[HIGH COURT OF AUSTRALIA.]

HUNKIN . . . . . APPELLANT;
NOMINAL DEFENDANT,

AND

SIEBERT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1934.

ADELAIDE, *Sept.* 28; *Oct.* 1, 5.

Rich, Starke, Dixon and McTiernan JJ.

Public Service (S.A.)—Suspension of officer—Right to salary during suspension—Whether power to suspend incident to power to dismiss—Public Service Act 1916 (*S.A.*) (*No.* 1259), *secs.* 53, 54, 57, 60*—*Public Service Act Amendment Act* 1919 (*S.A.*) (*No.* 1385), *sec.* 5.

A., an officer in the Public Service in South Australia, was suspended from his duties until a charge of larceny on which he had been arrested had been dealt with. A. was acquitted on the charge, and subsequently the Governor in Council purported to dismiss him from the service as from the date of the suspension.

Held, that A. was entitled to his salary during the period of suspension and that the reservation by sec. 60 of the *Public Service Act* 1916 (S.A.) of the Crown's power to dismiss did not carry with it a reservation of the power to suspend.

Decision of the Supreme Court of South Australia (Full Court) affirmed.

* The *Public Service Act* 1916 (S.A.), sec. 60, provides that: Nothing in this Act shall be construed or held to abrogate or restrict the right or power of the Crown, under any other Act or at common law, to dispense with the services of any person employed in the Public Service.

APPEAL from the Supreme Court of South Australia.

The respondent, Joseph Augustine Siebert, was an officer in the Public Service of South Australia. On 4th March 1932 he was arrested and charged with larceny in the Public Service. On 5th March 1932 the head of his department gave him a signed notice in the following terms :—" Notice of Suspension. Take notice that I have suspended you from your duties as an officer of the Children's Welfare and Public Relief Department until the charge on which you were arrested yesterday by Detective Dayman has been finally dealt with." The respondent was tried on indictment and acquitted, and, on an information for obtaining money by false pretences which was also laid, a *nolle prosequi* was entered. The respondent thereupon presented himself for duty, but the head of the department orally suspended him further. After some inquiry he was dismissed from the service by an order of the Executive Council. The dismissal was on 14th December 1932, and purported to take effect from 5th March 1932, the date of suspension. During the period of suspension the respondent received no salary.

The respondent brought a petition of right praying for payment of his salary during the term of suspension. The petition was referred to the Supreme Court and heard by *Napier* J., who gave judgment for the respondent. An appeal from this judgment to the Full Court of South Australia was dismissed.

From this decision of the Full Court the appellant now appealed to the High Court.

Hannan, Crown Solicitor for South Australia, for the appellant. Under prior legislation the Crown had only a limited power to dispense with services of a public servant. Sec. 60 of the *Public Service Act* 1916 restores the old common law power to dismiss and incidentally to suspend (*Le Leu* v. *The Commonwealth* (1)). The power to suspend is inherent in the power to dismiss. The legal effect of suspension is that the servant is suspended both from duties and from remuneration (*Wallwork* v. *Fielding* (2)). Too much weight should not be attached to the form of notice. In fact

(1) (1921) 29 C.L.R. 305, at p. 311. (2) (1922) 2 K.B. 66.

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respondent was suspended from remuneration as well as duties. The departmental head had no power to suspend him on full pay. There is no contractual relationship between the Crown and its servant (*Reilly* v. *The King* (1)). [Counsel also referred to *Cloete* v. *The Queen* (2); *Slingsby's Case* (3).]

Travers, for the respondent. There was no power to suspend except from duties only, or, if there were any greater power, the terms of the notice of suspension show that it was not exercised. The right to salary continued while the respondent had the character of officer. A contractual relationship existed (*Gould* v. *Stuart* (4); *Carey* v. *The Commonwealth* (5); *Williamson* v. *The Commonwealth* (6); *Coker* v. *The Queen* (7); *Leaman* v. *The King* (8); *Gibson* v. *East India Co.* (9); *Grant* v. *Secretary of State for India* (10)). [He was stopped.]

Cur. adv. vult.

Oct. 5.

The following written judgments were delivered :—

RICH, DIXON AND MCTIERNAN JJ. In the suit out of which this appeal arises a dismissed public servant recovered from the Crown unpaid salary for a period during which he had been under suspension. He was charged with larceny as a public servant, whereupon the head of his department notified him that he had suspended him from his duties until the charge on which he was arrested was finally dealt with. He was tried on indictment and acquitted. An information for false pretences had been filed, but upon this a *nolle prosequi* was entered. Thereupon he again presented himself for duty, but the departmental head orally suspended him further. After some inquiry he was dismissed from the service by an order of the Executive Council. The order purported to dismiss him retrospectively as from the date upon which he had been suspended. During the

(1) (1934) A.C. 176.
(2) (1854) 8 Moo. P.C.C. 484; 14 E.R. 184.
(3) (1680) 3 Swanst. 178; 36 E.R. 821.
(4) (1896) A.C. 575.
(5) (1921) 30 C.L.R. 132.
(6) (1907) 5 C.L.R. 174.
(7) (1896) 16 N.Z.L.R. 193.
(8) (1920) 3 K.B. 663.
(9) (1839) 5 Bing. N.C. 262; 132 E.R. 1105.
(10) (1877) 37 L.T.N.S. 188.

period of his suspension and up to his dismissal he received no salary. Sec. 60 of the *Public Service Act* 1916 provides that nothing in the Act shall be construed, or held to abrogate or restrict the right or power of the Crown, under any other Act or at common law, to dispense with the services of any person employed in the Public Service. It is in virtue of this provision that he was dismissed (Cf. *Young* v. *Adams* (1)). Secs. 53 and 54 of the Act contain elaborate provisions for dealing with charges against officers, the nature of which sec. 53 describes; and, under sec. 54, an officer so charged may be temporarily suspended by the permanent head of the department, who must thereupon furnish him with a statement of the charge and proceed to the investigation of the charge in the manner prescribed in the section. If, in the result, the charge is established, the officer may be dismissed, and, in that case, unless the Governor in Council otherwise orders, he is not entitled to any salary for the period of suspension.

In the present case proceedings were not taken under these provisions, which, whether applicable or not in point of law, were considered unsuitable to a case in which the public servant was to be tried criminally. Moreover, sec. 57 provides that, if any officer is convicted of felony, he shall be deemed to have forfeited his office and his salary shall cease from the day of his conviction, or, if the Governor in Council so directs, from the date of the commission of the offence. Probably the departmental head, although he suspended the officer, did not proceed under sec. 54 because he regarded sec. 57 as disposing of the matter if a verdict of guilty were found. But the result, in our opinion, is to make it impossible for the Crown to withhold the salary for the period of suspension. The Crown's power of suspending its servants from office existed at common law and is of great antiquity. The manner of its exercise depended upon the nature of the office. Its exercise did not have the effect of provisionally or temporarily vacating the office, and did not necessarily deprive the officer of the right to salary (see *Slingsby's Case* (2); *Sutherland* v. *Murray* (3), cited in *Johnstone* v. *Sutton* (4);

(1) (1898) A.C. 469.
(2) (1680) 3 Swanst. 178; 36 E.R. 821.
(3) (1783).
(4) (1786) 1 Term Rep. 510, at p. 538; 99 E.R. 1225, at p. 1240.

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Johnstone v. *Sutton* (1); *Phillips* v. *Bury* (2); *Bunter* v. *Cresswell* (3); Cp. *Duke of Buckingham's Case* (4) and Preface to *Croke's Reports* and *Forsyth's Cases and Opinions*, p. 70). But whatever might be its effect at common law, the *Public Service Act* 1916 operates, in our opinion, to define exclusively the occasions and mode of the exercise of the power to suspend. Secs. 53 and 54 lay down a method of dealing with delinquent officers, which includes suspension, and, according to *Gould* v. *Stuart* (5), such provisions must be interpreted as restricting the common law right of the Crown to exercise a similar power by other means and in other circumstances.

The argument in support of the appeal recognized this consequence but sought to displace it by means of sec. 60. It was contended that the reservation of the power of dismissal without cause necessarily carried with it a reservation of the power of suspension, which, it was claimed, was an incident or concomitant of the former power. This contention appears to us to be untenable. Not only does the statute itself distinguish between suspension and dismissal, but in point of law they have, as is illustrated by the authorities already cited, always been treated as separate things. The power of dismissal is plainly exercisable without preliminary suspension. Indeed the very fact that it is reserved, notwithstanding an elaborate provision for dealing with offending officers, suggests that the purpose of the reservation was not to remove delinquent officers, but to enable the Crown to exercise a residual or ultimate discretion. Suspension may be convenient in some, but certainly not in all, cases where the use of this discretion is contemplated. However this may be, it cannot be said in any case that suspension must continue for the reasons suggested by the maxim *quando lex aliquid concedit concedere videtur et illud sine quo res ipsa valere non potest.* The power of dismissal can be effectually exercised without suspension.

For these reasons we think the order appealed from was right and the appeal should be dismissed.

(1) (1786) 1 Term Rep., at p. 526; 99 E.R., at p. 1233.
(2) (1788) 2 Term Rep. 346, at p. 351; 100 E.R. 186, at p. 189.
(3) (1850) 19 L.J. Q.B. 357, at p. 362; 117 E.R. 317, at p. 319.
(4) (1568) 3 Dyer 285b; 73 E.R. 640.
(5) (1896) A.C. 575.

STARKE J. The respondent was an officer in the Public Service of South Australia. On 5th March 1932 he was suspended from his duties as an officer of the Children's Welfare and Public Relief Department, until a charge of larceny on which he was arrested had been finally dealt with. The respondent was acquitted on this and other charges. But, on 14th December 1932, the Governor in Council dismissed him from the service as from the 5th March 1932, under the provisions of sec. 60 of the *Public Service Act* 1916. The question for determination is whether the respondent is entitled to payment of his salary during the period of his suspension, that is, from 5th March 1932 to 14th December 1932. The Supreme Court of South Australia decided, and in my opinion rightly decided, that he was so entitled.

The *Public Service Act* 1916 provides, in sec. 54, for the temporary suspension of officers, but it was conceded, and properly conceded, in argument, that the respondent was not suspended under or in accordance with the provisions of this section. It was contended, however, that the provisions of sec. 60 reserved the common law right or power of the Crown to dispense with the services of any person employed in the Public Service, and it was claimed that the right or power of suspension was an incident of that right or power. The argument is untenable, and for the reasons given by the learned Judges of the Supreme Court. One was that the fair meaning of the notice of the 5th March—"I have suspended you from your duties . . . until the charge . . . has been finally dealt with"—was not a determination of the respondent's service or office, but an intimation that he should desist from performing his duties until the charge was disposed of. The notice looked to the provisions of sec. 57, if the charge were established: "If any officer is convicted of any felony, or, unless the Governor directs to the contrary, of any other indictable offence, he shall be deemed to have forfeited his office, and he shall thereupon cease to perform the duties thereof, and his salary or other remuneration shall cease as from the day of his conviction, or, if the Governor so directs, from the date of the commission of the offence."

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The other, that the express power of suspension contained in sec. 54 necessarily regulates and controls any prerogative power of the Crown to suspend, and, by and during suspension, deprive an officer who is subject to the Public Service Acts of the salary provided for him pursuant to those Acts (see *Public Service Act Amendment Act (No. 2) 1925*, sec. 27).

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the respondent, *Villeneuve Smith, Kelly, Hague & Travers.*

C. C. B.