[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANT;
RESPONDENT,

AND

ANDERSON . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COUNTY COURT AT MELBOURNE, VICTORIA.

H. C. OF A. 1957.

MELBOURNE, *June* 11;

SYDNEY, *July* 2.

Dixon C.J., Webb, Kitto and Taylor JJ.

High Court—Appeal—From decision of county court given on appeal from determination of commissioner under Commonwealth Employees' Compensation Act—Whether as of right—County Court Act 1928 (*No.* 3663) (*Vict.*), *ss.* 3, 74—*Commonwealth Employees' Compensation Act* 1930-1954 (*No.* 24 *of* 1930—*No.* 15 *of* 1954), *s.* 20—*Judiciary Act* 1903-1955 (*No.* 6 *of* 1903—*No.* 35 *of* 1955), *s.* 39 (*b*).

Commonwealth employees' compensation—Employee injured while travelling to or from employment—By shortest convenient route—Power of commissioner to accept liability on behalf of Commonwealth if he considers that the nature etc. of the risk of accident was not changed or increased by reason of interruption to journey or deviation therefrom—Provision for appeal to county court by way of rehearing against determination or action of commissioner—Whether county court can review exercise of commissioner's discretion not to accept liability—Commonwealth Employees' Compensation Act 1930-1954 (*No.* 24 *of* 1930—*No.* 15 *of* 1954), *ss.* 9A (2), 20.

Section 9A of the *Commonwealth Employees' Compensation Act* 1930-1954 provides: "(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); 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

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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."

Section 20 provides that any person affected by any determination or action of the Commissioner for Employees' Compensation under the Act may, subject to certain conditions, appeal to a county court against the determination or action and such appeal may be in the nature of a re-hearing.

Held, that, having regard to the circumstances under which it is to be exercised, the discretion of the commissioner under the proviso to s. 9A cannot be reviewed by the court on an appeal under s. 20.

Held, further, that a proceeding under s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1954 is a " matter " within the meaning of s. 74 of the *County Court Act* 1928 (Vict.) so that by virtue of s. 74 and s. 39 (2) (*b*) of the *Judiciary Act* 1903-1955 there may be an appeal from the decision of the county court in such a proceeding to the High Court.

Decision of the County Court at Melbourne, Victoria (Judge *Dethridge*), reversed.

APPEAL from the County Court at Melbourne, Victoria.

Mary Josephine Anderson applied under the *Commonwealth Employees' Compensation Act* 1930-1954 for compensation in respect of the death of her husband James Alexander Horne Anderson on 14th December 1953. The application was made on behalf of herself and Josephine Carmel Anderson, a dependent child of her marriage to the deceased.

The application having been disallowed by the Delegate of the Commissioner for Employees' Compensation on the ground that the death of the deceased " did not result from personal injury by accident while travelling to or from his employment by the Commonwealth on 14th December 1953 " or " from a disease due to the nature of his employment by the Commonwealth " the applicant appealed to the county court, pursuant to s. 20 of the *Commonwealth Employees' Compensation Act*. The appeal was heard before Judge *Dethridge*, who, on 23rd November 1956, ordered that the appeal be allowed and that the matter be remitted to the commissioner to assess the amount of compensation to be paid to the applicant.

From this decision the Commonwealth appealed to the High Court.

N. E. Burbank Q.C. (with him *W. H. Tredinnick*), for the appellant. On the evidence it could not be said that at the time the deceased met his death he was travelling from his employment. The question what was the deceased's journey is a question of fact. The deceased's journey from his employment was his travel to the George Hotel. When he collapsed he was travelling from Mrs. Brennan's flat. [He referred to *The Commonwealth* v. *Wright* (1).] A man cannot 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. It was not open to the learned county court judge on a re-hearing under s. 20 to exercise the discretion given to the commissioner by the proviso to s. 9A (2) of the *Commonwealth Employees' Compensation Act*. The discretion is one peculiarly given to the commissioner and given to him personally. The only means of correcting a decision of the commissioner under the proviso to 9A (2) is by prerogative writ directing him to exercise his discretion according to law. It is no part of the duty of the court to accept liability on behalf of one of the parties. There is no evidence that the commissioner did not properly exercise his discretion.

P. D. Phillips Q.C. (with him *S. T. Frost*), for the respondent. The commissioner was under a legal duty, if he formed the opinion required by the proviso to s. 9A (2) of the *Commonwealth Employees' Compensation Act* to declare the liability of the Commonwealth. The argument on behalf of the appellant places too much weight on the words " may accept liability ". " May " is to be construed as " shall ". The commissioner's determination is consequently the subject of appeal under s. 20. [He referred to *Jolly* v. *Federal Commissioner of Taxation* (2).] On the evidence the trial judge could properly find that the nature etc. of the risk of accident was not materially changed or increased by reason of the deviation. The legislature in s. 9A contemplates that an interruption to, or deviation from, the journey would not destroy the fact that it is the kind of journey contemplated. So, it is a journey from which there may be deviations or in which there may be interruptions. That being so they may be of greater or less degree or extent. It is not possible to lay down in advance what are the characteristics of a journey. Whether a person is engaged on a journey within the meaning of the section can only be ascertained by examining his intention and his regular purpose. The trial judge rightly

(1) (1956) 96 C.L.R. 536, at pp. 543, 544, 548, 549, 552, 553, 557.

(2) (1935) 53 C.L.R. 206.

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found that the deceased was on a journey from his employment. When he went to the George Hotel and to Mrs. Brennan's flat that was merely an interruption or deviation to the journey.

N. E. Burbank Q.C., in reply.

Cur. adv. vult.

July 2.

The following written judgments were delivered :—

DIXON C.J. This is an appeal brought in purported pursuance of s. 39 (2) (*b*) of the *Judiciary Act* 1903-1955 from a decision of the County Court at Melbourne exercising the jurisdiction conferred by s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1954. No doubt the word " matter " which occurs in s. 74 of the *County Court Act* 1928 of Victoria and is defined by s. 3 of that Act very widely is enough to cover a proceeding under s. 20 of the *Commonwealth Employees' Compensation Act* so that a combination of s. 74 of the *County Court Act* of Victoria with s. 39 (2) (*b*) of the *Judiciary Act* gives an appeal as of right to this Court. I say this because of the doubt I expressed in *The Commonwealth* v. *Wright* (1) as to an appeal lying as of right from a decision by the District Court of New South Wales under s. 20 of the *Commonwealth Employees' Compensation Act*. Section 20 of the last-mentioned Act provides that any person affected by any determination or action of the Commissioner for Employees' Compensation under that Act may, within thirty days of the date of the determination or the taking of the action or within such extended time as the court upon application in that behalf allows, appeal to a county court against the determination or action and the court shall have jurisdiction to hear and determine the appeal, and such appeal may be in the nature of a re-hearing. The expression " County Court " is defined by s. 4 (1) so that it includes the County Court of a State. The Secretary to the Treasury is *ex officio* the Commissioner for Employees' Compensation (s. 5 (2)) but by writing under his hand he may delegate all or any of his powers and functions (s. 7 (1)). The commissioner is by s. 6 (1) of the Act empowered to examine, hear and determine all matters and questions arising under the Act and the regulations. He may reconsider his determinations and may alter, amend or revoke them (sub-s. (2)). In the determination of matters and questions the commissioner is to be guided by equity, good conscience and the substantial merits of the case without regard to technicalities or legal precedent and is not to be bound

(1) (1956) 96 C.L.R. 536, at p. 541.

by any rules of evidence. Sub-section (4) provides that, in particular, the power of the commissioner shall extend to determining certain matters, the first of which is whether the injury received by an employee entitles him to compensation under the Act. The central provision of the Act is s. 9 (1), which provides that if personal injury by accident arising out of or in the course of his employment by the Commonwealth is caused to an employee, the Commonwealth shall, subject to that Act, be liable to pay compensation in accordance with the first schedule. The incidence, however, of this liability is enlarged by s. 9A. That section in its present form reads as follows : " (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) ; 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."

Much turns upon the proviso to sub-s. (2) in the determination of this appeal. For it was held by the learned county court judge that, notwithstanding that the deputy of the commissioner who dealt with the case had refused or failed to give relief under the proviso to the now respondent, s. 20 enabled the learned judge to apply the proviso on appeal against the determination or action of the commissioner's deputy. His Honour went on to decide that the case fell within the proviso and that the respondent was entitled to succeed. The Act extends, with certain exceptions not presently material, to soldiers : s. 4 (1), definition of " employee " and s. 4A (2).

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The respondent is the widow of a staff sergeant who was posted as Section Leader, No. 1 Section, A Group, Department of the Army, Central Records Office. He lived at Surrey Hills, a suburb of Melbourne, and on the night of 14th December 1953, while he was walking uphill from the Surrey Hills railway station he suffered a heart attack from which shortly afterwards he died. His widow made a claim for compensation on the ground that his death was caused by personal injury by accident while he was travelling from his employment by the Commonwealth. According to his widow's evidence, when he left home that morning for his work, which seems to have been in the Army buildings in Albert Park, he was quite well. It is clear, however, from other evidence that during the day he suffered from pains in the region of the heart and the medical evidence which was acted upon by the learned county court judge showed that death resulted from coronary arterio-sclerosis. That evidence was to the effect that the final attack was precipitated by the walk uphill. The learned judge found that the deceased's heart had reached a critical stage where it was unable to cope with the exertion required to enable him to climb the hill to his home. His Honour was not of opinion that his heart attack was due to anything which happened during the day while he was actually performing duty.

It appears from the evidence that about 1 p.m. on the day of his death he telephoned to his wife to say that he might be working back that night but that as he felt very poor he hoped that he did not have to do so. He seems to have stopped work at the Army buildings shortly after 5 p.m. It apparently was his custom to walk to the St. Kilda railway station, a distance of about four hundred yards, and to go home by train. In walking in that direction he caught up with a Mrs. Brennan who was employed at the Army buildings. He asked her why she was hurrying so much and said that he had a pain in his chest. He left her and went to the George Hotel, which is opposite to the station. She went to her flat, which was about seven hundred yards from the hotel, and a little later he came to the flat offering to help her lift some flower pots, a thing she refused to allow him to do. He sat slumped in a chair and complained of pains in his chest. A Mr. Capp came to the flat who seems to have been up till then a stranger to the deceased. Mr. Capp offered to drive him by car some distance upon his journey home. They left the flat about 9 p.m. Mr. Capp set him down at the Glenferrie railway station. Shortly after half-past 9 p.m. the deceased caught a train for Surrey Hills.

It was on the journey from the Surrey Hills station up the hill that he collapsed.

On these facts the learned county court judge decided that there had been a substantial interruption of the deceased's homeward journey, although his Honour had some doubt whether it was a substantial deviation from his route within the meaning of s. 9A (2). He decided that the jurisdiction of the court under s. 20 extended to reviewing the exercise of the authority of the commissioner to accept liability if he considered 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 such interruption or deviation. His Honour held that the interruption of the journey, if anything, lessened the risk of accident because it enabled the deceased to rest and, further, that the deviation did not in any way add to the risk. His Honour decided too that the failure of the commissioner to exercise his discretion under the proviso favourably to the widow was unreasonable. In any case the learned judge took the view that under s. 20 he was required to deal with that as other questions as on a rehearing and so to place himself in the position of the commissioner. He had no hesitation on that basis in holding that liability to pay the compensation should be borne by the Commonwealth.

The first question which presents itself is whether the case is one where a journey from the employment was interrupted or where a deviation from the journey occurred. It is contended for the appellant Commonwealth that the case is rather one where the "travelling from the employment" terminated altogether when the deceased reached Mrs. Brennan's flat. If that is so, the respondent's claim, of course, must fail hopelessly. The very great difficulty of interpreting and applying the definition of "travelling" has been discussed in the judgments of members of the Court in *The Commonwealth* v. *Wright* (1). Nothing is to be gained by going over the same ground again. I suppose the question must be decided as one of fact and the destination which the deceased set for himself when he left his employment must be a material consideration. The meagre evidence points to the conclusion that he intended to journey home but was led to "interrupt" his intended journey. That seems to have been the view of the county court judge and there is no sufficient ground for departing from it. That the interruption was substantial there can be no question. Why the deputy of the commissioner did not accept liability on behalf of the Commonwealth we do not know. But he did not. Is his

(1) (1956) 96 C.L.R., at pp. 544-546, 548, 552-554, 557, 558.

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failure to apply the proviso to the case an " action of the Commissioner " against which s. 20 gives an appeal ? The text of s. 20 substantially has been set out already, but it may be as well to recall that the " appeal " to the county court is against the determination or the action of the commissioner and that it is intended to be a complete rehearing. Section 20, coupled with the definition of " County Court " in s. 4, amounts to an exercise of the power given by s. 77 (iii.) read with s. 76 (ii.) of the Constitution to invest the court of a State with federal jurisdiction in a matter arising under a law made by the Parliament. The jurisdiction it confers is in truth original and it is given for the purpose of submitting to judicial decision the correctness of what has been determined or done by the commissioner or his deputy to the disadvantage of a claimant. The words in s. 20 " action of the Commissioner " are cumulative upon the words " determination of the Commissioner " and seem to be intended to enable the claimant to call in question whatever the commissioner has done to the prejudice of the person affected ; while " determination " seems to refer to the commissioner's quasi-judicial administrative decision. But s. 20 formed part of the original Act of 1930, whereas the proviso to s. 9A (2) was introduced by Act No. 61 of 1948 as part of the re-writing of s. 9A. It is therefore a subsequent provision which cannot have been within the contemplation of the draftsman of s. 20. Moreover the proviso is expressed as enabling the commissioner to " accept liability on behalf of the Commonwealth " when the circumstances of the case fulfil the condition stated. Again it is he who is to " consider " whether the conditions stated in the proviso are fulfilled. Like other provisions of the Act, no doubt the language employed is neither artificial nor precise. But nevertheless the proviso conveys the impression that a discretion belonging to the commissioner in his official capacity to accept a liability not otherwise existing was all that the legislature had in contemplation. It is not unimportant that the commissioner is the Secretary to the Treasury. The words " the Commissioner may " in the proviso suggest a discretionary power, although, no doubt, it is difficult to know on what further considerations the exercise of such a discretion should be based once it appears to the commissioner that in the circumstances of the particular case, the nature, extent, degree and content of the risk of accident was not materially changed or increased by reason only of such interruption or deviation. But even if the scope and purpose of the relevant provisions of the statute do not readily suggest any additional considerations which might be relevant to the exercise of the discretion conferred on the commissioner by the word " may "

in the proviso, it is hardly possible to construe the provision as obliging the commissioner to accept liability for the Commonwealth when the condition stated by the proviso is fulfilled. The word "may" must be interpreted as conferring a discretion upon him. So to construe it, perhaps, does not make it entirely impossible to treat s. 20 as operating to pass or transfer his discretion to the county court in the case of an appeal. But if the consideration supplied by treating the word "may" as conferring a discretion is added to the fact that "accepting liability" is the thing which the commissioner has a discretion to do and the further fact that his discretion is to arise, not on the circumstances as they are found in truth to exist, but as to the commissioner they appear to be, it follows as an inevitable conclusion that the proviso must be understood to confer a discretion to pay a claim notwithstanding an absence of liability and not such a discretionary judgment as an appeal under s. 20 could transfer to the county court. In other words, the discretion belongs to the commissioner as Secretary of the Treasury and cannot be reviewed by the Court on an appeal under s. 20. The result of this view is that the decision of the learned county court judge cannot stand. But it does not necessarily follow that the learned judge should simply have dismissed the appeal of the now respondent. Upon the materials before him a strong case appeared for supposing that the proviso applied to the case so as to enable the commissioner to exercise his discretion. These materials were not before the commissioner or his deputy. Moreover there is nothing to show, or even to suggest, that the commissioner or his deputy ever applied his mind to the question and it is quite possible, perhaps more than possible, that he accepted the view that the deceased's journey from his employment on the day of his death ended at Mrs. Brennan's flat or even at the George Hotel. If so the question whether his journey from his employment was interrupted never arose and consequently the proviso could not be applied. For all that appears he may have never considered the question which is within his discretion. In these circumstances it would have been proper for the county court to declare that the deceased's death occurred while he was travelling from his employment but after a substantial interruption of the journey and with that declaration to remit the matter to the commissioner or his deputy so that he may consider the exercise of his discretion under the proviso to s. 9A (2) of the Act.

The appeal should be allowed, the order of the county court set aside and in lieu thereof the foregoing declaration and order made.

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WEBB J. I would allow the appeal for the reasons given by the Chief Justice.

KITTO J. I also agree in the judgment of the Chief Justice.

TAYLOR J. I agree with the reasons of the Chief Justice and I have nothing to add.

Appeal allowed. Order of the County Court of 23rd November 1956 *set aside. In lieu thereof declare that the death of James Alexander Horne Anderson deceased occurred while he was travelling from his employment but after a substantial interruption of the journey, and order that the matter be remitted to the Commissioner for Employees' Compensation or his delegate so that he may consider the exercise of his discretion under the proviso to s.* 9A (2) *of the Commonwealth Employees' Compensation Act* 1930-1954.

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

Solicitors for the respondent, *Gillott, Moir & Ahern.*

R. D. B.