

expressing a doubt upon the subject, and avoid deciding the matter in a sense contrary to the view they have formed.

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THE KING  
v.  
MACFAR-  
LANE;  
EX PARTE  
O'FLANAGAN  
AND  
O'KELLY

*Orders nisi discharged with costs. Motion for interlocutory injunction dismissed with costs.*

Solicitors for the prosecutors and plaintiffs, *R. D. Meagher, Hogarth & Co. ; Collins & Mulholland.*  
Solicitor for the respondents and defendants, *Gordon H. Castle,*  
Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

TROWER . . . . . PLAINTIFF ;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

*Public Service (Commonwealth)—Transferred officers—Officer in Public Service of State—Transfer to Public Service of Commonwealth—Break in service of State between establishment of Commonwealth and time of transfer—The Constitution (63 & 64 Vict. c. 12), sec. 84—Commonwealth Public Service Act 1902-1918 (No. 5 of 1902—No. 46 of 1918), sec. 60.*

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Sec. 84 of the Constitution deals in the first three paragraphs with the rights of officers of Departments of the Public Service of a State transferred to the Commonwealth, and provides 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.” The fourth paragraph of the section enacts that “any officer who is, at the establishment of the Commonwealth, in the Public Service of a State,

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and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the Public Service of the Commonwealth, shall have the same rights as if he had been an officer of a Department transferred to the Commonwealth and were retained in the service of the Commonwealth.”

The plaintiff was a classified officer in the Public Service of the State of Queensland on 1st January 1901, the date of the establishment of the Commonwealth. In January 1904 he ceased to be an officer in that Public Service, but in March 1904 he was again appointed thereto, and continued therein until October 1917, when he was appointed to the Commonwealth office of Director of Lands in the Northern Territory and was transferred to the Public Service of the Commonwealth; and in that office he remained until his services were dispensed with in August 1921.

*Held*, that the plaintiff acquired no right under the last paragraph of sec. 84, as that provision relates only to officers in the Public Service of a State who, at the time of their transfer to the Public Service of the Commonwealth, had rights against the State based on continuous employment in the Public Service of the State from a date prior to the establishment of the Commonwealth.

CASE REFERRED.

The plaintiff, Horace Melville Trower, instituted an action against the Commonwealth claiming (1) a declaration that he is still an officer of the Public Service of the Commonwealth; (2) a declaration that he is entitled to retain his office of Director of Lands until such office is determined according to law and in accordance with the provisions of the *Queensland Public Service Act of 1896*; (3) a declaration that he was wrongly deprived of his said office on or about 22nd August 1921; (4) an order for reinstatement thereto; (5) an order for payment of salary and/or arrears of salary; (6) £5,000 damages for wrongful dismissal; (7) £1,000 for travelling and house and other allowances, costs of removal, loss and damage on sale and disposal of furniture and effects. The action came on for trial before *Gavan Duffy J.*, and, after certain admissions of fact had been made for the purposes of the action by the parties and evidence on the question of damages had been taken, the learned Judge directed the case to be argued before the Full Court of the High Court.

The only question argued was whether sec. 84 of the Constitution gave any rights to the plaintiff.

The material facts appear in the judgments hereunder.



*Wassell* (with him *Fahey* and *Murray Graham*), for the plaintiff. Sec. 84 applies to any officer individually transferred who complies with two conditions—first, is in the Public Service of a State at the establishment of the Commonwealth, and, secondly, is with the necessary consent transferred to the Public Service of the Commonwealth. The exact words of the section do not require continuity of service from the establishment of the Commonwealth to the date of transfer, and the duty of the Court is loyally to accept and plainly to expound the words actually used (*Vacher & Sons Ltd. v. London Society of Compositors* (1)). A requirement of continuous employment would, in effect, be the insertion of the words “and who continues to be” into the section.

*Macgregor* (with him *McGill*), for the defendant. Sec. 84 must be read as a whole; its earlier paragraphs show that it applies only to officers whose service is continuous between the relevant dates, and by reference that condition is imported into the last paragraph. The plaintiff has no rights other than those arising on his appointment in March 1904, and therefore he acquired no rights under sec. 84.

KNOX C.J., during argument, asked counsel for the plaintiff whether, in the event of the Court being of opinion that the break in the plaintiff's employment precluded him from coming within the ambit of the last paragraph of sec. 84, that decision would finally determine the action. On counsel replying in the affirmative, the Court adjourned argument on the other questions involved in the case.

*Cur. adv. vult.*

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. The claim of the plaintiff in this action is as follows:—[The claim above set out was here stated]. A settlement has been arrived at in respect of the last item of this claim, which is accordingly withdrawn from our consideration.

The relevant facts are as follows:—At the date of the establishment of the Commonwealth—1st January 1901—the plaintiff was a

(1) (1913) A.C., 107, at p. 126.

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classified officer in the Public Service of the State of Queensland. On 1st January 1904 the plaintiff ceased to be an officer in the Service of that State. On 2nd March 1904 he was again appointed as an officer in the Public Service of Queensland, and continued as an officer in that Service until 1st October 1917. On the last mentioned date he was appointed as Director of Lands of the Northern Territory, and continued in that position until 31st August 1921, when his services were dispensed with. His appointment to the position of Director of Lands was made with the consent of the Governor of Queensland with the advice of the Executive Council of that State.

Several objections have been taken to the validity of the plaintiff's claim, but we need deal with only one of them. His counsel admits that the plaintiff cannot succeed unless he comes within the ambit of the last paragraph of sec. 84 of the Constitution. We think he is not within it because, in our opinion, that provision relates only to officers in the Public Service of a State who, at the time of their transfer to the Public Service of the Commonwealth, have rights against the State based on continuous employment in the Public Service from a date prior to the establishment of the Commonwealth. The words "any officer who is, at the establishment of the Commonwealth, in the Public Service of a State, and who is . . . transferred to the Public Service of the Commonwealth," indicate that the rights intended to be protected are not those of every individual who happened to be an officer in the Public Service of a State at the time of the establishment of the Commonwealth, but only those of every such person if he remained in the Public Service of the State until he was transferred to the Public Service of the Commonwealth. At the time of his transfer to the Public Service of the Commonwealth, if he was so transferred, the plaintiff had no rights based on employment in the Public Service of the State of Queensland prior to the establishment of the Commonwealth; and, therefore, took no right under sec. 84 of the Constitution.

ISAACS J. The material facts are that at the date of the establishment of the Commonwealth the plaintiff was an officer in the Public Service of the State of Queensland as draftsman and surveyor to the Marine Department. That was not one of the Departments



transferred to the Commonwealth, and therefore the plaintiff continued in the Public Service of Queensland unaffected by the establishment of the Commonwealth. The State Government in December 1903 stopped most of its harbour works and laid up dredges, by State governmental action the office of draftsman and surveyor was abolished, and in January 1904 the plaintiff ceased to be an officer of the State. On 2nd March 1904 the State of Queensland again appointed the plaintiff to its Public Service; in which he remained until 1917, in which year he was Lands Commissioner, Townsville District. In October or December 1917 he was appointed to the Commonwealth office of Director of Lands in the Northern Territory. The Governor in Council of Queensland consented to the transfer. In September 1921 the Commonwealth dispensed with his services. At that time he was only fifty-five years of age; and if he had remained in the Public Service of Queensland he could not, it has been assumed for the purposes of the argument, have been dispensed with for another ten years.

The question is whether such a case falls within the concluding paragraph of sec. 84 of the Constitution. The plaintiff contends that it does, because, says his learned counsel, he answers the description in that paragraph inasmuch as he was an officer who was at the establishment of the Commonwealth in the Public Service of a State, and he was, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the Public Service of the Commonwealth. Sec. 84 must be read as a whole. The previous portion deals with the transfer of Departments, which are by the Constitution destined to be transferred to the Commonwealth as soon as they conveniently can be. The Department of Customs and Excise necessarily passed at once. Four other Departments depended for their transfer on proclamation by the Governor-General, but their transfer was certain. As to all transferred Departments the officers became at once on transfer subject to Commonwealth control, and might be retained or not retained by the Commonwealth. If not retained, such an officer was to be appointed in the State Service to an office of equal emolument or was to receive whatever compensation the State provided on the abolition of his office. If retained by the Commonwealth, he was to preserve intact

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all his existing and accruing rights, and was also to have his retiring rights as if his Commonwealth service were a continuation of his State service. And provision was made for apportioning his pension or retiring allowance between Commonwealth and State. But the persons who are to have those benefits are "all officers of the Department" which is transferred. The moment of transfer identifies the officers; and there is no hiatus between the identifying circumstance and the entry into the Commonwealth Service. But since the Commonwealth might need State officers other than those in transferred Departments, the concluding paragraph created an assurance to those officers "who, at the establishment of the Commonwealth," were in the Service of the State that if they left that Service, with the State's consent, to enter the Commonwealth Service, they would have the same rights as if they had passed over with a Department and were retained. The consent of the State to an isolated officer's transfer takes the place of the constitutional provision as to the transfer of a Department; but it is the consent of the State to terminate the office of an officer who was at the establishment of the Commonwealth in the State Service. That is the only thing the Commonwealth guarantees to protect under the relevant portion of the 84th section of the Constitution. When the State itself, after the establishment of the Commonwealth, abolishes that office, and the officer ceases to be any longer in the Public Service of the State without any transfer to the Commonwealth, the situation is destroyed which the relevant paragraph of sec. 84 contemplates. The constitutional guarantee is that the officer's rights which have their root in his State office in 1900 shall not suffer by reason of his transfer later to the Commonwealth with the State's consent. But the basis disappeared when the State itself stepped in and abolished the office. When Mr. Trower re-entered the State Service in March 1904, he did so purely under then existing State auspices, and he no longer had the status of an officer holding office in its Service in 1901; and, consequently, when he was transferred to the Commonwealth in 1907 he stood in no other position than that originating in March 1904.

The foundation of the plaintiff's claim under sec. 84 of the Constitution disappearing, it is useless to pursue the facts further.

KNOX C.J., after the judgments had been delivered, read the following announcement:—On the only question argued the Court has expressed its opinion and given its reasons. Since the argument closed, however, it has been suggested that possibly the plaintiff may have a larger right under sec. 60 of the *Commonwealth Public Service Act* 1902-1911 than under sec. 84 of the Constitution. In order that the plaintiff may not be precluded from raising this question, if so advised, the Court, without expressing or having formed any opinion thereon, abstains from pronouncing formal judgment in the action at present, and reserves leave to the plaintiff to make, not later than the end of the November sittings of the High Court in Sydney, such application as he may be advised.

Solicitors for the plaintiff, *Hobbs, Curnow, Flemming & Caine*.

Solicitors for the defendant, *Chambers, McNab & McNab*, for *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

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