[HIGH COURT OF AUSTRALIA.]

WILLIAMSON . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . DEFENDANT.

H. C. OF A. 1907.

MELBOURNE, *Nov.* 18, 19, 20, 29.

Higgins J.

*Commonwealth Public Service Act* 1902 (*No.* 5 *of* 1902), *secs.* 46, 78—*Public Servant — Dismissal — Procedure — Suspension—Condition precedent—Wrongful dismissal—Relief—Damages—Reinstatement—Defence—Money not voted by Parliament.*

On 30th January 1907 an officer of the Public Service of the Commonwealth was suspended from duty in reference to a shortage which had been discovered in his accounts. He was prosecuted criminally in connection with that shortage, was tried and was acquitted. Afterwards, on 2nd May, the officer was charged under the *Commonwealth Public Service Act* 1902 by the Chief Officer with three offences, one being in connection with the shortage in his accounts, and was required to admit, deny or explain these charges, but the original suspension had not been removed, nor was the officer suspended on the later charges. The officer having denied these charges, was on the 7th May further suspended, and, after proceedings which were in accordance with sec. 46, the Governor-General in Council "approved" of his dismissal, and the Government excluded him from the Department, and would not allow him to perform his duties.

*Held*, that the officer was wrongfully dismissed and was entitled to recover damages from the Commonwealth for such wrongful dismissal.

Sec. 78 of the *Commonwealth Public Service Act* 1902 is not an answer to a claim for damages for wrongful dismissal from the Commonwealth Public Service.

There is no right to dismiss an officer at will or otherwise than in accordance with the procedure prescribed in that Act.

The power of dismissal under sec. 46 of that Act must be exercised strictly, and suspension from duty of an officer on the charges for which he is subsequently dismissed is a condition precedent to his rightful dismissal; but

although the power has been wrongfully exercised, if he has been in fact put out of the service, he is not entitled to a declaration that he remains in the service. He has the same remedy as any other servant wrongfully dismissed.

In assessing damages for such a wrongful dismissal the Court will take into consideration the fact that the officer was liable to be forthwith dismissed rightfully under the process prescribed by the Act.

TRIAL OF ACTION.

The plaintiff, William Suckling Williamson, brought an action in the High Court against the Commonwealth claiming £3,000 damages for the wrongful and illegal dismissal of him from his office of Postmaster in the Public Service of the Commonwealth, and alternatively:—(*a*) A declaration that the plaintiff still was, or was entitled to be reinstated as, an officer in the Public Service of the Commonwealth; (*b*) if necessary, an order for the reinstatement of the plaintiff in the Public Service of the Commonwealth; (*c*) an order for payment to the plaintiff by the defendant of all arrears of salary at the date of such order for payment, or, alternatively, of a sum of money equivalent to the whole salary the plaintiff would have received, or would have been entitled to receive, up to the date of such order had he not been deprived of his salary; (*d*) such other declaration or order as the Court might deem proper or necessary.

Prior to 1st March 1901 the plaintiff had been an officer in the Post and Telegraph Department of Victoria, and on that day, when that Department was transferred to the Commonwealth, the plaintiff was transferred to the Public Service of the Commonwealth, and thereafter remained an officer in the Department of the Postmaster-General. At the beginning of the year 1907 the plaintiff was Postmaster at Dimboola, in Victoria, at a salary of £235 per annum. On 29th January 1907 an inspector of the Department examined the Post Office books under the charge of the plaintiff and found a shortage of £50 6s. 7½d. On 30th January 1907 a letter was written by F. L. Outtrim, Deputy Postmaster-General and Chief Officer of the Department, to the plaintiff as follows:—"With reference to the shortage of £50 6s. 7½d. discovered in your advances by the inspector who visited your office yesterday I have to inform you that, pending

H. C. OF A. 1907.

WILLIAMSON v. THE COMMONWEALTH.

further action, you are suspended from duty under the provisions of sec. 46 of the *Commonwealth Public Service Act* 1902."

On 20th February 1907 the plaintiff was at the Court of Petty Sessions, Dimboola, charged on information with larceny of £50 6s. 7½d. the property of His Majesty, and on the hearing of the information the plaintiff was discharged.

On 10th April 1907 the plaintiff was at the Court of Petty Sessions, Dimboola, committed for trial on an information for that on or about 29th January 1907 he being an accounting officer within the meaning of the *Audit Acts* 1901 and 1906 did improperly dispose of certain public moneys, to wit, £50 6s. 7½d., which sum had been received for or on account of the Commonwealth by the plaintiff. On this charge the plaintiff was on 26th April 1907 tried at the Court of General Sessions at Ararat, and was found not guilty.

On 2nd May 1907 a letter was written by W. B. Crosbie, Acting Deputy Postmaster-General (F. L. Outtrim having ceased to act as Chief Officer about 21st February 1907) to the plaintiff as follows:—"Take notice that you are hereby charged under sec. 46 of the *Commonwealth Public Service Act* 1902 with the offences of

"(1) Improper conduct in that on 29th January 1907 you failed to produce when called upon by Mr. H. S. Edgar, District Inspector, the sum of £50 6s. 7½d., Government moneys held by you as an officer of the Postmaster-General's Department.

"(2) Being negligent or careless in the discharge of your duties.

"(3) Using intoxicating beverages to excess.

"You are required to forthwith state in writing whether you admit or deny the truth of such charges and to give any written explanation relative to such offences that you may consider proper for my consideration."

The plaintiff having denied these charges, on 7th May 1907 he was further suspended from duty. A Board of Inquiry was then appointed to consider the charges, and, having considered them, the Board on 29th May 1907 found that all the charges were proved.

On the same day, the Acting Deputy Postmaster-General

recommended that the plaintiff should be dismissed from the service. On 6th June 1907, R. Betheras, Deputy Public Service Commissioner, recommended the dismissal of the plaintiff, and that recommendation was on 22nd June approved by the Governor-General in Council, and his approval was notified in the *Gazette* of 29th June 1907.

The plaintiff then brought this action. The Commonwealth by its defence (*inter alia*) objected that the claim for salary could not be maintained inasmuch as it was not alleged that any greater sum than that received by the plaintiff by way of payment of salary had been appropriated by Parliament for the purpose, and they relied on sec. 78 of the *Commonwealth Public Service Act* 1902. They also, without admitting any liability, brought into Court the sum of £63 16s. 1d., and said that it was sufficient to satisfy any claim of the plaintiff for salary. The plaintiff accepted this sum in satisfaction of the claim in respect of which it was paid in.

*W. Fink*, for the plaintiff.

*Duffy* K.C. (with him *Lewers*), for the defendant. The proceedings taken against the plaintiff were perfectly regular. The word "forthwith" in sec. 46 (2) (*b*) of the *Commonwealth Public Service Act* 1902 means as soon as is reasonable under the circumstances: *Ex parte Lamb*; *In re Southam* (1); *R.* v. *Justices of Worcester* (2). But sec. 66 (1) of the *Commonwealth Public Service Act* 1902, which provides that, if on indictment or presentment an officer is convicted of an offence he shall be deemed to have forfeited his office, contemplates that, where an officer is charged with an offence for which he should be tried by a judicial tribunal, further proceedings under sec. 46 should not be taken until that trial has been had. In such a case, therefore, the intention indicated by the word "forthwith" is satisfied if the proceedings which are to follow upon suspension are postponed until the result of the trial is known. That was the course taken here. The fact that the suspension was on a charge different from that subsequently made, and on which the plaintiff

(1) 19 Ch. D., 169.

(2) 7 Dowl. P.R., 789.

H. C. OF A. 1907.

WILLIAMSON v. THE COMMONWEALTH.

was dismissed, is immaterial, for the suspension is not a condition precedent to the subsequent inquiry and the proceedings following upon it: *Hardcastle on Statutory Law*, 3rd ed., p. 267. If the suspension is under any circumstances a condition precedent, it is not so when the officer is already under suspension at the time the charge is made in respect of which he is subsequently dismissed. No claim for damages for wrongful dismissal can be maintained. The plaintiff was either rightly dismissed or else he is still in the service, and is entitled to a declaration to that effect. The power of dismissal is in the Governor-General: The Constitution, sec. 67. And, even if he has acted illegally, no action will lie against the Commonwealth: *Mattingley* v. *The Queen* (1). If the plaintiff is entitled to damages, the Court in assessing them must take into account the fact that proceedings may at once be taken under sec. 46 to dismiss him: *French* v. *Brookes* (2). See also *McDade* v. *Hoskins* (3). So that the plaintiff has really suffered no damage. By virtue of sec. 78 of the *Commonwealth Public Service Act* 1902 no action for salary will lie here, for no money has been voted by Parliament for that purpose. *Bond* v. *The Commonwealth* (4); *Cousins* v. *The Commonwealth* (5); *Miller* v. *The King* (6); *Fisher* v. *The Queen* (7); *Bremner* v. *Victorian Railways Commissioner* (8).

Proceedings under sec. 46 are quite independent of criminal proceedings, and there can be no question of election between them.

*Fink* in reply. The word "forthwith" means "immediately," the object being that there may be a speedy trial while the evidence is fresh. The defendant by prosecuting the plaintiff criminally made its election, and is not now entitled to proceed against him under sec. 46 of the *Commonwealth Public Service Act* 1902. That section is a criminal code and must be followed strictly. In assessing damages it is to be assumed that the plaintiff is innocent of these charges, and that he will remain in the service until his death or until he reaches the age of retirement.

(1) 22 V.L.R., 80; 16 A.L.T., 171.
(2) 6 Bing., 354.
(3) 18 V.L.R., 417; 14 A.L.T., 56.
(4) 1 C.L.R., 13.
(5) 3 C.L.R., 529.
(6) 28 V.L.R., 530; 24 A.L.T., 150.
(7) 26 V.L.R., 781, at p. 796; 22 A.L.T., 217; (1903) A.C., 158.
(8) 27 V.L.R., 728; 23 A.L.T., 210.

[The following authorities also were cited: *In re Gavegan* (1); *Stockwell* v. *Rider* (2); *Grant* v. *Secretary of State for India* (3); *Smith's Master and Servant*, 5th ed. p. 157.]

*Cur. adv. vult.*

HIGGINS J. read the following judgment.

This is an action by a Postmaster for damages for wrongful dismissal by the defendant, or, in the alternative, for a declaration that he is still in the defendant's service, and payment of salary.

It seems to be beyond question that in the case of an officer under the *Commonwealth Public Service Act* 1902 there is no right to dismiss him at will, or otherwise than in accordance with the procedure prescribed in the Act: *Gould* v. *Stewart* (4). The procedure is set forth in sec. 46.

Under sec. 46, if an officer be charged with an offence, he may either be reprimanded or temporarily suspended. The person to suspend is either the Chief Officer, or some other officer authorized to suspend. "The *suspending* officer or the Chief Officer shall *forthwith* furnish the offending officer with a copy of *the charge on which he is suspended*, and require him to forthwith state in writing whether he admits or denies the truth of *such charge*, and to give any explanation," &c. (sec. 46 (2) (*b*) ). Then the Chief Officer may either (*a*) remove *such suspension*, or (*b*) reprimand, and remove *the suspension*, or (*c*) fine the officer, or (*d*) *further suspend* him, and refer the charge to a Board of Inquiry; and one of the Board must be a representative of the Division in the State in which "the *suspended officer* performed his duties." The Board must not include the person by whom the *officer was suspended*. If "such *suspended* officer" do not admit the truth of the charges, the Board inquires and reports (sec. 46 (3), (4) ). If any of the charges is found to be proved, then, on the recommendation of the Chief Officer the Permanent Head may impose a penalty; or the Public Service Commissioner may reduce the officer in rank; or the Governor-General in Council may dismiss him from the service. In the event of dismissal, the officer shall not be entitled to any salary

(1) "Brisbane Courier" 1st Dec. 1905.
(2) 4 C.L.R., 469.
(3) 2 C.P.D., 445.
(4) (1896) A.C., 575.

H. C. OF A. 1907.

WILLIAMSON v. THE COMMONWEALTH.

or wages during the time of his *suspension*, unless the Governor-General otherwise order (sec. 46 (5) ).

It will be noticed that the whole machinery is made to hinge on an initial suspension of the officer. There is no obligation to suspend; just as there is no obligation to adopt the other alternative—reprimand. But unless there be a suspension, the rest of the machinery prescribed for removal is not applicable. The officer is to be given a copy of the charge "on which he is suspended"; and he is to state whether he admits or denies the truth of "such charge." The Chief Officer, if he think that the offence has not been committed, may remove "such suspension." If there is to be a Board of Inquiry he may "further suspend" the officer. The Board cannot inquire unless the "suspended officer" do not admit the truth of the charges. In short, if there be no suspension for the charges, the officer cannot be furnished with a copy of the charges "on which he is suspended"; and unless he be furnished with such a copy, there is no power to appoint a Board of Inquiry; and if there be no valid Board of Inquiry, the power of the Governor-General to dismiss does not arise. It may be thought that the officer suffers no harm in not being suspended. I am not sure that he is not prejudiced, especially if—as the parties assume—a suspended officer is entitled to pay during suspension, in the event of his not being dismissed. But, prejudiced or not, suspension on the charges for which he is dismissed is made a condition precedent to dismissal. Powers of dismissal under this Act, like powers of expulsion under partnership and other agreements, must be exercised strictly as prescribed.

In the present case, the order of dismissal is based on the three charges contained in the letter of 2nd May 1907. But the plaintiff was not suspended for these three charges. He had been suspended on 30th January 1907 on a certain charge—one only; and the suspension was wrongfully continued till 2nd of May. I say wrongfully, because the section contemplates that the suspension shall be only temporary, and that a copy of the charge should be "forthwith" furnished to the officer; and no such copy was furnished; and the officer was not asked to admit or deny this first charge, but was prosecuted before the

Courts on two abortive informations. Perhaps the strict course for the Department to adopt was to remove the improper suspension, and then to suspend again on the three new charges. But, however that may be, I cannot see how I can say that the Governor-General's order, or "approval" of dismissal, was made in pursuance of the section, when I find that it was made on the basis of the charges other than the charge on which the plaintiff was suspended. In my opinion, the order of dismissal was not justified by the antecedent facts.

Looking at the facts more in detail, it appears that on 30th January 1907, after an inspector's visit to the plaintiff's post office at Dimboola, Mr. Outtrim, the Deputy Postmaster-General, and Chief Officer for Victoria, wrote to the plaintiff, a letter informing him, "with reference to the shortage of £50 6s. 7½d. discovered" in his "advances," that he is suspended from duty under sec. 46 of the Act. The plaintiff replied on 5th February, stating that he intended to make good the shortage, and asking to be allowed to hand it to the relieving officer; and further asking that the Board of Inquiry be held in Melbourne. But the Chief Officer, instead of following the procedure prescribed in sec. 46, on 11th February took out an information against the plaintiff, as a public servant, for stealing the said sum of money. This information was dismissed at Petty Sessions on 20th February. On 5th April 1907 another information was taken out against the plaintiff, under the Audit Acts, for improperly disposing of the said sum of public money. The plaintiff was committed for trial, and on 26th April was tried in General Sessions, and was found not guilty, and discharged. At this time, it will be noticed, the plaintiff was wrongfully under suspension. Even if the loose words of the recital in the letter of 30th January can be treated as stating a definite charge (which I doubt), the plaintiff was not asked to admit or deny or to explain, and the necessary consequential steps were not taken. Then the Department formulated three new charges against the plaintiff. On 2nd May the Acting Deputy Postmaster-General sent him notice that he was charged under sec. 46 with three offences:— (1) improper conduct in failing to produce the said money to the inspector; (2) being negligent or careless in the discharge of his

H. C. OF A. 1907.

WILLIAMSON v. THE COMMONWEALTH.

duties; and (3) using intoxicating beverages to excess. This notice also called on him, in pursuance of sec. 46, for admission or denial, and explanation. But the plaintiff was never suspended on these three charges; and what sec. 46 requires is that the officer shall be forthwith furnished with a copy of the charge *on which he is suspended*. The rest of the procedure seems to have been regular under sec. 46. On 29th May a so-called Board of Inquiry found against the plaintiff on all three charges. On 31st May the Acting Deputy Postmaster-General recommended that the plaintiff be dismissed from the service. On 6th June the Deputy Public Service Commissioner recommended to the Governor-General in Council that the plaintiff be dismissed; and on 22nd June—as appears by the *Gazette* of 29th June—the Governor-General "approved" of many departmental recommendations, including the dismissal of the plaintiff. On 5th July the plaintiff received from the Acting Deputy Postmaster-General a letter stating that the Governor-General in Council "has approved of your dismissal from the public service, and you have been dismissed accordingly."

It has been urged for the defendant that, if the dismissal was illegal, it was only a dismissal or pretended dismissal by the Governor-General in Council, and not by the defendant (see par. 2 statement of claim and defence). But this is, in my opinion, a curious misconception of the basis on which the Courts grant relief in cases of wrongful dismissal. I need not examine the logical puzzles which the position might suggest—a man dismissed by one who had no power to dismiss is not dismissed, &c. Nor is it necessary to enter into an elaborate examination of the legal and constitutional position of the Governor-General, and the responsibility of the Commonwealth for his acts. In my opinion, the plaintiff has proved the statements in par. 2, that the defendant—the Commonwealth—has refused and still refuses to allow him any longer to discharge his duties. If there were nothing else, the letter of the Acting Deputy Postmaster-General of 5th July shows that the Department adopted and acted on the Governor-General's order of dismissal, excluded the plaintiff from the Department, and prevented him from doing the work by which he could earn his salary. It is to be observed, also, that

this objection to the action for wrongful dismissal was not even suggested in the similar Queensland case of *Stockwell* v. *Rider* before the Full High Court (1).

The defendant has, however, resisted this action on the ground, also, of sec. 78 of the Act. Sec. 78 provides that "nothing in this Act shall authorize the expenditure of any greater sum out of the Consolidated Revenue Fund by way of payment of any salary than is from time to time appropriated by the Parliament for the purpose." This section, however, in no way interferes with the power and the duties of the Court to declare rights and to pronounce judgments, leaving it to Parliament to find money for payment of the judgments against the Crown. It refers only to the process of drawing money out of the Consolidated Revenue Fund, forbidding (say) payment of £250 as salary when the sum of £200 only has been appropriated; and it does not apply to the payment of damages at all. It was not meant to affect the substantive rights, created by the Act, of officers against the Crown (sec. 21). It was drawn in view of the *Audit Act* (cf. sec. 34 (4) &c.), and was intended to prevent any inference to the effect that the *Commonwealth Public Service Act* 1902 operated in any way of itself as an appropriation of a larger salary for any officer than that appearing in the *Appropriation Act*. Under the numerous Crown Remedies Acts, a successful petitioner got a certificate of the judgment; and on receipt of the certificate the Governor in Council was authorized to pay the amount out of the Consolidated Revenue. If the Governor in Council refused, there was no legal remedy. The *Judiciary Act* 1903 (sec. 56) has allowed the Commonwealth to be sued instead of the King; but there is no indication of any intention to make such a grave alteration of the legal position as is claimed on behalf of the defendant. A similar contention was raised for the Crown in *Fisher* v. *The Queen* (2); but it was rejected both by the Victorian Full Court, and by the Judicial Committee of the Privy Council. It is urged on me that the Full High Court has taken a different view of this section in *Cousins* v. *The Commonwealth* (3) but I do not think so. The Full Court there had to deal with the

(1) 4 C.L.R., 469.
(2) 26 V.L.R., 781; 22 A.L.T., 217; (1903) A.C., 158, at p. 167.
(3) 3 C.L.R., 529, at p. 542.

H. C. OF A. 1907.

WILLIAMSON v. THE COMMONWEALTH.

specific case pointed at in sec. 78—not a claim for damages, but a claim for a salary greater than that appearing in the *Appropriation Act*. The subject does not appear to have been argued, and the points of distinction were not discussed. But the Court referred to the previous case of *Bond* v. *The Commonwealth* (1), in which the long established practice is clearly stated; and it showed no intention of overruling that case. At all events, sec. 78 has nothing to do with the claim for damages for wrongful dismissal.

There were two points to which considerable attention was given in the argument, but as to which I shall merely state my conclusions. I cannot concur with Mr. *Fink* in his contention that the defendant must be treated as having elected to prosecute the plaintiff criminally, and thus to have precluded itself from proceeding under sec. 46. I think also that Mr. Crosbie, the Acting Deputy Postmaster-General, was competent to give to the plaintiff the notices of May. Mr. *Duffy* seems to me to have proved conclusively that Crosbie was duly appointed by the Permanent Head to perform the duties of Chief Officer under sec. 13 (3).

What, then, is the remedy ? My chief difficulties are owing to the form of the pleadings, and the conduct of the case. The parties ignore the fact that the suspension of 30th January has no logical connection with the dismissal in June—that the suspension from 30th January to May might be unauthorized, even if the subsequent steps were proper (see defence, paragraphs 2, 3 and 4). There seem to have been at least two distinct breaches of contract on the part of the defendant—one in the suspension from work from 30th January to May, or perhaps June; the other in the dismissal of June. Nor have the parties noticed that under Order XVIII. of the High Court Rules any payment of money into Court must be in respect of "a cause of action"; that is to say, in respect of the entire set of facts that give rise to an enforceable claim—"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court": *Read* v. *Brown* (2). But putting aside for the present the difficulty arising from the

(1) 1 C.L.R., 13.

(2) 22 Q.B.D., 128, at p. 131, *per Esher* M.R.

payment into Court, I think that I may fairly deal with the case on the substantial merits—treating the case, as the parties have treated it, as if the plaintiff were suspended on 30th January, as the first step towards the dismissal which took place in June. This course will involve no difference in the result. A suspension under the Act seems to be a conditional or provisional dismissal; if a dismissal follow, the officer is not entitled to pay during the time of suspension (sec. 46 (5) ).

Now, under the ordinary law, a servant dismissed has an option between two remedies. He cannot have both remedies; he must elect between them. One remedy is on the contract for the wrongful dismissal; the other remedy is to treat the contract as rescinded, and to sue for his actual service: *Goodman* v. *Pocock* (1). There was for some time an impression that a servant could wait till the end of his term, doing nothing, but remaining ready and willing to work; and then sue for his wages for the balance of the term. This view seemed to rest on the theory of a status in the servant, such as could not be affected by a wrongful act; but the view has long since been exploded: 2 Sm. L.C., 11th ed., p. 48; *Goodman* v. *Pocock* (2). The truth is, a servant cannot claim wages unless he perform the condition precedent of doing the work. If he have been prevented from doing the work, he has an action for damages for breach of the contract; or he may accept the position, rescind the contract which the master refuses to perform, and sue for the work actually done. In the present case the plaintiff claims, alternatively, for damages for wrongful dismissal, or for salary up to the order for payment thereof; and, in the event of the latter order, he asks for a declaration that he still is, or is entitled to be reinstated as, an officer in the service, and for an order for reinstatement. I know of no authority or ground for any such order or declaration; and I certainly shall not declare the plaintiff to be still in the Government service when, according to his own allegation as well as my finding, he has been put out of the service, and remains out.

As for the alternative remedy, damages for wrongful dismissal, a servant dismissed would be entitled to recover the amount of

(1) 15 Q.B., 576, at p. 583, *per Erle* J.

(2) 15 Q.B., 576, at pp. 581, 583, *per Patteson* and *Erle* JJ.

H. C. OF A. 1907.

WILLIAMSON v. THE COMMONWEALTH.

the loss which he has sustained by the breach of contract; and in assessing the damages it would be proper, and necessary, to take into account the wages attributable to the broken period, the time of actual service since last pay time till dismissal: *Goodman* v. *Pocock* (1). In this case, under the circumstances, I propose to take into account in assessing damages the amount of the plaintiff's salary until dismissal. I regard him as being unable, until dismissal, to get other employment. The plaintiff's case for damages was based on the theory that if he had not been dismissed he would have remained in the service till the age of 60, and would get a pension afterwards. But I have to take into account, not only the risk of death, and the risk of removal, but the probability—the extreme probability—of the plaintiff speedily losing his office by legal means, and even for the offences already charged against him (see *French* v. *Brookes* (2); *Maw* v. *Jones* (3).) If the defendant, instead of dismissing the plaintiff in June or July, had chosen to start anew, to suspend him, and to take proper proceedings for dismissal, the plaintiff's tenure of office would have been very short indeed; and the wages would cease at the suspension. In my opinion, such fresh proceedings would have been taken; and if the plaintiff were still in the service, they would now be taken; and a fresh Board of Inquiry would come to the same conclusions of fact as the former Board. As regards the possible earnings of the plaintiff from other sources, having seen him, and heard him, and ascertained his age and qualifications, I think that £78 per annum is as much as he could reasonably expect to earn, year in year out. On the whole, I assess the damages at £100.

But then I have to deal with the payment into Court. The defendant, without admitting any liability, brought into Court £63 16s. 1d., and said that this sum was "sufficient to satisfy any claim of the plaintiff for salary." The particulars showed this sum to be meant for the salary from 31st January to 7th May (the date of sending the three charges to a Board of Inquiry). The plaintiff, by his reply, accepted this sum "in satisfaction of his claim for salary." Now, the rule says that the money must be accepted "in satisfaction of the *cause of action*" (rule 6); and

(1) 15 Q.B., 576. (2) 6 Bing., 354. (3) 25 Q.B.D., 107.

in such a case the plaintiff cannot proceed with his action except as to costs: *In re Earl of Stamford*; *Savage* v. *Payne* (1). The defendant's repudiation or breach of the contract is an essential part of the cause of action, whichever remedy be pursued. The parties treat the case as one breach, involving one of two remedies. But, even if the action could proceed, notwithstanding the acceptance of the money, I should have thought that the acceptance of the payment showed an election on the part of the plaintiff to treat the contract as rescinded, and to sue for any past wages for services rendered, and not to sue for damages. I should have thought that the plaintiff could claim no more salary than that paid in, could not claim any damages attributable to salary. But Mr. *Duffy*, for the defendant, has admitted that notwithstanding the withdrawal from Court of £63 16s. 1d., the plaintiff, if he has been wrongfully dismissed, is entitled to have damages assessed on the basis that he would get salary as an officer as from 7th May 1907. I shall not insist on the rigour of the pleadings where neither party wishes me to do so. Both parties have acted on the understanding that the acceptance of the money did not conclude the plaintiff's rights; and I think that under the circumstances I shall best do justice by dealing with the merits of the case unfettered, with regard to the money in Court, by the form of the proceedings. Having found the plaintiff's loss, apart from the money in Court, to be £100, I deduct the money already taken out by the plaintiff, £63 16s. 1d.; and I find his net loss, the amount for which I shall give judgment, to be £36 3s. 11d.

*Judgment for the plaintiff for* £36 3*s.* 11*d.*

Solicitor, for plaintiff, *Peers*.

Solicitor, for defendant, *Powers*, Commonwealth Crown Solicitor.

B. L.

(1) 53 L.T., 512.