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LAMSON STORE SERVICE CO. LTD. v. RUSSELL WILKINS & SONS LTD.

O'Connor J.

wards prove they have sustained. For these reasons I think the appeal should be dismissed.

Appeal allowed. Order appealed from discharged and proof allowed with such costs as are usually allowed in a liquidation on an admission of a proof. Respondents to pay costs of appeal, and to have their costs in both Courts out of the assets.

Solicitors, for the appellants, *Ruthning & Jenson.*
Solicitors, for the respondents, *O'Sullivan & Scott.*

N. G. P.

Rev *Williams v Curator of Intestate Estates* (1909) 8 CLR 760

[HIGH COURT OF AUSTRALIA.]

GREVILLE . . . . . APPELLANT;
PLAINTIFF,

AND

WILLIAMS . . . . . RESPONDENT.
(NOMINAL DEFENDANT),

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 24, 27, 28. *Dec.* 17, 20.

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

Civil Service Act (*N.S.W.*), (48 *Vict. No.* 24), *secs.* 46, 48—*Public Service Act* (*N.S.W.*), (*No.* 25 *of* 1895), *secs.* 8, 59, 60—*Public Service* (*Superannuation*) *Act* (*N.S.W.*), (*No.* 55 *of* 1899), *sec.* 2—*Services of officer dispensed with—Abolition of office—Question of fact—Estoppel by acquiescence.*

Sec. 46 of the *Civil Service Act* 1884 provides that when the services of an officer of the Civil Service are dispensed with "in consequence of the abolition of his office," and no other office can be offered him, he shall be entitled to retire upon the superannuation allowance provided for by other sections of the Act.

Sec. 8 of the *Public Service Act* 1895 provides that the Public Service Board shall investigate the working of each department of the Public Service, and if it finds a greater number of persons employed than necessary, and if the per-

sons in excess cannot be profitably employed in any other department, their services shall be dispensed with subject to certain provisions in other sections for a refund of their contributions to the superannuation account, and a gratuity.

The appellant for some years up to June 1896 held an office which was officially known as that of Accountant in Bankruptcy, and was formally notified in the *Gazette* as ranking next after that of Registrar in Bankruptcy, and as such officer he performed certain specified duties attached to the office. The Public Service Board investigated the working of the Bankruptcy department, regraded the officers, and reported to that effect to the Minister, attaching to their report a schedule of the officers, amongst which the appellants's name did not appear. Subsequently the appellant was notified by letter that his retirement had been recommended by the Board and approved of by the Governor, and a *Gazette* notice to that effect was shortly afterwards published. Thereafter no officer held the title of Accountant in Bankruptcy or the status formerly enjoyed by the person holding that office, and the duties formerly attached to the office were distributed amongst other officers of the department.

Held, that it was a question of fact whether the services of the appellant were dispensed with owing to the abolition of his office within the meaning of sec. 46 of the Act of 1884, or under the provisions of sec. 8 of the Act of 1895, and that on the evidence the proper inference to be drawn from the facts was that his services had been dispensed with under the former section; and, as the rights given by the *Civil Service Act* 1884 to contributors to the superannuation account, of which the appellant was one, had not been taken away by subsequent legislation, the appellant was entitled to the arrears of the pension provided by that Act.

Held, also, that the acceptance by the appellant, shortly after his retirement, of a gratuity under the *Public Service Act* 1895 and, later, of a pension under the *Public Service (Superannuation) Act* 1899, was not, under the circumstances, such an acquiescence as would operate as a bar to the subsequent assertion of his claim to be dealt with under the *Civil Service Act* 1884.

Decision of the Supreme Court: *Greville* v. *Williams*, (1905) 5 S.R. (N.S.W.), 600, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

This was an action by the appellant, an officer in the Public Service of New South Wales, whose services had been dispensed with by the Governor upon the report of the Public Service Board, against the respondent as the nominal defendant on behalf of the Government, to recover arrears of pension under secs. 46 & 48 of the *Civil Service Act* 1884.

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The declaration alleged that before the accruing of the causes of action the plaintiff was an officer within the meaning of the *Civil Service Act* 1884 in the employment of the Government in the Civil Service of New South Wales at the yearly salary of £400 under the conditions contained in that Act, and had been so employed continuously for forty years and had been in receipt of a certain salary for more than six years preceding his retirement, and had fulfilled all the conditions required by the Act to entitle him to the allowance claimed, if his services should be dispensed with by the Government in consequence of the abolition of his office and there should be no other office that could be offered him at the same salary or at a salary not less than five-sixths of it, and his services were dispensed with in consequence of the abolition of his office and no other office could be offered to him at the prescribed salary, whereupon he became entitled on retirement to a certain superannuation allowance subject to certain reductions, and retired, yet, on his retirement, the Government paid him only a portion of that allowance, and the plaintiff claimed the balance.

The particulars of the plaintiff's claim showed a balance due to him from the Government of £1,092 19s. 1d., subject to an abatement at a certain percentage of the total salary received by him during his term of office which was left for subsequent calculation and adjustment.

The defendant pleaded that the services of the plaintiff were dispensed with by the Public Service Board under sec. 8 of the *Public Service Act* 1895, on the ground that he was found to be in excess of the number of officers required in the department in which he had been employed for its efficient working, not in consequence of the abolition of his office as alleged, and also that the plaintiff was not entitled to retire and did not retire from the service as alleged.

The action was, by agreement between the parties, tried before *Pring* J., without a jury, who came to the conclusion that the plaintiff's services could not have been dispensed with "in consequence of the abolition" of his office, because the office had not been abolished within the meaning of sec. 46 of the Act of 1884, and found a verdict for the defendant. A rule *nisi* to set aside the verdict and have a verdict entered for the plaintiff for the

amount claimed, or for a new trial, was granted by the Full Court on the ground that the plaintiff's retirement was under sec. 46 of the *Civil Service Act* 1884, and that he was therefore entitled to a pension under sec. 48 of that Act, but the rule was subsequently discharged with costs: *Greville* v. *Williams* (1).

From this decision the present appeal was brought by special leave.

The facts are fully stated in the judgments.

Piddington (*Hammond* with him), for the appellant. The office of the appellant was in fact abolished, and his services were dispensed with in consequence of its abolition. Office means a separate position in the department, and when that separate position ceases to exist by an Executive act of the Government the office has been abolished. The appellant held the office of Accountant in Bankruptcy, and performed certain duties as the duties attached to that office. The only possible inference from the facts proved is that that office was abolished and the appellant's services consequently dispensed with. There is no formal step prescribed by the Statute as requisite for the abolition of an office. It is not suggested that the Board dispensed with his services on the ground of incompetency under sec. 56 of the Act of 1895, so that their act was either under sec. 46 of the Act of 1884 or sec. 8 of the Act of 1895. The fact that the Board rearranged the work of the department is not inconsistent with an abolition of office, nor is the fact that, since the re-arrangement, the duties of the office have been distributed amongst other clerks in the office. [He referred to *The King* v. *The Mayor &c. of Bridgewater* (2); *The Queen* v. *Mayor &c. of York* (3). The appellant had a vested right under the Act of 1884, and it will not be presumed that the legislature intended to deprive him of that, unless the intention is clear. There is nothing in the documents evidencing the official acts of the Board to indicate that the appellant's services were dispensed with on any other ground than the abolition of his office. They cannot be heard to say now that they intended their action to be under any particular section; the documents must speak for themselves.

(1) (1905) 5 S.R. (N.S.W.), 600. (2) 6 A. & E., 339.
(3) 3 Q.B., 550.

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C. B. Stephen K.C. and *H. M. Stephen*, for the respondent. The office of the appellant was not abolished. His duties really constitute the office, and they were merely distributed among other persons in the same department. Sec. 46 of the Act of 1884 was intended to provide for the case where a whole department was swept away, or a whole class of work dispensed with, resulting in the discharge of the officers who constituted the department or carried out the work. The Board in this case found that the appellant was in excess of the number of officers required, within the meaning of sec. 8 of the Act of 1895, and that the other officers of the department could do the work which he had done, in addition to their own. Their recommendation follows the words of sec. 8, and the Chairman of the Board gave evidence that that was the intention of the Board.

[GRIFFITH C.J.—How can any member of the Board give evidence of his intention? Can they be heard to say anything in addition to what they have said by their official proceedings?]

The evidence was given without objection, and was uncontradicted. Sec. 46 does not give the right to a person merely because his office is abolished, but only to one whose services are dispensed with on that account. That was not the reason for dispensing with his services in this case. If the issue before the Judge was a question of fact, he has found it in favour of the defendant. The circumstances are clearly capable of such a construction, and the Judge's decision should not be interfered with. No evidence was given that the office was abolished, or that the appellant's services were dispensed with in consequence of its abolition. The appellant was bound to prove an official act of abolition. The Board had no power to abolish an office in the strict sense. They could only inquire into conditions, and recommend re-arrangements. The presumption must be that, having been appointed for the express purpose stated in sec. 8, they acted under that section throughout.

The appellant is estopped from setting up a claim to be dealt with under the Act of 1884. He must be taken to have known his rights, and he has acquiesced in being dealt with under the Act of 1895, and has accepted a gratuity under the Act of 1899, which

has no application to persons dealt with under the Act of 1884. [They referred to *Wilson* v. *McIntosh* (1).]

[GRIFFITH C.J. referred to *Willmott* v. *Barber* (2).]

Piddington, in reply, referred to *Clarke & Chapman* v. *Hart* (3). [He was stopped on the question of acquiescence.]

Cur. adv. vult.

December 12th.

The Court having asked to hear further argument as to the effect of sec. 59 of the *Public Service Act* 1895 on the appellant's right to recover,

C. B. Stephen K.C., for the respondent, was allowed to refer to the Report of Parliamentary Debates 1895, p. 3039, as evidence of the state of affairs in connection with the Public Service at the date of the passing of the Act of 1895.

Piddington for the appellant, referred to secs. 59, 60, 61 and 62 of the *Public Service Act* 1895, and to sec. 2 of the *Public Service (Superannuation) Act* No. 55 of 1899.

Cur adv. vult.

December 21.

GRIFFITH C.J. This was an action brought by the appellant against the Government of New South Wales to recover arrears of pension which he claims to be due to him upon the abolition of his office as a member of the Civil Service of New South Wales, his case being that since the abolition of his office on 1st July 1896 he has received a pension at a lesser rate than that to which he is entitled. He received some time ago, shortly after the abolition of his office, a gratuity under the Statute of 1895. Since then by virtue of another Act he has received a pension, the amount being calculated according to the *Public Service (Superannuation) Act* 1899. His present action is based upon the claim that he is entitled under the *Civil Service Act* 1884 to a pension at the rate of £266 13s. 4d. The total balance which

(1) (1894) A.C., 129.
(2) 15 Ch. D., 96, at p. 105.
(3) 6 H.L.C., 633, at p. 656.

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he claims amounts to £1,029 2s. 1d. The amount of the gratuity which he received in cash was £955. If his claim is well founded, then he ought not to have received the gratuity, and certainly he ought not to keep it, nor indeed does he desire to do so.

Before referring to the facts of the case—and in the view I take of it the question in this case is entirely one of fact, and does not involve any general principle—it is necessary to refer to the Statutes under which the claim arises. By the *Civil Service Act* 1884 various provisions were made for the regulation of the Civil Service. Sec. 43 of that Act provided that "Any officer shall at any time after having attained the age of sixty years be entitled to retire from the service upon the superannuation allowance" calculated at the rate specified in sec. 48. Sec. 44 provided for persons who had not attained the age of sixty years but desired to retire owing to infirmity of mind or body, in which cases, under certain circumstances, they might retire upon a superannuation allowance upon a scale prescribed. Sec. 45 provided that the Governor might order a person to retire if it should be reported to him that the officer was unfit to perform his duties by reason of infirmity of mind or body, in which case he was entitled under certain circumstances to a superannuation allowance. Sec. 46 provided as follows:—"When the services of any officer are dispensed with in consequence of the abolition of his office and no other office can be offered to him at the same salary as hereinbefore provided" (that was a reference to sec. 8, now repealed, to which it is not necessary to refer) "or at a salary of not less than five-sixths of the same he shall be entitled to retire upon the superannuation allowance hereinafter provided." The plaintiff was an officer of the Civil Service and entitled to the benefits conferred by that Act, whatever they are, unless they have been taken from him by subsequent legislation. For the purpose of providing a fund for the payment of superannuation allowances provision was made by sec. 53 for establishing a fund called the Civil Service Superannuation Account, which was made up partly by a contribution from the Consolidated Revenue of £20,000 a year for five years, and afterwards by deductions from the salaries of all officers in the service with certain exceptions, at the rate of four per cent. per annum from

the year 1885, and also by paying the sum of £3,500 payable under sec. 52 of the Imperial Act 18 & 19 Vict. c. 54 from the Consolidated Revenue Fund for Pensions to the credit of the amount subject to outstanding claims. Then provisions were made in case of the fund so created being insufficient for the purpose of meeting all claims upon it.

By the *Public Service Act* 1895 various provisions of the *Civil Service Act* 1884 were repealed, but sec. 46, providing for the payment of pensions to officers on the abolition of their office, was not repealed. Indeed, so far from being repealed, it was expressly kept in force, and express reference was made to it. Sec. 8 of the Act of 1895 provides : "As often as shall be necessary to carry out the directions and provisions of this Act, and to ensure the establishment and continuance of a proper standard of efficiency and economy in the Public Services, the Board shall, as far as practicable, personally inspect each department, and investigate the character of the work performed by every officer therein, and the efficiency, economy, and general working of such department. . . . And if the Board shall at any time find that a greater number of persons is employed in any department than it may determine to be necessary for the efficient working thereof such persons as are in excess may (if practicable) be transferred to any other department which, in the opinion of the Board, requires additional assistance, and if the persons so found to be in excess cannot be usefully and profitably employed in any other department, their services shall be dispensed with subject to the provisions of section sixty hereof." Sec. 60 provides that "If the services of any person permanently employed in the Public Service shall be dispensed with by the Board under the provisions of this Act otherwise than for an offence, then" in the case of such officers as the plaintiff, who was a contributor to the Superannuation Account, but not entitled to retire under secs. 43 and 44 of the Act of 1884, the officer should be entitled to receive a refund of his contributions to the Superannuation Account together with a gratuity calculated at a certain prescribed rate. Sec. 59 provided that no person, who should, after the commencement of the Act enter any department of the Public Service to which the Act applied, or who was not at

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that time a contributor to the Superannuation Account under the Act of 1884 "shall be allowed to become a contributor to or to acquire any right to any payment by way of pension, annual superannuation, retiring allowance, or gratuity out of such Superannuation Account. Nor shall any person to whom this Act applies," except as provided in sec. 60, "receive out of the Consolidated Revenue any payment by way of pension, annual superannuation, retiring allowance, or gratuity, either directly or indirectly." It was suggested, and we asked for further argument on the point, that that section might have the effect of distinctly declaring that no pension should be paid to any person in the Public Service except under the provisions of this Act. Sec. 60 deals with the case of persons whose services are dispensed with by the Board under the Act otherwise than for an offence. Sec. 62 deals with two classes of persons; first, those who at the date of the commencement of the Act are contributors to the fund, and as to them it makes provision that they may, if they please, discontinue contributing to the fund, in which case they will be entitled to a refund of their contributions. It also deals with another class of persons, namely, those who, being contributors to the superannuation fund at the commencement of the Act, continue in the service after the expiration of twelve months, that is, persons whose services are not dispensed with; with respect to whom it is provided that they shall be entitled on retirement to all the benefits conferred upon contributors to the Superannuation Account by the provisions of Part V. of the Act of 1884, and goes on:—"For the purpose of this proviso, such rights and benefits shall be deemed to include the right to superannuation allowance under sections forty-six and forty-eight of that Act as though their office were abolished where the officer who shall retire or be removed as aforesaid shall be otherwise within the terms of section forty-eight." It is clear, therefore, that it was not intended that the only right to receive a pension should be that under sec. 60. Moreover, in sec. 59 the terms "Superannuation Account" and "Consolidated Revenue" are both mentioned; and, having regard to the other provisions for pensions, I am of opinion that the prohibition of any payment by way of pension, annual

superannuation allowance, retiring allowance, or gratuity out of the Superannuation Account does not deal with the question whether a person in the position of the plaintiff shall be entitled to receive payment of a pension out of the superannuation fund. By a later Act of 1903, No. 8, all claims for superannuation allowances were transferred from the Superannuation Account to the Consolidated Revenue.

The only question then to be determined is whether the appellant is a person whose services were dispensed with owing to the abolition of his office within the meaning of sec. 46 of the Act of 1884, or whether, as the Supreme Court held upon the facts, he is a person whose services were dispensed with under the provisions of sec. 8 of the Act of 1895. That is purely a question of fact. But, before referring to the question of fact, it is important to remember that there is a presumption in all legislation that it is not intended to interfere with vested interests. The legislature of course have plenary power to do so, and can destroy such rights if they please, but it is always taken that they have not done so unless their intention to do so is shown by express words. Now, as I have shown, the rights given by the Act of 1884 to contributors to the Superannuation Account, of whom the plaintiff is one, to receive a pension on the abolition of their office is not interfered with by the later legislation. That provision remains, therefore, as part of the law. The only question is whether the office was abolished, or, to use the exact words of the section, whether "his services were dispensed with in consequence of the abolition of his office."

What are the facts? The appellant held the office of Accountant in Bankruptcy. That office was created in the year 1890 by the Lieutenant Governor in Council, as appears by notification in the *Government Gazette* of 31st January of that year. It was there announced:—"His Excellency the Lieutenant Governor, with the advice of the Executive Council, has been pleased to approve of the following appointments and promotions in the office of the Bankruptcy Court, viz:—Mr. Henry James Greville, Chief Clerk, to be Accountant, with rank next after the Registrar in Bankruptcy." The various promotions were stated and the notification concluded:—"Such appointments and promotions to

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take effect from the first instant." The appellant, therefore, was appointed to this office by a special name, with a special status. The office was recognized by Parliament by that name in the *Appropriation Act* of 1894. In June 1896, therefore, the plaintiff was holder of the office of Accountant in Bankruptcy. Was that office abolished? As a matter of fact he ceased to hold office at the end of that month under these circumstances. The Public Service Board, having investigated the work of the office, reported to the Minister on the 17th June 1896:—"We . . . have . . . inspected the Department of Justice and so far as practicable, investigated the character of the work performed by every officer of the Department. We have also, subject to any right of appeal under sec. 15 . . . graded the officers employed therein and classified the work performed by each in the manner described in the accompanying schedule." Then followed a schedule of the officers in the Bankruptcy office, amongst which the appellant's name did not appear. On 26th June the Under Secretary of the department wrote to the appellant and informed him that the Public Service Board had recommended that he be retired from the Public Service, and that the Governor, with the advice of the Executive Council, had approved of his retirement accordingly from the 30th of that month; and, by notice in the *Government Gazette* of 4th July, bearing date 2nd July, it was notified that the Governor with the advice of the Executive Council had approved of the retirement of various officers mentioned, under the provisions of the *Public Service Act* of 1895, including "Mr. Henry James Greville, accountant and cashier." The communication to him and the *Government Gazette* did not use the term "abolition," nor state that his office was abolished, or that his services were dispensed with under the provisions of sec. 8 of the Act of 1895, but the neutral word "retire" was used. The word "retire" is a word used in the Act of 1884; for instance, under sec. 45, the Governor may order a person to retire on a superannuation allowance.

Under these circumstances, what is the proper view to take of the facts? There is no doubt whatever in my mind that the office was abolished. A number of officers in the department were dispensed with, so that the total number was reduced. Presumably

when an office is abolished, it may be because the services of the officer who held it are not wanted; he may be in excess of the number which can be further profitably employed in the department. But it by no means follows that, because that is the view taken by the Government, the office has not been abolished. It appears to me that, when an officer at the beginning of the month holds an office under a special name with a special status recognized by Parliament, and at the end of the month the office no longer exists, the office has been abolished. Whatever may have been the motive of the Government in abolishing it, it does not alter the fact that his office no longer exists, and in my opinion under these circumstances it must be taken to be abolished. It was suggested for the respondent that if the work attached to the office were still carried out by someone else, then the office could not be said to have been abolished. I cannot follow that argument. It is very little satisfaction to a person, whose services have been dispensed with and who claims to be dealt with as an officer whose office has been abolished, to be told that someone else is doing his work. It is suggested that the Board intended to act under the Act of 1895. Possibly it did. But the Court must deal with the official act of the Governor as recorded in the official documents, not in the light of any statement of intention or motive that may be given in evidence as to what the Board intended to be the legal effect of their act. In substance the appellant's office was abolished, and he is entitled to whatever rights are conferred upon him by sec. 46 of the Act of 1884. The Government, however, assumed to deal with him under the Act of 1895, and offered him a gratuity under that Act, and he accepted it. He afterwards took advantage of another Act passed in 1899 for the benefit of persons who seemed to have been hardly treated under the Principal Act, *i.e.*, *The Public Service (Superannuation) Act* 1899, which gave the right to a pension at a reduced rate, allowance being made for any gratuity received under the Act of 1895. It was faintly suggested that, having taken advantage of these Acts, he could not set up a claim under the original Act. But a statutory claim cannot be defeated in that way, unless there is something in the nature of accord and satisfaction, or estoppel. Nothing of that kind was pleaded

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or set up here. It is not suggested that the appellant's voluntary acquiescence in the very hard terms offered him can have that effect. He asked for a pension and the Government gave him a gratuity, and he had to choose between taking that and getting nothing.

For these reasons I am of opinion that the appellant has established the facts he set out to prove, and that he is therefore entitled to receive a pension at the rate claimed, from 1st July 1896 to the date of this action. But it is quite clear that he must give credit for the amounts he has already received. In my opinion, therefore, the particulars of claim should be amended by giving credit for the amount of the gratuity £995, and judgment should be entered in his favour for the balance.

BARTON J. To effect abolition of an office as a fact is it necessary that the work of the office should be abolished? Can the office be abolished though the work continues to be done, but by other hands? Let us put the matter another way. Cannot a new office be created unless new duties come into existence?

It would be a strange thing to say that when the working of a department is facilitated or improved by the assignment of a group of the existing duties, because of their importance or rational connection, to an office newly named, whether the person selected to fill it is already in the service or is introduced from outside, a new office, in the ordinary meaning of the term, has not been created. This process seems to be what occurred in the case of the appellant. When both the name and the man are dispensed with and the duties given to others, has not the office of the man been abolished? If not, it must still be in existence. Then was there ever an office of Accountant in Bankruptcy? If so, where has it been since 30th June 1896?

For the respondent the case was urged upon us of a typewriter who is got rid of and the work done by another officer not called a typewriter, but done with the machine, and it was pointed out that such a case could not be an instance of the abolition of office. That may be conceded. But is the mere work of writing, whether by hand or machine, at all contemplated in the term, creation of an office, or the term, abolition of an office? If on

the estimates one finds the line "Clerks (5) at £175," there having previously been only three of them, does that mean that two offices are created, or only that two more hands are to be employed? And would the converse mean that two offices have been abolished, or merely that two hands less are to be employed? The line must be drawn somewhere, and I think it consists in this, that where duties are of a merely general and ordinary character they are not the subjects of offices to which the term creation or abolition applies as it does where the duties are special and distinctive, as they are in the case of an accountantship. If you get rid of an accountant and the name of accountant because you happen to have just now a specially qualified clerk who can perform some of the duties together with his own, and you still call him clerk, and give the balance of the accountant's duties to one or two other persons, are you any the less doing without the office of accountant, whatever shift you adopt to avoid the appearance of doing so? Is the case a different one if you find the smart clerk can do all the work? I think you do abolish the office, just as you would re-create it if you again collected the accountancy duties together *per se* and placed them and them alone in the hands of an officer to whom you gave the name of accountant. And that is just what you would have to do if you lost your clever clerk and had to accept, and perhaps to pay at a higher rate than you gave the clerk, a man qualified as an accountant. It is not necessary to pursue the argument further. I am of opinion that the appellant's office was abolished as the term is generally understood, and I find nothing in the Statute to indicate that some other meaning is to be attached to it.

As to the question raised under the last portion of sec. 59 of the *Public Service Act*, and made the subject of re-argument, I have nothing to add to what the Chief Justice has said, and I agree on both points that the appeal should be allowed on the terms indicated.

O'Connor J. The principle laid down in *Wilson* v. *McIntosh* (1) has no application to the facts of this case. There is nothing

(1) (1894) A.C., 129.

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in the evidence from which it can be fairly inferred that the plaintiff ever voluntarily gave up his rights as now claimed, or that the Government were influenced in their dealings with him by any intimation on his part express or implied that he was willing to forego those rights. He was retired against his will, and in every step that followed the Government appear to have acted in accordance with their own view of the position, without any regard to whether he consented or objected. The only substantial question for our consideration is whether the plaintiff on his compulsory retirement became entitled to a pension under sec. 46 of the *Civil Service Act* 1884 as being an officer whose services were dispensed with on account of the abolition of his office. That question involves two inquiries: first, was the plaintiff's office an office within the meaning of that section; and, secondly, was it abolished? The facts material on these inquiries may be shortly stated. The *Government Gazette* of January 1890 notifies the promotion of the plaintiff from the position of Chief Clerk in the Bankruptcy office to that of "Accountant with rank next after the Registrar in Bankrupcy." From that date until the office was, as the plaintiff alleges, abolished, in the grading of the department on the 17th June 1896, he held the office of Accountant in Bankruptcy. It may be noted that during that period the *Appropriation Act* of 1894 embodying estimates described the office as "Accountant in Bankruptcy" and appropriated the plaintiff's salary specifically to the office under that description. The *Bankruptcy Act* imposes upon the Registrar many important duties in accountancy. The official assignees' accounts and all receipts and disbursements in bankrupt estates are directly under his control. Until 1890 the Registrar was nominally accountant as well as Registrar. But on plaintiff's appointment as accountant in that year all the accountancy work of the department, including the accountancy duties imposed upon the Registrar under the *Bankruptcy Act* were collected and placed in the hands of the plaintiff as accountant, and what we have to determine is whether the office thus constituted, and having allotted to it such definite duties, is an office within the meaning of sec. 46 of the *Civil Service Act* 1884. For some purposes every office held

by a permanent salaried official is an office under the Act. The definition section of the Act of 1884 defines the Civil Service as "The body of persons now or hereafter appointed to permanent salaried offices in the service of the Government." It would be impossible to hold that every such office was an office capable of being abolished within the meaning of sec. 46. Take, for instance, the case of five clerks all employed at the same kind of work and graded as first, second, third, fourth and fifth clerks, and assume that the services of the fifth clerk have been dispensed with and his duties have been distributed amongst the remaining four. His duties would then be discharged by the remaining four, the work of one or more of them would be increased according to the arrangements made, but no new kind of work and no new kind of duties would be imposed on any one of them. In such a case the fifth officer might be fairly said to have had his services dispensed with, not on account of the abolition of his office, but in "consequence of a departmental change" within the meaning of sec. 10 of the Act of 1884. That section draws the distinction between the two cases in the following words: "If the services of any officer shall be dispensed with in consequence of the abolition of his office or of any departmental change and not from any fault on his part such officer may be required at the rate of salary last received by him to perform any duty for which he is considered competent in any public department and should he refuse such change of duty he shall not be entitled to receive any compensation."

On the other hand the possibility of distributing amongst the officers remaining in a department the duties of the officer whose services have been dispensed with cannot be the test. If it were, it is difficult to imagine a case in which sec. 46 could apply. Take as an illustration a well-known incident in New South Wales administration. Two departments are constituted each with a ministerial head and Under Secretary. It is decided to absorb one department within the other, to place the combined department under one Minister and one Under Secretary. The duties and services previously carried out by the Under Secretary of the absorbed department do not disappear altogether. They still exist, but are performed by the Under Secretary of the combined

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department. Could it be said that in such a case the office of Under Secretary of the absorbed department had not been abolished, and that the office was not one to which sec. 46 of the Act of 1884 could apply. Between the first of these illustrations in which sec. 46 would clearly not apply, and the last in which it clearly would, an infinite variety of cases may arise, and it would be impossible, even if it were necessary, to frame an exhaustive definition which would separate the cases on one side of the line from those on the other. Each case must be decided according to its facts. But where, as in this case, there is an office to which all the duties of a certain kind in a department are specifically apportioned, where the office is constituted and recognized by the Civil Service Board and by Parliament by a designation appropriate only to that group of duties, I have no doubt that such an office comes within the meaning of sec. 46, and is capable of being abolished.

The plaintiff, then, being the holder of an office within the meaning of the section under consideration, the next question is was that office abolished? The judgment of the learned Chief Justice in the Court below proceeds upon the ground that abolition of office under sec. 46 can be accomplished in no other way than by some act of the Governor with the advice of the Executive Council. In other words that, unless the Government chose to pass an executive minute formally abolishing the office, the holder of an office which has in fact been abolished can have no claim under that section. I can see no reason for placing so limited a meaning upon the expression "abolition of office" as used in the *Civil Service Act* of 1884. The expression has no technical or legal meaning. According to the ordinary rules of construction it must be construed according to the natural meaning of the words in the context in which they are found. In sec. 46 itself there are no words to limit or control the ordinary meaning of the words "abolition of office"; and, looking at the other sections, it is difficult to see how the purpose and intention of the Act as a whole could be effectively accomplished if the expression in question were interpreted with the restricted meaning which the Supreme Court has adopted. One main purpose of the Act is to confer on every permanent salaried

officer, whose services have, through no fault of his own, been dispensed with before he has had time to earn his pension, definite rights in some cases and definite title to favourable consideration in others. Sec. 46 gives the right to a pension on abolition of office. Sec. 49 authorizes the Minister to grant a gratuity to any officer whose services have been dispensed with through no fault of his own. And one of these cases for gratuity is incidentally referred to in sec. 10 already quoted where the officer's services are dispensed with through no fault of his own in consequence of a departmental change, "departmental change" being contrasted in that section as I have already pointed out with "abolition of office." Under the Act of 1884 the Civil Service Board was charged with the duty of classifying officers as to their positions and duties. The Government acted on that classification, and Parliament voted salaries in accordance with it. It was in the power of the Board in the course of classification so to arrange duties as to necessarily involve the dispensing with an officer's services because of the breaking up and distribution of the group of well-defined duties which constituted his office. When that classification had been acted on by Government and by Parliament, the office was as effectually abolished, in so far as its holder was concerned, as if it had been abolished by executive minute passed in the most solemn form. In the actual working of the system it was by classification such as I have described, and not by executive minute, that offices were abolished, and it was no doubt with reference to that method of abolition of office actually in use in the working of the departments that a right of pension on the abolition of an office was given, a right depending on the existence of a state of facts, namely, that the office had, through no fault of the officer, ceased to exist. If the officer's right depended not upon the fact that his office had, through no fault of his, ceased to exist, but upon adoption by the Government of a particular form of recognizing and declaring that fact—which form they might or might not adopt at their discretion—the officer's right would indeed be of a shadowy description. An examination therefore of the Act of 1884 leads me to the conclusion that it was intended to confer upon the officer, whose services were dispensed

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with on account of the abolition of his office, a real right dependent upon the fact that his office had ceased to exist and had been treated by the Board and the Government as non-existent, and not upon the circumstance that the Government had thought fit to adopt a particular form of recognizing that fact. The Act of 1895 left section 46 of the 1884 Act unrepealed, and has nowhere cut down any right the plaintiff may have had under that section. The Public Service Board, which under the Act of 1895 replaced the Civil Service Board, has even larger powers of grading and classifying officers, assigning duties, and allotting salaries, than the Civil Service Board, and it is declared by sec. 10 that the grading and classification of officers, assignment of duties, and apportionment of salaries, shall, subject to parliamentary provision for the salaries, be as so determined by the Board. The Public Service Board therefore had the power to so classify the officers of a department and apportion their duties as to drop a particular office out of existence and leave its holder without duties or salary. And when by such grading an office capable of being abolished within the meaning of sec. 46 thus ceased to exist, it became as effectually abolished for the purposes of the section as if it had been formally abolished by executive minute. Sec. 21 of the Act of 1895 is the only section of the Statutes dealing with the Public Service which expressly empowers the Governor in Council to abolish an office —that is, the section declaring and defining the divisions under which the officers of the service are to be classified. The Special Division is to include all persons whose office the Governor in Council shall declare by notification in the *Government Gazette* to belong to that division. But the Board is empowered under certain circumstances to certify to the Governor in Council that it is expedient to add any office to or abolish any office in the Special Division, and upon such certificate and not otherwise the Governor in Council may add any office to or abolish any office in that division. The introduction of this power for the first time in the Act of 1895, and then for this special purpose, in my opinion, strongly corroborates the view that the abolition of office referred to in sec. 46 and other sections in the Act of 1884 included other modes of abolition of office than that by express

declaration of the Governor in Council. Such being in my view the proper interpretation of the expression "abolition of office" as used in sec. 46 of the Act of 1884, it is clear that the Public Service Board, by their grading of the Bankruptcy Office, notified in the *Government Gazette* of the 17th June 1896, dropped the plaintiff's office out of the department, distributed its duties, and so abolished the office. It is urged, however, by the defendant that, under the circumstances in which the plaintiff was retired, he has no claim under sec. 46, inasmuch as his services were not dispensed with by reason of the abolition of his office under that section, but in exercise of the Board's powers under sec. 8 of the Act of 1895. That section enables the Board, when they determine that a greater number of persons are employed in a department than are necessary for its efficient working, to dispense with the services of any officers they find to be in excess on the conditions prescribed by that section. It is contended that the Public Service Board, having under that section determined that the plaintiff was an officer in excess of the requirements of the department, dispensed with his services under that section and not under sec. 46 of the Act 1884. As a matter of fact the office was abolished on the 17th of June 1896, and the notification of the Government's approval of his compulsory retirement was not made to him until the 26th of the same month. But, assuming that the grading of the department by which the office was abolished and the determination that the plaintiff was an officer in excess of the requirements of the department were simultaneous acts, it is quite clear that it was the abolition of the office which made it necessary, in fact inevitable, that the Board should determine as it did. The plaintiff's office having been abolished, he was necessarily an officer in excess of the requirements of his department. When an office has been abolished within the meaning of sec. 46 of the Act of 1884, the rights of the holder of the office to a pension under that section accrue, and there is nothing in sec. 8 of the Act of 1895 to take them away. If that were not the true interpretation of the Act, it would be possible for the Government to escape from the obligation of sec. 46 in every case where an office was abolished by determining that the officer thus left without work by the aboli-

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tion of his office was an officer in excess of the requirements of the department within the meaning of sec. 8 of the Act of 1895. I have no doubt that, when once an office has been abolished within the meaning of sec. 46, the officer's right to a pension accrues, and that right cannot be divested by any act of the Board or the Government under the provisions of sec. 8 of the Act of 1895. Such being the proper interpretation of sec. 8, it seems to me that the inference on the facts is irresistible, that it was by reason of the abolition of his office that the plaintiff's services were dispensed with, and that he is therefore entitled to the rights he claims under sec. 46 of the *Civil Service Act* 1884.

It was contended by Mr. Stephen, in the re-argument of the case, in so far as it related to the meaning of sec. 59 of the Act of 1895, that, even assuming that the plaintiff's office was an office capable of being abolished under sec. 46 of the Act of 1884 and that it had been abolished, yet, in view of the last paragraph of sec. 59, it was impossible for the plaintiff to assert his claim in the present action. The words relied on are as follow:—

"Nor shall any person to whom this Act applies, except as in the next succeeding section provided, receive out of the Consolidated Revenue of the Colony any payment by way of pension, annual superannuation, retiring allowance, or gratuity, either directly or indirectly."

I am satisfied that Mr. Piddington's explanation of the object and purpose of that portion of the section is correct, and that it cannot operate to take away the plaintiff's right to a pension on the abolition of his office.

The Act of 1884 constituted a fund under the name of the Civil Service Superannuation Account out of which all expenditure under that Act was to be defrayed. The fund consisted of the monthly percentage from officers' salaries, together with certain payments by the Government out of the Consolidated Revenue. The intention of the Act was to establish the fund on a sound actuarial basis and make it self supporting. That is very apparent from sec. 54, which empowers the Government by proclamation to reduce all allowances and gratuities *pro rata*, if the actuarial reports at any time showed that the fund was insufficient

to pay the allowances and gratuities provided by the Act. The fund was in existence and full operation when the 1895 Act was passed; indeed it continued to be in operation, both receiving deductions from salaries and paying allowances, until 1903, when by the *Public Service (Superannuation) Act* of that year all its obligations and liabilities were passed on to the Consolidated Revenue Fund. The Act of 1895 leaves unrepealed all the sections of the Act of 1884 dealing with the fund, and recognizes its existence in many sections. Sec. 59 itself, in the earlier portion, specially enacts that no person entering the service after the passing of the Act shall acquire any rights against the fund, and then it goes on to provide that no one to whom the Act applies should acquire any rights to be paid out of the Consolidated Revenue, as distinguished from the Superannuation Fund, unless under the provisions of the Act. One object no doubt of the Act of 1895 was to effect in the first twelve months of its operation a substantial reduction in the number of officers—an object which could not be attained without payment of a larger sum in allowances and gratuities than the fund could be fairly expected to bear. The Act directs that these payments shall be made out of the Consolidated Revenue, and the latter words of sec. 59 are merely intended to make it quite clear that the Consolidated Revenue Fund is free from any obligations other than those expressly imposed on it by the Act. Such being the meaning of sec. 59 of the Act of 1895, it cannot operate in any way to cut down the plaintiff's rights acquired under sec. 46 of the Act of 1884 by the abolition of his office under the circumstances proved in this case. And there is certainly no other portion of the Act which directly or indirectly cuts them down. For these reasons I am of opinion that the finding of Mr. Justice *Pring* was erroneous and should be set aside and the verdict should be entered for the plaintiff for the amount claimed. It should be made a condition that the plaintiff is to give full credit to the Government for all moneys received by him from them since his retirement, and, if amendment of the proceedings is necessary to enable that credit to be given, such amendment should be made.

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Appeal allowed with costs. Order appealed from discharged with costs. Rule absolute to enter judgment for the plaintiff with costs for £829 14s. 6d., subject to an agreement signed by counsel and filed in Court.

Solicitors, for the appellant, *Aitken & Aitken.*

Solicitor, for the respondent, *The Crown Solicitor of New South Wales.*

C. A. W.

Foll *R v Longshaw, D.J.* (1990) 50 ACrimR 401

Refd to *Stamps, Commissioner of v Telegraph Investment Co* (1995) 133 ALR 130

Refd to *Stamps, Comr of v Telegraph Investment Co* (1995) 184 CLR 453

Cons *Hooper v Territory Insurance Office* (2002) 11 NTLR 182

Cons *Le Blanc v Qld TAB Ltd* [2003] 2 QdR 65

[HIGH COURT OF AUSTRALIA.]

SWEENEY . . . . . APPELLANT;

AND

FITZHARDINGE AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 21, 22, 23, 27.

Griffith C.J., Barton and Isaacs JJ.

Liquor Act (*N.S.W.*), (*No.* 18 *of* 1898), *sec.* 108—*Liquor* (*Amendment*) *Act* (*N.S.W.*), (*No.* 40 *of* 1905), *secs.* 46-52—*Registration of club—Appeal to Quarter Sessions from an order of Licensing Court—Re-hearing.*

The *Liquor* (*Amendment*) *Act* 1905, which was passed for the purposes, amongst others, of making fresh provision for the control of the sale of liquor in houses licensed under the Principal Act, and also for placing clubs in which liquor was sold on a footing analogous to that of licensed houses, gives the Licensing Courts jurisdiction to deal with the registration of such clubs, and to make orders in respect thereof. Sec. 1 provides that the Act shall be "construed with the *Liquor Act* 1898" thereinafter referred to as the Principal Act.

Sec. 108 of the *Liquor Act* 1898 provided that "Any person aggrieved by any adjudication of a Licensing Court . . . made under this Act," subject to certain exceptions, may appeal to the Court of Quarter Sessions, which "shall have power to hear and determine the matter of the appeal in a