

concerned upon the reference to the said  
Special Tribunal made by the said Charles  
Hibble, chairman of the said Tribunal, on  
29th December 1920.

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—  
THE KING  
v.  
HIBBLE;  
EX PARTE  
BROKEN  
HILL PRO-  
PRIETARY  
CO. LTD.

Solicitor for the prosecutor, *A. A. Rankin*, Newcastle, by *Minter, Simpson & Co.*

Solicitor for the respondent organization, *Cecil A. Coghlan & Co.*

Solicitor for the intervener, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

LE LEU . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

*Public Service (Commonwealth)—Officers in transferred Departments—Rights pre-  
served—Rights under South Australian law—Removal on account of age—Life  
tenure—Compulsory retirement under Commonwealth law—Civil Service Act  
1874 (S.A.) (37 & 38 Vict. No. 3), secs. 13, 14, 24, 25, 26, 28, 32 \*—Civil  
Service Amendment Act 1881 (S.A.) (No. 231), sec. 4 \*—Commonwealth Public  
Service Act 1902-1918 (No. 5 of 1902—No. 46 of 1918), secs. 60, 73, 74, 78—  
The Constitution (63 & 64 Vict. c. 12), sec. 84.*

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MELBOURNE,  
May 19, 20;  
June 14.  
—  
Knox C.J.,  
Higgins,  
Gavan Duffy,  
Rich and  
Starke JJ.

\* By secs. 24 and 25 of the *Civil Service Act 1874* (S.A.) it is provided that the Governor may dismiss from his office an officer guilty of a breach of regulations or of conduct rendering him unfit to remain in the Civil Service. Sec. 26 provides that an officer convicted of felony or taking the benefit of any Act for the relief of insolvent debtors shall be deemed to have forfeited his office. Sec. 28 provides that "the Governor may require any officer, who has become incapacitated for the performance of his duties, to resign his office, and, in the event of

non-compliance, may remove such officer, who shall thereupon be entitled to the compensation provided by this Act." Sec. 4 of the *Civil Service Amendment Act 1881* provides (*inter alia*) that "every officer in the Civil Service on being removed from, or on being permitted to resign, his office on account of illness, infirmity, age, abolition of office, or any other cause whatever, except misconduct or pecuniary embarrassment, shall, with the consent of the Governor, be entitled to and shall be paid by the Treasurer" a sum of money ascertained in a certain manner.

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*Held*, that sec. 60 of the *Commonwealth Public Service Act* 1902-1918 deals specially with the rights of officers of Departments of the Public Services of States transferred to the Commonwealth who were retained in the service of the Commonwealth, and that other provisions of that Act which would be inconsistent with the provisions of that section if they were read as applying to transferred officers as well as to other officers of the Commonwealth Public Service should be construed as inapplicable to transferred officers so far as may be necessary to avoid inconsistency.

*Cousins v. The Commonwealth*, 3 C.L.R., 529, on that point dissented from by *Knox C.J.*, *Gavan Duffy*, *Rich* and *Starke JJ.*; distinguished by *Higgins J.*

*Held*, also, that under the *Civil Service Act* 1874 (S.A.) and the *Civil Service Amendment Act* 1881 (S.A.) age, apart from incapacity, was not a ground for removal of an officer of the Civil Service, and an officer having attained the age of sixty-five years could not on that ground alone be lawfully retired or removed from office; that that was an existing right which an officer of a Department transferred to the Commonwealth who was retained in the Commonwealth Public Service then enjoyed; and that that right was preserved by sec. 60 of the *Commonwealth Public Service Act* 1902-1918, and was unaffected by sec. 74 of that Act.

*Per Higgins J.* :—(1) The plaintiff retained his right of tenure by virtue of sec. 84 of the Constitution, even if sec. 60 of the *Commonwealth Public Service Act* did not exist; and there is nothing in *Cousins v. The Commonwealth* to the contrary: (2) the concluding passage in the judgment of *Griffith C.J.* in that case at p. 542 does not apply to the present case, which is a claim in respect of dismissal, not for salary of an officer still in the Service; and sec. 78 of the *Commonwealth Public Service Act* is not raised by the demurrer.

#### DEMURRER.

An action was brought in the High Court by Frederick Leon Le Leu against the Commonwealth in which the statement of claim was as follows :—

1. The plaintiff was, immediately prior to and including 15th December 1920, an officer of the Commonwealth Public Service holding the position of cashier (third class officer) in the Commonwealth Customs Department.
2. The plaintiff was born on 16th December 1855.
3. On or about 1st October 1877 the plaintiff was appointed to an office in the Public Service of the Province or Colony of South Australia under the provisions of the South Australian *Civil Service Act* 1874 (No. 3).
4. From the said 1st October 1877 until 31st December 1900 the plaintiff continuously held a position in the Public Service of the

said Province or Colony of South Australia, and at or about 31st December 1900 was employed in the Customs Department of the said Public Service as a "landing waiter."

5. On 1st January 1901 the Customs Department was taken over by the Commonwealth of Australia, and the plaintiff was transferred from the Public Service of the said Colony to that of the said Commonwealth, and thereafter until 15th December 1920 was continuously employed in the Commonwealth Public Service.

6. The plaintiff was on or about 10th September 1920 notified that he would be retired from the Public Service upon his attaining the age of sixty-five years; and in pursuance of such notification on 15th December 1920 he was actually retired therefrom, and ever since has been wrongfully deprived of all the rights and privileges belonging to him as such officer as aforesaid.

7. He contends that under and by virtue of the said South Australian *Civil Service Act* 1874 (No. 3) he acquired a right to retain office in the Public Service of South Australia until death or removal in terms of the said Act.

8. He contends that by virtue of sec. 84 of the Commonwealth Constitution all existing and accruing rights as an officer of the South Australian Public Service as aforesaid were preserved to him upon his transference to the Public Service of the Commonwealth.

9. He contends that it was not competent for the Commonwealth Government under the provisions of the Constitution and the *Commonwealth Public Service Act* 1908 to remove from office and/or retire the plaintiff as aforesaid.

10. The plaintiff claims (a) a declaration that he is entitled to retain his office in the service of the Commonwealth until such office is determined in accordance with the provisions of the South Australian *Civil Service Act* 1874 (No. 3); (b) a declaration that he was wrongfully deprived of his office on 15th December 1920; (c) an order for his reinstatement to the office in the Public Service of the Commonwealth; (d) damages for wrongful dismissal from the said office; (e) such consequent and incidental relief as to the Court seems meet.

The defendant demurred to the whole of the statement of claim on the following grounds:—

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(1) That the facts alleged do not disclose any cause of action ;

(2) That under the provisions of the *Civil Service Acts* of South Australia, No. 3 of 1874 and No. 231 of 1881, the plaintiff had no right to retain office in the circumstances set forth in the statement of claim ;

(3) That the right (if any) of the plaintiff under the provisions of the *Civil Service Acts* of South Australia, No. 3 of 1874 and No. 231 of 1881, to retain office until death or removal in the terms of the said Acts was not an existing and accruing right preserved to the plaintiff by sec. 84 of the *Commonwealth Constitution Act* ;

(4) That the defendant will rely on the *Commonwealth Public Service Act* 1902-1918, secs. 73-75.

The demurrer now came on for argument.

Gregory, for the defendant, to support the demurrer. Under the *Civil Service Act* 1874 (S.A.) an officer has not a life tenure and may be removed at the pleasure of the Governor. At common law an officer may be removed at pleasure, and there is nothing in the Act to take away the right of removal at pleasure.

[KNOX C.J. referred to *Gould v. Stuart* (1).]

[RICH J. referred to *Young v. Adams* (2) ; *Young v. Waller* (3).]

*Gould v. Stuart* (1) dealt with dismissal, as to which the Act of 1874 does, by secs. 24 and 25, make provision limiting the right to dismiss ; but no limitation is placed by the Act on the right to remove. Sec. 13, which makes the Governor the final arbiter as to the rights or obligations of officers under the Act, and sec. 14, which authorizes the Governor to diminish the total number of officers and so abolish some offices, support the view that the power of removal at pleasure remains. Sec. 28 provides that an officer who is incapacitated may be removed, but must in that case be compensated. Sec. 32 shows that an officer may be removed for other causes than those mentioned, and negatives any implication that he has a life tenure. If there is any limit placed on the power of removal by sec. 32, the Governor may make the attainment of a certain age an incapacity, and under sec. 13 he has an absolute

(1) (1896) A.C., 575.

(2) (1898) A.C., 469.

(3) (1898) A.C., 661.



discretion in the matter. This is borne out by the fact that age is mentioned in sec. 32 as one of the grounds on which an officer may be removed or permitted to resign. The right which an officer is given by sec. 84 of the Constitution is no greater than the right which he had while an officer of the State Public Service; that is to say, just as while he was an officer of the State his rights might have been altered by the State Parliament, so when he becomes an officer of the Commonwealth his rights may be altered by the Federal Parliament (*Bond v. The Commonwealth* (1); *Cousins v. The Commonwealth* (2)). Sec. 84 was intended to provide for the rights of officers of Departments taken over by the Commonwealth until Parliament should pass legislation with reference to the Public Service. [HIGGINS J. referred to *New South Wales v. The Commonwealth* (3).]

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*Foster and Owen Dixon*, for the plaintiff. On the true construction of the *Civil Service Act* 1874 and the authority of *Gould v. Stuart* (4), the Crown had not a right to dismiss the plaintiff at pleasure. Sec. 84 of the Constitution preserves for all time the rights of officers taken over and retained in the Commonwealth Public Service. The section does not contain the words "until the Parliament otherwise provides"—showing that it was not intended that the Parliament could take away the rights which sec. 84 said were to be preserved. The word "preserve" is inconsistent with the existence of such a power in the Parliament. *Cousins v. The Commonwealth* (2), so far as it deals with sec. 84, should be limited to the salaries of officers. If it cannot be so limited, it was wrongly decided. There is not in that case an explicit statement of the law as to the meaning of sec. 84, and the Court should not follow it even though the decision was given fifteen years ago (*Bourne v. Keane* (5)). Even if the Parliament had power to take away the rights which sec. 84 preserved, it has not done so. Sec. 60 of the *Commonwealth Public Service Act* shows an intention to preserve to transferred officers whatever rights they were entitled to, and it should be read as not cut down by sec. 74. No meaning can be given to sec. 60 unless secs. 73-75 are read subject to it.

(1) 1 C.L.R., 13, at pp. 23-24.

(2) 3 C.L.R., 529.

(3) 6 C.L.R., 214, at p. 237.

(4) (1896) A.C., 575.

(5) (1919) A.C., 815.

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*Gregory*, in reply. The word "preserve" in sec. 84 of the Constitution cannot be read in its ordinary sense, because the rights which the officers had under the State law were rights against the State whereas those which are "preserved" to him are rights against the Commonwealth. The section is intended to create new rights by placing the officers in the same position with regard to the Commonwealth as that which they occupied with regard to the State. The general provisions of the *Commonwealth Public Service Act*, including those in sec. 73, apply to all officers, including those transferred from State Departments; and sec. 60 is a saving provision for cases where the general provisions do not apply.

*Cur. adv. vult.*

June 14.

The following written judgments were delivered:—

KNOX C.J., GAVAN DUFFY, RICH AND STARKE JJ. The plaintiff, prior to the establishment of the Commonwealth, was employed in the Public Service of South Australia as a landing waiter. On 1st January 1901 the Customs Department was, pursuant to the Constitution, transferred to the Commonwealth, but the plaintiff was retained in the Public Service of the Commonwealth. He remained actively employed as an officer of the Commonwealth until 15th December 1920, when, having reached the age of sixty-five years, the Commonwealth retired or purported to retire him from its service. The plaintiff seeks, in substance, a declaration that he was not lawfully retired from the service of the Commonwealth, and is still entitled to remain in that service, and certain ancillary orders and damages for wrongful dismissal. The Commonwealth has demurred to the statement of claim, on the ground that it discloses no cause of action. The plaintiff bases his claim upon the provisions of secs. 69 and 84 of the Constitution, and also upon the provisions of sec. 60 of the *Commonwealth Public Service Act* 1902-1918. This latter Act, by sec. 60, provides as follows: "Where a Department of the Public Service of a State has become transferred to the Commonwealth, every officer of such Department 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 . . . which would be permitted by the law of the State from which he was transferred if his service with the Commonwealth were a continuation of his service with such State." The plaintiff, as an officer of a transferred Department, falls within the words of this section, and this throws us back upon the relevant provisions of the law of the State of South Australia. These are to be found, for the purposes of this case, in the *Civil Service Acts* of South Australia No. 3 of 1874 and No. 231 of 1881.

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The Commonwealth contended that under these Acts the civil servants of the Crown in South Australia held their offices only during the pleasure of the Crown. We have examined these Acts, and our conclusion is that their terms are inconsistent with the usual implication that a contract of service under the Crown is determinable at pleasure. The Act of 1874, in Parts III. and V., provides for the classification and appointment of officers, and, in Part VII., for their removal and dismissal from office. By sec. 24 an officer guilty of breaches of regulations or conduct rendering him unfit to remain in the Service is entitled to a certain investigation before he can be dismissed or otherwise punished, and by sec. 26 provision is made for forfeiture of office if the officer is convicted of felony or takes the benefit of a law for the relief of insolvent debtors. Sec. 28 empowers the Governor to require any officer who is incapacitated to resign his office and, if he does not do so, to remove him from office, subject in this case to compensation. All these provisions are inconsistent, in our opinion, with the right of the Crown to terminate a contract of service at its pleasure. They prescribe a definite statutory rule for the determination of contracts of service with the Crown operating under those Acts. *Gould v. Stuart* (1) is in point, and *Young v. Waller* (2) does not conflict with this view.

It was contended, however, that sec. 4 of the Act of 1881 militated against this view, because it provided an allowance on being removed or permitted to resign from office on account of illness, &c., or any other cause whatever except misconduct or pecuniary embarrassment. It was argued that this provision necessarily implied that there was power to remove an officer "for any cause whatever," but, in our opinion, it is neither necessary nor proper to construe the

(1) (1896) A.C., 575.

(2) (1898) A.C., 661.

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section in this way. We think that the words "or any other cause whatever" should be read as referring to resignation, and not to both removal and resignation, and that the section does no more than provide compensation for officers who, apart from misconduct or pecuniary embarrassment, are removed from office in accordance with the provisions of the Act, or are permitted by the Executive to resign their office on account of illness or for any other cause whatever. The Legislature seems to have recognized that while the power to remove from office was circumscribed by other sections of the Act, the power of the Executive to permit an officer to retire from the Service was left at large, and might be exercised in any case "for any cause whatever" which the Executive in its discretion might think sufficient. The words were necessary in order to cover cases in which the Executive might permit an officer to resign for reasons other than illness, and on ordinary principles of construction we see no reason to extend their operation further.

The plaintiff thus establishes that under the law of South Australia age, apart from incapacity, is not a ground for removal, and that he could not on the facts of this case be lawfully retired or, to use the words of the statute, removed from office, except for incapacity. He had therefore, in our opinion, an existing right which he enjoyed when transferred to the Commonwealth Service, and which was preserved by sec. 60 of the *Commonwealth Public Service Act*. It was said, however, that this right was destroyed by sec. 74 of that Act, which provides that every officer shall retire on attaining the age of sixty-five years unless required to continue in the Service; the argument being that "officer" in sec. 74 means a "transferred" officer as well as an "appointed" officer, and in this connection the definition of "officer" in sec. 2 was relied on. It is apparent that, if sec. 74 be construed as relating to all "transferred" officers, its provisions so far as officers transferred from the South Australian Service are concerned are inconsistent with those of sec. 60 of the Act, which purports to preserve the right of such officers to remain in the Service until removal for incapacity. In our opinion, the contention submitted on behalf of the Commonwealth on this point is opposed to the well-recognized rule of construction which requires that all parts of a statute shall, if possible, be construed so as to be consistent,



one with the other. In the present case this can be done by reading sec. 74 as applying only to those officers who had not a right preserved to them by sec. 60 to remain in the Service after attaining the age of sixty-five years. We think sec. 60 may and should be regarded as dealing specially with the rights of transferred officers, and that other provisions of the Act which would be inconsistent with the provisions of that section, if they were read as applying to transferred as well as to appointed officers, should be construed as inapplicable to transferred officers so far as may be necessary to avoid inconsistency. In this connection counsel for the Commonwealth relied on the decision of this Court in *Cousins v. The Commonwealth* (1). Three distinct points were argued in that case: first, the "real point" (per Griffith C.J. (2)), what was the proper construction of sec. 19 of the Victorian Statute; secondly, the construction of sec. 84 of the Constitution, and, thirdly, the construction of sec. 60 of the *Commonwealth Public Service Act*. The first point does not call for discussion in this case, and we say no more about it. We think also that, as Parliament has not, on the proper construction of the *Commonwealth Public Service Act*, purported to interfere with the rights of the plaintiff as they existed at the time of his transfer, it is unnecessary for us to decide whether power exists to do so under the Constitution. With regard to the third point, the decision in *Cousins's Case* seems to have proceeded on the footing that the provisions of sec. 60 of the Act were overridden or rendered ineffectual by other provisions of the same Act, e.g., secs. 8 and 80. It follows from what we have said, that we respectfully dissent from the judgment in *Cousins's Case* so far as it rests on the opinion there expressed as to the effect of the *Commonwealth Public Service Act*.

In our opinion the statement of claim discloses a cause of action, and consequently the demurrer must be overruled.

HIGGINS J. I concur with my learned brothers in the opinion that under the South Australian Act this officer had a right to retain his office until death, unless he were removed on the ground that he had become incapacitated, or on some other of the specific grounds

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(1) 3 C.L.R., 529.

(2) 3 C.L.R., at p. 536.

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for removal or dismissal mentioned in the Act. He had a qualified or conditional life tenure of the office ; and mere age is not in itself one of the grounds on which he could be removed. I concur also in the opinion that, if the Commonwealth Parliament had power to interfere with this right, it has not exercised that power ; that sec. 73 of the *Commonwealth Public Service Act* 1902 does not deprive transferred officers of their existing rights, because effect has also to be given to sec. 60, which provides that every transferred officer "shall preserve all his existing and accruing rights" ; and his right of tenure is one of those rights. In his statement of claim, however, the plaintiff relies specifically and only on sec. 84 of the Constitution and on "the *Commonwealth Public Service Act* 1908," not on sec. 60 of the Act of 1902. So far as I am personally concerned, it must not be inferred that, even if there were no sec. 60, the plaintiff would not retain his right of tenure by virtue of sec. 84 of the Constitution ; and, in my opinion, there is nothing in the decision of *Cousins v. The Commonwealth* (1), when closely examined, against the view that under sec. 84 the right of tenure is preserved from interference on the part of the Commonwealth. Under that section the transferred officer is to "preserve all his existing and accruing rights." Counsel for the Commonwealth urges that this means no more than that the officer is to pass over to the Commonwealth having all existing, &c., rights, and that these rights can be varied or withdrawn by an Act of the Commonwealth—enacted as to the Department under sec. 52. This exclusive power conferred on the Commonwealth Parliament by sec. 52 as to transferred Departments is conferred "subject to this Constitution" ; and sec. 84 is part of the Constitution. Moreover, this reading does not give its full force to the word "preserve." The preservation must be against the Commonwealth ; and it is unlimited in time. "Preserve" is not a technical word ; but it certainly implies *retain, keep intact or unimpaired* ; and the right to retain existing rights, being without words of limitation, must be treated as a right to retain office for life, with such qualifications only as are imposed by the South Australian Acts.

As for the case of *Cousins v. The Commonwealth* (1), I cannot find that in it the late Chief Justice has either assumed or stated that

the Commonwealth Parliament has power, notwithstanding sec. 84, to alter or take away the rights, existing or accruing, which a transferred officer had at the transfer of his Department. That case turned on a peculiar Victorian Act, passed four days before Federation. The construction which the Court put upon that Act was that it contained "a merely *temporary* provision to fix the status of these officers when transferred to the Commonwealth Government, and the *operation of which would then be exhausted*" (1). It does not matter, for the purpose of the present case, whether such a construction of the Victorian Act is right or not; it is enough to say that this construction of the Act is the foundation of the decision in *Cousins's Case*. The position is the same as if a lessee for a term of years bequeathed the lease to A for life, and the lease expired before A died; there would then be no lease to which the bequest for life could any longer apply. "That being so," the judgment proceeds, "the only right which the plaintiff took over was the right to receive his existing salary until lawfully reduced, and it was competent for the Commonwealth Parliament to reduce it" (1). In other words, because the right as derived from the State had expired independently of any action of the Commonwealth Parliament, the ground was clear for any action of that Parliament; the "right" had already terminated, and "it was" therefore "competent for the Commonwealth Parliament to reduce" the salary. There is no explanation that I can conceive of the elaborate consideration given in *Cousins's Case* to the meaning of the Victorian Act if the late Chief Justice and *Barton* and *O'Connor JJ.* thought that the Commonwealth Parliament had power to lower the transferred officer's salary whether the operation of the Act had been exhausted or not. Indeed, it seems rather to have been taken for granted that if the Act were meant to be permanent or indefinite in its operation the salary could not have been reduced.

The concluding passage in *Cousins's Case* (2) does not seem to me to apply to this case. In that case, the plaintiff did not claim for wrongful dismissal, as in this case; for he was still in the Service. He claimed for £1 arrears of salary underpaid for November 1905; and the defendant raised in its defence the point that the claim

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(1) 3 C.L.R., at p. 540.

(2) 3 C.L.R., 529.

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was bad in law for that it was not alleged that the Commonwealth Parliament had appropriated any sum to pay the salary claimed by the plaintiff. The defendant relied specifically on sec. 78 of the Act: "Nothing *in this Act* shall authorize the expenditure of any greater sum out of the Consolidated Revenue Fund by way of payment of any salary than is from time to time appropriated by the Parliament for the purpose." The late Chief Justice said (1): "Here the only claim of the plaintiff, *if he claims under the Commonwealth Public Service Act 1902*, is such a right as that Act gives him, and it is a defence that no greater sum of money has been voted by Parliament." In this case, the defendant in his demurrer does not rely on sec. 78, but on secs. 73-75 only. I express no opinion on the question whether sec. 78 (1) is a sufficient answer to a mere claim for salary underpaid, based on sec. 60 (see *R. v. Fisher* (2) ).

*Demurrer overruled.*

Solicitors for the plaintiff, *Loughrey & Douglas*.

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

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(1) 3 C.L.R., at p. 542.

(2) (1903) A.C., 158.