

July 23

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to this sum, and asking that the causes be stayed. Amongst others, an answer to the petition was filed by a widow of one of the deceased seamen on behalf of herself and her unborn child. It was replied that she had no claim, but subsequently the petitioner admitted that she had a claim, but persisted that no person not in existence could have a claim. The argument put forward on behalf of the petitioner was that an unborn child was not a person in existence, and it was said that it had suffered no pecuniary loss. Against that, counsel for the unborn child said he was asking only that the child be allowed to claim in the ordinary way when born. Sir Robert Phillimore expressed the view that the Act does not require as a condition precedent to a right of action that the child should be in existence, but in his decree he reserved leave to the infant to prove his claim when born. How, in view of the requirement that there can be only one action, this was to be done I do not know, unless the widow's right was also postponed. In vol. XXIII. of Halsbury's *Laws of England* (2nd ed.) at p. 62, the learned author of the article on Negligence says in a footnote that in such a case the claim cannot be made on behalf of the infant until it is born. No authority is cited for the proposition, and I assume it is the author's reading of what was done in *The George and Richard*, (1871) L.R. 3 A. & E. 466. Then in the workers' compensation case to which Mr. Barry referred, *Williams v. Ocean Coal Co. Ltd.*, [1907] 2 K.B. 422, it was held that a posthumous child was a dependant within the scope of the Workmen's Compensation Acts, but the Master of the Rolls, in a judgment concurred in by the other Judges, said he so found on the ground that a child *en ventre* is deemed to have been born for such purposes as may be necessary for the child's benefit. He purported to follow the decision of the House of Lords in *Villar v. Gilbey*, [1907] A.C. 139. In 1935, in *Elliot v. Joicey* (Lord), [1935] A.C. 209, the House of Lords again dealt with the question, and it was there held by more than one of the learned Lords that the fiction of law that treats an unborn child as born applies only in cases when the application of the fiction enables the child to take a benefit to which it would be entitled if born. That case seems to reinforce the opinion of Cozens Hardy, M.R., in *Williams v. Ocean Coal Co. Ltd.*, [1907] 2 K.B. 422. Mr. King raised the question whether any dependancy was possible in the case of an unborn child. The Court of Appeal in *Schofield v. Orrell Colliery Co. Ltd.*, [1909] 1 K.B. 178, appeared to think that there can be dependancy. It seems that what authority there is is in favour of the view that a child *en ventre sa mère* has a right of action, but whether that right is a vested right which enables a claim to be made on its behalf before birth or only becomes vested when it is born alive, is a difficult question on which I do not intend to express an opinion, as in any event I consider a stay should

be granted. There is evidence that the child will probably be born in June, and there is no jury list before June and another jury list in July.

If the action were to proceed now, and subsequently the child were stillborn, the damages might be greatly increased. Then there is the grave difficulty of the division of the damages between mother and child when the sex of the infant, and whether it is born crippled or mentally deficient, are unknown. These are all matters which might affect the jury in awarding damages, while a widow without a child might be better off financially than if her husband were alive. The plaintiff is only nineteen years of age, and may have an earning power exceeding that of her late husband. On the other hand, as Mr. Barry pointed out, the widow may die in childbirth and so lose her own right, which is a vested one; but, as Mr. King has said, that is not a common result of childbirth, and in these days the risk is slight. Mr. King urged that in any event her action would survive to her executors, but I doubt very much if it would.

But in any event the balance of convenience seems to be in favour of granting a stay of the trial until the birth of the child or further order, and if the child be stillborn I grant liberty to the defendants to apply to strike out of the statement of claim all reference to it.

Order accordingly.

[Solicitors—For the plaintiff, John W. Galbally; for the defendants, Arthur Robinson and Co.] F. M. B.

[A male child having been born in June, the claim was settled without a trial.]

FULL COURT—(Macfarlan, Lowe } Dec. 11-15,
and O'Bryan, J.J.) } 1939.

**TILBURY AND LEWIS PTY. LTD. v.
MARZORINI.**

Factories and Shops — Wages board determination—Provisions of relevant Federal award—Not incorporated in board's determination — Statutory provision for such incorporation—Directory or mandatory—Factories and Shops Act 1928 (No. 3677), sec. 178—Factories and Shops Act 1934 (No. 4275), sec. 23—Factories and Shops Act 1936 (No. 4461), sec. 5 (2).

Section 23 (1) of the Factories and Shops Act 1934 (as amended by section 5 (2) of the Factories and Shops Act 1936) provides that where a Federal award has been made with respect to any industry, any Wages Board for the trade concerned shall, "as soon as may be" incorporate in its determination certain of the provisions of the Federal award.—

Held (Macfarlan, J., dissenting), that the legislation as to the incorporation of the award provisions is directory and not mandatory, and the validity of the board's determination is not dependent upon its having those provisions incorporated.

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Per Lowe and O'Bryan, JJ.—1. For the purposes of section 23, a "trade concerned" by an award means a trade the employers or employees in which by virtue of the award acquire rights or privileges, or come under obligations or liabilities.

2. A Wages Board is not entitled to enter upon any inquiry as to the validity of a Federal award; but may take notice of any proceedings pending before an appropriate tribunal directed to challenging the award.

APPEAL from Gavan Duffy, J.

A Wages Board for electroplaters made a determination dated 1st March, 1939, without incorporating in it the provisions of existing awards made by the Commonwealth Court of Conciliation and Arbitration, with respect to employers and employes in the industry. Upon the application of Tilbury and Lewis Pty. Ltd., a Company affected by the determination, and Charles Herbert Grant, industrial officer of the Victorian Chamber of Manufacturers, a rule *nisi* was granted, under sec. 178 (1) of the Factories and Shops Act 1928, calling upon F. A. Marzorini, chief inspector of factories, to show cause why the determination should not be quashed for illegality, in that the board had failed to incorporate the provisions of the Federal awards.

Gavan Duffy, J., made an order discharging the rule *nisi*, and the applicants appealed.

Lewis and *Ellis* for the appellants.—The determination is illegal in that three Federal awards containing provisions which the Wages Board should have incorporated were not included—Factories Act 1934, sec. 23 (1); Factories Act 1936, sec. 5 (2). The board has no power to fix wages rates differing from those in the award—*Reg. v. Shire of Huntly, Ex parte Tootell*, (1887) 13 V.L.R. 606.

T. W. Smith for the respondent.—The determination is not rendered invalid by reason of any inconsistency with the award. The direction in the amended sec. 23 is for the incorporation of the award provisions, "as soon as may be," and thus is not peremptory. The effect of omitting such provisions is not specified. Various difficulties of law and fact may be involved in the question of applying sec. 23, and great inconvenience would follow if the determination was invalidated in the way contended—*Montreal Street Railway Company v. Normandin*, [1917] A.C. 170; *Middlesex v. The Queen*, (1884) 9 App. Cas. 757; *Caldow v. Pixell*, (1877) 2 C.P.D. 562.

Lewis in reply.—The words "as soon as may be" are the equivalent of "forthwith." In the cases cited there was no remedy applicable for establishing the alleged illegality. The determination is effective until it is quashed. It is illegal in that it is not in accordance with the requirements of the statute, and it should be quashed because it adversely affects the

rights of individuals. He referred to *Chief Inspector of Factories v. Watsford*, (1936) 55 C.L.R. 276, [1936] A.L.R. 294.

MACFARLAN, J.—This was an appeal from a decision of His Honour Mr. Justice Gavan Duffy discharging a rule *nisi* under sec. 178 of the Factories and Shops Act 1928, which called on the chief inspector to show cause why a determination of the Electroplaters' Board, dated the 1st March, 1939, should not be quashed either wholly or in part for the illegality thereof. By sec. 23 (1) of Act No. 4275 of 1934 (as amended by sec. 5 of Act No. 4461 of 1936), which amends the Factories and Shops Act 1928, it is provided that—"Where under any Commonwealth Act 'the Commonwealth Court of Conciliation and Arbitration or a Conciliation Commissioner makes or 'has made an award with respect to employers and 'employes in any industry the Wages Board for 'every trade concerned as soon as may be shall so 'far as the provisions of such award are provisions 'which that Wages Board is under the Factories and 'Shops Acts empowered to include in its determination incorporate such provisions as varied from time 'to time in any determination of that Wages Board 'and thereupon the provisions so incorporated shall 'be deemed to apply as if they were included in a 'determination of that Wages Board made in accordance with the provisions (other than this section) 'of the Factories and Shops Acts.'"

The appeal to this Court was based on various grounds, and various answers or objections were urged by Counsel for the respondent, but the only question with which the Court is concerned at present is the broad contention of Counsel for the respondent that, on the proper interpretation of the section which I have read, the requirement to incorporate as soon as may be the provisions of an award in the cases therein mentioned is not mandatory but directory merely; the Court having intimated to Counsel that it proposed to deal first with this aspect of the case and to postpone consideration of the other objections or answers which were made to the appeal.

I have had an opportunity of reading the judgment of my brother Lowe, in which I understand my brother O'Bryan concurs, and I confess that I have been very much impressed with their grounds for holding that the provisions of the section are directory and not mandatory, in the sense that the Court would not quash the determination for illegality by reason of the fact that it does not incorporate the provisions of an existing award as provided for by the section. But, for the purpose of the present case, this Court is assuming (to put it briefly) that an award has been made by the Court of Conciliation and Arbitration which contains provisions with regard to the trade of electroplaters: that that trade is a trade concerned, that those provisions are provisions

which the Wages Board has power to include in its determination, and that the Wages Board has thereafter made a determination, but that though it has had ample time to incorporate those provisions it has not done so. The question whether the provisions of a particular statute are mandatory or, in spite of the use of the word "shall," are directory merely, has often been debated, and Counsel for the respondent relied strongly on passages from two cases. In *Justices of Middlesex v. The Queen*, (1884) 9 App. Cas 757, p. 778, Lord Blackburn says—"There are many cases—I was not aware that this point was to be raised and I have not looked into them and I cannot refer to them—but there is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory in the sense that they were not meant to be a condition precedent to a grant or whatever it may be, but a condition subsequent, a condition as to which the responsible persons may be blameable and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done, third persons having nothing to do with that." The other passage is to be found in *Montreal Street Railway Company v. Normandin*, [1917] A.C. 170 at p. 175, where the Privy Council say—"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done." The judgment proceeds to give numerous instances of the application of that principle.

But an examination of these and other cases on the subject makes it clear to my mind that the provisions which the Court held to be directory and not mandatory are procedural provisions or provisions as to time, and not substantive provisions. In the case more particularly of provisions as to time it is true that in one sense it is difficult to separate such provisions from the substantive provisions of the statute—the substantive thing required to be done. But the actual decisions in the cases where something is required to be done within a certain or ascertainable time are that the provisions as to time are in certain cases directory merely and not mandatory in the sense and with the result that the acts once done are not illegal or invalid merely by reason of the fact that they are done after the expiration of the specified period. That is a very different thing from holding that where (1) the Legislature imposes a public duty on a body like a wages board to incorporate certain provisions in any determination made by it within a

specified or ascertainable time; (2) it is established with certainty that the time for such incorporation has elapsed; (3) that the board has had ample time and opportunity to incorporate the provisions required to be incorporated; (4) that the board thereafter makes a determination but refuses or neglects to incorporate those provisions; (5) that the result of the refusal or neglect is that the determination of the board as it stands imposes or continues to impose obligations and/or liability to penalties on employers or employees bound by the determination to which they would not be subject if the requirement of the Legislature had been obeyed; (6) that the object or will of the Legislature is accordingly defeated by the refusal or neglect of the board—the Court would not have power, and in some cases would not be bound, to quash the offending determination in whole or in part.

I agree that the words "as soon as may be" should be interpreted in a liberal sense, that in effect every allowance would be made for the difficulties of the board and, it may be, that in case of doubt every presumption of fact should be made in its favour in arriving at a conclusion whether the time "as soon as may be" has elapsed. But in deciding the present question the Court, as already indicated, for the purpose of determining the present question, is assuming and must assume that an award has been made in an industry which contains provisions with regard to the trade of electroplaters, that there has been ample time to incorporate those provisions, that the board has actually thereafter made a determination, and has either refused or neglected to incorporate those provisions in it, and that the result is to impose obligations on employees and others to which they would not be subject if the requirement of the Legislature had been observed.

The passage which I have read from *Montreal Street Railway Company v. Normandin*, [1917] A.C. 170 at p. 175, is qualified by the words "and at the same time would not promote the main object of the Legislature." In the present case a number of circumstances have been put forward to show that to quash the offending determination would work serious inconvenience or injustice to persons who have no control over those entrusted with the duty of incorporating the provisions of an award. It is true that it may give rise to serious inconvenience, but that may be said to be the result of quashing any determination of a wages board. Section 178 clearly contemplates the result that a determination may be quashed, and it appears to me that the same argument may be put in any case. It is said that the effect of quashing may be to revive a determination which itself would not incorporate the provisions of the award. That may or may not be so. If it is so it may merely indicate the necessity of quashing the previous determination as well, or it may point to the

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alternative of quashing in part only the offending determination—in order to clear the ground for other remedies. I should point out that by sec. 178 (2) of the Factories and Shops Act 1928 every determination of a wages board, unless and until quashed, is to have and be deemed and taken to have the like force and validity and effect as if it had been enacted in the Act itself, and shall not be in any manner liable to be challenged or disputed. That rather emphasises what I have endeavoured to stress, viz., the subversive results of what the Wages Board has done or failed or neglected to do in the case supposed. Where its provisions are clearly contrary to and inconsistent with the provisions which the Legislature has intended should be the provisions of the determination, and they cannot be questioned otherwise, then to quash the determination is one necessary step to giving effect to the intention of the Legislature.

That leads me to another matter which is touched on by His Honour Mr. Justice Gavan Duffy, who expresses the view that in an appropriate case the board could be compelled to make the preliminary inquiries necessary, *e.g.*, to ascertain whether, so far as it is a matter of fact, the trade in question is a "trade concerned." It would appear to follow that the board could be compelled to do the very thing required by the Legislature, viz., to incorporate the provisions of the award. There is certain authority on the point that *mandamus* applies in the case of provisions which in effect the Court holds are mandatory, so far as they are substantive, but merely directory so far as they prescribe a time for carrying out those substantive provisions. *R. v. Sparrow*, (1740) 2 Strange 1123, and *R. v. The Mayor of Rochester*, (1857) 7 E. & B. 910, are cases in which the Court interfered to compel acts which were required by the statute to be done within a certain time to be performed after the expiration of that time. It is in that sense only that the provisions of sec. 23 (1), as amended, are in my opinion directory and not mandatory. Non-compliance invalidates the determination, but the act may still be done after and even compelled to be done after the lapse of the prescribed time, and these decisions rather favour than discount the view that in the true sense the provisions of the section are mandatory and not merely directory.

It seems to me to be no objection to quashing an offending determination that another step may be necessary in order to implement the object of the Legislature.

For those reasons I have been unable to agree with the decision of the majority of this Court. My view, of course, still leaves open, *inter alia*, the question whether the assumptions on which the Court has proceeded are justified by the facts of this particular case.

LOWE, J., read the following judgment:—This is an appeal from an order of Gavan Duffy, J., discharging an order *nisi* to quash a determination of the Electroplaters' Board for the illegality thereof.

Section 23 of the Factories and Shops Act 1934 had provided—" (1) Where under any Commonwealth Act "the Commonwealth Court of Conciliation and Arbitration or a Conciliation Commissioner makes or has "made an award with respect to employers and employees in any industry the Wages Board for every "trade concerned as soon as may be shall so far as "the provisions of such award are in the opinion of "that Wages Board provisions proper to be included "in a determination of that Wages Board (whether "by a unanimous decision or otherwise) incorporate "such provisions as varied from time to time in any "determination of that Wages Board and thereupon "the provisions so incorporated shall be deemed to "apply as if they were included in a determination "of that Wages Board made in accordance with the "provisions (other than this section) of the Factories "and Shops Acts," thus making the opinion of the Wages Board the criterion as to the propriety of including in its determination any of the provisions of an award of the Commonwealth Court of Conciliation and Arbitration or of a Conciliation Commissioner. This section was amended by sec. 5 of Act No. 4461, which deletes the language relating to the opinion of the board and inserts other words.

The amended section now reads, so far as material—"The Wages Board for every trade concerned as soon "as may be shall so far as the provisions of such "award are provisions which that Wages Board is "under the Factories and Shops Acts empowered to "include in its determination incorporate such provisions as varied from time to time in any determination of that Wages Board."

The applicants allege that there were existing awards of the Commonwealth Court in relation to which electroplaters were a "trade concerned," that these awards contained provisions which the Wages Board was under the Factories and Shops Acts empowered to include in its determination, that ample time had elapsed and opportunity been given for incorporating such provisions in the determination of the Electroplaters' Board, and that this board had on the 1st March, 1939, made a determination which did not include these provisions or any of them, and included provisions which were actually inconsistent with the awards. They therefore contended that the determination was illegal and sought under the provisions of sec. 178 (1) of the Factories and Shops Act 1928 to have the determination quashed. Obviously this contention rests on the view that sec. 23 in its present form requires the incorporation in a determination of the provisions of an award so far as is within the powers of the board as a condition of the legality of the determination. The respondent, on the

other hand, has strongly contended that there is no such requirement expressly, and that failure on the part of the board to obey it does not invalidate the determination.

At an early stage of the argument it became apparent that the question of construction of the section was a vital one, and if determined in the respondent's favour would render unnecessary a lengthy examination of the provisions of the awards and determination in question and a comparison thereof. The Court therefore requested Counsel in the first place to confine their arguments to questions of construction of the section, indicating that if its ultimate view on these questions rendered it necessary to consider the actual provisions of the awards and determination the Court would hear Counsel on these matters.

For the purpose of construing the section it may be assumed that the applicant's allegations are established as to the existence of Commonwealth awards containing provisions which the Wages Board is empowered to include and which it has failed to include, after due opportunity, in the determination it has made, and that by reason of failure the determination is inconsistent with the awards.

There are two matters of interpretation arising out of the language of sec. 23 which I shall refer to before dealing with the question whether the proper implication arising from the relevant language is to make incorporation a condition of the validity of the determination. The section refers to an award. This I think means a *de facto* award. The Wages Board must take the award as it finds it, and I do not think that it is open to the board to enter upon any inquiry as to the validity of the award. This is not to say, however, that if proceedings were pending before an appropriate tribunal to challenge the award it would be improper for the board to take notice of such proceedings in considering the statutory injunction to act "as soon as may be."

A question also arises as to what is a "trade concerned" in an award. The language is undoubtedly vague, but when the difficulties arising in industries and trade from the Federal organisation of the Commonwealth are borne in mind (and they are notorious) I do not find great difficulty in seeing what the Legislature intended by this language. The Legislature sought to remove any foundation for the sense of unfairness and the irritation which were aroused among members of the same trade doing the same class of work, some of whom worked under the provisions of a Federal award and some under the differing conditions of a State determination, and its method of achieving this aim was to have the same provisions (so far as the board was by law empowered to act) operating throughout. The board had no power to deal with an award, but it is given power to achieve the result by incorporating in the deter-

mination provisions of the award. In my opinion a trade is a "trade concerned" by an award whenever employers or employees in that trade, by virtue of the award, acquire rights or privileges or come under obligations or liabilities. If this position exists, then the board will have to consider how far the provisions of the award are such as by the Factories and Shops Acts it is empowered to include in its determination. It will be seen that this view differs from a view expressed by Martin, J., as President of the Court of Industrial Appeals, though it is possible that the practical result of the view he expressed may not be very different from the result of the view I have indicated.

I am now in a position to consider the proper construction of the words "as soon as may be shall so far as the provisions of such award are provisions which that Wages Board is under the Factories and Shops Acts empowered to include in its determination incorporate such provisions." Does failure to comply with this injunction render invalid the determination, or must compliance be enforced by means other than sec. 178 (1)? Section 23 as amended does not itself prescribe the remedy for disobedience of its requirements: the language of other parts of the Act must be considered, but it is clear that the Court, in answering this question, is not confined merely to the language used. The purpose of the legislation and the consequences which would ensue from holding that failure to comply with the requirements of the language renders the act void, are always of importance. So, too, is the question whether the matter dealt with is one of public duty or private right. And the Courts have found it easier to construe affirmative words as subsidiary to the main purpose of the legislation, and consequently not to impose conditions and, as it is said, to be merely directory, than they have so to construe negative words.

"It is clear that the word 'shall' is not always 'used in a mandatory sense. There is abundance of 'authority to the contrary in cases where it has been 'held directory merely'—*per* Lopes, L.J., in *In re Lord Thurlow, Ex parte Official Receiver*, [1895] 1 Q.B. 724 at p. 731. Erle, J., in *R. v. Deverell*, (1854) 23 L.J.M.C. 121 at p. 123, thought a direction that a notice "shall be forthwith given" was merely directory. In *R. v. Ingall*, (1876) 2 Q.B.D. 199, a statutory direction that "overseers shall make and deposit the 'valuation list before the 1st of June" and "shall 'transmit the valuation list" within a certain time, was not complied with within the specified time, but the Court held that the provisions were not mandatory but merely directory. A similar view was taken in *Caldow v. Pixell*, (1877) 2 C.P.D. 562, but it is unnecessary to multiply citations. Criticism has been directed to the use of the terms "mandatory" and "directory," and certainly care must be exercised in looking to the sense in which they are used. The

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method of construction, however, is well established where the considerations mentioned above point to that conclusion. The section in question is dealing with a public body—a wages board. It is to act “as soon as may be.” How soon it can act may depend on many considerations. There may be a number of awards to consider (in this case there are at least three). The board may be considering other questions. It may be necessary to investigate the identity or similarity of processes or work dealt with by the award before the board feels itself capable of acting, and there may be other questions which this Court, through unfamiliarity with the work involved, cannot even state. Again if the applicant’s contention that the determination which fails to incorporate the provisions of an award is quashable under sec. 178 is given effect to the Court may have to investigate elaborately matters which it little understands, though when an appeal is brought it is thought necessary to have on the Court of Industrial Appeals skilled representatives of the employers and employees. It is difficult to suppose that non-compliance with the provision in sec. 23 of Act No. 4275 could have been the subject of an application under sec. 178 (1) of the Factories and Shops Act 1928, and what has been altered by the amendment is not the frame of the section, but the content of the matter to be incorporated. That no longer is determined by the opinion of the board, but by the fact that it is part of a Federal award. This suggests that the Legislature was not giving to the word “shall” a meaning which it did not previously bear, but was setting up a different criterion for incorporation. All these matters point against the implication of invalidity being read into sec. 23. It seems to me also to be not immaterial that the Act itself contains other machinery for rectifying the position if the board fails to incorporate such provisions of an award as sec. 23 contemplates. The Governor-in-Council and the Minister are both to exercise a supervision of the working of determinations and to act as the Act directs where they deem it advisable. Section 179 (1) permits the Governor-in-Council to suspend the operation of a determination whereupon the Wages Board must reconsider the matter. And the Minister is, by sec. 184 (2), empowered to refer the determination to the Court of Industrial Appeals for its consideration. Moreover the parties concerned may in the prescribed manner appeal against the determination to the Court of Industrial Appeals, which by sec. 184 (6) has full power to deal with the matter, though I am not so clear what the position would be if the Court of Industrial Appeals thought some provision as to price or rate of an award which concerned the trade had or might have the effect of prejudicing the progress, maintenance of or scope of employment in the trade or industry affected by such price or rate—see sec. 183. With these courses open to ensure compliance with

the will of the Legislature I find it difficult to suppose that Parliament left to implication in sec. 23 a further power to have the determination quashed for invalidity.

Lastly, let us consider the consequences of holding illegal a determination which fails to incorporate the provisions of an award. At least a position of great uncertainty is created as to whether the trade is then regulated by any determination. If it is a first determination of the board, when that is quashed there is no determination regulating the trade. If it is not the first determination the position is full of difficulty. The Factories and Shops Acts contemplate that a determination is superseded by a later one of the board or of the Court of Industrial Appeals—secs. 171, 184; and even though a determination be ultimately quashed by the Court, it is valid until quashed—sec. 178 (2). Is the preceding determination then to revive, since it is at that stage plain that it was never superseded by a valid determination? If it does revive, then the trade is for the time being regulated by a determination which there is reason to think does not or may not express the views of the board as to the proper conditions of work and pay in the trade. And this preceding determination may itself be challengeable, because it does not incorporate the provisions of the award (and so as to determinations preceding it). If it does not revive, then the position is the same as where a first determination is quashed. Where the consequence of reading into the language of an Act the implication of invalidity is that persons who are no parties to the non-performance of the act commanded may suffer injustice, an additional reason is afforded for not making that implication. “When the provisions of a statute ‘relate to the performance of a public duty,’” said the Privy Council, “and the case is such that to hold ‘null and void acts done in neglect of this duty’ ‘would work serious general inconvenience or injustice’ ‘to persons who have no control over those entrusted ‘with the duty, and at the same time would not ‘promote the main object of the Legislature, it has ‘been the practice to hold such provisions to be ‘directory only, the neglect of them, though punishable, not affecting the validity of the acts done’”—*Montreal Street Railway Company v. Normandin*, [1917] A.C. 170 at p. 175.

But it was said in argument that the Courts do not treat the words of a statute as merely directory where the substantial matter commanded by the Legislature has never been performed at all, and that the Courts have only so construed a statute where what has been commanded has in fact been performed though not within the time or in the manner commanded—that the principle of construction only applies (to put it shortly) where there has in fact been obedience and never where there has been disobedience to the statutory command. No doubt many

of the cases which construe words as directory are in fact as contended for, but it seems to me that the objection cannot be sustained. Obedience out of time or otherwise than in the prescribed manner necessarily implies that there has been disobedience within the time or as to the manner prescribed, and each of such cases necessarily denies that invalidity follows from that disobedience. In truth the Courts, in construing words as directory and not mandatory, are necessarily concerned with the substance of the enactment, but concerned for a limited purpose, viz., that of determining whether what has been done is valid or invalid. And it may be remarked that in determining that an enactment is merely directory, the Courts neither affirm nor deny the enforceability of the Legislature's command by other procedure if any such be available. All these considerations lead me to the conclusion that the implication contended for should not be made in sec. 23, and even if the assumptions made above be well founded the determination should not be quashed for illegality.

In my opinion the conclusion arrived at by Gavan Duffy, J., was right, and this appeal should be dismissed, with costs.

O'BRYAN, J.—I concur in the judgment of my brother Lowe. I have nothing to add to the reasons he has given in his judgment.

Appeal dismissed.

[Solicitors—For the appellants, Moule, Hamilton and Derham; for the respondent, F. G. Menzies, Crown Solicitor.] F. M. B.

FULL COURT — (Mann, C.J., }
Lowe and Gavan Duffy, JJ.) } March 1, 15.

WALSH v. COMMERCIAL TRAVELLERS' ASSOCIATION OF VICTORIA.

Factories and shops—Determination of Wages Board—Wages paid lower than prescribed—Owing to misrepresentation as to age—Claim for difference—Estoppel—Counterclaim for deceit and breach of contract—Factories and Shops Act 1928 (No. 3677), sec. 232.

A determination of a Wages Board under the Factories and Shops Act 1928 prescribed a rate of wages for a junior billiard marker and a higher rate for a billiard marker of twenty-one years of age. An applicant for employment as a marker represented that he was nineteen years of age, and he was thereupon engaged as a junior marker and was paid wages accordingly. After his engagement had ceased he disclosed that at the time of the engagement he was over twenty-one years of age, and he sought by action to

recover from his employer the difference between the amount which he had received while employed and the wages payable at the rate prescribed for a marker over twenty-one years of age. The employer counterclaimed for damages for deceit and breach of contract.—

Held, that section 232 of the Factories and Shops Act 1928 imposed a positive duty upon the employer, and accordingly the plaintiff was entitled to recover the amount claimed, and the counterclaim was unsustainable.

APPEAL FROM COUNTY COURT.

James Allan Walsh was employed by the Commercial Travellers' Association of Victoria as a billiard marker, and at the time of his engagement he represented verbally and in writing that he was nineteen years of age. He was therefore paid wages at the rate prescribed by a Wages Board appointed under the Factories and Shops Act 1928 as applicable to junior billiard markers, there being a higher rate prescribed for markers of twenty-one years of age or upwards. Walsh was in fact twenty-four years of age at the time of his engagement; and, after his employment terminated, fifteen months later, he disclosed that fact, and brought an action in the County Court at Melbourne against the Association, claiming the sum of £145 8s. 3d. as being the difference between the amount he had received during his employment and the amount payable to a marker of his age according to the determinations of the Hotel and Restaurant Board. The defendant counterclaimed for £145 8s. 3d. damages for deceit, or alternatively breach of contract of employment, in that the plaintiff had agreed that he was aged nineteen years. The learned County Court Judge entered judgment for the defendant on the claim, and the plaintiff appealed to the Supreme Court.

Collie for the appellant.—Section 232 of the Factories and Shops Act 1928 makes it obligatory to pay the correct wage. Therefore fraudulent misrepresentation can have no effect on the employer's obligation.—*Duncan v. Ellis*, (1916) 21 C.L.R. 379, 22 A.L.R. 188. There can be no estoppel, nor will a counterclaim on the basis of fraud be maintainable, for either of these would defeat the obvious intention of the Legislature as expressed in sec. 232.—*R. Leslie Ltd. v. Sheill*, [1914] 3 K.B. 607.

Dean for the respondent.—*R. Leslie Ltd. v. Sheill* (*supra*) may be distinguished in that sec. 232 does not create an incapacity to contract, and here the contract is valid in every respect save one. The doctrine of estoppel applies. An action for fraud may be maintained.