[HIGH COURT OF AUSTRALIA.]

COMMISSIONER FOR GOVERNMENT TRANSPORT (N.S.W.) . . . . . } APPELLANT;
DEFENDANT,

AND

DEACON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3-5;

MELBOURNE, *June* 10.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Workers' Compensation—Commissioner for Government Transport—Officer—Injury—Incapacitated—Employment—Termination—Subsequent treatment—Medical—Hospital—Ambulance—Expenses—Recovery—Mutatis mutandis—Workers' Compensation Act 1926-1942 (*N.S.W.*), *s.* 10 (3) (*c*)—*Transport Act* 1930-1952 (*N.S.W.*), *ss.* 124 (1), (2), (3), 124A, 124B, 124C, 142D.

Sub-section (3) of s. 124 of the *Transport Act* 1930-1952 (N.S.W.) provides:—"(3) An officer who has been incapacitated by injury arising out of and in the course of his employment shall, except where such injury was caused by his own serious and wilful misconduct, be entitled, in addition to any payment under sub-section one or sub-section two of this section, to the cost of such medical or hospital treatment or ambulance service as may be reasonably necessary having regard to the injury received by the officer. The provisions of sub-sections two to seven both inclusive of section ten of the Workers' Compensation Act, 1926-1942, shall, mutatis mutandis, apply to and in respect of such medical or hospital treatment or ambulance service."

Held, that the more natural interpretation of this sub-section is that which makes it accessory to sub-ss. (1) and (2) of s. 124 and confines its operation accordingly to officers who have been incapacitated and who continue to receive or to be eligible to receive the benefit of such sub-sections.

Sub-sections (2) to (7) of s. 10 of the *Workers' Compensation Act* 1926-1942 are incorporated as part of s. 124 (3) in the terms in which they were expressed at the time when such latter sub-section was enacted and are to be applied in its operation without regard to amendments thereto made subsequent to its enactment.

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Having regard to the expression *mutatis mutandis* in s. 124 (3) the reference to the Workers' Compensation Commission in s. 10 (3) of the *Workers' Compensation Act* must be read as the court in which action is brought.

Laumets v. *Commissioner for Railways* (*N.S.W.*) (1953) 89 C.L.R. 15, at p. 23, and *Harvey* v. *Commissioner for Government Transport* (1956) S.R. (N.S.W.) 231, at p. 236; 73 W.N. 152, at p. 155, referred to.

Decision of the Supreme Court of New South Wales (Full Court) (1956) S.R. (N.S.W.) 405; 73 W.N. 506, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the District Court before *Lloyd* D.C.J. and a jury the claim made by the plaintiff, Stanley Thomas Deacon, upon the defendant, the Commissioner for Government Transport, was in respect of salary and hospital and medical expenses arising out of an injury sustained in June 1953 by Deacon whilst he was employed by the commissioner as a bus conductor, and when he fell down a few steps of a bus and struck his back aggravating an injury to which he was prone and which, according to him, had incapacitated him from work and resulted subsequently in him having to have an operation to his spine.

Deacon was admitted to hospital on 27th November 1953 and was there operated upon for causes attributable to the injury. He was compulsorily retired from the transport service on 5th March 1954, and was discharged from the hospital on 27th March 1954. Medical and hospital expenses were incurred by him prior to 5th March 1954 and subsequent to that date until 27th March 1954.

The jury returned a verdict in favour of the plaintiff for the sum of £356 10s. 6d., the full amount claimed.

An appeal by the commissioner was dismissed by the Full Court of the Supreme Court (*Street* C.J. and *Herron* J., *McClemens* J. dissenting) (1), and from that decision the commissioner, by special leave, appealed to the High Court.

Further facts and relevant statutory provisions appear in the judgment hereunder.

B. P. Macfarlan Q.C. (with him *H. J. H. Henchman*), for the appellant. In respect of hospital and medical expenses the only entitlement under s. 124 of the *Transport Act* 1930-1952 (N.S.W.) was while the plaintiff was an officer. The limitations clearly stated in s. 124 are that the amount is payable during incapacity and cease to be payable when he is retired from the transport service. Sub-section (3) was added to s. 124 in 1943 to give a person entitled

(1) (1956) S.R. (N.S.W.) 405; 73 W.N. 506.

to bring an action for salary under sub-s. (1) a right also to claim for hospital and medical expenses during the same period of time that he was entitled to receive salary. Sub-section (3) filled a gap which existed in cases where an officer elected to sue under s. 124. It is not right to presume that Parliament intended the hospital and medical expenses under s. 124 to be of the same amount as under the *Workers' Compensation Act* as varied from time to time. Under s. 10 (3) there is an upward limit of £25 on hospital expenses unless the commission on application made to it from time to time sees fit to order a greater sum to be named in the order. The figure limits are the only parts of s. 10, sub-ss. (2) to (7), which are applicable. The £25 in the case of hospital expenses and medical expenses applies to claims under s. 124. An officer gets the benefit of increases in amounts payable for hospital and medical expenses only if he elects to proceed under the *Workers' Compensation Act*, not if he elects to proceed under the *Transport Act*. Sub-section (3) of s. 124 only applies to justify an award of hospital and medical expenses while the person is incapacitated and is an officer, " incapacity " meaning incapacity from performing the duties of the particular classification to which he or she was appointed. Sub-section (3) is in every respect to be regarded as conferring rights which are ancillary to those conferred by sub-s. (1). While he is an officer a person has three alternatives and when he ceases to be an officer he has two alternatives open to him, the second one only arising if there were negligence. The only authority or right conferred by sub-s. (3) is a right in an officer ; an officer is a person who is appointed to or employed in the service of the commissioner. " An officer " cannot be read as meaning a person who has been an officer or may previously have been an officer. It means a person who is now an officer, i.e. at the time when the hospital and medical expenses were incurred. No costs of hospital or medical expenses in respect of any period or point of time after the date of retirement, are payable under s. 124 (3). A general survey was made in *Shugg* v. *Commissioner for Road Transport and Tramways* (N.S.W.) (1) of the provisions of Pt. II at that time for the purpose of determining whether " officer " in s. 123 was used in some sense other than the defined sense. The salary right terminates upon retirement and, if the incapacity still continues, the right to the salary or compensation flows from some other source. One would not expect the two classes of rights which are conferred by s. 124 to stop at different times, as is the view of the Full Court. The words defining the point of time and bringing about a single point of time at which

(1) (1937) 57 C.L.R. 485.

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the whole section ceases to operate are present in the section and it is relevant and permissible to look to convenience in operation when one is presented with choices of construction. The second paragraph in sub-s. (3) must have some limiting effect on the complete indemnity which has already been given. The words "*mutatis mutandis*" as used mean that for "worker" one should read "officer", and for "employer" one should read "Commissioner". That the 1942 amendments are applicable is shown by the fact that Parliament in sub-s. (3) has directly said that sub-s. (8) of s. 10 is not to apply. Sub-section (8) is the very provision which provides a procedure for making the additional provisions work. The correct interpretation of s. 124 (3) of the *Transport Act* 1930, as amended, appears in the dissenting judgment in the court below.

[DIXON C.J. referred to the *Commissioner for Railways (N.S.W.)* v. *London* (1).]

J. R. Kerr Q.C. (with him *J. H. Wootten*), for the respondent. The rights conferred by sub-ss. (1) and (2) of s. 124 are in terms limited to the period of the incapacity and to the period of the employment, but no such limiting language is to be found in sub-s. (3). If it was intended so to limit its operation nothing would have been easier than to say so expressly. [He referred to *Harvey* v. *Commissioner for Government Transport* (2).] The words "in addition to any payment under sub-section (1) and sub-section (2)" serve merely to confer an additional right to those mentioned and do not assist in determining the duration of the right so conferred. Rights conferred by sub-ss. (1), (2) and (3) are not required to exist contemporaneously.

[McTIERNAN J. referred to *Benson* v. *Commissioner for Road Transport and Tramways* (3).]

There are many places in the Act where the word "officer" is used specifically about a person who has retired or is no longer an actual employee of the commissioner: see ss. 108 (2), 109, 114, 124A, 124B, 124C. Those sections show that the word "officer" is not to be construed on the assumption that it always, and wherever it is, used refers to a person who is still, at the relevant time in relation to the relevant right, an actual employee of the commissioner. Sub-section (1) is part of the general context into which sub-s. (3) fits. Sub-section (3) does not contain the limits contended for on behalf of the appellant even though other sub-sections of the same section do. The new sub-section sets out to create

(1) (1951) 85 C.L.R. 95.
(2) (1956) S.R. (N.S.W.) 231; 73 W.N. 152.
(3) (1935) 35 S.R. (N.S.W.) 348; 52 W.N. 128.

a common law right which would normally be enforced in the common law courts, or courts applying the common law. It is creating a right to the totality of what may emerge as the cost. The *ratio* of *Harvey* v. *Commissioner for Government Transport* (1) is that the restrictions found in sub-s. (1) cannot be found in sub-s. (3). Ordinary common law rights are here created without limitation. Upon its proper construction s. 124 does in fact refer to the *Workers' Compensation Act* with all the amendments to sub-ss. (2) to (7) that have taken place since 1942. The use of the words " as amended from time to time " in some instances but not in others does not indicate in the latter cases that only the Act as it then stood is incorporated, subsequent amendments being ignored : see *Transport Act* 1930-1952, ss. 4 (definition of Commissioner of Police, Public Service), 18 (2), (5), (8), 21 (7).

[TAYLOR J. referred to s. 25 of the *Interpretation Act* of 1897.]

On its correct interpretation, s. 124 (3) of the *Transport Act* must be taken, in referring to the *Workers' Compensation Act* and certain sections of it, to be referring to those sections as amended from time to time ; see *Interpretation Act* of 1897, s. 25. The position in 1942 was that the legislature gave the Commission in this type of case the right to increase the amount and at the same time gave it jurisdiction to do so, but the legislature, when it adopted s. 124 (3) excluded the new sub-s. (8) and the right creating sub-s. (1), but it left in the clause beginning with " Unless ". This method of drafting is highly unsatisfactory because it shifts to the court the responsibility for determining what are necessary changes. All these provisions apply with necessary changes. The reference in the beginning of s. 124 is to a new right. The whole of the provisions are to be applied *mutatis mutandis* ; not such of them as appear to be applicable but all of them are to be so applied. What *mutatis mutandis* says and implies is : when one gets a part that does not seem to be applicable one changes it to the extent necessary to make it applicable. If that be the correct approach then the whole of sub-s. (3) (c) of s. 10 must be omitted. Paragraph (c) of s. 10 (3) exists as a limitation on the previously created right, whether that right be created by the *Workers' Compensation Act* or by the *Transport Act* and if the right created in sub-s. (1) of s. 10 is to be limited in the *Transport Act* by applying a limitation from the *Workers' Compensation Act* then the whole of the limitation must be applied, or none of it. If it is not applicable in its totality it is not applicable at all. The legislature could not have intended that an entirely different limitation should apply to part only.

(1) (1956) S.R. (N.S.W.) 231 ; 73 W.N. 152.

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To hold otherwise would be to impose a limitation on the right to recover medical expenses of an entirely different character from the one contemplated by the legislature. The limitation cannot be applied in part.

B. P. Macfarlan Q.C., in reply.

Cur. adv. vult.

June 10.

THE COURT delivered the following written judgment :—

The appellant, who is the Commissioner for Government Transport, obtained from this Court special leave to appeal in the case before us on the ground that the meaning and application given by the decision of the Supreme Court to s. 124 of the *Transport Act* 1930-1952 produced important consequences in the ordinary course of the administration of his department. It was not thought necessary to trace out precisely the consequences of the decision but, the questions being entirely questions of law, it was considered enough to place the commissioner upon terms as to costs, and special leave was granted.

In the view we take of the appeal, which has now been argued before us, it appears to involve two matters under s. 124. The first is whether, when the officer who has been incapacitated is retired from or leaves the transport service, he must rely for all his compensatory relief thereafter upon the *Workers' Compensation Act* 1926-1954. The second matter is whether, up to the point of time, whatever it is, when s. 124 ceases to afford any such relief to him, there are limits still governing the amount of the cost of medical or hospital treatment or of ambulance service recoverable by him under s. 124 (3), although the same limits no longer operate in the case of claims under the *Workers' Compensation Act* 1926-1954 itself.

The facts out of which these questions arise are simple. The respondent Deacon had joined the transport service in 1948 and in June 1950 was a conductor upon a double decker bus. In that month he must be taken to have sustained an injury arising out of and in the course of his employment. On 27th November 1953 he was admitted to hospital for causes attributable to the injury and there he underwent a surgical operation. On 5th March 1954 he was retired from the service. On 27th March 1954 he was discharged from hospital. He incurred medical and hospital expenses before 5th March 1954 and after 5th March 1954, that is from 5th March to 27th March 1954. The first question is whether the expenses incurred after 5th March are recoverable under s. 124.

The second question is whether, for whatever medical and hospital expenses are recoverable under s. 124, there is an upper limit and what is that limit.

Sub-sections (1) and (2) of s. 124 in their present form go back to Act No. 19 of 1936. Sub-section (3) upon which the questions arise was added by Act No. 23 of 1943. Sub-sections (1), (2) and (3) of s. 100B of the *Government Railways Act* 1912-1955 are in the same form and in that form go back respectively to the same enactments. But in a different form s. 100B has a longer history. It was introduced by Act No. 69 of 1916 into the *Government Railways Act* 1912. When the *Transport Act* 1930 (Act No. 18 of 1930) separated the administration of the tramway services from the railway services, s. 124 was enacted in that Act in the same form as that in which s. 100B then stood.

Section 100B and s. 124 have formed a fruitful source of litigation and the change of form was doubtless a consequence of the difficulties in the provisions which decided cases had disclosed. As sub-ss. (1) and (2) of ss. 100B and 124 had come to stand by the time sub-s. (3) was added to those respective sections their effect was plain enough. Stated without the qualifications and more precise conditions necessarily involved, the operation of sub-ss. (1) and (2) was to confer upon an officer incapacitated by injury arising out of and in the course of his employment in the service a right, so long as he was unable to do the same work as before and as he remained in the service, to receive the same salary as he otherwise would have done. To ensure that the right ended when the service terminated the sub-sections concluded with an express provision: " but such salary shall cease to be payable where such officer is retired from or otherwise leaves the transport (*or* railway) service ". There is a correlative expression in s. 124B of the *Transport Act*, closely corresponding with s. 100D of the *Government Railways Act*, sections both of which in their present form were inserted by Act No. 19 of 1936. These provisions are concerned with an option or election which is conferred upon the officer. The expression in s. 124 which we have called correlative occurs in restating the right the officer possesses unless the election is exercised. Thus s. 124B (1) says that " he shall, to the exclusion of any right *while he remains in the transport service* to compensation or damages against the Commissioner for Road Transport and Tramways, continue to be so entitled during incapacity attributable to the injury and *while he remains in the transport service* unless " etc. It seems clear enough that after an incapacitated man ceases to be an officer of the service these provisions mean that (assuming

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he does not resort to some cause of action for damages at common law) he should rely on the compensatory remedies for his incapacity which the *Workers' Compensation Act* 1926-1954 confers. No doubt theoretically the prima facie requirement of s. 53 of that Act that a claim shall be made within six months of the injury might create a difficulty : for an officer, while he is receiving salary as provided in s. 124, is unlikely to make a contingent claim for workers' compensation in case his service is terminated. But it would readily be found that a reasonable cause existed. It may be remarked that in *Laumets* v. *Commissioner for Railways* (*N.S.W.*) (1), as was there noted, s. 53 was not relied upon.

There was, however, one result of the division between the operation of s. 124 of the *Transport Act* (or of s. 100B of the *Government Railways Act* as the case might be) and of the *Workers' Compensation Act* which must at times have worked to the material disadvantage of the officer who remained in the service. Under s. 10 of the *Workers' Compensation Act*, if and when it applied, the officer who had been incapacitated by injury arising out of and in the course of his employment would be entitled to receive, to the extent provided, the cost of medical treatment, hospital treatment and ambulance service. But until the adoption of sub-s. (3) by Act No. 23 of 1943, an officer who, although incapacitated from work, was receiving his salary as a result of sub-s. (1) or sub-s. (2) of s. 124 (or of s. 100B as the case might be) could not claim as of right to be reimbursed medical, hospital or ambulance services. It was obviously to remedy this disadvantage that sub-s. (3) was added to each of the above sections. That sub-section provides as follows : "(3) An officer who has been incapacitated by injury arising out of and in the course of his employment shall, except where such injury was caused by his own serious and wilful misconduct, be entitled, in addition to any payment under subsection one or subsection two of this section, to the cost of such medical or hospital treatment or ambulance service as may be reasonably necessary having regard to the injury received by the officer. The provisions of subsections two to seven both inclusive of section ten of the Workers' Compensation Act, 1926-1942, shall, mutatis mutandis, apply to and in respect of such medical or hospital treatment or ambulance service." It will be seen that this sub-section does not contain an express statement corresponding with the provision found in sub-ss. (1) and (2) that the salary shall cease to be payable when such officer is retired from or otherwise leaves the transport (or railway) service. Nor can the language of s. 124B (or s. 100D

(1) (1953) 89 C.L.R. 15, at p. 23.

as the case may be) apply: for, being framed before the adoption of sub-s. (3) now under discussion, that language is expressed in terms of compensation or damages. As a result sub-s. (3) has been interpreted by the Supreme Court (*Street* C.J. and *Herron* J., *McClemens* J. dissenting) *Deacon* v. *Commissioner for Government Transport* (1) as continuing to apply to an officer after his service has terminated and entitling him to the expenses of medical and hospital treatment and ambulance services incurred after that event in respect of an injury by which he was incapacitated while he still was in the service.

After some hesitation we have come to the conclusion that on a reading of the provisions contained in ss. 124 to 124B as a whole the more natural interpretation of sub-s. (3) of s. 124 is that which makes it accessory to sub-ss. (1) and (2) and confines its operation accordingly to officers who have been incapacitated and who continue to receive or to be eligible to receive the benefit of sub-s. (1) or sub-s. (2).

In adopting this view we have been influenced by a number of considerations. In the first place it is evident from the last five lines of sub-s. (3) that it proceeds on the basis that s. 10 of the *Workers' Compensation Act* cannot apply of its own force to cases within sub-s. (3). Yet clearly enough once an officer is retired from or otherwise leaves the transport service that Act does apply to him and s. 10 gives the very benefits which sub-s. (3) confers "*mutatis mutandis*". In the second place sub-s. (3) gives these benefits "in addition to any payment under subsection one or subsection two of this section" and it is natural to understand these words as meaning that the benefits were by way of quantitative enlargement of the relief afforded by sub-ss. (1) and (2) and were not new and independent rights to which the duration of the principal right was irrelevant. In the third place the policy and purpose of adding sub-s. (3) is evident enough. It was to fill an omission. Medical, hospital and ambulance expenses were not covered by s. 124 and yet the officer would become entitled to them if, at the cost of losing a substantial part of the payments he was receiving as salary he elected to take workers' compensation. But to fill up this omission it was enough to deal with the period up to the officer's retirement. After that he became entitled to all these benefits under s. 10 of the *Workers' Compensation Act* of its own force. Great weight was attached in the argument for the appellant commissioner to the word "officer" in sub-s. (3). It was said that he was no longer an "officer" when he had retired and therefore

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his qualification ceased. We would not be disposed ourselves to place very much reliance upon this consideration: for, notwithstanding some want of strict logic, it would seem not an unnatural use of language to describe a man as an officer though the rights acquired in that capacity were to be realised after his occupation of the office had terminated. But of course the use of the expression fits in with the general intention which our conclusion ascribes to the draftsman. That means that for the hospital expenses incurred after 5th March 1954 the respondent Deacon must rely on the *Workers' Compensation Act*. It appears that the point was not taken as to medical expenses but, apart from this, medical expenses fall also under the application of the interpretation we have adopted. It governs also the right to ambulance expenses.

The last paragraph of sub-s. (3) requires that sub-ss. (2) to (7) of s. 10 of the *Workers' Compensation Act* 1926-1942 shall *mutatis mutandis* apply to and in respect of such medical or hospital treatment or ambulance service. These sub-sections, among other things, prescribe maximum limits to the weekly cost and to the total cost of hospital treatment, to the total cost of medical treatment and to the total cost of ambulance service. It will be enough to set out s. 10 (3) (c), which deals with the maximum total cost of hospital treatment, and to add that like provisions are made for the maximum cost of medical treatment and ambulance service. Section 10 (3) (c) is as follows:—" The maximum sum for which an employer shall be liable for hospital treatment afforded to a worker in respect of the same injury (whether such treatment is afforded at different stages of the injury or not) shall be twenty-five pounds unless the Commission upon application made from time to time by or on behalf of the worker directs that the employer shall be liable for a further sum to be specified in the order." These limits have been increased since 1942 by a number of successive amendments of the *Workers' Compensation Act*: s. 2 (3) (a) of Act No. 20 of 1945; s. 2 (1) (e) (i) and (iv) of Act No. 40 of 1948; s. 4 (a) (v) to (x) of Act No. 20 of 1951; s. 4 (a) of Act No. 21 of 1953. The last-mentioned amendment results in the limitation of the total cost of hospital treatment being a maximum amount of £150 or such greater sum as may be prescribed. By regulations published in the *Gazette* of 15th January 1954 a greater sum was prescribed, the amount being £300. (See *N.S.W. Rules, Regulations, Bylaws &c.* 1954, p. 10.) In the same way a maximum sum for the cost of medical treatment was prescribed at £300. Sub-paragraph (v) of par. (a) of s. 4 of Act No. 21 of 1953 inserted in s. 10 of the *Workers' Compensation Act* 1926 as amended the following sub-s. (9):

"Any regulation prescribing a greater sum than that prescribed by this section for medical or hospital treatment or ambulance service may provide that such greater sum shall apply to medical or hospital treatment or ambulance service after the date such regulation takes effect in respect of an injury received before such date as well as to medical or hospital treatment or ambulance service in respect of an injury received after such date." The regulations referred to provided that the sums prescribed thereby should apply to medical or hospital treatment after the date of the regulation taking effect in respect of an injury received before such date as well as to medical or hospital treatment in respect of any injury received after such date. These regulations were replaced by regulations gazetted on 3rd September 1954 having the same effect. (See *N.S.W. Rules, Regulations, Bylaws &c.*, 1954, pp. 265, 266.)

On the view we have already expressed no hospital or medical expenses incurred after the date of the respondent Deacon's compulsory retirement from the transport service are recoverable by him under s. 124. But up to 5th March 1954 he had incurred such expenses which appear to exceed the maxima allowed respectively for hospital and medical treatment by s. 10 of the *Workers' Compensation Act* 1926-1942, that is to say by s. 10 of that Act as it stood when s. 124 (3) was introduced.

The limit prescribed by s. 10 of the *Workers' Compensation Act* then for hospital treatment was £25, subject, of course, to the power of the Commission to direct a further sum from time to time. The limit of £25 was exceeded in the present case and so was the sum of £150, certainly if the cost of treatment is taken up to 27th March 1954 and is not disallowed under s. 124 after 5th March, as our view of the meaning of s. 124 (3) would require.

For the better understanding of s. 10 (3) (c) as amended by the Act No. 21 of 1953 and affected by the regulation it is well to set out the resulting text of that paragraph; it is as follows:—(c) The maximum sum for which an employer shall be liable for hospital treatment afforded to a worker in respect of the same injury (whether such treatment is afforded at different stages of the injury or not) shall be £150 or such greater sum as may be prescribed (*scil.* £300) unless the Commission upon application made from time to time by or on behalf of the worker directs that the employer shall be liable for a further sum to be specified in the order.

It is evident, if this provision, together with the prescribed sum of £300 which we have inserted in the foregoing for clearness, are applicable, that no further difficulty remains in the recovery of the full amount of the expenses for medical and hospital treatment,

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that is to say up to 5th March 1954 according to our view of s. 124 (3). But can the provision be applied in its present form ? Section 124 (3) speaks of " the provisions of sub-sections two to seven both inclusive of section ten of the *Workers' Compensation Act*, 1926-1942 ". Is it possible to treat this as covering the provisions so identified as they might be subsequently amended ?

Section 10A of the *Acts Interpretation Act* 1901-1950 (Cth.) has no counterpart in New South Wales. It is true that s. 25 of the *Interpretation Act* of 1897 of the State provides that where an Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted. But we are unable to regard that provision as covering such a process of amendment as has occurred in s. 10. Section 25 is directed to the not uncommon case of a repeal followed by a replacement of the same provision even though modified. Moreover it is concerned with " references ". Here we have more than a reference : we have a referential adoption as law equivalent to a positive independent enactment. Nor do we think it possible to construe that referential adoption as itself conveying what may be called an ambulatory intention to incorporate the provisions in whatever shape they may afterwards be thrown by amendment. We think that sub-ss. (2) to (7) of s. 10 are simply incorporated as part of s. 124 (3) in the terms in which they were expressed at the time and all that remains is to apply the sub-sections. The result may be due to a legislative oversight, but even if we knew that to be so it could make no difference.

In applying to s. 124 (3) of the *Transport Act* sub-ss. (2) to (7) of s. 10 of the *Workers' Compensation Act* there is great difficulty. The difficulty is occasioned by the vague Latin phrase *mutatis mutandis*. It is easy to see that, among the *mutanda*, the things that must be changed, is the clause " unless the Commission upon application made from time to time by or on behalf of the worker directs that the employer shall be liable for a further sum to be specified in the order ".

It could not be the intention that an application under s. 124 should be made to the Commission. The Commission was excluded when the earlier version of s. 100B of the *Government Railways Act* was dropped. Moreover the deliberate omission of sub-s. (8) of s. 10 from the provisions adopted confirms the view that no reference to the Commission was intended. But to see that the clause must be changed, that it is one of the *mutanda*, is one thing. To know into what it is to be changed is another. All that can be done is

to realise that the legislature assumed that counterparts for the various elements in s. 10 were to be found and then to attempt to identify them. So proceeding it seems clear enough that a tribunal capable of making " orders " is to be fixed upon. Surely it can be identified as none other than the court in which suit is brought to enforce s. 124. We agree in the view expressed on this point by *Street* C.J., *Roper* C.J. in Eq. and *Herron* J. in *Harvey* v. *Commissioner for Government Transport* (1). In this particular case the District Court did not itself make an order for the increase of the maximum and in fact the District Court left the question of increasing the limit to the jury. But this appeal was not brought for the purpose of correcting such an error affecting only the particular case.

We think the appeal should be allowed. Strictly speaking there should be a new trial, but no doubt the parties will agree on a course obviating further proceedings. The appellant should bear the costs of this appeal, abide his costs in the Supreme Court and pay the costs in the District Court.

Appeal allowed. Order of the Supreme Court discharged. Further consideration of the order to be made in lieu thereof adjourned with a view to enabling the parties to agree thereto and obviate the necessity of a new trial.

Pursuant to the condition of the order of this Court granting special leave to appeal order that the appellant pay the respondent's costs of this appeal, abide his own costs of his appeal to the Supreme Court from the District Court and pay the respondent's costs of the action in the District Court.

Solicitor for the appellant, *R. W. Scotter* (Solicitor for Government Transport).

Solicitors for the respondent, *Abram Landa & Co.*

J. B.

(1) (1956) S.R. (N.S.W.) 231, at p. 236; 73 W.N. 152, at p. 155.