[HIGH COURT OF AUSTRALIA.]

HARBON . . . . . APPELLANT;
PLAINTIFF,

AND

GEDDES . . . . . RESPONDENT.
DEFENDANT,

THE COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (NEW SOUTH WALES) APPELLANT;
DEFENDANT,

AND

BUTLER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *April* 1, 2.

MELBOURNE, *May* 1.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Claim under Workers' Compensation Act made by worker prior to his death—Compensation received by worker—Claim under same Act made by worker's widow—Amount so claimed paid by employer into office of Commission—Not taken out—Action by widow under Compensation to Relatives Act 1897-1928 (*N.S.W.*)—*Alternative remedies—Option—Knowledge of claimant—"Proceed under this Act"—"Proceed"—Workers' Compensation Act* 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *sec.* 63*.

In an action under the *Compensation to Relatives Act* 1897-1928 (N.S.W.) brought by a widow against her deceased husband's employer, it was pleaded

* Sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.), provides as follows:—"(1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. (2) In such case the worker may, at his option, proceed under this Act or independently of this Act, but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act."

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

that before his death, which resulted from an injury received during his employment, the husband had claimed under, and had received compensation payments and other benefits as provided by, the *Workers' Compensation Act* 1926-1929 (N.S.W.) in respect of the injury which caused his death, and that upon a claim made under the latter Act, by his widow for herself and her children, subsequent to his death and before the action, the employer had paid the full amount payable under the Act into the office of the Commission. It was not alleged that either the husband or the widow was aware of the option conferred by sec. 63 (2) of the Act. The widow neither applied for nor received any part of the amount so paid in.

Held, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the widow was not precluded from exercising the option conferred by sec. 63 (2) of the *Workers' Compensation Act*, and was, therefore, entitled to pursue her remedy under the *Compensation to Relatives Act*:—

By *Rich* and *Dixon* JJ., on the ground that the matters pleaded did not involve legal proceedings as contemplated by the word "proceed" in sec. 63 (2).

By *Evatt* and *McTiernan* JJ., on the ground that it was not shown that either the husband or the widow was aware of, or had really and effectively exercised, the option conferred by sec. 63 (2).

Per Rich, *Starke* and *Dixon* JJ.: The mere making of a claim under the *Workers' Compensation Act* 1926-1929 (N.S.W.), although acted upon by the employer, does not constitute a final election under sec. 63 (2) to claim compensation under that Act.

Per Evatt and *McTiernan* JJ.: Under sec. 63 (2) of the *Workers' Compensation Act* 1926-1929 (N.S.W.) a worker may be debarred from proceeding at common law by reason of his having recourse to the *Workers' Compensation Act*, but, before he can be so debarred, it must appear (i) that the worker did "proceed" and obtain compensation under that Act, and (ii) that the circumstances accompanying the worker's proceeding and obtaining compensation under the Act show that the worker, knowing that he had a right to bring proceedings at common law in respect of the same injury, chose to prefer benefits obtainable under the Act.

Decision of the Supreme Court of New South Wales (Full Court) in *Harbon* v. *Geddes*, (1934) 34 S.R. (N.S.W.) 515; 51 W.N. (N.S.W.) 173, reversed, and in *Butler* v. *Commissioner for Road Transport and Tramways*, (1935) 52 W.N. (N.S.W.) 18, affirmed.

APPEALS from the Supreme Court of New South Wales.

Harbon v. *Geddes*.—An action was brought in the Supreme Court of New South Wales, under the *Compensation to Relatives Act* 1897-1928 (N.S.W.), by Isabella Harbon, on behalf of herself and her four children for damages in the sum of £3,000 in respect of the death of her husband and their father, which was alleged to have

been caused by negligence for which his employer, the defendant W. B. Geddes, was responsible. The defendant pleaded that the deceased was a worker within the meaning of the *Workers' Compensation Act* 1926-1929 (N.S.W.), employed by the defendant, that the injury which caused his death and was the subject of the action arose out of and in the course of his employment and was caused by negligence for which the defendant was responsible, that prior to the commencement of the action the deceased " exercised his option and proceeded under the said statute and had claimed and received compensation as by the said Act provided and had claimed and received medical and other benefits under the same " and that after his death " the plaintiff on her own behalf and on behalf of the said children claimed from the defendant the amount of compensation payable under the said statute in respect of the death . . . and thereupon the defendant paid into the office of the Workers' Compensation Commission . . . the amount of compensation payable thereunder." The plaintiff demurred to the plea. The demurrer was overruled by the Full Court of the Supreme Court on the ground that sec. 63 (2) of the *Workers' Compensation Act* operated to defeat the plaintiff's action, because her husband, having exercised his option to accept benefits under that Act, terminated his right and remedies at common law for the same injury, and the plaintiff's cause of action under the *Compensation to Relatives Act* necessarily depended upon the existence of her husband's right to maintain an action against the defendant: *Harbon* v. *Geddes* (1).

The Commissioner for Road Transport and Tramways (N.S.W.) v. *Butler.*—Dorothy Nina Butler brought an action in the Supreme Court of New South Wales, under the *Compensation to Relatives Act* 1897-1928 (N.S.W.), on behalf of herself and her two daughters to recover the sum of £2,000 as damages for the pecuniary loss sustained by them through the death of her husband and their father, which was alleged to have been caused by negligence for which his employer the defendant, the Commissioner for Road Transport and Tramways, was responsible. The defendant pleaded that the deceased was a

(1) (1934) 34 S.R. (N.S.W.) 515; 51 W.N. (N.S.W.) 173.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

worker within the meaning of the *Workers' Compensation Act* 1926-1929 (N.S.W.), employed by the defendant, that the injury which caused his death and was the subject of the action arose out of and in the course of his employment, and was caused by negligence for which the defendant was responsible, that before the commencement of the action the plaintiff on behalf of herself and her children claimed from the defendant the sum of £850, the amount of compensation payable under the *Workers' Compensation Act*, and required the defendant to pay that sum as required by the Act, and thereupon and pursuant thereto and prior to the commencement of the action the defendant to the knowledge of the plaintiff and the children paid into the office of the Workers' Compensation Commission the sum of £850 being the whole of the amount of compensation payable under the Act in respect of the death of the deceased.

It was not alleged that the plaintiff applied for or obtained any part of that sum. She did not institute any legal proceedings under the Act, nor did she accept satisfaction of her claim thereunder, and she did not obtain any vested right in the sum. A demurrer to the plea was overruled by the Full Court of the Supreme Court upon the ground that the claim by the plaintiff for compensation under the *Workers' Compensation Act*, although it was followed by payment into the office of the Workers' Compensation Commission, did not amount to the exercise of an option under sec. 63 (2) of the Act, and did not preclude her from pursuing the remedy reserved in general terms by sec. 63 (1): *Butler* v. *Commissioner for Road Transport and Tramways* (1).

From these decisions of the Full Court Mrs. Harbon, by special leave, and the Commissioner for Road Transport and Tramways, by leave, now appealed to the High Court.

The appeals were heard together.

Spender K.C. (with him *Evatt*), for the appellant Harbon and the respondent Butler. The purpose of sec. 63 of the *Workers' Compensation Act* 1926-1929 is to prevent a worker from simultaneously exercising two remedies for compensation. All that the section means is that the particular remedy selected in exercise of the option

(1) (1935) 52 W.N. (N.S.W.) 18.

conferred by sub-sec. 2 of that section must be exhausted or pursued to award or judgment. If a worker fails in respect of an application made under the Act, he still has reserved to him his remedy at common law. Also he is not precluded from his remedy under the Act if he fails in an action at common law ; the only prohibition in the section is directed to the contingency of obtaining judgment at common law, in which event only is the right lost. The expression " at his option " contemplates something more than taking the initial step under the Act, or taking out a writ at common law. Decisions given under the English *Workmen's Compensation Act* have no application here. That statute is entirely different from the Act in force here. The acceptance by Harbon of some payments of compensation in respect of an injury which subsequently caused his death cannot be construed as an agreement within the meaning of *Barker* v. *Stoneham & Wilson Ltd.* (1), nor does it debar his widow from exercising her right at common law.

The payments accepted by the worker were in respect of his personal claim. The claim of his widow and children arose upon the death of the worker, and is independent of his claim. It is not stated in the plea that the money was accepted by the worker in full satisfaction of all rights at common law or otherwise. " Proceed " in sec. 63 (2) contemplates something more than the mere making of a claim (*M'Cafferty* v. *MacAndrews & Co.* (2)). It involves the taking of initial proceedings either by an application for an award in accordance with the Act, or an initial process at common law (*M'Cafferty* v. *MacAndrews & Co.* (3)). The position is as stated in *Erickson* v. *Australian Steamships Ltd.* (4).

Miller, for the respondent Geddes and the appellant Commissioner. The deceased worker Harbon exercised his option under sec. 63. That being so, his dependants have no option. They cannot be placed in any better position than the deceased worker (*British Electric Railway Co.* v. *Gentile* (5) ; *Read* v. *Great Eastern Railway Co.* (6) ; *Salmond* on *Torts*, 8th ed. (1934), p. 367). The pleadings

(1) (1922) 22 S.R. (N.S.W.) 512 ; 39 W.N. (N.S.W.) 183.
(2) (1930) A.C. 599.
(3) (1930) A.C., at pp. 618, 622, 623, 627.
(4) (1919) 19 S.R. (N.S.W.) 132, at p. 138 ; 36 W.N. (N.S.W.) 54.
(5) (1914) A.C. 1034.
(6) (1868) L.R. 3 Q.B. 555.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

show that Harbon claimed and received the compensation to which he was entitled under the Act. The fact that he subsequently died as a result of the injury does not affect the matter. His acceptance of the payments by way of compensation bars an action at common law for damages in respect of the same injury (*Barker* v. *Stoneham & Wilson Ltd.* (1)). Upon a worker electing to come under the Act he remains under the Act, and his dependants also come under the Act. The question is whether a certain amount was accepted irrespective of any other remedy. The expression " proceed under this Act " in sec. 63 merely means to avail oneself of the rights created by the Act. Secs. 45, 53 and 57 of the Act have an important bearing upon the matter. All that was decided in *M'Cafferty* v. *MacAndrews & Co.* (2) was that the six months' limit does not apply to common law proceedings under secs. 14 and 29 of the English Act in conjunction. (See sec. 53 of the *Workers' Compensation Act* 1926-1929 (N.S.W.).) Here there was an acceptance of a claim under the Act, and an agreement for acceptance of compensation. It is not a question of the worker's claim being misconceived as in *Beckley* v. *Scott & Co.* (3). In the case of Butler the plea alleges that the death of the worker occurred in circumstances creating a legal liability upon the employer to pay workers' compensation. Liability was accepted and the amount paid in. The matter was, so far as the employer was concerned, thereupon ended. By its use in sec. 63 of the words " at his option " and " or " the Legislature intended that a worker should have a right of election to do one of two things. The scheme of the Act is that claims by workers, who as such meet with an injury, should, in respect of that injury, as between themselves and their employers, be dealt with under the Act. If in the exercise of his option a worker brings an action at common law and fails, he may nevertheless pursue his remedy for workers' compensation. Sec. 63, correctly construed, means that a worker who sustains an injury within the meaning of the Act and which also gives him rights at common law, is put in the position of electing; he has to decide to which remedy he will resort. He is bound by his election, and is not permitted to resort to the other remedy unless

(1) (1922) 22 S.R. (N.S.W.) 512; 39 W.N. (N.S.W.) 183.

(2) (1930) A.C. 599.

(3) (1902) 2 I.R. 504.

and until an action by him at common law has failed (*Beckley* v. *Scott & Co.* (1); *Taylor* v. *Hamstead Colliery Co.* (2); *Burton* v. *Chapel Coal Co.* (3); *Harrison* v. *Wythemoor Colliery Co.* (4)).

The remedies are mutually exclusive subject to the right of proceeding at common law (*Little* v. *P. & W. MacLellan Ltd.* (5)).

[DIXON J. referred to *Lochgelly Iron and Coal Co.* v. *M'Mullan* (6) and *Ropner Steamship Co.* v. *Morgan*; *Miller* v. *Same* (7).]

The latter case has no application to this matter. Here in Butler's case, the distinction is that the money was paid into the office of the Commission in pursuance of an agreement made between the employer and the dependant. Sec. 63 preserves to the worker or his dependants the option of taking one or other of the remedies indicated therein (*Taylor* v. *Hamstead Colliery Co.* (8)).

The plea in Butler's case should be dealt with as in *Edwards* v. *Godfrey* (9). The allegation made in Harbon's case is similar to that in *Campbell* v. *Caledonian Railway Co.* (10). The difference between the words used in sec. 63 and in sec. 64 should be considered. The clause in sub-sec. 2 of sec. 63, which commences with the word "but," confers a privilege, that is, it suspends the effect of the option in cases where common law proceedings have been taken. "Proceed" is not restricted to the taking of legal proceedings. It includes the making of a claim under the Act (*Powell* v. *Main Colliery Co.* (11)).

Spender K.C., in reply. The making of a claim which merely preserves rights under the Act does not prevent the claimant from bringing an action at common law. The payment of money by the employer into the office of the Commission was an act of the employer in which the claimant was not interested (*Devons* v. *Alexander Anderson & Sons* (12); *Abel* v. *Estler Bros.* (13)). Rule 16 of the *Workers' Compensation Rules* 1926-1930 shows that the matter is not determined by mere payment to the Commission. The Act

(1) (1902) 2 I.R., at pp. 532-535.
(2) (1904) 1 K.B. 838, at p. 847.
(3) (1909) 46 Sc.L.R. 375, at pp. 377, 378.
(4) (1922) 2 K.B. 674, at pp. 687, 690.
(5) (1900) 2 F. (Ct. of Sess.) 387.
(6) (1934) A.C. 1.
(7) (1935) 1 K.B. 1.
(8) (1904) 1 K.B. 838.
(9) (1899) 2 Q.B. 333.
(10) (1899) 36 Sc.L.R. 699.
(11) (1900) A.C. 366, at p. 370.
(12) (1910) 4 B.W.C.C. 354.
(13) (1919) 12 B.W.C.C. 184.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

May 1.

does not contain a provision with respect to agreements between the parties similar to that before the Court in *McIlwraith McEacharn Ltd.* v. *Sweetman* (1).

Cur. adv. vult.

The following written judgments were delivered :—

RICH J. *Harbon* v. *Geddes.*—This case turns upon the interpretation of sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.). This provision represents an attempt on the part of the State Legislature to restate the law relating to the double remedies of an employee against the employer which up till the time when the restatement was originally introduced had been expressed in a section transcribed from the English *Workmen's Compensation Act* 1906. The restatement is more compendious but not less obscure than the English enactment. For my part I think we would have been well advised if, in addressing ourselves to the interpretation of the New South Wales provision, we had disregarded the enactment from which it arose and its English counterpart, and excluded from the discussion the authorities decided upon them. The first and most important ambiguity presented by the words of sec. 63 lies in the words " proceed under this Act or independently of this Act." Does the word " proceed " refer to legal proceedings, or is it satisfied by any step referable to the Act on the one hand or the common law on the other ? I think it should be construed as referring to legal proceedings. It is the prima facie legal meaning of the word in such a setting, and when the sub-section goes on to provide that if the worker has obtained judgment against his employer independently of the Act he shall not be entitled to compensation under the Act, it supplies a context which confirms the prima facie meaning. If this meaning is given to the word " proceed " it is evident that, unless the worker takes legal proceedings, the option to which the sub-section refers has not been exercised conclusively. Whether or not the issue of process or an application for relief is enough to constitute an exercise of the option is a matter which does not arise in this case. The question which we have to determine is raised by a

(1) (1930) 44 C.L.R. 116.

demurrer to a plea. The only facts which the plea has been taken to allege are that the worker, who subsequently died, claimed and received compensation up to his death, and received medical aid and other benefits. This allegation involves no legal proceedings on the part of the worker. It does not show, in my opinion, that within the meaning of the Act he did " at his option proceed under this Act." When he died his cause of action at common law for negligence causing his injuries had not been barred by any step he took. Nothing his widow afterwards did according to the plea, in my opinion, precludes her from suing under Lord Campbell's Act in respect of his death resulting from these injuries. In my opinion, the appeal should be allowed, and judgment for the plaintiff given upon the demurrer.

Commissioner for Road Transport and Tramways (N.S.W.) v. *Butler.*—Like *Harbon* v. *Geddes*, this case depends upon sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.). Unlike that case, the steps relied upon as precluding the plaintiff from recovering under Lord Campbell's Act were taken by her and not by her deceased husband, in respect of whose death she sues. She is not alleged to have actually received any benefits under the Act. She made a claim, however, on behalf of herself and the deceased's children, and in response to that claim the employer paid the maximum amount for a death claim into the office of the Workers' Compensation Commission. Upon these facts the construction I have given to the words " proceed at his option," in my judgment in *Harbon* v. *Geddes*, determines this appeal. For the purposes of sec. 63 the deceased's widow is included by sec. 6 (2) within the expression " worker." Neither she nor anybody else included within the meaning of that expression took any legal proceedings. Her action is, therefore, not barred. I think the appeal should be dismissed with costs.

STARKE J. These appeals involve the true construction of sec. 63 of the *Workers' Compensation Act* 1926-1929 of New South Wales. It provides :—" (1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

Starke J.

negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. (2) In such case the worker may, at his option, proceed under this Act or independently of this Act, but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act." It will be observed that the words are not, as in the English *Workmen's Compensation Act* 1925, sec. 29, " the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act." Nor are they, as in the New South Wales *Workmen's Compensation Act* 1910, sec. 8, " the workman may, at his option, either claim compensation under this Act, or take such proceedings as are open to him independently of this Act." Upon the proper construction of the English Act there was considerable conflict of opinion. But the view prevailing, and the one upon which we should act unless a higher authority holds otherwise, is that the object of the Act is not to protect the employer against double payments, but against double proceedings (*Bennett* v. *L. & W. Whitehead Ltd.* (1), and cases there collected). The workman had an option under the English Act to take either of two courses. " Has he to elect," said the present Lord *Atkin* in *Bennett* v. *L. & W. Whitehead Ltd.* (2), " between proceedings, and is his election determined once he has commenced either proceeding ? On this question I would desire to call attention to the words, ' The workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act.' If the words mean that, while he has the option to do one of two things, as soon as he does one he may never thereafter do the second, it is not immaterial to notice that the first choice is to ' claim compensation.' It is well known that up to 1900 the word ' claim ' in the Act had been treated as meaning ' file a request for arbitration,' and that the decision to the contrary of the House of Lords in *Powell* v. *Main Colliery Co.* (3) made an important change in the law as understood up to that date. . . . ' Claim compensation ' therefore means intimate a claim to the employer. Such intimation may be written or verbal, and may be evidenced by proof that the employer has

(1) (1926) 2 K.B. 380.

(2) (1926) 2 K.B., at pp. 407, 410.

(3) (1900) A.C. 366.

in fact paid compensation. . . . I think that election is a question of fact in each case, and is not a question of law. Further, it is essential to a binding election that it should be made with a full knowledge of the material facts."

Now in the present cases under the New South Wales Act, we have to consider the words " the worker may, at his option, proceed under this Act or independently of this Act." Under Part VII. (" Proceedings respecting Compensation ") there is, in sec. 53, a provision that " proceedings for the recovery, under this Act, of compensation for an injury shall not be maintainable . . . unless the claim for compensation with respect to such injury has been made within six months." *Powell's Case* (1) decides, as we have seen, that " the claim for compensation " means, not the initiation of proceedings before the tribunal by which compensation is to be assessed, but a notice of claim sent to the workman's employer. And there are passages in that case which suggest that such a claim is a step—the first step—in the proceedings. (See *Powell's Case* (2).) If this is so, the worker, in making claim for compensation, proceeds under the Act, but it becomes a question of fact whether, in so doing, he has elected to take his remedy under the Act. It was suggested that the words in sec. 63 " but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act " indicate a contrary intention. In my opinion that is not so. The implication of these words is that a worker shall not lose his right to compensation under the Act unless a judgment has been obtained against his employer independently of the Act. Under sec. 36 of the Act, the Workers' Compensation Commission is given exclusive jurisdiction to examine into, hear and determine all matters and questions arising under the Act. The words of the section seem designed to achieve the same result as sec. 29 (2) of the English Act of 1925, but in another way. In my opinion, the word " proceed " in sec. 63 cannot be limited to proceedings " which introduce the jurisdiction of that tribunal whose function it is to decide the matter between the parties and to put compulsion upon them." It is a word of general application,

(1) (1900) A.C. 366.
(2) (1900) A.C., at pp. 377, 382 ; (1900) 2 Q.B. 145, at pp. 159, 160.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

Starke J.

and extends not only to such proceedings, but to acts or documents which indicate an intention to claim compensation under the *Workers' Compensation Act*.

The circumstances of the present cases remain for consideration. In Harbon's case, the action was founded upon the *Compensation to Relatives Act* 1897-1928 of New South Wales. The Act gives a right of action to the relatives of a deceased person whensoever the death of that person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof. "The right of the workman to claim is a right which must exist on his death, and if by any means that right has been taken away, the conditions cannot be satisfied which" enable "the dependants to sue" (*Union Steamship Co. of New Zealand* v. *Robin* (1)). "The *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment (have) maintained, i.e. successfully maintained, his action, then the action under the Act does not arise" (*British Electric Railway Co.* v. *Gentile* (2)). The defendant in the action pleaded that the deceased person Harbon was a worker within the meaning of the *Workers' Compensation Act* 1926-1929, and that Harbon "had exercised his option and proceeded under the said statute and had claimed and received compensation as by the said Act provided, and had claimed and received medical and other benefits under the same." The plaintiff in the action demurred to the plea. The Supreme Court gave judgment for the defendant upon the demurrer. It was of opinion that the plea alleged matter which amounted in law to a concluded election on the part of the workman to take his remedy under the *Workers' Compensation Act*. If there is a payment and a receipt of money to which a workman is not entitled except under the Act, and that payment and that receipt are in no way qualified, then the workman has exercised his option and concluded his election to proceed under the Act, and must abide

(1) (1920) A.C. 654, at p. 662. (2) (1914) A.C., at p. 1041.

by that election. (See *Oliver* v. *Nautilus Steam Shipping Co.* (1); *Page* v. *Burtwell* (2); *Mackay* v. *Rosie* (3); *Barker* v. *Stoneham & Wilson Ltd.* (4). Note *Bennett* v. *L. & W. Whitehead Ltd.* (5).) The plea in the present case has, in substance, so alleged, and, in my opinion, the judgment for the defendant upon demurrer was, therefore, right.

In Butler's case, the action was also founded upon the *Compensation to Relatives Act* 1897-1928. But the plea was that the plaintiff on her own behalf and on behalf of the children of the deceased claimed from the defendant the amount of compensation payable under the *Workers' Compensation Act* 1926-1929 in respect of the death of the deceased, namely, £850, and required the defendant to pay the same as by the said statute required, and thereupon and pursuant thereto and prior to the commencement of the action the defendant to the knowledge of the plaintiff and the children paid into the office of the Workers' Compensation Commission of New South Wales, under the statute, for the benefit of the plaintiff and the children the said sum of £850, the whole amount of the compensation payable under the said statute as and for the total dependency of the plaintiff and the children upon the earnings of the said deceased as by the statute provided and required. The plaintiff demurred to this plea, and the Supreme Court entered judgment for the plaintiff upon the demurrer. In my opinion this judgment was also right. "The worker" in sec. 63 includes, by force of sec. 6 of the Act, the dependants of the deceased. But making a claim for compensation, though acted upon to some extent by the employer, does not constitute a final election to claim compensation under the Act (*King* v. *Edinburgh Collieries Co.* (6); *Bennett* v. *L. & W. Whitehead Ltd.* (5)). And especially is this so where the claim and allegations of the defendant, as is pointed out in the judgment of the Supreme Court, in no wise establish the right of any of the dependants to any portion of the amount paid into Court.

Both appeals should be dismissed.

(1) (1903) 2 K.B. 639.
(2) (1908) 2 K.B. 758.
(3) (1908) S. C. 174.
(4) 22 S.R. (N.S.W.) 512; 39 W.N. (N.S.W.) 183.
(5) (1926) 2 K.B., at p. 409.
(6) (1924) S. C. 167.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

DIXON J. *Harbon* v. *Geddes*.—In this appeal we are called upon to interpret sec. 63 of the *Workers' Compensation Act* 1926-1929, New South Wales.

As a preparation for the task we have examined the text of the successive English provisions which correspond in purpose or supply an analogy, and we have traced the erratic course which judicial decision upon them has taken. *Scrutton* L.J. in *Harrison* v. *Wythemoor Colliery Co.* (1) collected and classified the more important cases which up to that date had been decided upon the English provisions, i.e. sub-secs. 2 (*b*) and 4 of sec. 1 and sec. 6 of the *Workmen's Compensation Act* 1897 and sub-secs. 2 (*b*) and 4 of sec. 1 and sec. 6 of that of 1906. It is enough to add a reference to the later cases of *Bennett* v. *L. & W. Whitehead Ltd.* (2) and *Kinneil Cannel and Coking Coal Co.* v. *Waddell* (3) and to sec. 18 of the Act of 1923 and sec. 29 of that of 1925. Except for gaining a better understanding of the difficulties arising, which over so long a period the Legislature has failed to remove and the Courts have been unable to solve, but little help is obtainable from so close an inspection of what Lord *Atkin* described as " the multi-coloured lights of the decisions " (4). Even if any settled interpretation had been placed upon the English provisions, it would not follow that such of their phrases as are reproduced in the New South Wales statute should be given a similar meaning. For the New South Wales enactment was recast with the intention of departing from the original provision transcribed from the English Act. But it is not too much to say that the interpretation of the English provision is almost completely unsettled.

The dominating words in sec. 63 appear to me to be those with which it opens : " Nothing in this Act shall affect any civil liability of the employer." Its main purpose is to preserve the liabilities of the master to his servant arising under the general law. In conferring a right to compensation the statute intended that it shall not be understood as implying any restriction upon rights which otherwise would exist. But, although the rights are dual, the

(1) (1922) 2 K.B., at pp. 697-699.
(2) (1926) 2 K.B, particularly at pp. 387, 388, 394, 397-404, 406, 407 and 409.
(3) (1931) A.C. 575, at pp. 580, 581, 583, 584, 590, 591 and 595.
(4) (1926) 2 K.B., at p. 406.

recompense is not to be double. They must be enjoyed as alternatives between which it is for the worker to choose. The office of sub-sec. 2, an office very badly performed, is to state the point of time at which the adoption of one of the alternatives to the exclusion of the other is complete. The words, " in such case," in my opinion, operate to confine the sub-section to cases in which a civil liability actually exists. They do not admit of an interpretation of the sub-section such as that placed upon the English provision under which the worker by pursuing a wrong remedy loses the right one. The words " at his option " have for their purpose the vesting in the worker of the choice between alternatives. Their prime purpose, as it appears to me, is not to insist that it is an option, but that it is the worker and not the employer with whom the choice lies. The word " proceed " in the next phrase, " proceed under this Act or independently of this Act," is open to the wider meaning, " to pursue a course under " and to the narrower and more definite meaning, " to take legal proceedings." The latter is the more natural, and, indeed, in reference to such a subject matter, it is its prima facie legal meaning. The English provision uses the expression " may, at his option, claim compensation under this Act or take proceedings independently of this Act." Referring to the first limb of this alternative, Lord *Atkin* said: " It is well known that up to 1900 the word ' claim ' in the Act had been treated as meaning ' file a request for arbitration,' and that the decision to the contrary of the House of Lords in *Powell* v. *Main Colliery Co.* (1) made an important change in the law as understood up to that date " (2).

It is not improbable that the language of the New South Wales provision was adopted in order to restore the meaning formerly ascribed to the enactment. That meaning is confirmed by the reference to the recovery of judgment occurring in the concluding clause of the sub-section. It is by no means easy to say what is the effect of that reference. It appears to assume that, in its absence, a worker might be considered to remain entitled to compensation after he had actually recovered judgment independently of the Act. Perhaps the clause is to be explained on the ground that it means to do no more than to preclude any further inquiry into the question

(1) (1900) A.C. 366. (2) (1926) 2 K.B., at p. 407.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

DIXON J.

whether an actual election was made by the worker if he has prosecuted a claim independently of the Act to judgment. But, whatever be the explanation of this portion of sub-sec. 2, it does not weaken the view that the whole provision intends to continue in the worker two separate rights, one only of which he is to enjoy to the full beneficially. To that end the sub-section enacts that he may maintain legal proceedings to enforce one of them only, and the choice shall lie with him. The question does not arise in the present case whether the option is finally exercised if the worker, knowing his rights, begins legal proceedings. Possibly the section means to allow the worker to pursue either remedy, but not both simultaneously, and to conclude him only when one of his alternative rights has passed into judgment, or award, or recorded agreement, or has been discharged by satisfaction. It is to be observed that, except in the final reference to the recovery of judgment, the sub-section deals with legal proceedings and not rights and liabilities as such. In any view it appears to me to imply that, if full satisfaction of one of the two alternative rights is obtained without legal proceedings, or without prosecuting legal proceedings to judgment, or award, or recorded agreement, the other alternative right shall also be discharged. It may be doubted whether, in using the word "option," the Legislature's main concern was the legal consequence expressed in the maxim *electio semel facta non patitur regressum.* Rather its concern was in the person to whom the choice should be given. If the provision means that it is only judgment, award, recorded agreement, or satisfaction which finally shuts out the worker from his alternative, it explains its concluding reference to recovery of judgment, and removes some of the difficulties inherent in the application to the sub-section of sec. 6 (2). On the other hand, much injustice to employers may arise from a construction which allows a worker, who has long been in receipt of weekly payments, to assert a claim under the general law. But no construction of which the language is fairly capable appears entirely to avoid the possibility of such cases occurring. It is not necessary to decide in the present case whether, at any earlier stage than judgment, award, recorded agreement or satisfaction, the worker loses the alternative right which he has not asserted. The plea

upon which the case must be determined alleges only that before his death the worker had claimed and received compensation as by the Act provided, and had claimed and received medical and other benefits under the same. This allegation is preceded by general words, but these are not relied on as an averment covering further facts.

Upon the interpretation of sec. 63 which I have adopted, as the worker had not instituted legal proceedings at all, he did not come within the words " at his option, proceed under this Act." Although I think the section implies that the discharge by satisfaction of one alternative right bars the other, I do not think it implies that a claim under the Act without any legal proceedings and the receipt of some compensation and some benefits constitute a bar of the workers' rights under the general law.

It was suggested that upon his death, *eo instanti* his right to compensation became fully satisfied so as to extinguish his alternative common law right which his widow relies upon under Lord Campbell's Act. The suggestion confuses satisfaction of his claim for compensation with its lapse by reason of his death.

In my opinion the appeal should be allowed and judgment for the plaintiff given upon the demurrer.

Commissioner for Road Transport and Tramways (N.S.W.) v. *Butler.*—This case, which was argued with the appeal in *Harbon* v. *Geddes*, is governed by the interpretation of sec. 63 adopted in the reasons for judgment I have given in that case.

The action is brought under Lord Campbell's Act by the widow of a worker whose death occurred in circumstances entitling his dependants to compensation under the *Workers' Compensation Act* 1926-1929, New South Wales. The plea demurred to alleges that the widow on her own and her children's behalf claimed from the defendant the amount of workers' compensation payable, and required the defendant to pay the same as provided by the statute, whereupon the defendant paid into the office of the Workers' Compensation Commission the sum payable under the statute. The plea contained some general words, but these are not relied upon

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

as an allegation of additional facts. It is not alleged that the plaintiff, the widow, applied for or obtained the sum or any part of it. She instituted no legal proceedings under the *Workers' Compensation Act*. She did not accept satisfaction of her claim under the Act, and, as the judgment of *Jordan* C.J. (1) shows, she obtained no vested right in the sum.

In my opinion the appeal should be dismissed.

EVATT AND MCTIERNAN JJ. Each of these appeals, which were heard together, brings into question the meaning of sec. 63 of the *Workers' Compensation Act* 1926-1929. That section is in the following terms :—

> "(1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. (2) In such case the worker may, at his option, proceed under this Act or independently of this Act, but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act."

In each case the questions were determined by the Full Court of the Supreme Court upon demurrer, the plaintiff in each instance being a widow who brought an action by virtue of the *Compensation to Relatives Act* 1897 against the employer of her deceased husban d.

In Harbon's case, the relevant plea of the defendant asserted (*a*) that, during his lifetime, the husband of the plaintiff made a claim upon the defendant and obtained certain compensation payments and medical benefits under the *Workers' Compensation Act*, and (*b*) that the plaintiff, after her husband's death, made a claim for compensation under the *Workers' Compensation Act* on behalf of herself and her children, and the full amount of such claim was paid into the office of the Workers' Compensation Commission by the employer.

On these facts the Full Court held that sec. 63 (2) operated to defeat the widow's action, because her husband, having exercised his option to accept benefits under the *Workers' Compensation Act* terminated his right and remedies at common law for the same injury, and the widow's cause of action under the *Compensation to*

(1) (1935) 52 W.N. (N.S.W.), at pp. 19, 20.

Relatives Act necessarily depended upon the existence of her husband's right to maintain an action against the defendant. The Full Court was also of opinion that the widow's making a claim under the *Workers' Compensation Act* was not in itself sufficient to defeat her action under the *Compensation to Relatives Act*.

In Butler's case the defendant's plea was limited to an allegation of similar facts to those asserted in the second branch of the plea in Harbon's case. In Butler's case the Full Court accordingly held that the claim by the widow for compensation under the *Workers' Compensation Act*, although it was followed by payment into the office of the Commission, did not amount to the exercise of an option under sec. 63 (2), and did not prevent the pursuit of the remedy reserved in general terms by sec. 63 (1) of the *Workers' Compensation Act*.

In the result, the demurrer of the plaintiff was overruled in Harbon's case, and allowed in Butler's case.

On the appeals the arguments for the employer and worker respectively assumed extreme forms. For the employer it was contended that the mere making of a claim for compensation under sec. 53 of the *Workers' Compensation Act* necessarily debarred the worker from seeking his common law remedy in respect of the same injury. Sec. 53 provides that proceedings for the recovery of statutory compensation shall not be maintainable unless, *inter alia*, the claim for compensation has been made within six months from the happening of the injury. The section itself clearly distinguishes a preliminary claim for compensation from proceedings for the recovery of such compensation (see *M'Cafferty* v. *MacAndrews & Co.* (1), per Lord *Buckmaster*). It follows that it is impossible to regard a mere claim as coming within the alternative of sec. 63 (2), which refers to the worker's right to "proceed" under the *Workers' Compensation Act*.

In the argument for the worker, it was boldly contended that he was entitled to pursue his remedies under the Act or independently of it, to the extent he thought fit, and that the only qualification upon his rights was that expressed in the words of sec. 63 (2) itself,

(1) (1930) A.C., at p. 618.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

Evatt J. McTiernan J.

viz.: "but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act." In particular it was argued that the worker could recover full compensation under the Act, and subsequently commence proceedings in the Courts of law, it being admitted that, in dealing with the question of damages, the jury would be bound to take into account, in reduction of the damages otherwise recoverable, the statutory compensation already made for the same injury.

Just as the extreme contention of the employer fails to give any effective operation to the word "proceed" in sec. 63 (2), so that of the worker omits to notice that sec. 63 (2), in presenting the worker with an option, postulates that, where the worker "proceeds" under the Act, under circumstances which indicate that he has really and effectively exercised an option, he cannot recall his option.

The following propositions may be asserted in relation to sec. 63 (2) of the *Workers' Compensation Act*:—(1) A worker may be debarred from proceeding at common law by reason of his having had recourse to the *Workers' Compensation Act*. (2) Before he can be so debarred, it must appear (i) that the worker did "proceed" and obtain compensation under the *Workers' Compensation Act*, and (ii) that the circumstances accompanying the worker's proceeding and obtaining compensation under the Act show that the worker, *knowing that he had a right to bring proceedings at common law in respect of the same injury, chose to prefer the benefits obtainable under the Act.*

For the purpose of the present appeals, it is not necessary to determine the question whether, before a worker is deprived of his remedy independently of the Act, he must "proceed" under the Act to a stage where the Workers' Compensation Commission deals with the question of compensation. Whether or not a curial determination is required, it is essential that there must be a real exercise of an option before the worker loses his common law rights and remedies.

Lord *Blackburn* said in *Kendall* v. *Hamilton* (1): "I assent to the argument that there cannot be election until there is knowledge of the right to elect." These observations were regarded by *Bankes*

(1) (1879) 4 App. Cas. 504, at p. 542.

L.J. and *Atkin* L.J. as applicable to the question of a worker's exercising an option between the alternative remedies available under the *Workmen's Compensation Act* and under the common law respectively (*Bennett* v. *L. & W. Whitehead Ltd.* (1)). The judgments of *Bankes* L.J. and *Atkin* L.J. are quite unaffected by the subsequent decision of the House of Lords in *Kinneil Cannel and Coking Coal Co.* v. *Waddell* (2), and they greatly aid the interpretation of the New South Wales Act. (See also *Codling* v. *John Mowlem & Co.* (3).)

The necessity of a worker's being aware of his alternative remedies in respect of compensation for injury is particularly great in cases where payments are made without the knowledge of the Workers' Compensation Commission itself. It is obvious that a worker or his dependant may sign a claim under the Act in order to secure what is popularly called "compensation," without the slightest knowledge or advice as to the existence of his alternative rights and remedies. The maxim that ignorance of the law does not excuse cannot be converted into a doctrine that every person is bound to know the law.

These considerations are sufficient to dispose of both these appeals. In Harbon's case it is not alleged by the plea that there were any curial proceedings in relation to the payments made to the deceased worker, which were stated at the Bar to amount only to a trifling sum. But the decisive factor is that there is no allegation in the plea that the worker or the plaintiff was at any time aware that he or she possessed any right of proceeding independently of the Act for such an amount of compensation as would not be affected by the limitations prescribed in the *Workers' Compensation Act*. In these circumstances, it is not possible to hold either that the deceased worker or the plaintiff "opted" to proceed under the Act. The appeal should therefore be allowed, and the demurrer allowed.

In Butler's case, all that the widow did was to make a claim under the *Workers' Compensation Act*. It is true that the employer paid into the office the sum of money claimed, but there the money

(1) (1926) 2 K.B., at pp. 388 and 410 respectively.
(2) (1931) A.C. 575.
(3) (1914) 2 K.B. 61; (1914) 3 K.B. 1055, especially at pp. 1063-1065.

H. C. OF A. 1935.

HARBON v. GEDDES.

COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.) v. BUTLER.

remained, and no order in relation to its payment out has ever been made. Again the decisive fact is that there is no allegation in the plea that the widow was at any time aware that she possessed an alternative right to proceed at common law. Consequently the appeal in Butler's case should be dismissed.

Harbon v. Geddes.—Appeal allowed with costs. Judgment for the plaintiff on demurrer with costs.

Commissioner for Road Transport and Tramways (N.S.W.) v. Butler.—Appeal dismissed with costs.

Solicitors for Harbon and Butler, *Landa and Lamaro.*

Solicitor for Geddes and the Commissioner, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.