

[HIGH COURT OF AUSTRALIA.]

PEMBERTON PLAINTIFF ;

AND

THE COMMONWEALTH DEFENDANT.

H. C. OF A. *Constitutional Law—Transfer of State Public Service Departments to Commonwealth*
1933. *—Transferred officers—Preservation of “all existing and accruing rights”—*
Right to retire on pension which would be permitted by law of State—Hypothetical
MELBOURNE, *continuation of service with State—Officer having no pension rights at date of*
transfer—Pension rights subsequently conferred on State officers.—The Constitution
(63 & 64 Vict. c. 12), sec. 84—Commonwealth Public Service Act 1922-1931*
SYDNEY, *(No. 21 of 1922—No. 21 of 1931), sec. 45*—Superannuation Act 1928 (Vict.),*
*sec. 58.**
April 24.

Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

The plaintiff was appointed to the Post and Telegraph Department of Victoria after 24th December 1881 and before 1st November 1883. On 1st March 1901, when the plaintiff was transferred to the Commonwealth Public Service, there was no provision in the law of Victoria entitling officers appointed between those dates to a pension on their retirement from the Public Service of Victoria.

Held, by Rich, Starke, Dixon and Evatt JJ. (McTiernan J. dissenting), that in sec. 84 of the Constitution and sec. 45 of the Commonwealth Public Service

* Sec. 84 of the Constitution is as follows :—

“84. 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 term of service with the State bears to his whole term of service, and for the purpose of the calculation

Act 1922-1931 the words "which would be permitted by the law of the State" refer to the law of the State in force at the time of the transfer.

Held, therefore, by Rich, Starke, Dixon and Evatt JJ. (McTiernan J. dissenting) that the plaintiff was not entitled to take advantage of the Victorian *Superannuation Act* passed in 1925, the relevant provisions of which now appear in the *Superannuation Act* 1928 (Vict.), sec. 58, which makes provision for the payment of a pension to the officers of the State Public Service who were appointed during the above-mentioned period, upon their retirement.

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DEMURRER.

The plaintiff, Walter Pemberton, brought an action against the Commonwealth of Australia in which the statement of claim was as follows :—

1. The plaintiff was appointed to an office in a department of the public service of the State of Victoria, to wit, the Post and Telegraph Department after the commencement of Act No. 710 of the State of Victoria and before 31st December 1884 and was recorded in the first list (under sec. 25 of the *Public Service Act* 1883) of the said State of Victoria as corrected by the return published in the Government *Gazette* of 29th January 1886.

2. The said department of the Public Service of the State of Victoria became transferred to the Commonwealth on 1st March 1901.

3. The plaintiff on the said transfer was retained in the service of the Commonwealth and remained in such service until his retirement therefrom.

4. The plaintiff retired from the service of the Commonwealth on 13th March 1932 after having attained the age of sixty-five years.

his salary shall be taken to be that paid to him by the State at the time of the transfer.

"Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth."

* Sec. 45 of *Commonwealth Public Service Act* 1922-1931 is as follows :—

"45. Where any officer of the Public, Railway or other Service of a State, whether or not he was an officer of that

Service at the date of the establishment of the Commonwealth, was transferred to the Commonwealth Service before the commencement of this Act, he 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 from which he was transferred, if his service with the Commonwealth were a continuation of his service with the State."

* Sec. 58 of the *Superannuation Act* 1928 (Vict.) is as follows :—

"58. Notwithstanding anything in this Act the following provisions of this section shall apply with respect to any

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5. The average annual salary received by the plaintiff during three years preceding his retirement amounted to £492.

6. The plaintiff in accordance with the provisions of sec. 58 of the *Superannuation Act* 1928 of the State of Victoria, sec. 84 of the *Commonwealth of Australia Constitution Act* and sec. 45 of the *Commonwealth Public Service Act* claims to be entitled to a pension at the rate of £164 per annum.

7. The defendant has not paid and has refused to pay to the plaintiff any part of such pension.

8. The plaintiff claims (a) a declaration that he is entitled to the said pension ; (b) payment of £150 6s. 8d., the amount of pension now due.

The defendant, after making various admissions in its defence, alleged substantially that the plaintiff immediately prior to his retirement was contributing for six units of pension under the *Superannuation Act* 1922-1930 of the Commonwealth, and that the defendant had paid on and from 14th March 1932 to the plaintiff a retiring allowance under the said Act at the rate of £131 19s. per annum and had thereby paid in full to the plaintiff any pension or retiring allowance to which he was entitled by law. The defendant also demurred to the whole of the plaintiff's statement of claim on the ground that the facts alleged in such paragraphs did not show any cause of action, and alleged that a ground in law for the demurrer was that on a proper construction of sec. 84 of the Constitution of the Commonwealth and/or sec. 45 of the *Commonwealth Public Service Act* the plaintiff was not entitled to the pension or retiring allowance by sec. 58 of the *Superannuation Act* of the State of Victoria provided.

person who after the commencement of Act No. 710 (a) and before the thirty-first day of December One thousand eight hundred and eighty-four was appointed to an office in any department of the public service and was recorded in the first list (under section twenty-five of *The Public Service Act* 1883) as corrected by the return published in the *Government Gazette* on the twenty-ninth day of January One thousand eight hundred and eighty-six or classified in the first classified roll or in the supplementary roll to the first classified roll published under section fifty-one of the said Act or who on or

after the first day of November One thousand eight hundred and eighty-three and before the first day of July One thousand eight hundred and eighty-four was appointed to any office in the Railway Department and was recorded in the first or second list published under section thirty-eight of *The Victorian Railways Commissioners Act* 1883." ["(a) The Act 45 Vict. No. 710 (24th December, 1881) was an Act to abolish the payment of pensions or superannuation or other allowances in the case of persons thereafter entering the Public Service."]

Fullagar, for the defendant in support of the demurrer. The plaintiff was appointed after the Victorian Act No. 710 was passed. That Act abolished pensions and superannuation and other allowances to persons thereafter appointed to the public service of this State. When the plaintiff was transferred to the Commonwealth he had no pension rights whatever. By the Commonwealth *Superannuation Act* 1922-1930 the plaintiff is in receipt of a pension. Sec. 45 of the *Commonwealth Public Service Act* 1922-1931 carries the matter no further than sec. 84 of the Constitution and was intended to carry the same right only as sec. 84. After officers are transferred from a State department to the Commonwealth the State loses all right to legislate as to those officers. Their rights become crystallized as at the date of the transfer to the Commonwealth and an officer retires on his existing and accruing rights (*Cousins v. The Commonwealth* (1); *Blaney v. The Commonwealth* (2); *Lucy v. The Commonwealth* (3); *Bradshaw v. The Commonwealth* (4)). A State cannot impose an entirely fresh burden on the Commonwealth after an officer is transferred. Sec. 45 of the *Commonwealth Public Service Act* should not be given a different construction from sec. 84 of the Constitution. The right to retire must be taken as at the date of transfer.

C. Gavan Duffy, for the plaintiff, to oppose. The authorities are not of assistance on this point. This question was not decided in *Flint v. The Commonwealth* (5). The relevant provisions are sec. 84 of the Constitution and sec. 45 of the *Commonwealth Public Service Act* 1922-1931, where the words "accruing rights" are also used. The words "accruing rights" are at least as consistent with reference to the time of retirement as to the time of transfer. If everything had to be crystallized as at the date of transfer it would have been sufficient to use the words "existing rights" instead of the words "existing and accruing rights" in sec. 45 and in sec. 84. The pension rights should be fixed as at the date of retirement and not as at the date of transfer. Though it is impossible to say that the words "existing and accruing rights" cannot be read in the way suggested by the defendant, still that would not be a very appropriate

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(1) (1906) 3 C.L.R. 529, at p. 539.
(2) (1917) 23 C.L.R. 177, at pp. 181,
182.

(3) (1923) 33 C.L.R. 229, at p. 244.
(4) (1925) 36 C.L.R. 585, at p. 591.
(5) (1932) 47 C.L.R. 274.

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way to read them. The words "which would be permitted" in sec. 45 and in sec. 84 point to the date of retirement. The more natural meaning of the words "entitled to retire from office" &c. in sec. 45 and in sec. 84 is to look at the time at which the right is said to arise. No right arises until the time of retirement and then it may be a question whether the right was possessed or not. The whole of both these provisions is directed to the future and that points to the time of retirement. The officer's service with the Commonwealth should be regarded as a continuation of his service with the State, and he must be regarded as though he were carrying on his employment in the State, and the employment must be regarded as a continuing employment.

Fullagar, in reply. The expression "would be" in sec. 45 and in sec. 84 is conditional and does not necessarily point to a future time, and it would be natural for the legislature to use that expression when formulating a condition. It would be a remarkable result if the words "existing and accruing rights" were taken to relate to the time of transfer and the other words in the provisions were taken to refer to the time of retirement. There is support for the defendant's contention in the word "continuation" which means continuation at the time of his transfer. There is no State law applicable to this officer at the time of his retirement after his transfer to the Commonwealth. He is an "officer" within the meaning of sec. 7 of the *Commonwealth Public Service Act*.

Cur. adv. vult.

April 24.

The following written judgments were delivered:—

RICH AND DIXON JJ. Under the provisions now contained in secs. 150 and 151 of the Victorian *Public Service Act* 1928 persons employed in the public service of Victoria on 1st November 1883, except persons appointed since 24th December 1881, are entitled to superannuation or retiring allowance calculated under the *Civil Service Act* 1862 (No. 160). (See *Attorney-General (Vict.) v. Roberts* (1).) Persons employed in the service on 1st November 1883 but

(1) (1931) 46 C.L.R. 1, at pp. 8, 9, 13, 14, 19.

appointed after 24th December 1881 long complained of their exclusion from the benefits upon retirement given by the *Civil Service Act* 1862 (No. 160). By way of redress for this complaint, a provision was included by the Victorian Legislature in the *Superannuation Act* 1925, which confers upon officers of the Victorian public service, who were appointed after 24th December 1881 and before 1st November 1883, a right to a pension calculated according to a method which it prescribes. This provision is now sec. 58 of the *Superannuation Act* 1928.

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The plaintiff was appointed to the Victorian public service during the interval of time with which the State enactment deals. On 1st March 1901, however, when the Postal Department was taken over by the Commonwealth, he was transferred pursuant to sec. 84 of the Constitution to the Federal public service. He retired from the Commonwealth public service on 13th March 1932 having reached the age of sixty-five. He now claims that by virtue of sec. 84 of the Constitution, or sec. 45 of the *Commonwealth Public Service Act* 1922-1931, or both, he is entitled to receive from the Commonwealth the same pension as the State enactment of 1925 confers upon officers appointed within the period who remained in the service of the State.

His claim under sec. 84 of the Constitution depends on the interpretation to be given to the provision it contains that a transferred officer retained in the Federal service “ 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.”

The plaintiff construes the expression “ which would be permitted by the law of the State ” as referring to the law of the State in force at the time of retirement, that is at the time when his actual service with the Commonwealth ended and the hypothetical “ continuation of his service with the State ” would have ended.

The Commonwealth construes it as referring to the State law in force, at latest, at the time of transfer. The language is repeated in sec. 45 of the *Commonwealth Public Service Act* 1922-1931 where, owing to changes of tenses, there is a context which, perhaps, may be thought to give a little more support to the plaintiff’s construction.

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We think, however, that the language of sec. 45 of the Commonwealth statute should receive the same construction as sec. 84 of the Constitution upon which it is founded, and we do not think that our construction of sec. 84 should be influenced by the form of the Federal statute.

The words "preserve all his existing and accruing rights" must, of course, refer to rights acquired, or in process of acquisition, under the law in force before the transfer. "Those rights 'existing and accruing' were fixed when the Departments were transferred, and could have been there and then stated in writing. They neither increased nor diminished as the years went on. Their actual results were, of course, dependent in many cases upon time" (per *Isaacs J.* in *Lucy v. The Commonwealth* (1)).

On the one side, it is argued that because this result is produced by the words "existing and accruing rights," an expression large enough to include a right to retire upon a pension given by existing law, therefore the words which follow and expressly provide for pension rights must have a further operation and extend to rights which an officer, if he had never been transferred, might have acquired under future State law.

On the other side, it is said that the whole provision is coloured by the meaning of the words "existing and accruing" and that its policy was simply to ensure that no change of law attempted by State or Federal Legislatures after the transfer would affect the rights of the officer in the service from which he was transferred. The expression "would be permitted by the law of the State" appears to us to be equally appropriate whether "the law" means "the law of the State in force at the time of the transfer," or "the law of the State in force at the time of retirement." But there are, we think, general considerations which make the former construction the more probable. The objects of the provision were to provide for the transfer of officers, to safeguard the interests of public servants transferred, to impose upon the Commonwealth a direct responsibility to the officers, and to provide the distribution between State and Commonwealth of the burden of the payment of their pensions. The future relations of the officers to the Commonwealth were necessarily to be governed by Commonwealth law. But, in order

(1) (1923) 33 C.L.R., at pp. 243, 244.

that this law might not diminish the rights of the officer, the constitutional provision was included preserving existing and accruing rights. Neither State nor Commonwealth could lessen the officer's pension or other rights. Clearly the Federal legislature could increase them. The policy that sec. 84 discloses was not that the transferred officer should share the fortunes of the members of the service whence he was transferred: for no reduction in respect of remuneration, status, or pension in that service could affect him. Why should it have been intended to allow the State legislatures by their enactments to increase his pension rights? None of the objects of sec. 84 appear either to require or to suggest such a power. The salary paid to the officer at the time of transfer is expressly made the measure of the State's liability to the Commonwealth in respect of his pension. This reference and the limitation contained in the concluding paragraph which restricts its operation in the case of officers transferred individually, and not as part of a department, to those in the service of the State at the establishment of the Commonwealth, indicate that the responsibilities of the State to officers as at the inception of the Commonwealth were prominently in view. To allow the rights of the Commonwealth officers to accrue under future enactments of the State Parliament appears an anomalous arrangement. It is so at variance with the general character of the Federal system that the intention to include it in sec. 84 ought to appear with reasonable clearness before we adopt a construction producing such a result. Doubtless sec. 84 is a very special provision. Unlike the rest of the Constitution, it is directed to private rights. But it operates to control the exclusive power of the Parliament expressly given by sec. 52 (ii.) to legislate with respect to matters relating to transferred Departments. When the extent is in question to which the exercise of such a power is fettered and the words are equivocal, we should not adopt an interpretation which extends the restriction in preference to one which leaves the power less fettered, unless context or subject matter requires it by clear indications of that meaning. We think that neither context nor subject matter requires such a meaning but that, on the contrary, such indications as exist are against it.

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For these reasons we think that the expression “ which would be permitted by the law of the State ” in sec. 84 should be construed as relating to the law of the State in force at the time of transfer.

In our opinion the demurrer should be allowed.

STARKE J. In my opinion the demurrer in this case should be allowed.

In 1881, the Act No. 710 of the State of Victoria abolished pensions and superannuation and other allowances to persons thereafter appointed to the public service of that State. The plaintiff was appointed to an office in the Post and Telegraph Department of the State of Victoria after the passing of this Act and before 31st December 1884 and his name was recorded in a list kept by the Public Service Board of the State of Victoria, pursuant to the provisions of sec. 25 of the *Public Service Act* 1883, No. 773, of that State. That Department was transferred to the Commonwealth on 1st March 1901, and the plaintiff was retained in the service of the Commonwealth. By sec. 84 of the Constitution, any officer 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. But the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which the officer’s 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 *Public Service Act* of the Commonwealth 1922-1931, sec. 45, contains a similar provision, but it adds nothing, in my opinion, to the rights secured to the officer by the Constitution. It is thus clear that at the time of the plaintiff’s transfer to the Commonwealth he had no rights existing or accruing to any pension or retiring allowance under either the Constitution or sec. 45 of the *Public Service Act*.

In 1925, however, a *Superannuation Act* was passed in Victoria numbered 3408, and by sec. 58 any person who after the commencement of the Act No. 710 and before 31st December 1884 was appointed

to an office in any department of the public service and was recorded in a list kept by the Public Service Board of the State of Victoria pursuant to the *Public Service Act* 1883 of the State of Victoria was granted a pension if such person were an officer within the meaning of the Act and on or after 1st January 1926 retired on or after attaining the maximum age for retirement. The provision is now found in sec. 58 of the *Superannuation Act* 1928 of Victoria. But these Acts only grant pensions to persons being officers in the service of the State of Victoria. The plaintiff retired from the service of the Commonwealth on 13th March 1932 after having attained the age of sixty-five years, being the maximum age for retirement. And his claim is that the pensions granted by the *Superannuation Acts* of 1925 and 1928 of the State of Victoria are carried over and secured to him by the Constitution, sec. 84, and by sec. 45 of the *Public Service Act* of the Commonwealth. In other words, that his pension rights should be calculated on the State law in force at the date of his retirement, and not on that in force at the date of his transfer to the Commonwealth.

The words of the Constitution lend some colour to the argument, but I cannot think it right. Thus the State is to pay part of the pension, and for the purpose of ascertaining that part the officer's salary is taken as that paid to him by the State at the time of transfer. It strikes me as quite inconsistent with this plan that the State could by its legislation increase these pension rights after the officer was transferred to the Commonwealth, and yet be under no obligation to meet any part of the increased pension thus resulting. Again, such a power would constitute a serious inroad upon the power of the Parliament of the Commonwealth under sec. 52 of the Constitution to make laws with respect to matters relating to any department of the public service which is by the Constitution transferred to the Commonwealth. It must, of course, be admitted that the Parliament cannot alter the rights secured by sec. 84 to transferred officers, but express and clear, not ambiguous, language is required to confer rights that were not in existence at the time of transfer. And finally it strikes me as unusual, as a matter of constitutional practice and usage, that one legislative authority should have power to confer benefits upon officers under the control of another legislative

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authority, though it must be admitted that such a result has been reached under the arbitration power in the Constitution. The dominant words of the relevant provision of the Constitution refer to rights that are existing or accruing when the officer goes over to the Commonwealth, and the subsequent words are ancillary to and explanatory of those rights.

EVATT J. This demurrer raises a curious and interesting point as to the meaning of sec. 84 of the Constitution and sec. 45 of the *Commonwealth Public Service Act 1922*.

Each of these sections endeavours to secure special rights to officers in the public service of a State who are transferred to the public service of the Commonwealth.

Before the inauguration of the Commonwealth the plaintiff was an officer in the Post and Telegraph Department of the State of Victoria, that Department became transferred to the Commonwealth on March 1st 1901, and the plaintiff was retained in the service of the Commonwealth.

Sec. 84 therefore guaranteed to him the preservation of "all his existing and accruing rights." But, through circumstances which it is not necessary to elaborate, the plaintiff did not possess any existing or accruing right against the State of Victoria to the payment of either pension or retiring allowance.

But the plaintiff says, and for this he points to the second part of the constitutional guarantee, that, upon transfer, he became "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."

The plaintiff contends that although, at the date of his transfer, he had no inchoate right against the State of Victoria to be paid a superannuation allowance, the Victorian Legislature subsequently, in the year 1925, conferred upon Victorian public servants belonging to a class of which he was or had been one, the right to be paid a superannuation allowance; and that, as a consequence of this enactment of the State of Victoria in 1925, he became entitled upon his retirement from the Commonwealth public service in 1932 to be

paid precisely the same superannuation allowance as would have been payable to him had he always remained in the service of the State and been expressly included as grantee of the benefits conferred by the Victorian Act of 1925.

In his lucid argument, Mr. *Gavan Duffy* emphasized that sec. 84 looks to the time when the transferred officer will be leaving the service of the Commonwealth having then completed a term of service with both State and Commonwealth, and that the time when he becomes entitled to retire and the pension which he becomes entitled to receive, are only described in sec. 84 by reference to the law of the State from the service of which he was transferred. He said that the question was, what provision as to retiring age and pension would be permitted by the law of Victoria if the plaintiff had never left the service of the State and asked why should it be assumed that, when a question of retiring allowance arises in the year 1930, the relevant law of the State is that in force in the year 1901 instead of that in force in the year 1930.

I see no grammatical obstacle to reaching a conclusion that the law of a State to be applied in ascertaining the pension or retiring allowance of a transferred officer is to be that in force at the time of retirement. But there are very considerable difficulties in reaching such a conclusion if one pays regard to the general working out of the scheme of sec. 84.

When sec. 84 was drafted, it was probably recognized that the State authorities might increase the pension benefits of their officers after the transfer of some of the departments to the Commonwealth. For instance, it was open to the State to enact that their public servants should become entitled to retire at the same age upon a higher pension than was contemplated by the State laws of 1901 or at an earlier age at the same pension. It may be urged that, in the event of such legislation being passed by a State, a Commonwealth officer who had been transferred would have a genuine cause for complaint if he could truly say "Had I remained in the State service I would have been better provided for during the days of my retirement."

On the other hand, subsequent legislative action in relation to pensions might take the form of a decrease instead of an increase

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of benefit. In such a case the transferred officer would be driven to alter his ground and say "That decrease of benefit cannot affect me. I do not rely upon the positive provision as to pension and retiring allowance in sec. 84. I rely upon the preservation of my 'accruing rights' which are guaranteed by the first part of the sentence."

Now it is in the highest degree improbable that sec. 84 was so designed as to make the transferred officer bear the risk of the passing of subsequent State legislation cutting down or abolishing the right to be paid a pension or retiring allowance; yet, logically, if pension or retiring allowance was to be made dependent upon the law of the State at some future date, the possibility of reduction or abolition had to be reckoned with. In my opinion, "the law of the State" is the controlling factor for all purposes of pension and retiring allowance and I am forced to reject the suggestion that, in the case of a general reduction or abolition of pension benefits by the State, the officer may hark back to the phrase "existing and accruing rights." In other words, the provision as to retirement from office on pension or retiring allowance is specially framed by reference to State law upon the footing that the right to retire and to be paid a pension or retiring allowance is not included in the general preservation of "all existing and accruing rights."

As I think it is impossible to hold that the right to retire upon pension or retiring allowance can be unfavourably affected by a State law passed subsequent to transfer, the phrase "the law of the State" must mean the law of the State in force when the department becomes transferred to the Commonwealth and the officer is retained in the service thereof. This conclusion is supported by many practical considerations.

Great difficulties would arise in accepting the view that "the law of the State" means the law in force at the time of the individual officer's final retirement from the Commonwealth service. It is obvious that a legislature of a State would never, after the transfer of a department to the Commonwealth, pass a law saying "With reference to ex-officers of this State who were transferred to the Commonwealth service in 1901 they may retire at the age of 50 and enjoy a pension increased or reduced in the following manner."

Such a law is quite unthinkable in practice and would probably be deemed invalid by reason of sec. 52 (II.) of the Constitution which commits to the Commonwealth Parliament the exclusive power of regulating matters concerning transferred departments.

Difficulties arise whatever form subsequent State legislation may take. The Victorian *Superannuation Act* of 1925, upon which the present plaintiff relies, does not proceed to confer any right upon the plaintiff as such. Of course the State of Victoria was not concerned with transferred officers at all but was only concerned with some of its own officers who had not become transferred to the Commonwealth.

No doubt sec. 84 requires us to assume for certain purposes that the plaintiff's service with the Commonwealth was a continuation of his original service with the State. This provision compels us to add Commonwealth service to State service for the purpose of determining both the time when the officer's right to retire from office arises and the amount of pension or allowance payable. But it throws no light upon the meaning of the phrase "the law of the State." And it is quite in accord with the grammatical construction of the provision that the sole measure to be applied to the total length of service with State and Commonwealth is to be found in the State law existing at the time of transfer.

On ultimate analysis, the plaintiff's argument tends to defeat itself. For sec. 84 is attempting an answer to a supposed question of the transferred officer, namely :—"At what time shall I be entitled to retire from office ?" He is told by sec. 84 to look to the provisions of "the law of the State." "What law ?" he asks. "The law in force at the date of your retirement," he is told. "But I have not yet retired, and may elect not to do so," he replies. "Then look at the present law!" It follows that "the law of the State" cannot be the law in force at the moment of the officer's retirement, but at some earlier, undefined, and necessarily indefinable moment.

The only satisfactory solution of the problem is to refer to "the law of the State" in force at the time of transfer.

No doubt the State Legislature may, from its own funds, increase the pension rights of transferred officers when the latter have left the service of the Commonwealth. In such a case the transferred

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officers will look to the State itself for payment and cannot found themselves on sec. 84 of the Constitution.

The plaintiff's alternative argument based on sec. 45 of the *Commonwealth Public Service Act* is answered by the same considerations as those applicable to sec. 84. The words used in sec. 84 are almost identical with those in sec. 45. I am of opinion that the phrase "the law of the State from which he was transferred" which is used in sec. 45, refers to the law of the State in force when the officer was transferred from the State service to that of the Commonwealth. Upon that construction, the officer, as in the analogous case of sec. 84, knows precisely his own future rights. If he is remitted to the law of the State in force at the date of his retirement, what is known is replaced by something which is both unknown and unknowable.

In my opinion the demurrer should be allowed.

MCTIERNAN J. The plaintiff had been an officer of the Post and Telegraph Department of Victoria which became transferred to the Commonwealth on 1st March 1901 under sec. 69 of the Commonwealth Constitution. Pursuant to sec. 84 of the Constitution, the plaintiff became subject to the control of the Executive Government of the Commonwealth and was retained in the service of the Commonwealth. He retired on 13th March 1932 at the age of 65 years. He was appointed to the Post and Telegraph Department of Victoria after 24th December 1881 and before 1st November 1883. On the 1st March 1901 there was no provision in the law of Victoria entitling officers appointed during that period to a pension on their retirement from the Public Service of Victoria. But in 1925 the State Parliament made provision for the payment of a pension to the officers of the Public Service who were appointed during the above-mentioned period, upon their retirement. This provision is now contained in sec. 58 of the *Superannuation Act* 1928.

For the plaintiff it is contended that sec. 84 of the Constitution assures to him a pension equivalent to that payable under sec. 58 of the *Superannuation Act* of Victoria, whereas the contention made for the Commonwealth is that sec. 84 gives him no title to a pension to which he had no existing or accruing right at the time he became

an officer of the Commonwealth. In *Lucy v. The Commonwealth* (1), it was decided that the "existing and accruing rights" of any officer who was retained in the service of the Commonwealth were fixed when the department of which he was an officer was transferred to the Commonwealth. The general description "existing and accruing rights" is capable of including a right which is specially dealt with in sec. 84, namely, the right to retire and receive a pension. But the words which follow, namely, "and shall be entitled . . ." are capable of conferring an additional right. I think that they have this effect. If by adding "and shall be entitled" sec. 84 intended merely to make it clear that the "existing and accruing rights" included whatever right the officer may have had at the time of transfer, to retire and receive a pension, words such as "including his right" would have been more appropriate to express that intention. Moreover that part of the section consisting of the words "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," deals with a pension on the footing that the officer's service in the State and his service in the Commonwealth should be regarded as a continuous period of service in the State. The pension thereby assured should therefore, I think, be that permitted by the law of the State in force at the date of retirement from the service of the Commonwealth.

Sec. 52 (II.) of the Constitution confers power on the Parliament of the Commonwealth to legislate with respect to matters relating to any department of the Public Service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth. Sec. 84 is a restriction on that power. When a department became transferred to the Commonwealth the officers of the department became compulsorily transferred to the Commonwealth. It was, of course, just and reasonable to preserve their existing and accruing rights. But I think it was also just and reasonable, upon any proper consideration of the interests of these officers, not to defeat entirely any expectations they may have had of future benefits to be derived from their continuance in the Public

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H. C. OF A. Service of Victoria. If the contention of the Commonwealth be
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McTiernan J. correct as to the construction of sec. 84, it is plain that no attempt was made to give any effect to this consideration. What benefits, if any, an officer might derive in the future were, of course, entirely unknown. But the question whether State law would permit him to retire at a pension and at what rate, if he continued in the service of the State, is one which would probably not have been omitted from consideration. Upon the language of sec. 84 the view is open that in addition to the accruing and existing rights of officers at the time of transfer, this question was taken into consideration. The language of the section does suggest that one of its objects is to secure that any officer therein mentioned should not suffer a loss of pension during his retirement on account of his compulsory transfer to the service of the Commonwealth. Sec. 84 does, in my opinion, assure to the plaintiff the benefit of a pension equivalent to that provided by the *Superannuation Act* of Victoria, which was passed after his compulsory transfer from the State to the Commonwealth. In this view it is unnecessary to consider whether the plaintiff's claim is supported by sec. 45 of the *Commonwealth Public Service Act*.

The demurrer, should, in my opinion, be overruled.

Demurrer allowed with costs.

Solicitor for the defendant, *H. F. E. Whillam*, Acting Crown Solicitor for the Commonwealth.

Solicitor for the plaintiff, *Bernard Nolan*.

H. D. W.