[HIGH COURT OF AUSTRALIA.]

FAITHORN . . . . . APPELLANT;
PLAINTIFF,

AND

THE TERRITORY OF PAPUA . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE CENTRAL COURT OF THE TERRITORY OF PAPUA.

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MELBOURNE, *Oct.* 11; *Nov.* 3.

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

Public Service (Papua)—Public servant—Suspension—Subsequent reduction in rank—Invalidity—Dismissal and reappointment to lower rank—Dismissal at pleasure of Crown—"Unless otherwise provided"—Suit by public servant—Parties—Declaration of right—Papua Act 1905-1934 (*No.* 9 *of* 1905—*No.* 45 *of* 1934), *secs.* 17, 18—*Public Service Ordinance of* 1907 (*Papua*) (*No.* 2 *of* 1907), *secs.* 1, 2—*Public Service Regulations* 1926 (*Papua*) (*S.R.* 1926 *No.* 9), *reg.* 53.

Constitutional Law—Suits against the Crown—In what right Crown should be sued—Treasury out of which claim to be satisfied.

The *Papua Act* 1905-1934 provides:—Sec. 17 (1): "The Lieutenant-Governor may in the name of the Governor-General appoint all necessary judges, magistrates, and other officers of the territory, who shall, unless otherwise provided by law, hold their offices during the pleasure of the Governor-General." Sec. 18:—"(1) The Lieutenant-Governor may, upon sufficient cause to him appearing, suspend from office any officer of the territory. (2) The Lieutenant-Governor shall forthwith report every such suspension to the Governor-General, and the suspension shall continue only until the Governor-General's pleasure therein is signified to the Lieutenant-Governor." Sec. 36: "Subject to this Act, the Legislative Council shall have power to make ordinances for the peace, order, and good government of the territory." The *Public Service Ordinance of* 1907 (Papua) provides:—Sec. 1: "It shall be lawful for the Lieutenant-Governor with the advice of the Executive Council to make alter or repeal rules and regulations for the good order and conduct

of the Public Service of the Territory of Papua and in particular for all or any of the following purposes namely :—(1) The creation and abolition of departments and offices . . . (5) the punishment of officers by suspension fine (not to exceed twenty pounds) or reprimand." Sec. 2 : " The rules and regulations shall . . . have the force of law." Reg. 53 of the *Public Service Regulations* 1926 (Papua) provides :—" (1) No officer shall be suspended unless . . . the question of his suspension has been brought before the Executive Council. . . . (7) If the officer is suspended the Lieutenant-Governor shall without loss of time report the matter to the Governor-General for approval and confirmation. . . . (8) If after full inquiry before the Executive Council the Lieutenant-Governor decides not to suspend the officer, or if the suspension of an officer is not approved and confirmed by the Governor-General, and no other punishment is awarded, the officer will be entitled to the full amount of salary which he would have received if he had not been . . . suspended. . . . (14) If upon full inquiry the Executive Council are of opinion that the officer deserves punishment but not the full penalty of suspension, the Lieutenant-Governor may remove the officer to an office of lower rank in the Service, or may require him to serve in his original office at a reduced salary, either permanently or for a stated period, or may deduct a portion of salary due or about to become due to the officer, or may inflict any other punishment allowed by the regulations."

The plaintiff was an assistant resident magistrate in the Public Service of the Territory of Papua. He was suspended by the Lieutenant-Governor, but his suspension was not approved by the Governor-General under sec. 18 (2) of the *Papua Act*. The Lieutenant-Governor then reduced him in office, purporting to act under reg. 53 (14) of the *Public Service Regulations* 1926, and he was required to act as a patrol officer at a reduced salary. The plaintiff brought an action against the Territory of Papua, claiming a declaration that the Order in Council reducing him in rank was invalid and that he was still entitled to the office and salary of assistant resident magistrate. Before the trial of the action a notification was inserted in the Government *Gazette* that the order which reduced the plaintiff to the position of patrol officer was cancelled. On 23rd April 1938 the Administrator (acting for the Governor-General) terminated the plaintiff's appointment, and on the same day the Lieutenant-Governor appointed the plaintiff as a patrol officer at the reduced salary. The plaintiff was paid arrears of salary as assistant resident magistrate up to the date of his dismissal. The plaintiff then brought a second action, claiming a declaration that he was still holder of the office of assistant resident magistrate and that the dismissal was invalid.

Held, by *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that after the suspension of the plaintiff had been disapproved no power remained in the Lieutenant-Governor under reg. 53 (14) of the *Public Service Regulations* to reduce the plaintiff in rank and, up to the time of his dismissal on 23rd April 1938, he was entitled under reg. 53 (8) to salary on the basis that his suspension had not been approved and no other punishment had been awarded ; but, by the whole court, that the plaintiff was lawfully dismissed on 23rd April

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1938, inasmuch as he held office during the pleasure of the Governor-General under sec. 17 (1) of the *Papua Act*: the regulations governing the Lieutenant-Governor's power of suspending officers did not "otherwise provide" within the meaning of that section.

Held, further, by *Rich*, *Dixon* and *McTiernan* JJ., as to the first action, that the Territory of Papua was the proper defendant and that a declaration of right, as sought by the plaintiff, was the appropriate relief; the plaintiff was accordingly entitled to his costs of that action.

Per Dixon J.: The question whether a suit against the Crown should be brought against it in right of one Dominion, Possession or jurisdiction rather than another depends upon the exchequer or treasury out of which the liability or claim put in suit would be discharged or satisfied.

Gould v. *Stuart*, (1896) A.C. 575, *Bridges* v. *The Commonwealth*, (1907) 4 C.L.R. 1195, and *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland*, (1925) A.C. 754, referred to.

Decisions of the Central Court of the Territory of Papua (*Gore* J.) varied.

APPEALS from the Central Court of the Territory of Papua.

Barter William Faithorn was an assistant resident magistrate in the Public Service of the Territory of Papua at an annual salary of £510 a year. He had been duly appointed by the Lieutenant-Governor under sec. 17 of the *Papua Act* 1905, and his appointment had been duly approved by the Governor-General under that section. He was suspended by the Lieutenant-Governor under reg. 53 of the *Public Service Regulations* 1926 (Papua). His suspension was not approved by the Governor-General under sec. 18 (2) of the *Papua Act*. The Lieutenant-Governor then reduced him in office, purporting to act under reg. 53 (14) of the *Public Service Regulations*, and he was required to act and was paid as a patrol officer at a salary of £420 per annum. By virtue of the *Claims by and against the Government Ordinance* 1911 (Papua), Faithorn brought an action against the Territory of Papua in which he claimed a declaration that the Order in Council reducing him in rank was invalid and that he was still entitled to the office and salary of assistant resident magistrate. On 22nd April 1938, before the trial took place, a notification was inserted in the *Government Gazette* that the order which reduced the plaintiff to the position of patrol officer was cancelled. On 23rd April the Administrator of the Government of the Commonwealth (acting for the Governor-General) terminated the plaintiff's appointment, and on the same day the Lieutenant-Governor appointed the

plaintiff as a patrol officer at a salary of £420 per annum. The plaintiff was then paid arrears of salary as assistant resident magistrate up to the date of his dismissal from that position. The plaintiff then commenced a second action, claiming a declaration that he was still the holder of the office of assistant resident magistrate and that his dismissal was invalid.

Both actions were tried by *Gore* J., who dismissed them both with costs.

From both decisions the plaintiff appealed to the High Court.

The argument for the appellant was submitted in writing under sec. 9 of the *Appeal Ordinance of* 1909 (Papua) and sec. 43 (2) of the *Papua Act*. It was substantially as follows:—In the first case the plaintiff should at least have received his costs, even if no other order could have been made in his favour. As to the second action, members of the Public Service in Papua are not subject to dismissal by the Governor-General at pleasure or at least they are not so subject where any misconduct is alleged against them (*Gould* v. *Stuart* (1)). The principles of *Shenton* v. *Smith* (2) and *Dunn* v. *The Queen* (3) do not apply to the present legislation. All the power of punishing the plaintiff was exhausted when the suspension was not confirmed. As from that date the plaintiff was not under any suspension. There is no power to punish an officer for a grave offence otherwise than by suspension, and the appellant is therefore entitled to the declarations sought. [The following statutes and cases were also referred to :—*Papua Act* 1905, secs. 17, 18 ; *Public Service Ordinance of* 1907 (Papua), secs. 1, 2 ; *Public Service Regulations* 1926 (Papua), reg. 53 ; *Bridges* v. *The Commonwealth* (4) ; *Institute of Patent Agents* v. *Lockwood* (5) ; *R. Venkata Rao* v. *Secretary of State for India* (6) ; *Attorney-General for Quebec* v. *Attorney-General for Canada* (7) ; *Williamson* v. *The Commonwealth* (8) ; *Taylor* v. *The Commonwealth* (9) ; *Hollinshead* v. *Hazleton* (10).]

(1) (1896) A.C. 575.
(2) (1895) A.C. 229.
(3) (1896) 1 Q.B. 116.
(4) (1907) 4 C.L.R. 1195, at pp. 1205, 1213.
(5) (1894) A.C. 347.
(6) (1937) A.C. 248.
(7) (1932) 48 T.L.R. 238.
(8) (1907) 5 C.L.R. 174, at p. 185.
(9) (1917) 23 C.L.R. 250.
(10) (1916) 1 A.C. 428, at p. 450.

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T. W. Smith, for the respondent. As to the first case, the plaintiff was not entitled to all that he claimed and was, therefore, not entitled to costs. The trial judge thought that in any event the territory must ultimately have won the action, and the fact that the defendant took further steps for the sake of peace does not make it liable for costs. The action is misconceived as to parties and as to the relief claimed. The defendant should have been the Commonwealth and not the territory. The King in right of the Commonwealth is the employer of the plaintiff.

[DIXON J. referred to *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (1).]

That case is not applicable to a claim to a particular office. A declaration of right was not the appropriate remedy under any jurisdiction. The plaintiff should have sued for salary and damages for wrongful dismissal or for damages for breach of contract not amounting to dismissal (*Lucy* v. *The Commonwealth* (2)). The Commonwealth, if not the only party, is at least a necessary party. The Executive Council is not to be deemed to have exhausted its powers merely by imposing excessive punishment (*Foran* v. *The Queen* (3)). As to the second case, the appellant in substance asks for a decree of specific performance, and that relief is not such as can be obtained against the defendant (*Lucy* v. *The Commonwealth* (4); *Williamson* v. *The Commonwealth* (5); *Gould* v. *Stuart* (6)). The Governor-General has the right to dismiss at pleasure. The regulations do not confer indefeasible rights on public servants (*Fletcher* v. *Nott* (7)).

Cur. adv. vult.

Nov. 3.

The following written judgments were delivered :—

LATHAM C.J. These are appeals from judgments in two actions brought in the Central Court of the Territory of Papua by Barter William Faithorn against the Territory of Papua. The appellant, Faithorn, has taken advantage of sec. 9 of the *Appeal Ordinance*,

(1) (1925) A.C. 754.
(2) (1923) 33 C.L.R. 229, at pp. 237, 248, 252.
(3) (1890) 16 V.L.R. 510; 12 A.L.T. 54.
(4) (1923) 33 C.L.R. 229.
(5) (1907) 5 C.L.R., at pp. 180, 185.
(6) (1896) A.C., at p. 577.
(7) (1938) 60 C.L.R. 55.

No. 8 of 1909, and has presented arguments in support of the appeals in writing. His case has been well put in those arguments. The respondent territory was represented upon the appeal by counsel. The appeal given by the ordinance in civil matters is a general appeal, and, unless the parties otherwise agree, the appellant is not limited to specific questions asked in the case.

The actions were brought against the Territory of Papua as defendant by virtue of the *Claims by and against the Government Ordinance* of 1911. The plaintiff was an assistant resident magistrate (second grade) at an annual salary of £510 in the Public Service of the territory. He had been duly appointed by the Lieutenant-Governor under sec. 17 of the *Papua Act* 1905-1934, and his appointment had been duly approved by the Governor-General under that section. He was suspended by the Lieutenant-Governor for some alleged offence (the nature of which does not appear in the present proceedings) under reg. 53 of the *Public Service Regulations* 1926. His suspension was not approved by the Governor-General under sec. 18 (2) of the Act. The Lieutenant-Governor then reduced him in office, purporting to act under reg. 53 (14), and he was required to act and was paid as a patrol officer at a salary of £420 per year.

In the first action the plaintiff claimed a declaration that the Order in Council reducing him in rank was invalid and that he was still entitled to the office and salary of assistant resident magistrate (second grade).

Before the trial of the action took place the governmental authorities evidently reconsidered the matter. A notification was inserted in the *Government Gazette* on 22nd April 1938 that the notice which reduced the plaintiff to the position of patrol officer was cancelled. On 23rd April the Administrator of the Government of the Commonwealth (acting for the Governor-General) terminated the plaintiff's appointment (that is, dismissed him) and, on the same day, the Lieutenant-Governor appointed the plaintiff as a patrol officer at an annual salary of £420. The plaintiff was then paid arrears of salary as assistant resident magistrate up to the date of his dismissal from that position. Accordingly, when the action came on for trial, there was nothing of which the plaintiff could complain unless his dismissal were unlawful. He had been restored to his previous

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rank and had been paid the proper salary in full in respect of the period for which he held that rank.

The plaintiff then took fresh proceedings in respect of his dismissal from office. He issued a second writ claiming a declaration that he was still holder of the office of assistant resident magistrate (second grade), that is, that the dismissal was invalid.

The first action proceeded to trial, and *Gore* J. dealt with the issues raised and gave judgment for the defendant with costs. The plaintiff upon this appeal contends that he should at least have received his costs, even if no other order could have been made in his favour. The learned trial judge refused to award costs to the plaintiff because he considered that the plaintiff had no cause of action at any time. The question which arises upon this appeal is whether this decision was right.

The determination of the question depends upon the true interpretation of certain sections of the *Papua Act* 1905-1934, the *Public Service Ordinance*, No. 2 of 1907, and the *Public Service Regulations* 1926 made under that ordinance. The *Papua Act*, sec. 17, is as follows :—

" (1) The Lieutenant-Governor may in the name of the Governor-General appoint all necessary judges, magistrates, and other officers of the territory, who shall, unless otherwise provided by law, hold their offices during the pleasure of the Governor-General. (2) Every such appointment shall be temporary until approved by the Governor."

Sec. 18 is as follows :—

" (1) The Lieutenant-Governor may, upon sufficient cause to him appearing, suspend from office any officer of the territory. (2) The Lieutenant-Governor shall forthwith report every such suspension to the Governor-General, and the suspension shall continue only until the Governor-General's pleasure therein is signified to the Lieutenant-Governor."

It is not contended that the plaintiff was not suspended in accordance with law. The Governor-General, however, refused to approve the suspension, and therefore the suspension ceased (sec. 18 (2)).

Reg. 53 of the *Public Service Regulations* 1926 provides (*inter alia*) that no officer shall be suspended unless the question of his suspension has been brought before the Executive Council. The regulation

provides that an officer may be heard in his defence. Par. 8 of the regulation is in the following terms: "If after full inquiry before the Executive Council the Lieutenant-Governor decides not to suspend the officer, or if the suspension of an officer is not approved and confirmed by the Governor-General, and no other punishment is awarded, the officer will be entitled to the full amount of salary which he would have received if he had not been relieved from duty or suspended, even though the officer discharging the functions of the office in the meanwhile has been allowed to receive some portion of the salary of the office."

This part of the regulation comes into operation if either of two conditions is satisfied. These conditions are expressed in the three introductory sentences. The first sentence is: "If after full inquiry before the Executive Council the Lieutenant-Governor decides not to suspend the officer." The second sentence is: "or if the suspension of an officer is not approved and confirmed by the Governor-General." The third sentence is: "and no other punishment is awarded." It might perhaps be argued that, by reason of the interposition of the second sentence, the third sentence is not grammatically attached to the first sentence. In my opinion it is so attached, but this question does not arise in the present case. It is, however, I think, at least clear that the third sentence must be read conjunctively with the second sentence. It appears to me to be impossible to give any proper meaning to the words unless the third sentence is regarded as so attached. If this be so, then par. 8 becomes operative upon the following condition: If an officer has been suspended by the Lieutenant-Governor but "the suspension is not approved and confirmed by the Governor-General and no other punishment is awarded." If another punishment is awarded, the officer does not become entitled to full salary under par. 8. The Governor-General may dismiss an officer by virtue of sec. 17 of the Act, which provides that offices in the Public Service are held during the pleasure of the Governor-General. Par. 8, restoring an officer to full salary, does not operate in a case of dismissal. In such a case, the suspension of the officer would have been approved by the Governor-General. There is no provision in any statute or ordinance for the award of any punishment by the Governor-General—unless

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dismissal can be regarded as a punishment, and, as I have just stated, in such a case par. 8 could have no operation.

But par. 8 contemplates the possibility of the award of other punishment in a case where an officer has been suspended, but the suspension has not been approved by the Governor-General. Such other punishment is provided for in reg. 53, par. 14. There are no other provisions providing for the award of any punishment. Accordingly, the phrase "no other punishment" in par. 8 either refers to the punishment mentioned in par. 14 or it refers to nothing at all. Reg. 53 (14) is as follows:—"If upon full inquiry the Executive Council are of opinion that the officer deserves punishment, but not the full penalty of suspension, the Lieutenant-Governor may remove the officer to an office of lower rank in the Service, or may require him to serve in his original office at a reduced salary, either permanently or for a stated period, or may deduct a portion of salary due or about to become due to the officer, or may inflict any other punishment allowed by the regulations."

The punishments authorized by par. 14 are all punishments which are less severe than suspension. They may be awarded when, after full inquiry, the Executive Council are of opinion that the officer deserves punishment, but not the full penalty of suspension, and when the Lieutenant-Governor, after the Executive Council has expressed such an opinion, decides to inflict them. The punishments specified are removal to an office of lower rank (that is the punishment awarded to the plaintiff in the present case), reduction of salary and deduction of a portion of salary.

In the case of a minor offence, where the Executive Council does not regard the officer as deserving the full penalty of suspension, any of the punishments authorized by par. 14 can admittedly be imposed. But if the offence is sufficiently grave (reg. 53 (1) and (2)) to lead the Lieutenant-Governor, after inquiry before the Executive Council, to suspend the officer, then the position is, according to the argument for the plaintiff, quite different. In such a case, the argument is, no minor penalty can ever be inflicted. The only alternatives are first, suspension and either dismissal or full reinstatement, and secondly, no penalty at all. Thus, if the Governor-General decides that the offence is not sufficiently grave

to deserve suspension the officer can never be punished by reduction in rank or otherwise, even though the offence may be admitted. If such a conclusion follows from the terms of the regulation, it must be accepted, but the process of reasoning by which it is supported should be closely examined.

In my opinion, this argument on behalf of the plaintiff, as I have already indicated, receives no support from the initial words of par. 8. I have stated my view that the words "and no other punishment is awarded" must be attached to and associated with the immediately preceding words relating to the failure of the Governor-General to approve and confirm the suspension—whether or not they are also connected with the first sentence of the paragraph. Par. 8 contemplates that there may be a suspension of an officer, that the suspension may not be approved by the Governor-General, and that some other punishment than suspension may be awarded in such a case. Thus, the terms of par. 8 are, at least prima facie, opposed to the argument submitted for the plaintiff.

Par. 14 is, as already stated, the only provision for punishment other than suspension. Therefore par. 14 must be the provision which is referred to in par. 8 when mention is made of the award of other punishment. The plaintiff endeavours to escape this conclusion (which is fatal to his argument) by arguing that in any case where there has been a suspension of an officer the application of par. 14 is excluded by the initial words of that paragraph. These words are: "If upon full inquiry the Executive Council are of opinion that the officer deserves punishment, but not the full penalty of suspension, the Lieutenant-Governor may remove the officer," &c. The argument is that, in a case of suspension, the Executive Council have already recommended the suspension under par. 8, and have therefore formed the opinion that the full penalty of suspension is deserved. Therefore, in such a case, it is contended, it cannot be said that the Executive Council are of opinion that the officer does not deserve the full penalty of suspension. Therefore par. 14 cannot be applied in such a case.

In my opinion, a careful consideration of the regulations provides an effective answer to this argument. The regulations do not require the Executive Council, in order to justify the suspension of

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an officer by the Lieutenant-Governor, to form an opinion that the officer should be suspended. Doubtless the Council may form such an opinion and may express it. But the Lieutenant-Governor can act by suspending an officer notwithstanding any opinion of the Executive Council. Reg. 53 (1) requires the question of the suspension of any officer to be brought before the Executive Council. Par. 8 of the regulations requires a full inquiry by the Executive Council, but vests the decision solely in the Lieutenant-Governor, and not in the Council. An opinion of the Executive Council is not a necessary step or a step at all in the procedure of suspension. Any opinion which the Executive Council may form in the course of an inquiry under par. 8 is, as a matter of law, irrelevant from every point of view—whether the point of view of the officer, of the Lieutenant-Governor, or of the Governor-General—though doubtless both the Lieutenant-Governor and the Governor-General would attach just weight to such an opinion. It may be noted that in the present case there is no evidence that the Executive Council formed an opinion that the officer should be suspended. The only evidence on this matter is contained in a letter of 19th November 1937 in which the Government Secretary recites a minute that Mr. Faithorn be suspended and "Mr. Faithorn be informed that members of the Council are not unanimous." The most that can be said is that some members of the Council apparently approved of suspension and that others did not approve of suspension. It may be a fair guess that the Lieutenant-Governor probably acted in accordance with the views of the majority of the Council. But, even if it were proved that the majority of the Council were at that time of opinion that the plaintiff should be suspended, that opinion, at that stage, had and could have no legal effect. Such an opinion would be an opinion to which the regulations attached no legal consequence.

Par. 14, on the other hand, expressly provides for the formation of an opinion which does have a legal effect. The power of the Lieutenant-Governor to impose a minor punishment is made dependent upon the opinion of the Executive Council that the officer deserves punishment but not the full punishment of suspension. The words are: "If upon full inquiry the Executive Council are of opinion that the officer deserves punishment, but not the full penalty

of suspension, the Lieutenant-Governor may remove the officer," &c. There is a marked difference between these words and those of par. 8.

When the Governor-General refused to approve the suspension of the plaintiff the Executive Council were then in the position of having to consider whether any action should be taken to award any other punishment. It was not at any time for the Council to determine whether or not the plaintiff should be suspended. At the later stage of proceedings the Council evidently adopted the view of the Governor-General that the full penalty of suspension should not be awarded, but also considered that the plaintiff did deserve some penalty. Such an opinion authorized the Lieutenant-Governor to act, if he thought proper to do so, in the manner in which he did act, namely, by removing the plaintiff to an officer of lower rank.

It should be carefully observed that this view of the meaning of the regulations does not involve the proposition that the Council may, under par. 8, form an opinion that the officer deserves suspension and then may, at a later stage, again approach the same question and, for the purpose of par. 14, form the different opinion that he does not deserve suspension. My view is that the regulations do not require or authorize the Council to form any opinion under par. 8, and that any opinion formed by the Council before suspension is immaterial for all legal purposes, however valuable it may be to the Lieutenant-Governor and to the Governor-General in the administration of the service. The only opinion of the Executive Council to which any legal effect can be given is that which is referred to in par. 14.

Thus, in my opinion, reg. 53 (14) was rightly applied in the present case and the Lieutenant-Governor was entitled to take the action of which the plaintiff complained in his first suit, namely, the action of reducing him in rank.

The plaintiff has, however, contended that the ordinance and all the regulations, so far as they provide for other punishment than suspension, are invalid. The argument is that, as sec. 18 of the *Papua Act* contains a specific provision relating to the suspension of officers, no other provision can be made by ordinance for the discipline of the service. The *Public Service Regulations* were made

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by virtue of the authority conferred by sec. 36 of the *Papua Act*, which provides that, subject to the Act, the Legislative Council shall have power to make ordinances for the peace, order and good government of the territory. The terms of the section make it clear that the power to make ordinances is limited by the provisions of the statute. Under sec. 36 the *Public Service Ordinance*, No. 2 of 1907, was made, and the regulations to which reference has already been made at length were enacted by virtue of the ordinance. The ordinance and the regulations, however, are in no way inconsistent with the provisions of sec. 18. Those provisions have full operation and effect in every particular, and there is no point at which the ordinance or the regulations conflict with them. Accordingly, in my opinion, it cannot be held that the ordinance or the regulations are invalid for the reason that they contain provisions for the discipline of the service additional to the provisions with respect to suspension contained in sec. 18 of the Act.

But it is further contended for the plaintiff that, whatever may be the position as to the regulations as a whole, reg. 53 (14) is invalid because it is beyond the power of making regulations conferred by the *Public Service Ordinance*, No. 2 of 1907. Sec. 1 of that ordinance, so far as material, is as follows: "It shall be lawful for the Lieutenant-Governor with the advice of the Executive Council to make alter or repeal rules and regulations for the good order and conduct of the Public Service of the Territory of Papua and in particular for all or any of the following purposes, namely . . . (5) the punishment of officers by suspension fine (not to exceed twenty pounds) or reprimand." This section confers a general power to make regulations for the good order and conduct of the Public Service and also confers some particular powers. It is contended that the power to make regulations for the punishment of officers by suspension, fine or reprimand impliedly excludes any power to make regulations for the punishment of officers by reduction in rank or by any form of punishment other than those specifically mentioned. In my opinion this argument fails to give any real effect to the general words which I have quoted. It is true that particular provisions following such general words may be so expressed as to involve a limitation upon the extent of the power

which otherwise would have been conferred by the general words. For example, in the present case, I would agree that regulations could not be made to authorize the imposition of a fine exceeding £20. But the same considerations do not apply to the other words in the clause mentioned. As to this part of the argument I agree entirely with the judgment of *Gore* J., who relied upon the judgment of *Dixon* J. in *Huddart Parker Ltd.* v. *The Commonwealth* (1), where my learned brother stated the principles which should be applied in considering expressions of the character now under consideration. In my opinion, what is said in the case cited is precisely applicable to this case.

For these reasons I am of opinion that the judgment in the first action was right and that, as the plaintiff had no cause of action at any time, the learned judge acted rightly in refusing to order that the defendant pay his costs.

In the second action, which was also dismissed with costs, the validity of the dismissal of the plaintiff by the Governor-General is challenged. The plaintiff contends that members of the Public Service in Papua are not subject to dismissal by the Governor-General at pleasure or at least they are not so subject where any misconduct is alleged against them. The argument is that the principles enunciated in *Gould* v. *Stuart* (2) apply to the relevant legislation rather than those laid down in *Shenton* v. *Smith* (3) and *Dunn* v. *The Queen* (4).

It is true that the regulations prescribe the method in which the Lieutenant-Governor and the Executive Council are to exercise powers of discipline with respect to the service. These regulations are binding upon the Lieutenant-Governor and upon the Executive Council. But the regulations do not deal in any way with the power of the Governor-General to dismiss officers. Sec. 18 of the *Papua Act* provides that the officers of the service shall "unless otherwise provided by law, hold their offices during the pleasure of the Governor-General." It would, therefore, have been competent for the Legislative Council of the territory to provide by law that officers should hold their offices otherwise than at the pleasure of

(1) (1931) 44 C.L.R. 492, particularly at p. 509.
(2) (1896) A.C. 575.
(3) (1895) A.C. 229.
(4) (1896) 1 Q.B. 116.

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the Governor-General. But in fact no such law in the form of ordinance or regulation has been made. The power of the Governor-General to dismiss officers is not referred to in the ordinances or in the regulations in any way, and it is not affected by them in any way.

The plaintiff relied upon a statement in *Bridges* v. *The Commonwealth* (1) by *O'Connor* J. in a judgment approved by *Griffith* C.J. (2). *O'Connor* J. was there discussing public-service Acts of the States in the light of *Gould* v. *Stuart* (3) and *Shenton* v. *Smith* (4). The learned judge said that public-service statutes of the *Gould* v. *Stuart* (3) type "leave the right of the Government to dismiss for any cause other than misconduct as at common law, but provide that no Government may dismiss a public servant for misconduct without giving him an opportunity of disproving the charge" (5). This statement was an *obiter dictum*. It was not necessary for the decision of the case. The court has not been referred to any other similar statement, and I have been unable to discover any other authority for the proposition contained in it. The adoption of the principle suggested would produce the strange result that public servants employed under the *Commonwealth Public Service Act* and certain State Acts could be dismissed at will if it were not suggested that they had been guilty of misconduct, but that, if it were so suggested, they could not be dismissed unless the charge were established in the manner provided for by the statute. The practical result would be that, by abstaining from making any charge of misconduct, a Government could dismiss any public servant at will, notwithstanding the protective provisions of the public-service Acts. I do not read *Gould* v. *Stuart* (3) in such a way as to bring about this result. In *Gould* v. *Stuart* (6), in the judgment of the Privy Council it is said, with reference to what I have called the protective provisions of the public-service Acts: "These provisions which are manifestly intended for the protection and benefit of the officer are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure." Thus *Gould* v. *Stuart* (3) decided that in the case then under consideration there

(1) (1907) 4 C.L.R., at pp. 1213, 1214.
(2) (1907) 4 C.L.R., at p. 1205.
(3) (1896) A.C. 575.
(4) (1895) A.C. 229.
(5) (1907) 4 C.L.R., at p. 1214.
(6) (1896) A.C., at p. 578.

was no term in the contract of employment that the Crown could dismiss at pleasure. The case did not, as I read it, decide that there was such a term, but that it was subject to the limitation that there could be no dismissal at pleasure in the case of alleged misconduct.

In *Ryder* v. *Foley* (1) *Griffith* C.J. said :—" I do not know any instance in which a person who holds office during pleasure could bring an action for wrongful dismissal. The foundation of the wrongful dismissal is the wrongful refusal to retain him in the service, but the service is terminable at pleasure. How can the exercise of that pleasure be wrongful ? " In my opinion this is an accurate statement of the meaning of the proposition that in certain cases an employer can dismiss a servant at pleasure. This view is, I think, better founded than that stated *obiter* by *O'Connor* J. in *Bridges* v. *The Commonwealth* (2).

Finally, the defendant raised the objection that the plaintiff had sued the wrong defendant, and that, if he had any cause of action, proceedings ought to have been taken against the Commonwealth and not against the Territory of Papua. As, in my opinion, the plaintiff fails upon the substance of his case, this question as to the proper party to be sued becomes unimportant. As at present advised, I think that the actions are well constituted as against the Territory of Papua. But, before actually deciding such a question, I would like to have the point thoroughly argued, and would prefer that the Commonwealth should be represented upon the argument. I therefore express no concluded opinion upon this question.

For the reasons which I have stated both appeals should, in my opinion, be dismissed.

Rich J. On these appeals two objections preliminary in their nature were raised to the competence of the suits brought by the plaintiff against the territory. The first objection was that the suits should have been brought against the Commonwealth, and the second was as to the nature of the relief claimed. Having regard to the provisions of the *Claims by and against the Government Ordinance* 1911 (Papua), I think these objections are untenable.

(1) (1906) 4 C.L.R. 422, at p. 436. (2) (1907) 4 C.L.R., at p. 1214.

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The suits are two in number. In the first the plaintiff complains of an attempt at his reduction in rank by the Lieutenant-Governor. In the second he complains of his purported removal from office by the Governor-General—a removal followed immediately by his appointment to the reduced rank. I am of opinion that his second suit should fail. I cannot agree with the view that the power vested in the Governor-General by sec. 17 (1) of the *Papua Act* 1905-1934 has been restricted by law. He therefore held office at the pleasure of the Governor-General. The question whether before the exercise by the Governor-General of his removal of the plaintiff the Lieutenant-Governor had validly reduced his rank has lost its substantial importance for the plaintiff. From a practical point of view it affects only the question whether he should receive the costs of his first suit. I think the attempted reduction involved an excess of power on the part of the Lieutenant-Governor. I read sub-clause 8 and sub-clause 14 of clause 53 of the *Public Service Regulations* 1926 (Papua) as conferring powers which may be exercised alternatively but not in succession. I attach no importance to the fact that the first is expressed to vest power in the Lieutenant-Governor after inquiry before the Executive Council and the second in him when the Executive Council has formed an opinion upon inquiry. These are but the vagaries of draftsmanship, involving no substantial difference of meaning. The words in sub-clause 8 referring to the possibility of no other punishment being awarded were necessary because under sub-clause 14 the Lieutenant-Governor, having decided under sub-clause 8 not to suspend, might have awarded another punishment. I do not think that the sub-clauses contemplate the Lieutenant-Governor and the Executive Council reconsidering the case with a view of awarding further punishment after the Governor-General's pleasure has become known in relation to the Lieutenant-Governor's decision. Sub-clause 8 would have been better expressed if the order of words had been as follows: "If after full inquiry before the Executive Council the Lieutenant-Governor decides not to suspend the officer, and no other punishment is awarded, or if the suspension of the officer is not approved and confirmed by the Governor-General, the officer will be entitled

to" &c. But precision and artistry in the order of clauses are not common characteristics of legislative draftsmanship in any jurisdiction.

I think that the plaintiff should have had his costs of his first suit. I think that the complications of taxation and set-off can be avoided and the same result produced by dismissing the appeals without costs but varying the judgments below by striking out the orders for costs.

DIXON J. These are appeals from judgments of the Central Court of the Territory of Papua pronounced for the defendant in two suits brought by an officer of the Public Service of the territory to establish his rights in respect of the office of assistant resident magistrate. Under the *Claims by and against the Government Ordinance* 1911 a suit may be brought against the Territory of Papua under that name by any person making any claim against it in contract or in tort.

The plaintiff, who is the appellant, was on and before 2nd November 1937 an assistant resident magistrate. On that date he was relieved from duty. The proceedings prescribed by Part VI. of the *Public Service Regulations* 1926 of the territory (statutory rule No. 9 of 1926) in such a case were taken, and the Lieutenant-Governor suspended the plaintiff. Sec. 18 of the *Papua Act* 1905 provides by its first sub-section that the Lieutenant-Governor may upon sufficient cause to him appearing suspend from office any officer of the territory. The second sub-section requires that upon doing so the Lieutenant-Governor shall forthwith report every such suspension to the Governor-General and that the suspension shall continue only until the Governor-General's pleasure therein is signified to the Lieutenant-Governor. Sub-clause 7 of clause 53 of the *Public Service Regulations* 1926 (Part VI.) provides that, if the officer is suspended, the Lieutenant-Governor shall without loss of time report the matter to the Governor-General for approval and confirmation, transmitting the minutes of the Executive Council of the territory, the written statements and all material documents relating to the case.

The Lieutenant-Governor complied with these provisions. The Governor-General refused to confirm the suspension. The plaintiff

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thereupon came within the operation of sub-clause 8 of clause 53 of the regulations. This sub-clause is as follows: "If after full inquiry before the Executive Council the Lieutenant-Governor decides not to suspend the officer, or if the suspension of an officer is not approved and confirmed by the Governor-General, and no other punishment is awarded, the officer will be entitled to the full amount of salary which he would have received if he had not been relieved from duty or suspended, even though the officer discharging the functions of the office in the meantime has been allowed to receive some portion of the salary of the office."

Even if it was within his power to do so, the Governor-General had not purported to award any other punishment. It would, therefore, appear, prima facie, that, upon the pleasure of the Governor-General refusing approval or confirmation of the suspension becoming known, the plaintiff was remitted to his former status as an assistant resident magistrate with a title to the full amount of salary. But the Lieutenant-Governor proceeded to take a course which, if open to him, would prevent the plaintiff's restoration to his former office.

The fourteenth sub-clause of clause 53 of the regulations makes the following provision: "If upon full inquiry the Executive Council are of opinion that the officer deserves punishment, but not the full penalty of suspension, the Lieutenant-Governor may remove the officer to an office of lower rank in the service, or may require him to serve in his original office at a reduced salary, either permanently or for a stated period, or may deduct a portion of salary due or about to become due to the officer, or may inflict any other punishment allowed by the regulations."

In purported exercise of the power given by this provision the Lieutenant-Governor reduced the plaintiff to an office of lower rank and salary. The plaintiff thereupon brought a suit against the Territory, seeking a declaration that he still held the office of assistant resident magistrate.

In my opinion the attempt by the Lieutenant-Governor to reduce his rank under sub-clause 14 of clause 53 of the regulations was not authorized by that sub-clause. I think that when the Lieutenant-Governor resolved to suspend the plaintiff, he gave his decision

under clause 53 and that nothing further remained for him to do. His duty was performed, and he was not entitled, so to speak, to resume the case and give a new decision under sub-clause 14. It is true that sub-clause 8 speaks of the imposition of some other punishment. On a first reading of that sub-clause, it might appear that the condition expressed in the words " and no other punishment is awarded " meant that the draftsman supposed that when the Governor-General did not approve or confirm a suspension some other punishment might be imposed. On this reading, the contention is that the power given by sub-clause 14 was meant to cover cases where the Governor-General had refused his confirmation of a suspension. But I think it is a misreading of sub-clause 8. That sub-clause refers to two preliminary conditions without fulfilment of one or other of which the officer cannot obtain the benefits given by the sub-clause. They are alternative conditions. The first of them is expressed thus : " If after full inquiry before the Executive Council the Lieutenant-Governor decides not to suspend the officer." The event so described covers the condition upon which the application of sub-clause 14 depends. That sub-clause begins : " If upon full inquiry the Executive Council are of opinion that the officer deserves punishment, but not the full penalty of suspension." When sub-clause 8 goes on to say " and no other punishment is awarded," it is providing for the possibility of the Lieutenant-Governor's awarding some other punishment under sub-clause 14, having decided not to suspend. There is no reason to suppose that it is also referring to the second alternative event mentioned in sub-clause 8, viz., the Governor-General's failing to approve and confirm a suspension. The inclusion of the condition that no other punishment is awarded is fully explained by the possibility of the Lieutenant-Governor's imposing another punishment under sub-clause 14 when he decides not to suspend. An implication of a power to impose some further punishment when the Governor-General does not confirm a decision to suspend is neither needed nor justified. Such an implication is indeed opposed to the language by which sub-clause 14 is introduced. So far, therefore, the complaint of the plaintiff appears to have been well founded. It is contended, however, that his suit was misconceived.

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In the first place, it is said that his cause of action was against the Commonwealth and not against the Territory of Papua. The reason given is that as an officer of the service of the territory he was appointed under sec. 17 of the *Papua Act* in the name of the Governor-General and that he was a servant of the Commonwealth. In my opinion this contention is fallacious. When Part IX. of the *Judiciary Act* 1903-1937 speaks of suits against the Commonwealth and when the *Claims by and against the Government Ordinance* 1911 speaks of suits against the territory each refers to a proceeding against the King, the one in right of the Commonwealth and the other in right of the Territory of Papua. As is explained in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (1), particularly by Lord *Phillimore* (2), the question whether a suit against the Crown should be brought against it in right of one Dominion, Possession, or jurisdiction rather than another depends upon the exchequer or treasury out of which the liability or claim put in suit would be discharged or satisfied. Here it is plain that the salary attached to the office to which the plaintiff lays claim and any damages for exclusion from that office would be answerable out of moneys made available to the Crown in right of the Territory of Papua. The ordinance means that suits for the establishment of such a right or claim shall be brought as against the Territory of Papua. As that territory is a territory of the Commonwealth, it is not inconceivable that a suit may also be brought under Part IX. of the *Judiciary Act*, but that is a matter which need not be considered.

A second objection to the form of the action was made. It was based on the nature of the prayer at the end of the statement of claim, which sought, not damages for deprivation of office, but declarations of right establishing the plaintiff in the office of assistant resident magistrate. It is a sufficient answer to this objection that it is open to the court to declare that the plaintiff's reduction in rank was contrary to law or a breach of his rights. In my opinion, at the time when the plaintiff instituted his first suit he was entitled to succeed.

But, after the issue of the writ, further steps were taken both by the Governor-General and by the Lieutenant-Governor.

(1) (1925) A.C. 754.

(2) (1925) A.C., at pp. 779, 780.

Sec. 17 (1) of the *Papua Act* 1905 provides, among other things, that the judges, magistrates and other officers of the territory shall, unless otherwise provided by law, hold their offices during the pleasure of the Governor-General. On the view that the plaintiff held office as assistant resident magistrate at pleasure, the Governor-General terminated his appointment as an officer of the Public Service of the territory as from 20th April 1938. As from the following day, the Lieutenant-Governor thereupon appointed him a patrol officer, an office carrying a lower salary. He was paid as an assistant resident magistrate to 20th April. If the power of the Governor-General enabled him to dismiss him from the service in this way, it is evident that the plaintiff ceased to be entitled to any relief in his first suit.

The plaintiff then began a second suit. Its purpose was to establish the invalidity of the attempt to dismiss him from the service, reappointing him to a reduced rank. If the plaintiff held office altogether at the pleasure of the Governor-General, the validity of his dismissal could not, I think, be denied. Accordingly the plaintiff's contention is that sec. 17 (1) no longer has its full operation, because it has been " otherwise provided by law."

The *Public Service Ordinance* 1907 authorizes the making of regulations for the good order and conduct of the Public Service of the territory which are to have the force of law. The regulations of 1926 made under this power contain in Part VI. a set of provisions governing the Lieutenant-Governor's power of suspending officers and regulating in the interest of the officers the procedure by which it may be exercised. In these regulations the plaintiff seeks a foundation for the view that the Governor-General cannot terminate an officer's appointment, at all events in consequence of alleged misconduct, except as the final authority in a proceeding in accordance with the regulations. The application of the principles laid down in *Gould* v. *Stuart* (1) is seldom free from difficulty. But in the present case I think that it is clear that the regulations are confined to regulating and controlling the authority of the Lieutenant-Governor and do not touch the authority of the Governor-General.

(1) (1896) A.C. 575.

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No implication or inference that the members of the Public Service of the territory do not hold office in all respects at the pleasure of the Governor-General finds a warrant in the regulations.

I am of opinion that the plaintiff's second suit could not succeed.

The two suits were heard separately and the appeals were heard as distinct proceedings. In the circumstances I think that, as, but for the subsequent action of the Governor-General, the plaintiff was entitled to succeed in his first suit, he should have received his costs of that proceeding. His appeal from the judgment in that suit was not without justification. I think a proper order to make would be to vary the judgments below by striking out the orders for costs and otherwise to dismiss the appeals without costs.

McTIERNAN J. In my opinion the appeal against the judgment in the first action should be allowed, and the appeal against the judgment in the second action should be dismissed.

The question which arose in the first action was whether the Lieutenant-Governor of the territory acted in excess of his powers by removing the appellant from the office of assistant resident magistrate to that of patrol officer after the Governor-General had declined to approve of the Lieutenant-Governor's decision to suspend the appellant. In the second action the question was whether the Governor-General acted in excess of his powers by summarily dismissing the appellant from the Public Service of the territory.

These questions depend on the *Papua Act* 1905, the *Public Service Ordinance* 1907 made under it and the *Public Service Regulations* 1926 made under the ordinance.

The continuance of the appellant's suspension, which was made under Part VI. of the regulations, depended upon the Governor-General's approval of the suspension. The suspension was made by the Lieutenant-Governor after an inquiry before the Executive Council of the territory. The regulations provide that no officer can be suspended by the Lieutenant-Governor unless such an inquiry is held.

The Governor-General having declined to approve of the appellant's suspension, the Lieutenant-Governor removed him to an office

of lower rank than that which he was holding at the time of his suspension. Then the appellant began an action in the Central Court of the Territory of Papua against the territory in which he alleged that his removal was unlawful, and he claimed relief on that footing. The Government of the territory defended the action, but, before trial, reversed the action of which the appellant complained, but without any admission of liability. It would appear that the object which the administration had in retracing its steps was to ensure that, even if the appellant succeeded in the action, he could not rely on the judgment as a title to the office from which he had been removed. The order removing him from the office was cancelled, and he was reinstated. But thereupon the Governor-General dismissed him from the office and the Lieutenant-Governor immediately appointed him to the inferior position to which he had been removed. The appellant met these measures by bringing the second action, in which he claimed relief on the footing that the Governor-General had unlawfully dismissed him. The validity of the order removing the appellant to an inferior position, after the refusal of the Governor-General to confirm his suspension, turns upon the question whether the power of imposing one or other of the punishments specified in clause 14 of reg. 53 was then available to the Lieutenant-Governor. Clause 14 is in these terms: "If upon full inquiry the Executive Council are of opinion that the officer deserves punishment, but not the full penalty of suspension, the Lieutenant-Governor may remove the officer to an office of lower rank in the service, or may require him to serve in his original office at a reduced salary, either permanently or for a stated period, or may deduct a portion of salary due or about to become due to the officer, or may inflict any other punishment allowed by the regulations." It is implicit in this clause that it is upon the inquiry that the Executive Council are to form the opinion whether the officer deserves punishment, and, if they form the opinion that he deserves punishment, whether the punishment is to be suspension or a punishment less than suspension. The terms of the regulations plainly show that this opinion is to be formed before the matter is reported to the Governor-General for his decision. It would not

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be so reported unless the officer were suspended by the Lieutenant-Governor. The inquiry upon which the Executive Council are to arrive at their conclusion on the question of punishment is identical with the inquiry referred to in clause 8 of reg. 53. The words in that clause, "and no other punishment is awarded," refer to the punishments less than suspension which are specified in clause 14. These words exclude any officer who deserves any such punishment from the rights, in respect of salary, which are preserved to an officer who is not punished at all or whose suspension is not approved by the Governor-General.

In my opinion, the Lieutenant-Governor acted in excess of his powers under Part VI. of the regulations in removing the appellant to the office of patrol officer after the Governor-General had declined to confirm his suspension from the office of assistant resident magistrate.

The question for decision in the second appeal is whether the Governor-General lawfully dismissed the appellant from the Public Service of the territory. Sec. 17 of the *Papua Act* provides that, unless otherwise provided by law, officers of the territory shall hold their offices during the pleasure of the Governor-General. But, it is contended for the appellant that, since the making of the *Public Service Regulations*, the Governor-General cannot dismiss an officer otherwise than by approving and confirming a suspension imposed on him by the Lieutenant-Governor. The basis of this contention is that, after the making of the *Public Service Regulations*, it became a condition upon which an officer held office that he would not be suspended except in the manner provided in the regulations. The regulations do not, in express terms, restrict the Governor-General's power to dismiss an officer at pleasure. They limit the powers of the Lieutenant-Governor, and subject his power of suspension to the control of the Governor-General. In my opinion, the regulations did not impliedly create any restriction on the power of dismissal which the Governor-General enjoys under sec. 17 of the Act.

I agree that the Territory of Papua was the proper defendant.

In the circumstances existing at the time the first action was brought, the appellant was entitled to a judgment granting him

appropriate relief with costs, but it is unnecessary to settle the form of the judgment because of the result of the second appeal, which, in my opinion, should be dismissed. There should be no order for costs in either appeal or in either action.

Judgment of Central Court in each case varied by striking out the orders relating to costs. Otherwise each appeal dismissed without costs.

Solicitor for the appellant, *R. D. Bertie.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

H. D. W.