

[HIGH COURT OF AUSTRALIA.]

BOND PLAINTIFF;
 AND
 THE COMMONWEALTH OF AUSTRALIA . DEFENDANT.

High Court Procedure Rules, Order XXI.—The Commonwealth of Australia Constitution Act (63 & 64 Vict.) c. 12 ss. 69, 84—Commonwealth Public Service Act 1902 (No. 5 of 1902) s. 78 (1)—Public Service Act 1900 (Vict.) (No. 1721) s. 19—Demurrers—Cross-demurrers—Right to begin—Reading Pleadings—Hearing two counsel—Transferred department—Officer retained—Existing and accruing rights—Payment of salary—Appropriation—State Statutes—Construction by State Court—Recognition by High Court.

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Nov. 18, 19.

Griffith, C.J.

On demurrers two counsel will be heard.

Upon the transference of a department of a State to the Commonwealth the rights of the officers of the department are definitely ascertained and settled, and an officer in such a department who is retained in the service of the Commonwealth preserves all his "existing and accruing rights."

Those rights include a right to be retained in the service at his existing rate of remuneration until his engagement is terminated or its conditions are varied by a competent authority.

Sec. 78 (1) of the *Commonwealth Public Service Act* has no operation upon the "existing rights" declared by the *Constitution Act* to be preserved, and sec. 84 of the *Constitution Act* operates as a charge upon the Commonwealth revenue of a sufficient sum to give effect to it, and as a sufficient authority to the Executive Government of the Commonwealth to make the necessary payments to the persons entitled to receive them.

Semble : The High Court will be reluctant, as a general rule, to put a different construction upon the Statutes of a State from that which the Supreme Court of the State itself has declared to be their true construction ; at any rate unless its decision is directly invited by way of appeal, either from the same Court, or from the Court of another State in a case involving the construction of identical words.

DEMURRER.

The Pleadings were as follows :—

" STATEMENT OF CLAIM.

" 1. The plaintiff was on the 28th day of February, 1901, and at all times material prior thereto, an officer of the Post and

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Telegraph Department of the Public Service of the State of Victoria, and on the said 28th day of February, 1901, and at all times material prior thereto, discharged the duties of a letter carrier in the said Department within the said State.

“ 2. On the said 28th day of February, 1901, plaintiff was entitled by virtue of the Public Service Acts of the State of Victoria to receive a salary in respect of his services as such officer at the rate of £150 per annum.

“ 3. On the 1st day of March, 1901, the said Post and Telegraph Department became transferred to the Commonwealth.

“ 4. On the 1st day of March, 1901, the plaintiff as such officer as aforesaid became subject to the control of the Executive Government of the Commonwealth, and from the said 1st day of March, 1901, to the 1st day of September, 1903, inclusive, remained in the service of the Commonwealth, and during such period discharged the duties of a letter carrier in the Post and Telegraph Department of the Commonwealth.

“ 5. The plaintiff has received from the Commonwealth during the whole of the said period from 1st March, 1901, to September 1st, 1903, in respect of such services a salary at the rate of £132 per annum and no more.

“ 6. Under the provisions of the *Commonwealth of Australia Constitution Act*, and the *Commonwealth Public Service Act* 1902, and the Regulations made thereunder, the plaintiff is entitled to be paid in respect of such services a salary at the same rate as that which he was entitled to receive under the Public Service Acts of the State of Victoria in force on the said 28th day of February, 1901.

“ 7. The amount actually paid in salary to the plaintiff by the Commonwealth for the period 1st day of March, 1901, to 1st day of September, 1903, does not exceed £330, whereas the proportion due to him by reason of the foregoing circumstances amounts to £375.

“ 8. The plaintiff is entitled to arrears of such salary, £45.

“ The plaintiff claims £45.

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“The defendant says that the statement of claim is bad in law for that :—

“1. It is not alleged therein that the Commonwealth Parliament has appropriated any sum out of the consolidated revenue to pay the alleged salary claimed by the plaintiff in this action.

“The defendant will rely upon the provisions of sec. 78 (I.) of the *Commonwealth Public Service Act 1902*.

“2. Neither sec. 84 of the *Commonwealth of Australia Constitution Act* nor secs. 18 and 80 of the said *Public Service Act* nor Regulation 100 of the Regulations made thereunder gives the plaintiff a legal enforceable right to be paid by the Commonwealth under the circumstances stated in the statement of claim a salary at the same rate as that which he was entitled to receive under the Public Service Acts of the State of Victoria in force on the said 28th day of February, 1901.

“3. If contrary to what the defendant contends the said Regulation 100 purports to give the plaintiff an enforceable legal right to be paid by the Commonwealth of Australia a salary at the said rate as aforesaid, such Regulation is *ultra vires* and void.

“4. This applies to the whole of the plaintiff’s claim.”

Regulation 100 referred to is as follows :—

“Notwithstanding anything contained in these regulations officers may until the Commissioner has made full enquiries and classified them continue to receive the salaries or wages provided under the State Acts or Regulations but thereafter shall not continue to receive such salary or wages unless approved by the Governor-General upon the recommendation of the Commissioner.”

Mitchell and *Lewers* in support of the demurrer.

Isaacs, K.C., *Cussen*, and *Macfarlan* for the plaintiff.

Mitchell. It is contended that the party supporting the demurrer has the right to begin.

[GRIFFITH, C.J.—That was the usual practice, except when there are cross demurrers. Then the plaintiff begins].

Demurrers have been abolished in the Victorian Courts ever since the Rules under the *Judicature Act 1883* came into operation, and we are in doubt as to whether the pleadings should be read.

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[GRIFFITH, C.J.—It is not necessary to read the pleadings. By Order XXI., r. 15, they are to be left at the Chambers of the Judge four days at least before the demurrer is set down for argument. It is only necessary to shortly state their purport and the points raised].

Under sec. 84 of the Constitution it is provided that, in case of a transfer of a State Department to the Commonwealth, an officer retained in the service of the Commonwealth shall preserve all his “existing and accruing rights,” and, for the calculation of his salary, it shall be taken to be that paid to him by the State at the time of the transfer. Sec. 18 of the *Commonwealth Public Service Act* 1902 provides that officers in the Professional and General Divisions shall be paid such salaries and wages in accordance with such fixed amounts or scales as may be prescribed, but that section of itself gives no particular salary. Sec 80 (a) of that Act provides that the Governor-General may make regulations for determining the limits of salaries and wages to be paid. The regulation made thereunder is Regulation 100, made 15th December, 1902; but that only authorizes the Government to pay officers at the same rate as they had from the State; it does not make it compulsory on them to pay the same rate. Sec. 78 (1) provides that:—“Nothing in this Act shall authorize the expenditure of a greater sum out of the Consolidated Revenue Fund by way of payment of any salary than is from time to time appropriated by the Parliament for the purpose.” That is an overriding section. It is contended by the other side that sec. 84 of the Constitution gives the plaintiff an indefeasible right to receive the same salary as he had been receiving, so that the Commonwealth Parliament would have no power to alter his salary. The question is, what is the meaning of the words “existing and accruing rights” in sec. 84 of the Constitution. By sec. 121 of *Victorian Public Service Act* 1890 his services might have been dispensed with at any time.

The plaintiff was a member of the non-clerical division, and, by sec. 28 of that Act, he was to be paid such salary as might be provided in the Annual Appropriation Act. By sec. 19 of the *Victorian Public Service Act* 1900, he was entitled to receive a salary equal to the highest salary then payable to an officer of

corresponding position in any Australian Colony, with the proviso that this section did not entitle him to receive more than £156 per annum. For the purpose of this demurrer, it must be held, that the plaintiff was entitled to a salary of £150 a year. That cannot be disputed in accordance with *Miller v. The King*, 24 A.L.T., 150; 28 V.L.R., 530. Following that decision a judgment has been obtained by the plaintiff on that basis, and the defendant's contention is that, although he has the right to that salary, his services may be dispensed with at any moment. Sec. 52 (II.) of the Constitution provides that the Parliament shall have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to matters relating to any Department of the Public Service the control of which is transferred to the Executive Government of the Commonwealth; but, if the plaintiff's contention were correct, any alteration of the conditions under which a transferred officer served a State would be an interference with his existing rights, and therefore could not be carried into effect by the Commonwealth Parliament. It could not have been intended that his existing rights should be preserved, not as against the State, but as against the Commonwealth. "Existing and accruing rights" cannot refer to salary. By sec. 83 of the Constitution it is provided that no money is to be drawn from the Treasury except under appropriation, but that, until the expiration of one month after the first meeting of Parliament, the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any transferred Department. After that month, Parliament is to provide for the payment of the salary, and therefore it has control over the money. By inference that shows that these words were not intended to include salaries under sec. 84. The plaintiff's existing rights as against the State were to be paid a salary, to a year's leave after 20 years service, and not to be sent out of the State; but it could not be intended that the Commonwealth Government should not have the right to send him out of the State if the exigencies of business required it. Some limitation must be placed on the words. The mere fact of putting all on the same footing must interfere with someone's existing rights.

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Sec. 85 (IV.) of the Constitution provides that the Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect to transferred departments, and there are certain provisions in sec. 84 as to pensions; but there are no words giving a transferred officer the same rights against the Commonwealth as he had against the State. The words "shall preserve all his existing and accruing rights" in sec. 60 of the *Commonwealth Public Service Act* refer to the time of the passing of the Constitution on the 9th July. The Victorian *Public Service Act* 1900, which increased the plaintiff's salary, came into force on the 27th December, 1900. The transfer of the department in which the plaintiff was engaged was in 1901. Sec. 84 of the Constitution gives no date as to when the plaintiff's existing and accruing rights are to be determined; but it is submitted that it is to be at the time of the passing of the Constitution Act, so that State, after the passing of that Act, could not give its servants privileges they would not otherwise have had. It was not contemplated that rights were to be dealt with so as to injuriously affect the Commonwealth. It could not have been intended to take away the power of the purse from the Commonwealth Parliament with regard to transferred officers, and therefore the words "existing rights" cannot include the right to continue to receive salary at a fixed rate, and to be employed in a particular State. The existing right was to be paid a certain salary until either the State or, after the transfer, the Commonwealth Parliament had done something to interfere with that right. Having regard to sec. 83 of the Constitution it would be extraordinary if it were intended to include something which amounted to a specific appropriation of the amount of the salaries transferred officers were receiving in the different States. The only contract entered into with the plaintiff was that, if he performed his work, he would be paid if Parliament voted the money. *Churchward v. The Queen*, L.R. 1 Q.B., 173.

The question was raised whether more than one counsel could be heard on each side.

GRIFFITH, C.J. In England at Common Law one counsel only was heard, but in Chancery it was the practice to hear two

counsel. The hearing of only one counsel was a perfectly arbitrary rule, and as demurrers will generally raise important questions, I think it better to adopt the practice of hearing two counsel, which is the practice in Queensland.

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Isaacs, K.C. It is not necessary to decide whether the Commonwealth Parliament can or cannot take away a right because it has not done so in this case. Sec. 6 of the *Commonwealth Public Service Act* 1902 provides that every officer in a transferred department is to preserve all his existing and accruing rights. This matter must be argued on the assumption that Parliament has not only not assumed to take away rights, but has declared that they shall continue. If there were a Regulation taking away rights, the plaintiff might be forced to argue that such regulation was *ultra vires*, but that is not so. If the plaintiff can show that this is an existing right under sec. 84 of the Constitution he is entitled to judgment, apart from the powers of the Commonwealth Government. Although the State paid the plaintiff only £132 a year, the State Court decided that he had a right to £150 a year, and the Full Court, on the authority of *Miller v. The King* (*supra*), dismissed the appeal. The plaintiff is entitled to £150 a year as long as he is in the service of the Commonwealth. Neither sec. 17 nor sec. 18 of the *Commonwealth Public Service Act* 1902 fixes the amount of the salary, but sec. 19 does fix the amount. Officers would have no right to be paid any salary until the Appropriation Act was passed, but no such Act is necessary for fixing the amount of a salary. An Appropriation Act is necessary for making the money legally available, but a declaration of right can be asked for although there has been no Appropriation Act. Sec. 60 of the same Act is an expression of intention to preserve existing rights. The Auditor-General would see that the money was legally available. By sec. 69 of the Constitution certain departments are to be transferred on dates to be proclaimed. Under sec. 84 of that Act the Commonwealth might retain none of the State officers, but every officer not retained has any rights he may have against the State retained. An Appropriation Act is not necessary for the purpose of determining rights. *The*

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 BOND the Commonwealth Public Account except in the manner pro-
 v. vided by that Act. Sec. 81 of the Constitution provides that
 THE COMMON- all moneys are to form one Consolidated Revenue Fund, and
 WEALTH OF sec. 83 provides that no money shall be drawn from the Treasury
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 amount is certain, and a declaratory order can be made, although
 no order for payment can be made until the money has been
 appropriated. *Barraclough v. Brown* (1897) A.C., at p. 623.
 Sec. 19 of the *Commonwealth Public Service Act* 1902 provides
 that an officer is to receive payment in accordance with the
 amount fixed. Regulation 100 is an interim provision, and
 means that, until grading has been done all over the Common-
 wealth, an officer is to receive the same salary as he did in the
 State. At the moment the Commonwealth came into existence
 there was a cleavage, and the rights were ascertained as to
 salary, pension rights, &c. If a man's salary could be cut down
 without the intervention of Parliament, his pension right might
 be greatly affected. Under Sec. 19 of the *Victorian Public*
Service Act 1900 the plaintiff is entitled to £150 a year. That
 was an existing right when he came into the Commonwealth
 service, and he is entitled to payment. *Fisher v. The Queen*, 26
 V.L.R., at pp. 794, 797. Parliament may say that it will not
 pass the money, but it is not going to consider the position of
 every officer.

Mitchell in reply.

Cur. adv. vult.

GRIFFITH, C.J., read the following judgment. The Constitution provided (sec. 69) that on a date or dates to be proclaimed by the Governor-General the following departments of the public service of each State should become transferred to the Commonwealth, namely—Posts, telegraphs, and telephones; naval and military defence; light-houses, light-ships, beacons, and buoys; and quarantine; and that the departments of Customs and Excise in each State should become transferred to the Commonwealth on its establishment. Section 84 provided that when any department

of the public service of a State should become transferred to the Commonwealth all officers of the department should become subject to the control of the Executive Government of the Commonwealth; that any such officer who was not retained in the service of the Commonwealth should, unless he were appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation payable under the law of the State on the abolition of his office; and that any such officer who should be retained in the service of the Commonwealth should preserve all his existing and accruing rights, and should be entitled to retire from office at the time, and on the pension or retiring allowance, which would have been permitted by the law of the State if his service with the Commonwealth had been a continuance of his service with the State. Then followed provisions regulating the payment of such pensions or allowances and the apportionment of the amounts between the State and the Commonwealth. Upon the transference, therefore, of a department of a State to the Commonwealth, the rights of the officers of the department were to be definitely ascertained and settled. They might be "retained" in the service of the Commonwealth, in which case they were to retain "all their existing and accruing rights"; or they might be "not retained," in which case, unless appointed to an office of equal emolument in the State, they were to be treated as State officers whose offices had been abolished.

The date appointed for the transference of the Post and Telegraph Departments of the States to the Commonwealth was 1st March, 1901. On that date, therefore, the rights of the several officers in those departments were to be determined.

The plaintiff was at the date of the transfer an officer of the Post and Telegraph Department of the State of Victoria. He was retained in the service of the Commonwealth, and thereupon he preserved all his "existing and accruing rights." He claims to have been entitled at that time to receive a salary at the rate of £150 per annum, and to be still entitled to receive a salary at the same rate from the Commonwealth. He has, however, actually been paid at the rate of £132 per annum only, and this action is brought to enforce his right to the difference. It was

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stated in argument that he was, at the time of the transfer, in actual receipt of the smaller sum only, and that the Commonwealth Government have continued to pay him at the same rate. His claim is based in the first place on the provision of the Constitution already referred to, and in the second place on the provisions of the *Commonwealth Public Service Act* 1902 (No. 5 of 1902), which came into operation on 1st January, 1903.

The defendants demur to the statement of claim, substantially on the grounds that the Constitution does not confer on the plaintiff any enforceable right such as that claimed under it, and that, regarding his claim as based on the *Public Service Act*, it is not enforceable in a Court of law by reason of the provisions of sec. 78 (1) of that Act, which provides that:—"Nothing in this Act shall authorize the expenditure of any greater sum out of the Consolidated Revenue Fund by way of payment of any salary than is from time to time appropriated by the Parliament for that purpose." This, it is contended, is an overriding section, the effect of which is that, whatever rights to salary are conferred by the Act, they are subject to the condition that a sum shall have been appropriated by Parliament from time to time for payment of the salary at the rate claimed.

This section, however, has no operation upon the existing rights, whatever they are, which are declared by the Constitution to be preserved. That provision of the Constitution operates, in my opinion, as a charge upon the Commonwealth Revenue of a sufficient sum to give effect to it, and as a sufficient authority to the Executive Government of the Commonwealth to make the necessary payments to the persons entitled to receive them. What, then, were the "existing rights" of the plaintiff as an officer of the State of Victoria at the time of the transfer? It is alleged in the statement of claim as a fact, and admitted, so far as the allegation is one of fact, by the demurrer, that he was then entitled under the Public Service Acts of Victoria to receive a salary in respect of his service as such officer at the rate of £150 per annum. So far as this is an allegation of a matter of law, there is probably no admission binding upon the Court. But it has been decided by Madden, C.J., and by the Supreme Court of Victoria on appeal, in a litigation between the present plaintiff and the Government of Victoria, that the allegation is

true in law as well as in fact. This decision has not been appealed from, and its correctness is not now impeachable as between the plaintiff and the State of Victoria. This Court would, I think, in any case, be reluctant, as a general rule, to put a different construction upon the Statutes of a State from that which the Supreme Court of the State itself has declared to be their true construction; at any rate, unless its decision were directly invited by way of appeal, either from the same Court or from the Supreme Court of another State in a case involving the construction of identical words. But I am relieved from the consideration of any such question, and am asked to deal with the case on the basis that the plaintiff would, if he had continued in the State service, have been entitled to receive a salary at the rate of £150 per annum until that salary was reduced by some authority competent under the State laws to make the reduction. I may, however, be permitted to say for myself that I cannot see any ground for doubting the correctness of the decision.

For the defendants it is contended that the term "existing rights" refers only to pensions, and does not extend to a right to receive a salary. On this it may be remarked that the word "accruing" seems especially apt to deal with an inchoate but incomplete right to a pension, while the term "existing" would *prima facie* appear to cover both a completely earned right to a pension and whatever other rights the officer might have. Now, what are the rights of an officer in the Public Service? Are they different from the rights of any other person who is in the service of another, except so far as a difference is made by statute? In my opinion a public servant, like any other servant, is entitled as against his employer to receive remuneration for his services at the rate agreed between them, whether the terms of that agreement are to be made out from a statute or from a written or verbal agreement or otherwise. Further, when the rate of remuneration has once been fixed, it is presumed to continue at the same rate so long as the engagement lasts, unless otherwise stipulated by the original agreement or by a fresh agreement (still using that term as potentially including a statute). If it is a condition of the existing agreement that it may be terminated by either party at will or on the happening of a particular event, or that its terms may be altered by a superior authority, then

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the rights of the servant are to that extent conditional and not absolute. The rights of a public servant or any other servant are, in my opinion, in this respect analogous to the rights of any other person under agreement with another. If the rights of a superior owner of lands are transferred by competent authority to another superior, the existing tenures of the lands held under him being declared to be preserved, it could hardly be contended that the new superior would have as against the tenants either greater or lesser rights or obligations than his predecessor had.

In my judgment, therefore, the existing rights of the plaintiff at the time of the transfer included a right to be continued in the service of the State until his engagement was lawfully terminated, and a right to continue to receive a salary at the then existing rate until that rate was lawfully reduced by a competent authority. It was contended for the plaintiff that this latter qualification ought not to be added, because, it was said, the preservation of his existing rights precludes any such reduction. It is not, however, necessary, and, not being necessary, it is certainly not desirable, to consider this question in the present case. For it is not suggested that any action has up to the present time been taken by any competent authority to make any reduction. Nor is it necessary to consider what, if any, is the competent authority to make it.

For these reasons I am of opinion that, upon the facts as alleged, the plaintiff is still entitled to receive a salary at the rate of £150 per annum.

It therefore becomes unnecessary to consider the question raised under sec. 78 of the Public Service Act. I think it right, however, to say that, as at present advised, there appears to me to be an essential difference between an obligation which is incomplete by reason of the non-fulfilment of a condition attached by law to the obligation itself, and an obligation which, although complete, is not enforceable by process of a Court of law by reason of Constitutional considerations affecting the character or status of the public authority against whom it is desired to establish it.

Solicitors for plaintiff: *Rigby & Fielding.*

Solicitor for defendant: *Powers*, Crown Solicitor for the Commonwealth.