[HIGH COURT OF AUSTRALIA.]

WALTER GEORGE MASON . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . DEFENDANT.

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SYDNEY, *May* 17, 18, 19.

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

Civil Service Act 1884 (*N.S.W.*), (48 *Vict.*, *No.* 24), *secs.* 2, 8, 48, 55—*The Constitution* (63 & 64 *Vict.*, *c.* 12), *sec.* 84—*Superannuation allowance—Period of computation—Officer—Telegraph line repairer—Contribution to superannuation account—Position of similar class, character or importance.*

In 1873 the plaintiff had been appointed by the Governor in Council to the office of a telegraph line repairer in the service of the Government of New South Wales, and he held this office in January 1885, when the *Civil Service Act* 1884 came into force. By sec. 2 of this Act "officer" is defined as a person holding office other than those mentioned in secs. 7 and 8. By sec. 48 an officer who has served 15 years is entitled to a superannuation allowance, and by sec. 53 a deduction may be made from each officer's salary to a superannuation account. By sec. 55 any officer who held any office at the commencement of the Act is entitled to a superannuation allowance, subject to an abatement, although he has not contributed during his past service to the superannuation account. In the Civil Service list of 1885 the plaintiff was erroneously classified under sec. 7 of the Act, and no deduction to the superannuation account was made from his salary. No objection to this classification was made by the plaintiff. In 1889 the plaintiff was appointed a post and telegraph master, and was then classified as an officer, and from this time deductions to the superannuation account were regularly made from his salary.

Held, that the plaintiff was an officer within the meaning of sec. 2 from the time of his appointment in 1873, and upon his retirement was entitled to a superannuation allowance calculated from that date.

The words "occupying positions of similar class character or importance," in sec. 8, qualify the words "persons employed in the printing and telegraph offices, dredge and marine service" as well as the words "other persons"

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immediately preceding, and the nature of the plaintiff's duties and the mode of his appointment showed that his office was not of such a kind as to fall within that section.

ACTION by the plaintiff against the Commonwealth for superannuation allowance. By consent of the parties the case was remitted to the Full Court by *O'Connor* J. upon a statement of facts agreed upon by the parties, the Full Court to have power to draw all inferences of fact necessary for their decision, and to enter judgment in accordance with their view of the rights of the parties.

The statement of facts agreed upon by the parties was as follows:—

1. On 9th November 1873 the plaintiff was appointed telegraph line repairer at Gundagai at a salary of £120 per annum.

2. On 7th September 1877 the plaintiff was appointed telegraph stationmaster and line repairer at Pooncairn at a salary of £180 per annum.

3. On 8th June 1880 the plaintiff, at his own request, was transferred to Gundagai as line repairer at a salary of £150 per annum.

4. On 1st June 1882 the plaintiff was transferred to Taree as line repairer at a salary of £150 per annum.

5. On 1st January 1885, the *Civil Service Act* 1884 (48 Vict. No. 24), came into force.

6. On 31st March 1885 the Civil Service List, prepared for publication by the Civil Service Board in pursuance of sec. 16 of the Act last mentioned, containing the names of all the officers of each division and class and of all other persons employed in the Civil Service of New South Wales, was published in the New South Wales *Government Gazette*. The plaintiff's name was not included in the division of the list headed "Persons temporarily employed," but it was included in the division of the list headed "Persons coming within the provisions of sec. 7 of the Act." The plaintiff's office was therein described as "Line Repairer, Taree, Electric Telegraphs."

7. From 1st January 1885 to 16th September 1889 the plaintiff was employed as line repairer, a class of officials from whose

salaries the 4 per cent. deduction on account of superannuation was not, in fact, made.

8. On 17th September 1889 the plaintiff was appointed post and telegraph master at Hurstville at a salary of £120 per annum, and was as from that date classified in the General Division.

9. The plaintiff's office of line repairer was identical with that described as line inspector in the "rules and regulations for the observance of officers and others engaged in conducting and working the lines of electric telegraph New South Wales" issued by E. C. Cracknell superintendent of telegraphs in January 1862. Under the said rules the duties of line inspectors were :—"1st—To maintain a continuous metallic conductor. 2nd—To remove from the wire all foreign conductors, whether metallic or otherwise. 3rd—To preserve thorough insulation of the wire. 4th—To secure the permanency of poles, and to have them replaced before an actual interruption occurs.

"In addition to the foregoing it will also be the duty of line inspectors when not actually engaged inspecting the lines, to assist the stationmaster in the office, to renew the batteries, and where no messengers are provided, to keep the office in order and deliver messages.

"Any line inspector disregarding these rules will be fined, and if a second time brought unfavourably under the notice of the Superintendent, his dismissal will be recommended.

"An inspector from the Chief Office will at intervals visit portions of lines not found to work satisfactorily, and if faults are discovered which are due to the negligence of the inspectors on that particular section, the expenses of such special inspection will be charged to the officer or officers entrusted with its supervision."

The plaintiff as line repairer performed the duties prescribed for line inspectors in the said rules. He also assisted in the postal work of the office.

10. The plaintiff did not at any time make application under sec. 57 of the *Civil Service Act* 1884 to be admitted as a contributor to the superannuation account, and no deduction was made up to 17th September 1889 from his salary by way of contribution to the account. Deduction was made from his

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salary for superannuation purposes on and after 17th September 1889.

11. From 11th March 1899 to 11th September 1899 the plaintiff was absent from duty on six months' leave of absence on full pay, with the approval of the Governor in Council.

12. On 11th September 1899 the plaintiff was appointed post and telegraph master at Bellingen, New South Wales, at a salary of £170 per annum.

13. On 1st March 1901 the post and telegraph services of the State of New South Wales became transferred to the Commonwealth under the *Commonwealth of Australia Constitution Act.*

14. On 26th December 1906 the plaintiff was retired from the Public Service of the Commonwealth under the provisions of sec. 43 of the *Civil Service Act* 1884, sec. 84 of the *Commonwealth of Australia Constitution Act*, and sec. 73 of the *Commonwealth Public Service Act* 1902.

15. From 17th September 1889 to 26th December 1906 the plaintiff was an officer within the meaning of the *Civil Service Act* 1884, and he has been paid by the defendant and has accepted, without prejudice to his rights if any to a larger sum, a superannuation allowance of £48 17s. 6d. per annum, based upon service from 17th September 1889 as such officer.

If the plaintiff is entitled to superannuation allowance calculated upon service from 9th September 1873, the amount of such allowance would be £94 17s. 6d. per annum subject to an annual abatement of £10 15s. 6d. under sec. 55 of the said Act.

16. During the plaintiff's service in the Department of the Postmaster-General from 9th September 1873 to 17th September 1889 there were no rules and regulations with regard to the said department of a similar kind to those made by the Commissioner for Railways and described in sec. 7 of the *Civil Service Act* 1884, and the plaintiff was not engaged and did not agree to serve under any such rules and regulations.

In each case the plaintiff was appointed by the Governor by Executive Council minute.

The material sections of the *Civil Service Act* of 1884 are cited in the judgment of *Griffith* C.J.

Brissenden and *Clive Teece*, for the plaintiff. On 1st January 1885 the plaintiff was an officer within sec. 2 of the *Civil Service Act* 1884, unless he was a person mentioned in secs. 7 or 8 of that Act. Although in the Civil Service list of 1885 the plaintiff was classified under sec. 7, he could not come under that section, as it is admitted that there were no rules and regulations with regard to his Department of a similar kind to those made by the Commissioner for Railways. The mode of his appointment and the nature of the duties he was required to perform show that he was not a person occupying a position of similar class, character or importance to those specified in sec. 8, and therefore he did not come under that section. If he did not come under secs. 7 or 8 he was entitled, in computing his pension, to take into calculation the whole period of his past services by secs. 43, 48 and 55. Even if he was not an officer in 1885 he is entitled to include his whole period of service under sec. 48, as he was an officer when he retired. Sec. 55 does not qualify secs. 43 and 48. Upon this point the plaintiff adopts the reasoning of *A. H. Simpson* J. in *Hales* v. *Miller* (1). [They also referred to *Williams* v. *Macharg* (2).]

Piddington, (*Wise* K.C. and *Ferguson* with him), for the defendant. The plaintiff was not classified as an officer until 1889, and he has never protested against the classification. His acquiescence is some evidence of an admission that he was not an officer. The fact that he did not contribute to the superannuation account between 1884 and 1889 is also evidence that he did not regard himself as an officer. The plaintiff occupied a position of similar class, character or importance to those specified in sec. 8, and therefore came under that section, and was not an officer. The right to pension allowance is co-ordinate with the contributions made under sec. 53. Sec. 57 is entirely prospective in its operation, just as sec. 53 would be but for sec. 55.

Brissenden, in reply. The word "office" in sec. 55 means a recognized permanent position in the service. If the plaintiff became an officer subsequently to the Act of 1884, and when his

(1) 5 S.R., N.S.W., 163. (2) 7 C.L.R., 213, at p. 222, 231.

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pension was computed had held an office for 15 years, he is entitled to a pension under secs. 43 and 48, and is not deprived of his rights by sec. 55. "Office," in sec. 55, is not necessarily limited by the definition of "officer," but is used in a non-technical sense.

Cur. adv. vult.

May 19.

The following judgments were read :—

GRIFFITH C.J. This is an action brought by the plaintiff for a declaration of his rights to a pension or retiring allowance under the combined effect of the *Civil Service Act* 1884 (N.S.W.), sec. 48, and sec. 84 of the Constitution, with consequent relief. The *Civil Service Act*, which came into force on 1st January 1885, is entitled "An Act for the regulation of the Civil Service for providing superannuation and retiring allowances to the members thereof and for other purposes."

The preamble recited that "it is expedient that officers of the Civil Service should be classified and that a scale of salaries and a system of appointments promotions and retiring allowances should be established and that other provisions for the regulation of the service should be made."

By sec. 2 the term "Civil Service" was defined to mean "The body of persons now or hereafter appointed to permanent salaried offices in the service of the Government," with certain exceptions not material to the present case. The term "officer" was defined to mean "Any person holding office in the Civil Service other than those mentioned in secs. 7 and 8, and teachers under the Educational Division and persons employed temporarily."

On 9th November 1873 the plaintiff had been appointed by the Governor in Council to the office of a telegraph line repairer in the service of the Government of New South Wales at a salary of £120 per annum. When the *Civil Service Act* came into force on 1st January 1885 he held the same office of a telegraph line repairer at a salary of £150 a year, and was stationed at a country town. He was, therefore, at that time a person who had been appointed to a permanent salaried office in the service of the Government, and was consequently a person holding office in the Civil Service. He remained in the service until his retirement in September 1906.

On 17th September 1889 he was appointed to the office of post and telegraph master at a salary of £120 per annum.

Sec. 48 of the *Civil Service Act* was as follows:—"The following shall be the scale of superannuation allowances payable under this Act, viz.:—"To any officer who shall have served fifteen 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 but in no case shall such superannuation allowance exceed two-thirds of his annual salary. And such superannuation allowance shall be computed upon the average annual amount of salary or emoluments other than forage equipment or travelling allowance received by such officer during the preceding three years."

The amount of pension is, therefore, dependent upon the length of service.

Sec. 55 provided that any "officer" who "held office" at the commencement of the Act should, notwithstanding his not having contributed during his past service to the superannuation account (which did not then exist) be entitled to the superannuation allowance as provided by sec. 48, subject to an abatement to be calculated in the prescribed manner, unless he should elect to pay up by instalments a sum equal to the amount which would have been deducted if the scheme had been in force.

The question in the present case is whether the plaintiff's service should be reckoned from 9th November 1873 or from 17th September 1889.

The answer to this question depends primarily upon whether at the commencement of the Act he was an "officer" within the meaning of sec. 55. Sec. 2 appears to draw a distinction between persons holding office in the Civil Service, and the persons intended to be dealt with by the provisions specifically dealing with officers *eo nomine*. The point arises in this way. According to the definition of the term "officer" persons holding office in the Civil Service are, for certain purposes at any rate, not officers if they are mentioned in secs. 7 and 8. Sec. 7 provided that nothing in the Act contained should interfere with the rules and regulations made by the Commissioner for Railways with regard to persons employed in the railway service, "or with

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such rules and regulations of a similar kind with regard to any other Department" (with an exception not here material). If this section is literally read, the only persons holding office in the Civil Service, and mentioned in it, are persons employed in the Railway Department, but it may perhaps be extended to mean persons employed in other Departments governed by similar rules. As a matter of fact, however, there were not in 1884 any rules and regulations of a similar kind governing the Telegraph Department, or Post and Telegraph Department, in which the plaintiff was employed. It seems clear, so far, that sec. 7 had no application to him.

Sec. 8 was as follows:—"In the case of messengers housekeepers letter-carriers stampers or sorters bailiffs warders matrons nurses attendants boatmen storemen and persons employed in the printing and telegraph offices dredge and marine services and other persons occupying positions of similar class character or importance who are in the receipt of annual salaries and not of daily or monthly wages or paid by piece-work the Governor may order an increase of any salary in any year not exceeding ten pounds. But all such increases shall be specified in the annual estimates." There can be no doubt, I think, that the words "occupying positions of similar class, character or importance," &c. qualify the words "persons employed in the printing and telegraph offices, dredge and marine service," as well as the words "other persons" immediately preceding them. Otherwise the extraordinary anomaly would result that all the persons employed in the Telegraph Department, some of whom were possessed of high professional attainments and in receipt of large salaries, would have been put on the same footing as, *e.g.*, messengers, letter-carriers and boatmen.

It is now suggested that the plaintiff fell within the terms of sec. 8. This is a question of fact.

Part I. of the Act dealt with the classification of officers and contained detailed provisions on the subject, by which classification was made dependent on the salary actually received, and officers were entitled to annual increments of salary dependent upon their classification.

By sec. 16 of the Act a Board, called the Civil Service Board,

to which the administration of the Act was committed, was required to publish annually in the *Gazette* an alphabetical list of "all the officers in each Division and class and all other persons employed," and the list was to be deemed to be the classification for the ensuing year unless it should be appealed against within 30 days. The amount of salary payable to an officer was, as already said, dependent upon his classification.

In the list published for the year 1885 the plaintiff's name was not included in the list of classified officers, nor was it included in an accompanying list of persons falling within sec. 8, but it was included in a list of persons falling within sec. 7.

So far as this list can be regarded as evidence on the question whether the plaintiff in fact fell within sec. 8, it is strongly in his favour, for it shows that the Board did not regard him as a person occupying a position of a similar class, character or importance to those enumerated in that section. Apart from this evidence, I think that it abundantly appears from the facts stated as to the nature of the plaintiff's duties, and from the fact that he was appointed by the Governor in Council at an annual salary, that his office was not regarded as a minor one within the meaning of sec. 37 of the *Constitution Act* of New South Wales (as those enumerated in sec. 8 would almost certainly have been), and was not in fact one of such a kind as to fall within sec. 8. His inclusion in the list of persons falling within sec. 7 was apparently an error, perhaps based upon the erroneous notion of the existence of some rules and regulations in the Post and Telegraph Department similar to those in the Railway Department.

In point of law, then, the plaintiff was on 1st January 1885 an "officer" within the definition of the Act, and unless he is now precluded from setting up that position he is entitled to relief on that assumption.

Upon his new appointment in 1889 he was classified as an officer. He had not in the meantime asserted his right to be regarded as an officer entitled to classification. If he had successfully asserted such a claim he would have been liable under sec. 53 of the Act to a deduction at the rate of 4 per cent. per annum from his salary as a contribution to the superannuation account established under the Act. From the time when he received his

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new appointment in 1889 such deduction was regularly made. If he was an "officer" during those four years it ought to have been made as from January 1885. The defendant relies upon this omission as a bar to the plaintiff's claim, but I confess my inability to find any ground on which it can be regarded as a bar. It was the duty of the Government to make the deduction. Even if the plaintiff had an independent duty to call attention to the omission the parties were in *pari delicto*. The omission is, however, easily to be accounted for without imputing any dereliction of duty to the plaintiff, or imputing to him an election, if such election could be made, to be regarded as outside the benefit of the superannuation provisions. It may be that he thought that there were some rules in force in the Telegraph Department which were equally beneficial to him. Most probably he merely acquiesced in the decree of his superior officers without its occurring to him to challenge its validity. The amount which was thus in error not deducted is about £25.

The mistake—for mistake I think it was—was in one sense a mistake of fact, viz., in supposing that there were in existence rules and regulations by virtue of which the plaintiff fell within sec. 7. In another sense it was a mistake of law. In either view it was mutual.

In my opinion there is no doctrine by which such a mistake can be relied upon as estopping the plaintiff from asserting the truth as to his real position in the service.

The plaintiff claims to take advantage of sec. 55, and as he was, in my opinion, an officer at the commencement of the Act, he is entitled to do so. I think, therefore, that his service must be counted as from 9th November 1873.

A further question was debated, whether, if the plaintiff was not an "officer" at the commencement of the *Civil Service Act* 1884, he was nevertheless a person who "held office" at that time within the meaning of sec. 55, or a person who had "served" within the meaning of sec. 48. But in the view which I take of the first point this question, which involves some matters of difficulty, becomes immaterial, and I reserve my opinion upon it. Nor do I think it necessary to say anything as to what should be done

with respect to the deductions which should have been made before September 1889.

O'CONNOR J. On 9th November 1873 the plaintiff was appointed by the Governor and Executive Council telegraph line repairer at a salary of £120 per annum. With the exception of a period of two years and eight months between 1887 and 1890, during which he was postmaster as well as line repairer at Pooncairn, he continued to hold the office of telegraph line repairer until 17th September 1889, when he was appointed postmaster at Hurstville. Prior to that no deduction had been made from his salary for the purpose of contribution to the superannuation fund under sec. 53 of the *Civil Service Act* 1884. From that date the usual deduction was regularly made. The Commonwealth do not dispute the right to pension in respect of his service from that time until his retirement in December 1906. Indeed, he has been granted and has accepted without prejudice to his present claim a pension calculated on that basis. But he claims to be entitled to have taken as the basis of the calculation the whole of his service from its commencement in 1873 until his retirement. That claim being contested by the Commonwealth, this suit has been brought to determine whether the disputed period ought or ought not to have been counted for the purpose of computing the pension. A question of some difficulty was raised in the course of the argument as to whether, if the plaintiff was not an officer within the meaning of sec. 55 of the *Civil Service Act* 1884 at the date when that Act came into force, he had any status for claiming pension in respect of any service prior to his appointment as postmaster in 1889. But in the view that I take of the facts it becomes unnecessary to consider that matter. The *Public Service Act* 1895 operated to preserve any rights the plaintiff might have under the Act of 1884, and he took over with him into the Commonwealth service all those rights, whatever they might be. It is by secs. 43 and 48 of the Act of 1884 that the rights of pension are conferred on officers. It is an essential condition that the plaintiff was an officer within the meaning of that Act at the date of his retirement. That he was so is common ground. It may be conceded for the purposes of this suit that in

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order to entitle him to include in the calculation his years of service prior to the Act, it is necessary that he should have been an officer at the date of its commencement. It becomes, therefore, necessary to determine the issue, partly of law and partly of fact, whether the plaintiff was at that date an officer within the meaning of the Act. Sec. 2 defines "officer" as "Any person holding office in the Civil Service other than those mentioned in sections seven and eight and teachers under the Educational Division and persons employed temporarily." That he was the holder of an office in the Civil Service from the time of his first appointment cannot be doubted, having regard to the definition of Civil Service in the same section. But we have to inquire whether though holding office he was one of the class of persons mentioned in sec. 7 or sec. 8. It appears that he was listed in the first Civil Service list issued by the Commissioners under the provisions of sec. 16 as coming under sec. 7. It is admitted now that he was so listed in error. There is no power conferred on the Commissioners to take away rights from public servants or to confer rights on them by omitting names from the list or by inserting names in the list. There was, it appears, no justification in fact for treating the plaintiff as coming within sec. 7. The list may therefore be disregarded, and it must be taken as established that the plaintiff was not one of the class of persons mentioned in that section.

Turning now to sec. 8, it must, in my opinion, be interpreted as including, not all persons employed in the printing and telegraph offices and the dredge and marine Services, but only the persons in those services who occupy positions of similar class, character or importance to those mentioned in the beginning of the section. The class of persons mentioned are messengers, housekeepers, letter-carriers, stampers or sorters, bailiffs, warders, matrons (which I take to be matrons holding minor positions), nurses, attendants, boatmen, and storemen. There are not many characteristics common to such a heterogeneous collection of duties. But there are some common to all of them. They are as a class minor offices, the duties of which are mostly manual, having little or no responsibility or initiative, and generally carrying out their work under immediate direction of a superior

officer. Whether or not the plaintiff's position was of that class, character or importance is entirely a question of fact, and to that I shall now address myself. The inferences to be drawn from evidence adduced on this issue may be divided into two parts. Inferences in the nature of admissions to be drawn from the plaintiff's conduct in his dealings with his Department, and inferences to be drawn from the mode of his appointment, his status in the service, and the nature of his duties. Under the first head I would place the listing of the plaintiff not as an officer, but as under sec. 7, and the plaintiff's failure to object to the list, and his failure to object that he was not treated as an officer, in that no deductions were made from his salary for the purposes of the superannuation fund under sec. 53. In my opinion no inference can be drawn from the plaintiff's inaction or silence with regard to either of these matters. The question whether the Commissioners and the Department took the right view of the plaintiff's position was to a certain degree a question of law, besides which, having regard to the ordinary relations between an officer in the Public Service and his official superiors, it is impossible to say that his silence and inaction may not have proceeded reasonably from quite other motives than willingness to acquiesce. I therefore treat all that class of inference as of no value whatever in determining the question whether the plaintiff's office was or was not one of similar class, character and importance to those mentioned in sec. 8. The issue, therefore, must depend entirely upon the proper inference to be drawn from the mode of the plaintiff's appointment and the nature of his duties.

Appointments to such offices are seldom if ever made by executive minute. In the classification of government employés for most purposes those appointed by executive minute are regarded as holding a higher status than those appointed by a Minister or head of a Department, as persons holding the offices named in sec. 8 are generally appointed. Looking now at the duties of a telegraph line repairer, it is proved that they are the same as those of a telegraph line inspector. It is obvious that the duties are very different in class, character, and importance from those performed by the class of persons specified in sec. 8. The position involves considerable responsibility, technical know-

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ledge, and power of initiative. The holder of it may be called upon at any time to carry out any or all the duties of a postmaster, as the plaintiff actually did for nearly three years at an early period of his employment. Under these circumstances I find myself driven to the conclusion that the plaintiff's position was not of similar class, character, or importance to those enumerated in the section. It follows that he was, in my opinion, from the time of his first appointment until his retirement an officer within the meaning of the Act. That being so, his right to pension accrued under secs. 43 and 48. As to the period between the commencement of the Act and his retirement there can be no ground for question. Assuming that pensions are payable only for years of service in respect of which contributions towards the superannuation fund have been paid, or can be commuted under sec. 55, there is clearly power to adjust the abatement for that period. Nor can there be any doubt that the provisions of the section are similarly applicable to the period between the commencement of the Act and the beginning of the plaintiff's service in 1873. The words "past service" clearly include service before the commencement of the Act. The plaintiff having established that he was in fact an officer within the meaning of the Act at the time of its commencement, and that he continued so until his retirement, the Court must determine what are his rights under secs. 43 and 48. It is, I think, undoubted that he may count his service before the Act came into force equally with his service after it came into force. On the face of the section it was evidently intended to operate retrospectively as well as prospectively. To interpret it otherwise would be to read it as being, as far as pensions are concerned, practically inoperative for fifteen years from the day it was passed, a consequence we cannot assume that the legislature intended. During the whole period of his service the plaintiff was, in my opinion, an officer within the meaning of the Act, and he is therefore entitled in the calculation of his pension to have that whole period counted as years of service. But for every year in which no deduction was made for his contributions towards the superannuation fund the Commonwealth may now make the deduction and abatement provided for in sec. 55. For these reasons there must be, in my opinion,

judgment for the plaintiff with the declaration of right which he has claimed, and judgment for payment of arrears on that basis. If the amounts arranged by the parties at the trial are to be adhered to, the annual amount of the plaintiff's pension will be, not £48 17s. 6d. as now paid, but £94 17s. 6d. per annum, subject to the abatement agreed upon of £10 15s. 6d. per annum.

ISAACS J. The contest between the parties is whether prior to 17th September 1889 the plaintiff was an "officer" within the terms in which that word is defined in the *Civil Service Act* 1884, No. 24.

It is conceded that he did come within the definition unless he was excluded by reason of being a person mentioned in secs. 7 or 8. Both in fact and law it is clear he did not come under sec. 7, unless he is to be taken to have been under it by force of the list prepared by the Board and published in the *Gazette* under sec. 16. In order to understand the meaning and effect of that section it is necessary to recollect the position of the service immediately before the Act was passed. The officials in the employ of the Government were appointed by the Executive, and their emoluments and positions were regulated by administrative action. Some held office in the proper sense of the term, and were in the permanent service of the State, others were only temporarily employed. The Act declares its purpose in the preamble, namely (1), to classify the officers; (2) to establish a system of appointments, promotions and retiring allowances; and (3) to make other provisions for regulation of the service. The "service" as defined consists of the body of persons who, either at the time the Act was passed were appointed, or afterwards were appointed, to "permanent salaried offices" with certain specified exceptions.

The word "offices" in that definition connotes that the occupants are the "officers" contemplated by the Act.

Then "officer" as defined "means any person holding office" in the service—that is a permanent salaried office—except those mentioned in secs. 7 and 8, teachers and temporary employés. But for the express exceptions, as the legislature indicates, the

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word "office" is broad enough to include even the excepted persons.

Part I., sub-part "Classification," marks off the service into divisions and classes, and provides that "all officers" at the time of the passing of the Act shall be classed in one of them; and that every future officer shall be assigned a position in one of them.

It applies to "officers" as defined only. All of them are governed by its terms—no others are within them. Sub-heading 3, "Educational Division," emphasizes this, by the contrast it makes between the "officers" and the "teachers," who are expressly retained under the *Public Instruction Act* 1880.

Sub-part "Increases" provides by sec. 4 that as a general rule every officer of the General Division not in receipt of the maximum salary of his class shall be entitled to certain increases, until the maximum is reached, the increases to run from 1st January 1885.

Section 7 excludes any interference with the rules of the railway service or with those of any other Department possessing regulations, except as to retiring allowances and gratuities.

And sec. 8 makes special provisions relative to certain classes of employés, to which I shall separately refer.

Sec. 11 enacts that the estimates submitted to Parliament each year shall give specified information, and contains an important proviso in these words: "Provided that the *classifications imposed by this Act* shall not be held to diminish or affect the rights by way of precedence or otherwise except by way of *emolument* of any officer." This is a plain declaration that the classification imposed is for salary purposes only and assumes as its groundwork the status of officer—the actual status of officer or non-officer being otherwise determined.

The next sub-part is headed "Civil Service Board." The Board is constituted and assigned certain duties, among which is that of preparing the Annual List. It is evident that the Board is not for ever bound by the list as framed for any specific year. Its function is to prepare one annually, and if the Crown is not to be held estopped as a matter of law by the original classification of the Board, neither can any officer be so held.

It must be remembered *in limine* that the Board was not in the strict sense empowered to classify the officers as existing at the

date of the Act. The Act did that itself by reference to the *Appropriation Act* 1884 or assumed to do so. To use its own terms it imposed the classification.

Sec. 3 divided the then existing officers into divisions and classes, all that was necessary was to identify the individuals. Subsequent appointees had to abide by the provisions of Part II. relating to examination, appointment and promotion, but with them we have here no concern.

Sec. 16 is substantially an identification section. The list is to show who are "officers" and who are "other persons employed." And as to the officers, the Board cannot depart from the lines of demarcation fixed by sec. 3, which are specified salaries; but sec. 16 allows certain elements to be factors in constituting those salaries, as for instance the value of official residences, allowances, &c., and as to these the Board may, and is required to determine in the first place the pecuniary value. This list is then to be deemed the classification for that year. But the Board could not make a man an officer who was not one, or unmake an officer and convert him into a non-officer; but in the sense of attaching the proper legislative label to each existing officer, it could declare his classification, and for that purpose could determine certain necessary values.

Sec. 17 allows any "officer" dissatisfied with the position assigned to him to appeal, and on appeal he may be changed from one Division to another or raised from one class to another. The Board may have wrongly estimated elements in determining what was the true amount of his salary. But nothing is said as to changing from "non-officer" to "officer," because that would be foreign to the purpose. I therefore see no reason for attributing any legislative force to the error which the Civil Service Board made for some years in including the plaintiff, if the Telegraph Department had no such rules and regulations, among those employés who were covered by sec 7. He is therefore free of that section. Then does he come under sec. 8? This is dependent upon the validity of two distinct contentions.

The first is one of pure law, namely, that every person employed in the printing and telegraph offices, and the dredge and marine service, whatever his rank, duties, or annual re-

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muneration, from the head downwards, was excepted from the definition of "officer." This is, in my opinion, quite untenable. It would introduce an anomalous distinction between Departments or branches of Departments as such for which no reason can be assigned; it would place within each of these three branches its head and its subordinates on an equal footing for the purpose of the Act, and all of them for that purpose in the same situation as the employés mentioned at the beginning of the section. This would in turn necessarily lead to the absurd result that the subsequent words, "other persons occupying positions of similar class character or importance," would mean persons high and low in any other Department whose positions were similar to all previously mentioned persons, including those high and low in the specially named branches—in other words would mean practically the whole service.

Consequently the words "occupying positions," &c., must be read as qualifying both persons employed in the printing and telegraph offices and dredge and marine service as well as "other persons," and the word "similar" to positions of the enumerated classes of employés at the head of the section.

The next question is one of fact, that is to say, whether Mason's position was similar in importance to that of the enumerated classes.

Mr. *Piddington* contended that the Board did not think his duties were those of an officer, because it did not at any time include him in the classified list of officers, or compel him to submit to a deduction under sec. 53, and that he did not think so, he did not ask to be so included, and did not see to any such deduction, and, most of all, from the plaintiff's standpoint, that he laid no claim to any increase of salary under sec. 4.

These are all powerful arguments, and were well put. But it is not suggested that there is any estoppel, or any agreement, barring Mason of any actual rights otherwise existing. The case was not, as I understood, put that way. The mutual conduct was only urged as evidence, so to speak, of the view which both parties took on the spot of the facts now in dispute. But the value of the considerations so addressed to the Court is completely destroyed by one circumstance. The plaintiff was included,

though wrongly included, in the list of sec. 7. Both parties apparently thought that was right. And, so thinking, neither party could have given any mental attention to the situation as tested by the standard of sec. 8, and in the list of employés under sec. 8 he was not in fact included. All the consequences, absence of application to be placed in the classified list, non-deduction of salary, and non-increase of salary, are explicable by the inclusion as under sec. 7.

That leaves for our consideration nothing but the bare evidentiary facts of the case upon which to determine the ultimate fact, whether Mason's position was of the same importance—for the test of class and character are inapplicable—as that of those employés enumerated in sec. 8.

As to this I can only say that, viewing it as a jury, I come to the conclusion it was not. A position in which such skilled requirements as are included in the statement of duties mentioned on page 20 of the case is not, I think, similar—but is distinctly superior—to that of any of those with which it is compared. There is a higher standard of requisite attainment, a larger public responsibility, a greater necessity for personal initiative and independent judgment of action, and more risk of life and limb than can be fairly predicated with respect to any of the other occupations, and so viewing the matter the plaintiff has, in my opinion, made out his claim and is entitled to judgment. I ought to add that the case was well argued on both sides.

Judgment for plaintiff.

Solicitors, for plaintiff, *John McLaughlin & Sons.*

Solicitor, for defendant, *Charles Powers,* Commonwealth Crown Solicitor.

C. E. W.