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voidable for breach or non-observance of the provisions of the Crown Lands Acts, and that steps would be taken to have it declared void. The Department at that time apparently intended to proceed under the provisions of sec. 44 of the *Crown Lands Act of* 1895, but it ignored the defendants' request for an explanation of the meaning of the letter. We think that any expenditure incurred by the defendants from this date till the termination of the original leases in 1910 was incurred at their own risk. In December 1910 the old leases terminated, and the Crown received rent for the year 1911 purporting to be paid under the new leases. We think this receipt of rent might be taken by the defendants as an intimation that the Crown did not intend to avoid the transaction which the letter of 25th June 1906 had declared to be voidable, but no evidence has been given of any expenditure by the defendants between December 1910 and 11th May 1911, much less of any expenditure of which they have not since had the full benefit. On 11th May 1911 the Department wrote to the defendants informing them that the documents were absolutely void, and demanding possession of the lands. Under these circumstances we do not think that the defendants are entitled to any order for restitution or compensation in this proceeding.

Decree varied by declaring the indorsements on the improvement leases void and not merely voidable, and omitting the reference to the Master in Equity and the order as to costs. Decree as varied affirmed.

Solicitor, for the appellants, *T. D. Ryan*, Bingara, by *B. A. McBride.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT;
DEFENDANT,

AND

STEPHEN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 2, 3, 4, 15, 17.

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

Public Service of New South Wales—Right to gratuity—Officer whose services are dispensed with by Public Service Board—Officer over 60 called on to retire—Public Service Act 1902 (*N.S.W.*) (*No.* 31 *of* 1902), *secs.* 9 (2), 66, 67, 71.

Sec. 66 of the *Public Service Act* 1902 provides (1) that every officer in the public service shall be entitled on attaining the age of 60 years to retire, (2) that any such officer may, unless called upon to retire, continue in the service until he attains the age of 65 years, and (3) that "if any such officer continues in the public service after he has attained the age of 60 years, he may at any time before he attain the age of 65 years be called upon by the Governor, acting upon the recommendation of the Board, to retire; and every such officer so called upon to retire shall retire accordingly."

Sec. 67 provides that every officer on attaining the age of 65 years is to retire unless called upon to continue to perform his duty, and that (3) "every officer who retires under the provisions of this or the last preceding section, and is not a contributor to the Civil Service Superannuation Account, shall, if otherwise within the provisions of sub-clause (*b*) of sec. 71 be entitled to receive, on such retirement, the gratuity or allowance thereby specified."

Sec. 71 provides that "If the services of any person permanently employed in the public service are dispensed with by the Board under the provisions of this Act otherwise than for an offence, then—(*a*) if such person was employed in the public service before and on the 23rd day of December 1895, and was a

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contributor to the Superannuation Account under the provisions of the *Civil Service Act* of 1884, but not entitled to retire under secs. 43 and 44 of that Act, such person shall receive a refund of the amount of his contributions to such Account, calculated to the date on which his services were dispensed with, together with a gratuity . . . ; such gratuity . . . to be payable only in respect to service prior to the commencement of this Act; (*b*) if such person was employed in the public service before and on the said date, but was not a contributor to the said Superannuation Account, such person shall receive a gratuity . . . ; such gratuity . . . to be payable only in respect of service prior to the said date."

Held, that an officer who, having attained the age of 60 years, is called upon by the Governor under sec. 66 (3) to retire and retires accordingly, is not an officer whose services have been dispensed with by the Board within the meaning of sec. 71, and therefore that an officer who fulfils the conditions prescribed by sec. 71 (*a*) but who retires from the public service pursuant to sec. 66 (3) is only entitled to the gratuity prescribed by sec. 71 (*b*).

Decision of the Supreme Court of New South Wales: *Stephen* v. *Miller*, 13 S.R. (N.S.W.), 44, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action in the Supreme Court by Alfred Farish Hindmarsh Stephen against George Miller, as nominal defendant on behalf of the Government of New South Wales, the following special case was stated by the parties:—

"1. This is an action brought by the plaintiff, Alfred Farish Hindmarsh Stephen, against the defendant, George Miller, as nominal defendant on behalf of the Government of New South Wales, to recover the sum of £273 12s. 4d., being balance of gratuity alleged by the plaintiff to be payable to him by the Government under the provisions of the *Public Service Act* 1902.

"2. It appears from the departmental papers that the plaintiff, on 1st July 1903, was examiner and inspector-in-charge of the revenue branch of the Audit Department of the Government of New South Wales.

"2A. The plaintiff was a person permanently employed by the said Government in the public service of the said State within the meaning of the *Public Service Act* 1902, and was so employed before and on 23rd December 1895, and was on 23rd December 1895 a contributor to the Superannuation Account under the provisions of the *Civil Service Act* of 1884, and the plaintiff within twelve months after 23rd December 1895 elected

to discontinue contributing to the said Superannuation Account and was not subsequently reinstated thereon.

"3. On 2nd July 1903 the plaintiff wrote to the Deputy Auditor-General a letter," which, so far as is material, was "in the words and figures following:—'I have the honour to report for the information of the Public Service Board in compliance with regulation 140 that I have now exceeded the age of sixty, and beg to add that I am not as yet desirous of retiring from the Service.'

"4. The Deputy Auditor-General recommended Mr. Stephen's retirement under sec. 66 of the *Public Service Act* of 1902, and informed Mr. Stephen of his recommendation.

"5. On 17th July 1903 the plaintiff wrote and caused to be sent to his superior officer, the Deputy Auditor-General, a letter," which, so far as is material, "together with the minute of the said Deputy Auditor-General thereon," was as follows:—

"'In reference to your having been good enough to semi-officially inform me that you had recommended my retirement at the end of August next from the public service under clauses 66 and 71 of the Act of 1902, I would ask you to kindly consider the circumstances of my case with a view to making such comments to the Board as you may deem right. . . . . I would ask that I be granted twelve months' leave of absence on full pay, and I would point out that if I had finished the current year I should have been entitled to nine months under the regulations, and also I have nearly three months' ordinary leave owing to me, but being forced out very much against my wishes and years before the statutory time limit, I trust will be taken as warrant for extra indulgence. I would also ask that the money coming to me might be paid at once instead of at the time my salary ceases. . . . Trusting that you will see your way to recommending my requests for the approval of the Public Service Board, I have, &c., A. F. H. Stephen.'

"'I shall be glad if (in view of Mr. Stephen's long and excellent service) the Public Service Board will grant a favourable reply to this application.—J.V., D.A.G., 17/7/03.'

"6. On 17th August 1903 the Chief Secretary submitted the

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following minute for the approval of His Excellency the Governor and the Executive Council :—

"'In accordance with the accompanying recommendation of the Public Service Board, I submit for the approval of His Excellency the Governor and the Executive Council that leave of absence on full pay for a period of nine months be granted to Mr. Alfred F. H. Stephen, clerk, Department of Audit, in terms of the provisions of No. 42 of the Regulations under the *Public Service Act* 1902, such leave to be in addition to any accumulated annual leave of absence to which Mr. Stephen may be entitled.

"'I also submit with like recommendation that at the expiration of the above leave he be called upon to retire from the public service in terms of sec. 66 of the said Act.'

"7. This minute was approved by His Excellency the Governor and by the Executive Council on 18th August 1903, and confirmed by the Executive Council on 25th August 1903.

"8. On 26th August 1903 the Deputy Auditor-General was notified by letter that the Governor had, with the advice of the Executive Council, approved of Mr. Stephen being called upon to retire from the public service in terms of sec. 66 of the said Act, and the following minutes appear on the said letter of advice—'Mr. Stephen to note leave will commence as from 1st September, 1903.—J.V., D.A.G. Noted, A.F.H.S.'

"9. The plaintiff at that time was entitled to 18 weeks and 2 days accumulated leave.

"10. On 12th December 1903 the following minute was submitted by the Chief Secretary for the approval of His Excellency the Governor and the Executive Council :—

"'In accordance with the accompanying recommendation of the Deputy Auditor-General, I submit for the approval of His Excellency the Governor and the Executive Council, that Mr. A. F. H. Stephen, clerk, Department of Audit, who has been granted leave of absence on full pay for a period of nine months in terms of No. 42 of the Regulations under the *Public Service Act* 1902, such leave to be in addition to any accumulated leave to which he may be entitled, be paid the sum of £425, equal to twelve months' salary, in lieu of all claims for leave of absence,

so that he might sever his connection with the Service as from the 1st instant instead of at the expiration of such leave.'

"11. This recommendation was duly approved on 15th September 1903, and the plaintiff was paid the said sum of £425, and retired as from 1st September 1903. The notification of his retirement published in the *Government Gazette* is as follows:— 'His Excellency the Governor, with the advice of the Executive Council, and upon the recommendation of the Public Service Board, has approved of the retirement of Mr. A. F. H. Stephen, clerk, Department of Audit.'

"12. On 28th November 1903 the Public Service Board recommended that there be paid to the plaintiff a gratuity of £592 6s. 8d., together with a refund of his contributions to the Superanuation Fund, with interest thereon, amounting to £195 0s. 6d., and at the same time stated that these amounts were chargeable to the Consolidated Revenue Account, and such recommendation was on 8th December 1903 approved by the Governor, with the advice of the Executive Council, and the plaintiff subsequently received the said sums out of that account.

"13. This gratuity is calculated in accordance with the provisions of sec. 71 (*b*) of the *Public Service Act* of 1902, and was paid in respect of service prior to 23rd December 1895.

"14. The plaintiff alleges and contends that he is a person permanently employed by the Government, whose services were dispensed with by the Board within the meaning of sec. 71 (*a*) of the said Act, and is accordingly entitled to the full gratuity given by that sub-section.

"15. The defendant, on behalf of the Government, contends that plaintiff is not a person whose services were dispensed with by the Board within the meaning of sec. 71 (*a*) as alleged in the declaration, but that he comes within the provisions of sec. 66 of the said Act, and is an officer who retired under sub-sec. 3 of that section, and has been paid all sums to which he is entitled.

"The questions for the opinion of the Court are:—

"1. Whether the plaintiff is a person whose services were dispensed with by the Board within the meaning of sec. 71 (*a*) of the *Public Service Act* 1902.

"2. Whether upon the facts hereinbefore set forth the

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plaintiff was entitled to a gratuity in respect of his service between the 23rd December 1895 and 16th August 1902.

"If either of these questions be answered in the affirmative, judgment shall be entered for the plaintiff for £197 9s., with costs. If both of these questions be answered in the negative, judgment shall be entered for the defendant, with costs."

The Full Court answered the first question in the affirmative and ordered judgment to be entered for the plaintiff for £197 9s. with costs: *Stephen* v. *Miller* (1).

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

The nature of the arguments appear in the judgments hereunder.

Loxton K.C. (with him *Pickburn*), for the appellant.

Rolin K.C. and *Delohery*, for the respondent.

The following authorities were referred to during argument:— *Stephen* v. *Miller* (2); *Williams* v. *Curator of Intestate Estates* (3); *Russell* v. *Reid* (4).

Cur. adv. vult.

Dec. 17.

The following judgments were read:—

BARTON A.C.J. The *Public Service Act of* 1895, now included in the consolidating Act of 1902, became law on 23rd December 1895.

The respondent, the plaintiff in this action, was before and on that date employed in the public service of New South Wales, and was a contributor to the Superannuation Account under the provisions of the *Civil Service Act* of 1884, but not then entitled to retire under sec. 43 or sec. 44 of that Act. He continued to be in the public service thereafter until his retirement, which took place in 1903. In July of that year, holding then the clerical appointment of examiner and inspector-in-charge of the

(1) 13 S.R. (N.S.W.), 44.
(2) 12 S.R. (N.S.W.), 235.
(3) (1909) A.C., 353, at p. 359.
(4) 19 N.S.W.L.R., 48.

revenue branch of the Audit Department, he reported to the Deputy Auditor-General that he had exceeded the age of 60 years, but was not as yet desirous of retiring from the service. The Deputy Auditor-General, however, recommended the respondent's retirement under sec. 66 of the *Public Service Act* 1902 (see sub-sec. 3). By an Order of the Executive Council of 18th August 1903 he was granted leave of absence on full pay for nine months in addition to certain accumulated annual leave to which he was entitled. By the same Order in Council he was called upon to retire from the public service at the expiration of his leave under the terms of sec. 66. The terms of retirement were varied by an Order in Council of 15th September following, authorizing the payment to him of £425—equal to twelve months' salary—in full of all claims in lieu of leave of absence, so that he might sever his connection with the Service as from the first of that month instead of at the expiration of his leave. Accordingly the respondent was paid £425 and retired as from 1st September 1903, his retirement being approved of by Order in Council of 9th October of the same year. Afterwards he was paid a gratuity of £592 6s. 8d., and a refund of his contributions to the Superannuation Fund, with interest thereon, amounting to £195 0s. 6d.; the payment of this amount was also sanctioned by Order in Council.

The controversy in this case really arises in connection with the amount of the gratuity. The respondent contends that it should have been calculated in accordance with the terms of sec. 71 (*a*) of the Act of 1902 so as to be payable in respect of all service "prior to the commencement of this Act." Calculated under sub-clause (*b*), it was payable and paid only in respect of services up to 23rd December 1895, which in that sub-section is called "the said date."

The appellant contends that as the respondent retired on being called upon by the Governor in Council, who acted upon the recommendation of the Public Service Board, his only claim to a gratuity arises under sec. 67 (3) which is as follows:—"Every officer who retires under the provisions of this or the last preceding section, and is not a contributor to the Civil Service Superannuation Account, shall, if otherwise within the provisions of

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sub-clause (*b*) of sec. 71, be entitled to receive, on such retirement, the gratuity or allowance thereby specified."

After the passage of the Act of 1895 the respondent ceased to contribute to the Superannuation Account under the *Civil Service Act* of 1884.

It will be seen then that the respondent fulfils the conditions of sec. 67 (3), which refers to sub-clause (*b*) of sec. 71, and that he also fulfils the conditions of sub-clause (*a*) of that section. But sec. 67 (3) imports no more of sec. 71 than the words in sub-clause (*b*), while the respondent's contention that he is within sub-clause (*a*) of that section depends on his coming within the terms of its opening words. To do so he must succeed in his contention that his services were "dispensed with by the Board under the provisions of this Act otherwise than for an offence." He concedes that his case does not come within the words "dispensed with by the Board," but he maintains—and this position is vital to his claim—that the words are not to be read literally. He says that they mean "dispensed with on the recommendation of the Board" or "dispensed with at the instance of the Board."

He bases this contention on the words, "under the provisions of this Act," for, he says, there is no part of the Act which authorizes the Board of its own motion to dispense with the services of any officer "permanently employed." It is true that under sec. 44 (4) the Board has a power to dispense with services, but that provision applies only to persons employed temporarily.

To enable the respondent to succeed in his action, he must get over a preliminary difficulty. He must show that his services have been "dispensed with" before he can bring himself within the provisions of sec. 71 (*a*), even if, having shown that, he could show that the words "by the Board" mean "at the instance of the Board," or "on the recommendation of the Board," so as to cover cases in which the Governor in Council has to act on the recommendation of the Board or those in which the Board has to act with Executive approval. The respondent's services clearly terminated under a process which purported to follow sec. 66 of the Act, of which subsec. 3 is the applicable part. He was "called upon by the Governor, acting upon the recommendation of the Board, to retire"; and he retired accordingly. Does the

Act, where it prescribes that the services of an officer shall or may be dispensed with, mean the same thing as when it says that an officer shall retire, or may be called upon to retire, or that the Governor may cause his retirement, or the like?

The sections relating to retirement include sec. 15 (4) and (5), which deal with voluntary retirement; sec. 46, which speaks of officers who have "been retired"; sec. 66 (1), relating to officers who, having attained the age of 60 years before or after the commencement of the Act, are "entitled to retire"; sec. 66 (3) which has been already quoted, and refers to an enforced retirement such as that of the respondent; sec. 67 (1) which enforces the retirement of an officer on attaining the age of 65, unless required and willing to continue duty; sec. 67 (3), above set out; sec. 69, which distinguishes between "retirement" and "removal," and probably includes under the latter term all terminations of the service of officers except by way of retirement; sec. 71 (*a*), which, though dealing with cases in which services have been dispensed with, speaks of certain voluntary retirements under two sections in the *Civil Service Act*; sec. 73 (1), which uses as to employés who are not "officers" the phrase "retirement . . . for any cause other than an offence"; and sec. 73 (2), which as to officers continuing to contribute to the Superanuation Account confers certain rights "on retirement or removal . . . otherwise than for an offence."

The Act, considered apart from sec. 71, refers in several sections to the process of "dispensing with" the services of an officer. In sec. 9 (2) it directs that if officers found to be in excess of the number necessary for the efficient working of a department cannot be usefully employed in any other department "their services shall be dispensed with subject to the provisions of sec. 71 hereof." Officers thus dealt with become entitled to a gratuity, but I do not think they are retired. I cannot see that the getting rid of a useless overplus of officers would be accurately described by the term "retirement," which is, however, properly applied, for instance, to an election to retire under sec. 15 (4) or (5). Compensation, on reduction of salary and consequent retirement, and compensation, on the officer's services being dispensed with, are clearly distinguished in sec. 76. Sec. 44 (4) I have already

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referred to, and it need scarcely be said that dispensing with the services of a temporary officer is not retiring him. Sec. 20, sub-clause (*j*), is a power to the Board to make regulations providing that the services of officers not retained as the most fit may be either dispensed with or transferred to another department. Here, again, the term "dispensed with" is used in a sense obviously different from that of calling upon an old and approved servant of the public to retire. By sec. 61 (1) an officer convicted of felony or other infamous offence is to be summarily dismissed. By sub-sec. 2, if he becomes a bankrupt or insolvent, or assigns his property for the benefit of his creditors, he is deemed to have committed an offence within the meaning of the Act, "and his services shall thereupon be dispensed with, unless he prove to the satisfaction of the Board" that his conduct has not been culpable. We find there a distinction between a summary dismissal and a dispensing with services for an offence, but it would be a strange misuse of terms to say that an officer is retired when his service has been brought to an end under sec. 61 (2).

On comparison of the various sections I think that the Act prefers, if it does not uniformly employ, the term "retirement" or "retire" to indicate the voluntary or compulsory cessation of service when the age limit has been reached, where salary has been reduced, or when the officer has become mentally or physically unfit for further duty. I do not think the services of officers are said to be "dispensed with" on any of these grounds.

Examination of the Act seems to me to make it evident that when an officer is called upon to retire his services are not "dispensed with" within the meaning of sec. 71, unless the term is used in that section in a sense quite different from that which it conveys wherever else it is employed in the Act. It was for the respondent to show that difference in sense before he could succeed in his action, and I am afraid he has not shown it. If he did so, would he bring himself within sub-clause (*a*) in view of the clear provision of sec. 67 (3)? Would not the consequence be that in view of the inconsistency in which such a construction would result, one would again be driven to face the contrast between a retirement under sec. 66 (3) and the termination of service under sec. 71?

But if the respondent succeeded in showing that when he was called upon to retire his services were dispensed with, he would still fail in the action unless he showed that they had been dispensed with *by the Board* within the meaning of sec. 71. He has referred to sec. 44 (4) to show that the Board is, apart from sec. 71, empowered only to dispense with the services of temporary employés, for he maintains that such a power is nowhere given with respect to permanent officers. Where officers are appointed by the Governor in Council, as is generally the case under this Act, whether the appointment is recommended by the Board or not, it is to be inferred that the appointing authority is also the dismissing or removing authority, and therefore, whether a section authorizes dismissal, removal, or the dispensing with services, it means, *primâ facie*, that such action is to be taken with the authority of the Governor in Council, and not merely by the Board. Now sec. 71 refers only to action taken by the Board itself. Is there, then, elsewhere in the Act a power in the Board to dispense with the services of permanent officers in any case? I turn to sec. 9 (2), which has already been quoted, and there I find that the services of certain officers referred to are, where the Board has found them to be in excess, to be dispensed with "subject to the provisions of sec. 71 hereof." It seems to me that the intention of this provision is that in cases which arise under it the redundant services are to be "dispensed with by the Board" within the meaning of sec. 71, and that the power in sec. 9 (2) was held in view in framing sec. 71, even if there was no other power of the Board which was in the contemplation of Parliament.

I think on the whole that sec. 9 (2) may fairly be held to satisfy sec. 71. The concluding words of sec. 70 must, however, be considered. It prohibits the receipt out of the Consolidated Revenue, by any person to whom the Act applies, of any payment by way of pension, annual superannuation, retiring allowance, or gratuity, except as provided in sec. 71. This provision cannot, of course, be read to establish a repugnancy as to any other part of the Act. Consequently it does not militate against the express provisions of sec. 63, which empowers the Governor on the recommendation of the Board to cause the retirement of

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an officer who has been found unfit or incapable, and probably permanently so, to discharge his duties, and authorizes the grant of compensation to such officer in terms of sec. 71. Nor does it militate against the provisions of sec. 67 (3), already considered, which again refers to sec. 71. The provisions of sec. 15 (4) will also be unaffected. Thus there are provided for, in addition to the cases mentioned in secs. 66 and 67, those of redundant officers under sec. 9 (2), of non-culpable incapacity under sec. 63, and of retirement upon reduction of salary under sec. 15 (4); and it would seem upon analysis that the Act makes a fairly full provision for meritorious cases.

It must be remembered, however, that the second branch of sec. 70 does not impose any bar to the payment of refunds of contributions where legally claimable. It was said on this head that while sec. 73 (2) provided for cases dealt with by the second part of sec. 62 of the Act of 1895, there was a hardship arising out of the failure to re-enact in 1902 the first part of that section. It seems to me that vested rights acquired under that section were untouched by the consolidated Act of 1902, either in the concluding words of its 70th section or elsewhere. For theAct of 1902, in repealing the Act of 1895, did not destroy any right already vested thereunder, and the Act No. 8 of 1903, sec. 2 (*c*), so far from cutting down any such right, or failing to cover it, really confirms it.

For these reasons I am of opinion that the appeal must be allowed, and both of the questions in the special case answered in the negative. Throughout the case the Court has anxiously considered the enactments referred to by counsel, and if there is any hardship to the respondent in the conclusion arrived at, I fear it is inevitable.

ISAACS J. The appellant's case depends on whether his services were "dispensed with by the Board" within the meaning of sec. 71 of the *Public Service Act* 1902.

In fact and in law he retired in pursuance of the direction in sec. 66, which required him to retire, because the Governor with the advice of the Executive Council called upon him to retire. This was done upon the recommendation of the Board, which the

section prescribes as a condition precedent, but, as the section itself says, it is the Governor who is "acting." The Supreme Court held that as the Board recommended the Governor to call upon the respondent to retire, it was the Board who "dispensed with" his services. With the greatest deference, I am unable to see how that can possibly be so. The Governor was not obliged to follow the Board's recommendation—the Executive Council might have advised him differently; and if recommendation or advice, which is an essential condition, be the test of whose act it is that is thereupon taken, the dispensing in this case was more immediately the act of the Executive Council than of the Board. But in truth the recommendation of the Board does nothing: it merely enables the Governor with the advice of the Executive Council to act.

The learned Judges of the Supreme Court thought they were compelled to put an unnatural meaning on the opening words of sec. 71, because, said the Court (1), "the Board is not by any section of the Act expressly empowered of itself to dispense with the services of a permanent officer." But apart from other criticisms of that observation, the fact is that there is express power in the Board to dispense with the services of permanent officers, in some cases with, and in others without, the approval of the Executive.

The question involves such a radical construction of the Act, and so greatly affects its every-day working, as to require a very careful and anxious examination of its provisions.

There are two main relevant extant enactments—the *Civil Service Act* 1884, secs. 42 to 56 inclusive and sec. 64, and the *Public Service Act* 1902.

The *Civil Service Act* 1884 provided in Part II. for "Examination, Appointment and Promotions" of officers. Appointments to vacancies (sec. 27), special appointments (sec. 28) and classification of vacancies (sec. 30) were made by the Governor, which meant the Governor with the advice of the Executive Council on the recommendation of the Minister.

Part III. related to Dismissals and Penalties. By sec. 33 it was the Governor who might also dismiss, reduce or fine an officer.

(1) 13 S.R. (N.S.W.), 44, at p. 51.

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He might require the Civil Service Board to investigate and report to the Minister before the Governor came to his "final decision." Sec. 35 provided that an officer convicted of felony or other infamous offence should be summarily dismissed, and a bankrupt officer should forfeit his office, unless he proved his freedom from blame to the satisfaction of the Governor. Sec. 37 empowered the Governor upon the recommendation of the Minister to suspend or dismiss an officer who in the opinion of the Board was guilty of dishonourable conduct or addicted to the excessive use of intoxicants or drugs.

In 1895 a new departure was taken. A non-political board was substituted in large measure for the Executive, and that still exists, and the question can be treated by reference to the Act of 1902, which is a consolidation Act. It is divided into three Parts, the second Part containing various subdivisions each with a guiding or explanatory head-line.

The "Examination and appointment of officers," which may conveniently be first referred to, are dealt with by a group of sections, 27 to 43. Sec. 27 requires the Board subject to the approval of the Governor to make certain regulations. They are, of course, notwithstanding the required approval, the Board's regulations. The power of appointment of permanent officers, involving indefinite charges on the public purse, is probably as a financial assurance, retained as before in the hands of the Crown, but always on the recommendation or report of the Board. The appointment of temporary officers is left (sec. 44) to the Minister with the aid of the Board. Vacancies (sec. 49) are to be filled by appointments by the Governor on the Board's recommendation. The only real change from the 1884 Act as to appointments was that the non-political Board's recommendation or report was substituted for that of the political adviser of the Crown. But with respect to the removal of officers a marked alteration was made. And here it is desirable to observe some general provisions. Sec. 7 says in sub-sec. 1:—"For the purpose of carrying out the provisions of this Act the Governor shall appoint a 'Public Service Board,' to consist of three persons, who shall be charged with the administration of this Act, and shall have the powers and authority and exercise the duties and functions

hereinafter vested in or imposed upon the Board." We have therefore to see what powers and duties are given to the Board. Sub-sec. 10 of sec. 7 says: "The Board shall have, exercise, and perform all the powers, authority, and duties imposed upon 'the Board' by the *Civil Service Act* of 1884 so far as the said Act is unrepealed."

There is a group of sections, 9 to 12 inclusive, covered by a heading, "General powers and duties of Board." That heading is most important. I asked Mr. *Rolin* how he escaped from the conclusion that it constituted an express legislative assertion that the powers and duties found under it, were those of the Board. He thought it had not that effect. It is, however, as if Parliament had said: "The following shall be the general powers and duties of the Board." The later heading, "Dismissals, removals, &c." (sec. 56 and following sections), formed, while the Act of 1895 was in operation, the subject of an observation by the Privy Council in *Young* v. *Adams* (1). There Lord *Watson* referred to it as "The statutory heading, 'Dismissals, removals, &c.,' which is part of the Statute, and must be taken into account in construing its provisions." Now, the analogous heading, "General powers and duties of the Board" uses "powers" as short for the words "powers and authority" mentioned in sec. 7, and uses "duties" for duties and functions" in the same section. Sec. 18 refers to "the powers and authorities by this Act conferred upon it" (that is, the Board). Starting then with the heading as an indicator in respect of secs. 9 to 12, it is plain that in sub-sec. 2 of sec. 9 the phrase, "services shall be dispensed with," means by the Board. Such mandatory terms are not ordinarily used with reference to the Crown. Sec. 11, referring to an inquiry or investigation by the Board under the Act, provides that "the decision of the case shall be determined by a majority of the Board." Passing from the *general* duties and powers of the Board, the Act proceeds to deal in separate groups with special powers and duties having reference to particular events, but these groups look to the Board as the immediate subject of legislative attention. Thus there is the "Grading and salaries of officers" (secs. 13 to 19); "Power to make regulations"

(1) (1898) A.C., 469, at p. 475.

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(sec. 20). Then there is a break. The Act proceeds to deal immediately with the Service, its division and classification and the rights of officers as the direct subject of attention. The first heading in this connection is "Divisions of Public Service," and in the course of it, various powers and authorities are assigned specifically to Governor and to Board. The next group is that of "Examination and appointment of officers" already mentioned. It entrusts examinations to the Board, but maintains appointments in the hands of the Crown. Then "Temporary officers" (secs. 44 and 45) are placed in the control of the Minister and Board. "Appointment of retired officers" (sec. 46) is a qualification of the requirements for appointment. The next group is "Internal administration—Promotions, &c.," and it retains appointments (sec. 49) in the Governor, and examinations (sec. 50) in the Board. But sec. 51 prescribes dismissals for disobedience to an order of the Board removing an officer from one position to another, unless in the judgment of the Board some valid and sufficient reason is given. It seems to me obvious that the dismissal is in the hands of the Board. Then comes a special heading "Public Instruction"—secs. 53 to 55, which require appointments and dismissals to be made by the Governor upon the recommendation of the Board "under the provisions of this Act;" that is, the provisions of the 1902 Act as to recommendations of the Board shall apply to recommendations with regard to public instruction, instead of the Governor acting upon the advice of the Executive Council as provided by the Act of 1880. The non-political check is to apply also to that department. Then the group of sections, "Dismissals, removals, &c." (56 to 65), are highly important. Sec. 56 (1) enumerates offences which render an officer (says the sub-section) "liable to dismissal or such other punishment as may be determined upon under the provisions of this section." So we have to look further in the section. Sub-sec. 2 (*c*) requires the Board to inquire into the truth of a report made by the permanent head, or request the Governor to appoint a special board; sub-sec. 2 (*d*) says that in the advent of an adverse finding by the Board or the special tribunal, then the Board may fine, or deprive of leave of absence, or (with the approval of the Governor) may dismiss the officer

or require him to resign. But it is the Board all through, and explicitly so. So, too, in secs. 57, 58 and 59. Sec. 61 is a special case of dismissal, and does not alter the authority which is to exercise the power. Sub-sec. 2, by using the words "dispensed with" and substituting the Board for the Governor in the case of bankruptcy, strongly indicates the change of authority from that in sec. 35 of the Act of 1884. Sec. 65 retains the right of the Crown unconditionally to "dispense with" the services of any officer. I do not think this section should be pressed too far against the appellant, because it has a double aspect: first, it enables the Crown to act direct, and not by means of a board or other authority, and, next, it enables it to act irrespective of any conditions otherwise created for the protection of the officer. But one thing is important to be noted with respect to this section. The right conserved to the Crown is the right "to dispense with the services of any person employed in the public service." That phrase is manifestly used in the widest possible sense. Its history, commencing with the case of *Gould* v. *Stuart* (1), is significant. Under the Act of 1884 the Government dismissed Stuart, who brought action in March 1895 for damages for wrongful dismissal. The Crown pleaded its right to terminate the employment of an officer at any time. The Supreme Court and the Privy Council held that the Act restricted the power of the Crown to dismiss officers. The Supreme Court order allowing the plaintiff's demurrer was made on 23rd May 1895. The Act of 1895 was assented to on 23rd December 1895, containing in sec. 58 the provisions of the present sec. 65. In the meantime, on 30th June 1895, the Government summarily dismissed another officer named Adams without compensation. He sued in July 1896 for damages for wrongful dismissal, and the Crown set up sec. 58 as a defence. The whole question turned on whether the section was retrospective. That its terms included dismissal was never questioned, either by the parties, the Supreme Court, or the Privy Council, to whom the case went: *Young* v. *Adams* (2). Lord *Watson*'s language involves the view that dismissal was so included. That brings me to the first group with which we are directly concerned. It is headed

(1) (1896) A.C., 575. (2) (1898) A.C., 469.

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"*Retiring* age of officers" (secs. 66 and 67). It was under sec. 66 that the appellant was retired, and sec. 67 (3) specifically enacts with respect to an officer whose circumstances exactly correspond to those of the appellant, that sec. 71 (*b*) shall be the measure of his rights so far as they relate to "gratuity or allowance thereby specified." But it uses no words depriving him of anything to which besides such "gratuity or allowance" the law may otherwise entitle him. Now, it is clear, from what I have said, that the Board has express power to "dispense with the services of permanent officers," and I read that in the same large sense as in sec. 65. This power is assumed by Parliament as the very basis of sec. 71, and is there assumed as extending under the term to the case of offences, by which it consequently includes dismissed; and so in that sec. 71 we find the most authoritative interpretation possible of the preceding provisions of the Act with respect to the question in hand. Sec. 63 is specially notable in this regard. First, it expressly confers the rights of sec. 71 upon officers dispensed with, not by the Board, but by the Governor, on the Board's recommendation, and next it leaves the application of sub-sec. *a* or sub-sec. *b* to depend upon whether the circumstances of the particular officer more nearly answer the terms of one sub-section or the other.

In a supplemental argument by Mr. *Delohery* it was urged that sec. 67 (3) applies only to cases of voluntary retirement, all compulsory retirement falling under the head of "dispensing" and coming under sec. 71. That view does extreme violence to the express language of sec. 67. Secs. 66 and 67 form a separate group, headed "*Retiring age of officers*," and begin with the word "retiring," which is used to cover all cases of retirement in the group. Three cases of retirement are therein provided for—one voluntary, and the other two compulsory. Sec. 66 (1) is voluntary: the officer is "entitled, if he desires so to do," to retire. The next sub-section gives him the alternative option to continue up to 65, "unless called upon to retire as hereinafter provided." That sub-section, therefore, links on the voluntary retirement to the next mode of retirement. Sub-sec. 3 provides that if he does exercise the option of continuing, he may, at any time before 65, be called upon to retire, and then he shall retire. The alter-

native option given by sub-sec. 2 is then at an end. He retires, though compulsorily; the Act compels him to do so on the happening of the given event, and its own language is "retire."

Then comes sec. 67 (1), which pre-supposes the officer exercises the alternative option under sub-sec. 2 of sec. 66 to continue, and that the Governor does not call upon him to retire before 65 years of age. That sub-section itself of its own force compels him to "retire" by reason of his age, unless he is required to remain and is willing to do so. This is the third mode of retirement, the second compulsory one. Sub-sec. 2 prescribes the procedure of such a request. Then sub-sec. 3 dealing with all three modes refers to "every officer who retires under the provisions of this or the last preceding section, and is not a contributor" &c.

From the above review of the two sections, it is evident that the argument put forward by the respondent not only deals with one mode of retirement only out of three, but gives no force to the word "this" in sub-sec. 3. According to that argument, there is no officer who retires under "this section," that is, sec. 67, which is even more strongly compulsory than sec. 66 (3), because under the earlier section the officer need not retire unless told to go, whereas the later section directs him to retire unless asked to stay.

Mr. *Rolin* contended, and with some force, that the legislature could not be supposed to have wantonly destroyed existing rights; and he added that unless his argument were given effect to, that destruction would be the result. He said that as sec. 62 of the Act of 1895 was repealed in 1902, and not completely re-enacted, the case of an officer in the appellant's position is materially altered for the worse, because there is no existing law entitling him to receive the refund to which sec. 62 entitled him, by reason of ceasing to contribute to the superannuation fund. And Mr. *Rolin* also pointed to the concluding words of sec. 70 of the Act of 1902 as strengthening that view. Therefore, he contended, it is necessary to resort to sec. 71 to avoid manifest injustice. But there are good reasons against that contention.

Mr. *Loxton* pointed out that in the *Public Service (Superannuation) Act* of 1903, No. 8, Parliament had in sec. 2 recog-

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nized the still existing rights of officers to refunds by virtue of sec. 62 of the Act of 1895, in addition to those under sec. 73 of the Act of 1902. Similarly in sec. 4, which speaks of a person "becoming hereafter entitled under sec. 1 of the repealed Act 60 Vict. No. 27"—which related to "non-officers" within the meaning of the Act of 1895. But, independently of that recognition, the difficulty is met by sec. 8 of the *Interpretation Act of* 1897. That provides as follows:—"Where an Act repeals in the whole or in part a former Act, then, unless the contrary intention appears, the repeal shall not . . . (*b*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under an enactment so repealed." Therefore, unless Mr. *Rolin's* point as to the concluding words of sec. 70 holds good, there is no contrary intention appearing. Those concluding words are:—"Nor shall any person to whom this Act applies, except as in the next succeeding section provided, receive out of the Consolidated Revenue of the State any payment, by way of pension, annual superannuation, retiring allowance, or gratuity, either directly or indirectly." I am very doubtful whether the Crown's contention is right as to refunds not being included in that category. It seems to me very questionable whether it is not a species of "retiring allowance." I do not quite see to what else those words apply, after giving their full natural effect to the other terms used.

But, however that may be, there is one very clear answer. The stress of the provision relied on is upon the words "Consolidated Revenue of the State." Secs. 70 and 71, as to refunds, speak of them as refunds of contributions to the Superannuation Account. There has always been a distinction observed by the legislature between a right of public officers to payment out of the Consolidated Revenue and a right of payment or refund out of the Superannuation Account (see Act of 1884, sec. 53; Act of 1895, sec. 62; Act of 1902, secs. 70 and 73, and Act of 1903, sec. 2). The concluding words of sec. 70 in no way touch the case of any person having, as the appellant had, a vested right to payment of a refund out of the Superannuation Account. It was a refund "from such account" that sec. 62 of the Act of 1895 spoke of. And the first part of sec. 70 dealt with the right to payments out