1922
*May 31.
*June 1, 2.
*Oct. 10, 30.
*Dec. 19.

THE DOMINION CANNERS LIMITED, (DEFENDANT) ..... APPELLANT;

AND

HORACE COSTANZA AND OTHERS, (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Workmen's Compensation—Exclusive Jurisdiction of board—Injury by accident—Action against employer—Jurisdiction of court—Acquiesence in proceedings—Evidence—Certificate of board—Ex parte application R.S.O. [1914] c. 25, ss. 60 (1) and 64 (4)—5 Geo. V, c. 24, s. 8 (0).

Sec. 60 of the Ontario Workmen's Compensation Act gives the Compensation Board "exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part (Part I) * * * and the action or decision of the Board thereon shall be final and conclusive and shall not be open to review in any court." Sec. 15 in Part I as enacted by 5 Geo. V, s. 8, provides that the right of compensation shall be in lieu of any action by a workman against his employer in respect of injury by "accident" and that "no action in respect thereof shall hereafter lie." By sec. 15 (2) any party to an action may apply to the Board for a decision as to whether or not the right of action is taken away by the Act "and such adjudication and determination shall be final and conclusive."

Held, that the Board is the only tribunal competent to decide whether or not a common law action can be maintained by a workman against his employer in respect to personal injury sustained in the course of his employment.

Held, also, Duff J. dissenting, that where such an action is brought the court is free, if not obliged, *proprio motu* if want of jurisdiction is not pleaded, to take cognizance of the provisions of the Act and stay the proceeding until the right to maintain it is determined by the board.

Per Duff J. The question whether or not the plaintiff can maintain his action must be raised by way of defence or exception. If the defendant does not plead it or does not ask for a stay he is bound by the judgment given.

The court in an action by a workman will not take cognizance of a decision of the board that the plaintiff's injury did not result from "accident" and did not entitle him to compensation under the Act when such decision is given on an *ex parte* application in the ordinary course and not under sec. 15. Evidence of such decision, if admitted, would not be conclusive. Idington and Duff JJ. *contra.*

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

Where in such an action the defendant submits to the trial judge the question of the right to maintain it and does so in the belief that the court has jurisdiction to deal with such question the decision of the trial judge is not that of a quasi-arbitrator and so non-appealable as it would be if the issue was submitted with knowledge of the lack of jurisdiction and the parties assent to the judge acting virtually as an arbitrator.

Judgment of the Appellate Division (51 Ont. L.R. 166), not dealt with.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial in favour of the plaintiff.

The facts of this case are stated in the above head-note. The plaintiffs sued for damages in consequence of having contracted typhoid fever from drinking the water supplied by their employers. The trial judge held that the injury was not caused by "accident" and that plaintiffs could not proceed under the Workmen's Compensation Act. A judgment for damages was entered against the defendant and affirmed by the Appellate Division.

Lynch-Staunton K.C. and *Hobson K.C.* for the appellant.
Bain K.C. and *Peter White K.C.* (*Duggan* with them) for the respondents.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—The respondent having claimed to have suffered from typhoid fever attributable to the use by some of them of water received from a well of appellant in such a condition as to constitute it a nuisance within sections 73 and 74 subsection (*e*) of the Public Health Act, and which alone served the domestic needs of respondents as dwellers in a tenement of appellant, brought this action on the 14th December, 1920, and served its statement of claim on 12th January, 1921, to which appellant pleaded on 31st January, 1921.

On the 12th February, 1921, the appellant's solicitor served notice that on the trial defendants would move to amend said defence by adding the following paragraph:

The statement of claim discloses no cause of action and the defendants will so contend at the trial. If the plaintiffs suffered the damages

(1) 51 Ont. L.R. 166.

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alleged then the plaintiffs should apply to the Workmen's Compensation Board and are not entitled to maintain this action as same is barred by the provisions of that Act.

On the trial thereof on the opening which began on the 4th of April, 1921, the learned trial judge allowed said amendment and at the same time allowed respondents to amend their statement of claim by making specific references to the said Public Health Act and the Factories Act, being R.S.O. 229, sec. 43.

The trial then proceeded and lasted till the 7th April, 1921, when the sole question of negligence and said statutes relied upon by plaintiffs' amended statement of claim were left to the jury and a verdict was rendered for the plaintiffs (now respondents) and judgment was entered accordingly without any objection thereto.

Appellant gave on the 18th April, 1921, notice of appeal to a divisional court and that was heard before the Appellate Division on the 22nd and 23rd of December, 1921, and judgment was given on the 24th of November, 1921, dismissing said appeal with costs.

In that notice of appeal eight grounds of appeal were taken of which the 4th was as follows:—

> 4. That as to the plaintiffs, Mary Costanza, Philipine Costanza and Horace Costanza, Jr., who were in the employment of the defendant, their remedy if any was to have applied to the Workmen's Compensation Board, and this action is barred by the Workmen's Compensation Act.

The respondents' counsel, either by reason thereof or in consequence of something which transpired during the argument thereof made an application on their behalf to the Workmen's Compensation Board which resulted in the following finding by the board:—

Friday, 25th November, 1921.

Present:—
Samuel Price, Chairman.
H. J. Halford, Vice-Chairman.
George A. Kingston, Commissioner.

In the matter of—
Claim 217246 Matilda Shereno.
217247 Phillipina Costanza.
217248 Mary Costanza.
217249 Horace Costanza.
217250 Rosario Tasca.
217251 Mamie Tasca.

217252 Fannie Tasca.
217253 Lena Tasca.
217254 Antone Tasca.
217255 Rose Dispenza.
217256 Bessie Tasca.
217257 Cosimo Pecoraro.
217258 Russell Pecoraro.
217259 Lucy Pecoraro.
217260 Florence Pecoraro.

Upon consideration of the above mentioned claims, the papers, letters and other material filed, the Board finds that the above mentioned claimants did not sustain personal injury by accident arising out of and in the course of their employment with Dominion Canners Limited, and the said claims are hereby disallowed.

S. Price,
Chairman.

The appeal was taken to this court by the present appellant by notice dated 14th day of February, 1922.

It was set down for hearing, by order, at the foot of the Ontario list, May Term, and heard on the 1st day of June, 1922.

Thereafter on the 10th day of October, 1922, a direction was given for re-argument on the question of jurisdiction and was so partly re-argued, but that re-argument ended in a direction to counsel to file supplementary factums, which were delivered on or about the 13th November, 1922.

During all the time since the action was launched, at least until judgment at trial entered, it was, by section 64 of the workmen's Compensation Act, subsection 4 (R.S.O. 1914, c. 25), which reads as follows,

> 4. Where an action in respect of an injury is brought against an employer by a workman or a dependent the Board shall have jurisdiction upon the application of the employer to determine whether the workman or dependent is entitled to maintain the action or only to compensation under Part I, and if the Board determines that the only right of the workman or dependent is to such compensation the action shall be forever stayed,

open for appellant to have applied to the board within the terms thereof to have said action stayed.

It has never had the courage to apply either thereunder or under subsection (2) of section 15 of said Act as amended, and has evinced no intention of doing so.

The respondents, on the contrary, had done so as already stated, before the appeal to the Appellate Division had been finally disposed of, with the result above set forth.

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The counsel for respondents tendered on argument the said result duly certified as an answer to the appellant's argument so far as rested upon the said amended plea in the statement of defence as allowed at the trial.

Some one objected that we had decided in *Red Mountain Railway Company* v. *Blue* (1), that we could not receive any such evidence or look at any evidence save that adduced at the trial.

If any one will read said report they will see that though the then Chief Justice so held in regard to what was tendered and there in question, the remaining members of the court had agreed with the judgment of Mr. Justice Duff therein holding that there should be a new trial because the learned trial judge had misdirected the jury and hence all else in that case was but *obiter dicta.*

For my part I see I took the express precaution of declining to pass upon the question now raised.

And I pass no opinion now upon the question so broadly put as if only an ordinary question of hearing evidence is involved.

Section 60, subsection (1) of the Act now in question reads as follows:—

> 60. (1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court.

Surely we are bound to take judicial notice of any such proceeding and not stand upon any decisions such as are cited by the former Chief Justice in his said judgment and which are also cited in some of said factums.

I respectfully submit we must exercise a little common sense in applying any judicial expressions of opinion or decision.

It is proposed in defiance of the board to stay all proceedings herein notwithstanding the imperative language

(1) 39 Can. S.C.R. 390.

of the above quoted subsection declaring it shall not be open to question or review and that no proceedings by or before the board shall be subject to any proceeding in any court.

If the converse had been declared on an *ex parte* application by appellant at any time prior or up to the trial judgment and the learned trial judge had had it brought to his notice, I venture to say he never would for a moment have thought of proceeding further than to make a note of such order.

And if such a thing is conceivable as his doing otherwise, and in due course such a case brought here, what would we have done? And if we had conceivably ordered judgment to be entered—well, I will not pursue that inquiry.

Nor need I say that much as I esteem the due observance of the maxim *audi alteram partem,* there are many things which are judicially done *ex parte.*

And if I understand correctly the daily practice of the board in discharging its duties, it must of necessity do many things of its own motion. It is not a court where counsel is heard. The aim of the whole Act is to eliminate the litigious struggle and strife and the judicial peculiarities in mode of thought and applying the law.

A perusal of the statement of claim indicates, as counsel first conceived its nature to be, that respondents founded this action upon something as remote from the nature of an accident, within the meaning of the Workmen's Compensation Act, as would be an action by one of respondents for an assault and battery by his or her employer.

I am not surprised, therefore, that counsel for appellant in first pleading thereto failed to set up the Act.

One is sorely tempted to surmise that the doing so was an afterthought to try it on the court. It seems to have turned out an astute and confusing move.

Indeed when the trial proceeded after the pleading had been amended no further attention seems to have been paid to the point raised thereby, save counsel for respondents filing a letter from a member of the board which indicates that the well in question had been before it in other cases somewhat like unto those in question herein, for said letter reads as follows:—

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Referring to our telephone conversation to-day, I beg to say that those alleged typhoid cases which came before the Board for consideration were all employees of a firm of contractors—Newman Bros., Limited —who were I understand erecting some structure on the property of the Dominion Canners Co. The names of the parties whose claims were considered were:

J. T. Welsh.	Norton E. Schurr.
Wm. J. Schurr.	Norman W. Rymer.
Lloyd R. Rymer.	George W. Taylor.

These claims were all rejected on the ground that the circumstances did not point to injury by accident within the meaning of the Workmen's Compensation Act.

This clearly indicates the correct conception the board had formed of such a disease and its relation to the said Act.

Nor in the questions submitted by the trial court was any question put to the jury bearing upon the relations between the plaintiffs and the defendant, such as should have been if that question were before the court in the sense pleaded.

I respectfully submit that upon such a record of facts as I have recited this court is not warranted in directing a stay of proceedings unless and until appellant applies for and procures, and files, a certificate from the board.

Of course the appellant may possibly, astutely in line with its past two years course, abstain from further troubling anybody in this case. Meantime the respondents are unjustly, as I respectfully submit, hindered and delayed.

We should, in the absence of any such application by the appellant for two years during which it had deliberately refrained from applying, proceed to deliver judgment in the appeal in the absence thereof, unless that which respondent's counsel has presented will do justice herein.

Prima facie this court is seized of this case, on the evidence presented at the trial, and on the facts so found has no foundation for doing otherwise.

I doubt very much if either section 64, subsection (4), or section 15, subsection (2), was ever intended to extend the time for making such an application as contemplated thereby to the board, beyond a reasonable time or to proceedings in this court.

But in any case I am decidedly of the opinion that in face of the decision of the board, already made, the matter

ends, or should end. And I most respectfully submit that we have no right to criticize or assume that such decision was, or even may have been, arrived at without duly considering the question at every angle, merely because their methods of investigation do not follow our legal forms of doing so. It was to get away from such like forms and methods, and all implied therein, that the statute was enacted.

The past experience of the members of the board, no doubt was sufficient guide and we should at least give them credit therefor, and knowledge, by this time, of the Act, superior, I imagine, to ours.

DUFF J.—The result of my examination of the Workmen's Compensation Act is this. Where an action is brought against an employer by one of his employees alleging the right of reparation arising out of circumstances which may constitute an accident within the meaning of the Act, it is a complete answer to the action that the circumstances do constitute such an accident and that in respect of the accident a right of compensation is given to the workman by the statute. I think it may be an arguable question whether or not it is sufficient to establish that the circumstances do constitute such an accident but it is unnecessary to dwell upon that.

I think the proper inference from the provisions of the statute is that where the employer raises such a defence the authority to pass upon the issue thereby created is solely vested in the Workmen's Compensation Board. The employer may, if he be so minded, apply for a decision upon the point at the earliest stage and if the decision is in his favour it is the duty of the Supreme Court or other tribunal before which the action is pending to stay the action. He may, I think also, raise the defence by plea and establish it by producing proper evidence of the decision by the board.

On the other hand it is open to the workman to apply for and obtain such a decision the moment his writ is issued.

My view, however, is that the contention that no action lies because the matter is one for compensation under the

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Act, in other words, that the right of action is taken away by the statute, is strictly matter of defence or exception. If the defendant permits the action to proceed to judgment without having raised the defence or without having applied for a stay then he is concluded by the judgment as with regard to other exceptions and defences, unless on appeal the Court of Appeal sees fit, in the exercise of its discretion, to permit the defence or exception to be raised there.

So much by way of *conjectio causae*. The autonomy of the board is, I think, one of the central features of the system set up by the Workmen's Compensation Act. One at least of the more obvious advantages of this very practical method of dealing with the subject of compensation for industrial accidents is that the waste of energy and expense in legal proceedings and a canon of interpretation governed in its application by refinement upon refinement leading to uncertainty and perplexity in the application of the Act are avoided. The purport of s.s. 1 of s. 60 (ascribing to the words their minimum scope) seems to be that as regards any proceeding before the board and for the purpose of any such proceeding in relation to a matter in respect of which jurisdiction is given to the board, that jurisdiction is exclusive and the mastery of the board over its own proceedings is supreme. The act or decision of the board in such a case, to use the language of the section,

shall not be open to question or review in any court.

Language could not be plainer. Therefore where the board (for example) makes an order for the payment of money and under s.s. 3 the order becomes a judgment of the County Court, it becomes a judgment of that court only for the purpose of enforcing it. Therefore, with great respect, I am unable to agree with the judgment of the majority of the Court of Appeal in Manitoba delivered by the Chief Justice of that Court in *Canadian Northern Ry. Co.* v. *Wilson* (1), in which the opinion is expressed that an order of the board for the payment of compensation having been made a judgment of the Court of King's Bench under the corresponding section of the Manitoba Act, that court may,

(1) 29 Man. R. 193; 43 D.L.R. 412 at page 425.

if informed that some fundamental principle of procedure such, for example, as *audi alteram partem,* has been disregarded by the board, decline to permit the process of the court to be used for the enforcement of the order. Nobody indeed can too strongly assert the importance of observing the rules of natural justice in all legal proceedings. Nobody could imagine for a moment that the legislature contemplated the possibility of the board in exercising its judicial or quasi-judicial functions disregarding the rudimentary dictates of fair play. But what seems perfectly clear is that the legislation proceeds upon a confident assurance that a tribunal constituted by the Government for the purposes of the Act could be relied upon not to disregard such principles in its proceedings. And I can hardly believe that any tribunal composed of professional men is likely in discharging responsibilities such as those cast upon the board to fail to appreciate the importance of preserving a judicial temper and of performing its duties "conscientiously with a proper feeling of responsibility" to quote Lord Moulton's phrase in a passage of his judgment in *Local Government Board* v. *Arlidge* (1) at page 150 which received the approval of the Judicial Committee in *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (2), at page 211.

The exclusive authority of the board in respect of proceedings upon an application for compensation or in dealing with a question of assessment or the like is, indeed, quite manifest; but one must admit that the point is not so obvious when one is considering what may be called perhaps for want of a better phrase the auxiliary jurisdiction of the board, the jurisdiction to pass upon a given question for the purpose of determining an issue in a proceeding before another tribunal. It may well be argued that "questions arising under Part I" is not very apt phraseology for describing an issue presented to the Supreme Court in an action brought by a workman in consequence of a defence based upon an allegation that the plaintiff's only remedy is the statutory remedy given by the Workmen's Compensation Act. More apt and precise language could no doubt have been used and one might perhaps have expected more

(1) [1915] A. C. 120. (2) [1922] A.C. 202.

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apt and precise language if s.s. 1 of s. 60 was truly aimed at such questions and the decision of them. Something is to be said, moreover, as to the effect of s.s. 4. In terms, at all events, that subsection covers all cases to which s.s. 1 applies, and yet it is difficult to believe that the legislature intended to give to the board authority to revoke a decision given upon an application made by a defendant in an action in the Supreme Court that the action is or is not maintainable. A provision having such effect might conceivably lead at times to a very regrettable confusion.

Again, if you are to ascribe to the language of s.s. 1 a scope which brings every question as to the construction and effect of any enactment of the Act within the exclusive jurisdiction of the board, using "exclusive" in its ordinary sense, some results would be produced which would to say the least, be startling. For example, a question under section 56 as to the qualification of a member of the board would become exclusively cognizable by the board itself.

Nevertheless I think the argument in favour of the view that the jurisdiction of the board is an exclusive jurisdiction to deal with the defence as to the right to maintain a particular action in the Supreme Court, or rather the question whether or not in a particular case such right has been taken away by the provisions of the Workmen's Compensation Act, may be put upon very solid grounds. The answer is a new answer. It is an answer given by this statute and by this statute a procedure is prescribed or rather a procedure is created by means of which the answer can be made good. It does not, I think, necessarily follow that where a defence or exception is newly created by statute and a procedure is created for putting it forward, that the defendant who desires to avail himself of it must adopt the statutory procedure. I do not think the presumption that the statutory remedy is intended to be the sole remedy is quite so strong as that which arises where a new right is created by statute and a statutory remedy is given. On the other hand when, in addition to the circumstance that the defence or exception is a new one and to the fact that the statutory procedure for establishing it is newly created, there are obvious considerations

to be drawn from the object and policy of the enactment pointing to the conclusion that the procedure provided for determining the issue is intended to be the exclusive procedure, then I can see no reason why effect should not be given to that conclusion unless at all events there are practical considerations which forbid it.

Now it is quite true that when an action is brought by a workman against his employer in a particular case the question whether or not the action is excluded by the statute is in that particular case a question which concerns the workman and the employer alone; that is to say, it is a question and solely a question whether or not the workman is entitled to be paid and the employer is bound to pay a sum of money. On the other hand, if the question as to what does or does not constitute an "accident", if the question whether on a given state of facts an accident has or has not occurred in the course of the workman's employment, or whether the accident does or does not arise out of the workman's employment, if such questions are generally to be passed upon by the Supreme Court with the usual concomitants by way of appeal, it is easy to see the possibility of a jurisprudence arising marked by the not very happy characteristics of that which has grown up out of the English Workmen's Compensation Act. Add to that the possibility of conflict between the decisions of the courts and those of the board and you have potentialities which, at all events, could not be supposed to add to the favourable prospects of the system set up by the statute. Without elaborating the matter further I think there are excellent practical reasons for assuming that the legislature did not contemplate such a duplication of jurisdiction in respect of these questions.

On the other hand I am quite unable, with great respect to those who take a different view, to escape the conclusion that the statute as originally framed put upon the defendant, the employer, the responsibility of taking the necessary steps to enable him to raise the defence. In other words, that the onus was upon him to invoke the jurisdiction given by section 64, subsection 4. There is not a syllable in the statute which suggests that a defendant raising

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the question by plea, for example, could thereby deprive the Supreme Court of jurisdiction to dispose of the action. The statute gave the defendant the right to get a decision upon the issue raised by such a defence from the board and it would be the duty of the Supreme Court obviously to give the defendant due opportunity to exercise his right. But the general jurisdiction of the court over the action remains untouched, in my opinion. The statute declares that in given circumstances the action does not lie, not that the courts have no jurisdiction to deal with it, an obviously different thing. The amendment of 1915 was designed no doubt (in addition to giving a defendant in an action affected by section 9 an opportunity of applying to the board and obtaining a decision upon the question whether the action had been taken away) to give to the plaintiff the opportunity of ascertaining whether or not his action was maintainable. But I am unable to give my adherence to the view that the effect of the amendment of 1915 was to shift the burden from the employer to the workman, a result which I very much fear must follow from the decision of the majority of the court on this appeal. A workman suing in the Division Court, for example, who goes to court with his witnesses would be exposed, according to that view, to the risk of having his suit stayed because, notwithstanding the absence of any contention to that effect on the part of the defendant, it might appear to the judge that possibly there was a case within the Workmen's Compensation Act. I think there is nothing in the Act which justifies a construction exposing the workman to such embarrassment in pursuing his legal rights.

Nor (it is a point which I will not elaborate) do I think there is any reason for assuming that the legislature intended to place such an embarrassing responsibility upon judges. There are cases in which the law casts responsibility upon the judge to act *ex mero motu* where some illegality, for example, is disclosed by the evidence; but these are cases where some public interest is concerned. I am quite unable to understand what conceivable public interest can be affected by the fact that the employer has failed to raise the defence that the plaintiff's right is taken away by the sta-

tute. In such circumstances there is no decision upon the construction or effect of the Act and no possibility of conflicting interpretations. The administration of the Act is not touched, the interest involved is the interest of the parties and theirs alone.

I cannot conceive why such a responsibility should be placed upon the judge.

As to the disposition of the present appeal, the parties concurred in leaving the question whether the action would lie, first to the trial judge and then to the Appellate Division. In the ordinary case of an issue being passed upon by a judge of first instance in a manner *extra cursum curias* there is no appeal from the judgment. But a party having taken part in an appeal from the first judgment without objection is not generally permitted to raise the objection that the matter is not further appealable. *Burgess* v. *Morton* (1) at page 142. But where the matter passed upon is one which by statute is committed to the decision of another tribunal I think different considerations apply and I think the appeal from the decision of the Appellate Division on this question ought not to be heard. And as the parties have taken their chances on a favourable decision from the court itself, I think the matter must be deemed to be concluded by what has occurred.

This is sufficient to dispose of the appeal except as to one point, namely, the question of the plaintiff Horace Costanza's right to recover in respect of loss of services and expenses. On that point I shall express no opinion until the moment arrives for the delivery of final judgment upon the appeal by the court as a whole.

ANGLIN J.—The defendants appeal from the judgment of a Divisional Court of the Appellate Division, confirming, by a majority, the judgment for the plaintiffs rendered after trial before Rose J. and a jury. Three of the plaintiffs sued to recover damages for injuries sustained by them as the result of having contracted typhoid fever from drinking the water from a contaminated well on the defendants' premises while in their employment. The other plaintiff,

(1) [1896] A.C. 136.

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Horace Costanza, sued for consequential damages suffered by him as husband of one and father of two of his co-plaintiffs.

Several grounds of appeal were urged based on alleged insufficiency of the evidence to support the jury's findings that the illnesses of the plaintiffs were due to the cause assigned and that the condition of the well was ascribable to negligence of the defendants. But counsel for the appellant chiefly relied upon the plea, set up by amendment at the opening of the trial, that (except as to Horace Costanza) the present action does not lie because the case is one for compensation under the Ontario Workmen's Compensation Act (4 Geo. V., c. 25) and the right of action to recover damages is thereby taken away (s. 15 (1)). That question was determined adversely to the defendants by the learned trial judge and by a majority of the learned judges in the Divisional Court, who were of the opinion that the plaintiffs had not sustained injury "by accident" within the meaning of s. 3 (1) of the Workmen's Compensation Act. Apparently no objection was taken to the competency of either tribunal to dispose of that question. Indeed no difficulty on that score was suggested during the original argument here.

In the course of their consideration of the case, however, it seemed to the members of the court that there was a serious question whether the jurisdiction of the courts to determine whether or not the action is one the right to bring which has been taken away by the statute had not been ousted by the provisions of s. 60, which confers on the board

> exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or decision is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court.

Part I of the statute embraces secs. 3 to 104 inclusive. By section 15 as originally enacted, subject to three exceptions, any right of action against his employer for damages to which a workman would otherwise have been entitled is taken away wherever the statute confers on him a right

to compensation, i.e., where, in any employment to which Part I applies the workman has suffered

> personal injury by accident arising out of and in the course of his employment

(s. 3 (1)). By s. 64 (4), which was in the original Act, an employer-defendant in any action is authorized to apply to the Workmen's Compensation Board to determine whether the plaintiff can maintain the action or is entitled to statutory compensation, and if the board should decide that his only right is to such compensation the action is "forever stayed". By s.s. (2) of s. 15 (added in 1915), "any party to an action" is authorized to

> apply to the Board for adjudication and determination of the question of the plaintiffs' right to compensation under this part, or as to whether the action is one the right to bring which is taken away by this part, and such adjudication and determination shall be final and conclusive.

It seems to be quite clear that the question of the plaintiffs' right to bring and maintain this action "arises under" Part I and also that it is

> a matter or thing in respect to which power, authority or discretion is conferred on the Board.

In my opinion by giving to the board

> exclusive jurisdiction to examine into, hear and determine

all such matters and questions the legislature intended to oust and did oust the jurisdiction of the ordinary courts to entertain them, and required that they should be examined into, heard and determined solely by the board.

In reaching this conclusion I have not forgotten that the jurisdiction of superior courts is not taken away unless by express language in, or necessary inference from, a statute. *Balfour* v. *Malcolm* (1); *Oram* v. *Brearey* (2). I find here a positive and clear enactment that the jurisdiction of the board shall be "exclusive"— and nothing to warrant a refusal to give to that word its full effect.

The purpose of the legislature apparently was to secure uniformity in the determination of what classes of cases fall within the operation of the Compensation Act by having a single tribunal deal with that question, and also to ensure

(1) [1842] 8 Cl. & F., 485 at p. 500. (2) [1877] 2 Ex. D. 346 at p. 348.

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that no workman injured in the course of his employment should find himself in the position of having been denied damages by the courts because he was, in their opinion, entitled to compensation under the Act, and refused compensation by the board because he was, in its view, not so entitled.

Under the Act as originally drawn only the defendant was empowered to obtain the adjudication of the board on the question of the plaintiff's right to maintain his action. Sec. 64 (4). With the statute in that plight there might have been plausible ground for contending that the intention probably was to require the defendant, as a condition of being allowed to plead the provisions of s. 15 in bar of the action, to obtain an adjudication of the board that the plaintiff was entitled only to statutory compensation and not to maintain the action. If, with the statute in that condition, the court should stay the action until the board should have disposed of the question of the right to bring it, the defendant could scarcely be expected to make the application; the plaintiff was powerless to do so. But a construction of s. 64 (4) that would require the court, in the absence of a certificate from the board that the case is one for compensation and that the workman is therefore not entitled to maintain the action, to assume the contrary is scarcely consistent with the explicit and unqualified language of s. 15 (1), the application of which is in no wise made dependent upon its protection being invoked by the defendant. If the defendant does not plead the statutory bar but facts stated in the pleading or adduced in evidence at the trial indicate that the case might fall within s. 3 (1) of the statute and that ss. 15 (1) and 60 (1) might therefore apply, the court would, I think, be if not obliged certainly free *proprio motu,* to take cognizance of those provisions and stay further proceedings in the action until the question whether the right to maintain it had been taken away by the Act should be determined by the only competent tribunal. *In re Robinson's Settlement* (1) at pages 727-8; *Coburn* v. *Collins* (2)

(1) [1912] 1 Ch. 717.

(2) 56 Law Times 431.

at page 434; *Crossfield* v. *Manchester Ship Canal Co.* (1). Again the defendant would have no interest to have such stay removed. It was probably to meet these difficulties that s.s. 2 was added to s. 15 in 1915 enabling "any party to an action" to apply for the board's adjudication upon the question whether the action is one the right to maintain which is taken away by the statute.

Under the amended statute, in my opinion, whenever this question arises as a substantial issue in the course of an action the proper course to take is to stay proceedings in the action until it has been adjudicated upon by the board. *Simpson* v. *Crowle* (2) at pages 250, 255. In view of the provisions of s. 20 the workman-plaintiff will be well advised in every case where there is any conceivable ground for contending that his claim falls within the Act to seek the determination of the board at the earliest possible date.

In *Scotland* v. *Canadian Cartridge Co.* (3) this question did not arise. The plaintiff's claim to compensation had there been rejected by the board before the action was begun on the ground that he had not been injured "by accident" within the meaning of that term as used in s. 3 (1). This decision had been reconsidered by the board at the instance of the defendant. Certificates of the board's determination of both applications had been put in without objection. The right of the courts to deal with the action and to decide whether the plaintiff was entitled to recover was not questioned. In two recent cases before the Privy Council referred to by the appellant—*McMillan* v. *Canadian Northern Ry. Co.* (4), and *McColl* v. *Canadian Pacific Ry. Co.* (5)—their Lordships dealt with the appeals as submitted. The question now under consideration was not presented in either case. In the *McMillan Case* (4) owing to the doctrine of common employment there was no right of action under Ontario law apart from the Workmen's Compensation Act, and it gives only a right to compensation recoverable on application to the board: in the *McColl Case* (5) the Com-

(1) [1904] 2 Ch. 123.
(2) [1921] 3 K.B. 243.
(3) 59 Can. S.C.R. 471.
(4) 39 Times L.R. 19.
(5) 39 Times L.R. 14.

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pensation Board had determined that the case fell within the Act and that any right of action had been taken away, and its decision was accepted as conclusive in so far as the right of action was subject to provincial control.

The plaintiffs have applied to be allowed to put in a certified copy of the decision of the board that they

> did not sustain personal injuries by accident arising out of and in the course of their employment with Dominion Canners, Limited,

and accordingly disallowing claims made by them to compensation under the statute, as conclusive that their right to bring this action was not taken away by the Workmen's Compensation Act. They maintain that this document is admissible, notwithstanding any rule or practice of this court to decline to receive evidence that was not before the court from which an appeal is taken (*Red Mountain* v. *Blue* (1); *Michigan Central* v. *Jeannette,* 13th December, 1918), because it bears on the question of the jurisdiction of the court of first instance to proceed with the trial of the action and of the Divisional Court and of this court to deal with it on appeal without a determination by the board that it is not barred by s. 15 (1), and is therefore outside of the stated case on which the appeal is taken (Sup. Ct. Act, s. 73).

The decision of the board appears to have been rendered on the 25th of November, 1921, three weeks after the judgment of the Divisional Court had been delivered and considerably more than a year after the happening of what the plaintiffs allege to have been the accident or accidents which caused them personal injuries, i.e., some time after any claims they could have to statutory compensation had been barred (s. 20 (1)). *Ex facie* it is a decision rejecting a claim for compensation and not an adjudication by the board upon an application made to it under s. 15 (2). Counsel for the respondent further stated, without contradiction, that the decision of the board had been made *ex parte* and without notice having been given to his client and he produced a letter from the Chairman of the board stating that its decision of the 25th of November, 1921, was made in disposing of the claims before it in the ordinary

(1) 39 Can. S.C.R. 390.

course and not upon an application under section 15 (2), the board's practice on such latter applications being to have the opposite party to the litigation notified. On these grounds counsel for the respondent objected to the certified copy of the board's decision being received. He also contended that if admitted it would not be conclusive for the purposes of s. 15 (1) of the statute.

With the latter contention I am disposed to agree. The board in determining that the right of action asserted by a plaintiff has or has not been taken away by s. 15 (1) of the Act or that a plaintiff is or is not entitled only to compensation under the statute, whether on application made under s. 15 (2) or under s. 64 (4), acts judicially. It is empowered to adjudicate upon and finally to dispose of certain rights of the parties.

> It is one of the first principles in the administration of justice,

said Erle C.J., in *In re Brook and Delcomyn* (1) at p. 416,

> that the tribunal which is to decide must hear both sides and give both an opportunity of hearing the evidence upon which the decision is to turn * * * I find the master minds of every century are consentaneous in holding it to be an indispensable requirement of justice that the party who is to decide shall hear both sides giving each an opportunity of hearing what is urged against him.

Seneca's couplet:

> Quicunque aliquid statuerit, parte inaudita altera,
> Aequum licet statuerit, haud aequus fuit,

has often been quoted with approval by learned judges. *R.* v. *Archbishop of Canterbury* (2), at p. 559, per Lord Campbell; *Smith* v. *The Queen* (3) at p. 624, per Sir R. Collier; *Marcoux* v. *L'Heureux* (4) at p. 283 per Duff J. Unless dispensed with by statute, this rule of elementary justice is of universal application. *Bonaker* v. *Evans* (5) at p. 171.

> The laws of God and man both give the party an opportunity to make his defence, if he has any,

said Fortescue J. in Dr. *Bentley's Case* (6) at p. 567. Nor is the application of the principle that no man

(1) [1864] 16 C.B.N.S. 403.
(2) 1 E. & E. 545.
(3) 3 App. Cas. 614.
(4) 63 Can. S.C.R. 263.
(5) 16 Q.B. 162.
(6) 1 Str. 557.

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shall be deprived of his rights without an opportunity of being heard, limited to strictly judicial proceedings. *Cooper* v. *Wandsworth Board of Works* (1) at p. 189.

Under section 60 of the Workmen's Compensation Act, which makes the Board's jurisdiction exclusive and its action or decision final and conclusive, the board is empowered not merely to

> determine all matters and questions arising under this Part, etc.,

but "to examine into, hear and determine" all such matters and questions, etc. There is here at least an implied direction that before determining any matter or question the board shall examine into and hear it. This involves the hearing of all parties interested. The judgment of Lord Lyndhurst in *Capel* v. *Child* (2) at pp. 573-4 is instructive on the import of examination and hearing. The decision of the board tendered by the plaintiff was *ex parte* and was not rendered in the exercise of the special jurisdiction conferred by s. 15 (2) and s. 64 (4) of the Workmen's Compensation Act. In my opinion it should not be accepted as conclusive of the right of the plaintiff, notwithstanding the provision in s. 15 (1), to maintain the action, if otherwise well founded. The board is given explicit authority to reconsider any matter with which it has dealt and to rescind, alter or amend any decision or order previously made: s. 60 (3).

During the course of the argument it was suggested that the defendant having submitted for trial by Mr. Justice Rose the issue whether the plaintiff's right of action had been taken away by the statute and having taken the chance of its determination by a tribunal lacking jurisdiction must accept the judgment rendered as the decision of a quasi-arbitrator and therefore non-appealable. *Burgess* v. *Morton*, (3). Lack of jurisdiction to pronounce it deprives a judgment of any effect whatever (*Archbishop of Dublin* v. *Trimleston* (4) at p. 268, even as against the party who invoked the determination. *Toronto Ry. Co.* v. *Toronto* (5) at p. 815. Where a court is deprived of jurisdiction over a subject by statute no acquiescence—not even express con-

(1) 14 C.B.N.S. 180.
(2) [1832] 2 Cr. & J. 558.
(3) [1896] A.C. 136.
(4) [1849] 12 Ir. Eq. R. 251.
(5) [1904] A.C. 809.

sent—can confer jurisdiction upon it. The remedy against such an excess of jurisdiction by an inferior court is either by appeal, if there be provision for an appeal, or otherwise by prohibition; in the case of the High Court by appeal. *Burgess* v. *Morton* (1). This right of appeal is not lost unless relinquished either expressly or by asquiescence such as is found when parties with knowledge of the lack of jurisdiction in the court assent to the judge hearing and determining the matter virtually as an arbitrator.

Here there was no intention that there should be any determination of the matter *extra curiam* such as would exclude a right of appeal. The proceedings in the trial court and in the Divisional Court were carried on under the belief and on the assumption that those courts were entitled to take cognizance of, and had jurisdiction to adjudicate upon, the issue raised by the plea based on section 15 (1) of the Workmen's Compensation Act. The parties clearly meant to keep themselves *in curia*; the trial judge and the Divisional Court so understood the position; and both courts and parties thought an appeal was open. This is not a case of mere deviation from the *cursus curiae* in dealing with a subject-matter over which the court had jurisdiction—a case in which the taking of an intermediate appeal without challenging the original jurisdiction might preclude its being questioned on further appeal. *Bickett* v. *Morris* (1); *Cornwall* v. *Ottawa & N.Y. Ry Co.* (2). On the contrary, it is a case in which the courts have been divested by statute of jurisdiction over the subject-matter, and in which they have assumed the duty of another tribunal. *Pisani* v. *Attorney General* (3) at p. 522. The plaintiffs are therefore not entitled to have the judgment which they hold treated as unappealable and conclusive in their favour, *Simpson* v. *Crowle* (4) at pages 250, 252-3, 255, 257, as they would have been had there been conscious assent to the question whether the action was one which the statute had taken away their right to maintain being dealt with by the trial judge *extra curiam*.

(1) [1896] A.C. 136.
(2) L.R. 1 H.L. S.C. 47.
(3) 52 Can. S.C.R. 466.
(4) L.R. 5 P.C. 516.
(5) [1921] 3 K.B. 243.

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The judgment of the Divisional Court is a final judgment appealable to this court under s. 36 of the Supreme Court Act; it is our duty to pronounce the decision at which the Divisional Court should have arrived (s. 51, Sup. Ct. Act); and that court in turn should have dealt with the question now before us as the trial judge should have done. Ont. Judicature Act, s. 27 (1).

Making the order which the trial judge, in my opinion, should have made when the issue under s. 15 (1) came to his notice, I would direct that proceedings upon the pending appeal should be stayed to permit of an application being made to the board under s. 15 (2) for its

> adjudication and determination * * * as to whether the (present) action is one the right to bring which is taken away by

Part I of the Workmen's Compensation Act. I see no reason why a certificate of the board's decision should not be filed with the registrar. The appeal may then be disposed of.

BRODEUR J.—I concur with Mr. Justice Anglin.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Proceedings stayed.

Solicitors for the Appellant: *Lees, Hobson & Co.*

Solicitors for the Respondents: *Bain, Bicknell, Macdonell & Gordon.*