THE WORKMEN'S COMPENSATION BOARD ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY CO. .....

AND

MARILYN ANN NOELL ..... RESPONDENTS.

1952

*April 28, 29, 30

*June 30

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION.

Workmen's Compensation—Accident—Waitress injured diving in hotel swimming pool during off-duty hours—Whether accident arose out of and in the course of employment—Application for compensation filed by employer on behalf of infant employee and others interested within limitation period; ratified by infant on attaining majority—Whether application filed in time—Whether any person interested entitled to adjudication by Workmen's Compensation Board—Workmen's Compensation Act, 1932 (N.B.) c. 36, ss. 12, 16, 33, 41.

The respondent Noell, a 19-year-old student, was employed by the respondent, the Canadian Pacific Ry. Co., for the summer of 1949 as a waitress at the company's hotel at St. Andrews, N.B. In common with other students similarly employed she was permitted the use of a private bathing beach owned by the hotel. When not on duty, she was free to leave the premises and go where she pleased. Following the serving of breakfast on June 23, 1949, she was told she would not be required until 5 p.m. While so excused she proceeded to the private bathing beach for a swim and in diving from a float struck bottom and suffered serious and permanent injuries.

The accident was reported to the Workmen's Compensation Board by the C.P.R. in October, 1949, and on June 22, 1950, it submitted a further report, together with an application for an adjudication, binding on all interested parties including N, that the accident was one covered by the Workmen's Compensation Act (1). The Board ruled that it was unable to consider the report submitted as being a claim made by N. and would take no action to deal with it as such. On Jan. 2, 1951, N. in a communication to the Board setting out that she was then of age, purported to adopt as a claim for compensation the application made by the C.P.R. except as to any differences there might be in the answers made in that application and the one now enclosed with her letter. N.'s application was disallowed whereupon the C.P.R., pursuant to s. 35 of the Act, appealed to the Supreme Court of New Brunswick, Appeal Division, on the ground that the Board's decision involved the following questions of law:

1. Whether the accident to said Marilyn Noell on June 23, 1949, arose out of and in the course of her employment within the scope of the said chapter.
2. Whether an application for compensation was filed in time.
3. Whether any person interested in the adjudication and determination of the question whether an accident has arisen out of and in the

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

(1) 1932 (N.B.) c. 36.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

course of an employment within the scope of the said chapter, is entitled at any time to an adjudication and determination by the said Board.

The appeal was heard by Harrison, Hughes and Bridges, JJ. who answered the questions as follows:

Question (1) Yes (Bridges J.—No.)

Question (2) Yes.

Question (3) No answer.

On appeal to this Court:

Held: The appeal should be allowed and the questions answered as follows:

Question (1): No.

Question (2): No (Cartwright J. No answer.)

Question (3): Yes.

Decision of the Supreme Court of New Brunswick, Appeal Division, 28 M.P.R. 270, reversed.

APPEAL from the judgment of the New Brunswick Supreme Court, Appeal Division (1), allowing an appeal from certain decisions of the Workmen's Compensation Board.

J. J. F. Winslow Q.C. and *E. N. McKelvey* for the appellant. As to Q. 1, the judgment of the majority of the Appeal Division proceeds on a wrong principle: the Court failed to examine the question as to whether Miss Noell's employment had been interrupted before the accident. The question involves the application of s. 7 of the Act. Her work required her to serve in the hotel proper as a waitress at the regular meal hours. Although her employment was not that of a "domestic", it was in a sense continuous in that she worked, ate and slept on her employer's premises. The permission given her on the date of the accident to take time off constituted an interruption in her employment. While there is no direct finding by Harrison J., the effect of his reasons for judgment is that there was no interruption in her employment. The decided cases do not support such a finding. *Philbin* v. *Hayes* (2); *Davidson* v. *M'Robb* (3); *L. & Y. Ry.* v. *Highley* (4); *St. Helen's Colliery* v. *Hewitson* (5); *Parker* v. *Black Rock* (6). *Davidson* v. *M'Robb* and *St. Helen's Colliery* v. *Hewitson* are the leading English cases on the point at issue. The two latter cases are referred to with approval in *McKenzie* v. *G.T.P. Ry. Co.* (7) by Mignault J. The true position

(1) 28 M.P.R. 270; [1952] 1 D.L.R. 426.
(2) [1918] 87 L.J.K.B. 779.
(3) [(1918] A.C. 304 at 314.
(4) [1917] A.C. 352 at 372.
(5) [1924] A.C. 59.
(6) [1915] A.C. 725.
(7) [1926] S.C.R. 178 at 185.

is that at the time of the accident, she was merely a licensee making use of a privilege granted her by her employer but in no way connected with the work she was employed to do. The courts have held that an accident occurring in such circumstances does not arise out of and in the course of the workman's employment. *Whitfield* v. *Lambert* (1); *Standen* v. *Smith* (2); *Stringer* v. *O'Keeffe* (3).

The cases relied upon by counsel for the C.P.R. and applied by Harrison J. in the judgment of the Court below are *Codling* v. *Ridley* (4) and *Knight* v. *Howard* (5). In the former case, a domestic servant was held to be acting in the course of her employment; the second held that the accident arose out of and in the course of the applicant's employment. The *Knight* case purports to follow the *Armstrong Whitworth* case (6) and therefore does not in any way weaken the authority of the cases referred to above and the principle of those cases is still applicable. After citing *Codling* v. *Ridley* and other cases Harrison J. makes this finding: "Recreation on the hotel premises in off-duty hours was a natural incident of Miss Noell's employment * * * *" but as pointed out by Bridges J. "It is difficult * * * * to see how swimming at Katy's Cove was a natural incident to waiting on tables * * * *" The question to be decided is not so much whether Miss Noell is entitled to the benefit of the Act but rather whether the C.P.R. can obtain the protection of the Act. Harrison J. erred in attaching too great significance to the element of locus. The *Davidson* case *supra; Betts and Gallant* v. *The Workmen's Compensation Board* (7); *Davies* v. *Rhymney Iron Co.* (8). The question of the locus of the accident is entirely irrevelant because the true question is whether the continuity of Miss Noell's employment was broken before the accident.

As to Q. 2—Whether an application for compensation was filed in time—The rights of employer and employee provided by the Act are statutory and an injured workman in order to have the benefits of the Act is required to file

(1) [1915] 84 L.J.K.B. 1378.
(2) (1927) B.W.C.C. 305.
(3) [1936] 70 I.L.T. 110.
(4) (1933) 26 B.W.C.C. 3.
(5) [1938] 4 All E.R. 667.
(6) [1920] A.C. 757; 13 B.W.C.C. 68.
(7) [1934] S.C.R. 107.
(8) (1900) 16 T.L.R. 329.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

his application within the time limited therein. The Board has no power to award compensation unless the requirements of the Act are carried out.

S. 16 provides that no compensation shall be payable "unless application for such compensation is made within one year after the occurrence of the injury". The expression "application for compensation" appears in no section of the Act other than s. 41(1) which states that a workman "shall file with the Board an application for such compensation." It is clear, on the words of the statute, that the application under s. 41(1) can only be made by the workman and to be valid must be made within the one year period limited by s. 16. No such application was filed by Miss Noell within the time limited. The C.P.R. filed a report within a year after the accident but this was not an "application for compensation" at all. The report filed by the C.P.R. purportedly on behalf of Miss Noell was without her authority because through her solicitor she wholly repudiated that any such authority existed. On Jan. 2, 1951, more than a year after the accident, Miss Noell filed with the Board what purports to be an application for compensation, and by a letter of the same date purported to adopt as her own the application previously made by the C.P.R. There is a rule of English law, that ratification by a principal of an agent's prior unauthorized act does not relate back to the unauthorized act if the ratification takes place after a time limit within which the unauthorized act could be done by the principal. *Lord Audley* v. *Pollard* (1); *Margaret Podger's case* (2); *Right dem. Fisher et al* v. *Cuthell* (3); *Doe dem. Mann* v. *Walters* (4); *Bird* v. *Brown* (5) followed in *Dibbins* v. *Dibbins* (6). The true principle to be derived from the cases cited is that stated by Parke B. in *Bird* v. *Brown*. Although in those cases it can be said that the facts were that a *jus tertii* had intervened, the decisions of the courts were not based on the mere existence of this *jus tertii* but on broader principles. It is not sufficient as Harrison J. did, to base analogies on the similarity of facts, but rather on the applicability of the principles of law upon which analogous

(1) (1597) 78 E.R. 806.
(2) (1613) 77 E.R. 883.
(3) (1804) 102 E.R. 1158.
(4) (1830) 109 E.R. 583.
(5) (1850) 154 E.R. 1433.
(6) [1896] 2 Ch. 348.

cases were decided. *Lyell* v. *Kennedy* (1) is not relevant, the House of Lords found no period of limitation and that judgment expressly approves the decisions in *Lord Audley* v. *Pollard* and *Bird* v. *Brown*. If it be considered that the intervention of a *jus tertii* is necessary to the application of the case, there is such a right in the case at bar. Because of s. 16 the Board is entitled to consider that a case is closed after the expiration of one year from the accident. Other employers in the same class are entitled to assume that their liability to assessment will depend on applications made within the year.

As to Q. 3, the Workmen's Compensation Board is a creature of statute and the rights, powers and remedies relevant to it are regulated by statute. Although as stated by Barry C.J. in *Fleck* v. *Workmen's Compensation Board* (2), the Act should receive a "broad and liberal construction", there can be no right to adjudication by an interested party unless such right is given by the Act. There is no provision in the Act allowing an application for adjudication as contemplated by Q. 3. The jurisdiction conferred by ss. 30(1) and 33(1) can only be exercised when a case is properly brought before the Board under s. 41. *Dominion Canners Ltd.* v. *Constanza* (3) was decided under s. 15(2) of the Ontario Workmen's Compensation Act, the New Brunswick Act contains no such section, and the case does not apply to the case at bar.

C. F. H. Carson Q.C. and *Allan Findlay* for the respondent, the C.P.R. The majority of the judges of the Appeal Division were right in holding that the accident arose out of and in the course of the employment. The unanimous judgment was right in holding that the application was filed in time. The unanimous judgment was right in holding that Q. 3 need not be answered. If, however, this Court should take the view on the second issue that the application was not filed in time, it is submitted that question should be answered to the effect that the respondent company was nevertheless entitled to an adjudication by the Board as to whether the accident arose out of and in the course of the employment.

(1) [1899] 14 A.C. 437. (2) 8 M.P.R. 33.
(3) [1923] S.C.R. 46.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

As to Q. 1, Miss Noell's employment was continuous in nature. It was similar to that of a domestic servant living in the employer's house. As to the distinction between intermittent and continuous employment see 34 Hals. p. 832 para. 1162. Miss Noell at the time of the accident was in the course of her employment. So long as an employee engaged in continuous employment (e.g. a domestic servant living on her employer's premises) remains on her employer's premises she is acting in the course of her employment, provided of course, she is not doing something prohibited by her employer or otherwise doing something unreasonable. *Davidson* v. *M'Robb* (1). The continuity of her employment had not been interrupted at the time of the accident. It was not her day off. Though she no doubt had the right that day to leave the premises if she chose to do so, the fact remains that she was on the premises when the accident occurred, and was doing something which had not been prohibited. Indeed she was engaged in an activity (bathing) that was contemplated and permitted by her employer.

The accident having occurred in the course of the employment and having taken place on the employer's premises at a spot which turned out to be dangerous, it follows that the accident arose out of such employment. *Lawrence* v. *George Mathews Ltd.* (2); *Brooker* v. *Borthwick & Sons Ltd.* (3); *Knight* v. *Howard Wall Ltd.* (4). The risk to which she was exposed was a so-called "locality risk". *Lawrence* v. *George Mathews Ltd., supra* at p. 19; *Brooker* v. *Borthwick & Sons Ltd., supra* at p. 677. A "locality risk" is to be distinguished from a risk created by the employee. *Codling* v. *Ridley* (5). Since the risk was not one created by the employee but was a "locality risk", the question does not turn upon whether the swimming was in the performance of a duty as in *Codling* v. *Ridley*. The accident arose out of and in the course of an employment within the scope of the provisions of the Act and the appeal in respect of this question should be dismissed.

(1) [1918] A.C. 304 at 314.
(2) [1929] 1 K.B. 2 at 19 and 23.
(3) [1933] A.C. 669 at 676, 677.
(4) [1938] 4 All E.R. 667 at 672.
(5) (1933) 26 B.W.C.C. 3.

The cases cited by the appellant re an accident "arising out of" are to be distinguished viz. the *Codling* case; the *Brice* case; *Lancashire & Yorkshire Ry.* v. *Highley* (1); *McKenzie* v. *G.T.R.* (2). As to the appellant's argument that the bathing was not incidental or ancillary to her employment. If it was not unreasonable it is covered by *Knight* v. *Howard Wall Ltd.* (3). If it was incidental, it was incidental to her employment. We do not have to meet the high test of "necessarily" incidental as in *Betts and Gallant* v. *Workmen's Compensation Board* (4).

As to Q. 2. The application for compensation made by the appellant company on June 22, 1950, which purported to be on behalf of all interested persons including Miss Noell was effectively ratified by her in her letter to the Board dated Jan. 2, 1951. The injury occurred on June 23, 1949. The application as made within one year after the occurrence of the injury and so was not barred by s. 16. Although the subsequent ratification by Miss Noell did not take place within one year of the occurrence of the injury, its effect was to constitute the relation of principal and agent between Miss Noell and the respondent company because the ratification took place within a reasonable time and because no *jus tertii* arose before the ratification. 1 Hals. pp. 228, 229 and 234. *Lyell* v. *Kennedy* (5). Therefore the Court below was right in answering "Yes" to the 2nd question.

As to Q. 3. The Appeal Division was right in holding that it need not be answered. If, however, this court should take the view on the second issue that the application was not filed in time, Q. 3 should be answered to the effect that the respondent company was nevertheless entitled to an adjudication by the Board as to whether the accident arose out of and in the course of the employment of the respondent Noell.

In view of the provisions of ss. 12, 33(1); 33(2), it would appear that when a workman is injured in an accident arising out of and in the course of his employment, his right of action at common law is taken away. It would also appear that the question of whether his accident arose

(1) [1917] A.C. 352.
(2) [1926] S.C.R. 178.
(3) [1938] 4 All E.R. 667.
(4) [1934] S.C.R. 107.
(5) (1887) 14 App. Cas. 437 at 462.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

out of and in the course of his employment must be determined by the Board, subject in New Brunswick to an appeal under s. 35, and that the jurisdiction of the courts to determine such question is ousted accordingly. *Dominion Canners Ltd.* v. *Costanza* (1). Although no procedure is prescribed in the Act for an application being made by the employer for an adjudication and determination of the question whether an accident arose out of and in the course of employment, the right of an employer to make such an application must be implied. Ss. 16, 24, 30(1), 35(3) and 41(1) and (4).

O. F. Howe Q.C. for the respondent Noell, stated that an action had been taken in 1950 in the Ontario court by the father of Miss Noell, a minor, and while he found himself before this court in the role of respondent, he had not filed a factum and preferred to take no part in the argument.

APPEAL from a decision of the Supreme Court of New Brunswick, Appeal Division (2) allowing an appeal from a decision of the Workmen's Compensation Board disallowing compensation to Marilyn Ann Noell.

The judgment of Rand, Kellock, Estey and Locke JJ. was delivered by:

RAND J.:—The facts in this controversy are not complicated. The respondent, Miss Noell, then a young woman in her 20th year and attending college, was engaged as a waitress in the hotel of the company at St. Andrews, New Brunswick, for the summer season of 1949 at the rate of $35 a month. In that capacity she was to perform such work as the company might "appoint". She was, "if receiving * * * meals on the company's premises" to take them in any place and within the hours stipulated by the manager; and if receiving sleeping accommodation, to accept such as might be assigned to her. She was to report for duty punctually and not to be off duty without permission from the head of the department. She was not to make use of the public spaces in the hotel nor its grounds used by guests nor any other place designated by the manager except when on duty and then only when so required. She was to maintain her personal state and appearance as prescribed in writing for waitresses, including regulation

(1) [1923] S.C.R. 46. (2) 28 M.P.R. 270; [1951] 1 D.L.R. 426.

dress for breakfast, luncheon and dinner. These terms were embodied in a standard form of agreement which, although expressed to be applicable to different capacities, is clearly limited to employment in or about a hotel.

Notwithstanding the clause dealing with public places, she was given oral permission to use a jetty and three floats for swimming, two golf courses and the tennis courts; for the golf, she was charged a fee of $5; the jetty, floats and tennis courts were free. In all these, she was expected to respect the prior privileges of the guests.

She presented herself for duty on June 4 and on June 23 the accident occurred which gives rise to this litigation. During that period she received both meals and sleeping accommodation on the hotel premises. The hotel is a well known summer resort, and its attractions, including those mentioned, are contained within a continuous area.

The swimming place, about half a mile from the hotel, is the mouth of a small stream flowing into Passamaquoddy Bay across the entrance of which is the line of the company's railway. In a sluiceway in the railway embankment the company has installed gates and what is so enclosed is a substantial body of water. The depth is controlled by operation of the gates, and the practice is to empty the basin every few days and refill it with fresh water from the sea. At a point near the shore, what is called the jetty has been built, which consists of a three sided rectangular boom adjoining a retaining wall enclosing a space of shallow water for children. Along the top of the boom is a walkway. Some distance outside are three swimming floats, one of which has diving stands. The jetty, by its nature, was beyond that part of the premises on which the work of a waitress would be carried out.

The ordinary hours for breakfast were from 7:00 to 10:00, for lunch from 11:00 or 11:30 to 2:00, and dinner from 6:30, before which waitresses would have their own dinner. Between these meals, certainly unless otherwise ordered, and during any other time off, they were free to go where or do as they pleased, even beyond the limits of St. Andrews. Under the regular schedule, each would have one day off in every seven. During the hours off, except conceivably in an emergency, they could not be recalled to the service.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

Rand J.

On the morning of June 23, at the conclusion of breakfast, she was told that she would not be required again until dinner, and she was then free for her own purposes. About 1:00 o'clock she went to the jetty intending to swim out to a float, a thing she had already done a dozen times or so before. From an outer corner of the jetty she dived into the water. The water was muddy and at the point of the dive only between two and three feet in depth. She struck bottom and suffered grave and permanent injuries. The question raised in the appeal is whether that act of diving was an act "arising out of and in the course of" her employment.

These words have produced a bewildering vagueness in interpretation and conflict in judicial application since they were first introduced into the Compensation Act of England. The comment of Fitzgibbon J. in *Stringer* v. *O'Keeffe,* (1) on what he characterizes as the "mass of conflicting and irreconcilable decision" and his quotation of the "despairing cry" of Lord Wrenbury in *Armstrong* v. *Redford* (2) that he had "long abandoned the hope of deciding any case upon the words 'out of and in the course of' upon grounds satisfactory to myself or convincing to others" are by no means unfair. Particularly is that so in activities which are not related directly to the work; and as that is the case here we are free to approach the question from the standpoint of the broad conceptions underlying the legislation. As Viscount Haldane observed in *Davidson* v. *M'Robb* (3):—

> My lords, the Workmen's Compensation Act, 1906, appears on the face of it intended to afford a simple and speedy method of claiming compensation in the cases to which it relates * * * But around the principle which Parliament laid down in this language there is already spreading itself in Courts of Justice an atmosphere of legal subtlety which bids fair to defeat the obvious purpose of the Legislature * * * But I feel that, while in the interpretations we who are the judges put on the words used we are bound to follow our previous decisions when they form really binding precedents, we ought, in applying the statute to particular facts, to direct our efforts rather to giving effect to broad principles with freedom in applying them to individual circumstances than to searching for guidance from mere apparent analogies with the particular facts of previous cases, analogies which rarely embody the full truth.

(1) (1936) 70 Ir. L.T. 110. (2) [1920] A.C. 757.
(3) [1918] A.C. 304 at 316.

It is obvious that the basic purpose of the statute was to protect employees against the risks to which by reason of their employment, in the sense of their job, they were exposed: injury so resulting was recognized as part of the wear, tear and breakage of the work being done which the business, as part of its expense, ought to bear. The legislation was instigated by the impact of the casualty product of modern industry on the individual employee. The solution, then, must, basically, have regard to those risks.

The employee has, of course, his own field of activity which at some point meets that of his employment; and it is now settled that the risks extend not only to those met while he is actually in the performance of the work of the employer, but also while he is entering upon that work and departing from it.

Ordinarily the place of the risks is the employer's premises, including means of approach and departure; but it may be elsewhere as in the case of a truck driver. On the other hand, while he is going or returning from work, on public streets, he is obviously moving in his own sphere and at his own risk.

It is when he is on the employer's premises, however, and is not at the moment actually furthering the employer's work or interest, that difficult questions may arise. The true interpretation of the statutory language seems to be indicated by the illustration of simple cases. If a workman at his bench straightens himself up for a momentary rest, certainly the course of his employment remains unbroken; the employment contemplates such cessations as part of itself. If he is permitted to eat a lunch while still at the bench or in the shop and he is injured, say, by an explosion of a boiler, he is equally then within the course of employment. A domestic servant, who, by her engagement, lives as a member of the household, is conceived to be on duty at all times while on the premises notwithstanding that she is not actually doing work, but, just as clearly, she is not so when she is in town shopping for herself. These examples illustrate the difference between what has been called intermittent service and intermittent cessations not of the course of employment but of its labour: they illustrate also the difference between the currency and the course of employment.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

Rand J.

Mr. Carson has argued that the claim is to be determined on the footing that the relation of the young woman to the entire premises was analogous to that of the domestic servant, and that consequently her mere presence on them is sufficient for the attribution to her of being in the course of her employment. I cannot agree that the facts bring her within that category. In no sense was she a member of a household. She had specified hours within which her time was her own, during which she was under no such kind or degree of responsibility. She was obliged to live in the hotel, no doubt, but there was no continuing duty to act unless recalled to the service. The contention so based must then be rejected: but I do not understand that the main argument depends entirely on the existence of that analogy.

Since the accident did not arise in the course of the actual work as a waitress, nor of entering upon nor departing from it, to be within the statute her act must be found to be what has been called an incident of the work. I have already given examples of what I consider to be incidents of that nature and the fallacy, in my opinion, of the argument addressed to us, lies in this: it treats all privileges accorded an employee by reason of the employment, exercisable on the employer's premises, as incidents of the work the employee is to perform. The privilege of swimming from the jetty was conferred on the young woman as a member of the staff; so was that of golfing and of tennis: it might have been of shooting in an adjoining wood, or of travelling under a pass on the railway of the company: but from that fact it did not follow that those activities were incidents of her work.

These collateral advantages are not, either in their nature or by the intention of the contract, such incidents: they might be described as incidents of the contract but that is an entirely different thing; and whatever might be the view taken in any case within the area of her work, a personal act done beyond it is, *prima facie,* an act within the range of her own responsibility. In other words, to bring the act within the statute, the employee must be where she is either in carrying out a duty or under the

coercion of the contract or in an exercise of conduct that is intimately involved, as an incident, with action in those two spheres.

This is illustrated in the following cases. In *Philbin* v. *Hayes* (1) a labourer had permission to put up a sleeping hut on the works of his employer which a wind blew down, seriously injuring him. He was to be provided with the hut at a small sum a day. His hours of work were from 7:00 a.m. to 5:30 p.m. and he was paid by the hour. The Court of Appeal held that the accident did not arise in the course of the employment. In *Gaskell* v. *St. Helen's Colliery Co.* (2) a miner was injured while taking a bath on premises owned by the employer but leased to trustees of both the employer and workmen for the purpose of maintaining the baths. The employees were instructed that they must use the baths after each shift, but they were not subject to dismissal for not doing so. The same court held, assuming an order had been given, which was not, however, a term of the contract, that the taking of the bath did not arise in the course of the employment. Finally, in *Stringer* v. *O'Keeffe, (supra)*, decided in the Supreme Court of the Irish Free State, the workman was a general farm hand with no fixed hours of work who could be called upon at any time for duty. He received ten shillings a week with a house free of rent, certain supplies and the right to get firewood for his own use. While cutting trees in his own time on the employer's land, a bough fell upon him, causing injuries from which he died. It was held that he was not injured in the course of his employment.

The young woman, as part of her duty and of the obligation of her engagement, was to serve meals and live in the hotel. There is no more attachment or bond between the privilege of swimming at the jetty and that conduct than the privilege of travelling free on the trains of the company: the one is no more, in its nature or origin, incidental to the work than the other: both are severed from it.

(1) [1918] 87 L.J.K.B. 779. (2) (1934) 27 B.W.C.C. 32.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

Rand J.

The second question passed on by the Appeal Division dealt with the interpretation of s. 16 of the Act which reads:—

16. No compensation shall be payable under this part in respect of any injury, unless application for such compensation is made within one year after the occurrence of the injury, or in case of death within six months from the time of death.

The application here was made one day before the expiration of the year by the company purporting to act on behalf of the young woman as well as of itself. Some weeks later the employee, through her solicitor, repudiated it. Still later, when she became of age, she purported to ratify it and the court held unanimously that the right was thereby preserved.

Considering the section apart from authority, it would seem to me to be beyond controversy that unless, at the expiration of the year, it could then be said that there was before the Board an application, nothing done afterwards could avail the employee.

There is no dispute that, as a general proposition, ratification of an act of purported agency must take place at a time when the act itself could be done by the principal. This is the rule of *Bird* v. *Brown* (1), in which Parke B. states it that the doctrine of ratification

must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies.

But it is said that this rule, followed in *Dibbins* v. *Dibbins* (2), requires, in order to defeat ratification, the existence of a *jus tertii* and that none arose here. It was said that the qualification is warranted by *Lyell* v. *Kennedy* (3). In that case it was clearly stated that if a person professedly received money in trust for another, the limitation period was inapplicable. As the Earl of Selbourne in his speech observed:—

These propositions appear to me to assume the main question, as to the statute running during the continuance of the self-constituted agency between the true owner and the person taking upon himself to act as agent. I find nothing to support them in the Statute of Limitations itself; and I do not think them well founded in principle.

(1) (1850) 154 E.R. 1433. (2) [1896] 2 Ch. 348.
(3) (1887) 14 A.C. 437 at 462.

At the most, the qualification was assumed, not applied, and as well it was assumed that the agent could be a third person.

Even accepting the supposed qualification, I am unable to understand any difficulty in its application to this case. Certainly at the expiration of a year the right of the Board, in relation to the fund, came into existence. That fund is the object of the Board's administration and protection, and I should say that under the statute it was bound, as a duty, to see that it was dealt with strictly within the statutory requirements. We do not need to go behind the fund to the contributors who likewise are vitally interested in the manner of administration. How could the Board possibly justify using its own judgment or discretion on such a matter?

A third question was raised going to the right of the company to apply to the Board to determine whether the accident did or did not come within the statute. This was not answered by the court in appeal, but it is pressed upon us as being one which the Board itself is anxious to have settled, and I see no reason why this Court should not accede.

I interpret s. 16 as requiring the application for compensation to be made by the employee. That seems to me to be confirmed by s. 41:—

> 41. When a workman or dependent is entitled to compensation under this Part he shall file with the Board an application for such compensation
> * * * *

Then s. 33 deals with the jurisdiction of the Board. It declares that, except as provided in s. 35 which provides for appeals,

> 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.

By ss. (2) (*j*) this includes the finding whether an accident has arisen out of and in the course of an employment. By ss. (4) the decisions of the Board shall be upon

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

Rand J.

the real merits and justice of the case, and it shall not be bound to follow strict legal precedent.

By s. 12 the provisions of Part I, under which the right to compensation arises, shall be in lieu

> of all claims and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for, or by reason of any accident in respect of which compensation is payable under this Part.

The question under consideration becomes important when, without any application for compensation, an action is brought against the employer for damages. By the statute of Ontario this situation is expressly met, but there is nothing in the Act under consideration which directly contemplates it.

S. 12 must, I think, be interpreted to declare that if a right to compensation arises under Part I, then every right of action is taken away. To construe the word "payable" as meaning that the right to compensation has been established could be made to effect a virtual repeal of the statute in every case in which there was negligence on the part of the employer.

It is arguable that in an action the question is whether the right has been abrogated, but that is merely the complementary aspect of the right to compensation. Where the statute so expressly provides that the Board shall have the exclusive jurisdiction to determine the existence of the latter, it reveals the policy that would be broken into by permitting the question of right or no right under the statute to be declared by a court. The right of appeal from the Board gives ample protection to the desirability of judicial determination of such a question as one of law, and certainly such a determination would be an answer to an action.

Although the matter is not free from doubt, I think the exclusive jurisdiction conferred by s. 33 implies that the question is to be determined by the Board for all purposes and for the benefit of any person having an interest in it. The company here, then, was entitled, as it endeavoured to do, to raise that question before the Board and to have it decided.

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

I would, therefore, allow the appeal and answer the questions in the following manner:—

1. No.
2. No.
3. Yes.

Rand J.

CARTWRIGHT J.:—As to questions 1 and 3 I agree with the reasons and conclusions of my brother Rand, but in my view no answer should be made to question 2.

The Court of Appeal having answered question 1 in the affirmative it became necessary that they should deal with the second question but since in answering the first question we have decided that the accident to Miss Noell did not arise out of and in the course of her employment within *The Workmen's Compensation Act* it becomes unnecessary for us to deal with question 2 and in my view anything that we might say about it would be said *obiter*.

In answering the question we would not be called upon to decide generally as to the construction of s. 16 of *The Workmen's Compensation Act* but only whether under the facts of this case which are unusual and not likely to arise again, Miss Noell, had she been otherwise entitled to compensation under the Act, ceased to be so entitled because of her alleged failure to comply with the provisions of s. 16.

In dealing with this question the Court of Appeal does not make reference to the alleged repudiation on behalf of Miss Noell of the application for compensation which had been made to the Board on June 22, 1950. The reason for this may well be that, as we were informed by counsel, Miss Noell did not, herself, direct or authorize the sending of the letter of repudiation. On this assumption the facts with which the Court of Appeal had to deal were as follows. Miss Noell suffered very serious injuries under circumstances which it was suggested brought her within the provisions of *The Workmen's Compensation Act*. She was at the time of the accident a minor and was still a minor at the expiration of the year within which, under s. 16, application for compensation must be made. Within the year an application in writing was made for compensation which was expressly stated to be made on her behalf and was signed not by an irresponsible stranger but by her employer. If what has been referred to as "the letter of

1952

WORKMEN'S COMPENSATION BOARD v. C.P.R. AND NOELL

Cartwright J.

repudiation" be ignored, as was done by the Court of Appeal, there is nothing in the record to show that Miss Noell did not authorize or request the making of this application insofar as it was possible for her to do so in view of the fact that she was under age and so gravely injured that it may be she was not able to attend to any business. Her first act in reference to the matter which appears in the record after her coming of age was an adoption of the notice as her own and a further step looking to the adjudication of her claim by the Board.

Under these circumstances it may be that the onus of showing that the application made within the year was not authorized by Miss Noell rested upon those who were so asserting. It may be observed in passing that s. 16 is expressed in the passive voice and does not expressly require the application for compensation to be made by the claimant.

I am not prepared to hold on the assumed state of facts set out above, which appears to me to have been that assumed by the Court of Appeal, that if Miss Noell had been otherwise entitled to compensation her claim would have been defeated by reason of the manner in which application was made but I express no final opinion on the point as in my view it is neither necessary nor desirable that we should deal with it.

I would dispose of the appeal as proposed by my brother Rand except that I would make no answer to question 2.

Appeal allowed.

Solicitors for the appellant: *Ritchie, McKelvey & MacKay.*

Solicitors for the respondent, the C.P.R.: *Inches & Hazen.*

Solicitors for the respondent, Noell: *Howe & McKenna.*