[HIGH COURT OF AUSTRALIA.]

JAMES LESLIE WILLIAMS . . . . APPELLANT;
NOMINAL DEFENDANT.

AND

JOHN MACHARG . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *Sept.* 1, 2, 3.

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

Civil Service Act 1884 (*N.S.W.*) (48 *Vict. No.* 24) *secs.* 43, 48—*Superannuation allowance—Service before the Act—Broken periods—Officer—Person temporarily employed — Effect of notification in Gazette — Confirmation of prior "temporary" appointment.*

A draftsman employed by the Government of New South Wales, who from the date of his first employment had been engaged in regular and continuous work in an office, which, though described in the Blue Book of that year as that of "temporary draftsman," was not merely casual or created to meet a temporary emergency, but was necessary to the ordinary working of the department, and who for fifteen months had been paid at a daily rate including Sundays, with no deduction for absence, and who from the end of that period was paid an annual salary of equivalent amount:

Held, to have been from the first in the service of the Government within the meaning of sec. 2 of the *Civil Service Act* 1884, and not a person temporarily employed, and, therefore, entitled to the superannuation allowance provided by sec. 48 in respect of his whole period of service, notwithstanding the fact that he was not paid an annual salary but at a rate calculated at so much per day.

An officer of the public service who had been temporarily appointed in 1883 was gazetted some nine months later, as having been appointed permanently, the appointment to take effect from the date of his entry on duty.

Held, that it was a fair and reasonable inference that the original appointment was intended to be a permanent appointment, although subject to con-

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

firmation, and that the notification in the *Gazette* raised a presumption, which in the absence of evidence to the contrary was conclusive, that in the interval between the original appointment and the *Gazette* notice there had been some formal act of the Executive confirming the appointment.

The only conditions necessary to entitle a person to a superannuation allowance under the *Civil Service Act* 1884 are that at the date of his retirement he shall be an "officer" within the meaning of that Act and shall have "served for fifteen years." For the purpose of computing the period of service, any period or periods of "service" before the Act may be added to the period of service after the Act, although separated from it by an interval of time.

Semble, that for the purpose of calculating the period of service for the purpose of a pension, service prior to the Act, in order to be counted in the fifteen years, need not be of such a nature that, if it had taken place after the Act, it would have entitled the person serving to be called an "officer" within the meaning of the Act; it is sufficient if the person serving was continuously and regularly in the service of the Government in the ordinary sense.

Decision of the Supreme Court (*Macharg* v. *Williams*, (1907) 7 S.R. (N.S.W.), 792), affirmed.

Ratio decidendi in *Hales* v. *Millard*, ((1905) 5 S.R. (N.S.W.), 163), disapproved.

APPEAL from a decision of the Supreme Court of New South Wales on an appeal from a District Court.

The material facts as stated by Mr. District Court Judge *Murray* are shortly as follows.

The action was brought by the respondent, formerly an officer in the service of the Government of New South Wales, against the appellant, as nominal defendant representing the Government, for arrears of pension, claimed to be due on the ground that an annual pension paid to the respondent since his retirement in 1896 had been calculated on a wrong basis. The first error alleged consisted in the omission from the time of service which had been taken as the basis of calculation, of the period from 24th September 1868 to 31st December 1869, the second omission being of a period at the end of the service which is not now material. The defendant set up that during the first period the service of the respondent was temporary, being followed from 1st January 1870 by permanent service extending up to 10th September 1872, when for the purpose of this appeal he may

be taken to have resigned, again entering the service in March 1884; credit having been duly given for the broken period of so-called permanent service, but not for the earlier period called temporary. As an answer to the whole claim the appellant set up that whatever pension had been paid was granted under a mistake of fact, in that the respondent was not entitled to any pension, it having been erroneously assumed that the period ending in 1896 was one of permanent service, whereas it was in fact only temporary. As to the first period, most of the documentary evidence had been destroyed by fire many years before, but it appeared that the respondent had been first appointed as nominally a temporary officer, being paid by the day, but for every day including Sundays, without any deduction for absence on account of illness. As from the beginning of 1870, he was called a permanent officer, though the only change had been as to his salary, which was from that time called an annual salary, though it was practically the same in amount as before. His duties and all other incidents of his office remained the same, and he was not personally consulted as to the change, or even formally notified of it. The facts as to the respondent's re-entry to the service in 1883 are sufficiently stated in the judgments hereunder.

The Judge found as a fact that the employment of the respondent had been permanent from the commencement and over all the periods of his service, and was of opinion that the case of *Josephson* v. *Young* (1) was in point, and found generally for the plaintiff.

The appellant appealed to the Supreme Court, who dismissed the appeal on the ground that a mere question of fact was involved, and there was abundant evidence to support the finding: *Macharg* v. *Williams* (2).

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

Piddington, for the appellant. The learned Judge was wrong in finding that during the first period, from 1868 to 1869, the respondent was permanently employed.

(1) 21 N.S.W. L.R., 188.

(2) (1907) 7 S.R. (N.S.W.), 792.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

[BARTON J.—Is not that a mere question of fact?]

No, because the documentary and other evidence was overwhelming the other way. In the absence of other evidence the Blue Book is conclusive. The respondent himself in his correspondence admits that his employment then was temporary. Moreover, the fact that at the end of 1869 his position was changed, and from that time he was treated as a permanent officer, makes the inference irresistible that until that time he was only temporarily employed. He was, therefore, not an "officer" within the meaning of sec. 2 of 48 Vict. No. 24, and the period does not count for his pension, if he is entitled to a pension at all. Service to be counted under sec. 48 must be service as an "officer" within the definition contained in that Act. [He referred to *Civil Service Act* 1884, 48 Vict. No. 24, secs. 2, 8, 43, 48, 57; 60 Vict. No. 27, sec. 1; *Walker* v. *Simpson* (1); *Bale* v. *Miller* (2); *Manton* v. *Williams* (3); *Hales* v. *Miller* (4); *Inman* v. *Ackroyd and Best Limited* (5); 59 Vict. No. 25 (N.S.W.), secs. 55, 60; 25 Vict. No. 16, sec. 21.] As to the period between 1883 and 1896 the correspondence between the plaintiff and the defendant and the official act of the Governor show conclusively that the appointment was temporary, and the nature of the service was never altered. There is no limitation on the Governor's power to appoint temporarily. Sec. 31 of 48 Vict. No. 24 only refers to ministerial appointments. The Crown may employ temporarily as it pleases and dismiss as it pleases: 59 Vict. No. 25, sec. 58. The notice in the *Gazette* did not in any way affect the nature of the appointment that had been made. It merely chronicled the fact. It was not even *primâ facie* evidence of a "permanent" appointment. The nature of the appointment appears from the correspondence and other documents prior to the *Gazette* notice. [He referred to *Bartlett* v. *Garrard* (6).] Pension rights are only given to permanent salaried officers: 48 Vict. No. 24, secs. 2, 43, 48, 55. The respondent was shown on the documents to have been definitely temporarily appointed. There is no evidence

(1) (1903) A.C., 208.
(2) (1904) 4 S.R. (N.S.W.), 652.
(3) (1907) 7 S.R. (N.S.W.), 236; 4 C.L.R., 1046.
(4) (1905) 5 S.R. (N.S.W.), 163.
(5) (1907) 1 K.B., 613.
(6) 13 N.S.W. W.N., 11.

whatever of any other appointment to which the *Gazette* notice could refer. The Judge did not draw any inference as to departmental or executive action in the interval to support a permanent appointment.

Service before the Act of 1884 cannot be counted in the 15 years for a pension under that Act unless it is such service as would constitute the person serving an "officer" within the meaning of sec. 2. [He referred to *Bale* v. *Miller* (1); 30 Vict. No. 22, sec. 6; 48 Vict. No. 24, secs. 44, 48, 55; 60 Vict. No. 27, sec. 1.]

Brissenden, (*Pitt* with him), for the respondent. There was no question of law involved.

[GRIFFITH C.J.—There was the question whether under the circumstances there could be in point of law such an employment that the service arising out of it was service within the meaning of the Act.]

That point was not raised in the District Court and was not argued in the Supreme Court. It must be noted at the tria before advantage can be taken of it.

[He was not called upon as to the period from 1883 to 1896.] As to the first period, from 1868 to 1869, "service" as applied to such a period should not be construed in accordance with the definition in the Act of 1884. It must be assumed that the legislature, when speaking of service before the Act, used the word in the general sense, not the technical sense defined by the Act. Persons may be "officers" before the Act who would not be so called if their service had taken place after the Act. So long as a person employed by the Government before the Act was in such a position that he could be said to have been serving as an officer in the sense in which the words were then understood, he is entitled to claim a pension in respect of that service provided he is an officer at the time of his retirement. Before the Act any person appointed to an office was an officer. The respondent was called an officer in the Blue Book of 1869. "Temporary draftsman" was the name of the office. The service is none the less service because of the word "temporary" in the title. Moreover,

(1) (1904) 4 S.R. (N.S.W.), 652.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

the work was in its nature permanent, and would have been so treated if it had taken place after the Act of 1884. There was nothing casual or temporary either in the office or in the work. It was part of the departmental routine. The mode of payment does not affect its nature, nor does the length of the period. He was admittedly permanent after 1869 though there was no change in his status, or in the nature of his service. The only change was in the mode of payment. It is purely a question of fact in each case whether the service is temporary or permanent. Temporary service is that of an officer appointed to meet some particular emergency, or to carry out some particular work, which may not continue beyond a certain time. There was abundance of evidence to justify the Judge's finding in this case. The respondent was appointed to an office, paid a salary monthly for every day of the period, and received leave of absence just as the other officers. He was an officer even when judged by the standard of the Act. The mode of appointment is immaterial: *State of New South Wales* v. *Commonwealth* (1).

[ISAACS J. referred to *In re Shine*; *Ex parte Shine* (2).]

Piddington, in reply.

Cur. adv. vult.

September 3.

GRIFFITH C.J. This action was brought by the respondent in the District Court against a nominal defendant representing the Government of New South Wales, claiming a sum of money which he alleged to have been short paid to him in respect of a pension to which he claimed to be entitled under the *Civil Service Act* 1884. He had been employed in the public service, and retired from it on 30th September 1896 under circumstances which he claimed to be such as to entitle him to a pension under the Act mentioned. His claim was investigated in due course, and was allowed, and from the time of that allowance he has been in receipt of a pension. I will refer more particularly to the Acts directly, but I here remark that a person has no claim to a pension unless he has served for 15 years. The

(1) 6 C.L.R., 214. (2) (1892) 1 Q.B., 522.

Government, having inquired into the matter, were satisfied that the respondent had served for 15 years, and allowed the pension. As a matter of fact he was in the employment of the Government from 24th September 1868 continuously up to 10th September 1872, a period of 3 years, 11 months and 17 days. He was also in the employment of the Government from 14th July 1883 to 30th September 1896 a period of 13 years, 2 months and 16 days. These two periods added together make up a period of slightly more than 17 years. It was decided by the Privy Council in the case of *Walker* v. *Simpson* (1) that, in the case of an officer claiming to be entitled to a pension under the *Civil Service Act*, two such periods may be added together, and a period before the passing of the Act added to a period after the passing of the Act. The plaintiff accordingly claimed that he was entitled to receive a pension based upon service for 17 years. The Government refused to pay for more than 15 years, for reasons which I will state presently. He then brought the action in the District Court.

Two points are raised in the appeal. The appellant has taken up this position, that at the time of the plaintiff's retirement from the public service he was not an officer in the service at all, and therefore was not entitled to any pension. As I have said before, his claim was investigated at the time of his retirement and was admitted. The Government now take the objection that he was not entitled to any pension, and cannot recover in the action. If this contention is good and the Government obey the law, as it must be assumed they will, they will refuse to pay the plaintiff any pension at all for the future. We are told that they do not intend to take that course, but I cannot refrain from expressing my surprise that the point should be taken now, more especially when we consider the circumstances.

As I have said, the plaintiff re-entered the public service on 14th July 1883. In the *Government Gazette* of 14th March 1884, nine months afterwards, there appeared a notification signed by the Minister for Public Instruction, notifying that His Excellency the Governor with the advice of the Executive Council had been pleased to appoint the plaintiff to be inspector and surveyor in

(1) (1903) A.C., 208.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

Griffith C.J.

connection with the Church and School Lands Branch of the Department of Public Instruction, to take effect from the date of his entry on duty. Upon the faith of that public notification the plaintiff continued in the service until 30th September 1896, and now it is said that, notwithstanding that notification, which was apparently in the usual form, his appointment was in point of law a mere temporary appointment, and that he was never an officer at all within the meaning of the Act. That contention is based upon the language of the interpretation clause of the Act of 1884, which defines an officer as any person holding office in the civil service, with certain exceptions, and the civil service as "the body of persons now or hereafter appointed to permanent salaried offices in the service of the Government" with certain exceptions that are not material. It is not disputed that the plaintiff during all these years was paid an annual salary, but it is contended that the appointment was not permanent; that the notification in the *Government Gazette* that the plaintiff had received a permanent appointment was a mistake; that as a matter of fact, the plaintiff was appointed some months before temporarily, and a ministerial recommendation was made upon which an executive minute was intended to be founded, of which there is no evidence or of which, at any rate, no evidence has been produced, from which it appears that when the appointment was first made it was made temporarily, and that there is no evidence that the original appointment, which was temporary, had ever been confirmed. As a matter of fact I think there is abundant evidence, if such evidence is necessary, that it had been confirmed. I think that the public notification made by the Minister in the ordinary course of his official duty is evidence from which the Court ought to infer, in favour of any person not estopped from denying the fact, that the appointment had been confirmed, and that the appointment was permanent. During the time that the plaintiff was in the service a deduction was made from his salary annually according to law for the purpose of a pension, a deduction that may only be made in the case of "officers," that is, of persons occupying permanent salaried offices. If necessary, I am prepared to infer the existence of some formal act of the Executive Council which has been lost, or not produced.

There is, therefore, I think, sufficient evidence to show that the office of the plaintiff was permanent in whatever sense that term is used. But there is, I think, another answer to the argument. The word "temporary" seems to have been used in connection with the public service in various senses. I mentioned during the argument four different senses in which it was used. It appears from the case of *Josephson* v. *Young* (1) that it was a common practice to call every appointment that was not made by the Governor a temporary appointment, and that was probably a convenient distinction for many purposes. But it did not alter the law, under which a permanent appointment may be as effectually made by the Minister who has authority for that purpose as by the Governor himself. Take the case of messengers, for instance; they are always, as I mentioned in argument, appointed by the Minister, but they are permanent officers. Another sense in which the word may be used is "conditional," that is, subject to confirmation, or "on probation." That view is, I think, borne out by the Act of 1884 itself, for in sec. 20 it is provided that in the general and professional divisions every appointment to the lowest class shall be made from the probationary or junior class or from persons who have been temporarily employed in the service, provided that the person in each case shall have been employed for at least twelve months, and shall be otherwise qualified; and after that period of probation the appointment is to date from the beginning of the employment, though perhaps in one sense it was at first temporary. Another sense in which the word may be used is to distinguish casual from continuous employment. In the present case, if any weight is to be attached to the use of the word in the original recommendation to the Governor, I think the interpretation that ought to be put upon it is "provisional," or subject to confirmation, but for the reasons given I do not think its presence there under the circumstances is material. In my opinion the appointment that was made at that time was such that the plaintiff became a permanent salaried officer of the Government. I again express my surprise that after twenty years have passed such an objection should be taken by the

(1) 21 N.S.W.L.R., 188.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

Griffith C.J.

Government merely because the plaintiff has chosen to assert what he honestly believes to be his legal rights.

The other point in the case is whether the plaintiff is entitled to claim for more than 15 years service, and the question arises in this way. The right to a pension depends upon sec. 43 of the Act of 1884 which provides 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 hereinafter provided," subject to certain conditions and provisoes that are not material. Sec. 48 provides the scale of superannuation allowances, viz.:—"To any officer who shall have served 15 years a superannuation allowance equal to one-fourth of his annual salary with an addition of one-sixtieth part of such salary for each additional year of service." The Government do not dispute that the plaintiff served for 15 years, that is to say, a period of 13 years, 2 months, 17 days, and a sufficient further period to make up 15 years. The facts relating to this point are these: On 24th September 1868, when the plaintiff first entered the employment of the Government, he entered the Department of Crown Lands as one of the officers in the Occupation Branch then first established, the title of his office being temporary draftsman. The appointment was made by the Minister, and he was paid at the rate of 12s. 6d. per day for every day in the week, and was paid monthly. In the Blue Book of 1868 he is described as "temporary draftsman." Early in the year 1870 his salary was changed, probably by executive minute, to a fixed amount of £225 per annum. For the first three months that made no difference, as one-fourth of £225 is exactly equal to 12s. 6d. for 90 days; and from that time until he left the service in 1872 he received salary at the rate of £225 per annum. He then resigned at the request of the Government, but continued to do work for the Government in the capacity of surveyor. The Government now say that during the period from 24th September 1868 to 30th December 1869, at which point the annual salary was made to begin, he was not in the "service" of the Government, and, therefore, that, although his employment was going on during all that time it was not service that could be counted for the purposes of a pension. There can

be no doubt that he was in the employment of the Government, and continuously in that employment, from 24th September 1868 to 10th September 1872, so that, unless there is some valid reason for holding that that continuous employment was not service, his contention is well founded. The learned Judge of the District Court came to the conclusion that he was permanently employed in the service of the Government. An appeal does not lie to the Supreme Court from the District Court on a question of fact, so that the only question that could be raised was whether on the facts stated it was possible for the learned Judge to hold that the employment during the period in question was service within the meaning of sec. 48 of the *Civil Service Act* 1884. The conditions upon which a person is entitled to apply for a pension are that he shall be, at the time when he retires, an officer. If he is an officer and has attained the age of 60 years, he is entitled to retire, and if he has served 15 years he is entitled to be paid a pension; and the period of 15 years may be made up by adding previous periods of service separated from the last period by an interval of time. It is said that that view is apparently inconsistent with the decision of the Supreme Court in *Hales* v. *Miller* (1). If it is, then I think that that decision, so far as it is inconsistent, cannot be supported. The condition entitling a person to a pension is that of being an officer at the time of retirement, and if he is an officer at the time of his retirement and entitled to a pension, he is entitled to reckon in addition his service before the passing of the Act. The section referred to by the learned Judges in that case merely relates to the mode of computation of the pension for the period of service before the passing of the Act. I think, however, that the judgment in that case was perfectly right upon a different ground. These then being the conditions, we find the plaintiff in the service of the Government. He is 60 years of age and has served 15 years. So much is conceded. Then was he not serving the Government during the previous period? Upon what grounds can it be contended that he was not? The contention, as I understand it, is this: that service before the Act, to count as service for the purpose of computing a pension, must be service of such a nature that, if the Act of 1884 had been passed when the service took

(1) (1905) 5 S.R. (N.S.W.), 163.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

Griffith C.J.

place, the person serving would have been entitled to be called an officer within the definition contained in that Act. I am unable to accept that argument. The word "service" is not a technical word. Before the Act of 1884 was passed persons were considered to be in the service of the Government whether they were in receipt of a permanent salary or not. Why should the word be held now retrospectively to have a meaning that would deprive an officer, who has by continuous service earned a pension, of his right? The legislature clearly did not intend the element of an annual salary to be the governing one in considering the question whether a person is entitled to a pension or not, because they expressly provided by sec. 57 of the same Act that any person in the permanent employment of the Government who shall be remunerated for his services by daily, weekly or monthly wages, or otherwise, shall, on making application in writing to the Treasurer, be admitted as a contributor to the Superannuation Account and be liable to the same deduction from his pay as is provided "in respect of the officers," and entitled to participate in the superannuation allowances and gratuities. It appears to me that all that the legislature meant by "service" was this, that the person should have served continuously and not casually, that is to say, that he should be "in the service" in the ordinary sense. So far from thinking that the learned Judge of the District Court could not properly come to the conclusion that the plaintiff had been in the permanent or continuous employment of the Government at that time, I think he was bound to come to that conclusion. My opinion on that subject, however, in the view I take of the case, is not material. Quite apart from that, I think the learned Judge was justified upon the facts, even if the word "service" cannot have so wide a meaning as I think it has, in finding that the plaintiff had been in continuous employment, and in holding that he had been permanently appointed from the first, if the word permanent is material. I think that the word "temporary" as applied to a draftsman in the position of the plaintiff did not connote any idea of casual employment, but either that the appointment was subject to confirmation, or on

probation, or that it was in the first instance made by the Minister.

For all these reasons I think that the learned Judges of the District Court and the Supreme Court came to the right conclusion, and that the appeal, therefore, fails.

BARTON J. My learned brother has dealt so exhaustively with the question whether the plaintiff was temporarily or permanently employed that I have very little to add. But I wish to say that, so far as the case consists of a question of fact, the learned Judge of the District Court came to a conclusion upon abundant evidence; and I think that both he and the Supreme Court were unquestionably right as to the question of fact. Upon such a question the conclusion arrived at by the Court below must be obviously and unmistakably wrong before this Court will disturb it, where, as in this case, the conclusions of two tribunals agree. I think that in this instance they were undeniably right, and the conclusions they arrived at have my entire concurrence.

As to the question of law I will only say that Mr. *Piddington* deserves our sympathy because he has been involved in a struggle to maintain a position obviously untenable. I agree that the appeal must be dismissed.

O'CONNOR J. The Supreme Court declined to interfere with the finding of the District Court Judge upon the ground that no question of law was involved in the appeal. I was at first disposed to think that view was right, and that the question was entirely one of fact. But as the case went on I came to the conclusion that there was a question of law involved. And that question is whether upon the facts before the learned Judge of the District Court it was possible for him to legally come to the conclusion that the disputed periods of service could be included as service within the meaning of sec. 48 of the Act of 1884. The whole period of service was divided into three parts. As to the second there is no dispute. But the first and the third were both disputed. I shall deal first with the third period because that does not seem to me to raise any question of law. The facts are so plain that I think the decision of the learned Judge

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

O'Connor J.

of the District Court was not only one that he could legally come to, but was the only decision, in my opinion, that could be arrived at upon any fair view of the evidence. The third period was from July 1883 to September 1896, a period of 13 years, 2 months and 17 days. As to that period the plaintiff relied upon the *Government Gazette* of 14th March 1884, in which in a notification of 8th March 1884 it is stated under the hand of the Minister of the Department that the Governor with the advice of the Executive Council has been pleased to appoint John Macharg Inspector and Surveyor in connection with the Church and School Lands Branch of the Department of Public Instruction, to take effect from the date of his entry on duty. I think it is impossible to imagine any more deliberate or binding way in which a Government can declare the nature of an appointment than by a notification of that kind in the *Gazette*. If the case had stopped there no one could question the decision of the learned Judge that that represented on the face of it a permanent appointment to permanent work. But it appears that on his first employment, somewhere about July in the previous year, some correspondence had taken place and an executive minute had passed which described his appointment as a temporary appointment. It was sought to draw the inference from that correspondence which was completed in July 1883 that the announcement of the appointment in the *Government Gazette* was an error, and that it had no executive minute behind it. I think there is absolutely no ground for any such conclusion. The probabilities are that there was in the interval between July 1883 and the *Gazette* notice in March 1884 some communication or correspondence resulting from the manner in which the plaintiff's work was performed which led to a determination by the Government to make the appointment permanent, the result of which appears in the *Government Gazette* entry which I have read. In addition to that, it is open to any person considering these facts to give very great weight to another circumstance, and that is that the Government itself, in considering whether the plaintiff was entitled to a pension or not, admitted by their own actions that this period must be included. Without its inclusion it is impossible to make up the necessary 15 years, and the view the

Government took before the matter was litigated must have been based on the assumption that the appointment was a permanent appointment. There was some suggestion by Mr. *Piddington* that the Government was entitled now to state that that was a mere matter of generosity, that they might have insisted upon this point but did not do so. Now, I do not think it can be too clearly understood that the pension or the gratuity which a man receives at the end of his period of service is a matter of right and not a matter of favour or bounty on the part of any Government. It is part of the remuneration which is paid for the services he has rendered. If it is his by right he is entitled to be paid it without diminution or increase.

The Government has no right to expend public money in distributing unauthorized bounties to public servants, and, therefore, it must be assumed that the Government Department would take the correct legal view of the position, and in coming to the conclusion that the plaintiff's service was permanent they must have acted upon the knowledge they had of the transactions of the Department, from which they inferred at that period that the notice in the *Gazette* correctly represented the appointment which had been made.

I come now to the other period in dispute, that is, the first period of service from 24th September 1868 to 31st December 1869. In regard to that Mr. *Piddington* in his argument put the question of law clearly and fully before the Court. Several contentions were rather tentatively urged by him which, in the view I take of the matter, are not really necessary for the decision of this case. It was contended by Mr. *Piddington* that the definition of "officer" in the *Civil Service Act* 1884 must be carried back to the commencement of the service, even if the period went back to a time before the passing of the Act. No doubt it appears to have been assumed in all the cases hitherto decided dealing with service before the Act that this is so. In the case of *Josephson* v. *Young* (1), it was expressly put by *Sir Frederick Darley* C.J. that it was necessary to establish that the plaintiff was an officer as defined by the Act of 1884. If it were necessary to decide that question now, I am certainly of the same opinion

(1) 21 N.S.W.L.R., 188.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

O'Connor J.

as my learned brother the Chief Justice, that you cannot limit the meaning of "officer" or "service" as from the beginning by the definition in the Act of 1884, which in express terms defines the civil service to be "the body of persons now or hereafter appointed to permanent salaried offices in the service of the Government." It is, no doubt, a necessary condition to the granting of a pension or gratuity under the Act of 1884, that at the time when a claimant applies he should be an officer within the meaning of the Act. But I cannot see any justification for the proposition that he must be an officer within the words of that statutory definition at the time when his period of service began before the Act. But, as I have said, it is not necessary to decide that now. All that it was necessary for the learned Judge of the District Court to decide was whether the plaintiff had served the Government for the period mentioned in sec. 48. Now, it is not necessary to go into any fine definition as to what service may mean. I can quite see that some very difficult questions might arise as to what is service, if you once take away, as I think you must, the definition given by the Act of officer, in dealing with periods before the Act. But it is not necessary to decide that now because the learned Judge of the District Court took it that he was acting in accordance with the law as laid down in *Josephson* v. *Young* (1), and the proposition of law upon which he acted was that, in order that the plaintiff may succeed in establishing his right to include the period in question, he must show that during that period he was a permanent, not a temporary, officer, and it was upon that view of the facts that the learned Judge decided. Coming to the facts, my learned brother the Chief Justice has dealt very fully with them, and I do not think it necessary to repeat what he has said. I will only say that I entirely agree in the conclusion of the learned Judge of the District Court that during the first period the plaintiff was clearly employed as a permanent salaried officer of the Department. The sum and substance of the evidence amount, in my opinion, to this, that he was employed to do permanent work, that he did permanent work continuously, that the work upon which he was kept was necessarily done in the interests of the Depart-

(1) 21 N.S.W. L.R., 188.

ment and necessarily done continuously, and the only indication which there is of anything temporary about the work or employment is that it is described in the Blue Book as temporary service. That may be accounted for by the usage of the Department of which, I think, we can take judicial cognizance, since it is stated in the case of *Josephson* v. *Young* (1) that it is the practice of the Department, when an officer is appointed by the Minister, to describe him as a temporary officer, no matter how long, or how permanent in its nature, his service might be. I can see no reason or justification for the use of the word " temporary " in reference to such work as that involved in this case, except that it was apparently for the convenience of the Department to so describe officers appointed by the Minister.

I therefore agree that the decision of the learned Judge of the District Court as a matter of law must be affirmed. Not only do I think that he had ample evidence before him that the plaintiff's service was service within the meaning of the Act during the whole period, but I will add that if he had come to any other conclusion he would have been clearly wrong. I therefore agree that the appeal should be dismissed.

ISAACS J. read the following judgment :—

As the respondent would have been entitled to retire under sec. 43 of the Act of 1884, his rights depend on the construction to be given to the provisions of that Act with regard to superannuation, and particularly sec. 48.

The second period, 1870 to 1872, gives rise to no contest. The third period raises only a question of fact, and I agree that the judgment as to this should stand. It seems to me impossible to withdraw this question, so to speak, from the jury, and direct a finding for the appellant. The *Gazette* notice raises a *primâ facie* case in respondent's favor which is not necessarily displaced by the original correspondence terminating so many months before. The Crown had a very difficult and serious task to challenge the accuracy of its own formal and public *Gazette* notice. There was no explanation why the original Executive minute was not followed up by a corresponding formal order and

(1) 21 N.S.W. L.R., 188.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

Isaacs J.

notification, and why so much time elapsed without any order being publicly notified at all, and why when the notification appeared it took the absolute form. Add to this the admission by conduct during many years and the action of the Government after the retirement of the plaintiff when it was called upon to investigate his right to a pension, and it becomes quite beyond argument to contend that there was no evidence to support a finding for the respondent. This, so far, places him in the position of a person entitled to a pension.

As to the first period, 24th September 1868 to 31st December 1869, there is more difficulty. There are two questions as to this period, one of fact and one of law. As to the facts I take the view already expressed, and desire to add nothing. Upon the question of law the Privy Council decision in *Walker* v. *Simpson* (1) has caused me some hesitation. There is no doubt that the language of the Judicial Committee justifies the stand taken by Mr. *Piddington* in his very earnest argument. Their Lordships did think it proper to include among the important circumstances as to period A. the fact that it was not disputed that the respondent was as to that period an officer within the meaning of the Act of 1884. They also disposed of the period B. by holding that he was not in respect of it an "officer" within the meaning of the Act. If on a careful reading of that case I came to the conclusion that the Privy Council meant deliberately to decide upon the construction of the Statute that no service can be made the ground of pension rights, except such as has been rendered in the capacity of an officer as defined in the interpretation section of that Act, I should have nothing more to do than follow it, leaving that tribunal to correct it if found to be wrong. But I do not believe their Lordships attached any such rigid meaning to their words. Period A. was an admitted period except for continuity, and that was the only point to be decided. Period B. had reference to employment as a licensed surveyor, and two circumstances convince me that elasticity must be given to the words of the Privy Council. First of all, in view of sec. 57, their Lordships could not have meant to decide that no pensions could be claimed except upon

(1) (1903) A.C., 208.

service as an officer strictly defined. By that section daily, weekly, or monthly paid men are expressly made eligible if they contribute to the Superannuation Account; so that officers' service in the strict sense is not essential. And next, in the early part of the judgment Lord *Macnaghten* said:—"Licensed surveyors are not salaried officers, nor are they members of the Civil Service" (1). Reading this sentence with what follows, I think their Lordships meant by "officer" a member of the service, and in saying that the respondent was not an "officer" within the meaning of the Act, they meant that he was not in the service of the Government at all in the sense that the relation of master and servant existed, and they held accordingly that that circumstance was an obvious and conclusive answer to the claim. Looking to the Act itself two positions are clear. First, an officer in the strict sense may add to his period of service under the Act any previous period of service of a permanent and salaried character. Next, where a daily, weekly or monthly wages employé has contributed to the Superannuation Account, he is liable to deduction from pay as in the case of officers, and is entitled to participate in like manner in pension benefits. All the provisions relating expressly to officers apply to him *mutatis mutandis*. So that past daily, weekly or monthly paid service of a permanent character may be added. It would be strange then, if, for instance, a member of the service, who having originally been a daily paid man, and who if he had so remained could have added his previous service, should on being promoted to an officer's position, lose the benefit of previous service. But if not, the true test must be this: Any service, which is of such a nature that if it lasted fifteen years after the Act would be the foundation of a pension claim, is service which may be added by a person entitled to claim a pension. Taking this as the test the respondent is clearly entitled to add his first period, and the judgment in his favour should not be disturbed.

I desire to add my concurrence with the observations of the learned Chief Justice as to *Hales* v. *Miller* (2).

Appeal dismissed with costs.

(1) (1903) A.C., 208, at p. 211.

(2) (1905) 5 S.R.. (N.S.W.), 163.

H. C. OF A. 1908.

WILLIAMS v. MACHARG.

Solicitor, for the appellant, *The Crown Solicitor for New South Wales.*

Solicitor, for the respondent, *G. W. Ash.*

C. A. W.

Appl *McKean v Page* (1999) 25 FamLR 15

[HIGH COURT OF AUSTRALIA.]

SARAH PATIENCE PETER, ADMINISTRATRIX OF WILLIAM PETER . . . . } APPELLANT;

AND

SHIPWAY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *Aug.* 10, 11, 12, 28.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Will, construction of—Inconsistent provisions—Clear gift, how far affected by subsequent provisions—Intention of testator—Assignability of contingent interest—Assignment for benefit of creditors—Consideration.

A testatrix gave to trustees an estate "F." in trust for her son R. for life and after his death to her daughter M. absolutely. After making certain other provisions she gave the residue of her estate in trust for R. and M. in equal shares, their issue to "take the respective shares which their parent takes," and directed that in the event of either R. or M. "dying without issue" the interests or interest of either under the will should vest in the survivor, and that if both should die without issue the trustees should convert into money all her estate "as shall not already be converted into money" and divide the proceeds in certain proportions between P. and B. There was a direction in the will to the trustees to sell certain furniture and personal and household effects and apply the proceeds for the benefit and advancement in life of R.

Held, that the interest of P. under the will, though its enjoyment was dependent on a contingency, was a vested interest assignable after the death