[HIGH COURT OF AUSTRALIA.]

WOODBRIDGE . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER FOR MAIN ROADS (NEW SOUTH WALES) . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 1; *Nov.* 22.

Rich, Starke, Dixon and McTiernan JJ.

*Transport—Commissioner for Main Roads (N.S.W.)—Action for personal injury—Statutory limitation of damages—Ministry of Transport Act* 1932 (*N.S.W.*) (*No.* 3 *of* 1932), *sec.* 18—*Transport* (*Division of Functions*) *Act* 1932 (*N.S.W.*) (*No.* 31 *of* 1932), *secs.* 6, 20.

Sec. 18 of the *Ministry of Transport Act* 1932 (N.S.W.), provides: "In any action . . . against the Board of Commissioners in respect of injuries sustained by any person, no larger sum than two thousand pounds shall be recoverable." By sec. 6 of the *Transport* (*Division of Functions*) *Act* 1932 (N.S.W.) the powers and functions of the Board of Commissioners exercisable in respect of roads are vested in the Commissioner for Main Roads, and sec. 20 of the Act provides: "In the construction, and for the purposes of any Act . . . any reference to . . . the Board of Commissioners shall be read, deemed, and taken to refer to the commissioner appointed under this Act to exercise and perform the power, authority, duty, or function of the Board of Commissioners to which such reference applies."

*Held*, by *Rich*, *Dixon* and *McTiernan* JJ. (*Starke* J. dissenting), that sec. 20 of the *Transport* (*Division of Functions*) *Act* 1932 (N.S.W.) does not operate to apply to an action against the Commissioner for Main Roads the limitation of £2,000 contained in sec. 18 of the *Ministry of Transport Act* 1932 (N.S.W.).

Decision of the Supreme Court of New South Wales (Full Court): *Woodbridge* v. *Commissioner for Main Roads*, (1938) 38 S.R. (N.S.W.) 141; 55 W.N. (N.S.W.) 60, reversed.

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APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Leah Agnes Woodbridge against the Commissioner for Main Roads for £10,000 damages in respect of personal injuries sustained by her whilst travelling as a passenger in a motor car along a road under the control of the defendant. The plaintiff alleged that the accident was occasioned by the negligence of the defendant's servants in obstructing the road with some gravel and/or metal.

The defendant pleaded the statutes and denied that it had the care, control and management of the road and gravel referred to by the plaintiff.

At the trial no mention was made to the jury as to whether or not there was any statutory limitation of the amount of damages recoverable against the defendant.

The jury found in favour of the plaintiff and assessed damages at the sum of £3,750. When the verdict was given attention was drawn in some way by counsel for the defendant to what was claimed to be a statutory limitation of damages, but nothing was done except that counsel for the defendant asked for and was granted a stay of proceedings for fourteen days.

On a motion by the commissioner to the Full Court of the Supreme Court for a new trial limited to the issue of damages or to reduce the amount of damages that court held that by reason of the combined operation of sec. 18 of the *Ministry of Transport Act* 1932 (N.S.W.) and sec. 20 of the *Transport (Division of Functions) Act* 1932 (N.S.W.), the plaintiff was unable to recover from the defendant more than the sum of £2,000 as damages, and the verdict was reduced accordingly: *Woodbridge* v. *Commissioner for Main Roads* (1).

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgments hereunder.

*Evatt* K.C. (with him *Kirby*), for the appellant. No reference was made prior to the delivery of the verdict to any statutory limitation of the *quantum* of damages; therefore an appeal from the

(1) (1938) 38 S.R. (N.S.W.) 141; 55 W.N. (N.S.W.) 60.

verdict was not competent. Sec. 20 of the *Transport (Division of Functions) Act* 1932 is a " dragnet " section for the purposes which are set forth in the preamble to that Act. It is not an interpretation section ; nor is it automatic in its application, but is invocable only when it becomes necessary (*a*) to construe any Act, by-law, &c., and (*b*) for the purposes of any Act, by-law, &c. The section does not provide that Board of Commissioners means the commissioners appointed in that Act. All it provides is that a reference to the Board of Commissioners shall be read as a reference to an individual commissioner only if there is a reference to a specific power or function. Sec. 18 of the *Ministry of Transport Act* 1932 does not refer to any specific power or function ; therefore it does not apply to the individual commissioners. The logical construction of sec. 20 of the *Transport (Division of Functions) Act* 1932 is that it deals with a division of powers and authorities. It operates as a general provision in a case of uncertainty in the allocation of a particular activity. In any event, unless the injuries to the appellant were caused by work in course of being carried out in pursuance of the authorities, functions and duties of the respondent as defined and as delimited by the *Transport (Division of Functions) Act*, sec. 18 of the *Ministry of Transport Act* does not afford the respondent any protection whatsoever (*Ellis* v. *Commissioner for Main Roads* (1) ) In other words, sec. 18, if it applies at all, extends only to the performance of the powers which the respondent derived from the Board of Commissioners, and not by way of other statutes or subsequent to 1932, e.g., secs. 30A and 65 of the *Main Roads Act* 1924-1936.

*Weston* K.C. (with him *W. B. Simpson*), for the respondent. Sec. 20 of the *Transport (Division of Functions) Act* operates to substitute one authority for another whenever the occasion requires such a substitution. Clear indication of the legislature's intention is shown in sec. 15 (2) of that Act. The effect of sec. 20 is to carry forward secs. 16, 17 and 18 of the *Ministry of Transport Act.* As regards new bodies created for the first time, and in the functions under the Act of 1932, there is no immunity unless derived by way

(1) Unreported. (Supreme Court of New South Wales, May 1938.)

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of sec. 20 of the *Transport (Division of Functions) Act*, or by sec. 20 in conjunction with sec. 12 (2) of the *Ministry of Transport Act*. The immunity enjoyed by the Railway Commissioners under their Act was passed on to the whole board by sec. 12 (2). Sec. 15 (2) of the *Transport (Division of Functions) Act* clearly relates to every commissioner under the Act including the respondent. Sec. 12 (2) was the " bridge " which carried into effect the way in which it was subdivided. The limitation imposed by sec. 18 of the *Ministry of Transport Act* still applies in respect of actions brought against the respondent. On the question of construction see *Astor* v. *Perry*; *Duncan* v. *Adamson* (1). The preliminary objection raised by the appellant is without merit or substance. The statute overrides rules of pleading and any rules of court as to how a party should conduct his case. In the absence of evidence to the contrary it must be inferred that the subject work was being carried out in pursuance of the original powers conferred upon the respondent.

*Evatt* K.C., in reply.

*Cur. adv. vult.*

Nov. 22.

The following written judgments were delivered :—

RICH J. I have had an opportunity of reading the reasons of *Dixon* J. and of *McTiernan* J. and agree with them.

The statutory provisions which we are called upon to construe contain attempts at referential treatment of a subject which ought to have been dealt with by direct enactment, attempts which may be described as singular in their multiplicity. No one can say with confidence what is the result, but hope, if not confidence, may be entertained that legislation in such a form will never be repeated. In the course of the very full examination of the provisions made by *Jordan* C.J. in an endeavour to elucidate a somewhat different point arising under the same provisions, his Honour said of sec. 20 of Act No. 31 of 1932 (*Transport (Division of Functions) Act* 1932 (N.S.W.) ), that is, the section on which this case turns :—" The natural meaning of this section, read by itself, is that when one finds a reference to

(1) (1935) A.C. 398.

the Board of Commissioners as possessing a power this is to be taken as a reference to the commissioner in whom the power is now vested ; but it may be a clumsy way of trying to say that references to the Board of Commissioners are now to be taken to refer to whichever is the appropriate commissioner of those amongst whom the powers of the board have been distributed " (*Ellis* v. *Commissioner for Main Roads* (1) ). I adopt this statement and proceed to apply it. Sec. 18 of Act No. 3 of 1932, the continuance of which is the matter in question, gives no power, so that, if sec. 20 bears its natural meaning, there is not in sec. 18 a reference to the Board of Commissioners as possessing a power. If, on the other hand, sec. 20 is taken as a clumsy way of saying that references to the board are to be taken to refer to the appropriate commissioner, we are called upon to find " the " appropriate commissioner. But sec. 18 has no distinct application to one rather than another of the new commissioners. Each is equally appropriate, or inappropriate, for its application. It cannot now be taken to refer to all three at once. Sec. 20 does not authorize that. There is no one who can be called " the " appropriate commissioner.

I think the appeal should be allowed.

STARKE J. The appellant in an action in the Supreme Court of New South Wales obtained a verdict against the respondent for £3,750 for damages in respect of the respondent's negligence in the care and management of a highway under its control.

It is contended for the respondent that no larger sum than £2,000 is recoverable. The question depends upon the proper construction of some confused legislation in New South Wales. Prior to 1931, government railways, public tramways and the main roads of the State were managed and controlled by administrative authorities free from political control by the Executive Government. See Acts 1912 No. 30 ; 1930 No. 18 ; 1924 No. 24, and the amendments thereof. Under the *Main Roads Act* 1924 there was no provision for giving notice of action and limiting the amount of damages recoverable, but in the other Acts there was such a provision. In 1931 the *State Transport* (*Co-ordination*) *Act* brought all the author-

(1) Unreported. (Supreme Court of New South Wales, May 1938.)

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ities constituted under the Acts already mentioned under political control (1931 No. 32). In 1932 a *Ministry of Transport Act* (1932 No. 3) was passed. It provided for the appointment of a Minister of Transport and a Department of Transport and a body corporate called the "Board of Commissioners." Upon the commencement of the Act the authorities constituted under the earlier Acts ceased to function, and the duties, powers and authorities and functions imposed upon them or any of them by or under any Act were to be executed by the Board of Commissioners under the Act. But the "Board of Commissioners" was subject to the control of the Minister of Transport. Provisions were made in the Act in the usual form for notice of any action being brought against the commissioners and by sec. 18 it was provided:—"In any action, either under the *Compensation to Relatives Act*, 1897, or otherwise, against the Board of Commissioners in respect of injuries sustained by any person, no larger sum than two thousand pounds shall be recoverable." Some amendments and repeals of the earlier Acts were made (see secs. 21 and 22), but there was no repeal of the whole of the Acts. It cannot be doubted that, if the present action had been brought against the Board of Commissioners constituted under the Act 1932 No. 3, the appellant could not have recovered a larger sum than £2,000. But in November 1932 another Act was passed (1932 No. 31). It is called the *Transport (Division of Functions) Act* 1932. It was an Act to provide for the appointment of a Commissioner for Railways, a Commissioner for Road Transport and Tramways and a Commissioner for Main Roads and for the exercise and performance by such commissioners of the powers, authorities, duties and functions of the Transport Commissioners of New South Wales, to extend such powers and authorities in certain respects, to amend the Act already mentioned and certain other Acts "and for purposes connected therewith." It provided for a Ministry of Transport under the Minister of Transport which should be divided into three departments: Railways, Road Transport and Tramways, and Main Roads, each of which was to be administered by a separate commissioner, who was created a body corporate. Thus, by sec. 6, it is provided that the Commissioner for Main Roads shall be a body corporate under the name of "The Commissioner for Main Roads."

Upon the commencement of this Act the Board of Commissioners ceased to function, its functions were exercisable by the respective commissioners appointed under the Act. Thus, by sec. 6, the Commissioner for Main Roads shall exercise the functions that were immediately before the Act exercised by the Board of Commissioners in respect of main roads. Various provisions are then made for vesting property and funds held by the Board of Commissioners in the respective commissioners appointed under this Act to exercise and perform the functions under or in respect of which such property was held by the Board of Commissioners and for the assumption of liabilities incurred by the Board of Commissioners in respect of the property so vested.

A saving clause was also enacted (sec. 15) providing that matters commenced by the Board of Commissioners might be completed by the respective commissioners appointed under the Act to exercise the function in respect of which such matters were commenced. So debts and moneys recoverable against the Board of Commissioners were made recoverable against the commissioner appointed under the Act to perform the function in respect of which such debt or moneys became recoverable. Similarly each commissioner might pursue the same remedies for the recovery of money claims and the prosecution of actions and proceedings as the Board of Commissioners might have done but for the Act. Agreements &c. entered into with the Board of Commissioners are, it is enacted, deemed to be contracts &c. entered into with the commissioner appointed under the Act to exercise the power or function under or in respect of which such agreements were so entered into.

Any cause of action or proceeding pending or existing immediately before the Act by or against the Board of Commissioners might be continued by or against the commissioner appointed under the Act to exercise the powers or functions under or in respect of which such action or proceeding arose. If any doubt arises in any proceeding, whether before or after the commencement of the Act, as to the commissioner against whom notice of action should be served or action continued or brought, then it is provided that the Minister may nominate the commissioner appointed under the Act against whom the action or proceeding should be commenced.

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Finally there is sec. 20, which gave rise to the main argument in this case. "In the construction, and for the purposes of any Act, by-law, regulation, ordinance, or any other instrument or document whatsoever, of the same or a different kind or nature, any reference to, or to be read, deemed, and taken to refer to the Board of Commissioners shall be read, deemed, and taken to refer to the commissioner appointed under this Act to exercise and perform the power, authority, duty, or function of the Board of Commissioners to which such reference applies." Some amendments are made of former Acts, but in the main those Acts are kept on foot.

The Act 1932 No. 31 only purports to divide functions, and its method is to constitute a Ministry of Transport and divide its functions among three departments. To each department is assigned the powers, functions, property, funds, rights, debts and obligations appropriate to it. But nowhere, so far as I have observed, is there any withdrawal of the limitation of the amount which might be recoverable against the Board of Commissioners or against the substituted authorities in respect of the rights of action which are saved and allowed.

The scheme of the Act is that the commissioners of the three departments shall each in his own department take over the assets liabilities and obligations of the Board of Commissioners which they displace.

It is unlikely, I should think, that the limitation of liability imposed by sec. 18 of the Act 1932 No. 3, and by earlier Acts in the case of the railway and transport authorities, none of which were expressly repealed, should have been withdrawn without any reference whatsoever to the matter in the *Transport (Division of Functions) Act* 1932 No. 31. But it is not, I fear, within legitimate rules of construction to hold that the limitation is retained by implication arising from the general features of the Act 1932 No. 31. The respondent however insists that sec. 20 of the Act 1932 No. 31 incorporates and applies sec. 18 of the Act 1932 No. 3 to the commissioners appointed under the Act 1932 No. 31 to administer the three departments therein mentioned. *Bavin* J., in the Supreme Court, was against this view. "Unless", he said, "that intention is the inescapable consequence of the words used" (in sec. 20), "it

seems to me that we should hold that the plaintiff's ordinary common law rights are unimpaired " (1). I do not follow this, for the common law rights in respect of injuries sustained by any person against transport authorities had already been impaired and the only question was whether the limitation had been carried over against the three commissioners appointed to administer the three departments of transport. The appellant's contention that the limitation was not carried over was rested upon the words of sec. 20. The Act, it was said, provided for the exercise of powers, duties and functions by the transport authorities in New South Wales and the continuance of such powers was not dependent upon sec. 18. The fallacy of this argument is in treating the words of sec. 20 as referring only to the powers, functions and duties carried over to the new commissioners. The words " taken to refer to the commissioner appointed under the Act to exercise and perform the power, authority, duty, or function of the Board of Commissioners to which such reference applies " are descriptive of commissioners of the three departments of transport to which the provisions of sec. 20 are applied.

Another contention was that, assuming that sec. 18 applied to the Commissioner for Main Roads, still it must be restricted to the performance by him of the powers conferred by the Act 1932 No. 31. Additional functions were subsequently conferred upon the Commissioner for Main Roads by the Act of 1936, No. 40, and consequently in exercising those new functions the Commissioner for Main Roads was not protected by sec. 18 of the Act 1932 No. 31. But this argument fails to notice that the *Main Roads Acts* 1924-1931, as amended by the Act 1936 No. 40, are treated as one Act, and are cited as the *Main Roads Act* 1924-1936. (See Act 1936 No. 40, sec. 1). I should add that this argument was based upon the assumption that the injuries of the plaintiff may have arisen from the exercise of the new functions conferred by the Act 1936 No. 40. But if these arguments fail, as I think they should, then the provisions of sec. 20 expressly provide that in the construction and for the purpose of any Act any reference to the Board of Commissioners shall be read, deemed and be taken to refer to the respective commissioner appointed to administer the departments of transport men-

(1) (1938) 38 S.R. (N.S.W.), at p. 151.

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tioned in the Act. In my opinion no difficulty arises in applying sec. 18, which has been kept on foot, distributively and as conferring upon each commissioner of the three departments of transport the immunity set out in sec. 18 of the Act 1932 No. 3, so that in respect of injuries sustained by any person no larger sum than £2,000 is recoverable.

I prefer the construction of the majority in the Supreme Court, followed as it was in the same court in *Ellis* v. *Commissioner for Main Roads* (1), to the restricted meaning which commends itself to this court. It would be well, as the Chief Justice of the Supreme Court of New South Wales observed, if the confused legislation were reviewed by the Parliament of New South Wales and replaced by a statute or statutes setting forth more clearly the powers, functions, obligations and immunities of each commissioner appointed under the *Transport (Division of Functions) Act* 1932 No. 31.

In my judgment this appeal should be dismissed.

DIXON J. The plaintiff in the action, who is the appellant, obtained against the defendant, the Commissioner for Main Roads, a verdict for £3,750. The cause of action was negligence in the care and management of a highway, in consequence of which the plaintiff suffered personal injuries. The accident occurred, we were told, on 6th August 1936, and the negligence complained of was leaving a heap of gravel or road metal as an obstruction in a highway without any proper guard or warning.

The question for decision is whether the limitation to £2,000 imposed by sec. 18 of the *Ministry of Transport Act* 1932 upon the amount of damages for personal injuries which might be recovered against the Board of Commissioners set up by that Act had been made applicable by sec. 20 of the *Transport (Division of Functions) Act* 1932 to the Commissioner for Main Roads, a corporation sole established by the latter Act.

The *Ministry of Transport Act* 1932 remained in operation only for about nine months. To the Board of Commissioners which it constituted, it gave the full title of the Transport Commissioners of New South Wales. Under their single authority it brought the

(1) Unreported. (Supreme Court of New South Wales, May 1938.)

activities and undertakings of a number of bodies including the Railway Commissioners, the Tramway and Omnibus Authorities and the Main Roads Board. The *Transport (Division of Functions) Act* 1932 abandoned this concentration of functions and again placed the various undertakings in separate hands, but, instead of reviving the former authorities, it established new bodies among whom it redistributed the responsibilities borne by the Board of Commissioners. Three provisions imposing conditions upon the bringing of actions against the Board of Commissioners had been introduced into the *Ministry of Transport Act* 1932. Sec. 16 limited to one year the time within which actions might be brought against them " for anything done or purporting to have been done under " that Act, and sec. 17 required one month's notice before such an action was commenced. Sec. 18, with which this appeal is concerned, restricted the amount of damages recoverable for injuries. Unlike the two preceding sections, it did not speak of things done or purporting to be done under the Act. The material words of the provision were :—" In any action . . . against the Board of Commissioners in respect of injuries sustained by any person, no larger sum than two thousand pounds shall be recoverable." The *Transport (Division of Functions) Act* 1932 did not repeal the provisions of the *Ministry of Transport Act.* Having erected new bodies corporate under the names of the Commissioner for Railways, the Commissioner for Road Transport and Tramways and the Commissioner for Main Roads, it transferred or transmitted to them respectively the undertakings and responsibilities denoted by their titles (secs. 3, 4, 5 and 6). What may be regarded, perhaps, as the chief section of the statute provided that the Board of Commissioners should cease to function, and the powers, authorities, duties and functions conferred or imposed upon such Board of Commissioners by or under any Act should be executed and performed by the respective commissioners appointed under the *Transport (Division of Functions) Act*, sec. 14. Sec. 20, upon the interpretation of which the application of sec. 18 of the earlier Act depends, is as follows :—" In the construction, and for the purposes of any Act, by-law, regulation, ordinance, or any other instrument or document whatsoever, of the same or a different kind or nature, any reference to, or to be read,

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deemed, and taken to refer to the Board of Commissioners shall be read, deemed, and taken to refer to the commissioner appointed under this Act to exercise and perform the power, authority, duty, or function of the Board of Commissioners to which such reference applies."

The question is whether this provision carries over to the Commissioner for Main Roads the restriction to £2,000 imposed by sec. 18 of the earlier Act upon the amount of damages recoverable against the Board of Commissioners. Does it give him, in respect of actions brought against him for injuries sustained upon or in connection with highways or works under his authority, the protection enjoyed under sec. 18 of the *Ministry of Transport Act* by the Board of Commissioners ?

I find myself unable to give to the language of sec. 20 of the *Transport* (*Division of Functions*) *Act* a meaning which will bring about this result. It does not appear to me to be fairly open to an interpretation by which it would fix upon a reference in a prior statute or instrument, not a meaning applying to one of the newly established commissioners to the exclusion of the others, but an application indifferently to each in turn or to all three as occasion demands. I am prepared to concede that sec. 20 is a general provision expressed in language chosen because of the width of operation of which it appeared to be capable. In the earlier Act, it had been necessary to provide for the application to the single Board of Commissioners of the various references to the separate responsible authorities in the different statutes and other instruments affecting the undertakings then to be concentrated in the hands of that board. This was done by two paragraphs in sub-sec. (2) of sec. 12, which adopted the form of words with which sec. 20 of the *Transport* (*Division of Functions*) *Act* begins, viz. : " In the construction and for the purposes of any Act, by-law, regulation, ordinance or other instrument or document whatsoever of the same or a different nature." The first paragraph then required that any reference in such an instrument to the minister should " be deemed and taken to refer " to the Minister for Transport, his office and the appropriate branch of the Department of Transport, as the case required. The second paragraph directed that any such reference to the various

antecedent authorities, naming them, should " be read, deemed and taken to refer to the Board of Commissioners." Sec. 20 of the *Transport (Division of Functions) Act*, in speaking of " any reference to, or to be read, deemed, and taken to refer to the Board of Commissioners," contemplates first, express references to the Board of Commissioners either in the *Ministry of Transport Act* or in any statute or other instrument which had come into existence after the establishment of the Board of Commissioners by the *Ministry of Transport Act*, and second, references in earlier Acts and other instruments to the various antecedent authorities which by the second paragraph of sub-sec. 2 of sec. 12 of that Act are to " be read, deemed, and taken to refer to the Board of Commissioners." No doubt the purpose of sec. 20 of the *Transport (Division of Functions) Act* is to distribute the application of the two classes of references to the Board of Commissioners, that is to say, to give both to the first class of direct or immediate references to the board, and to the second class of mediate or transmitted references to the board, a meaning and application which would govern the new separate repositories of the various powers, authorities, duties and functions of the Board of Commissioners according to the relevance of each such reference to the powers, authorities, duties and functions respectively assigned to the repository.

We are here concerned with a direct or immediate reference to the Board of Commissioners. Sec. 18 of the *Ministry of Transport Act* makes a general reference to " any action . . . against the Board of Commissioners in respect of injuries sustained." The reference is general in that it does not distinguish between the undertakings or responsibilities of the Board of Commissioners. The limitation of its liability applies without regard to the class of activity which the Board of Commissioners may have been pursuing when the cause of action against it arose. When sec. 20 of the *Transport (Division of Functions) Act* directs that, in construing any prior Act or instrument and giving effect to its purposes, you are to read, deem and take a reference to the board as a reference to the commissioner appointed by the later Act to exercise the power &c. to which the reference applies it speaks as if the reference will apply to one or other class of power &c. transferred, and

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not to all indiscriminately. The latter part of sec. 20 is inappropriately expressed for the purpose of distributing among all the various new commissioners the application of a general undiscriminating reference to the old board made without relation to any separate part of its undertakings. In the words: "the commissioner appointed under this Act to exercise and perform the power, authority, duty, or function of the Board of Commissioners to which such reference applies," the definite article "the" followed by the relative "which" distinguishes one commissioner from the others and requires a selection amongst them. The words quoted are an attempt to define the particular commissioner who in the case of a given reference is to receive the benefit of the *metastasis* which the section directs. The words "appointed under this Act to exercise and perform the power, authority, duty, or function" constitute the formula adopted by the draftsman for general use in defining the respective commissioners who are to take by devolution. It occurs, for instance, in secs. 15 (1), (2), (3), (4) and (7), 16 and 17, and reflects the phraseology of sec. 14. The formula is doubtless not intended to limit the subject matter devolving, but it is intended to serve as a means of identifying the particular commissioner upon whom it devolves. The expression "to which such reference applies" implies the assumption that a reference in the prior Act or other instrument has an application to one of the now separated classes of powers, authorities, duties, or functions. It may be conceded that it does not require that expressly or by implication the prior document itself shall refer to one class, to the exclusion of the other classes, of powers, authorities, duties or functions concentrated in the Board of Commissioners. But the section supposes that, in seeking to give effect to any prior instrument in the new condition of distributed control which the statute establishes, it will be found that, but for the change, it would have an application to powers, authorities, duties and functions which have been transferred to a particular commissioner, and it says, in effect, that its application shall follow the transfer. Sec. 20 of the *Transport (Division of Functions) Act* means that, for all the purposes of the prior statute in which the reference to the Board of Commissioners occurs, that reference shall be read as if it mentioned, not the board,

but a particular new commissioner. Its language cannot mean that the same reference is to bear three different meanings according to the threefold separation of the purposes of the prior statute. It cannot mean that, when the subject is railways, the reference shall be read as if "Commissioner for Railways" were written, when tramways, as if "Commissioner for Road Transport and Tramways" were written, and when highways, as if "Commissioner for Main Roads" were written. Yet it must operate in this manner upon the general reference contained in sec. 18 of the *Ministry of Transport Act*, if the defendant's contention is to be supported. The form in which sec. 20 is cast appears to me to necessitate an interpretation which confines it to references in prior instruments capable of applying to one class of the transferred powers &c. to the exclusion of other classes. Or, put in another way, I read it as directing that a reference to the Board of Commissioners shall now be read as a reference to one of the new commissioners, but to one only. This means that it could not operate upon references in prior instruments made to the Board of Commissioners in relation to their undertakings generally without discrimination. I do not think the presumption in favour of including the plural in the application of singular nouns is sufficient to overcome such a construction. In arriving at this conclusion I have not attached much weight to the consideration that the Commissioner of Main Roads is seeking to restrict the common-law right of the subject. The question is not whether sec. 20 intends to introduce a new restriction of common-law right, but what is the scope of its general operation. That being fixed, the existing restriction is found to fall either within or outside a description of matters that are continued. But, in my opinion, the language of sec. 20 of the *Transport (Division of Functions) Act* is not wide enough to operate upon sec. 18 of the *Ministry of Transport Act* so as to confer upon the Commissioner for Main Roads an immunity from liability for damages for injuries sustained by any person to a greater amount than £2,000.

It is, perhaps, desirable that I should express my opinion upon two further contentions advanced on the part of the plaintiff appellant, although on the view I have adopted of the meaning of sec. 20 the appeal should succeed. It was contended, in the first place,

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that, upon any view, the protection against liability beyond £2,000 for personal injury could not be enjoyed by the Commissioner for Main Roads in relation to operations carried on by him under or in pursuance of the provisions of sec. 30A or sec. 65 of the *Main Roads Act* 1924-1936, provisions which were introduced ten days before the accident, viz., as from 27th July 1936, by Act No. 40 of that year (secs. 13 (*f*) and 20). The point that the amount of damages was limited was not raised by the defendant at the trial, or mentioned until after verdict, and the plaintiff says that, as it was not shown that the operations out of which his injury arose were not carried on by the commissioner in pursuance of either sec. 30A or sec. 65, the commissioner cannot now avail himself of the limitation. I am not prepared to assent to the view that, if the protection in question did otherwise apply to the Commissioner of Main Roads, nevertheless it would not apply to him when he is acting under sec. 30A or sec. 65. Those sections were introduced by an amendment into the existing statute, which is the source of the commissioner's general authority. According to the assumption made, and contrary to the view I have adopted, at and from the time when his office was established and incorporated the limit was placed upon his liability in respect of all the functions he then assumed. I should have thought that in the performance of the duties subsequently added he possessed all his prior general powers and enjoyed all his existing immunities. The case is quite different from that of *Ellis* v. *Commissioner of Main Roads* (1), in which the decision necessarily turned very much on the words, which occur both in sec. 16 and sec. 17 of the *Ministry of Transport Act*, "anything done or purporting to have been done under this Act."

A point was made on behalf of the plaintiff appellant, in the second place, that the defendant's application to the Full Court of the Supreme Court, which was for a reduction of the verdict to £2,000 or for a new trial, was incompetent or irregular. Assuming, contrary to my own view, the law to be that upon the causes of action declared upon the plaintiff could not lawfully recover more than £2,000, the verdict could not entitle the plaintiff to judgment

(1) Unreported. (Supreme Court of New South Wales, May 1938.)

for more than that sum. At common law a four-day rule for judgment was given on the *postea* in the King's Bench where it was entered with the clerk of the rules, and in the Common Pleas, although judgment was entered on the roll by the prothonotary without a rule, a similar time was given to avoid the judgment by motion *in banco* for a new trial or in arrest of judgment (*Boote, Action at Law* (1814), pp. 171 et seq.). The alterations which were made, first, by 1 Will. IV. c. 7, secs. 2 to 5, and, then, by the *Common Law Procedure Act* 1852, sec. 120, and the Hilary Term Rules 1853, rules 55 et seq., did not deprive the court *in banc* of control of the judgment (cp. sec. 133, *Common Law Procedure Act* 1899 (N.S.W.), and rules 168, 169, 173 and 174 of the *Regulæ Generales*). In any case, sec. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.) might, perhaps, be considered capable of an interpretation wide enough to include the entry by the court *in banco* of a verdict for that amount beyond which a plaintiff is found not to be entitled to recover.

In my opinion the appeal should be allowed with costs, the order of the Supreme Court should be discharged, and the defendant's appeal and application to the Full Court of the Supreme Court should be dismissed with costs.

McTiernan J. In my opinion the appeal should be allowed.

The general scheme and provisions of the *Ministry of Transport Act* of New South Wales, No. 3 of 1932, and the extent to which they have been modified or altered by the *Transport (Division of Functions) Act*, No. 31 of 1932, have been explained in previous judgments.

The crucial question is: What operation, if any, had sec. 20 of Act No. 31 on sec. 18 of Act No. 3? The words, "any reference to, or to be read, deemed, and taken to refer to the Board of Commissioners," which make up the subject and its adjuncts in the sentence comprising sec. 20 of Act No. 31, are wide enough to include (at least) all express references to the Board of Commissioners in any Act, by-law, regulation, ordinance, or any other instrument or document whatsoever. The subject, therefore, is wide enough to include the reference to the Board of Commissioners in sec. 18 of Act No. 3. From this fact arises the difficulty of construction in

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this case ; for, at first sight, it would appear necessary to import the provisions of sec. 20 of Act No. 31 into the provisions of sec. 18 of Act No. 3 for the reason that the latter section contains the words " Board of Commissioners." By sec. 20 of Act No. 31 the legislature intended that, wherever the name " Board of Commissioners " occurred in any Act &c., the name of a commissioner should be substituted. If in any particular case the substitution can possibly be made, then clearly sec. 20 becomes operative in that particular case. But, in the case of sec. 18 of Act No. 3, is it possible to ascertain which commissioner is to be substituted for the Board of Commissioners, or, further, is it possible to determine whether any commissioner can be substituted at all ?

In order to determine which commissioner is to be substituted in any case for the Board of Commissioners, there is only the guidance provided by the whole of the predicate completing the sentence comprising sec. 20. From the predicate it is clear that the name of the commissioner to be substituted for the Board of Commissioners in a particular section of an Act &c. is such commissioner—and he only—appointed under Act No. 31, as, by Act No. 31, has been appointed to exercise and perform that power, authority, duty, or function of the Board of Commissioners which is referred to in the section as appertaining to the Board of Commissioners. The commissioner, therefore, to be substituted is not any commissioner, but only that commissioner who can be traced in this way by the reference to the power, authority, duty, or function in the particular section in which the substitution is to be made. Thus, the key to the determination of which commissioner is to be substituted for the Board of Commissioners is provided by the nature of the power, authority, duty, or function referred to in the section of the Act &c. in which the substitution is to be made.

On considering the construction of the whole of sec. 20 it appears logically that the legislature presupposed that a reference to a power, authority, duty, or function was to be found wherever a reference to the Board of Commissioners had been made. But there are various references in Act No. 3 to the Board of Commissioners in contexts which contain no such references to a power, authority,

duty, or function. Sec. 18 is one such section. It provides, therefore, in its terms no key to solve the problem of which commissioner is to be substituted for the Board of Commissioners where those words occur in that section.

Notwithstanding, therefore, the generality of the words, "any reference to, or to be read, deemed, and taken to refer to the Board of Commissioners," the application of them in practice will be limited to mean "any reference . . . to the Board of Commissioners" in a context which includes also a reference to some power, authority, duty, or function.

It follows that upon its true construction sec. 20 of Act No. 31 does not transmit the immunity conferred on the Board of Commissioners by sec. 18 of Act No. 3 to the respondent, the Commissioner for Main Roads.

On the other questions in the appeal I agree with the reasons of my brother *Dixon* and have nothing to add.

*Appeal allowed with costs. Order of the Supreme Court discharged. In lieu thereof order that the appeal and the application of the defendant to the Full Court of the Supreme Court be dismissed with costs.*

Solicitor for the appellant, *Stephen C. Taperell*, Hornsby, by *H. E. Dale.*

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

J. B.