelling " was a travelling to a physical *terminus ad quem* or from a physical *terminus a quo*. The section also contained a third sub-section, which provided a special definition of the expression " place of

employment " in relation to members of the defence force. Even when s. 9A stood in that form, I am inclined to think that the purpose of the journey to or from the specified place would not have been an irrelevant consideration, and that a case where a journey to or from that place had no relation to the duties to be performed at that place might have been held to fall outside the section. It is not necessary, however, to determine that question. The section now speaks simply of travelling to or from an employment and not to or from a place of employment, and sub-s. (3) has been omitted. The object of these amendments of 1951 was most probably to widen the field in one direction and to narrow it in another. At any rate, we now have an abstract *terminus ad quem* and an abstract *terminus a quo*, and it is only by reference to the purpose or occasion of the journey in relation to duties of employment that any satisfactory meaning can, to my mind, be given to the language used. A man cannot, in my opinion, be properly said to be travelling to his employment unless the purpose of his travelling is to assume the duties of his employment. The notion of travelling from employment is perhaps a little more difficult, for the reason that it is more natural to characterise a journey by reference to its point of destination than by reference to its point of departure. But a man cannot, in my opinion, properly be said to be travelling from his employment unless the occasion of his journey is the cessation for the time being of the duties of his employment and his primary purpose is to leave those duties behind him.

In the ordinary case of a civilian employee, while it would be too much to say that no difficulty can arise, no serious difficulty is likely to arise. For in such cases the circumstances will be present which were doubtless primarily in the contemplation of the draftsman of s. 9A. Such an employee will normally, to put it shortly, live in one place and work in another place. The daily journey from his home or place of abode to the place where the duties of his employment are performed may be regarded as an incident of that employment, and it is to an accident happening on such a daily journey that I have no doubt that s. 9A is primarily directed. The journey must be made by the " shortest convenient route " ; otherwise an accident happening in the course of it will be excluded by sub-s. (2) of s. 9A. But the conception, which seems implicit in s. 9A (2), of a regular journey from a place of abode to a place where the duties of an employment are to be performed is not, generally speaking, appropriate to the case of a member of the defence force. Such members will be commonly found to be stationed in camp or in barracks or in a ship. In effect they live in the place where the

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duties of their " employment " are performed : they do not travel regularly to and from their employment. It does not, of course, follow that they are excluded from any benefit under s. 9A. They will from time to time go on leave, and return from leave. When they go on leave, they will normally have a destination in view, which may be a final destination or may be only a first destination. When they have departed from the performance of their duties and while they are travelling to that destination, I would think that they are travelling from their employment within the meaning of s. 9A. But such a man is not, in my opinion, travelling to his employment unless his immediate purpose in making the journey is to enter upon the duties of his employment.

Coming to the present case, it does not seem to me to be established that McLean, when the accident befell him which caused his death, was travelling to his employment within the meaning of s. 9A. It is, I think, a fair enough inference that he was on his way to the camp at Bandiana. But that is not enough. It is not made to appear that his immediate purpose in going to the camp was to enter upon the duties of his employment. He may have been returning to his place of employment, but it is not shown that he was in any real sense returning to his employment. He was (subject to certain conditions) at large, so to speak, from the Friday afternoon until the Monday morning. He might have gone into and out of the camp a dozen times or more during that period. If he did, it could not fairly be said that he spent his time in travelling to and from his employment. The accident occurred early on the Saturday evening. Assuming that he was going to the camp, he may have intended to remain in the camp only for a few minutes. It is perhaps slightly more probable that he intended to sleep there. But, whether or not our ignorance is unfortunate, we simply do not know what his purpose was in going to the camp. And, unless it is proved that his purpose was to resume the duties of his employment (which I think, on the whole, improbable) compensation is not, in my opinion, payable. The case may from one point of view seem a hard one, but I am unable to say that it falls within s. 9A. The appeal should, in my opinion, be allowed.

KITTO J. This is an appeal from a judgment of a District Court exercising federal jurisdiction under s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1954 (Cth.).

The District Court had before it a proceeding, called in s. 20 an appeal but nevertheless a primary judicial proceeding, by which the mother of a deceased member of the Defence Force sought a

reversal of a decision, made by a delegate of the Commissioner for Employees' Compensation, disallowing a claim by her for compensation in respect of the death of her son. The District Court upheld the appeal and awarded the appellant compensation in the sum of £750. The appellant is the respondent in the present appeal and will be so referred to in this judgment.

The respondent's case in the District Court was that within the meaning of s. 9A of the Act which has been mentioned (and which will be referred to as the Act) the death of her son resulted from personal injury by accident which was caused to him while he was travelling to his employment by the Commonwealth. So far as it need be quoted, the section is in these terms: "(1) Where personal injury by accident is caused to an employee while he is travelling to or from—(*a*) his employment by the Commonwealth (including any school in relation to which sub-s. (2) of the last preceding section applies); or (*b*) . . . the Commonwealth shall, subject to this Act, be liable to pay compensation in accordance with this Act as if the accident were an accident arising out of or in the course of his employment. (2) In this section, 'travelling' means travelling by the shortest convenient route for the journey and does not include travelling during or after any substantial interruption of the journey or any substantial deviation from the route made for a reason unconnected with the employee's employment . . .".

The preceding section, s. 9, contains in sub-s. (1) the provision of the Act which gives the right to compensation if personal injury by accident arising out of or in the course of an employment is caused to an employee. The provision is that in that event the Commonwealth shall, subject to the Act, be liable to pay compensation in accordance with the First Schedule to the Act. The first schedule provides, *inter alia*, that, where the death of the employee results from the injury, if the employee does not leave any dependants wholly dependent upon his earnings but leaves dependants in part dependent upon his earnings, the amount of the compensation shall be such sum, not exceeding £2,350, as is considered by the commissioner to be reasonable and proportionate to the injury to the dependants. The respondent was in part dependent on her deceased son's earnings, and he left no one wholly dependent upon him.

From evidence called by the respondent and admissions made by the Commonwealth, there emerged the following facts, and, I think, no others which bear in any way upon the question we are called upon to decide.

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The respondent's son, Chester George McLean, was at the time of his death a private soldier in the Australian Regular Army. Accordingly, he was an " employee " within the meaning of the Act, for that word is defined in s. 4 to mean, *inter alios*, " any member of the defence force to and in relation to whom this Act applies," and s. 4A (2) provides that the Act applies to and in relation to a member of the Defence Force, subject to certain exceptions none of which covers the present case. The deceased was stationed at the Southern Command Workshops at Bandiana, which is in Victoria and is about eight miles from Albury. He was required to live in the Bandiana Camp. The duties to which he was assigned were those of a clerk in the Receipt and Issue Section, dealing with the checking and logging of trucks, tanks and other vehicles which came into the workshops for repair ; but he might also be required to act as telephone picket or to do kitchen duties. Being subject to military law, he might be given other duties by his military superiors ; but the regular course of the clerical work upon which he was in fact engaged occupied him from 7.25 a.m. to 4.20 p.m. on Mondays to Fridays inclusive. In week-ends, he might be rostered for week-end duties, and in any case he might be called upon in an emergency ; but in general he was on " stand-down " or, as it is put in the Military Board Instructions which are in evidence, " off duty ", between the end of his usual hours of duty on Fridays and the commencement of his usual hours of duty on Mondays. This was a period of " local leave " as the Instructions term it, and he was free while it lasted to leave the camp, coming and going without any special permission and without needing a leave pass, provided that he remained within one hundred miles of the camp.

On Saturday, 17th July 1954, the deceased, being off duty for the week-end, went into Albury, apparently by a bus which left Bandiana at 9.30 a.m., and he reached Albury at 9.55 a.m. How he occupied himself during the day is not completely ascertained. At approximately 6.45 p.m. he was struck by a motor car on the Murray Valley Highway, a road which provides the shortest convenient route between Albury and the Bandiana Camp. At the time of the accident he was walking in the direction of the camp and was about two miles from it. In the circumstances it was certainly open to the learned District Court judge to infer, as he did, that the camp was the destination towards which the deceased was moving.

On these facts the judge found that the deceased, while in the course of returning to the camp, was " travelling to his employment by the Commonwealth ". The question we have now to

decide is whether, on the true construction of this expression, the finding was supported by the evidence.

The expression refers to a journey, not by specifying its terminal points, but by prescribing its character. The section clearly implies, however, that it is a journey between identifiable points and that there is to be found in the section itself enough to indicate what those points are. The reference in sub-s. (2) to "the shortest convenient route for the journey" assumes that the *termini* are fixed, at least by implication, by what appears in sub-s. (1). What, then, are the terminal points of a journey which possesses the character indicated by the words "travelling to or from his employment by the Commonwealth"? One is clear enough: it must be either a place to which the employee is going because the performance of his duties as an employee of the Commonwealth awaits him there, or a place from which he has set out upon ceasing to be engaged in the performance of those duties. The other point must be that which is shown, less directly but hardly less clearly, by the choice of the word "travelling" and by the contrast which the whole phrase suggests. What is the indicated point of departure when a man is said to be travelling to his employment? And what is the indicated destination when he is described as travelling from his employment? The answer in each case, according to ordinary usage, is: his home or the place which at the time serves as his home. The purposes of his employment lie at one end of the journey; the purposes of his residence, of that part of his life which is apart from his employment, lie at the other. "Travelling", as a word describing a going to or from a man's employment, is hardly the word for an excursion between his employment and some place of limited activity as distinguished from the place which is the centre for the time being of the general pursuit of his own affairs; it is more naturally used to refer to a passing between residence and employment. The common expressions "going to work" and "going home" convey the notions which stand in broad opposition to one another. Accordingly I should understand s. 9A (1) (*a*) to be referring only to personal injury by accident which is caused to an employee while travelling (in the defined sense) between a place at which he is to perform, or has been performing, duties of his employment by the Commonwealth and a place which is his place of abode, either permanent or temporary. This view accords with that which was taken by *Napier* C.J., in the Supreme Court of South Australia, on a similarly expressed section in the *Seamen's Compensation Act* 1911-1949 (Cth.). His Honour said: "It seems to me that 'travelling to or from his place of employment' refers to a seaman

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who is joining his ship or going home. It may, perhaps, apply when a sailor is going on or returning from leave, and whether the place in which he spends his leave is his permanent home or a temporary residence, but it does not cover a seaman going to a race meeting, or to a public house for a drink, or, as in the present case, for a stroll ashore to post a letter" : *Davey* v. *Union Steamship Co. of New Zealand Ltd.* (1).

The history of the section was brought to our attention, but it furnishes no reason for preferring any other view. When the section was enacted in 1948, the words " place of " occurred between " his " and " employment " in sub-s. (1). These two words were omitted by s. 4 of the Act No. 27 of 1951, and the omission ensured that compensation should not be payable simply because the employee's destination at the time of the accident was a place answering the description of the place of employment; he must be actually going to his work. Logically, no doubt, " school " should have been altered to " attendance at a school " or some similar phrase. The amendment does not affect the point now being discussed. The section, as I have said was enacted in 1948. It was substituted, by s. 4 of the Act No. 61 of that year, for a section which had been inserted in the principal Act by s. 5 of the Act No. 8 of 1944. The last-mentioned section used the expression " travelling to or from work ", and it defined this expression to mean " travelling between the employee's place of abode and place of employment by the Commonwealth and between either of those places and any . . . school . . . ". It then went on to make an exception in respect of interruptions and deviations, similar to that which is now in s. 9A (2). As has been seen, the 1948 Act restricted the definition in the section to the one word " travelling ", and the definition of that word does not expressly identify either of the termini of the journey to which it refers. But there is nothing in the changes so made, and certainly nothing in the omission of the specific mention of the place of abode, which seems to me to warrant a conclusion that the legislature was turning its attention to a different kind of journey. The character of the journey must be the same; and as a necessary consequence, in my opinion, the character of each terminal point is unchanged.

If this construction of s. 9A is correct, the respondent must fail in her claim, for it is clear that the deceased soldier had no place of abode in Albury, and was, in fact, killed while walking to the camp which was at once his place of employment and his place of

(1) (1953) S.A.S.R. 35, at pp. 38, 39.

abode. In my opinion he cannot be said, in a relevant sense, to have been " travelling " on " the journey " " to his employment ".

But there is, I think, another reason why we should decide this case against the respondent. " Employment ", as used in the section must mean the service which the soldier is bound as such to render and all that is incidental to it : *Charles R. Davidson & Co.* v. *M'Robb* or *Officer* (1) and the expression " travelling to his employment " cannot be applied, in any fair use of language, except to a man whose object in his travelling is to get to that service, including its incidents. If the deceased soldier in the present case had been killed on the Sunday night instead of the Saturday night, it might have been inferred from circumstances that when the car struck him he was in the course of returning from his week-end leave in order to take up his duties at 7.30 on the following morning ; and accordingly his journey might have been described as a journey to his employment, notwithstanding that in the normal course it would bring him to the camp earlier than was strictly necessary. But what was his object in returning to the camp on the Saturday night ? He had been relieved of duty for the whole week-end. He had received no order to return. There were no circumstances to suggest to him that if he were in the camp on the Sunday there was any likelihood of his being put on duty. Indeed, men being what they are, the fact that he was returning on the Saturday night may be thought to suggest that he felt reasonably confident that he could safely do so without imperilling the freedom of his Sunday. All that can properly be inferred is that he was minded to spend the night in camp. What he contemplated doing next day no one can say on the evidence. He may have been going to the camp merely for his own convenience, for the sake of the bed and breakfast which were to be had there, intending next day to continue attending to his own private occasions, whether by returning to Albury, or by going out on a shooting or fishing expedition or otherwise. Such hypotheses as these are at least as likely as that he was returning a day and a half early to his work. There is simply nothing in the proved facts from which it can be thought more probable than not that his purpose in making the journey to the camp was to get to his duties. The onus lay upon the respondent to establish that such was the case, and the onus has not been discharged.

In a helpful argument, Mr. *Barbour* for the respondent has urged upon us that in the case of a soldier returning, half way through his leave, to a camp in which he is in general residence in accordance with orders, there is a reason which does not exist in the case of

(1) (1918) A.C. 304.

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any other " employee " of the Commonwealth for concluding that he is travelling to his employment. The suggested reason is that the camp is not only the place of his employment in the ordinary sense, but is a place in which he is specially liable to be put on duty, even during a period for which he has been given leave. It is said that, because of this, his return to the camp is necessarily a return to his duties, even though he may believe that there is no probability of his being given any duties to perform and may intend to make another expedition from the camp on his own affairs before his leave expires. This argument, however, will not bear examination. In the case of a permanent soldier as surely as in any other, the notion of going to the performance of his duties is essential to the concept of " travelling to his employment ". It is not enough that the place to which he is going is one at which, while he is still off duty, he may possibly be called upon to work. So he may, wherever he may be: see reg. 197 (1) (*a*) of the *Australian Military Regulations*. He is no less off duty, and under no greater or different legal liability to be put on duty, when he enters the camp than he was while he remained outside it. By going to the camp he merely incurs the added danger which notoriously attends propinquity to military superiors. To describe the camp as a place where that added danger exists is but to emphasise one characteristic of a soldier's place of employment; and to regard the description as enabling a journey to his place of employment to be identified as a journey to his employment would simply be to deprive the 1951 amendment of all effect so far as soldiers are concerned. The object of journey is the crucial matter. The possibility of being given extra duties must be immaterial unless the journey was being made in order to court that possibility. And no one could really think that in the chance of being put prematurely on duty may be seen the goal towards which the deceased soldier in the present case was making when he met his untimely death.

Finally, it was suggested, I understood, that as the deceased was in continuous employment at the camp, subject to such leave of absence as he might be granted, any return journey to the camp from leave must be considered a journey to his employment. In a number of reported decisions on the meaning of the expression, " in the course of the employment ", as used in workers' compensation Acts, the problem has been to draw a line by which it may be ascertained, in cases of continuously employed workers returning from leave to the places of their employment, whether such a stage of the journey has been reached that an injury then received arises in the course of the employment. So far as I am aware, they have

all been decisions dealing with the return of the worker at the end of, or so as to terminate, a period of leave. In such a case there must be a point on the journey at which the worker ceases to be on his own concerns and enters upon the course of his employment. In the case of a seaman injured while returning to his ship from leave, the character of that point was dealt with by Lord *Macmillan* in *Northumbrian Shipping Co. Ltd.* v. *McCullum* (1) in a passage frequently referred to: "So long as the seaman on leave, whether quitting or returning to his ship, is in a public place where he might equally well be although he was not employed as a seaman, an accident befalling him there is not identifiable with his employment . . . and it is not due to risks not shared by him with every member of the public" (2). At first sight this may be thought to provide a foundation for a view favourable to the respondent in the present case. The deceased soldier, at the time he was struck down, was going to a place, the camp, to which he was not entitled to go as a member of the public but only as a soldier on the strength of the force stationed at the Bandiana Camp. If Lord *Macmillan's* observation meant that no more than that need be shown to justify the conclusion that upon arrival at the camp the deceased would necessarily be in the course of his employment, the conclusion might be said to follow that while going to the camp he was going to his employment. But as Lord *Evershed* M.R. has shown in *Jenkins* v. *Elder Dempster Lines Ltd.* (3) Lord *Macmillan's* words must be read in the light of their context, and should not be taken as meaning that the employee has entered within the scope of his employment whenever he is not in exactly the same position as any member of the public. The ultimate question must be whether his presence at the place to which his character as an employee alone admits him is (to use words of Lord *Evershed's*) "so closely related to his employment as to justify the conclusion that he was acting within its scope" (4). Does his presence there show that (to use another expression of his Lordship's) he was then on his job? The answer in general must be that a man "is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place . . .": *St. Helens Colliery Co. Ltd.* v. *Hewitson* (5). In a particular case like the present the answer should be that, as leave is an interruption of the course of the employment: *Charles R. Davidson & Co.* v. *M'Robb* or *Officer* (6),

(1) (1932) 48 T.L.R. 568.
(2) (1932) 48 T.L.R., at p. 570.
(3) (1953) 2 All E.R. 1133; (1953) 1 Lloyd's Rep. 433.
(4) (1953) 2 All E.R., at p. 1135.
(5) (1924) A.C., at p. 95.
(6) (1918) A.C. 304.

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his presence within the confines of his camp, by his own choice, during a period when he is off duty and is free to go where he wishes, is not enough to show that he is then in the course of his employment. Consequently, when he is going to the camp at a time which is prima facie unrelated to the resumption of his duties at the termination of his leave, it seems to me impossible to conclude, if no more is known, that he is then travelling to his employment. In the present case, if the deceased had reached the camp with no other purpose in view than to spend the night there for his own convenience and to set out again on the following morning upon his own affairs, it could not have been said, in relation to that night, that his presence in the camp was so closely related to his employment as to justify the conclusion that he was acting within its scope. He would not have been performing in the camp that night any service which he owed the Commonwealth, but would have been serving his own ends exclusively, as the Commonwealth, by granting him leave of absence with liberty to sleep and eat in the camp if he wished, had permitted him to do. That being so, his passing along the road at the time of the accident is not shown to have been a travelling to the discharge of his duties or to anything incidental to their performance. It is not shown to have been a travelling to his employment.

In my opinion the appeal to this Court should be allowed, the order of the District Court should be set aside, and in lieu thereof an order should be made dismissing the appeal to that court from the decision of the commissioner's delegate.

Appeal allowed with costs. Order of the District Court of 22nd November 1955 set aside. In lieu thereof order that the determination made by the Delegate of the Commissioner for Employees' Compensation of 28th March 1955 be restored.

Solicitor for the appellant, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Clayton, Utz & Co.*

J. B.