[HIGH COURT OF AUSTRALIA.]

CAIN AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

MALONE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1942.

SYDNEY, *Aug.* 25, 26; *Sept.* 1.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

*Workers' Compensation—Infant—Receipt of compensation—Right to bring proceedings independently of the statute—Limitation of action—High Court—Overruling prior decision—Workers' Compensation Act* 1926-1938 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1938), *sec.* 63 (3) (*a*)*—*Industrial Arbitration and Workers' Compensation (Amendment) Act* 1938 (*N.S.W.*) (*No.* 36 of 1938), *sec.* 5.

Payment of compensation by an employer to an infant worker and receipt thereof by the infant do not of themselves bring sec. 63 (3) (*a*) of the *Workers' Compensation Act* 1926-1938 (N.S.W.) into operation; it is necessary to show that the receipt of compensation was for the benefit of the infant before the time limit prescribed by that sub-section becomes applicable. The Court declined to overrule *Farmer & Co. Ltd.* v. *Griffiths*, (1940) 63 C.L.R. 603.

Decision of the Supreme Court of New South Wales (Full Court): *Malone* v. *Cain*, (1942) 42 S.R. (N.S.W.) 90; 59 W.N. 77, affirmed.

* Sec. 63 (3) (*a*) of the *Workers' Compensation Act* 1926-1938 (N.S.W.), inserted by the *Industrial Arbitration and Workers' Compensation (Amendment) Act* 1938, sec. 5 (1) provides as follows: "Where any payment by way of compensation under this Act in respect of the injury is received by the worker after the date upon which the assent of His Majesty to the *Industrial Arbitration and Workers' Compensation (Amendment) Act*, 1938, is signified, no proceedings against the employer, independently of this Act, in respect of the injury, shall be maintainable by any person whomsoever unless such proceedings are instituted within six months after the date upon which such payment was so received by the worker, or where more payments than one have been so received by the worker, unless such proceedings are instituted within six months after the date upon which the first of such payments was so received by the worker. . . ."

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Maisie Lisbeth Malone, an infant, by her next friend, Hector Malone, against George James Cain and Eric Colin Eggins, in which the plaintiff claimed as damages the sum of £5,000.

In the first count of the declaration it was alleged that the defendants, trading as Modern Laundry, employed the plaintiff to perform work at machinery in a factory occupied by them and there were in that factory certain parts of machinery which although dangerous had not been securely fenced by the defendants as required by the *Factories and Shops Act* 1912-1937 (N.S.W.), and, further, the defendants did not constantly maintain fencing in an efficient state whilst those dangerous parts of machinery were in motion or use for the purpose of a manufacturing process whereby the plaintiff had her right hand and the fingers thereof crushed, bruised, burnt and lacerated in and by those dangerous parts of machinery, she was permanently incapacitated and disfigured, had permanently lost the efficient use of her right hand and was otherwise greatly damnified.

In the second count the plaintiff alleged that having the care, control and management of certain laundry premises and of the operations performed and the machinery installed therein and wherein they employed the plaintiff the defendants by themselves their servants and agents were negligent careless and unskilful in and about the care, control and management of the said premises, operations and machinery and they negligently omitted to guard dangerous parts of the machinery or to warn or in any way to call the attention of the plaintiff to the fact that certain parts of the machinery were dangerous whereby the plaintiff in the course of her employment sustained the injuries and was damnified as set forth in the first count.

The defendants pleaded that neither of them was guilty. For a second plea they said that at the time of the injury the plaintiff was a worker, within the meaning of the *Workers' Compensation Act* 1926-1938 (N.S.W.), in the employ of the defendants and the injury to the plaintiff arose out of and in the course of her employment by the defendants within the meaning of that Act; that after the date upon which the assent of His Majesty to the *Industrial Arbitration and Workers' Compensation (Amendment) Act* 1938 (N.S.W.) was signified payment by way of compensation under the first-mentioned Act was received by the plaintiff from the defendants in respect of the injury and that these proceedings were not instituted within the prescribed period referred to in sec. 63 of the *Workers' Compensation Act* 1926-1938, nor was any order made under that Act for an

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extension of the prescribed period, and, further, that before the institution of these proceedings the time for making an application for such extension had expired.

The plaintiff joined issue upon the pleas and for a second replication to the second plea said that at all material times she was an infant under the age of twenty-one years and it was not for her benefit that payment by way of compensation under the *Workers' Compensation Act* 1926-1938 should have been received by her from the defendants in respect of the injury.

The defendants joined issue and demurred to the second replication on the following grounds :—(*a*) That it confessed but did not avoid the plea to which it was pleaded. (*b*) That it admitted the allegations made in the second plea that, after the date on which the consent of His Majesty to the *Industrial Arbitration and Workers' Compensation (Amendment) Act* 1938, (i) payment by way of compensation had been received by the plaintiff, (ii) these proceedings had not been instituted within the prescribed period, and (iii) no order had been made for an extension of the prescribed period. (*c*) That an infant worker who has received compensation as aforesaid is bound by the provisions of sec. 63 of the *Workers' Compensation Act* 1926-1938.

Upon the hearing of the demurrer the second replication was treated as alleging that the plaintiff at all relevant times was an infant, that the payment referred to in the second plea was not made and *de facto* received in circumstances which would for some special reason unconnected with sec. 63 have made the question of benefit to the plaintiff immaterial, and that it was not in fact for the plaintiff's benefit that payment of compensation should have been so received by her. The defendants raised no objection to the replication by reason only of the fact that it was argumentative.

The Full Court of the Supreme Court held that it should follow its own previous decision in *Farrell* v. *Motor Body Repairing and Welding Pty. Ltd.* (1), in which the principle in *Farmer & Co. Ltd.* v. *Griffiths* (2) was applied, and gave judgment for the plaintiff on the demurrer : *Malone* v. *Cain* (3).

From that decision the defendants appealed to the High Court.

*K. A. Ferguson*, for the appellants. Where any payment by way of compensation under the *Workers' Compensation Act* 1926-1938 in respect of an injury is received by an infant worker after the commencing date of the *Industrial Arbitration and Workers' Compensation (Amendment) Act* 1938 such infant worker is bound by the

(1) (1941) 58 W.N. (N.S.W.) 216.
(2) (1940) 63 C.L.R. 603.
(3) (1942) 42 S.R. (N.S.W.) 90 ; 59 W.N. 77.

limitation imposed by sec. 63 (3) of the first-mentioned Act notwithstanding that the receipt of that payment was not for the infant's benefit. Payment by way of compensation having been received by the respondent after the commencing date of the second-mentioned Act, the fact that the receipt of such payment was not for her benefit does not affect the question as to whether she was bound by the limitation imposed by sec. 63 (3). For the purpose of that section the respondent was in the same position as an adult. The Act draws no distinction between an infant worker and an adult worker. Satisfaction of the obligation imposed by sec. 7 of the Act must be a payment of compensation. *Farmer & Co. Ltd.* v. *Griffiths* (1) is distinguishable, because the respondent in this appeal was not deprived of any right, e.g., the right to sue at common law; she was merely included in a class of persons who if intending to sue were required to do so within a specified time. The position is correctly stated in the judgment of *Dixon* J. in *Farmer & Co. Ltd.* v. *Griffiths* (2). *Stimpson* v. *Standard Telephones and Cables Ltd.* (3) has reference only to the exercise of an option, or what amounts to the exercise of an option, and since an infant cannot do that any purported exercise of an option is not effective. In this case there is no question of any exercise of an option. The only question is whether money was paid under the Act by way of compensation to the infant. If money was so paid the infant is not able to bring an action unless it is commenced within six months after the date upon which she received the first payment (*Aldin* v. *Stewart* (4)).

*Dwyer* K.C. (with him *Kirby*), for the respondent. The question raised on this appeal is covered by the decisions in *Farmer & Co. Ltd.* v. *Griffiths* (1) and *Farrell* v. *Motor Body Repairing and Welding Pty. Ltd.* (5). This Court should not overrule its prior decision (*The Tramways Case* [*No.* 1] (6)). From the form of the amendments made to the Act subsequent to the decision in *Farmer & Co. Ltd.* v. *Griffiths* (1), the legislature must be taken to have known of that decision and to have approved of the principle there enunciated (*Sargood Bros.* v. *The Commonwealth* (7)). The *de-facto* receipt is not a receipt in law. It cannot be a payment of compensation unless it be shown that the payment is for the infant's benefit: See *Stimpson* v. *Standard Telephones and Cables Ltd.* (8). The fact that sub-sec. 3 of sec. 63 of the Act contains no special reference to

(1) (1940) 63 C.L.R. 603.
(2) (1940) 63 C.L.R., at pp. 606-611.
(3) (1940) 1 K.B. 342.
(4) (1915) 9 B.W.C.C. 418.
(5) (1941) 58 W.N. (N.S.W.) 216.
(6) (1914) 18 C.L.R. 54, at p. 58.
(7) (1910) 11 C.L.R. 258, at p. 268.
(8) (1940) 1 K.B., at p. 359.

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infants does not justify the drawing of an inference that no exception as to infants was intended in that sub-section.

*K. A. Ferguson*, in reply. No question of election arises in this case.

*Cur. adv. vult.*

Sept. 1.

The following written judgments were delivered :—

LATHAM C.J. 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. It was held in *Farmer & Co. Ltd.* v. *Griffiths* (1) that where moneys have been paid to an infant worker as compensation under the Act the infant is not on that account prevented from recovering damages against a third party whose negligence caused the injury if it is not for the benefit of the infant to receive compensation from the employer rather than to recover damages from the third party.

The present appeal raises the question of the construction of sec. 63 (3) (*a*) of the Act, inserted by the *Industrial Arbitration and Workers' Compensation* (*Amendment*) *Act* 1938, sec. 5. This sub-section includes the following provision : " Where any payment by way of compensation under this Act in respect of the injury is received by the worker after the date upon which the assent of His Majesty to the *Industrial Arbitration and Workers' Compensation* (*Amendment*) *Act*, 1938, is signified, no proceedings against the employer, independently of this Act, in respect of the injury, shall be maintainable by any person whomsoever unless such proceedings are instituted within six months after the date upon which such payment was so received by the worker, or where more payments than one have been so received by the worker, unless such proceedings are instituted within six months after the date upon which the first of such payments was so received by the worker." An amendment made by Act No. 13 of 1942 does not affect the present case.

The question which arises upon this appeal is whether the payment of compensation by the employer and the receipt thereof by an infant worker bring the sub-section into operation, or whether it is necessary also to show that the receipt of compensation

(1) (1940) 63 C.L.R. 603.

was for the benefit of the infant before the time limit prescribed by the section becomes applicable.

It is conceded for the appellants that they cannot succeed in this appeal unless the Court is prepared to overrule the case of *Farmer & Co. Ltd.* v. *Griffiths* (1).

After careful consideration of the reasoning in that case and of the English authorities upon which it is based I can see no reason for overruling the case. A decision of three Justices (as in *Farmer's Case* (1) ), especially with one Justice dissenting, can certainly be overruled by a Bench of five Justices : See per *Higgins* J. in *Gray* v. *Dalgety & Co. Ltd.* (2). But the power to overrule a prior decision should be exercised with great caution and only in a clear case—where, as it has been said, the prior decision is " manifestly wrong " (*The Tramways Case* [*No.* 1] (3) ). The point decided in *Farmer's Case* (1) is one of some difficulty and there is room for difference of opinion upon it, as is shown by the dissenting judgment of *Dixon* J. in that case. But the decision, applying a decision in the English Court of Appeal, cannot be described as manifestly wrong. In my opinion the decision is right. If Parliament disapproves the decision, the statute can readily be amended. *Farmer's Case* (1) should not, in my opinion, be overruled.

The appeal should be dismissed.

RICH J. In this case both before the Supreme Court and this Court counsel for the defendants (appellants) expressly waived any technical grounds raised by the demurrer. He asked for a decision whether " for the purpose of sec. 63, any *de-facto* receipt by an infant of money paid to him by way of worker's compensation, irrespectively of the circumstances in which it was paid, is a binding receipt which, coupled with the lapse of the appropriate time, precludes him from commencing an action, notwithstanding that it may not have been for the infant's benefit that the payment should have been received." The Supreme Court gave judgment for the plaintiff on the demurrer, following its previous decision in *Farrell* v. *Motor Body Repairing & Welding Pty. Ltd.* (4), which was treated as governed in principle by the decision of this Court in *Farmer & Co. Ltd.* v. *Griffiths* (1). The appeal to this Court is in effect an application to reconsider and overrule the case last mentioned. The propriety of reconsidering our prior decisions was considered by *Isaacs* J., as he then was, in *Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemen's Association of Australasia* (5), and after reviewing the relevant

(1) (1940) 63 C.L.R. 603.
(2) (1916) 21 C.L.R. 509, at p. 551.
(3) (1914) 18 C.L.R., at p. 58.
(4) (1941) 58 W.N. (N.S.W.) 216.
(5) (1913) 17 C.L.R. 261, at pp. 274 et seq.

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authorities his Honour concluded "that where a former decision is clearly wrong, and there are no circumstances countervailing the primary duty of giving effect to the law as the Court finds it, the real opinion of the Court should be expressed" (1). Similarly it was said in *The Tramways Case* [*No.* 1] (2): "But we should not interfere with settled law for light cause", and should not "set aside a considered decision of this Court unless we were convinced that it was wrong." Recently we were asked, and consented, to overrule a considered judgment of this Court in *Waghorn* v. *Waghorn* (3). So far as I am concerned I did so for the purpose of securing uniformity in decisions of the English Court of Appeal and this Court. I should, I think, be reversing the position I then took up if I expressed an opinion in favour of reversing the case of *Farmer & Co. Ltd.* v. *Griffiths* (4), which follows the principle laid down in *Stimpson* v. *Standard Telephones & Cables Ltd.* (5). In these circumstances I am not "convinced that the decision in *Farmer's Case* (4) was wrong" and should be overruled.

I agree that the appeal should be dismissed.

STARKE J. The *Industrial Arbitration and Workers' Compensation (Amendment) Act* 1938, No. 36, of New South Wales, sec. 5, enacts that where any payment by way of compensation under this Act in respect of the injury is received by the worker no proceedings against the employer, independently of the Act, in respect of the injury shall be maintainable by any person whomsoever. The words seem explicit and "if the text is explicit the text is conclusive alike as to what it directs and what it forbids" (*Attorney-General for Ontario* v. *Attorney-General for Canada* (6)). But it seems that the text is not sufficiently explicit to preclude the application of the law relating to the transactions of infants. *Farmer & Co. Ltd.* v. *Griffiths* (4), though decided under another section, is to that effect.

Still the words of the statute ought to be the paramount consideration, and an approach to the statute which assumes, because a person is an infant, that he is not bound by any transaction not proved to have been for his benefit cannot be justified as a method of construction. But it is the method which the majority of the Justices appeared to have adopted in *Farmer's Case* (4) and which now finds favour with the Chief Justice and my brethren.

*Farmer's Case* (4), I agree, cannot be distinguished in principle from this case, though I think it was wrongly decided.

(1) (1913) 17 C.L.R., at pp. 278, 279.
(2) (1914) 18 C.L.R., at p. 83.
(3) (1942) 65 C.L.R. 289.
(4) (1940) 63 C.L.R. 603.
(5) (1940) 1 K.B., at p. 354.
(6) (1912) A.C. 571, at p. 583.

McTIERNAN J.—I agree with the conclusion and reasons of the Chief Justice.

*Stephens* v. *Dudbridge Ironworks Co. Ltd.* (1) and *Murray* v. *Schwachman Ltd.* (2) show that the decision in *Farmer's Case* (3) is a correct application of the principle stated by *Greene* M.R. in *Stimpson* v. *Standard Telephones and Cables Ltd.* (4). The principle has been applied in the construction of this Act for at least forty years.

WILLIAMS J. I agree that the appeal can only succeed if this Court is prepared to overrule its previous decision in *Farmer & Co. Ltd.* v. *Griffiths* (3). I think that this decision is in accordance with the statement in the judgment of *Greene* M.R. in *Stimpson* v. *Standard Telephones and Cables Ltd.* (4) that "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?" and that it should be followed.

The appeal should therefore be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellants, *Stephen, Jaques & Stephen.*
Solicitor for the respondent, *Aidan J. Devereux.*

J. B.

(1) (1904) 2 K.B. 225.
(2) (1938) 1 K.B. 130, at pp. 146, 147, 151, 152.
(3) (1940) 63 C.L.R. 603.
(4) (1940) 1 K.B., at p. 354.