IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT (NEW BRUNSWICK, 1932, C. 36).

GRACE BETTS AND GRETA GALLANT ..... APPELLANTS;

AND

THE WORKMEN'S COMPENSATION BOARD ..... RESPONDENT.

1933.

* Oct. 17, 18.
* Dec. 22.

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

Workmen's compensation—New Brunswick Act, 1932, c. 36, ss. 7, 3 (1), 2 (m)—"Mining"—"Mine rescue work"—"Accident arising out of and in the course of his employment."

The appellants' husbands, miners in the employ of M. Co., lost their lives when they went down a disused mine shaft on M. Co.'s property in an attempt to rescue fellow employees who were overcome by gas

* PRESENT:—Duff C.J. and Rinfret, Smith, Crocket and Hughes JJ.

(1) (1886) 13 Can. S.C.R. 563.

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in attempting to rescue children who while playing had gone into the shaft and been overcome by gas. The Workmen's Compensation Board disallowed appellants' claims for compensation under the *Workmen's Compensation Act*, N.B., 1932 c. 36, and its decision was affirmed by the Appeal Division of the Supreme Court of New Brunswick (6 M.P.R. 120).

Held: "Mine rescue work," included (by s. 2 (*m*)) under the term "Mining" in the Act, should not be construed as applying only to the occurrence of a peril which places in jeopardy the lives of miners in a mine which is in actual operation. There is no warrant for limiting the meaning of the words so as to exclude rescue in a mine shaft in which actual operations have ceased or been suspended, if circumstances arise to create a peril there; or so as to apply only to the rescue of miners.

"Employment" in s. 7 of the Act is not to be restricted to the actual particular work the workman is engaged to do. An accident is one "arising out of and in the course of his employment," within the meaning of s. 7, which arises out of and in the course of anything the workman does which is reasonably incidental to such work. Also, a workman may be impliedly authorized in an emergency to do something which does not fall within the scope of his ordinary duties under his contract of service (*Culpeck* v. *Orient Steam Nav. Co.*, 15 B.W.C.C. 187, at 189, and other cases cited). This principle, in its application, is not limited to emergencies in which the employer's property is involved. It applies to any emergency in which the interests of the employer are in any manner involved. The scope of employment, as indicated in the contract of service, may be impliedly enlarged by the occurrence of an emergency, and without any intervention on the part of the employer, and, if the employment is thus enlarged, anything which the workman does in such an emergency is to be deemed quite as much a part of his employment as if it were comprehended in the contract of service itself.

The Act should not be narrowly construed against workmen, but should be given a large and liberal construction in their interest (*Gibbs* v. *Great Western Ry. Co.*, 12 Q.B.D. 208, at 211, cited).

In the present case, the vital question was, not whether the descending into the mine shaft was a duty which the appellants' husbands' contracts of service as coal miners imposed upon them, but whether, in going to and participating in the work of rescue which the mine manager had undertaken at the shaft, they were doing something which they were, expressly or impliedly, authorized to do. This question demanded consideration of the entire evidence regarding the employing company's responsibility for the condition of the idle shaft and the presence in it of noxious gas as well as its responsibility for the protection of that shaft as a source of danger, the giving of the alarm, the mine manager's participation in the work of rescue, his bringing employees to the scene of peril, and especially his directions as to summoning other employees from the neighbouring shafts. The question as to the appellants' husbands going to and participating in the rescue in consequence of orders or directions expressly given by the mine manager was entirely one of fact, upon which the Board had not made, and this Court was (under said Act) precluded from making, a finding. As the Board had misconstrued provisions of the Act and (in consequence) had ignored evidence that should have been

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considered, the case should be sent back to it for reconsideration in the light of this Court's holdings as to the true construction of s. 7 of the Act.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1), dismissing (by a majority) the present appellants' appeals from a decision of the Workmen's Compensation Board of New Brunswick disallowing (by a majority) the appellants' claims for compensation under the *Workmen's Compensation Act,* Statutes of New Brunswick, 1932, c. 36, which claims were made by reason of the deaths, on July 28, 1932, of the appellants' husbands, who were miners in the employ of the Miramichi Lumber Co. Ltd. at Minto, New Brunswick, and who met their deaths while attempting to rescue two fellow employees who had been overcome by gas after entering a disused mine shaft on the said company's property in an attempt to rescue some children who had, while playing, entered the mine shaft and been overcome by gas.

The material facts of the case (as found by the Board) and the questions in issue on the appeal are sufficiently stated in the judgment now reported and are indicated in the above headnote.

Special leave to appeal to this Court was granted by the Appeal Division of the Supreme Court of New Brunswick.

The appeal was allowed with costs in this Court and in the Appeal Division, and the case sent back to the Board for reconsideration in the light of what this Court held to be the true construction of s. 7 of the Act.

W. H. Harrison, K.C., for the appellants.

N. B. Tennant for the respondent.

The judgment of the court was delivered by

CROCKET J.—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) dismissing the appeal of the appellants from a decision of the New Brunswick Workmen's Compensation Board, disallowing their claims for compensation under the provisions of the *Workmen's Compensation Act* of that province for the deaths of their husbands.

(1) (1933) 6 M.P.R. 120.

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There was a division of opinion both in the Board and in the Appeal Division. The majority decision of the Board was that of the Chairman, Mr. Sinclair, and Mr. Steeves (though the latter was not present at the examination of the witnesses), with Mr. Doucet, the third member, dissenting, while the majority decision in the Appeal Court was that of Grimmer and Baxter, JJ., with Hazen, C.J., dissenting.

The Act allows an appeal from a decision of the Board only on a question as to its jurisdiction or on a question of law.

That the decision of the Board was primarily grounded upon the Chairman's view of the legal effect of the material provisions of the statute under which the compensation was claimed is conclusively shewn by a perusal of the written reasons which the Chairman has given for the Board's decision. He first says that the evidence seems "to be quite clear and uncontradicted," and summarizes it in the following exceedingly brief statement of facts:

> Some children were playing on the property of the Miramichi Lumber Company at Minto. Apparently four of them attempted to climb down the ladder of an abandoned mine and on reaching the bottom were overcome by gas.
>
> The alarm was given sometime between 11.30 or 12.00 o'clock a.m., when the miners of the working pits were at dinner. Immediately a number of miners went to their rescue. A Mr. Tooke and Mr. Bauer were the first two to go down the disused shaft to rescue the children. They were both overcome by gas, then a Mr. Betts and a Mr. Gallant went down to help. Mr. Gallant got to the bottom of the pit and was overcome by the gas and did not survive. Mr. Betts attempted to climb out of the pit, but before he got to the top, fell and was killed; there can be no doubt he was killed by the fall which was caused by his being overcome by the gas.

He immediately proceeds:—

> To bring these claims, it must be shown that the deaths of Betts and Gallant were occasioned by an accident which arose out of and during the course of their employment.
>
> Under the definition of "Mining," Mine Rescue is to be included as Mining, and the question at once arises, are the circumstances as set forth by the evidence "Mine Rescue".
>
> It seems to me that before this question can be answered in the affirmative, certain conditions must be shown to have existed:
>
> 1. There must be a mine in actual operation.
>
> 2. There must have occurred some accident or happening that placed the lives of the miners in the mine in jeopardy.

If those conditions existed and miners who were not working at the place where the accident happened went to the rescue of the imperilled miners and lost their lives, then their dependents would be entitled to compensation under the terms of the Workmen's Compensation Act.

In this case, however, these conditions did not exist, the pit or shaft where the accident happened had been abandoned for a number of years. The children who entered the abandoned pit had no right there, and the first man (men) who entered the shaft (no doubt referring to Bauer and Tooke) did so, not to rescue miners, but the children, and did so of their own volition prompted simply by their humane desire to try and save these lives. If they had lost their lives as the result of their humane efforts, I do not see how this could come under "Mine Rescue," nor how the industry of Mining could be called upon to assume the cost of compensating their dependents.

The fact that Betts and Gallant may have gone to the rescue of their fellow workmen who had gone to the rescue of the children does not, to my mind, strengthen the cases for their dependents, consequently, I am forced to the conclusion that the deaths of Mr. Betts and Mr. Gallant were not caused by an accident arising out of and during the course of their employment, nor can the occurrences in any way be classed as "Mine Rescue".

The question as to the emergency to which the misfortune was primarily due being an accident within the meaning of the Act was not considered by the Board, nor was it considered or even so much as raised by counsel before the Court of Appeal, though Mr. Tennant now raises it on this appeal. Upon this question we have no doubt that the deaths of the applicants' husbands must be considered as accidental within the meaning of the governing section of the Act.

It will be observed that, while the Chairman finds that Tooke and Bauer entered the shaft to rescue the children of their own volition, prompted simply by their humane desire to save these lives, he makes no such finding in the case of Betts and Gallant, but simply states that the fact that they may have gone to the rescue of their fellow-workmen, who had gone to the rescue of the children, did not strengthen the cases for their dependents, and that, consequently, he was forced to the conclusion stated.

There can be no doubt that the Chairman construed "mine rescue" as applying only to the occurrence of a peril which places in jeopardy the lives of miners in a mine which is in actual operation, and held that for that reason Betts and Gallant could not be considered as engaged in "mine rescue work" at the time of their deaths.

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The only other reason suggested for the finding that the deaths of the deceased men were not caused by accident arising out of and in the course of their employment is that Tooke and Bauer, who entered the shaft before them, did so of their own volition, prompted simply by their humane desire to rescue the children, and that the fact that Betts and Gallant went down to rescue them, even though they were fellow-workmen, makes no difference. This is plainly itself a pure question of law, quite as much so as the question of the legal effect of the words "mine rescue".

As to the question of the Board's construction of the words "mine rescue", it should first be stated that these words appear only in the interpretation section of the Act, 2 (*m*). This reads simply: "'Mining' includes mine rescue work." S 3 (1) specifies the industries to which Part I of the Act, including s. 7, the governing section which gives the right to compensation, applies. S. 3 (1) begins: "This part shall apply to employers and workmen in or about the industries of lumbering, mining," etc., etc., and ends with the words: "and any employment incidental thereto or immediately connected therewith", i.e., incidental to or immediately connected with any one of the industries named. S. 2 (*m*) was not in the original Act.

Whatever effect the specific inclusion of "mine rescue work" in s. 3(1) may have, we are of opinion that there is nothing to warrant the limitation which the Board has placed on these words. In the absence of any definition in the statute itself they must be given their popular and ordinary meaning in relation to the industry of mining, as all other words and expressions in the Act, not specifically defined, must be construed in the same sense, i.e., in the sense in which they would be generally understood in the lay, as distinguished from the purely professional mind. See *Fenton* v. *Thorley* (1); and *Trim Joint District School Board* v. *Kelly* (2). Whether viewed, however, in the popular and ordinary, or in a technical, sense—if they could in any way be said to have any technical meaning—we cannot see how they can properly be taken to exclude rescue in a mine shaft, in which actual operations have

(1) [1903] A.C. 443. (2) [1914] A.C. 667.

ceased or been suspended, if circumstances arise to create a peril there, or to apply only to the rescue of miners.

The Board, however, has not only found that Betts and Gallant were not engaged in mine rescue work within the meaning of the Act when they lost their lives, but that their deaths were "not caused by an accident arising out of and during the course of their employment", and this is really the decisive question. Ordinarily such a finding is a mixed question of law and fact, involving not only a conclusion upon the legal effect of the words contained in the phrase as it appears in the material section of the statute, but a consideration of the evidence adduced in support of the claim in question. Where, however, it involves no question as to the facts upon which it is based the question is entirely one of law. See *Sparey* v. *Bath Rural District Council* (1).

As appears from what has already been stated, the only fact found by the Board which bears upon this question, apart from the fact of the shaft in which the fatalities occurred being an abandoned mine, is that Bauer and Tooke, the first men to enter the shaft, did so of their own volition, prompted simply by their humane desire to try and save these lives. Whether the statement that "the fact that Betts and Gallant may have gone to the rescue of their fellow workmen who had gone to the rescue of the children does not, to my mind, strengthen the cases for their dependents" implies that Betts and Gallant were also prompted simply by their humane desire to try and save the lives of their fellow workmen, and that this consideration also formed part of the basis of the Board's finding, it is evident from what has already been said that the finding is primarily based on the Board's construction of the meaning of the words "caused by accident arising out of and in the course of his employment", as contained in s. 7 of the Act, and that the finding cannot be supported on appeal if the construction which the Board has placed upon those words is erroneous. This is the vital point with which we are now concerned.

As the meaning of any phrase in a statute cannot be truly ascertained without looking at it closely in the context in which it is used and in the light of all other pro-

(1) (1931) 48 T.L.R. 87.

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visions of the statute bearing upon it, it is well that s. 7 should be fully set forth. It is as follows:—

> When personal injury or death is caused to a workman by accident arising out of and in the course of his employment in any industry within the scope of this Part (Part I), compensation shall be paid to such workman or his dependents * * * unless *such injury* was, in the opinion of the Board, intentionally caused by such workman, or was wholly or principally due to intoxication or serious and wilful misconduct on the part of the workman, or to a fortuitous event unconnected with the industry in which the workman was employed.

The only other provision in the statute, material to the question, besides s. 2(*m*) and those which I have above quoted from s. 3(1), is that of s. 2(*v*), which is that "'workman' includes a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied".

It is to be borne in mind, therefore, in the first place, that s. 7 and s. 3(1) with the words "mine rescue work" incorporated in it are to be read together, so that the concluding words of s. 3(1) "and any employment incidental thereto or immediately connected therewith" are to be deemed as being embodied in s. 7. This, I think, points directly against any intention to narrowly restrict the word "employment", as used in s. 7, to the workman's ordinary work as designated in his contract of service.

It may well be that the word "employment" in s. 7 might *prima facie* point to employment as fixed by the contract of service, but that it was not intended to restrict it to that alone would appear to be conclusively indicated by the language of the proviso "unless such injury * * * was wholly or principally due * * * to a fortuitous event unconnected with the industry in which the workman was employed." The last quoted words themselves imply that there may be an injury arising out of and in the course of a workman's employment within the meaning of the first part of the section, which is, not wholly or principally due, but in part due, to a sudden emergency, which may be outside the scope of a workman's ordinary work but connected with the industry in which he is employed; otherwise why except from the provisions of the preceding clause a fortuitous event "unconnected" with that industry? It is clear beyond all question that, so far as concerns the fortuitous event to which the injury claimed for may be in

part due, it is not the particular workman's particular work with which it must be connected, but "the industry in which the workman was employed".

No such provisions as these are contained in the Imperial *Workmen's Compensation Act*, and yet it has been laid down by the courts again and again that the words "arising out of and in the course of the employment", as they appear in the governing section of that Act, embrace, not only an injury to a workman which arises out of and in the course of the particular work indicated by his contract of employment, but any injury which arises out of or in the course of anything the workman does which is reasonably incidental to such work.

To limit "employment" to the actual, particular work the workman is engaged to do, in this case, would be to limit it to the actual work of mining coal. Baxter, J., in his very exhaustive opinion in fact says: "The work which all these men were employed to do was to mine coal", but he adds: "The orders, express or implied, of the employer must be in relation to that occupation *or the things incident to it,*" thereby fully recognizing the principle that not only the usual work of the workman is to be regarded but anything he may do which is incidental thereto. That learned Judge also quoted the dictum of Lord Atkinson in *St. Helen's Colliery Co.* v. *Hewitson* (1), regarding the test which the latter said he had been rash enough to suggest, viz:

> that a workman is acting in the course of his employment when he is engaged "in doing something he was employed to do," or what is, in other and, I think, better words, in effect the same thing—namely, when he is doing something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract of service.

With all deference, I venture to think that the learned Judge of the Appeal Division laid too much stress upon this dictum, and attached to it a narrower meaning than Lord Atkinson himself intended. The very illustrations the latter gives in the next following paragraph seem to me to shew that when he spoke of "duty" he had no thought of restricting its application to something the workman was actually obliged to do by his contract of service. "For instance", he says,

(1) [1924] A.C. 59.

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haymakers in a meadow on a very hot day are, I think, doing a thing in the course of their employment if they go for a short time to get some cool water to drink to enable them to continue the work they are bound to do, and without which they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment and sit down on their employer's premises to eat food to enable them to continue their labours.

Workmen stopping work for the moment and going to get some cool water to drink or sitting down on their employer's premises to eat food cannot surely be said to be doing something in discharge of a duty to their employer either directly or indirectly imposed upon them by their contract of service, if the word "duty" is to be read in its strict literal sense; yet Lord Atkinson himself gives these very instances as instances of cases which would fall within the terms of his test.

There are numerous cases under the Imperial *Workmen's Compensation Act,* as well as under the Imperial *Employers' Liability Act,* which the *Workmen's Compensation Act* replaced, which shew that such statutes should not be narrowly construed against workmen, but that on the contrary they should be given a large and liberal interpretation in their interest. In *Gibbs* v. *Great Western Ry. Co.* (1), a case under the Imperial *Employers' Liability Act* (1880), Brett, M.R., used these words:

> This Act of Parliament having been passed for the benefit of workmen, I think it is the duty of the court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore *as largely as reason enables one* to construe it in their favour and for the furtherance of the object of the Act.

Few instances furnish any better illustration of this principle than those given by Lord Atkinson of his own suggested test of the meaning of the words "arising out of and in the course of their employment". Suggested tests are, no doubt, often most useful as aids in solving the question involved, but the truth is, as Lord Dunedin put it, in *Trim Joint District School Board* v. *Kelly* (2), already cited, and referring to his own remarks in *Plumb* v. *Cobden Flour Mills Co.* (3), in which latter Lord Atkinson as well as Viscount Haldane, L.C., and Lord Kinnear concurred, "the ultimate criterion must always be found in the words

(1) (1884) 12 Q.B.D. 208. (2) [1914] A.C. 667.
(3) [1914] A.C. 62.

of the Act itself, and not in tests, explanations, or definitions given by judges, however eminent", or, as Viscount Haldane in the same case said: "Having regard to the conflict which exists between judicial opinions expressed in some of the decided cases, the only safe guide appears to me to be the language of the Act of Parliament itself."

It goes almost without saying that it would be quite impossible for any one to devise any test which would apply to all of the many and differing cases which are constantly arising under Workmen's Compensation Acts.

Mr. Justice Baxter, however, quotes in part a dictum from the opinion of Lord Macmillan in *Sparey* v. *Bath Rural District Council* (1), which seems to me to define in the clearest possible way the real issue which the Compensation Board had to consider in the case at bar, namely:—

> The question is whether the workman when he was injured was in his capacity as an employee doing something referable to his employment or was in his capacity as a citizen doing something independent of his employment.

This helpful dictum, however, does not attempt to define the scope of the word "employment", but the sentence immediately preceding it, with equal clearness, sheds valuable light upon the question of employment also. In this he says:—

> The place where an accident occurs to a workman is not the determining element in deciding whether it occurred in the course of the employment, though it may be a very important element, *for the course of employment is not a matter of physical locality but of legal relationship.*

There is no suggestion in the whole dictum of either narrowing or enlarging the meaning of the words "course of employment" as they stand in the statute. As to this, he points out, it is a question purely of legal relationship, dependent on considerations of various and differing facts and circumstances. The *locus* of the accident may be one, but it alone is not necessarily conclusive one way or the other. What the learned Lord says as to place, would obviously similarly apply as to time or any other fact bearing on the question of the scope of the workman's employment, such, for example, in the case of an attempted rescue, whether the person sought to be rescued was a fellow workman or a stranger to the employment in which he was engaged.

(1) (1931) 48 T.L.R. 87, at 91.

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In this view and having regard to the special provisions of the New Brunswick Act already discussed, I cannot for my part appreciate upon what logical ground the word "employment", as used in this Act, can be said to be limited to the particular work described in his contract of service.

That a workman may be impliedly authorized in an emergency to do something which does not fall within the scope of his ordinary duties under his contract of service must now, I think, be taken to be a settled rule of law. As Scrutton, L.J., said in *Culpeck* v. *Orient Steam Navigation Co.* (1):

> There have been many cases where the servant of the employer has done something quite outside his ordinary duties, but has done that something in his master's interests, as, for instance, in the case of a fire, or of a thief stealing ship's stores. There have been many cases where the action of the servant has been justified by the general duty of protecting his master's interests in an emergency, although he has embarked on work which he had not been specifically engaged to do.

See particularly *Rees* v. *Thomas* (2); *London & Edinburgh Shipping Co.* v. *Brown* (3); and *Poland* v. *Parr* (4).

Baxter, J., suggests that this principle applies only to emergencies in which the employer's property is involved. With every respect, I think that the principle is not so limited, and that it applies to any emergency in which the interests of the employer are in any manner involved. No consideration of property was involved either in *Culpeck* v. *Orient Steam Navigation Co.* (5) or in *London & Edinburgh Shipping Co.* v. *Brown* (6). The latter case was the case of a stevedore, entirely of his own volition and on his own suggestion, leaving his work on the quay, where he was employed, and going into the hold of a vessel where his work did not require him to go, for the purpose of rescuing a workman, engaged with another crew of men employed by the same employer, who had been overcome by noxious gas in the bottom of the hold. As in the case at bar, Brown was himself overcome and lost his own life. Why should the rule be limited simply to emergencies in which only property interests are involved? Surely an

(1) (1922) 15 B.W.C.C. 187, at 189.
(2) [1899] 1 Q.B. 1015.
(3) (1905) 7 Fraser, Session Cases, 488.
(4) [1927] 1 K.B. 236.
(5) (1922) 15 B.W.C.C. 187.
(6) (1905) 7 Fraser, Session Cases, 488.

emergency which involves the lives of a foreman and other employees as well as those of children in a mine shaft which is in the control of the employer is of as much importance to the employer as the emergency of a horse running away, as was the case in *Rees* v. *Thomas* (1), or of a supposed intention on the part of a boy to steal a few handfuls of sugar from a truck moving along a public highway, as was the case in *Poland* v. *Parr* (2). It is true, as the learned Judge of the Appeal Division points out, that in *Poland* v. *Parr* (2), Atkin, L.J., in the course of his judgment, does say: "Any servant is as a general rule authorized to do acts which are for the protection of his master's property", but a perusal of this judgment shews that the quoted statement is given as a mere illustration of the principle he was expounding. The essence of the judgment is to be found in the words: "A servant may be impliedly authorized in an emergency to do an act different in kind from the class of acts which he is expressly authorized or employed to do."

The clear result of the cases, in my opinion, is that the scope of a workman's employment, as indicated in his contract of service, whatever it is, may be impliedly enlarged by the occurrence of an emergency without any intervention on the part of the employer, and that, if the employment is thus enlarged, anything which the workman does in such an emergency is to be deemed quite as much a part of his employment as if it were comprehended in the contract of service itself.

It is, of course, beyond question that the employer may himself either expressly or impliedly enlarge the scope of the workman's employment under his contract of service without regard to any question of emergency. He could not, of course, as Baxter, J., suggests, by doing so enlarge the scope of the word "employment", as used in the Act, but unless the Act itself restricts its scope so as to exclude anything which may be done under such express or implied authority—which, I have already pointed out, it does not—no such question as that suggested by His Lordship can arise.

The vital question raised by the claims is not whether the act of Betts and Gallant in descending into the mine

(1) [1899] 1 Q.B. 1015. (2) [1927] 1 K.B. 236.

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shaft was a duty which their contract of service as coal miners imposed upon them, as the Board manifestly assumed, but whether, in going to and participating in the work of rescue which the mine manager had undertaken at the shaft, they were doing something which they were either expressly or impliedly authorized to do.

It is apparent that the proper solution of this question demands consideration of the entire evidence regarding the company's responsibility for the condition of the idle shaft and the presence in it of the noxious gas as well as its responsibility for the protection of that shaft as a source of danger; the giving of the alarm, the participation of the mine manager in the work of rescue, his bringing Bauer and other employees to the scene of the peril, and especially his directions as to the summoning of other employees from the neighbouring shafts. It is equally apparent from its decision that the Board ignored all such evidence, though it states that the evidence seemed to be clear and uncontradicted, and, we think also, from an examination of the entire evidence as contained in the appeal book, that the case was one in which the Board might well have found that the deaths of the applicants' husbands were caused by accident arising out of and in the course of their employment within the contemplation of the Act.

In the view I take of the case, it is needless to discuss the cases of *Jones* v. *Tarr* (1), or *Mullen* v. *Stewart* (2), which were so strongly relied upon by the respondent's counsel, further than to say, that they, like the cases relied upon by the appellant's counsel regarding the rule as to the occurrence of an emergency extending the scope of a workman's employment, all lacked the important feature which the case at bar presents with respect to the employer himself intervening in the emergency and summoning his employees from the scene of their work to take part in the rescue work.

I should have no hesitation in holding, in the circumstances disclosed by the evidence, that if the mine manager was responsible for the summoning of the unfortunate men from the scene of their work to help in the work of rescue, which he was directing as the manager of the mining company, their deaths while participating in the work of rescue

(1) [1926] 1 K.B. 25. (2) (1908) 1 B W.C.C. 204.

were caused by accident arising out of and in the course of their employment within the contemplation of the Act. The difficulty is that this particular question as to their going to and participating in the rescue in consequence of orders or directions expressly given by the mine manager is entirely a question of fact, upon which, in the absence of a finding by the Board, we are precluded, we think, on such an appeal as this from ourselves making any such finding, notwithstanding the Board's statement that the evidence is uncontradicted.

After much anxious consideration of this aspect of the case, I have concluded that all we can do is to send the case back to the Board for reconsideration in the light of what we have here held to be the true construction of s. 7 of the statute.

The appeal should be allowed with costs in this Court and in the Appeal Division.

Appeal allowed with costs, and judgment in the terms indicated.

Solicitors for the appellants: *Weldon & McLean.*

Solicitor for the respondent: *Nigel B. Tennant.*