Weight is added to the majority conclusion in the present case by the fact that as the administrator controls only the actual estate he is not in a position to affect the interest of, for example, a surviving joint tenant, by a process of apportionment such as is authorized by the Act.

Thus this case seems to be of interest and importance not only in that it is an interpretation of an extremely important statute but also for the methods of statutory interpretation applied and for some comments on an ancient doctrine.

H. G. SHORE

MARKS v. THE COMMONWEALTH OF AUSTRALIA[1]

Military officer—Resignation of commission—Necessity for acceptance—Whether Crown bound to accept—Royal prerogatives and civil liberty—Defence Act 1903-1956 (Cth) S.17 (1).

Section 17 (1) of the Defence Act 1903-1956 (Cth) provides: 'Except during time of war an officer may by writing under his hand tender the resignation of his commission at any time by giving three months' notice.' Marks, an officer of the Australian military forces, on 17 April 1963 gave three months' notice of his intention to resign his commission. The plaintiff sought two alternative declarations: either (1) that the Governor-General, acting with the advice of the Executive Council,[2] was under a legal duty to accept his resignation, or (2) that an officer in the military forces may effectively resign his commission by his own act without permission of the Governor-General, and that consequently the plaintiff ceased to be a commissioned officer on 17 July 1963. The Commonwealth demurred, claiming that, on the true construction of section 17 (1), a resignation, to be effective, must be accepted, and that the question of acceptance is one which is left to be determined by the Governor-General. It was held unanimously by the Full Court of the High Court in a reserved judgment that the legal effect of section 17 (1) is that an officer cannot resign his commission without the permission of the Governor-General, and that there is no legal duty to accept resignations tendered in the manner required by the sub-section.

Kitto, Taylor and Menzies JJ. had no doubts that at common law an officer of the Queen could not resign without Her Majesty's permission which she was under no obligation to give. Menzies J. said that he 'did not find it necessary to go beyond *Hearson v. Churchill*[3] for persuasive authority for this self-commending proposition'.[4] Taylor J. considered that, at least since *Hearson's* case, 'there has been universal acceptance that an officer in the regular army has no right to resign his commission'.[5] Kitto J. appears to have assumed the point. Windeyer and Owen JJ. examined the common law regarding offices held of the Crown (Windeyer J. pointed out that the expression 'resigning a commission' means resign-

1 (1964) 38 A.L.J.R. 140. High Court of Australia: Kitto, Taylor, Menzies, Windeyer, and Owen JJ.

2 S.4 defines 'Governor-General' as 'the Governor-General . . . acting with the advice of the Executive Council'.

3 [1892] 2 Q.B. 144.

4 38 A.L.J.R. 143.

5 *Ibid.* 142.

ing the office to which the officer was appointed),[6] and they concluded that such offices could not be effectively vacated by their holders without the consent of the Crown.

There were five decisions of English courts which were discussed by Windeyer and Owen JJ.:[7] *Parker v. Lord Clive*,[8] *Vertue v. Lord Clive*,[9] *Attorney-General v. Lady Rowe*,[10] R. *v. Cuming; Ex parte Hall*,[11] and *Hearson v. Churchill*.[12] The first two cases decided that 'military officers in the service of the East India Company were not at liberty to resign their commissions, and quit the service, at any time and under any circumstances, merely *ad libitum*, whenever they themselves should think fit or be so inclined'.[13] However, officers would have a right to be discharged after giving reasonable notice of their intention to resign.[14]

Windeyer J. regarded these two decisions as authority for the proposition that 'an officer does not upon sending in his papers become entitled at once to leave his post and quit the service'.[15] His Honour indicated that, in the appropriate circumstances, which he did not particularize, an officer may have a legal right to have his resignation accepted.[16] Owen J. regarded (correctly in the writer's opinion) the East India Company cases as irrelevant because they depended on the contract between the Company and the officers. It was for this reason that the opinion of a jury was sought to determine whether the officers had given reasonable notice of their intention to quit the service. Lord Esher was of the same opinion in *Hearson v. Churchill*.[17]

At common law no contract exists between the Crown and its servants.[18] An office bearer is bound to serve according to the legal tenor of his oath as determined by the courts of law.[19] Whether, and in what circumstances, he may retire depends upon the common law or statute.

In the *Attorney-General v. Lady Rowe*[20] it appears to have been de-

6 *Ibid.* 146. Although it may be logically accurate to consider the law relating to the resignation of military offices as but one aspect of the wider question of the resignation of offices held of the Crown, it is only in the case of military offices that disregard for the law leads to the imposition of a penalty. The exigencies of military service and the security of the nation are factors which, in the writer's opinion, justify this difference. If a civil office-holder ceased to perform his duties without permission it would be disrespectful, but nothing more. The law relating to military offices is therefore really an area *sui generis*, and reference to the law of civil offices can have little more than persuasive authority.

7 These cases are cited in *Halsbury's Laws of England* (Simonds Edition 1954) xxx para. 1598 as authority for the proposition that 'an officer has no right to resign his commission, but may apply for permission to do so'.

8 (1769) 4 Burr. 2419; 98 E.R. 267.

9 (1769) 4 Burr. 2472; 98 E.R. 296.

10 (1862) 1 H. & C. 31.

11 (1887) 19 Q.B.D. 13.

12 [1892] 2 Q.B. 144. See also *Ex parte Trenchard* (1874) L.R. 9 Q.B. 406.

13 *Per* Lord Mansfield reported (1769) 98 E.R. 268.

14 'As to their being bound for life by their contract—I freely declare that they are not . . . [but they are not] at liberty to quit under all circumstances.' *Per* Yates J. 98 E.R. 296.

15 38 A.L.J.R. 151.

16 *Ibid.* 150, 151, 153.

17 [1892] 2 Q.B. 144.

18 'The general rule is well established that at common law the Crown is not contractually bound to persons whom it takes into its military or civil service, and it may at pleasure dismiss them or refuse to pay them.' *Per* Rich J. in *The Commonwealth v. Welsh* (1947) 74 C.L.R. 245, 262. See also *The Commonwealth v. Quince* (1944) 68 C.L.R. 227.

19 'The duties of the people towards their sovereign are implied by law.' Joseph Chitty, *Prerogatives of the Crown* (1820) 16.

20 (1862) 1 H. & C. 31.

cided that a judge, who holds an office under the Crown, may resign without obtaining the permission of the Sovereign. The Court were undoubtably influenced by the need for complete judicial freedom from the Crown, and it would be wrong to regard the decision as being applicable to other than judicial offices. Owen J. regarded statements of the Court which indicated that an officer may resign of his own volition as wrong.[21]

The two most important and recent decisions, *R. v. Cuming; Ex parte Hall*,[22] and *Hearson v. Churchill*,[23] were concerned with naval officers who left their ships, with no intention of returning, after having tendered their resignations but before they were accepted. In both cases the question was whether the plaintiffs were, at the time they left their ships, 'persons in or belonging to Her Majesty's Navy, and borne on the books of any one of Her Majesty's ships in commission'.[24] It was held that their resignations did not have the effect of removing them from the navy until they were accepted, and that, as their names were 'borne on the books of . . . one of Her Majesty's ships in commission', they were deserters[25] and subject to naval discipline.

Having regard to the common law relating to the resignation of military offices, the Court agreed that the plaintiff must fail unless he could establish statutory authority for his contentions.[26] The Court held that he had failed to do this. Section 17 (1) was declaratory (with two procedural differences) of the common law.[27] Windeyer J. stated that he regarded the section as merely indicating the procedure to be adopted by an officer intending to leave the military forces. After three months' notice of his intention to do so, the officer may offer in writing to resign his commission. It would still be necessary to look to the common law in order to see what was required to make this offer effective.[28] The other members of the Court did not make it clear whether they agreed with Windeyer J., or whether they regarded section 17 (1) as itself enacting by implication that an effective resignation required the Governor-General's permission which was to be given in his absolute discretion.[29] The former conclusion is the more likely.[30] In effect, though, the Court's decision is unanimous in accepting the submission of the Commonwealth.

21 38 A.L.J.R. 158. 22 (1887) 19 Q.B.D. 13.

23 [1892] 2 Q.B. 144.

24 Naval Discipline Act, 1866 s.87.

25 It would indeed be strange if an officer could avoid a charge of desertion by the simple expedient of sending in his resignation before leaving his regiment.

26 E.g. Menzies J.: 'I am in no doubt that, in the absence of statutory authority so to do, an officer of the Queen cannot resign his commission without Her Majesty's permission.' 38 A.L.J.R. 143.

27 At common law an officer could tender his resignation at any time, whether in peace or war, without giving notice of his intention to do so. 38 A.L.J.R. 153. The new Defence Act, No. 92 of 1964, has repealed these procedural requirements.

28 'It seems to me that section 17 (1) leaves the question of when his resignation can become effective to be governed by the established practices in the service and the common law existing in 1903.' *Per* Windeyer J. 38 A.L.J.R. 153.

29 Their Honours appear to have agreed that the section is purely declaratory of the administrative policy of the executive, and this would seem to indicate that they agreed with Windeyer J.

30 But note that Kitto J., with whom Taylor J. agreed, said: 'I should construe section 17 (1) as not entitling an officer to bring about the termination of his commission without the assent of the Governor-General.'

Kitto, Taylor, Menzies and Owen JJ. found support for their construction of section 17 (1) in the provisions of section 13 of the Naval Defence Act of 1910.[31] This expressly provides that a naval officer may 'retire', but makes the Governor-General's permission necessary in order to make the resignation complete.[32] Menzies J. said: 'It seems to me that the two sections by different modes of expression achieve substantially the same result, and, as might be expected, naval officers and other officers of the Australian defence forces stand on the same footing so far as resignation is concerned.'[33]

Owen and Menzies JJ. regarded the now repealed section 34 as important.[34] It permitted members of state forces who had been compulsorily incorporated in the newly constituted Australian defence forces to 'retire therefrom on giving fourteen days' notice in writing'. This section was enacted at the same time as section 17 (1). 'The contrast between the word "retire" . . . and the words "tender the resignation of his commission" in section 17 (1) is a strong indication that this section was not intended to give officers the right to bring their services to an end merely by their own act.'[35]

The Solicitor-General's argument based on section 16 is worth some attention. That section states that 'officers shall hold their appointments during the pleasure of the Governor-General . . .'. Sir Kenneth Bailey argued that this provision enabled the Governor-General, not only to dismiss, but also to hold officers at his pleasure. Owen J.,[36] with whom Menzies J. appears to have agreed,[37] accepted this argument, and regarded it as 'the sound basis for the rule that an officer has no right, by resigning his commission, to put an end to his obligation to serve the Crown'.[38] Windeyer J. denied that section 16 was more than declaratory of the common law rule that servants of the Crown are dismissible at the Crown's pleasure.[39] The section is silent as to the capacity of a government servant to terminate his employment, and, in its terms, the section is clearly concerned only with the power of the Crown to dismiss its servants. It is difficult to deny the force of the argument of Windeyer J. that the expression 'at the pleasure of' is a technical expression of the common law[40] which means no more than it says; an officer holds his commission only for as long as the Governor-General pleases. It is true that the effect of the decision in *Marks* is that both the tenure and

[31] 38 A.L.J.R. 141, 144, 158.

[32] S. 13 '(1) Except in time of war, an officer may by writing under his hand resign his commission at the expiration of any time not being less than three months from the date of receipt of the resignation.

(2) The resignation shall not have effect until it has been accepted by the Governor-General.'

[33] 38 A.L.J.R. 144. In *O'Day v. The Commonwealth* (1964) 38 A.L.J.R. 159, the High Court, applying *Marks*, construed s. 13 of the Naval Defence Act 1910-1963 (Cth) as giving an officer no enforceable legal right to have his resignation accepted by the Governor-General.

[34] 38 A.L.J.R. 144, 158.

[35] *Ibid.* 144. *Per* Menzies J.

[36] *Ibid.* 158.

[37] *Ibid.* 143.

[38] *Ibid.* 158. He regarded his interpretation of s. 16 as declaratory of the common law.

[39] 38 A.L.J.R. 154 ff.

[40] To the argument that Mr Justice Rowe was precluded from resigning his appointment whenever he wished because his office stated that he held it during the

dismissal of commissioned officers depends on the pleasure of the Governor-General, but it is difficult to see why Owen J. should regard this as 'the sound basis' for the common law rule.

The High Court gave little consideration to the question of the undoubted royal prerogative of the administration of the army.[41] This is difficult to understand as the Court would have been without jurisdiction if the Governor-General was acting in the matter of the appointment of officers under the army government prerogative. It would appear that the Court regarded this prerogative as suspended by virtue of section 8(e) of the Defence Act which expressly empowers the Governor-General to *appoint* officers. This is not an indisputable conclusion. If Windeyer J. is correct, and in the opinion of the writer he is, the Act is silent as to the requirements of an effective resignation, and it would appear then that the matter would depend on the prerogative, the *intra vires* exercise of which the Court could not examine.[42] It is disappointing that the Court was silent on this matter, but it is easy to understand why counsel for the Commonwealth did not press what might be considered a technical point.

It is curious to observe that Kitto[43] and Taylor JJ. accepted as good law the ancient prerogative of the Sovereign to 'employ and compel his subjects . . . on any occasion . . . to serve in such offices or functions as the public good and the nature of the constitution require'.[44] Windeyer J. regarded this prerogative as 'obsolete'.[45] In times of peace, it is difficult to understand how this ancient prerogative, if it ever did exist, can be called upon to justify the grossest deprivation of the liberty and freedom of the citizen.[46] Surely Parliamentary authority[47] is always necessary, except in time of war, when the rights of the individual are to be sacrificed for the vague concept of the 'public good'.[48]

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pleasure of the Crown, Pollock C.B. said: 'That is a perversion of its meaning. The Crown merely retains the power of terminating the appointment at any moment.' (1862) 1 H. & C. 31.

41 *Chandler v. Director of Public Prosecutions* [1962] 3 W.L.R. 694. See generally *Halsbury's Laws of England* (Simonds Edition 1954) vii para. 562.

42 *China Navigation Co. v. Attorney-General* [1932] 2 K.B. 197, per Scrutton L.J.; Halsbury, *op. cit.* vii para. 464.

43 38 A.L.J.R. 142.

44 Joseph Chitty, *Prerogatives of the Crown* (1820) 18.

45 38 A.L.J.R. 149.

46 Halsbury, *op. cit.* vii para. 464: 'The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to *Magna Carta*, or any other statute, or to the liberties of the subject.'

Ibid. para. 464: 'It has also been suggested that the Crown has by its prerogative a right to take steps to deal with an *apprehended emergency*, even to the extent of interfering with the rights of the subject; but this is almost certainly incorrect.' It would seem that this statement is too wide, and that the Crown may interfere with private property rights when a war emergency is *immediately imminent: Burmah Oil Co. Ltd. v. Lord Advocate* [1964] 2 W.L.R. 1231. However, *a fortiori*, it would appear to be clear that such interference cannot be justified in times of peace.

47 38 A.L.J.R. 149. *Per* Windeyer J.

'The King shall . . . lay no burden upon his subjects, but he must do it by their consent in parliament.' *Hampden's* case 3 St. Tr. 826, 1130, *per* Fortescue C.J.

48 See generally John Locke, *Of Civil Government*, 14th chapter entitled 'Of Prerogative', and Dennis Lloyd, *The Idea of Law*, (1964) 7th chapter entitled 'Law and Freedom'.

Soon after the decision of the High Court was given the Commonwealth Parliament altered section 17 of the Defence Act to make it absolutely clear that the permission of the Governor-General is always necessary in order to make an officer's resignation complete, and that the officer has no absolute right to be released from his military duties.[49] Precise details are given of the types of circumstances in which an officer might expect his resignation to be refused, but the basic law remains unaltered.[50]

P. L. A. GORE

[49] S. 11 Defence Act, No. 92 of 1964.
[50] Parliamentary Debates, Senate, 15 October 1964, 1028. Parliamentary Debates, House of Representatives, 29 October 1964, 2320.