

[HIGH COURT OF AUSTRALIA.]

DAY APPELLANT ;
PLAINTIFF,

AND

HUNKIN RESPONDENT.
NOMINAL DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

Public Service (S.A.)—Appointment of officer for fixed term—Salary determined as prescribed by statute—Reduction of salary—Pastoral Acts 1904 to 1929 (S.A.) (No. 850—No. 1937), sec. 10—Public Service Acts 1916 to 1925 (S.A.) (No. 1259—No. 1716), sec. 27 (1)—Acts Interpretation Act 1915 (S.A.) (No. 1215), sec. 37.*

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Sept. 23, 26,
27 ;

Oct. 4.

Latham C.J.,
Rich, Dixon,
and McTiernan
JJ.

In reply to a circular inviting applications for the position of chairman of the Pastoral Board of South Australia at a salary of £1,000 per annum, D. applied for, and was subsequently appointed to, the position. The office was created by sec. 10 of the *Pastoral Acts 1904 to 1929* (S.A.), which made the holder subject to the provisions of the *Public Service Acts 1916 to 1925* (S.A.) except as to tenure of office, which was for a fixed term of five years. On D.'s appointment he was classified as an officer of the First Division in accordance with the provisions of the *Public Service Acts*. By sec. 27 (1) of the *Public Service Acts* the Governor was empowered to determine on the recommendation of the Public Service Classification and Efficiency Board the salary which should be paid to

* Sec. 27 (1) of the *Public Service Acts 1916-1925* (S.A.) provided :—" Every officer of the First Division shall be paid such salary as is determined by the Governor on the recommendation of the board : Provided that the board shall notify every such officer of its recommendation as to his salary by notice published in the *Gazette*, and the

Governor shall not determine the salary of any such officer until after the expiration of fourteen days from the time such officer receives notice of the board's recommendation. Any such officer may request the board to reconsider its recommendation as to his salary, and the board shall reconsider its recommendation accordingly."

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an officer of the First Division. Before a recommendation as to D.'s salary had been made by the board, D. was notified of his appointment "at the salary of £1,000 per annum." Subsequently, on the recommendation of the board, his salary was approved at that rate. Later, on further recommendations of the board, D.'s salary was twice reduced. D., by petition of right, claimed the difference between the salary actually received by him and a salary at the rate of £1,000 per annum.

Held that the power contained in sec. 27 (1) of the *Public Service Acts* was not exhausted in the case of each officer by the first determination of his salary under that section, and that the first determination of D.'s salary at £1,000 per annum did not fix it unalterably at that rate for the period of five years.

Decision of the Supreme Court of South Australia (Full Court) affirmed.

APPEAL from the Supreme Court of South Australia.

Theodore Ernest Day presented a petition of right, claiming the sum of £762 11s. 5d. for salary owing and unpaid to him as chairman of the Pastoral Board of South Australia. This office was created by sec. 10 of the *Pastoral Acts* 1904-1929 (S.A.), as enacted by sec. 3 of the *Pastoral Act Amendment Act* 1929 (S.A.), which provided: "The first members of the board shall be appointed under and be subject to the provisions of the *Public Service Act* 1916, except such as are inconsistent with this Act, and shall hold office for five years and shall give the whole of their time to the duties of their offices as such members. On 7th January 1930 applications were invited by circular for the position of chairman of the Pastoral Board at £1,000 per annum. The plaintiff applied for the position in the terms of the circular. The Public Service Commissioner recommended his appointment with classification in the Second Division under the *Public Service Acts*. The appointment of the plaintiff was approved by the Governor in Council, but it was determined that he should be appointed to the First Division. The appointment dated from 1st February 1930. By letter dated 6th February 1930 the plaintiff was informed of his appointment at the salary of £1,000 per annum, but no recommendation had then been made by the Public Service Classification and Efficiency Board. Such a recommendation was required by sec. 27 of the *Public Service Acts*, which was applicable to the plaintiff on his appointment. On 13th February 1930 the board recommended a salary of £1,000 per annum, and on 5th March the Governor

in Council approved of the recommendation. On 4th October 1930 the Governor in Council approved a recommendation of the board that the appellant's salary should be reduced to £900 per annum, and again on 19th September 1931 that it should be reduced to £800 per annum. The plaintiff claimed that a contract of service had been arrived at, including among its terms one providing that he should receive a salary of the specified amount; further, that the two subsequent recommendations as to the rate of his salary were invalid, and that, a determination having once been made, it could not be altered without his consent during his five-years' tenure of office; and that the effect of sec. 37 of the *Acts Interpretation Act* 1915 (S.A.) was simply to enable the Governor in Council to determine the salary on each occasion when a new appointment was made. The nominal defendant, on behalf of the State Government, replied that civil servants in general are not entitled to a fixed salary, that the plaintiff in particular was not so entitled and that sec. 37 authorized the determination from time to time of the salary of any public servant who was in the First Division.

Cleland J. held that the plaintiff had a contractual right to receive in consideration of the performance of his duties a salary of £1,000, neither more nor less, for each year of his term of service, and entered judgment in favour of the appellant for the sum of £762 11s. 5d. On appeal, the Full Court held that it was not a term of the contract that the plaintiff should receive a specified sum for his services and that it was within the power of the Public Service Classification and Efficiency Board from time to time to make different recommendations as to the rate of his salary. It therefore allowed the appeal.

From this decision the plaintiff appealed to the High Court.

Travers (with him *R. M. Hague*), for the appellant. A purely contractual relationship existed (*Gould v. Stuart* (1); *Carey v. The Commonwealth* (2); *Hunkin v. Siebert* (3)). The classification and reclassification provisions of the *Public Service Acts* 1916 to 1925 did not apply to the plaintiff, because he was not permanently employed and he was a First-Division officer. The letter notifying

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(1) (1896) A.C. 575.
(2) (1921) 30 C.L.R. 132.

(3) (1934) 51 C.L.R. 538; (1934)
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the plaintiff of his appointment was an acceptance of his offer which was made legally binding on the determination of his salary. There was never a contract for service at a salary to be fixed. The contract was not divisible, and the salary was an essential part of it (*Loftus v. Roberts* (1)). The reference in the letter to £1,000 per annum meant for the term of five years, as is shown by the preliminary negotiations, which are admissible (*Carey v. The Commonwealth* (2); *Bond v. The Commonwealth* (3)). There is a prerogative right in the Crown to grant an office for a term of years (*Chitty's Prerogatives of the Crown* (1820), p. 82), and it follows that there must be a prerogative right to grant a fixed salary for a definite time also (*Todd's Parliamentary Government in England*, 1st ed. (1867), vol. I., p. 375). The only ground on which the salary might be altered is under sec. 37 of the *Acts Interpretation Act* 1915. The word "determine," prima facie, involves finality. If the contract is for a fixed period, there is no power to redetermine the salary, for such a power is incidental to the power to dismiss (*Hunkin v. Siebert* (4)). Sec. 37 only gives the right to determine the salary at the end of the period; it does not give power to break an existing contract. The section was enacted only to rebut the common-law presumption that a power once exercised is extinguished (*Halsbury's Statutes of England*, vol. 18, p. 1003; *Halsbury's Laws of England*, 2nd ed., vol. 25, pp. 567, 568; *Farwell, Treatise on Powers*, 3rd ed. (1916), p. 306). The Governor could have reserved power to make a further determination as to the salary. Sec. 37 only applies if the occasion requires. The first exercise of the power to determine the salary created a right, and the occasion did not require that that right should be defeated (*Nelson v. James Nelson & Sons Ltd.* (5)). [Counsel also referred to *Sutton v. Attorney-General* (6); *Bank of New Zealand v. Simpson* (7).]

Hannan K.C. (with him *Healy*), for the respondent. The terms of the contract made with the plaintiff were entirely statutory.

(1) (1902) 18 T.L.R. 532.

(2) (1921) 30 C.L.R., at p. 137.

(3) (1903) 1 C.L.R. 13.

(4) (1934) 51 C.L.R. 538; (1934) S.A.S.R. 347.

(5) (1913) 2 K.B. 471; (1914) 2 K.B. 770.

(6) (1923) 39 T.L.R. 295.

(7) (1900) A.C. 182, at p. 187.

The contract differed only from an ordinary contract in the Public Service in that the term was fixed, that is, all the provisions of the *Public Service Acts* 1916 to 1925, except sec. 60, applied. The plaintiff's general position was substantially the same as that of a transferred civil servant, as in *Le Leu v. The Commonwealth* (1). The plaintiff could not sue for his salary until the board made its recommendation, and he was only entitled to what the board recommended and the Governor determined. His salary was never fixed for any term; it was fixed pursuant to a power, and not in accordance with a contract. There was no power to make any other contract except one permitting a variation of salary (*Rederiaktiebolaget Amphitrite v. The King* (2); *Young v. Williams* (3)). Sec. 27 of the *Public Service Acts* (as interpreted with the aid of sec. 37 of the *Acts Interpretation Act*) gives the power to fix the salary from time to time. There is nothing inconsistent here with the grant of an office for a term of years. The legislature in effect said that the plaintiff was to be governed by the *Public Service Acts* except in regard to the tenure of office.

[LATHAM C.J. referred to *Fletcher v. Nott* (4).]

The Governor cannot, without legislative authority, bind himself to pay a fixed salary for a term of years; this would prevent him from exercising the power to vary such salary from time to time and would be against public policy (*Rederiaktiebolaget Amphitrite v. The King* (2)). The Public Service Classification and Efficiency Board had to assess the value of the plaintiff's office and could not be fettered by the Governor or by any contract he might make with the plaintiff (*Nixon v. Attorney-General* (5)).

Travers, in reply, referred to *Holdsworth's History of English Law* vol. 10, at p. 657.

[DIXON J. referred to *De Dohse v. The Queen* (6) and *Dunn v. The Queen* (7).]

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

(2) (1921) 3 K.B. 500.

(3) (1916) 21 C.L.R. 145.

(4) (1938) 60 C.L.R. 55.

(5) (1931) A.C. 184.

(6) (1886) 66 L.J. Q.B. 422, n.; 3 T.L.R. 114.

(7) (1896) 1 Q.B. 116.

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The following written judgments were delivered :—

LATHAM C.J. The appellant, Theodore Ernest Day, presented a petition of right claiming a sum of £762 11s. 5d. for salary owing and unpaid to him as chairman of the Pastoral Board of South Australia. He was appointed chairman of the board for a term of five years. The Governor determined, under sec. 27 of the *Public Service Act* 1916 (S.A.), as amended by the *Public Service Act Amendment Act* (No. 2) 1925 (S.A.), that his salary should be £1,000 per annum. Later the Governor made other determinations reducing the salary first to £900 per annum and subsequently to £800 per annum. The plaintiff accepted the reduced salary without objection. After his term of office had expired he sought by his petition to recover the difference between the salary actually received and salary at the rate of £1,000 per annum. He succeeded before *Cleland J.*, but the Full Court set aside the judgment in his favour and ordered that the action be dismissed with costs.

The *Pastoral Act Amendment Act* 1929 (S.A.) provided for the appointment of a board to administer the *Pastoral Act*. Sec. 3 of the 1929 Act introduced the following sections into the *Pastoral Act* 1904 (S.A.) :—

Sec. 10: “The first members of the board shall be appointed under and be subject to the provisions of the *Public Service Act* 1916, except such as are inconsistent with this Act, and shall hold office for five years and shall give the whole of their time to the duties of their offices as such members.”

Sec. 11: “Every subsequent member of the board shall be appointed for such period and on such terms and conditions as the Governor determines.”

Thus, the first members of the board were appointed for five years. The statute does not fix a period of tenure in the case of subsequent members. Their period of office is to be determined by the Governor.

When the appellant was appointed chairman of the board he was appointed under and was subject to the provisions of the *Public Service Act* 1916, except in so far as those provisions were inconsistent with the *Pastoral Act* as amended. It is necessary, therefore, to ascertain the relevant provisions of the *Public Service Act* 1916. This latter Act was amended by the *Public Service Act Amendment*

Act (No. 2) 1925, which added to the 1916 Act the provisions which are important in this case. Sec. 5 of the 1925 Act established a Public Service Classification and Efficiency Board. One of the duties of this board was to make a classification of permanent offices in the Public Service (other than offices of the First Division) and to fix the maximum and minimum salary of the offices and amounts of annual increases. The Act also provided that the board should from time to time make such variations of and additions to the classification as alterations in the conditions and requirements of the Public Service rendered necessary (sec. 11b, inserted in the 1916 Act by sec. 5 of the 1925 Act). Sec. 25 of the Act as it now stands provides for four divisions in the Public Service. The First Division includes such officers as the Governor determines. The Second and Third Divisions include officers whose offices the board, in accordance with the Act, directs to be included in those divisions, and the Fourth Division includes all officers not included in the other divisions.

Sec. 27 provides that every officer of the First Division shall be paid such salary as is determined by the Governor on the recommendation of the board. Provision is made for reconsideration of a salary so determined, if the officer concerned requests reconsideration.

Sec. 28 contains provisions relating to annual increases up to the maximum in the case of offices in other divisions than the first.

Sec. 60 of the 1916 Act provides that nothing in the Act shall be construed or held to abrogate or restrict the power of the Crown under any other Act or at common law to dispense with the services of any person employed in the Public Service. Sec. 57 provides for forfeiture of office on conviction of a felony, and secs. 58 and 59 provide for dismissal, transfer or reduction in grade in cases of insolvency or incapacity. Sec. 54 provides for the investigation and punishment of offences mentioned in sec. 53 and for penalties for offences, including dismissal from office.

The facts of the case may be stated as follows:—The plaintiff was a member of the Public Service, holding the office of Surveyor-General. On 7th January 1930 applications were invited for the position of chairman of the Pastoral Board at £1,000 per annum.

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} sioner recommended his appointment with classification in the
DAY Second Division. The recommendation for appointment of the
v. plaintiff was approved by the Governor, but it was determined that
HUNKIN. he should be appointed to the First Division. The plaintiff was
Latham C.J. informed that he had been appointed at the salary named, but this
was done before any recommendation as to his salary had been
received from the Public Service Classification and Efficiency Board.
Such a recommendation was required by sec. 27 of the *Public Service Act*. On 13th February the board recommended a salary of £1,000 per annum, and on 5th March the Governor approved of the recommendation of the Board that the salary should be £1,000 per annum. The plaintiff discharged the duties of the office of chairman from 1st February 1930 for a period of five years.

On 4th October 1930 the board made a recommendation that the salary of the plaintiff should be determined at £900 per annum, and the recommendation was approved by the Governor. On 19th September 1931 the board made a further recommendation for the reduction of the plaintiff's salary to £800 per annum. This recommendation was also approved by the Governor.

The plaintiff contends that the two subsequent recommendations as to his rate of salary were invalid, and that, a determination having once been made under sec. 27, such determination could not be altered without his consent during his five-years' tenure of office. Before stating the contentions of the parties in greater detail it is desirable to refer to the *Acts Interpretation Act* 1915 (S.A.), sec. 37, which is in the following terms :

“Power given by any Act to do any act or thing, or to submit to any act or thing, or to make any appointment, shall be capable of being exercised from time to time, as occasion requires, unless the context, or the nature of the act or thing, indicates a contrary intention.”

It is contended by the Crown that this section authorizes the determination from time to time of the salary of any public servant who is in the First Division. The plaintiff, on the other hand, contends that the section only has the effect, in relation to sec. 27

of the *Public Service Act*, of enabling the Governor in Council to determine the salary on each occasion when a new appointment is made.

The *Pastoral Act*, sec. 10, makes the provisions of the *Public Service Act* applicable to the plaintiff with the exception of such provisions as are inconsistent with the *Pastoral Act*. The only provision of the *Public Service Act* which is so inconsistent is sec. 60, which provides that the Crown may dispense at pleasure with the services of officers. Sec. 60 is inconsistent with the provision in sec. 10 of the *Pastoral Act* providing for the holding of office for five years. No other provisions in the *Public Service Act* are inconsistent with the *Pastoral Act*.

The contention of the appellant is that, once the salary of an officer of the First Division has been determined under sec. 27, that determination, certainly unless otherwise expressed, is a determination relating to the whole period of office of the officer, in this case, to the period of five years for which he was appointed. The result of making the determination is to constitute a contract between the Crown and the officer (*Carey v. The Commonwealth* (1)). One of the terms of the contract in the present case therefore is, it is said, that the appellant's salary is to be £1,000 per annum during the whole of his period of office. Sec. 37 of the *Acts Interpretation Act*, it is urged, receives full effect if it is read as permitting a new determination upon a new appointment. It is contended that this provision does not enable the Crown to repudiate a term of a contract by which it has become bound. If a statutory provision enabled the Governor to make grants of land, and under that provision a grant of land was made, sec. 37 would not justify a revocation of the grant by the process of purporting to re-exercise the power of granting the land in a different manner, that is, by merely granting the same land to another person. The effect of the first grant would be that the grantee had acquired rights and had become the owner of property. Sec. 37 is not directed to anything more than the exclusion of the old rule that prima facie a power is exhausted when it has been exercised (*Halsbury's Laws of England*, 2nd ed., vol. 25, p. 567). The same principle must apply to contractual rights. Thus,

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(1) (1921) 30 C.L.R. 132.

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exercise of a power to determine the plaintiff's salary gave the plaintiff a right to receive that salary, namely, £1,000 per annum, while he held the office to which the salary was attached. Such a contractual right, it is urged, cannot be set aside or terminated by purporting to exercise over again, but in a different manner, the power upon which the creation of the right depended.

I accept the proposition that sec. 37 of the *Acts Interpretation Act* does not authorize the extinction of rights, whether proprietary or contractual, which have been brought into existence by the exercise of a statutory power. But there is a preliminary question which must be answered before this principle can be applied. That question, in the case of a contract, is: What are the terms of the contract which has been brought into existence?

The appointment authorized by the *Pastoral Act* is an appointment to the office of chairman of the Pastoral Board for a period of five years, but, except in relation to the period of appointment, the *Public Service Acts* apply to the chairman of the board. The chairman of the board is an officer of the First Division. In the case of officers of the Second, Third and Fourth Divisions, their salaries are determined and may be altered from time to time by the board under sec. 11 (b) of the Act as it now exists. Are the salaries of officers of the First Division, once determined under sec. 27, exempt from any corresponding possibility of alteration? If the determination of salary under sec. 27 prevents any alteration during the period of office, then, in the case of a five-year appointment, it would prevent any alteration during the period of five years. In the case of a normal appointment it would prevent any alteration during the whole period of occupancy of office, that is, as a general rule, until the officer reached the age of sixty-five years (sec. 70 of the *Public Service Act* 1916 as amended in 1933) or until some other event occurred by reason of which the appointment was terminated (secs. 53, 54, 57). Further, the principle suggested, if it is applicable at all, must apply to any increase in salary as well as to any decrease in salary. If the determination of a salary under sec. 27 operates to prevent a decrease, it so operates because a contract has been made which cannot be altered either by the unilateral act of one party or by the agreement of both parties. The same principle

must apply in the case of an increase of salary. The Governor in Council and a member of the Public Service are not authorized by law to make any agreement which they may choose with respect to the salary of a public servant. Salaries must be determined upon proper recommendation in accordance with the Act (Cf. *Nixon v. Attorney-General* (1)). Thus, the consequence of adopting the argument for the appellant is that the salaries of officers in the First Division are unalterable by any means whatsoever. The officer might, if he did not have a fixed statutory tenure, be dismissed under sec. 60, and he might be reappointed at a different salary. But it would be necessary to follow the procedure prescribed by the Act (for example, see sec. 36 as to appointments of persons not in the Public Service). The new salary would become payable, not by an agreed or a compulsory alteration of the original contract, but by the establishment of a new contract. Thus, the salaries of First Division officers would be strictly unalterable by either decrease or increase. An interpretation of sec. 27 which brings about such a result should not be adopted if a more reasonable interpretation is fairly open.

I have already said that I agree that sec. 37 of the *Acts Interpretation Act* does not justify the alteration of the term of a contract fixing the salary of the public servant. But the terms of all such contracts are, as I have just said, prescribed by the statute. If the statute, properly construed, provides that salaries may be altered from time to time in accordance with the Act, then the contract of employment itself provides for the alteration of the salaries, and such alteration is not a breach of the contract. Thus, the proposition that sec. 37 does not justify an alteration of salary in breach of a contract does not in itself establish the plaintiff's case. The real question is whether, under the terms of the *Public Service Act*, the salary of an officer of the First Division, once determined, cannot be altered by a fresh determination. The words of sec. 27 do not exclude such alteration. The words "such salary as is determined by the Governor on the recommendation of the board" are capable in themselves, without any assistance from the *Acts Interpretation Act*, of applying to and covering determinations

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made from time to time. Under sec. 27 (2) other officers are paid the salaries which are fixed by the board. It is not disputed that these salaries may be altered by the board from time to time. There is no general principle which would exclude the application of a similar principle to officers of the First Division who are governed by sec. 27 (1) of the Act. The relation of a civil servant to the Crown is not the same as that of an ordinary employee of an ordinary employer (See *Ryder v. Foley* (1); *Fletcher v. Nott* (2)). There is nothing unusual or exceptional in the alteration by the Crown of the terms of employment of a civil servant, and the *Public Service Act*, throughout its provisions, recognizes that this is the case. The Act provides a procedure which is designed to secure fair treatment for members of the service and to protect them against merely arbitrary alteration of salaries. Accordingly, in my opinion, sec. 27 should receive an interpretation which permits the board to make recommendations for either reduction or increase of salary from time to time and for the Governor in Council to make new determinations from time to time.

It is not immaterial to observe that, in sec. 14 of the *Public Service Act* 1916, there is an example of a statutory fixation of salary beyond the possibility of alteration by the board or the Governor. Sec. 14 (1) is as follows :

“The salary of the commissioner shall be at the following rates :—
 (a) for the first seven years that he hold office, eight hundred pounds a year : (b) for any subsequent term of seven years, such sum as is fixed by the Governor at or before the commencement of such term.”

This provision, which fixes a salary definitely during the whole of a specified period, is a very different provision from that which is to be found in sec. 27.

In reaching this conclusion I have not found it necessary to rely upon sec. 37 of the *Acts Interpretation Act*. I am, however, of opinion that sec. 27 gives power to the Governor to make a determination, as it also “gives power” to the board to make a recommendation. There is nothing in the *Public Service Acts* to indicate an intention that these powers should not be exercised from time to time. I have

(1) (1906) 4 C.L.R. 422.

(2) (1938) 60 C.L.R. 55.

referred to the general character of the relation between public servants and the commissioner, and to the distinctive provision contained in sec. 14 of the Act. Thus, I am of opinion that sec. 37 applies in relation to the powers mentioned, though it is not necessary to call sec. 37 in aid in order to reach the conclusion that the power of determining salaries can be exercised from time to time as occasion requires.

I am of opinion that the judgment of the Full Court was right and that the appeal should be dismissed.

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RICH J. I concur in the reasons and conclusion arrived at.

DIXON J. Sec. 27 of the *Public Service Acts* 1916 to 1925 (S.A.) must be construed as a general provision affecting the Public Service as a whole and cannot bear some other meaning in its application to the first members of the Pastoral Board, assuming, of course, that it is one of the provisions to which they were made subject by sec. 10 of the *Pastoral Acts* 1904 to 1929 (S.A.). Construed in this manner, it appears clearly enough to mean that the determination of the salary which for the time being any officer of the First Division is entitled to receive shall lie with the Governor in Council. Officers of the Public Service, unless governed by some special Act, have no fixed term but continue in the service until they vacate office by reason of age, death or the occurrence of some other of the events specified in the statute.

It is evident that it is not the intention of sec. 27 (1) to require or empower the Executive to fix once for all the rate of salary which an officer of the First Division shall receive throughout the rest of his service or during his tenure of a particular office. I take it to mean that, on the recommendation of the Public Service Classification and Efficiency Board, the Governor in Council may give a determination of the rate of salary which shall operate until he gives another determination. In other words, the provision means to authorize the determination from time to time of the salary payable to a First-Division officer. It is the purpose of the proviso to subsec. (1) to enable the officer to make representations to the board if he objects to its recommendation.

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The expression "such salary as is determined" may perhaps be susceptible of a meaning which would include not only a determination for the time being but also a determination of the salary to which the officer shall be entitled during a fixed and specified time. That is to say, the words are not necessarily incompatible with a determination expressed as deciding what throughout a definite time shall be the rate of pay. But to understand them as including such a determination would mean that they confer on the Executive a power to invest any officer of the First Division with a right to an unalterable salary for a fixed term of any length. Such a meaning should not be ascribed to a general provision dealing with the Service at large unless the intention is clearly expressed, and I do not think that it is the meaning of sec. 27 (1). It is perhaps worth remarking that, upon such a construction, the determination for a fixed period would preclude an increase as well as a reduction of salary.

When sec. 10 of the *Pastoral Acts* 1904 to 1929 made the first members of the Pastoral Board subject to the provisions of the *Public Service Act*, it excepted such of those provisions as are inconsistent with the *Pastoral Acts*. There is, I think, nothing in the *Pastoral Acts* inconsistent with the application of sec. 27 of the *Public Service Act*. Indeed, the application of some provision for the fixing of the salary of the first members of the Pastoral Board is indispensable, and there is none other. It follows that the plaintiff as first chairman of that board, classified in the First Division, depended for his salary upon a determination by the Governor in Council of the rate to be paid for the time being, that is, until another determination should be made, upon a recommendation from the Public Service Classification and Efficiency Board. The proceedings of that board and of the Executive Council in the plaintiff's case conformed to this view of the legislation, and a determination was made accordingly. No doubt an appointment to a public office established by statute and its acceptance may be regarded as constituting a contract between the Crown and the officer upon the statutory terms, although so to look at the matter seems to involve an unnecessary transfer of the conception of a contract of master

and servant into the relation between the Executive and the incumbent of a public office under the Crown. But it is clear enough, in my opinion, that in relation to the plaintiff the Executive Council exercised the power conferred by the statute and, notwithstanding that in all probability the plaintiff and the Government alike supposed that no change in his rate of salary would be made, the Governor in Council did not purport to go outside his statutory power and make with the plaintiff an agreement for a fixed rate for a fixed term or indeed make any agreement or contract with him at all.

In my opinion the appeal should be dismissed.

MCTIERNAN J. I agree that the appeal should be dismissed.

The appellant was appointed to the office of chairman of the Pastoral Board which was created by the *Pastoral Act Amendment Act 1929* (S.A.). This Act provides that the first members of the board should be appointed under and be subject to the provisions of the *Public Service Act 1916*, except such provisions as are inconsistent with that Act, and should hold office for five years. It is clear that neither sec. 26 of the *Public Service Act*, which empowered the Governor to determine that any officer whom he thinks fit should be included in the First Division of the Public Service, nor sec. 27, which empowers the Governor to determine, on the recommendation of the Public Service Board, the salary which should be paid to an officer of the First Division, is inconsistent with the provisions of the *Pastoral Act Amendment Act*. Both these sections became applicable to the appellant upon his appointment to the above-mentioned office in the Public Service. After the appointment the following steps were taken. The appellant was placed in the First Division of the Public Service, and the Governor, on the recommendation of the Public Service Board, determined that his salary should be £1,000 per annum. Subsequently, the Governor, on the recommendation of the board, determined that a salary less than £1,000 per annum should be paid to the appellant. If that determination was authorized by sec. 27, it is clear that the appellant's claim for arrears of salary has no foundation in law. It is not an arbitrary rule that every statutory power is

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exhausted when it is once exercised. In the case of a power which has been conferred by statute on the Executive, the power is not exhausted when once exercised, if the expressed or the implied intention of the statute is that the Executive should be vested with a discretion to exercise the power from time to time. Sec. 27 does not, in my opinion confer a power which is exhausted in the case of each officer by the first determination of his salary under that section. It is the intention of the section that the salary of the officer may be increased or diminished whenever the board sees fit to make a recommendation either way and the Governor sees fit to act upon it. It is not necessary to call in aid sec. 37 of the *Acts Interpretation Act* in order to obtain that result. The appellant, as an officer of the First Division, was subject to sec. 27. There was nothing in the *Pastoral Act Amendment Act* which prevented sec. 27 applying to the appellant in the same manner as it does to an officer who is subject only to the provisions of the *Public Service Act*. Indeed, the former Act clearly exposed him to the operation of sec. 27. The determination of his salary at £1,000 per annum did not fix it unalterably at that rate for the period of five years so that it could be neither increased nor diminished. It would, in my opinion, be inconsistent with the *Pastoral Act Amendment Act*, by force of which the appellant became subject to sec. 27 of the *Public Service Act*, to say that the first determination of his salary bound the Crown to pay him that salary during the whole period for which he would hold office.

Appeal dismissed with costs.

Solicitors for the appellant, *Kelly, Hague & Travers*.

Solicitor for the respondent, *A. J. Hannan* K.C., Crown Solicitor for South Australia.

C. C. B.