[HIGH COURT OF AUSTRALIA.]

FARMER AND COMPANY LIMITED . . APPELLANT;
DEFENDANT,

AND

GRIFFITHS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 6; *Sept.* 2.

Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Infant—Receipt of compensation—Right to recover damages against third person—Workers' Compensation Act 1926-1938 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1938), *sec.* 64.

Sec. 64 of the *Workers' Compensation Act* 1926-1938 (N.S.W.) provides that when the injury for which compensation is payable under the Act is caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation but shall not be entitled to recover both damages and compensation.

Held, by *Evatt* and *McTiernan* JJ. (*Dixon* J. dissenting), that an infant, being a worker under the *Workers' Compensation Act* 1926-1938, to whom his employer has paid over certain moneys purporting to be payments of compensation for personal injury, is not thereby barred from recovering damages against a third party whose negligence caused the injury where it is not for the benefit of the infant to receive compensation rather than to recover damages from the third party.

Per Evatt J.: The amount of the payments made by the employer may be taken into account in reduction of the damages payable by the third party.

Decision of the Supreme Court of New South Wales (Full Court): *Griffiths* v. *Farmer & Co. Ltd.*, (1940) 40 S.R. (N.S.W.) 296; 57 W.N. (N.S.W.) 96, affirmed.

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APPEAL from the Supreme Court of New South Wales.

By the declaration in an action brought by him in the Supreme Court of New South Wales, John Alexander Griffiths, by his next friend, claimed to be entitled to recover damages in the sum of £2,000, from Farmer & Co. Ltd. for injuries alleged to have been sustained by him through negligence for which the defendant was alleged to be responsible.

The defendant's fourth plea was based on sec. 64 of the *Workers' Compensation Act* 1926-1938 (N.S.W.). It alleged that the plaintiff was a worker within the meaning of the Act and was employed by Yellow Express Carriers Ltd.; that the injuries mentioned in the declaration were sustained by the plaintiff during the course of and arose out of his said employment; and that prior to the commencement of the action he applied for and received from his employer compensation under the said Act in respect of the said injuries.

The plaintiff's second replication, which was pleaded to the defendant's fourth plea, alleged that at all material times the plaintiff was an infant, and that it was not for his benefit that he should apply for and receive from his employer compensation under the Act.

The defendant demurred to this replication.

The Supreme Court, by majority, gave judgment for the plaintiff on the demurrer on the ground that he, being an infant, was not bound by any *de-facto* act not proved to have been for his benefit: *Griffiths* v. *Farmer & Co. Ltd.* (1).

From that decision the defendant appealed, by leave, to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Cook, for the appellant. Sec. 64 of the *Workers' Compensation Act* 1926-1938 (N.S.W.) is quite different in its terms from sec. 63 of that Act. It is contrary to the terms of sec. 64 that unless receipt of compensation is found to be for his benefit an infant is entitled to retain compensation which has been paid to him and also to recover damages. *Stephens* v. *Dudbridge Ironworks Co. Ltd.* (2); *Murray* v. *Schwachman Ltd.* (3) and *Stimpson* v. *Standard*

(1) (1940) 40 S.R. (N.S.W.) 296; 57 W.N. (N.S.W.) 96.
(2) (1904) 2 K.B. 225.
(3) (1938) 1 K.B. 130.

Telephones and Cables Ltd. (1) are cases involving the interpretation of sec. 63, and in each case the proposition was put on the basis of contract. So far as sec. 64 is concerned there is normally no question of contract (*Neale* v. *Electric and Ordnance Accessories Co. Ltd.* (2); *Cribb* v. *Kynoch Ltd.* [*No.* 2] (3)). In England the view taken, particularly in *Perkins* v. *Hugh Stevenson & Sons Ltd.* (4), is that quite independently of legal proceedings the mere application for and receipt, and, independently of that, the mere payment by the employer, is in discharge of his obligation, and further, if the worker has received that money then he is deemed to have exercised his option. A worker who has applied for and received compensation under the Act is barred by sec. 64 from suing for damages in respect of the injuries sustained by him (*Smith* v. *Commonwealth Oil Refineries Ltd.* (5)). The plea demurred to was based upon that decision. An infant is not in a more favourable position than an adult (*Neale* v. *Electric and Ordnance Accessories Co. Ltd.* (6); *Cribb* v. *Kynoch Ltd.* [*No.* 2] (7)). Acceptance of compensation bars any other remedy under sec. 64 (*Page* v. *Burtwell* (8)). The position is covered by the judgment of the Lord President in *Aldin* v. *Stewart* (9).

Clive Evatt K.C. (with him *Kirby*), for the respondent. Sec. 63A (3) (*b*), as inserted by Act No. 36 of 1938, is the only provision in the *Workers' Compensation Act* by which an infant worker can be deprived of common-law protection. There is nothing in sec. 64 which takes away that protection. Unless it can be shown that compensation received was for the benefit of the infant, common-law protection runs and the infant cannot be estopped from proceeding at common law (*Thomason* v. *The Council of the Municipality of Campbelltown* (10)). The principle is as stated in the court below (11) and in *Stimpson* v. *Standard Telephones and Cables Ltd.* (12). The mere payment of money as compensation is not sufficient. The question of infancy was not referred to in *Aldin* v. *Stewart* (9), therefore

(1) (1940) 1 K.B. 342.
(2) (1906) 2 K.B. 558.
(3) (1908) 2 K.B. 551.
(4) (1940) 1 K.B. 56.
(5) (1938) 60 C.L.R. 141.
(6) (1906) 2 K.B., at p. 568.
(7) (1908) 2 K.B., at p. 561.
(8) (1908) 2 K.B. 758.
(9) (1915) 9 B.W.C.C. 418.
(10) (1939) 39 S.R. (N.S.W.) 347, at pp. 360, 361; 56 W.N. (N.S.W.) 108, at p. 112.
(11) (1940) 40 S.R. (N.S.W.), at p. 303.
(12) (1940) 1 K.B., at pp. 353, 354.

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that decision should not be followed. There must be some method of determining the quality of the payment. The simple question between the parties is whether the mere physical handing over of the money is sufficient or whether in the case of an infant it should be for the infant's benefit. The test to be applied and the point of time at which it should be applied is shown in *Stimpson* v. *Standard Telephones and Cables Ltd.* (1). Having regard to the limits of the compensation payable under the Act, it is more beneficial for an infant who has a good common-law case to proceed under the common law for damages than under the Act for compensation. The meaning of the word "recover" was considered in *Smith* v. *Commonwealth Oil Refineries Ltd.* (2), *Harbon* v. *Geddes* (3), *Rogers* v. *Schultz* (4) and *Page* v. *Burtwell* (5). The courts have regard to the relationship between the person injured and the employer as one in the nature of a contract or agreement.

Cook, in reply.

Cur. adv. vult.

Sept. 2.

The following written judgments were delivered :—

DIXON J. The state of facts upon which the decision of the appeal must be based is this :—The plaintiff, an infant, suffered injury by accident arising out of and in the course of his employment and applied to his employers for and received workers' compensation. Then, by his next friend, he brought the present action against a third party claiming damages for the same injury on the ground that it was caused by the defendant's negligence.

Sec. 64 (*a*) of the *Workers' Compensation Act* 1926-1938 (N.S.W.) provides that where the injury for which compensation is payable under the Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation but shall not be entitled to recover both damages and compensation.

(1) (1940) 1 K.B., at pp. 354, 355.
(2) (1938) 60 C.L.R., at pp. 147, 148.
(3) (1935) 53 C.L.R. 33.
(4) (1921) 21 S.R. (N.S.W.) 731, at p. 739.
(5) (1908) 2 K.B. 758.

If, therefore, the infant plaintiff has on the facts stated "recovered compensation," his present action is barred. The plaintiff says that he has not recovered compensation because he is an infant and the receipt of compensation by him was not for his benefit. It must be taken that it was not in fact for his benefit to receive compensation and thereby exclude his alternative remedy for negligence against the third party, that is, the defendant. The question for our decision is whether that fact affords a sufficient answer to the application of sec. 64 (*a*) so that his present action remains open to him.

Sec. 64 (*b*) goes on to provide, in effect, that when the worker has recovered compensation from his employer, for the purpose of indemnifying the latter, any cause of action which the worker may have against a stranger in respect of the same injury shall vest in the employer. Thus recovery of compensation by a worker has a double operation. It divests from him any right of recovery for the same injury he may have against a third party and at the same time, for the purpose of indemnity, it invests his employer with that cause of action.

Independently of infancy, a construction has been placed upon sec. 64 by judicial decisions which must form the foundation of the conclusion we may reach. It is settled that for the purposes of the section a workman recovers compensation when he receives payment of compensation and, further, that he recovers compensation notwithstanding that he receives some payments of compensation and not the full compensation to which he may be entitled. In *Smith* v. *Commonwealth Oil Refineries Ltd.* (1) this court acted upon the English decisions which adopted such a construction. It may be remarked that, if a different interpretation had been placed on the provision and "recovery" had been limited to recovery by award or as a result of legal proceedings, the present question could not have arisen. For, if in properly constituted proceedings an infant recovered by judicial decision damages or compensation, no question could afterwards arise as to his not being bound because the result was not for his benefit.

But as it is, the question must present itself whether the *de-facto* receipt by an infant worker from his employer of a sum or sums of

(1) (1938) 60 C.L.R. 141.

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money as and for compensation is binding upon him notwithstanding that it spells the loss of a right to recover from strangers, which is not for his benefit.

In considering this question it must be steadily borne in mind that no question of election or option arises under sec. 64. In this respect it is quite unlike the provision dealing with alternative remedies against the employer himself: sec. 63, upon which *Latter* v. *Muswellbrook Corporation* (1) was decided. Under sec. 64 the sole question is whether the worker has in fact recovered and his knowledge of the existence of other remedies, of the facts or circumstances, and his mental operations, are all irrelevant.

In my opinion the matter is, therefore, reduced to the question: Can an infant worker validly receive compensation from his employer notwithstanding that to exclude his rights to recover damages from a third party is not for his benefit? Now it is not true that an infant can give a good discharge for no payment made to him. Speaking generally, he cannot give a good discharge for payments in the nature of property, as, for example, a legacy. But there is no such general rule in respect of liabilities contractual in their origin. A contract of employment or apprenticeship may bind an infant and under it liabilities to him for wages will arise which are validly discharged by payments to him. According to Lord *Mansfield*, he may give a good discharge for rent accruing due to him as lessor (*Buckinghamshire* (*Earl of*) v. *Drury* (2)). I should suppose that the discharge was not invalidated by the circumstance that the payment operated to waive a right of re-entry which it was for his benefit to exercise.

Workmen's-compensation legislation is framed upon the plan of providing weekly payments which, unless redeemed by a lump sum, represent a proportion of the wages the workman is disabled from earning owing to the incapacity caused by the accident. The Act draws no distinction between infants and workmen of full age. The assumption appears to be that just as an infant would receive his wages so he will receive his weekly payments of compensation. That an infant worker employed at wages can receive his wages personally and that payment to him is a valid discharge to his

(1) (1936) 56 C.L.R. 422.
(2) (1761) 2 Eden 60, at p. 72 [28 E.R. 818, at p. 823].

employer can admit of no doubt. There is no reason to think that payments of compensation stand in any different position. But for the fact that the receipt of compensation operates to transfer, so to speak, to the employer the worker's right of action against third parties in respect of the injury, there could be no ground for denying the validity of such a payment to an infant.

But the legislation, as it has been construed, makes this an automatic consequence of an act which comes within the description of recovery of compensation. It was not intended, by affixing this consequence to it, to change the attributes of that act, the elements or ingredients by which it is constituted. To say that a payment which otherwise operates as a valid discharge cannot do so because the legislature has affixed a new consequence to the receipt of the money and it would not be for the benefit of the payee, being an infant, to incur the consequence, is to alter the characteristics of the thing chosen by the legislature as its standard or criterion.

It appears to me that the provision assumes that "recovery of compensation" is open to all workers alike and, that being so, has assigned a result which shall invariably follow, viz., the passing of the cause of action against strangers in respect of the injury. It may be that the meaning placed by the courts upon the word "recovery" was not before the minds of the framers of the provision. But, even so, it does not justify the introduction of a qualification into the capacity of an infant to receive payment and thereby recover compensation.

It is said, however, that before a man can receive payment of compensation there must be a mental assent on his part to the nature of the payment, that is, he must assent to the proposition that the money is paid as and for compensation. No assent by an infant, it is claimed, can bind him unless it is for his benefit. My answer to this is that an infant can validly assent to that proposition, namely, that the money is paid as and for compensation. He might not be able to assent to an election. But there is no election in the matter. His loss of remedy against third parties is not a matter to which his mind need be directed. Could an infant who has received payment of compensation say to his employer: "If that payment was valid it would operate to deprive me of valuable rights against

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strangers and therefore it was not for my benefit and was nugatory and void. True it is I don't propose to sue the strangers. But the payment, for that reason, does not bind me. My receipt of the money did not operate as a discharge: you must pay me over again" ?

Reliance was, however, placed upon a passage in the judgment of *Greene* M.R. in *Stimpson* v. *Standard Telephones and Cables Ltd.* (1). It was not a decision upon the same provision but upon that giving the workman a choice of remedies against the employer himself. The Master of the Rolls said:—"In the case of an infant, when once it is clear that in order to find the requisite quality in the payment a mental operation on the part of the recipient is required, the question arises: Was it for the infant's benefit that that particular decision should be taken ? If the payment was made under an agreement, if the parties rested not merely on the statutory position but also on a contractual position, it is clear that the question of the infant's benefit becomes immediately relevant. That appears from the case of *Stephens* v. *Dudbridge Ironworks Co. Ltd.* (2) and from *Murray* v. *Schwachman Ltd.* (3). In my judgment, quite apart from cases involving an actual contract, where there is need of a mental operation of the infant, whether it is in the exercise of the option before receiving payment, or whether it is looked at from a point of view of actual receipt of payment, the question must always be investigated, was it for the infant's benefit that the payment should be made ?" (4).

In using this language *Greene* M.R. in my opinion was not thinking of what amounted to a "recovery" by an infant. He was considering only a case of a receipt of payment amounting to an exercise of an option. Though to receive payment of compensation might amount in an adult to the exercise of an option, yet, says the Master of the Rolls, it could not in an infant because its quality as an exercise of an option is beyond his capacity to judge.

Finally I should add that I do not agree in the view that, under sec. 29 (1) of the English Act of 1925, payment of itself may be a bar, not because it amounts to an exercise of an option, but because

(1) (1940) 1 K.B. 342.
(2) (1904) 2 K.B. 225.
(3) (1938) 1 K.B. 130.
(4) (1940) 1 K.B., at p. 354.

of the second limb of the sub-section, namely, the provision that an employer shall not be liable to pay compensation both independently of and also under the Act. The emphasis is on "liable." *De-facto* payment by the employer is not enough. I do not think the English cases can be explained on such a ground. They depend upon receipt of payment operating as an exercise of an option.

In my opinion the appeal should be allowed. The order of the Supreme Court should be discharged and in lieu thereof there should be judgment for the defendant in demurrer.

EVATT J. The question for our decision is whether an infant (being a worker under the New South Wales *Workers' Compensation Act*) to whom his employer has handed over certain moneys purporting to be payments of compensation for personal injury under the said Act, in circumstances where the receipt thereof as compensation was not for the benefit of the infant, is nevertheless debarred by sec. 64 (*a*) from recovering damages against a third party whose negligence has caused the injury. Sec. 64 (*a*) provides that, where the injury for which compensation is payable under the *Workers' Compensation Act* has been caused by the negligence of a person other than the employer, the worker shall be at liberty to take proceedings both against his employer and the third party, but "shall not be entitled to recover both damages and compensation."

The recent case of *Smith* v. *Commonwealth Oil Refineries Ltd.* (1) shows that, in legislation which is framed according to the tenor of sec. 64, an adult worker who has "recovered" a sum of money which is paid as, and received as, worker's compensation for an injury, is debarred from recovering against a third party in respect of the same injury; even although the "recovery" by the worker is limited to one week's compensation, and the worker is willing to repay the sum. But *Smith's Case* (1) was not concerned with the case of an infant worker.

In the recent case of *Stimpson* v. *Standard Telephones and Cables Ltd.* (2), which arose under sec. 29 (1) of the English Act of 1925, it was held by the Court of Appeal that an infant workman was not barred from recovering damages at common law for the personal

(1) (1938) 60 C.L.R. 141. (2) (1940) 1 K.B. 342.

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negligence of the employer although the workman had advisedly claimed and been paid workman's compensation. The ground of the decision was that it was not for the benefit of the infant that she should obtain workman's compensation instead of damages for personal negligence. Is the principle of *Stimpson's Case* (1) limited to provisions analogous to sec. 29 (1) of the Act of 1925, or does it apply also in provisions framed like sec. 64 of the New South Wales Act? With one exception, sec. 29 (1) of the English Act corresponds to sec. 63 (1) of the *Workers' Compensation Act* as it appeared before its recent amendment. The exception is that the English Act contains a provision that the employer shall not be liable "to pay compensation for injury to a workman by accident . . . . both independently of and also under this Act," whereas in the New South Wales section the only absolute prohibition was that the workman should not be entitled "to compensation under this Act if he has obtained judgment against his employer independently of this Act." Under sec. 29 (1) of the English Act, therefore, it is possible for proceedings against an employer to fail not only in cases where the statutory option to take proceedings at common law has been irrevocably exercised, but also where the employer has already paid the workman compensation under the Act. It was to the latter provision that the Court of Appeal addressed itself in *Stimpson's Case* (1). It appeared that weekly payments had been made by the employer from April 1935, the date of the accident, until March 1936, in circumstances where the advisers of the infant, acting on her behalf, duly claimed the payments and duly received them with a full knowledge that they were, and with the intention that they should be, payments under the *Workmen's Compensation Act*. This is emphasized by *Greene* M.R. (2). It was not contended by the employer or the workman that the question of the exercise of an option was in any way involved. All that the employer contended was that, inasmuch as compensation under the Act had been duly asked and received, the absolute terms of sec. 29 (1) precluded common-law recovery independently of the Act.

The Court of Appeal decided the case upon the very broad ground that, in order to constitute a payment to a workman under the

(1) (1940) 1 K.B. 342.

(2) (1940) 1 K.B., at p. 353.

Workmen's Compensation Act, it is not sufficient that there should be a mere passing of money from the employer to the employee. The payment must, it was held, be made as a workers'-compensation payment, and must be received in that quality. The conclusion of the court was thus expressed: "In my judgment, quite apart from cases involving an actual contract, where there is need of a mental operation of the infant, whether it is in the exercise of the option before receiving payment, or whether it is looked at from the point of view of actual receipt of payment, the question must always be investigated, was it for the infant's benefit that the payment should be made?" (1).

It follows that, if *Stimpson's Case* (2) is followed, we should hold that, in determining whether there has been an actual receipt of workers' compensation by an infant worker, it is necessary to ask whether it was for the infant's benefit that such compensation should be made, rather than damages at law. There is no reason why this clear principle should be ignored in cases where weekly payments by an employer to an infant worker are alleged to constitute a "recovery" of workman's compensation which debars the infant from recovering damages at law. In principle there is no valid distinction between the two cases. *Smith's Case* (3) says that one weekly payment of worker's compensation may constitute a "recovery" under sec. 64 (*a*). If *Stimpson's Case* (2) is right, it is surely necessary to examine whether, in the case of an infant worker, there has in truth been an "actual receipt of payment" constituting worker's compensation.

Some consideration was given in the Supreme Court to the subordinate question whether, in case a payment to an infant worker has been found to be not for his benefit, but the actual money has been retained by him or for his use, the person who is sued at common law for damages is entitled to ask the court and the jury to take into account in reduction of damages the amount of such *de-facto* payments. In principle, and having regard to sec. 64 (*b*), I think that such a claim by the defendant is admissible: Cf. *Latter's Case* (4). It is to be noted that, in *Perkins's Case* (5),

(1) (1940) 1 K.B., at p. 354.
(2) (1940) 1 K.B. 342.
(3) (1938) 60 C.L.R. 141.
(4) (1936) 56 C.L.R., at p. 449.
(5) (1940) 1 K.B., at pp. 66, 70, 71.

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the Court of Appeal seemed to think that no precedent warranted any reduction of common-law damages where an employer had made workman's-compensation payments to a worker and the latter was subsequently deemed entitled to recover damages at law in respect of the selfsame injury for which the payments had been made. But if after an injury the employer had made voluntary payments to an injured worker, it seems plain that the amount of such payments could properly be considered as mitigating damages if a jury were awarding damages in relation to the same injury. Again, quite apart from the *Workers' Compensation Act*, a defendant who has already paid money to the plaintiff in respect of an injury in circumstances alleged by the defendant to constitute an accord and satisfaction, is entitled to ask that, although the plea is not made out, the amount of the payments should be reckoned by the jury in reduction of the damages : Cf. *Ellen* v. *Great Northern Railway Co.* (1). There are a number of apparent exceptions to a general principle, including those of (*a*) payment under policies of insurance, (*b*) other recoveries for separate publications of an identical libel, and (*c*) cases where a defendant contends that damages should be reduced merely because the plaintiff might possibly recover against a third party. But the principle of Lord *Watson's* judgment in *Grand Trunk Railway Co. of Canada* v. *Jennings* (2) seems to suggest a general rule that, where a plaintiff is proved to have received the benefit of payments which have been made to him solely because of and in relation to a personal injury for which he is seeking to recover damages, such payments may properly be taken into account by the jury in determining as a question of fact what damages have been sustained by the plaintiff as a result of an injury. The mere fact that the payments to the plaintiff purported to have been made under the terms of a statute would seem to be immaterial.

Without further developing this minor aspect of the case, I am of opinion that the appeal should be dismissed.

Since writing the above, I have had an opportunity of considering the judgments of my brothers *Dixon* and *McTiernan* ; and I also would accept the latter's reasons. I desire to add for myself that it would be very unjust and contrary to the public interest if the court

(1) (1901) 17 T.L.R. 453.

(2) (1888) 13 App. Cas. 800, at p. 804.

was compelled to hold that, irrespective of any question of benefit, every child who has sustained personal injuries through a third party's wrongful act is regarded as having irrevocably surrendered his right to recover damages merely because of the fact of physical receipt of money equivalent to one weekly payment. If, contrary to the opinion of the majority here and in the Supreme Court, such were held to be the law, the legislature of New South Wales might confidently be expected to step in to amend sec. 64 of the *Workers' Compensation Act* as it has recently amended sec. 63.

McTIERNAN J. The demurrer raises a question affecting the operation of sec. 64 (*a*) of the *Workers' Compensation Act* 1926-1938. The question is whether the operation of that sub-section is affected by the rules of the common law relating to the disability of infants. The appellant pleaded in answer to the respondent's claim in negligence for damages facts which if established would by force of sec. 64 (*a*) be a bar to the respondent's claim if he was not under the age of twenty-one years. The facts pleaded were that he had applied for and received compensation from his employer in respect of the injury for which he claimed damages from the appellant. The respondent in his replication to this plea said that it was not for his benefit to recover compensation under the Act. That is the pleading to which the appellant demurred. The Full Court of the Supreme Court of New South Wales read the replication—and rightly—not as a pleading which confessed and avoided the appellant's plea but as an argumentative traverse of the allegations in the plea that the respondent recovered compensation. The ground of the denial is that a worker under the age of twenty-one years is incapable of performing the act relied upon in the plea, that is, the recovery of compensation, because it is an act prejudicial to his rights. It is not necessary in this case to raise any doubt as to the capacity of a worker under the age of twenty-one years to recover compensation and as to the effect of its recovery in discharging his employer either wholly or in part from his statutory liability to pay it where the worker's only redress is under the statute. In that case it could not but be for the benefit of the worker to recover the statutory compensation.

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Sec. 64 (1) provides for a case in which a worker has two rights, namely, the statutory right to redress against his employer and a right to recover damages at common law from a person other than his employer. The sub-section enables the worker to proceed concurrently to enforce both his statutory remedy against his employer and his common-law remedy against the other person, the author of his injury. But the sub-section prohibits him from recovering both damages and compensation. It is settled that, if the worker receives a payment as and for the statutory compensation to which he is entitled, the sub-section operates to discharge his right to recover damages from the tortfeasor; and this result does not depend upon an election on the part of the worker to recover compensation instead of damages but on the fact that he received as compensation what was paid to him: *Smith* v. *Commonwealth Oil Refineries Ltd.* (1). While it is true that the sub-section operates independently of an election by the worker between the two remedies, yet it is the act of recovering compensation to which the sub-section gives a special legal effect prejudicial to the worker. It is prejudicial because it discharges a common-law right of the worker.

The question, then, is whether a worker who is an infant is capable of performing the act of recovering compensation and thereby discharging his right to damages if it would not be beneficial to him that the right to damages should be discharged. "The general principle of law," said Lord *Abinger* C.B. in the case of *Oliver* v. *Woodroffe* (2), "is that a minor is not to be allowed to do anything to prejudice himself or his rights, which he here does by undertaking not to bring a writ of error." In *Compton* v. *Collinson* (3) *Buller* J. said: "An infant is disabled from binding himself, except when it is for his benefit, for want of judgment and capacity." In *Basset's Case* (4) it is said: "An infant in all things which sound to his benefit, shall have favour and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage." In *Overton* v. *Banister* (5) Sir *James Wigram* V.C., referring to a release by an infant of a claim against a trustee, said: "That would have been a bar at law if given by an adult, but the release of infants is worth nothing in law." The following statements are to the same

(1) (1938) 60 C.L.R. 141.
(2) (1839) 4 M. & W. 650, at pp. 653, 654 [150 E.R. 1581, at p. 1583].
(3) (1788) 2 Bro. C.C. 377, at p. 387 [29 E.R. 209, at p. 213].
(4) (1557) 2 Dyer 136a, at p. 137a [73 E.R. 297, at p. 298].
(5) (1844) 3 Hare 503, at p. 506 [67 E.R. 479, at p. 481].

effect: "An infant cannot do an act apparently to his prejudice" (*Comyn's Digest*, Tit. *Enfant*, par. C.2). "The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right, and that they are not capable of taking notice of the rules of law, so as to be able to apply them to their advantage" (*Bacon's Abridgement*, 5th ed. (1798), Vol. III., Tit. *Infancy* and *Age*, par. G, p. 587).

These principles, unless excluded by the Act, do, in my opinion, limit the capacity of an infant worker to perform the act of recovering compensation from his employer in circumstances in which by force of sec. 64 (*a*) the performance of that act by a worker operates as a discharge or release of his right to claim damages. The presumption of legislative intention is that these principles are not excluded by the Act. There are no clear words rebutting the presumption: *Arthur* v. *Bokenham* (1); *Rolfe and The Bank of Australasia* v. *Flower, Salting & Co.* (2). In my opinion, the respondent's replication, therefore, raises a relevant issue in the case, namely, whether it was for the respondent's benefit that he should have taken the payments from his employer. The rights of the parties, as has been observed, do not depend on the question whether the respondent exercised an option as to what form of redress he would accept. If the respondent's act in applying for and receiving compensation is to be held to be a recovery of compensation under the sub-section, it must be because he exercised a judgment; for his receipt of a sum of money without understanding that it was given to him as compensation and that he accepted it as such would not be a recovery of compensation for the purposes of the sub-section. As it would be necessary for the respondent to exercise such a judgment in recovering compensation, he is not, in my opinion, bound by the receipt of the money unless it were for his benefit to receive compensation instead of damages: See *Stimpson* v. *Standard Telephones and Cables Ltd.* (3), per Sir *Wilfred Greene* M.R. This case concerns provisions different from sec. 64 (*a*). But there the Master of the Rolls is, I apprehend, applying

(1) (1708) 11 Mod. Rep. 148 [88 E.R. 957].
(2) (1865) L.R. 1 P.C. 27.
(3) (1940) 1 K.B., at p. 354.

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the principles of common law limiting the capacity of infants to do acts which effect their rights and require the exercise of judgment.

The case of *Aldin* v. *Stewart* (1) was relied on by the appellant. I agree with the observations of *Jordan* C.J. and *Davidson* J. on this case.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitor for the respondent, *Aidan J. Devereux.*

J. B.

(1) (1915) 9 B.W.C.C. 418; (1916) S.C. 13.