[HIGH COURT OF AUSTRALIA.]

TAYLOR . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . DEFENDANTS.

H. C. OF A. 1917.

MELBOURNE, *June* 26, 29.

Isaacs J.

Public Service (Commonwealth)—Offence by officer—Investigation—Reference to Board of Inquiry—Report—Penalty—Condition precedent—Suspension of officer—Commonwealth Public Service Act 1902-1915 (*No.* 5 *of* 1902—*No.* 37 *of* 1915), *sec.* 46.

Where an officer of the Public Service of the Commonwealth is charged with an offence under sec. 46 of the *Commonwealth Public Service Act* 1902-1915, the charge may be referred to a Board of Inquiry under sub-sec. 4 of that section notwithstanding that the officer has not been suspended under sub-sec. 2 or further suspended under sub-sec. 4.

Williamson v. *The Commonwealth*, 5 C.L.R., 174, distinguished.

Therefore, where an officer charged with such an offence was permitted by the Chief Officer to continue in the performance of his duties pending the determination of the charge and voluntarily assented to so continue,

Held, that the subsequent proceedings and report of the Board of Inquiry in relation to the charge, and the consequent reduction of the officer in status and salary, were not *ultra vires*.

HEARING OF ACTION.

An action was brought in the High Court by William Taylor, an officer of the Public Service of the Commonwealth, against the Commonwealth, seeking a declaration that the proceedings and report of a Board of Inquiry, appointed under sec. 46 (4) of the *Commonwealth Public Service Act* 1902-1915, and the action of the Public Service Commissioner thereon, were *ultra vires* and without authority, and that he was still a line inspector in the Department of the Postmaster-General at a salary of £228 a year.

The action was heard by *Isaacs* J., in whose judgment hereunder the material facts appear.

Schutt, for the plaintiff.

Mann, for the defendants.

Cur. adv. vult.

June 29.

ISAACS J. read the following judgment:—The plaintiff William Taylor is an officer employed in the General Division of the Commonwealth Public Service. In November 1915 he was a line inspector in the Postmaster-General's Department receiving £228 a year. From 19th May 1915 to 7th July of that year he had been supervising the work of line construction between Footscray and Sunshine. On 8th November the Chief Officer, Melbourne, charged him with negligence or carelessness in the discharge of his duties in failing to see that the work was carried out in accordance with standard practice and that satisfactory progress was made. He was not suspended, but all the rest of the procedure required by sec. 46 of the *Commonwealth Public Service Act* was followed. The Chief Officer at once, by letter of 8th November, gave him written notice of the charge, setting it out formally, and required him to forthwith state in writing whether he admitted or denied the truth of the charge, and to give any explanation in writing he might think fit as to the matter for the Chief Officer's consideration. The letter added these words: "You will be permitted to continue in the performance of the discharge of your duties pending the determination of the charge." On 13th November the plaintiff replied by letter stating: "In reference to the charge made against me, I absolutely deny the charge and demand that a Board of Inquiry be appointed to investigate it, as all work carried out by me between the dates mentioned was by instructions received from the Assistant Engineer, Metropolitan Division." On 7th January 1916 the Chief Officer, having considered the explanation, formally stated that the alleged offence "is in my opinion of so serious a nature that an investigation thereof should be made by a Board of Inquiry," and with the written approval of the Public Service Inspector

H. C. OF A. 1917. TAYLOR v. THE COMMONWEALTH. Isaacs J.

appointed a Board of Inquiry, consisting of three persons named, and referred the charge to the Board for investigation and report. On 12th January notification was given to the plaintiff. On 14th February and on several subsequent days the Board sat. On 22nd March a majority of the Board found the charge proved, the third member dissenting. On 11th May the Acting Public Service Commissioner reduced the plaintiff in status and salary, by reducing him to the position of line foreman at a salary of £210 per annum as from the date upon which he should take up that position.

On 9th October 1916 the plaintiff instituted these proceedings, in which he seeks a declaration by this Court that the proceedings of the Board, and its report, and the action of the Acting Public Service Commissioner were all *ultra vires*, and without authority, and that consequently the plaintiff is in law still a line inspector at the salary of £228 a year.

This claim is based on two grounds—one of law, and the other of fact.

The point of law is that as there was no suspension of the plaintiff there has been an absence of an indispensable condition stipulated by the Legislature in sec. 46. The objection of fact is that although the Chief Officer expressly stated he considered the matter serious enough for investigation by a Board of Inquiry, he really did not so consider it, either because he never gave the point any consideration but acted on the plaintiff's own demand for a Board, or else he did consider it and came to the contrary conclusion when he permitted the plaintiff to continue his duties. The objection rests purely on suggestion without any evidence to support it, and is contrary to the express and responsible statement of the Chief Officer. Further it is quite consistent to think a charge sufficiently serious to require investigation by a Board, and yet not so serious as to demand the entire suspension from duty of the officer involved. I have no hesitation in finding this issue of fact against the plaintiff.

That leaves the one point of law, namely, whether the simple absence of suspension entirely vitiates the whole proceedings. It is true there is no issue of estoppel raised, nor have I to consider whether it could in any circumstances be successfully raised ; I therefore have not considered such a question. But the broad facts remain

that the Chief Officer in making the charge intimated his permission to the plaintiff to continue his duties pending the determination of the charge; that the plaintiff did continue his duties without remonstrance, and did himself demand a Board of Inquiry notwithstanding that he was not suspended. No doubt, if the law requires suspension in all cases, these facts do not cure the defect; but they show that if his voluntary assent by conduct to continue his duties, added to the Chief Officer's permission to so continue, would satisfy the law, then the law has been satisfied.

It was argued for the plaintiff that, notwithstanding the amending provision of 1911, there must still in all cases be a suspension of an officer as a condition to the investigation of a charge by a Board of Inquiry. On the other hand, it was contended for the Commonwealth that the Chief Officer may of his own volition, if he thinks the charge not so serious as to require suspension, dispense with suspension altogether, and require the officer to continue his duties pending the determination of the charge, whether the officer be willing to do so or not.

There is a middle course, which may be the true interpretation of the section as it now stands. On sec. 46 as originally framed, the case of *Williamson* v. *The Commonwealth* (1) was decided in 1907 by my learned brother *Higgins*. The judgment in that case proceeded on the view that, upon the true construction of the section as it then stood, suspension was an indispensable condition precedent to punishment. The learned Justice said (2): "It will be noticed that the whole machinery is made to hinge on an initial suspension of the officer." From that point the procedure was traced down to its finality. So the law stood for about four years, during which time no doubt the decision was observed in the course of administration. Then, when Parliament was in various directions amending the Act it took occasion by sec. 5 of Act No. 26 of 1911 to alter sec. 46 of the original Act. That alteration took the form of inserting as a proviso to sub-sec. 2 these words: "Provided that where the Chief Officer is satisfied that the charge is not of such a serious nature as to require a suspension of the officer, he may permit

(1) 5 C.L.R., 174. (2) 5 C.L.R., at p. 180.

H. C. OF A. 1917.

TAYLOR v. THE COMMONWEALTH.

Isaacs J.

him to continue in the performance of his duties pending the determination of the charge." It is quite true, as learned counsel for the plaintiff has observed, that the proviso is inserted at the end of sub-sec. 2, which provided only for the "temporary" suspension which ends with departmental action short of sending the case to a Board. But that, though an element in construing the amendment, is not the only element, or even the chief one. The principal element is the language of the Legislature. The test in such a case as the present, where no question of legislative power arises, is "What have they said?" not "Where have they said it?" And having regard to the words used by the Legislature, I am bound to reject the interpretation relied on by the plaintiff. The decision in *Williamson's Case* regarded "suspension" as an indispensable condition until the charge was finally disposed of one way or the other. Suspension was either "temporary" suspension or "further" suspension, but "suspension" in some form had to exist until the charge was determined. Now, when Parliament turned its attention to the subject in 1911 it manifestly treated the decision in *Williamson's Case* as correct upon the law then existing, and it resolved to alter the law regarding suspension. It introduced the alteration at the earliest point by inserting the amendment at the end of sub-sec. 2, but it used language which carried on the alteration to the termination of the proceedings. It has not used the expression "temporary" suspension but "suspension," which may include suspension all the way if the other words require it; and then it does use the widest words when it extends the continued performance of duties down to "the determination of the charge." Reading those words in their natural sense (see *R.* v. *Smith* (1) and cases there cited) and without any qualifying context, and remembering they are inserted in 1911 after *Williamson's Case*, I find it impossible to cut them down as the plaintiff suggests. That suggestion is to limit the words "determination of the charge" to the determination of the charge by the Chief Officer if he does in fact determine it. But that is inserting words not found in the enactment. It also admittedly refers to a "determination" not included in sub-sec. 2 and only found in sub-sec. 3, and yet it declines

(1) (1910) 1 K.B., 17, at p. 25.

to go on and include the determination included in sub-secs. 4 and 5 though these are just as consequential on sub-sec. 2 and just as naturally referable to the phrase under consideration as is the alternatively possible determination in sub-sec. 3. In addition, if we are to act on the familiar principle of choosing as between two possible constructions that which is more reasonable and convenient, the balance turns against the plaintiff's view. I, therefore, reject his contention that the "further suspension" referred to in sub-sec. 4 is still always essential where a Board is appointed, notwithstanding there may now be no initial suspension to which the suspension insisted on can be regarded as a "further" suspension. "Determination of the charge" at the end of sub-sec. 2 means any determination of the charge which may take place under any of the provisions which follow that sub-section. I consequently decide against the plaintiff. But I desire to add that I do not decide that the full argument pressed for the defendants is necessarily correct. I mean that I do not decide that point, because the facts are such that I am not called upon to decide whether the Chief Officer can force an accused officer to continue his duties against that officer's will. As the law according to the case referred to stood before 1911, neither side could separately, and both sides together were unable conjointly, to dispense with suspension. Parliament has now enabled the Chief Officer to "permit" the accused officer to continue in the performance of his duties; the law does not say the Chief Officer may "compel" or "direct" the officer to continue: and it may be that Parliament has empowered the Chief Officer to consent on the part of the Commonwealth if he thinks no public injury will arise, leaving the officer himself to continue or not as he thinks he will or will not be benefited or injured by so doing.

As I have said, the facts of this case show the plaintiff assented voluntarily to continue his duties, and so, whichever way it is, his case is met. But I have thought it desirable to indicate the alternative view that is certainly possible, so as to prevent any misconception as to the extent of my decision.

Judgment will be entered for the defendant.

I give no costs, because, though I determine the case against the

H. C. OF A. 1917.

TAYLOR v. THE COMMONWEALTH.

Isaacs J.

plaintiff, it cannot be said the matter was not *bonâ fide* open to argument. The Commonwealth, as the employer, is free to frame its regulations in its own way, and as in this case the provision might have been framed so as to exclude all possible doubt, and as this is a ruling which enures for the benefit of the Commonwealth in cases other than the present, I think justice will be met by leaving both sides to bear their own costs.

Judgment for the defendants.

Solicitors for the plaintiff, *Loughrey & Douglas.*

Solicitor for the defendants, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

HIS MAJESTY THE KING . . . . APPELLANT;

AND

SNOW . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1917.

ADELAIDE, *May* 28-31.

MELBOURNE, *June* 7.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Trading with the Enemy—Meaning at common law—Commercial intercourse—Communications upon business matters—Trading with the Enemy Acts 1914 (*No.* 9 *and No.* 17 *of* 1914), *secs.* 2, 3—*Imperial Proclamations of 5th August* 1914 *and 9th September,* 1914.

The term "trading with the enemy" at common law and as used in the *Trading with the Enemy Acts* 1914 includes all commercial intercourse with the enemy.

The Panariellos, 84 L.J. P., 140; 85 L.J. P., 112, considered and followed.