of that account, and then the latter part was necessary to make a clear negative provision with respect to the Consolidated Revenue. That distinction was the evident *raison d'être* of sec. 2 of the Act of 1903, No. 8, providing for payments out of the Consolidated Revenue, notwithstanding the prohibition in sec. 70, whenever the Superannuation Account has become exhausted. See also sec. 6 of the later Act.

For these reasons I am of opinion the respondent's case has failed, and the appeal should be allowed.

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

GAVAN DUFFY J. We agree with our brother *Isaacs* J. in the conclusion to which he has been led by an exhaustive analysis of the legislation in New South Wales with respect to the public service, that the compulsory retirement of an officer under the provisions of sec. 66 (3) of the *Public Service Act* 1902 is not a dispensation with the services of such officer by the Board within the meaning of sec. 71 of the same Act, because it is the act of the Governor that causes the retirement, and not that of the Board. We desire to add for ourselves that, even if the act could be regarded as the act of the Board, the officer so retired would not have his services dispensed with within the meaning of sec. 71 in view of the special provision made for such a case by sec. 67 (3).

Appeal allowed. Order appealed from discharged. Both questions in the special case answered in the negative. Judgment entered for the defendant with costs. Appellant to pay costs of the appeal.

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

Solicitors, for the respondent, *Stephen, Jaques & Stephen.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MARKHAM . . . . . APPELLANT;
PLAINTIFF,

AND

WILLIAMS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 12.

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

Public Service of New South Wales—Right to gratuity—Person whose services are dispensed with by Public Service Board—Officer under control of Board of Health—Public Service Act 1902 (*N.S.W.*) (*No.* 31 *of* 1902), *sec.* 71—*Sydney Abattoir Act* 1850 (*N.S.W.*) (14 *Vict. No.* 36), *sec.* 5—*Noxious Trades and Cattle-slaughtering Act* 1894 (*N.S.W.*) (57 *Vict. No.* 21), *sec.* 16—*Sydney Abattoir and Nuisances Prevention Act* 1902 (*N.S.W.*) (*No.* 37 *of* 1902), *sec.* 9.

By sec. 5 of the *Sydney Abattoir Act* 1850, the Governor was empowered to appoint, employ, and continue in office such clerks, inspectors and other officers and servants as might be necessary, and from time to time to remove and dismiss such officers and servants. By sec. 16 of the *Noxious Trades and Cattle-slaughtering Act* 1894 it was enacted that on the passing of the Act the Board of Health should have the control of the Sydney Abattoir and should be the authority for administering the *Sydney Abattoir Act* 1850, and that for that purpose the powers and authorities vested by the latter Act in the Governor should be vested in and might be exercised by the Board. By sec. 9 of the *Sydney Abattoir and Nuisances Prevention Act* 1902, power was given to the Board of Health to appoint, employ and continue in office such clerks, inspectors, and other officers and servants as might be necessary.

The plaintiff had been appointed by the Governor in 1877 under sec. 5 of the *Sydney Abattoir Act* 1850 as a pump driver at the Sydney Abattoir, and was employed there until 1904, when the Board of Health purported to dispense with his services. Since the institution of that Board the plaintiff was under the control of their officers.

Held, that the plaintiff was not a person whose services had been dispensed with by the Public Service Board within the meaning of sec. 71 of the *Public Service Act* 1902, and therefore was not entitled to a gratuity under sub-sec. (*b*) of that section.

Decision of the Supreme Court: *Markham* v. *Williams*, 13 S.R. (N.S.W.), 1, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Patrick Markham against James Leslie Williams, a nominal defendant on behalf of the Government of New South Wales, in which the plaintiff alleged that on and before 23rd December 1895 he was a person permanently employed in the public service of New South Wales, but was not a contributor to the Superannuation Account, that he continued in such service until 23rd February 1904 when his services were dispensed with by the Public Service Board under the provisions of the *Public Service Act* 1902 and that he thereupon became entitled to the gratuity provided for in sec. 71 (*b*) of that Act, and that the Government refused to pay him that gratuity. The defendant therefore claimed the amount of such gratuity. The defences were that the plaintiff was not a person permanently employed in the public service before and on 23rd December 1895, and that the services of the plaintiff were not dispensed with by the Public Service Board.

It appeared that in 1877, pursuant to the *Sydney Abattoir Act* 1850, the plaintiff was appointed by the Governor as a pump driver, and remained in that position until 1902, and thereafter was employed as a labourer at the Sydney Abattoir; that the Sydney Abattoir was administered under that Act and Acts amending the same, and that since the institution of the Board of Health the plaintiff had been under the control of the officers of that Board. It further appeared that on 15th July 1896 the Public Service Board graded the plaintiff as being an officer of the public service in the general division, and classified his work, and that on 25th February 1904 the Board of Health purported to dispense with his services.

By consent a verdict was entered for the plaintiff, leave being reserved to the defendant to move to set aside the verdict and enter judgment for the defendant. The motion was heard by

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the Full Court, who held that the plaintiff did not come under the provisions of the *Public Service Act*, and that his services were not dispensed with by the Public Service Board, and they therefore set aside the verdict and entered judgment for the defendant: *Markham* v. *Williams* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

O'Reilly, for the appellant.

Loxton K.C. and *Pickburn*, for the respondent, were not called upon.

BARTON A.C.J. I think this appeal must be dismissed. There are two things for the plaintiff to establish in order to succeed in his claim under sec. 71 (*b*)—first, that he was permanently employed in the public service, and, secondly, that his services were dispensed with by the Public Service Board. It is perfectly obvious, and, indeed, it was almost admitted by Mr. *O'Reilly*, that the plaintiff's services were not dispensed with by the Public Service Board. Without going into the other matter it seems to me on that ground alone that the judgment of the Supreme Court was obviously right, and must be affirmed. Whether the plaintiff was permanently employed in the public service, which it is also necessary for him to establish, is a question we need not and do not decide. It is quite sufficient to say that his services were not dispensed with by the Public Service Board. Unless they were, he could not claim the gratuity provided for in the section referred to.

ISAACS J. I agree that the appeal should be dismissed. I think that the judgment of *Pring* J. is correct, and I would only add a reference to sec. 30 of the *Interpretation Act of* 1897.

GAVAN DUFFY J. I concur. I think the judgment of the Supreme Court was quite right.

(1) 13 S.R. (N.S.W.), 1.