[HIGH COURT OF AUSTRALIA.]

HEALY . . . . . APPELLANT;
PLAINTIFF,

AND

THE LAW BOOK COMPANY OF AUSTRAL-ASIA PTY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1942.

MELBOURNE, *Oct.* 14, 15, 28.

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

Master and Servant—Contract of employment—Termination—Engagement for two years and thereafter until engagement terminated—Provision for six months' notice of determination—Sufficiency of notice not ending with year of service.

By an agreement set out in correspondence between the parties the appellant was employed by the respondent company as editor of a publication "for a year from the first of this month" (October 1933) "at £400 and for the ensuing year at £500, and thereafter at the latter salary until the engagement is determined"—"this arrangement to be continued subject to six months' notice by either party of their intention to determine the same." In May 1941 the respondent gave to the appellant notice of its intention to determine the agreement; this notice expired on 30th November 1941.

Held that the agreement was duly determined by the notice given. The employment was for two years certain, and thereafter determinable by six months' notice expiring at any time; it was not an engagement from year to year determinable only by six months' notice expiring at the end of some year of the engagement.

Decision of the Supreme Court of Victoria (Full Court): *Healy* v. *The Law Book Co. of Australasia Pty Ltd.*, (1942) V.L.R. 203, affirmed.

APPEAL from the Supreme Court of Victoria.

Eugene Francis Healy was employed by The Law Book Co. of Australasia Pty Ltd. first as co-editor and then as editor of the Commonwealth Law Reports on terms set out in correspondence between the parties. The material passages of the relevant letters

were as follows:—Letter from the Law Book Co. to Healy dated 17th October 1933: "As from 1st October 1933 you are to act as co-editor at a remuneration of £400 p.a. This arrangement to be continued subject to six months' notice by either party of their intention to terminate same . . . we purpose increasing your remuneration to £500 as from 1st October, 1934." Letter from Healy to the Law Book Co. dated 22nd October 1933: "As I understand, I am appointed for a year from the first of this month at £400 and for the ensuing year at £500, and thereafter at the latter salary until the engagement is determined. The period of notice specified by you for determining the engagement is satisfactory to me." Letter from the Law Book Co. to Healy dated 24th October 1933: "Your appointment as you suggest, was for one year from 1st October 1933 at £400 per annum. As from October 1st 1934 your remuneration to be increased to £500 per annum." Letter from Healy to the Law Book Co. dated 27th October 1933: "I am glad to be informed that you accept my letter of 22nd inst. as correctly expressing our agreement in the aspect about which I was concerned."

Healy continued to act as editor of the Commonwealth Law Reports during the remainder of 1933, throughout 1934-1940, and during part of 1941. In 1941, negotiations for a variation of the agreement having broken down, the Law Book Co. in May 1941 gave Healy six months' notice of termination as from 1st June 1941. This notice expired on 30th November 1941.

Healy brought an action in a County Court at Melbourne, Victoria, claiming the sum of £450 damages for wrongful dismissal. He contended, *inter alia*, that he was employed under a yearly engagement, which could be terminated only by a notice expiring at the end of a year. The County Court Judge gave judgment for the defendant. An appeal by the plaintiff against the decision of the County Court was dismissed by the Supreme Court of Victoria: *Healy* v. *The Law Book Co. of Australasia Pty Ltd.* (1).

From that decision Healy appealed to the High Court.

Walker, for the appellant. A contract of employment for one or more years, followed by employment for an indefinite term, becomes a yearly hiring, which in the absence of a stipulation to the contrary can be determined only by a notice expiring with a year of service. This contract could not properly be terminated until 30th September 1942 (*Halsbury's Laws of England*, 2nd ed., vol. 22, pp. 144, 149; *Chitty* on *Contracts*, 19th ed. (1937), p. 895; *Mackenzie* v. *Union Fire and Marine Insurance Co. of New Zealand* (2)). It is of importance that the salary is not "at the rate" of £500, but simply at £500

(1) (1942) V.L.R. 203.

(2) (1880) 1 L.R. (N.S.W.) 103.

H. C. OF A. 1942. HEALY v. THE LAW BOOK CO. OF AUSTRALASIA PTY LTD.

a year, which distinguishes this case from the case of *Soames* v. *Nicholson* (1). For a case in which the absence of these words produced a different result, see *Lewis* v. *Baker* (2)—See also *Bullock* v. *Wimmera Fellmongery & Woolscouring Co. Ltd.* (3); *Williams* v. *Byrne* (4); *Jackson* v. *Hayes Candy & Co.* (5).

Stafford, for the respondent. The contract is clear. There is no necessity to resort to implications or presumptions, which should not be read into a contract unless it is necessary (*The Moorcock* (6)). The respondent is content to regard the contract as one for two years certain, and afterwards for an indefinite term, subject to determination by six months' notice given at any time. The plaintiff seeks to add a term (*Ryan* v. *Jenkinson* (7)). The very rule about a presumption of a yearly service is subject to this, that there shall not be any term to the contrary as to termination in the contract (*Buckingham* v. *Surrey & Hants Canal Co.* (8), per *Grove* J.; *Diamond* on *Master and Servant*, (1931), p. 84; *Macdonnell* on *Master and Servant*, 2nd ed. (1908), p. 135; *Forgan* v. *Burke* (9); *Zeigler* v. *Monckton* (10)). Tenancy agreements are distinguished in *Beeston* v. *Collyer* (11). [Counsel also referred to *Costigan* v. *Gray Bovier Engines Ltd.* (12); *Fisher* v. *W. B. Dick & Co. Ltd.* (13); *Jacks & Co.* v. *Palmer's Shipbuilding and Iron Co.* (14).]

Walker, in reply. The agreement means: "and thereafter for the sum of £500 for each year." The appellant is entitled to be paid for a whole year and must work for a whole year. It would be different if he were engaged "at the rate of" £500 a year. The cases cited for the respondent bear no resemblance to this case. The party in question was not getting a fixed sum per year: See *Cutter* v. *Powell* (15).

Cur. adv. vult.

Oct. 28. The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria dismissing an appeal from a judgment of the County Court for the defendant in an action for wrongful dismissal.

(1) (1902) 1 K.B. 157.
(2) (1906) 2 K.B. 599.
(3) (1879) 5 V.L.R. (L.) 362.
(4) (1837) 7 A. & E. 177 [112 E.R. 438].
(5) (1938) 4 All E.R. 587, at p. 589.
(6) (1889) 14 P.D. 64.
(7) (1855) 25 L.J. Q.B. 11.
(8) (1882) 46 L.T. 885, at p. 886.
(9) (1861) 12 Ir. C.L.R. 495.
(10) (1885) 4 N.Z.L.R. 213, at p. 214.
(11) (1827) 4 Bing. 309 [130 E.R. 786].
(12) (1925) 41 T.L.R. 372, at p. 373.
(13) (1938) 4 All E.R. 467.
(14) (1929) 98 L.J. K.B. 366, at pp. 369, 370.
(15) (1795) 6 T.R. 320 [101 E.R. 573]; *Smith's Leading Cases*, vol. 2, p. 1.

The appellant was employed by the Law Book Co. first as co-editor and then as editor of the Commonwealth Law Reports. The terms of the engagement were contained in certain letters. The appellant was appointed "for a year from the first of this month" (October 1933) "at £400 and for the ensuing year at £500, and thereafter at the latter salary until the engagement is determined"—"this arrangement to be continued subject to six months' notice by either party of their intention to terminate same." The employment continued on these terms till 1941. Owing to changes resulting from the war, the company found it necessary or desirable to reduce expenditure, and proposed a reduction in salary which the appellant was not prepared to accept. The company therefore in May 1941 gave six months' notice of termination as from 1st June 1941. This notice expired on 30th November. The appellant contends that no effective notice could be given unless it expired with a year of service—i.e., on 30th September. This contention did not succeed and he now appeals to this Court.

The terms of the agreement show that the appellant was engaged for two years certain and thereafter until the agreement was duly determined. The remuneration for the first and second years was a lump sum annual payment for a full year's service—£400 or £500 a year, not "at the rate" of £400 or £500 a year. The appellant was not entitled under the contract to any payment for the first or second year until he completed each year of service. In the absence of any express stipulation or custom to the contrary the well-established presumption would apply, so that the employment thereafter would be a yearly engagement determinable only by notice ending with a year of service: *Halsbury's Laws of England*, 2nd ed., vol. 22, pp. 144, 149—the former statement approved as a correct statement of the law in *De Stempel* v. *Dunkels* (1); *Jackson* v. *Hayes Candy & Co.* (2); *Mackenzie* v. *Union Fire and Marine Insurance Co. of New Zealand* (3); *Bullock* v. *Wimmera Fellmongery and Woolscouring Co. Ltd.* (4); *Broadhurst & Co. Ltd.* v. *Robinson* (5).

In this case the parties have not left the meaning of their contract to be determined by any presumption so far as the determinability of the employment by notice is concerned. They have made an express stipulation upon this matter. The question of sufficiency of notice is therefore to be decided by interpreting this express stipulation: See *Buckingham* v. *Surrey & Hants Canal Co.* (6), from which *Greer* L.J. in *De Stempel* v. *Dunkels* (7) adopted the following state-

(1) (1938) 1 All E.R. 238.
(2) (1938) 4 All E.R. 587.
(3) (1880) 1 L.R. (N.S.W.) 103.
(4) (1879) 5 V.L.R. (L.) 362.
(5) (1903) 29 V.L.R. 447.
(6) (1882) 46 L.T. 885.
(7) (1938) 1 All E.R., at p. 247.

H. C. OF A. 1942. HEALY v. THE LAW BOOK CO. OF AUSTRALASIA PTY LTD. Latham C.J.

ment :—" As a general rule, where the hiring is a yearly hiring, it cannot be put an end to by either party before the end of the year. This rule, however, is subject to an exception in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice."

The question therefore is : What is the meaning of the provision that the employment is to continue " thereafter " at £500 per annum until the engagement is determined by six months' notice ? There is nothing in this provision which implies that such determination can take place only at the end of a year. The more natural meaning is that the engagement continues until six months' notice of determination is given and that it ends with the expiry of the notice. The result is that the engagement should not, in this case, be regarded as a yearly hiring which would be determinable only at the end of a year. Thus I am of opinion that the notice actually given was effective and that the appeal should be dismissed.

Rich J. The contract in this case is free from any implications. Rules or customs as to hiring agreements are excluded by the express terms of the agreement, which are set out in the plaintiff's letter of 22nd October 1933. It there appears that his engagement by the defendant was " for a year from the first of this month " (1st October 1933) " at £400 and for the ensuing year at £500, and thereafter at the latter salary until the engagement is determined." The letter continues : " The period of notice specified by you for determining the engagement is satisfactory to me." In the defendant's letter of 17th October to which the plaintiff's letter of 22nd October was an answer the period of notice is stated to be six months. As I read the agreement it was for two certain periods and at the expiration of the second period six months' notice could be given to determine the agreement : Cf. *Costigan* v. *Gray Bovier Engines Limited* (1) ; *Jacks & Co.* v. *Palmer's Shipbuilding and Iron Co.* (2).

The appeal should be dismissed.

Starke J. The appellant was engaged by the respondent as assistant, and later as editor of the Commonwealth Law Reports. The terms of the engagement were that the appellant was " appointed for a year . . . at £400 and for the ensuing year at £500, and thereafter at the latter salary until the engagement is determined " ;

(1) (1925) 41 T.L.R. 372, at p. 373. (2) (1929) 98 L.J. K.B. at pp. 369, 370.

that " the period of notice . . . determining the engagement " be " six months' notice by either party of their intention to terminate same."

The contention of the appellant is that his engagement was from year to year, determinable only by six months' notice expiring at the end of some year of the engagement. But, in my opinion, the natural and ordinary signification of the terms of the engagement is that the appellant was engaged for two years certain, giving the words of the parties the most favourable meaning to the appellant, after which time (" thereafter " is the word used by the parties) either party was at liberty to terminate the engagement by giving six months' notice: Cf. *Jacks & Co.* v. *Palmer's Shipbuilding and Iron Co.* (1). Accordingly the six months' notice given to the appellant, though it did not expire at the end of the third or any subsequent year of the engagement, was in accordance with the terms of his engagement.

The appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be dismissed.

The terms of the contract upon which the appellant was employed as the editor of the respondent's publication, the Commonwealth Law Reports, are contained in the correspondence between the parties. The terms were that the appellant was appointed " for a year " from 1st October 1933 at a salary of £400 per annum " and for the ensuing year " at a salary of £500 per annum " and thereafter at the latter salary until the engagement is determined." The term of the contract providing for the determination of the engagement was expressed in these words: " This arrangement to be continued subject to six months' notice by either party of their intention to terminate same." The respondent gave the appellant six months' notice expiring on 30th November 1941 of its intention to terminate the engagement. The question to be decided is whether according to the proper construction of the contract it should have been not only a six months' notice but a notice expiring at the end of a year beginning on 1st October, that is, the day on which the agreement began. The appellant remained in the respondent's service for the whole of the first year from that day and for the whole of the ensuing year. Thereafter the agreement was binding on the parties until it was determined by six months' notice given by either party to terminate it. The construction of the agreement is that after the end of the second year it continues for an uncertain time which is to be determined by the six months' notice. It binds the appellant

(1) (1929) 98 L.J. K.B. 366.

H. C. OF A. 1942.

HEALY v. THE LAW BOOK CO. OF AUSTRALASIA PTY LTD.

McTiernan J.

to serve and the respondent to employ him, not until the end of each year commencing on a named day, but until it is determined by six months' notice given by either party. Whatever was the position before the end of the second year, the agreement was thereafter determinable by a six months' notice given at any time: Compare *Brown* v. *Symons* (1); *Langton* v. *Carleton* (2). If the contract did not contain the term as to notice it might have been implied that it was after the end of the second year a hiring from year to year to the end of each year so long as the parties pleased: Compare *Beeston* v. *Collyer* (3); *Williams* v. *Byrne* (4). But the parties have expressly provided for the limitation of the time for which the agreement is to enure. It would, I think, be adding an express term rather than implying a term to say that it is an agreement for the whole of each year succeeding the second year as long as the parties pleased.

I should add that the respondent terminated the agreement because the appellant would not agree to a reduction of the remuneration. The respondent desired the reduction because of an increase in the costs of publication and a decrease in subscriptions in consequence of the war. The respondent's letter to the appellant expresses regret at the severance of their relations and expresses appreciation of the appellant's work as editor.

WILLIAMS J. From the four letters forming the correspondence which took place between the parties in October 1933, I gather that their intention was either that the agreement was to be for two years certain from 1st October 1933 and after that was to be determinable on six months' notice by either party expiring at any time, or that it was to be from its commencement for an indefinite period determinable by such a notice. Since more than two years had expired when the appellant received the notice, it is immaterial to decide which of these two constructions is correct, as upon either he received a proper notice.

Counsel for the appellant urged that it was a condition of the contract that the appellant's salary should only accrue and become payable at the end of each year, so that, if the contract was determined by a notice expiring during the year, he would not be entitled to any remuneration for his work during the broken period prior to the expiry of the notice. The point is academic except so far as it throws light upon the construction of the contract as a whole,

(1) (1860) 8 C.B.N.S. 208 [141 E.R. 1145].
(2) (1873) L.R. 9 Ex. 57.
(3) (1837) 4 Bing. 309 [130 E.R. 786].
(4) (1837) 7 A. & E. 177 [112 E.R. 438].

because the appellant was in fact paid an apportioned part of his annual salary for this period. If, upon the true construction of a contract, the completion of a certain period of service is a condition precedent to the right to receive any part of a lump sum, then nothing is payable until the whole period of service has been completed (*Cutter* v. *Powell* (1)). This principle has been applied to the remuneration payable to directors. So it has been held, in *Inman* v. *Ackroyd & Best Ltd.* (2) and similar cases, that where the articles of association have fixed the remuneration payable to directors upon an annual basis and have omitted the words " at the rate of," directors who do not complete their year of office are not entitled to any remuneration. But in *Moriarty* v. *Regent's Garage Co. Ltd.* (3) Lord *Sterndale* M.R., after referring to the conflict between the earlier decision of the Court of Appeal in *Swabey* v. *Port Darwin Gold Mining Co.* (4) and the later decision of that Court in *Inman's Case* (2) on this point, proceeded to say that, where these words are omitted, it is still a question whether, in all the circumstances of the case, the parties intend that there should nevertheless be a right to receive payment for a broken period.

The provisions in the present contract relating to remuneration and to notice must be construed together as component parts of a contract which is contained in correspondence and not in a formal document. This correspondence relates to a variation of an existing contract made in December 1932 by which the appellant had agreed to assist the editor of the Commonwealth Law Reports for the year 1933. The evidence does not disclose what the appellant's salary was for 1933 under the existing contract, but presumably it was payable periodically and not annually. Otherwise, by agreeing to the new arrangement operating from 1st October the plaintiff would have forfeited his right to any salary for the previous nine months. This supports the inference that the new salary to be paid under the varied contract was also to be paid periodically. From 1st October to the end of the year, the new salary was to be substituted for the previous one. The parties could scarcely have intended that the appellant should only receive this substituted remuneration if he completed a further nine months of service under the new contract. So that the circumstances under which the new contract originated afford a strong indication that the new salary was intended to be at the rate of £400 for the first year and at the rate of £500 for the subsequent years. It was in fact paid quarterly, so that the parties evidently regarded the contract which they had

(1) (1795) 6 T.R. 320 [101 E.R. 573].
(2) (1901) 1 Q.B. 613.
(3) (1921) 2 K.B. 766, at pp. 776, 777.
(4) (1889) 1 Meg. 385.

H. C. OF A. 1942. HEALY v. THE LAW BOOK CO. OF AUSTRALASIA PTY LTD. Williams J.

made as providing for periodical payments. If the words of an instrument be ambiguous it is permissible to call in aid the acts done under it as a clue to the intention of the parties (*Watcham* v. *East Africa Protectorate* (1); *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (2)). Upon the true construction of the contract the appellant's salary was, in my opinion, payable at the rate of £500 per annum at the date the notice was given, so that the contention on which his counsel founded one of his main arguments fails.

It is, therefore, unnecessary to discuss whether the *Supreme Court Act* 1928 (Vict.), Div. 5 (Apportionment), secs. 73-76, applies to the contract: See *Moriarty's Case* (3).

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *F. J. Barlow & Co.*
Solicitors for the respondent, *Whiting & Byrne.*

B. B. M.

(1) (1919) A.C. 533, at pp. 538, 539. (2) (1888) 39 Ch. D. 339, at pp. 366, 369.
(3) (1921) 2 K.B. 766.