

[HIGH COURT OF AUSTRALIA.]

BLANEY PLAINTIFF ;

AND

THE COMMONWEALTH DEFENDANTS.

Public Service (Commonwealth)—Pension or superannuation or retiring allowance—
Officer of department transferred to Commonwealth—Benefits conferred by State
Act—The Constitution (63 & 64 Vict. c. 12), sec. 84—Public Service Act 1883
(Vict.) (No. 773), secs. 2, 99, 101—Civil Service Act 1862 (Vict.) (No. 160).

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Sec. 99 of the *Public Service Act 1883* (Vict.), which was passed on 1st November 1883, provided 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 an Act intituled ‘*An Act to abolish the payment of Pensions or Superannuation or other Allowances in the case of persons hereafter entering the Public Service*’ shall be entitled to superannuation or retiring allowance compensation or gratuity to be computed under the provisions of Act No. 160.” Sec. 101 provided that “The provisions of this Act other than those pertaining to the appointment of the Board examiners and classifiers shall not come into force until the Board shall have certified that all the arrangements necessary to bring this Act into full force and effect have been completed ; whereupon the Governor in Council may issue a proclamation to the effect that this Act has come into force.”

Held, that the words “at the time of the passing of this Act” in sec. 99 meant 1st November 1883, and not the time when the proclamation pursuant to sec. 101 was issued.

Held, therefore, that a person who did not on 1st November 1883 hold an office in the Public Service, but was permanently appointed to an office before the proclamation referred to in sec. 101 was issued, was not entitled to the benefits conferred by sec. 99.

HEARING OF ACTION.

An action was brought in the High Court by Michael Blaney, a retired officer of the Public Service of the Commonwealth, against

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the Commonwealth, seeking a declaration that he was entitled to a superannuation or retiring allowance or pension to be computed under the provisions of the Victorian Act No. 160, and payment of arrears of such allowance or pension.

The action was heard by *Isaacs J.*, in whose judgment hereunder the material facts are set out.

Schutt, for the plaintiff.

Mann, for the defendants.

Cur. adv. vult.

June 29.

ISAACS J. read the following judgment :—In this case the plaintiff, who is a retired Commonwealth public servant, seeks a declaration that he is entitled to a superannuation or retiring allowance or pension to be computed under the provisions of the Victorian Act No. 160. The interpretation of the Federal Constitution is not involved. The facts as I find them are as follows :—On 2nd January 1873 the plaintiff was appointed to the office of boatman in the Department of Trade and Customs of the State of Victoria. This was a permanent appointment made under the provisions of Act No. 160. He continued in that office until dispensed with in the following circumstances :—On 8th October 1880 he received written notice that in consequence of reductions necessary to be made in the Department his services would be dispensed with on 31st December 1880. The letter informed him that, should vacancies occur, seniority would be duly considered for re-employment. By Order in Council his services, with those of other officers, were dispensed with, to date from 1st January 1881. The plaintiff had an interview with Mr. A. T. Clark, then Commissioner of Trade and Customs, in consequence of which he did not draw a sum of £80 to which he was then entitled as retiring allowance. I infer that the hope of future re-employment entitling him to add past services to future services so as to have a larger ultimate retiring allowance was the actuating motive for leaving the sum mentioned undrawn. It still remains, but in a Treasury letter of 27th February

1912 there would appear to be a willingness on the part of the Victorian Government to pay the plaintiff that sum.

Some question was raised before me as to the plaintiff's employment after 31st December 1880. On 11th January 1882 he obtained a certificate from the Ports and Harbours Department, a branch of the Trade and Customs Department, as to his length of service, and it was there stated to be from 1st May 1874 to 30th December 1881, adding "being dispensed with in consequence of reductions in the Service." This certificate was written out by one officer, who had been in the Service about eighteen months in all, and was signed by another officer. Both officers at that time were working under great pressure, and I am satisfied the high pressure under which these officers were then working led to an inadvertent error. That error was in making the final year 1881 instead of 1880. The commencing date is wrong also. It gives 1st May 1874 instead of 2nd January 1873. That may arise from the date of Blaney's entering the Ports and Harbour's branch, but it shows that error entered into the certificate at that point. Next, as to the other terminal, the certificate states that Blaney was dispensed with in consequence of reductions in the Service. On the evidence that reason could only apply to 31st December 1880.

The departmental records are now in some respects incomplete for the period in question, but, as far as I can see, they are not incomplete in any particular which would throw light on the plaintiff's service during 1881. I have heard his own evidence on the point and the evidence of the two officers connected with the certificate, and I have seen the records setting out the plaintiff's services, permanent and temporary, and I am convinced the statement in the certificate as to 31st December 1881 is an error for 31st December 1880. In so dealing with the matter, I have treated the certificate as properly admitted as *prima facie* evidence. I am not sure it is: my impression is rather that it is not, but I do not decide it. The plaintiff has the full benefit of its initial weight, but with the eventual result stated.

The plaintiff was re-employed after his permanent position ended. His re-employment was casual, and intermittent.

During 1881, he was employed as follows :—On 20th June he was

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engaged as a labourer for 4 hours undocking the S.S. *Sorata*. On 15th, 16th, 18th, 19th, 20th, 23rd, 24th and 25th August he was engaged as a labourer at some iron punts for 7 hours, 7 hours, 8½ hours, 8½ hours, 5½ hours, 8½ hours, 8½ hours and 8½ hours respectively. This was in another department, the Public Works Department. On 22nd August he was engaged as a labourer at *caisse* and docking in connection with H.M.S. *Cerberus* for 10 hours. That would be in the Trade and Customs Department. On 27th August he was engaged in the Public Works Department as labourer for 5½ hours. On 30th August, 1st and 2nd September he was engaged as a labourer 8½ hours each day in scraping, cleaning and painting S.S. *Despatch*. He was paid 1s. an hour for all the time so worked. From 3rd September to 10th October on apparently every working day he was employed as a labourer in similar work, the hours he worked noted, and he was paid at the rate of 1s. an hour. Then there was a gap. On 14th November and continuously to 15th December he was employed as lighthouse keeper or assistant lighthouse keeper at Gellibrand lightship. That is the last evidence of employment in 1881.

As to 1881, therefore, I find he was not employed at all until 20th June, when he did 4 hours' work, then he was not employed till the middle of August, then he was employed practically constantly, but as a temporary labourer only, up to 15th December, and then he stopped. The plaintiff in his own evidence says:—"I was in the Gellibrand lightship in 1881. I was there up to 15th December 1881. I cannot be sure whether between that date and 25th December 1881 I was working in the Customs Department. I think so, but I am not sure, I kept no dates." The plaintiff said, "I think so," but he said it in a way that convinced me he did not have any distinct thought about it. He really did not recollect, and was frank enough to say so. The official register of accounts kept at the time marks his services for December 1881 down as lasting from 1st December to 15th December, names him as a claimant for payment, states the amount of his claim as £4 10s. being 15 days at 6s., states that the account was received on 19th December and was paid on 30th December, and that the entry

itself was made on 16th January 1882. That is quite inconsistent with his being employed later than 15th December.

I am not merely not satisfied by the plaintiff's evidence that he was employed after that date, but I have no doubt he was not employed by the Department in 1881 after 15th December.

A gap then takes place till 28th April ; and on that day and the 22 following days—that is, till 19th May—he worked in the dredge at the Powder Canal. Then another gap till the end of June. From 1st July to 31st December 1882 he is employed as night-watchman at the dockyard. He was also employed from 1st January to 12th January 1883 and on 5th, 6th and 7th February 1883. He was not further employed in any capacity by the Government during 1883.

On 3rd January 1884 the plaintiff wrote to the Minister asking for re-employment as boatman. On 18th January 1884 he was informed by the secretary of the Department of Trade and Customs that he had been re-appointed, and was directed to report on the 21st.

By Order in Council, gazetted 1st February 1884, he was appointed as boatman, Third Schedule, to date from 21st January 1884. That was a permanent appointment, which he retained in the Victorian Customs Department until it was transferred to the Commonwealth. On transfer, his services were retained, and he became a Commonwealth public officer, and so continued until 24th February 1911, when he reached the age of sixty-five, and retired.

On those facts it is contended that he is entitled to a pension or other retiring allowance. Sec. 84 of the Constitution prescribes that “ Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State.” It is common ground here that this provision sends us to inquire what would have been the rights of Blaney, having regard to the provisions of the Victorian Acts.

The Act in force when Blaney was transferred to the Commonwealth was Act No. 773, and his rights must depend on the provisions

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of that Act, and the Acts it incorporates. That Act was passed on 1st November 1883. As to pensions, it acted on a very distinct principle. By sec. 99 it provided 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 an Act intituled '*An Act to abolish the payment of Pensions or Superannuation or other Allowances in the case of persons hereafter entering the Public Service*' shall be entitled to superannuation or retiring allowance compensation or gratuity to be computed under the provisions of Act No. 160."

From what I have said, the plaintiff did not hold any office in the Public Service on 1st November 1883, and so could not fall even under the first part of sec. 99. I may mention that according to his own evidence he plainly did not regard himself in November 1883 as holding any office in the Service, because in that year he says he might have worked for private persons when not employed by the Government, though he cannot recollect whether in fact he did so. It is really superfluous to add, but it is nevertheless a fact, that even if he had fallen under the first part, his appointment in January 1884 was after the passing of the Act, called for shortness "Ramsay's Act," and so he is in any event excluded from any affirmative pension rights, under sec. 99. Before leaving that section, we may notice the words "holding offices . . . at the time of the passing of this Act." It is clear that those words were meant to confer privileges on all persons who held office on 1st November 1883, and not to apply to all persons, and only to persons, who might happen to hold such office at some future indeterminate date, to be ascertained only by the issue of the proclamation under sec. 101. The latter is the contention on the part of the plaintiff. The Legislature were settling on a distinct basis the question of pension rights. A clear line of demarcation was drawn, namely, the date of the passing of the Act. All public servants on that date were on one side of the line, and all that came after were to be on the other, so far as sec. 99 was concerned. There was, however, the question of rights under Act No. 160 to be considered. That Act was abolished, and in consonance with sec. 99 was abolished as from the same day, "the passing of this Act" (sec. 2). But there was a saving of "all the privileges

and rights *now* existing or hereafter accruing of all persons *now* subject to the provisions of that Act, and all such persons shall in every other respect be subject to the provisions of this Act in the same way and to the same extent as if they had been appointed after the passing hereof, save and except as to being required to pass any examination." The words "persons now subject to the provisions of this Act" show that persons appointed after the passing of "this Act" are not regarded as having any rights under Act No. 160. Had the Act No. 773 been directed expressly or impliedly to come into operation on its passing, no difficulty could possibly arise. The facts show that Blaney was not in fact employed on 1st November 1883, and therefore was not one of the persons "now subject" &c. He certainly was not in any permanent position, and sec. 1 of the Act No. 160 excludes from its application all officers "temporarily appointed or employed." So that, even if by any stretch of imagination Blaney could be said to be "temporarily employed" in November 1883, he would not in that month be "now subject" to the Act No. 160, and therefore would not be within the saving clause of sec. 2 of Act No. 773 if that Act had come into immediate operation in its entirety. But by sec. 101 of the later Act, it was provided that "The provisions of this Act other than those pertaining to the appointment of the Board examiners and classifiers shall not come into force until the Board shall have certified that all the arrangements necessary to bring this Act into full force and effect have been completed; whereupon the Governor in Council may issue a proclamation to the effect that this Act has come into force."

It is contended that in view of that section the words "the time of the passing of this Act" must be read as "the date of the Act coming into force." Now, it is plain that certain provisions, the preparatory provisions, come into force on 1st November 1883. They cannot, of course, have come into force except as part of an Act that has been "passed." But unless we can conceive of the Act being passed piecemeal, part on one date and part on the other, it must follow that the whole Act must be taken to have been passed on 1st November 1883, which accords with the fact and with the natural meaning of the words used.

The plain intention of the Act is to let the Act operate from its

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passing, so far as it practically can ; but that as part of its scheme is the creation of new machinery, which takes time, the old machinery must be used in the meantime. But though the old Act No. 160 is to be used as machinery, it is not to create new pension rights. They are stereotyped as at the date the Act No. 773 passed. When the mechanical necessity for Act No. 160 has ended, its effect has ended, except so far as concerns the rights it gave rise to in favour of persons who were subject to it on 1st November 1883, that is, before the new substantive enactment was made. Then by force of sec. 2 its repeal as from 1st November 1883 operates subject to matters saved. From the time that the new Act was passed all persons appointed by means of the old mechanism were appointed with full notice that pension rights were not for them ; that they did not come under sec. 99, and were not covered by Act No. 160.

This view renders it unnecessary to say anything about the contention pressed as to sec. 2 of Act No. 710. It was urged that although Blaney was not actually employed by the Government on 24th December 1881, when that Act was passed, he must be taken to have been so employed within the meaning of the section, because he was a person whose services were so constantly called for as to be really in the regular employment of the Government at that time. If it were necessary to determine that point, I should unhesitatingly reject the contention. At the time of the passing of that Act he was not a Government employee either permanent or temporary, and the personal exemption from sec. 1 was not intended for him. If the contention were sound, he would equally well have been in the Government service had he been actually engaged after 15th December 1881 in the service of some private individual. There was no arrangement by which he was to remain at the disposal of the Government.

From every standpoint the case fails.

As to costs, I have considered this case in all its aspects. The prevailing consideration affecting me as to costs is that the Commonwealth succeeds to the State, and the State legislation, though taken to be clear when the point is judicially determined, is not until then free from the doubt raised. The plaintiff's case is a very hard one. He served about thirty-five years faithfully and without reproach.

Through no fault of his own, he missed the second section of Ram- H. C. OF A.
say's Act by nine days and Act No. 160 by about three months in 1917.
the long period of actual service. I add reference to the mistake in
the certificate. On the whole I give no costs.

Judgment for the defendants.

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Solicitors for the plaintiff, *Loughrey & Douglas*.
Solicitor for the defendants, *Gordon H. Castle*, Crown Solicitor for
the Commonwealth.

B. L.

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[HIGH COURT OF AUSTRALIA.]

THE PERPETUAL EXECUTORS AND TRUS-
TEES ASSOCIATION OF AUSTRALIA } APPELLANTS ;
LIMITED }
DEFENDANTS,

AND

WRIGHT RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
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Trust—Declaration of trust—Acknowledgment of existing trust—Assignment of H. C. OF A.
property to defeat creditors—Recovery back of property—No proof that creditors 1917.
were defeated—Stamp duty—Trustee—Costs—Personal liability—Appeal to High
Court—Trusts Act 1915 (Vict.) (No. 2741), sec. 71—Stamps Act 1915 (Vict.) MELBOURNE,
(No. 2728), secs. 29, 30 ; Sched. 3, cl. IX. (2). May 15, 16 ;
June 13.

The fact that the purpose with which a man has put property into his wife's
name as a trustee for him is to defraud his creditors does not prevent him from
afterwards recovering that property from her, or her representatives after her
death, provided that the illegal purpose has in no respect been carried into
effect.

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