from the agreement we are dealing with. Those features were: (1) it contained expressions of future vesting, as "shall transfer" and "shall take over"; (2) those expressions were applied to land, shares, &c., which it was obviously contemplated required future formal acts of assurance.

The appeal should be dismissed with costs.

Appeal dismissed. Appellant to pay costs of appeal.

Solicitors for the appellant, *Feez, Ruthning & Baynes.*

Solicitors for the respondent, *H. J. H. Henchman*, Crown Solicitor for Queensland.

J. L. W.

[HIGH COURT OF AUSTRALIA.]

LAFFER . . . . . APPELLANT;
PLAINTIFF,

AND

MINISTER FOR JUSTICE (WESTERN AUSTRALIA) . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Public Service (W.A.)—Superannuation—Staff of Education Department—Qualification for superannuation allowance—Reference to Public Service Board—Decision in favor of claimant—Claim for superannuation allowance—Refusal to grant—Discretion of Crown—Superannuation Act 1871 (W.A.) (35 *Vict. No.* 7), *secs.* 1, 12—*Public Service Act* 1904 (*W.A.*) (*No.* 41 *of* 1904), *secs.* 5, 83—*Public Service Appeal Board Act* 1920 (*W.A.*) (*No.* 14 *of* 1920), *secs.* 6, 10, 18.

Sec. 83 of the *Public Service Act* 1904 (W.A.) enacts that "the provisions of the *Superannuation Act* shall not apply to any person appointed to the Public Service after the commencement of this Act."

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Held, that members of the teaching staff of the Education Department who are qualified under the *Superannuation Act* 1871 (W.A.) to receive superannuation allowances are not deprived of the privilege by sec. 83 of the *Public Service Act* 1904.

By sec. 1 of the *Superannuation Act* 1871 it is enacted that, subject to the exceptions and provisions of the Act, the superannuation allowance to be granted after the commencement of the Act to persons who shall have served in an established capacity in the permanent Civil Service should be as set out in the Act, but provided in the case of any question arising as to the claim of any person for superannuation under this clause it shall be referred to the Governor in Executive Council, whose decision shall be final. By sec. 12 it is provided that "nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to . . . any superannuation or retiring allowance under this Act."

Held, by *Gavan Duffy* and *Starke* JJ. (*Isaacs* A.C.J. dissenting), that the grant of such superannuation allowance is dependent upon the discretion and bounty of the Crown, and that a person qualified for such allowance has no legally enforceable right unless and until the Crown chooses to exercise its power or authority to grant the allowance.

By sec. 3 o the *Public Service Appeal Board Act* 1920 (W.A.) the Public Service Appeal Board has jurisdiction to hear and determine appeals from the Public Service Commissioner and the Minister of Education "as to the qualification of any person claiming a superannuation allowance under section one of the *Superannuation Act*, or the length of service of such person, or if any question shall arise . . . under any other section of the said Act as to whether, or for what period, any person has served in an established capacity in the permanent civil service, it shall be referred to the Board, whose decision shall be final." Sec. 10 enacts that "the decision of the Board . . . shall be final; and effect shall be given to every such decision."

Held, by *Gavan Duffy* and *Starke* JJ. (*Isaacs* J. dissenting), that the finding of the Board that a person is qualified under the *Superannuation Act* to receive superannuation allowance does not, as a matter of law, affect the right of the Crown in its discretion to refuse to grant such allowance.

Decision of the Supreme Court of Western Australia (*Northmore* J.): *Laffer* v. *Minister for Justice*, (1923) 26 W.A.L.R. 83, affirmed.

APPEAL from the Supreme Court of Western Australia.

The appellant, Elizabeth Laffer, was a member of the permanent teaching staff of the Education Department from June 1885 to September 1897, when she retired from the Service. She was not then qualified for a superannuation allowance. She was subsequently employed at intervals between the years 1909 and 1914, and served

as a head teacher. On 1st January 1915 she was reappointed to the teaching staff of the Education Department, and served on the permanent staff in the capacity of head teacher from that date until her retirement from the service of the Department on 23rd March 1922 on the ground of ill-health. Prior to such retirement the appellant, in pursuance of the provisions of sec. 9 of the *Superannuation Act* 1871 (W.A.), submitted a medical certificate to the satisfaction of the Governor in Council that she was incapable from infirmity to discharge the duties of the situation, and that such infirmity was likely to be permanent. The appellant then applied to the Department for a grant of superannuation allowance covering her service from 1st June 1885 to 23rd March 1922. The Public Service Commissioner, by letter dated 16th May 1922, informed the appellant that, as to her claim for superannuation allowance covering service from June 1885 to March 1922 (less the period from September 1897 to 29th November 1909), her service from June 1885 to September 1897 could not be regarded as service qualifying for superannuation allowance, as, under sec. 9 of the *Superannuation Act* 1871, it was not lawful to grant superannuation allowance to any person under sixty years of age; and that neither her broken service from November 1909 to December 1914 nor her permanent service from January 1915 could count for superannuation as the *Public Service Act* 1904 (W.A.) had abolished pension rights as from 17th April 1905: he also informed her that he was forwarding the papers so that she might appeal to the Public Service Appeal Board as provided for in the *Public Service Appeal Board Act* 1920 (W.A.), sec. 6, sub-sec. 4. The appellant thereupon appealed to the Board. At the hearing of such appeal it was contended on behalf of the Public Service Commissioner (1) that the Board had no jurisdiction to deal with the interpretation of sec. 83 of the *Public Service Act* 1904 as a matter of law, and (2) that upon its true construction that section operates to deprive the appellant of any claim to superannuation allowance. In its decision, dated 19th October 1922, the Board disagreed with both of these contentions; and decided that the appellant was a person qualified to receive a superannuation allowance under the *Superannuation Act* 1871, and that she had served in an established capacity for a

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period of twenty-four years. The decision of the Board was duly communicated to the Governor and published in the *Government Gazette*. The appellant's claim for an allowance under the *Superannuation Act* 1871 was referred to the Governor in Executive Council, and was disallowed on 10th April 1923.

An action was then brought in the Supreme Court against the Minister for Justice by the appellant, claiming, in substance, a series of declarations to the effect that she was a person to whom superannuation allowance should be granted under the *Superannuation Act* 1871. The action was heard by *Northmore* J., and was dismissed with costs: *Laffer* v. *Minister for Justice* (1).

From this decision the appellant now, by special leave, appealed to the High Court.

Further facts and the nature of the arguments appear in the judgments hereunder.

Keenan K.C. and *W. Dwyer*, for the appellant.

Sir Walter James K.C. and *H. Parker*, for the respondent.

[During the argument the following authorities were referred to: *Yorke* v. *The King* (2); *Cooper* v. *The Queen* (3); *Smith* v. *The Crown* (4); *Grenfell* v. *Commissioners of Inland Revenue* (5); *Cargo ex Schiller* (6); *Barwick* v. *South-Eastern and Chatham Railway Cos.* (7); *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.* (8); *Holmes* v. *Angwin* (9); *Barraclough* v. *Brown* (10); *Toronto General Trusts Corporation* v. *The King* (11).]

Cur. adv. vult.

Sept. 13.

The following written judgments were delivered:—

ISAACS A.C.J. This appeal discloses a situation which is certainly regrettable and, I should have thought, impossible. The Government—its only substantial ground of objection, and indeed the sole ground it originally advanced, to the appellant's claim being

(1) (1923) 26 W.A.L.R. 83.
(2) (1915) 1 K.B. 852.
(3) (1880) 14 Ch. D. 311.
(4) (1913) 17 C.L.R. 356.
(5) (1876) 1 Ex. D. 242.
(6) (1877) 2 P.D. 145.
(7) (1921) 1 K.B. 187.
(8) (1921) 1 K.B. 616.
(9) (1906) 4 C.L.R. 297.
(10) (1897) A.C. 615.
(11) (1919) A.C. 679.

recognized as untenable and virtually abandoned—has taken refuge in a position which, personally, I think from every point of view indefensible. The position finally taken up is that, however long and faithful the service of any public servant may have been, however great the infirmity causing his retirement, if that were the cause, however perfect his qualifications to receive the retiring allowance prescribed by sec. 1 of the *Superannuation Act*, yet the Government claims that for no reason other than its own mere will, and without anything in the nature of a hearing, it may, notwithstanding all that is said in the recent Act of 1920, point-blank refuse to let him have it, and that that ends the matter. That is the ultimate standing-ground taken up by the Government on this appeal. That is, therefore, what we have to decide; and I find myself in the position that I am utterly unable to reconcile the contention of the Government with what I consider the very distinct language and obvious policy of the recent parliamentary arrangement made in the common interest with the public servants of this State. From the actual words and evident general intent of that arrangement there was deliberately established, in respect of those "public servants" defined by the Act, a radical change from the earlier system based on a different conception of the industrial or quasi-industrial relation of public employees to the State. That brought them, in a measure, into line with the position of other Government employees already under the new system. This change (in effect, a constitutional change), if there were any want of precision in the crucial words of the Act (sec. 10) taken alone, is amply evidenced by the Act as a whole, and conspicuously by secs. 6, 10 and 18 in combination. There was swept away much that permitted of political or personal considerations, or even want of adequate acquaintance with the viewpoint of the public servant, prejudicially affecting his interests. One of the provisions intended to effect that end and to dispel insecurity, inequalities of treatment, and consequent discontent, was an attempt to secure certain rights to the non-political servants of the Crown; and it is the efficacy of this attempt that we are called upon to determine.

1. *The Facts.*—Mrs. Laffer originally entered the Education Department as a teacher in 1885, and voluntarily retired in 1897.

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She had not then qualified for a pension, because she had not attained sixty nor did she suffer from any infirmity. No question of a pension then arose. When the *Public Service Act* 1904 was passed she was not in the Service at all. That Act provided a new basis for certain branches of the Service. It also provided, by sec. 83, in very general terms that new appointees to the Public Service were not to come under the *Superannuation Act*. But it also enacted that, except where otherwise expressly provided, the Act was not to apply to teachers in the Education Department. The next relevant event is that in 1915 Mrs. Laffer rejoined the permanent teaching staff of the Education Department. She continued her service from 1915 until 23rd March 1922, when she retired, after furnishing a medical certificate in accordance with sec. 9 of the *Superannuation Act* 1871. On 3rd April 1922 she made a claim for superannuation under sec. 1 of that Act.

Now, what follows discloses that there was clearly no intention to refuse the claim except for one reason only—that is, illegality. On 16th May 1922 the Public Service Commissioner, after consulting with the Solicitor-General, wrote to Mrs. Laffer informing her of one objection, and of one objection only, to her claim, namely, that "the *Public Service Act* of 1904 abolished pension rights as from 17th April 1905." That is, that sec. 83 of the Act came into force on that day. Then continued the letter: "I am putting forward the necessary Executive Council papers disallowing a superannuation allowance, but before sending these forward I am advising you of the proposed action in order to give you an opportunity, if you so desire, to appeal to the Appeal Board, as provided for in sec. 6, sub-sec. 4, of the *Public Service Appeal Board Act* 1920." Nothing could be clearer than that this was an intimation that only sec. 83 of the Act of 1904 stood in the way of Mrs. Laffer's claim, and that that alone would lead to an Executive disallowance. Further, it was an invitation to settle the question, if disputed, by reference to the Appeal Board under the new Act. The appellant accepted the invitation; and the appeal was heard. The Public Service Commissioner appeared, and admitted that the appellant had served in an established capacity in the permanent Civil Service for a period of ten years and upwards. But he raised two objections: (1) that

the Board had no jurisdiction to decide the effect of sec. 83, and (2) that in law sec. 83 did deprive the appellant of any claim to superannuation allowance. The Board ruled against both objections, and decided "that the appellant, Bessie Laffer, is a person qualified to receive a superannuation allowance, and that she has served in an established capacity for a period of twenty-four years." That was reported to the Governor on 19th October 1922. It will be observed that the "decision" of the Board was strictly as to Mrs. Laffer's qualification and length of service. Incidentally the Board rejected two legal contentions of the Public Service Commissioner, but unless *both* were wrongly rejected the decision was unimpeachable. In other words, if sec. 83 did not apply to Mrs. Laffer, then, whether the Board had jurisdiction to decide so judicially or not, the way was clear to proceed to the decision as to "qualification" and "service." If, on the other hand, a decision as to "qualification" includes a decision interpreting sec. 83, that was done, and the Act makes it "final." However, on an application by way of certiorari the Supreme Court refused to quash the decision; and it still stands. In that condition of affairs, what did the law require? Up to that point I find no fault whatever with the departmental conduct. A clear and distinct admission had been made that Mrs. Laffer had satisfied every condition possible for her to fulfil to satisfy sec. 1 of the *Superannuation Act*, subject only to one objection, namely, the applicability of sec. 83 of the *Public Service Act* 1904.

On 10th April 1923 the Governor in Council, not on any reference under the *Superannuation Act* or any other Act, made an Order in Council disallowing Mrs. Laffer's claim *in toto*. Mrs. Laffer was not heard on that occasion, and the Order in Council cannot be regarded as of any force under the proviso to sec. 1 of the Act of 1871. Indeed, learned counsel for the Crown, when asked, could not suggest any statutory effect. It can have no statutory effect. And I know of no common law effect attaching to it. It is, as my brother *Starke* observed during the argument, merely evidence that the Crown declined to grant any superannuation allowance to Mrs. Laffer. But, in any case, how does the matter so far stand? Let me recapitulate: Mrs. Laffer had retired in circumstances entirely satisfying, so far as she was concerned, all the requirements of sec. 1

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of the *Superannuation Act*, provided she was not disqualified by sec. 83 of the *Public Service Act* 1904. Her broken periods of service needed appraising to ascertain the totality of service for computation. The two questions, qualification and length of service, had been referred to the Board under the Act of 1920 and reported on favourably to her; and the decision stood. Had she, then, any right to superannuation, or could the Government arbitrarily refuse it? If the Board had jurisdiction to construe sec. 83, she was not debarred by that section. If the Board had not such jurisdiction, then, as a matter of judicial construction, I have no doubt it does not apply to teachers in the Education Department. Sir *Walter James*, with the utmost candour, admitted he was unable to argue that it did apply to teachers. He, in reply to a question, said that he left it to the Court to decide, but he could not argue it. As it is left to the Court and is of much importance, and as this matter may, for aught I know, be the subject of subsequent consideration, I shall state my reasons for holding the inapplicability of the section, and, what is more, its intended inapplicability to be gathered from *the only proper source*—the language of the Act. I emphasize the words "the only proper source" because the language of the Act is not only the guide to a Court: it was the guide to every person who, on the faith of the law as it stood in the Statute Book, has entered the Public Service in any and every branch since 17th April 1905, and continued in that Service, and made, or left unmade, his provision for the future.

2. *Sec. 83 of the Public Service Act* 1904.—I entertain no doubt that, when ordinary and well recognized principles of construction are applied, sec. 83 of the Act of 1904 does not extend to the teaching staff of the Education Department. It is true that its words would in themselves be comprehensive enough to apply to every appointment to every branch of the Public Service after the commencement of the Act. But when, as repeatedly enounced—as, for instance, by Lord *Halsbury* in *Higgins* v. *Dawson* (1)—the whole instrument is looked at, the true intention of the Legislature is seen to be much more limited. In sec. 4, when defining "officer," it is stated that, "unless the contrary intention appears," that expression is limited

(1) (1902) A.C. 1, at pp. 3-4.

to persons employed "in those branches of the Public Service to which this Act applies." Sec. 5 is placed, so to speak, at the threshold of the enactment, and governs the whole of what the Legislature is about to say. To begin with, it opens with a phrase markedly different from the corresponding phrase in sec. 4. In sec. 4 we find "unless the contrary intention appears." Under such words the "contrary intention" may appear either expressly or by implication. But in sec. 5 the words are "unless otherwise expressly provided." The word "expressly" would be ignored if implication, however strong, were acted on. The Legislature, having thus guarded itself against all but its own express extension of its enactment to the classes specified in sec. 5, proceeds to use terms which inherently might cover a larger field but are expressly restricted to the smaller. To emphasize this point, suppose under the last paragraph of sec. 5 the Governor declared, as to a given officer or class of officers, "the provisions" of the Act should not apply—that is, not one provision or some of the provisions, but "the provisions" of the Act—could it be said that sec. 83 nevertheless applied to that officer or class of officers? I am clearly of opinion it could not. And the expressly enumerated classes in sec. 5 stand in no less powerful a position. There are several sections of the Act that support that view. For instance, sec. 17, which divides "The Public Service" into four divisions, and by sec. 18, sub-sec. 4, it is clear the named divisions are exhaustive of "The Public Service" as dealt with by the Act. Again, the sections dealing with "appointments" to the Public Service, within the ambit of the statute, are exhaustive—see sec. 28, for instance. The group of sections 69 to 75 inclusive are to some extent cognate to sec. 83, because they relate to provision for the future, and are in a sense a substitutory provision for the *Superannuation Act*. But *ex concessis* they do not extend to teachers. Consequently, when sec. 83 is reached and is found to contain no "express" extension to any of the classes named in sec. 5, it is, in my opinion, properly read as part of a general scheme dealing with the limited branches of the Public Service forming the general subject matter of the Act. It is really unnecessary to call in aid the well-known principle in case of ambiguity, that rights are not usually destroyed by ambiguous terms. It would be a strange

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thing that the teaching staff of the Education Department, appointed since 1904 and working under a totally different set of enactments, and expressly excluded by sec. 5 from the *Public Service Act* of 1904 unless " expressly " included, should, without such express inclusion in sec. 83, find themselves cut out of the rights, whatever these may be, which they naturally believed they were obtaining under the *Superannuation Act* of 1871. In my opinion sec. 83 has no application to the appellant's case. But once sec. 83 is shown to be inapplicable, and practically abandoned by the Crown itself, the only objection ever raised to the appellant's superannuation disappears. What excuse has the Crown now for refusing it ? Not a single reason was given, except the arbitrary will of the Government—euphemistically styled " discretion."

When Mrs. Laffer was informed of the single objection that stood in her way and invited to go to the trouble and expense of an appeal to the Board, it was implied that otherwise her claim would be allowed. It was idle, and worse than idle, to treat her in such a fashion if the Department intended in any case to exercise an arbitrary " discretion " to refuse. But such is the attitude of the Government at the bar of this Court, and we have to deal with it.

3. *Secs.* 6 (4) *and* 10 *of the Public Service Appeal Board Act* 1920. —I would ask how does that so called " discretion " arise in face of the very explicit language of the Act of 1920 ? Sec. 6, sub-sec. 4, says: " If any question shall arise . . . in any department of the Public Service as to the qualification of any person claiming a superannuation allowance under section one of the *Superannuation Act*, or the length of service of such person . . . it shall be referred to the Board, whose decision shall be final." So far, that gives " finality " to the decision and binds both sides. But the Board's decision is not like the decision of a Court of law, because a Court can itself carry its decisions into execution. A decision of the Board, however, on this subject was only one of many possible decisions enumerated in sec. 6 and other sections. Parliament, therefore, in order to secure obedience to the Board's decisions, provided by sec. 10 as follows : " The decision of the Board or of a majority of the members of the Board shall in each case be reported in writing by the Board to the Governor, and *shall be final; and*

effect shall be given to every such decision." "Finality" is thus twice prescribed for a case like this—once in sec. 6 (4) and again in sec. 10. Now, it cannot, on the literal force of these words in sec. 10, be denied, and it was not denied, that it was the duty of the proper authorities to obey the mandate that "effect shall be given" to the Board's decision of 19th October 1922. I asked learned counsel for the Crown how that effect was to be given according to the Crown's view. The answer was that the words meant that the report of the Board was to be "laid at the foot of the Throne," or, as it was otherwise and less picturesquely phrased, "presented to the Governor," and that satisfied the statutory command. When it is remembered that the words in question were primarily addressed to the members of the Public Service and relate to many classes of subjects, and can have but the same meaning throughout, it appears to me that they convey nothing short of an assurance of complete redress in accordance with the decision, so far as the law permits, and subject to such qualifications as the law requires in giving effect to it. The Government read the words as if they were "shall be final and effect shall be given to every such decision *at the discretion of the Governor in Council.*" That would vitally alter, and indeed destroy, the effect of the legislation. The Board is really substituted for the Governor in Council in respect of sec. 1 of the *Superannuation Act*. It was suggested that, since sub-sec. 4 of sec. 6 referred to the Board only the determination of facts—namely, the "qualification" and the "length of service" in connection with sec. 1 of the *Superannuation Act*—the provision in sec. 10 that effect should be given to the decision meant that the Crown should take into consideration the facts as found, namely, that the appellant was fully qualified and had to be credited with twenty-four years' service. And then that the Executive Government, notwithstanding that finding, could, consistently with the intention of Parliament and without other reason than its own uncontrolled will, solemnly say "No." How, I would seriously ask, does that *give effect* to the Board's decision? If the Executive is intended to have the arbitrary "discretion" to say "No" entirely, or to say "No" partially—that is, if it can arbitrarily grant half the allowance that twenty-four years would justify as if the proper period of service were twelve years—how is the

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Executive in such a case giving effect to the decision as to the settled fact of twenty-four years ? Of what possible use is it to an applicant to go to the trouble and expense and incur the struggle of an appeal before the Board instead of the Governor in Council, if failure means real failure, leaving the Crown without discretion to give, but if after the clearest success the Governor in Council can at will entirely or according to pleasure disregard what the Board has said and act as if it had said nothing ? A house built on sand has a firmer foundation than such an argument.

On the other hand, the appellant contends that the words " effect shall be given to every such decision " mean, in relation to such a case as this, that the decision shall *bind both parties*, and so far as the decision is adverse to the claimant he is concluded but so far as it is in favour of the claimant the Crown shall on its part respect it and honour it and the proper authorities shall see that the claimant has the full benefit of it that the law prescribes. The words themselves carry that significance, and sec. 32 of the *Interpretation Act* 1918 enforces it. There may be difficulty in enforcing this duty, but I refer to the very emphatic words of Sir *George Farwell*, speaking for the Privy Council, as to the duty of the Crown in *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (1). Let us test this by applying it to the *Superannuation Act*. Sec. 1 commences with the words " subject to the exceptions and provisions hereinafter contained " ; and those words will be presently examined. The rest of the section consists of (a) statement of qualification, namely, " persons who shall have served in an established capacity," &c. ; (b) a statement of the proportionate allowance according to period of service, and (c) a proviso that " if any question should arise in any department of the Public Service as to the claim of any person for superannuation under this clause it shall be referred to the Governor in Executive Council, whose decision shall be final." It is seen, therefore, that the two expressions " qualification " and " length of service " exhaust sec. 1 so far as its own subject matter is concerned—except of course the quasi-judicial reference to the Governor in Council under the proviso, and except the fixed proportions which have been settled by Parliament itself. But that reference to the Governor

(1) (1915) A.C. 750, at pp. 759-760.

in Council is to culminate in a "decision," and the "decision" is to determine only any "question that should arise in any department." It seems obvious to me that a "question that should arise in any department" is inherently incapable of including the so-called "discretion" of the Governor in Council to grant the allowance. The question of his own discretion can only be raised by the Governor in Council, and, if he raises it, it is absurd to consider it referred by himself to himself under the proviso. Therefore, the proviso cannot include it in the sense suggested. A more inapt mode of expressing such an idea can hardly be devised. Both the history and the language of the proviso show that it is to provide a domestic tribunal to determine quasi-judicially whether the conditions stated by Parliament as necessary to be fulfilled by the applicant before his claim is justified have been satisfied.

Consequently, "qualification" and "length of service" being settled by the Board's finding, that is, whether the claimant is a proper or eligible person to receive superannuation for a given length of service, the Government have to apply the necessary and known figures and the amount is ascertained. It is a mere matter of calculation. Parliament itself has once for all settled the question of discretion in the arbitrary sense. There are still the "exceptions and provisions" subject to which that amount is enacted; and those are found in secs. 3, 7, 8 and 9, all of which are modifications which are applicable, according to circumstances, in the course of "giving effect" to the decision. If there be needed any *procedure* for effectuating this, that is fully provided for. Sec. 17 of the Act of 1920 enables the Governor to make regulations . . . (*e*) "for all such . . . matters arising under and consistent with this Act not herein expressly provided for, and otherwise for *fully and effectually carrying out and giving effect to this Act.*" It is objected that no parliamentary command is given where there is no "decision" of the Board. The answer to that is obvious, and, to my mind, reaches the very core of the matter. Parliament was dealing with the inability of public servants, as the law stood, to have an impartial examination of disputed cases. It was not contemplating cases which were admitted and fully recognized, for these normally needed no remedy; nor was it contemplating cases where, all conditions being admittedly

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established, the Executive arbitrarily refused to carry out the law, for those were considered impossible. This is the first instance of the present nature on record. Where there was no dispute as to the facts entitling the person to the benefit of the Act, Parliament, in these days of constitutional government, would naturally assume the Executive to follow the obvious spirit of the law. Nor are Courts of law precluded from taking judicial notice of constitutional practice. Wherever, however, a dispute could arise as to any constituent element essential to an allowance—qualification and length of service (which include everything in sec. 1 not settled by Parliament itself)—a " decision " was provided for. In either event in contemplation of Parliament the position was plain.

Another suggestion was that the Executive might exercise its discretion in view of the state of the public funds. In days when pensions were made dependent on annual appropriations, other considerations might apply. But the Act of 1920, like that of 1871, is independent of such a condition. The Act of 1920 provides for the Board ultimately determining salaries and other expenditure. There is no trace of a condition as to the state of the finances. Parliament foresaw that it must provide the means of salaries and of pensions. Besides, the momentary condition of the Exchequer cannot determine pensions which last for the life of the recipient. There is thus no reason for limiting the full effect of the words requiring effect to be given to the decision of the Board.

Then, says the respondent, sec. 12 of the Act of 1871 stands in the way of the new Act and enacts the " discretion." In my opinion that is a wholly wrong expression to apply to sec. 12, in the sense attributed, namely, arbitrary and unregulated power. For the moment, however, I shall assume it to be correct, so far as the Act of 1871 is concerned.

4. *Sec.* 18 *of the Public Service Appeal Board Act* 1920.—But again the Act of 1920 is explicit. In addition to the provisions already quoted as to " finality " and " effect," the Act of 1920, by sec. 18, says : " The *Public Service Act* 1904, the *Elementary Education Act* 1871 and its amendments, and the *Superannuation Act, shall be construed and have effect, subject to this Act.*"

I am unable to appreciate (I mean judicially) the contention that

in order to construe and give effect to the *Superannuation Act*, sec. 12, *subject to the Act of* 1920, you must give effect to sec. 12 of the *Superannuation Act* first, and then apply the concluding words of sec. 10 of the Act of 1920. Those words are to have their full effect as if sec. 12 did not exist; and then only, if at all, can sec. 12 have any application. The concluding words of sec. 10 are the pivotal words of the Act from the side of the public servants. They have, as I have already observed, one meaning and one only. Whatever construction they receive as to retiring allowances, they must receive as to promotions and redress or correction of anomalies in treatment affecting officers in respect of classification, salary or position; and so on. So their effect stands far beyond the present case, and far beyond even the *Superannuation Act*. If, notwithstanding sec. 18, they leave the Executive as free to exercise its "discretion" as before with regard to sec. 12 of the *Superannuation Act*, they leave the same freedom wherever the Governor in Council has to act in relation to the Public Service. But in my firm opinion, qualified only by my deep respect for the opposite opinion of my learned brethren, those words overcome any power in sec. 12 of the earlier Act to disregard the claim of a retired officer, once the expressed elements of his claim as stated in sec. 1 are established in case of dispute by reference to the Board. The refusal of the Government in this case to adhere to the words in question, and to give them their full extent *so far as in its power lies* by granting or paying superannuation allowance on the basis determined by the Board, is in my opinion contrary to the distinct parliamentary bargain with its executive officers.

5. *General Nature of the Public Service Appeal Board Act* 1920.—As for the general nature of the Act of 1920, we need not travel beyond the Statute Book to see that it was a parliamentary and mutual settlement, in grave public circumstances, of disputes between the State as employer and the public servants as employees. And it will be at once seen how the radical change of system which I have referred to, and which is its main characteristic, was brought about. Looking at the specific words of the Act, we see that shortly before it was passed there was what is termed "the recent simultaneous cessation of work on the part of certain public servants" (sec. 6 (1) (*f*) and sec. 14). That is, of course, a polite elaboration of the word "strike."

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What grievances existed or were thought to exist, we are left to infer from the terms of the remedial legislation; and that is not a difficult task.

It is noticeable, to begin with, that though strikes were penalized in the *Industrial Arbitration Act* of 1912 (W.A.) (No. 57 of 1912) (see sec. 104), Part V. of that Act (secs. 100-103) excluded from the operation of the Act altogether "public servants subject to the *Public Service Act* 1904." Placing ourselves in possession of those circumstances, as well as of the statutes of 1871 and 1904 already mentioned, and also the Education Acts, so as to stand for the moment in the position of the Legislature, we can the more readily understand the nature and meaning of the new legislation which Parliament enacted in 1920. The propriety of considering these circumstances in case of suggested ambiguity in the language used, is established by such high authorities as *Owners of Steamship Lion* v. *Owners of Ship or Vessel Yorktown* (1) and *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, &c.* (2). The Act of 1920 may justly be described as a legislative compact to end internal dissension in the public departments and to establish for that purpose a system of arbitration somewhat analogous to that existing elsewhere, including some Government departments (other than those under the Act of 1904). Instead of a tribunal entirely representative of the employer, it was determined there should be (as to some extent there already were, as in cases of punishment) tribunals representative of both employer and employed, and even specially representative of distinct divisions of the service concerned. The tribunals were to be presided over by an independent chairman of the highest judicial standing in the State. Instead of the unsystematic, erratic and possibly arbitrary conclusions of a ministerial head, moved by varying political views and influenced principally or greatly by departmental heads, there was to be a method probably more reducible to system and open discussion and presentation of views, and above all attended with the certainty, so far as Parliament could command it in language compatible with the dignity of the Crown, that whatever decision was arrived at would be carried into effect. On the other hand, and in return for this impartial, just and effective remedy for grievances

(1) (1869) L.R. 2 P.C. 525, at p. 530. (2) (1898) A.C. 571, at pp. 575-576.

or fancied grievances, the strike was forbidden under penalty. The two branches are obviously interdependent. Now, that, in a few words, is the broad scheme of the Act; and sec. 10 on the one hand and sec. 15 on the other are the mutual and reciprocal guarantees, so to speak, of the future certainty of good relations between the parties concerned to the advantage of the whole community. The concluding words of sec. 10, "and effect shall be given to every such decision," are, as I have said, the pivot on which the whole Act turns, and constitute the pledge of the State to its public officers. They are the plain negation of the system of uncontrolled discretion which, as to some of the matters dealt with, previously existed and to which I am surprised to find the Executive still clings. Sec. 6 includes decisions, not only as to sub-sec. 4 and to classification, reclassification, salary and allowances, but also the interpretation and application of Acts governing the service of public servants; also decisions as to anomalous treatment in positions, with power to adjust, and among other things (sec. 6 (1) (*f*)) victimization for the recent strike. Therefore, if the Crown argument of abso ute discretion in face of the Board's decision in this case can prevail, then a great part of the Act of 1920 is a scrap of paper, and the reference by Mr. *Keenan* to the concluding quotation by *James* L.J. in *Cargo ex Schiller* (1), "to keep the word of promise to the ear and break it to the hope," would be amply justified.

I am not able to consider the Act of 1920 as so futile and unfair; but, if it is not, then it must be that when Parliament in remodelling the Public Service statutory position declared that "effect shall be given to every such decision" of the Board, it meant to clothe that decision, if favourable to the claimant, not only with finality but also with full force of a legal right, subject to any conditions imposed by law, to have whatever the decision expressly or in effect declared was not barred by the matters decided.

6. *The Superannuation Act* 1871.—So far I have assumed that prior to the Act of 1920 pensions were not the subject of legal rights in any sense, but were purely the gift and grace of the Crown. That is made the starting-point of the Crown's argument, and is rested upon the words of sec. 12 of the Act of 1871. It is intended as

(1) (1877) 2 P.D., at p. 161.

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evidencing a wide gap untouched by the new Act. I have already expressed my view that, even if that were so, it is so no longer. But I am of opinion that a careful reading of the Act of 1871 leads to an important limitation even of the initial doctrine. In the case of *Cooper* v. *The Queen* (1) *Malins* V.C. says :—" Now this *right* to superannuation allowance is a very *peculiar right*. As I read the Acts of Parliament, it is a *right* which can never be *enforced* in the civil tribunals of this country." He goes on to interpret the Acts of 1834 and 1859, and undoubtedly he uses language which on one hand recognizes that Parliament has created a *right*, and yet, by reason of sec. 30 of the earlier Act, not a " legal " right—by which I think he means " absolute right " in the sense of non-enforceability. He says the matter is one for " bounty," and then he returns and says again " these *rights* are not to be enforced in the civil tribunals of the country." In *Yorke* v. *The King* (2) *Lush* J. takes the same view, and quotes the earlier case. Both were cases of Courts of first instance, but the actual decisions are unquestionable.

It is true, as *Burnside* J. said on the certiorari application, that no case like the present was ever dealt with. The cases were all instances of adverse decisions by the Crown or Treasury which the applicant asked the Court to correct. The applicants failed. *Smith* v. *The Crown* (3) is one of those instances. We are brought to look at the statute more closely and from a somewhat different angle in a case like the present. We are called upon to see whether the position before a favourable " decision which shall be final " is given is the same as after such a decision. Now, in both the English cases, the learned Judges conceded the claimant had a " right." How did he get that right ? By the statute, of course. If so, it was a statutory right of some sort, and necessarily a legal right, but not " an absolute right to compensation or superannuation or retiring allowance." The Acts in England, as in Western Australia, use very significant words indicative of a right conferred by statute. In the Act of 1871, in sec. 1, it is enacted that " the superannuation allowance to be granted " &c. " *shall be* as follows," &c. The proviso, as I have said, provides for a " decision " which is to be final.

(1) (1880) 14 Ch. D., at p. 314.
(2) (1915) 1 K.B. 852.
(3) (1913) 17 C.L.R. 356.

Sec. 4 speaks of "the period which would have *entitled* him to a "superannuation allowance." So in sec 5; and sec. 6 speaks of "the amount to which such person would have been *entitled* under the scale of superannuation provided by this Act." On the other hand, when gratuities are spoken of, the Act says (sec. 5) "such sum of money by way of gratuity as the Governor in Executive Council may think proper," with a maximum. The Crown's argument is that that is precisely what totally different language in sec. 1 means.

In my view the true construction of the Act is this:—Parliament by sec. 1, subject only to such qualifications of that section as are found in secs. 7 and 9, has conferred upon the designated persons a statutory legal right to get superannuation allowance. But that right is not an "absolute right" (sec. 12); that is, the officer cannot on proof of the constituent facts claim the aid of a civil Court to declare or enforce his claim. He must take the right as the statute has created it, with all its conditions. At first, in England there was no tribunal whatever provided to adjudicate on such a claim. In 1859 there was a tribunal, the Commissioners of the Treasury. Here sec. 12 and the proviso to sec. 1 came into operation together; and they must be read together, neither nullifying the other, but each having full effect as constituent parts of the one scheme, remembering at the same time that the proviso was a partial corrective of the former position. Sec. 12, in enacting that "nothing in this Act contained shall . . . give any person an absolute right to . . . superannuation allowance," does not, I apprehend, mean that there is no absolute right conferred by a grant where there is no dispute. If it does mean that, then at no time is there any right, and the proviso to sec. 1 is futile. But if a grant which is not *in* the Act but under it confers an absolute right, surely a decision which is not *in* the Act but under the proviso to sec. 1 must either itself directly confer the same absolute right, or, what is the same thing, an absolute right to a grant; otherwise it is equally futile. I conclude that the "*peculiar right*" in the words of *Malins* V.C., is a "right" which the Governor in Council was trusted to recognize and respect, and was required by law to investigate if disputed by departmental officers, and to investigate impartially and quasi-judicially, and

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determine according to what it found to be the law and the facts. And further, we have the authority of the same learned Vice-Chancellor that the " decision " of the Commissioners under sec. 2 of the English Act (the local sec. 1) is in law binding on the Crown as to a grant of superannuation. In *Edmunds* v. *Attorney-General* (1) he said :—" It appears to me therefore, beyond all doubt, that no public servant can possibly maintain an action for a pension until the pension has been granted. The question, whether a pension shall be granted or not, is to be *decided by the Commissioners of the Treasury*, ' whose decision shall be final ' (*Superannuation Act* 1859, sec 2)." I gather from the Vice-Chancellor's reference to the Commissioners that, if there had been the decision of the Commissioners in the plaintiff's favour, he would have allowed the litigation to proceed.

In one respect the Governor in Council, that is, really, the ministerial heads of departments, dealing with disputed departmental questions of the nature of offices and work and internal regulations would be better able to determine these than an ordinary Court. The decision being made final, I can see no effect—unless a one-sided effect—that can be attributed to the word " final," other than that, if favourable to the claimant, there is then by force of the decision an " absolute right." The decisions of *Cooper* v. *The Queen* (2) and *Yorke* v. *The King* (3) were subsequent to 1871, and, therefore, did not guide the local Legislature. While I respectfully agree that no Court can give where the Governor in Council has not given, I am not of opinion, even under the Act of 1871, that where the Governor in Council has given a " final decision " in favour of a claimant under sec. 1, he can give another " final decision " against him under sec. 12. That would not make the sections accord, but clash. I think, moreover, that *Lush* J. in *Yorke* v. *The King* (4) recognized that a decision of the Commissioners in favour of the claimant under the proviso to sec. 2 was a final grant of the " bounty." I therefore think that the words " discretion " and " bounty," which are not found in the statute, have been pushed beyond their legitimate limits. The Legislature, while leaving the Crown under the Act of 1871 without curial control,

(1) (1878) 47 L.J. Ch. 345, at p. 348.
(2) (1880) 14 Ch. D. 311.
(3) (1915) 1 K.B. 852.
(4) (1915) 1 K.B., at p. 856.

did not leave it without parliamentary direction or a standard of legal rights. The Crown was left to ascertain, examine, acknowledge and admit those rights if they existed, and the Crown admission was the exclusive evidence of the existence of the right in a specific case. Then, and then only, was the right one fully clothed as an absolute right. But that is very different from saying the Legislature created no rights but mere discretion and sanctioned arbitrary and differential treatment at the mere caprice of the Executive Government. When that position is properly grasped, it deprives the argument derived from sec. 12 of the Act of 1871, limiting sec. 10 of the Act of 1920, of most of its support, because the step from the proviso in the earlier Act to the concluding words of sec. 10 is very short.

I regret that I find myself constrained to differ from the view of the majority of the Court and to hold that this appeal should be allowed. There being no suggestion of any qualifying circumstances coming within sec. 7, and, it being conceded that sec. 9 is satisfied, I am of opinion that there should be the following declarations: (1) That the disallowance by the Governor in Council on 10th April 1923 of the appellant's claim was contrary to law and is null and void; and (2) that effect ought by law to be given to the decision of the Appeal Board of 19th October 1922 by proper steps necessary to pay the appellant superannuation provided by law in such a case.

GAVAN DUFFY AND STARKE JJ. The object of this action was to establish a right on the part of Mrs. Laffer to the grant of a superannuation allowance under the *Superannuation Act* of 1871 of Western Australia (35 Vict. No. 7).

Mrs. Laffer served on the permanent staff of the Education Department from June 1885 to September 1897, when she resigned. She had not then attained sixty years of age, and retired in order that she might marry, as we were informed. The provisions of sec. 9 of the said Act excluded her, at this point of time, from the privileges provided for by the Act. Between October 1909 and January 1915 she was again employed temporarily in the Education Department of the State, but not "in an established capacity in the permanent Civil Service" of the State. On 1st January 1915 she was reappointed to the teaching staff of the Education Department

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"in an established capacity in the permanent Civil Service," and retired on 23rd March 1922 owing to ill-health.

The *Public Service Act* 1904 had been passed in the meantime, and sec. 83 provided: "The provisions of the *Superannuation Act* shall not apply to any person appointed to the Public Service after the commencement of this Act; and nothing in this Act contained shall be deemed to confer on any person whomsoever any right or privilege under the said Act." But the Act does not, in our opinion, exclude Mrs. Laffer from the privileges of the *Superannuation Act*. By sec. 5 it was enacted that "unless otherwise *expressly provided*, this Act shall not apply to . . . the teaching staff of the Education Department." It is not expressly provided in sec. 83 or elsewhere in the Act that the provisions of that section shall apply to the teaching staff of the Education Department. Again, sec. 17 of the Act provides that the Public Service shall consist of four Divisions: Administrative, Professional, Clerical and General. The General Division (sec. 18) includes all persons in the Public Service not included in the Administrative or Professional or Clerical Divisions, and sec. 23 enables the Governor to make regulations for the examination of persons desirous of admission into the Public Service. All these sections make it clear, in our opinion, that the words in sec. 83, "any person appointed to the Public Service," mean public servants appointed under or whose service is regulated and controlled by force of the provisions contained in the Act of 1904. Mrs. Laffer, however, was not appointed under nor was her service regulated or controlled by the provisions of the 1904 Act. She was appointed and her service was regulated by the Acts relating to Public Education (see 57 Vict. No. 16, secs. 6 and 22).

This brings us to a consideration of the *Superannuation Act* itself. It was substantially copied from the Superannuation Acts of 1834 and 1859 of Great Britain (4 and 5 Wm. IV. c. 24 and 22 Vic. c. 26). By sec. 1 of the Act of Western Australia it is enacted that, subject to the exceptions and provisions of the Act, *the superannuation allowance to be granted* after the commencement of the Act to persons who shall have served in an established capacity in the permanent Civil Service should be as set forth in the Act: "Provided that if any question should arise in any department of the Public Service as to the claim of any person for superannuation under this clause it

shall be referred to the Governor in Executive Council, whose decision shall be final"; and sec. 12 provided that "Nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under this Act." These provisions make it clear, in our opinion, that the Act gave Mrs. Laffer no right to a superannuation or other allowance. This Act confers an authority upon the Crown to grant superannuation or retiring allowances in certain cases, but makes the grant dependent "upon the discretion and bounty of the Crown"; unless and until the Crown chooses to exercise this power or authority Mrs. Laffer has no right enforceable in any Court of law to any such allowance. A similar conclusion was reached under the English Acts in *Cooper* v. *The Queen* (1) and *Yorke* v. *The King* (2).

Another Act remains for consideration. It is the *Public Service Appeal Board Act* 1920 (11 Geo. V. No. 14) of Western Australia. It established "The Public Service Appeal Board," and gave it jurisdiction to hear and determine appeals from the Public Service Commissioner and the Minister of Education in respect of the classification, reclassification, salary or allowances of public servants or any decision involving the interpretation or application of any Act or regulations governing the service of such public servants; and by sec. 6, sub-sec. 4, it was provided: "If any question shall arise . . . in any department of the Public Service as to the qualification" &c., and sec. 10 enacts that "the decision of the Board . . . shall in each case be reported in writing by the Board to the Governor, and shall be final; and effect shall be given to every such decision."

Now, it is contended that the decision of the Board establishing the qualifications of a public servant for a superannuation allowance and his length of service establishes or crystallizes the right of that person in point of law to the grant of an allowance under the said Act, and consequently that "it is the duty of the Crown and of every branch of the Executive to abide by and obey the law" (*Eastern Trust Co.* v. *McKenzie, Mann & Co.* (3)). But, in our opinion, the decision of the Board has no such effect.

(1) (1880) 14 Ch. D. 311.
(2) (1915) 1 K.B. 852.
(3) (1915) A.C., at p. 759.

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The grant of a superannuation allowance is, since the *Public Service Appeal Board Act*, as much dependent upon the discretion and bounty of the Crown as ever it was. The Board ascertains, if a dispute arises, whether the conditions exist or do not exist upon which alone the Crown is authorized to grant a bounty or an allowance out of the public funds and the period of service in respect of which the bounty or allowance may be computed. It is said that this construction gives no meaning to the words in sec. 10 that " effect shall be given to every such decision " ; but we do not agree. The finding by the Board as to the qualification of a person to receive an allowance and as to his length of service conclusively establishes the power or want of power in the Crown to exercise and to complete the bounty pursuant to the statutory authority. Normally, we suppose that the Crown would exercise its discretion in favour of a public servant who was qualified under the Act to receive an allowance ; but we cannot affirm any legal right in the servant to that allowance or bounty unless the Crown chooses to exercise its powers in that behalf. Thus, under sec. 7 of the Act reports may be made as to diligence and fidelity of the officer which would, no doubt, affect the discretion of the Crown to the extent provided in that section. It is not for us, however, to say how or in what manner or on what conditions the discretion of the Crown should be exercised. But we observe in this case that the Governor in Council was wrongly advised, in our opinion, that the provisions of the *Public Service Act* 1904, sec. 83, precluded Mrs. Laffer from the grant of an allowance under the *Superannuation Act.* The Crown, in view of the decision of the Public Service Appeal Board that Mrs. Laffer was a person qualified to receive a superannuation allowance and had served in an established capacity in the Public Service for a period of twenty-four years might lawfully, we think, have exercised its discretion in her favour and granted an allowance. And it is open to the Crown to reconsider the matter and to do what shall appear to be just in the circumstances of the case.

Appeal dismissed.

Solicitors for the appellant, *Dwyer, Durack & Dunphy.*

Solicitor for the respondent, *F. L. Stow,* Crown Solicitor for Western Australia.