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with the case on appeal. Claiming credit for merely ordinary prudence, I should not have considered myself in any danger if I had come into Court with any two of the counsel who held briefs for the respondent.

Now, as to the copying of the briefs. This part of the claim of costs is not insisted on with respect to two of the briefs. As to the third brief, the claim fails with the failure of the portion relating to third counsel, and therefore I do not disturb the Registrar's finding in that respect.

As the application has failed, the costs must fall upon the applicant. Also, they must be set off against his costs of the appeal.

Application dismissed with costs. Costs of the application to be set off against the general costs of appeal.

Solicitor for the respondent (applicant), *Mark Mitchell.*

Solicitor for the appellant (respondent in this application), *The Crown Solicitor of New South Wales.*

HIGH COURT OF AUSTRALIA.]

E. D. MILLER . . . . . PLAINTIFF

AND

THE COMMONWEALTH . . . . DEFENDANT.

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MELBOURNE, *Nov.* 7, 8.

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

The Public Service Act 1900 (*Victoria*) (*No.* 1721), *sec.* 19—*Public servant—Salary—Increments.*

Sec. 19 of the *Public Service Act* 1900 (Victoria) which provides that "From the commencement of this Act every officer of the Trade and Customs, Defence, and Post and Telegraph Departments shall be entitled to receive a salary equal to the highest salary then payable to an officer of corresponding position in any Australian colony," only entitled such an officer to receive a present salary equal to the highest salary which, on the day the Act came into force, was then actually payable

to an officer of corresponding position, &c., and did not entitle such officer to increases of salary which, under the law then in force in the particular colony, might thereafter from time to time become payable to an officer of corresponding position.

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QUESTIONS of law referred to the Full Court.

In an action brought by Edwin Derness Miller against the Commonwealth, the statement of claim was, so far as is material, as follows:—

"1. The plaintiff was on the 28th day of February, 1901, and at all times material prior thereto an officer of the Post and 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, the 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 £100 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 July, 1904, inclusive, remained in the service of the Commonwealth, and during such period discharged the duties of letter carrier in the Post and Telegraph Department of the Commonwealth.

"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, namely:—

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1901.				
1st March to 24th Sept.	$8\frac{23}{31}$ months' salary for period between these dates at £100 per annum ...	£56	13	4
24 Sept. to 24 Sept. 1902	1 year's salary for period between these dates at £110 per annum ...	110	0	0
24 Sept. 1902 to 24 Sept. 1903	1 year's salary for period between these dates at £120 per annum ...	120	0	0
24 Sept. 1903 to 21st July 1904	$9\frac{6}{30}$ months' salary for period between these dates at £130 per annum ...	99	13	4
		£386	6	8

"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 July, 1904, does not exceed £359 9s. 1d., whereas the proportion due to him by reason of the foregoing circumstances amounts to £386 6s. 8d.

"8. The plaintiff is entitled to arrears of such salary £26 17s. 7d.

"The plaintiff claims £26 17s. 7d."

By further particulars given of the statement of claim it was stated that the section of the Victorian Act, relied on by the plaintiff in support of his claim under paragraphs 2 and 6, was sec. 19 of the *Public Service Act* 1900 (No. 1721).

By their defence the defendants (*inter alia*) denied each and every allegation contained in paragraphs 2 and 6 of the statement of claim, and objected that, even if the allegations contained in paragraph 2 were true, the plaintiff would not be entitled to receive the sums set forth in paragraph 6.

The questions of law were referred by *Griffith*, C.J., to the Full Court.

Isaacs, K.C, and *Cussen*, for the plaintiff. An officer of the Public Service of South Australia, at the time the *Public Service Act* 1900 came into force, was, by virtue of the South Australian *Civil Service Act* 1874 (37 & 38 Vict., No. 3), entitled to a salary of £100 for the first year, £110 for the second year, and so on by

increments of £10 until it amounted to £150, and that is the salary to which the plaintiff was then entitled. The word "then" in sec. 19 of the *Public Service Act* 1900 is used to fix the time when the law is to be ascertained, and "then payable" means "payable under the law then in force." If the Post and Telegraph Department had not been transferred to the Commonwealth, from the passing of this Act he would have been entitled to the salary which an officer of corresponding position would have been entitled to at the date of the coming into force of the Act. The plaintiff says: "I am a man in the second year of my service. A man in the second year of his service in South Australia was at the date this Act came into force entitled to a salary of £110 a year. Therefore I am entitled to that salary." Next year he can similarly claim £120, and so on. A contrary interpretation would have this effect, that an officer who had been in the South Australian Department would be entitled to increments, but one who had been in the Victorian Department would not.

Mitchell, K.C., and *Lewers*, for the defendants. Sec. 23 of the *Public Service Act* 1890, which applied to the plaintiff before the Department was taken over, provided for increments, but gave no right until the money was voted by Parliament. That Act is to be read as one with the *Public Service Act* 1900. Increments were also dependent upon good conduct, and upon the discretion of a superior officer. Having dealt with increments in its own enactments the legislature cannot have intended to allow the South Australian Acts to regulate them. Besides, this Act was passed in view of the taking over of the departments by the Commonwealth, and to the Commonwealth would be left the power to deal with increments. As a matter of fact there was no officer in South Australia in a corresponding position to that of the plaintiff. The word "payable" in sec. 19 means payable at the commencement of the Act. The legislature never contemplated periodical investigations as to the salaries payable.

[GRIFFITH, C.J.—The plaintiff must read somewhere into the section the words "from time to time."]

That would mean investigations from year to year. The *Public Service Act* 1900 was intended to meet a concrete case of injustice,

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and to secure that a Victorian officer should, on the transference of the departments, have a salary not less than other officers. To give force to the contention for the plaintiff the words of the section should be "a salary payable to an officer of a position then or at any time thereafter corresponding with the position held from time to time by the Victorian officer."

Cussen in reply.

GRIFFITH, C.J., delivered the judgment of the Court as follows:—

In this case the Court is called upon to construe sec. 19 of the *Public Service Act* 1900 of Victoria, which was passed on 27th December, 1900, four days before the Commonwealth came into existence. That section provides that "From the commencement of this Act every officer of the Trade and Customs Defence and Post and Telegraph Departments shall be entitled to receive a salary equal to the highest salary then payable to an officer of corresponding position in any Australian colony. Provided that this section shall not entitle any officer to receive more than One hundred and fifty-six pounds per annum." The plaintiff's case is that when this Act came into operation he was an officer, a letter carrier, in the Post and Telegraph Department of Victoria, and was in the first year of his service; that officers in a corresponding position in the Post and Telegraph Department of South Australia were then entitled to a salary of £100 a year, and that he, therefore, was, under this Act, entitled to £100 a year. And so the Supreme Court of Victoria decided in an action brought by the present plaintiff against the Victorian Government (*Miller* v. *The King*, 28 V.L.R., 530; 24 A.L.T., 150.) But the plaintiff now says that, under the same South Australian law, a South Australian officer was entitled to get £110 for his second year's service, £120 for his third year's service, and so on up to £150 for his sixth year's service, and he claims the benefit of that provision.

It seems to us that there is more difficulty in finding a difficulty in the case than in solving it. The words of the Act seem tolerably plain. As soon as this Act was passed, every officer in any of the departments concerned was entitled to enquire what was the highest salary payable on 27th December, 1904, to an officer in a

corresponding position in any of the Australian Colonies. On inquiry he finds that in South Australia a salary of £100 a year is payable to an officer in a corresponding position, and he is therefore entitled to demand that salary from the Victorian Government. The typical officer in the other State is a person in the service of that State on the 27th December, holding a corresponding position. Having discovered him, and having ascertained what salary is then payable to him, the Victorian officer is entitled to demand the same salary, and there, it seems to us, the section is exhausted. That seems so simple that it is difficult to find the puzzle to be solved.

It is contended by Mr. Isaacs that the section should be read in this way, that, instead of the words "the highest salary then payable to an officer of corresponding position in any Australian colony" there should be read the words "the highest salary payable under the law then in force in any Australian colony." We do not know that that would carry the matter any further, but those are not the words used. The words that are used point to an immediate present enquiry what is the highest salary then payable to an officer in a corresponding position, so as to create an obligation between the government and the officer when it is ascertained. It is a matter of then existing fact, and, when ascertained, it is to be the test of the salary of the officer in the Victorian Public Service.

Mr. Cussen most ingeniously contended that this was an Act that might have remained in force for an indefinite time, and would have applied to officers in the Victorian Public Service as long as they remained in that service; that it was a section under which benefit might be claimed from year to year; and that the section might be read in effect thus:—Every officer shall from time to time be entitled to receive a salary equal to the highest salary payable under the law in force in any Australian colony on 27th December, 1900, to an officer then holding in that colony a position corresponding to that of the Victorian officer at the time when the question arises. That is a most ingenious suggestion. We do not think the words are open to that construction. Assuming that they are, we have to enquire whether it is a probable construction, and, for this purpose, we may regard the context. The words are

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certainly open to the other construction. The rights are to be ascertained on 27th December, 1900. If Mr. Cussen's view were correct, the result would be that officers then in the Victorian Public Service would, for an indefinite period, be entitled to refer to the laws of any State—in this case, of South Australia—which provide for periodical increases of salary. Those increases were, in South Australia, dependent upon various contingencies, one of which was the good conduct of the officer, and another was that Parliament should not have interfered. It would seem singular that the Parliament of Victoria should have incorporated into their laws, without express reference, provisions of that kind. Again, the Act is to be read and construed as one with the *Public Service Act* of 1890. That Act made express provision for increases of salaries of public officers, and made those increases dependent upon a certificate of good conduct, and also upon the voting of the money by Parliament. Moreover, by the Act of 1900 itself the government was enjoined by sec. 13 to pass regulations with respect to rates of pay, and to re-issue regulations which had been in force before 22nd October, 1894. In those regulations provisions were made for increments which, again, were discretionary, and dependent upon the voting of the money by Parliament. So that is improbable that the legislature, having, in the same Act, directed their attention to the subject of increments, should have intended to adopt a stereotyped rule as to increments by reference to the laws of another colony, not even knowing which colony it might be. Now, when an Act is said to be open to two constructions, you may always, to use the words of *Tindal*, C.J., "call in aid the ground and cause of making the Statute." This Statute was passed four days before the establishment of the Commonwealth, and it was evidently passed in view of the fact that the Constitution of the Commonwealth required the taking over of certain departments by the Commonwealth, and must, therefore, be considered in that view. It is just as if the Statute had recited that "Whereas certain departments will shortly be transferred to the Commonwealth," and then proceeded to enact this section. If those words are read into the section, it is almost impossible to argue that it was intended to do more than fix the salary which each

officer should be entitled to receive when those departments were transferred.

For all these reasons it seems to us that the construction suggested by Mr. Cussen is excluded by the considerations usually called in aid in construing an ambiguous section of an Act. The plain meaning is that, as soon as the enquiry has been made what is the salary to which an officer is entitled on 27th December, 1900, the section is exhausted. The plaintiff says that he was entitled to a salary of £100 a year at that time, and he has received it. He has not made out any cause of action in respect of any addition to that salary.

Other questions have been raised with which it is unnecessary for us to deal.

Questions answered in favour of defendants.

Solicitors, for petitioner, *Rigby & Fielding*, Melbourne.

Solicitor, for respondent, *Powers*, Commonwealth Crown Solicitor.

[HIGH COURT OF AUSTRALIA.]

BACKHOUSE . . . . . APPELLANT;
DEFENDANT,

AND

MODERANA . . . . . RESPONDENT;
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Practice—Irregular service of initiatory process—Appeal—Prohibition—Special leave to appeal—Rule upon which the High Court will act in granting leave to appeal.

Irregularity in the service of initiatory process does not oust the jurisdiction of the Court. Such a defect is a ground for appeal, and not for prohibition. *Barker* v. *Palmer*, 8 Q.B.D., 9, approved.