[PRIVY COUNCIL.]

WILLIAMS . . . . . APPELLANT;

AND

MACHARG . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1910. June 7.

Public Service—Officer—Superannuation allowance—Period of service—Temporary employment—Public Service (Superannuation) Act 1899 (*N.S.W.*) (*No.* 55 *of* 1899)—*Civil Service Act* 1884 (*N.S.W.*) (48 *Vict. No.* 24), *secs.* 2, 43, 48.

An officer of the Public Service of New South Wales, whose services were dispensed with on 30th September 1896 and who became entitled to a superannuation allowance under the *Public Service* (*Superannuation*) *Act* 1899 (N.S.W.), was from 24th September 1868 until 10th September 1872 employed by the Government of New South Wales as a "temporary draftsman."

Held, on the facts, that during that period he was an "officer" within the definition of that word in sec. 2 of the *Civil Service Act* 1884 (N.S.W.) and that his service during that period should be taken into account in computing his superannuation allowance under sec. 48 of the *Civil Service Act* 1884 (N.S.W.).

Walker v. *Simpson*, (1903) A.C., 208, explained.

Decision of the High Court (*Williams* v. *Macharg*, 7 C.L.R., 213) affirmed.

APPEAL to His Majesty in Council from the decision of the High Court: *Williams* v. *Macharg* (1).

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The respondent, John Macharg, was a member of the New South Wales Civil Service at the date of the passing of the *Public Service Act* 1895. Within twelve months from the commencement of that Act his services were dispensed

* Present—Lord Macnaghten, Lord Collins, Lord Shaw, and Sir Arthur Wilson.

(1) 7 C.L.R., 213.

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with by the Public Service Board, but not for any offence or through any fault on his part. As he had not then attained the age of 60 years, he had no claim to a superannuation allowance under sec. 43 of the *Civil Service Act* 1884. He received a refund of his contributions to the Civil Service Superannuation Account and the gratuity payable under the Act of 1895. Afterwards, on the passing of the *Public Service Superannuation Act* 1899, he became entitled to receive the superannuation allowance to which he would have been entitled if he had retired under the provisions of sec. 43 of the Act of 1884, subject to the deduction or diminution specified in the Act of 1899.

Sec. 48 of the Act of 1884 declares that the following shall be the scale of superannuation allowances payable under the Act:— "To any officer who shall have served 15 years a superannuation allowance equal to one-fourth of his annual salary with an addition of one-sixtieth part of such salary for each additional year of service, but in no case shall such superannuation allowance exceeds two-thirds of his annual salary." The allowance was to be computed upon the average annual amount of salary or emoluments other than forage equipment or travelling allowance received during the preceding three years.

The respondent first entered the service of the Government on 24th September 1868, as an officer in a newly-constituted branch of the Department of Crown Lands called the Occupation Branch. The Government records, which presumably contained the particulars of his appointment, were accidentally destroyed in a fire, known as the Garden Palace fire, but it may be taken that he was appointed as "temporary draftsman." He is so described in the Blue Book of 1868. What the precise meaning of the word "temporary" in that connection may be is not at all clear. Probably it meant nothing more than that the appointment was made by a Minister, and not by the Governor in Council, and was regarded in a sense as provisional, not being published in the *Government Gazette*. Be that as it may, the office itself was clearly of a permanent character, and apparently it has been continued up to the present time under the style of Assistant Draftsman. The respondent was originally employed at a salary of twelve shillings and sixpence per diem, payable monthly.

As from 1st January 1870 until 10th September 1872, under appointment by the Governor in Council, he held the office of assistant draftsman, continuing to perform the same duties and to receive, within two or three pounds a year, the same salary as before, his pay during this period being £225 per annum, payable monthly. On 10th September 1872, at the request of the Department, he resigned his office and took up the work of a licensed surveyor, and he was so employed until 14th July 1883. On that date he was appointed to the office of inspector and surveyor in the Department of Public Instruction at a salary of £350 per annum. He held that office until his services were dispensed with on 30th September 1896.

It is not disputed now that the respondent was an officer in the Civil Service from 1st of January 1870 to 10th of September 1872, and also from 14th of July 1883 to 30th of September 1896, and that he is consequently entitled to a superannuation allowance on the footing of 15 years service. The only question at issue has reference to the period of the respondent's service as temporary draftsman from 24th of September 1868 to 31st of December 1869.

The respondent claimed to reckon that period as additional service. The Government rejected his claim. The contention on the part of the Government was that during that period he was not an officer in the Civil Service, but only a person employed temporarily, and therefore excluded from the position of officer by the definition of the term "officer" in the *Civil Service Act* 1884. And in aid of that argument some reliance was placed on certain expressions to be found in the judgment of this Board in the case of *Walker* v. *Simpson* (1).

In resisting the respondent's claim, the advisers of the Government of New South Wales appear both to have misapprehended the effect of the Act of 1884, and to have misconstrued the judgment of this Board in *Walker* v. *Simpson* (1).

The interpretation clause in the Act of 1884 is no doubt at first sight rather perplexing, but it becomes tolerably plain if regard is had to the scope of the Act and due attention is paid to the precise language used.

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The main object of the Act was the reorganisation of the Civil Service as constituted at the date of the Act, and the classification of its members. With that object principally in view the Interpretation Clause (sec. 2) defines "'Civil Service' or 'Service'" as "the body of persons *now or hereafter* appointed to permanent salaried offices in the service of the Government" with certain exceptions such as the Judges of the Supreme and District Courts and persons holding appointments in the military or naval service and others whom it is not necessary to specify. Now there seem to be two points especially to be noted:—In the first place the definition clause has no application to the Civil Service as constituted before the passing of the Act. It was only concerned with the then present members of the Service and their successors. In the next place it is to be observed that the definition does not speak of persons permanently appointed to salaried offices, but of persons appointed to permanent salaried offices. It is the holding of a permanent salaried office which constitutes membership, not the quality or duration of the tenure. Then the section proceeds to define the term "officer." "Officer" is defined as "any person holding office in the Civil Service," that is in the body of persons at the date of the passing of the Act and subsequently for the time being constituting the Civil Service, "other than those mentioned in secs. 7 and 8," that is persons in the railway services and persons holding offices of a somewhat humble grade, as messengers and people of that class, "and teachers under the Educational Division" who are excepted by sec. 3, sub-sec. 3, "and persons employed temporarily." The question is, who are the persons referred to as "persons employed temporarily?" In the argument on behalf of the Government an observation was made to the effect that the interpretation clause was drawn somewhat carelessly. It was said that, having regard to the definition of "Civil Service," it would seem that persons temporarily employed were already excluded, and there was no point in excluding them over again. But that appears to be a mistake. A person temporarily employed might be a member of the Service by virtue of his office if it were a permanent salaried office. It is hardly to be supposed that any draftsman of ordinary intelligence

would take pains to exclude specifically from a definite class persons on whom a sentence of exclusion had already been pronounced. Then what is the meaning of persons employed temporarily? The reference seems to be to sec. 31, which declares that in any Public Department persons may be temporarily employed by the Minister, but that no such person shall be qualified for admission to the Service by reason of such temporary employment until he has passed the prescribed examination, and then goes on to declare that such temporary employment shall cease at or before the expiration of two years. It would seem that the interpretation clause must refer to that section, inasmuch as all persons temporarily employed in permanent salaried offices at the date of the Act were, with all other officers, to be classed in some one of the Divisions and classes mentioned in sec. 3 (the lowest class being a probationary class) and there could be no fresh appointment of temporary employés except under sec. 31.

Such, then, being the scope and effect of the interpretation clause, and that clause being confined as regards the definition of "officers" to persons holding office at the date of the passing of the Act or subsequently thereto, it is to be observed that the Act does recognize persons as "officers" in respect of office held antecedently to the passing of the Act. Office antecedent to the passing of the Act is obviously recognized in the provision for superannuation allowances. Otherwise no one would be in a position to claim such an allowance until the expiration of fifteen years from the date of the passing of the Act. And in sec. 56 persons are described as "officers" in virtue of office held at the date of the passing of the *Constitution Act* 1855. The result, therefore, seems to be that the Act of 1884 regards as "officers" (1) persons holding permanent salaried offices in the Civil Service at the date of the passing of the Act of 1884 and their successors, other than persons excluded by the exception in the definition of the term "officer" in the Act, and (2) persons holding permanent salaried offices in the Civil Service antecedently to the passing of the Act to whom the exception in the definition clause cannot apply.

One word as to the judgment in the case of *Walker* v. *Simpson*

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(1). Having pointed out that licensed surveyors are not salaried officers, or even members of the Civil Service, the judgment concludes by saying that Simpson, the respondent in that case, was not, during the period when he was a licensed surveyor, an officer within the meaning of the Act. The language of the judgment seems to be perfectly accurate. Simpson was not excluded by reason of the exception in the definition; for the exception would have had no application in his case if he would have been an "officer" but for the exception. He was not an officer within the meaning assigned to the term "officer" in the interpretation section or within the meaning which the term "officer" must bear in other sections when the Act is describing persons as officers in respect of office held before the passing of the Act.

The result, therefore, is that the appeal fails, and their Lordships will humbly advise His Majesty that it must be dismissed.

The appellant, in accordance with his undertaking, will pay the costs of the respondent as between solicitor and client.

Appeal dismissed.

[HIGH COURT OF AUSTRALIA.]

ROBERT STEPHEN BLACKER

v.

THE KING.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY, *May* 19.

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

Criminal law—Evidence—Identification by finger prints—Enlarged photographs.

Upon the trial of a prisoner photographs of a thumb print found on a box, alleged to be that of the prisoner, and a photograph of the prisoner's thumb print, were put in evidence. The Crown also tendered enlarged photographs

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