Dist *Haines* v *Leves* (1987) 8 NSWLR 442

Foll *Bond Corp Pty Ltd* v *Thiess Contractors Pty Ltd* 71 ALR 125

Appl *Pannizutti* v *Trask* (1987) 10 NSWLR 531

Foll *Petromart Pty Ltd (in liq)* v *McLean* 11 ACLR 248

Appl *The Last Aussie Fish Caf Pty Ltd* v *Almove Pty Ltd* 16 IPR 376

Appl *National Mutual Holdings* v *Sentry Corporation* 87 ALR 539

Appl *Universal Telecasters* v *Ainsworth Consolidated Industries Ltd* 78 FLR 16

Appl *McMahon* v *Smith* 69 ALR 527

Appl *Rajski* v *Powell* (1987) 11 NSWLR 522

Appl *Oatmont Pty Ltd* v *Australian Agricultural Co Ltd* (1991) 5 ACSR 75

Foll *Dorfler* v *ANZ Banking Group Ltd* (1991) 103 ALR 699

Foll *Davidson* v *Shearer* (1992) 15 FamLR 635

Appl *Minenco Pty Ltd* v *Abigroup Contractors (WA) Pty Ltd* (1992) 7 WAR 576

Appl *O'Sullivan, In the Marriage of* (1991) 104 FLR 45

Appl *P & E Phontos* v *McConnel Smith & Johnson Pty Ltd* (1993) 9 BCL 259

Foll *Webster* v *Lampard* (1993) 67 ALJR 886

Foll *Hanimex Pty Ltd* v *Kodak Pty Ltd* 74 FLR 447

Appl *Oatmont Pty Ltd* v *Australian Agricultural Co Ltd* (1991) 23 ALD 461

Appl *Walker* v *Hussmann Australia Pty Ltd* (1991) 24 NSWLR 451

Foll *National Mutual Life Assoc* v *Coffey & Partners Pty Ltd* [1991] 2 QdR 401

Appl *Munnings* v *Australian Government Solicitor* (1994) 118 ALR 385

Appl *Munnings* v *Australian Government Solicitor* (1994) 68 ALJR 169

Appl *Madden* v *Kirkegard Ellwood & Partners* [1983] 1 QdR 649

Appl *Douglas & State of Western Australia* v *Tickner* (1994) 49 FCR 507

Appl *Douglas & State of Western Australia* v *Tickner* (1994) 34 ALD 192

Appl *Faessler* v *Neale* (1994) 29 IPR 1

Appl *Concorde Trading Pty Ltd* v *Croner Trading Pty Ltd* (1994) 29 IPR 507

Foll *Lindon* v *Commonwealth of Australia (No2)* (1996) 136 ALR 251

Appl *Sega Enterprises Ltd* v *Galaxy Electronics Pty Ltd* (1998) 39 IPR 577

Appl *Tingey* v *Christ Church Grammar School Inc* (1999) 21 SR(WA) 357

Appl *X* v *Borsody* (1997) 47 ALD 211

Refd to *McIntyre & Comcare Australia, Re* (1997) 48 ALD 437

Foll *Algons Engineering Pty Ltd* v *Abigroup Contractors Pty Ltd* (1997) 14 BCL 215

Cons *Abbott, In the Marriage of* (1995) 123 FLR 424

Foll *Torrens Aloha Pty Ltd* v *Citibank NA* (1996) 65 FCR 39

Foll *Flocast Australia Pty Ltd* v *Purcell* (1997) 39 IPR 177

Appl *Drake Personnel Ltd* v *Chief Comr of State Revenue* (1999) 42 ATR 782

Appl *Fritz* v *Torres Strait Regional Authority* (1999) 55 ALD 647

Cons *R, Re* [2000] 2 QdR 328

Foll *Devaugh Pty Ltd* v *Lamac Developments* (1999) 16 BCL 378

Foll *Turner (Gourmet Sausages)* v *Leda Commercial Properties* (2000) 97 FCR 313

Appl *Inglis* v *Carmody, Federal Commissioner of Taxation* (1998) 39 ATR 60

Refd to *McIntyre & Comcare Australia, Re* (1997) 48 ALD 437

Appl *Dunn* v *Aust Society of Certified Practising Accountants* (1998) 29 ACSR 1

Appl *Cubillo & Gunner* v *Commonwealth* (1999) 163 ALR 395

Refd to *Willhart Ltd* v *Samimi* (2000) 49 IPR 593

Foll *Foodco Group Pty Ltd* v *Northgan Pty Ltd* (1998) 83 FCR 356

Foll *JC Decaux Pty Ltd* v *Adshel Street Furniture* (2000) 178 ALR 339

JEY . APPELLANT;

PLAINTIFF,

ICTORIAN RAILWAYS COMMISSIONERS . RESPONDENT.

DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1948-1949.

MELBOURNE, 1948, *Oct.* 25-27; 1949, *Feb.* 22.

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

Workers' Compensation—Injury by accident arising out of or in course of employment—Death of worker—Negligence of employer—Option of dependants to apply for compensation or take other proceedings—Award of compensation obtained by widow on behalf of herself and children—Effect of award as barring claim by dependants under Lord Campbell's Act—Workers' Compensation Acts 1928-1946 (*No.* 3806—*No.* 5128) (*Vict.*)*—*Wrongs Act* 1928 (*No.* 3807) (*Vict.*), *Part III.—The* 1946 *Workers' Compensation Rules, rr.* 8, 81.*

Practice—Supreme Court (*Vict.*)—*Dismissal of action—Abuse of process—Inherent jurisdiction—Rules of the Supreme Court* (*Vict.*), *Order XXV., rr.* 2, 4.

A worker having died in such circumstances that compensation under the *Workers' Compensation Acts* 1928-1946 (Vict.) was payable by the employer, the worker's widow instituted proceedings as claimant before the Workers' Compensation Board constituted under the Acts. She was not aware that she had the option referred to in s. 5 (2) (*b*) of the *Workers' Compensation Act* 1928 to take proceedings independently of the Act. The Board made an award which was entitled in the matter of a claim for compensation made by the

Foll *Briglia* v *FCT* (2000) 44 ATR 166

Appl/Foll *Pappin* v *Bairnsdale Local Aboriginal Land Cel* (2001) 113 LGERA 240

Appl *Woodroffe* v *DCT* (2000) 45 ATR 486

Appl *GAP (ITM) Inc* v *Temporary Dept Store* (2006) 68 IPR 564

Appl *McGlade* v *Lightfoot* (2000) 63 ALD 147

Foll *Bendel* v *Pattison* (2003) 174 FLR 152

* The *Workers' Compensation Act* 1928 (Vict.) provides :—By s. 3 (2) : "Any reference to a worker who has been injured shall where the worker is dead include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable." By s. 5 (as amended) : "(1) If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of the *Workers' Compensation Acts*. (2) Provided that . . . (*b*) . . . when 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 . . . nothing in this

widow ; it recited that the deceased had left a widow and four children under sixteen years of age wholly dependent on him and awarded the sum of £1,100 to be paid into the custody of the Board. The amount awarded was that provided in such a case by par. 1 (1) (*a*) (i) of the First Schedule to the *Workers' Compensation Act* 1946 (which, by s. 4 (2) of that Act, is substituted for the Second Schedule to the Act of 1928). The employer paid the amount of the award into the custody of the Board, which, at the request of the widow's solicitor, retained it pending an investigation of the legal position. Subsequently the widow brought against the employer an action (which, on the application of the defendant, was transferred from the County Court to the Supreme Court of Victoria) for the benefit of herself and the children under Part III. of the *Wrongs Act* 1928 (Vict.). On a summons taken out by the defendant seeking the dismissal of the action on the grounds that, by reason of the award, it was frivolous, vexatious and an abuse of the process of the Court, a judge of the Supreme Court dismissed the action.

Held, by *Latham* C.J., *Rich* and *Williams* JJ. (*Dixon* and *McTiernan* JJ. dissenting), that the widow was not entitled to maintain the action in her own right, but, by the whole Court, that the infant children were competent to sue by their next friend.

Observations on the procedure adopted in the Supreme Court and on the power to dismiss an action as frivolous and vexatious.

Brown v. *William Hamilton & Co.*, (1944) Sc. L.T. 282 ; 37 B.W.C.C. Supp. 52, and *Young* v. *Bristol Aeroplane Co., Ltd.*, (1946) A.C. 163, discussed.

Decision of the Supreme Court of Victoria (*Barry* J.) varied.

Act . . . shall affect any civil liability of the employer, but in any such case the worker may at his option either claim compensation under this Act . . . or take proceedings independently of this Act . . . but the employer shall not be liable to pay compensation for injury to a worker by accident arising out of or in the course of the employment both independently of and also under this Act . . . and shall not be liable to any proceedings independently of this Act . . . except in the cases aforesaid." By s. 7 (1) (as re-enacted by s. 4 (1) of the *Workers' Compensation Act* 1946) : " Where the worker's death results from the injury the compensation shall be a sum in accordance with the Second Schedule." The Second Schedule (being the First Schedule to the 1946 Act, substituted by s. 4 (2) thereof) contains the following provisions :—" 1. (1) The amount of compensation shall be ascertained as follows :—(*a*) Where death results from the injury :—(i) If the worker leaves a widow or any children under sixteen years of age at the time of the accident . . . wholly dependent upon his earnings, the amount of compensation shall be the sum of one thousand pounds together with an additional sum of twenty-five pounds in respect of each such child." " 5. (1) The payment in the case of death . . . shall be paid into the custody of the Board and any sum so paid shall, subject to rules made by the Board and the provisions of this Schedule, be invested applied or otherwise dealt with by the Board in such manner as the Board in its discretion thinks fit for the benefit of the persons entitled thereto under this Act and the receipt of the registrar shall be a sufficient discharge in respect of the sum so paid. (2) In the case of death if the worker leaves more than one dependant the Board having regard to the circumstances of the various dependants and variations in such circumstances from time to time may—(*a*) apply or otherwise deal with any sum so paid into its custody in such manner as in the opinion of the Board will for the time being be most beneficial to the dependants ; (*b*) provide for any two or

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APPEAL from the Supreme Court of Victoria.

On 29th April 1947 Gordon Dey, an employee of the Victorian Railways Commissioners (a statutory corporation, hereinafter called the defendant), died as the result of injury by accident arising out of or in the course of his employment. On 9th May 1947 E. H. Ruddell, an officer of the Australian Railways Union, wrote to the defendant stating that on behalf of Dey's dependants he desired to apply for compensation and that the deceased had left a widow, Ellen Malvina Dey, and four sons (named), all of whom were under the age of sixteen years. In accordance with s. 17 (1) of the *Workers' Compensation Act* 1946 (Vict.) and rule 9 of the 1946 *Workers' Compensation Rules* the defendant gave notice to the registrar of the Workers' Compensation Board that compensation had been claimed and that it admitted liability. The board appointed a day for hearing the claim, and on that day the widow appeared and gave evidence. The union official, Ruddell, was also present. The Board made an award which was entitled in the matter of a claim for compensation made by the widow; it recited that the deceased had left a widow and four children under sixteen years of age at the time of the accident wholly dependent on his earnings and awarded the sum of £1,100 to be paid into the custody of the Board. On 28th May 1947 the defendant paid the amount of the award into the custody of the Board. On the same day the solicitor for the widow wrote to the registrar of the Board stating that he had been instructed to launch a common-law action against

more dependants collectively; (*c*) exclude any dependant from participating in any benefit." The 1946 Act, by s. 4 (2), substitutes the First Schedule to that Act for the Second Schedule to the 1928 Act, as above indicated, and, by s. 17, provides: "(1) When any claim for compensation . . . is made to any employer, the employer shall . . . give to the registrar notice in writing that such claim has been made, setting out . . . particulars of the claimant, the worker in respect of whom the claim is made and the alleged accident . . . out of which the claim arises and other relevant matters. . . . (2) Upon receipt by the registrar of any such notice proceedings for the settlement of the claim shall be deemed to have been instituted by the claimant and such proceedings shall be placed in the . . . list. (3) In any such proceedings the Board may make any order determination or award which it is empowered to make upon any proceedings under the *Workers' Compensation Acts*." The 1946 *Workers' Compensation Rules* provide: "8. The provisions of the *County Court Rules*" (which provide for an infant suing by a next friend or defending by a guardian *ad litem*) "as to persons under disability . . . suing and being sued shall, with the necessary modifications, apply to proceedings under the Act. Provided that the Board may at any time direct that an infant shall appear either as Applicant or Respondent in the same manner as if he were of full age." "81. Non-compliance with any of these rules shall not render any proceedings void unless the Board so directs, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Board shall think fit." Other provisions of the Acts are set out in the judgments, *post*.

the defendant for damages on behalf of the widow and children and asking the Board to " withhold any payments herein " until investigations had been made. The registrar replied that no further action would be taken in the matter pending further instructions from the solicitor.

The widow commenced an action against the defendant in the County Court at Melbourne, for the benefit of herself and the four children under the *Wrongs Act* 1928 (Vict.) (*Lord Campbell's Act*), claiming £9,000 damages on the basis that the death of her husband was due to the negligence of the defendant's servants or agents. On the application of the defendant an order under s. 61 of the *County Court Act* 1928 (Vict.) was made by consent transferring the action to the Supreme Court.

The defendant then applied by summons for an order that the action " be dismissed or for ever stayed on the grounds that it is frivolous vexatious and an abuse of the process of the court in that . . . the plaintiff on behalf of herself and others dependent on . . . Dey . . . obtained an award of the Workers' Compensation Board against the defendant in respect of an accident to . . . Dey . . . whereby he was fatally injured, the facts of which accident also form the basis of this action."

On this application *Barry* J. ordered that the action be dismissed.

From this decision the plaintiff appealed to the High Court.

T. W. Smith K.C. (with him *C. A. Sweeney*), for the appellant. The summary procedure adopted here was quite inappropriate to the circumstances of the case. It applies only where the action obviously cannot succeed, so that it amounts to an abuse of the process of the court. Unless the action is within this special category, the plaintiff has a right to have the questions of law and fact determined at the trial. [He referred to the *Rules of the Supreme Court* (Vict.), Order XXV., rule 4; *Cox* v. *Journeaux* [*No.* 2] (1); *King* v. *King* (2).] The construction of the section in question here (*Workers' Compensation Act* 1928 (Vict.) (as amended), s. 5 (2) (*b*)) presents unusually great difficulty. The many decisions on the corresponding English section show a great diversity of judicial opinion. The appeal should be allowed on the ground that the procedure adopted was wrong.

THE COURT called on counsel for the respondent.

(1) (1935) 52 C.L.R. 720.

(2) (1920) V.L.R. 443.

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Sholl K.C. (with him *Gillard*), for the respondent. The application was to the inherent jurisdiction and/or under Order XXV., rule 4, and/or Order XIVA. of the *Rules of the Supreme Court*. The facts which alone were relied on being quite indisputable, the procedure was correct. The application followed the suggestion of Viscount *Simon* in *Young* v. *Bristol Aeroplane Co. Ltd.* (1). All presumptions as to facts were made in favour of the plaintiff. The judge properly considered the matter as one of discretion and exercised his discretion (*a*) without any error as to the facts; (*b*) on no wrong principle. [He referred to *Burr* v. *Smith* (2); *Vacher & Sons Ltd.* v. *London Society of Compositors* (3); *Willoughby* v. *Eckstein* (4); *Lawrance* v. *Lord Norreys* (5); *Barrett* v. *Day* (6); *Halsbury's Laws of England*, 2nd ed., vol. 14, pp. 255, 256.] As to the substance of the matter, s. 5 (2) (*b*) of the *Workers' Compensation Act* 1928 has four branches, which may be stated in the form of numbered clauses:—1. Nothing in the Act is to affect the civil liability of the employer when the injury is caused by personal negligence &c. 2. In such a case the worker may at his option claim compensation under the Act to take proceedings independently of the Act; and here "worker" includes the dependants of a deceased worker (1928 Act, s. 3 (2)). 3. The employer shall not be liable to pay compensation for injury to a worker &c. both independently of, and also under, the Act. 4. The employer is not to be liable to any proceedings independently of the Act except in the "cases aforesaid"; i.e., those mentioned in that part of s. 5 (2) (*b*) which has been described as clause 1, to the extent to which they are not barred under clause 2 or clause 3. Where there has been an award and payment thereof, it must, in one view, be taken that there has been a conclusive exercise of the option under clause 2—"evidence" in law "of an irrevocable exercise of his statutory option" (*Young's Case* (7)); that the case belongs to an area in which the question of knowledge of choice of remedy is no longer material. In any event, clause 3 operates independently of clause 2 to bar double liability to process (*Young's Case* (8)). In this view an award and payment represent one process; and there is no statutory exception allowing another which fits this case: cf. 1928 Act, s. 12. There is also authority that clause 3 has an independent operation to bar double liability to payment;

(1) (1946) A.C. 163, at p. 172.
(2) (1909) 2 K.B. 306, at pp. 310, 313.
(3) (1912) 3 K.B. 547, at pp. 556, 563.
(4) (1936) 1 All E.R. 650, at pp. 651, 652.
(5) (1888) 39 Ch. D. 213; 15 App. Cas. 210.
(6) (1890) 43 Ch. D. 435, at pp. 443-451.
(7) (1946) A.C., at p. 180.
(8) (1946) A.C., at pp. 177, 192.

so that an award and payment, or even an award without payment, will operate to bar proceedings independently of the Act (*Beckley* v. *Scott & Co.* (1); *King* v. *King* (2); *Young's Case* (3)). It is clear that, in any of the foregoing views, the widow, in so far as she claims in her own right, is barred by the award from independent proceedings (*Young's Case* (4); *Thomason* v. *Council of the Municipality of Campbelltown* (5); *Codling* v. *John Mowlem & Co. Ltd.* (6)). She appeared before the Board as claimant and obtained a final award, from which there is no appeal. Payment of the sum awarded must be made to the Board, which thereafter administers it for the dependants (*Workers' Compensation Act* 1946, First Schedule, pars. 5, 7-9). The employer could not get the amount back. [He referred to *Wheelhouse* v. *Douglas* (7).] It is submitted that the infants are in no better position than the widow. In their case, also, the award puts an end to any question of election or authority. Here an award has been made under which the infants take rights, and the employer has received a statutory discharge under the 1946 Act, First Schedule, par. 5. The infants are deemed to be applicants in (and, so, parties to) the proceedings before the Board (1946 Act, s. 17). In any event, defects of form are irrelevant (1946 *Workers' Compensation Rules*, rule 81). The 1946 Act, s. 17, does not require or contemplate a next friend. If the question of an infant's authority (and, through that, of benefit) is involved whenever a notification is given to the Board under s. 17 of the 1946 Act, the Board will be quite unable to know whether to proceed with the claim. The Board cannot, in every case in which an infant is concerned, conduct an inquiry to ascertain what proceedings are preferable. Moreover, the question whether proceedings under the Act are for the infant's benefit is relevant only where, without an award (or, before the 1946 Act, an approved agreement), moneys are received by the infant or paid into the Board's hands. [He referred to *Stephens* v. *Dudbridge Iron Works Co. Ltd.* (8); *Beauchamp* v. *London County Council* (9); *Cain* v. *Malone* (10); *Stimpson* v. *Standard Telephones and Cables Ltd.* (11); *Gilbert* v. *Dixon* (12); *Neale* v. *Electric and Ordnance Accessories Co. Ltd.* (13); *Cribb* v. *Kynoch, Ltd.* [*No.* 2] (14); *Condon* v. *Mudgee Shire*

(1) (1902) 2 I.R. 504.
(2) (1920) V.L.R. 443.
(3) (1946) A.C., at pp. 187, 188.
(4) (1946) A.C., at pp. 178, 180, 185-188, 192.
(5) (1939) 39 S.R. (N.S.W.) 347, at pp. 358-362.
(6) (1914) 2 K.B. 61; (1914) K.B. 1055.
(7) (1940) V.L.R. 307: particularly at p. 311.
(8) (1904) 2 K.B. 225.
(9) (1947) 63 T.L.R. 602.
(10) (1942) 66 C.L.R. 10.
(11) (1940) 1 K.B. 342.
(12) (1944) V.L.R. 34.
(13) (1906) 2 K.B. 558, at pp. 565-568.
(14) (1908) 2 K.B. 551, at p. 561.

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Council (1); *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 708.] There cannot be, in any proceedings under *Lord Campbell's Act*, a taking into account of the money paid to the Board. The duty of the jury would be to fix individual sums (*Wrongs Act* 1928, s. 16), whereas the Board, under pars. 5 and 6 of the First Schedule to the *Workers' Compensation Act* 1946, retains control of the fund and need not allocate individual interests. There is no procedure whereby the £1,100 in the hands of the Board, or any part of it, could be credited against the amount of a judgment in an action under *Lord Campbell's Act* or whereby it could be returned to the employer: cf. *Ropner Steamship Co., Ltd.* v. *Morgan* (2); *Madaris* v. *Lars Halversen* (3). The 1928 Act, s. 12, is inconsistent with the view that alternative proceedings are open. [He also referred to the 1928 Act, ss. 5 (3), 7 (1) (as amended by the *Workers' Compensation Act* 1937, s. 13); 1937 Act, ss. 8 (3) (*a*), (*b*) (i); 10 (1) (*a*) (as inserted by the 1946 Act); 1946 Act, ss. 3, 4 (1).]

T. W. Smith K.C., in reply. It is submitted that, on the proper construction of s. 5 (2) (*b*) of the 1928 Act, the award of the Workers' Compensation Board is no bar to the claim under *Lord Campbell's Act* either by the widow in her own right or on behalf of the infants. For the purposes of this submission the infants are considered on the same footing as the widow. Alternatively, even if the widow is barred, there are special reasons why the infants are not barred, and it is proposed to deal first with those reasons. The right to compensation vests in the dependants, not as a body, but as individuals. Each has a separate right and a separate option; and an award cannot bar a dependant who is not a party (*Workers' Compensation Act* 1928, ss. 3 (2), 5 (2) (*b*); *Kinneil Cannel and Coking Coal Co. Ltd.* v. *Waddell* (4); *Avery* v. *London and North Eastern Railway Co.* (5)). The award here shows on its face that the infants were not parties to it. While it stands in that form it cannot bar them. The inclusion in the amount awarded of £25 in respect of each infant does not mean that it is awarded to them; it must be included in the award, whoever the applicant is (*Workers' Compensation Act* 1946, ss. 3 (1) (*a*), (2) (*a*), 4 (1), First Schedule, pars. 1 (1) (*a*), 5, 7 (1)). Section 17 of the 1946 Act does not affect the position of the infants; they were not claimants within that section. They could have been made parties to the proceedings before the Board under rule 8 of the 1946 *Workers' Compensation*

(1) (1945) 45 S.R. (N.S.W.) 258, at p. 263.
(2) (1935) 1 K.B. 1.
(3) (1943) 44 S.R. (N.S.W.) 71.
(4) (1931) A.C. 575.
(5) (1938) A.C. 606, at p. 621.

Rules, but that was not done. Apart from that rule no-one had authority either in fact or in law to make them claimants, and it has not been shown that it would have been for the benefit of the infants to claim workers' compensation. In the cases relating to infancy relied on by the respondent all that was decided was that infants are bound by what happens in proceedings duly instituted on their behalf: cf. *Thomason* v. *Campbelltown* (1). In such a case the question of the infant's benefit does not matter, but this is not such a case. [He referred to *Stimpson* v. *Standard Telephones and Cables, Ltd.* (2); *Beauchamp* v. *London County Council* (3); *Farmer & Co. Ltd.* v. *Griffiths* (4); *Cain* v. *Malone* (5).] Apart from these considerations, s. 5 (2) (*b*) is not a bar either in the case of the widow or that of the infants. They exercised no such option as s. 5 (2) (*b*) deals with, because they had no knowledge of the option (*Young* v. *Bristol Aeroplane Co. Ltd.* (6); *Leathley* v. *John Fowler & Co. Ltd.* (7)). That being so, they are not, on the law as it now stands, barred by the later words of the section to the effect that an employer shall not be liable both independently of, and also under, the Act (*Brown* v. *William Hamilton & Co.* (8); *Young's Case* (6)). Lord *Porter's* view in the last-mentioned case is not opposed to the present submission. He was referring to a different kind of award from that made here. Here the award merely directs payment into the custody of the Board; it does not determine who is entitled to the sum awarded or any part of it (1946 Act, First Schedule, par. 5 (1), (2)). It is not a final determination giving anyone a right to receive any sum. If there is a binding election to proceed under *Lord Campbell's Act*, the respondent will become entitled to the amount paid in. [He referred to *King* v. *King* (9); *Unsworth* v. *Elder Dempster Lines, Ltd.* (10); *Latter* v. *Muswellbrook Corporation* (11); *Farmer & Co. Ltd.* v. *Griffiths* (4); *Harbon* v. *Geddes* (12); *Union Steamship Co.* v. *Burnett* (13); *O'Connor* v. *Bray* (14); *Perkins* v. *Hugh Stevenson and Sons, Ltd.* (15); *Selwood* v. *Townley Coal and Fireclay Co., Ltd.* (16).]

Cur. adv. vult.

(1) (1939) 39 S.R. (N.S.W.) 347, particularly at pp. 360, 362.
(2) (1940) 1 K.B. 342, at p. 354.
(3) (1947) 63 T.L.R. 602.
(4) (1940) 63 C.L.R. 603.
(5) (1942) 66 C.L.R. 10.
(6) (1946) A.C. 163.
(7) (1946) K.B. 579.
(8) (1944) Sc.L.T. 282; 37 B.W.C.C. Supp. 52.
(9) (1920) V.L.R. 443.
(10) (1940) 1 K.B. 658.
(11) (1936) 56 C.L.R. 422.
(12) (1935) 53 C.L.R. 33, at p. 49.
(13) (1937) 56 C.L.R. 450, at p. 461.
(14) (1937) 56 C.L.R. 464.
(15) (1940) 1 K.B. 56.
(16) (1940) 1 K.B. 180.

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1949, Feb. 22.

The following written judgments were delivered :—

LATHAM C.J. This appeal raises two questions : (1) The first question is whether an award made under the *Workers' Compensation Act* 1928, as amended, in pursuance of which an employer has paid the amount awarded into the custody of the Workers' Compensation Board, prevents, in the circumstances of this case, the widow of the worker or his infant children from proceeding under the *Wrongs Act* 1928 (*Lord Campbell's Act*) for damages. The Supreme Court of Victoria (*Barry* J.) answered this question in the affirmative and dismissed the action under the *Wrongs Act* as frivolous and vexatious. (2) The second question is whether the learned judge (whatever the answer to the first question should be) exercised his discretion rightly in striking out the action as frivolous and vexatious either under the *Rules of the Supreme Court,* Order XIVA or Order XXV, rule 4, or under the inherent jurisdiction of the court. The first question, it is contended by the appellant, is a question of substance and difficulty and the plaintiff should have been allowed to go to trial.

The evidence before the Supreme Court showed that the husband of the appellant was killed on 29th April 1947 by an accident arising out of and in the course of his employment with the defendant, the Victorian Railways Commissioners. On 9th May 1947 Mr. E. H. Ruddell, accountant of the Australian Railways Union, wrote to the Secretary for Railways the following letter :—

> " On behalf of the dependants of the late Gordon Dey, formerly A.S.M. at Williamstown Beach, who was killed as a result of accident on duty on 29th ultimo, I desire to apply for compensation.
>
> Deceased leaves a widow, Ellen Malvina Dey, born 22/10/07, and four sons—Ivor William Dey, born 7/4/32 ; Timothy Gordon Dey, born 29/6/35 ; Gordon Joseph Dey, born 18/3/39; and John Anthony Dey, born 5/12/41."

On 19th May the employer, in accordance with s. 17 of the *Workers' Compensation Act* 1946 and the 1946 *Workers' Compensation Rules,* rule 9, gave notice that a claim for compensation had been made : see Form 12 in the Appendix to the rules. The notice was introduced by the following statement, as required by the prescribed form :—

> " To the Registrar, Workers Compensation Board, 412 Collins Street, Melbourne.
>
> Take notice that a claim for compensation has been made by or on behalf of Ellen Malvina Dey on her own behalf and

on behalf of her sons Ivor William Dey, Timothy Gordon Dey, Gordon Joseph Dey and John Anthony Dey of 59 Railway Crescent, Williamstown Beach—Claimants.

to The Victorian Railways Commissioners of Spencer Street, Melbourne an employer in respect of the death of Gordon Dey late of 59 Railway Crescent, Williamstown Beach Deceased, ex Relieving Assistant Station Master."

It will be observed that the letter written by the accountant of the Australian Railways Union made the claim on behalf of the widow and the children, and that in the employer's notice the claim was described as a claim by the widow on her behalf and on behalf of the children, and that they were all described as claimants. The particulars in the notice stated that the deceased left as dependants his widow and four children under sixteen years of age. The employer admitted liability to pay such compensation as the employer was lawfully obliged to pay, " the amount of which is to be ascertained by the Board." Notice of hearing of the proceedings was given to the solicitor for the commissioners on 21st May 1947. It was headed " In the matter of a claim by Ellen Malvina Dey against the Victorian Railways Commissioners " and gave notice that the Board would proceed to hear " the claim in this matter " on 26th May. In accordance with s. 17 (2) of the *Workers' Compensation Act* 1946 the proceedings for the settlement of the claim were placed in the summary list.

The widow was represented at the hearing by Mr. Ruddell, and she gave evidence that she was the widow of the deceased and that there were four children of the marriage dependent upon him and that the names and dates of birth of the children were as set out in the claim for workers' compensation which had been made on behalf of her and the said children by Mr. Ruddell. The Board made an award against the employer for £1,100, that amount being determined by the provisions of clause 1 (*a*) of the First Schedule to the *Workers' Compensation Act* 1946—£1,000 and an additional sum of £25 for each child under sixteen. The award was in the following form :—

" Workers Compensation Acts

SUMMARY LIST Number 3169/47.

Before the Workers Compensation Board

In the Matter of a claim for Compensation made by Ellen Malvina Dey, the Claimant to the Victorian Railways Commissioners, the Employer in respect of the death of Gordon Dey, the Deceased.

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AWARD

The Board having found that the deceased left

Ellen Malvina Dey, his widow, Ivor William Dey, Timothy Dey, Gordon Joseph Dey and John Anthony Dey children under 16 years of age at time of accident *wholly* dependent upon his earnings

Doth award the sum of £1,100 to be paid into the custody of the Board, the amount of the award being limited to the said sum unless and until it is shown that the deceased left a child or children under 16 years of age as aforesaid other than the above-named children.

Leave being reserved to the Claimant to prove in respect of costs of medical, hospital, nursing or ambulance services or of burial.

Amount of Award: £1,100.

Dated the 26th day of May 1947

By Order of the Workers Compensation Board
Geo. T. Smith
Registrar."

On 28th May the commissioners paid the amount of the award, £1,100, into the custody of the Board and a receipt was given by the registrar of the Board as Receiver of Revenue for the Workers' Compensation Board.

On the same day, 28th May, the solicitor for the widow and children wrote to the registrar of the Board, stating that he had been instructed to institute a common-law action against the commissioners to claim damages on behalf of the widow and children. The letter included the following:—" I have been instructed that an award has been made relative to the widow and children of the above deceased.

" I was instructed to act for the widow at an Inquest, which was heard this day and I have been instructed to launch a Common Law action against the Victorian Railways Commissioners to claim damages on behalf of the widow and children against the Victorian Railways Commissioners.

" I am instructed that an official of the Railways' Union, who acted on behalf of the widow, at no time explained to her that she was making an election to accept workers' compensation as distinct from an action at Common Law and the Union Official today intimated to my Mr. Quinn that he at no time apprised her of the fact that she had a claim at Common Law before she elected to take workers' compensation.

"Under these circumstances would your Board kindly withhold any payments herein until thorough investigations can be made preparatory to the action contemplated."

On 30th May the registrar replied, stating that no further action would be taken in the matter pending further instructions from the solicitor for the widow and children, but, that as already stated, the amount of the award had been paid into the custody of the Board on 28th May.

On 30th September the appellant issued a County Court summons claiming £9,006 4s. 6d. against the commissioners on behalf of herself and her four children. The defendant applied for transfer of the action from the County Court to the Supreme Court under s. 61 of the *County Court Act* 1928 upon the ground that the defendant proposed to conduct a defence based on the fact that an award had been made by the Workers' Compensation Board and contended that this defence would raise a difficult question of law. An order was made transferring the action to the Supreme Court and pleadings were delivered. In her statement of claim the plaintiff alleged negligence on the part of the defendant commissioners in seventeen particulars. The defendant, who delivered a defence (agreed to be without prejudice to proceedings for the dismissal of the action), relied upon contributory negligence under eleven heads, as well as on the defence already mentioned based upon the making of the award. Upon application by the defendant the action was dismissed by *Barry* J., his Honour stating that the facts were indisputable and permitted of only one conclusion, namely, that the award was a final determination of a statutory tribunal whereby the employer became liable to pay compensation for the fatal injury to the deceased, and that the effect of s. 5 of the *Workers' Compensation Act* 1928 as amended was that the employer therefore could not be made liable to pay compensation for the injury to the worker independently of the Act. Therefore the action must fail, and his Honour dismissed it instead of involving the parties in a trial, which would have involved unnecessary delay and expense, and, if his Honour's conclusion as to the law was correct, would have resulted in the same way.

I propose now to refer to the relevant statutory provisions. The *Workers' Compensation Act* 1928 has been amended on several occasions. The 1928 Act, s. 3 (2), provides :—"Any reference to a worker who has been injured shall where the worker is dead include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable." Section 5, as last amended in 1946, contains the following

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provisions :—" (1) If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of the *Workers' Compensation Acts*. (2) Provided that— . . . (*b*)—when 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 or was such as to give a right to recover compensation under section four hundred and forty-one of the Mines Act 1928 nothing in this Act or in any scheme under section thirteen of this Act shall affect any civil liability of the employer, but in any such case the worker may at his option either claim compensation under this Act or the said scheme (as the case may be) or take proceedings independently of this Act or the said scheme (as the case may be) but the employer shall not be liable to pay compensation for injury to a worker by accident arising out of or in the course of the employment both independently of and also under this Act or the said scheme (as the case may be), and shall not be liable to any proceedings independently of this Act or the said scheme (as the case may be), except in the cases aforesaid." Section 12 as amended by the Act of 1937 is as follows :—" 12. (1) *Proceedings where action brought independently of this Act or where appeal from judgment therein*—If, within the time limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed ; but—(*a*) the court in which the action is tried, or (*b*) if the determination is the determination (on an appeal by either party) by an appellate tribunal—that tribunal—shall remit the case to the Board for the assessment of compensation and in such case the Board may deduct from the amount of compensation assessed by it all or part of the costs which in its opinion have been caused by bringing the action instead of proceeding under this Act. (2) *Action independently of Act after unsuccessful claim hereunder*—Subject to this Act if it is determined in any proceedings under this Act that the injury is one for which the employer is not liable under this Act such determination shall not prevent an action being brought in respect of such injury independently of this Act and the court in which such action is tried may deduct from any damages awarded by such court all or part of the costs which in its opinion

have been caused by the plaintiff having proceeded under this Act instead of bringing the action." This section gives the worker or his dependants a second chance where a claim has been unsuccessfully made either independently of the Act or under the Act. It does not provide a second chance where either claim has been successful.

By s. 16 of the 1946 Act a new s. 10 is inserted in the *Workers' Compensation Act* 1937. That section provides that no payment, with certain exceptions, shall be deemed to be a payment of compensation or in valid compromise of any claim under the Act unless the payment is made pursuant to an award or an order of the Board. The section also provides that if any person otherwise than in accordance with the award of the Board makes a payment (other than a weekly payment to an infant or a payment of medical &c. expenses) in purported payment of compensation or in purported compromise of any claim under the Act, then the person who makes the payment and (if that person is an employee or agent of the employer concerned or of the employer's insurer) the employer or insurer, as the case may be, shall be guilty of an offence against the Act and liable to penalties.

The First Schedule to the 1946 Act (to which effect is given by s. 4 of the Act) provides in par. 1 (1) :—" The amount of compensation shall be ascertained as follows :—(*a*) Where death results from the injury :—(i) If the worker leaves a widow or any children under sixteen years of age at the time of the accident or leaves any other dependants wholly dependent upon his earnings, the amount of compensation shall be the sum of One thousand pounds together with an additional sum of Twenty-five pounds in respect of each such child." Paragraph 5 of the First Schedule provides :— " The payment in the case of death and any payment (other than a weekly payment) payable to a person under twenty-one years of age shall be paid into the custody of the Board and any sum so paid shall, subject to rules made by the Board and the provisions of this Schedule, be invested applied or otherwise dealt with by the Board in such manner as the Board in its discretion thinks fit for the benefit of the persons entitled thereto under this Act and the receipt of the registrar shall be a sufficient discharge in respect of the sum so paid." Under other provisions in this paragraph the Board may apply or otherwise deal with any sum so paid into its custody in such manner as in the opinion of the Board will for the time being be most beneficial to the dependants, and generally the Board is to administer the moneys paid into the custody of the Board.

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The principal matter arising upon this appeal depends upon the construction of s. 5 (2) (*b*) of the 1928 Act. Section 5 (2) (*b*) applies, so far as relevant, only in cases 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. The following provisions apply to such cases :—

(*a*) Nothing in the Act shall affect any civil liability of the employer. Thus the claimant may sue the employer in the ordinary way at common law or under *Lord Campbell's Act* (*Wrongs Act* 1928) or under the *Employers and Employés' Act* 1928, without being impeded in any manner by the provisions of the Act.

(*b*) In any such case the worker may at his option either claim compensation under the Act or take proceedings independently of the Act. The words " at his option " have now been construed to involve a choice between the two alternatives mentioned with knowledge that the two alternatives are available. This view was taken in this Court in *Latter* v. *Muswellbrook Corporation* (1), and has since been taken by the House of Lords in *Young* v. *Bristol Aeroplane Co. Ltd.* (2). In the present case the widow was not aware that she had the right to sue independently of the Act and accordingly did not exercise or purport to exercise any option either on her own behalf or on behalf of the children.

(*c*) " But the employer shall not be liable to pay compensation for injury . . . both independently of and also under this Act."

(*d*) The employer shall not be liable to any proceedings independently of the Act except in the cases aforesaid ; that is, except in the cases where injury was caused by the personal negligence or wilful act of the employer or of some person for whom the employer was responsible.

The *Workers' Compensation Act* created a new means of obtaining compensation for injuries the result of an accident arising out of or (originally " and ") in the course of the employment of a worker. The establishment of this new remedy inevitably involved the consideration of difficulties arising from the fact that where a person was injured there might be several remedies available to him. First, he might contend that he was a worker within the meaning of the *Workers' Compensation Act*, and that his injury was due to an accident arising out of or in the course of his employment, and make a claim under that Act. In the event of the death of the worker his dependants might have rights under the Act. Secondly, the worker might sue at common law for damages for negligence. In

(1) (1936) 56 C.L.R. 422.

(2) (1946) A.C. 163, at pp. 173, 176, 187.

this case the questions whether he was a " worker " and whether the accident which had caused his injury arose out of or in the course of his employment would be immaterial. Thirdly, he might sue under the *Employers and Employés' Act* 1928, s. 35, alleging some defect in ways, works, machinery or plant, or some other of the grounds of liability specified in s. 35 of that Act. Finally, if death resulted from the accident his dependants could claim under the *Wrongs Act* 1928 for damages for a wrongful act, neglect or default. The issues in these proceedings would be different, and the law as to estoppel by judgment would not readily and clearly solve the questions which would arise. Unless some provision had been made dealing with these various possibilities an employer might be subjected to several proceedings at the same time in respect of the same injury, and unless it were made clear that the liability under the *Workers' Compensation Act* was not cumulative upon the other remedies mentioned the employer might have to pay more than once to or for the same claimants in respect of the same injury. Section 5 (2) (*b*) represents the endeavour of the legislature to deal with these matters. Lord *Porter* said in *Young* v. *Bristol Aeroplane Co., Ltd.* (1), with respect to the substantially identical English section, " The wording is not very artistic, but the aim is, I think, clear enough, namely, to leave the workman his choice of two remedies whilst preventing the employer from having to pay both damages and compensation." The aim of the section may have been clear enough, but the great and increasing mass of judicial decisions shows that the section has not been a striking legislative success. In the course of the argument upon this appeal we were referred to a large number of these cases. Some of them can, I think, at once be put on one side as irrelevant for the purposes of the decision of this appeal, either because they are based upon a view of the meaning of the provisions with respect to the exercise of an option by a workman which has now been displaced, or because there are provisions in the Victorian Act which avoid a number of difficulties which have been found in other legislation dealing with the subject of workers' compensation.

In several cases it was held that if the worker pursued one or other of his alternative remedies to a final conclusion he must be deemed to have exercised his option irrevocably—even though he did not know that there was an option which he could exercise. An example is to be found in *Neale* v. *Electric and Ordnance Accessories Co., Ltd.* (2), where it was held that a plaintiff in an action at common law

(1) (1946) A.C., at p. 184. (2) (1906) 2 K.B. 558.

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who had previously obtained an award under the *Workers' Compensation Act*, had thereby conclusively exercised his option. It was also held that even if the worker failed in a common-law action the option had been finally exercised: see *Cribb* v. *Kynoch, Ltd.* [No. 2] (1); *Edwards* v. *Godfrey* (2), where it was held that the worker had "exercised his option in favour of bringing a common law action which has failed." There were differences of opinion between the English and the Irish Courts: see *Beckley* v. *Scott & Co.* (3); *Harrison* v. *Wythemoor Colliery Co., Ltd.* (4). But it is no longer possible after the decision in *Young's Case* (5) to hold that the fact that the worker has instituted proceedings under the Act or otherwise or has obtained an award under the Act or a judgment, as the case may be, in itself constitutes an exercise of his option. The one thing which is clearly decided in *Young's Case* (5) is that there can be no exercise of the option without a knowledge that alternative courses are open. Thus the cases which hold that obtaining an award or a judgment has the effect of exercising an option can no longer be regarded as authorities upon what I have referred to as provision (*b*) in s. 5 (2).

Further, there are special provisions in the Victorian Acts which remove difficulties which have been experienced in the interpretation of the application of other legislation. Questions arose whether agreements to accept a sum by way of compensation or actual acceptance of moneys by way of compensation prevented the worker from taking proceedings independently of the Act, either because such agreement or such acceptance had the same effect as an award under the Act, or because the liability under the Act was discharged and satisfied by the agreement and the acceptance of moneys as compensation. As already stated, the 1946 Act, s. 16, prohibits under penalty, in such a case as the present, which is a case of death, the making of agreements as to compensation, and prevents any acceptance of moneys from operating as a satisfaction of liabilities under the Act. There must be an award in this case to create liability under the Act, and no acts of the parties can substitute any agreement or course of action so as to bring about the same result as an award.

Another provision in the Victorian Act which provides for cases not covered in similar Acts is to be found in the 1928 Act, s. 12, as amended by the Act of 1937. Section 12 (1) provides for the case where the workman makes an unsuccessful claim independently of

(1) (1909) 2 K.B. 551.
(2) (1899) 2 Q.B. 333.
(3) (1902) 2 I.R. 504.
(4) (1922) 2 K.B. 674, at pp. 687-688, 697-698.
(5) (1946) A.C. 163.

the Act for damages for injury caused by an accident. Provision is made for the court in which the action is tried to determine whether the employer would have been liable to pay compensation under the *Workers' Compensation Act*, and, if so, to remit the case to the Workers' Compensation Board for assessment of compensation. Provisions of this character are to be found in other legislation. But s. 12 (2) is an additional provision not to be found in any other legislation to which reference has been made during argument. It provides for the case of an unsuccessful claim under the Act and enacts that, if it is determined in proceedings under the Act that the injury is one for which the employer is not liable under the Act, that determination shall not prevent an action being brought in respect of that injury independently of the Act. The absence of such a provision has caused many difficulties in England, but these difficulties do not arise under the Victorian Act.

The principal argument for the appellant was that the operation of provision (*c*) in the section depended entirely upon the prior operation of provision (*b*); that is to say, that provision (*c*) never came into operation so as to limit in any way the rights of a worker unless the worker had actually exercised the option given to him by provision (*b*). That option could not be exercised unless there were knowledge of the available alternatives. In the present case neither the widow nor the children had exercised the option, and therefore, it was said, provision (*c*) had no application to the present case. Reliance was placed upon what was said in *Young's Case* (1) with respect to the relation of these two provisions. There Lord *Simon* (2) referred to the judgment of Lord *Patrick* in *Brown* v. *William Hamilton & Co.* (3), and said :—" I think that the Scotch authorities quoted by Lord *Patrick* (4) are right in treating the final part of s. 29 (' but the employer,' etc.), as exegetical of the preceding part (' but in that case the workman may, at his option,' etc.), and not as further restricting by an added condition the workman's right of option." Lord *Russell of Killowen* (5) also expressed agreement with this opinion. Lord *Macmillan* takes a contrary view (6) and Lord *Simonds* does not expressly refer to the case. Lord *Porter* (7) expresses approval of the reasoning of Lord *Patrick*, but (8) regards the wording of the second half of the subsection (that is provision (*c*)) as protecting the employer, even

(1) (1946) A.C. 163.
(2) (1946) A.C., at p. 171.
(3) (1944) Sc.L.T. 282, at p. 286; 37 B.W.C.C. Supp. 52, at p. 61.
(4) (1944) Sc.L.T., at p. 285; 37 B.W.C.C. Supp., at p. 60.
(5) (1946) A.C., at p. 176.
(6) (1946) A.C., at p. 184.
(7) (1946) A.C., at p. 186.
(8) (1946) A.C., at p. 188.

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though it was considered that a judgment in favour of the workman was not necessarily a final choice—a view which gives provision (*c*) an operation even though no option has been exercised under provision (*b*). Thus Lord *Patrick's* view can be regarded as definitely approved only by two of their Lordships.

I have difficulty in understanding the view that provision (*c*) is exegetical of provision (*b*). Provision (*b*) relates to an exercise of an option by the workman. That is one subject. Provision (*c*) relates to the liability of the employer under the Act or independently of the Act. That is a different subject. The provision as to the liability of the employer cannot, in my opinion, be regarded as expository or explanatory of the provision relating to the exercise of the option. Provision (*c*) is introduced by the word "but". It follows upon the alternative given to the worker to claim compensation under the Act or to take proceedings independently of the Act. "But" is adversative in sense; it is not complementary or explanatory. It introduces a reference to circumstances which limit or prevent the application of some prior proposition. An exegetical statement may properly be introduced by "that is to say." A proposition introduced by the word "but" is intended to introduce a statement which modifies or qualifies the proposition to which it is attached by preventing that proposition from being understood or applied in what (apart from the adversative sentence) might have been regarded as its proper significance. The word "but," where it here appears in the section, produces in my opinion the following result as the meaning of (*c*):—provision (*c*) should be read as meaning—"but (whatever the worker does about his option—whether he exercises it or not—and however he exercises it) the employer shall not be liable to pay compensation both independently of and also under the Act." The provision deals with the liability of the employer to pay compensation, not with the exercise of an option by the worker. This part of the section does not (though provision (*b*) does) relate to the worker claiming compensation or taking legal proceedings. It relates to the liability of the employer to pay compensation for injury. In case of death that liability can arise *under the Victorian Act* only by reason of an award being made. Reference has already been made to s. 16 of the 1946 Act, introducing a new s. 10 into the Act, which prohibits any compromise or agreement with respect to compensation unless it is embodied in an award. Accordingly the only manner in which the employer can become liable *under the Act* is by an award being made against him. Such an award has been made in the present case. The employer paid the amount awarded (£1,100), which was

the maximum amount which could be obtained by any proceedings by or on behalf of any person under the Act—1946 Act, First Schedule, par. 1. The employer paid that sum into the custody of the Board and obtained a receipt. Under par. 5 of the First Schedule to the Act that receipt is a discharge to the employer. The sum paid into the custody of the Board is then administered by the Board. The employer has no further concern with the matter—he cannot be heard with respect to the disposition of the money among the dependants.

It is the award which creates the liability to pay a sum of money. The money is not payable by the employer to the claimant—the Act requires it to be paid into the custody of the Board—1946 Act, Schedule 1, par. 5. The employer does not become "liable to pay compensation" under the Act in the case of death unless and until an award is made. Similarly, the employer does not become "liable to pay compensation" independently of the Act unless and until judgment is given against him in proceedings under some law other than that contained in the Act. Until there is an award or a judgment no-one can say whether the employer is or is not liable to pay any and what amount of compensation. If the claimant fails in his proceeding there is no liability under the law upon which the claimant relies.

Thus in the present case the employer became liable to pay compensation under the Act. Accordingly he is not liable to pay compensation independently of the Act. But what I have called provision (*c*) does not prevent an employer from being held to be liable in respect of some persons—e.g. dependents such as children —under the Act, and in respect of other persons—e.g. a widow— independently of the Act. The double liability which the provision excludes is a double liability in respect of the same person. If the worker himself takes proceedings, it is possible to apply the provisions of the Act in a reasonably satisfactory manner. If, however, the worker was killed as a result of the injury, his dependants possibly have claims—not at common law (except in Scotland), but under the *Workers' Compensation Act, Lord Campbell's Act* or the *Employers' Liability Act*. Some may wish to take proceedings under one Act and others under another Act. Section 3 (2) of the Act provides that any reference to a worker who has been injured shall include a reference to his legal personal representative or to his dependants. Section 5 (2) (*b*) must therefore be applied to cases where there are several dependants. The liability to each dependant is a several liability and proceedings for compensation

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under the Act by one dependant do not constitute a bar to proceedings by another dependant independently of the Act—*Kinneil Cannel and Coking Coal Co. Ltd.* v. *Waddell* (1). But the employer has some protection against separate claims in separate proceedings in addition to that afforded by provision (*c*). There can be only one proceeding in respect of an injury for compensation under the *Workers' Compensation Act*—to which all dependants (in the case of death) must be parties as applicants or as respondents: see Rules under the Act (1938), rule 3. So also there can be only one action under *Lord Campbell's Act* or the *Employers' Liability Act*. These propositions were established in *Avery* v. *London and North Eastern Railway Co.* (2)—and they leave many difficulties unsolved —see the report at p. 622. Thus the employer may have to pay in respect of one person under the Act and in respect of another person independently of the Act. But provision (*c*) excludes liability in respect of the same person both under the Act and independently of the Act. Unless it has at least this effect, it would appear to be completely nugatory.

In the present case the employer became liable, by reason of the award, to pay compensation under the Act. Accordingly he is not liable to pay compensation independently of the Act in respect of the person with respect to whom he has become liable to pay compensation under the Act. It therefore becomes necessary to inquire as to the persons in respect of whom the award ascertained and created liability under the Act. If those persons were the widow and the children, the employer cannot be made liable independently of the Act in respect of any of those persons and the present action must fail.

I take first the position of the widow, who was a claimant under the *Workers' Compensation Act* and is the sole plaintiff in this action under the *Wrongs Act* suing on behalf of herself and the children. A final award has been made upon a claim by her on her own behalf. From that award there is no appeal: see the *Workers' Compensation Act* 1937, s. 9. It is a conclusive determination that the employer is liable to pay compensation under the Act so far as the widow is concerned. The employer has paid the compensation awarded. It follows that he is not "liable to pay compensation independently of the Act" in respect of the widow—provision (*c*).

It is argued, however, that for various reasons these considerations do not apply in the case of the infant children. It is contended that the infants were not parties to the proceedings under the Act, that they could not be parties except by a next friend, and that

(1) (1931) A.C. 575. (2) (1938) A.C. 606.

there is no determination that proceedings under the Act and obtaining an award thereunder were for their benefit.

The claim upon which the Workers' Compensation Board in fact adjudicated when it made its award was a claim which was made by the widow on behalf of herself and her children. Mr. Ruddell's letter was written with the authority of the widow, and he claimed on behalf of the widow and the children. The employer gave notice to the registrar of the Board that a claim for compensation had been made by or on behalf of the widow on her own behalf and on behalf of her sons, who were named in the notice. That claim made by the widow was dealt with by the Board and an award was made. Thus the infants were represented to be claimants in the proceedings and were described as such. But the 1946 *Workers' Compensation Rules*, rule 8, provide that the provisions of the *County Court Rules* as to persons under disability shall, with the necessary modifications, apply to proceedings under the Act. This rule is subject to a proviso that the Board may at any time direct that an infant shall appear either as applicant or respondent in the same manner as if he were of full age. No such direction was given in the present case. The *County Court Rules* 1930, Order 4, rules 15 and 16, provide for infants suing by their next friend. Therefore the infants should have claimed before the Workers' Compensation Board by a next friend. But rule 81 of the *Workers' Compensation Rules* is as follows :—" Non-compliance with any of these rules shall not render any proceedings void unless the Board so directs, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Board shall think fit." The Board has not set aside the award, but it does not appear that the attention of the Board was drawn to the fact that the infants had no next friend. Non-compliance with the requirement that the rules of the County Court should be observed did not render the proceedings void—but it does not dispense with the necessity of ascertaining what the proceedings were. It deals with irregularities in the course of proceedings between two persons, A and B, but it does not operate so as to affect the rights of persons other than A or B, if they were not parties to the proceedings. If proceedings were instituted in the name of an adult person without his authority, he could not be prejudiced by them. An infant cannot give authority to institute proceedings so as to bind himself, and that is one of the reasons why a next friend is required. Accordingly, in my opinion, the better view is that the rights of the infants were not affected by the

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result of the proceedings taken without observance of the legal requirement of a next friend.

This conclusion renders it unnecessary for me to consider the further separate argument that the award does not bind the infants unless it is shown that it is for their benefit so to be bound. I will say only that awards and orders of courts in cases of infants are on a different footing in this respect from agreements by infants: see *Neale* v. *Electric and Ordnance Accessories Co., Ltd.* (1), and *Cribb* v. *Kynoch, Ltd.* [No. 2] (2).

The question remains whether an order should have been made for the dismissal of the action against the widow. No evidence could affect the decision upon this point. The relevant facts are indisputable, as the learned judge said. But it is argued that if a case involves any question of difficulty the summary procedure of dismissing an action as vexatious should not be applied. In the present case there is nothing frivolous about the action, but if a court is of opinion that the plaintiff cannot succeed there is every reason for protecting a defendant from vexation by the continuance of proceedings which must be useless and futile. The contention of the appellant really is that procedure under Order XIVA or Order XXV., rule 4, or under the inherent jurisdiction of the court for dismissing an action at an early stage, should be used only in easy cases. I do not agree with this view where there is opportunity for full argument and full consideration of the question raised. In the present case the argument before the learned judge was evidently a thorough argument. It is true that it has often been held that the power of the court created by the rules mentioned or existing under the inherent jurisdiction of the court should not be exercised except in clear cases: see, for example, *Mayor, &c. of City of London* v. *Horner* (3), and *Hubbuck & Sons, Ltd.* v. *Wilkinson, Heywood & Clark, Ltd.* (4). It is also true that the procedure provided by Order XXV., rule 2 (raising a question of law for argument) might have been applied; but if that procedure had been adopted exactly the same arguments before a judge sitting in chambers would have been presented. It was said in *Hubbuck's Case* (4) that this method was appropriate to cases requiring argument and careful consideration, and that the summary procedure under Order XXV., rule 4, was appropriate only to cases which were plain and obvious, so that any master or judge could say at once that the statement of claim was insufficient, even if proved, to entitle the plaintiff to what he asked. In Victoria applications for the dismissal of the action are

(1) (1906) 2 K.B., at p. 566.
(2) (1908) 2 K.B., at p. 561.
(3) (1913) 111 L.T. 512.
(4) (1899) 1 Q.B. 86.

not dealt with by a master, and they can be and are fully argued. If, as a result of argument, the court reaches a clear decision which could not be altered by any evidence which could be adduced at the trial, then it is proper in the interests of both parties to dismiss the action instead of allowing the parties to incur completely useless expense. In my opinion *Barry* J. acted within his powers in dismissing the action so far as the widow is concerned, the ground upon which he acted was in my opinion right, and therefore the appeal should be dismissed in respect of the widow but allowed in respect of the infants.

RICH J. I am in substantial agreement with the judgment of my brother *Williams* but, as, in my opinion, the matter is of importance, I shall add a few words of my own.

I do not consider that the course taken by the learned primary judge was the appropriate course to be taken in the circumstances. In my opinion it would have been better if a statement of claim had been delivered, the issues defined by the pleadings and the children had been properly represented. It is clear that the widow by her agent Mr. Ruddell had made her election from which she could not retract but she as mother was not empowered to make any election on behalf of her infant children. They are not bound. They should have been represented by a duly appointed next friend whose responsibility is not merely one for costs but is a responsibility to guard their interests. It is the interposition of the court, charged with the duty to watch over the infant's interests, that lends sanctity to a judgment for or against an infant and binds him: *Arabian* v. *Tufnall & Taylor, Ltd.* (1).

In the result I consider that my brother *Williams* came to a right conclusion.

DIXON J. This appeal is from an order made in chambers.

The order is that " the action herein be dismissed " and that the costs of the action be paid by the plaintiff excepting, for some reason not explained, the costs of the summons upon which the order was made. The summons was expressed as an application on the part of the defendants in the action for an order that the action be dismissed or forever stayed on the grounds that it was frivolous, vexatious and an abuse of the process of the court. The action was by a widow under *Lord Campbell's Act*. She had named herself and four children as the persons by whom and for whom the action was brought. The summons stated the reason why the action was

(1) (1944) 1 K.B. 685, at p. 688.

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frivolous, vexatious and an abuse of the process of the court. It consisted in the allegation that the plaintiff on behalf of herself and others dependent on the deceased obtained an award of the Workers' Compensation Board against the defendant in respect of an accident to the deceased by which he was fatally injured and that the facts of the accident formed the basis of the action.

From the affidavits in support of the summons it appeared that the deceased had been employed as an assistant station master by the Victorian Railways Commissioners, the defendants, and that he had been killed on 29th April 1947 while he was driving a tractor at a level crossing at Williamstown. He had been struck by some trucks propelled by an engine. It was alleged by the plaintiff that the accident arose from the negligence of the defendants and their servants in the lighting and management of the level crossing and of the trucks.

The four children were all boys; the eldest was fifteen years of age, the youngest five. On 9th May an officer of the Australian Railways Union, who, it is said, deals with the claims to workers' compensation of members of the union and their dependants, wrote to the defendants saying that on behalf of the dependants of the deceased he desired to apply for compensation. The letter went on to state that the deceased left a widow and four sons, giving their names and the dates of birth. Sub-section (1) of s. 17 of the *Workers' Compensation Act* 1946 (No. 5128) provides that when a claim for compensation is made to any employer the employer shall within fourteen days give to the registrar of the Workers' Compensation Board notice that the claim has been made setting out particulars of the claimant, the accident and other relevant matters. In consequence of this sub-section the Victorian Railways Commissioners gave notice of the claim to the registrar in the form prescribed by the 1946 *Workers' Compensation Rules* (Form 9). Pursuant to rule 11 a notice was included admitting liability. Sub-section (2) provides that upon receipt by the registrar of the notice proceedings for the settlement of the claim shall be deemed to have been instituted by the claimant and such proceedings shall be placed in the summary list. Sub-section (3) provides that in any such proceedings the Board may make any order determination or award that it is empowered to make upon any proceedings under the *Workers' Compensation Act*. Rule 17 provides that where the employer admits liability and gives no further notice the proceedings shall forthwith be set down for hearing. Notice was given to the Victorian Railways Commissioners fixing 26th May 1947 as the day for hearing the claim. The notice was entitled in the matter of a claim by the

widow (the plaintiff) against the commissioners. She was not described as representing the children. Presumably a similar notice was given to the plaintiff.

On the appointed day the widow, that is the plaintiff, and the officer of the union were present. The commissioners, the defendants, were represented by a clerk of the Crown Solicitor. The plaintiff gave evidence that she was the deceased's widow and that there were four dependent children. An award was made which as drawn up is entitled in the matter of the widow, described as the claimant to (*sic*, meaning apparently claimant upon) the Victorian Railways Commissioners in respect of the death of the deceased. The award, after reciting that the Board had found that the deceased left his widow and four children under sixteen naming them wholly dependent upon his earnings, awarded the sum of £1,100 to be paid into the custody of the Board. A provision followed not presently material limiting the amount to that sum unless it was shown that another child existed and providing for that possibility. Under the *Workers' Compensation Acts* the amount of compensation is fixed where death results from the injury and the deceased leaves a widow and children under sixteen: it is fixed at £1,000 together with an additional sum of £25 in respect of each such child (s. 4 and clause 1 (1) (*a*) (i) of First Schedule of Act No. 5128). That meant that the £1,100 awarded to be paid to the Board was a sum fixed by law. Though the sum is calculated by reference to the number of children under sixteen that does not mean that any such child has a right to any specific part of it. The calculation is only a means of ascertaining the amount in respect of which the employer is liable.

The Acts provide that the payment in the case of death shall be paid into the custody of the Board and any sum so paid shall, subject to the rules and the provisions of the schedule, be invested applied or otherwise dealt with by the Board in such manner as the Board in its discretion thinks fit for the benefit of the persons entitled thereto under the Acts and the receipt of the registrar is a sufficient discharge. The Board may apply the sum or otherwise deal with it as in its opinion will for the time being be most beneficial to the dependants and may exclude any dependant from participating in any benefits (clause 5 (1) and (2) (*a*) and (*c*) of First Schedule of Act No. 5128). Except for authoritatively fixing the number of children and therefore the amount of the compensation the award seems to have served no purpose. The duty of the employers to pay the money into the custody of the registrar arose under the statute and no further liability was imposed upon them by the

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award, the making of which seems to be rather the result of the requirement of rule 17 that on an admission of liability the proceedings shall forthwith be set down for further hearing.

The award did not invest in the widow, the plaintiff, nor in any of the four children any greater right in or to or with respect to the money to be paid into the custody of the registrar.

The material placed before the Court includes nothing upon which to impute to the children any legal responsibility for or in connection with these proceedings. Rule 41 says that, subject to the provisions of the Act, in any case not provided for by the Act or rules, the general principles of practice and the rules observed in County Courts may in the discretion of the Board be adopted and applied to any proceedings or matter with such modifications as may appear necessary or desirable. Rule 74 provides that where any matter or thing is not provided for under the rules the same procedure shall be followed and the same provisions shall apply with the necessary modifications and, as far as practicable, as in a similar matter or thing under the County Court Acts and rules thereunder. It follows that in proceedings instituted on behalf of infants they should be represented by a next friend and in proceedings to which they are parties respondent they should appear by a guardian *ad litem*. Thus the manner prescribed by law for proceeding in a way which will presumptively bind infants was not pursued. There is however in rule 81 the usual non-compliance provision and s. 9 of Act No. 4524 says that no award shall be vitiated by reason of any informality or want of form. If therefore some ground could be discovered for ascribing to the infants a responsibility for the proceedings in law or perhaps even in fact, a question might arise whether the absence of a next friend and of a guardian *ad litem* was fatal. But no facts appear to support the notion that legal responsibility for the proceedings may be fastened upon the infants or that any of them was in fact associated with them. The mother is probably sole guardian of the children but even that does not appear. There is nothing to suggest that it would be for the benefit of the infants to make a claim on their behalf as well as on their mother's behalf and it seems almost impossible that it should be. For whoever among dependants puts forward the claim the Victorian Railways Commissioners would be bound to act in the same way and place in the hands of the Board the same sum of money. There could therefore be no advantage to the infants in joining in the claim. The disabilities of an infant are such that it is difficult to suppose that the actual authority of any of them would matter, however much virtue may be claimed for the non-compliance

provision. But no ground appears for believing that even the boy aged fifteen knew anything of the claim.

As to the widow herself it may be supposed that she left everything in the hands of the officer of the union. It would be natural therefore to treat him as acting with her authority. Further, after the making of the award had been announced the chairman of the Board informed the plaintiff that she should attend at the office of the registrar to make the necessary arrangements for the distribution of the money to her. She and the officer of the union at once so attended and she signed a paper stating how she desired the sum to be paid to her. But whatever view may be adopted or assumed as to her authority to the officer of the union, for present purposes at all events it must be taken that she had no knowledge of the existence of any alternative remedy or remedies against the Victorian Railways Commissioners. For she is alleged to have been ignorant of her rights and there is nothing to the contrary. Two days later an inquest was held by a coroner into the deceased's death. A solicitor appeared for the plaintiff before the coroner and upon the same day but after the inquest he wrote to the registrar informing him that an action would be brought on behalf of the widow and the children against the Victorian Railways Commissioners at common law, that is under *Lord Campbell's Act*, and requesting the registrar to withhold any payments. On the same day as the letter the Railways Commissioners paid into the custody of the Board the £1,100. The plaintiff gave notice of action under s. 200 of the *Railways Act* 1928 and on 30th September 1947 the widow on behalf of herself and her four children brought an action against the commissioners in the County Court in pursuance of s. 201 (2) of that Act.

On 23rd February 1948 the Crown Solicitor acting on behalf of the Railways Commissioners requested the plaintiff's solicitor to consent to the removal under s. 61 of the *County Court Act* 1928 of the action into the Supreme Court on the ground that important questions of law would arise in the action. That assent was given and an order was made accordingly. On 17th March 1948 the defendants issued the summons to dismiss the action. The summons was issued upon the footing that upon the foregoing facts the action must fail by reason of s. 5 (2) (*b*) of the *Workers' Compensation Act* 1928. The difficulties of that provision are notorious. Substantially in the same form it was in force in the United Kingdom from the passing of the *Workmen's Compensation Act* 1897 until the *National Insurance* (*Industrial Injuries*) *Act* 1946 came into operation. As to the repeated efforts of the courts of England, Scotland

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and Ireland during those fifty years to settle its meaning and application they may be described as fifty years of failure. At the very end of the period the House of Lords made a final attempt to expound some of its meaning: *Young* v. *Bristol Aeroplane Co., Ltd.* (1). But much difference of opinion is disclosed by the opinions of their Lordships. In the words of a commentator—In view of the marked differences of opinion held by their Lordships it is clear that *Young's Case* (1), turning as it did upon its own peculiar facts, in no way provides a solution to those many cases on this subject where the workman has at no time during receipt of compensation had any knowledge of his option (*Law Quarterly Review* (1946), vol. 62, p. 120). Nor does it appear to me to have provided any solution of the question whether such an award as the present makes any inquiry into the exercise of the option irrelevant and of itself precludes the plaintiff and the children from asserting a claim under *Lord Campbell's Act*. The defendants could not succeed in their application without making good one or other of two propositions. One is that to make a claim before the Board to workers' compensation and pursue it to award of the kind here made amounted necessarily to an exercise of the option between the two remedies. The other proposition is that the award itself meant an imposition of liability upon the employers precluding the plaintiff and the children from resorting to the remedy under *Lord Campbell's Act*.

But to say the least of them these are very dubious propositions and on the decided cases they involve very difficult questions. Nevertheless the defendants by their application undertook to show that it was so certain that one or other of these questions must be answered in the defendants' favour that it would amount to an abuse of the process of the court to allow the action to go forward for determination according to the appointed modes of procedure. It is not hard to understand the defendants desiring to have the effect of s. 5 (2) (*b*) of the *Workers' Compensation Act* 1928 as a bar to the plaintiff's action determined as a preliminary question before going to trial before a jury upon the issues of negligence and damages. But the appointed procedures provide for the disposal of questions of law before trial in proper cases and for the separate determination of independent questions of fact (Order XXV. rules 2 and 3, Order XXXIV. rules 1 and 2 and Order XXXVI. rule 8). The application was not made for summary judgment for the defendants under Order XIVA., an order peculiar to Victoria. But if it had been it must have failed. Order XIVA. is the counterpart for defendants of Order XIV. It confers a power of summarily

(1) (1946) A.C. 163.

dealing with an action which *Barton* J. said should be reserved for exercise as to actions that are absolutely hopeless: *Bayne* v. *Riggall* (1).

The application was not made under, nor could it be supported under, Order XXV. rule 4 or Order XIX. rule 27. The question does not arise on the statement of claim and it involves no matter of pleading. It is a substantive question chiefly of law relating to an alleged bar to the cause of action to be pleaded by way of confession and avoidance. But had it been a question capable of arising in such a way that either of those rules could be used, the application must have failed. For the power they confer is not to be used in cases of doubt or difficulty or where the pleading raises a debatable question of law: *Agar* v. *Williamson Ltd.* (2); *Healey* v. *Bank of New South Wales* (3); *Wall* v. *Bank of Victoria Ltd.* (4); *Goodson* v. *Grierson* (5); *Wright* v. *Prescott Urban District Council* (6); *Mayor, &c., of City of London* v. *Horner* (7); *Hubbuck & Sons, Ltd.* v. *Wilkinson, Heywood & Clark, Ltd.* (8).

The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.

In *Burton* v. *Shire of Bairnsdale* (9), *O'Connor* J. said: "Prima facie every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals and the inherent jurisdiction of the court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and

(1) (1908) 6 C.L.R. 382.
(2) (1920) 42 A.L.T. 98.
(3) (1898) 24 V.L.R. 405.
(4) (1890) 16 V.L.R. 2.
(5) (1908) 1 K.B. 761, at pp. 763, 764.
(6) (1916) 115 L.T. 772.
(7) (1914) 111 L.T. 512.
(8) (1899) 1 Q.B. 86, at p. 91.
(9) (1908) 7 C.L.R. 76, at p. 92; 14 A.L.R. 529, at p. 534.

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vexatious will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed." *Higgins* J. made some observations which may be applied to the present case. "It is my opinion" he said "that the Full Court were led, by a very natural process I admit, to take a wrong attitude. They dealt with the matter as if they were deciding it on the merits whereas they had merely to decide whether there was anything in fact or in law that was fairly triable or arguable." Then his Honour said, "It is surely absurd to argue for days as to a plaintiff's case being arguable." "It cannot be doubted," said Lord *Herschell* in *Lawrance* v. *Norreys* (1), "that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases."

It sometimes happens that an application in chambers under one of the rules mentioned or perhaps even in the inherent jurisdiction is by common consent treated as an occasion for settling some question. But that did not take place in the present case. We are informed that the plaintiff's counsel objected that it was not a case for the exercise of any summary power and that he persisted in that objection. It is to be noticed that notwithstanding that no jurisdiction under the rules attached an order for the dismissal out of court of the action was made in chambers. But, although of its own force the order finally determined the action, it may not have been so intended. For an order for leave to appeal was made on the footing that it was interlocutory.

It is in my opinion of more importance to maintain the integrity of the principle that under cover of the inherent jurisdiction to stop abuse of process litigants are not to be deprived of the right to submit real and genuine controversies to the determination of the courts by the due procedure appropriate for the purpose than for this Court to add another to the many judicial attempts that have been made to construe and apply the perplexing provisions that stand in Victoria as s. 5 (2) (*b*) of the *Workers' Compensation Act* 1928.

The use that the defendants have here made of the summary powers of the court raises at all events a question of principle about which I have not hitherto understood there was any doubt, even if at times courts with or without the help of the parties have overlooked it. I would allow the appeal on this simple ground. But as opinions are to be expressed about the operation in this case of s. 5 (2) (*b*) I shall state mine.

(1) (1888) 39 Ch. D. 213; 15 App. Cas. 210, at p. 219.

I shall not enter upon any general discussion of s. 5 (2) (*b*) of the *Workers' Compensation Act* 1928. I shall confine myself to specific points which appear to decide the question whether the widow and children are barred of the action under *Lord Campbell's Act*. These points arise upon the words " the worker may at his option claim compensation under this Act . . . or take proceedings independently of this Act . . . but the employer shall not be liable to pay compensation for injury to a worker . . . both independently of and also under this Act." For the purposes of this case, as it is a death claim, the word " worker " where it first occurs, must be taken to refer to the worker's legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable (s. 3 (2) of the Act of 1928). The effect which is produced by the substitution was stated as follows by Lord *Russell* in *Kinneil Cannel and Coking Coal Co., Ltd.* v. *Waddell* (1): " I find no difficulty in construing it in relation to the dependants of an injured workman who is dead—as if (omitting immaterial words) it ran thus: ' but in that case the dependants may at their respective options either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay to any dependant compensation . . . both independently of and also under this Act.' "

It is important steadily to bear this adaptation of the words of the provision to dependants of a deceased worker in mind in considering its application to the facts of the present case. It will be found that by doing so some of the difficulties are made to wear a different aspect.

The first point that it is desirable to make is one that does no more than exclude a possible, indeed a plausible, interpretation of the words " either claim compensation under this Act or take proceedings independently of this Act," an interpretation which if valid would tend against the plaintiff. It has been clear that these words cannot operate under the Victorian legislation to make the formulation of a claim under the Act that is unfruitful or the institution of proceedings independently of the Act that fail a ground for excluding resort by the worker or his dependants to the alternative remedy. That is made clear by the fact that not only does the legislation provide, as in England, a procedure for assessing compensation in the same litigation when an action for negligence against an employer fails (s. 12 (1) as amended by Act No. 4527) but it expressly enacts that if it is determined in any proceedings under the Act that the injury is one for which the employer is not

(1) (1931) A.C. 575, at pp. 594, 595.

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liable such determination shall not prevent an action being brought in respect of the injury independently of the Act (s. 12 (2)).

It may be that after unsuccessful proceedings independently of the Act compensation cannot be obtained except by the procedure provided. There is not a little authority for that position. But it is a result to be attributed not to the meaning of the words in s. 5 (2) (*b*) but to an interpretation placed upon s. 12 (1). If the unsuccessful pursuit of one alternative remedy whether by claim or proceedings is not a bar to resorting to the other alternative, it is hard to see how the making of a claim or the institution of proceedings could be a bar before the result is known.

The second point to be made is that the " option " conferred by the opening words of the clauses I have quoted from s. 5 (2) (*b*) cannot be exercised by one who is not aware of the existence of both remedies. That was established finally by the decision of the Court of Appeal in *Leathley* v. *John Fowler & Co. Ltd.* (1), giving effect to the opinions expressed by Viscount *Simon* Lord *Russell* and Lord *Porter* in *Young* v. *Bristol Aeroplane Co.* (2).

As we must assume in the present case that the plaintiff was ignorant of the availability of the two remedies and of her right to pursue either at her option, it follows that the defendants cannot succeed upon the words alone " may at his option either claim compensation under this Act . . . or take proceedings independently of this Act." They must succeed, if at all, by force of the words " but the employer shall not be liable to pay compensation for injury to a worker . . . both independently of and also under this Act."

The third point which I wish to make is upon the operation of these words in relation to the description of award made by the Board in this case. That award gave neither the plaintiff nor any of her children any right to participate in the distribution of the money paid by the employers into the custody of the registrar. Their respective claims to participate remained dependent upon clauses 5 (1) and (2) of the First Schedule of Act No. 5128, the effect of which has been stated above. What the award did was to ascertain, at all events provisionally, the number of children, specify the money figure that resulted, and translate, perhaps unnecessarily, the statutory liability imposed upon the employers by the earlier words of clause 5 (1) into an award, which, had it been found necessary to enforce the obligation to pay the money into the custody of the registrar, might have been converted into a judgment of the County Court, by the means prescribed by s. 11

(1) (1946) K.B. 579.

(2) (1946) A.C., at pp. 169, 173, 186.

of Act No. 4524 as substituted by s. 4 of Act No. 4593 and amended by Act No. 5128. At first sight this may seem in strict logic to have imposed a liability, a fresh liability juristically different from the old liability, upon the employers to pay compensation under the Act, so that it would no longer be possible for the plaintiff, who has been taken as authorizing the claim that led to the award, and perhaps for the infants notwithstanding that they cannot be taken to have done so, to seek to impose a liability independently of the Act in respect of the same matter. But it has been found necessary to place upon the critical words an entirely different meaning. The necessity was felt in cases where death had resulted and different dependants took different courses. Lord *Atkin*, as a judge of the King's Bench and afterwards in the Court of Appeal, had adopted the view that once an order was made requiring an employer to pay over to or for the benefit of any dependants the compensation provided by the Act the employer could not thereafter be made liable independently of the Act in respect of the injury, the death. The employer had become liable under one alternative and he could not be made liable thereafter under the other. It did not matter that some of the dependants were unaware of or were opposed to the imposition of that liability upon him. " Otherwise the employer might have to pay twice ": *Bennett* v. *L. & W. Whitehead, Ltd.* (1) ; *Codling* v. *John Mowlem & Co., Ltd.* (2). Now it is apparent that this view takes into account not the relation of the employer to each dependant, not the right of each dependant to claim upon the sum, but the liability only of the employer to make available the total sum. It is not easy to reconcile with Lord *Russell's* translation, already set out, of the material part of s. 5 (2) (*b*) when adapted to the case of dependants of a workman who has been killed. In his Lordship's version, to repeat it, he makes the words equivalent to this statement :—" but the employer shall not be liable to pay *any dependant* compensation . . . both independently of and also under the Act." In other words you look to the liability to each dependant, not to the employer's preliminary responsibility for making the total sum available. The liability to each dependant must be dealt with separately. Lord *Atkin's* view was held to be erroneous by the House of Lords which in two cases settled the operation of the provision with respect to the choice of remedies. In *Kinneil Cannel and Coking Coal Co. Ltd.* v. *Waddell* (3) it was decided that each dependant had a separate choice between compensation under the Act and his cause

(1) (1926) 2 K.B. 380, at p. 409.
(2) (1914) 2 K.B. 61 ; 3 K.B. 1055.
(3) (1931) A.C. 575.

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of action for negligence, in England under *Lord Campbell's Act*, and that each could exercise his option independently of the other and in a different way. In *Avery* v. *London and North Eastern Railway Co.* (1) it was held that the amount of compensation to be paid in a death claim could not be diminished because some of the dependants recovered damages under *Lord Campbell's Act* and the *Employers' Liability Act* and that in assessing those damages no account could be taken of the fact that the first dependants claimed not thus but under the *Workmen's Compensation Act*. In the latter case Lord *Macmillan* described the option as personal to each dependant of a deceased workman. "The effect of the . . . interpretation section in requiring every reference in the Act to a workman to include, where the workman is dead, a reference to his dependants, as construed in this House, is undoubtedly to permit duplication of proceedings" (2). The basal reason for these decisions lies in the conception that the several dependants are given several and unconnected rights. It places on the provision a meaning which makes it necessary to consider not whether the employer has made over to the authority the fixed lump sum. He must do that if any one of the dependants requires him to do so. The fact that the others stand out does not relieve him of the liability or reduce the amount. What the meaning placed on the provision makes it necessary to consider is whether the individual dependant has taken a course which gives that dependant a claim only upon the fund or a claim only for negligence as the case may be. On the surface of this interpretation it is plain enough that the children in the present case cannot be precluded by anything done by their mother, unless at all events in a representative capacity. Legal responsibility must be properly attributable to them before they can be affected.

But the importance of the interpretation is not confined to the children. For the interpretation rests upon or implies a principle which has yet another application in the circumstances of the case. The principle which the provision is interpreted as seeking to express and put into effect is not that an employer shall be protected from exposure to two proceedings, not that he shall be protected from exposure to more than one head or form of liability, not even that he shall be protected from liability to the maximum extent under both forms of liability provided that the payees are different, but that no workman and no dependant of a workman shall be entitled to recover more than the full sum under one of the two heads or forms of relief or remedy. Lord *Dunedin* in *Kinneil Cannel and*

(1) (1938) A.C. 606.

(2) (1938) A.C., at p. 621.

Coking Coal Co. Ltd. v. *Waddell* (1) goes to the central point and states it almost in a sentence. " The compensation to be paid by the employer may be viewed as a lump sum, and an aggregate of what is actually called a lump sum, plus a children's allowance if there are such. But the claim to participate in this lump sum is an individual claim, and what I think the section means to say, and what involves no absurdity, is that no individual is to get two payments, one at common law and the other under the Act."

Apart from all other considerations the plaintiff, the widow, having exercised no option is not to be precluded under the words " an employer shall not be liable both independently and under the Act " unless her individual claim to workers' compensation has become the subject of a distinct liability to her, a liability whether on the part of the employers directly or of the fund they have placed in the custody of the registrar.

Whether, without an exercise of her option, she would be precluded even by the creation of such a liability is another question, a question depending in some measure upon the deductions to be drawn from the decision of the House of Lords in *Young* v. *Bristol Aeroplane Co., Ltd.* (2). But short of the creation of an individual right in her to a separate sum and a corresponding liability on the side of the employer she is not barred.

The fourth point which I think should be made relates to the effect of the judgment of Lord *Patrick* in *Brown* v. *William Hamilton & Co.* (3). This judgment commanded the approval of Viscount *Simon*, Lord *Russell* and Lord *Porter* in *Young's Case* (4) though with some qualification as to the differences between option and election. Their Lordships made use of opinions and expressions to be found in the judgment. In particular Viscount *Simon* and Lord *Russell* adopt the view that the words " the employer shall not be liable . . . both independently of and also under this Act " do not confer a distinct and additional protection upon the employer which does not depend upon the worker's option but, as I understand it, that it expresses a consequence of the existence and ultimately inevitable exercise of the option. A second matter which Viscount *Simon*, Lord *Porter* and perhaps Lord *Russell* take from the same source though it is to be found elsewhere is the view that in assessing damages in an action of negligence the amounts already received by a workman as compensation under the Act must be taken into account and allowed to the employer in reduction

(1) (1931) A.C., at pp. 584, 585.
(2) (1946) A.C. 163.
(3) (1944) Sc.L.T. 282; 37 B.W.C.C. Supp. 52.
(4) (1946) A.C., at pp. 171, 176, 186.

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of the damages. Thus resort to an action of negligence after the enjoyment of compensation under the Act can never result in a double recovery.

The first of these propositions did not originate with Lord *Patrick* but with Lord *Low* (*Burton* v. *Chapel Coal Co., Ltd.* (1)). Lord *Patrick* says (2): "It is assumed by the judges in the Scots cases rather than stated that the second part of the subsection (i.e. the words 'but the employer shall not be liable . . . both independently etc.') has no effect independent of and different from the first part and in particular has no effect restrictive of the right to elect conferred by the first part. That view is, however, expressly stated by Lord President *Clyde* in *King* v. *Edinburgh Collieries Co., Ltd.* (3) when he said that in his opinion the second part was exegetical of the first part and I read Lord *Low's* opinion in *Burton* v. *Chapel Coal Co. Ltd.* (1) as being to the same effect." Again Lord *Patrick* says (4): "The words of the second part of the subsection can receive adequate effect if one regards them only as exegetical of the first part of the subsection, as Lord *Clyde* did, or to put it in another way, if one regards the first part of the subsection as defining the rights of the workman and the second part as defining, perhaps unnecessarily, the resulting rights of the employer, as Lord *Low* did in *Burton's Case* (1)".

In *Young's Case* (5) Viscount *Simon* says: "Lord *Patrick* in *Brown* v. *William Hamilton & Co.* (6) develops the view which I would uphold with much clearness and cogency. I think that the Scotch authorities quoted by Lord *Patrick* (7) are right in treating the final part of s. 29 ('but the employer,' etc.), as exegetical of the preceding part ('but in that case the workman may, at his option,' etc.), and not as further restricting by an added condition the workman's right of option. As Lord *Patrick* points out, and as was also laid down by the present Lord *Goddard* in the Court of Appeal in *Unsworth* v. *Elder Dempster Lines, Ltd.* (8), no difficulty in adopting this construction arises from the rule that the employer is not to be bound to pay twice over. If, before the workman can be regarded as having really exercised his option, he receives one or more weekly payments under the Act, and he then opts to issue a writ and recovers damages, the damages in the action would be reduced by the amounts already received."

(1) (1909) S.C. 430.
(2) (1944) Sc.L.T., at p. 285.
(3) (1924) S.C. 167.
(4) (1944) Sc.L.T., at p. 286.
(5) (1946) A.C., at p. 171.
(6) (1944) Sc.L.T. 282, at p. 286; 37 B.W.C.C. Supp. 52, at pp. 63, 84.
(7) (1944) Sc.L.T. 282, at p. 285; 37 B.W.C.C. Supp. 52, at p. 60.
(8) (1940) 1 K.B. 658, at p. 674.

Lord *Clyde's* word " exegetical " may perhaps be not a very happy expression of his meaning. Moreover in view of the mystery in which the provision has so long been enveloped it may have been unfortunate to choose a word of which a classical or post-classical use was to describe books explaining the significance of omens. Grammarians are perhaps more accustomed to the word epexegetical, but it has a narrower use I imagine. However Lord *Clyde* means that the second limb of the clause explains, expounds, carries out and interprets the first. How this is done is made quite clear by a passage in Lord *Russell's* opinion which should be read but of which I shall quote only three sentences. His Lordship says (1): " to make a choice the workman must be aware of his right to choose, and of the alternatives open to his choice . . . On the other hand, if a workman, who knows of his right to choose and of the alternatives open to his choice, has enforced his claim to compensation independently of or under the Act, he cannot thereafter seek to enforce any other liability of the employer . . . But unless and until he has so enforced the liability of his choice, I find nothing in the sub-section to prevent him from changing his mind, abandoning any pending proceedings in reference to one liability, and commencing proceedings to enforce the other liability." Lord *Porter* did not concur in the view thus expressed. He appears to have considered that the limb of the clause, which in these judgments is called the second, operated independently of the option conferred by the first but that it did not apply unless a stage had been reached at which the employer is at least compellable to pay (the workman) either by judgment in an action by award or by registered agreement (2).

Lord *Macmillan* and Lord *Simonds* however differed from Viscount *Simon*, Lord *Russell* and Lord *Porter* in the entire interpretation of the section and if this pronouncement of the House upon the provision is to be used as an authority, as the Court of Appeal used it in *Leathley* v. *John Fowler & Co. Ltd.* (3), it seems to me that attention must be confined to the judgments of the three Lords last named.

I have made no attempt to form, or perhaps I should say to persist in, views of my own concerning the meaning of the section, but I have applied myself to an attempt to ascertain the effect which the weight of authority seems to give to the provision. So regarding the matter I think that in this as in so many other questions of workmen's compensation what may be called the

(1) (1946) A.C., at p. 176.
(2) (1946) A.C., at p. 187.
(3) (1946) K.B. 579.

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Scots view has been justified and has prevailed and that the general conception of the provision which has now been adopted either in the House of Lords or as a result of opinions expressed in the House is more in harmony with the view expressed by Lord *Patrick* and adopted by Viscount *Simon* and Lord *Russell*. I think therefore that for the reason that the plaintiff was unaware of the existence of the two remedies and the choice open to her she could not be barred under the words " but the employer shall not be liable . . . both independently of and also under this Act."

The fifth point I shall make relates to the particular position of the infants. Even if I had been of opinion that the plaintiff, the widow, was barred I should have thought that the infants were not. On the assumption I have stated the position of the infants would depend on their responsibility in law for the claim which led to the award. To my mind it is not a question of the " validity " of the award, but of the legal connection of the infants with the proceedings. Suppose that in an imaginary case dependants though not infants are numerous and one of them without the authority of the others proceeds in the most formal manner on behalf of himself and the other dependants. Are they " bound " in the sense that the proceedings preclude them from alternative remedies, conclude them so that they no longer may exercise an option ? I should say clearly not : because the representation of them is unauthorized. In the case of infants the agency or representation must be established by legal means. The infants are under a disability depriving them of the power of employing an attorney or other agent. Not that they attempted to do so in the present case. The law however supplies the means of providing representation of infants and by that means making legal proceedings available to them. In describing the circumstances I have shown that whether regularly or irregularly the proceedings could not be treated as proceedings of the infants. For so far as appears there are no grounds for connecting the infants legally with the claim. It is not shown to be for their benefit. There was no next friend. So far as appears the proceedings were *res inter alios acta*. On the face of the Board's documents they do not purport to make the infants parties, though I do not think that is of great importance. It is true that s. 17 (2) of Act No. 5128 says that proceedings shall be deemed to have been instituted by the claimant. But the infants were not " claimants."

For all these reasons I am of opinion that neither the plaintiff in the action nor the four children she names pursuant to *Lord Campbell's Act* are precluded by anything that appears from prosecuting the action.

In my opinion the appeal should be allowed with costs and the order discharged the defendants respondents paying the taxed costs of the summons and the attendance of counsel in chambers being certified for.

McTiernan J. The ground of this application to dismiss the present action raises a question involving the construction and application of s. 5 (2) (*b*) of the *Workers' Compensation Act* 1928, as amended, of Victoria. The application results from the defence framed upon this provision and filed in this action.

The plaintiff and her children are brought within the operation of this sub-section by s. 3 (2) of the Act. In this defence there is an allegation that the plaintiff's application for compensation under the *Workers' Compensation Act* was an exercise of the statutory option for herself and her children. This allegation must for the present purposes be disregarded because there is no proof of any element of knowledge necessary to give the plaintiff's application the character of an exercise of her statutory option.

The defence also contains an allegation that an award was made upon the plaintiff's application under the Act, and that the defendant paid the sum awarded into the statutory court for the benefit of the dependants of the deceased. There is a question whether the award, although it is expressed in this way, binds the rights of the plaintiff's children in such a way as to effect the present action. The rest of this allegation is, however, incontestably proved. It raises the question whether irrespective of any effect which the exercise of the statutory option would have, the award debars her from maintaining this action. The award by its own force cannot do this. It can bar the action only if it derives that force from s. 5 (2) (*b*).

In *Young* v. *Bristol Aeroplane Co., Ltd.* (1), Lord *Russell of Killowen* made an analysis which applies to s. 5 (2) (*b*). The analysis is as follows :—" On the one hand the first provision preserves to the workman the civil liability of the employer, and the second provision gives him a choice between enforcing that liability and enforcing the liability imposed on the employer by the Act. On the other hand, the third provision protects the employer from being obliged to meet both liabilities."

The plaintiff relies upon the first and second provisions of s. 5 (2) (*b*) to give her the right to maintain this action notwithstanding the award. These provisions in terms give her this right. The defendant relies upon the third provision to give the award the

(1) (1946) A.C. 163, at p. 175.

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force of a bar to the action, a force over and above that which it has *per se*. This provision does not in terms say that upon the making of an award the civil liability of the employer shall be extinguished or that the option given by the second provision is to cease upon such an event.

In *Young's Case* (1) Viscount *Simon* very decisively upheld the view expressed by Lord *Patrick* in *Brown* v. *William Hamilton & Co.* (2), that a legislative provision similar to the third provision of s. 5 (2) (*b*) and incorporated in a similar context is " exegetical " of a provision similar to the second provision of the present sub-section, and should not be treated " as further restricting by an added condition the worker's right of option." In the same case (3) Lord *Russell of Killowen* said that he found himself in substantial agreement with Lord *Patrick's* views in *Brown* v. *William Hamilton & Co.* (4) and added these observations: " As I have said, the primary object of the section is to preserve the civil liability of the employer, making it plain on the one hand that it is the workman who may choose which liability shall be enforced against the employer, and on the other hand that the employer cannot be made to pay more than the measure of his liability independently of, or under, the Act as the case may be."

The reasoning of Lord *Patrick*, to which Viscount *Simon* and Lord *Russell of Killowen* gave their adherence, is also generally accepted by Lord *Porter* (5), but his construction of the English sub-section differs from that of Viscount *Simon* and Lord *Russell of Killowen*. Lord *Porter's* construction is stated in these terms: " If the workman, knowing of the alternative, makes his choice, I should regard the option as exercised. But if he had not this knowledge, a claim for damages which either was not brought to a conclusion, or if brought to a conclusion failed, need not be a final election. Even judgment in favour of the workman would not of itself necessarily be a final choice, but it would bar a claim under the Act because the employer, being thereby liable to pay independently of the Act, could not be made liable to pay under it; the wording of the second half of the sub-section would protect him. For the same reason an award or registered agreement under the Act would likewise protect the employer " (6).

Lord *Macmillan* said (7) that he could not accept Lord *Patrick's* reasoning. The only other member of the House, Lord *Simonds*,

(1) (1946) A.C., at p. 171.
(2) (1944) Sc.L.T. 282, at p. 285.
(3) (1946) A.C., at pp. 176, 177.
(4) (1944) Sc.L.T. 282; 37 B.W.C.C. Supp. 52.
(5) (1946) A.C., at p. 186.
(6) (1946) A.C., at p. 188.
(7) (1946) A.C., at p. 184.

does not refer to this reasoning but his construction inferentially rejects it.

Young's Case (1) must be regarded as an authority on the construction of s. 5 (2) (*b*). Lord *Patrick's* reasoning which is accepted by a majority, provides the cardinal rule for the interpretation of s. 5 (2) (*b*). But there is a difference of opinion between Viscount *Simon* and Lord *Russell of Killowen* on the one hand and Lord *Porter* on the other hand, who are the majority, how the provision protecting the employer against double liability operates. Lord *Russell of Killowen* said that the English sub-section is not " worked out " until the worker has made his option, and that it is not until then that the " chapter is closed." It follows that s. 5 (2) (*b*) is not " worked out " by the making of an award or that an award " closes the chapter " unless the award results from a choice by the worker made with the requisite knowledge of his rights.

The order of *Barry* J. in so far as it depends upon the interpretation of s. 5 (2) (*b*) has the support of Lord *Porter*, but I do not think that it can stand with the opinions of Viscount *Simon* and Lord *Russell* and Lord *Patrick*.

I do not see how the reasons of Lord *Macmillan* or Lord *Simonds* can be used to support the order because their view of the sub-section was that if a worker in fact claimed under the Act he debarred himself from taking proceedings independently of the Act and it is immaterial whether he knew of his rights or not.

If in *Young's Case* (1) the facts had been like those assumed to be proved in the present proceedings, I apprehend that Lord *Macmillan* and Lord *Simonds* would have said that the guillotine fell on the plaintiff's statutory right to take proceedings independently of the Act when she claimed compensation. Lord *Porter* would have said that it fell when the award was made, and Viscount *Simon* and Lord *Russell* would have said that the sub-section did not give the award the force of a bar to the action. It would be contrary to the views of the majority about the conditions requisite for the exercise of the statutory option to apply the construction which Lord *Macmillan* and Lord *Simonds* adopted in *Young's Case* (1).

The sub-section having given the worker a benefit because he is ignorant of his rights, it would be a strange result if he lost the benefit as from the time an award was made upon his application, although then and after the award his ignorance of his rights continued. This benefit is to take proceedings independently of the Act notwithstanding that he has already claimed compensation under the Act.

(1) (1946) A.C. 163.

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I think it is not a correct view of the operation of the sub-section that the worker's ignorance of his rights is an important factor up to the time of the award, but that then all other remedies are as effectively closed to him as if he had full knowledge of his rights from the time he applied for the award. In *Young's Case* (1), Lord *Russell* said : " Lord Patrick has pointed out the harsh results and the difficulties which would ensue if a workman is to be held to be deprived of his rights against the employer which are independent of the Act, by the mere acceptance as such of compensation paid under the Act. I need not repeat them, but they appear to me very real ; and while no suggestion is or could be made against the employers in the present case, it is obvious that instances might arise in which, on the construction of the sub-section adopted by the Court of Appeal, very grave injustice might be inflicted on a workman by his employer." These observations apply to an award obtained by a worker in ignorance of his right to enforce payment of the employer's civil liability. The observations apply with special force to a consent award. But no suggestion of course is made in this case that the consent was given in order to close speedily all other alternative remedies which s. 5 (2) (*b*) leaves open to a worker or his dependants.

The liability to pay compensation is imposed upon the employer by the Act and not by the award. The third provision of s. 5 (2) protects the employer from being obliged to meet both the statutory liability and his civil liability. The latter liability is preserved to the worker by the first provision in the sub-section. The problem is how to apply this provision if an award is made and the worker then proceeds to enforce the civil liability. The first case is where the worker obtains an award with full knowledge of his rights. In other words he has exercised his statutory option. The third provision of the sub-section then comes into play for the employer's protection. It relieves him from any liability which he has independently of the Act to pay damages in respect of the injury to which the award refers. It is clearly this provision and not the award which relieves the employer of this liability. The terms of the provision are not apt to bring in the award as a bar to an action. The second case is where the worker obtains an award without knowledge of his rights. In this case he has not at that stage exercised his statutory option. The sub-section has not then been " worked out " or " the chapter closed." The worker's right of option remains notwithstanding the award. The third provision of the sub-section must of course be applied. It protects the

(1) (1946) A.C., at p. 177.

employer in all circumstances from liability to pay twice over. In other words the protection extends to the employer whether the award is the result of the worker's deliberate choice or not. But the third provision does not deprive the worker of his right of option. It would strain the terms of the provision to construe them in that way. Indeed the protection which this provision gives to the employer is extended to him because a right of option is given to the worker. Hence if an award is made at the worker's option, it is clearly to the third provision and not to the award that the employer must look for protection against paying up on account of this civil liability as well as upon the statutory liability. If the award is not the result of the worker's deliberate choice, I do not see upon what principle the third provision should be given a different construction. In that case it would not authorize the award being brought in to stop the worker from exercising his choice by bringing an action to enforce the employer's civil liability. Upon the assumption that the worker has not made his choice the third provision cannot prohibit him from exercising it. It does not annihilate the second provision from which the worker derives his right of option. But the third provision would limit the employer's liability to paying the amount of the verdict in the action even if the amount of the award exceeded the verdict; it would do so, as I have said, whether the worker obtained the award with knowledge of his rights or not.

In *Young's Case* (1) Viscount *Simon* said: "If, before the workman can be regarded as having really exercised his option, he receives one or more weekly payments under the Act, and he then opts to issue a writ and recovers damages, the damages in the action would be reduced by the amounts already received. This view secures what Lord *Greene* M.R. in *Perkins' Case* (2), described as the effect of the final words, namely, that 'the employer is not to be made to pay twice over to the same person.' I cannot agree that the deduction from damages of a sum already paid in respect of the same injury is contrary to any 'principle of law' (3). On the contrary, I would adopt Lord *Patrick's* statement that 'when the workman sues at common law, if the sum awarded in name of damages exceeds the sums already paid to him in name of workmen's compensation, these sums will form a good set-off or will have to be taken into account in diminution of damages' (4)." The case to which these observations are intended to apply is

(1) (1946) A.C., at p. 171.
(2) (1940) 1 K.B. 56, at p. 65.
(3) (1940) 1 K.B., at p. 67.
(4) (1944) Sc.L.T. 282, at p. 286; 37 B.W.C.C. Supp. 52, at p. 64.

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expressed by the words " If before the workman can be regarded as having really exercised his option." The phrases " he receives one or more weekly payments under the Act " and " the sum awarded in the name of damages " are, I think, of general application to all payments which are not the fruit of a real exercise by the worker of his statutory option whether made under the compulsion of an award or not.

In the present case, however, neither the plaintiff nor any of her children has received any sum from the money which the defendant paid into court under the obligation of the award. This fact, of course, would not assist her if the making of the award debars her from maintaining the action.

I come to the conclusion that upon the true construction and application of s. 5 (2) (*b*), the making of the award does not destroy or restrict the right of option given to the plaintiff or any of her children by virtue of their status as dependants. If the action succeeds the plaintiff at least must be content with the quantum of her interest in the damages. The question whether the children would be bound to take their share of the damages, rather than compensation under the Act, might depend upon the question whether it was for their benefit for the plaintiff to choose the present remedy. But subject to this suggested contingency, the provision in s. 5 (2) (*b*), protecting the defendant from being obliged to pay twice over, would sterilize the award under the *Workers' Compensation Act*, whether the damages awarded in the action were more or less than the amount of the award : nothing has been paid under the award and there would therefore be no set-off against the verdict if in favour of the plaintiff.

I am of the opinion that the summons should have been dismissed upon the ground that upon the true construction of s. 5 (2) (*b*) the plaintiff is not debarred from maintaining this action either for herself or for any of her children.

For these reasons I should allow the appeal.

WILLIAMS J. This is an appeal from an order made by *Barry* J. dismissing an action brought by the plaintiff, the present appellant, for the benefit of herself and her four children, all under the age of sixteen years, against the defendant, the Victorian Railways Commissioners, the present respondent, under Part III. of the *Wrongs Act* 1928 (Vict.) claiming £9,000 damages in respect of the death of her husband Gordon Dey alleged to have been caused by the negligence of the defendant or of its servants or agents acting in the course and within the scope of their employment. The

order was made on a summons dated 17th March 1948 taken out by the defendant to have the action dismissed or forever stayed on the grounds that it was frivolous, vexatious and an abuse of the process of the Court in that on 26th May 1947 the plaintiff on behalf of herself and her four children dependent on the deceased obtained an award of the Workers' Compensation Board against the defendant in respect of the same accident.

The facts may be shortly stated. On 29th April 1947 Gordon Dey, who was in the employment of the defendant, met his death as a result of personal injury by accident arising out of or in the course of his employment. On 9th May 1947 the defendant received a letter from E. H. Ruddell, the accountant of the Australian Railways Union, Victorian Branch, stating that he desired to apply for compensation on behalf of the widow and four children of the deceased. On 19th May 1947 the defendant, pursuant to s. 17 of the *Workers' Compensation Act* 1946 (Vict.), gave notice in writing to the registrar of the Workers' Compensation Board that a claim for compensation had been made by or on behalf of the widow on her own behalf and on behalf of the four children (naming them) as claimants, that the deceased left as dependants wholly dependent on his earnings the plaintiff and the four children, and that the defendant admitted liability to pay such compensation as the employer was lawfully obliged to pay, the amount of which was to be ascertained by the Board. On 21st May 1947 the Board made an award entituled in the matter of a claim for compensation made by the widow as claimant to the defendant as employer in respect of the death of Gordon Dey. The award stated, so far as material, that the Board, having found that the deceased left his widow and four children, naming them, under sixteen years of age at the time of the accident wholly dependent upon his earnings, awarded the sum of £1,100 to be paid into the custody of the Board. At the hearing before the Board the plaintiff, who was represented by E. H. Ruddell, gave evidence on oath that she was the widow of the deceased, that there were four children under the age of sixteen years wholly dependent on the deceased, and that the names and dates of birth of the children were as set out in the claim for workers' compensation made on behalf of herself and the children by E. H. Ruddell. At the conclusion of the evidence the chairman of the board announced that the Board awarded the sum of £1,100 as compensation to the widow and her children, and informed the widow that she should attend at the office of the registrar of the Board to make the necessary arrangements for the distribution of this sum to her. On 28th May 1947 the defendant paid the sum of

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£1,100 to the Board. This sum was the amount prescribed by par. (1) (*a*) (i) of the First Schedule to the *Workers' Compensation Act* 1946 which provides that where death results from an injury, if a worker leaves a widow or any children under sixteen years of age at the time of the accident, the amount of compensation shall be £1,000 together with an additional sum of £25 in respect of each such child.

On the same day the solicitors for the plaintiff wrote to the registrar of the Board stating in effect that the widow did not know that she had an option to elect whether to claim compensation under the *Workers' Compensation Act* or to sue for damages under the *Wrongs Act*, and requesting the Board to withhold any payments of compensation until the question of commencing an action for damages could be investigated. On 30th May 1947 the registrar of the Board replied that the Board would take no further action pending further instructions from the plaintiff's solicitors. On 30th September 1947 the present action was commenced in the County Court and on 27th February 1948 an order was made under s. 61 of the *County Court Act* 1928 (Vict.) transferring the action to the Supreme Court of Victoria. Section 5 (2) (*b*) of the *Workers' Compensation Act* 1928 (Vict.) provides, so far as is material, that where the injury (in this case the death of Gordon Dey) 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 . . . nothing in this Act shall affect any civil liability of the employer, but in any such case the worker may at his option either claim compensation under this Act . . . or take proceedings independently of this Act but the employer shall not be liable to pay compensation for injury to a worker by accident arising out of and in the course of the employment both independently and also under this Act. The ground on which his Honour made the order dismissing the action was that, to use his own words, "once there has been a final determination, whether by judgment or award, imposing a liability on the employer, the chapter is closed so far as the worker or the person by or on whose behalf the judgment or award was obtained are concerned, and no other proceedings by him or them or on their behalf to establish the employer's liability are permissible."

It was contended on three main grounds that it was wrong for his Honour to order the action to be dismissed, the first ground being of a technical nature, and the other two going to the merits. The first ground was that the facts and circumstances were not such as to justify his Honour in exercising the power under Order XXV,

rule 4, of the *Rules of the Supreme Court* or under the inherent jurisdiction of that Court summarily to dismiss the action. The second and third grounds were that his Honour was wrong in holding that the award of the Workers' Compensation Board had the effect of precluding the widow and children from proceeding under Part III. of the *Wrongs Act* 1928, and alternatively that his Honour was wrong in holding that the award precluded the children of the deceased from proceedings under Part III. of that Act. Order XXV, rule 4, provides that the court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just. The jurisdiction to strike out or stay an action under this rule is practically concluded by what appears in the pleadings. The only pleading so far filed in the action is the statement of claim and there is nothing on the face of this pleading to bring the rule into operation. It seems to me therefore that his Honour must have relied on the inherent jurisdiction of the court to strike out or stay an action which is shown to be frivolous or vexatious or an abuse of its process. This jurisdiction is not confined to cases where the abuse is manifest from the pleadings, the application may be supported by affidavits, and the jurisdiction may be exercised where the facts proved raise a complete legal bar to the action so that the action is vexatious in that it must fail. In the present case his Honour appears to have considered that it was clear that the award of the Board was made on the application of the widow and children, and that this raised the question of law whether the liability of the defendant to pay compensation, which crystallised upon the making of the award, was not a complete legal bar to these persons suing under the *Wrongs Act*. If it was such a bar, then the whole of the expenditure of energy and money required to prepare the action for trial on the facts would be wasted. In these circumstances I am not prepared to uphold the first contention, although I am of opinion that it would have been preferable for his Honour to have refused summarily to dismiss the action, and to have left the defendant to plead the facts raising the legal bar and then apply to have the point disposed of as a question of law before trial under Order XXV., rule 2.

I shall therefore proceed to consider the other two contentions which go to the merits. Assuming for the moment that the application for compensation made to the Board was an application by

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the widow and her four infant children, I am of opinion that his Honour's decision was right. Section 5 (2) (*b*) of the *Workers' Compensation Act* 1928 provides that an employer shall not be liable to pay compensation . . . both independently of and also under this Act. The award of the Board made the defendant liable to pay compensation under the *Workers' Compensation Act*, and the section appears to me to provide in clear and unambiguous terms that the defendant shall not also be made liable to pay damages to the same applicants under the *Wrongs Act*. The provisions of s. 5 (2) (*b*) of the Victorian Act correspond to s. 29, sub-s. (1), of the English *Workmen's Compensation Act* 1925. The meaning of this sub-section was recently discussed by the House of Lords in *Young* v. *Bristol Aeroplane Co., Ltd.* (1). The House consisted of Viscount *Simon*, Lord *Russell of Killowen*, Lord *Macmillan*, Lord *Porter* and Lord *Simonds*. Three of their Lordships, Viscount *Simon*, Lord *Russell of Killowen* and Lord *Porter* expressed the opinion that the choice given to the workman necessarily involves a choice between known things. Viscount *Simon* said (2) that it is the workman who has the option and that he does not lose his alternative remedy merely because he accepts some payments under the Act when the option is unknown to him. Lord *Russell of Killowen* said (3) that to make his choice the workman must be aware of his right to choose and of the alternatives open to his choice. He said that: "In the case of a workman who, owing to ignorance in these respects, has been unable to exercise his option under the sub-section, but who has been paid and has accepted compensation under the Act, even to the full amount, I cannot see how he can be prevented, on discovering his right to choose, from recovering compensation independently of the Act, if he be not barred by lapse of time." Lord *Porter* said (4) that: "Apart from authority, I should have thought it reasonably plain that whereas the workman can choose which of his two types of remedy he would pursue, he cannot recover both damages and compensation, and at some time or other he must reach the position when he is bound to the one and debarred from the other." At (5) he said: "In my view, unless the dispute has reached the stage at which the employer is at least compellable to pay, either by judgment in an action or by award or registered agreement under the Act, he cannot be said to be liable to pay within the wording of the sub-section. Even a failure at law or the dismissal of a claim for compensation would

(1) (1946) A.C. 163.
(2) (1946) A.C., at pp. 172, 173.
(3) (1946) A.C., at p. 176.
(4) (1946) A.C., at p. 185.
(5) (1946) A.C., at p. 187.

not be enough ; there must be some binding decision under which the employer is liable to pay. The provisions of this part of the sub-section are a defence against a legal liability to pay twice, not a method of ascertaining whether the workman has or has not made an irrevocable choice. But a choice has to be made under the first part of the sub-section and must at some time become irrevocable. When does this occur ? I can find no answer, except that it comes when the workman is fully aware of the alternatives and deliberately makes his choice between them. He must not only know that he has claimed, or is offered or is receiving, workman's compensation as such, he must also know that he has an alternative remedy."

I have not cited any passages from the speeches of Lord *Macmillan* and Lord *Simonds* because they thought that the acceptance of payments knowing them to be compensation under the Act barred a claim at common law irrespective of the plaintiff's knowledge of his option. In this conflict of opinion of their Lordships, I feel that I am free to accept the opinion of Lord *Porter* which is exactly in point that once the workman has obtained an award of compensation or a judgment for damages, even if he did not know that he had a choice, the prohibition against double liability prevents him from thereafter choosing to pursue the other remedy. Accordingly the widow of the decaseed who clearly applied for and obtained an award of compensation under the *Workers' Compensation Act* is barred from suing for damages under the *Wrongs Act.*

It remains to consider the case of the four children. Unless they were applicants before the Board they are not barred from suing for damages under the *Wrongs Act.* The authorities are clear that where a worker is killed each of his dependants as defined by the *Workers' Compensation Act* has a separate right to claim compensation under that Act, and that any of these dependants who are also persons entitled to sue for damages under the *Wrongs Act* has an individual choice as to which remedy he or she will pursue. In the present case the widow and children of the deceased were all persons having rights of action under both Acts. The widow, as I have said, is barred from suing under the *Wrongs Act.* The amount of compensation awarded by the Board was calculated on the basis that the deceased left a widow and four children wholly dependent on him, but this was the amount which the Board was bound to award whether all or some or one only of the class consisting of the widow and her four children applied to the Board to make an award. Assuming that the award was made on the application of the widow alone, there would be no legal bar to the four children suing under

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the *Wrongs Act* and the amount of damages which they could lawfully recover under that Act would not be affected by the fact that the widow had been awarded £1,100 as compensation under the *Workers' Compensation Act* calculated on the basis that there were four children under sixteen also wholly dependent on the deceased. Nor would the amount awarded to the widow as compensation be affected by the amount of damages recovered by the children: *London Brick Co. Ltd.* v. *Robinson* (1). In my opinion the children should not be held to have been applicants in the application which was made to the Board for an award of compensation. Rule 43 of the 1946 *Workers' Compensation Rules* provides that a party to any proceedings or matter may appear (*d*) by agent. Ruddell presumably acted for the widow and purported to act for the children under this rule, but the children could not authorize Ruddell to act on their behalf or appear for them: *Geilinger* v. *Gibbs* (2). Rule 8 of the 1946 *Workers' Compensation Rules* provides that the provisions of the *County Court Rules* as to persons under disability shall, with the necessary modifications, apply to proceedings under the Act. Provided that the Board may at any time direct that an infant shall appear either as applicant or respondent in the same manner as if he were of full age. Rule 15 of the *County Court Rules* provides that infants may sue in the court as plaintiffs by their next friends and be defended by their guardians appointed for that purpose. Rule 16 provides that where an infant desires to commence an action he shall procure the attendance of a next friend at the office of the registrar at the time of entering the plaint. The plaint shall not be entered until the next friend has undertaken to be responsible for costs and the action shall proceed in the name of the infant by such friend. The procedure required by these rules was not adopted and the children were not made applicants before the Board by a next friend. The Board did not direct that the infants should appear as applicants in the same manner as if they were of full age.

In *Gregory* v. *Molesworth* (3), Lord *Hardwicke* L.C. said: "it is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age; and this is general, unless gross laches, or fraud and collusion appear in *the prochein amy*, then the infant might open it by a new bill." In *Cribb* v. *Kynoch, Ltd.* (*No.* 2) (4), *Buckley* L.J. said: "The point was taken that the workman in this case was an infant. . . . There

(1) (1943) A.C. 341.
(2) (1897) 1 Ch. 479, at p. 482.
(3) (1747) 3 Atk. 626, at p. 627 [26 E.R. 1160, at p. 1161].
(4) (1908) 2 K.B. 551, at p. 561.

is nothing in the point . . . the litigation, duly commenced in the name of the infant by a next friend, was prosecuted to judgment. In such case an infant is just as much bound by the proceedings as if he were adult. If authority be needed, *Neale* v. *Electric & Ordnance Accessories Co., Ltd.* (1) is authority for the proposition." See also *Condon* v. *Mudgee Council* (2). Accordingly, if the infants had duly applied for and obtained an award of compensation under the *Workers' Compensation Act* in the manner prescribed by the rules, they would have been barred like the widow from suing for damages under the *Wrongs Act*. But, apart from a direction by the Board under the proviso to rule 8, the infants could only have duly applied, if the application had been commenced in their names by a next friend, and their interests had been protected by the presence of a next friend who would have been responsible for the proper conduct of the proceedings on their behalf, and subject to the supervision which the court exercises over a next friend in the conduct of the proceedings. In *Rhodes* v. *Swithenbank* (3) *Bowen* L.J. said: "The only reason that the next friend of an infant is entitled to bind the infant in matters connected with the cause is that he is the officer of the court to take all measures for the benefit of the infant in the litigation in which he appears as next friend. One of the purposes of appointing a next friend is to have a person on the record who is personally liable for costs. But that is not the only purpose for which a next friend is appointed. He is appointed principally to institute and carry on the proceedings on behalf of the infant because the law considers that an infant is incapable of asserting or protecting his rights or forming a judgment as to the necessity of applying for protection or redress to the tribunals of the country. Accordingly, where more than one person is willing to act as a next friend, the court will appoint as most suitable the father or if he is dead the widow or some near relative in preference to a stranger unless the interest of the father or other relative is adverse to that of the infant. The next friend will be removed by the court if he has an interest, or is closely connected with some person who has an interest, which is adverse to that of the infant, or if for any reason the court considers that the infant's interests will not be properly protected by him. If there be any suspicion that the proceeding is an improper one or that the next friend is unfit to have the conduct of it, an inquiry may be directed on such matters, and if it appears on inquiry, or in clear cases without inquiry, that the

(1) (1906) 2 K.B. 558.
(2) (1945) 45 S.R. (N.S.W.) 258.
(3) (1889) 22 Q.B.D. 577, at p. 579.

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proceeding is not for the infant's benefit it will be stayed, or, if the circumstances warrant it, dismissed with costs to be paid by the next friend: *Nalder* v. *Hawkins* (1); *Da Costa* v. *Da Costa* (2); *Anderton* v. *Yates* (3); *Fox* v. *Suwerkrop* (4); *Guy* v. *Guy* (5)". See generally *Simpson* on *The Law and Practice relating to Infants*, 4th ed. (1926), pp. 293 to 297; *Halsbury's Laws of England* 2nd ed., vol. 17, pp. 702 to 707.

Rule 81 of the 1946 *Workers' Compensation Rules* provides that "Non-compliance with any of these rules shall not render any proceedings void unless the Board so directs, but such proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Board shall think fit." But this rule could not operate to make an award binding upon a person who was not properly before the Board as a party. In *Ex parte Brocklebank, In re Brocklebank* (6), Bradshaw, an infant, by his next friend sued Brocklebank for breach of a contract of apprenticeship, and recovered damages and costs amounting to £255 11s. 4d. Bradshaw then issued a debtor's summons without a next friend to recover this amount. Brocklebank applied to have the summons dismissed on the ground that he was not indebted in the amount claimed. An order was made staying the proceedings on the terms of the debtor giving security for the debt. The security was not given within the time fixed, the debt was not paid, and Bradshaw by his next friend then presented a bankruptcy petition upon which Brocklebank was adjudicated bankrupt by the registrar. Brocklebank appealed on the ground that no act of bankruptcy had been committed because Bradshaw, being an infant, was not competent to instruct a solicitor to issue the summons and was incapable of giving a valid discharge for the debt if it had been tendered to him. The Court of Appeal was not satisfied that it was irregular for an infant to issue a debtor's summons without a next friend. Assuming that it was, the Court was of opinion that the debtor had waived the irregularity by his own conduct. In the course of his judgment, *James* L.J. said (7), "It is said that the debtor's summons ought to have been issued by a next friend on behalf of the infant. I am not aware of any such practice in the Court of Bankruptcy. In the Court of Chancery a suit on behalf of an infant was brought in his name by a next friend in order to give security for the costs to the Defendant, but if the

(1) (1833) 2 Myl. & K. 243 [39 E.R. 937].
(2) (1732) 3 P.W. 140 [24 E.R. 1003].
(3) (1852) 5 De G. & S. 202 [64 E.R. 1081].
(4) (1839) 1 Beav. 583 [48 E.R. 1068].
(5) (1840) 2 Beav. 460 [48 E.R. 1259].
(6) (1877) 6 Ch. D. 358.
(7) (1877) 6 Ch. D., at p .360.

suit had been commenced without the intervention of a next friend, and the Defendant chose to appear, I know of no reason why it should not have been prosecuted without a next friend. Probably, if in the present case an application had been made by the debtor in the first instance, that some adult person should be named for the purpose of giving security for the costs of the debtor's summons, the application would have been successful. If, however, there was any irregularity in this respect, it has been waived by the debtor." The facts of *Brocklebank's Case* (1) were very special. The proceeding under appeal was the bankruptcy petition which had been properly presented by Bradshaw by his next friend, the action which resulted in Brocklebank becoming indebted to Bradshaw was also properly brought in the name of the infant by his next friend and the debtor's summons was simply a step in the proceedings to recover the judgment debt and was plainly for his benefit. *Cotton* L.J. said (2) that "the question of substance is, whether the adjudication ought to have been made. . . . A judgment having been recovered for the debt, there was a regular mode of discharging the liability created by it, and, as the debtor did not choose to avail himself of it, the adjudication was rightly made." *Brocklebank's Case* (1) is not to my mind any authority for the proposition that an infant is bound by proceedings which have not been duly instituted and litigated on his behalf. In the present case the four children were not in my opinion properly before the Board as applicants and are not bound by the award.

I would therefore allow the appeal.

Appeal allowed. Order of Supreme Court discharged. Declare that the plaintiff is not entitled to maintain the action in her own right, but that the infant children of Gordon Dey deceased are competent to sue by their next friend. Liberty to such infants or any of them by their next friend to apply to the Supreme Court or a judge thereof for change of parties. Otherwise action stayed until further order of the Supreme Court or a judge thereof. No order as to costs of appeal or of summons to dismiss action.

Solicitor for the appellant: *J. W. Galbally.*

Solicitor for the respondent: *F. G. Menzies*, Crown Solicitor for Victoria.

E. F. H.

(1) (1877) 6 Ch. D. 358.

(2) (1877) 6 Ch. D., at p. 361.