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visions of the deed of settlement relating to the appropriation of net profits. To do otherwise comes within either or both of the conditions mentioned in *Burland* v. *Earle* (1), namely "of a fraudulent character or beyond the powers of the company."

In these circumstances I have been led to a view different from that formed by my learned brothers, and in my opinion this appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors, for the appellant, *Leibius & Black.*

Solicitors, for the respondents, *Holdsworth & Son.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CASEY . . . . . APPELLANT;
PETITIONER,

AND

HIS MAJESTY THE KING . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 26, 27.

Griffith C.J., Barton and Isaacs JJ.

Public Service of Victoria—Pension or superannuation allowance, Right to—Date of appointment—Pensions Abolition Act 1881 (*Vict.*) (*No.* 710), *secs.* 1, 2—*Public Service Act* 1883 (*Vict.*) (*No.* 773), *sec.* 99—*Public Service Act* 1890 (*Vict.*) (*No.* 1133), *sec.* 107—*Public Service Act* 1893 (*Vict.*) (*No.* 1324), *sec.* 22.

Sec. 99 of the *Public Service Act* 1883 (Vict.) (sec. 107 of the *Public Service Act* 1890 (Vict.)), provides that: "All persons classified or unclassified holding offices in any department of the public service at the time of the passing of this Act except persons appointed since the passing of" the Act No. 710 "shall be

(1) (1902) A.C., 83, at p. 93.

entitled to superannuation or retiring allowance compensation or gratuity to be computed under the provisions of Act No. 160, but save as aforesaid nothing in this Act shall in any way affect alter or vary the first-mentioned Act so as to give any person appointed hereunder any claim to any pension superannuation or other allowance."

Sec. 22 of the *Public Service Act* 1893 provides that: "(1) In the calculation of the rate of superannuation or retiring allowance or the amount of compensation or gratuity to which any officer may at any time be entitled such officer shall not be entitled to count as part of his service any service in respect of which he may have already received compensation or gratuity within the meaning of sec. 16 or Part VI. of the Act No. 160 on the occasion of any previous retirement from the public service of such officer or on the occasion of his services having been previously dispensed with. (2) This section shall not apply to any officer who at any time before the granting of such allowance compensation or gratuity has or shall have repaid into the consolidated revenue any compensation or gratuity so received by him on any occasion as aforesaid. (3) This section shall apply to the officers of the Parliament and to the railway service as well as to the public service."

The petitioner was first employed in a department of the public service in 1874 as a supernumerary officer but was not appointed by the Governor in Council. In 1880 his services were dispensed with, and he was paid compensation for the loss of his employment but not under the authority of any Act. On 24th December 1881 Act No. 710 was passed. On 1st May 1883 the petitioner was again employed in the public service, and on 20th February 1884 he was appointed by the Governor in Council and was duly classified under the *Public Service Act* 1883. The petitioner remained in the service until 30th April 1911 when he retired, being over the age of 65 years. On 1st May 1911 he repaid into the consolidated revenue the amount of the compensation paid to him in 1880.

Held, that the petitioner was a person appointed since the passing of Act No. 710, and therefore was not entitled under sec. 99 of the *Public Service Act* 1883 to a pension or superannuation allowance on his retirement in 1911.

Held, also, that sec. 22 of the *Public Service Act* 1893 conferred on the petitioner no right which he had not under sec. 99 of the *Public Service Act* 1883.

Decision of the Supreme Court of Victoria: *Casey* v. *The King*, (1913) V.L.R., 34; 34 A.L.T., 120, affirmed.

APPEAL from the Supreme Court of Victoria.

A petition having been filed in the Supreme Court by Albert Edward Berkeley Casey to recover from His Majesty the King a pension or superannuation allowance in respect of his term of service in the public service, the following special case was stated by the parties for the opinion of the Full Court:—

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1. On 1st July 1874 the petitioner was employed as a supernumerary in the public service of Victoria, viz., in the Department of Lands and Survey, and his name appears in the Parliamentary Blue Book for the year 1877-1878 in the list of persons employed in the public service and he is therein described as a supernumerary. He was not appointed by the Governor in Council.

2. The petitioner was continuously employed in the public service of Victoria as aforesaid until 31st October 1880, when the services of himself and other persons similarly employed were dispensed with. The petitioner during the whole of the said service was not a classified officer.

3. The services of the petitioner were so dispensed with on the ground of economy and not for any fault upon the part of the petitioner. (And the Premier and other Ministers announced publicly that lists should be prepared setting out the names and qualifications of the persons whose services had been so dispensed with, with a view of having them re-appointed or employed when vacancies occurred, and it was stated in Parliament that in making future appointments when vacancies occurred qualified persons who had lost employment in consequence of the reductions in the service should have the preference).

4. At the time of such dispensation of service the petitioner was paid the sum of £68 as compensation for loss of employment in the public service, and a few weeks later a further sum of £4 19s. 8d. was paid to him as compensation—such compensation being at the rate of one month's pay for each year of service. Such payment was not made under the authority of any Act of Parliament relating to the public service, but by a special vote of Parliament.

5. The petitioner was not employed in the public service of Victoria at the time of the passing of the Act No. 710. On 1st May 1883 the petitioner was again employed in the public service of Victoria, and his name appears in the Parliamentary Blue Book for the year 1884 in the list of persons then employed; and on 20th February 1884 he was appointed by the Governor in Council and was duly classified under the provisions of the *Public Service Act* 1883, and his name appeared in the list of officers in the supplement to the *Government Gazette* published

on 31st January 1885, at page 413, and each year thereafter; and the date of his first appointment was therein stated to be 1st July 1874.

6. The petitioner continued in the public service until 30th April 1911 when he retired, being over the age of sixty-five years. The average annual salary received by the petitioner during the three years preceding his retirement was £400.

7. The petitioner claims to be entitled to a pension or superannuation allowance in respect of his term of service commencing in the manner hereinbefore set forth on 1st July 1874 and extending for a period of over thirty-four years, and on 1st May 1911 he repaid into the consolidated revenue of Victoria the sum of £70 as representing the compensation received by him as aforesaid purporting to act in so doing in accordance with the provisions of sec. 22 of Act No. 1324.

The question for the opinion of the Court is:

"Is the petitioner entitled to a pension or superannuation allowance; and if so, in respect of what term of service and how calculated?"

If the Court shall be of opinion in the negative, then judgment with costs shall be entered for His Majesty.

If the Court shall be of opinion in the affirmative, then judgment with costs shall be entered for the petitioner, and a declaration made that the petitioner is entitled to the said pension or superannuation allowance.

It is agreed between the parties that the pleadings and the documents herein mentioned may be referred to by either party if deemed necessary.

The portion of paragraph 3 in brackets is inserted at the request of the petitioner without prejudice to the right of counsel for His Majesty to object that such portion is irrelevant and should be excluded.

The Full Court answered the question in the negative: *Casey* v. *The King* (1).

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

(1) (1913) V.L.R., 34; 34 A.L.T., 120.

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Arthur, for the appellant. The appellant is entitled to the benefit of sec. 99 of the *Public Service Act* 1883 (*Public Service Act* 1890, sec. 107). He was an unclassified person holding office at the time of the passing of the Act of 1883, and he is not within the exception of persons appointed since the passing of the Act No. 710, for the appointment which is to be considered for the purpose of that exception is his original appointment in 1874. The exception does not include persons who had been in the service at some time prior to the passing of Act 710, and who, for some reason not due to their own fault, had ceased to be in the service before the passing of that Act, but were relying on a promise of re-instatement and were re-instated after the passing of that Act. Sec. 22 of the *Public Service Act* 1893 shows that it was not the intention of Parliament to include such persons in the exception to sec. 99. Parliament had in view this very class of cases in enacting sec. 22, and there are no other classes of persons to whom that section could apply. [He referred to *Williams* v. *Macharg* (1); *Payne* v. *The Queen* (2).]

Lewers and *Starke*, for the respondent. The appellant is included in the plain words of the exception to sec. 99 of the *Public Service Act* 1883. When his services were dispensed with in 1880 he was out of the service. His relationship with the Crown was then absolutely at an end, and there was not a mere suspension of his employment. When he was appointed again in 1883 he became literally a person appointed since the passing of Act No. 710. In addition to this, the appellant was not a person classified or unclassified holding office at the passing of the Act of 1883. That description applies only to persons regularly appointed through Act No. 160 and to those appointed by the Governor in Council to the public service. Sec. 22 of the *Public Service Act* 1893 does not help the appellant; for there are many officers, classified or unclassified, who had retired from the service or whose services had been dispensed with before the passing of Act No. 710 and who may have become entitled to pensions, &c., but who had not severed their connection with the service and were afterwards again employed, and to these the

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

(2) 26 V.L.R., 705; 22 A.L.T., 143, 205.

section would apply. It also applies to officers in the Railway Department and officers of Parliament.

Arthur, in reply.

GRIFFITH C.J. This is in some respects a hard case, and the appellant possibly had some ground for thinking when he left the public service that he was retiring on a pension. But that cannot affect his legal right. He was originally employed under the Government in the year 1874, as a supernumerary officer. He was not, however, appointed by the Governor in Council, and consequently did not become a member of the civil service as regulated by Act No. 160, which was then in force. In 1880 his employment ended, and he received, by the bounty of Parliament, not under any statutory right, a compensation or gratuity on its termination.

On 24th December 1881, while he was still not employed in the service, Act No. 710 was passed, which provided that, notwithstanding any Acts then in force relating to pensions, "no pension or superannuation or retiring allowance or compensation or gratuity for loss of office or on death or on reduction of salary or other like payment shall be paid either directly or indirectly out of the consolidated revenue to any person who shall hereafter be appointed either permanently or temporarily to any public office whatsoever, or to his family or representatives."

That Act did not apply to "any person now employed in the public service" (sec. 2). As I have pointed out, the petitioner was not then employed in the public service, so that the latter provision did not operate in his favour. The result was that no person appointed to the public service after the passing of that Act, and while it was in force, acquired any pension rights.

In 1883 the appellant was again employed in the public service. His appointment was not at first made by the Governor in Council, but afterwards was so made. At that time Act No. 160 was still in force. In the same year, but after the re-employment of the appellant, the *Public Service Act* 1883 was passed, which, by sec. 99, restored the pension system for the future, and provided that "all persons classified or unclassified holding offices in

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any department of the public service at the time of the passing of this Act except persons appointed since the passing of" the Act No. 710 "shall be entitled to superannuation or retiring allowance compensation or gratuity to be computed under the provisions of Act No. 160 but save as aforesaid nothing in this Act shall in any way affect alter or vary the first mentioned Act so as to give any person appointed hereunder any claim to any pension superannuation or other allowance." The appellant, having been appointed since the passing of Act No. 710, did not therefore acquire any right to compensation under the Act of 1883. Since then the law has not been altered.

The petitioner, therefore, seems to me to come exactly within the words of what now stands as sec. 107 of the *Public Service Act* 1890 (sec. 99 of the Act of 1883). Whether he held "an office" or not, is a point which the Crown desires to be left open. If he did, he was a person appointed since the passing of Act No. 710. All that is urged against that view is that his former employment in 1874, which had terminated, should be taken to be an appointment made before and not since the passing of the Act No. 710, or, in other words, as was suggested by one of the learned Judges of the Supreme Court, that the word "first" must be read in before the word "appointed" in the Act of 1883. I cannot see any justification for such an interpretation. Without expressing any opinion whether, if the petitioner had been a person appointed before the passing of Act No. 710 within the meaning of sec. 107 of the Act of 1890, he would have been held to be a person "holding office," I am of opinion that his case fails for the reasons I have stated.

It was, indeed, suggested that the Act of 1893 confers some right upon the petitioner. Sec. 22 of that Act provides that for the purpose of computing the compensation of persons who were entitled to compensation, a gap in their service should not make any difference, with certain qualifications. But, unless the petitioner was entitled to compensation, that section has no application, and it is quite irrelevant to the inquiry whether he was entitled to compensation.

For these reasons, which are the same as those of the Supreme Court, I think that the appeal should be dismissed.

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BARTON J. I am clearly of opinion that within the meaning of the *Public Service Act* 1883 the petitioner was appointed to the service after the passing of Act No. 710, and that is a fatal bar to his claim. I would add that it seems to me that the reasons given by the Supreme Court Judges are conclusive, and need no further indorsement on our part.

While it is not for this Court to make recommendations to the Crown, still it is open to me to say that this is a case of evident hardship.

I agree that the appeal will have to be dismissed.

ISAACS J. I agree with what has been said both as to the hardship and as to the law.

Appeal dismissed with costs.

Solicitors, for the appellant, *Snowball & Kaufmann.*

Solicitor, for the respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

Cons *Miller v TCN Channel Nine* (1986) 67 ALR 321

Cons *Loubie, Re* (1985) 62 ALR 139

Cons *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

Foll *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1

Foll *Theophanous v Herald & Weekly Times Ltd* (1994) 34 ALD 1

[HIGH COURT OF AUSTRALIA.]

THE KING AGAINST SMITHERS.

EX PARTE BENSON.

H. C. OF A. 1912.

SYDNEY, *April* 22, 23, 24.

Griffith C.J., Barton and Isaacs JJ.

Dec. 16, 17, 20.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Constitutional law—Power of State to exclude undesirable persons—Freedom of "intercourse"—Police power—Limits of power—Discrimination between residents of different States—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 92, 107, 117—*Influx of Criminals Prevention Act* 1903 (*N.S. W.*) (*No.* 6 *of* 1903), *sec.* 3.

The *Influx of Criminals Prevention Act* 1903 (N.S.W.), by sec. 3, provides that "If any person (other than a person who has been resident in New South Wales at or prior to the commencement of this Act), has before or after such commencement, been convicted in any other State . . . of an offence for which in such State he was liable to suffer death, or to be imprisoned for one year or longer; and if before the lapse of three years after the termination of any imprisonment suffered by him in respect of any