[HIGH COURT OF AUSTRALIA.]

THE STATE OF NEW SOUTH WALES . PLAINTIFF;

AND

THE COMMONWEALTH . . . . DEFENDANT.

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SYDNEY, *May* 8, 11, 12, 19.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Transfer of department to Commonwealth—Rights of transferred officers—Retiring allowance—Gratuity—Proportions to be paid by Commonwealth and State—Powers of Governor vesting in Governor-General—Discretion—Permanent employment—Public Service Act 1895 (*N.S.W.*) (59 *Vict. No.* 25), *secs.* 11, 60* —*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 70, 84, 89, 93.

The question whether a person employed in the public service is "permanently employed" within the meaning of sec. 60 of the *Public Service Act*

* 59 Vict. No. 25 :—

Sec. 11. In all cases in which it shall appear to the Board that any person actually employed in the public service at the commencement of this Act has not been appointed by the Governor, the Board shall inquire into and consider the character of the work or duties performed by such person and the time during which he shall have been so employed, and if the Board shall determine that the employment, work, or duties of such person are in their nature such as should properly be designated permanent, and that the services of such person should be retained, then such person shall be considered as having become a permanent officer at and from the commencement of this Act, without examination or further probation, notwithstanding that he shall not have been appointed by the Governor, and the period of service of such person antecedent to the commencement of this Act shall be considered service for the purposes of section sixty: Provided that as to officers temporarily employed at the commencement of this Act, whose services are dispensed with, the Governor shall, on the recommendation of the Board, grant out of moneys provided by Parliament for the purpose a gratuity to each such officer at a rate not exceeding a fortnight's pay for each year of such service prior to the commencement of this Act.

Sec. 60. If the services of any person permanently employed in the public service shall be dispensed with by the Board under the provisions of this Act otherwise than for an offence, then—

. . . . . .

(2) If such person shall have been employed in the public service before and at the date of the commencement of this Act, but shall not be a contributor to the said Superannuation Account, such person shall receive a gratuity not exceeding one month's pay for each year of service from the date of his permanent appointment, and a fortnight's pay in respect of each year of temporary service; such gratuity to be calculated on the average of his salary during the whole term of his employment, and to be payable only in respect to service prior to the commencement of this Act.

1895 (N.S.W.) is a question of fact, and does not depend upon his appointment having been made by the Governor in Council; and the right of a person who is in fact permanently employed to a gratuity under sec. 60 sub-sec. ii. is not affected by the provisions of sec. 11.

An officer who was employed in the public service before and at the date of the commencement of the *Public Service Act* 1895 and whose employment was in fact permanent although he was not appointed by the Governor in Council, is entitled, on his services being subsequently dispensed with under the circumstances contemplated by sec. 60, sub-sec. ii. to a gratuity as a person permanently employed, in respect of the period of his service prior to the commencement of the Act, notwithstanding the fact that the Public Service Board had dealt with his case under sec. 11, and decided that he should be "considered as having become a permanent officer at and from the commencement of the Act."

That provision relates only to persons who are not in fact so permanently employed.

Distinction between permanent and temporary employment under the Acts of 1884 and 1895, discussed.

In construing Statutes relating to the public service the Court will take notice of the established practice as to appointments of officers.

Josephson v. *Young*, 21 N.S.W. L.R., 188, approved.

An officer of a department of the public service of New South Wales who, on the transfer of the department to the Commonwealth, was retained in the service of the Commonwealth, was afterwards called upon to retire under the provisions of sec. 65 of the *Commonwealth Public Service Act* 1902, and so became entitled by virtue of sec. 84 of the Constitution to a gratuity calculated in accordance with the scale provided by sec. 60 sub-sec. ii. of the New South Wales *Public Service Act* 1895.

Held, that the discretion conferred by sec. 60 sub-sec. ii. of the New South Wales Act as to the amount of the gratuity was vested in the Governor-General by virtue of sec. 70 of the Constitution.

Held also, that the gratuity, having been paid by the Commonwealth, was expenditure "incurred solely for the maintenance or continuance, as at the time of transfer" of the department, within the meaning of sec. 89 sub-sec. ii. (*a*) of the Constitution, and was, therefore, by virtue of that sub-section and sec. 93 of the Constitution, wholly chargeable against the State.

Quære, *per Higgins* J., whether a gratuity in the case of compulsory retirement comes within the provisions for apportionment between State and Commonwealth in sec. 84.

SPECIAL CASE stated for the opinion of the High Court under Order XXIX., Rule 1 of the Rules of the High Court.

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This was an action in which the State of New South Wales sought to recover from the Commonwealth the sum of £264 3s. 11d., which was paid by the Commonwealth as gratuity to the representatives of one John Heffernan, formerly an officer in the Post Office, and charged and debited to the State, and was deducted by the Commonwealth from the amount which would otherwise have been payable to the State, or in the alternative to recover £153 17s. 3d.

The circumstances out of which the claim arose are sufficiently set out in the judgments hereunder.

By the case stated it appeared that the Commonwealth paid to the representatives of John Heffernan after his retirement £264 3s. 11d. as a gratuity upon his retirement, calculated at the rate of one month's pay for each year of service prior to the commencement of the *Public Service Act* 1895. It was admitted that on that basis the gratuity was correctly calculated, and that on the basis of one fortnight's pay for each year of service the amount of gratuity would be £121 18s. 9d., and that the proportion payable by the State to the Commonwealth under sec. 84 of the Constitution, if calculated on those sums, would be £239 1s. 1d. and £110 6s. 8d. respectively, and that the payments and the charging and debiting and retaining of the amount of the payment were made without the assent, approval or authority of the State.

The questions for the opinion of the Court were:—(1) Is the exercise of the discretion as to the amount of gratuity under sec. 60 sub-sec. (ii.) of the *Public Service Act* 1895 vested in the State or in the Commonwealth? (2) Was the Commonwealth justified under sec. 84 of the Constitution in charging the plaintiff State with the sum of £239 1s. 1d. or with any part thereof? (3) Was the Commonwealth justified under secs. 89 and 93 of the Constitution in charging the State with the sum of £25 2s. 10d. or any part thereof?

Knox K.C. and *Blacket*, for the plaintiff. Heffernan was an officer whose services up to the date of the *Public Service Act* 1895 were temporary within the meaning of sec. 60 of that Act. One of the main objects of the Act was to place the service on a

proper footing as regards permanent and temporary employment. Under the Act of 1884 the definition of officer excluded persons employed temporarily. Sec. 60 must be construed by reference to sec. 11. The latter section in effect divides the service into two classes, one consisting of those persons who were appointed by the Governor, and the other consisting of those who were not appointed by the Governor. The obvious inference from the wording of the section is that the latter class were regarded as persons temporarily employed. As to them the Board inquires, and, if it is of opinion that the services of any one are such as should properly be designated permanent and that they should be retained, that person is from the commencement of the Act a permanent officer. His prior service must, therefore, have been temporary. Heffernan was included in that class, and was so dealt with by the Board. He was, therefore, under sec. 60 sub-sec. (ii.) only entitled to a gratuity at a rate not exceeding a fortnight's pay in respect of each year of service before the commencement of the Act of 1895. [They referred to *Manton* v. *Williams* (1), and *Civil Service Act* 1884, secs. 7, 57.] The words "not exceeding" in sec. 60 sub-sec. ii. show that some discretion is to be exercised as to the amount of the gratuity. An officer who leaves the service under these circumstances is not entitled to any gratuity unless the Governor directs that he shall have it: sec. 56. That discretion is to be exercised by the Governor of the State, not by the Governor-General. The whole gratuity is in respect of service under the State Government, and the officer's rights are those which he had under the law of the State: The Constitution, sec. 84.

The Commonwealth is not justified in charging the whole burden of the gratuity on the State. It is not expenditure incurred solely for the maintenance or continuance as at the time of transfer of the department. If it were, the provisions of sec. 84 as to apportionment would be unnecessary, for the whole amount could be charged against the State under 89 ii. (*a*). A gratuity paid to Heffernan on retiring could not be an expense of continuing the department, as at the time of transfer.

[O'CONNOR J.—But surely gratuities generally would be part

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of the ordinary expense of up-keep of the department if it had not been transferred.]

Not, "as at the time of transfer." The expense is fixed as at that date, in order to protect the States from the possibility of subsequent extravagance which they cannot control.

[HIGGINS J.—Could not the hope of a pension or gratuity be regarded as an incentive to efficiency on the part of officers, and so coming within sec. 89 ii. (*a*)?]

The gratuity in this case cannot be so regarded, because it accrued only up to 1895. Since the date of the Act of that year no further right could be acquired. Only those then entitled to a gratuity could ever receive one. Sec. 84 was intended to cover this as well as all other cases of officers leaving the service whether voluntarily or involuntarily.

Cullen K.C. (*D. S. Ferguson* with him), for the defendant. Prior to the *Civil Service Act* 1884 Ministers had power to make minor appointments to the public service, either permanent or temporary. Sec. 37 of the *Constitution Act* of New South Wales vested the power of appointment in the Governor in Council, leaving minor appointments to the Ministers and heads of departments. The power to appoint temporary officers was cut down by sec. 31 of the *Civil Service Act* 1884, which limited such appointments to a period of two years. Therefore, in 1895 there could not be a temporary officer in the service who had been there for more than two years. It must be presumed that Heffernan, who had then been employed in the service for 20 years, was permanently employed. That is not the same thing as a permanent officer: see sec. 57 of the Act of 1884. The words "permanently employed" cover all persons who were in fact in employment of a permanent nature. There is no definition of the term in the *Public Service Act* 1895. Sec. 11 does not affect the question at all. Under that the Board may decide that an officer is entitled to be regarded as a *permanent officer* from the date of the Act, although his employment was not in fact permanent before the Act. The question whether the employment was permanent or temporary is entirely one of fact. The evidence as to the nature of the duties of Heffernan throughout the whole period of his employ-

ment, the continuity of his service, the fact that he was paid a salary and received promotion and increases of salary from time to time in accordance with a scale fixed for the class to which he belonged, the fact that his office had a regular name and was not in any sense temporary, establish beyond all question that he was permanently employed in the ordinary sense of the words. The words of the Act should be construed in that sense unless the contrary intention appears, and there is nothing in the context to show any such contrary intention. Any public servant so employed should be presumed to have been duly appointed: *Josephson* v. *Young* (1), even if there is no evidence that he was appointed by the Governor. The Executive recognized Heffernan as lawfully in the public service by including him in the Civil Service List under the Act of 1884. That alone is sufficient to establish that he was not temporarily employed. The date of his permanent appointment, for the purpose of sec. 60 sub-sec. ii., is the date of his admission to permanent employment in the service. At any rate after 1884 the lawfulness of his appointment was recognized by the Governor in Council in the classification under the Regulations of 3rd July 1885.

[Reference was also made to Postal Rules and Regulations 3rd July 1885, to secs. 42, 64, of 59 Vict. No. 25, to sec. 57 of 48 Vict. No. 24, and to the *Postal Act* 31 Vict. No. 4, sec. 2.]

Manton v. *Williams* (2) does not affect this case. The employment in that case was in fact temporary; the appointments were periodical, and were expressed to be temporary. The argument for the appellant was rested solely on the length of time over which the successive periods of employment extended. Anything said in that case as to the question now involved was *obiter*.

On the constitutional point, the discretion that is to be exercised under sec. 60 sub-sec. ii., must pass to the Governor-General by sec. 70 of the Constitution. It is clearly within the words "powers and functions" in that section. The consequence of excluding it from sec. 70 would be that after many years of service in the Commonwealth, an officer, who had only served for a short time under the State, would be dealt with by the

(1) 21 N.S.W.L.R., 188, at p. 191. (2) 4 C.L.R., 1046.

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Governor of the State without any information as to the circumstances which might affect the exercise of the discretion.

[ISAACS J.—*Primâ facie* the person who pays the officer should decide what gratuity he is to receive.]

Sec. 84 preserves the rights of an officer under the Act of 1895, but it in no way cuts down the express provision in sec. 70. The transfer of the discretion does not affect the officer's rights any more than does the transfer of control.

The payment of the gratuity comes within the words of sec. 89 ii. (*a*) of the Constitution. It is part of the recurring annual expense for the maintenance or continuance of the department.

[HIGGINS J.—Is not the test this: Would the State, if the department had not been transferred, have paid the gratuity?]

Yes, the State would have to pay gratuities to all the officers in similar circumstances to Heffernan. The right to the gratuity is not the result of any change made since the transfer. It is on the same footing as the salary.

Knox K.C. in reply. Heffernan clearly came within the meaning of sec. 11, and on the inquiry by the Board depended the question whether he remained in the service or not. The Board's decision is conclusive that Heffernan was before 1895 temporarily employed. Upon any other construction there is no antithesis in the proviso. The benefit of sec. 11 is that, if it were not for its provisions, those in the position of Heffernan could not have the advantages attached to permanent officers under the section without examination. If a person not appointed by the Governor is made a permanent officer only by virtue of sec. 11, and to the extent provided by that section, he must be taken to have been not permanent before.

Sec. 84 of the Constitution should be construed as an exception to sec. 89 if both apply to the same matter. But, unless the latter section is read as including this case, there is no conflict. Sub-sec. ii. (*a*) fixes the rate of expenditure as at the date of transfer. If everything that the State would have had to pay at this time if the department had been left under the State control is included, then the section includes everything which is required

for keeping the department efficient in view of the growth of population and increase of business, &c. That would make what was intended for a limitation practically meaningless. The object was apparently to exclude everything except what was strictly necessary for maintenance. Heffernan had no enforceable right at the date of transfer. The calculation is based on the state of affairs in 1895, but the expenditure is necessitated by an event which has occurred subsequently. The case is one within sec. 84, and the State should only be charged with its proportion as therein provided.

Cur. adv. vult.

The following judgments were read :—

May 19.

GRIFFITH C.J. The first question in this case depends upon the construction to be put upon sec. 11 of the *Public Service Act* 1895 (59 Vict. No. 25).

By the *Constitution Act* appointments to all public offices, except the appointment of officers bound to retire on political grounds, were vested in the Governor in Council. But this did not extend to " minor appointments which by any Act of the legislature or order of the Governor in Council may be vested in Heads of Departments or other officers or persons within the Colony."

As a matter of history, it is notorious that these minor appointments were not formally made by the Governor in Council, but by Ministers and sometimes by other officers. Whether any formal Order was ever made by the Governor in Council ratifying this practice does not appear, but in the case of *Josephson* v. *Young* (1), the Supreme Court of New South Wales held that, if necessary, such an order might be presumed. I entirely concur in the reasoning of the judgment in that case, and think that in construing Acts relating to the public service the existing practice must be treated as well known and as authorized by law.

The *Civil Service Act* 1884 (48 Vict. No. 24), regulated in part (though not altogether) the public service of the Colony. The main provisions of that Act referred to such persons employed in

(1) 21 N.S.W. L.R., 188.

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the public service as were described in the Act as "officers," which term meant "any person holding office in the Civil Service other than those mentioned in secs. 7 and 8 and teachers under the Educational Division and persons employed temporarily" (sec. 2).

Sec. 7 referred to persons employed in the railway service and other departments in which the employés were governed by regulations made under statutory authority. Sec. 8 provided that with respect to messengers, housekeepers, letter-carriers, and a large number of other "persons occupying positions of similar class character or importance who are in the receipt of annual salaries and not of daily or monthly wages or paid by piecework" the Governor might order increments of salary.

With respect to "officers" the Act itself provided for regular increments in salary, and also for pensions and retiring allowances, for which purpose an account called the Civil Service Superannuation Account was established and supported by an enforced deduction from their salaries.

By sec. 57 it was provided that:—

"Any person in the permanent employment of the Government who shall be remunerated for his services by daily weekly or monthly wages or otherwise shall on application in writing addressed to the Treasurer be admitted as a contributor to the Superannuation Account and shall thereupon be liable to the same rate of deduction from his pay as is provided in respect of the officers and shall be entitled to participate in like manner in all the benefits of the superannuation allowances and gratuities."

Admission to the service could only be obtained by examination after a period of probation (secs. 18-22). Sec. 31 provided that in any department of the public service persons might be temporarily employed by the Minister, but that no such person should be qualified for admission to the service until he should have passed the prescribed examination, and that such temporary employment should cease on or before the expiration of two years.

Comparing sec. 57 with secs. 7 and 8, it is clear that the quality of permanent employment in the government service was regarded as depending upon a question of fact and not upon

the mode of appointment; for the persons holding the minor appointments described in sec. 8, which were ordinarily made by some authority other than the Governor in Council, were regarded as possibly being in permanent employment.

Heffernan, with regard to whom the present case arises, had been appointed by the Postmaster-General in 1876 to a position in the Postal Department at a salary of £50 per annum. He subsequently received promotion to the position of letter-carrier (one of the positions mentioned in sec. 8 of the *Civil Service Act* 1884) and other positions, holding in 1881 that of Senior Railway Mail Sorter at a salary of £175 per annum. It seems a strange contention that a person who has such a position in the hierarchy of the service as to be designated "Senior" of his class should be regarded otherwise than as in the permanent employment of the Government. I think it clear that he was "in the permanent employment of the Government" within the meaning of sec. 57 of the Act. He did not, however, take advantage of the provisions of that section as to becoming a contributor to the Superannuation Account.

In 1895 the *Public Service Act* of that year (59 Vict. No. 25) was passed. In the meantime Heffernan had been treated by the Civil Service Board constituted under the *Civil Service Act* 1884 as a person in the service of the Government under the provisions of sec. 8 and as a person not employed temporarily. The class of "mail sorters" had also been treated by the Governor in Council as falling within the provisions of sec. 8.

The Act of 1895 made new provision for the regulation of the public service. The definition of "officer" was altered so as to include all persons employed otherwise than temporarily in those branches of the service to which the Act applied, in which Heffernan was included. Sec. 60, which is one of a group of sections headed "Pensions, Gratuities Etc.," begins as follows:— "If the services of any person permanently employed in the public service shall be dispensed with by the Board under the provisions of this Act otherwise than for an offence, then—" and proceeds: (1) "If such person shall have been employed in the public service before and at the date of the commencement of this Act, and shall be a contributor to the Superannuation

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Account," he shall (subject to certain conditions not now material) receive "a refund of the amount of his contributions to that Account . . . together with a gratuity not exceeding" a specified amount. (2) "If such person shall have been employed in the public service before or at the date of the commencement of this Act, but shall not be a contributor to the said Superannuation Account," he shall receive a gratuity not exceeding one month's pay in respect of each year of permanent service and not exceeding one fortnight's pay in respect of each year of temporary service; "such gratuity to be calculated on the average of his salary during the whole term of his employment, and to be payable only in respect to service prior to the commencement of this Act."

By sec. 59 all pensions and gratuities were abolished as to persons who were not at the commencement of the Act contributors to the Civil Service Superannuation Account except as provided in sec. 60.

After the commencement of the Act of 1895 Heffernan continued in the service of the Postal Department of the State until the transfer to the Commonwealth, preserving under sec. 84 of the Constitution "all his existing and accruing rights." Subsequently his services were dispensed with under circumstances entitling him to the benefit of sec. 60 of the Act of 1895. He asked for a gratuity of the maximum amount permitted by the second part of that section, and claimed that it should be calculated on one month's pay for each year of his service in permanent employment before the commencement of the Act of 1895. The claim was allowed, and a gratuity calculated at that rate was paid.

So far the case seems clear enough. Heffernan was a person permanently employed in the public service of the Commonwealth, and his services were dispensed with by the Commonwealth Authority corresponding to the Board (see sec. 70 of the Constitution). He had been employed in the public service of the State before the commencement of the Act of 1895, and his permanent employment had begun some years before that period.

The plaintiff, however, who is required under sec. 84 of the

Constitution to bear the charge of the greater part of the gratuity, says that sec. 11 of the *Public Service Act* 1895 had the effect of declaring that for the purposes of that Act Heffernan's employment, although actually permanent, was to be deemed temporary, and that the maximum amount of his gratuity must therefore be calculated on a fortnight's pay, and not a month's pay, for each year of service.

The section is as follows:—

"In all cases in which it shall appear to the Board that any person actually employed in the public service at the commencement of this Act has not been appointed by the Governor, the Board shall inquire into and consider the character of the work or duties performed by such person and the time during which he shall have been so employed, and if the Board shall determine that the employment, work, or duties of such person are in their nature such as should properly be designated permanent, and that the services of such person should be retained, then such officer shall be considered as having become a permanent officer at and from the commencement of this Act, without examination or further probation, notwithstanding that he shall not have been appointed by the Governor, and the period of service of such person antecedent to the commencement of this Act shall be considered service for the purposes of sec. 60: Provided that as to officers temporarily employed at the commencement of this Act, whose services are dispensed with, the Governor shall, on the recommendation of the Board, grant . . . to each such officer" a gratuity, "at a rate not exceeding a fortnight's pay for each year of such service prior to the commencement of this Act."

Heffernan was dealt with by the Board under this section, and they determined that his employment, work, or duties should be designated permanent.

The plaintiff says, and rightly, that the section applies in terms to all officials not appointed by the Governor in Council, and that if the Board as to any such person determined that the employment should properly be designated permanent, and that his services should be retained, then he was to be considered as having become a permanent officer, from the commencement of

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the Act. But it contends that he was to be so considered from that time only, so that any previous employment, although in fact permanent, was thenceforth to be considered as having been temporary.

There is some ground for suggesting that the draftsman may have thought that the class of persons not appointed by the Governor in Council was co-extensive with the class of persons not permanently employed. If he did think so, he was, as already shown, mistaken, and it requires something more than the suggestion of a mistake by a draftsman to justify the construction of ambiguous language as a declaratory deprivation of an existing status. But on clearer examination the suggested construction is not supported even by a literal construction of the actual language. The provision is on its face an enabling one, intended to confer a privilege, viz., the status of permanent employment, on persons who did not already enjoy it, and there is nothing to indicate an intention that it should operate as a disabling provision. Again, the inquiry is to be made as to all persons "actually" employed, which indicates that up to this point the fact of appointment, not the permanency of appointment, is material. The test to be applied in each case is whether "the employment, work, or duties . . . are in their nature such as should properly be designated permanent"—words which suggest that they are for the time being (although erroneously) designated temporary. This was not true with regard to persons who were in fact permanently employed, for they were called by that name in the Act of 1884 irrespective of the mode of their appointment. Such language is quite inapt as applied to such officers. The words "permanent officer" in the phrase "shall be considered as having become a permanent officer" are not necessarily synonymous with the words "permanently employed in the public service" used in sec. 60. Moreover, the direction as to reckoning the service is that the period of service of such persons antecedent to the Act shall be considered "service" for the purposes of sec. 60. But sec. 60 deals with both temporary and permanent service. Why, then, should the word "service" in this connection be held to mean "temporary service" rather than "service permanent or temporary as the case may be,"

which seems the literal meaning. The concluding proviso draws a distinction between persons permanently and persons temporarily employed at the commencement of the Act, which upon the suggested construction is idle, since all the persons in question were, if the contention is accepted, to be regarded as having been temporarily employed before the Act.

In my opinion the words "at and from the commencement of this Act" are not used in contradistinction to the date when the officer was first actually permanently employed, but to the date of the Board's decision, so that that decision might for the benefit of the officer have a retrospective effect. The words "without examination or further probation" are also very material as showing the intention to confer a new privilege and not to derogate from an old one.

For these reasons I am of opinion that sec. 11 is irrelevant to the case, that Heffernan was a person permanently employed in the public service within the meaning of sec. 60, and that his gratuity was properly calculated on the basis of one month's pay for each year of service.

If there is anything in the case of *Manton* v. *Williams* (1) apparently inconsistent with this conclusion, it must be taken as *obiter* only, since the point now decided did not arise upon the facts of that case.

Another question raised by the plaintiffs is whether the discretion as to the amount of the gratuity to be given under sec. 60 is to be exercised by the Government of the Commonwealth or by that of the State. In my opinion the case falls within the provisions of sec. 70 of the Constitution, and the amount of the gratuity was properly determined by the Governor-General in Council.

The next question is as to the distribution of the burden of the gratuity. As to the greater part it is not disputed that it must fall upon the State.

The case was argued upon the assumption that the gratuity falls within the words "retiring allowance" in sec. 84 of the Constitution. The whole amount was properly paid by the Commonwealth, but the Commonwealth was entitled to recover

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from the State a part calculated in proportion to the term of Heffernan's service with the State as compared with his whole term of service. The residue is by sec. 84 left to be borne by the Commonwealth. But secs. 89 and 93 provide that for a time prescribed, which has not yet expired, the Commonwealth shall debit to each State (sec. 89 (II.) (*a*)) "the expenditure . . . . incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth," and the question arises whether the payment of the balance of the gratuity falls within these words.

The right to recover the gratuity was "an existing or accruing right" possessed by Heffernan at the time of transfer. If the transfer had not taken place, and he had continued in the service of the State, the expenditure in payment of the gratuity would have had to be borne by the State, and would, in my opinion, have been an expense for the maintenance and continuance of the department. This is sufficient for the determination of the present question. I express no opinion on the general question of the extent of the operation of sec. 89 (II.) (*a*), except to say that I think that, being a temporary provision, it must, as to cases within sec. 84, be read as a proviso to that section.

The result is that the whole of the amount paid by the Commonwealth in respect of the gratuity is properly chargeable by the Commonwealth to the plaintiffs, part under sec. 84, and the rest under secs. 89 (II.) (*a*) and 93.

The questions submitted should be answered accordingly.

BARTON J. I have had the opportunity of reading the judgment which has just been delivered by the learned Chief Justice, and I entirely concur in his reasoning and his conclusions.

O'CONNOR J. The question which arises at the outset of this inquiry is whether the exercise of discretion as to the amount of gratuity under sec. 60 sub-sec. (ii.) of the *Public Service Act* 1895 is vested in the State or in the Commonwealth. In view of sec. 70 of the Constitution it is hard to see what answer there can be to the contention of the Commonwealth on this point. The transferred services in all the States were administered under Acts

creating rights, duties and obligations between the officers and the governing authorities of the Departments in each State. When the services passed to the Commonwealth the officers became subject to the control of the Commonwealth under sec. 84 of the Constitution, and in the interval which necessarily elapsed between the transfer and the enactment of the *Commonwealth Public Service Act* 1902 the provisions of the State Acts, conferring on the transferred officers the rights preserved to them by the Constitution, were in the daily work of the services administered by the Commonwealth departmental authorities, not only of necessity, but under the express authority of sec. 70 of the Constitution. When the *Commonwealth Public Service Act* 1902 was passed the State Acts ceased to have effect except as to provisions which preserved the rights of the transferred officers existing and accrued at the date of transfer. But the administration of those provisions necessarily remained in the hands of the Commonwealth authorities.

The consideration of the circumstances necessary to be reviewed in determining the amount of gratuity to be awarded to a Commonwealth officer whose services have been dispensed with is, in my opinion, as much a matter of Commonwealth departmental concern as would be the consideration of circumstances relating to the exercise of any of his existing and accrued rights before his services were dispensed with. To hand over the determination of the matter in question to the State departmental authorities would be, therefore, inconsistent with that unfettered control over its own officers which sec. 84 of the Constitution confers on the Commonwealth.

The Commonwealth departmental authorities having exercised their discretion by granting to Heffernan and paying his representatives a gratuity calculated on the basis of one month's pay for every year of service, the objection is taken by the plaintiff that under the circumstances of the case there was no authority to take that basis of calculation; that the basis should have been one fortnight's pay for every year of service.

The question whether that objection is or is not valid depends upon what is the proper construction of secs. 60 and 11 of the New South Wales *Public Service Act* 1895. It is common

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ground that Heffernan was, when his services were dispensed with, a "person permanently employed in the Public Service" within the meaning of sec. 60 of the *Public Service Act* 1895, and that his right to have his claim for gratuity under that section considered was a right which sec. 84 of the Constitution preserved for him. As he was not a contributor to the Superannuation Account under the New South Wales *Civil Service Act* 1884 his case came under sub-sec. (II.) of sec. 60, and is governed by the following words: "such person shall receive a gratuity not exceeding one month's pay for each year of service from the date of his permanent appointment, and a fortnight's pay in respect of each year of temporary service; such gratuity to be calculated on the average of his salary during the whole term of his employment and to be payable only in respect of service prior to the commencement of this Act."

The first matter to be determined is whether Heffernan's service was permanent or temporary and, if permanent all through as he contended, what was the date of his appointment? Apart from sec. 11 that would seem to be a mere question of fact. But the plaintiff contends that it is not so, and that, whatever the facts may be as to Heffernan's service, the determination of the Public Service Board under sec. 11 is conclusive that all his service up to the passing of the Act was temporary, and that his permanent service began only at the date when the *Public Service Act* 1895 came into force. As the sub-section quoted provides that the gratuity shall be payable only in regard to service before that date, it would follow, if that contention is correct, that the Commonwealth departmental authorities had no discretion to grant more than a fortnight's pay for each year of service before the date mentioned.

Before examining that contention it will be well to consider what was in fact the nature of Heffernan's service. He was appointed on 18th August 1876 by the Postmaster-General as mail boy at a salary of £50 per annum and commenced duty on that date. From that time on until the transfer of the Department to the Commonwealth, he was continuously in the postal service of New South Wales discharging duties connected with

the regular and ordinary work of the Department. In 1884 was passed the Act which for the first time placed the public service of New South Wales under the control of a Board, and conferred on public servants definite rights in respect of their conditions of service. The Act recognized in several of its sections that there was then a class of persons holding office in the service who were designated as "temporarily employed." For example, the definition in sec. 2 which excludes persons temporarily employed from being "officers," within the meaning of the Act; the provisions of sec. 25 directing Heads of Departments to furnish the Board each year with a list of persons "temporarily employed;" sec. 26 directing appointments in the General and Professional Division to be from amongst the probationary or junior class "from persons who shall have been temporarily employed in the service." Again, sec. 31 expressly authorizes that persons may be "temporarily employed" by the Minister, but provides that "no such person shall be qualified for admission to the service by reason of such temporary employment until he shall have passed the prescribed examination and such temporary employment shall cease at or before the expiration of two years." What might constitute "permanent employment" in the service was also recognized under sec. 57. Persons employed in the Railway Department or in the Education Department and those performing duties involving more or less manual work, such as messengers, letter-carriers, letter-sorters, warders, and others performing duties of a like kind, although not officers within the definition in sec. 2, were recognized as being "permanently employed." Sec. 57 conferred upon any person "in the permanent employ of the Government" belonging to the class I have mentioned the right to become contributors to the Superannuation Account by way of deduction from their pay and thereafter to have the same advantages from the Fund as "officers" within the meaning of sec. 2. In the beginning of 1885 a list was issued in compliance with sec. 16 containing the names alphabetically arranged of all officers "and of all other persons employed" in the service. In that list there is a special heading for the class of persons temporarily employed. Heffernan is not in that list but *is* in the list headed "persons coming within the provisions of sec. 7 of the

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Act," that is, coming under the regulations of the railway service. His position is therein stated to be "Senior Railway Sorter, General Post Office." It is difficult to imagine any way in which the Government could more distinctly declare that Heffernan's employment at that time was not "temporary" but "permanent" than by classifying him as he was classified in that list. From that time on he continued in the same kind of employment, nothing having taken place to alter the permanency of its character till the *Public Service Act* 1895 became law. If the expression "permanent" in sec. 60 is to be taken as used in its ordinary meaning, it seems to me, on this state of facts, abundantly clear that Heffernan's nineteen years of employment up to that date had been permanent employment, and that therefore the date of his "permanent appointment" was the date when he was first appointed to the service. The defendant's counsel conceded that, but for the provisions of sec. 11, that would be the date of the permanent appointment within the meaning of sec. 2, but they broadly contended that in the case of any officer not appointed by the Governor and Executive Council whose services were dispensed with by the Board under that section after consideration of his duties, his permanent service was fixed by the section as commencing when the Act came into force, no matter what the actual facts as to his service might have been.

Before examining the provisions of sec. 11 it is necessary to advert to one of the matters with which the legislature had to deal in enacting the *Public Service Act* 1895. In spite of the provisions of sec. 31 of the Act of 1884 to which I have referred, the number of "persons temporarily employed" had gone on increasing, and many of them, although originally employed on the footing of temporary employment, had been retained for many years discharging the same class of duties as permanent officers. In other words, though classed in the Department as "temporarily employed," they were in fact permanent officers, and in the general adjustment of rights which the Act aimed at it was recognized that the anomalous position of such officers had to be dealt with. There can be no doubt that sec. 11 was passed to deal with such cases. It will be noted that the operation of the section is limited to those employés who had not been appointed

by the Governor in Council. It was suggested in argument that that limitation must be taken by implication to class all employés appointed by a Minister only as "persons temporarily employed." There is, in my opinion, no ground for that inference. The mode of appointment can have no relation to the temporary or permanent nature of the employment. Sec. 57 of the Act of 1884, to which I have already referred, expressly recognizes persons performing duties similar to Heffernan's duties as being permanently employed, though not appointed by the Governor in Council, and gives them the right of contributing to and benefiting by the Civil Service Superannuation Account. The plain object of sec. 11 is enabling an authority to confer the status of permanent officers on those who were really discharging permanent duties. There is certainly nothing in the section, or in any other section of the Act, to indicate that the legislature intended in such cases to convert years of employment, permanent in fact and before then recognized by the Act of 1884 as permanent, into temporary employment. If the section were to be so read some extraordinary consequences would follow.

I shall take one illustration which was referred to in argument. Under sec. 57 of the Act of 1884 Heffernan was entitled to become a contributor to the Superannuation Account. If he had become a contributor to that Account his claim would have come under sub-sec. (1) instead of sub-sec. (2) of sec. 60. But he would also be within the provisions of sec. 11, and it was admitted by the plaintiff's counsel that in that case the same interpretation must be put on the words "permanent appointment" in sub-sec. (1) as in sub-sec. (2); from which it would follow that a person who was in fact in the permanent employment of the Government for 19 years who had, by virtue of his employment being permanent, been allowed to share in the obligation and benefits of the Superannuation Account, and who was entitled on his services being dispensed with to a return of his contributions to the Account with interest, should, because his original appointment was by the Minister and not by the Governor in Council, have his 19 years of permanent employment turned into 19 years of temporary service for the purpose of calculating the amount of his gratuity. Any construction which leads to a consequence so

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inconsistent with the whole scope and purpose of the Act, and which would compel a legal inference contrary to the facts and to the prejudice of the officer, must be avoided if any other reasonable meaning for the section can be found. The limitation of sec. 11 to officers not appointed by the Governor in Council was, in my opinion, merely intended to confine the inquiry to persons holding appointments of the kind which are described in the New South Wales Constitution as minor appointments. It evidently follows the line of division drawn in that section of the Constitution which is the original authority for all appointments to the Service. That section enacts that appointments shall be made by the Governor in Council, but provides that minor appointments may be made by Ministers, Heads of Departments, and other persons authorized by Statute or Order in Council to make such appointments. When the section itself is examined it becomes apparent that it is not applicable to all officers not appointed by the Governor in Council, but only to those of them recognized in the Act of 1884 as "persons temporarily employed." The employment of the officer must be such that the Board may determine "that his duties are in their nature such as should properly be designated permanent." How can such an inquiry be relevant in the case of an officer whose employment has always been recognized as permanent? When the Board has come to its determination the consequences that follow are described in these words: "then such person shall be considered as having become a permanent officer at and from the commencement of this Act, without examination or further probation, notwithstanding that he shall not have been appointed by by the Governor." These latter words are meaningless when applied to the case of an officer whose service is and has been in fact permanent, but are exactly applicable to the conditions under which alone a "person temporarily employed" could enter the permanent service under the provisions of sec. 31 of the Act of 1884. In my opinion, therefore, the section is inapplicable to such a case as Heffernan's, and its provisions cannot under the circumstances be taken to alter the interpretation to be placed on the words "permanent appointment" in sub-sec. (ii.) of sec. 60. I have come to the conclusion that Heffernan's service was per-

manent service from the beginning, and that the date of his permanent appointment was the date when he was first appointed, and that it was open to the Commonwealth authorities to award his gratuity on the basis of one month's pay for every year of that service.

As to the question raised under sec. 89 (II.) (*a*) of the Constitution, I take the view that the amount of £25 2s. 10d. was properly charged against the State of New South Wales as "an expenditure . . . incurred solely for the maintenance or continuance, as at the time of transfer," of the Post Office Department. Pensions and allowance of gratuities to officers are, in effect, part of the consideration for which the officer's services are given to the State. The expenditure to meet those obligations is, in my opinion, as necessary for the continuance of the Department as the provision for salaries as they become due.

When the service was transferred, Heffernan's rights, extending as they did only in respect of his services up to 1895, were inchoate. And if his services had been dispensed with between that date and the transfer, the expenditure on his gratuity would certainly have been incurred in the carrying on of the Department. The payment when made by the Commonwealth must, I think, be in the same position. As to this question also the answer must be in favour of the defendant.

On the whole case therefore, I am of opinion that judgment must be for the defendant.

ISAACS J. The amount properly payable to Heffernan depends on whether he is to be considered as having been permanently appointed as from 1876. The facts show he was originally appointed by the Postmaster-General to the comparatively humble position of a mail boy at a salary of £50 a year, and from that date he remained continuously in the postal service of New South Wales until the Department was transferred to the Commonwealth in 1901.

In the meantime the *Civil Service Act* 1884 and the *Public Service Act* 1895 were passed enacting strict provisions as the mode of appointing to the public service, and I do not find any means of arriving at a conclusion that after 1884 he was

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appointed permanently at all within the meaning of the Acts. I base my judgment on what took place as to appointments before there was any statutory restriction on the power of the Crown to appoint to the public service, though the subsequent course of events may be looked at to guide us in ascertaining the initial fact.

For a period of between 8 or 9 years of that time, Heffernan was treated by the Crown as a permanently appointed member of the public service of New South Wales. In 1877 he was promoted to the position of letter-carrier at £108 a year, and in 1880 he was again promoted to the position of assistant railway guard and railway sorter at £150 a year, and in 1880 again promoted to the position of railway mail sorter at £175. His subsequent retention up to 1895, without apparently being considered anything but a permanent officer, is strong evidence of some former permanent appointment. As far as the facts go I think they irresistibly show a permanent appointment by the Crown, and I do not think the Crown can dispute it—certainly not without much more cogent negative evidence than appears here.

The next question is whether it is open to Heffernan or, what is the same thing in this case, the Commonwealth to set up the real facts in view of the action of the Public Service Board under sec. 11 of the Act of 1895. The Act does not, in my opinion, intend to take away any actual existing rights, though it does provide a means of advancing persons from the status of temporary employment to that of permanent employment, and so simplifying the classification. It may have been overlooked by the legislature that many persons had been lawfully appointed to minor positions in the service before 1884 by the Ministers under power delegated by the Governor. Possibly the legislature thought that, when in sec. 11 it made provision for constituting as permanent officers all those employés who had not been appointed by the Governor, but whose work was in the Board's opinion of a permanent nature, and who were retained, it had covered all necessary ground. But it had not in fact done so, because there may—indeed must—have been very many employés who, like Heffernan, had been a great number of years in the service, and

who had entered it in some minor capacity under ministerial appointment, and had been advanced step by step as permanent employés until 1895. Parliament did not say expressly that the only permanent employés known to the law should henceforth be those who had been appointed by the Governor or had been so determined by the Board under sec. 11. Nor can I, on full consideration, see that Parliament has done so by necessary implication, notwithstanding any dictum in *Manton* v. *Williams* (1), for which I am responsible equally with the learned Chief Justice, who delivered the judgment of the Court. Further, in relation to the Education Department mentioned in sec. 46 of the same Act, reference to the *Public Instruction Act* 1880 shows that a great number of employés held their appointments by virtue of the original appointment by the Education Board and the new Act, without any new appointment by the Governor. It could not be that all those persons, whose employment continued from before 1886 to 1895, were to be considered temporary employés, and yet, if the artificial hard and fast line argued for is to be laid down, this result would follow.

I therefore think that sec. 11 would not have prevented Heffernan, and does not prevent the Commonwealth, from adducing facts to establish the permanent appointment of Heffernan from 1884. If this be established, as I think it is, the amount paid by the Commonwealth is correct, and the next question is as to the right of the Commonwealth to charge the amount to the State. It is first said on behalf of the State of New South Wales that nothing is payable at all because it was the Commonwealth and not the State that had fixed the retiring allowance, and that the only competent authority to do so was the Governor of New South Wales in Council, in accordance with the provisions of the State *Public Service Act* 1895. But there is an inherent fallacy in this argument. Heffernan on the transfer of the Department severed his connection with the State. The State on the one hand ceased to have any jurisdiction over him as a public servant either as to duties, salary or retiring allowance; he on the other hand ceased to have any rights against the State, so far as the State law operated of its own force. Heffernan's rights and

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duties as a public servant existed henceforth with relation to the Commonwealth, and it was sec. 84 of the Constitution to which he and the Commonwealth had to look for the existence of any claim to an allowance on retirement from the Commonwealth service. In order to ascertain the rights given by that section reference must, of course, be made to State laws, but only for the purpose of applying and working out the terms of the constitutional provision. It follows, therefore, that the Commonwealth alone must determine the gratuity or retiring allowance; and sec. 70 of the Constitution indicates the appropriate organ for the purpose, viz., the Governor-General in Council. The mode of arriving at the fact and amount of retiring allowance was therefore correct.

The last question is whether it is the whole amount which ought to be charged against the State or only the proportionate amount indicated by sec. 84. The State contends that that section covers the whole ground, and that it would be inconsistent with its definite provisions to charge the whole sum against the State. It is said that the section makes special and specific provision, and that must prevail against the mere general direction of sec. 89. But it has been answered, I think correctly, that sec. 84 makes an allocation of a permanent nature to apply so long as any person exists to whose case it is applicable. What will follow in addition must depend upon circumstances, and how far any other provision of the Constitution applies to the circumstances.

Sec. 84 requires the particular State to bear its fixed proportion in any event; as to the residue the Commonwealth bears it it is true, but the burden is still to be ultimately borne by the people of the States, and the manner of distributing that burden may vary. By secs. 89 and 93, until the imposition of uniform duties of Customs and for five years afterwards, and thereafter until Parliament otherwise provides, the Commonwealth expenditure in any State incurred solely for the maintenance or continuance as at the time of transfer of any transferred Department is to be debited outright to the State. I do not propose, nor do I think it desirable to attempt to formulate any standard of interpretation for this sub-section. What expenditure is solely

for the maintenance or continuance as at the time of transfer of any transferred Department may in some particular case prove to be a question involving very complicated matters of fact, and possibly expert and scientific opinion. While there undoubtedly must be a point where the Court is properly called upon to protect the interests of the States in this regard, either as against the Commonwealth or as between themselves, I do not feel at liberty in this case to enter upon the onerous and responsible task of laying down any specific general test. It is evident that a standard—however accurate it appeared at first sight—might turn out to be erroneous when tested in operation and examined by the light of actual facts, and there are really no proper materials for essaying its formulation in the present case. A mistake might place an undue and unauthorized strain upon some States that would not easily be corrected.

This case, however, is clear. Whatever the complete construction of sec. 89 may be, it certainly must include a case like the present. Here every penny of the money paid by the Commonwealth would have been payable by the State of New South Wales had there been no transfer of the Department. Heffernan's salary was not increased by the Commonwealth; the period in respect of which he was paid his retiring allowance did not extend beyond 1895, and there is no justification of any kind for casting the burden of any part of this sum on any other State. The expenditure of this amount was manifestly and strictly incurred solely for the maintenance and continuance, as at the time of transfer, of the Postal Department.

I therefore agree with the judgment proposed by the learned Chief Justice.

HIGGINS J. As for the construction of sec. 60 (ii.) of the New South Wales *Public Service Act* 1895, I was, during the argument, strongly inclined to the view put by Mr. *Knox* that Heffernan was not shown to have held "a permanent appointment" within the meaning of that section, until that Act, sec. 11, came into force. I was startled by the unusual meaning of the word "permanent," in these New South Wales Acts, which the argument for the Commonwealth implies—a meaning which has

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nothing to do with tenure or right to stay in the service. But, on reconsidering the Acts, I find that the word "permanent" cannot mean to refer to permanency in tenure of office; cannot involve a right to the office for life or for any definite time (cf. sec. 57 of the Act of 1884); and that it must refer to the character of the duties performed. The man in "permanent employment" is distinguished from the man in "temporary employment" by the fact that his work is not casual or emergency work (see Act of 1884 sec. 2 "service"; sec. 31; Act of 1895, sec. 11). Therefore, I concur with my colleagues in their view that the gratuity payable to Heffernan must be calculated on the basis of one months' pay for each year of his service prior to the Act of 1895.

I am also of opinion that under sec. 70 of the Constitution the exercise of the discretion as to the amount of the gratuity rests with the Governor-General in Council.

As for the obligation of the State of New South Wales in respect of this gratuity, I am clearly of opinion that the sum of £239 1s. 1d. at the least (in respect of the period up to 1st March 1901, when the Department was transferred) is to be paid by the State. According to the case, the Governor-General in Council called upon Heffernan to retire under sec. 65 of the *Commonwealth Public Service Act* 1902. This retirement must have been for some unfitness to discharge his duties. The retirement was compulsory, but not for any offence. Under these circumstances, the Governor of New South Wales in Council until the 1st March 1901, and the Governor-General in Council subsequently, had power to fix the amount of gratuity to be granted to him in terms of sec. 60 of the *Public Service Act* 1895. Having been retained in the service of the Commonwealth, he preserved "all his existing and accruing rights" under sec. 84 of the Constitution; and this right to gratuity as fixed by the proper authority was, in my opinion, a right preserved for him by the Constitution. But I am strongly inclined to think that the next following words of sec. 84, as to the apportionment of the compensation between the State and the Commonwealth, do not apply to the case of Heffernan. They apply, in terms, only to one who retires voluntarily (*e.g.*, under sec. 68 of the

New South Wales *Public Service Act* 1895). We may conjecture that, if their attention had been called to the matter, those who drafted the section would have made the provision apply to the case of compulsory retirement also. But the section says "and shall be *entitled to retire from office at the time, and on the pension or retiring allowance*," &c.; and "*such* pension or retiring allowance shall be paid to him by the Commonwealth," and apportioned between State and Commonwealth. That is to say, he is to be entitled to retire at the time—the age of 60—and on the pension or retiring allowance provided for persons retiring at the age of 60. There is nothing in sec. 84 to show what is to be done as between State and Commonwealth with regard to the gratuity or retiring allowance payable on compulsory retirement (see and compare preceding clause of sec. 84: "entitled to receive from the State any pension, gratuity," &c.)

Having settled that Heffernan is entitled to the gratuity, who is to pay it? The Commonwealth is to pay it in the first instance, as the employer; but how is the burden to be borne? Apart from sec. 84—which, as I have said, does not, except that it preserves his existing or accruing rights, apply to this case—we must look to sec. 89 and sec. 93 of the Constitution. Sec. 93 adopts the method of accounting prescribed in sec. 89; and under sec. 89 the Commonwealth is to debit to each State "the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth." This section may well become difficult of application in cases more complex than this. But, speaking generally, I should say that those expenses which a department of a State would still have to bear if there had been no Federation, are expenses which the State must bear under this section when the department has been transferred. In this case there was no change of salary after the department was transferred; and if there had been no Federation, the expense of paying a gratuity to Heffernan would have been treated as an expense of the department. The analogy of maintenance of a business suggests itself. If an owner of a business leave it in the charge of another, promising to abide the cost and risk of its maintenance and continuance in the same

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state as at the time of leaving it, there is no doubt that this promise would cover the wages of the employés, and any pensions or retiring allowances promised to retiring employés. Whether the promise would cover more, and how much more, depends on circumstances, and must be determined if and when occasion arises. But here the payment to Heffernan is an expense incurred in pursuance of the statutory provisions relating to the department when it belonged to New South Wales. It is an expense "incurred solely for the maintenance and continuance of the department" on the same lines as at the time of transfer of the department; and, in my opinion, therefore, the £239 1s. 1d. ought to be debited by the Commonwealth to the State of New South Wales.

According to my view of sec. 84, the same result follows as to the £25 2s. 10d., extra gratuity paid by reason of the gratuity having to be calculated on the average of his salary during the whole time of Heffernan's "employment"—including the time of his employment in the Commonwealth service. It may be thought anomalous that the State should be saddled with the sum of £25 2s. 10d. rendered necessary by the higher average due to the period of Heffernan's service in the Commonwealth. But it seems to be the necessary result of secs. 89 and 93, if sec. 84 does not apply to the case; and after all, looked at as a summary method of attaining substantial justice between the States, it is not unjust. I agree with the proposed answers to all the questions.

Judgment for the defendant with costs.

Solicitor, for the plaintiff, *The Crown Solicitor for New South Wales.*

Solicitor, for the defendant, *The Crown Solicitor for the Commonwealth.*

C. A. W.