[HIGH COURT OF AUSTRALIA.]

THE BRITISH BROKEN HILL PROPRIETARY COMPANY LIMITED . } APPELLANT;

AND

DAVID SIMMONS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 10, 11, 24.

Knox C.J., Higgins, Gavan Duffy, Rich and Starke JJ.

Workmen's Compensation—Review of compensation—Maximum weekly payment—Accident before amending Act—Statute—Interpretation—Retrospective operation—Workmen's Compensation Act 1916 (*N.S.W.*) (*No.* 71 *of* 1916), *secs* 2, 3, 5; *Sched. I., pars.* 1 (*b*), 16—*Workmen's Compensation* (*Amendment*) *Act* 1920 (*N.S.W.*) (*No.* 45 *of* 1920), *secs.* 1, 2, 3—*Interpretation Act* 1897 (*N.S.W.*) (*No.* 4 *of* 1897), *sec.* 8.

The *Workmen's Compensation Act* 1916 (N.S.W.), by sec. 5 (1), provides that "If in any employment personal injury . . . is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the Schedule One." Schedule One, by par. 1 (b), provides (so far as is material) as follows: "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, . . . such weekly payment not to exceed two pounds, and the total liability in respect thereof shall not exceed seven hundred and fifty pounds." By par. 16 it provides that "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided," &c. The *Workmen's Compensation* (*Amendment*) *Act* 1920 (N.S.W.), by sec. 1, is to be construed with the *Workmen's Compensation Act* 1916; by sec. 2, gives an extended meaning to the word "workman"; and, by sec. 3, amends par. 1 (b) of Schedule One of the Act of 1916 by substituting for the words "fifty per cent." the words "sixty-six and two-thirds per cent.," and for the words "two pounds" the words "three pounds."

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy*, *Rich* and *Starke* JJ., that one who is a "workman" within sec. 5 only because of the extended meaning given to that word by sec. 2 of the Act of 1920, can take no benefit under the section unless with respect to injury sustained after the passing of the Act of 1920.

Held, also, by *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the increased maximum in Schedule One prescribed by sec. 3 of the Act of 1920 is applicable only in case of an injury sustained after the passing of the Act of 1920.

Held, therefore, by *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that a workman who at the time the Act of 1920 was passed was receiving a weekly payment of £2 in respect of an injury sustained before that time was not, on an application for review under par. 16 of Schedule One, entitled to have the weekly payment increased to £3 or any sum exceeding £2.

Decision of the Supreme Court of New South Wales: *Simmons* v. *British Broken Hill Proprietary*, (1921) 21 S.R. (N.S.W.), 626, reversed.

APPEAL from the Supreme Court of New South Wales.

David Simmons, who while he was an employee of the British Broken Hill Proprietary Co. Ltd. was injured by accident, was on 21st May 1919, pursuant to the *Workmen's Compensation Act* 1916 (N.S.W.), awarded as compensation a weekly payment of £2. On 21st March 1921, while Simmons was still in receipt of that weekly payment, he applied, under par. 16 of Schedule One to that Act, for an arbitration for the purpose of increasing the weekly payment to £3. The only ground for such increase was the amendment of the *Workmen's Compensation Act* 1916 by the *Workmen's Compensation (Amendment) Act* 1920 (N.S.W.). The District Court Judge before whom the arbitration took place held that the *Workmen's Compensation (Amendment) Act* 1920, by which the maximum weekly payment was increased from £2 to £3, was not retrospective; and he therefore refused the application. On an appeal by Simmons to the Supreme Court the Full Court, by a majority (*Pring* and *Wade* JJ., *Ferguson* J. dissenting), ordered the award or order of the District Court to be set aside and the application to be reheard: *Simmons* v. *British Broken Hill Proprietary* (1).

From that decision the Company now, by special leave, appealed to the High Court.

(1) (1921) 21 S.R. (N.S.W.), 626.

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Brissenden K.C. (with him *Norman Pilcher*), for the appellant. After the passing of the *Workmen's Compensation (Amendment) Act* 1920, a person who is in receipt of the maximum weekly payment under the *Workmen's Compensation Act* 1916 is not entitled to have his weekly payment increased merely because of the increase of the maximum enacted by the Act of 1920. A review under par. 16 of Schedule One to the Act of 1916 is a reconsideration of the original award in which the arbitrator is entitled to take into consideration any change of circumstances which renders a change in the weekly payment desirable, and the arbitrator has no right to entertain the application unless such a change of circumstances is shown. The passing of the Act of 1920 is not such a change of circumstances. The decrease in the purchasing power of money is not a change of circumstances which according to the decisions will entitle the arbitrator to alter the amount of the weekly payment.

[STARKE J. referred to *Tarr* v. *Cory Brothers & Co.* (1).]

That case shows that a review can be allowed on certain grounds only, and a reduction was there allowed on the ground that by reason of the general rise in wages the injured employee was able to earn more wages (2). The right of a workman to obtain compensation vests in him on the happening of an accident (*United Collieries* v. *Simpson* (3)), and a corresponding liability arises in the employer. Before the Act of 1920 was passed the appellant had satisfied that liability by paying the maximum weekly payment. The Act of 1920 does not disturb that position. The standard of payment fixed by the Act of 1916 is preserved by virtue of sec. 8 of the *Interpretation Act* 1897 (N.S.W.). The employer acquired a right under the Act of 1916 to have his liability determined under that Act. The Act of 1920 has left open the question of how it is to operate. There would have been no difficulty in saying that it should operate on awards under the Act of 1916 (see *Workmen's Compensation (War Addition) Act* 1917 (7 & 8 Geo. V. c. 42), sec. 1). An Act should not be construed as retrospective unless its language is such as to plainly require that construction (*Broadfoot* v. *Railway Commissioners for New South Wales* (4)). On a review

(1) (1917) 2 K.B., 774.
(2) (1917) 2 K.B., at p. 777.
(3) (1909) A.C., 383, at pp. 389, 393.
(4) (1920) 20 S.R. (N.S.W.), 377.

under par. 16 of Schedule One the arbitrator is bound to make an award such as would have been made on the original arbitration if the new circumstances had then been known.

E. M. Mitchell (with him *Cantor*), for the respondent. If a workman who has obtained an award of the maximum weekly payment under the Act of 1916 can show a change of circumstances, he is entitled to ask for the maximum established by the Act of 1920. The intention of the Legislature is to be found from the Act itself, looking at its general scope and purview, and at the remedy sought to be applied, and considering what was the former state of the law and what the Legislature contemplated (*Worrall* v. *Commercial Banking Co. of Sydney* (1)). The object of the Act of 1920 was to relieve helpless workmen by giving a weekly sustenance to injured men. That being so, it would be a curious result if those who were injured after the Act was passed were put in a better position than those who were injured before that time. Under sec. 1 of the Act of 1920 that Act is to be construed as one with the Act of 1916, and the latter Act provides that it is to apply to all accidents happening after 1st July 1917 ; the amendments of Schedule One made by the Act of 1920 should therefore be construed as applying to all accidents so happening (see *Canada Southern Railway Co.* v. *International Bridge Co.* (2)). *Primâ facie* where claims in respect of injuries which happened before the Act of 1920 was passed remained to be dealt with to some extent, the Act of 1920 is to be read as applying to those claims so far as they have not been dealt with.

[KNOX C.J. referred to *George Gibson & Co.* v. *Wishart* (3) ; *Hosegood & Sons* v. *Wilson* (4).]

The proviso to par. 16 of Schedule One, read with the amendments enacted by sec. 5 of the Act of 1920, supports the view that those amendments apply to an accident which took place before the Act of 1920 was passed. Under par. 17 of Schedule One an employer may, after the weekly payment has been continued for six months, redeem his liability therefor by payment of a lump sum ; if he does

(1) (1917) 24 C.L.R., 28, at p. 31.
(2) (1883) 8 App. Cas., 723, at p. 727.
(3) (1915) A.C., 18.
(4) (1911) 1 K.B., 30.

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not redeem he cannot complain of hardship if the amount of the weekly payment is increased. The general terms of the Act of 1920, and the absence from it of any provision that it is to apply prospectively only, are a ground for saying that the Act was intended to take effect retrospectively (see *Worrall* v. *Commercial Banking Co. of Sydney* (1); *The Derfflinger* (2); *West* v. *Gwynne* (3)). On the face of the Act of 1920 it is apparent that the Legislature had in mind the increase in the cost of living as a ground for increasing the weekly payments to injured workmen. The right to have the benefit of privileges conferred by a repealed Act is not a right which has accrued under that Act within the meaning of sec. 8 of the *Interpretation Act* 1897 (*Reynolds* v. *Attorney-General for Nova Scotia* (4); *Abbott* v. *Minister for Lands* (5); *R.* v. *Vine* (6)). Sec. 8 only applies to an Act which repeals an earlier Act, and not to an Act which repeals provisions of an earlier Act and substitutes other provisions (see *Artizans, Labourers and General Dwellings Co.* v. *Whitaker* (7)). It is sec. 7 that applies to this particular Act.

[HIGGINS J. referred to *Quilter* v. *Mapleson* (8).

[KNOX C.J. referred to *Harcourt* v. *Lowe* (9).]

A workman who is receiving the maximum weekly payment under the Act of 1916, may apply for an increase to the maximum fixed by the Act of 1920, and the mere fact that the maximum has been so increased is a change of circumstances which will entitle him to an increase in his weekly payment although it never could have come under the consideration of the arbitrator before (see *Tarr* v. *Cory Brothers & Co.* (10); *R.* v. *St. Mary's, Whitechapel* (11)). If the effect of the Act of 1920 is that from its passing on 31st December 1920 where, in respect of a past accident, incapacity continues after that date the amended scale of payments is to apply, then the Act is not retrospective.

Brissenden K.C., in reply.

Cur. adv. vult.

(1) (1917) 24 C.L.R., at p. 32.
(2) (1919) P., 264, at p. 274.
(3) (1911) 2 Ch., 1.
(4) (1896) A.C., 240.
(5) (1895) A.C., 425.
(6) (1875) L.R. 10 Q.B., 195.
(7) (1919) 2 K.B., 301.
(8) (1882) 9 Q.B.D., 672.
(9) (1919) 35 T.L.R., 255.
(10) (1917) 2 K.B., at p. 779.
(11) (1848) 12 Q.B., 120, at p. 127.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, RICH AND STARKE JJ. Subject to certain provisoes which are immaterial to the present inquiry, sec. 5 (1) of the *Workmen's Compensation Act* 1916, which we shall hereafter call the Principal Act, ran as follows : " If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the Schedule One." Schedule One, 1 (b), subject to an irrelevant proviso, ran thus : " Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed two pounds, and the total liability in respect thereof shall not exceed seven hundred and fifty pounds." It will be observed that the maximum compensation payable under this provision is limited in three ways. Under these enactments the respondent was in the receipt of a weekly payment of two pounds when the *Workmen's Compensation (Amendment) Act* 1920 was passed. Sec. 2 of that Act extended the meaning of the word " workman " which appears in sec. 5 of the Principal Act. Sec. 3 amended par. 1 (b) of Schedule One of the Principal Act: " (a) by omitting the words ' fifty per cent.' and substituting therefor the words ' sixty-six and two-thirds per cent.' ; (b) by omitting the words ' two pounds ' and substituting therefor the words ' three pounds '." It will be observed that the effect of sec. 3 was to extend the maximum compensation with respect to two out of the three ways in which it had theretofore been limited.

On 16th March 1921 the respondent asked that the weekly payment should be reviewed under the provisions of par. 16 of Schedule One, alleging that on such review he was entitled to the benefit of the increased maximum inserted by the new Act in par. 1 (b) of that Schedule. If Schedule One could be read as conferring rights apart from sec. 5 of the Principal Act there would be much force in the respondent's contention, but the Schedule is merely ancillary

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to sec. 5, and confers no rights apart from that section. Accordingly the inquiry must be whether that section entitles the respondent to the benefit he claims or not. We agree with our brother *Higgins* in thinking that one who is a "workman" within sec. 5 only because of the extended meaning given to that word by the amending Act can take no benefit under the section unless with respect to injury sustained after the passing of the amending Act, and the reasons which induce us to come to this conclusion lead us to think that the increased maximum in Schedule One prescribed by the amending Act is applicable only in case of such an injury. Sec. 5 of the Principal Act declares that in the case of personal injury by accident a specified class of men shall be entitled to compensation subject to a specified maximum. Sec. 2 prevents retroactive operation of the Act in cases occurring after the passing of the Act and before the time prescribed for its commencement; but it was conceded in argument that, even if no time had been thus fixed for the commencement of liability, the Act would not have applied to injuries sustained before the passing of the Act, because the provisions of an Act of Parliament must ordinarily be read as having no retroactive operation unless a contrary intention is to be found in the Act itself. The amending Act altered the operation of sec. 5 by enlarging the class of workmen and increasing the maximum of compensation, and for a like reason must be read as applying only to injuries sustained after the passing of the amending Act.

An attempt was made to distinguish between the right to originally obtain compensation under sec. 5 and the right to review compensation under par. 16 of Schedule One. It was argued that, as par. 16 of Schedule One was in its terms applicable to all accidents happening after the commencement of the Principal Act, it was not merely ancillary to sec. 5 but gave an independent right, and that therefore a person seeking review might take advantage of the maximum existing at the time of review; but this view is untenable. The Schedule merely prescribes the measure of the compensation given by sec. 5, and has no independent operation. The section declares that an employer shall be liable to pay compensation in accordance with Schedule One, and the word "compensation"

in the section includes both the original compensation fixed under that Schedule and that fixed by the review. The result is that if the respondent can succeed in this case a "workman" is entitled to say: "I sustained injury by accident before the passing of the amending Act and my compensation was fixed under the Principal Act, but I have now acquired a new right and I require that my compensation shall be fixed under the amending Act, not by way of review under par. 16, but by way of original fixation under par. 1 (b) with the new maximum." In our opinion the statutes under consideration cannot bear such an interpretation.

We think that the appeal should be allowed.

HIGGINS J. In my opinion, the appeal should be dismissed. The accidents to which the composite Act—the Principal Act with the amending Act—applies are accidents which occurred or occur after 1st July 1917 (secs. 2 and 3 of the Principal Act); but any application made after the date of the amending Act (31st December 1920), whether for award or for review of award, must be made on the basis of the altered Schedule—altered as to maximum payments. Any application made before that date had to be made on the basis of the Schedule as unaltered.

The two Acts have to be construed as one (sec. 1 of amending Act); but the amendments thereby made are made as from 31st December 1920, for the present tense is used—"Par. 1 (b) of Schedule One *is amended*" (sec. 3). The amendments made by secs. 2, 4, 5, 6, also operate as from the same date. From that date onwards, the maximum compensation "shall be" $66\frac{2}{3}$ per centum of the average weekly earnings, but not to exceed £3. Before that date, the maximum compensation permitted was 50 per centum of the average weekly earnings, but not to exceed £2; but the power to assess on such a basis has gone absolutely.

I see no difficulty whatever in applying the same principle to the words of sec. 2 of the amending Act, as to the definition of "workman." The definition of "workman" is enlarged, but it is enlarged as from the date of enlargement only. No workman who was not within the class of "workman" as defined up to 31st December 1920 is entitled to compensation if the accident happened before that date. The obligation to pay compensation to an injured

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workman, which was created by sec. 5 of the Principal Act, applies up to the end of 1920 only to workmen as defined up to that date, and the obligation as from the end of 1920 applies to workmen as defined on that date. An employee earning £400 per annum is not entitled to any compensation unless he be injured after that date. So with sec. 3—the assessment or review of compensation at any time before the end of 1920 had to be made on Schedule One as it then existed, but the assessment or review at any time after that date has to be made on the basis of par. 1 (b) of Schedule One as it now exists. So with sec. 4, which provides that for casual workmen the average weekly earnings are to be deemed to be not less than the appropriate living wage as found by the Board of Trade—the Board of Trade finding is to be applied to assessments of compensation made after 31st December 1920. So with secs. 5 and 6—the dividing line is at the date of the amendment.

This construction gives a consistent and workable scheme without doing violence to any of the words of the composite Act. On the other hand, on the construction submitted by the appellant, there arise the anomaly and the injustice that a workman who has got an award before the end of 1920 cannot now get the award reviewed under par. 16 of Schedule One at all; for he cannot apply on the basis of the Schedule as amended, and he cannot apply on the basis of the Schedule as it formerly stood—for that basis has been repealed. There is no provision to the effect that the Schedule as it formerly stood is to remain for the purpose of awards made before the end of 1920, and to imply such a provision is to make law, not to interpret the Act (see also Schedule One, par 1 (b), proviso; par. 2 of Schedule One as amended by sec. 4 of the amending Act; par. 16, proviso). It is admitted that according to the appellant's suggestion the word "accident" in the proviso to par. 16 would have to be read as "accident occurring after 31st December 1920," yet "accident" there meant, in accordance with the Principal Act, an accident occurring after 1st July 1917; and what it meant at first, it means still. The anomaly and injustice become even more apparent if we apply the appellant's construction to a workman who got 20s. or 30s. per week under the award, not the full maximum of 40s. as in the present case.

The construction which approves itself to my mind gives no retrospective force to any of the provisions of the amending Act. It is true that "accident" means accident happening since 1st July 1917, but that is due to the Principal Act in its combination with the amending Act. It is unnecessary to say that I accept the principle that an Act should not be construed as retrospective unless you see that the Legislature so intended it, and to the extent only that it was so intended (see per *Bowen* L.J. in *Reid* v. *Reid* (1)).

But it is urged that this construction interferes with the right of the employer to treat £2 as the maximum weekly payment, and counsel have cited sec. 8 of the *Interpretation Act of* 1897 : "Where an Act repeals in the whole or in part a former Act, then, unless the contrary intention appears, the repeal shall not . . . affect any right, privilege, obligation, or liability acquired, accrued, or incurred under an enactment so repealed." It might be a sufficient answer to say that the contrary intention does appear here, even if we assume that the "right" to treat £2 as the maximum payment is a "right acquired or accrued." But the assumption itself is wrong; for it is clear that such a "right" is not a "right acquired or accrued" within the meaning of the Act (*Abbott* v. *Minister for Lands* (2); *Reynolds* v. *Attorney-General for Nova Scotia* (3)). In the former case the repealed Act gave a right to an owner of land to make another conditional purchase. The new Act took away this right, but there was a saving clause in the new Act preserving "all rights accrued," &c., in words substantially the same as in sec. 8 of this *Interpretation Act*. The Judicial Committee of the Privy Council said the mere "right" existing in members of the community, or any class of them, to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the saving clause. In the latter case R. obtained a licence to work a coal-mining area for two years, and under the Act as it then existed the licence might be extended for another year on additional payment. The provision for licences was repealed, and a system of leases introduced in its place. Their Lordships held that R. had

(1) (1886) 31 Ch. D., 402, at p. 409. (2) (1895) A.C., 425.
(3) (1896) A.C., 240.

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no "accrued right" to the extension, and that an application for extension made after the repeal must be refused. The construction of "obligation or liability incurred" must be on the same lines.

With all respect, I think that a fallacy has crept into the reasoning by the use in argument of abbreviated expressions, such as "increased right to compensation," or "right to increased compensation," instead of the full expression "extension of the limit beyond which the arbitrator may not award." If a County Court or District Court has jurisdiction to try actions for any sum not exceeding £200, and if an amending Act substitute "£300" for "£200" as from the end of 1920, a man who complains of breach of contract committed on 30th December 1920 could bring his action in that Court on 1st January 1921 claiming £300; but there is no "new right," or increase of the right to damages. The limit imposed by the Schedule is a limit imposed on the arbitrator; but the raising of the limit may incidentally enure to the benefit of the injured man, in the event of the arbitrator thinking that the man should be paid more than £2 per week. The man himself has no increased right unless and until the arbitrator so award; and the best test is that there are no means of enforcing any such alleged right. *Ubi jus, ibi remedium.*

In my opinion, *Pring* J. in the Supreme Court touched the heart of the matter when he said (1):—"Immediately on the passing of the Act the words 'two pounds' were excised from the Schedule and the words 'three pounds' were substituted for them. The words 'two pounds' are no longer in the Schedule and therefore cannot be applied by the Judge when hearing an application for a review under par. 16."

Appeal allowed. Order appealed from set aside and order of District Court Judge restored.

Solicitor for the appellant, *John R. Edwards*, Broken Hill, by *Minter, Simpson & Co.*

Solicitor for the respondent, *W. P. Blackmore*, Broken Hill, by *Thomas Green.*

B. L.

(1) (1921) 21 S.R. (N.S.W.), at p. 632.