insurmountable, that he has undertaken the burden of showing that *Madden* C.J. was not under any circumstances entitled to make the order which he made. We think he has not discharged that burden. We are not furnished with the reasons given by *Madden* C.J. or informed as to the circumstances which affected him. We cannot undertake to say that he was wrong under all circumstances in making the order complained of. In addition to that the interrogatory is open to the objection embodied in the passages already referred to.

We think, therefore, that we cannot grant leave to appeal in respect of either of these two orders.

There remains the order of *Madden* C.J. as to the postponement of the trial of the issues. As a consequence of the refusal of the applications for leave to appeal from the other orders this application fails also.

The motions therefore are dismissed.

Leave to appeal in each case refused.

Solicitors, *Snowball & Kaufmann.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;

AND

THE CROWN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1913.

PERTH, *Oct.* 28, 29.

Barton A.C.J., Gavan Duffy and Rich JJ.

Civil Servant—Superannuation allowance—Question as to period of service—Decision by Governor in Executive Council—Jurisdiction of Court—Superannuation Act 1871 (*W.A.*) (35 *Vict. No.* 7), *sec.* 1.

After providing that the superannuation allowance to be granted to persons "who shall have served in an established capacity in the permanent Civil Service" of the Government of Western Australia shall be at the rates therein set out, sec. 1 of the *Superannuation Act* 1871 (W.A.) enacts as follows:—"Provided that if any question should arise in any department of the public service as to the claim of any person for superannuation under this clause it shall be referred to the Governor in Executive Council, whose decision shall be final."

A question having arisen in a department of the public service of that State as to the length of time a claimant for a pension had so served the State,

Held, that as the matter had been referred to and decided by the Governor in Executive Council, the Court had no jurisdiction to inquire whether such decision was right or wrong, or whether it was arrived at on adequate or inadequate evidence.

Judgment of the Supreme Court of Western Australia (*McMillan* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

William Pugh Smith, who, on retirement from his office in the Civil Service of Western Australia, had lodged an application for

a superannuation allowance under the provisions of the *Superannuation Act* 1871, and was allowed a smaller amount than that applied for, instituted proceedings under the *Crown Suits Act* 1898, and in his petition he claimed to be entitled to the amount for which he had made application. The case was heard by *McMillan* J., who gave judgment for the Crown.

From this decision the petitioner now appealed to the High Court.

The facts sufficiently appear from the judgment of *Barton* A.C.J.

Pilkington K.C., *Northmore* K.C. and *Robinson*, for the appellant. This is a claim for a retiring allowance under the provisions of the *Superannuation Act* 1871 (35 Vict. No. 7). The material parts of the Act are the preamble and secs. 1 and 12. The questions that arise are: Has the appellant in fact served for the time he states; and has he in fact reached such an age as to be entitled, or become otherwise entitled owing to mental or physical infirmity, to receive the pension? The Executive Council have no power to decide the question whether or not they will grant a pension to a person entitled. The appellant made an application for a pension which was refused; he therefore had a right to be heard before the Executive Council. What is now sought is a declaration from this Court that he is entitled to a pension on a certain basis. This is a case of breach of contract, and either of the parties to a contract may come to the Court and get a judgment declaring their respective rights under it. A party would be entitled to any amendment of pleadings at any time, and as the facts are all agreed upon in this case the respondent could not be prejudiced: *Western Australian Bank* v. *Royal Insurance Co.* (1). As the Crown is the other party to the contract, the appellant would, in the event of the Crown's agents failing to refer the matter to the Executive Council, be entitled to damages for breach of contract. Order XXV., r. 5, of the *Supreme Court Rules* 1888 (W.A.) deals with declaratory judgments. This action is brought under the provisions of the *Crown Suits Act* 1898. At common law a fiat from the Minister

(1) 5 C.L.R., 533, at p. 547.

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was originally necessary, but under this Act it is no longer necessary: *Tobin* v. *The Queen* (1). *Edmunds* v. *Attorney-General* (2) does not decide the point in issue in this case. In *Cooper* v. *Queen* (3) the Commissioners of the Treasury had given a decision after consideration of the matter; consequently, that case is distinguishable from the present one. Sec. 1 is an absolute section, if it were not so there would be no need for the proviso. Sec. 12 cannot be construed to mean that the Governor can, without good cause, withhold a retiring allowance to which an officer is entitled. Such a construction would nullify the whole Statute. Sec. 12 is a saving clause, and when a saving clause is repugnant to the enacting part the saving clause must be considered to be of no effect: *Maxwell on the Interpretation of Statutes*, 5th ed., p. 254.

Dr. *Stow*, Crown Solicitor, for the respondent. A great part of the argument in this case is that the matter never came before the Executive Council. The Executive Council cannot be examined, nor can what happened *in camerâ* be inquired into. The office file was put in, and the minute signed by the Clerk, which must be considered to be conclusive. The doctor's certificate and all other necessary documents are on the file, and we must assume that they came before the Governor in Council in due course, otherwise it would not have been lawful for him to grant any pension at all, and a pension was granted. The Court cannot make a declaratory judgment in this case: *Barraclough* v. *Brown* (4). [He was stopped.]

Northmore K.C., in reply. If it is held that a question has arisen, and has been referred under sec. 1, further argument is unnecessary.

Cur. adv. vult.

Oct. 29.

BARTON A.C.J. read the following judgment:—The petition of right delivered on 4th February 1910 states that the petitioner (now appellant) is entitled by virtue of the *Superannuation Act*

(1) 32 L.J.C.P., 216, at p. 221.
(2) 38 L.T., 213.
(3) 14 Ch. D., 311.
(4) (1897) A.C., 615, at p. 623.

1871 (35 Vict. No. 7) to a superannuation allowance of twenty-nine-sixtieths of the annual salary and emoluments of his office from the date of his disconnection with the public service in February 1908, he having served "in an established capacity in the permanent Civil Service" of the Government of Western Australia from March 1879 to February 1908. The supplicant also claims interest.

The defence delivered on 18th March 1910 alleges, *inter alia*, that the claim of the petitioner was submitted to and duly considered by the Governor in Executive Council, and a recommendation of the Cabinet was duly approved by the Governor in Council; and it is set up that this was a final decision, and concludes the petitioner.

The *Superannuation Act* 1871 is the first legislation of its kind in this State. Sec. 1 provides that "subject to the exceptions and provisions hereinafter contained, the superannuation allowance to be granted . . . to persons who shall have served in an established capacity in the permanent Civil Service of the Colonial Government, whether their remuneration be computed by day pay, weekly wages or annual salary, . . . shall be as follows." The rates of pension, which amount to one-sixtieth of the annual salary and emoluments of the retiring holder of an office for each year of service, but only if he has served 10 years and upwards, are then set out, and the section concludes as follows:—"Provided that if any question should arise in any department of the public service as to the claim of any person for superannuation under this clause it shall be referred to the Governor in Executive Council, whose decision shall be final." On 27th December 1907 the petitioner applied for permission to retire upon a pension computed according to his years of service. At this time the petitioner was under 60 years of age. But he procured a medical certificate, dated 8th January 1908, that he was incapacitated by bodily infirmity from the active performance of his duties, and this appears to have been accepted as the certificate without which sec. 9 forbids the grant of any superannuation allowance to a person under the age of 60 years. In the first instance the Minister recommended a "retiring allowance" or gratuity of £263 1s. 6d., being two weeks' pay for each year of his 29 years' service. This was

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approved by the Governor in Executive Council on 29th January 1908. On 4th March 1908 the Executive Council, also on the Minister's recommendation, approved of the payment of a further sum of £120 as the capitalized value of the petitioner's right to long-service leave. The petitioner received the lump sum of £383, but regarded it as inadequate, and maintained that he was entitled to an annual sum by way of pension based on his service from its inception. This appears to have been the state of affairs when the petition and the defence were respectively delivered. But the case was contested below, by common consent, not only upon these but also upon additional facts which occurred after the pleadings, but to which, nevertheless, the petition and the defence in form apply, and it is upon the complete state of facts that the appeal rests. After the delivery of his petition the appellant continued to press the Government through its Minister, the Treasurer, for a pension, which, indeed, was the subject of his original application. On 6th February 1911 he wrote to the Minister asking that his case might be reconsidered, and a pension granted him from the date of his retirement, and he mentioned his service of 29 years. The original record, certified by the permanent head of the petitioner's department, stated, as the fact was, that the petitioner entered the service in March 1879 as a compositor at 36s. a week; that in July 1903 he was promoted to be a foreman at a yearly salary; that afterwards he was promoted to be sub-overseer, and again to be overseer, both of these positions being the subjects of yearly salary; and that he retained the position and emoluments of overseer from 1901 until his service ceased. This document, like all the others to which I shall refer, is part of the file, and is in evidence. Now, it is undisputed that the petitioner did serve from March 1879 to November 1907, or nearly 29 years. But it will appear that the department contended that he had not served in "an established capacity in the permanent Civil Service" for more than 15 years and 2 months. That is, they counted his service in such a capacity in the permanent Service from his promotion to the position of foreman, as shown in the record of service above mentioned. That there was such a contention is material. Whether it was right or wrong is, I think, immaterial.

On 18th May 1911 the Government Printer, under whom

the petitioner served, gave a "certificate of service," in which he stated that the date of the petitioner's "first appointment to the 'permanent Civil Service' of the State followed by continuous service" was 1st July 1893, and that the "period of continuous service (to include retiring leave of absence, if any)" was 15 years 2 months. On this document the Under-Treasurer certified that "the pension due to William Pugh Smith on the date of his retirement" was £60 per annum.

There are many other papers on the file, but those I have mentioned and those to which I am now about to refer will suffice to elucidate the questions that are for this Court to determine.

The petitioner's solicitor contested the matter, and his correspondence with the department is on the file and in evidence. He, the solicitor, contended that the petitioner "after the first three months of his employment, was put on the permanent staff" of the department, though the Under-Treasurer asserted that the "pension was calculated on his period of service in an established capacity," namely, from 1893; that he had "no pension rights prior to 1st July 1893, for the reason that he was then only temporarily employed"; and that on 1st July 1893 he "was appointed to the permanent staff by virtue of his being transferred from the temporary staff to an established position in the permanent Civil Service."

This was, of course, a dispute between the department and the petitioner; and if it is not also a question arising in a department of the public service as to the claim of a person for superannuation within the terms of the proviso to sec. 1, I am at a loss to know how such a question can be more plainly evinced. It is none the less such a question, because the petitioner himself, or by his solicitor, is a party to it. I hold, therefore, that it was such a question.

There is a minute paper for the Executive Council, signed "H. Gregory for Colonial Treasurer." It is not suggested that Mr. Gregory signed it wrongfully or without authority. The minute paper runs thus:—"I recommend the Cabinet to advise His Excellency the Governor in Council to grant a pension of £60 per annum to William Pugh Smith, to date from 17th August 1908, such pension, however, to be suspended pending the

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adjustment of the lump sum retiring allowance of £263 1s. 6d. paid to him in February 1908." On this minute paper are written the following words and figures :—

"*The Under-Treasurer.*

"Approved by His Excellency in Council, and entered in the Minutes of the Executive Council accordingly.

"BERNARD PARKER,

"Clerk of the Council.

"16/8/11."

If the pension had been based on the entire service of the petitioner, and not merely on the 15 years 2 months, it would have amounted to about £116 per annum. It is clear, therefore, that the Executive decided that the petitioner's "service in an established capacity in the permanent Civil Service" amounted to 15 years, to which period, at one-sixtieth of his salary for each year of service, the rate of £60 per annum was applicable.

Was, then, the question so decided by the Governor in Council "referred" to him for decision? Well, if it was not, it is rather hard to imagine how it came to be decided.

Here is a file of papers kept in the office of a public department. It relates to the particulars of the service of an officer who has a claim for superannuation under the Act. From time to time it is the subject of minutes and other correspondence, which, in their turn, become part of the file. It becomes necessary for the responsible Minister to decide whether he will recommend, or urge the Cabinet to recommend—it does not matter which, albeit the Cabinet is a body not known to the law —a specific course to the Governor in Council for adoption. He could not well arrive at his recommendation without recourse to the file. He does frame one, and it is in evidence. It is also in evidence that the Executive adopted it, for the attestation by the Clerk of the Council to that body's approval is not questioned. Are we then unable to say that upon the evidence the question which arose in the department was referred to the Executive? Assuming, but not deciding, that it was necessary that the material facts should have been before the Council in addition to the Ministerial recommendation, everyone who knows the course of public business will know that the Minister laid the file before

the Executive for its consideration. It is common knowledge that the effective determinations of Governments are made by Ministers separately or collectively, and that the orders of the Executive Council are in general made in adoption of the conclusions of the individual Minister, or of the ministerial body, though those conclusions are conveyed in formal recommendations. One cannot pretend to be ignorant of such a matter as that; it may be found in any elementary text-book on the functions of Executive Government. Such a matter as the date from which a pension to a subordinate officer is to start may be considered by Ministers collectively, if the Minister of the department thinks he ought to refer it to them, or if they think so. But the decision of the Executive follows implicitly, save in very exceptional cases, the individual or collective "recommendation." Nevertheless the recommendation is accompanied by the file of papers; they are all there for any member of the Executive Council to see. Now Acts of Parliament are passed by persons intimately acquainted with such facts as I have described, and they know that some of the terms they employ are to be read, especially within the departments, in a sense which is purely conventional, and which is conformable to settled practice. They are perfectly aware of the sense in which they employ the terms "Governor in Executive Council," "Governor in Council," and "Executive Council," all of which ordinarily carry the same meaning.

I have, therefore, no doubt whatever that in the sense intended by the Act the question which had arisen in the department as to the petitioner's claim for superannuation, namely, whether the petitioner's service "in an established capacity in the permanent Civil Service" dated back 29 or 15 years—a pension to be awarded accordingly—was referred to the Executive in terms of the proviso. There can be no question that the Executive decided it. Whether that decision was right or wrong, and whether it was arrived at on adequate or inadequate evidence, are matters which neither the Supreme Court nor this Court can entertain, for the law says that the decision of the Executive is final.

It was conceded for the petitioner that the question was one

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which, assuming that it had "arisen," could properly be referred to the Governor in Council under the proviso. His contention, for which I can find no ground, was that it had not been, but ought to have been, so referred. It was further conceded that if we were of opinion, as we are, that it had been referred to and had been decided by the Executive, the appeal must fail. That concession accords with my view of the meaning of the section, and as I am of the opinion that the question has been referred and decided, I am bound to hold that the judgment appealed from must be affirmed.

Many interesting questions were discussed in the argument, and particularly the construction of sec. 12. I offer no opinion upon any of them, because the points on which I have expressed my opinion are sufficient for the decision of the case.

As the Crown did not begin to allot the appellant a pension until after the delivery of his petition, and as it has to that extent admitted the justice of his claim, we are all of opinion that we should not grant costs of this appeal against him.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. In this case we are asked to determine the rights of the parties as they existed at the time of the hearing before *McMillan* J., and not as they existed at the time this litigation began. At the time of the hearing the petitioner had been granted a pension, but a smaller one than he claimed, and the only question between the parties was this:—How long had the petitioner served in an established capacity in the permanent Civil Service of the Colonial Government within the meaning of sec. 1 of Act 35 Vict. No. 7? It is admitted that that question was a proper one to be referred to the Governor in Executive Council under the provisions of that section, and that, if it was so referred, the decision of the Governor in Executive Council would be final. In our opinion the question was in fact referred to the Governor in Executive Council and decided by him, and that disposes of the petitioner's case. In the circumstances it is not necessary to consider the effect of sec. 12 and the other sections of Act 35 Vict. No. 7 which were discussed before us, and in the judgment of *McMillan* J.