[HIGH COURT OF AUSTRALIA.]

EDWARDS . . . . . APPELLANT
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1934-1935.

ADELAIDE, 1934, *Sept.* 20, 21; *Oct.* 1.

Starke J.

ADELAIDE, 1935, *Sept.* 18.

SYDNEY, *Dec.* 18.

Rich, Dixon Evatt and McTiernan JJ.

Public Service (Cth.)—Transferred department—Rights preserved to officer—Excess of officers—Abolition of office—Retirement from Public Service—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 67, 69, 70, 84—*Commonwealth Public Service Act* 1922-1931 (*No.* 21 *of* 1922—*No.* 21 *of* 1931), *secs.* 20, 29, 45—*Civil Service Act* 1874 (S.A.) (37 & 38 *Vict. No.* 3), *sec.* 14*.

E. was an officer of the Postal Department of South Australia when that department was transferred to the Commonwealth pursuant to sec. 69 of the Constitution. He remained in the Public Service of the Commonwealth until 1932. In March 1932 the office of telegraphist occupied by him at Adelaide was abolished, but he was retained in a temporary capacity as a telegraphist. In May 1932 the Board of Commissioners appointed under the *Commonwealth Public Service Act* 1922-1931 found that there was a greater number of officers classified as telegraphists employed in the telegraph branch in Adelaide than was necessary for the efficient working of that branch, found that E. was in excess, and, there being no position available for him in the Public Service of the Commonwealth, retired him from that service.

Held that the retirement was unlawful because it violated the rights under the *Civil Service Acts* (S.A.) which were preserved to E. by sec. 84 of the Constitution. His retirement was not the result of a diminution of the total number of officers in a department in accordance with sec. 14 of the *Civil*

* Sec. 14 of the *Civil Service Act* 1874 (S.A.) provides: "The Governor may from time to time diminish the total number and alter the distribution of the officers in the Civil Service in each department as circumstances may require: Provided that in case of retrenchment, the Governor may appoint any officer, whose office would thereby be abolished, to a lower class in the Service, without dispensing with his services altogether."

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Service Act 1874 (S.A.), and there was no other ground on which he could lawfully be retired.

Decision of *Starke* J. reversed.

APPEAL from *Starke* J.

An action was brought in the High Court by Albert Edward Edwards against the Commonwealth. The plaintiff claimed a declaration that he was entitled to retain his office of telegraphist in the Post and Telegraph Department of the Commonwealth Public Service until his death or removal in accordance with the *Civil Service Act* 1874 (S.A.) and the *Civil Service Amendment Act* 1881 (S.A.), a declaration that he had been wrongfully and unlawfully retired, and £2,565. The plaintiff, who was born in 1868, was appointed in 1882 to an office in the Civil Service of South Australia under the provisions of the *Civil Service Act* 1874 (S.A.). He continuously held an office in that service until 1st March 1901, at which time he was employed in the Post and Telegraph Department as a telegraph operator. On that date the department became transferred to the Commonwealth under sec. 69 of the Constitution, and the plaintiff became transferred to the Commonwealth Public Service. Thereafter, until 24th June 1932, he was continuously employed in the Commonwealth Public Service as a telegraphist. On 2nd March 1932 the office of telegraphist occupied by him at Adelaide was abolished by the Governor-General. He was thereafter employed in a temporary capacity as senior telegraphist practically continuously until April 1932, when he went on sick leave. On or about 26th May 1932 the Board of Commissioners appointed under the *Commonwealth Public Service Act* 1922-1931 found that there was a greater number of officers classified as telegraphists employed in the telegraph branch in the Postmaster-General's Department in Adelaide than was necessary for the efficient working of that branch, and found that the plaintiff was in excess, and, there being no position available for him in the Public Service of the Commonwealth, the board on 26th May 1932 retired him from the Public Service as from the close of business on 24th June 1932. The plaintiff claimed that no circumstances had arisen which, under

the *Civil Service Act* 1874 (S.A.) or the *Civil Service Amendment Act* 1881 (S.A.), would have justified the abolition of his office or his removal from the Service.

Ligertwood K.C. (with him *Brebner*), for the defendant.

Cleland K.C. (with him *Ward*), for the plaintiff.

Cur. adv. vult.

1934, Oct. 1.

STARKE J. delivered the following written judgment :—

In August 1882, Edwards, the plaintiff, was appointed an officer pursuant to the *Civil Service Acts* 1874 and 1881 of South Australia. He was employed in the Postal Department of that State as a telegraphist. In 1901 the Post and Telegraph Department of each State was transferred to the Commonwealth (Constitution, sec. 69). Edwards was retained in the service of the Commonwealth, and became subject to the control of its Executive Government (Constitution, secs. 67, 84). The Constitution also provided, by sec. 84, that any officer so retained in the service of the Commonwealth should preserve all his existing and accruing rights, and 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. Early in 1932 the Governor-General in Council abolished the office held by the plaintiff (*Commonwealth Public Service Act* 1922-1931, sec. 29). He was employed, however, in the Post and Telegraph Department of the Commonwealth in a temporary capacity as senior telegraphist, practically continuously from the date of the abolition of his office until April 1932, when he went on sick leave. In June of 1932 the Public Service Board of Commissioners, purporting to act in pursuance of the power contained in sec. 20 of the *Commonwealth Public Service Act* 1922-1931, retired him from the Public Service as from the close of business on 24th June 1932.

It was contended that the office was abolished and that the plaintiff (who was born in October 1868) was retired, simply on the ground of the plaintiff's age. And this Court has held that age, apart from

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incapacity or other cause specified in the Acts, is not a ground for removal from office of an officer subject or entitled to the benefit of the provision of the South Australian *Civil Service Acts* of 1874 and 1881 (*Le Leu* v. *The Commonwealth* (1); *Lucy* v. *The Commonwealth* (2); *Bradshaw* v. *The Commonwealth* (3)). The evidence, however, satisfies me that plaintiff's office was abolished and that he was retired because there were a greater number of officers of his classification employed in the Postal Department than was necessary for the efficient working of the department; and that, though some temporary employment was given him, no position was available for him in the Service.

It was also contended that the abolition of the plaintiff's office and his retirement from the Service necessarily infringed his "existing and accruing rights," preserved by sec. 84 of the Constitution and sec. 45 of the *Commonwealth Public Service Act* 1922-1931. But the provisions of sec. 20 of the *Commonwealth Public Service Act* apply, as *Isaacs* J.—rightly, I think—suggested in *Lucy* v. *The Commonwealth* (4), to all officers of the Public Service, subject to the rights preserved by the Constitution and by sec. 45 of the Act itself.

The question then is whether secs. 20 and 29 of the *Commonwealth Public Service Act* 1922-1931 impinge upon the "existing and accruing rights" of the plaintiff, preserved by the Constitution and sec. 45 of the Act. In my opinion they do not. Under sec. 14 of the South Australian *Civil Service Act* of 1874 power was expressly reserved to the Government to diminish from time to time the total number and alter the distribution of officers in the Civil Service in each department, as circumstances might require. The plaintiff had no absolute right to the preservation of his office, or to retention in the Service, if circumstances required that the office be abolished or the number of officers diminished. If the plaintiff had "a qualified or conditional life tenure," to use the language of *Higgins* J. in *Le Leu* v. *The Commonwealth* (5), then one of the conditions of his tenure was this reserved power of the State, or else an overriding power in the State to diminish its officers (*Bradshaw* v. *The Commonwealth* (3)). In other words, there was no right acquired by the plaintiff

(1) (1921) 29 C.L.R. 305.
(2) (1923) 33 C.L.R. 229, at p. 252.
(3) (1925) 36 C.L.R. 585.
(4) (1923) 33 C.L.R., at pp. 242, 243.
(5) (1921) 29 C.L.R., at p. 314.

under his appointment except a right which, from its inception, was subject to determination by diminishing the officers in the Public Service or abolishing their offices (*Reilly* v. *The King* (1)). *Bradshaw* v. *The Commonwealth* (2) establishes, in my opinion, that this power is, by virtue of the Constitution, vested in the Commonwealth, and is lawfully exerted in secs. 20 and 29 of the *Commonwealth Public Service Act* 1922-1931.

But it was suggested that the power could only be exerted in the same circumstances as those in which sec. 14 of the South Australian *Civil Service Act* 1874 could be exerted, or, as I understood the argument, that it could only be exerted if the circumstances required that the number of officers employed in the postal branch of the Public Service in South Australia should be diminished, or their offices abolished. The argument is untenable. It must be remembered that the officers were transferred to the Commonwealth, and entered its service ; so that, even if their tenure and conditions of office and the causes of removal or dismissal are established by reference to the provisions of the South Australian law, nevertheless that tenure and those conditions depend upon the Commonwealth law, and the causes of removal or dismissal must be applied and adapted in connection with the officers' service in the Commonwealth and not in connection with a service which has ceased to exist.

The action is dismissed with costs.

From this decision the plaintiff appealed to the Full Court. Before the appeal came on for hearing the plaintiff died, and an order was made on 18th April 1935 that the appeal be carried on and prosecuted by Sarah Edwards as executrix of his will.

Cleland K.C. (with him *Ward*), for the appellant. There was no power to dismiss the appellant at pleasure, and abolition of the office meant abolition of the officer. Whether the office was abolished or the appellant was dismissed, his rights as a transferred officer were not preserved but destroyed. Sec. 14 of the *Civil Service Act* 1874 (S.A.) ceased to apply when the appellant became a member of a different service. If it still applied, the circumstances here

(1) (1934) A.C. 176, at pp. 180, 181.

(2) (1925) 36 C.L.R. 585.

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were not such that any power of dismissal was exercisable or exercised. The condition of the appellant's life tenure was the exigencies of the South Australian Service, not of the Federal Service. When he was transferred to the latter service, the condition became impossible of fulfilment. The power conferred by sec. 20 of the *Commonwealth Public Service Act* 1922-1931 is not the same as the power conferred by the *Civil Service Act* 1874 (S.A.). If there are excess officers in the Commonwealth Public Service, the Constitution should be obeyed and officers other than transferred officers should be retrenched. *Reilly* v. *The King* (1) is distinguishable, because Reilly had no such statutory rights as has the present applicant.

Ligertwood K.C. (with him *Brebner*), for the respondent. The appellant was dismissed, not on account of his age, but because retrenchment became necessary in the Post and Telegraph Department. This distinguishes the present case from the cases of *Le Leu* v. *The Commonwealth* (2), *Lucy* v. *The Commonwealth* (3) and *Bradshaw* v. *The Commonwealth* (4). While the appellant was in the State Service, his tenure of office was subject to his liability to be dismissed under sec. 14 of the *Civil Service Act* 1874 (S.A.), if retrenchment became necessary. The power of dismissal in such circumstances was vested in the Governor of South Australia, and, upon the plaintiff's being transferred to the Commonwealth Service, this power of dismissal became vested in the Governor-General until Parliament otherwise prescribed (see sec. 67 of the Constitution). In the *Commonwealth Public Service Act* 1922-1931 Parliament has otherwise prescribed by establishing a special procedure for cases where retrenchment becomes necessary. This procedure is embodied in secs. 20 and 29, and was properly followed in the present case. Secs. 20 and 29 are a re-enactment in Commonwealth legislation of the provisions of sec. 14 of the State Act. Sec. 84 of the Constitution preserves the substantial rights of the transferred offices (see, per *Knox* C.J., *Bradshaw* v. *The Commonwealth* (5)). Looking at the substance of the matter, the plaintiff entered the Commonwealth Service subject to the possibility of retrenchment if the exigencies

(1) (1934) A.C. 176.
(2) (1921) 29 C.L.R. 305.
(3) (1923) 33 C.L.R. 229.
(4) (1925) 36 C.L.R. 585.
(5) (1925) 36 C.L.R., at p. 591.

of the Service required retrenchment. He was dismissed solely on the ground that his retrenchment became necessary and there was no other position in the Commonwealth to which he could be appointed.

Cleland K.C., in reply.

Cur. adv. vult.

1935, Dec. 18.

The following written judgments were delivered :—

RICH, EVATT AND MCTIERNAN JJ. The appellant had been a telegraphist in the Post and Telegraph Department of South Australia, and upon the transfer of this department to the Commonwealth he was retained in the service of the Commonwealth. By sec. 84 of the Constitution of the Commonwealth an officer in a transferred department, who thus passed into the service of the Commonwealth, became subject to the control of the Executive Government of the Commonwealth, but he also became entitled to preserve all his existing and accruing rights as an officer of the Civil Service of the State in which he was formerly employed. Sec. 84 converts into constitutional rights rights which had previously rested only on the authority of a State Parliament, and it is beyond the power of a State or of the Commonwealth to interfere with any existing or accruing rights which are so protected (*Flint* v. *The Commonwealth* (1), per *Dixon* J.).

The question for decision in this appeal is whether, by retiring the appellant from its service, the Commonwealth violated any existing or accruing rights to which he, as an officer of the Civil Service of South Australia, was entitled at the time of the transfer of the Post and Telegraph Department of that State to the Commonwealth. Such existing and accruing rights as the appellant enjoyed are to be ascertained by reference to the relevant provisions of the law of South Australia, which, in the present case, are to be found in the *Civil Service Acts* of that State (No. 3 of 1874 and No. 231 of 1881). In *Le Leu* v. *The Commonwealth* (2) it was said of these Acts : " They prescribe a definite statutory rule for the determination

(1) (1932) 47 C.L.R. 274, at p. 278. (2) (1921) 29 C.L.R., at p. 311.

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of contracts of service with the Crown operating under those Acts." In that case the Court held that their provisions were inconsistent with the right of the Crown to terminate a contract of service at pleasure. *Higgins* J., in discussing the operation of sec. 84 on these provisions of the law of South Australia, said: "'Preserve' is not a technical word; but it certainly implies *retain, keep intact or unimpaired*; and the right to retain existing rights, being without words of limitation, must be treated as a right to retain office for life, with such qualifications only as are imposed by the South Australian Acts" (1). It is clear that the rights of the appellant, which were preserved by sec. 84 of the Constitution, included the right to be employed in the service of the Commonwealth during his life, subject to removal or dismissal for some cause specified in those State acts (see *Lucy* v. *The Commonwealth* (2), per *Knox* C.J.). But neither in its defence nor in its amended defence does the Commonwealth say, in justification of the dismissal of the appellant, that a cause for retiring him, specifically provided for by the relevant law of the State, had arisen, and that he was retired for such cause. But circumstances are alleged and proved, which, it is submitted, not only satisfied the conditions requisite for dismissal under sec. 20 or sec. 29 of the *Commonwealth Public Service Act* 1922-1931, but also amounted to lawful ground for dismissal under sec. 14 of the *Civil Service Act* 1874 of South Australia. Sec. 14 is in these terms: "The Governor may from time to time diminish the total number and alter the distribution of the officers in the Civil Service in each department as circumstances may require: Provided that in case of retrenchment, the Governor may appoint any officer, whose office would thereby be abolished, to a lower class in the Service, without dispensing with his services altogether."

The safeguards provided by the Constitution for the preservation of the appellant's existing rights as a former officer of the Civil Service of a State require, in order that his dismissal from the Commonwealth service should be lawful, that there should be a strict adherence to the conditions upon which his employment in the Civil Service of such State could have been lawfully terminated. Mr. *Cleland's* first contention was that, as the power of dispensing

(1) (1921) 29 C.L.R., at p .314. (2) (1923) 33 C.L.R., at p. 238.

with the services of officers of the State was vested by sec. 14 of the State Act in the Governor of South Australia, sec. 84 of the Constitution precluded the exercise of that power by the Governor-General or the Board of Commissioners of the Public Service. Whether that contention be sound or not, the Commonwealth Parliament has not legislated expressly to give any Commonwealth authority the same power to retire former officers of the Civil Service of South Australia as that vested in the Governor of South Australia by sec. 14 of the *Civil Service Act* of South Australia. But it is not necessary to deal with Mr. *Cleland's* first contention because, in the present case, there is no complete or sufficient identity between the circumstances alleged and proved by the Commonwealth and the circumstances in which the Governor's power of dismissal under sec. 14 would arise. The circumstances alleged and proved by the Commonwealth, as justifying the dismissal of the appellant under sec. 20 of the *Commonwealth Public Service Act*, or the abolition of his office under sec. 29, are as follows: "On or about the 26th May 1932 the Board of Commissioners appointed under the said *Commonwealth Public Service Act* found that there was a greater number of officers classified as telegraphists employed in the telegraph branch in the Postmaster-General's Department in Adelaide, South Australia, than was necessary for the efficient working of that branch and found that the plaintiff was in excess and there being no position available for the plaintiff in the Public Service of the Commonwealth the said board on the 26th May 1932 retired the plaintiff from the said Public Service as from the close of business on the 24th June 1932."

The purpose to be served by dismissal under sec. 14 is the diminution of the total number of officers in a department, whereas the appellant was dismissed for the purpose of relieving the Commonwealth service of an excess of officers of a particular classification. It is true that the result of dismissing telegraphists because there is an excess of such officers, or of dismissing a number of officers, regardless of their classification, is to diminish the total number of officers. Such is the result aimed at by sec. 14 of the *Civil Service Act* of South Australia. But when an officer's employment is liable to defeasance, if it is found that the number of persons of the

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classification to which he belongs is excessive, and no other position is available for him, his tenure is not the same as if his employment is liable to defeasance if it is found expedient to reduce the total number of officers in a department. The appellant's tenure was liable to the latter defeasance, not the former. He was liable under South Australian law to dismissal, if he were one of a surplus of officers, not of a surplus of telegraphists. It is not to the point to discuss which of these tenures would be the more secure. It follows that the dismissal of the appellant was a violation of his existing rights as an officer of the Civil Service of South Australia, and that his suit against the Commonwealth should succeed. The factors to be considered in estimating the damages, which in this view should be awarded, are set out in the judgment of *Knox* C.J. in *Lucy* v. *The Commonwealth* (1).

The appeal should be allowed.

DIXON J. The question upon this appeal is whether an officer, who had been transferred from the Civil Service of South Australia, was unlawfully deprived of his office in the Public Service of the Commonwealth. He was employed in the South Australian Post and Telegraph Department, which was transferred to the Commonwealth under sec. 69 of the Constitution. Under the law of South Australia he was not liable to retirement at any specified age. Under that law he was entitled to remain in the Civil Service of the Province until he was removed by the Governor in Council for incapacity, or dismissed by him for misconduct, or was convicted of felony, or became insolvent, or until the Governor in Council, in the exercise of a statutory power to diminish the total number and alter the distribution of the officers in the Civil Service in each department, might abolish the office held by him and thereupon dispense with his services altogether (see *Civil Service Act* 1874 (No. 3) (S.A.), secs. 14, 24, 25, 26 and 28 ; *Language of Acts Act* 1872 (No. 9) (S.A.), sec. 16 ; *Le Leu* v. *The Commonwealth* (2) ; *Lucy* v. *The Commonwealth* (3) ; *Bradshaw* v. *The Commonwealth* (4)).

Sec. 84 of the Constitution provides that, when a department of a State is transferred to the Commonwealth, all the officers of the

(1) (1923) 33 C.L.R., at p. 239.
(2) (1921) 29 C.L.R. 305.
(3) (1923) 33 C.L.R. 229.
(4) (1925) 36 C.L.R. 585.

department shall become subject to the control of the Executive Government of the Commonwealth. It also provides that, if any officer is retained in the service of the Commonwealth, 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 if his service with the Commonwealth were a continuation of his service with the State.

Under sec. 70 of the Constitution, in respect of matters which pass to the Executive Government all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in any authority of a Colony, shall vest in the Governor-General, or in the authority exercising similar powers under the Commonwealth, as the case requires. Sec. 84 and this section together are open to the meaning that a transferred officer, who under the law of the Colony could lose office only by the action of the Governor in Council, became subject to the control of the Executive Government of the Commonwealth, but otherwise preserved his rights in the sense that he had the same rights against the Commonwealth as he had had against the Colony and could lose office only by the like action of the Governor-General in Council. But sec. 67 of the Constitution says that, until the Parliament otherwise provides, the appointment and removal of officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council. This Court has decided that sec. 67 governs the operation of sec. 84 so that, when under the law of the State whence he comes a transferred officer was removable by the Governor in Council, the power of removing him does not become absolutely vested in the Governor-General in Council, but only until the Parliament otherwise provides (*Bradshaw* v. *The Commonwealth* (1)). The Parliament has provided that in some cases the power of removal or of compulsory retirement shall be exercised by the Board of Commissioners appointed under the *Commonwealth Public Service Act* 1922-1934; e.g., under secs. 55 (3) (*e*), 62, 63 (3), 66 and 67. Thus a transferred officer, who under State law was liable to removal on the ground of incapacity

(1) (1925) 36 C.L.R. 585.

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by the Governor in Council, may be retired lawfully from the Commonwealth Public Service on that ground by the Board of Commissioners (*Bradshaw* v. *The Commonwealth* (1)).

In the present case, the transferred officer was removed from the Commonwealth Public Service as a result of the abolition by the Governor-General in Council of the office he occupied and of his retirement afterwards by the Board of Commissioners. The permanent head of the Postmaster-General's Department forwarded to the Board of Commissioners a report that thirteen positions of telegraphists in Adelaide were in excess of requirements and a proposal that their offices should be abolished and that they should be placed on the unattached list and required to take furlough until it appeared whether any suitable work was available for them. To the report he attached a request that the board would be good enough to signify its concurrence in the proposal. Thereupon the board recommended for the approval of the Governor-General in Council that a list of thirteen offices in the telegraph branch be abolished. In each case the office was described as " telegraphist occupied by " a named person. The transferred officer with whom this appeal is concerned was named among them. The Governor-General in Council approved the recommendation and the abolition of the office was notified in the *Gazette*. For five months from the date of the recommendation, so approved, the transferred officer was employed at telegraph work which at the end of that time was discontinued, and the Board of Commissioners then retired him as an excess officer.

The power of the Governor-General in Council is found in Division 2A of the *Commonwealth Public Service Act* 1922-1934. The Division, which is intituled " Creation and Abolition of Offices " consists of one section, sec. 29. That section provides that the Governor-General in Council may, on the recommendation of the board, after obtaining a report from the permanent head, *inter alia*, abolish any office in any department. The power which the board purported to exercise is contained in sec. 20, which provides that, if at any time the board finds that a greater number of officers of a particular classification is employed in any department, or branch of a department, than is

(1) (1925) 36 C.L.R. 585.

necessary for the efficient working of that department or branch, any officer whom the board finds is in excess, if no position of equal or lower classification and salary is available for him, may be retired by the board from the Service.

Under sec. 14 of the South Australian *Civil Service Act* 1874, he was liable to loss of office in the event of the Governor's deciding upon a diminution of the total number of the officers in a department. Under the law of the State, he was not liable to retrenchment on the ground of abolition of office except as a result of the exercise of the power so conferred upon the Governor in Council. It was a condition of his service with the State amounting to an existing right preserved by sec. 84. As a transferred officer, he enjoyed the same protection from dismissal from the Commonwealth Service. Thus, except under the same condition, he could not lawfully be deprived of office on the ground of abolition of office and of excess of officers. Sec. 14 is as follows: "The Governor may from time to time diminish the total number and alter the distribution of the officers in the Civil Service in each department as circumstances may require: Provided that in the case of retrenchment, the Governor may appoint any officer, whose office would thereby be abolished, to a lower class in the Service, without dispensing with his services altogether." Loss of office under this provision is referred to in other parts of the legislation as removal on account of abolition of office (see sec. 32, and *Civil Service Amendment Act* 1881 (No. 231), sec. 4).

I construe sec. 14 as conferring upon the Governor a power to reduce the number of offices in any department of the South Australian Service if he should consider circumstances so require and thereupon to place any officer whose office is thus abolished in some other position in the Service or to retire him from the Service altogether.

In the application of the provision to transferred officers in the Commonwealth Service more than one question arises.

First, what is to be considered the "civil service" or the "department," the total number of which are diminished, or the officers of which are distributed? Is it the whole Commonwealth Service or department, or so much of it as is situated in South

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Australia ? The contention in support of the claim of the transferred officer is that, in formulating the question, the complete inapplicability of the section to the conditions of the Commonwealth Service is shown. It is said that the existence of the South Australian Service and the continuance in it of a department of which the officer is a member is essential to the operation of the provision : it cannot apply except to the diminution of the total number of that Service, or of a department of it, or to the distribution of officers therein. Thus, it is argued, the liability of the officer to retirement on the ground of the abolition of office ceased when he was transferred to the Commonwealth. This contention attributes to sec. 84 of the Constitution an effect which upon its true interpretation it does not appear to me to produce. The rights which it "preserves" are converted into rights against the Commonwealth. There is necessarily a change of identity of what may be called the employer who owes the corresponding duty. The service of that employer extends throughout Australia, and in that respect differs from the service whence the officer is transferred. The rights preserved are to be enjoyed in that service. The control of the Executive Government of the Commonwealth under which the section, in terms, places the transferred officer, and the transfer of the department of the State to the Commonwealth imply a transmutation of the rights preserved. Where they depend upon the exercise of authority, that authority necessarily ceases to be exercisable by those to whom State law commits it and by reference to the circumstances of the State Service. It necessarily becomes exercisable by reference to the circumstances of the Commonwealth Service, and those who are to exercise it are designated by or under the Constitution and governed by the law of the Commonwealth. The consequence is that sec. 14 operates as a measure of the transferred officer's rights against the Commonwealth, and, in applying it, the Commonwealth Service or department is to be considered for the purpose of diminution of numbers or the distribution of officers. This view is supported, if not required, by the reasons given in *Bradshaw* v. *The Commonwealth* (1) and *Lucy* v. *The Commonwealth* (2).

(1) (1925) 36 C.L.R. 585.

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

Secondly, by what authority or authorities under Commonwealth law may the conditions required by sec. 14 of the State Act be fulfilled so that a transferred officer will suffer a lawful loss of office and consequent retirement from the Commonwealth Service? This question is made difficult, not only because it is uncertain whether sec. 70 of the Constitution and not sec. 67 applies to a power exercisable by the Governor of a Colony to diminish the total number of officers in the service in each department, but also because, in exercising its legislative power under sec. 67, the Parliament has distinguished between the abolition of offices, a power it has committed to the Governor-General in Council alone, and the retirement of officers of a particular classification if found to be in excess of the number required for the efficient working of a department, a function which it has entrusted to the Board of Commissioners. The distinction cuts across the authority described by the South Australian provision. For that authority contemplates two steps. The Governor is to decide to diminish the number and to effect the diminution by abolishing offices; then he is to consider alternatives to dispensing with the individual officer's services altogether. No doubt secs. 20 and 29 of the Commonwealth statute were not enacted with sec. 14 of the South Australian Act in view. But the effect of the provisions contained in secs. 20 and 29 seems to be to distribute between the Governor-General in Council and the board the functions which the South Australian section assigned to the Governor in Council. The Parliament has not provided that offices may be abolished by the Board of Commissioners: on the contrary, it, by sec. 29, has expressly given that power to the Governor-General in Council. But, when the office of the transferred officer is abolished by the Governor-General in Council, then, under Commonwealth law, the board appears to be the authority which is to exercise the power of retiring him from the service. Neither under sec. 29 of the Commonwealth Act nor under sec. 14 of the State Act is the power to abolish an office treated as amounting in itself to a power to retire an officer from the service. In both Acts retirement from the service is treated as a consequence which may or may not be suffered by an officer whose office is abolished. The functions are, therefore, not incapable of separation, and I think

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that the law of the Commonwealth has effected a separation. Indeed *Bradshaw's Case* (1) seems almost to involve the consequence, in relation to sec. 14 of the South Australian Act, that sec. 20 of the Commonwealth Act validly gives to the board the power of removing or retiring an officer on the ground that his office has been abolished by the Governor-General in Council and there is a consequent excess of numbers. It appears to result from the interpretation given by this Court in *Bradshaw's Case* (1) to sec. 67 of the Constitution, in reference to sec. 67 of the *Commonwealth Public Service Act* and to sec. 28 of the South Australian *Civil Service Act* 1874.

It follows from these views that there was no necessary inconsistency between the conditions, on the one hand, which must be satisfied before the right of the transferred officer in this case to remain in the service of the Commonwealth could be defeated and, on the other hand, the procedure actually adopted in dealing with him It was an order of the Governor-General in Council which purported to abolish his office. It was by the action of the Board of Commissioners thereafter that he was in fact excluded from the Service. But, in order to defeat his right to remain in the Service, more was required than the exercise by the Governor-General in Council of the discretion conferred by sec. 29 of the Commonwealth enactment to abolish an office. No doubt, as a result of the Commonwealth statute, he could not lose office unless that discretion were exercised. But the rights given him by State law and preserved by sec. 84 of the Constitution necessitated the exercise of a very different discretion or power, as a condition precedent to the abolition of his office, if that abolition was to spell his retirement from the Service. The condition affecting the power of the Governor-General in Council to abolish the office occupied by the officer now in question was that the Governor-General in Council should form the opinion that circumstances required a reduction in the number of officers in the department, and that he should diminish them accordingly. No doubt the condition would be satisfied if the Governor-General in Council acted upon advice based upon that ground. But he did not in fact resolve to diminish the number of officers in the department and, so far as appears, he did not, in approving the abolition of the

(1) (1925) 36 C.L.R. 585

thirteen offices of telegraphist, act upon advice based upon the ground that circumstances required a reduction of the number of officers in the Service in the Postmaster-General's Department. The evidence is unsatisfactory as to the materials laid before the Governor-General in Council. Sec. 29 of the *Commonwealth Public Service Act* 1922-1934, under which he acted, requires a report from the permanent head. It does not appear that such a report was obtained unless it consist in a mere request which he made that the board should concur in a proposal made by the chief officer in South Australia that thirteen positions of telegraphists should be abolished as in excess of requirements and that the thirteen should be placed on furlough with a view of discovering other departmental work for them at a later date and so avoiding dispensing with their services. Neither the request of the permanent head nor the report of the chief officer of South Australia seems to have been placed before the Governor-General in Council. But the recommendation of the Board of Commissioners to the Governor-General in Council was actuated by this report. The proposal it makes, however, falls far short of diminishing the numbers of a department of the Service. It is said that the board's proposal could not be carried out without reducing numbers. It is true that the abolition of the offices of thirteen men does logically involve a reduction or diminution to that extent in the numbers of the department unless other work was found for the thirteen, or at the same time there was a corresponding accession to the Service. But the report is not directed to a consideration of the number of offices or officers in the department as a whole. It is concerned only with a surplus of telegraphists because of a falling off in demand for work of that kind. The board invoked the power given to the Governor-General by sec. 29 to give effect to the proposal. That power is exercisable without reference to the purpose of diminishing the numbers of the department. It extends to dispensing with the services of men performing particular work which is no longer required. In relation to officers transferred from South Australia such a ground would not be admissible. For the power given by the South Australian Act to the Governor is directed to the diminution of the numbers of a department or of the Service as a whole, not to the retirement of officers engaged in the

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performance of needless work of a particular kind. The crux of the case appears to me to lie in this distinction. In my opinion it cannot be said that the Governor-General really exercised the discretion which formerly belonged to the Governor of South Australia. The required opinion was not formed by him or on his behalf and he did not make any Order in Council or approve of any recommendation to effect a diminution in the numbers of a department of the Service. The retrenchment of the Service contemplated by sec. 14 of the State Act is quite a different thing from reducing the numbers performing particular work. The latter involves no consideration of the organization of the Service or the department as an entirety, of its numbers, or of the classification, relative positions, and arrangements of the personnel, and it is not concerned with the strength at which it should be maintained.

For these reasons I am of opinion that the right of the transferred officer in question to be retained in the Commonwealth Service was not defeated. That opinion is not in accordance with the view of the case taken by *Starke* J., who heard the suit. The point of departure is at what I have ventured to describe as the crux of the case. His Honor found "that plaintiff's office was abolished and that he was retired because there were a greater number of officers of his classification employed in the Postal Department than was necessary for the efficient working of the department; and that, though some temporary employment was given him, no position was available for him in the Service." The finding was made in reference to secs. 20 and 29 of the Commonwealth Act. For the reasons I have already given such a finding does not appear to me to support the conclusion that the conditions described by sec. 14 of the South Australian Act were complied with. Indeed the finding is almost inconsistent with that conclusion. For it restricts the reason of the abolition of the office of telegraphist to an excess of officers of the same classification. When his Honor turns to the conditions of tenure resulting from sec. 14 of the South Australian Act, he says that the officer had no absolute right to the preservation of his office or to retention in the Service, if circumstances required that the office should be abolished *or* the number of officers diminished. I am unable to agree that such an alternative was open to the

Commonwealth. The retirement of the transferred officer cannot be brought about by an abolition of office unless the abolition is a result of a diminution in the number of officers in the department resolved upon by the Governor-General in Council.

For these reasons I think the appeal should be allowed and judgment entered for the plaintiff's representative for an amount of damages to be ascertained.

Appeal allowed with costs. Judgment appealed from set aside. Order that the plaintiff's executrix who pursuant to order dated 18th April 1935 carried on and prosecuted this appeal after the death of the plaintiff be substituted as a party plaintiff in the suit and that judgment be entered for her as such executrix for an amount of damages to be ascertained and for the deceased plaintiff's and her own costs of the suit to this date. Further order that she be at liberty in the event of the parties being unable to agree upon such amount to apply to the Court or a Justice for the assessment of damages by the Court pursuant to Order XXXIII.

Solicitors for the appellant, *Cleland & Teesdale Smith.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner.*

C. C. B.