

[HIGH COURT OF AUSTRALIA.]

BRADSHAW PLAINTIFF;

AGAINST

THE COMMONWEALTH DEFENDANT.

*Commonwealth Public Service—Transferred Department—Rights preserved to officer—
Removal from Service by Governor-General in Council or Board of Commissioners
—Right to be called on to resign—The Constitution (63 & 64 Vict. c. 12), secs.
51, 67, 70, 84—Commonwealth Public Service Act 1922 (No. 21 of 1922), secs. 45, 67—Civil Service Act 1874 (S.A.) (37 & 38 Vict. No. 3), sec. 28.**

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Oct. 6; Nov. 2.Knox C.J.,
Isaacs, Higgins,
Rich and
Starke JJ.

Held, that in the case of an officer of the Civil Service of South Australia who was retained in the Public Service of the Commonwealth when the Department in which he was employed was transferred to the Commonwealth, any power of removing him from the Public Service was, by virtue of sec. 67 of the Constitution and sec. 67 of the *Commonwealth Public Service Act 1922*, vested in the Commonwealth Board of Commissioners, not in the Governor-General.

Held, also by Knox C.J., Rich and Starke JJ. (Isaacs and Higgins JJ. dissenting), that in the case of such an officer no "right," within the meaning of sec. 84 of the Constitution, to be required to resign before being removed for incapacity was conferred by sec. 28 of the *Civil Service Act 1874* (S.A.), and therefore that such an officer might, under sec. 67 of the *Commonwealth Public Service Act 1922*, be removed from the Public Service without first being required to resign.

DEMURRER.

An action was brought in the High Court by Thomas Andrew Bradshaw against the Commonwealth. By his statement of claim the plaintiff alleged, in substance, that from 24th June 1878 until

* Sec. 28 of the *Civil Service Act 1874* (S.A.) provides that "the Governor may require any officer, who has become incapacitated for the performance of his duties, to resign his office, and, in

the event of non-compliance, may remove such officer, who shall thereupon be entitled to the compensation provided by this Act."

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1st March 1901 he was an officer in the Public Service of the Province of South Australia, and at the latter date was employed in the Postal Department as an officer of the fourth class in charge of a telegraph station; that on 1st March 1901 the Postal Department of South Australia was taken over by the Commonwealth, and the plaintiff was thereupon transferred to the Public Service of the Commonwealth and thereafter until 12th July 1924 was continuously employed therein; that about 9th July 1924 he was notified that the Public Service Board had retired him from the Public Service of the Commonwealth as from 12th July 1924 under the provisions of the *Commonwealth Public Service Act* 1922, and that in accordance with that notice he was actually retired or removed from his office. The plaintiff claimed declarations that the order or certificate of the Public Service Board purporting to remove or retire him from the Public Service of the Commonwealth was null, void and inoperative, and that notwithstanding any such order or certificate he continued to be an officer of the Public Service of the Commonwealth and entitled to the remuneration and emoluments of such an officer. Alternatively he claimed damages for wrongful dismissal.

The material portion of the defence was as follows:—“(4) On and shortly before 9th July 1924 the plaintiff became and now is and was at all times material to this action incapacitated for the performance of his duty and the plaintiff appeared to the Board of Commissioners and the Chief Officer for the State of South Australia to be incapacitated for the performance of his duty and inefficient and incompetent and unfit to discharge and incapable of discharging the duties of his office efficiently and the said Board thereupon after report from the Chief Officer and after investigation into the circumstances retired and removed the plaintiff from the Commonwealth Service from 12th July 1924 the date specified by the Board for that purpose. (5) The power or function to remove or retire the plaintiff as an officer of the Civil Service of South Australia existed at the establishment of the Commonwealth and was then vested in the Governor of South Australia and such power or function was in respect of a matter which under the Constitution passed to the Executive Government of the Commonwealth and

such power or function became vested in the said Board of Commissioners which said Board was at all times material to this action the authority exercising and was empowered to exercise the power or function of removal or retirement of the plaintiff from the Public Service.”

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The plaintiff demurred to those paragraphs on the grounds, substantially, that the facts alleged in par. 4 would not in law warrant the Board of Commissioners in retiring and removing the plaintiff in the manner therein set out or at all and would not warrant the actual retirement or removal of the plaintiff in the manner and circumstances set forth in the statement of claim; that the power or function of removing or retiring the plaintiff on the grounds alleged in par. 4 never in law vested in the Board; that such power or function, by virtue of the *Civil Service Act* 1874 (S.A.), of secs. 70 and 84 of the Constitution and of sec. 45 of the *Commonwealth Public Service Act* 1922, became and remained vested in the Governor-General in Council and was exercisable by him only and in accordance with the terms and provisions of sec. 28 of the *Civil Service Act* 1874.

The demurrer now came on for argument.

Keating, for the plaintiff. The plaintiff, as an officer retained in service of the Commonwealth on the transfer of the Post and Telegraph Department in March 1901, preserved his existing rights as established at that time by the law of South Australia (The Constitution, sec. 84; *Le Leu v. Commonwealth* (1)); and the Parliament of the Commonwealth could not diminish those rights (see *Lucy v. Commonwealth* (2)) except for offences and similar causes. The plaintiff's tenure of office under the *Civil Service Act* 1874 (S.A.) was for life, subject, under sec. 28, to removal for incapacity by the Governor in Council (*Language of Acts Act* 1872 (S.A.), sec. 16; *Acts Interpretation Act* 1915 (S.A.), sec. 23). On the transfer of the Department to the Commonwealth the power or function of removal under sec. 28 became vested in the Governor-General in Council (sec. 70 of the Constitution), so that the plaintiff

(1) (1921) 29 C.L.R. 305, at pp. 311,
314.

(2) (1923) 33 C.L.R. 229, at pp. 253,
254.

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 1925. in Council. Such a form of removal involved the restraints imposed
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 BRADSHAW on the expression of the will of the Crown by the interposition of  
 v. responsible Ministers (*Anson's Law and Custom of the Constitution*  
 THE Vol. II., Part I., p. 28). The Crown has no choice as to the form  
 COMMON- in which its will may be expressed if the law requires it to be given  
 WEALTH. in a particular form. The plaintiff preserved the right to the  
 ~~~~~ continuance of the check or restraint upon his removal involved in  
 the interposition of responsible Ministers. The Commonwealth
 Parliament could not diminish that right. Under sec. 28 of the
Civil Service Act 1874 (S.A.) the plaintiff could not be removed
 without first being called upon to resign. The right to the fulfilment
 of that condition precedent to his removal was one of the rights
 preserved to the plaintiff by sec. 84 of the Constitution, and sec. 67
 of the *Commonwealth Public Service Act* 1922 does not provide for
 any similar condition.

Owen Dixon K.C. (with him *C. Gavan Duffy*), for the defendant.
 Sec. 67 of the *Commonwealth Public Service Act* 1922, on its proper
 construction, applies to all officers of the Public Service including
 those taken over with the transferred Departments. There is
 nothing in the rest of the Act to cut down that construction. Sec. 84
 of the Constitution preserves the substantive rights of such officers,
 that is, rights of such a character as to connote some correlative duties
 in the Governor in Council of the State. If such a right existed, secs.
 70 and 84 of the Constitution operate to transfer the correlative duty
 to the Governor-General in Council or whatever other authority may
 for the time being be exercising similar powers in the Commonwealth.
 Under secs. 67 and 51 (xxxvi.) of the Constitution the Common-
 wealth Parliament has power to provide what persons shall perform
 any functions which are involved in the removal of an officer. The
 plaintiff had no right preserved to him by sec. 84 of the Constitution
 to be requested to resign. There is no difference in substance
 between retiring an officer under sec. 67 of the *Commonwealth Public*
Service Act and calling upon him to resign and retiring him if he
 does not. The preservation of existing and accruing rights does
 not mean the preservation of the forms by which an officer may

be retired. Secs. 25-28 of the *Civil Service Act* 1874 (S.A.) show that removal and resignation are the same thing, and they have the same meaning in sec. 67 of the *Commonwealth Public Service Act*. Sec. 84 of the Constitution has nothing to do with the formal steps to be taken for bringing about the retirement of an officer.

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*Keating*, in reply. Sec. 67 of the *Commonwealth Public Service Act* 1922, if it applies to the plaintiff, does so only subject to sec. 84 of the Constitution. The right of which the plaintiff was deprived, even if procedural only, was substantial. An option of resigning, rather than of being removed *in invitum*, is a recognized substantial advantage.

*Cur. adv. vult.*

The following written judgments were delivered :—

Nov. 2.

KNOX C.J. In this action the plaintiff sues the Commonwealth (a) for a declaration that the order of the Public Service Board purporting to remove him from the Public Service of the Commonwealth is null and void ; (b) for a declaration that notwithstanding such order he continues to be an officer of the Public Service, and (c) alternatively, for damages for wrongful dismissal from the Public Service.

The substantive defence set up by the Commonwealth is contained in pars. 4 and 5 of the statement of defence, which are in the words following :—[Pars. 4 and 5 of the defence were here set out.]

The plaintiff demurs to these paragraphs of the defence. The grounds of the demurrer are (1) that the power of removal, if any, was vested in the Governor-General and not in the Public Service Board ; (2) that under sec. 28 of the South Australian *Civil Service Act* of 1874 the power to remove an officer on the ground of incapacity could not be exercised until he had first been required to resign and had failed to do so ; that this provision conferred on the plaintiff a “right” within the meaning of sec. 84 of the Constitution to be required to resign before being removed for incapacity and that this “right” was preserved to him by that section.

The first ground is clearly untenable. It is true that by sec. 67 of the Constitution the appointment and removal of officers in



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the Public Service of the Commonwealth is vested in the Governor-General, but only "until the Parliament otherwise provides."

Parliament has now by sec. 67 of the *Commonwealth Public Service Act* 1922 provided otherwise by conferring on the Public Service Board the power to remove from the Service any officer who appears to the Board to be inefficient or incompetent or unfit to discharge or incapable of discharging the duties of his office efficiently. The allegation in the statement of defence that the plaintiff is such an officer is admitted by the demurrer, and it follows that the power to remove him from the Service is vested in the Board.

I think the second ground of the demurrer also fails. Sec. 28 of the South Australian *Civil Service Act* of 1874 provides that the Governor may require any officer who has become incapacitated for the performance of his duties to resign his office, and in the event of non-compliance may remove such officer. The question is whether sec. 84 of the Constitution preserves to the plaintiff the "right" to be required to resign his office before being removed from the Service. In my opinion the provisions of sec. 28 confer no "right" properly so called on the officer. The object of the section is rather to impose a disability on the officer by authorizing his removal from the Service in the event of his incapacity, and the provision that he may be required to resign is no more than a direction to the Governor as to the procedure to be observed in exercising the power conferred on him. The Commonwealth Parliament has by sec. 67 of the *Commonwealth Public Service Act* 1922 provided for the removal of an officer on the ground of incapacity, but has substituted for the preliminary request to resign prescribed by the South Australian Act an investigation into the circumstances by the Public Service Board. Incapacity in fact being established, or, as in the present case for the purposes of this demurrer, admitted, the power of removal comes into existence. Whether he is removed after being required to resign, or after being called on to show cause why he should not be removed, or after an investigation into the circumstances on which he has the opportunity of being heard, appears to me to have no effect on his substantial right, which is to remain in the Public Service until removed by the proper authority for some reason which in law justifies his removal. If it be conceded



that the power of removal for incapacity is properly vested in the Public Service Board, there is, I think, no substantial difference between the procedure prescribed by sec. 28 of the South Australian *Civil Service Act* and that prescribed by sec. 67 of the *Commonwealth Public Service Act*. The difference, such as it is, is merely one of form, and in my opinion the object of sec. 84 of the Constitution was not to provide for a pedantic compliance with forms, or to compel the Commonwealth to observe in each State the procedure prescribed by the laws of that State, but was to preserve the substantial rights of public servants who were transferred to the Public Service of the Commonwealth.

In my opinion the demurrer should be overruled.

ISAACS J. The only standard of the "rights" which are guaranteed to Commonwealth public servants who have been "retained" or "transferred," within the meaning of sec. 84 of the Constitution, is the Constitution itself. Sec. 84 is explicit and, except so far as it is affected by any other part of the Constitution, the "rights" therein referred to are *precisely* those, great and small, "existing or accruing" by State law at the moment of retention or transfer. No other interpretation would keep faith with the public servants on the one side, and the people of the Commonwealth and the States on the other.

One of the plaintiff's contentions is met by other provisions of the Constitution. He contends that no authority other than the Governor-General in Council could remove him from office. That contention is founded on sec. 70 of the Constitution. But there was a transitional provision to provide for the immediate administration by the Commonwealth of transferred Departments. Customs and Excise passed to the Commonwealth on its establishment, and therefore before any parliamentary provision could be made. In a lesser degree the necessity applied or might apply to subsequently transferred Departments. But sec. 67 of the Constitution invests the Parliament with power to do what it has done by sec. 67 of the *Commonwealth Public Service Act* 1922. The Public Service Board, therefore, was the competent authority to retire the plaintiff. The first contention fails.

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Then the plaintiff contends that his retirement was in breach of sec. 84, because the "rights he had under the South Australian *Civil Service Act* of 1874 were not observed." Sec. 28 says: "The Governor may require any officer, who has become incapacitated for the performance of his duties, to resign his office, and, in the event of non-compliance, may remove such officer, who shall thereupon be entitled to the compensation provided by this Act." The contention is that the summary ejection described in par. 4 of the defence deprived him of the right to remain in the Service unless in his case the terms of sec. 28 were adhered to. In adherence to what I have already said, I am bound to disregard any notion of whether the rights included in the South Australian Act are great or small. Whatever they are, the plaintiff is entitled to them all. It would, in my opinion, be unsafe for a Court to measure or weigh for itself the comparative importance of any right that is secured by sec. 84.

Now, to ascertain whether in 1924 the events predicated in sec. 28 could be insisted on if it were sought to terminate his service, we have to look back to 1901 just before the Postal Department was transferred. Bradshaw had, as has been held in previous cases in this Court, a right to be employed during his life, subject to statutory provisions for removal or dismissal. How far did sec. 28 limit that primary right? Suppose he were still in the State Service and the Governor assumed under sec. 28 to "remove" him without first requiring him to resign, would that have been lawful? In my opinion it would have been manifestly a wrong. The life tenure would have been defeated in fact by an unauthorized event. It would have been a wrong, not only technically, but substantially: technically, because in direct violation of the words of the section; substantially, as I conceive, for two reasons. The South Australian Parliament, in enacting the requirement of resignation and non-compliance therewith as a condition precedent to the power of removal, no doubt had its own good reasons. If the question arose under South Australian law, inquiry into reasons would obviously be unnecessary and also out of place. The words themselves would be controlling. *Prima facie* they are so now. But the Commonwealth's argument here was in effect: There is no substantial



difference between the combined operations required by sec. 28 of the State Act and the single operation of retirement under sec. 67 of the Commonwealth Act. That necessitates an answer. The first answer, I apprehend, and to my mind sufficient, is that they are *not the same*. The plaintiff is entitled to have the *same*, not something which a Court thinks “as good.” They are not even, in my opinion, substantially the same in the necessary sense. An operation which includes the possible resignation of the officer cannot be said to be substantially the same, as a legal condition precedent, as an operation which excludes the possibility of his resignation. But in a broader sense also the two things are not the same. Starting with the position that the public servant holds his office for life subject only (so far as this point is concerned) to lose it in the prescribed way in the event of incapacity, we have first of all to ask what is meant by “incapacity for the performance of his duties”—not of his “duty” as in par. 4 of the defence. If “incapacity” in that connection is held to mean total and absolute incapacity to perform any of his duties, that would, of course, have a material bearing on the trial. If, however, as I conceive the expression, “incapacity” in that collocation is elastic and covers a wide range—since duties vary in kind and importance—the matter is entirely different. Incapacity there may be, great or slight, partial or complete, temporary or permanent. Then, proceeding with the words of sec. 28, it says the Governor “may” require resignation. The power is discretionary only. But, even if exercised, there is, to begin with, the opportunity to the officer by resigning to go decently out by the door that is opened for him. He is not unnecessarily pushed out. But, though he does not comply, it is quite plain he has the opportunity of placing his case before the Crown and convincing it that the case is not one for the exercise of the further discretionary power of removal. He might show that his incapacity is not sufficiently serious or extensive, or so likely to be prolonged, as to call for his removal from the Service altogether. When we are cutting down what is held to be a life interest, the conditions of defeasance must be adhered to.

I am unable, therefore, to overcome the natural and primary effect of the words of sec. 28—which *prima facie* uphold the plaintiff's

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In my opinion the demurrer is good on the ground stated.

HIGGINS J. The plaintiff, who before Federation was an officer in the Postal Department of South Australia, was retained in the Service of the Commonwealth when the Department was transferred to the Commonwealth—1st March 1901; but on 12th July 1924 he was retired (removed) by the Commonwealth Board of Commissioners appointed in pursuance of the *Commonwealth Public Service Act* 1922. The plaintiff complains of this removal as wrongful, relying on sec. 84 of the Constitution. The Commonwealth in its defence (par. 4) alleges that the plaintiff was in fact incapacitated for the performance of his duty; and that, as he appeared to the Board to be incapable of discharging the duties of his office, the Board, as in pursuance of sec. 67 of the Act, after a report from the Chief Officer, and after investigation into the circumstances, retired the officer from the Commonwealth Service. The defence alleges also that before the transfer of the Department the Governor of South Australia had power to remove the plaintiff for incapacity (*Civil Service Act* of 1874 of South Australia), and that this power had passed to the Executive Government of the Commonwealth by sec. 67 of the Constitution, and is now vested by the Act of 1922 in the Board. The plaintiff demurs to this defence, and urges, in substance, (1) that under sec. 28 of the South Australian Act the Governor had no power to remove him for incapacity unless the Governor had first required him to resign, and he had failed to resign; and (2) that the power, if any, should have been exercised by the Governor-General and not by the Board.

The demurrer, of course, admits the facts stated in pars. 4 and 5 of the defence for the purpose of the argument; so that we must treat it as a fact that the plaintiff was in fact as well as in the opinion of the Board, incapacitated for the performance of his duty, and that the requirements of sec. 67 of the Act of 1922, if that section is valid and applicable to officers transferred with the Department, have been fulfilled. I assume, in favour of the Commonwealth, that sec. 45 of that Act does not apply to officers transferred with



the Department, but applies only to officers transferred without the Department (under the last clause of sec. 84 of the Constitution).

The difficulty is due to this much discussed sec. 84 of the Constitution. This provides (*inter alia*): "Any such officer who is retained in the service of the Commonwealth shall preserve *all his existing and accruing rights*, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State." There is no difficulty with regard to the pension or retiring allowance; the difficulty is as to the power of the Board to remove the officer at all.

I see no difficulty as to the power of removal being exercised by the Board instead of the Governor-General. Under sec. 67 of the Constitution, the appointment and the removal of officers are vested in the Governor-General in Council "until the Parliament otherwise provides." Under sec. 70, all powers and functions which at the establishment of the Commonwealth were vested in the Governor of a Colony vested in the Governor-General or in the authority exercising similar powers under the Commonwealth, as the case requires. The Board can do what the Governor of South Australia could have done; but could the Governor have removed this officer without requiring him to resign, and being met with a refusal?

Sec. 28 of the South Australian *Civil Service Act* 1874 expressly says that "the Governor may require any officer, who has become incapacitated for the performance of his duties, to resign his office, and, in the event of non-compliance, may remove such officer, who shall thereupon be entitled to the compensation provided by this Act." The undoubted effect of this section is that an officer who was incapacitated could not be removed from the Service unless and until he had been required to resign, and had failed to resign. The requirement to resign and the failure to resign were conditions precedent to the right to remove compulsorily. The officer had a right to keep the office until these conditions precedent had been satisfied. It has been held in *Le Leu v. Commonwealth* (1) that age without incapacity is not a ground under the South Australian Act

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for removal, and the right of the officer to hold his office notwithstanding advanced age was a right which the South Australian officer had preserved to him under sec. 84 of the Constitution. In my opinion, the officer had also the right under sec. 84 to hold his office even if he be incapacitated but had not been required to resign. Mr. *Dixon*, for the Commonwealth, urges that this right is not a substantial right, such as is protected by sec. 84; but the section makes no distinction between substantial rights and other rights. How should we be justified in creating a distinction which the Constitution has not made, expressly or by necessary implication? And what is meant by "substantial"? If the officer try to seek his livelihood in some other service, it might be much better for him to be able to say that he has resigned from the Government service rather than to say that he has been removed therefrom. It is no answer to say that this is a mere procedural right; it is a right of the officer which, even if it rested on mere sentiment, must be preserved to him. The distinction between being removed from office and being permitted to resign was well marked in sec. 32 of the South Australian Act of 1874, and it is retained in the section which was substituted for sec. 32—sec. 4 of Act No. 231 of 1881. Sec. 67 of the *Commonwealth Public Service Act* of 1922, if it applies to officers transferred with the Department (and it seems to apply—see definition of "officer" in sec. 7) is simply in conflict with sec. 84 of the Constitution and is invalid as to this officer. The Act is subject to the Constitution (sec. 51 of the Constitution).

In my opinion, the demurrer must be allowed.

RICH J. I agree that the demurrer should be overruled. On the facts admitted by the demurrer it appears that the plaintiff was before Federation an officer in the Public Service of the Province of South Australia. Subsequently he was transferred to the Service of the Commonwealth. On 9th July 1924 the plaintiff was retired by the Board from the Commonwealth Service on the ground of incapacity. The plaintiff claims that the power of retirement or removal was not vested in the Board but in the Governor-General. The Constitution, however, by secs. 67 and 51 (xxxvi.) empowers the



Parliament to provide for the removal of Public Service officers, and Parliament, by sec. 67 of the *Commonwealth Public Service Act* 1922, has "otherwise provided" and vested the power of removal in the Board—"the authority exercising similar powers" to those of the Province (sec. 70 of the Constitution). The plaintiff's other ground of demurrer is founded on sec. 28 of the *Civil Service Act* 1874 (S.A.). He claims that this section in effect conferred a right that he should first be required to resign his office before the power of removal was exercised. This right he maintains attached to his contract of service under the Commonwealth and was preserved or safeguarded by the Constitution and the law of the Commonwealth. But, in my opinion, the plaintiff's right was to hold office for life subject to incapacity at a certain salary and to receive the pension or retiring allowance permitted by the law of South Australia (sec. 84 of the Constitution), that is to say, the compensation provided by the *Civil Service Act* 1874, sec. 28. That section relates to the ending of any substantive right owing to incapacity. The method of formally effecting this ending, e.g., by resignation or dismissal, depending on whether the civil servant remained a State or became a Federal officer, has no effect on such ending.

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STARKE J. The plaintiff belongs to the class of persons whose rights were dealt with in *Le Leu's Case* (1) and in *Lucy's Case* (2). He was removed or retired from the Public Service of the Commonwealth as on 12th July 1924, according to the facts admitted in the pleadings; and the Commonwealth in its defence thus justifies that act: [Par 4 of the defence was here set out.] The plaintiff has demurred to this allegation.

Upon the transfer of the Post and Telegraph Department to the Commonwealth the plaintiff became subject to the control of the Executive Government of the Commonwealth. He was retained in the Service of the Commonwealth, and all his existing and accruing rights were preserved and he was 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 services with the State (Constitution,

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

(2) (1923) 33 C.L.R. 229.



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sec. 84). And in *Le Leu's Case* (1) it was held that an officer in the position of the plaintiff could not be removed except for incapacity or other cause specified in the South Australian Acts. That is the right preserved to him by the Constitution. But it was argued that the Civil Service Acts of South Australia of 1874 and 1881 gave him another right, namely, that he should be removed only in the manner allowed by sec. 28 of the 1874 Act. Sec. 28 is as follows: "The Governor may require any officer, who has become incapacitated for the performance of his duties, to resign his office, and, in the event of non-compliance, may remove such officer, who shall thereupon be entitled to the compensation provided by this Act." But that is not a right of the plaintiff: it is a power vested in the Executive authority of the State. And the Constitution has made other provisions for the exercise of the power of removal. The effect of sec. 67, sec. 51, pl. xxxvi. and pl. xxxix., and sec. 52 of the Constitution is that the power of appointment and removal of officers of the Public Service is conferred upon the Governor-General in Council until the Parliament otherwise prescribes and then as is so prescribed. The Constitution does not import into this power the restrictions contained in sec. 28 of the State Act but leaves the Commonwealth perfectly free to prescribe the manner in which the power of removal shall be exercised, subject only, so far as the plaintiff is concerned, to the right preserved to him by sec. 84 of the Constitution, namely, that he shall not be removed from office except for incapacity or other causes specified in the South Australian Acts. Now in sec. 67 of the *Commonwealth Public Service Act* (No. 21 of 1922) the Parliament has prescribed the method of removal of officers in case of incapacity as follows: "If an officer appears to the Board or the Chief Officer to be inefficient or incompetent or unfit to discharge or incapable of discharging the duties of his office efficiently, the Board may, after report from the Chief Officer, and after investigation into the circumstances, retire the officer from the Commonwealth Service from a date to be specified by the Board." The Commonwealth in its defence has pleaded facts bringing the plaintiff's case within this section. And it is to these



allegations that the plaintiff has demurred. But if the Commonwealth establishes the facts pleaded, then, in my opinion, it will establish a lawful justification for the removal of the plaintiff. The consequence is that the demurrer ought to be overruled.

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*Demurrer overruled with costs.*

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

B. L.