

## [HIGH COURT OF AUSTRALIA.]

TROWER . . . . . PLAINTIFF ;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

*Public Service (Cth.)—Transferred officers—Officer in Public Service of State—* H. C. OF A.  
*Transfer to Public Service of Commonwealth—Appointment to Public Service* 1924.  
*of Northern Territory—Power of Governor-General to dispense with services—*  
*Public Service Ordinance 1913 (N.T.) (No. 6 of 1913), secs. 4-6—Commonwealth* BRISBANE,  
*Public Service Act 1902-1918 (No. 5 of 1902—No. 46 of 1918), sec. 60—The* June 18, 27  
*Constitution (63 & 64 Vict. c. 12), secs. 67, 84, 122.*

Isaacs A.C.J.,  
 Gavan Duffy  
 and Starke JJ.

An ordinance, No. 6 of 1913, was made by the Governor-General in Council of the Commonwealth under the powers conferred by the *Northern Territory Acceptance Act 1910* and the *Northern Territory (Administration) Act 1910*, both of which statutes were passed under the powers contained in sec. 122 of the Constitution. By sec. 4 of the ordinance "Public Service," unless the contrary intention appears, is declared to mean "Public Service of the Northern Territory"; and sec. 6 provides that "Nothing in this ordinance . . . (b) shall affect the right of the Governor-General to dispense with the services of any person employed in the Public Service."

The plaintiff was a classified officer in the Public Service of the State of Queensland in 1917. He was then appointed to the Commonwealth office of Director of Lands in the Northern Territory. The Governor in Council of Queensland consented to his transfer to the Public Service of the Commonwealth. His appointment was published in the *Northern Territory Gazette*; and he continued to hold the position until 1921, when the Governor-General in Council dispensed with his services.

*Held*, that sec. 6 of the ordinance was an express reservation of the power of the Crown, acting by the central administration, to control the personnel of the Public Service of the Northern Territory, and that the Crown had power to dispense, at will, with the services of the plaintiff, who was appointed under the provisions of the ordinance and not under the *Commonwealth Public Service Act*.



H. C. OF A. CASE REFERRED.

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This case came first before the Court on a reference by *Gavan Duffy J.* on 14th June 1923, when it was decided that the plaintiff acquired no right under sec. 84 of the Constitution: *Trower v. Commonwealth* (1).

After the judgments had been delivered in that case *Knox C.J.* 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."

On application made within that time, the High Court directed the case to be restored to the list of causes for hearing at its next sittings at Brisbane; and the case now came on for further argument.

*Wassell* (with him *Fahey* and *Murray Graham*), for the plaintiff. The question of appointment is one of fact; the Governor in Council of Queensland formally consented to the plaintiff's transfer to the Public Service of the Commonwealth, and he was accepted as a Commonwealth public servant. Although his services were utilized in the Northern Territory branch of that Service, he was subject to the control of a Commonwealth Department of State—namely, the Home and Territories Department,—and his transfer and appointment bring him within sec. 60 of the *Commonwealth Public Service Act* 1902-1918. There is no limitation on the operation of sec. 60; it applies to every transferred officer, whether transferred with a Department or individually (cf. sec. 2 (c); *Cousins v. Commonwealth* (2)), who leaves a State with the consent of the State and enters the Service of the Commonwealth, and the section preserved to the plaintiff his rights under the *Public Service Act of 1896* (Q.)

(1) (1923) 32 C.L.R. 585.

(2) (1906) 3 C.L.R. 529.



(60 Vict. No. 15), one of which is a tenure of office until he attained the age of sixty-five (*Le Leu v. Commonwealth* (1)). It will be contended that sec. 6 of the ordinance (No. 6 of 1913 (N.T.)) preserves the power of the Crown to dismiss at pleasure, and governs this case; but, reading that ordinance as a whole, that is not the proper construction. The ordinance does not nullify the contractual relationship created by sec. 60 and the *Public Service Act* of 1896 (Q.). The Governor-General has power to appoint officers (The Constitution, sec. 67), which implies a power to dismiss (*Acts Interpretation Act* 1901, sec. 33 (4)); the ordinance gives power to the Administrator of the Northern Territory to dismiss officers in certain cases (sec. 27 (2)), and gives a similar power to the Minister in other cases (sec. 27 (5)); and sec. 6 should not be construed as a grant of power but as a preservation, as a coexisting power, of a power which before the ordinance rested in the Governor-General in the cases to which it applied and which might otherwise be deemed to be impliedly restricted by the provisions of sec. 27 (2) and sec. 29 (5).

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*Macgregor* (with him *McGill*), for the defendant, were not called on.

*Cur. adv. vult.*

THE COURT delivered the following written judgment:—

June 27.

The point argued was that referred to in the report of the former judgment in this action (2), namely, whether the plaintiff has, under sec. 60 of the *Commonwealth Public Service Act* 1902-1911, a larger right than under sec. 84 of the Constitution.

For the plaintiff, it was contended (1) that sec. 60 (b) of the Act did not, as does the Constitution, contain, with respect to officers, the limitation “who at the establishment of the Commonwealth”; (2) that sec. 60 (b), construed as free from that limitation, was valid and operative; and (3) that the plaintiff had, under State law at the time of his transfer to the Commonwealth Service, a right to remain in the Service until he reached sixty-five years, or unless his service was terminated in manner prescribed by the *Queensland Public Service Acts (Consolidated)* 1896-1920. It is unnecessary to

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

(2) (1923) 32 C.L.R., at p. 591.



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enter upon the first two points argued, because the third, which is essential to the plaintiff's case, is in our opinion not tenable. His appointment to the Commonwealth Service was not under the *Commonwealth Public Service Act*, of which sec. 60 is a part. That Act was passed under the powers contained in chapter I. of the Constitution. The plaintiff was appointed under the provisions of Ordinance No. 6 of 1913, made by the Governor-General in Council in pursuance of the powers conferred by the *Northern Territory Acceptance Act* 1910 and the *Northern Territory (Administration) Act* 1910. Those Acts were passed under the powers contained in sec. 122 of the Constitution, portion of chapter VI. Not only does sec. 60 of the *Commonwealth Public Service Act* not apply to the plaintiff of its own force, but the ordinance under which his appointment was made, and by the terms of which he is bound, contains affirmative provisions inconsistent with such application. By sec. 4 of the ordinance the term "Public Service," unless the contrary intention appears, is declared to mean the Public Service of the Northern Territory. Sec. 6 provides that "Nothing in this ordinance . . . (b) shall affect the right of the Governor-General to dispense with the services of any person employed in the Public Service." This declaration standing at the threshold, so to speak, of the regulative provisions of the ordinance, is an express reservation of the power of the Crown, acting by the central administration, to control the personnel of the Public Service of the Territory. Then, and always subject to that reservation, ministerial—really departmental—powers are given to regulate the Service. In this instance the Governor-General in Council dispensed with the services of the plaintiff under the ordinance. That, in view of the power reserved, is in our opinion fatal to the plaintiff's claim.

This question having been disposed of, the Court now formally pronounces judgment. Judgment will be entered in the action for the defendant.

*Judgment for defendant with costs.*

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

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

J. L. W.