[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER FOR RAILWAYS (N.S.W.) . . . . . } APPELLANT;
RESPONDENT,

AND

LONDON . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 26, 27; *July* 17.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Workers' Compensation—Railway worker—Fettler—Injury in performance of duties—Permanent incapacity—Employed as messenger but paid wages of fettler—Retirement from railway service—Claim for compensation—Lump sum—Deductibility of sum paid in excess of messenger's rate—Workers' Compensation Act 1926-1941 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 26 *of* 1941), *ss.* 13, 16 (1), (2), (3), 47—*Government Railways Act* 1912-1943 (*N.S.W.*) (*No.* 30 *of* 1912—*No.* 23 *of* 1943), *ss.* 100B, 100C, 100D.

A fettler employed under the provisions of the *Government Railways Act* 1912-1943 (N.S.W.), in July 1933, sustained, in the performance of his duties, a permanent incapacity by the loss of the middle finger of his left hand. From June 1935, until his retirement from the railway service in February 1949, he, being unfitted by his injury for the work of a fettler, was employed as a messenger, but, pursuant to s. 100B of the *Government Railways Act*, at the minimum rate of wages appropriate to a fettler, the excess of the fettler's rate over the messenger's rate for the period he was so employed aggregating the sum of £304 7s. 9d. Upon a claim, brought by the worker upon his retirement, for compensation in terms of s. 16 of the *Workers' Compensation Act* 1926-1941 (N.S.W.) the judge held that the said sum paid under s. 100B of the *Government Railways Act* was not deductible by the Commissioner for Railways from the lump sum claimed by the worker as compensation. This decision was approved by the Supreme Court. On appeal,

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Held, by the whole Court, that the said sum was "salary or wages" within the meaning of those words as used in s. 16 (2) of the *Workers' Compensation Act* 1926-1941 (N.S.W.) and was deductible.

Clark v. *Commissioner for Railways*, (1936) 53 W.N. (N.S.W.) 196, discussed.

Decision of the Supreme Court of New South Wales (Full Court), (1950) 24 W.C.R. 144, reversed.

APPEAL from the Supreme Court of New South Wales.

Caleb London, of 46 Moore Street, Campsie, was on 26th July 1933, an officer in the employ of the Commissioner for Railways (N.S.W.). On that date, whilst working as a fettler, he received an injury to the middle finger of his left hand, arising out of and in the course of his employment, whereby he was incapacitated and became entitled to benefits under the *Workers' Compensation Act* 1926-1941 (N.S.W.).

During the period between the date of the injury and 21st June 1935, he received the sum of £55 4s. 10d. as worker's compensation in respect of his incapacity. Between the last-mentioned date and 26th February 1949, he was unable, by reason of the injury, to perform his former work as a fettler, and in consequence of that disability he was given selected light work as a messenger in one of the departments of the railway, and he received payment in accordance with the provisions of s. 100B of the *Government Railways Act* 1912, as then amended. The payment he so received was the sum of £304 7s. 9d. This was in addition to the sum which he would have received had he been paid at the rate appropriate for a messenger in the service, and represented the difference over that period between the rate for a messenger and the rate for a fettler. London retired from the employ of the commissioner on 26th February 1949, and on 29th November 1949, he made an application under the *Workers' Compensation Act* 1926-1941 in which he claimed compensation from the commissioner in the form of a lump sum under the provisions of s. 16 of the Act. The amount payable under the claim was assessed by a Medical Board on 31st January 1950 to be £240, for the permanent loss of forty per cent of the efficient use of the left hand, the result of the injury. The commissioner claimed to deduct from that amount the sum of £55 4s. 10d. paid to London during and in respect of the period of incapacity between 26th July 1933 and 21st June 1935. London agreed that that deduction was properly made. But the commissioner also claimed to deduct the above-mentioned sum of £304 7s. 9d. This deduction was disputed by London.

The Workers' Compensation Commission held that the matter was covered by the decision in *Clark* v. *Commissioner for Railways* (1) and that the sum of £304 7s. 9d. was not deductible from the lump sum claimed. An award was accordingly made in favour of London for the sum of £240, less only the admitted deduction of £55 4s. 10d.

In a case stated by the judge at the request of the commissioner, under s. 37 (4) of the *Workers' Compensation Act* 1926-1948, the questions of law referred for the decision of the Supreme Court were :—

(a) On the facts proved or admitted, did his Honour err in law in holding that the sum of £304 7s. 9d. paid by the commissioner to London under the provisions of s. 100B of the *Government Railways Act* 1912, as amended—particularly by Act No. 19 of 1936—was not deductible from the sum payable under s. 16 of the *Workers' Compensation Act* 1926-1929 ?

(b) On the facts proved or admitted, should his Honour have held that the said sum of £304 7s. 9d. was deductible from the sum payable under s. 16, by virtue of s. 17 of the *Workers' Compensation Act* ?

(c) On the facts proved or admitted, should his Honour have made an award for the commissioner ?

The Full Court of the Supreme Court (*Street* C.J., *Maxwell* and *Owen* JJ.) held that the said sum of £304 7s. 9d. was not deductible from the lump sum payable under the *Workers' Compensation Act.*

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

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

E. S. Miller K.C. and *P. L. Head*, for the appellant.

J. H. McClemens K.C. and *M. E. Pile*, for the respondent.

Cur. adv. vult.

July 17.

The Court delivered the following written judgment :—

The question upon which the decision of this appeal depends concerns the second paragraph of s. 16 (2) of the *Workers' Compensation Act* 1926-1941 (N.S.W.), that is to say, the second paragraph in the form it took before s. 16 (2) was amended by Act No. 13 of 1942. The question is how that paragraph operates

(1) (1936) 53 W.N. (N.S.W.) 196.

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in relation to s. 100B of the *Government Railways Act* 1912 as amended.

Sub-section (1) of s. 16 provides that the compensation payable by the employer for certain injuries mentioned in a table shall, if the worker so elects, when the injury results in total or partial incapacity, be the amounts indicated in the table.

The respondent, while a fettler employed by the appellant the Commissioner for Railways, received an injury to the middle finger of his left hand. This took place as long ago as 26th July 1933. He was incapacitated by the injury totally for ten days and thereafter partially. The incapacity was permanent. He remained in the employment of the appellant commissioner, though not as a fettler, until 26th February 1949 when he retired. He thereupon elected under s. 16 (1) and claimed an amount based on the table as made applicable to his case by sub-s. (3) of s. 16. That sub-section confers a right to a percentage of an amount indicated in the table where there has not been a total loss of the member or the faculty mentioned in the table but only a permanent loss of its full efficient use. The percentage is to equal the percentage of the diminution of the full efficient use of the member or faculty. The appellant was considered to have suffered a permanent loss of forty per cent of the full efficient use of his left hand, and an amount of £240 was accordingly fixed. But the date of his injury placed his case under the provisions of the second paragraph of sub-s. (2) of s. 16 in the form in which it stood before 1st July 1942, the date of the commencement of Act No. 13 of 1942. By that paragraph it was provided that where such an election (*scil.* as prescribed by sub-s. (1)) has been made, any payment, allowance, benefit, salary or wages which the worker has received and may receive from his employer in respect of the period of incapacity shall be deducted from the amount payable in accordance with the table.

Now from 22nd June 1935 until his retirement on 26th February 1949 the respondent had been employed as a messenger in the Ways and Works Branch of the Railways Department because his injury unfitted him for the work of a fettler, but in pursuance of s. 100B of the *Government Railways Act* the minimum rate of wages which he had been paid was that appropriate, not to a messenger, but to a fettler. Over the whole period the excess of the fettler's rate which he had received over the messenger's rate aggregated £304 7s. 9d. At the time when the appellant commissioner began to pay the respondent wages at fettlers' rates for his services as a messenger s. 100B ran as follows :—" Where any

officer has been injured in the performance of his duties he shall, unless and until he is retired or retires from the Railway Service be paid the salary he was receiving at the date of the injury, except where the injury was caused by his gross negligence or wilful or wrongful act." But a year later, namely, on 22nd June 1936, another provision was substituted for s. 100B by s. 3 of Act No. 19 of 1936. The new provision was to be deemed to have commenced on 1st January 1917, but not so as to affect any action or proceeding concluded before the commencement of Act No. 19 of 1936. The new s. 100B (1), that now in force, is as follows:—"Where an officer has been incapacitated by injury arising out of and in the course of his employment so as to be unable to perform the duties of the classification to which at the date of the injury he had been appointed, he shall, except where such injury was caused by his own serious and wilful misconduct, be paid, during such incapacity, not less than the salary for the time being payable to officers with the same classification and with the same length of service therein as such officer had at the date he received the injury, but such salary shall cease to be payable when such officer is retired from or otherwise leaves the railway service."

What is to be decided is whether the aggregate of the amounts by which the periodical wages or salary of a messenger was exceeded by the rate of wages or salary received by the respondent in consequence of this provision must be deducted in pursuance of s. 16 (2) of the *Workers' Compensation Act* 1926-1941. That means in effect whether within the true meaning of s. 16 (2) the description "payment allowance benefit salary or wages which the worker has received . . . from his employer in respect of the period of incapacity" applies to so much of the salary or wages received by the respondent for his services as a messenger as, in compliance with s. 100B of the *Government Railways Act*, exceeded the rate which otherwise would be payable to him as a messenger.

No point has been made of the difference between the payments received by the respondent up to 22nd June 1936, that is before the substitution of the present s. 100B, and those received afterwards. There is perhaps something to be said for the view that the retrospective adoption of the present s. 100B (1) does not operate to stamp payments actually made in pursuance of the old s. 100B with a new and different character, so that if, as has been decided by the Supreme Court in *Clark* v. *Commissioner for Railways* (1), benefits received under the old s. 100B were not deductible under s. 16 (2), the difference between the fettlers' rate

(1) (1933) 53 W.N. (N.S.W.) 196.

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paid to the respondent during the first year of the period and that for a messenger would not now be deductible. But the amount involved in the point is small and probably the period is too remote for the distinction to be any longer of general importance. At all events no point was made of the distinction, and for the purposes of this appeal it can be disregarded.

In deciding the relation of the second paragraph of s. 16 (2) of the *Workers' Compensation Act* 1926-1941 to payments or parts of payments made in consequence of s. 100B (1) of the *Government Railways Act* it is necessary to determine not only the scope of the former, but also the characterization of the latter. The words contained in par. (ii.) of s. 16 (2) " payment allowance benefit salary or wages which the worker has received or may receive from his employer in respect of the period of incapacity " are very wide and interpreted literally and without restraint by subject matter or context they are undeniably capable of covering the " salary " which s. 100B requires that the incapacitated officer " shall be paid during such incapacity ". But the words " in respect of the period of incapacity ", though capable of a merely temporal meaning, seem to imply a causal connection between the incapacity and the payment allowance benefit salary or wages. It would be natural to understand them as intending that it was not enough that the payment &c. should be made with reference to a division of time which was in fact one in which the incapacity of the officer existed, but that the payment &c. must also be made because the incapacity existed, if not indeed as something compensatory for that fact. In its earlier form s. 100B made injury in the performance of his duties a condition of the officer's rights thereunder and excluded injury caused by gross negligence or wilful or wrongful act. The right conferred was a right to the salary he was receiving at the date of the injury. In that form the sub-section was construed as guarding against the loss by the officer of his status because of his injury and as giving him no right to remuneration except for periods of work but as fixing his (minimum) salary for work done. The Supreme Court in *Clark* v. *Commissioner for Railways* (1) construed s. 16 (2) as inapplicable to salary or wages received pursuant to such a right. *Jordan* C.J. said (2) " I am of opinion that the benefits receivable under s. 100B are not sufficiently related to the worker's period of incapacity to make them deductible under s. 16 ". This means a restrictive construction of s. 16, for clearly enough wages had been received in respect of

(1) (1936) 53 W.N. (N.S.W.) 196.

(2) (1936) 53 W.N. (N.S.W.), at p. 198.

a period and in that period the officer remained under an incapacity and, further, his injury formed the necessary condition upon which depended his right to receive the amount. This appears to involve an interpretation, making it necessary that before an amount is deductible under s. 16 it must be a payment allowance benefit salary or wages made or given because of the incapacity. Section 16 is not the only provision in the *Workers' Compensation Act* dealing with the consequences of the receipt by the worker of benefits described in very general words and so raising an analogous problem of interpretation. Both s. 13 and s. 47, although having other objects and expressed differently, must be governed by much the same controlling considerations. Section 13 provides that in fixing the amount of the weekly payment, regard shall be had to any payment allowance or benefit which the worker may receive from the employer during the period of his incapacity. It will be noticed that this section does not use the words " salary or wages " with " payment allowance and benefit " as does s. 16 and it employs the phrase " during the period " and not " in respect of the period ". It is a provision taken from the English *Workmen's Compensation Act* 1906, 1st Schedule, par. 3. The generality of its words have been restrained by judicial construction to what is received by the workman in respect of the incapacity. In the language of Lord *Atkinson* the provision describes " any payment, allowance, or benefit which the worker should receive from his employer in respect of the injury and the consequent incapacity to earn " (*McDermott* v. *Owners of S.S. Tintoretto* (1)). The construction of s. 13 was considered and explained by this Court in *Thompson* v. *Armstrong & Royse Pty. Ltd.* (2). There *McTiernan*, *Fullagar* and *Kitto* JJ. adopted a restrictive construction of s. 13 confining it to benefits received in respect of the incapacity. The authorities are cited in the judgment of *Fullagar* J., who quoted the foregoing statement of Lord *Atkinson* and set out two passages from decisions of Judge *Perdriau* in which his Honour said that the learned judge was correctly interpreting high English authority. Judge *Perdriau* used the expression " a connecting link between the injury and the benefits, e.g., sick leave on full pay or other benefit which accrues as a result of the injury ". *Kitto* J., after mentioning *McDermott* v. *Owners of S.S. Tintoretto* (3) ; *Considine* v. *McInerney* (4) ; and *Watts* v. *Manchester Corporation* (5), said : " I should think it inconsistent

(1) (1911) A.C. 35, at p. 41.
(2) (1950) 81 C.L.R. 585.
(3) (1911) A.C. 35.
(4) (1916) 2 A.C. 162.
(5) (1917) 1 K.B. 791.

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with the cases last cited to regard s. 13 as applying to all payments made in respect of the period of incapacity by an employer as such, irrespective of the existence or non-existence of any relation between the payments and the incapacity " (1).

Section 47 is the provision which (together with the definition of " employer " in s. 6 (1)) brings the Commissioner of Railways under the liabilities imposed by the Act. Section 47 (1) is as follows :—" This Act shall apply to workers employed by or under the Crown or any Government department to whom this Act would apply if the employer were a private person ; but any such worker shall not, save to the extent indicated in subsection two of this section, be entitled to receive compensation or benefits under this Act as well as benefits under any other Act."

It is apparent that on the facts of the present case a question must exist whether the receipt by the respondent of higher wages pursuant to s. 100B (1) of the *Government Railways Act* operates under s. 47 to preclude him from claiming the benefit of s. 16 of the *Workers' Compensation Act.* But upon the argument of the appeal, when this was pointed out, counsel for the appellant commissioner declined to rely on the section, not, it would seem, because of any view that the provision cannot apply to the facts, but because apparently for some unexplained reason of policy reliance had not been placed upon the provision before the Workers' Compensation Commission.

To ignore the section and decide the case as if it had no place in the Act would not be a satisfactory course. But s. 47 is expressed in wide terms which, like those of s. 13, have by construction been restricted in their application. In *Ex parte Brennan* ; *Re Garside* (2) ; *Jordan* C.J., in delivering the judgment of the Full Court, said of s. 47 : " Obviously, it must be read subject to some limitation, or else a Crown worker who became entitled to receive any benefit of any kind under any Act, although completely unrelated to any injury or incapacity on his part, would stand outside the *Workers' Compensation Act.* It is impossible to suppose that the legislature meant this. I think that the object and effect of the sub-section is to prevent a Crown worker from obtaining workers' compensation in respect of an incapacitating injury if there is some other legislation which entitles him to benefits in respect of that injury. It prevents a Crown worker who becomes entitled under some Act to receive during a period benefits on account of a personal injury arising out of and in the course of his employment which incapaci-

(1) (1950) 81 C.L.R., at p. 624.

(2) (1936) 36 S.R. (N.S.W.) 110 ; 53 W.N. 59, at p. 60.

tates him for work, from being entitled to receive workers' compensation for the same period and the same injury." In one of the passages cited by *Fullagar* J. in *Thompson's Case* (1), from the decisions of Judge *Perdriau* the necessity that there must be a connecting link between the injury and the benefits is ascribed to s. 47. The application of such a restriction to the benefits given by the old form of s. 100B was dealt with in *Sandry's Case* (2) (affirmed (3)), where *Jordan* C.J. said: "Obviously 'benefits' means benefits analogous to the compensation or benefits which are recoverable under the Act". This opinion was accepted in this Court, where the object of s. 47 (1) was said to be to disallow claims which would give for a second time the same kind of benefit as had already been obtained. The benefits to which it referred were those that alleviate or avert the loss which follow incapacity from injury and perhaps the analogous loss which would be suffered by dependants. The language of s. 47 (1) leaves it uncertain whether it disentitles a worker to benefits under other Acts if he receives benefits under the *Workers' Compensation Act* or does no more than disentitle him to benefits under that Act if he obtains benefits under other Acts; but that question does not arise here. Compare *Sandry's Case* (4); *Kirkwood's Case* (5); *Ex parte Brennan*; *Re Garside* (6); *Clark's Case* (7), which contain expressions of differing views upon the point. Sections 13, 16 (2) and 47 (1) are all directed, though in different aspects, to the general problem of possibly overlapping compensatory provisions, they are all three expressed in general language, and it is reasonable to read them as restrained by the same considerations of subject matter and policy. The scope of the second paragraph of s. 16 (2) may accordingly be treated as limited to a payment allowance benefit salary or wage which the worker obtains from his employer in respect of the incapacity, that is to say, in respect of the incapacity to earn consequent upon the injury.

From the meaning of the second paragraph of s. 16 (2) it is now necessary to turn to the very difficult question of the characterization of the benefits obtained under s. 100B (1) of the *Government Railways Act*. The question is whether the benefit which the worker obtains under s. 100B (1) should be characterized as a benefit obtained from his employer in respect of the incapacity consequent upon the injury and therefore within s. 16 (2) or on

(1) (1950) 81 C.L.R., at p. 619.
(2) (1935) 52 W.N. (N.S.W.) 203, at pp. 204, 205.
(3) (1936) 10 A.L.J. 76.
(4) (1935) 52 W.N. (N.S.W.) 203.
(5) (1936) 53 W.N. (N.S.W.) 39.
(6) (1936) 36 S.R. (N.S.W.), at p. 115; 53 W.N., at p. 60.
(7) (1936) 53 W.N. (N.S.W.) 196.

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the contrary the benefit should be characterized as no more than a regulation of minimum wages or salary during future service.

Upon this question certain considerations arising upon s. 100B (1) in its present form may be thought to point to a characterization of it as a mere regulation of minimum wages or salary for future service, and others to a contrary characterization, that of a compensatory benefit. The decision of the question depends upon the greater weight to be attached to one rather than the other set of these considerations, and it is therefore desirable briefly to refer to the more important of them. On the side of treating s. 100B (1) as no more than a provision establishing a minimum rate of salary the first to mention turns upon the simple reference in s. 100B (1) to the salary payable to officers of the same classification and length of service. This gives rise to a difficulty which no doubt forms a consideration favouring the characterizing of s. 100B (1) as merely prescribing a minimum salary for services and not as giving a compensatory benefit. The difficulty begins in the fact that s. 16 (2) requires the deduction of the salary or wages which the worker has received in respect of the period of incapacity. That suggests the whole salary or wages received. It is not contended for the appellant commissioner that the whole of the wages received between 22nd June 1935 and 26th February 1949 by the respondent for his services as a messenger form an aggregate fund which should be "deducted" from the amount otherwise obtainable by the respondent under s. 16 of the *Workers' Compensation Act*. Of course such an aggregate would far exceed the amount so obtainable. Section 100B (1) of the *Government Railways Act* is so expressed as to confer on the officer what looks like only one right, the right of the officer to salary; that is to say, the salary payable to him whilst he remains in the service. It may be true that it makes it payable to him regardless of the question whether while in the service he is able to work and regardless of the ordinary rates of remuneration for the kind of work he does. But the salary appears to be conceived by s. 100B (1) as an indivisible remuneration, not a remuneration falling into two parts, namely, the part appropriate to the work he does and the part appropriate to the classification he held before the injury. Nor can a distinction be perceived in s. 100B (1) between salary for the period when he is able to and does work and salary for the period when, though still in the service, he does not work either because of disablement or because of other reasons. Nevertheless, what the appellant contends for is that the second paragraph of s. 16 (2) of the *Workers' Compensation Act* authorizes apportion-

ment of the salary given by s. 100B (1) of the *Government Railways Act*. The apportionment for the purposes of this case is between so much of the salary as would be appropriate to the work he is put to do calculated at current rates and the difference between that salary and the greater salary belonging to the classification he held before the injury. The contention, however, appears to imply that still another apportionment should be made in a case where the facts demand it. That apportionment is between the salary to which he would be entitled for work done, holidays taken and the like, independently of s. 100B (1), and the salary which under s. 100B (1) he receives for periods of total incapacity or other periods in which he does no work and would, but for s. 100B (1), receive no pay.

The foregoing provide considerations the tendency of which is against treating the benefits of s. 100B (1) of the *Government Railways Act* as constituting payments, allowances, benefits, salary or wages within the meaning of par. (ii.) of s. 16 (2) of the *Workers' Compensation Act*. On the other side there must be reckoned a number of considerations which tend in the contrary direction. In the first place, s. 100B (1) hinges on the officer having suffered incapacity by injury arising out of and in the course of his employment. That is a preliminary condition. It is a further condition that there must be such incapacity as to render the officer unable to perform the duties of the classification to which at the date of the injury he had been appointed. Then there is the negative condition that the injury must not have been caused by his own serious and wilful misconduct. These conditions provide the situation to which the remainder of s. 100B (1) is addressed and it is evident that its purpose is to remedy that situation. It is true that the additional condition that the incapacity must be such as to disable the officer from performing the duties of his classification looks more particularly to the terms of employment in the railway service. But, as the point for consideration is the characterization of the relief given by s. 100B (1), it is a very important consideration that the whole ground upon which it proceeds belongs to the conception of workers' compensation for injury. In the next place the remedy which it gives is to last during the incapacity subject to any earlier termination of the employment by the retirement of the officer or his otherwise leaving the railway service. It is no doubt true that the remedy consists in preserving the salary of his former classification and continuing it, whether he is able to work or not. The difficulty in the case arises from the fact that, as to the greater part of the salary he necessarily earns it

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by his work, and it is only the excess which he owes to s. 100B (1), together with such salary as is paid to him for periods of complete disablement from work.

Section 100B (1) in its present form was placed in the *Government Railways Act* in 1936 in substitution for the former s. 100B for reasons which do not clearly appear. In all probability the reason was that s. 124 of the *Transport Act* 1930 had been framed in a somewhat similar manner. *Clark* v. *Commissioner for Railways* (1) was heard after Act No. 19 of 1936 was passed substituting the present s. 100B (1), and the judgment of the Court does make a reference to it, but not for the purpose of explaining the difference between the old and the new provision. *Jordan* C.J., however, does refer to s. 124 of the *Transport Act* 1930 for the purpose of making such a distinction. The case was treated as within the provision protecting proceedings concluded before the commencement of Act No. 19 of 1936 from the retrospective application of the new s. 100B (1). In dealing with the effect of s. 47 upon s. 100B in its old form his Honour said (2):—"The effect of s. 100B is to fix a rate for an injured worker after he has recovered from his incapacity sufficiently to enable him to return to work for the Railway Commissioner, not to compensate him for the period of his incapacity. The benefits are different in kind and different in period, and, in my opinion, there is nothing in s. 47 which calls for the deduction now claimed. It does not follow that the same considerations would apply to payments made under s. 124 of the Transport Act, 1930. The benefits receivable under that section are incapacity benefits analogous to those provided by the Workers' Compensation Act."

This dictum appears to show that his Honour was of opinion that s. 100B (1) in its new form, closely resembling as it does s. 124 of the *Transport Act* 1930, fell within the description of benefit, as that word is used in s. 47, and that he therefore regarded it as falling within the scope of s. 16 (2), par. (ii.). Although s. 100B (1) in its present form deals with salary as an indivisible recompense for services, it does not seem impossible to regard the second paragraph of s. 16 (2) as necessitating an inquiry into the real character of any sum of money alleged to amount to or to include any payment, allowance, benefit, salary or wages. The inquiry so necessitated would authorize a dissection of any sum of money and the distinction between the occasions on which it or parts of it were paid. In this view it would be s. 16 (2), second paragraph,

(1) (1936) 53 W.N. (N.S.W.) 196.

(2) (1936) 53 W.N. (N.S.W.), at p. 198.

which made it possible to treat the excess of the wage rate payable for fettlers over that payable for messengers as a benefit under s. 16 (2), and also the whole sum of salary if and when paid under s. 100B (1) for a period of disablement as a benefit under s. 16 (2).

Act No. 19 of 1936, which substituted the present s. 100B (1), also introduced s. 100D. An examination of that long and somewhat complicated provision discloses strong reasons for the conclusion that the legislature itself regarded s. 100B in its new form as belonging to the category of compensatory provisions. Act No. 19 of 1936 did not give s. 100D a retrospective commencement as it did s. 100B. But the object of the provision is to deal with the question of the double benefit which otherwise might be obtained by an officer, if he could receive compensation under the *Workers' Compensation Act* and salary at the rate prescribed by the new s. 100B (1) and it provides for the case of injuries sustained by an officer before the commencement of s. 100D as well as for the case of injuries sustained after its commencement. In that way it covers the whole period of the retrospectivity of the new s. 100B, as well as the future. What s. 100D does in the case of an officer who has become entitled to the benefit of s. 100B is to exclude his right to compensation for damage while he remains in the service. But it does this subject to an option on his part. He may elect within a time that is limited to make a claim against the Railways Commissioner for compensation. A claim for damages is also made the subject of an election except where the injury was sustained more than a year before the commencement of the Act.

It is only because the present respondent has left the railway service that he is no longer under the operation of s. 100D, and has ceased to be excluded from claiming under the *Workers' Compensation Act.*

The times limited for making the election, which must be done by notice in writing, vary according to the date when the injury was sustained and to the period of incapacity. It is enough to say that if the injury occurred before s. 100D came into operation, the notice had to be given not more than six months after that date, unless the incapacity arose subsequently for the first time and, in that case, within six months from its so arising, and, if the injury arose after s. 100D came into operation, the notice must be given as soon as practicable and not later than six months from the beginning of the first period of incapacity. If an officer elects or has elected under these provisions, then from the date of the election he is no longer entitled to the benefit of s. 100B. Moreover, and it is most material to the question under decision, if the officer has already received salary under s. 100B, the excess

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of the amounts so received over the salary which he otherwise would have received must be set off against the compensation or damages, as the case may be.

Section 100D (1) (c) and (5) contain elaborate provisions for the case of officers who before the commencement of Act No. 19 of 1936 had made a claim for compensation against the Commissioner for Railways in respect of an injury received before such commencement, an injury by reason of which they would receive the benefits of s. 100B. The principle of these provisions is to exclude such an officer from the benefits of s. 100B unless he elects to the contrary, except in the special case of an officer who has obtained under s. 16 of the *Workers' Compensation Act* an amount payable under the table to that section. In that special case s. 100D (5) (a) provides that the officer is to be excluded from the benefits of s. 100B in respect of any period before the commencement of Act No. 19 of 1936, but as from such commencement is notwithstanding the provisions of s. 47 of the *Workers' Compensation Act* to be entitled to the benefits conferred by s. 100B.

In all other cases if the officer made an election within six months, he came under s. 100B, but was to be paid for a specified period prior to the election only the excess of the amount of salary under s. 100B over what he had received by way of compensation and salary.

The foregoing provisions prevent the difficulties arising which would be caused by any attempt to apply the provision in s. 16 (2) of the *Workers' Compensation Act* requiring the deduction from the amount specified in the table of any payment &c. which the worker may receive to a case where immediately or shortly after an injury an officer elects under s. 16 (1) for an amount in the table. Those difficulties would be considerable if the future payments likely to be received under s. 100B had to be estimated for the purpose. But the importance of s. 100D is not simply that it prevents these difficulties arising. It shows that s. 100B was conceived as a provision the operation of which might be cumulative upon the *Workers' Compensation Act* in compensating for the incapacity: in other words, that s. 100B is compensatory. It provides an additional reason for concluding that the excess portion of the salary under s. 100B is divisible from the balance. Further, the reference which it contains to s. 47 of the *Workers' Compensation Act* indicates that but for the enactment rights conferred by s. 100B would or might have been within the words "benefits under any other Act" made by s. 47 a mutually exclusive alternative with workers' compensation. An examination of s. 100C (2) (b) will show that that provision supports similar inferences. All this

points to the conclusion that s. 100B should be characterized at least in part as a compensation provision.

The decision of the case must depend upon balancing the considerations which have been mentioned above and forming a conclusion as to which set of those considerations preponderates. On the whole, the true view appears to be that s. 100B (1) has a double aspect. In so far as it results in an excess payment being made over that which the officer would earn by the work he does and in so far as it confers upon him a right to salary for periods of disablement and the like, it should be characterized as a provision compensatory for injury, that is as a provision giving a payment, allowance, benefit, salary or wage in respect of the incapacity occasioned by the injury. In its other aspect it does not fall within s. 16 (2), par. (ii.).

This view gives effect to the opinion expressed *obiter* by *Jordan* C.J. in *Clark's Case* (1), an opinion concurred in by *Street* J. and *Bavin* J. It will result in this appeal being allowed and the order of the Supreme Court being discharged. In lieu of that order it should be declared in answer to question (a) in the case stated that the learned judge of the Workers' Compensation Commission did err in holding that the sum mentioned was not deductible, and in answer to question (b) that his Honour should have held that the sum was deductible, and in answer to question (c) that his Honour should have made an award in favour of the appellant commissioner.

Appeal allowed with costs. Order of Supreme Court discharged. In lieu thereof order that it should be declared in answer to question (a) in the case stated that the learned Judge of the Workers' Compensation Commission did err in holding that the sum mentioned was not deductible, and in answer to question (b) that his Honour should have held that the sum was deductible and in answer to question (c) that his Honour should have made an award in favour of the appellant Commissioner for Railways. Order that the respondent pay the appellant's costs in the Supreme Court of the case stated.

Solicitor for the appellant, *S. Burke*, Solicitor for Railways.
Solicitors for the respondent, *Boyland, McClelland & Co.*

J. B.

(1) (1936) 53 W.N. (N.S.W.), at p. 198.