[HIGH COURT OF AUSTRALIA.]

HENDY-POOLEY. . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1912.

SYDNEY, *April* 19, 24, 26.

Griffith C.J., Barton and Isaacs JJ.

Public Service—Transfer of Department to Commonwealth—Superannuation allowance—Officer "who shall have served 15 *years"—Temporary employment—Permanent office—Civil Service Act* 1884 (*N.S.W.*) (48 *Vict. No.* 24), *secs.* 2, 26, 28, 31, 43, 48.

Sec. 43 of the *Civil Service Act* 1884 (N.S.W.) provides that "any officer shall at any time after having attained the age of 60 years be entitled to retire from the service upon the superannuation allowance hereinafter provided," &c.

Sec. 48 provides that "the following shall be the scale of superannuation allowances payable under this Act, viz.:—To any officer who shall have served 15 years, a superannuation allowance equal to one-fourth of his annual salary," &c.

Held, that an officer whose employment as such began after the passing of the Act, and who has not served 15 years as an officer, is not entitled to a superannuation allowance.

Held, therefore, that the period of service as a "temporary clerk" in the Post and Telegraph Department of a person who at the time of his retirement was an officer could not be taken into account in determining his right to superannuation allowance.

CASE stated by *Barton* J.

George Hendy-Pooley, the plaintiff, brought an action in the High Court to recover superannuation allowance under the circumstances set out in the judgments hereunder.

The action coming before *Barton* J., His Honor stated a case for the opinion of the Full Court, the only material question asked being as follows:—

H. C. OF A. 1912.

HENDY-POOLEY v. THE COMMONWEALTH.

Was the plaintiff at his retirement an "officer who had served 15 years" within the meaning of sec. 48 of the *Civil Service Act* 1884?

Brissenden (with him *Bavin*), for the plaintiff. The plaintiff's right to a superannuation allowance depends upon whether he was an officer who, at the time of his retirement, had "served 15 years" within the meaning of sec. 48 of the *Civil Service Act* 1884. The word "serve" is not limited to service as an "officer," as that word is defined in sec. 2, but is satisfied by service in the employment of the Government. The plaintiff's position, however, is stronger. The office to which he was appointed in 1889 was, on the evidence, a "permanent salaried office," although he was employed in it temporarily, so that he was then in the "Civil Service" as defined in sec. 2. Sec. 26 recognizes that persons might be in the service although temporarily employed. His position is therefore the same as that of the officer in *Williams* v. *Macharg* (1), except that all his service was after the Act of 1884. Having been in the service from 1889, from which time his service was continuous, and being an officer when he retired, he was an officer who had served 15 years within sec. 48. The word "serve" is capable of that construction and such a construction is consistent with the policy of the Act and should be adopted. [He also referred to *New South Wales* v. *Commonwealth* (2); *Williams* v. *Macharg* (3).]

Flannery, for the defendant. The word "serve" in sec. 48 means service as an officer, and such service includes the service before the Act of persons who when the Act came into force were created officers: *Williams* v. *Macharg* (4). The plaintiff was not in the service until his appointment in 1895. His original appointment was not to a permanent salaried office. The Act makes complete provision for entry into the Civil Service, and the modes are through the probationary class (secs. 18-21), by appointment to the lowest class from persons temporarily employed (sec. 26), or by the appointment of specially qualified persons outside

(1) (1910) A.C., 476; 10 C.L.R., 599.
(2) 6 C.L.R., 214, at p. 226.
(3) 7 C.L.R., 213, at p. 222.
(4) 10 C.L.R., 599, at p. 603.

the service. The plaintiff's appointment in 1889 was in none of these modes, but it was a temporary employment under sec. 31 which did not qualify him to enter the service except subject to the performance of certain conditions which the plaintiff did not perform. The object of that section was to prevent persons temporarily employed from claiming to be officers in the service and to be entitled to the benefits conferred on them. Having been temporarily employed, that employment after the expiration of two years was contrary to the provisions of sec. 26, and the plaintiff cannot base any claim upon it.

Brissenden, in reply. The plaintiff's temporary appointment for less than two years was clearly legal, and the Court will assume that he was legally appointed every two years during the period from 1889 to 1895.

Cur. adv. vult.

GRIFFITH C.J. In this case the plaintiff, who was employed in the Post and Telegraph Department of New South Wales at the time when that Department was taken over by the Commonwealth, claims to be entitled to a pension which, if he is entitled to it, is now payable by the Commonwealth. He founds his claim upon the provisions of secs. 43 and 48 of the *Civil Service Act* 1884 of New South Wales. Sec. 43 provides that:—"Any officer shall at any time after having attained the age of sixty years be entitled to retire from the service upon the superannuation allowance hereinafter provided," with certain exceptions which it is not material to mention. Sec. 48 provides for the scale of superannuation allowances, which is:—"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." There is no scale applicable to an officer who has not served 15 years. Consequently sec. 43 must be qualified to that extent, and, in order that the plaintiff may succeed, he must show that he has served 15 years. That is the first question for determination.

The plaintiff first entered the employment of the Government

H. C. OF A. 1912.

HENDY-POOLEY v. THE COMMONWEALTH.

Griffith C.J.

in June 1889 as a temporary clerk in the Post and Telegraph Department. In August 1895 he received a permanent appointment to the Civil Service. He resigned his position, having attained the age of 60 years, in 1905. He did similar work during the whole of the period—ordinary clerical work—and his service was continuous. The question is whether he comes within the words "any officer who shall have served fifteen years."

In order to solve that question, it is necessary to construe some sections of the Act, which are not easy to construe. Sec. 2 of the Act 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 that are not now material. It 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 Divisions and persons employed temporarily." So that persons employed temporarily are not "officers" within the meaning of the Act. The term "persons employed temporarily" refers, as was pointed out in *Williams* v. *Macharg* (1), to sec. 31, to which I will presently refer, and it may also include certain other persons. Sec. 3 provides for the classification of officers. The General Division, to which the plaintiff belonged, when he was appointed to the service in 1895, is divided into six classes and a "probationary" class, the class to which an officer belonged depending upon the amount of his salary. The mode of entry into the service was defined by Part II. of the Act, containing secs. 18 to 31 inclusive. Sec. 21 provided that no person should be admitted to the probationary class, which is the lowest rung of the service in that Division, who was under 17 or above 25 years of age nor unless he should satisfy the Civil Service Board as to his character and should comply with the prescribed requirements. Sec. 26 provided that in the General Division every appointment to the lowest class should be made from the probationary class "or from persons who shall have been temporarily employed in the service," and in that case the person appointed must have been so employed for at least 12 months and must have satisfied the Board that he possessed the necessary qualification. Sec. 28

(1) (1910) A.C., 476; 10 C.L.R., 599.

provided for the admission into the service of a person not in the service but who had special qualifications by professional or special attainments or experience, and in that case the Governor on the recommendation of the Minister might appoint him without either examination or probation. Sec. 31 provided that "in any Public Department persons may be temporarily employed by the Minister but no such person shall be qualified for admission to the service by reason of such temporary employment until he shall have passed the prescribed examination and such temporary employment shall cease at or before the expiration of two years." It appears therefore that besides persons who are officers in the service there might be others employed in Public Departments described as in "temporary employment," but that that did not qualify for admission to the service and was not to be allowed to last for more than two years. It is clear that the plaintiff was appointed in 1889 under sec. 31, that that employment did not qualify him for admission to the service, and that he did not become an officer by virtue of it. It is also clear that employment for the full period of 15 years in that capacity would not have entitled him to a pension, because the plaintiff did not become an "officer" by virtue of such employment. On the other hand, such employment was a qualification for entry to the service under sec. 26. but only to the probationary class and only subject to his satisfying the Board that he possessed the necessary qualifications. The plaintiff's appointment in 1895 was both in form and in fact an appointment under sec. 28, which applies in terms only to the appointment of persons not in the service, and was made on the basis that he was not in the service. The question then is whether the plaintiff comes within the words of sec. 48, "an officer who shall have served fifteen years." He was then in 1895 an officer. Had he served 15 years? That depends on the meaning of the words "shall have served." Do they mean "shall have served as an officer," or do they mean "shall have been employed by the Government?" The first construction is the more natural one, and it is supported by the consideration that the plaintiff had no inchoate right to a pension until 1895 when, for the first time, he

H. C. OF A. 1912.

HENDY-POOLEY v. THE COMMONWEALTH.

Griffith C.J.

became an officer. In *Williams* v. *Macharg* (1) it was held that service before the passing of the Act in a permanent office was to be counted as service under sec. 48, but all the plaintiff's service in this case was after the passing of the Act, and up to 1895 he was not qualified for admission to the service as an officer except under sec. 28, under which he was appointed, or under sec. 26, which does not apply. If he had applied for transfer from his temporary employment to the probationary class under sec. 26, it is possible that two years of his temporary employment might have counted for pension. It is not necessary to express an opinion upon that point, because his continuance in that employment after the first two years was in contravention of sec. 31 of the Act, and I do not think that employment in contravention of the Act can be relied upon as giving the plaintiff an inchoate right to a pension. I come to the conclusion, therefore, that the plaintiff was not an officer who had served 15 years at his retirement and is not entitled to a pension.

BARTON J. The plaintiff claims by virtue of his original appointment that he is entitled to a pension. He was originally appointed on 14th June 1889, not, so far as appears, to any vacancy, but to undertake "temporary employment." A temporary clerk had died just before then; the plaintiff made his application, but just before his engagement that vacancy had been filled, and no other has been mentioned. He worked in the mail branch for about three months, chiefly at sorting. About September 1889 he was transferred to the Inland Mails branch. Thenceforward his employment was continuous, and he did ordinary clerical work until his retirement. On 20th August 1895 the Governor in Council appointed him, together with two other gentlemen, to the position of "extra clerk" at a salary of £208 per annum. He continued in this position until his retirement at the age of 65 years on 30th June 1905. These are, I think, the whole of the material facts.

As it presents itself to the plaintiff the case stands thus:— The plaintiff though employed temporarily was employed in a "permanent salaried office," within the meaning of the definition

(1) (1910) A.C. 476.

of the "Civil Service" in sec. 2. He was an "officer" on his retirement within the meaning of the definition of that word. It was not necessary that, in order to earn a pension, he should have been an officer during a minimum of 15 years of service, if, being on his retirement an "officer," he had "served" for that time. By sec. 43 an officer is entitled to his pension if, before attaining the age of 60 years, he has become an officer, provided that he is within sec. 48, that is, provided that he is an officer who has served 15 years at least. In both these sections "officer" means "a person who at the time of retirement is an officer." Thus, in sec. 48 the term "officer who shall have served fifteen years" has reference to the length of service and not to the length of officership. The plaintiff would have been an "officer" if the definition of that word had not excluded "persons employed temporarily," and he was *in the Service*, though not an "officer." See sec. 26, which speaks of persons "temporarily employed *in the Service*."

As the Commonwealth views the matter the action must fail for the following reasons:—The plaintiff became an "officer" only on his appointment as an "extra clerk" on 20th August 1895. He had therefore not been an officer for quite 10 years when he retired. Thus he was not entitled to a pension, for in sec. 48 the words "officer who has served 15 years" mean one who has served 15 years *as an officer*. The plaintiff, moreover, did not from June 1889 to August 1895 "serve" within the meaning of sec. 48, even supposing that that section does not require him to serve 15 years as an officer. Looking at secs. 18 to 21 (providing for a probationary class), sec. 26 (providing for the appointment to the lowest class of officers from the probationary class or from persons "temporarily employed in the service"), and sec. 28 (providing for the appointment in special cases of persons not "in the service"), it is clear that the plaintiff was not qualified in 1889 to enter the service, and did not enter it, by any of those three methods. There was no change in his condition from 1889 to 1895. His appointment can only be referred to sec. 31, and, therefore, up to his appointment in 1895 under sec. 28 he was not in the "service," and, had he been so, he would not have been eligible for that appointment. Nor was

H. C. OF A. 1912.

HENDY-POOLEY v. THE COMMONWEALTH.

Barton J.

he qualified for admission by reason of his temporary employment until he should pass the prescribed examinations, for which he did not offer himself. He was not appointed to the vacancy caused by the death of Mr. Harle. That had already been filled. Clearly, also, no new office was created: see sec. 29. He was not appointed to any office at all, even temporarily. He was simply a temporary clerk, and such an employment is not a "permanent salaried office." However literally "officer" may be read, no authority has said that "the service" is to be read otherwise than as defined, and, at least, a person to be entitled to a pension under sec. 48 must have passed the prescribed period in the service.

I put the contentions on both sides fully, as it will shorten what I have now to say.

The matter depends largely on the definitions in sec. 2. The definition of "officer" excludes persons employed temporarily although they are employed in the service of the Government. A "person employed temporarily" may be so employed in a "permanent salaried office" and may so come within the class defined as the "Civil Service" or "Service": *Williams* v. *Macharg* (1). But the employment of the plaintiff from 1889 to 1895 was not in a "permanent salaried office." A temporary clerk had died just before the plaintiff was engaged, but the vacancy had been filled. The plaintiff was engaged as an additional temporary employé, but no new office was created. It is impossible to hold that he was a person temporarily employed in a permanent salaried office. His services were engaged *pro re nata*, though work was found for him for six years. His retention beyond two years may have been in disregard of sec. 31, but that fact cannot be said to have raised his status.

Hence the plaintiff was not, up to August 1895, in the service. While I think that a person, retiring as an officer, is not entitled to claim a pension unless he has served 15 years as an officer, and that the plaintiff fails on that point, I also think that the word "served" is used in sec. 48 in relation to the service as defined in sec. 2, and that the claimant of a pension must therefore have served in a permanent salaried office for at least 15 years. This

(1) (1910) A.C., 476; 10 C.L.R., 599.

the plaintiff has not done, and I am compelled to hold that his claim fails.

ISAACS J. read the following judgment :—I am also of opinion that the plaintiff must fail. The language of sec. 48 in its primary signification would convey the meaning that an officer's service was to be service as a officer. That is heightened by sec. 42 which says that for the purpose of Part V.—allowances and gratuities—teachers should be deemed to be officers. No mention is there made of persons employed temporarily, and, if their service were intended to be placed on the same footing as that of officers and teachers, who are not technically officers, it is unaccountable why teachers should have been selected out of the definition of "officers" in sec. 2, and the persons employed temporarily who are found in the same definition, ignored.

There is not a syllable in the Act which militates against the primary construction of sec. 48. But there is one expression which tells affirmatively the other way. Sec. 55 provides for contribution to the superannuation account. It commences by a reference to "any officer in the service who held any office at the commencement of this Act" &c. Before going further, it will be remembered that "office" in view of the Privy Council judgment in *Williams* v. *Macharg* (1) must be taken to mean a permanent salaried office. Then the section provides for an annual abatement from the pension based on a percentage of the salary received "by such officer during his term of office prior to the passing of the Act."

It is clear therefore that the only salary and consequently the only period of service contemplated by the section are referable to a permanent salaried office. The rest of the section is consistent with that.

So that if the matter be looked at from a strictly technical point of view, the plaintiff's case cannot be supported.

But on broad lines of policy also it seems this is the genuine intent of Parliament.

In placing the Civil Service on a new statutory basis, Parliament arranged it in divisions with specified classes, and placed

(1) (1910) A.C., 476.

H. C. OF A. 1912.

HENDY-POOLEY v. THE COMMONWEALTH.

Isaacs J.

express limits on the salaries in most cases; similar limits being otherwise provided for the other cases. It established a Civil Service Board, and made careful rules for admission to the service and for promotions. Sec. 29 declared that when any new office should be created there should be placed on the estimates the salary proposed to be paid to the holder of the office, and such salary as should be voted should fix the class of the officer.

But to provide for emergencies outside the regular necessities of the recognised service so modelled sec. 31 was passed. The Minister was given power to temporarily employ persons, but that was to give no admission to the service, until the necessary examination was passed, and it was distinctly enacted that the temporary employment should cease at or after the expiration of two years. In other words, the provision intended for exceptional cases of emergency or experiment was not to be abused by converting it into a surreptitious entrance to the public service as designed by Parliament.

It is impossible in my opinion without doing violence to the intention of the legislature as apparent on the face of the enactment to attach a pension right to service which was expressly forbidden—I mean beyond the two years.

And, though not absolutely necessary to decide, it seems to me as at present advised equally impossible to place on the same footing for pension rights even two years temporary service of persons engaged by the personal will of the Minister at salaries unfixed by the Act but left to his discretion, and who might be professional men, clerks or messengers, and subject to his uncontrolled direction on the one hand, and the ordinary statutory service of the organized body of regular Crown officials whose status, pay, and rights and responsibilities were settled with considerable definiteness.

It seems to me therefore that the claim must fail and judgment pass for the defendant.

Question answered accordingly.

Solicitors, for the appellant, *Ash & Maclean.*

Solicitor, for the defendant, *C. Powers,* Commonwealth Crown Solicitor.