[HIGH COURT OF AUSTRALIA.]

FLETCHER . . . . . APPELLANT;
PLAINTIFF,

AND

NOTT . . . . . RESPONDENT.
NOMINAL DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 30, 31; *May* 4.

Latham C.J., Rich, Starke, Dixon and Evatt JJ.

Police—Police officer—Tenure of office—At the pleasure of the Crown—Police Regulation Act 1899-1935 (*N.S.W.*) (*No.* 20 *of* 1899—*No.* 13 *of* 1935), *secs.* 6, 9, 10, 12—*Police Regulation (Appeals) Act* 1923 (*N.S.W.*) (*No.* 33 *of* 1923), *secs.* 6, 8—*Interpretation Act* 1897 (*N.S.W.*) (*No.* 4 *of* 1897), *sec.* 30.

Neither the rules providing for the general government and discipline of the police force made under sec. 12 of the *Police Regulation Act* 1899-1935 (N.S.W.), nor the *Police Regulation (Appeals) Act* 1923 (N.S.W.) control or restrict the power of the Executive Government to dismiss an officer of the police force at will.

Decision of the Supreme Court of New South Wales (Full Court): *Fletcher* v. *Nott*, (1937) 37 S.R. (N.S.W.) 430; 54 W.N. (N.S.W.) 138, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales against Melville Charles Nott, as nominal defendant on behalf of the Government of New South Wales, the plaintiff, Ernest Harold Fletcher, claimed the sum of £10,000 as damages for wrongful dismissal out of the service of His Majesty as a member of the police force of New South Wales.

Upon the hearing of a demurrer to the pleadings by the plaintiff the parties agreed to state a special case in accordance with the

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provisions of the *Common Law Procedure Act* 1899 (N.S.W.). The matter was adjourned, accordingly, and, subsequently, there was filed a special case which was substantially as follows :—

1. The plaintiff, Ernest Harold Fletcher, is the plaintiff in an action wherein he is claiming damages for wrongful dismissal from his office of police constable.

2. Under the provisions of the *Claims against the Government and Crown Suits Act* 1912, Melville Charles Nott, Under-Secretary of Justice, has been appointed as nominal defendant on behalf of the Government of New South Wales and is, accordingly, the defendant in the action.

3. Prior to the happening of the events hereinafter set out the plaintiff had been duly appointed as a police constable by the Inspector-General of Police in accordance with the *Police Regulation Act* 1899 and the regulations passed thereunder.

4. On 1st December 1936 the plaintiff was in service as such police constable and in enjoyment of the rights and privileges attached to such position.

5. On 30th November 1936 his Honour Judge *Markell*, in pursuance of a commission, delivered to the Governor a signed report in which the plaintiff was reported to be guilty of having deliberately "framed" a man for a starting-price betting offence and of having given false evidence to procure a conviction for a betting offence.

6. On 1st December 1936 the Chief Secretary, being the Minister referred to in the Act, transmitted the following minute to the then Commissioner of Police :—"Chief Secretary's Department. Report of Royal Commission in relation to Starting-Price Betting. Following the receipt of the report of the Royal Commissioner, I now direct that the members of the police force named in the attached list be suspended forthwith from any duty in the police force with a view to finalising further action on each case." In the "attached list" the names of thirteen officers were given, including that of the plaintiff. Those thirteen officers were thereupon accordingly suspended by the commissioner.

7. On 2nd December 1936 the Chief Secretary transmitted to the commissioner the following minute :—"Chief Secretary's Department. Report of Royal Commission in relation to S.P. betting.

Following my minute of the 1st inst., in relation to the report of the Royal Commissioner concerning S.P. betting, I now direct that the following members of the police force be dismissed from the police service forthwith in view of the finding of the commissioner as indicated against their respective names in respect of the cases mentioned " [Here followed a list of thirteen men with, in each instance, the finding and the name of the case].

8. The thirteen men referred to in the minute were the same thirteen as were named in the previous minute. They were thereupon accordingly dismissed by a departmental communication made to them by order of the commissioner.

9. At or before the time of the receipt by the commissioner of the minute of 2nd December he received from the Chief Secretary in the course of his duty a copy of the report of the Royal Commissioner aforesaid.

10. On 5th February 1937 a minute by the Chief Secretary of which the following is (omitting formal parts) a copy, was passed by the Executive Council for New South Wales :—" Subject : Confirming dismissals of certain members of police force made by the deputy commissioner at the direction of the Honourable the Chief Secretary ; disallowing their appointments &c. Department of the Chief Secretary, Sydney, 5th February 1937. It is recommended to His Excellency the Lieutenant-Governor and the Executive Council that—(*a*) the dismissals from their respective offices in the police force of the members of the police force mentioned in the schedule hereto made on or about the 2nd December 1936, by the Deputy Commissioner of Police at the direction of me, the Minister administering the *Police Regulation Act* 1899-1935, be confirmed ; and (*b*) the appointments of the sergeants of police mentioned in the first part of the schedule hereto and of the constables of police mentioned in the second part of such schedule (made by any Commissioner of Police or any Inspector-General of Police or any Deputy Commissioner of Police or any person performing the duties of the Inspector-General of Police or Commissioner of Police in that behalf) be, and each and every of such appointments be, disallowed ; (*c*) the members of the police force mentioned in the schedule hereto and each and every of such members be dismissed

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from the police force of New South Wales." (The schedule contained the names of thirteen members of the police force, including that of the plaintiff.)

11. On the same day the Commissioner of Police notified the plaintiff in writing of the contents of the last-mentioned minute.

12. No departmental inquiry was held with regard to the allegations of misconduct against the plaintiff and none of the procedure prescribed by sec. IX. of the police regulations was followed with regard to the plaintiff prior to the purported dismissals or either of them.

The questions for the determination of the court were :—

Whether in the events which had happened as set out in the case an action for wrongful dismissal lay by the plaintiff against the Crown in respect of either or both of the following acts :—

(*a*) The purported dismissal on 2nd December 1936.

(*b*) The purported dismissal on 5th February 1937.

Without prejudice to any right of appeal it was agreed that the parties should submit to any order that the court might see fit to make in regard to the action generally and to the costs of the special case.

Rules made in pursuance of the *Police Regulation Act* 1899-1935, sec. 12, which empowered the Governor to make rules "for the general government and discipline" of the members of the police force, provide, *inter alia*, for the distribution and organization of the force, the enrolment, promotion and discipline of officers, and for conditions of service. Sec. IV, dealing with conditions of service, provides, by clause 1 : "Police are admitted to the service in accordance with the provisions of the *Police Regulation Acts* and upon the following conditions :—(*m*) They will be liable to punishment or dismissal for disobedience, neglect or omission of duty, incompetency, intemperance, disrespect to any person in authority, insolent or indecorous behaviour, or any words or actions subversive of discipline or calculated to impair the efficiency of, or bring discredit upon the police service, or any misconduct punishable by law or contrary to rules and instructions : and will also be liable to such legal penalty as may be incurred." Sec. IX. contains provisions in relation

to " discipline " and includes the following provisions in respect of " inquiries and punishments " :—" 8. Where the facts as disclosed by reports and statements appear to justify disciplinary action against a member of the force the papers are to be forwarded through the usual channels with a recommendation and a draft charge clearly setting out the offence in terms of sub-section 1 (*m*) of section IV. of these rules : Provided that, before any such recommendation and draft charge are submitted, the superintendent in his discretion may order the holding of an open departmental inquiry to ascertain the facts and to see whether there is justification for preferring a definite charge against a member of the police force. A superintendent of police may suspend a member of the force from pay and duty pending the decision of the commissioner, the whole of the facts being promptly reported for consideration. If any doubt arises as to identity police may be directed to appear in the clothes worn at the time of the alleged offence or misconduct. 9. In the Metropolitan District all draft charges shall be submitted to and approved by the metropolitan superintendent before being served upon any member of the service. So far as country districts are concerned, superintendents shall submit draft charges to the commissioner for consideration as to the appropriateness thereof. 10. When it has been decided to prefer a charge against a member of the service for any alleged breach of police rules or instructions, such charge must be made in writing, signed by a responsible officer, and a copy thereof handed to the member concerned who must promptly report in writing whether he admits or denies the charge." Sec. IX. further provides that where the member concerned denies the charge a departmental inquiry is to be held and in respect of the inquiry all proper notices and all reasonable opportunities shall be given to enable the member of the service concerned to collect evidence on his own behalf and call such evidence, to be heard in his own defence and to cross-examine witnesses and to nominate a member of the legal profession who shall appear on his behalf, and the whole of the evidence given at the inquiry shall be taken down, and the officer holding the inquiry shall draw up comment and finding, concluding with a definite statement as to whether the charge inquired into is found proved or not, and that the officer shall thereupon submit

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the whole of the papers to the superintendent or commissioner. Sec. IX. of the rules also contains provisions relating to such matters as the procedure at an open departmental inquiry where no member of the police is definitely charged, attendance at the Police Appeal Board, and police committing offences against the law.

The Full Court of the Supreme Court answered the questions in the special case in the negative and ordered that judgment be entered for the defendant with costs : *Fletcher* v. *Nott* (1).

From that decision the plaintiff appealed to the High Court.

Watt K.C. and *Louat* (with them *Nagle*), for the appellant.

Watt K.C. Although it is not disputed that, in ordinary circumstances, the Crown has the right to dismiss at pleasure members of the police force, the *Police Regulation Act* 1899, under which the appellant was appointed, provides for the making of rules for the general government and discipline of members of the force. The rules made thereunder limit the right of the Crown to dismiss. The legislature dealt with those rules as bearing on the contract of service, that is, by giving members of the police force a right of appeal, and thus brought the matter within the decision in *Shenton* v. *Smith* (2). The rules were issued long after *Ryder* v. *Foley* (3) had been decided. In that case it was admitted that the right of the Crown to dismiss at pleasure was not affected or questioned. The rules furnish some assurance to members of the police force of the continuity of the tenure of office (*Gould* v. *Stuart* (4)). *R. Venkata Rao* v. *Secretary of State for India* (5) is distinguishable. The statute there under consideration, unlike the statute now under consideration, expressly preserved the right of the Crown to dismiss at pleasure. In *Ryder* v. *Foley* (3), also, there was an express statutory provision preserving that right to the Crown. The right of appeal conferred by sec. 6 of the *Police Regulation (Appeals) Act* 1923 is inconsistent with the Crown's right to dismiss at pleasure (*Le Leu* v. *Commonwealth* (6) ; *Reilly* v. *The King* (7)).

(1) (1937) 37 S.R. (N.S.W.) 430 ; 54 W.N. (N.S.W.) 138.
(2) (1895) A.C. 229.
(3) (1906) 4 C.L.R. 422.
(4) (1896) A.C. 575, at p. 578.
(5) (1937) A.C. 248.
(6) (1921) 29 C.L.R. 305, at p. 311.
(7) (1934) A.C. 176, at p. 179.

[LATHAM C.J. referred to *Cross* v. *Commonwealth* (1).]

The appellant has not had an opportunity of defending himself; he has not been heard on the merits.

Louat. The appellant's case does not involve making the rules part of the tenure of the office of members of the police force. The rules are inconsistent with the implication of a power to dismiss at pleasure. In statutes of the nature of the *Police Regulation Act*, there is usually no express power to dismiss; that power is implied. The existence in a statute of a rule-making power similar to that provided in the *Police Regulation Act* renders it impossible to imply the power to dismiss at will which otherwise would be implied (*Gould* v. *Stuart* (2)). The only power to dismiss constables is derived from the *Interpretation Act* 1897. The rules are not inconsistent with the statute and themselves have statutory force. The proper construction of sec. 6 of the *Police Regulation Act*, read in conjunction with sec. 30 of the *Interpretation Act*, shows that the whole exclusive power of the appointment and dismissal of members of the police force was conferred upon the Commissioner of Police. It was competent for the legislature to delegate that power, and the proper exercise by the commissioner of the power so delegated has effect as if the exercise were by the legislature itself (*National Telephone Co.* v. *Baker* (3)). As evidenced by *Williamson* v. *Commonwealth* (4), *Browne* v. *Commissioner for Railways* (5) and *Reilly* v. *The King* (6), a wide public policy is involved in these provisions. The provisions of the *Police Regulation (Amendment) Act* 1935 support the view that the policy is that members of the police force should be protected.

Mason K.C. (with him *Webb*), for the respondent. Under the *Police Regulation Act*, as amended, a member of the police force holds office only during the pleasure of the Crown. Appointments made by the commissioner under sec. 6 of the *Police Regulation Act* 1899 are subject to disallowance by the Governor, that is, the Crown.

(1) (1921) 29 C.L.R. 219.
(2) (1896) A.C. 575.
(3) (1893) 2 Ch. 186, at p. 203.
(4) (1907) 5 C.L.R. 174.
(5) (1935) 36 S.R. (N.S.W.) 21; 53 W.N. (N.S.W.) 1.
(6) (1934) A.C., at p. 179.

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Contracts between the Crown and members of the force are unilateral and are not void for want of reciprocity. The appellant is unable to rely upon the rules as conferring upon him a right to sue the Crown for wrongful dismissal, because those rules are purely administrative and have no legal force or effect whatsoever. The rules are binding on the commissioner in the sense that he should only exercise his power of dismissal in accordance therewith, but they do not, at any time, detract from the power of the Crown to dismiss at pleasure (*Ryder* v. *Foley* (1); *R. Venkata Rao* v. *Secretary of State for India* (2)). It was never contemplated by the legislature that rules would be made giving members of the police force a tenure which was not the unilateral tenure as defined by sec. 10 of the statute. The right of dismissal was discussed in *Power* v. *The King* (3). Although a right of appeal is given by the *Police Regulation (Appeals) Act* 1923 and the regulations made thereunder, the recommendation of the appellate tribunal is forwarded to the Minister of the Crown for adoption or rejection. Here there was not any complaint by the appellant such as was contemplated by the rules requiring departmental investigation.

[DIXON J. referred to *Cooper* v. *Wilson* (4).]

Watt K.C., in reply. The words "legally discharged" in the oath taken and subscribed by members of the police force in pursuance of sec. 9 of the *Police Regulation Act*, and also in sec. 10 of that Act, preclude a capricious discharge. The point decided in *Hunkin* v. *Siebert* (5) was not dismissal *qua* dismissal, but that the reservation by the particular statute of the Crown's power to dismiss did not include a reservation of the power to suspend.

Cur. adv. vult.

May 4. The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales given upon a special case stated under the provisions of the *Common Law Procedure Act*

(1) (1906) 4 C.L.R., at pp. 444, 452, 453.
(2) (1937) A.C., at p. 255.
(3) (1929) N.Z.L.R. 267.
(4) (1937) 2 K.B. 309, at pp. 316, 354, 355.
(5) (1934) 51 C.L.R. 538.

1899 (N.S.W.) in an action in which the plaintiff appellant sued the defendant respondent as a nominal defendant on behalf of the Government of New South Wales.

The action in which the special case was stated is an action in which the plaintiff claimed against the Crown £10,000 damages for wrongful dismissal. The special case submitted for the opinion of the court the question whether, in the events which had happened as set out in the case, an action for wrongful dismissal lay against the Crown in respect of what purported to be a dismissal of the plaintiff from his position of a constable of police by the Commissioner of Police on 2nd December 1936, or in respect of what purported to be a dismissal by the Governor in Council on 5th February 1937.

The plaintiff was appointed as a police constable by the Inspector-General of Police under the *Police Regulation Act* 1899. In 1936 an inquiry into the subject of starting-price betting was held by his Honour Judge *Markell* as Royal Commissioner. The report of Judge *Markell* stated that the plaintiff had " framed " a man for a starting-price betting offence and had given false evidence. The Colonial Secretary, who is the Minister in charge of the administration of the police force under the *Police Regulation Act*, sec. 4, ordered that the plaintiff be suspended from duty, and on 2nd December 1936 directed that he was to be dismissed from the police service. The Commissioner of Police (who by virtue of the *Police Regulation Act* 1935 has been substituted for the inspector-general) then dismissed the plaintiff. On 5th February 1937, the Governor in Council approved a recommendation that the dismissal of the plaintiff be affirmed. The plaintiff was notified accordingly. These are the two dismissals referred to in the special case.

The *Police Regulation Act* 1899, sec. 12, provides that rules may be made by the Governor " for the general government and discipline of the members of the police force." It is contended that the provisions of these rules confer upon the plaintiff a right to a formal inquiry before he can be dismissed for any failure to perform his duty or for any misconduct. The *Police Regulation (Appeals) Act* 1923 establishes a Police Appeal Board which can hear appeals from (*inter alia*) any decision of the commissioner which involves dismissal.

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It is contended that the effect of this Act is that the plaintiff can be dismissed only if the procedure laid down by the Act is followed. The defendant, on the other hand, contends that the plaintiff held his office at pleasure and that he can, therefore, be dismissed at any time by the Crown, and that he cannot possibly have an action for damages against the Crown for wrongful dismissal.

It will be convenient first to consider the general law with respect to the rights of persons engaged in the service of the Crown, and next to inquire into the effect of the relevant statutes and rules upon which the plaintiff relies.

The Full Court adopted and applied the law as declared in *Ryder* v. *Foley* (1). It was there held by this court, after an examination of the authorities, that " it is an implied term in the engagement of every person in the public service that he holds office during pleasure, unless the contrary appears by statute." Reference was made to the leading cases of *Shenton* v. *Smith* (2) and *Dunn* v. *The Queen* (3), which are clear authorities establishing this principle.

This general rule of law was not disputed by the plaintiff, but it was contended that, in this case, the statutory provisions to which reference has been made operated so as to exclude the application of the rule in the case of members of the police force in New South Wales, and it was argued that the case fell within the rule in *Gould* v. *Stuart* (4), and not within the rule in *Shenton* v. *Smith* (2). In *Gould* v. *Stuart* (4) the Privy Council considered the New South Wales *Civil Service Act* 1884, which contained provisions relating to the entry of officers into the civil service, their classification, salaries, promotion, superannuation allowances, &c., and also provided a scheme under which an officer could be suspended and his suspension reported to the minister. The Act also provided that if the Minister ordered or confirmed a suspension he should report to the Governor, who, after calling on the officer to show cause or make explanation, might remove the suspension or, according to the nature of the offence, dismiss the officer from the service, or reduce him, &c. These provisions, it was held, being " manifestly intended for the protection and benefit of the officer, are inconsistent

(1) (1906) 4 C.L.R., at pp. 435, 436.
(2) (1895) A.C. 229.
(3) (1896) 1 Q.B. 116.
(4) (1896) A.C. 575.

with importing into the contract of service the term that the Crown may put an end to it at its pleasure " (1).

The case of *Ryder* v. *Foley* (2) was decided upon a Queensland statute which contains provisions which are indistinguishable from corresponding provisions in the legislation of New South Wales. The provision relating to the appointment of constables is contained in sec. 6 of the *Police Regulation Act* 1899. It provides that the inspector-general (now the commissioner) may, subject to disallowance by the Governor, appoint sergeants and constables of police. (The Queensland *Police Act* 1863 contains a similar provision in sec. 6.) The *Police Regulation Act* 1899 also provides in sec. 9 that a certain oath shall be taken by members of the police force. Under this oath every person entering the police force is required to swear that he will well and truly serve the King for a period specified in the form of oath and until he is legally discharged. (This section corresponds to sec. 11 of the Queensland Act.) Sec. 10 of the *Police Regulation Act* 1899 is as follows: " Every person taking and subscribing such oath shall be deemed to have thereby entered into a written agreement with and shall be thereby bound to serve Her Majesty as a member of the police force and in the capacity in which he has taken such oath, at the current rate of pay for such member, and from the day on which such oath has been taken and subscribed until legally discharged: Provided that—(*a*) no such agreement shall be set aside, cancelled, or annulled for want of reciprocity; (*b*) such agreement may be cancelled at any time by the lawful discharge, dismissal, or other removal from office of any such person, or by the resignation of any such person accepted by the inspector-general or other person acting in his stead." (This section corresponds with sec. 12 of the Queensland Act.) Further, the *Constitution Act* 1902 of New South Wales, sec. 47, provides that, subject to the provisions of the *Public Service Act* 1902 and of all other enactments relating to the appointment of officers, &c., " the appointment of all public officers under the Government . . . shall be vested in the Governor, with the advice of the Executive Council, with the exception of the appointments of the officers liable to retire from office on political grounds,"

(1) (1896) A.C., at p. 578.

(2) (1906) 4 C.L.R. 422.

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and of minor appointments which by any Act or Order in Council are vested in heads of departments or other officers or persons. (This section is found in the *Constitution Act* 1869 of Queensland in sec. 14.)

Upon these provisions it was held in *Ryder* v. *Foley* (1) that there was nothing in the statute to prevent the application of the general rule, so that appointments of constables were at pleasure.

It has been argued upon this appeal that, in view of the provisions of sec. 26 of the *Police Act* 1863 *Amendment Act* 1891 of Queensland, there was really little or nothing to argue in *Ryder* v. *Foley* (1). But that section only provided that nothing in the Act of 1891 should be taken to prevent any members of the police force from being discharged, dismissed or otherwise removed from office in the same manner as if the Act (that is, the Act of 1891) had not been passed. Plainly the section could not affect the construction of the earlier Act (1863) which, as I have pointed out in detail, corresponds very closely with the provisions in the *Police Regulation Act* 1899 of New South Wales. So far as the statutory provisions to which I have already referred are concerned, it is, I think, not possible to distinguish *Ryder* v. *Foley* (1) from the present case.

The next question is whether there are other statutory provisions which bring the present case within the principle of *Gould* v. *Stuart* (2). In the first place, the *Police Regulation Act* 1899 contains in sec. 12 a provision that the Governor may make rules for the general government and discipline of the members of the police force. Rules have been made by virtue of this authority and all the rules have been placed before the court.

Many of the rules consist of advice and instruction to members of the force. Such rules cannot be regarded as establishing rules of law which confer rights; but it is contended that other rules do confer rights on the members of the force. Reference is made particularly to sec. IV. (1) (*m*), which provides that "police are admitted to the service in accordance with the provisions of the *Police Regulation Acts* and upon the following conditions . . . (*m*) They will be liable to punishment or dismissal for disobedience, neglect or omission of duty, incompetency, intemperance, disrespect to any

(1) (1906) 4 C.L.R. 422. (2) (1896) A.C. 575.

person in authority, insolent or indecorous behaviour, or any words or actions subversive of discipline or calculated to impair the efficiency of, or bring discredit upon the police service, or any misconduct punishable by law or contrary to rules and instructions; and will also be liable to such legal penalty as may be incurred." Other rules, under the heading of "discipline", provide for the making of complaints concerning the conduct of officers and for inquiries into such complaints. Provision is made for departmental inquiries into charges formally made. At such inquiries evidence is taken according to a prescribed procedure in the presence of the member of the force who is charged. Further provisions, relating to "open departmental inquiries", deal with cases where such an inquiry has shown that there is ground upon which a charge against a member of the force may be made. In such circumstances the rules provide that a charge shall be formally made and that the procedure for departmental inquiries shall be followed. It is contended that these rules create legal rights so that members of the force can be dismissed only if the procedure set forth in the rules is followed.

In my opinion the rules do not confer upon the plaintiff the right for which he contends, namely, the right to hold his office unless and until he is dismissed in accordance with the rules set forth. If, according to the true construction of the Act, a constable holds his office only during pleasure, no rule made under the Act can alter the conditions of his tenure of office so as to prevent him from being dismissed at the will of the Crown. Servants of the King hold their offices at the King's pleasure. As already stated, this is a long-established principle of law which remains unimpaired save so far as it is affected by statute. See per *Rowlatt* J. in *Rederiaktiebolaget Amphitrite* v. *The King* (1):—The government "cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure; the reason

(1) (1921) 3 K.B. 500, at pp. 503, 504.

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being that it is in the interests of the community that the Ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable." This rule has been altered by statute in many cases in Australia, and civil servants, as a general rule, now have rights which were not thought of in earlier days. *Gould* v. *Stuart* (1) provides an illustration of such a case. On the other hand, *Cross* v. *Commonwealth* (2) is an example of the complete maintenance of the older rule in the case of the Commonwealth military forces, even though the statute itself in that case provided that the commission of an officer should not be cancelled unless a procedure designed to give him a hearing was observed. *Knox* C.J. held that these words were directory only and that they conferred no legal rights upon an officer. Sec. 10 of the *Police Regulation Act*, which has already been quoted, is plainly based upon a recognition of the rule that, as was said in *Power* v. *The King* (3) by the Full Court of New Zealand, and in *Power* v. *The Queen* (4) by the Full Court of Victoria, the contract between the Crown and a servant of the Crown is unilateral. The servant is bound to serve, and to continue to serve for the term for which he has undertaken to serve, but the Crown is not bound to continue to employ him and may determine the employment at any moment without cause, that is, simply at will. While the employment continues, the relations are contractual in character (*Carey* v. *Commonwealth* (5)). But there can be a contract which is determinable at will (*Reilly* v. *The King* (6)).

Under sec. 12 of the *Police Regulation Act* 1899 rules can be made only for the general government and discipline of the police force. A rule which altered the terms of the appointment of members of the force by giving them rights against the Crown which were inconsistent with their legal position as determined by the true construction of the statute would not be a rule merely for the government and discipline of the force. Any rule which, purporting to be made under sec. 12, conferred upon a member of the force a right to be employed unless his dismissal could be justified would, in my opinion, be inconsistent with the Act and would therefore be invalid.

(1) (1896) A.C. 575.
(2) (1921) 29 C.L.R. 219.
(3) (1929) N.Z.L.R. 267, at p. 283.
(4) (1873) 4 A.J.R. 144.
(5) (1921) 30 C.L.R. 132.
(6) (1934) A.C., at pp. 178-180.

Further, it is clear that rules may be made under a statute for the purpose of informing public servants of the manner in which the right to dismiss will be exercised by the Crown without conferring any legal right upon public servants to have those rules observed. A striking instance is to be found in the case of *R. Venkata Rao* v. *Secretary of State for India* (1). In that case the statute provided in express terms that appointments to the civil service of the Crown in India were appointments during His Majesty's pleasure. The statute also provided that rules could be made for regulating the discipline and conduct of civil servants. Rules were made which contained provisions for proper departmental inquiry before dismissal and for appeal against dismissal. It was held by the Privy Council that the rules did not limit in any way the legal right of the Crown to dismiss at pleasure. Such rules could coexist with such a right in the Crown. They gave to members of the civil service a solemn assurance that the right to dismiss would not be exercised in a capricious or arbitrary manner, but they did not confer any legal rights.

Thus it is recognized by the highest judicial authority that there is no necessary inconsistency between an officer of the Crown holding his appointment at pleasure, and the existence of rules, either contained in a statute or made under a statutory power, which purport to regulate the manner in which an officer is to be dismissed. Such rules do not legally limit the power or manner of dismissal.

The rules made under the Act in this case do not, however, purport to confer rights upon members of the police force. For example, the rule upon which most reliance is placed, namely, sec. IV. (1) (*m*), informs the members of the force that they will be liable to dismissal in certain cases. Such a rule does not purport to create any rights. It merely informs and warns members of the force that the power of dismissal may be exercised in the circumstances mentioned. The provisions which led the Privy Council in *Shenton* v. *Smith* (2) to the decision that there was no power to dismiss at pleasure were very different indeed. In that case there was a series of statutory provisions which brought the matter of the dismissal of any officer through the Minister to the Governor, and they included provisions

(1) (1937) A.C. 248. (2) (1895) A.C. 229.

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which specified in detail what the Governor (the Crown) could do. There are no such provisions in the rules made under the Act in this case.

For these reasons I am of opinion that the failure to observe the rules did not give to the plaintiff any right of action.

The plaintiff also relies, however, upon the *Police Regulation (Appeals) Act* 1923. This Act provides for an appeal against the decision of the commissioner in the case of dismissals in the same way as in the cases of granting or refusal of promotion, and punishment by way of fine or otherwise. The appeal, however, is given only from the decision of the commissioner. No appeal is given from a decision of the Governor in Council.

If, for reasons which I have stated, the appointment of the plaintiff was, by reason of the provisions of the *Police Regulation Act* 1899, an appointment at pleasure, then the provisions of the Act of 1923 can have no relevance to this case, unless, indeed, the Act were interpreted as providing not merely for appeals from decisions of the commissioner, but as regulating the whole subject matter of dismissal from the police force. In my opinion, however, the Act cannot be regarded as an Act dealing with this whole subject matter. Under the Act an appeal board is constituted and it has a defined jurisdiction, namely, a jurisdiction to hear appeals from decisions of the commissioner. If, in the present case, the only dismissal of the plaintiff had been the dismissal by the commissioner on 2nd December 1936, and if no action had been taken by the Minister and the Governor in Council, the plaintiff would, in my opinion, have been entitled to demand a hearing before the Police Appeal Board. But in the present case the plaintiff was dismissed by the Governor in Council on 2nd February, and no statute contains any provision for an appeal from such a dismissal.

The plaintiff in this action is suing a nominal defendant on behalf of the Crown. He is not suing the commissioner. Unless he can establish that the Crown wrongfully dismissed him he has no cause of action.

As *Griffith* C.J. said in *Ryder* v. *Foley* (1), "the service" (of the plaintiff) "is terminable at pleasure. How can the exercise of that pleasure be wrongful?" Thus the plaintiff's action must fail.

(1) (1906) 4 C.L.R., at p. 436.

It is not strictly necessary to answer the question asked as to whether the dismissal by the commissioner was lawful, because that question cannot arise in an action against the Crown for damages for wrongful dismissal by the Crown, but it is perhaps desirable to deal with the whole case sought to be made on behalf of the plaintiff. If the commissioner's action can be attributed to the Crown, as having been adopted or ratified by the Crown, then the foregoing reasoning will apply to show that the dismissal, even if without cause, can give no right of action. If, on the other hand, the commissioner had no power to dismiss and his action was not so adopted or ratified, then the position is that the plaintiff has not been dismissed at all. The dismissal is "by reason of its origin bad and inoperative" (*Rangachari* v. *Secretary of State for India* (1)). If, however, the commissioner himself had power to dismiss and exercised that power, but unfairly or wrongfully, the remedy of the plaintiff is not by way of action, but by way of appeal to the Police Appeal Board. I proceed to give my reasons for the opinion that the commissioner had power to dismiss the plaintiff—apart altogether from any rights of the Crown—and that the only remedy of the plaintiff is as stated.

In the first place, the commissioner appointed the plaintiff. Therefore he has power to remove him (*Interpretation Act* 1897, sec. 30). In the second place, the *Police Regulation (Appeals) Act*, sec. 6, assumes and recognizes a power in the commissioner to dismiss a constable, because it gives an appeal from any decision of the commissioner involving a dismissal. The result, therefore, is that when the commissioner dismissed the plaintiff he was acting within his powers, subject to the right of appeal given to the plaintiff by the Act of 1923. The dismissal stands as lawful unless the decision of the commissioner is reversed or varied by the Minister after an appeal to the Police Appeal Board. The remedy of the plaintiff for any unfair dismissal by the commissioner is to be found in an appeal to the board and not in an action for wrongful dismissal (Compare *Browne* v. *Commissioner for Railways* (2)).

The conclusion that the plaintiff has no right of action for wrongful dismissal whether he was dismissed by the commissioner or by the

(1) (1937) L.R. 64 Ind. App. 40, at p. 53.

(2) (1935) 36 S.R. (N.S.W.) 21; 53 W.N. (N.S.W.) 1.

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minister is, I think, placed beyond dispute by the provisions of sec. 8 of the *Police Regulation (Appeals) Act*, which is as follows: "Notwithstanding anything contained in any other Act, no appeal from a decision, either of the appeal board, or of the Minister (or, save as hereinbefore provided, from the inspector-general), with respect to any member of the police force shall lie or be permitted to any court or tribunal whatsoever, and no writ of prohibition or mandamus or certiorari shall lie in respect thereof." The commissioner, as already explained, now takes the place of the inspector-general. This section prevents an appeal to any court by a member of the force from a decision of the Minister. Similarly it prevents any appeal to any court from a decision of the commissioner. An action in which a constable complains of wrongful dismissal by the commissioner or by the Minister must, in my opinion, be regarded as an appeal to a court from a decision of the commissioner or the Minister when he has been dismissed under such a decision. Upon any other interpretation of sec. 8 the provision would be quite ineffectual. Thus sec. 8 provides a further answer to the plaintiff's claim.

For the reasons which I have given the judgment of the Full Court was right and the appeal should, therefore, be dismissed.

RICH J. In *Shenton* v. *Smith* (1) it was said "that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown." The appellant, who was a constable of police, contends that in relation to the police force it is otherwise provided. He bases the contention on the existence of statutory regulations providing a method of laying charges and disposing of them by means of inquiry, report to and action by the commissioner, and upon the existence of a statutory appeal to a board constituted under the *Police Regulation (Appeals) Act* 1923. No doubt all this was intended to increase the security of members of the police force against dismissal on ill-founded or insufficient grounds. But I doubt whether the regulations are more than administrative for the guidance of the force, and it is clear that the *Police Regulation (Appeals) Act* 1923 confers a right of appeal against decisions of the commissioner only. Neither rules

(1) (1895) A.C., at pp. 234, 235.

nor statute appear to me to be directed to the control or restriction of the powers of the Executive Government. In England at common law a police constable did not hold an office in the service of the Crown. But in Australia the police force has been part of the service of the Crown. From that mere fact it follows *prima facie* that a police constable, like other officers, is liable to dismissal by the Governor in Council, whether with or without cause. There is nothing, in my opinion, to take police constables in the New South Wales force out of the general rule. The appellant received notice of his dismissal from the commissioner, but he gave it under the direction of the Minister, whose action was confirmed by an Order in Council. This, I consider, amounts to dismissal under the power of the Crown.

For these reasons I think the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales upon a case stated by the parties in an action in that court.

The *Police Regulation Act* 1899 authorized the Inspector-General of Police (now styled the Commissioner of Police, Act 1935 No. 13), subject to disallowance by the Governor, to appoint constables of police for the preservation of peace throughout New South Wales. Constables so appointed were required to take an oath prescribed in sec. 9, and every person taking and subscribing such oath was deemed to have entered into a written agreement with and was thereby bound to serve His Majesty as a member of the police force until legally discharged, provided that no such agreement should be set aside for want of reciprocity and that such agreement might be cancelled at any time by the lawful dismissal, discharge or other removal from office of any such person.

The *Interpretation Act* 1897, sec. 30, provides that whenever by any Act power is given to His Majesty or to any officer or person to make appointments to any office or place it shall, unless the contrary intention appears, be intended that His Majesty or the Governor, or such officer or person, shall have power to remove or suspend the person appointed.

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The appellant had been appointed a police constable under the *Police Regulation Act* 1899.

A Royal Commission (see Act 1923, No. 29) had been issued by the Governor of New South Wales and in 1936 the commissioner reported that the appellant and other officers of police had been guilty of serious misconduct. Whereupon the Chief Secretary (the Minister administering the *Police Regulation Act*) directed the Commissioner of Police first to suspend the appellant and others and then, on 2nd December 1936, to dismiss them from the force. The Deputy Commissioner of Police (See Act 1933, sec. 4 (1)) dismissed the appellant and others accordingly.

On 5th February 1937, the Governor in Council confirmed the dismissal and also passed an executive minute that the appellant and others "and each and every of such members be dismissed from the police force of New South Wales." The action of the Governor in Council was communicated to the appellant by the Commissioner of Police.

The appellant then commenced an action against the respondent, as nominal defendant on behalf of the Government of New South Wales pursuant to the *Claims against the Government and Crown Suits Act* 1912, for wrongful dismissal. The case was stated in this action and the questions for determination were : Whether an action for wrongful dismissal lies by the plaintiff—the appellant here—against the Crown in respect of either or both of the following acts : —(*a*) the purported dismissal on 2nd December 1936 ; (*b*) the purported dismissal on 5th February 1937.

The appellant as a member of the police force of New South Wales was an officer in the service of the Crown. And it is now well settled that servants of the Crown hold their office during the pleasure of the Crown unless the contrary is provided by law (*Shenton* v. *Smith* (1) ; *Gould* v. *Stuart* (2) ; *R. Venkata Rao* v. *Secretary of State for India* (3) ; *Ryder* v. *Foley* (4)).

The statutory power given to the commissioner to appoint and dismiss constables is a delegated power : it is an expeditious way, as *O'Connor* J. said in *Ryder* v. *Foley* (5), by which when necessity

(1) (1895) A.C. 229.
(2) (1896) A.C. 575.
(3) (1937) A.C. 248.
(4) (1906) 4 C.L.R. 422.
(5) (1906) 4 C.L.R., at p. 451.

arises a constable's services with the Crown might be terminated. But it is an additional authority and in no wise cuts down the right of the Crown itself to dismiss a constable (*Ryder* v. *Foley* (1), per *Barton* J.).

The appellant, however, contends that he did not hold office at the pleasure of the Crown and that he could only be dismissed by a procedure which he claims is provided by the *Police Regulation Act* 1899 and rules made thereunder and by the *Police Regulation (Appeals) Act* 1923. The *Police Regulation Act* 1899, sec. 12, authorized the Governor to make rules for the general government and discipline of members of the police force. Under this power the Governor in Council purported to make rules relating to conditions of service and discipline of the force. They are set forth in detail in the transcript, and I shall not go through them in detail. Somewhat similar provisions have been fully considered by the Judicial Committee in *R. Venkata Rao* v. *Secretary of State for India* (2), by this court in *Ryder* v. *Foley* (3), and by the Supreme Court of New Zealand in *Power* v. *The King* (4). All these tribunals denied that such provisions affected the tenure of office of constables or conferred any right upon them. The conclusion reached was that the provisions constituted administrative machinery necessary or desirable for the management and discipline of the police force.

The reasons assigned for the conclusion are applicable to the present case and may be found at large in the cases mentioned. But there is an additional provision relevant to this case which is contained in the *Police Regulation (Appeals) Act* 1923. It, by sec. 6, provides that any member of the police force, if dissatisfied with any decision of the inspector-general (now Commissioner of Police) in regard to the granting or refusal of promotion to him or the imposition upon him of any punishment where such punishment consists of the infliction of a fine, suspension or reduction whether in rank or pay, dismissal, discharge or transfer, may give notice of appeal from such decision to a Police Appeal Board constituted by the Act. The decision of the board and the report and recommendation of the Commissioner of Police must be forwarded to the Minister

(1) (1906) 4 C.L.R., at pp. 444, 445.
(2) (1937) A.C. 248.
(3) (1906) 4 C.L.R. 422.
(4) (1929) N.Z.L.R. 267.

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administering the Act to be considered by him and his decision is final. No appeal by sec. 8 lies or is permitted to any court or tribunal whatsoever and no writ of prohibition or mandamus or certiorari lies in respect thereof. All this is part of the same administrative scheme for the management and discipline of the police force and is, to adopt the words of the Judicial Committee in *R. Venkata Rao* v. *Secretary of State for India* (1), " a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious and arbitrary action, but will be regulated by rule."

The result is that both the questions stated in the case should be answered in the negative, as they were answered by the Supreme Court, and the appeal dismissed.

DIXON J. Under the combined effect of sec. 6 of the *Police Regulation Act* 1899-1935 and of sec. 30 of the *Interpretation Act* 1897 the Commissioner of Police may appoint and dismiss constables of police. Under sec. 12 of the former Act the Governor in Council is authorized to make rules for the general government and discipline of the police force. Under this power rules have been made which provide how charges against a member of the police force should be formulated, notified, inquired into and dealt with. The rules provide for a hearing before an officer who is to draw up his comment and state whether he finds the charge proved or not, and to submit the record to the superintendent or the commissioner. Under the *Police Regulation* (*Appeals*) *Act* 1923 a board is constituted called the " Police Appeal Board." From decisions of the commissioner of a disciplinary nature a constable or other police officer may appeal to this board. In particular an appeal lies against dismissal by the commissioner.

Although the procedure set out in the rules was not followed, the plaintiff appellant was dismissed from the police force, in which he held the rank of constable. This dismissal was directed by the Minister and communicated to him by the commissioner. Afterwards the dismissal was confirmed by the Governor in Council.

The plaintiff complains that he was wrongfully dismissed. He says that the rules, considered with the statutory provisions giving an

(1) (1937) A.C., at p. 257.

appeal from dismissal by the commissioner, operate to impose conditions upon his liability to removal from office and that, as these conditions were not observed, his dismissal from the force was wrongful.

In my opinion the short answer to the plaintiff's case is that a final or residuary power of dismissal without cause belongs to the Executive Government and that his removal from office was effected by the Governor in Council. For the purposes of the case, it may be assumed in the plaintiff's favour that the rules and the statutory provisions for appeal do regulate the mode in which the commissioner's statutory power of removal may be exercised and the conditions upon which its exercise becomes finally effective. It is unnecessary to consider to what extent the assumption is valid, though plainly it is open to question whether some at least of the rules relating to charges of a disciplinary kind are not merely directory. But neither the rules nor the *Police Regulation (Appeals) Act* govern removal from office by the Governor in Council. No statutory provision invests the Governor in Council with a power of removing members of the police force from office. But, on the other hand, none takes it away. In my opinion the power exists. Its existence is due to the simple fact that the police force is in New South Wales a regular service of the Crown. It is a disciplined force in the service of the Crown. Unless statute otherwise provides, either expressly or by implication, those who serve in such a capacity hold office at the pleasure of the Crown. The general rule of the common law is that the King may refuse the services of any officer of the Crown and suspend or dismiss him from his office.

I do not think that, when a power of appointing and dismissing police constables is given by statute to the commissioner, this is any evidence of a legislative intention to abrogate or exclude the power or removal otherwise residing in the Crown.

For these reasons I think the appeal should be dismissed.

EVATT J. This appeal from the Supreme Court of New South Wales is brought to determine whether police constables hold office upon the condition that the Crown has the power to dismiss at pleasure. Such is the condition which ordinarily applies to

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servants of the Crown: and, to adopt the words of the Judicial Committee in *R. Venkata Rao* v. *Secretary of State for India* (1), "the question is: Does the present case fall into the general category defined and illustrated by *Shenton's Case* (2); or the more exceptional category defined and illustrated by *Gould's Case* (3)?"

To support his contention that the case resembles *Gould's Case* (3), the plaintiff relied upon the rules made in pursuance of the *Police Regulation Act* 1899. By sec. 12 of that Act the Governor is empowered to make rules "for the general government and discipline" of the members of the police force. Rules were duly made. They consist of twenty sections providing, *inter alia*, for the distribution and organization of the force, for the enrolment, promotion and discipline of officers and for conditions of service.

It is to be noted that sec. IV. (1) (*v*), dealing with conditions of service, is mainly set out in descriptive or narrative form. Further, when closely examined, each condition seems rather to emphasize existing legal liabilities and obligations rather than to describe existing rights or to confer new rights. For instance, clause 1 (*m*) of sec. IV. states that the police are liable to punishment or dismissal in respect of a large number of matters mentioned in the rule. It is not possible to read clause 1 (*m*) as an exclusive specification of the causes for which punishment or dismissal may be imposed.

Sec. IX. (10) (dealing with discipline) declares that complaints against police officers should be committed to writing so that, if disciplinary action is required or intended, a definite charge will be preferred and such a procedure will be adopted as will enable the officer charged to know what is alleged against him, and to make full answer. But here again the rules refrain from employing language of command and strongly suggest that what is being done is to direct each person concerned how he is to behave and conform himself, not to give any legally enforceable right to the officer charged or to alter the contract or any part of it to which he is a party.

These prima facie conclusions from the rules are greatly reinforced by a consideration of the statute itself. Sec. 9 shows that the service

(1) (1937) A.C., at p. 256. (2) (1895) A.C. 229.
(3) (1896) A.C. 575.

of the constable is the service of the Crown. Sec. 10 makes the oath of office of a constable equivalent to a written agreement to serve the Crown from the day on which the oath has been taken until the officer has been legally discharged from his obligations. Next, sec. 10 (*a*) provides that the agreement is binding despite " want of reciprocity." By sec. 10 (*b*), the agreement may be cancelled " at any time " by the lawful discharge of the officer. The " want of reciprocity " referred to in sec. 10 (*a*) seems to refer to the fact that, while no member of the police force is at liberty to resign unless he gives three months' notice of such intention (sec. 18), the Crown is under no similar or analogous obligation. It seems to follow at once that the Crown may dispense with the services of the officer without any notice whatever.

It is in the setting of the above statutory provisions that sec. 12 (conferring the rule-making power) must be viewed. I think that Mr. *Watt* was right in arguing that *Ryder* v. *Foley* (1) turned to some extent upon the special provisions of Queensland legislation ; none the less the conclusion to be drawn from the Act of 1899 is that not only does it fail to remove officers of police from the general category of Crown servants liable to be dismissed at pleasure but it provides practically conclusive evidence that they are included within the general category ; further, the special disciplinary rules as to the procedure in case of charges were not intended to (and in fact could not) remove the officers of police from the general category.

Up to this point the plaintiff's case should fail. But attention must be directed to the *Police Regulation* (*Appeals*) *Act* 1923. Sec. 6 thereof gives every member of the police force dissatisfied with the decision of the commissioner a right to appeal to the Police Appeal Board, consisting of a District Court judge. The jurisdiction of the District Court judge includes questions of promotion and questions of punishment, including dismissal. The right of appeal is from the decision of the commissioner. After the Police Appeal Board hears the appeal, it forwards its decision to the commissioner, who transmits to the Minister all the departmental documents, including a report and recommendation of his own. The Minister is thereupon required to consider the matter, and his decision is made final.

(1) (1906) 4 C.L.R. 422.

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Sec. 8 provides that no appeal from a decision either of the appeal board or of the Minister or of the commissioner shall be permitted to any court whatsoever.

It is plain that this Act is of fundamental importance in the good government of the police force of New South Wales. The scheme is that while officers are deprived of all redress before the ordinary courts of law, they are given, by way of compensation, a right of access to an independent tribunal, appointed for seven years, well experienced in the exercise of judicial power, and presumably specially acquainted with the administrative problems affecting the force. It seems to contemplate that, in the first instance, the commissioner should himself give a decision and that in respect of all matters of promotion and punishment the jurisdiction of the minister—whose decision is final—should be appellate and not original. In other words, the scheme is that the officers of police who are placed under the jurisdiction of a commanding officer shall be entitled to obtain his decision upon the vital questions of promotion and punishment; and although such decision is made subject to ultimate ministerial control it is expected that the Minister will never intervene until after the appeal board has heard all parties concerned—including the commissioner—and pronounced its decision. Of course, the appeal board's decisions are not made binding upon the Minister. None the less it would be a most serious responsibility for the Minister to refuse to act upon the decision of the appeal board.

Thus, the interposition of the independent tribunal operates as a continuing guarantee to every officer in the police force. Its very existence is calculated to prevent serious injustice to individuals by making the judgment of the political officer subject to the check and safeguard of a public hearing of grievances or charges where all really concerned can be heard. By such means administrative action is controlled by open investigation before a judicial officer. The importance of the public hearing is universally recognized. And, in regard to judicial proceedings proper, Lord *Shaw* said:—"It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has

place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice ' " (*Scott* v. *Scott* (1)).

In the present case the device of direct ministerial intervention set at nought the scheme of the *Police Regulation (Appeals) Act*. A Royal Commission had inquired into certain matters affecting the administration of the *Gaming and Betting Act* and the conduct of police officers in relation thereto. It is elementary that under New South Wales law a Royal Commission exists for the purpose of investigation and report. It is not intended to be a substitute for statutory tribunals with jurisdiction over departmental officers, nor can its finding that a charge is proved have the effect accorded to the finding of a court of justice. A Royal Commission may have to embark upon a general investigation and in the course of doing so deal incidentally with dozens of so-called " charges " not specifically referred to in its terms of reference. As a result there is an absence of the safeguards which usually attend a separate investigation of each individual charge, for one case is apt to be confused with another, causing danger of injustice to individuals. When finally a Royal Commission embodies its conclusions in a report, it may choose to make findings against individuals ; but such findings can never be judicial findings in the strict sense, they are merely administrative opinions.

However, by reference to the Royal Commissioner's report officers like the plaintiff were deprived of the benefits of the *Police Regulation (Appeals) Act* 1923. The Minister directed the commissioner to dismiss instead of allowing the commissioner to exercise his own discretion in each case. By these means the commissioner accepted no responsibility for the dismissals. Consequently, when the police officers sought to appeal to the Police Appeal Board the absence of any " decision " of the commissioner was held fatal to the jurisdiction of the board. It is very probable that such a result was never intended by the Royal Commissioner. It is quite possible that, after open inquiry, the appeal board would have reached a conclusion similar to that of the Royal Commissioner, but it is equally possible that it would have reached a different conclusion. In the latter event the final decision would have rested with the

(1) (1913) A.C. 417, at p. 477.

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Minister, but he would have had the enormous advantage, and the officer of police concerned would have had the enormous protection, of a reasoned decision against dismissal. In my opinion, it is very regrettable that in these cases neither the Commissioner of Police nor the appeal board was allowed to fulfil the functions specified in the Act of 1923 and intended to be exercised in accordance therewith.

But the question remains whether the *Police Regulation (Appeals) Act* 1923 precludes the Minister or the Executive Government from terminating the plaintiff's services. Does that Act intend that except in accordance with its own scheme of appeals all questions of promotion and dismissal shall be removed from direct political control ? The plaintiff is confronted with the difficulty that, prior to the Act of 1923, the Crown had the right of dismissal at pleasure and that it is quite possible that such a right can coexist with the scheme embodied in the Act. On the whole I do not think that the 1923 Act intends to interfere with decisions as to dismissal, providing that the Executive Government chooses to accept primary responsibility. The fact that the Act of 1923 preserves ministerial control only by way of final resort is not sufficient to warrant the inference that the pre-existing power of primary ministerial control by dismissal has disappeared.

Upon the admitted facts the dismissals of 2nd December 1936 and 5th February 1937 were each dismissals by the Minister acting on behalf of the Crown. Although the method of procedure adopted deprived the commissioner of his normal responsibility and stripped the plaintiff of his normal right of appeal to the independent Police Appeal Board, the dismissals were lawful and the judgment of the Supreme Court should be affirmed.

Appeal dismissed with costs.

Solicitors for the appellant, *P. V. McCulloch & Buggy.*

Solicitor for the respondent, *J. E. Clark,* Crown Solicitor for New South Wales.

J. B.