

[HIGH COURT OF AUSTRALIA.]

FLINT PLAINTIFF ;

AND

THE COMMONWEALTH DEFENDANT.

H. C. OF A. *Public Service—Officer—Transfer from State to Commonwealth—Pension—Amount—*
1932. *Whether liable to reduction—Amount of pension fixed by Constitution—The*
Constitution (63 & 64 Vict. c. 12), sec. 84—Financial Emergency Act (No. 10*
MELBOURNE, *of 1931), sec. 22 (2)*—Financial Emergency Act 1931 (Vict.) (No. 3961), sec. 13.**
Oct. 3.

—
Gavan Duffy
C.J., Rich,
Starke, Dixon
and McTiernan
JJ.

Where a Department of the Public Service of a State has been transferred to the Commonwealth, sec. 84 of the Constitution gives to an officer of the Department who has been retained in the service of the Commonwealth the right on retirement to a pension of the amount to which, if he had continued in the service of the State, he would have been entitled under the law of the State at the time of his retirement; and the amount cannot thereafter be reduced by Commonwealth or State legislation.

DEMURRER.

Arthur Loftus Sylvester Flint brought an action in the High Court against the Commonwealth of Australia claiming £53 17s. 11d. due from the defendant as superannuation allowance and a declaration that he was entitled to payment of a superannuation allowance at the rate of £337 18s. 4d. per annum.

*The Constitution, by sec. 84, provides:—"When any Department of the Public Service of a State becomes transferred to the Commonwealth, all officers of the Department shall become subject to the control of the Executive Government of the Commonwealth. Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the Public Service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the

abolition of his office. 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. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his

The statement of claim alleged :—1. On 1st December 1878 the plaintiff was appointed to an office in the Public Service of the State of Victoria and continuously held an office therein until the Department in which he held office was on 1st March 1901 transferred to the Commonwealth. 2. The plaintiff from the said 1st March 1901 continuously held office in the Public Service of the Commonwealth until his retirement therefrom on 11th January 1924. 3. The plaintiff on his retirement would have been a superannuated officer within the meaning of the *Civil Service Act* 1862 (No. 160) of the Colony of Victoria if his service with the Commonwealth had been a continuation of his service with the State of Victoria. 4. The average annual salary received by the plaintiff during the three years preceding his superannuation was £506 17s. 6d. 5. The retiring allowance which would be permitted by the law of the State of Victoria if the plaintiff's service with the Commonwealth had been a continuation of his service with the State would be £337 18s. 4d. per annum. 6. The defendant has since 18th July 1931 paid the plaintiff a retiring allowance at the rate of £279 2s. 5d. per annum and has refused and refuses to pay a retiring allowance at the rate of £337 18s. 4d. per annum. The plaintiff claimed £53 17s. 11d., the difference between an allowance at the rate of £337 18s. 4d. per annum and one at the rate of £279 2s. 5d. per annum for eleven months, and a declaration that the plaintiff was entitled to be paid by the defendant a retiring allowance of £337 18s. 4d. per annum.

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term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer."

The Victorian *Financial Emergency Act* 1931, which came into operation on 1st October 1931, provided by sec. 13 :—" Notwithstanding anything in any Act or any law to the contrary, on from and after the tenth day of July one thousand nine hundred and thirty-one and until the seventh day of July one thousand nine hundred and thirty-two, the rate of pension or superannuation or retiring allowance to which any person or his representatives is or are or becomes or

become entitled and which is or has been computed under Act No. 160 (and whether pursuant to section fifty-seven or section fifty-eight of the *Superannuation Act* 1928 or otherwise) and which is paid out of the consolidated revenue or the Superannuation Fund shall be and is hereby reduced as provided in the Second Schedule: Provided that no part of any such pension superannuation or retiring allowance with respect to which contributions under the Superannuation Acts have been made shall be reduced: Provided further that the pension superannuation or retiring allowance to which any such person or his representatives is or are or becomes or become entitled and

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The defendant admitted pars. 1 to 4 and par. 6 of the statement of claim and alleged:—"5. It admits that the retiring allowance which would be permitted by the law of the State of Victoria if the plaintiff's service with the Commonwealth had been a continuation of his service with the State would, up to 10th July 1931, be £337 18s. 4d. per annum: Save as aforesaid it denies each and every allegation contained in par. 5 of the statement of claim. . . . 7. By reason of the provisions of sec. 13 of the *Financial Emergency Act* 1931 of the State of Victoria and/or of sec. 22 of the *Financial Emergency Act* 1931 of the Commonwealth of Australia the plaintiff has since the said 10th July 1931 not been entitled to a retiring allowance at a higher rate than £279 2s. 5d. per annum. 8. The defendant has paid in full to the plaintiff any retiring allowance to which he is entitled in law."

The plaintiff demurred to the whole of the defence on the ground that the facts alleged did not show any ground of defence, and objected in law that on the proper construction of sec. 84 of the Constitution the plaintiff was entitled to such retiring allowance as would have been permitted by the law of the State of Victoria at the date of his retirement if his service with the Commonwealth had been a continuation of his service with the State of Victoria.

The demurrer was referred to the Full Court of the High Court for argument.

C. Gavan Duffy, for the plaintiff. The plaintiff's rights were settled, once and for all, either when he was transferred to the

which is comprised in any group specified in the Second Schedule shall not for the purposes of this Part be reduced below the amount thereof that would be receivable by him or them if the same were comprised in the group next lower in amount and such person or his representatives were entitled to the maximum pension superannuation or retiring allowance specified in the Second Schedule in respect of that lower group but less the reduction applicable thereto."

The *Federal Financial Emergency Act* 1931, which came into force on 20th July 1931, provides by sec. 22 (2):—"All payments of pensions or retiring allowances payable by the Commonwealth under section eighty-four of the

Constitution to any person who, having been transferred from the Public Service of a State to the Public Service of the Commonwealth, is entitled to retire, or has retired, from office on the pension or retiring allowance permitted by the law of the State as if his service with the Commonwealth were a continuation of his service with the State, shall be reduced by such percentages or amounts as are provided, from time to time, by or under any law of the State from the Public Service of which he was transferred to the Public Service of the Commonwealth, which would have been applicable to him if his service with the Commonwealth had been a continuation of his service with the State."

Commonwealth service or else when he retired from the Commonwealth service. Sec. 84 of the Constitution gives a definite and unalterable right to a pension, and any attempt to alter such right either by the Commonwealth or by a State is nugatory. The plaintiff had been receiving pension at the proper rate for some years prior to the enactment of the Federal and State Financial Emergency Acts. Sec. 84 of the Constitution means that all the rights of public servants were settled and measured once and for all when the officer came over from the State to the Commonwealth. The Constitution recognized an existing right, and such right was to be measured as at the time of the officer's transfer to the Commonwealth. At the time of the officer's transfer to the Commonwealth the Victorian Parliament ceased to have any power over the matter and the Commonwealth had no power to interfere as its powers were fixed by the Constitution. [Counsel referred to *Bond v. The Commonwealth* (1), *Le Leu v. The Commonwealth* (2), *Lucy v. The Commonwealth* (3) and *Bradshaw v. The Commonwealth* (4).]

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Wilbur Ham K.C. (with him *Fullagar*), for the defendant. The question should be answered in favour of the defendant: sec. 84 of the Constitution does not militate against this view. The Commonwealth has power to alter pension rights but not contrary to the provisions of the Constitution. There are two contending views at least: (1) whatever the rights of the officer were at the time of the transfer, they are crystallized, and even if they were conditional they could not be altered; (2) the rights which are preserved to the officer on his transfer are the rights which he would have if he had not been transferred. The latter is the correct interpretation. If the plaintiff had continued as an officer of the State, he would have retired under a State Act, and that position was always under the control of the Victorian Parliament and subject to alteration by it. The Victorian Legislature can alter the amount of the pension. Then sec. 84 of the Constitution takes up the Victorian Act as the measure of the officer's rights, and the Constitution itself says that the pension

(1) (1903) 1 C.L.R. 13, at pp. 21, 23. (3) (1923) 33 C.L.R. 229, at pp. 250,

(2) (1921) 29 C.L.R. 305, at p. 315. 252-254.

(4) (1925) 36 C.L.R. 585, at pp. 592, 597.

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that the officer is entitled to is what he would have received if he had remained in the Victorian Public Service. His rights to a pension are to be considered as if there had been no transfer at all and as though he had remained in the Victorian State Service all the time (*Bond v. The Commonwealth* (1) ; *Cousins v. The Commonwealth* (2)).

The following judgments were delivered :—

GAVAN DUFFY C.J. In this case we are all of opinion that the plaintiff ought to succeed on the demurrer.

Sec. 84 of the Constitution fixes the amount of the pension as that which the retiring officer would have enjoyed if up to the time of his retirement he had still remained in the service of the State. That, at all events, is the latest time at which the criterion of the amount of the State pension can apply.

The demurrer will be allowed with costs, and there will be judgment for the plaintiff as sought in the action.

DIXON J. I should like to add that, although sec. 84 of the Constitution presents a number of difficulties, in my opinion it gives to the transferred officer a constitutional right which cannot be affected by legislation of the Commonwealth or of the State. When the section says he “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,” it converts into a constitutional right a right which previously had rested upon the authority only of a statute of the State Parliament.

Demurrer allowed. Judgment in the action for plaintiff.

Solicitors for the plaintiff, *Tolhurst & Druce*.

Solicitor for the defendant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

(1) (1903) 1 C.L.R., at pp. 23, 24.

(2) (1906) 3 C.L.R. 529, at p. 535.