[HIGH COURT OF AUSTRALIA.]

McDONALD . . . . . PLAINTIFF;

AND

THE STATE OF VICTORIA . . . . DEFENDANT.

H. C. OF A. 1937.

SYDNEY, *Oct.* 11.

MELBOURNE, *Oct.* 25.

Evatt J.

Public Service (Vict.)—Retirement of officer—Pension—Amount—Liability to reduction—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 84—*Acts Interpretation Act* 1930 (*Vict.*) (*No.* 3930), *sec.* 2—*Financial Emergency Act* 1931 (*Vict.*) (*No.* 3961), *sec.* 13.

The plaintiff was appointed to the Department of Railways of Victoria in 1879, and remained in that service until he retired therefrom in 1923. Upon his retirement he became entitled, as an officer of the State of Victoria, to a pension at the rate of £360 per annum. The plaintiff claimed that certain deductions from his pension made by the defendant State under sec. 13 of the *Financial Emergency Act* 1931 (Vict.), had been wrongly made, on the ground that *Flint* v. *The Commonwealth*, (1932) 47 C.L.R. 274, established that sec. 13 was invalid in relation to the purported reduction of the retiring allowance payable to ex-officers of the State of Victoria who had been transferred to the Commonwealth and that, as the invalid part was not separable from the valid part, sec. 13 was wholly invalid.

Held:—

(1) That sec. 13 of the *Financial Emergency Act* 1931 (Vict.) did not apply to the case of pensions or allowances payable to transferred officers and, accordingly, was not invalidated in any respect by sec. 84 of the Constitution.

Flint v. *The Commonwealth*, (1932) 47 C.L.R. 274, explained.

(2) That even if, by reason of sec. 84 of the Constitution, sec. 13 of the *Financial Emergency Act* 1931 (Vict.) were partly invalid, the operation it otherwise had upon the pensions of persons in the position of the plaintiff was unaffected.

Effect of sec. 2 of the *Acts Interpretation Act* 1930 (Vict.) considered.

ACTION.

An action was brought in the original jurisdiction of the High Court by Lachlan McDonald of Longueville, near Sydney, New South Wales, against the Government of the State of Victoria in which the plaintiff claimed the sum of £294 15s. 7d., which, he alleged, had, between 10th July 1931 and 8th October 1936, been wrongly deducted and retained by the defendant from a pension payable to him, and he also claimed a declaration that at all material times he was and still is entitled to a pension at the rate of £360 per annum.

The plaintiff, on 1st May 1879, entered the service of the Government of the then colony of Victoria in the Department of Railways, and remained in that service until he retired therefrom on 1st January 1923. At the date of his retirement he occupied the position of Superintending Road Master in the Department of Railways of the defendant, and at no time was he transferred to, or employed in, the Public Service of the Commonwealth. Upon his retirement he became entitled, as an officer of the State of Victoria, to a pension computed under Act No. 160 of that State, the amount to which he became thus entitled being £360 per annum. From this amount deductions, totalling £294 15s. 7d., were made and retained by the defendant between 10th July 1931 and 8th October 1936 under the purported authority of sec. 13 of the *Financial Emergency Act* 1931 (Vict.) as amended by subsequent Acts.

Piddington K.C. and *Farrer*, for the plaintiff.

Fullagar K.C. and *McMinn*, for the defendant.

Cur. adv. vult.

Oct. 25.

The following written judgment was delivered :—

EVATT J. The plaintiff's claim is a curious one. It is based on the supposedly annihilating effect upon sec. 13 of the Victorian *Financial Emergency Act* 1931 of the decision of this court in *Flint* v. *The Commonwealth* (1). Thus it becomes necessary to explain the significance of *Flint's Case* (1).

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The present plaintiff is not a transferred officer at all, having been, throughout his service, an officer of the State of Victoria. He entered the Victorian Public Service in 1879 in the Department of Railways, and there remained until he finally retired in 1923. As an officer of the State of Victoria he became entitled to a pension computed under Act No. 160 of that State, the amount to which he was entitled on retirement being £360 per annum. Except for one contention, it is admitted that the reduction of the plaintiff's Victorian pension is clearly authorized by sec. 13 of the *Financial Emergency Act* 1931 of the State of Victoria, for that section provides expressly that pensions of a class to which the plaintiff's belonged should be reduced in accordance with the scheme set out in the second schedule of that Act. The plaintiff's single contention is that *Flint's Case* (1) establishes that sec. 13 is invalid in relation to the purported reduction of the retiring allowance of transferred officers, that it is impossible to sever the invalid portion of sec. 13 from the valid, and therefore sec. 13 is wholly invalid.

Sec. 84 of the Commonwealth Constitution provides that when public departments of a State have been transferred to the Commonwealth, the officers of the department transferred to the Commonwealth are entitled to preserve all existing and accruing rights and to retire on the allowance which would be permitted by State law if the officer's service with the Commonwealth were a continuation of his prior service with the State.

By sec. 84 the officer who is retained in the service of the Commonwealth after the transfer to it of the department is to have his pension or retiring allowance paid to him, not by the State whose servant he once was, but by the Commonwealth whose servant he now is. But the Commonwealth is entitled to obtain from the State concerned a proportionate part of the pension or allowance, the proportion being determined by relating the term of service of the officer with the State to his whole term of service. The case of *Pemberton* v. *The Commonwealth* (2) shows that, in determining the right to a pension or retiring allowance by reference to "the law of the State," sec. 84 intends to incorporate the law of the State as existing at the time

(1) (1932) 47 C.L.R. 274.

(2) (1933) 49 C.L.R. 382.

of the transfer of the department, not the law as at the subsequent date of the officer's retirement from the service of the Commonwealth.

Inasmuch as the rights conferred by sec. 84 are created by the Constitution, it is obvious that any State or Commonwealth law inconsistent with the right is void and inoperative to the extent of the inconsistency. *Flint's Case* (1) involved an elementary application of this principle.

There, a transferred officer, Flint, sued the Commonwealth of Australia in respect of the difference between an allowance of £279 per annum, paid to him by the Commonwealth, and an allowance of £337 per annum to which, in accordance with the law of the State from which he was transferred, he would have been entitled if his services had been retained by the State. The defendant Commonwealth attempted to justify the reduction of Flint's retiring allowance under both sec. 22 of the *Financial Emergency Act* 1931 of the Commonwealth and sec. 13 of the *Financial Emergency Act* 1931 of the State of Victoria. Both those Acts were passed as a result of a certain conference held in 1931 between ministers of the Commonwealth and ministers of the States.

As the decision of the court was that sec. 84 converted into constitutional rights the existing and accruing rights of an officer transferred to the Commonwealth service, so that neither the State nor the Commonwealth Parliament could lawfully interfere with any such rights, it became unnecessary to decide whether the relevant authority for the Commonwealth's reduction of Flint's retiring allowance was to be sought in the Act of the State of Victoria or in the Act of the Parliament of the Commonwealth. Therefore the court did not *decide* that any portion of sec. 13 of the *Financial Emergency Act* 1931 was invalid.

I am clearly of opinion that the plaintiff's case fails. In the first place, I am of opinion that sec. 13 of the *Financial Emergency Act* 1931 of the State of Victoria did not apply, and was not intended to apply, to the case of pensions or allowances payable to ex-officers of the State of Victoria who had become transferred to the Commonwealth. The State of Victoria was under no obligation to pay such pensions or allowances to its ex-officers. On its very terms, sec. 13

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applied only to pensions &c. to which a person became entitled, providing also (*a*) that it was or had been computed under Victorian Act No. 160 and (*b*) that it was paid out of the consolidated revenue or the superannuation fund. But in the case of a transferred officer, a pension or allowance is not paid out of the consolidated revenue or the superannuation fund of the State of Victoria. Both from the principle that the Victorian legislature was not concerned with the payment of retiring allowances or pensions to or in respect of its ex-officers, and from the terms of sec. 13, it is plain that sec. 13 had no direct application whatever to Flint or any other transferred officer. In my opinion, the only authority which could possibly be relied upon by the defendant Commonwealth for its action in reducing Flint's allowance was sec. 22 of the Federal *Financial Emergency Act* 1931. That section provided that payments of pensions and retiring allowances payable by the Commonwealth under sec. 84 of the Constitution should 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 . . . which would have been applicable to him if his service with the Commonwealth had been a continuation of his service with the State."

In *Flint's Case* (1) the application of such Act was that the Commonwealth legislature directed a percentage reduction by reference to such Acts of the State of Victoria as would have been applicable to Flint had he remained in the Victorian service. The direction in the Commonwealth Act necessitated reference to sec. 13 of the *Financial Emergency Act* 1931 of Victoria, so that the reduction of Flint's allowance was measurable in accordance with sec. 13. But sec. 13 had no independent and direct application to Flint's allowance, and was material solely because of the provision in sec. 22 of the Commonwealth Act which incorporated the laws of the State.

The result is that sec. 13 of the Victorian Act was not intended to apply to transferred officers, that the words of such section are not apt to describe the pensions payable to transferred officers, that, as *Pemberton's Case* (2) shows, the legislation framed by a State after the transfer of a department had nothing to do with the rights

(1) (1932) 47 C.L.R. 274. (2) (1933) 49 C.L.R. 382.

of the transferred officer (which are secured by sec. 84 in accordance with the law of the State as existing at the time of transfer), and that no one could expect such subsequent State legislation to deal directly with the rights of transferred officers. In sec. 13 of the Victorian Act we would never expect to find an attempt to interfere with such rights, and on examination we find that sec. 13 does not make any such attempt. On the other hand, as it is the Commonwealth which, under sec. 84, must pay the pension or allowance, provision for such payment is naturally to be found in Commonwealth legislation. It is found in the *Commonwealth Public Service Act* 1922-1932, sec. 45. Similarly the attempt, unlawful though it was, to reduce the payment by way of pension or allowance is also naturally looked for in Commonwealth legislation. When Commonwealth legislation is looked to we find that there, but only there, is the attempt made.

The result is that *Flint's Case* (1) does not establish that sec. 13 of the *Financial Emergency Act* 1931 (Vict.) was invalid in any respect whatever. As this is the sole foundation of the plaintiff's case, the case must fail.

If, contrary to the opinion I have expressed, sec. 13 were to be interpreted as applicable to ex-officers of the State of Victoria transferred to the Commonwealth, then the overriding direction in sec. 84 of the Constitution invalidates sec. 13 so far as it applies to such transferred officers. But in my opinion sec. 13 is not invalidated entirely, and the operation it otherwise had upon persons such as the plaintiff is quite unaffected.

Mr. *Piddington* argued that the words, "Notwithstanding anything in any Act or any law to the contrary," which introduce sec. 13, operate so as to exclude the application of sec. 2 of the Act 3930, which provides that, where an Act of the Parliament of Victoria is in conflict with the Constitution of the Commonwealth, it shall be construed subject to the Constitution and so as to preserve so much of the Victorian Act as would be valid if separated from the invalid portion. Sec. 2 is the now well-known salvage section. It was passed on December 31st 1930, and reproduces section 15A of the Commonwealth *Acts Interpretation Act* which became law several months earlier.

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With Mr. *Piddington's* argument I am unable to agree. The introductory phrase of sec. 13 applies only to Acts or laws which provide to "the contrary" of sec. 13. Sec. 13 provides for a reduction of pensions &c. in accordance with the percentage scheme of the second schedule. As I assume for the purpose of the present argument that sec. 13 is intended to apply to transferred officers, I must also assume that the phrase "any law to the contrary" includes sec. 84 of the Constitution, because sec. 84 provides to the contrary of sec. 13. But I am not bound to assume that the phrase "any Act" includes sec. 2 of the Act No. 3930, for such provision is in no sense to the contrary of anything provided in sec. 13. Sec. 2 of Act No. 3930 merely operates to preserve or salvage Victorian enactments which are *ultra vires* in some respects or aspects. Thus sec. 2 is aptly included in an *Interpretation Act*, and applies generally to all statutes. It operates upon sec. 13 only so far as there is some prior invalidation of sec. 13 by the Constitution, and, so to speak, rewrites sec. 13 in order to preclude it from having *any* operation contrary to the Constitution. No doubt sec. 2 can be excluded by appropriate language. But it would be strange to find such an attempt to exclude, and in my opinion there is no exclusion of it in sec. 13.

Mr. *Piddington* argued that in any event sec. 13 was so framed that sec. 2 of Act No. 3930 was not capable of application to it. He said that sec. 13 used "the same indistinguishable expression" wrapping up both lawful and unlawful subjects, referring to the judgment of *Isaacs* J. in *Roughley* v. *New South Wales*; *Ex parte Beavis* (1). He relied upon *Vacuum Oil Pty. Ltd.* v. *Queensland* [*No.* 2] (2) and *Australian Railways Union* v. *Victorian Railways Commissioners* (3), as well as upon the observations of *Isaacs* J. in *Committee of Direction of Fruit Marketing* v. *Collins* (4).

In my opinion, all these cases are very different from the present, and sec. 13 does not create any of the difficulties existing in the statutes there under consideration. From *Collins'* *Case* (4) it appeared that the committee was set up to control the marketing of "all fruit." Such a phrase was not capable of being "read down"

(1) (1928) 42 C.L.R. 162, at p. 190.
(2) (1935) 51 C.L.R. 677.
(3) (1930) 44 C.L.R. 319.
(4) (1925) 36 C.L.R. 410.

so as to exclude from control such fruit as was thought to be protected by sec. 92 of the Constitution. In other words, the Queensland legislature was intent upon a scheme of controlling the marketing of all fruit or none. No *tertium quid* was possible. In the *Australian Railways Union Case* (1), the court held that sec. 33 as well as sec. 34 of the amending Commonwealth *Arbitration Act* of 1930 was invalid because the two sections were regarded as essential portions of one statutory scheme which stood as a whole or, if part of it fell, fell as a whole. In such a case sec. 15A of the Commonwealth *Acts Interpretation Act* was thought to be incapable of operation. The feature of the *Vacuum Oil Case* [*No.* 2] (2) was that the oil companies were required to purchase such quantity of power alcohol as was measured by a fixed percentage of "every one hundred gallons of motor spirit sold." In the case of legislation so framed, it was impossible to exclude any portion of the total sales, for that would completely revise and rewrite the required statutory formula. In such case moreover, no provision such as sec. 15A was in force (Cf. *R.* v. *Burgess*; *Ex parte Henry* (3)).

But sec. 13 of the Victorian *Financial Emergency Act* is quite capable of the application to it of sec. 2 of Act No. 3930. Sec. 13 is more analogous to the words of the enactment considered in *Huddart Parker Ltd.* v. *The Commonwealth* (4), for it contains what *Dixon* J. called a "distributive description" (5). It is clear that sec. 13 was intended to apply to each and every pension or allowance answering the description of the words used in the section. The statutory reduction was intended to operate upon each individual pension as well as upon all pensions which fell within the description. Why should sec. 13 not apply to all pensions which are quite unaffected by sec. 84 of the Constitution? The words are perfectly capable of being read in a distributive sense. Moreover, the outstanding object of sec. 13 is to relieve government finance. It must be remembered that it is often easier to apply the "salvage" interpretation clause to State legislation than to Commonwealth legislation for the reasons suggested in *R.* v. *Burgess*; *Ex parte Henry* (6) by

(1) (1930) 44 C.L.R. 319.
(2) (1935) 51 C.L.R. 677.
(3) (1936) 55 C.L.R. 608, at p. 676.
(4) (1931) 44 C.L.R. 492.
(5) (1931) 44 C.L.R., at p. 513.
(6) (1936) 55 C.L.R., at pp. 675-677.

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my brother *McTiernan* and myself; further, even with regard to Commonwealth legislation, "there are occasions when sec. 15A may properly be applied, as, for instance in relation to words which, merely because they describe too widely certain classes of persons, places or things, extend beyond the limits of Commonwealth power, but which are readily capable of being 'read down' so as not to trespass beyond such limits" (1).

Therefore, even if, contrary to my opinion, sec. 13 is to be interpreted as being applicable to pensions payable to transferred officers of the State of Victoria, sec. 2 of the Act No. 3930 can lawfully and aptly be applied to such section, so that sec. 13 applies to all pensions payable to officers in the position of the plaintiff.

I am also of opinion that, apart from sec. 2 of the Act 3930, a similar conclusion would be reached by the general rule of construction that a statute should be read *ut res magis valeat quam pereat*. There is no difficulty whatever in reading sec. 13 as subject to such a constitutional provision as sec. 84. Sec. 84 applies to a group of officers and gives them constitutional rights which are incapable of being impaired by the legislation of a State. Sec. 13 is dealing with a similar subject matter, namely, pensions and allowances, and why should not such dealing be understood as being subject to, and not intended to be in derogation of, the overriding constitutional rights conferred by sec. 84? I can see no answer to such question.

For the above reasons, the action fails and it should be dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff, *Lamaro & McGrath*.

Solicitor for the defendant, *F. G. Menzies*, Crown Solicitor for Victoria, by *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1936) 55 C.L.R., at p. 676.