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do not see that justice would be assisted by driving the parties to further protracted litigation, leading possibly to further appeals.

The appellant stands simply non-suited; if he chooses to try his fortunes further he may do so, but without the aid of this Court. This judgment will not prevent him doing so if he wishes.

But so far from encouraging him to adopt that course, I entirely agree that, there being no question of general importance involved, the proper order in the circumstances is to rescind the leave to appeal and leave the parties to occupy the position in which they were placed by the judgment of the Supreme Court.

Special leave to appeal rescinded.

Solicitors, for the appellant, *Crisp & Crisp*, for *D. C. Urquhart*, Devonport.

Solicitors, for the respondent, *Ewing, Hodgman & Seagar*, for *Wilfred Hodgman*, Burnie.

B. L.

[HIGH COURT OF AUSTRALIA.]

JAMES WILLIAM EVANS . . . . . APPELLANT;
PLAINTIFF,

AND

JAMES LESLIE WILLIAMS . . . . . RESPONDENT.
DEFENDANT,

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SYDNEY, *Nov.* 22, 23; *Dec.* 12, 16.

Griffith C.J., Barton and Isaacs JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Construction — Implied term — Agreement by Crown with holder of statutory office—Agreement to give up statutory fees in consideration of payment of fixed salary by Crown—Power of Crown to terminate contract.

In 1883 the plaintiff was appointed Inspector of Weights and Measures under the *Weights and Measures Act* 16 Vict., No. 34. As such Inspector he was not an officer of the Public Service, and could only be removed from his office by the bench of magistrates. Under the Statute the plaintiff was entitled to certain fees of his office, and was also paid a salary by the Government for services rendered in another capacity. Prior to 1893 the Department of Justice had *de facto* exercised control over the plaintiff in his official capacity, and in that year the Minister of Justice prescribed certain rules to be followed by the plaintiff, and fixed his remuneration at £300 a year in addition to his fees. In answer to an inquiry by the Department of Justice the justices stated that they had no objection to the plaintiff being retained in his position as inspector upon the terms so prescribed. In 1896 the plaintiff was classified by the Public Service Board, under the *Public Service Act* 1895, as an officer in the clerical division, and his salary was fixed at £400 without fees. The Public Service Board further stated that unless the plaintiff renounced his claim to retain the fees, and agreed to their being waived and retained by the Government, the Board would consider the propriety of making other arrangements. The plaintiff agreed to this proposal, and in March 1897 the Department of Justice wrote to the plaintiff stating that in view of his having renounced his claim to fees, the Public Service Board had approved of his salary being fixed at £425 per annum, with £110 per annum allowance. Salary was paid to the plaintiff on this basis until 30th April 1908. In 1906, in pursuance of the recommendation of a Royal Commission, the administration of the plaintiff's office as inspector was transferred to the Police Department. The Chief Secretary, on the recommendation of the Public Service Board, decided that the plaintiff's services should be dispensed with. The plaintiff declined to retire, and stated that he was not an officer under the Public Service Act. On 30th April 1908 an order was made by a magistrate, sitting as a Court of Petty Sessions, that the plaintiff should be removed from his office of inspector under the *Weights and Measures Act*. This order was set aside by the High Court, but the plaintiff was *de facto* excluded from his office of inspector and prevented from earning his statutory fees. He then brought this action against the Government claiming, as damages for breach of an implied contract, a sum equal to the amount of his agreed salary from 30th April 1908 to 12th November 1909, the date of the action.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that it was an implied term of the contract made by the Government with the plaintiff in March 1897 that, if the Government terminated the contract by refusing to pay the plaintiff the stipulated salary, they would restore to him the opportunity of earning his statutory fees, which under the terms of the contract the Government had received and retained, and that the Government having prevented the plaintiff from discharging the duties of his office of inspector were bound to pay him the stipulated salary.

Per Isaacs J.: the contract made by the Government for payment of salary to the plaintiff was not made in respect of the plaintiff's

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statutory position as inspector, but was made under and as in pursuance of the *Public Service Act* 1895, and regarding the plaintiff as a public servant, and that any contractual relationship existing between the plaintiff and the Government had been duly terminated in 1907.

Decision of the Supreme Court: *Evans* v. *Williams*, 10 S.R. (N.S.W.), 522, reversed.

APPEAL by the plaintiff from the decision of the Supreme Court setting aside a verdict found for the plaintiff by *Cohen* J. for £637 10s., and entering a verdict for the defendant, upon the grounds that the Supreme Court were in error in holding (1) that there was no contract by the Government to pay the plaintiff the agreed salary so long as he should be Inspector of Weights and Measures: (2) that the Government could terminate their contract to pay the plaintiff the agreed salary at any time and with or without notice.

The declaration alleged that it was agreed between the plaintiff and the Government that the plaintiff should pay to the Government the fees and other emoluments to which he should become entitled for his own use as Inspector of Weights and Measures, under the Acts 16 Vict. No. 34 and 1898 No. 19, and that the Government should pay to the plaintiff, as and being such inspector, a salary of £425 and an allowance of £110 per annum payable monthly, and that the Government would not do or procure to be done anything whereby the plaintiff would be prevented, hindered or superseded in the exercise of his office as such inspector, or the earning such fees and emoluments, and all conditions were fulfilled to entitle the plaintiff to a performance by the Government of the said agreement, yet the Government repudiated its agreement and refused to pay the plaintiff the salary as agreed, and wrongfully and in breach of its agreement procured the justices in Petty Sessions to appoint persons other than the plaintiff to exercise the office of inspector, and to supersede the plaintiff, and to earn the fees and emoluments, to the exclusion of the plaintiff, and wrongfully endeavoured to procure the justices to remove the plaintiff from the said office, whereby he lost the salary and the benefits of the said agreement.

The pleas, so far as material to this report, traversed the agreement as alleged, and denied the commission of the breaches. As

to the alleged refusal to pay the plaintiff the agreed salary, the defendant also pleaded that before the alleged breaches the plaintiff retired from the office of inspector, and desisted from the performance of the duties of his office.

The plaintiff in November 1883 was appointed Inspector of Weights and Measures by the metropolitan bench of stipendiary magistrates under the *Weights and Measures Act*, 16 Vict. No. 34, now 1898 No. 19. As such inspector he received a salary of £200 per annum, and was entitled under the Act to certain fees. The Department of Justice *de facto* exercised control over him then and subsequently. In 1886 the plaintiff's salary irrespective of fees was raised by the Government to £300. In February 1893, in answer to certain questions raised as to the plaintiff's position and duties in the Legislative Assembly, a return was laid upon the table of that House stating (*inter alia*): "the Metropolitan Inspector of Weights and Measures occupies a position in this matter which is somewhat anomalous, inasmuch as he is appointed under sec. 7 of the *Weights and Measures Act*, 16 Vict. No. 34, by the justices in Petty Sessions within the Metropolitan District. The duty of appointing the present inspector was performed by the metropolitan bench of stipendiary magistrates, under the *Metropolitan Magistrates Act* 1881. He is, however, paid salary by the Department of Justice. As a matter of practice, the inspector is virtually under the sole control of the Minister of Justice, from whom he obtains all necessary authorities, and officially regards as the head of his Department."

In August 1893 the then Minister for Justice wrote a minute respecting the plaintiff's position and duties. He held that the time was inopportune to deal finally with the question of the plaintiff's salary, but that the matter should receive consideration after the new system established by him had been in force for three months. In the meantime the Minister directed that the plaintiff's salary should be £300, and that the fees should be paid into the Treasury to a suspense account.

In answer to an inquiry from the Department of Justice the stipendiary magistrates stated that they had no objection to the

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plaintiff being retained in his position as inspector upon the terms specified in the minute.

In April 1895 the plaintiff wrote to the Department of Justice asking that the Minister would take into consideration the question of the emoluments allowed to him in respect of his office, in the course of which he said: "I trust therefore upon these grounds, and the reasons adduced in my previous letters, that my claims to a substantial increase in fixed salary may be favourably considered, and that as an officer charged by your Department with responsible duties, I may thereby be relieved of the discreditable conditions attached to my present method of having to depend for emoluments by half fines. . . . Without prosecutions my power is a dead letter, and under the present system where the Department has assumed the control of my office, any prosecutions I make are attacked because of the half fine, which is the only means left of my supplementing my already seriously diminished salary." In a further letter of 18th January 1896 the plaintiff wrote to the Department asking that the Minister would consider "the expediency of providing for a fixed salary to this office in place of the present system." He further added: "For these and other reasons I would respectfully impress upon you the importance of placing the officer of this branch in such a position as will relieve him from even the suggestion of improper motives."

On 10th June 1896 the plaintiff wrote to the Department asking that his salary should be fixed at £500 in consideration of his abandoning his claim to fees. He added: "These questions, however, I feel I may with perfect confidence leave in your hands, and in view of the likelihood of the Public Officers Fees Bill, introduced by Mr. Gould on the 3rd instant, soon becoming law, the present would seem to be a suitable time for arriving at a settlement of my case upon an equitable basis."

In June 1896 a classification of persons employed in the Public Service was made by the Public Service Board under the *Public Service Act* 1895, and the plaintiff was classified as an officer in the clerical division, and his salary was fixed at £400, without fees.

In July 1896 the plaintiff wrote stating that he had never

relinquished his claim to fees and added: "The fact however remains that the Public Service Board recognized my services are worth £400 per annum without fees. Whatever may be my own opinion as to the amount that should be paid me as an equivalent for my services, I have accepted the Board's decision without protest, but I would earnestly urge the Minister to grant what I consider is an equitable claim on my part, and one which appears to me to be logically indisputable under the circumstances, that is, that if I am now entitled to receive the salary fixed by the Board, I must have been underpaid to the extent of £110 per annum during the time in which, owing to the delay of the Department, a salary was paid to me not based upon any definite or well considered grounds, but merely under temporary arrangement pending the permanent settlement of this matter."

On 6th February 1897 the Under-Secretary for Justice wrote to the plaintiff as follows: "Referring to your letter of the 5th ultimo and previous correspondence, respecting the amount of your salary and emoluments, I am directed by the Minister of Justice to inform you that the Public Service Board having carefully considered the matter, have intimated to this Department that they are prepared to recommend that you be paid salary at the rate of £425 per annum, with an equipment allowance of £110 per annum, upon the understanding that you renounce all claim to fees and half fines payable in connection with the performance of your duties, under the *Weights and Measures, Bread,* and *Sydney Coal Acts.*"

On 11th February the plaintiff wrote accepting these terms as from 1st July 1896, but asked that the question of the fees withheld from 1st December 1893 be dealt with. This letter was forwarded by the Department of Justice to the Public Service Board, asking the Board to state whether they intended that the plaintiff should renounce his claim to fees as a condition precedent to payment of his salary.

The Board wrote the following minute on this letter: "This undertaking must be distinctly made by Mr. Evans, otherwise the Public Service Board will consider the propriety of making other arrangements."

On 17th February the plaintiff accepted this condition.

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On 15th March 1897 the Under-Secretary for Justice wrote to the plaintiff as follows: "Referring to your blank cover communication of the 20th ultimo, and previous correspondence, I am directed by the Minister of Justice to inform you that, in view of your having formally renounced any claim which you may have had to fees and half fines payable in connection with your duties under the *Weights and Measures, Bread,* and *Coal Acts,* the Public Service Board have approved of your salary being fixed at the rate of £425 per annum, together with an equipment allowance at the rate of £110 per annum—to take effect from the 1st July last."

Salary was paid to the plaintiff on this basis until 30th April 1908.

In July 1906 a Royal Commission was appointed to inquire into the administration of the weights and measures office. As a result of the Commissioners' report the administration of this office was transferred to the Police Department. The Chief Secretary, on the recommendation of the Public Service Board, decided that the plaintiff's services should be dispensed with, and the plaintiff was given leave of absence for six months from 1st April 1907, and was called upon to retire from the Public Service on the termination of his leave of absence. The plaintiff declined to retire, and stated that, having regard to the peculiar nature of his appointment, he had always been led to believe that he was not an officer within the meaning of the *Public Service Act,* and that this belief was supported by the opinion expressed by the Minister of Justice in 1893, and the Crown Solicitor in 1906.

In February 1908 the plaintiff was summoned to show cause why he should not be removed from his office as Inspector of Weights and Measures by the metropolitan stipendiary magistrates. On 30th April 1908 an order was made by Mr. Donaldson, sitting alone as a Court of Petty Sessions, that the plaintiff should be removed from this office.

The plaintiff then moved for a *certiorari* on the ground that the bench of magistrates had received explicit instructions to remove him from the Attorney-General, and had stated that they intended to remove him whether he called evidence or not, and that he had therefore not had a fair hearing. The High Court

on appeal held that the plaintiff had not been properly dismissed, and the rule was made absolute for a *certiorari*: *Evans* v. *Donaldson* (1). The plaintiff then brought this present action claiming salary from 30th April 1908, the date of his alleged removal by the justices, to 12th November 1909, the date of the action. The action was tried by *Cohen* J. without a jury. The learned Judge found a verdict for the plaintiff for eighteen months salary, £637 10s.

The Supreme Court held that there was no contract by the Government to pay the plaintiff this salary so long as he held the office of inspector, and set aside the verdict (2).

The plaintiff appealed from this decision on the grounds above stated.

Wise K.C. and *Armstrong*, for the appellant. The Crown having induced the appellant to give up the fees to which he was entitled as Inspector of Weights and Measures, in consideration of the payment to him of a fixed salary, cannot retain the fees, which the appellant was prevented from earning, and refuse to pay him the salary which it was agreed that he should receive in lieu of the fees: *Stirling* v. *Maitland* (3).

[ISAACS J.—The question is whether the Government could not put an end to the contractual relationship under which the salary was payable.]

The plaintiff was entitled to his fees of office as inspector. The plaintiff agreed to give up these fees in consideration of the payment of a fixed salary. So long as the Government continued to receive the fees, which by Statute belonged to the plaintiff, they were bound to continue to pay him the salary agreed upon, which was the consideration for the abandonment of his right to these fees. The Government can terminate the agreement at any time; but if they terminate the agreement they cannot prevent the plaintiff from receiving the fees, so long as he is ready and willing to do the work of his office.

Knox K.C. and *Blacket*, for the respondent. The contract alleged in the declaration, and which the plaintiff is bound to

(1) 9 C.L.R., 140. (2) 10 S.R. (N.S.W.), 522.
(3) 5 B. & S., 840.

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prove, is an agreement by the Government to pay him the stipulated salary so long as he remained inspector. There is no such express term in the letters of 6th February and 15th March 1897 on which the plaintiff relies to prove the contract, and no such term can be implied. The plaintiff could only be removed from his office as inspector by the bench of magistrates. The suggestion is that the Government have agreed to pay the plaintiff a fixed salary for life, or until the bench of magistrates choose to remove him from his office, and have agreed that they will not do anything to procure his removal. Such a contract would be clearly unreasonable. The contract proved does not accord with the contract alleged. No such implied term as is now suggested can be read into the contract: *Douglas* v. *Baynes* (1). An alternative construction of the agreement is that the Government agreed to pay the plaintiff a salary as an officer of the Department, and not as inspector under the *Weights and Measures Act.* It was made on the assumption that the plaintiff should be regarded as a member of the Public Service, and that he should place himself under the orders of the Department. In that case his salary would only be payable so long as the Department chose to avail itself of his services. He would then hold a dual position as inspector under the Act, and as an officer of the Department. When he ceased to hold this dual position his right to receive the salary would cease. It would therefore be a new composite position created by agreement between the plaintiff and the Government, which could be determined by either party at will. If the agreement is not terminable at will, it must be terminable upon reasonable notice, and it is not disputed that reasonable notice has been given. In 1896 the plaintiff was classified as an officer under the *Public Service Act.* He accepted that classification without protest, and he then regarded himself as subject to the Public Service Board. On that assumption, acquiesced in by both parties, the subsequent contract was made. The plaintiff afterwards applied to the Department for leave of absence. He cannot now be heard to say that he was not subject to the control of the

(1) (1908) A.C., 477.

Department and the Board. He was therefore dismissible at will: *Ryder* v. *Foley* (1).

Wise K.C., in reply. There is no evidence that the plaintiff was required to perform or agreed to perform any duties other than those pertaining to his office as inspector under the *Weights and Measures Act*. It was necessary that the plaintiff should recognize some departmental control. He regarded the Department of Justice as the authority delegated by the bench of magistrates to supervise him. He has never admitted that he was an officer under the *Public Service Act*. Any term necessary to make the contract effectual will be implied. The salary was paid to him as the salary of his office of inspector under the Act in consideration of his giving up his right to receive fees. The Government cannot prevent the plaintiff from earning the fees and refuse to pay the salary.

Cur. adv. vult.

Dec. 16.

GRIFFITH C.J. This is an action brought by the appellant against the defendant, as nominal defendant representing the Government of New South Wales, upon an agreement, which, as alleged in the declaration, was that the plaintiff should pay over to the Government the fees and other emoluments to which he should become entitled for his own use as Inspector of Weights and Measures under certain Statutes, and that the Government should pay to him as and being such inspector a salary of £425 per annum payable monthly, and that the Government would not do anything whereby the plaintiff would be prevented from earning such fees and emoluments.

The breaches alleged were that the Government did not pay the agreed salary, and that they wrongfully procured the justices in Petty Sessions by whom the plaintiff was appointed to, and removable from, the office of inspector to remove him from his office.

The defendant by his pleas denied the alleged agreement and the alleged breaches, and said that before the alleged breach of

(1) 4 C.L.R., 422.

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non-payment the plaintiff retired from his office of inspector and desisted from the performance of the duties of it.

The alleged agreement was sought to be established by two letters, dated respectively 6th February and 15th March 1897, from the Under-Secretary of the Department of Justice to the plaintiff, and the plaintiff's acceptance of the terms offered to him in those letters and continuing to discharge the duties assigned to him. The only question argued in the Supreme Court was as to the nature and effect of the agreement. The existence of a contractual relation between the plaintiff and the Government was not in controversy. The letters on their face show an express agreement to the effect alleged in the declaration, so far as regards the terms that the plaintiff would pay over the fees and emoluments of his office to the Government and that they would pay him the stipulated salary.

The main question for determination is as to the terms to be implied in such an agreement. In my opinion the following terms are necessarily implied: that the plaintiff would faithfully discharge the duties of the office of inspector, that the Government would continue to pay him the stipulated salary so long as he should continue to hold that office and be ready and willing to perform the duties, unless the agreement should be sooner lawfully terminated, and that in the event of the Government terminating the agreement they would leave him free to earn and receive the statutory remuneration of his office.

The defendant did not plead a termination of the agreement, although an argument was set up for the first time in this Court which would have been relevant to such a defence if it had been pleaded.

In 1883 the plaintiff was appointed Inspector of Weights and Measures for the District of Sydney under the Act 16 Vict. No. 34, and continued to hold the office until after the commencement of this action, when he resigned. He appears to have been appointed for more than one Petty Sessions District, but no question arises on that point. At a later period he is described as Inspector of Weights and Measures for the Metropolitan District, or Metropolitan Inspector of Weights and Measures.

The nature and tenure of his office were the subject of discus-

sion and decision in the case of *Evans* v. *Donaldson* (1) decided on 9th August 1909. It is sufficient for present purposes to say that he was not, as inspector, an officer of the Public Service or Civil Service, and could only be removed by the bench of magistrates. His emoluments under the Statute consisted of certain fees and shares of fines.

It appeared from the evidence given at the trial that for some time before 1893 the plaintiff had, in addition to the actual duties of his office, performed extra functions of a supervisory and advisory nature, in consideration for which the Government had paid him a salary (the amount of which had varied) in addition to his fees.

In or before 1893 the supervision of the office of Metropolitan Inspector of Weights and Measures seems to have been informally assumed by the Department of Justice, and in that year the then Minister of Justice wrote a minute prescribing certain rules to be followed by that officer. The plaintiff, however, insisted that he was not an officer of the Department, but held his appointment from the metropolitan bench of magistrates. The Department accepted this contention, and asked the bench whether they had any objection to his being retained in his position on the terms of the minute. The bench offered no objection. The legal effect of all this would seem to be that the bench accepted the minute as a guide to be followed by the plaintiff in the discharge of his duties as their officer, and delegated to the Department any supervisory powers over him which they might have. At this time the salary which the plaintiff was receiving from the Government in addition to his fees was £300 a year. There can be no doubt that the obligation to pay that salary was terminable at will: *Ryder* v. *Foley* (2). In June 1896 the Public Service Board, then recently created, assumed to treat the plaintiff as a member of the Public Service, but the plaintiff, as I understand the correspondence which passed, protested against the assumption. See his letters of 17th July and 2nd September and 10th December 1896. The result was the making of the agreement now sued upon, which was made by the Government, and not, as now suggested, by the Board, who had no authority to

(1) 9 C.L.R., 140. (2) 4 C.L.R., 422.

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make it or do anything more than advise the Government in the matter. The plaintiff continued to perform the duties of his office as inspector subject to the conditions imposed by the minute of 1893.

On 12th December 1906 the Department of Justice informed the Metropolitan Bench that, in consequence of the control of Weights and Measures having been handed over to the Inspector-General of Police, the latter had recommended that three persons named should be appointed Inspectors of Weights and Measures for each Petty Sessions district within the metropolitan area. The bench in obedience to this behest appointed the persons named, two being appointed on 13th December 1906, and the third on 23rd March 1907.

On the same 12th December the Inspector-General of Police wrote to the Department of the Chief Secretary, of which he was an officer, suggesting that it would be expedient to retain the services of the plaintiff in an advisory capacity until the end of February following. On 18th December 1906 the Inspector-General of Police was instructed to notify the plaintiff that the Chief Secretary had approved of the suggestion. On 2nd January 1907 the plaintiff was informed by the Inspector-General of Police that the duties "in this office" (which I understand to mean the plaintiff's advisory duties in the Police Department) "will cease on 28th February next."

Early in 1907 leave of absence for six months was granted to the plaintiff—apparently by the Government, to whom the supervision of the plaintiff had been delegated by the bench as already shown. On 2nd October 1907 the plaintiff reported himself to the Chief Secretary's Department for duty on the expiration of his leave. On 3rd October the Under-Secretary to that Department wrote informing him that "the six months' leave of absence on full pay granted to you before retirement having expired" the Governor in Council had been pleased to approve of his being called upon to retire from the Public Service; and on 5th October the Under-Secretary, in reply to the plaintiff's letter of 2nd October, referred him to his own of the 3rd. On 19th October the plaintiff replied, insisting that he was not an officer of the

Public Service and asking for fuller information as to his proposed retirement.

On 15th February 1908 the Under-Secretary of the Department of Justice sent to the metropolitan bench a copy of a statement with respect to the retirement of the plaintiff and two other persons from the Public Service, together with an opinion of the Attorney-General to the effect that the plaintiff should be removed by the bench (which I read as meaning that his removal was in the hands of the bench and not of the Executive Government), and adding "As these appointments were made by the metropolitan bench I am to bring the matter under your notice with a view to the necessary steps being taken to remove the officers mentioned from the positions held by them."

The bench accepted this letter as a mandate to remove the plaintiff, and accordingly on 30th April 1908 made an order removing him from his office of Inspector of Weights and Measures, but without hearing him. On appeal to this Court this order was quashed: *Evans* v. *Donaldson* (1). The plaintiff therefore continued to hold his office.

The statement sent with the letter of 15th February alleged that the plaintiff had been informed early in 1897 that at the expiration of his six months' leave no salary would be payable to him.

After the order of 30th April 1908 the plaintiff was in fact prevented by the Government from discharging the duties of his office, which was treated as being *de facto* vacated, and the standard weights and measures were taken from his control.

At the trial before *Cohen* J. the jury were discharged by consent, and the plaintiff had a verdict for £637 10s., a sum equal to the amount of his salary at the agreed rate up to the commencement of the action. No question was raised as to the measure of damages. A rule *nisi* was granted by the Full Court to enter a verdict for the defendant or a new trial on the grounds:— (1) That there was no evidence of any express contract by the Government as alleged in the first count: (2) That no contract as alleged in the said count could be implied inasmuch as the Government could not lawfully contract as alleged: (3) That

(1) 9 C.L.R., 140.

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the Government could not, in the absence of an enactment empowering the Government so to do, contract to continue the plaintiff in office or to pay to the plaintiff a salary for any future period: (4) That the Government was entitled to discontinue the payment of the said salary without notice at will: (5) That there was no evidence that the Government promised to pay the said salary so long as the plaintiff should hold his office as Inspector of Weights and Measures.

In this Court the respondent's counsel expressly disclaimed the contention that the agreement sued upon was *ultra vires* of the Government except so far as the powers of the Government to make any agreement were relevant to the construction of the actual agreement and to the argument that it was terminable at will.

The learned Judges in the Full Court directed their attention mainly to a contention which they thought was set up by the plaintiff, to the effect that the agreement to pay salary could not be terminated so long as the plaintiff continued to hold his office of inspector, notwithstanding that he might have become unfit to discharge the duties of that office. Such a contention would be manifestly untenable, since in that case he would not have been ready and willing to discharge the duties. They thought that the only question in the case was whether the Government could bring to an end the contractual relations between the plaintiff and themselves outside the *Weights and Measures Act* altogether, and that there was nothing in the contract to prevent the Government from doing so. They went on to say that, this being so, the only issue would be whether the Government properly terminated them outside the *Weights and Measures Act* altogether, but that this issue was not in question because it was "conceded that if the Government had the power to terminate those contractual relations there is no case remaining on which the plaintiff can rely (1)." I have some difficulty in apprehending this passage in the judgment, which leaves out of consideration the real question in the action, which is whether the Government could, without breach of contract, at the same time refuse to pay the plaintiff the stipulated salary and prevent him from earning his

(1) 10 S.R. (N.S.W.), 522, at p. 531.

statutory remuneration. The Crown case was that the whole agreement, express and implied, was terminable at will.

In the view which I take of the case, it is not material whether the agreement was terminable at will or on notice, for in either view it was, as already said, an implied term of the agreement that if and when the Government terminated it they would restore to the plaintiff the opportunity of earning his statutory remuneration which under the agreement they received and retained. In this respect the case is analogous to that of a lease of land terminable on notice, under which the lessor is bound to render certain services to the lessee. If in such a case the lessee were to give the lessor notice that he would not in future accept the services or pay rent, still retaining possession of the land, the tenancy would not be determined. Such a notice would not be a notice to terminate the lease but a refusal to perform the conditions of it. A party cannot, while retaining the benefit of an agreement, refuse to bear the burdens, and it is a mistaken use of language to speak of such a refusal as a termination of the agreement. It is properly described as a breach. In the supposed case it would not avail the tenant to say that he thought he was entitled to do so.

Mr. *Blacket* set up an ingenious argument, not raised in the Supreme Court, to the effect that the plaintiff held a sort of composite office, partly under the bench and partly under the Government, and that the letter of 3rd October 1907 operated as a termination of that part of the composite office which was held under the Government. It might have had that effect if the Government could treat the agreement as divisible. But in my opinion it was not divisible, and the Government could not refuse to pay him the stipulated salary without restoring to him the opportunity to earn the other emoluments which he had conditionally surrendered. So far from doing so they deprived him of the opportunity of earning them. To quote the words of *Kennedy* L.J. in *Measures Brothers Ltd.* v. *Measures* (1):—"It is elementary justice that one of the parties to a contract shall not get rid of his responsibilities thereunder by disabling the other contractor from fulfilling his part of the bargain."

(1) (1910) 2 Ch., 248, at p. 258.

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The Government could, I think, terminate the contract (whether at will or on notice is immaterial), but only so that the plaintiff should revert to his rights under the Statute. What they actually did was not intended to have any such effect, but was intended to be, and operated as, an ouster from his statutory office, which *de facto* brought to an end his opportunity to earn the emoluments the surrender of which was part of the consideration for the promise to pay his salary. I think that such an ouster was a breach of the implied obligation which I have already stated.

At a late period of the argument it was suggested that the real relation between the plaintiff and the Government was not a contractual relation at all. If this point is open, the question may be asked: "By what right did the Government receive and retain the emoluments payable to the plaintiff?" The only possible answer is that they received and retained them under an agreement that they should do so. Counsel for the Crown, however, did not press this argument. This being so, the only questions remaining are as to the construction of the agreement and whether there has been a breach of it.

The relation between the Government and a member of the Public Service, as in every other case of employer and servant, is contractual. In ordinary cases the only consideration which a member of the Public Service gives for his salary consists in the service which he renders. In the present case, if the plaintiff is treated as a *quasi*-member of the Service, there was a further consideration, the surrender of his statutory emoluments to the Crown. So long as that consideration existed (and his readiness and willingness to earn them for the Crown was equivalent to actual earning), and the Government took the benefit of it, I am disposed to think that the obligation on their part to pay the salary could not be terminated. But if it could the action will still lie for the breach of the implied contract.

It may be that the damages for a breach of this implied contract are not necessarily measured by the amount of the stipulated salary, but no such point was raised before us, and in any case it would be too late to raise it at this stage.

It was also suggested that the plaintiff, in some way or other,

which I confess my inability to apprehend, estopped himself from denying that he was a member of the Public Service, and, as such, liable to have his employment terminated at will. He was not in point of law a member of the Public Service, and the fact that the Public Service Board, and afterwards the Government, thought that he was cannot alter the position. Nor can there be any estoppel against a Statute. At best, the proof of the suggested estoppel would be a question of fact, and, so far from acquiescing in the contention of the Board and the Government, the plaintiff, as I understand the facts, continually protested against it and insisted upon his statutory rights.

For these reasons I think that the appeal must be allowed.

BARTON J. We are not concerned with the second count or with any of the pleas except the first and second. As to the latter it is not, nor can it be, seriously contended that what the Government did was not in effect to oust the appellant from his office under the Statutes and to prevent him from earning the fees, &c., which he was to hand over to the Government. If then there was a binding agreement such as is alleged, there has been a breach of it. There remain the questions whether such an agreement has been proved and whether the appellant can be heard to say that it existed.

The correspondence of February and March 1897 establishes an agreement between the appellant and the Government by which the latter were to pay him £425 a year, with an equipment allowance of £110 a year, in consideration of his giving up to them all the fees and half fines which should be or become payable to him in connection with his performance of the duties of his then office. That is the effect of the correspondence of that period taken by itself, and I have no doubt that in such an agreement the term must be implied that the agreed composition should be payable so long as he should be ready and willing to fulfil the duties by the discharge of which the fees and half fines were earned, unless an end were lawfully put to the agreement at some earlier period. It would further be necessarily a term of the agreement, in the absence of anything expressed on the point, that the appellant should, if it were terminated by the

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Government, revert to his former position in respect of the fees and half fines, so as to be able to continue to earn them; inasmuch as it did not rest with the Government to terminate his tenure of office, from which only the bench of magistrates could remove him: see *Evans* v. *Donaldson* (1). To oust the appellant from an office from which they had no power to remove him directly, and so prevent him from earning the emoluments of the office, was plainly a breach of an agreement containing such a term.

But it is said that the antecedent correspondence and minutes established that the agreement of 1897 was one with the Government as his employers, to whom, I know not on what principle, there belonged the power of dismissal at pleasure in respect of his statutory office. I cannot find any such thing established. From the time of the minute of the then Minister of Justice, Mr. O'Connor, in 1893, until 17th June 1896 the Government had never claimed the power of removal, which it was conceded belonged to the bench of magistrates. There was however a *Gazette* notification bearing that date by the Public Service Board, in which that body assumed to deal with the office under sec. 11 of the *Public Service Act* 1895; but the Board had no lawful authority to issue such a notice in respect of the appellant, and there is not in the documents or the oral evidence any trace of his having consented to any alteration of the tenure of the office so as to be taken to have agreed to place the power of dismissal—even if he could do so—in the hands of the Government. It is said that this action was taken by the Board at the appellant's request. There is nothing in the evidence, in my opinion, which shows that he was treating with the Government on any other question than the exchange of his fees and half fines for a sum to be fixed, which is much as if he wished to sell the fees and fines to the Government for a consideration, retaining, however, his office and its tenure. I think then that the correspondence of February-March 1897 discloses the real contract between the appellant and the Government, a contract relating merely to the terms which he would accept for the surrender of his fees and half fines, and which in no respect affected his tenure of the office of Inspector of Weights and Measures, as

(1) 9 C.L.R., 140.

distinct from an arrangement to pay over those fees and fines. That such a contract was a lawful one, *Williams* v. *O'Keefe* (1), as decided by the Privy Council in affirmance of a judgment of this Court, is ample authority.

The alleged estoppel does not require extended reference. The Chief Justice is of opinion that the appellant protested throughout against the notion that he consented to any change in the tenure on which he held his office. The only question between us is whether what was written by the appellant deserves so strong a name as protest, which I think it scarcely does. But did he expressly or by implication consent to such a change? I fully agree that he has not done any such thing, or anything evidencing acquiescence in such a change if carried out, as in my opinion it was not. He was dealing with his income, not his tenure. I am therefore of opinion that the appeal ought to be allowed.

ISAACS J. I regret that I have not been able to reach the same conclusion as my learned brothers. In my opinion the judgment of the Supreme Court was right and this appeal should be dismissed. There is really only one question to answer, namely, what was the nature of the position for which the Government of New South Wales were to pay the appellant £425 a year.

The contract as alleged by the appellant in his declaration and as found by the learned primary Judge is, as a statement, perfectly clear and quite simple to understand.

He says it is nothing more complicated than this. He agreed to pay over to the Government certain emoluments to which by Statute he was then entitled as Inspector of Weights and Measures *under certain Acts*, and the Government agreed to pay to him *as and being such Inspector*—those are the all important words,—a salary of £425 a year and a further allowance of £110 a year. Further, he says that the Government undertook that, under no circumstances, whatever his conduct or condition might be, and notwithstanding any prejudice to the public, it would never take any step to have him prevented, hindered or superseded in the exercise of his office as such inspector. In other

(1) (1910) A.C., 186.

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words, being originally appointed by the magistrates, holding a position which in law was separate from and independent of the Executive, and with a mode of remuneration also independent of the Consolidated Revenue, he says the Crown merely entered into a contract, perpetual in its nature, by which, without any right of control if he chose to refuse submission, it bound itself to pay him a higher remuneration for life, and further undertook that, no matter what emergency arose, it would never seek to disturb him, or even to ask the magistrates to deprive him of his monopoly, and would never cease paying him his agreed salary and allowance so long as the bench for its own reasons chose not to revoke his appointment.

The simplicity of the contract as alleged in the claim could not well be surpassed by anything except that of any Government that could make it.

The breaches alleged are that from April 1908 the Government refused to pay any more salary, and procured the justices to appoint other persons, thus interfering with the appellant's monopoly, and also endeavoured to procure the justices to remove the plaintiff from office altogether.

The substantial answer is that the Government made no such bargain, that the provision made for salary and allowances was not simply in respect of his position as statutory inspector under the magistrates and independent of Government control, but was made under and as in pursuance of the *Public Service Act* 1895 and regarding him as a public servant, and that the negative provisions alleged were no part of the mutual relations of the Government and the plaintiff.

After considering in order of date the various exhibits put in evidence, so as to obtain an accurate view of events as they occurred, I have not been able to entertain the smallest doubt the respondent is right. The whole situation appears to be completely and fundamentally misunderstood by the appellant. The appellant's case depends upon the construction and effect of the letters of February 1897. In the *Direct United States Cable Co. Ltd.* v. *Anglo-American Telegraph Co. Ltd.* (1), Lord *Blackburn* says:—"The tribunal that has to construe an Act of a legislature,

(1) 2 App. Cas., 394, at p. 412.

or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject matter with respect to which they are used, and the object in view." And in *Van Diemen's Land Co.* v. *Table Cape Marine Board* (1), Lord *Halsbury* L.C. speaking for the Privy Council said:—"The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it." I have never known an instance where it was more requisite to remember and apply those elementary rules than the present case.

Looking at the letters themselves and recollecting the existence of the *Public Service Act* 1895, the letters present no aspect whatever of any contract extraneous to the Act. They are to all appearance the mere intimation of the exercise of statutory functions upon certain conditions acceded to.

The appellant however contends they are more, and so the history of the position requires examination, which will be found, as I think, to confirm the first impression the documents themselves create.

On 23rd November 1883 the metropolitan bench of magistrates appointed the appellant Inspector of Weights and Measures. The appointment was made under the *Weights and Measures Act*, 16 Vict. No. 34, now 1898 No. 19, which, as decided in *Evans* v. *Donaldson* (2), was a life appointment during good behaviour, and subject only to magisterial removal. The inspector so far as the Act is concerned has statutory duties, with statutory remuneration, and is not legally under any governmental control whatever—disregarding the Government both as to instructions and remuneration. But from the very beginning he entered into actual relations with the Executive. Outside his legal position, a consensual situation was created. Superadded to his statutory functions and remuneration were departmental position and control, and along with that, departmental salary. At first his additional salary was £200 a year, in 1886 on his representation to the Government, £300.

His official history is divisible into three distinct periods. For

(1) (1906) A.C., 92, at p. 98. (2) 9 C.L.R., 140.

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some years, 1883 to 1893, the Department of Justice, to which he was attached, exercised a very loose control over his actions.

In 1893 public dissatisfaction with his administration of the Government Weights and Measures Office became acute. Questions were asked in Parliament and in a return ordered by the Legislative Assembly, and printed 2nd February of that year, it is stated "he is under the *sole control of the Minister of Justice from whom he obtains all necessary authorities* and *officially regards as the head of his Department.*" If this is true, Evans clearly recognized himself even then as a Government servant.

At that time he retained all his fees as well as his salary.

Then comes the period 1893 to 1896.

In July 1893 Mr. (now Mr. Justice) *O'Connor*, the Minister of Justice, wrote an important minute in which he says:—"Mr. Evans seems to have been allowed to take up a position, which both in his own interests and that of the public *no officer* should be allowed to occupy." Then the Minister laid down new lines of conduct and control and remuneration, and observed:—"With that *loyal co-operation* which I have no doubt I will receive from Mr. Evans, I trust the change will result in increased efficiency and smoothness of administration."

On 5th October 1893 Mr. Evans writes to Under-Secretary Fraser saying:—"I humbly trust that the difficulty of *my position in its official relationship to the Minister of Justice* and the bench of magistrates may be realized, so that a course of action may be devised which will leave me free from censure."

It is this dual relationship which the respondent has pressed upon the Court, and he says that it was the first part, namely, the appellant's official relationship to the Minister of Justice, for which the appellant received his official salary. The appellant has now apparently forgotten it. In the same letter he refers to himself as "*Your Inspector*," that is the Government's inspector.

In the result he received a much better remuneration, his conditions were improved, and the departmental control over him was strengthened.

On 16th August 1895 he seems to have thought the time ripe for another modification of salary. He wrote (Exhibit C.) referring to "my office" and his statement of its duties shows he

means something more extensive than the mere magisterial office, and he refers to his claim "as that of *an officer charged by your Department with responsible duties.*"

His case now is that that was purely imaginary. His duties, he says, were prescribed by the Act and the magistrates, not by the Department. Up to the end of the year he pressed for increase of salary, not acceded to.

Then comes the third period. On 23rd December 1895 the *Public Service Act* was passed. On 18th January 1896 he again renews his request for increase of salary, in a letter to Mr. Fraser, asking the Under-Secretary to bring under the Minister's consideration the expediency of providing for "a fixed salary to this office" in place of the present system. He referred to himself as the "Principal Inspector" of the Colony and *the officer of this "branch."*

One cannot help asking how he can possibly reconcile his claim that he never regarded himself as a Government officer with the representations advanced in that letter. What he asked for there was a fixed salary to be attached to the "office," not to the man; and if the Government had acceded to his request it would have enured as much to the benefit of his successor as himself.

The claim is referred to the Public Service Board under the Act for its consideration. That led to an important and decisive change in the appellant's status. During the pendency of the Public Service Board's consideration of his case, Evans writes to Mr. Fraser (10th June, Ex. K) and himself makes the proposition which eventually becomes the real basis of the present claim, because what followed was only a modification. He says "I should prefer to surrender all claims to both sources of emoluments, viz., fees and half fines; which together amount to £283 per annum, in favour of an increased proportionate and fixed salary." He asks £500 a year. Now, as a reasonable man, indeed as a sane man, he could not have imagined that the Government would simply agree to make him a present of the difference between £283 and £500 a year. Yet that is substantially what his present contention assumes. If he was bargaining simply as a magisterial appointee, without relevance

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to conventional status and duties under the Executive Government, his request was nothing more than a cool proposal to give over a claim to a problematical £283 per annum to be earned without assistance, and which others might share if appointed by magistrates, for a certainty of £500 to be received after official premises and assistance were provided for him by the Government. Then he says in the same letter, that in view of the *Public Officers' Fees Bill* soon becoming law, he thinks the present a suitable time. On his view, what could such a Bill have to do with him ?

On 17th June, as a result of his energetic pleading, the Public Service Board, as appears by Ex. A, took a step which appears to me to be at once the foundation and the destruction of his case. They formally classified him, and conferred on him a recognized status in the Government Service as permanent employé. In the Exhibit referred to he is dealt with thus:— "Name of officer, J. W. Evans; Classification, Metropolitan Inspector of Weights and Measures; Salary, £400 without fees; *Division of Service*, Clerical; *Grade A2*." And together with that is recited the enactment (sec. 11 of the *Public Service Act* of 1895) under which this classification is made. It relates to "Any person actually employed in the Public Service at the commencement of this Act (who) has not been appointed by the Governor," and gives power to the Board to classify them as permanent officers—and so the appellant was dealt with and classified as a permanent officer of the Public Service of New South Wales at £400 a year without fees. That classification was his only right to receive £400 a year, and he received it on that basis accordingly.

On 17th July Evans writes to Mr. Fraser (Ex. L) inviting attention to the Public Service Board's decision, says he never relinquished his claim to fees, but at the same time he has accepted the Board's decision as to £400 without fees without protest. But he asks consideration for £110 as previous underpayment based on the £400 valuation.

It will be observed that at this date he acknowledges *his whole right to fees ceases*, so long as he gets £400 a year and retains his classified position. He took his salary on that basis and cannot be heard to say otherwise.

On 29th August he has a personal interview with the Public Service Board (see Ex. M) in which he admits reference was made *inter alia* to his "status as a public servant," manner of appointment, and conditions of tenure of office as an Inspector of Weights and Measures. By letter of 2nd September he reminds the Board that he only holds his tenure of that office on sufferance of the bench of magistrates, and asks that his status be defined by an appointment as "Chief Inspector for the Colony" —which as he adds "is *virtually filled by me now.*" He asks for £500 a year, and now asserts the statutory fees allotted to him come to £340. What he wants then is a higher designation and more money: his status is fixed.

On 10th December (Ex. N) he writes direct to the Public Service Board, distinctly disavowing all claims to fees, and asking for more remuneration. He says: "*I do not regard myself as having a claim to fees since the* 1*st July last*, from which date the salary (£400 per annum) allowed me by the Board has been paid to me." And yet the major part of the consideration, set up for the alleged contract two months and a half later, consists of these very fees.

He again asks for the position of Chief Inspector for the Colony, adding "as the duties now performed by me embrace every function of such a position."

Now come the documents we have specially to construe. The result of the applicant's persistency was that he persuaded the Public Service Board to recommend an increase, and on 6th February the Under-Secretary for Justice, by direction of the Minister and in the usual channel of communication, informed him that the Board had intimated its readiness to grant it. Seeing that he had already renounced all the fees in consideration of getting £400 a year and was anxious to get rid of the half fines, there was not very much in the way of consideration for the advance of £25 a year salary and £110 annual equipment. But apart from the smallness of any consideration which the appellant had at this juncture to offer, we are now fully in a position to appreciate the true nature of the communications. The appellant, according to the view acted upon by the Public Service Board on 17th June by its classification notice already referred to and acquiesced

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in and taken advantage of by the appellant, was conventionally at all events a permanent employé of the Government under the *Public Service Act* 1895 with a salary fixed at £400 without fees. He had also asked the Board to still further exercise their statutory powers in favour of himself as such permanent employé —for that was the only ground on which he could do so—and they—acting apparently under sec. 10—determined to accede to his request. They communicated their determination to the Government, who in turn so informed the appellant. There is nothing more than that in the letter of 6th February. His reply dated 8th February shows that he thoroughly understood the proposed increase was by the Public Service Board, not by the Executive Government outside the Act, and his acceptance of the terms—as from 1st July 1896—could only operate, so far as renunciation was concerned, with regard to the half fines, for the reason already stated.

This letter however preferred a further request, namely, as to some earlier fees; and it was sent on by the Under-Secretary on the 10th to the Public Service Board, and after the Board's determination to adhere to its resolve, its ultimatum was conveyed through the departmental channel to Mr. Evans on 16th February 1897 in these terms: "This undertaking must be distinctly made by Mr. Evans, otherwise the Public Service Board will consider the propriety of making other arrangements." So far the documents contain the story. At this point the appellant in his case in reply states that he got copies of Exhibit O, which are the last-mentioned documents, and then he had several interviews with the Public Service Board—Barling, Coghlan and Wilson. Barling told him distinctly that unless he agreed to forego the fees and fines they would otherwise fill the position. He believed, he says, the Public Service Board had the power to legally dismiss him and appoint someone else, adding "I am 66 years old." This had manifest reference to sec. 69 of the Act, whereby officers attaining the age of 65 are to retire unless called upon to continue. It is idle therefore for the appellant contrary to his sworn testimony to assert either that he did not believe he was being dealt with as a Government employé under the *Public*

Service Act, or that he believed these communications had reference solely to his magisterial appointment of 1883.

He then makes up his mind to acquiesce and take the benefit of the offer under the Statute, and accordingly by letter of 17th February to the Under-Secretary (Ex. No. 3) says that in deference to the decision arrived at by the Board he withdraws unreservedly all claims to the fees and fines. On 15th March the Under-Secretary informs him that in view of his having formally renounced his claim to the fees and half fines the *Public Service Board had approved* of the increased remuneration mentioned.

I do not see how the alleged contract independent of the *Public Service Act* can be for a moment maintained. The Crown representatives have not raised, and state they do not wish to raise, the contention that the agreement set up by the appellant, if made, is an illegal one. But it was argued, and properly I think, that inasmuch as such a bargain would be illegal, as well as unreasonable, if there are two possible interpretations attributable to the transaction, one being normal, reasonable, and lawful; the other abnormal, unreasonable, and unlawful, the former should be preferred. I consider that argument sound and applicable—if it were necessary. I do not think it necessary, because when all the facts are grouped together I cannot see any firm foundation for the appellant's contention. Legal or illegal, the Crown never intended to enter into any contract outside the Act. What it could do for the appellant within the four corners of the Act it tried to do. It certainly adds to the improbability of the Crown making so strange a bargain that sec. 58 of the *Public Service Act* expressly preserves the right of the Crown to dispense with the services of any person employed in the Public Service. It is a serious matter. I do not know how far the effects of the appellant's contention may reach. It would not be surprising if in a Service embracing many thousands of employés in various capacities there are numerous instances where precisely the same legal contention could be raised, that the Crown is bound as an ordinary contractor by reason of some possibly mistaken though well meant recommendation of the Public Service Board, approved by the Executive, though of course on different facts.

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From 1897 to 1906 no relevant fact occurred. But in July of the latter year a Royal Commission was appointed to inquire into the administration of the Weights and Measures office, and as a result that administration was transferred to the Police Department. On the recommendation of the Public Service Board the Chief Secretary determined that the services of Mr. Evans should be dispensed with. They as well as he thought he was in law, as he was in fact, under the jurisdiction of the Board. In the course of the Commission Evans said to Mr. White (Ex. No. 2) "I am transferred from the Department of Justice to the Treasury." In the course of attempting his removal, the Inspector-General of Police suggested an inquiry as to Evans' legal status, and that the concurrence of the magistrates should be obtained. The Attorney-General's opinion was taken, and he considered that in strictness the magistrates were the formal tribunal to terminate the appellant's inspectorship.

On 2nd January 1907 (Ex. W) the appellant was notified that his duties in the Government office would cease on 28th February. He however was retained later, and got six months' leave from 1st April 1907 from the Government, not the magistrates. He asked for extension of leave, from six to eight months —a remarkable request if he were not in his estimation a public servant—and was refused, being on 14th March distinctly informed that "no salary would be payable to him at the expiration of the six months leave granted to him on 1st April 1907, prior to retirement."

On 2nd October he wrote saying that the leave of absence having expired he reported himself for duty. Again this was to the Government, not the magistrates. Before this letter was received, a communication, dated 3rd October, was sent to him calling upon him to retire. On the 19th he wrote an astonishing letter to the Public Service Board, in which he says, "I have always been led to believe I was not an officer within the meaning of the Public Service Acts," and refers to the minutes of 1893. A more appropriate and convincing reference would have been to the changed situation created by the classification after the Act of 1895 had passed and, by the express reference to sec.

11 of that Act, under which he received for many years increased salary and other advantages, and asked for more.

In February 1908 the magistrates were requested to take the necessary steps to remove him from his statutory office; and in view of the actual character of the appellant's relations with the Government for 25 years, I do not wonder that the magistrates looked upon their action as being somewhat formal. It was of course illegal for the reasons stated in *Evans* v. *Donaldson* (1).

But the appellant's official connection with the Government, supposed by all concerned to be under the *Public Service Act*, was quite distinct from his statutory office. With this the magistrates had nothing to do, and it was either actually under that Act, or was intended to be, and was in fact terminated in 1907. Nevertheless he was well treated by being paid full salary up to 30th April 1908, much more than he was in any case entitled to, and the Government took none of his fees except when they paid him at least an equivalent in salary.

The alleged breaches other than the non-payment of salary are altogether too absurd.

Whether looked at from the standpoint of the *Public Service Act* or not, and even if regarded as an ordinary contract, which it is I think impossible to do, it cannot refer to more than the position actually filled by him with the Government, and as that terminated in October 1907 the special remuneration terminated also. He has established his right to be after that Inspector of Weights and Measures under the bench of magistrates and to earn whatever fees and fines he could in that limited capacity, but that is not the concern of the respondent, and certainly not in this action.

Appeal allowed.

Solicitor, for appellant, *H. E. McIntosh.*

Solicitor, for respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

C. E. W.

(1) 9 C.L.R., 140.