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ATTORNEY-GENERAL (N.S.W.). *v.* HOMEBUSH FLOUR MILLS LTD.

Peterswald v. *Bartley* (1); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2); *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (3)).

Judgment upon the demurrer should be given for the defendant.

Judgment for defendant upon the demurrer with costs including costs of motion to refer to High Court.

Solicitor for the informant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the defendant, *D. R. Hall & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

LATTER . . . . . APPELLANT;
PLAINTIFF,

AND

THE COUNCIL OF THE SHIRE OF MUSWELLBROOK . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 8, 24.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Statutory compensation—Payment into office of commission by employer of deceased worker—Money paid in—Application by widow—Payments out to widow—Action by widow under Compensation to Relatives Act 1897-1928 *(N.S.W.)—Further payments out after issue of writ—Alternative remedies—Option—Knowledge of widow—Proof—"In such case"—"At his option"—"Proceed"—Workers' Compensation Act* 1926-1929 *(N.S.W.) (No.* 15 *of* 1926—*No.* 36 *of* 1929), *sec.* 63*.

* Sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.), provides as follows:—"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."

(1) (1904) 1 C.L.R. 497. (2) (1926) 38 C.L.R. 408.
(3) (1927) 39 C.L.R. 139.

In an action under the *Compensation to Relatives Act* 1897-1928 (N.S.W.), brought by a widow on behalf of herself and her infant children against her deceased husband's employer, it was pleaded that the plaintiff, after the death of her husband, made a claim against the defendant under the *Workers' Compensation Act* 1926-1929 (N.S.W.), on behalf of herself and her children, and in pursuance of those proceedings and with the consent of the plaintiff the defendant paid the full amount of the claim into the office of the Workers' Compensation Commission and subsequently thereto the plaintiff with a full knowledge that she had an alternative right to proceed at common law applied for and obtained the payment out of certain sums of money by the commission for the benefit of herself and her children, and an order was made by the commission at the request of the plaintiff vesting in the plaintiff and her children the money paid in. Payment in by the defendant with an admission of liability was proved. The plaintiff signed a notice in the prescribed form of her intention to apply to the commission for the investment and application of the money so paid in, and small sums were paid out from time to time by the commission to the plaintiff. Later the plaintiff directed that no further payments be made, returned a cheque for the current payment, made a demand for damages and issued the writ in the present action. After the issue of the writ the plaintiff applied to the commission for and accepted further payments. No question was put to the jury with respect to any of the issues raised by the plea, the only questions submitted being negligence and damages. The jury returned a verdict for the plaintiff, and deducted from the amount of the damages awarded the amount paid to the commission by the defendant. The Supreme Court of New South Wales held that the rights of the plaintiff and her children under the *Workers' Compensation Act* had been satisfied, and, therefore, that by sec. 63 of that Act, the action was not maintainable. The verdict was set aside and judgment entered for the defendant. The plaintiff appealed to the High Court.

Held:—

(1) That the appeal should be allowed:—

By *Latham* C.J., *Evatt* and *McTiernan* JJ., on the ground that the allegation in the plea as to the plaintiff's knowledge of her right to exercise the option conferred by sec. 63 of the *Workers' Compensation Act* had not been established.

By *Rich* J., on the ground that the only step taken by the plaintiff, namely, her application to the commission for an apportionment of the compensation voluntarily paid by the defendant, was not a legal proceeding within the meaning of the expression "proceed under this Act" contained in sec. 63.

By *Dixon* J., on the ground that the facts, proved or assumed, did not establish that the rights of the plaintiff and her children to compensation under the *Workers' Compensation Act* were satisfied or discharged, and were insufficient to bar their remedy independently of that Act.

(2) That the verdict in favour of the plaintiff should be restored without any deduction therefrom of the amount paid to the commission by the defendant:—

By *Latham* C.J., on the ground that, if no order had been made vesting in the plaintiff the amount paid in (as to which, *quære*), the plaintiff was entitled to the full amount of damages obtainable at common law.

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By *Rich* J., on the ground that, in the absence of an award or order of the commission vesting in the plaintiff and her children the money paid in by the defendant, neither the Supreme Court nor the High Court had any control thereover.

By *Dixon* J., on the ground that the recovery of judgment disentitled the plaintiff to any claim on the money so paid in by the defendant.

By *Evatt* and *McTiernan* JJ., on the ground that, although there was no objection in principle to taking into account in reduction of the verdict any payments made to the plaintiff by way of compensation for the same injury, no reduction was required in the present case because the moneys paid into the commission were always under the control of the defendant and the plaintiff was to be regarded as never having had any claim upon them or any of them.

The meaning of the expressions "in such case," "at his option," and "proceed," contained in sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.) discussed.

Harbon v. *Geddes*, (1935) 53 C.L.R. 33, applied.

Decision of the Supreme Court of New South Wales (Full Court): *Latter* v. *Council of the Shire of Muswellbrook*, (1936) 36 S.R. (N.S.W.) 394; 53 W.N. (N.S.W.) 164, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action commenced in the Supreme Court of New South Wales by the issue of a writ on 31st May 1935, the plaintiff, Lily Latter, claimed from the defendant, the Council of the Shire of Muswellbrook, the sum of £3,000. The action was brought under the *Compensation to Relatives Act* 1897-1928 (N.S.W.), by the plaintiff on behalf of herself and her three children as dependants of her husband and their father, Edgar John Latter, who was killed whilst employed by the defendant in a gravel pit or quarry conducted by it.

The declaration, as amended at the hearing, alleged negligence in two forms, firstly, in the control and management of the quarry, and secondly, in leaving the working face of the gravel at a dangerous angle. The defendant pleaded, *inter alia*, that it was not guilty. The fifth plea was as follows:—"And for a fifth plea the defendant as to the whole of the plaintiff's claim says that the plaintiff after the death of the said Edgar John Latter made a claim against the defendant for compensation under the *Workers' Compensation Act* 1926-1929, on behalf of herself and of her children as dependants of the said Edgar John Latter and in pursuance of such proceedings and with the consent of the plaintiff the defendant paid the full

amount of such claim into the office of the Workers' Compensation Commission and subsequently thereto the plaintiff with a full knowledge that she had an alternative right to proceed at common law applied for and obtained the payment out of certain sums of money by the said Workers' Compensation Commission for the benefit of herself and her said children and an order was made by the said Workers' Compensation Commission at the request of the plaintiff vesting the said sum of money paid in as aforesaid in the plaintiff and her said children in accordance with the provisions of the said Act." The plaintiff joined issue on the pleas, but an additional replication was filed in which it was alleged that the plaintiff's children were infants. Issue was joined, and, at the hearing, a rejoinder was allowed to be pleaded which stated substantially that the facts already pleaded debarred both the plaintiff and her children from maintaining the action.

At the hearing evidence was given on the negligence counts, but as it is not material to this report it is not herein set forth.

The fifth plea, as set forth above, rested on the effect of sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.), having regard to the acts of the plaintiff in connection with the sum of £425 paid into the office of the Workers' Compensation Commission by the defendant with an admission of liability under the Act. The following statement of the effect of the evidence is taken from the judgment of *Davidson* J. :—" The evidence did not establish that the plaintiff had made a claim for compensation " under the *Workers' Compensation Act* 1926-1929 " before the defendant paid the money into the commission, nor that such money was so paid in with her consent, nor that the commission had made an order vesting the money in any way. What the evidence does establish is that after the money was paid in the plaintiff was asked to and did sign an application in Form 34 in the schedule to the rules made under the Act, and that thereafter some part of the money was paid to her by the commission for the benefit of herself and her three children. It was also proved that at a later stage, having received advice that she might have a right of action under the *Compensation to Relatives Act*, she wrote a letter to the commission directing that no further payments should be made, and returning a cheque which it had sent

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to her." Subsequently, however, on 26th April 1935, she wrote a letter to the registrar of the Workers' Compensation Commission in which she stated that " I would be glad if you would send me the cheque I returned to you recently for £17 2s. 10d., also any further payments that are due." This request was complied with. In compliance with a written request made by the plaintiff on 26th August 1935, after the present action had been begun, the sum of £5 was paid to her by the registrar, in addition to the periodical payments, in order that she might meet extra expenses occasioned by the illness of herself and her children. The periodical payments continued until 2nd October 1935. On 16th October 1935 she wrote a letter to the registrar informing him that " I do not wish you to send me any further cheques until you are notified." No further payments had been made to or accepted by the plaintiff since that date.

Form 34, referred to above, is a notice under rr. 37 and 38 of the *Workers' Compensation Rules*, to all interested parties of the intention of the applicant to apply to the commission for an order for the investment and application of money paid into the office of the commission by an employer.

No question was put to the jury with respect to any of the issues of fact raised by the fifth plea.

The jury found the issue of negligence proved and awarded as damages the sum of £1,000 to the plaintiff together with the sum of £16 10s. for funeral expenses; and the sums of £250, £450, and £300 respectively to the three children. From the amount so awarded to the plaintiff the jury deducted the sum of £425 paid into the office of the commission by the defendant.

On an appeal by the defendant the Full Court of the Supreme Court held that the effect of the payment by the defendant into the office of the commission, and the payments out by the commission in its discretion, upon the plaintiff's application, was to vest the money in the plaintiff and the infant dependants, and operated as a satisfaction of their claim and rights under the *Workers' Compensation Act* 1926-1929, and, therefore, by reason of sec. 63 of that Act, the plaintiff, and the infant dependants, who were bound by her acts, were debarred from proceeding under the *Compensation to*

Relatives Act 1897-1928 (N.S.W.). The verdict was set aside, and a verdict entered for the defendant: *Latter* v. *Council of the Shire of Muswellbrook* (1).

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgments hereunder.

Miller (*Evatt* K.C. and *Dwyer* with him), for the appellant. Other than that it was shown that the appellant received certain payments out of the moneys paid by the respondent into the office of the commission, the allegations made in the fifth plea have not been proved, and, further, no order has been made vesting in the appellant the whole or any part of the moneys so paid in by the respondent. Nothing was left to the jury in respect of the fifth plea. The Full Court was wrong in setting aside the verdict of the jury and entering judgment for the respondent. At the very least the appellant was entitled to have put to the jury the issues raised by the fifth plea. It was a question for the jury as to whether the matters alleged in that plea had or had not taken place. On the evidence no question arises under sec. 63 of the *Workers' Compensation Act*. There was nothing before the court from which the "average weekly earnings" of the deceased worker could be ascertained (*Perry* v. *Wright &c.* (2)). Sec. 14 (*e*) of the Act does not apply. The amount of the moneys paid in by the respondent was not based upon the "average weekly earnings" of the deceased worker, nor was it so paid in in pursuance of an award of the Workers' Compensation Commission exercising jurisdiction under the Act. The appellant did not make any claim under the *Workers' Compensation Act*, nor did she receive satisfaction of any such claim (*Commissioner for Road Transport and Tramways* (*N.S.W.*) v. *Butler* (3)). The statutory remedy under the Act has not been satisfied, and therefore the appellant was entitled to bring the present action (*Harbon* v. *Geddes* (4)). Satisfaction was neither pleaded nor proved; the onus of doing so was on the respondent. The effect of secs. 57 and 59 of the Act is that until the matters there referred to are dealt with by the commission and the sum paid in by the respondent be

(1) (1936) 36 S.R. (N.S.W.) 394; 53 W.N. (N.S.W.) 164.
(2) (1908) 1 KB. 441..
(3) (1935) 53 C.L.R. 33, at p. 50.
(4) (1935) 53 C.L.R. 33.

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divided up into such number of shares as there are dependants, and a particular share allotted to each dependant, none of the dependants have any right whatever in any part of the money so paid in (*Butler* v. *Commissioner for Road Transport and Tramways* (1)). The moneys received by the appellant were paid to her by the commission under secs. 41 and 52 of the Act for the sustenance of herself and the infant dependants of the deceased worker. Form 34, made under rules 37 and 38, which is said to have been signed by the appellant, but not proved to have been, is merely a notice of intention to apply for the investment and application of moneys paid in (*Treatt and Rainbow's Workers' Compensation Laws (N.S.W.)*, pp. 268-270, 310). Even if she signed the form she did not thereby " proceed " under the Act within the meaning of sec. 63. In any event the rights of the infant dependants are not concluded by the acts of the appellant. In the absence of a vesting order the respondent is entitled to have the money paid in returned to it (*Ropner Steamship Co.* v. *Morgan* (2)). [He was stopped.]

Bradley K.C. (with him *Ingham*), for the respondent. The only question for determination is : What is the legal effect of what was actually done by the appellant in connection with the application to the Workers' Compensation Commission ? The appellant alone has a right of action ; there is none in the infants. Every essential in the fifth plea is supported by evidence. The claim against the money paid in by the respondent was legally a claim against the respondent. If liability to pay compensation under the Act be not disputed by the employer, he is entitled under sec. 57 to pay the appropriate amount into the office of the commission : whether or not the money so paid in is the proper and full amount is for the commission only to determine. The adequacy of the amount paid in by the respondent has not been challenged. The relevant provisions of the Act (secs. 57, 59) and rules under the Act (rules 37, 38), as to admission of liability, payment in, and ascertainment of the adequacy of the amount paid in, have been complied with. From the moneys so paid in by the respondent payments have been made to and accepted by the appellant. In addition an application on Form 34

(1) (1935) 52 W.N. (N.S.W.) 18, at p. 19. (2) (1935) 1 K.B. 1, at pp. 7, 10, 11.

was made on behalf of the appellant and the infant dependants for the application and investment of the moneys paid in. Thus it is shown that the appellant accepted and continued to accept money on behalf of herself and the infant dependants knowing it to be compensation under the Act (*Barker* v. *Stoneham & Wilson* (1)).

[EVATT J. referred to *Erickson* v. *Australian Steamships Ltd.* (2).]

The evidence shows that the appellant applied for and obtained compensation under the Act for herself and the infant dependants. She took the prescribed, necessary and proper steps to apply for and obtain compensation under the Act in the case where money has been paid into the office of the commission. Strictly speaking, by taking those steps she did " proceed " under the Act, because no other method is provided by the Act. A claimant is not entitled under sec. 63 of the Act to obtain the maximum amount of the statutory compensation, and then to bring an action at common law for a further amount. The infant dependants are bound by the acts of the appellant (*Neale* v. *Electric and Ordnance Accessories Co. Ltd.* (3) ; *Rhodes* v. *Soothill Wood Colliery Co. Ltd.* (4) ; *Ware* v. *Whitlock* (5)). This action was brought under the *Compensation to Relatives Act* by the appellant as plaintiff on behalf of herself and the infant dependants. If, by virtue of the provisions of the *Workers' Compensation Act*, she was not entitled so to bring the action, then the infant dependants are not before the court at all. Full compensation was paid in by the respondent and accepted and used by the appellant before action brought, and therefore the right of the appellant and the infant dependants to bring an action at common law, that is, under the *Compensation to Relatives Act*, is completely barred. The Full Court held that the facts alleged in the fifth plea had been established.

Miller, in reply. The acts of the appellant in accepting payments from the commission did not, in the circumstances, enure for the benefit of the infant dependants, and, therefore, are not binding on them (*Stephens* v. *Dudbridge Ironworks Co.* (6)). The infant

(1) (1922) 22 S.R. (N.S.W.) 512.
(2) (1919) 19 S.R. (N.S.W.) 132.
(3) (1906) 2 K.B. 558.
(4) (1909) 1 K.B. 191.
(5) (1923) 2 K.B. 418.
(6) (1904) 2 K.B. 225.

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dependants have independent rights (*Kinneil Cannel and Coking Coal Co.* v. *Waddell* (1)). They neither " proceeded " nor were " satisfied " under the *Workers' Compensation Act.* The appellant is entitled to exercise the right preserved to her by sec. 63 of the Act. She is, by sub-sec. 2 of that section disentitled to proceed only in the event of her obtaining satisfaction in a common law action, that is, this action.

Cur. adv. vult.

Dec. 24.

The following written judgments were delivered :—

LATHAM C.J. Upon this appeal many questions have been argued relating to the interpretation of the difficult and obscure provisions of sec. 63 of the *Workers' Compensation Act* 1926-1929 of New South Wales. This section and the corresponding provisions in English legislation have been responsible for striking divergences of judicial opinion. Experience shows that it is impossible to anticipate all the possibilities that may arise in relation to the section, and I therefore think it wise to confine my decision in the case very strictly to what is necessary for the decision of this particular case.

This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales setting aside a verdict for the widow of a person who was injured as a result of an accident. The deceased was employed by the defendant council in excavating gravel in an open cut. Some of the gravel fell upon him and he was killed. The widow sued for damages for negligence on behalf of her children as well as on her own behalf, that is, she proceeded under the *Compensation to Relatives Act* 1897 as amended. The jury found that there was negligence and gave a verdict of £1,000 in favour of the widow with a sum for funeral expenses and for £250, £450, and £300 for three children respectively. The jury deducted from the widow's share a sum of £425 which she had received under the *Workers' Compensation Act.* The defendant council appealed. The appellant failed on the question of negligence and that issue is not now before this court. The defendant council, however, succeeded

(1) (1931) A.C. 575.

on its appeal to the Full Court in relation to the plea that the plaintiff so acted as to preclude any action for damages for negligence independently of the last mentioned Act. The decision of the Full Court depended upon the construction of sec. 63 and the plaintiff has appealed to this court against the decision of the Full Court on that question.

The plea which must be considered upon this appeal is as follows : "The defendant as to the whole of the plaintiff's claim says that the plaintiff after the death of the said Edgar John Latter made a claim against the defendant for compensation under the *Workers' Compensation Act* 1926-1929 on behalf of herself and of her children as dependants of the said Edgar John Latter and in pursuance of such proceedings and with the consent of the plaintiff the defendant paid the full amount of such claim into the office of the Workers' Compensation Commission and subsequently thereto the plaintiff with a full knowledge that she had an alternative right to proceed at common law applied for and obtained the payment out of certain sums of money by the said Workers' Compensation Commission for the benefit of herself and her said children and an order was made by the said Workers' Compensation Commission at the request of the plaintiff vesting the said sum of money paid in as aforesaid in the plaintiff and her said children in accordance with the provisions of the said Act."

No question was put to the jury with respect to any of the issues of fact raised by this plea. The verdict of the jury was taken only on questions of negligence and damages. It apparently was assumed that, though the jury obviously must determine the questions of negligence and damages, the matters raised by the plea quoted were questions of law as to which no findings of the jury were necessary. I do not agree that this is the case. There should have been some finding of fact with respect to the questions of whether the plaintiff made a claim under the Act, whether money was paid into the office of the commission with her consent, what the facts were which would show whether or not the money so paid was the full amount of the claim which could properly be made, whether the plaintiff had knowledge of her alternative rights to proceed at common law and under the *Workers' Compensation Act*, and whether any order was

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made by the Workers' Compensation Commission vesting money in the plaintiff and her children. The evidence as to some of these matters is clear enough but there was no finding of the jury with respect to any of them.

Sec. 63 of the *Workers' Compensation Act* 1926-1929 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."

I do not think it necessary for the determination of this case to consider the difficult question of the meaning of the word "proceed" in this section. I do not inquire whether it means legal proceedings or whether it includes other steps, or whether a worker can be said to have "proceeded" if he has instituted but abandoned proceedings, or if he has accepted a sum of money (or an agreement to pay a sum of money) in satisfaction of his rights either under the Act or independently of the Act. I do not consider these questions in this case because, in my opinion, the plea cannot be supported for the reason that it has not been determined by the jury whether or not the plaintiff was aware of the right to exercise an option which is conferred by the section. The plaintiff was examined and cross-examined upon this question and the determination of the truth was obviously a matter for the jury if it were relevant to the determination of the issues between the parties.

Sec. 63 (2) provides that "in such case," that is, in a case where the employer is liable independently of the Act (see sub-sec. 1) the worker may at his option proceed under the Act or independently of the Act. The question which arises is whether the worker must be deemed to have exercised this option if he in fact takes one of the possible alternative courses whether or not he was aware that he had the right to take the other course.

In my opinion the words " at his option " mean that the worker must exercise a choice between the two alternatives which the law allows to him. The mere adoption of one alternative without knowledge that the law permits another alternative is not an act of choice between the two alternatives. Therefore, in my opinion, the worker cannot be held to have exercised an option unless he knew that there were two alternatives. This does not mean that he must fully understand the meaning of the provisions of this section, which have already given rise to so much difference of judicial opinion. It means simply that he must know that there are two courses open and that, with such knowledge, he adopts one of them. The contrary view, namely, that knowledge of his right is irrelevant, appears to me to ignore the words " at his option." There is, in my opinion, a very real difference between the following provisions: (1) The worker may proceed under this Act or independently of this Act; and (2) The worker may at his option proceed under this Act or independently of this Act. Under a provision such as (1) it is provided that the worker may do one of two things. Apart from legislation, he would be entitled to proceed upon either or both of his possible causes of action, which are separate and distinct. For example, negligence is irrelevant in proceedings under the Act, and the question whether the injury arose out of and in the course of the employment does not determine liability in an action for negligence. The significance of a provision such as (1) would be that if the worker did one thing he was precluded from doing the other. On any other construction the provision would mean nothing. Knowledge of the existence of the alternative courses would be irrelevant. But, under a provision expressed as in (2), the position is, I think, quite different. The words " at his option " add to the meaning of the provision. They introduce an additional element. This additional element must be that there should be knowledge that the alternatives exist and a choice between them. This view is supported by the consideration of another provision in the Act. Sec. 39 is, or ought to be, very important in the administration of the Act. It provides that the commission shall furnish workers and employers with information as to their rights and liabilities in respect of all injuries sustained by workers

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in connection with their employment. It is therefore the duty of the Commission to inform both the worker and the employer that the worker has an option under sec. 63. If the Commission does this as a regular routine no difficulties should arise concerning the worker's knowledge of the courses open to him. Such an administration of the Act in accordance with its clear intention would remove the difficulties which have been suggested. It should be remembered that the *Workers' Compensation Act* is intended to deal with large numbers of cases where persons injured are not in a position to know their rights. It is the statutory duty of the Commission to see that they are fully informed as to their rights.

I have considered whether the view which I have taken is opposed to the principle *ignorantia juris haud excusat.* The maxim finds its obvious application when ignorance of the law is relied upon as an excuse for a criminal act. It is clear that the acceptance of such an excuse would subvert the operation of the criminal law. There is, however, a distinction between the negative proposition " Ignorance of the law is no excuse " and the affirmative proposition " Every person is presumed to know the law." The most authoritative statement of the latter proposition is to be found in the judgment of the House of Lords in *Carter* v. *McLaren* (1), per Lord *Chelmsford.* This was a case in which a person endeavoured on the ground of alleged ignorance of the law to avoid " penal consequences " clearly attached by a statute to the act of a creditor in receiving a gratuity from a bankrupt.

The application of a general rule may, however, be excluded by the provisions of a particular statute. In this case the provisions of the Act are such that in my opinion the proper conclusion is that Parliament dealt with the subject matter upon the basis that employers and workmen might not be aware of the provisions of the statute conferring rights upon them. The special provisions of sec. 39 to which reference has already been made show that the Act does not assume that all persons know the law. Indeed, sec. 39 provides a special means for informing them of the law. This provision and the general nature and objects of the Act distinguish this statute from other statutes and afford an apt occasion for the

(1) (1871) L.R. 2 Sc. & Div. 120, at p. 125.

application of what *Low* J. said in *Hook* v. *Hook and Brown* (1): "I do not see how the law is to be administered so as to be acceptable to reasonable persons unless allowance is made for the want of knowledge on the part of persons in humble life." I add to these features of the Act what I have already said about the nature of an "option" as consisting in an act of choice between two known alternatives. Thus I am of opinion that the maxim mentioned, whether it is expressed positively or negatively, does not stand in the way of the interpretation which I have given to the words "at his option" in sec. 63.

This view is supported by a consideration of the case of *Spread* v. *Morgan* (2). Lord *Westbury* L.C., dealing with a case of election and the equitable rules relating to election, said: "It is true, as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity." Thus the rule that everybody is presumed to know the law has its limits, and, in my opinion, for the reasons given, it would be "too much" to impute knowledge of sec. 63 to all persons with the result that a worker should be deemed to have exercised an option when he never knew that he had any option to exercise.

As I have already said, the jury was not asked to make any finding with respect to the plea now under consideration. In particular, the jury made no finding as to the plaintiff's knowledge of possible alternative courses of action. In my opinion, in the absence of such a finding the plea must fail. This view makes it unnecessary for me to consider many other questions which have been raised. These should be decided only when it is necessary to decide them. The obscurity of sec. 63 is such that it might with advantage receive legislative consideration.

A question arises as to the exact amount for which judgment should be given. In my opinion, the sum of £425 receivable (and in part received) under the Act should be deducted from the damages otherwise obtainable at common law. It is payable as compensation for the same injury as that in respect of which the verdict has been given and the jury, I think rightly, said that

(1) (1917) P. 56, at p. 58.
(2) (1865) 11 H.L.C. 588, at p. 602; 11 E.R. 1461, at p. 1467.

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it should be taken into account. The other members of the court, however, are of opinion that the evidence does not show that the plaintiff and her children have become entitled to this sum under any order of the commission. I find myself unable to accept this view and have little doubt that such an order has in fact been made. In the circumstances, however, it would be useless for me to go into this question. I agree that, if no such order has been made in favour of the plaintiff and her children, the common law judgment will operate to prevent her establishing any right to compensation under the Act. Upon the basis that the plaintiff and her children have no rights in any part of the £425, I agree that the verdict for £2,016 10s. should be restored.

RICH J. In *Harbon* v. *Geddes* (1) I expressed the opinion that the word " proceed " in sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.) referred to legal proceedings and that, unless the worker takes legal proceedings, the option to which the sub-section refers has not been exercised conclusively. I refrained from dealing with the question whether the issue of process or an application for relief is enough to constitute an exercise of the option because I considered that that question did not then arise. In my opinion it does not arise in the present case. My reason for so thinking lies in the operation upon the facts of the present case of the view I have already expressed as to the meaning of the word " proceed." The now plaintiff made no application to the Workers' Compensation Commission for the determination of any question between herself and the now defendant and she sought no other relief against it. When the defendant paid what it considered to be the amount of workers' compensation into the office of the commission, it did so voluntarily and in response to no claim or proceeding on the part of the plaintiff. The only step she took was to apply to the commission for an apportionment of the compensation, as a result of which she obtained payment of small sums apparently for her maintenance. In my opinion these are not legal proceedings within the meaning of the expression " proceed under this Act " contained in sec. 63. In the setting in which that expression occurs, it appears to me that it

(1) (1935) 53 C.L.R., at p. 40.

must refer to proceedings against the employer. Sub-sec. 1 of sec. 63 deals with the liability of the employer under and independently of the Act. Sub-sec. 2 deals with the proceedings to enforce those two liabilities. It is concerned with the choice of one out of the two remedies against him, whether the choice is final or not. But it is not concerned with the steps which may be taken by the worker or his dependants in relation to the commission when they do not involve the enforcement or imposition of liability upon the employer.

In the present case the employer sought to discharge itself by handing over to the commission a sum of money computed as equivalent to the compensation payable under the Act. No question arose as to the employer's liability, and the application related only to the disposition of the fund and not to the determination of the employer's obligations or the dependants' rights against the employer.

In my opinion there is no evidence of an award or order having been made in favour of the plaintiff. In cross-examining the plaintiff with reference to two undated documents addressed to the commission and signed by the plaintiff, counsel for the defendant referred to an award and order. But neither of these documents was produced or shown to the witness or put in evidence. In the circumstances the learned trial judge pointed out that the Supreme Court had no control over the £425 paid into the commission and this court has no control over it. As the case stands the balance of the £425 will, I presume, revert to the party paying it into the commission.

In my opinion the appeal should be allowed and the verdict for £2,016 10s. restored.

DIXON J. In this case the meaning of sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.) again arises for consideration. In *Harbon* v. *Geddes* (1) it was necessary to discuss to some extent its construction and application. Further consideration of the section has confirmed me in the views I then expressed. I do not desire to repeat what I then said, but, before dealing with the facts of this particular case, I shall add the following further observations.

(1) The words "in such case" appear to me to confine the operation of the provision to cases where there is in truth an injury

(1) (1935) 53 C.L.R. 33.

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caused by the personal negligence or wilful misconduct of the employer or of some person for whose act or default the employer is responsible. The reason why the Court of Appeal refused to give this interpretation to the corresponding words in the English section, viz., " in that case," is absent from the New South Wales provisions. In the English section there is a special provision to the effect that, if the worker brings an action for damages within six months and it fails, the court deciding the action may award him workers' compensation, that is, if under the Act he is otherwise entitled to receive it. This was considered to be an exclusive provision implying that in no other way could workers' compensation be obtained after the worker had brought an unsuccessful action against his employer in respect of his injuries. As a consequence it negatived the natural meaning of the words " in that case " which would confine the section to cases where a cause of action actually did exist (See *Cribb* v. *Kynoch Ltd.* [*No.* 2] (1)). There is no ground, in my opinion, for giving to the New South Wales provision a construction which makes it apply when the worker has no cause of action independently of the Act. Thus his claim for compensation is not barred by his bringing an action for damages against his employer in respect of his injury, if that action fails on the merits. It follows that the New South Wales provision is not aimed at protecting the employer from double proceedings. Its purpose is to protect him from a cumulative liability. This conclusion is confirmed, if not made inevitable, by the final part of sub-sec. 2 of sec. 63, which provides that the worker shall not be entitled to compensation if he has obtained judgment against the employer independently of the Act. For if the institution of an action, although it failed, were enough to disentitle the worker to compensation, it would be absurd to enact that recovery of judgment should be a bar.

(2) The kindred question arises whether the fact that a worker has proceeded under the Act is in itself enough to preclude him from afterwards suing his employer on a cause of action independently of the Act. If it were not for the final part of sec. 63 (2) the earlier words might perhaps have been understood to mean that a worker, who was entitled to proceed either under the Act or independently

(1) (1908) 2 K.B. 551, at pp. 556, 560, 562.

of the Act, might take either proceeding as he thought fit but not both, so that if he began one set of proceedings he could not afterwards resort to the other, that is, in a case where both lay. But the final part of sec. 63 (2) says: "but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act." I agree in the opinion expressed by *Jordan* C.J. in *Burnett* v. *Union S.S. Co. of New Zealand Ltd.* (1). He says:—"It is manifest from the concluding words of sub-sec. 2 that the fact that a worker commences proceedings at common law does not amount to an act of election taking away his right to compensation under the Act and barring his right to institute proceedings to recover such compensation. It is incredible that the Legislature should have said that a judgment in his favour should bar the right if it had intended that the writ should do so." The prima facie impression produced on the mind by the earlier words must, therefore, be modified. I think that they must be understood to mean that either of the two proceedings may be maintained but not both concurrently. This is in keeping with what I think is the policy of the provision. For, considered as a whole, it implies that enforcement of both rights is forbidden because it is not intended that a double reparation or recompense should be enjoyed. The worker may pursue either of the two remedies but not so that he obtains under one head rights that would be cumulative on those which under the other head he has already effectuated or fully enjoyed.

(3) But although in my opinion the purpose of the sub-section is to protect the employer against cumulative liabilities in respect of an employee's injuries, that is, against the payment of double reparation, it does not expressly refer to payment of compensation or payment of damages voluntarily and without resort to curial proceedings. It says the worker "may at his option proceed" under or independently of the Act. The word "proceed" is, in my opinion, equivalent to the expression "take proceedings," an expression which has a "meaning . . . familiar to all lawyers" and applies "only to those steps which according to the law applicable to the particular case initiate the process by which the claimant seeks to

(1) (1936) 36 S.R. (N.S.W.) 119, at p. 123.

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recover what he claims to be due to him, and cannot include a claim to compensation" (per Lord *Warrington of Clyffe* in *M'Cafferty* v. *MacAndrews & Co.* (1); see, too, per Lord *Buckmaster* (2)).

Concurrent proceedings for both compensation and damages are forbidden. But, as was decided in *Harbon* v. *Geddes* (3), a claim without legal proceedings is not within the provision and it does not imply that the worker's rights under the general law are barred by reason only of the fact that he has received some compensation or some benefits under the Act.

(4) Nevertheless I think that the sub-section does necessarily imply that, if full enjoyment or satisfaction is obtained of either of the rights to the alternative forms of reparation or redress, the other cannot be enforced. The provision that after recovery of judgment the worker shall not be entitled to compensation appears to me to imply that the right to compensation is alternative with the right of the worker against his employer independently of the Act to damages for his injuries. I am unable to agree in the view that although after judgment in an action of damages there can be no compensation, yet an action may be maintained by a worker to whom compensation has been awarded and paid in full. No doubt the concluding words of sub-sec. 2 deal explicitly only with the case of the recovery of judgment in an action of damages. But they are in the nature of a proviso to the first part of the sub-section, which says that the "worker may, at his option, proceed under this Act or independently of this Act." They give a meaning to these words. The words are apt for the purpose of making the rights they describe mutually exclusive. The proviso which follows them shows, in the first place, that the rights described are not procedural but substantive, that it is the right to damages and the right to compensation which are alternative, not the rights to litigate successively claims, made and denied, to the alternative forms of reparation.

The proviso shows, in the next place, that satisfaction of one right is to exclude or discharge the other. For its purpose is to make judgment without satisfaction, in an action to enforce the

(1) (1930) A.C. 599, at p. 623. (2) (1930) A.C., at p. 618.
(3) (1935) 53 C.L.R. 33.

right to damages, an answer to a claim for compensation. This appears to me to imply that satisfaction without judgment must have the like effect.

(5) There is no difficulty in supposing satisfaction of the right to damages independently of the Act. It may arise from payment of an agreed amount of damages or from other forms of accord and satisfaction. But the peculiar nature of the workers' compensation makes it sometimes difficult to say that the right has been satisfied, exhausted or enjoyed to the full. When there has been an injury of the kind falling within the table under sec. 16 there is no difficulty in treating payment of the lump sum as satisfying the liability. Nor is there any difficulty when a sum is paid in satisfaction of a death claim or by way of redemption of weekly payments pursuant to sec. 15 or when weekly payments have been made up to the limit imposed by sec. 9 (3). But, where weekly payments have been made without award and, before that limit is reached, they are stopped on the ground that the worker has recovered and is no longer under any incapacity, a difficulty does arise. For not only may the fact of the worker's recovery be disputed, but even if his incapacity has ceased, it may reappear. While this difficulty must be acknowledged, I do not think its existence is enough to outweigh the considerations appearing on the face of the section itself and evidencing its meaning. The failure to foresee and provide for the many contingencies which must arise in the practical application of such a section is the cause of the uncertainty that surrounds the present question, not only under the New South Wales, but also under the English, provision. The fact that the interpretation, which otherwise appears to represent the intention of the provision, is difficult of practical application in a particular contingency hardly justifies its rejection. The general intention expressed by the sub-section includes, in my opinion, the extinguishment of the cause of action under the general law when the right to compensation conferred by the Act has been enforced or fully enjoyed. The application of this general intention may in some events be difficult. But I think the difficulty must be resolved by deciding whether the particular situation arising does, or does not, fall within the true scope of that general intention. If it be necessary to

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suggest an answer to the difficulty I have mentioned, I should say that a worker who had apparently recovered from incapacity and was no longer in receipt of weekly payments would be presumed to have fully enjoyed his right to compensation, notwithstanding the logical possibility of incapacity again arising. If the weekly payments were terminated or their continuance were refused by order or award, while the order or award stood I should think his right to compensation must be considered satisfied or exhausted. The liability of the employer to pay compensation being satisfied, the action independently of the Act would be barred. It is not my purpose to attempt an exhaustive statement of the states of fact in which, apart from proceedings under the Act, the liability of the employer to make compensation may be satisfied. For instance, when proceedings are taken under the Act and the right to compensation passes into an award, it is, I think, a question whether that itself is not enough without payment to bar the remedy under the general law, but that question does not arise in the present case.

(6) The words " at his option " do not, in my opinion, import that the right to recover damages independently of the Act or compensation under the Act shall depend upon the worker's intention, whether considered as a state of mind only or a state of mind accompanying or actuating the issue of legal process or some other act.

A close examination of the reasons of *Bankes* L.J. and *Atkin* L.J. in *Bennett* v. *L. & W. Whitehead Ltd.* (1) shows, I think, that their Lordships thought that under the English provision an intention to abandon or exclude the right to compensation was necessary before the mere institution of an action of damages afterwards discontinued could bar a claim under the Act. For an intention to accept or adopt the common law remedy, as distinguished from an intention to reject the remedy under the Act, there appeared unequivocally and was acted upon. Further, *Bankes* L.J. speaks (2) of " a conclusive election to adopt that remedy to the exclusion of some other form of remedy," and *Atkin* L.J. (3) in the final words of his judgment says : " I find no evidence that the applicant did elect to adopt

(1) (1926) 2 K.B. 380. (2) (1926) 2 K.B., at p. 390.
(3) (1926) 2 K.B., at p. 410.

the common law remedy to the exclusion of his rights under the Workmen's Compensation Act."

To give an election to take one out of two courses, but not both, is a different thing from conferring a power to abandon one of them. The former is necessarily exercised when one of the two courses is taken. An intention to retain the right afterwards to take the second course would be beside the point. But, if the question is one of abandonment, the first course may quite consistently be taken and completed without any relinquishment of the right to pursue the second. In earlier cases, which are collected by *Scrutton* L.J. in *Harrison* v. *Wythemoor Colliery Co.* (1), it has been decided that the purposes of the English provision included the protection of the employer against double proceedings in respect of the same injury. Accordingly the choice was between proceedings, not merely between substantive rights. If the two courses between which in England the employee may or must elect are proceedings under or independently of the Act, it would seem that an intention to reject or abandon one of them is required by the decision in *Bennett* v. *L. & W. Whitehead Ltd.* (2). If, however, the two courses are the enforcement or effectuation of the rights, this is not the necessary consequence of the decision. But, whatever may be the effect of this decision under the English provision, I think the New South Wales Act makes the exercise of rights against the employer by the worker and not the worker's mental attitude or intention the test of the employer's liability.

I am unable to agree in the conclusion based on the use in sec. 63 (2) of the word " option." It appears to me to show no more than that the worker could pursue whichever right or remedy he liked. I do not see why the word should be taken to imply that the test is to be the worker's volition in choosing, rather than his act in pursuing to its conclusion, one of the alternative rights or remedies. Still less do I see why the expression should be understood to imply that the worker's adoption in fact of one of the two alternative courses cannot preclude him from afterwards pursuing the other unless at the time he was fully aware that the second course was open to him.

(1) (1922) 2 K.B. 674, at pp. 697, 698. (2) (1926) 2 K.B. 380.

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We are not here dealing with a question of waiver or one of estoppel. Whatever doubt or difference of opinion may exist as to the exact nature of the alternatives which the legislation intends to present to the worker, that is, whether the alternatives are two claims, two legal proceedings, or two substantive rights to reparation, it seems clear enough that it intends that he may have whichever he likes but not both. To say that when he has had one, he can then have the other provided that when he took the first he was unaware that he could have taken the other, is to ascribe to the enactment an operation that could scarcely have been foreseen. Suppose, for example, that a worker claims from his employer damages at common law for his injury and obtains in settlement of his claim out of court a sum fully commensurate with his injuries. If the application of sec. 63 (2) depends upon his intention and knowledge, then, unless it can be shown that he was aware of his right to worker's compensation, he remains entitled to weekly payments during the period of his incapacity. I see no means by which the damages could be taken into account either in satisfaction or in reduction of the weekly payments. This consequence would ensue, whether the worker had or had not issued a writ before the settlement of his claim, that is, so long as he did not recover judgment.

Under the English provision the choice is between proceedings. In his dissenting judgment in *Bennett* v. *L. & W. Whitehead Ltd.* (1) *Scrutton* L.J. appears to me to answer the contention that the worker " was not barred till he did an act by which he conclusively elected with full knowledge of the facts which course he intended to pursue." He pointed out that the force of the argument depended on the nature of the option. After giving examples, he said :— " I do not think you can escape the statutory prohibition against doing a thing by saying that, though you have done it, you have not elected to do it. If by statute you have an option to do A or B, but not both, and you have done A, it does not seem to me relevant to say ' I have done A, but I have not elected to do it.' Unless it can be said that you do not take proceedings when you issue a writ and serve it on the defendant, I think you have elected to do what you have in fact done, and cannot take the other alternative."

(1) (1926) 2 K.B., at pp. 404, 405.

The same view has been taken in the Supreme Court of New South Wales in *Burnett* v. *Union S.S. Co. of New Zealand Ltd.* (1) and *O'Connor* v. *S. P. Bray Ltd.* (2), where *Jordan* C.J. fully discusses the matter.

What I have already said contains most of the considerations which affect the question arising in the present appeal. But it is necessary to apply the general views I have expressed to the facts of the case which raise one further legal question. Owing to the manner in which the case was dealt with at the trial, there is some difficulty in determining what exact state of facts we should take as established. A discussion of this difficulty would serve no purpose and it is enough to say what are the facts which I accept or assume as the basis of my decision. They are as follows. The plaintiff, who is a widow, with three children, who are infants, lost her husband by an accident in circumstances which gave rise to a cause of action under the *Compensation to Relatives Act* 1897-1928 against the defendant his employer as well as to a right to compensation under the *Workers' Compensation Act* 1926-1929. Before she had taken any proceedings in respect of the cause of action or of the claim to compensation, the defendant paid into the office of the Workers' Compensation Commission the sum of money which it considered to be payable under sec. 8 of the *Workers' Compensation Act*. The payment was made under sec. 57 of that Act and rule 38 of the *Workers' Compensation Rules* 1926. The registrar did not, so far as appears, report that the sum paid in was inadequate (See rule 38 (3) and (5)). But the plaintiff did furnish to the commission information on a form corresponding in description with Form J of the regulations made under the Act, a form which is prescribed by clause ii. of those regulations for use when any person applies to the commission for the investment and application of any compensation money paid into the commission. She also signed a notice of intention to apply for an order for the investment and application of a sum of money paid into the commission. The notice followed Form 34 of the rules, which is prescribed by rule 37 (8). No order of the commission dealing with the sum paid in was proved, but some

(1) (1936) 36 S.R. (N.S.W.), at p. 123.
(2) (1936) 36 S.R. (N.S.W.) 248, at pp. 256-264; 53 W.N. (N.S.W.) 72, at pp. 73, 74.

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small sums were paid out to the plaintiff and I think it should be assumed in the defendant's favour that the commission, acting under sec. 57 (2), thought fit to apply to that extent the money paid in towards the maintenance of the plaintiff and her children. But, having regard to the course taken at the trial, it cannot be inferred or assumed that any other order was made by the commission affecting the title to, or the application of, the fund. At that stage the plaintiff rejected any further payment of compensation and sued for damages independently of the Act. What occurred after her writ was issued does not affect the question, which is whether the facts I have stated operated under sec. 63 (2) as an answer to her action.

Upon those facts it is, I think, clear that the rights neither of herself nor of her children to compensation were satisfied or discharged. It may be that by paying into the commission the sum which the defendant considered sufficient as compensation, the defendant did fulfil its obligations under the *Workers' Compensation Act* so that it lay under no further responsibility under the Act. That depends upon the correctness of its estimation of the sum. But property in the money did not pass to the plaintiff or her children. Their rights under the Act were not fully effectuated or enjoyed, and clearly she was at liberty when the money was paid in to ignore it, and without taking any part of it, to sue on her cause of action independently of the Act. If it turned out that some or all of the money was not required for the purpose of compensation it would be repayable to the defendant (*Ropner Steamship Co.* v. *Morgan* (1)). According to the opinions I have expressed above and in *Harbon* v. *Geddes* (2), as the plaintiff's rights under the Act are not satisfied, it is a preliminary condition to the application of sub-sec. 2 of sec. 63 that the plaintiff should have taken legal proceedings under the Act. For in the expression " at his option, proceed under this Act or independently of this Act " I interpret the word " proceed " as meaning " take legal proceedings." It may be that this preliminary condition is fulfilled by the plaintiff's having made an application to the commission in accordance with Form 34 of the rules and Form J of the regulations. It is true that in doing

(1) (1935) 1 K.B. 1.

(2) (1935) 53 C.L.R. 33.

so she did not take a proceeding for the purpose of imposing liability upon the employer to pay compensation under the Act. But she took a step in legal procedure for the purpose of obtaining a benefit conferred by the Act upon the plaintiff as a dependant. I assume in the defendant's favour that this amounts to proceeding under the Act within the meaning of that phrase in sec. 63 (2). I have already expressed the opinion that satisfaction of one right without legal proceedings bars the other and this view is applicable *a fortiori* where legal proceedings precede the satisfaction.

In the present case, however, there is a legal proceeding and no satisfaction but only the receipt of interim payments of small amount. It must be taken that no order vesting the fund in the dependants was made and that, except for the small payments received, it awaits disposition. The facts do not disclose a transmutation of the rights given under the Act into some other form so that they no longer depend simply on the statute and are no longer governed by the conditions it describes. An order vesting the compensation or apportioning it might have this effect. Possibly an award of compensation might be considered to do so, but, again, the question of the effect of an award does not arise in this case. The facts do not disclose complete enjoyment or satisfaction of the rights to compensation. They do not show any other definitive change of the mutual rights and obligations of the parties of such a kind that to enforce the remedy independently of the Act would give to the plaintiff more than the reparation to which that remedy entitles her. There is nothing but the plaintiff's application to the commission and the consequent payment to her of some small sums of money. Whatever else may be considered enough to bar the alternative remedy when proceedings under the Act have been instituted, this, in my opinion, will not suffice. I think the facts are insufficient to bar the plaintiff's remedy independently of the Act.

The recovery of judgment disentitles the plaintiff to compensation under the Act and she no longer has any claim on the money paid into the commission. The verdict should, therefore, have been entered for £2,016 10s. and not that amount diminished by the £425 paid into the commission. According to the *postea* it was entered for £1,591 10s.

I think the appeal should be allowed and a verdict entered for £2,016 10s.

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EVATT AND MCTIERNAN JJ. We are in agreement with the judgment of the Chief Justice on the main part of the appeal.

In *Harbon* v. *Geddes* (1) we pointed out the significance of the words " *at his option* " in sec. 63 (2) of the New South Wales *Workers' Compensation Act*. These words were inserted to ensure that the worker is presented with the reality of a choice between proceeding at law on the one hand, and under the Act on the other hand. Before a worker can be precluded from proceeding at law, it must at least be shown 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 " (2). In our view, such opinion finds direct support in the decision of the Court of Appeal in *Bennett* v. *L. & W. Whitehead Ltd.* (3), as appears clearly from the judgment of *Bankes* L.J. and *Atkin* L.J. For the purpose in hand, the words of the English Act, which are set out at p. 382 of the report of that case, are indistinguishable from those used in the New South Wales Act. The words of the English sub-section are : " but in that case *the workman may at his option*, either claim compensation under this Act, or take proceedings independently of this Act." The words of the New South Wales sub-section are : " in such case *the worker may, at his option*, proceed under this Act, or independently of this Act." How any distinction in respect of the question of " option " can be made between the two sub-sections, we are unable to understand, for the English sub-section is not only in *pari materia*, but the relevant part of it is identical with the relevant part of the New South Wales enactment.

We desire to add, with respect, that the interpretation of the sub-section has little or nothing to do with the questions discussed at great length by the Full Court of New South Wales in *O'Connor* v. *S. P. Bray Ltd.* (4). Although the word " election " appears in *Harbon* v. *Geddes* (5) and in the English cases, it was used, not in the technical sense elaborated in the Full Court's judgment, but merely as a convenient synonym for the exercise of a conscious choice, or " option " between two courses.

(1) (1935) 53 C.L.R., at pp. 50-54.
(2) (1935) 53 C.L.R., at p. 52.
(3) (1926) 2 K.B. 380.
(4) (1936) 36 S.R. (N.S.W.), at pp. 256-265 ; 53 W.N (N.S.W.), at pp. 73, 74.
(5) (1935) 53 C.L.R. 33.

If Parliament decides to adopt the Chief Justice's important suggestion of legislation in relation to sec. 63 (2), we desire to reiterate the opinion that, before a worker should be precluded by legislation from exercising the ordinary right of a citizen to sue for or recover at law the full measure of compensation for an employment injury caused by a defendant's negligence, it is essential that the worker should be made fully aware of the fact that he has a choice to make and that that choice is irrevocable. Otherwise the *Workers' Compensation Act* might, in cases where negligence exists, turn out to be a delusion and a snare.

In the present case, there was an allegation by the defendant in the fifth plea that the plaintiff proceeded under the Act " with a full knowledge that she had an alternative right to proceed at common law." But this allegation was not established by the defendant, so that the issue based on the plea must be treated as found in favour of the plaintiff.

It has been suggested that, in the present case, the verdict should be reduced by an amount equal to the sum of money paid by the respondent into the Workers' Compensation Commission.

We agree there is no objection in principle to taking into account in reduction of a common law verdict the amount of payments to a worker or a dependant, providing that those payments have been made in respect of the same injury as that in respect of which the plaintiff is suing. But we also think that, as in the present case, the money paid into the Workers' Compensation Commission was always under the control of the respondent, no reduction is required. It goes without saying that the successful appellant must be regarded as never having had any claim to the moneys paid into the Workers' Compensation Commission.

The appeal should be allowed, and a verdict entered for the plaintiff for the amount mentioned in the order. The respondent should pay the costs here and below.

Appeal allowed with costs in this court and in the Supreme Court. Order of the Full Court of the Supreme Court discharged. Verdict entered for £2,016 10*s*. *Plaintiff to have costs of action.*

Solicitors for the appellant, *Abram Landa & Co.*

Solicitors for the respondent, *Tietyens, McLachlan & Co.*

J. B.