

[HIGH COURT OF AUSTRALIA.]

FERGUSON PLAINTIFF;

AND

THE COMMONWEALTH DEFENDANT.

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ADELAIDE,
Oct. 3, 4;

MELBOURNE,
Nov. 3.

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

Public Service (Cth.)—Transferred department—Rights preserved to officer—Rights of “non-classified officer”—Person on provisional and temporary list—Retirement from Public Service—The Constitution (63 & 64 Vict. c. 12). sec. 84—Commonwealth Public Service Act 1922 (No. 21 of 1922), sec. 45—Civil Service Act 1874 (S.A.) (37 & 38 Vict. No. 3), secs. 3, 7, 15, Part VII.—Civil Service Amendment Act 1881 (S.A.) (No. 231), secs. 1, 4—Civil Service Further Amendment Act 1890 (S.A.) (No. 483), sec. 2.

The *Civil Service Act 1874* (S.A.) provided that the Civil Service should consist of six classes and of non-classified officers. Sec. 15 of the Act provided that persons who had been in the provisional and temporary employment of the Government for a period of five years continuously at the time of the passing of the Act or who should be and remain for the like period in the temporary employment of the Government should be non-classified officers. There was a proviso that the provisions of the Act, unless when otherwise expressly mentioned, should not apply to non-classified officers. Sec. 3 provided that nothing in the Act should apply to any person temporarily employed in the service of the Government. Part VII. of the Act related to removal and dismissal from office and in effect gave classified officers a life tenure, subject to certain exceptions. Sec. 1 of the *Civil Service Amendment Act 1881* repealed sec. 15 of the Act of 1874. Sec. 4 of this later Act provided that every officer in the Civil Service, on being removed from, or on being permitted to resign, his office, should be paid what, in effect, was a retiring allowance. Sec. 2 of the *Civil Service Further Amendment Act 1890* provided that Part VII. of the Act of 1874 should apply to all non-classified officers who might be entitled to claim an allowance on retirement.

F. entered the Civil Service of South Australia on 1st March 1881. From then until 28th February 1883 and from 1st May 1888 until 31st August 1891 he was a classified officer. During most of the period between 1st March 1883

and 30th April 1888 he was employed by the South-Australian Government, though there were some breaks in his service. At times during that period he was on the provisional and temporary list, and at other times he worked odd days and half-days, for which he was paid at a daily rate; there were also times as to which there was no evidence of his classification. When F. again became a classified officer on 1st May 1888, he was in the Customs Department. On 1st September 1891 he was placed on the provisional and temporary list, and he remained on that list in the Customs Department until 1st January 1901. The Customs Department was then transferred to the Commonwealth Government, and F. entered the Commonwealth Public Service. He remained in that Service continuously until he was retired under the *Commonwealth Public Service Act* upon reaching the age for retirement. He claimed that, by reason of sec. 4 of the Act of 1881 and sec. 2 of the Act of 1890, he was a non-classified officer who was entitled to claim an allowance on retirement and that, therefore, by virtue of sec. 84 of the Constitution and sec. 45 of the *Commonwealth Public Service Act* 1922, his retirement from the Public Service of the Commonwealth was unlawful.

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Held that the repeal of sec. 15 of the Act of 1874 closed the class of non-classified officers, that F. did not come within this class, that, though he was not classified, he was not a “non-classified officer” within the meaning of sec. 2 of the Act of 1890, and that, therefore, his dismissal from the Commonwealth Public Service was not wrongful.

CASE STATED.

Effie May Ferguson (as universal legatee in equity of Arthur Hepburn Johnston Ferguson and assignee of the cause of action in respect of which the claim was brought) brought an action in the High Court against the Commonwealth of Australia. The plaintiff claimed that Arthur Hepburn Johnston Ferguson (hereinafter called “the deceased”) prior to the 1st January 1901 was a civil servant employed in the Customs Department of South Australia as a provisional and temporary officer under the provisions of the *Civil Service Act* 1874 (S.A.) and by virtue of that Act was entitled to a life tenure of his office subject to the provisions of the Act. It was claimed that on 1st January 1901 the deceased was transferred to the Commonwealth Public Service and became an officer in the Commonwealth Customs Department, where he remained until the 6th January 1925. It was alleged that the defendant then wrongfully dismissed the deceased, and damages were claimed in respect of such dismissal.

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A case (which was substantially as follows) was stated by the parties for the opinion of the Full Court pursuant to Order XXXII. of the rules of court :—

1. Arthur Hepburn Johnston Ferguson, late of Seacliff in the State of South Australia, deceased (hereinafter referred to as the deceased), was born on 6th January 1860. He died on 2nd September 1934.

2. The deceased entered the service of the South Australian Government in the Customs Department as a boarding officer on 1st March 1881 and was placed upon the classified list as defined by the South-Australian *Civil Service Acts*.

3. On 1st March 1882 the deceased was promoted to be a clerk in the Customs Department on the classified list.

4. On 1st February 1883 the deceased was transferred to the South-Australian Treasury as a clerk on the classified list.

5. On 1st March 1884 the deceased was transferred to the Department of Marine as a purser on the South-Australian Government steamship *Palmerston*. For the months of March 1885 and February 1886 he was on the provisional and temporary list, but no records have been discovered stating on what list he was during the remainder of his service on the *Palmerston*. His name has not been found on a search of the classified lists for the period of such service.

6. For the period from 2nd March 1886 to 1st July 1886 there was a break in the service of the deceased with the South-Australian Government.

7. On 1st July 1886 the deceased became a surveyor's assistant in the Water Conservation Branch of the South-Australian Government and continued in that office until 30th September 1886.

8. For the period from 1st October 1886 to 31st December 1886 there was another break in the deceased's service with the South-Australian Government.

9. On 1st January 1887 the deceased was again employed in the Department of Marine as chief officer on the South-Australian Government steamship *Governor Musgrave*. This position he held until 1st July 1887.

10. For the period between 1st July 1887 and 1st May 1888 the deceased was employed as a glut officer in the Customs Department,

being paid a daily wage for the time actually worked. He was so employed on the following dates :—

- 1887—
- Aug. 25/27
- Sept. 2, 8/12, 16, 19, 26/28
- Oct. 1, 2, 7, 11, 15/18, 21, 27/29
- Nov. 3/5, 7, 8, 10/12, 14/18, 21, 24/29
- Dec. 1/3, 10, 12, 16/17, 20, 29/31
- 1888—
- Jan. 3/7, 9, 14, 16/20, 24, 27
- Feb. 1/2, 6/8, 10, 13, 15/18, 20/21, 23
- March 3/10, 12/17, 19/24, 26/29
- April 1/7, 9/14, 18/21, 23/8, 30

Half-days
employed in
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11. On 1st May 1888 the deceased was again placed upon the classified list in the Customs Department, and, subject to the next succeeding paragraph, his service with the South-Australian Government was thereafter uninterrupted until his transfer to the Commonwealth Public Service as hereinafter mentioned. He held successively the positions of boarding officer, locker officer and watchman.

12. On 1st September 1891 the deceased, being still employed in the Customs Department, was placed on the provisional and temporary list as defined by the South-Australian *Civil Service Acts* and remained thereon until 1st January 1901, when he was transferred to the Public Service of the Commonwealth. During the said period he received an annual salary and enjoyed recreation leave.

13. In relation to the periods referred to in pars. 6, 8 and 10 of this case, nothing is known except that during such periods the deceased was not on the salary list of the South-Australian Government. No information is available as to the nature of the breaks in his service, nor as to the reasons therefor, the departmental records having been destroyed.

14. On 1st January 1901 the Customs Department was transferred to the Commonwealth Government and the deceased entered the Commonwealth Public Service.

15. The deceased remained continuously in the Public Service of the Commonwealth until 5th January 1925, when he was retired under and in accordance with the provisions of the *Commonwealth Public Service Act* upon reaching the maximum age for retirement (sixty-five years) specified therein. At the time of his retirement the deceased was receiving a salary of £399 per annum.

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16. On 5th August 1891 a resolution was passed in the House of Assembly of the State of South Australia as follows :—" That a return be laid upon the table of the House showing 1. The number of persons in the Public Service entitled to retiring allowances. 2. The names of such persons. 3. The amount payable to each one."

17. Pursuant to such resolution a return was made to the House of Assembly and ordered to be printed on 25th September 1894. Such return contains the following reference to the deceased :—

PARTICULARS RE RETIRING ALLOWANCES.

Name.	Position	Compensation		Interest to	Total.
	on 31st December 1881.	due on 31st December 1881.	30th June 1894.		
Ferguson A. H. J.	Boarding Officer Customs	£6 16 10	£3 9 5	£10 8 3	

18. It is agreed that the court shall be at liberty to draw all inferences of fact necessary for deciding the question submitted, and to reject any facts which the court shall deem to be irrelevant.

The question submitted for the opinion of the court was :
Whether the retirement of the deceased from the Commonwealth Public Service on 5th January 1925 was wrongful, entitling the deceased to damages in respect thereof.

At the hearing, by consent, a Blue Book published in 1900 was put in evidence. This stated that the deceased's " present appointment " began on 1st September 1891 at a named salary and that his service had not been continuous. His first appointment was recorded as being on 1st March 1881.

Ligertwood K.C. (with him *E. Millhouse*), for the plaintiff. By virtue of the decision in *Le Leu v. The Commonwealth* (1) an officer in the South-Australian Civil Service who and whose department are transferred to the Commonwealth Public Service is entitled to a life tenure of his office, subject only to the provisions of Part VII. of the *Civil Service Act* 1874 (S.A.), provided that he comes within that Part. Sec. 15 of that Act (which was later repealed by sec. 1 of the amending Act of 1881) provided for non-classified officers.

(1) (1921) 29 C.L.R. 305.

Sec. 4 of the amending Act of 1881 conferred on the deceased a right to claim an allowance on retirement. Sec. 2 of the amending Act of 1890 provided that Part VII. of the Act of 1874 should apply to all non-classified officers who might be entitled to claim an allowance on retirement. When the deceased was transferred to the Commonwealth Public Service, he was on the provisional and temporary list in the South-Australian Civil Service. He was not a classified officer but a non-classified officer. He was also entitled to claim an allowance on retirement. He therefore came within sec. 2 of the amending Act of 1890, consequently within Part VII. of the Act of 1874, and, as a further consequence, within the decision in *Le Leu v. The Commonwealth* (1).

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Mayo K.C. and *Skipper* (with them *Brebner*), for the defendant. The *Civil Service Acts* throughout create and maintain a distinction between “officers” (whether classified or non-classified) and “persons” in the provisional and temporary employment of the Government. On each break in the deceased’s service with the State there was a determination of the existing contract, and every change in the terms of the contract constituted a new contract (*Meek v. Port of London Authority* (2)). Thus, when the department was taken over by the Commonwealth, the deceased was merely a provisional and temporary “person.” He was a non-classified officer within the meaning of sec. 2 of the Act of 1890. Sec. 4 of the Act of 1881 applied only to “officers” in the Civil Service. If the deceased had any right to a retiring allowance, his retirement which occurred on the first break in his service (prior to the Act of 1890) cancelled his right. Sec. 2 of the Act of 1890 did not relate to a retirement that had already occurred. That section related to non-classified officers who were entitled to claim an allowance as non-classified officers. The deceased’s right (if any) to such allowance came to him as a classified officer, because he was a classified officer when the 1881 Act came into operation. The effect of the repeal of sec. 15 of the Act of 1874 by sec. 1 of the Act of 1881 was to close the class of non-classified officers. In any case sec. 4 of the

(1) (1921) 29 C.L.R. 305.
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(2) (1918) 1 Ch. 415.
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Act of 1881 conferred on the deceased no right to a retiring allowance, because there was no machinery unless he had had three years' service (which he had not had): See *Clark Tait & Co. v. Federal Commissioner of Land Tax* (1); *Greenwood v. Joseph Nall & Co. Ltd.* (2). The particulars in pars. 16 and 17 of the case stated are inadmissible; alternatively, if admissible against the State, they are not admissible against the Commonwealth. An admission may be binding on the Crown if made by an agent acting in the scope of his employment (*Irish Society v. Bishop* (3)). It cannot become evidence by virtue of an agency which did not and could not exist at the time when the alleged admissions were made. The claim is out of time either (a) by reason of secs. 56 and 64 of the *Judiciary Act* 1903-1937, (b) by virtue of secs. 79 and 80 of the same Act, or (c) on general principles as to the right of a defendant in an action for breach of contract. As to the first of these three grounds, see *The Commonwealth v. Baume* (4); *The Commonwealth v. Miller* (5). Sec. 64 relates to procedural rights (*Griffin v. South Australia* (6); *Jamieson v. Downie* (7)). The right to rely on the statute is a procedural right (*Halsbury's Laws of England*, 2nd ed., vol. 6, p. 355; *Ruckmaboye v. Lulloobhoy Mottichund* (8); *Bauserman v. Blunt* (9); *Campbell v. Haverhill* (10); *Andreae v. Redfield* (11); *Federated Store Mill Association v. Alexander* (12)). On the second ground, secs. 79 and 80 of the *Judiciary Act* apply: See *Lady Carrington Steamship Co. Ltd. v. The Commonwealth* (13); *Cohen v. Cohen* (14); *Musgrave v. The Commonwealth* (15); *The Constitution*, sec. 71.

[DIXON J. referred to sec. 86 (h) of the *Judiciary Act*.]

As to the third ground, this is a claim under a simple contract (*Lucy v. The Commonwealth* (16); *Gutsell v. Reeve* (17)). The Crown

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| (1) (1929) 43 C.L.R. 1. | (10) (1895) 155 U.S. 610; 39 Law. Ed. 280. |
| (2) (1917) A.C. 1. | (11) (1878) 98 U.S. 225; 24 Law. Ed. 57. |
| (3) (1846) 12 Cl. & Fin. 641, at p. 657; 8 E.R. 1561, at p. 1568. | (12) (1912) 15 C.L.R. 308, at pp. 312, 321. |
| (4) (1905) 2 C.L.R. 405. | (13) (1921) 29 C.L.R. 596, at p. 601. |
| (5) (1910) 10 C.L.R. 742. | (14) (1929) 42 C.L.R. 91, at p. 99. |
| (6) (1924) 35 C.L.R. 200, at pp. 204, 208. | (15) (1937) 57 C.L.R. 514. |
| (7) (1923) A.C. 691. | (16) (1923) 33 C.L.R. 229, at pp. 238, 253. |
| (8) (1853) 8 Moo. P.C.C. 4. | (17) (1936) 1 K.B. 272. |
| (9) (1893) 147 U.S. 647; 37 Law. Ed. 316. | |

can take advantage of a Statute of Limitations (*In re Mason* (1); *In re Blake* (2)). The statute has been relied on by the Crown (*Attorney-General v. Tomline* (3); *Rustomjee v. The Queen* (4); *Fisher v. The Queen* (5); *Cayzer, Irvine & Co. Ltd. v. Board of Trade* (6); *Board of Trade v. Cayzer, Irvine & Co. Ltd.* (7); *R. v. Kidman* (8); *R. v. Morrall* (9)).

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Ligertwood K.C., in reply. The Act draws a distinction between temporary officers and provisional and temporary officers. The latter are officers, because they hold offices, and are all non-classified officers. The effect of the repeal of sec. 15 of the Act of 1874 was to delete the reference thereto from the second schedule to that Act. The class of non-classified officers was not closed. As to the point that the action is out of time, this action is founded, not on simple contract, but on specialty (*Limitation of Actions Act* 1936 (S.A.), sec. 34; *Pratt v. Cook Son & Co.* (10)).

Cur. adv. vult.

The following written judgments were delivered:—

Nov. 3.

LATHAM C.J. This is a special case stated under Order XXXII., rule 1, of the rules of the court upon which a decision is sought as to whether the retirement of the late A. H. J. Ferguson from the Public Service of the Commonwealth on 5th January 1925 was wrongful so as to entitle the deceased to damages.

The deceased was appointed to the Civil Service of South Australia, and, in order to ascertain his rights, it is necessary to consider his history in the Service and the provisions of several Acts dealing with the Civil Service. In *Le Leu v. The Commonwealth* (11) it was decided that under the *Civil Service Act* 1874 (S.A.), and the *Civil Service Amendment Act* 1881, age, apart from incapacity, was not a ground for removal of an officer, and that accordingly an officer could not be lawfully retired from office on the ground alone that

- (1) (1929) 1 Ch. 1.
- (2) (1932) 1 Ch. 54.
- (3) (1877) 5 Ch. D. 750; (1880) 15 Ch. D. 150.
- (4) (1876) 1 Q.B.D. 487.
- (5) (1900) 26 V.L.R. 460; 22 A.L.T. 217.

- (6) (1927) 1 K.B. 269.
- (7) (1927) A.C. 610.
- (8) (1915) 20 C.L.R. 425.
- (9) (1818) 6 Price 24; 146 E.R. 730.
- (10) (1938) 1 All E.R. 555.
- (11) (1921) 29 C.L.R. 305.

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he had attained a certain age. It was also held that the right to retain office under the terms of the South-Australian statutes was a right which, by virtue of sec. 84 of the Constitution and of the provisions of the Commonwealth *Public Service Act*, was retained by and preserved to an officer who was transferred to the Service of the Commonwealth. This right was held to depend upon the provisions of Part VII. of the *Civil Service Act* 1874. If Part VII. did not apply to a particular officer, he did not have a life tenure of his office by virtue of any other provisions of the relevant statutes. If the right mentioned is infringed, the officer has a right of action for damages for wrongful dismissal (*Lucy v. The Commonwealth* (1)). Ferguson was dismissed because he reached the age of sixty-five years. If Part VII. of the 1874 Act applied to him, his dismissal was wrongful. If Part VII. did not apply to him, he was rightfully dismissed. It will be convenient, in the first place, to state the relevant particulars of Ferguson's career in the Public Service.

On 1st March 1881 he was appointed to the Customs Department of South Australia and became what the Act describes as a classified officer. He held a position as a classified officer until 1st March 1884, when he was appointed purser on a government steamship.

The records show that in the months of March 1885 and February 1886 he was on the provisional and temporary list of officers. There is no evidence to show that he was a classified officer during the period between 1st March 1884 and 2nd March 1886, although he was employed by the Government during that period. From 2nd March 1886 to 1st July 1886 there was a break in his service, that is to say, there is no evidence that he was in the employment of the Government during this period.

On 1st July 1886 he was appointed as a surveyor's assistant in the Water Conservation Branch, and he continued in that office until 30th September 1886.

There was another break in his service from 1st October 1886 to 31st December 1886.

On 1st January 1887 he was appointed chief officer on another government steamship, and he held this position until 1st July 1887. From 1st July 1887 to 1st May 1888 he was employed for occasional

days and half-days in the Customs Department. He received a daily wage for the time actually worked.

On 1st May 1888 he again became a classified officer and served in the Customs Department of South Australia.

On 1st September 1891 he was placed on the provisional and temporary list, and he remained on that list until 1st January 1901, when he was transferred to the Public Service of the Commonwealth. At various times from 1891 to 1901 he received recreation leave for periods of fourteen days.

A return presented to the House of Assembly dated 20th September 1894 included the name of Ferguson as an officer on what is called in the return the fixed lists, and stated that he was entitled to compensation by way of retiring allowance.

By agreement of the parties a Blue Book published in 1900 was put in evidence. This stated that Ferguson's "present appointment" began on 1st September 1891 at a named salary and that his service had not been continuous. This appointment was evidently the appointment on the provisional and temporary list. His first appointment is recorded as being on 1st March 1881.

The plaintiff's case is that on 1st January 1901, when Ferguson was transferred to the Public Service of the Commonwealth, he was entitled to a life tenure of his office because Part VII. of the *Civil Service Act* 1874 applied to him. He was, on the date mentioned, an officer on the provisional and temporary list of the South Australian Civil Service. Such officers admittedly were not officers to whom Part VII. of the 1874 Act originally applied. Part VII. applied to classified officers, and by an amending Act (No. 483 of 1890) it was provided in sec. 2 that Part VII. of the 1874 Act should apply to "all non-classified officers who may be entitled to claim an allowance on retirement." Plainly Ferguson was not a classified officer, but the plaintiff contends that he was on 1st January 1901 a non-classified officer entitled to claim an allowance on retirement. I propose, therefore, to examine the question whether the plaintiff was a non-classified officer on the relevant date. If the answer to this question is in the negative, it will not be necessary to consider whether he was entitled to a retiring allowance.

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The 1874 Act recognizes the following four groups of employees in the service of the Government: (1) The professional division (sec. 5); (2) the ordinary division (sec. 6); (3) non-classified officers, being the officers mentioned in the second schedule (sec. 7); (4) persons temporarily employed in the service of the Government (sec. 3). The professional and ordinary divisions were divided into six classes. The non-classified officers mentioned in the second schedule were "non-classified officers as defined in sec. 15 of this Act."

Sec. 15 was as follows:—"Persons who have been in the provisional and temporary employment of the Government for a period of five years continuously at the time of the passing of this Act, or who shall be and remain for the like period in the temporary employment of the Government, and whether remunerated by daily or weekly wages or salary, shall be non-classified officers of the Civil Service, and rank in the second schedule hereto. Every non-classified officer shall be eligible for promotion to that class of the fixed establishment, whether in the professional or ordinary division, to which his salary, if calculated by the year, would entitle him if he were a classified officer: Provided that the provisions of this Act, unless when otherwise expressly mentioned, shall not apply to non-classified officers." Thus five-years' service was required in order to entitle a person employed by the Government to rank as a non-classified officer.

Sec. 3 of the 1874 Act provided that nothing in the Act should apply to any person temporarily employed in the service of the Government. Therefore Part VII., conferring a life tenure, did not apply to persons temporarily employed. Under the 1874 Act Part VII. did not apply to non-classified officers, because sec. 15 provided that the provisions of the Act, unless when otherwise expressly mentioned, should not apply to non-classified officers, and there was no provision applying Part VII. to such officers. But Part IX. of the Act, providing for allowances on retirement or death, did apply to non-classified officers (sec. 35).

By Act No. 231 of 1881, sec. 15 of the 1874 Act was repealed. Accordingly, after the passing of this Act it was not possible for any person to become a non-classified officer if he had not already attained that status.

At the time when the Act was passed the plaintiff was a classified officer and possessed all the rights conferred upon such officers by Part VII. of the Act. After a break in service in 1885 and 1886 he was temporarily employed in 1887, but on 1st May 1888 he again became a classified officer. His rights on that date were those of a classified officer, and not those of a non-classified officer. On 1st September 1891 he ceased to be a classified officer and was placed on the provisional and temporary list, on which he remained till 1st January 1901. Thus, on the last-mentioned date (which is the relevant date) he was not a classified officer and could not claim any rights under Part VII. as a classified officer. If he had been a non-classified officer on that date, he would, by virtue of the provisions of sec. 2 of the 1890 Act, have been entitled to the rights conferred by Part VII. of the 1874 Act if he was such an officer who was entitled to claim an allowance on retirement. But, if he was not a non-classified officer, he could not acquire any rights under that section. He was not a non-classified officer, because the repeal by the 1881 Act of sec. 15 of the 1874 Act prevented any persons from becoming non-classified officers after the date when the Act of 1881 came into operation. Thus, sec. 2 of the 1890 Act did not apply to him, and it therefore cannot be held that Part VII. of the 1874 Act applied in his case.

For the reasons given, the plaintiff was not a non-classified officer on 1st January 1901, and it is therefore not necessary to consider whether or not he was entitled to claim an allowance on retirement. The return made to the House of Assembly and the Blue Book represent that he was entitled to a retiring allowance. If it had been necessary to consider this matter, the question would have arisen whether a statement contained in such a return or Blue Book is to be regarded as an admission binding the Crown. Upon the view which I have taken, however, this question does not arise.

It was contended on behalf of the defendant that the plaintiff's claim was a claim upon a simple contract and that it was barred by a statute of limitations, either 21 James I. c. 16 or the *Limitation of Actions Act* 1936 (S.A.), sec. 34. The opposing contention was that the claim was founded upon a statute. An interesting argument was addressed to the court upon the question of the right of the

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RICH J. I agree that the plaintiff fails and the question in the special case should be answered: "No."

The deceased's career in the South-Australian Service includes a strange series of alterations of status. But, when he was transferred to the Commonwealth, he was, unfortunately for the plaintiff, a provisional and temporary officer. It would be curious if such an officer had a life tenure. It is true enough that he was non-classified, but I am unable to agree in the contention that he was a non-classified officer within the meaning of the Act No. 483. I agree in the view that sec. 3 applies to officers forming part of the Civil Service who fell under the second schedule of the *Civil Service Act* 1874 and under sec. 15 before its repeal. No doubt in 1890, when No. 483 was passed, there were some officers of that description still in the Service.

DIXON J. It appears from the provisions of the *Civil Service Act* 1874 (S.A.) that at the time when that Act was passed a distinction existed between officers in the Civil Service and persons in the temporary and provisional employment of the Government (sec. 15). The distinction was maintained. The statute provided that nothing it contained should apply to any person temporarily employed in the service of the Government (sec. 3). At the same time a provision was included for bringing into the Service persons who at the time of the enactment had been for five years continuously in the provisional and temporary employment of the Government and persons who should in the future remain for that period in such employment (sec. 15). They were to be brought in as non-classified officers. The Service was organized in six classes, but, by secs. 7 and 15 and the second schedule of the Act, provisional and temporary employees of five-years' standing were constituted non-classified officers. No other persons fell under the description of non-classified officers. The schedule confined the description to persons coming under sec. 15. That section was qualified by a proviso which prevented non-classified officers, although members of the Civil Service, obtaining

in full the status of classified officers. It provided that the provisions of the Act should not apply to them unless where otherwise expressly mentioned. Part VII. of the Act contained no such express mention of non-classified officers and, therefore, did not apply to them. It is this Part which, according to *Le Leu v. The Commonwealth* (1), operated to give classified officers a title to retain office in the Civil Service for life, unless in the meantime retired for incapacity, misconduct, or the like. Part IX. of the Act, which contained a provision for compensation on retirement, did apply, because by sec. 35 it was expressly so provided; and no doubt sec. 4 of the *Civil Service Amendment Act* 1881, which replaced the provision for such compensation, also applied. But the Act of 1881 repealed sec. 15 of the former Act. It did not repeal sec. 7 and the second schedule, which in terms described non-classified officers as "non-classified officers as defined in clause 15 of this Act." The result was, I think, that "non-classified officers" continued to exist as a description of officers forming part of the Civil Service, but, as sec. 15 was repealed, no more members could join their ranks. In 1890, by Act No. 483, sec. 2, it was provided that Part VII. of the *Civil Service Act* 1874 should apply to all non-classified officers who might be entitled to claim an allowance on retirement. It is suggested that in this provision the expression "non-classified officer" extended to all persons who could be described as officers and who were not classified and, further, that persons on the provisional and temporary list fell within this description. Nine years had passed since the class of non-classified officers under the second schedule of the Act of 1874 had been closed, and it is, of course, possible that the expression had become merely descriptive of persons who were employed as part of the service of the Crown in the Province and were not classified. But this, I think, we cannot assume. Unless it appeared from public documents that in the meantime the description "non-classified officer" had come to bear a wider or different meaning, we must take it to refer to the class so denominated and defined by the prior legislation. Our attention has not been called to any public documents or other source of information from which such an extension or change of meaning should be inferred, and there is no

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reason to suppose that any exists. I, therefore, read the expression "non-classified officers" in sec. 3 of the Act of 1890 (No. 483) as referring to those officers who, having come into the service under sec. 15 before it was repealed by the Act of 1881 (No. 231), still survived and remained unclassified. We ought not, I think, to interpret the expression as including persons who in 1890 or afterwards were in the employment of the Government upon the provisional and temporary list. Accordingly, such persons did not obtain a title to be retained in the service of the Crown until death or until removal or retirement for incapacity, misconduct or other specific cause expressly allowed by the *Civil Service Acts*.

The officer to whom the special case relates was on the provisional and temporary list in the Customs Department of South Australia at the establishment of the Commonwealth, when that department was transferred to the Commonwealth. He was retired from the Public Service of the Commonwealth on attaining the age of sixty-five, and it is claimed that his retirement was wrongful because, as a transferred officer, he preserved, under sec. 84 of the Constitution, all his existing and accruing rights and, so it is said, he was not liable, under the law of South Australia, to removal or retirement from office on the ground of age.

His career as an employee of the Government of South Australia had been a long but a peculiar one. For a little less than ten years before his transfer to the Commonwealth he had been on the provisional and temporary list. He was placed upon that list on 1st September 1891. But for over two years before he went onto the provisional and temporary list he had been upon the classified list in the Customs Department, to which he was appointed on 1st May 1888. That was not the first time he had been upon the classified list. He had entered the service of the Government on 1st March 1881 and remained a classified officer in the Customs Department until 1st March 1884. On that date he became a purser in a government steamship under the Department of Marine. From then until he was again appointed to the classified list on 1st May 1888 his position is not fully explained; but for a great part, if not the whole, of the period he was at best a provisional and temporary employee, sometimes being employed at a daily wage for broken periods and even

odd days and half-days at a time. As he was on the classified list on 31st December 1881, as from when, under the Act of 1881, compensation or retiring allowance ceased to be calculated, he was treated as having at that date a right to compensation under sec. 4 of that Act. In a return called for in Parliament and made in 1894 he was shown as entitled to a small sum of compensation or retiring allowance due on 31st December 1881 with interest from that date. In 1900 a parliamentary Blue Book gave 1st September 1891 as the date of his then present appointment, which was to the provisional and temporary list, and 1st March 1881 as the date of his "appointment under the Colonial Government," stating in a note that his service was not continuous.

Upon these facts the plaintiff's claim is that the transferred officer fell within sec. 2 of the Act of 1890 (No. 483) as a non-classified officer entitled to claim an allowance on retirement and so as one to whom Part VII. of the *Civil Service Act* 1874 applied in virtue of that section.

Upon the interpretation I have given of sec. 2 of the Act of 1890 (No. 483) this claim cannot be sustained, because the officer in question was not a non-classified officer within the meaning of that expression. If he had remained a classified officer instead of going onto the provisional and temporary list on 1st September 1891, he would have been entitled to the benefits of Part VII. of the Act of 1874, which, of course, applied to all classified officers. The circumstances in which he went onto that list do not appear. It is said that the purpose usually actuating such a course at that time was to escape the rigid graduations of salary for the six classes of officers. But, whatever the purpose, we must regard the officer as having then ceased to be a classified officer and as having become a person in the provisional and temporary employment of the Government. Such a person was not entitled to hold office until death, subject only to retirement or removal on the ground of incapacity, misconduct or other specified cause expressly assigned by the Act. He, therefore, had no right inconsistent with retirement on the ground of age.

In my opinion the question in the special case should be answered :
"No."

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McTIERNAN J. The South-Australian Customs Department, in which the deceased was employed, was transferred to the Commonwealth on 1st January 1901. The deceased was at the same time transferred to the Commonwealth Customs Department. Upon his transfer all his existing and accruing rights, whatever they were, under the relevant South-Australian *Civil Service Acts* were preserved by sec. 84 of the Commonwealth Constitution. The question which arises is whether the Commonwealth infringed any such right by retiring him from its service on the ground that he had attained the age of sixty-five. In *Le Leu v. The Commonwealth* (1) it was decided that Part VII. of the *Civil Service Act* 1874 (S.A.), conferred a tenure which could not be terminated except upon a ground specified in that Act. The attainment of a specified age is not one of those grounds. It is claimed, on behalf of the deceased, that, at the time of his transfer to the Commonwealth service, he was entitled to the tenure assured by Part VII. of the above-named statute. It appears from the special case that he was then on the provisional and temporary list, as defined by the South-Australian *Civil Service Acts*, and had been on that list since 1st September 1891. Since that date he had been continuously in the Customs Department of South Australia. The special case gives the history of his career in the service of the South-Australian Government prior to 1st September 1891. But the rights which were preserved by sec. 84 were those rights, if any, which were annexed to his status as a person whose name stood on the South-Australian Government provisional and temporary list of employees. The contention that one of those rights was to enjoy the tenure conferred by Part VII. of the *Civil Service Act* 1874 is based on sec. 2 of the *Civil Service Act* 1890, which provides that the provisions of Part VII. shall apply to all non-classified officers who fulfil the qualification mentioned in sec. 2. The first inquiry is whether the deceased was a non-classified officer. It may be observed that, if a person provisionally and temporarily employed has become entitled to the security of tenure which Part VII. gave to officers in the Service, the nexus between the Government of South Australia and its provisional and temporary employees must have assumed a peculiar character. Persons

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temporarily employed in the service of the Government were excluded by sec. 3 of the *Civil Service Act* 1874 from the operation of that Act. It provided that the Service should consist of six classes and non-classified officers. By sec. 15 it was provided that persons who had been in the provisional and temporary service of the Government for a prescribed period or who should remain for the like period in the Government should have the rank of non-classified officers of the Service. This provision was repealed by the *Civil Service Act* of 1881. Provisional and temporary employment was not abolished, but after the repeal of sec. 15 the condition of provisional and temporary employment could not ripen into the status of non-classified officer. It would appear that those persons in whose case this change of status had been worked by sec. 15, before it was repealed, were the object of the legislature's attention when it enacted sec. 2 of the *Civil Service Act* 1890. It clearly appears that the *Civil Service Acts* did not recognize any identity between the description, a non-classified officer, and the description, a person in the provisional and temporary service of the Government.

There is, in my opinion, no sound ground for holding that the deceased, who, in fact, was at the date of his transfer to the service of the Commonwealth ranked as a person in the provisional and temporary service of the Government, had any title to the status of a non-classified officer. It follows that the assumption is wrong that his tenure as a servant of the Government of South Australia was, at the date of his transfer to the Commonwealth Government service, protected by Part VII. of the *Civil Service Act* 1874. In my opinion, the question in the special case should be answered: "No."

Question in case answered: No.

Solicitors for the plaintiff, *Baker, McEwin, Ligertwood & Millhouse.*

Solicitors for the defendant, *H. F. E. Whitlam*, Commonwealth Crown Solicitor, by *Fisher, Jeffries, Brebner & Taylor.*

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