Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of The King v. *James Fisher, and of The King* v. *Frederick William Bull, from the Supreme Court of Victoria; delivered the* 13*th February* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.
SIR JOHN BONSER.

[*Delivered by Sir Ford North.*]

THE KING v. FISHER.

This is an Appeal to His Majesty in Council from a judgment dated the 27th of May 1901 of the Full Court of the Supreme Court of Victoria, dismissing an appeal from a judgment of Mr. Justice Holroyd in favour of the present Respondent upon a petition of right presented by him.

The Respondent entered the public service of Victoria in the year 1858. On the 7th of February 1881 he was appointed Postmaster and Telegraph Manager at Geelong, and he continued to fill that post until the 31st of December 1896, when he was superannuated on his statutory pension. It was necessary for the efficient performance of his duties as such officer that he should reside, and he was required to reside, upon the Post Office premises; and he did accordingly from 1881 to 1896 with his wife and family occupy

24369. 100.—2/1903. [8 & 9]

a part of the Post Office buildings appropriated to him.

It was provided by the Public Service Act, 1862 (No. 160) Section 52 that—

"Where any officer is allowed to use for the
"purpose of residence any building
"belonging to the Government, the
"Governor in Council may direct that a
"fair and reasonable sum as rent thereof
"be deducted from such officer's salary."

In 1883 that Act was repealed by the Public Service Act (No. 773), save and except as to all matters and things done under and to all the privileges and rights then existing or thereafter accruing of all persons subject to the provisions of that Act. Section 17 provided that in the Clerical division (to which the Respondent belonged) each of the five classes should have the maximum and minimum salary and the annual increment thereto mentioned in the Second Schedule to the Act, and Section 18 authorized the Governor in Council, upon the recommendation of the Public Service Board, to appoint a fixed salary to an officer without annual increment. Section 52 of the old Act was re-enacted, with an important addition, by Section 89 of this Act, which is as follows—

"If any officer *not entitled to quarters* is
"allowed to use for the purpose of
"residence any building belonging to
"the Government, the Governor in
"Council may direct that a fair and
"reasonable sum as rent thereof be
"deducted from such officer's salary, and
"the amount of such sum shall be fixed
"by the Board."

By the Public Service Act, 1890 (No. 1133), Act No. 773 was repealed: but by Section 136 Section 89 of the Act No. 773 was re-enacted *verbatim*.

The Government Gazette of the 31st of January 1885 contained a return made by the Public Service Board under Section 25 of the Act of 1883, which stated that Mr. Fisher's emolument as Postmaster on 31st December 1884 was 430*l.* salary, with allowances of quarters, fuel, and water.

On the 12th of January 1885 the Governor in Council approved of a recommendation by the Board purporting to be made under Section 18 of the 1883 Act (No. 773), that the salaries of postmasters at certain named places should be as specified, subject to fair and reasonable deduction for rent; and the salary specified for Geelong, Class ii., was 540*l.* This was followed by another Order of the Governor in Council of the 3rd of February, that in accordance with Section 89 of the Act of 1883 a fair and reasonable sum as rent should be deducted from the salary of every officer occupying for the purpose of residence any building belonging to the Government. This, it will be noticed, is wide enough to include officers entitled to quarters, although they are expressly excepted from Section 89; and the Public Service Board, purporting to act on Section 89, proceeded on 14th May 1885 to fix the value of the *quarters of the officers* mentioned in the Schedule at the amounts set opposite each place respectively. That Schedule included Geelong, salary 540*l.*, rent 72*l.* This shows that, in the opinion of the Board, the premises which the Respondent occupied, and in respect of which he was charged with rent, were "officers' quarters."

Down to this time no deduction by way of rent in respect of residence had ever been claimed from the Respondent, or from other persons in a like position; but from this time forward the Crown deducted 72*l.* each year for rent from the Respondent's salary of 540*l.*, notwithstanding

his protests, and only paid him the balance. Ultimately, in 1889, a special case was stated as between Mr. Fisher and the Crown for the purpose of obtaining the opinion of the Court upon the question (among others) whether the Governor in Council was justified in deducting from Mr. Fisher's salary the sum of 72*l.* per annum for rent for quarters at the Post Office.

Paragraphs 5, 10, and 11 of that special case (which were admitted as evidence in the present proceedings) were as follows:—

"Paragraph 5. For the purpose of performing his duties the Petitioner (*i.e.*, the present Respondent), has to be in attendance at the said office, and has to reside at the said office, and sometimes has to work overtime.

"Paragraph 10. Before the 12th day of January 1885 the Petitioner, like all other postmasters who resided at a post office, was treated as entitled to live at the post office with his family, and in the official returns published in the Government Gazette his emoluments were always stated as—

(1) The amount of his salary without deduction; and

(2) Quarters, fuel, and water.

"Paragraph 11. In all the Appropriation Acts of the Parliament of Victoria up to the said 12th of January, the Petitioner and all other postmasters and telegraph managers were described as being allowed quarters, fuel, and water, and except the persons so described in the Appropriation Acts there were not at the time of the passing of the Public Service Act, 1883, any persons 'entitled to quarters,' within the meaning of the 89th Section of that Act."

The answer of the Court to the above-mentioned question was that the Governor in Council was not justified in deducting the 72*l.* for rent. The Court pointed out that under Section 89 of the Act power to make a deduction for rent only existed where an officer had not any right or title to quarters; and that this state of facts was excluded by paragraph 5 of the special case, finding that the postmaster had to reside: and the Court drew a distinction between the cases of a man allowed to occupy Government premises, if he desired to do so, and of a man compelled to reside upon Government premises for the performance of his duties there, whether he liked it or not.

In consequence of that decision the sum of 226*l.* (being the amount of the deductions improperly made for rent) was paid to Mr. Fisher by the Crown. In other respects, however, the Crown simply ignored that decision, and continued to deduct 72*l.* per annum for rent from his salary as before. The Appropriation Acts from 1891 to 1896 continued to refer to his being allowed a salary with "quarters, fuel, and water," and the annual return in the January Gazette in each year under Section 28 of the Public Service Act No. 1133 (which section followed *verbatim* Section 25 of the repealed Act of 1883) put Mr. Fisher's salary at 540*l.* It also stated that every officer occupying for the purpose of residence any building belonging to the Government was charged a fair and reasonable sum for rent, which sum was deducted from his salary; although the Court had decided in the special case that such deduction was illegal against Mr. Fisher. But although under the Public Service Acts Mr. Fisher was entitled to a salary of 540*l.*, the Appropriation Acts for 1891 and subsequent years were so framed as to provide 468*l.* only to meet it; and that sum and no more

was, in spite of his protests, paid to him in each year down to the date of his final retirement; that is to say, the deduction of 72*l.* per annum for rent from his salary, which had been decided to be illegal, was persisted in.

Upon his retirement the Respondent commenced these proceedings by petition of right to recover the sums so deducted since the year 1890. The answer set up the old defence; and an amended answer raised the further defence that as the Appropriation Acts in each year provided 468*l.* and no more for the payment of Mr. Fisher's salary, there was no further money legally available for the purpose.

The case was tried before Holroyd, J., who decided in Mr. Fisher's favour; and this was affirmed by the Full Court, Williams and Hood, JJ., dissenting.

In their Lordships' opinion that judgment was unquestionably right. When Section 52 of Act No. 160 was altered by Section 89 of Act No. 773, by the introduction into the latter of the words "not entitled to quarters," without any express explanation of their meaning, it cannot be doubted that the alteration, making the power of deducting rent less extensive than before, was made with reference to the state of circumstances existing at the time, and with the express object of exempting from payment of rent for quarters persons who had never been charged with rent, although the words of Section 52 of the Act of 1862 were wide enough to include them. The dissenting Judges took a different view, and held that the words added had no specific meaning, but were merely inserted by way of extra caution to provide for the possible future event of some person coming forward who might make out such a right. Their Lordships cannot place such a construction upon the Act. The Chief Justice examined the Appropriation Acts for 42 years

past and pointed out that for the whole of that period certain classes of public officers (in which officers in charge of gaols and postmasters were included) had been provided in addition to their salaries with quarters, fuel, and water; and also that there were many instances in those Acts in which a temporary pecuniary allowance was made to officers for "loss of quarters" or "in "lieu of quarters." There is moreover the admitted fact that at the passing of the Act of 1883 (No. 773) there were not any persons "entitled to quarters" within the meaning of Section 89 of that Act except those described in the Appropriation Acts as allowed quarters, fuel, and water. Their Lordships have no hesitation in deciding that the persons so allowed quarters were the persons excepted from the operation of Sections 89 and 136 of the Acts Nos. 773 and 1133 as "officers entitled to quarters." Mr. Fisher therefore is not within either of those sections, and no deduction for rent can legally be made thereunder from his salary.

The two dissenting Judges took the view that although Mr. Fisher had been allowed quarters he could not claim to be *entitled* to them without some express provision by contract or statute conferring such title upon him; and no such provision was proved. But their Lordships cannot agree in this view. They consider that when Mr. Fisher entered into a legal contract to perform certain duties which necessarily involved his residence in quarters provided for him at the Post Office, it cannot be said that he was not entitled to those quarters while that contract was in force. Any further provision as to such quarters would have been unnecessary and superfluous.

The dissenting Judges also held that whatever right Mr. Fisher might otherwise have had, he lost it by acquiescing without complaint in the

annual deduction made from his salary. It is difficult to see how any such acquiescence not sufficient to create a bar by statute could have furnished a defence to a legal claim for salary, and no such point was made by the defence. But in fact there was not any such acquiescence. He did protest; and the Attorney-General instructed the Crown Solicitor to sign a letter admitting that he did so to be used on this Appeal, which will be found on the last page of the Record.

It was also said that when Mr. Fisher accepted a salary of 540*l.* subject to a fair and reasonable deduction for rent under the Order of 12th January 1885, he precluded himself from objecting to a deduction of rent. But this is a misapprehension of the meaning of that Order. It was made under Section 18 of the Act of 1883, to fix Mr. Fisher's salary permanently at 540*l.* without the right of increment up to 600*l.*, which otherwise he would have had under Section 17. It applied to other persons as well, and if read as providing for deduction in cases where a deduction could legally be made, it is not open to objection. But this Order in Council could not have been intended, and could not legally operate, to impose a deduction for rent upon a person who was, by Section 89 of the same Act, expressly exempted from any such deduction.

Another point set up by way of defence was that as the Appropriation Acts only provided 468*l.* for Mr. Fisher's salary, nothing further could be recovered against the Crown. This was very fully and exhaustively dealt with by the Chief Justice; and his reasoning on this point was not challenged at their Lordships' bar. But in any case their Lordships would not enter upon the consideration of that question; as they are satisfied that, the Respondent having finally established the validity of his claim against the

Crown for the sum for which he has recovered judgment, the provision necessary to satisfy that obligation will be readily and promptly made.

Under these circumstances their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The costs must be paid by the Appellant.

THE KING *v.* BULL.

This case in all material circumstances closely resembles the last. The present Respondent Colonel Bull seeks to recover from the Crown sums improperly deducted from his salary in respect of rent; and this is an appeal by the Crown from the decision of the Full Court of the Supreme Court of Victoria which confirmed the judgment of the Court below in Colonel Bull's favour for 635*l.* 16*s.* 8*d.*

The material facts are as follows:—Colonel Bull entered the public service in 1884. In 1889 he was appointed Governor of Melbourne Gaol. The Public Service Board, by two certificates each dated the 30th of July 1890, fixed the value of the *quarters occupied* by the Governor of the Melbourne Gaol and by the Governor of the Penal Establishment at Pentridge respectively, at 70*l.* per year. By an Order of the Governor in Council dated the 25th of August 1890 the salary of Colonel Bull as Governor of Melbourne Gaol was fixed at the sum of 570*l.* per annum from 30th July 1890; and by another order of the Governor in Council of the same date a deduction of 70*l.* per annum was directed to be made from his salary for the use of the building belonging to the Government which he occupied for the purpose of residence;

meaning his quarters in the prison. The Governorship of Pentridge Gaol being about to become vacant on the 25th of March 1892, the Board on the 26th February recommended the transfer of Colonel Bull, Second Class, fixed at 570*l.* a year, to the vacant office from the 26th of March, subject to a fair and reasonable deduction for rent. The Order in Council of the 2nd of March 1892, fixing his salary at 500*l.* a year, and saying nothing about deductions, was only a short method of carrying into effect the recommendation of the Board, and ought to be so regarded. The proposed transfer was made; and Colonel Bull held that post until he retired from the public service on the 31st of July 1899, on his statutory pension calculated on a salary of 570*l.*

During the whole time he was Governor Colonel Bull resided at Melbourne and Pentridge Gaols respectively in the quarters assigned to him there. He had no choice but to do so. In order to perform his duties it was essential that the officer in command and charge of the prison should reside on the spot. The rules and regulations relating to penal establishments and gaols were (very properly) extremely strict in that respect. Rule 217 of the Regulations of February 1892 provided that where quarters were not provided for the second executive officer the Inspector-General might make such arrangements for the charge of the prison as he might consider advisable. No provision was made for the more important case of the head officer not being provided with quarters. The reason is obvious, viz., that no such case could arise. The Appropriation Acts from a period long antecedent to Colonel Bull's appointment down to 1900 treated governors of gaols as provided with quarters, fuel, light, water, and prisoner servants.

During the period of Colonel Bull's service the Crown regularly each year deducted 70*l.* from his salary as rent for his quarters, notwithstanding his protests, and paid him 500*l.* only; and they attempted to justify such deduction under Sections 89 and 133 of the Acts of 1883 and 1890 (Nos. 773 and 1133). Ultimately Colonel Bull took these proceedings by petition of right to recover the sum thus deducted. He recovered judgment against the Crown in the Court below, and this was confirmed on appeal. The judgment on appeal was given by the Chief Justice, and it does not appear whether any Judge dissented or not.

Their Lordships concur entirely in that decision. For reasons given fully in Fisher's case, which need not be here repeated, they hold that Colonel Bull clearly was an officer entitled to quarters within the meaning of the two sections above mentioned, and therefore that no deduction by way of rent could legally be made from his salary. He was outside those sections altogether.

They will therefore humbly advise His Majesty that this Appeal should be dismissed.

The costs must be paid by the Appellant.