[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER FOR RAILWAYS (NEW SOUTH WALES) . . . . } APPELLANT;
DEFENDANT,

AND

O'DONNELL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 9, 10; *Sept.* 1.

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

Railways—Officer—Charged with criminal offence—"Misconduct"—Suspension—Government Railways Act 1912-1930 (*No.* 30 *of* 1912—*No.* 18 *of* 1930), *sec.* 82.

Sec. 82 of the *Government Railways Act* 1912-1930 (N.S.W.) provided: "Whenever any officer in any branch of the railway service is guilty of misconduct or of breaking any rule, by-law or regulation of the railway service, the officer at the head of such branch may in the prescribed manner—(*a*) dismiss or suspend him . . . but every such officer so dealt with may appeal in the manner hereinafter provided."

An officer employed in the traffic branch of the railway service informed that branch that he would be absent from duty indefinitely owing to his having been arrested and charged with manslaughter. The charge was not connected with the performance of his duties. Upon being informed by the officer of his arrest the staff superintendent discussed the matter with the head of the traffic branch, and the officer was notified that he was "relieved from duty."

Held:—

(1) By *Latham* C.J., *Starke* and *Dixon* JJ., that the direction relieving the officer from the performance of his duty was not a suspension from office under sec. 82 of the *Government Railways Act* 1912-1930 (N.S.W.).

(2) By *Rich*, *Dixon* and *McTiernan* JJ., that to suffer arrest on a criminal charge does not *per se* fall within the category "misconduct or breaking any rule, by-law or regulation of the railway service" contained in sec. 82 of the *Government Railways Act* 1912-1930 (N.S.W.).

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Decision of the Supreme Court of New South Wales (Full Court): *O'Donnell* v. *Commissioner for Railways*, (1938) 38 S.R. (N.S.W.) 123; 55 W.N. (N.S.W.) 32, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action against the Commissioner for Railways (N.S.W.) was brought in the Supreme Court of New South Wales by Hubert John Basil O'Donnell, who was employed by the defendant as a junior porter in the traffic branch of the Department of Railways, in which the plaintiff sought to recover as "money payable by the defendant to the plaintiff for the work and services of the plaintiff done performed and bestowed as an officer in the employment of the defendant and otherwise for the defendant at his request" the sum of £78 2s. 3d., salary alleged by the plaintiff to be due to him for the period between 20th July 1935 and 19th February 1936, "during which time the plaintiff, an officer of the defendant, was employed by the defendant as a junior porter."

The defendant pleaded the relevant statutes and, by a second plea, that the plaintiff "was an officer within the meaning of the *Government Railways Act* 1912, as amended, and whilst holding office as aforesaid the plaintiff was adjudged guilty of misconduct within the meaning of sec. 82 of the said Act by the officer at the head of the plaintiff's branch and thereupon the plaintiff pursuant to the provisions of the said section was duly suspended by the said officer at the head of the said branch and the plaintiff did not appeal as provided for in the said section and thereafter the plaintiff was permitted to resume and did resume the duties of a junior porter . . . and the plaintiff's claim herein pleaded to is a claim for salary alleged to have accrued to plaintiff during the period of his said suspension."

The evidence of the plaintiff was that on Saturday, 20th July 1935, O'Donnell was due to commence work at nine o'clock a.m., but at four o'clock a.m. he was arrested on a charge of manslaughter. He then communicated by telephone with the officer in charge of the defendant's telegraph office, wherein he was employed, and said that he would not be able to resume work for a while and would not be able to come in and see his superior officer, Mr. Green, until Monday, 22nd July. He did not then state the reason for his absence.

Early on Monday afternoon he called on Mr. Green, told him that he had been charged with manslaughter, and asked for his holidays due to him. At Mr. Green's request he wrote out a short statement in which he stated, *inter alia*, that he had been unable to take up duty on the previous Saturday owing to his having been arrested and charged with manslaughter. He did not remember what he was then told. In cross-examination he admitted that he could not be sure whether he saw Mr. Green or Mr. Still, an officer of the traffic branch, of which Mr. Denniss was the head. He went away, and after the committal proceedings he spoke by telephone on Monday, 29th July, to Mr. Green's clerk, and said that he was prepared to resume work. Subsequently on that day the clerk told him by telephone that he was automatically suspended. He stood his trial, and was acquitted on 20th February 1936. Next morning he was allowed to resume work.

For the defence evidence was given that Mr. Green made a written report that, after the first telephone message above referred to, the plaintiff called on Monday, 22nd July, and stated that he had been charged with manslaughter. Mr. Still stated that on that Monday the plaintiff saw him and gave him the written statement above referred to. Mr. Denniss, the head of the branch in which the plaintiff was employed, said that he examined certain papers relating to the plaintiff. These were the office records of his telephone messages on Saturday, 20th July, the plaintiff's written statement of Monday, 22nd July, Mr. Green's report of plaintiff's visit to him on that day, and a newspaper report dated Saturday, 20th July, that the plaintiff and a woman had been charged with having feloniously slain a girl, from which it might be guessed that the charge was abortion (as in fact it was). Mr. Denniss said that after discussing the matter with Mr. Hewitt, an officer who dealt with staff matters, he decided that the plaintiff should be suspended under sec. 82 for misconduct. He accordingly so suspended the plaintiff, and gave directions to Mr. Hewitt that this decision for his suspension be conveyed to the plaintiff. Mr. Denniss further said that he did not suspend the plaintiff for breaking any rule, by-law or regulation of the railway service, but that the matter before him was the fact that the plaintiff had been charged with manslaughter. Mr. Still said that on

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Tuesday, 23rd July, he spoke to the plaintiff by telephone and told him that his case had been considered by the chief traffic manager, who had given a direction that he, the plaintiff, be relieved from duty. There was a note dated 23rd July 1935, on the papers referred to by Mr. Denniss, stating that the plaintiff had been informed in reply to an inquiry by telephone that the chief traffic manager was not prepared to give any directions for him to resume duties pending the disposal of the charge against him. Against this note was the word "Seen," accompanied by the signature of Mr. Denniss and the date 23rd July 1935.

It was not disputed that the plaintiff was entitled to the amount claimed unless he was validly suspended. The only question left to the jury was whether he was in fact suspended.

The jury returned a verdict for the defendant.

An appeal by the plaintiff to the Full Court of the Supreme Court was allowed, the verdict set aside, and a verdict entered for the plaintiff for the sum of £72 2s. 3d.: *O'Donnell* v. *Commissioner for Railways* (1).

From that decision the defendant appealed, by special leave, to the High Court.

Bradley K.C. (with him *Chambers*), for the appellant. The respondent accepted the legal position as set forth in the pleas. He did not demur thereto, nor did he reserve any question at the trial; therefore the only dispute at the trial concerned questions of fact. The Full Court has departed from the principles laid down in *Browne* v. *Commissioner for Railways* (2) and *Grady* v. *Commissioner for Railways* (*N.S.W.*) (3), and has given a new interpretation to sec. 82 of the *Government Railways Act*. As objection was not taken at the trial the respondent is not entitled to raise these matters on appeal (See rule 151B of the *Regulae Generales* of the Supreme Court). Part VIII. of the Act, which contains secs. 69 to 107 inclusive, constitutes a code in which is set forth the rights of the employees in respect of their employment (*Stepto* v. *Railway Commissioners for New South Wales* (4)). "Misconduct" under sec. 82 means

(1) (1938) 38 S.R. (N.S.W.) 123; 55 W.N. (N.S.W.) 32.
(2) (1935) 36 S.R. (N.S.W.) 21; 53 W.N. (N.S.W.) 1.
(3) (1935) 53 C.L.R. 229.
(4) (1925) 42 W.N. (N.S.W.) 181, at p. 182.

misconduct generally, either as an employee or as a citizen, that is, it is not necessary that the misconduct should be directly associated with the employment (*Pearce* v. *Foster* (1)). When an officer has been dealt with in terms of sec. 82—when he has been suspended—the matter cannot, in the absence of *mala fides*, be questioned in any court. The appropriate tribunal for the review of such decisions is the board constituted by the Act (*Grady* v. *Commissioner for Railways (N.S.W.)* (2) ; *Browne* v. *Commissioner for Railways* (3)). Sec. 82 confers very wide powers on the head of a branch in the exercise of his discretion. Prior to the amendment of the section in 1936 he was entitled to suspend generally and was not bound to state that such suspension was by way of punishment. The facts in this case were sufficient to justify the action taken by the head of the branch concerned. The respondent was guilty of misconduct within the meaning of sec. 82. The head of the branch is an administrative officer. He honestly and properly exercised the powers conferred upon him and his decision cannot be challenged in a court of law (*Allcroft* v. *Lord Bishop of London* (4) ; *Local Board of Health of Perth* v. *Maley* (5) ; *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (6) ; *The King* v. *War Pensions Entitlement Appeal Tribunal* ; *Ex parte Bott* (7)). The Act has provided a specific remedy with specific procedure ; therefore that is the only remedy open to an officer dealt with under sec. 82 (*Pasmore* v. *Oswaldtwistle Urban Council* (8) ; *Holmes* v. *Angwin* (9) ; *Josephson* v. *Walker* (10) ; *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 11).

[LATHAM C.J. referred to *Medical Board of Victoria* v. *Meyer* (11).]

The respondent is not entitled to wages during the period of his suspension (*Wallwork* v. *Fielding* (12)). The decision in *Hunkin* v. *Siebert* (13) turned upon the section there under consideration and the method that had been adopted. The effect of secs. 82 and 83 of the Act was dealt with in *Browne* v. *Commissioner for Railways* (14).

(1) (1886) 17 Q.B.D. 536, at pp. 539, 540, 542.
(2) (1935) 53 C.L.R., at p. 232.
(3) (1935) 36 S.R. (N.S.W.), at p. 26 ; 53 W.N. (N.S.W.) 1.
(4) (1891) A.C. 666, at pp. 680, 681.
(5) (1904) 1 C.L.R. 702, at pp. 708-711.
(6) (1922) 1 A.C. 202, at pp. 211, 212, 214.
(7) (1933) 50 C.L.R. 228, at p. 243.
(8) (1898) A.C. 387.
(9) (1906) 4 C.L.R. 297.
(10) (1914) 18 C.L.R. 691, at pp. 694, 695, 697.
(11) (1937) 58 C.L.R. 62, at pp. 72, 97, 105.
(12) (1922) 2 K.B. 66, at pp. 74, 75.
(13) (1934) 51 C.L.R. 538.
(14) (1935) 36 S.R. (N.S.W.), at p. 27.

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Evatt K.C. (with him *McClemens*), for the respondent. A clear distinction arises between the provisions of sec. 82 and sec. 83 of the Act. Under sec. 82 the decision is the deliberative decision of the head of the branch; whereas the decision under sec. 83 is the immediate decision of the person in direct charge of the employee. The respondent, a permanent officer (see sec. 72 (1)), is prevented by the provisions of sec. 70 (3) of the Act from engaging in any employment outside the duties of his office during the period of his suspension. Those sections, in conjunction with sec. 83, are sufficient to bring the respondent within the common law principle that a person suspended from duty is not thereby deprived of his wages during the period of suspension. Other than in respect of the specific point involved the remarks upon sec. 82 in *Browne* v. *Commissioner for Railways* (1) were *obiter*. There is not any evidence that the respondent was informed that he had been suspended or otherwise dealt with under sec. 82; therefore this appeal must fail. On the contrary, the evidence points to the conclusion that the respondent was not suspended under sec. 82. The court is entitled to inquire into this aspect. At the trial the case was conducted on the footing that if there were not a suspension under sec. 82, then the respondent would be entitled to his wages. The respondent goes further and claims that he is entitled to his wages in any event. Under sec. 82 an officer has a right to be heard, either in person or by the usual means of communication; and he must be informed of, or there must be communicated to him, the fact that he has been suspended for misconduct.

Bradley K.C., in reply. The evidence shows that the head of the branch had all the requisite information before him upon which to make a decision; that he did make a decision to suspend the respondent for misconduct; that directions were given for that decision to be communicated to the respondent; and that the respondent was aware that he had been suspended. It was not necessary specifically to inform the respondent that he had been suspended under sec. 82 for misconduct.

Cur. adv. vult.

(1) (1935) 36 S.R. (N.S.W.) 21.

The following written judgments were delivered :—

LATHAM C.J. The respondent, O'Donnell, is a junior porter in the traffic branch of the railway department. He is the plaintiff in an action in which he claimed an amount of £78 2s. 3d. for salary due to him in respect of a period from 20th July 1935 to 19th February 1936. The only defence raised by the defendant appellant, the Commissioner for Railways, was that the plaintiff had been duly suspended under sec. 82 of the *Government Railways Act* 1912-1930 (N.S.W.) during the whole of the period in respect of which the claim was made. The case was fought upon the basis that if the plaintiff had not been duly suspended under sec. 82 he was entitled to the amount claimed. The defendant did not plead or seek to establish any other defence. The learned trial judge directed the jury that, as to the fact of suspension, the evidence was all one way in favour of the defendant. The plaintiff moved before the Full Court that a verdict be entered for the plaintiff or that a new trial be directed, and the Full Court ordered that a verdict be entered for the plaintiff for the amount claimed. An appeal is now brought by special leave to this court.

The appeal raises, in the first place, the question whether the plaintiff was suspended by the head of the branch to which he belonged. Several questions of law would arise if it was determined that the head of the traffic branch did, in fact, suspend the plaintiff under sec. 82.

On this issue the evidence is that the plaintiff was, on 20th July 1935, arrested upon a charge of manslaughter. On 20th July he informed the department that he had been arrested and that he would be absent from duty indefinitely. Later on the same day he said that he would not be resuming duty for a couple of days. On 22nd July he reported in writing that he was unable to take up duty on 20th July owing to his having been arrested and being charged with manslaughter and he asked for his holidays to be allowed to him. The action taken upon this information was that the acting staff superintendent discussed the matter with Mr. A. G. Denniss, the head of the traffic branch, who gave directions for him to be suspended. Mr. Denniss said in evidence :—" I suspended him under sec. 82 of the Act for misconduct. I gave

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directions for my decision for his suspension to be conveyed to him." But the communication made to the plaintiff by an officer of the traffic branch, J. H. Still, was to the effect that his case had been considered by the head of the traffic branch, who had given a direction that he be "relieved from duty." The plaintiff himself said that he did not remember what was told to him, but that on 29th July he was told by a junior officer that he was "automatically suspended." He also said that from 22nd July until the manslaughter case was finally disposed of in February 1936 he stayed away because he thought he had been suspended.

Sec. 82 of the Act authorizes suspension, dismissal, or reduction in rank, position, or grade in cases of misconduct or breach of rules, regulations or by-laws. The officer dealt with is given a right of appeal to a board of appeal. The provisions for appeal necessarily imply that the imposition of any punishment under the section must be communicated to the officer. Otherwise he would be unable to exercise his right of appeal.

In my opinion no communication was made to the plaintiff which clearly showed that disciplinary action had been taken against him by virtue of any powers conferred upon the head of the branch by the Act. An intimation that he was relieved from duty did not state or even suggest that the head of the branch had decided that he had been guilty of misconduct or of any breach of any regulation, &c. The circumstances were unusual. The plaintiff had been charged with a serious offence—of which he was ultimately acquitted. When he was told that he was relieved from duty he was entitled to act upon the basis that he was not required to present himself for the performance of his duties, but that his status as an employee was not affected. The evidence of the head of the branch that he "suspended" the plaintiff, and the plaintiff's statement that he believed that he had been "suspended," cannot give to what was actually done a legal complexion which is different from that which the actual facts truly bear. The reasons for relieving an officer from duty during the pendency of proceedings against him for a serious offence are obvious enough. It is equally obvious that, unless the head of the branch is prepared to find misconduct or breach of some regulation, &c., no action can be taken against the

employee by virtue of sec. 82. There may be room for argument as to the effect of " relieving from duty."* On the one hand it may be said that it amounts merely to a dispensation with performance of the obligations resting upon the employee. On the other hand it may be urged that it involves a mutual suspension of obligations. But, in the present case, the only matter contested was the validity of the " suspension " under sec. 82. No defence other than suspension under and by virtue of the provisions of that section was raised by the defendant. As there was no suspension under sec. 82 the plaintiff is entitled to recover.

If the plaintiff had been suspended under sec. 82 other questions would have arisen. They include the questions whether an officer is entitled to notice of a charge or to a hearing before action is taken under sec. 82 : whether, if an officer is dissatisfied with action taken against him under that section, his only remedy is by way of appeal to the board of appeal and the commissioner under the Act (as held in *Browne* v. *Commissioner for Railways* (1)) even in a case where his complaint is that what is charged against him is not and cannot be misconduct or breach of a regulation, &c. ; whether, if a court can even inquire into the matter, misconduct within the meaning of the section is limited to " misconduct as an employee " as distinct from " misconduct as a citizen " ; and whether suspension under the section involves loss of salary during the period of suspension. As to all these matters I abstain from expressing any opinion.

In my opinion the appeal should be dismissed for the reason stated.

RICH J. I agree that the appeal should be dismissed.

I consider that to suffer an arrest does not *per se* fall within the category " misconduct or of breaking any rule, by-law, or regulation of the railway service " contained in sec. 82 of the *Government Railways Act* 1912-1930 (N.S.W.), and that neither the head of the branch nor anyone else can make it so.

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

* At the request of *Latham* C.J. the following note is appended : As to the meaning of "relieved from duty," cf. per *Higgins* J. in *Carey* v. *The Commonwealth*, (1921) 30 C.L.R. 132, at p. 136.—*Ed.*

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STARKE J. Appeal by the special leave of this court from a judgment of the Supreme Court of New South Wales in Full Court directing that a verdict be entered for the respondent, a railway officer, for salary owing to him.

The commissioner contends that the respondent was lawfully suspended pursuant to the provisions of sec. 82 of the *Government Railways Act* 1912 (N.S.W.). Whenever any officer in any branch of the railway service is guilty of misconduct the officer at the head of the branch may dismiss or suspend him. In my judgment there was no evidence fit to be submitted to the jury that the respondent was suspended under this section or at all. The words of sec. 82 have, as *Bavin* J. observed in the Supreme Court (1), a punitive significance, and are intended to empower the head of a branch to punish some dereliction of duty.

It appears that the respondent was charged with manslaughter, unconnected with the performance of his duties, and advised his superior officer that he would be absent from duty indefinitely. The chief traffic manager, the head of the respondent's branch, considered his case and noted the departmental file that he was not prepared to give any directions for him to resume duty pending disposal of the charge against him. The respondent was informed that the traffic manager had given a direction "that he be relieved from duty." The chief traffic manager deposed that he suspended the respondent. Another officer—a time clerk—informed the respondent that he was automatically suspended and later that he was suspended and the respondent believed that he had been suspended. But the only direction given by the head of the branch was that the respondent be relieved from duty pending disposal of the charge against him. Such a direction did not, in my opinion, deprive the plaintiff of his office temporarily or at all. It was clearly not a punitive direction nor a punishment for any dereliction of duty. The fact that the chief traffic manager called his direction a suspension cannot alter its legal character or effect. The direction was in truth an act of grace relieving the respondent from the performance of his duty pending the disposal of the charge against him and in no wise a suspension from office for misconduct under

(1) (1938) 38 S.R. (N.S.W.), at p. 139.

sec. 82 or at all. In my opinion the judgment of the Supreme Court should be supported on this short ground and it is accordingly unnecessary for me to express any opinion upon the grounds debated before this court or the reasons given by the learned judges of the Supreme Court.

The appeal should be dismissed.

DIXON J. The appeal arises out of an action brought by a junior porter against the Commissioner for Railways. He sues for 212 days' pay in a count for work and labour done. The time covered by his claim was not spent in executing the duties of his office. The beginning of the period was marked by his arrest on a charge of manslaughter. The time was occupied in awaiting on bail, first, his examination before the magistrates, and then, after committal, his trial upon indictment, in undergoing his trial and in obtaining his acquittal at the hands of the jury. The day after his acquittal he resumed the functions of a junior porter and the receipt of the pay. His absence from duty during the period when he was suffering the inconveniences and delays of criminal proceedings was fully assented to by the chief traffic manager, who had directed that he be relieved from duty. Whether he supposed that the chief traffic manager regarded relief from duty as consistent with payment of wages in full does not appear, but no wages were in fact paid during the interval, and none, it would seem, were claimed.

How, upon the facts of the case, the count for work and labour done is sustained was not satisfactorily explained. The parties passed by such a question as unworthy of the serious attention of this court. Their concern, apparently, was to ascertain how sec. 82 of the *Government Railways Act* applies to such a case. In my opinion it ought not to apply at all. It is clear that the chief traffic manager formed no opinion that the junior porter was guilty of manslaughter. He relieved him from duty, not because he had any opinion, one way or the other, as to his actual delinquency, but because he was the subject of a criminal charge. The introductory words of sec. 82 are: "Whenever any officer in any branch of the railway service is guilty of misconduct or of breaking any rule, by-law, or regulation of the railway service." To be made the subject of a criminal

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charge is not misconduct. To be prosecuted is neither to act nor to omit to act. It is to suffer unwillingly the proceedings of the informant or prosecutor. Properly understood, therefore, the provision has no application where it is desired to relieve an officer from duty pending the hearing of a criminal charge of which the head of the branch is not prepared to say the officer is guilty.

But the commissioner contends that, while this may be so in substance, yet the question whether in fact and in law an officer has been guilty of misconduct is not one which can be gone into before a court of justice. On the true interpretation of the provision the question is left, he says, to the opinion of the head of the branch, subject to appeal to a board. If the head of a branch calls that misconduct which could not be misconduct, then, according to the contention of the commissioner, the officer's only remedy is to appeal to a board under sec. 87 ; a court of law cannot go behind the opinion of the head of the branch or the decision of the board.

The interpretation of sec. 82, in every form it has assumed, involves many difficulties. Retrospective and prospective amendments were made in the section by Act No. 19 of 1936, which result in giving the provision three successive versions. The first is that considered in *Browne* v. *Commissioner for Railways* (1). That decision gave the words I have quoted the same effect as would be produced if they had been written : " Whenever in the opinion of the officer at the head of the branch, an officer is guilty " and so forth. But it also decided that the officer at the head of a branch must proceed in a prescribed manner and, as the Governor in Council had not prescribed a manner, he could not proceed at all. The purpose of Act No. 19 of 1936 was to overcome this difficulty, both for the future and for the past. For both past and future, that is, both for cases which had occurred before 22nd June 1936 and for cases which should occur after that date, the fatal words " in the prescribed manner " were excised. For the future, but not for the past, the words at the end of the section were made to read : " but every such officer so dealt with *shall be notified in writing of the nature of the misconduct charged or of the breach of the rule by-laws or regulations alleged to have been committed and* may appeal in the manner

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

hereinafter provided." It is plain that the purpose of the amendment was to require for the future the notification mentioned instead of leaving the procedure for dealing with the officer to be prescribed by regulation. For the past this could not be done, because, unless by chance such a notification had been given to an officer dealt with under the section, to make such a requirement retrospective would simply mean that the section must still fail to authorize or sustain the dismissals, suspension, or punishments which had been directed in the past. For that reason the legislature confined the retrospective amendment to the repeal of the words " in the prescribed manner."

The period with which the case is concerned fell before 22nd June 1936, but I shall state the interpretation which I place upon the section as it applies to the future, because, as the amendments were all made by the one provision, it affects the interpretation of the amended section in its application to the past and because a decision confined to the form in which the section applies to the past might produce some misapprehension as to the interpretation which should be adopted for cases arising in the future or, more strictly, after 22nd June 1936. I think that the added words, which I have italicized, mean that a statement in writing of the charge of misconduct or the allegation of breach of by-laws or regulations must be made to the officer as a preliminary to the exercise by the head of the branch of the power of dismissal, suspension, or punishment confided to him by the section. It is true that the words " officer so dealt with," after which the new words are inserted, might formerly have been taken to bear the meaning " who has been so dealt with," but they are equally open to the meaning " who is so dealt with," and to take the reference to charge and allegation as a description of the act or decision of the head of the branch in dismissing, suspending, fining, or otherwise punishing, and not of the laying of a charge before him, appears to me unnecessarily to ascribe to the draftsman a great amount of confusion of thought. Once the view is adopted that the new words require that the officer shall be given notice of the charge or allegation made against him before the head of the branch proceeds to decide whether he shall impose upon him any of the enumerated punishments, it

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becomes easy to treat the words: "whenever any officer . . . is guilty," &c., as amounting to no more than a statement of what the head of the branch must find before he punishes under the section. Where a tribunal is constituted for the determination of matters of a given class, it is common to find liabilities which depend upon its determination stated absolutely, instead of in terms of its opinion, decision or judgment. This is common enough with judicial tribunals. For instance, when an offence is defined it is usual for an enactment to say "if any person does," &c., and not "if any person is found by a court to have done," &c. Yet the two expressions have the same result. It is less common with administrative tribunals, but it is natural that it should occur. Thus, according to the interpretation which I put upon sec. 82 as it applies to cases occurring after 22nd June 1936, it authorizes the head of a branch to discipline an officer whom, after notice of the charge, he finds guilty of misconduct or of breach of by-laws or regulations, but makes his decision subject to appeal to a board under sec. 87. The appeal must be brought within seven days of the date of the decision appealed against (sec. 91). It is, therefore, a necessary implication that the decision, that is, the dismissal, suspension or other punishment, shall be communicated to the officer. Indeed, the words of sec. 82, "dismiss or suspend him," "fine him" and "reduce him in rank . . . or pay" describe acts which could hardly be considered as complete or effective unless brought to the knowledge of the officer dealt with. But it appears to me that it is not enough to inform him that he has been, for instance, dismissed or suspended. He must be made aware that he has been so dealt with on account of misconduct, or breach of by-laws or regulations, or in the purported exercise of the powers conferred by sec. 82. I do not mean that an express notice to that effect must be given, but that, in all the circumstances of the case, it must appear with sufficient certainty that the dismissal or removal is on account of something he has done or is supposed to have done, so that, if he knows his rights, he is made aware that he has an appeal and that he is not being removed from office, or relieved from duty, quite independently of sec. 82 or of the matters to which it

relates. Where he has already been notified of the charge of misconduct or breach of by-laws or regulations, a communication of the mere fact that he has been dismissed or otherwise punished would almost necessarily carry with it the meaning that he had been so dealt with in pursuance of the charge, that is, under sec. 82. In cases occurring after 22nd June 1936 the point is, therefore, of little or no importance.

When, after due notification of the charge, the head of the branch has honestly formed the view that the officer has been guilty of misconduct or breach of by-laws or regulations and imposes one of the punishments enumerated, then, subject to appeal, his decision concludes the rights or liabilities of the officer. The question whether he was guilty of misconduct or breach of a by-law or regulation or the punishment was reasonable is not examinable in a court of law for the purpose of determining whether he is liable to the consequences of the decision of the head of the branch. His sole remedy is to appeal to a board. But this is subject to one necessary qualification. If it is made clearly to appear that the head of the branch has misconceived his function, his purported act may be void, notwithstanding that, being an ostensible exercise of the power under sec. 82, it may also be redressed on appeal.

Turning now to the operation of the section upon cases which occurred before 22nd June 1936, that is, upon cases like that of the junior porter now under consideration, it will be seen that the important difference lies in the absence of any requirement that the officer dealt with shall receive notice of the charge. The absence of this requirement makes it possible to give to the remaining parts of the provision entirely different meanings or effect. But I think that they should be given the same meanings. The amendments by Act No. 19 of 1936 were made as a coherent expression of the legislative intention and they give to the pre-existing terms of the section a reading of which they were fairly capable.

The absence of prior notification of the charge has one consequence important in the decision of the present case. It makes it impossible for the purpose of satisfying the requirement that a communication should be made to the officer of the fact that he has been dismissed, suspended, or otherwise dealt with, as for

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misconduct or breach of by-law or regulation, to rely upon the circumstance that he has already been informed that a charge is under the consideration of the head of a branch. The nature of what has been done by the head of the branch must be indicated by the substance of the notification or communication of his suspension or other punishment or by the circumstances. Upon the facts of the present case I think that there are two fatal defects in the attempted use of sec. 82. No doubt the oral evidence contains enough to warrant a finding that the head of the branch intended to suspend the junior porter on the ground of misconduct. But if he did, he completely misconceived his functions, because to suffer arrest could not be brought under the description "misconduct or . . . breach of by-law or regulation."

In the second place, the suspension of the junior porter was never communicated to him in such a manner as to indicate that it was on the ground of misconduct or was done by the head of the branch as under the power which is found in sec. 82 or was in any way based upon that authority of the head of a branch from the exercise of which an appeal to a board lies.

I am, therefore, of opinion that sec. 82 affords no answer to the plaintiff's supposed cause of action.

I think the appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed.

The alleged suspension of the respondent which the appellant says is a complete answer to his claim for arrears of salary took place before Act No. 19 of 1936, which amended sec. 82 of Act No. 30 of 1912, was passed. The effect of sec. 2 of the amending Act is to make the question whether the alleged suspension was lawful depend upon provisions which took the following form: "Whenever any officer in any branch of the railway service is guilty of misconduct or of breaking any rule, by-law, or regulation of the railway service, the officer at the head of such branch may—(*a*) dismiss or suspend him; (*b*) fine him a sum not exceeding five pounds; (*c*) reduce him in rank, position or grade, and pay; but every such officer so dealt with . . . may appeal in the manner hereinafter provided."

These provisions are part of the code contained in the *Government*

Railways Act dealing with the rights of railway employees in respect of their employment (*Stepto* v. *Railway Commissioners for New South Wales* (1)). The appellant must justify the alleged suspension of the respondent under the provisions which have been quoted. These have been described as provisions investing an administrative officer with an authority which is not absolute but is subject to review by the administrative board (*Grady* v. *Commissioner for Railways* (*N.S.W.*) (2)). It is implicit in these provisions that a conclusion as to the guilt of the officer to be dealt with is to be formed, and that such conclusion is to be formed by the officer at the head of his branch.

The appellant seeks to meet the respondent's allegation that there was no legal basis for the departmental action purporting to suspend him by relying upon the principle that the opinion of the officer at the head of his branch that he was guilty of misconduct cannot be challenged in a court of law, the respondent's only remedy being that provided by the Act for any officer dealt with under sec. 82, namely, to appeal to the board set up by sec. 87. It may well be that no attack, except by the statutory remedy, may be made on any opinion which the officer at the head of a branch is authorized by sec. 82 to form and adopt as the basis for dealing with an officer under that section. Two views of the scope of his authority under the section present themselves. One is that a subordinate officer may be dealt with by the officer at the head of his branch whenever the latter is of the opinion that the subordinate officer is guilty of any act or omission which in the opinion of such officer at the head of the branch is misconduct or the breach of any rule, by-law or regulation of the railway service. The other view is that he may deal with the subordinate officer under the section whenever such officer is in his opinion guilty of an act or omission which is misconduct or the breach of a rule, by-law or regulation of the railway service within the meaning of the section. In the former view the officer at the head of the branch would have a discretion to say what is misconduct. In the latter view his authority is limited to dealing with a subordinate officer whenever in his

(1) (1925) 42 W.N. (N.S.W.), at p. 182. (2) (1935) 53 C.L.R., at p. 232.

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opinion he is guilty of an act or omission which is misconduct according to a predetermined standard; the standard is determined by the meaning of the word misconduct in the section. In my opinion the latter is the correct view. The question which is excluded from judicial scrutiny is whether the opinion of the officer at the head of the branch that one of his subordinate officers is guilty of any act or omission, which is misconduct within the meaning of the section, is right or wrong. That question is reserved for the departmental tribunal, the appeal board. But the principle which excludes that question from judicial scrutiny does not deny a judicial remedy to an officer who is suspended on the ground that the head of his branch has found him to be guilty of some act or omission which is not misconduct within the meaning of the section. These conclusions do not conflict with the view expressed in the following passage in *Browne* v. *Commissioner for Railways* (1) :—" The plaintiff cannot in a court of justice challenge the correctness of a finding by the head of a branch under sec. 82 that he has been guilty of misconduct. If he wishes to challenge it, it is for him to appeal in the prescribed manner." In this passage the emphasis is to be placed on the word " finding." It is assumed that what is found is misconduct within the meaning of the section.

The basis of the action purporting to suspend the respondent was that he was arrested and proceeded against on a charge of manslaughter. It is not shown that the officer at the head of his branch was of the opinion that the respondent was guilty of manslaughter. The observation of *Bavin* J. is in point: " On the undisputed evidence, there was nothing except the fact of the charge being made to provide a basis for the action by the head of the branch " (2). To be arrested and charged with an offence is not in itself misconduct. The fact that the respondent suffered that adverse action could not be a legal basis for the suspension unless it was within the discretion of the officer at the head of the branch to make his own category of misconduct. In my view the section does not repose that wide and unlimited authority in him to deal with his subordinates. Sec. 82 binds him to apply the criteria which it

(1) (1935) 36 S.R. (N.S.W.), at pp. 26, 27.
(2) (1938) 38 S.R. (N.S.W.), at p. 139.

expressly provides in adjudging whether any officer in his branch is guilty of any act or omission for which he should be dealt with under the section. The relevant criterion in the present case is whether the respondent was guilty of misconduct according to the sense of that word in sec. 82. It is unnecessary to attempt a definition of misconduct. In the ordinary sense of that word, it is not misconduct to be arrested and charged with an offence, and there is nothing to indicate that, when an officer met with such an adversity, the statute intended that he should be deemed to be guilty of misconduct merely because of that occurrence.

Other questions which were argued were whether the respondent was in fact suspended at all and whether the provisions under which he was dealt with required either expressly or by implication that he should have been given an opportunity to answer the charge of misconduct alleged against him before he was suspended. It is unnecessary in the view I take to decide any of these questions.

Appeal dismissed with costs.

Solicitor for the appellant, *Fred. W. Bretnall*, Solicitor for Transport.

Solicitor for the respondent, *C. Jollie Smith & Co.*

J. B.