

has been proved ; and, as the respondent Mrs. Ure has failed in this proof, the decision of the directors cannot be canvassed in a Court of law.

The appeal ought to be allowed.

*Appeal allowed. Order of Lukin J. discharged.
Application dismissed with costs. Respondents to pay costs of appeal.*

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METRO-  
POLITAN  
LIFE  
ASSURANCE  
CO. LTD.  
v.  
URE.  
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Solicitors for the appellant, *Feez, Ruthning & Baynes.*  
Solicitors for the respondents, *Hawthorn & Lightoller.*

J. L. W.

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[HIGH COURT OF AUSTRALIA.]

LUCY . . . . . PLAINTIFF ;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

*Public Service (Commonwealth)—Officers in transferred Departments—Rights pre-  
served—Removal on account of age only—Remedy of officer—Damages for wrongful  
dismissal—Measure of damages—The Constitution (63 & 64 Vict. c. 12), sec. 84—  
Commonwealth Public Service Act 1902-1918 (No. 5 of 1902—No. 46 of 1918),  
secs. 60, 73, 74, 76—Civil Service Act 1874 (S.A.) (37 & 38 Vict. No. 3), secs. 22,  
28, 32—Civil Service Amendment Act 1881 (S.A.) (No. 231), sec. 4.*

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MELBOURNE,
Nov. 20-21,
1922 ; Aug.
9, 1923.

Knox C.J.,
Isaacs, Higgins
and Starke JJ.

The plaintiff, who was an officer of the Postal Department of South Australia at the time that Department was transferred to the Commonwealth pursuant to sec. 69 of the Constitution, remained in the Public Service of the Commonwealth in that Department until 1919, when he was removed from that Public Service by reason only of the fact that he had attained the age of sixty-five years. The removal of the plaintiff was admitted to be unlawful.

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Held, by *Knox C.J., Isaacs, Higgins and Starke JJ.*, that the plaintiff's remedy against the Commonwealth for his removal was damages for the unlawful termination of his services, and that the measure of damages was the same as that in an action for wrongful dismissal.

Held, also, by *Knox C.J., Higgins and Starke JJ. (Isaacs J. dissenting)*, that in estimating those damages the relevant salary was that which the plaintiff was receiving at the date of his removal, and not that which he was receiving when the Department was transferred to the Commonwealth or the maximum salary to which, under the law of South Australia, he could have attained if he had remained in the Public Service of that State.

REFERENCE by *Gavan Duffy J.*

An action was brought in the High Court by Edwin Robert Chettle Lucy against the Commonwealth wherein the plaintiff by his statement of claim alleged as follows :—

1. The plaintiff was born on 11th May 1854.
2. On or about 1st January 1872 the plaintiff was appointed to an office in the Public Service of South Australia.
3. From 1st January 1872 until 1st March 1901 the plaintiff continuously held a position in the Public Service of South Australia, and on or about 1st March 1901 was employed in the Postal Department of the Public Service of South Australia as postmaster at Parkside near Adelaide, South Australia.
4. On 1st March 1901 the Postal Department of South Australia was taken over by the Commonwealth, and the plaintiff was thereupon transferred from the Public Service of South Australia, and thereafter until 11th May 1919 was continuously employed in the Commonwealth Public Service.
5. The plaintiff was on or about 12th February 1919 notified in writing that he would be retired or removed from the Public Service of the Commonwealth upon his attaining the age of sixty-five years, and, in pursuance of such notification, on 11th May 1919 he was actually retired or removed from his office in the Public Service of the Commonwealth of Australia.
6. The plaintiff was so retired or removed by reason only of the fact that he had attained the age of sixty-five years and for no other reason.
7. By reason of the premises the plaintiff says (a) that under and by virtue of the South Australian *Civil Service Act* No. 3 of 1874

the plaintiff acquired a right to retain office in the Public Service of South Australia until death or removal in terms of the said Act ; (b) that the plaintiff was wrongfully retired or removed from his office in the Public Service of the Commonwealth, and that ever since such retirement or removal he has been wrongfully deprived of all the rights and privileges belonging to him in his said office ; (c) that by virtue of sec. 84 of the Constitution of the Commonwealth and sec. 60 of the *Commonwealth Public Service Act* No. 5 of 1902 all existing and accruing rights as an officer of the South Australian Public Service as aforesaid were preserved to the plaintiff upon his transfer to the Public Service for the Commonwealth ; (d) that it was not competent for the Commonwealth Government under the provisions of the Constitution and the *Commonwealth Public Service Act* 1902 or otherwise to retire or remove the plaintiff from his office as aforesaid.

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The plaintiff claimed (a) a declaration that he was wrongfully removed from and deprived of his office in the Public Service of the Commonwealth on 11th May 1919 ; (b) a declaration that he was then entitled to retain his office in the Service of the Commonwealth until his death or until such office was determined in accordance with the provisions of the South Australian *Civil Service Act* 1874 ; (c) damages for wrongful removal or dismissal from the said office ; (d) such consequent and incidental relief as to the Court might seem meet.

The parties to the action concurred in stating the questions of law arising in the action in a case, which was substantially as follows, for the opinion of the High Court :—

The first four paragraphs set out the facts which were alleged in pars. 1 to 4 of the statement of claim.

5. On 1st March 1901 at the time of the plaintiff's transfer from the Public Service of South Australia to that of the Commonwealth he was an officer of the Fourth Class in the State Service, having been promoted to that class on 28th February 1901. His statutory salary was £220 per annum with such statutory right of increase as given by the Civil Service Acts of the State. As postmaster at Parkside his duty was to reside, and he was on 1st March 1901 residing, in

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post-office premises and no deduction from his salary or monetary charge against him was made by the State Government in respect of such residence. As postmaster he was allowed by the State Government a commission or profit on sale of postage stamps at his post office. He was also allowed to act as agent for the Savings Bank of South Australia for a reward paid by the Savings Bank.

Pars. 6 and 7 set out the same facts as were alleged in pars. 5 and 6 of the statement of claim.

8. The plaintiff's salary at the time of his retirement was £318 per annum.

9. At the time the plaintiff was retired or removed he was in good health and capable of continuing his duties in the Public Service of the Commonwealth.

10. The plaintiff in the service of the State had a reasonable expectation of ordinary promotion and an expectation that the use of the residence above referred to would continue.

11. The plaintiff on 8th June 1919 received £159, being six months' salary in lieu of leave of absence on his retirement.

12. The plaintiff on 25th June 1919 received the sum of £384 as retiring allowance and interest to which he had become entitled under the State Act No. 231 of 1881, sec. 4.

13. Since his retirement he has earned £160 for his services as editor of the *West Torrens News* and £30 for sundry commissions on printing orders obtained by him, being employments into which he could not have entered if in the Commonwealth or State Public Services.

The question for the opinion of the Court is whether the damages to which the plaintiff is entitled should be measured and ascertained by any one or more, and which, of the following considerations :—

- (1.) Should the plaintiff receive the sum total of the amounts which he would have received since his transfer up to the date of the writ had he remained in the State Service less the sum total of the amounts in respect of the same matters which he in fact received from the Commonwealth Government during that period ?

- (II.) Is the measure of damage the value on 11th May 1919 of the then probability of the plaintiff continuing capable of performing his duties and earning the relevant salary (see sub-par. VI. hereof) less a deduction from such value of (a) £159 paid to the plaintiff; (b) the value to plaintiff of receiving his retiring allowance in June 1919 instead of at the future time when he would retire or be lawfully retired; (c) the value of his probable earnings after 11th May 1919 to the future time when his retirement would have come about lawfully?
- (III.) Should the plaintiff receive in addition to the amount (if any) referred to in sub-par. I. hereof the capital value of the amounts he would have received had he remained in the State Service from and after the writ during his life?
- (IV.) Should the plaintiff receive in addition to the amounts (if any) referred to in sub-paras. I. or II. and III. hereof interest by way of damages upon the moneys which he should have been paid between his retirement and the date of writ?
- (V.) Are the use of residence, allowances of profit on stamps and reward from Savings Bank relevant to the measure of damage?
- (VI.) Is the amount of salary relevant to the measure of damage:
- (a) the said salary of £318 which plaintiff was earning in the Commonwealth Service at the time of his retirement, or
 - (b) the salary of £220 which he was earning in the State Service on 1st March 1901, or (c) the £270 per annum the maximum salary of the Fourth Class in the State Service, or
 - (d) some amount to be ascertained or estimated upon considerations other or further than those mentioned in (a), (b) and (c), and, if yea, then what other considerations?

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On the determination of the above questions the case is to be referred back for assessment of damages.

The action and the case came on for hearing before *Gavan Duffy J.*, who directed the following questions to be argued before the Full Court:—

- (1) What remedy or remedies, if any, is the plaintiff entitled to on the pleadings and the facts admitted between the parties?

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(2) If the plaintiff is entitled to damages, on what principle should such damages be assessed ?

(3) The various questions raised by the special case stated between the parties.

Those questions now came on for argument before the Full Court.

Cleland K.C. (with him *Benny*), for the plaintiff. The removal of the plaintiff from the Public Service of the Commonwealth was unlawful, as was determined in *Le Leu v. Commonwealth* (1); and it follows that such removal was a nullity. The plaintiff, therefore, still holds his office and is entitled to his salary month by month to the present time.

[HIGGINS J. referred to *Williams v. Howarth* (2); *Elderton v. Emmens* (3); *Smith on Master and Servant*, 7th ed., p. 112; *Williamson v. Commonwealth* (4).]

The dismissal of the plaintiff was a breach of a statutory right and not a breach of contract. Whichever it is, if the plaintiff's remedy is damages, the measure is the same, namely, the unpaid salary up to the present time and the present value of his future salary until his service could be lawfully terminated (see *Beckham v. Drake* (5)). What the plaintiff earned outside after his removal should not be deducted in assessing the damages, because the nature of the work done was different from that which he did while in the Public Service. [Counsel also referred to *London, Chatham and Dover Railway Co. v. South-Eastern Railway Co.* (6).]

Latham K.C. (with him *C. Gavan Duffy*), for the defendant. A distinction must be drawn between the accrued rights preserved by sec. 84 of the Constitution and rights subsequently acquired by virtue of statutes of the Commonwealth. The accrued rights include rights which the plaintiff would have acquired by mere lapse of time if he had remained in the Public Service of South Australia and which could not have been affected by any action of the Government of that State. The chance of promotion beyond the class in which the plaintiff was when the Department was taken over by the

(1) (1921) 29 C.L.R., 305.

(2) (1905) A.C., 551.

(3) (1848) 6 C.B., 160.

(4) (1907) 5 C.L.R., 174.

(5) (1847-49) 2 H.L.C., 579, at p. 606.

(6) (1892) 1 Ch., 120; (1893) A.C., 429.

Commonwealth was only a possibility of acquiring a right (*The Minister v. New South Wales Aerated Water and Confectionery Co.* (1)). If the plaintiff is entitled to damages the relevant salary for the purpose of estimating the damages is therefore £270, the maximum salary of the class in which the plaintiff was. The removal of the plaintiff from the Commonwealth Public Service is rendered effective by sec. 74 of the *Commonwealth Public Service Act*, and at most the plaintiff is entitled to damages for the wrongful termination of his employment. He was not the holder of an office in the sense that he had a tenure of it or was entitled to perform the duties of the office whether the Government wished it or not, but his position was one governed by the ordinary principles of a contract of employment (*Williamson v. Commonwealth* (2); *Ryder v. Foley* (3); *Bond v. Commonwealth* (4)).

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[KNOX C.J. referred to *Johnson v. Shrewsbury and Birmingham Railway Co.* (5); *Pickering v. Bishop of Ely* (6).

[HIGGINS J. referred to *R. v. Rogers*; *Ex parte Lewis* (7).]

The use of the residence and other advantages should not be taken into account in assessing the damages, because the plaintiff was not entitled to them as of right (*In re English and Scottish Marine Insurance Co.*; *Ex parte Maclure* (8); *In re R. S. Newman Ltd.—Raphael's Claim* (9); *Manubens v. Leon* (10)).

Cleland K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

Aug. 9.

KNOX C.J. The plaintiff in this action was formerly employed in the Postal Department of the Public Service of South Australia. On 1st March 1901 the Postal Department of South Australia was taken over by the Commonwealth, and the plaintiff was thereupon transferred from the Public Service of South Australia to that of the Commonwealth, and was thereafter continuously employed in that Service till 11th May 1919. On that day the plaintiff attained the

(1) (1916) 22 C.L.R., 56.

(2) (1907) 5 C.L.R., at p. 182.

(3) (1906) 4 C.L.R., 422.

(4) (1903) 1 C.L.R., 13, at p. 23.

(5) (1853) 3 DeG. M. & G., 914.

(6) (1843) 2 Y. & C., 249.

(7) (1878) 4 V.L.R. (L.), 334.

(8) (1870) L.R. 5 Ch., 737.

(9) (1916) 2 Ch., 309.

(10) (1919) 1 K.B., 208.

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age of sixty-five years and, in pursuance of notice given to him previously, was removed from the Public Service of the Commonwealth by reason only of the fact that he had attained that age. On the cause coming on for trial, the parties agreed upon a special case submitting for the opinion of the Court a number of questions relating to the method of ascertaining the damages to which the plaintiff was admittedly entitled, and at the trial my brother *Gavan Duffy* ordered that the following questions should be argued before a Full Court, namely: (1) What remedy or remedies, if any, is the plaintiff entitled to on the pleadings and the facts admitted between the parties; (2) if the plaintiff is entitled to damages, on what principle should such damages be assessed; (3) the various questions raised by the special case stated between the parties.

The salary of the plaintiff at the time of his transfer to the Public Service of the Commonwealth was £220 per annum with such statutory right of increase as was given by the Civil Service Acts of South Australia. He resided rent free in post-office premises and was paid a commission on the sale of postage stamps. He was also permitted to act as agent for the Savings Bank of South Australia and received payment from the Bank for his services. The maximum salary for an officer in the class in which the plaintiff was in the South Australian Service was £270. At the time of his removal from the Commonwealth Public Service the plaintiff's salary was £318 per annum; and he was at that time in good health and capable of continuing his duties. He had a reasonable expectation of ordinary promotion and an expectation that the use of the residence enjoyed by him would continue. Since his removal from the Public Service the plaintiff has received from the Commonwealth £159, representing six months' salary in lieu of leave of absence on retirement, and £384, representing the retiring allowance and interest to which he would have become entitled under sec. 4 of the South Australian Act No. 231 of 1881 if he had retired from the Public Service of that State at the time of his removal from the Commonwealth Public Service. Since his removal from the Service the plaintiff has earned £190 from employments into which he could not have entered if in the Public Service of the Commonwealth or of the State of South Australia.

In *Le Leu v. Commonwealth* (1) this Court decided that an officer in the Public Service of South Australia who was transferred to the Public Service of the Commonwealth could not lawfully be dismissed from the Public Service on the ground of age alone apart from incapacity or some other of the specific grounds for removal or dismissal mentioned in the South Australian Act. It was held in that case that sec. 74 of the *Commonwealth Public Service Act*, which provided that every officer shall retire on attaining the age of sixty-five years, must be read 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.

It follows, and, indeed, it is admitted, that the plaintiff was wrongfully dismissed or removed from the Public Service of the Commonwealth. In so dismissing him the Commonwealth committed a breach of the contract of employment into which it had entered with the plaintiff, it being a term of that contract, by virtue of sec. 84 of the Constitution and sec. 60 of the *Commonwealth Public Service Act*, that the plaintiff should preserve all his existing and accruing rights, including the right to remain in the Public Service during his life or until dismissal or removal for some cause specified in the South Australian Acts.

1. The first question is what remedy the plaintiff is entitled to on the pleadings and the admitted facts. Mr. *Cleland*, for the plaintiff, argued that the affected removal of the plaintiff from the Commonwealth Public Service was a nullity, and that the proper remedy is a declaration that he is still in that Service and entitled to be paid salary at the rate which he was receiving at the date of his alleged removal until the employment shall be lawfully terminated. Such an order would in effect, if not in form, amount to an order for specific performance of the contract of service or an injunction against committing a breach thereof, but it is well settled that, except for the purpose of preventing the breach or intended breach of a negative stipulation in the contract, such an order will not be made. It was suggested that the effect of sec. 84 of the Constitution was to deprive the Executive Government of the power to remove the plaintiff from the Public Service, but, in my opinion, that section

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(1) (1921) 29 C.L.R., 305.

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did no more in this case than introduce into the plaintiff's contract of service, certain terms, including a term that he should not be removed or dismissed from the service except for some cause specified in the State Acts.

The position of the plaintiff in respect of his claim in this action is similar to that occupied by the servant of a private person who has been in fact dismissed from his service before the expiration of the period specified in his contract, and the remedy to which he is entitled is the same, namely, damages for the breach of contract committed by the employer. Moreover, it is difficult to see how the plaintiff can now be heard to allege that he is still in the Commonwealth Public Service, having regard to the form of his pleading and to his conduct in accepting from the Commonwealth payments made by reason only of his retirement from the Service and in engaging in employment into which he could not have entered while in the Public Service.

2. In answer to the second question—on what principle damages should be assessed—the true measure of damages is, in my opinion, the estimated pecuniary loss resulting as a reasonable and probable consequence from the premature determination of the plaintiff's service, on the footing that he was entitled to remain in the Commonwealth Public Service until his death or until he was sooner dismissed or removed for some cause specified in the State Acts. The application of the general rule to the admitted facts of this case will be dealt with in discussing the third question.

3. In my opinion the right which was preserved to the plaintiff by sec. 84 of the Constitution was a right to be employed in the Public Service of the Commonwealth during his life, subject to removal or dismissal for some cause specified in the State Acts, at a salary to be fixed in accordance with the law of the Commonwealth, but not less than the salary—in this case £270—to which the plaintiff would have been entitled under the State law had he remained in the Public Service of the State. The plaintiff's salary at the date of the breach of contract of which he complains was so fixed at the rate of £318 per annum. The right of the plaintiff which has been infringed by the Commonwealth is his right to continue for a period after his dismissal to be employed at a salary fixed in accordance

with the Commonwealth Public Service Acts, and the loss which he has sustained should, therefore, be estimated on the footing that he was entitled under those Acts at the time of his dismissal to salary at the rate of £318 per annum. It is the continued enjoyment of this salary—probability of diminution or increase not being suggested—of which he has been deprived. In my opinion, the factors to be considered in estimating the damages to which the plaintiff is entitled on the assumption that the whole of the relevant facts are included in the admissions made by the parties are as follows: (a) the rate of salary payable to the plaintiff at the time of his removal from the Service; (b) the time during which the plaintiff might reasonably be expected to be capable of performing his duties—or what Mr. *Latham* called the expectation of capable life at the time of dismissal; (c) any sum in the nature of a retiring allowance or gratuity which would have been payable under the State law to the plaintiff on the lawful termination of his employment in the State Public Service; (d) the sums of £159 and £384 paid to the plaintiff by the Commonwealth in consequence of his retirement, and the sum of £190 earned by him since his retirement, should be deducted from the damages which would otherwise be payable to the plaintiff for his wrongful removal.

As to the other matters raised by questions iv. and v. of the special case, namely, interest, use of residence, allowances of profit on sale of stamps and reward from Savings Bank, I do not think that any of these matters should be taken into consideration in ascertaining the damages. Damages being ascertained as at the date of dismissal, there is no ground for allowing any sum by way of interest. The plaintiff had no “right” to the use of the residence or to the commission on the sale of stamps which he could enforce against the Government of South Australia, and consequently no right against the Commonwealth in respect of these matters was conferred or preserved by sec. 84 of the Constitution. The suggested claim in respect of reward paid by the Savings Bank was abandoned by Mr. *Cleland*.

In my opinion the questions referred to this Court by my brother *Gavan Duffy* should be answered as follows:—(1) Damages for wrongful dismissal. (2) The measure of damages is the estimated pecuniary

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H. C. OF A. 1922-1923. loss resulting as a reasonable and probable consequence from the premature determination of the plaintiff's service. (3) The questions raised by the special case should be answered as follows:—(I.), (II.), (III.) and (IV.)—it is not necessary to answer these questions; (V.) No; (VI.) (a) Yes; (b), (c) and (d)—it is not necessary to answer these questions.

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ISAACS J. The material facts, as I view the case, are as follows:—(1) The plaintiff was born on 11th May 1854. (2) On 1st March 1901 the Postal Department of the State was transferred to the Commonwealth under sec. 69 of the Constitution. (3) On that day the plaintiff was in the Public Service of South Australia, holding the position of postmaster at Parkside near Adelaide. (4) Since the previous day he was an officer of the fourth class of the Ordinary Division. (5) The plaintiff was transferred with the Department to the Public Service of the Commonwealth, and remained therein continuously until 11th May 1919. (6) On 12th February 1919 he was notified in writing that he would be retired or removed from the Public Service of the Commonwealth upon his attaining the age of sixty-five years. (7) On 11th May 1919, the day he attained sixty-five, he was actually retired from the Public Service of the Commonwealth, and he in fact then ceased all actual connection with the Commonwealth Public Service. (8) His retirement was solely on the grounds of his attaining the age of sixty-five, though in good health and perfectly capable of performing his duties. (9) He did not insist on remaining in fact in the Service; on the contrary he accepted £159 in lieu of leave of absence on retirement and £384 as retiring allowance under a South Australian Act (sec. 4 of Act No. 231 of 1881). (10) Since his retirement he has earned £160 for his services as editor of the *West Torrens News* and £30 for sundry commissions on printing orders, obtained, as stated in the special case, "employments into which he could not have entered if in the Commonwealth or State Public Services." (11) His salary on 1st March 1901 was at the rate of £220 a year. (12) On 11th May 1919 his salary was £318 a year. The defendant admits that the plaintiff was improperly retired from the Service and that he is entitled to damages, the one question being: "On what basis?"

The impropriety arose from the provisions of the 84th section of the Constitution, which, while providing that he should “become subject to the control of the Executive Government of the Commonwealth,” went on to declare that, since he was retained in the Service of the Commonwealth, he should “preserve all his existing and accruing rights.” The rest is immaterial, as I do not find any provision in the State law whereby he was “entitled to retire from office on any pension or retiring allowance.” The retirement in this case was not caused by any action of the Government under sec. 73 of the *Commonwealth Public Service Act*, that is, retirement “before he attains the age of sixty-five years,” but by a notification that the plaintiff would have to retire under sec. 74, which is in these words: “Every officer shall retire on attaining the age of sixty-five years unless he is required to continue to perform his duty in the Public Service as hereinafter provided and is able and willing so to do.” Nevertheless, as the Crown admitted at the Bar that there had been a wrongful removal, I say nothing further as to that. But sec. 74 is, as decided by *Le Leu’s Case* (1), subject to sec. 60 of the Act. There is a passage in the first judgment in that case which has given me considerable hesitation. It is as follows (2):—“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

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(1) (1921) 29 C.L.R., 305.

(2) (1921) 29 C.L.R., at pp. 312-313.

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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 that 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." If that means that "transferred" officers are entirely outside sec. 74, then the wrongful removal was a wrongful deprivation of all emoluments to which the plaintiff was entitled under Commonwealth law, without reference to State law or constitutional guarantees, and, if he elected to rest on that basis, he could do so. But the passage may not mean that: it may mean that sec. 74, though including all officers, transferred as well as original, is subject to the provisions of sec. 60. I am assured by my learned brethren that the second meaning is open to me; and I act upon that. I read sec. 74 and sec. 60 together, and, what is very important, I read them both with sec. 84 of the Constitution, as they are all closely connected. But, acting upon that view, the wrongful dismissal amounted, in my opinion, to a wrongful deprivation of such emoluments, &c., as sec. 60 conserved, that is, in this case, such as sec. 84 of the Constitution guaranteed. I personally construe sec. 74 as being exercisable so as not to abridge any rights guaranteed by sec. 84 of the Constitution, and introduced by way of qualification of sec. 74 (*inter alia*) in sec. 60 of the *Commonwealth Public Service Act*. I take the legislative intention as expressed by sec. 74 qualified by sec. 60 to be this: Sec. 74 applies to the *whole Service* so that everyone retires from the Service at sixty-five, unless required to remain, &c., subject only to the right of every transferred officer under sec. 60 to remain for the time and at the

salary guaranteed to him by sec. 84 of the Constitution. The combined effect of the two sections is that, *to the extent of the individual right of any officer* under sec. 84 of the Constitution, the wide words of sec. 74 are cut down, and only to that extent. The right of the transferred officer is not one consisting of time only or of salary only. It is a composite right—that is to say, in the present case, the plaintiff's right is not simply “for life subject to incapacity,” but it is “for life subject to incapacity at a salary of £270 a year.” Test it. Suppose another officer of the same age but in a lower class, so that his guaranteed State salary would be £210 as compared with the plaintiff's £270. Unless the interpretation I have suggested be the right one, the result is that, if two officers are simultaneously retired and happen to have the same Commonwealth salary, then, although their guaranteed rights under the Constitution are markedly different, their compensation for loss of office would be precisely the same. Reading sec. 74 as qualified by sec. 60 in the way stated, I should say that the contract with every officer is that he must retire from the Service at sixty-five, unless required to remain, &c., with this single proviso, which is to be worked out separately with each individual, that the full extent of sec. 74 is to be cut down so as to provide for the existing and accruing State rights he brought over on transfer.

Applying this to an officer transferred from South Australia, it means that on the mere ground of age he is bound to retire from the Commonwealth position he holds, but is entitled to have a position corresponding to that which he can show he would then have held had he remained in the State Service. If he does not receive that position, *that* is the wrong done to him, and, if he is retired entirely from the Service, compensation is to be measured by the value to him of the corresponding office he was entitled to.

The Constitution meant to give to the Executive Government of the Commonwealth the fullest powers which Parliament chose to confer over the transferred Departments, subject to guaranteed rights “existing and accruing” and to what is expressly enacted as to retiring allowances. Those rights “existing and accruing” were fixed when the Departments were transferred, and could have been there and then stated in writing. They neither increased nor diminished as the years went on. Their actual results were, of course,

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dependent in many cases upon time. But, given the "time" element, then subject to one consideration, the money result could be worked out. That one consideration is not really legal, but is one which ought to be and, as I understand, was conceded by the Crown, namely, that any condition dependent merely on industry and good conduct of the officer, or on the general discretion of the Government, should be taken to be fulfilled. Such conditions are only "reserved" discretion for undeserving cases, and ought to be understood in that sense. But, that apart, I cannot read the *Commonwealth Public Service Act* as creating a contract that, although the only bar to retirement at sixty-five in the interests of the Service generally is the constitutional guarantee of pre-existing State rights, yet in case of breach of that guarantee a much greater sum will be paid. That would, I think, besides being unwarranted by any provision in the Act, operate prejudicially to other members of the Service, particularly since the *Superannuation Act* (No. 33 of 1922). In my opinion, transferred officers stand on exactly the same footing as other members of the Service, except that they hold guaranteed rights, the value of which, apart from the amount of retiring allowance, never alters in any individual case. Those rights, if invaded, must be fully compensated for; but I am quite unable to see why, by reason of those rights which the country has guaranteed, these officers should in still other respects stand in a better position than any other officers in the Service, or that the guarantee should be enlarged beyond the terms of the compact in the Constitution. The Constitution itself certainly does not give these added rights, and the whole intendment of the *Commonwealth Public Service Act* is against it. And justice is against it.

In my opinion, the proper measure of damages is the true money value of the plaintiff's position on the supposed basis that he was still in the State Service with such rights as were "existing or accruing" on 1st March 1901. As to anything further, he took his chance with the Commonwealth Parliament. And any increased salary is taken with the knowledge that it is subject to the general conditions of the Commonwealth Act, including retirement at sixty-five, which means "no further salary henceforth." I am, I confess,



unable to see how any salary can be claimed as given by the *Commonwealth Public Service Act* after the event which that Act provides to end all right to salary. Sec. 84 of the Constitution seems all that remains, and it preserves “existing and accruing rights.” Now, what were his “existing and accruing rights” guaranteed to him as on 1st March 1901? He had a salary of £220 a year, rising (let us assume) to £270 in five years. After that he could get no advancement except under conditions prescribed by sec. 22 of the 1874 Act of South Australia, which, in my opinion, preclude me from considering the promotion an “existing or accruing right.” It was not, of course, an “existing” right (see *Westralian Powell Wood Process Ltd. v. The Crown* (1); *Abbott v. Minister for Lands* (2)).

During the argument reference was made to the claim for a declaration that the plaintiff was on 11th May 1919 entitled to retain his office. Neither side argued or would argue that he is entitled to a declaration that he is *now* in the Service. Obviously that would be impossible. Sec. 74 says an officer “shall retire” &c. If, not being bound to retire, he yields, not unnaturally, to an official intimation that the Act so required him, it is of course right that the Government should take the responsibility for its intimation as an indication of what it *would* do if the officer did not retire. But retirement in those circumstances is none the less retirement in fact. And sec. 76 makes the *Gazette* notice of retirement conclusive evidence of the fact, leaving the legality to be ascertained if necessary. Then, from May 1919 to June 1922, over three years elapsed before the writ was issued. In the meantime the plaintiff entirely severed his connection with the Department and undertook other employment into which, as he says in the agreed statement of facts in the special case, “he could not have entered if in the Commonwealth or State Public Services.” No claim was ever made, and none is now made by him, that he has all through been in the Public Service.

His acceptance of benefits since his retirement is inconsistent with such a position, and any assertion on his part to the effect suggested would be hopeless.

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(1) (1921) 2 A.C., 133, at p. 140; 29 C.L.R., 458.  
(2) (1895) A.C., 425, at p. 431.



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HIGGINS J. The claim made by the plaintiff is that on or about 11th May 1919 he was wrongfully removed from his office in the Service of the Commonwealth. The case came on for trial before our brother *Gavan Duffy* in the peculiar form of a statement of facts admitted as well as a special case stated for the opinion of the Court ; and certain questions were directed to be argued before a Full Court. The questions are :—(1) What remedy or remedies, if any, is the plaintiff entitled to on the pleadings and the facts admitted between the parties ? (2) If the plaintiff is entitled to damages, on what principle should such damages be assessed ? (3) The various questions raised by the special case stated between the parties. Our jurisdiction is, of course, limited to these questions.

All the allegations and “ contentions ” in the body of the statement of claim have been admitted by the defence, including the statement (par. 7 (b) ) that the plaintiff was wrongfully retired or removed from his office in the Public Service of the Commonwealth.

The position is that the plaintiff entered the Public Service of South Australia on 1st January 1872 ; that on 1st March 1901, the date of the transfer of the Postal Department of South Australia to the Commonwealth, he was postmaster at Parkside, near Adelaide ; that his salary was then £220 per annum, with such right to increments as the State Act gave him ; that in pursuance of his duty he resided at the post office paying no rent ; that he was allowed a commission on the sale of postage stamps ; that he acted as agent for the Savings Bank of South Australia for remuneration ; that he had a reasonable expectation of ordinary promotion and of continuing to reside at the post office ; that he was retained in the Service of the Commonwealth on the transfer of the Department ; but that on 11th May 1919, having attained the age of sixty-five years, he was “ actually ” removed from the Public Service of the Commonwealth. It appears also that at the time of the removal the plaintiff’s salary in the Commonwealth Service was £318 per annum, a sum greater than the maximum with increments that would be payable to him as a member of the fourth class in the State Service ; that on 8th June 1919 the Commonwealth paid to him £159, being six months’ salary in lieu of leave of absence, on his retirement ; that on 25th June 1919 the Commonwealth paid to him £384 as retiring allowance



and interest as prescribed by the State Act No. 231, sec. 4; and that since his removal he has earned £160 as editor of a newspaper and £30 for sundry commissions.

It is not contended that by accepting the £159 and the £384 the plaintiff is in any way precluded from bringing this action.

It has been held by this Court in *Le Leu v. Commonwealth* (1) that under the South Australian Acts an officer in the Public Service of South Australia was entitled to remain in the Service during his life, subject only to the right of the Government to dismiss or remove him for causes specified in the Acts; and that mere increase of age, unless he became incapacitated to perform his duties, was not one of these causes. It was also held that the right of the officer to this conditional life tenure was one of the rights preserved to the officer by sec. 84 of the Constitution and sec. 60 of the *Commonwealth Public Service Act*. That sec. 84 provides that any officer who is retained in the Service of the Commonwealth on the transfer of the Department "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." That case has not been impugned in argument, and I see no reason to doubt that it is correct in the result. All the members of the Court agreed that the use of the word "removal" in sec. 32 of the Act of 1874, and in sec. 4 of the amending Act of 1881, did not imply that the South Australian Government had a general right to remove without cause. I see that I did not take the view expressed by my learned colleagues that the words "or any other cause whatever" in sec. 32 (sec. 4 of Act of 1881) referred only to resignation as distinguished from "removal." My view was that these sections merely provided compensation for officers who were removed from office *in accordance with the South Australian Acts*; for the Act of 1874 (sec. 28) allowed removal of any officer if he "become incapacitated," and yet refused to resign. But we all agreed in the result.

But *Le Leu's Case* (1) was decided on demurrer, and the question of the remedy for the wrongful removal did not arise. It seems to

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have been raised in arguments in this case (question 1); although the only claim made in the prayer is for “damages for wrongful removal or dismissal,” and “such consequent and incidental relief as to the Court shall seem meet”; and this relief prayed is to be based on two declarations—one as to the right to retain office, and the second as to the wrongfulness of the removal. The plaintiff in his statement of claim alleges that he was “actually retired or removed from his office in the Public Service of the Commonwealth” (par. 5), and that allegation is admitted by the defence. The defence also admits the “contentions” made by the plaintiff in par. 7 of the statement of claim, including the allegation “that the plaintiff was wrongfully retired or removed from his office in the Public Service of the Commonwealth and that ever since such retirement or removal he has been wrongfully deprived of all the rights and privileges belonging to him in his said office.” So far as this “contention” contains allegations of fact, it has not been denied or stated to be not admitted, and therefore it is to be treated as admitted, under our pleading rules (Order XVII., r. 10). Under these circumstances the plaintiff is entitled to damages as for wrongful dismissal. There has been an attempt made to show that the plaintiff is still in the office and entitled to his full salary till death, the removal being contrary to the Act; but although the writ seems to have suggested such a view, the statement of claim does not, and in face of the admissions which I have already stated, I do not think that the argument is open for the plaintiff to take; but, in any event, such an argument, in the case of an employee being wrongfully dismissed during his term, is inconsistent with *Emmens v. Elderton* (1); *Goodman v. Pocock* (2); *Smith on Master and Servant*, 7th ed., p. 112. The contract is not a mere promise to pay money, but to pay wages for service; and the breach of contract consists in not allowing the employee to continue in the service so as to get the wages (notes to *Cutter v. Powell* (3)). This is the view which I accepted in *Williamson v. Commonwealth* (4).

This position would be beyond question in a case of ordinary

(1) (1848) 6 C.B., 160; (1852-53) 4  
H.L.C., 624.  
(2) (1850) 15 Q.B., 576.

(3) 2 Sm. L.C., 9th ed., pp. 52-53.  
(4) (1907) 5 C.L.R., at pp. 182, 185.



contract between employer and employee for service for life ; and, in my opinion, the relation between the Commonwealth and the officer is a relation of contract (cf. *Williams v. Howarth* (1) ). The Constitution merely adds a certain term to the contract between the officer and the Commonwealth—the term being that all existing and accruing rights under the State law are preserved to the officer, and the right to a conditional life tenure is preserved.

Sec. 84 of the Constitution does not *forbid* the removal of an officer, making it illegal and inoperative. It merely means that if the Commonwealth takes over an officer, his rights—contractual rights with the Commonwealth—are to include all existing and accruing rights, including, in this case, his contractual rights with the State.

2. The only safe answer that I can make to this very general question is that the damages must be assessed as in an action for wrongful dismissal where the contract is for service for life subject to the qualifications of life tenure imposed by the State Act ; and that any moneys received by the plaintiff from the Commonwealth as incidental to the removal are to be deducted from the damages which would otherwise be payable as well as any moneys received by the plaintiff for outside work or which would have been received but for his neglect.

3. As to the questions raised by the special case—(1.) The damages must be assessed, not on the basis of the salary payable to the plaintiff under the State law, but on the basis of the salary payable to him under the Commonwealth—which is higher. The right to a life tenure must be kept distinct from the right to the salary payable by the Commonwealth under the Commonwealth Acts ; and that is £318, not £270. The Commonwealth was under contract with the officer for the salary payable under the Commonwealth Acts, and (because of sec. 84 of the Constitution) for the life tenure which he takes over from the State. It is the actual damage which the plaintiff sustains from the breach of the contract on the part of the Commonwealth that has to be ascertained.

I cannot take the view that the plaintiff's salary, to be regarded in the measurement of damages, is to be taken at £270 per annum,

(1) (1905) A.C., 551.

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the maximum payable under his classification in the State Service. The plaintiff is injured by his dismissal from the Commonwealth Service. The plaintiff entered the Commonwealth Service with a right to enjoy what the Commonwealth contracted to give him, with the addition of such rights as were existing or accruing to him from the State. In enacting that he should preserve all his existing and accruing rights, the Constitution did not say that he should preserve also any burdens or disadvantages which State law imposes on him. It is a one-sided arrangement—the officer is to take all the advantages which the Commonwealth gave him, plus any rights which he had under the State and to which he would not be entitled under an ordinary contract with the Commonwealth. The object of sec. 84 was, of course, to reassure State public servants in transferred Departments that whatever *rights* they had under the States would remain their *rights* under the Commonwealth; and a qualified life tenure was one of those rights. A pastoralist buys a station, and bargains with a boundary rider thereon to stay in his service, offering higher wages. The boundary rider says “The wages are all right; but I have always had a right to milk and vegetables, and a fortnight’s holiday.” If the pastoralist says “You shall have all such rights preserved to you,” then, in an action for wrongful dismissal, the boundary rider would be entitled to damages based on his new wages and these old rights.

(II.) The plaintiff is, in my opinion, entitled to damages attributable to his wrongful removal from the Commonwealth Service, regard being had to his existing salary at removal, and to his expectancy of life, capacity, &c., but with a deduction of such sums as have been already paid to him, and would have to be paid to him but for his removal, and also of such sums as he actually received or could have received for outside work. As to the £159, it was paid to the plaintiff as for six months’ salary in lieu of leave of absence on retirement. It was, in effect, six months’ salary which would not have been paid to him but for the compulsory retirement; and it is fairly to be deducted from the damages which would otherwise have been payable to him for the wrongful removal. (II.) (b) and (c) do not enter into the consideration of damages. The damage done has to be estimated as if it had to be paid on 11th May 1919, the date of removal.

(III.) This does not arise : see answer to I.

(IV.) There is no right to interest.

(V.) As it does not appear that the use of the residence was a *right* of the plaintiff, but was in pursuance of his duty, and inasmuch as the use of the residence could, so far as appears, have been taken from the plaintiff at any moment, I am of opinion that it is not a right which was preserved to the plaintiff by virtue of sec. 84, and that the plaintiff is not entitled to any damages for the loss of residence. Nor does it appear that the receipt of commission was a *right*, or the receipt of remuneration as agent for the Savings Bank. The value of these things is not relevant to the question of damages.

(VI.) (a), (b) and (c). In my opinion, the salary of £318 which the plaintiff was receiving from the Commonwealth is the salary which is to be regarded in measuring the damages resulting from the wrongful removal from the Commonwealth Service—not the £220 nor the £270.

(VI.) (d). It is impossible to say whether there are or are not other considerations in estimating the damages. The possibility of promotion is not a *right* within sec. 84.

I concur in the formal order proposed by the Chief Justice.

STARKE J. The plaintiff, prior to the establishment of the Commonwealth, was employed in the Public Service of South Australia as a postmaster. In 1901 the Postal Department of the Public Service of South Australia was transferred to the Commonwealth, pursuant to the Constitution (see sec. 69), but the plaintiff was retained in the Service of the Commonwealth, and became subject to the control of its Executive Government (sec. 84). The Constitution, however, preserved to him all his existing and accruing rights, and declared that he should 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 (sec. 84). The *Commonwealth Public Service Act* 1902-1918 (sec. 60) repeated in substance the provisions of the Constitution in this connection.

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The case of *Le Leu v. The Commonwealth* (1), in this Court, decided that age, apart from incapacity or other cause specified in the Acts, was not a ground for removal from office of an officer subject or entitled to the benefit of the provisions of the South Australian Civil Service Acts of 1874 and 1881. A suggestion was made during the argument that the decision in *Le Leu's Case* ignored the provisions of the Customs Act of South Australia of 1864 (27 & 28 Vict. No. 19, sec. 4), which had not been referred to in that case, and that the present case was distinguishable by reason of the provisions of the Post Office Acts of 1866 (30 Vict. No. 5, sec. 5) and 1876 (39 & 40 Vict. No. 49, sec. 6). But the Civil Service Acts of 1874-1881 defined and regulated, in my opinion, the rights and duties of the Public Service of South Australia. The plaintiff, prior to his transfer to the Commonwealth, was subject to the Civil Service Acts, and, under those Acts, could not be lawfully removed from office except for incapacity or other cause specified therein. This was one of the rights preserved to him both by the Constitution and the *Commonwealth Public Service Act*. Now it is clear that the plaintiff's position as an officer of the Public Service of South Australia did not continue after his transfer to the Commonwealth, and therefore the right preserved to him must attach to his position as an officer of the Commonwealth. In other words, one of his rights as an officer of the Commonwealth is that he should not be removed from office or his services terminated merely on the ground of age, apart from incapacity or other cause specified in the Civil Service Acts 1874-1881 of South Australia. But the Commonwealth, in contravention of the Constitution and the *Commonwealth Public Service Act*, did in fact remove the plaintiff from office and terminate his service merely because he had reached the age of sixty-five years, and notwithstanding that he was capable of continuing his duties as an officer of the Commonwealth.

What remedy, then, is the plaintiff entitled to for this unlawful act on the part of the Commonwealth? It was suggested that he was still in the Service of the Commonwealth and was entitled to be paid his salary as it accrued due. This relief is not, I think, claimed in the action. Certainly, the statement of claim seeks

(1) (1921) 29 C.L.R., 305.



declarations that the plaintiff was wrongly removed from, and is entitled to retain, his office ; but those declarations are sought for the purpose of founding the next claim, namely, damages for wrongful removal or dismissal from office. And even if salary had been claimed, that relief is not, in point of law, in my opinion, open to the plaintiff. The relation between the Crown and its officers is contractual in its nature. Service under the Crown involves, in the case of civil officers, a contract of service—peculiar in its conditions, no doubt, and in many cases subject to statutory provisions and qualifications—but still a contract (*Gould v. Stuart* (1) ). And, if this be so, there is no difficulty in applying the general law in relation to servants who are wrongfully discharged from their service. A servant so treated can bring an action against his master for breaking his contract of service by discharging him. The measure of damages in such an action is not the wages agreed upon (see *Emmens v. Elderton* (2) ; *Cutter v. Powell* (3) ), but the actual loss sustained, including, of course, compensation for any wages of which the servant was deprived by reason of his dismissal (*Goodman v. Pocock* (4) ). There is, in my opinion, no difficulty in applying this measure to the case of the plaintiff. But it is argued that his actual loss cannot exceed the remuneration which he would have been entitled to had he continued in the Public Service of South Australia. And this because the Constitution and the *Commonwealth Public Service Act* only preserved existing and accruing rights, which, in the case of the plaintiff at the date of his transfer, entitled him to a salary of £220, together with such increments as might accrue to him under the Acts of South Australia. I cannot assent to this view. The service of the plaintiff is with the Commonwealth, and his remuneration or salary depends upon his contract of service with the Commonwealth, which is to be gathered partly from the law of the Commonwealth and partly from the constitutional provision which preserves his existing or accruing rights under the Civil Service Acts of South Australia. Those constitutional rights cannot be diminished, but that fact is not inconsistent with the existence of other rights, such

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(1) (1896) A.C., 575, at p. 577. (3) 2 Sm. L.C., 12th ed., at pp. 52-53.  
(2) (1848) 6 C.B., at p. 178 ; (1852-53) (4) (1850) 15 Q.B., 576.  
4 H.L.C., 624.



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as the right to an increased salary, and so forth, conferred upon him by the law of the Commonwealth. It is admitted that the plaintiff was, at the date of his removal from the Service of the Commonwealth, in receipt of a salary of £318. The law which entitled him to this salary is not stated in the case, but no doubt it was allotted him by reason of the Commonwealth Public Service Acts or else pursuant to an award of the Arbitration Court made under the *Commonwealth Conciliation and Arbitration Act* 1904-1918, and the *Arbitration (Public Service) Act* of 1911. (And see, as to officers now in the Service of the Commonwealth, the *Arbitration (Public Service) Act* of 1920.)

The contract of service, then, between the plaintiff and the Commonwealth involved service by the plaintiff as an officer of the Commonwealth at a salary fixed by the law of the Commonwealth, but so that the plaintiff could not be removed from office merely on the ground of age, apart from incapacity or other cause specified in the Civil Service Acts of South Australia, and so that any other rights which he had, or which were accruing to him under the law of South Australia at the time of his transfer to the Commonwealth, were preserved and not diminished. No doubt the Parliament of the Commonwealth could by statute alter or diminish any of the rights of the plaintiff other than those secured to him by the Constitution. But what of that? Parliament could, in any case, put an end to any contracts of service, or to the terms of any such contracts, under which officers of the Public Service entered the service of the Commonwealth, and the existence of which was not secured by the Constitution. Until it in fact does so, the rights of the plaintiff are those which he has under the law as it exists. The King cannot, by a mere executive act, alter that law or vary the rights of the plaintiff; he cannot, by any such act, dissolve or vary the contract, and such cases as *French v. Brookes* (1) have, therefore, no bearing upon the matter.

If it be said that the possibility of alteration by Parliament of the terms of the plaintiff's contract (other than those secured by the Constitution) is a matter relevant to the determination of the pecuniary loss which the plaintiff has sustained, then it may be

(1) (1830) 6 Bing., 354.



answered that the Court has no means of estimating that possibility (whether in respect to a decrease or an increase of the plaintiff's remuneration or the other conditions governing his service), and cannot discuss or speculate as to the considerations of public policy which might or might not influence the action of Parliament. All that the Court can do is to affirm that certain rights exist under the law.

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The questions ordered to be argued before this Court might be answered as follows :—(1) Damages for the unlawful termination of the plaintiff's services. (2) The damages should be assessed on the same principle as is appropriate in the case of actions for wrongful dismissal between subjects. Or, more specifically, the plaintiff is entitled to recover the estimated pecuniary loss resulting, as a reasonable and probable consequence from his dismissal, including any salary of which he was deprived by reason of his dismissal and the value of any other benefit, for example increments, to which he was or might have been entitled by virtue of his contract of service and of which he was deprived by reason of his dismissal; subject, however, to a deduction in respect of any sum paid to him in respect of his removal and to an allowance by reason of the probability of his obtaining other employment elsewhere, and the possibility of his retirement on the grounds specified in the Civil Service Acts of South Australia, but not subject to the possibility of the alteration of the terms of his contract of service by the Parliament of the Commonwealth. (3) (I.), (II.), (III.), (IV.)—None of these questions should be determined in the form presented by the parties; (V.) No; (VI.) (a) Yes; (b), (c) and (d)—None of these questions should be answered.

The case ought to be referred back for further trial and assessment of damages pursuant to the order dated 24th August 1922.

*Questions answered as follows :—(1) Damages for the unlawful termination of the plaintiff's service. (2) On the same principle as in an action for wrongful dismissal. (3) (I.), (II.), (III.) and (IV.)—It is not necessary to answer these questions in detail; (V.) No; (VI.) (a) Yes; (b), (c) and (d)—It is not necessary to answer these*



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*questions in detail. Costs to be costs in the action.  
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damages.*

Solicitor for the plaintiff, *B. Benny*, Adelaide.  
Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for  
the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THOMAS . . . . . APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF }  
TAXATION . . . . . } RESPONDENT.

*Income Tax—Assessment—Option to purchase property—Agreement for sale—  
Services in negotiating sale—Remuneration therefor—Shares in company—  
Value of shares—Share of profits arising from sale of property—Income from  
personal exertion—Proceeds from property—Income Tax Assessment Act  
1915-1918 (No. 34 of 1915—No. 18 of 1918), secs. 3, 10.*

H. C. OF A.  
1923.

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PERTH,

Sept. 17, 18,
21.

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Knox C.J.,  
Higgins and  
Starke JJ.

Sec. 3 of the *Income Tax Assessment Act 1915-1918* defines “income from personal exertion” or “income derived by any person from personal exertion” as “income derived from sources in Australia consisting of earnings, salary, wages, commission, fees, bonuses, pensions, superannuation allowances, retiring allowances and gratuities not paid in a lump sum, allowances received in the capacity of employee, and the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person, and any income from any property where the income forms part of the emolument of any office or employment of profit held by the individual.” Sec. 10 (1) provides that “subject to the provisions of this Act, income tax shall be levied and paid for each financial year upon the taxable income derived directly or indirectly by every taxpayer from sources within Australia during the period of twelve months ending on the thirtieth day of June preceding the financial year for which the tax is payable.”