[HIGH COURT OF AUSTRALIA.]

NOONAN . . . . . APPELLANT;
PLAINTIFF,

AND

THE VICTORIAN RAILWAYS COMMISSIONERS . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 26, 27, 28. *Sept.* 6, 10, 11, 27.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Railways Act 1890 (*Vict.*) (*No.* 1135), *secs.* 70, 93—*Railway employé—Dispensing with services—Incapacity of employé—Right to compensation.*

The word "compensation" in sec. 93 of the *Railways Act* 1890 (Vict.) means an indemnity given to an employé who is deprived of his office not through any fault of his own.

Any default or failure on the part of an employé which at common law would disentitle him to claim to be retained in the service of the Railways Commissioners is such a fault as to disentitle him to compensation.

Held, therefore, (*Higgins* J. dissenting) that, under secs. 70 and 93 of the *Railways Act* 1890, the Railways Commissioners may dispense with the services of an employé who was appointed before the passing of the *Victorian Railways Commissioners Act* 1883, and who is no longer ready and willing to discharge, or who becomes permanently incapable of performing, his duties, without being liable to pay compensation to such employé.

Per Higgins J. :—I. The letter of 31st December 1904, as to which alone the special case is stated by agreement, shows that the Commissioners did not remove the plaintiff for any fault or incapacity, but because they had "no longer use for his services." II. The same letter shows that he was removed under the statutory absolute power contained in sec. 70; and the Commissioners could not now rely on any other power, if they had any other. III.

There are only two modes of discharging an employé in the railways:—(1) by dismissal for breach of regulations &c. under secs. 86-88; (2) by removal on grounds irrespective of conduct, but at the will of the Commissioners under sec. 70.

Victorian Railways Commissioners v. *Brown*, 3 C.L.R., 316, explained and followed.

Judgment of Supreme Court (*Noonan* v. *Victorian Railways Commissioners*, (1907) V.L.R., 123; 28 A.L.T., 129) affirmed.

APPEAL from the Supreme Court of Victoria.

In an action in the County Court of Victoria, brought by William Francis Noonan against the Victorian Railways Commissioners, a special case was stated for the opinion of the Supreme Court which set out the following facts:—

The plaintiff by his plaint summons claimed, *inter alia*, a declaration that he was entitled to a retiring allowance to be computed under the provisions of Act No. 160.

The plaintiff was in May 1883 employed as an engine cleaner in the Department of Railways, that Department having in the year 1862 been declared to be a temporary Department by the Governor in Council under the provisions of the Act No. 160.

The plaintiff continued to be employed as such cleaner, and afterwards in the year 1889 passed his examination as engine-driver and was appointed as engine-driver in January 1890.

The plaintiff continued to perform the duties of his office as engine-driver from 1889 until March 1903 at a salary or wages beginning at 11s. per day, and which from October 1899 onwards was 14s. per day.

The plaintiff was not called on to effect, and did not effect, an insurance on his life as provided by sec. 82 of the *Railway Act* 1890.

The plaintiff in the month of March 1903, having received a medical certificate as to his physical condition, applied to the defendants for leave of absence on the ground of ill-health, and on 26th March 1903 received leave of absence for six months from that date, during which period he was absent on leave.

The plaintiff on the 22nd September 1903, having received a further medical certificate as to his physical condition, made a further application for leave of absence, but the railway medical

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officer having reported that in his opinion, though the plaintiff was suffering from neurasthenia and that his heart was not absolutely sound, he was able to resume duty, the plaintiff was on the 11th November 1903 directed to resume duty. In reply to such direction the plaintiff on 13th November 1903 wrote that he regretted that, owing to the state of his health, he could not for some time obey that direction.

After some further correspondence, in the course of which the plaintiff was directed to report himself for duty as a pumper at Boort at 8/- per day, but declined to accept the position, a charge of misconduct was made against the plaintiff for having disobeyed orders in refusing to go to Boort. This charge was heard by a Board and was dismissed, but the plaintiff having appealed to the Commissioners, a letter was written to him stating that he would be given another chance and directing him to report himself for duty as engine-driver at Benalla. But the plaintiff, owing to ill-health, did not report himself for duty until 20th May 1904, and then for one day only, and on 28th June 1904, he wrote to the Chief Mechanical Engineer, applying for permission to retire on a superannuation allowance. This permission, however, was refused by the Governor in Council on the 28th June 1904.

Further correspondence then took place in the course of which the plaintiff was offered work as a skilled labourer at 6/- per day, and finally on 31st December 1904 the Secretary of Railways wrote to the plaintiff as follows:—

"I am directed by the Victorian Railways Commissioners to inform you that they have no longer use for your services, and that the Victorian Railways Commissioners have, under the provisions of the Railways Acts, determined your employment by them and removed you from their service from the date of this notification. It is intended to pay you any wages that may be due to you for the period up till and inclusive of the date of this notification, from which date your employment will absolutely terminate."

From the 20th May 1904 to the 17th November 1904 the plaintiff owing to ill-health did not present himself for duty, did no work, and did not receive any pay. On the 18th, 19th, 22nd, 23rd, 24th, 25th and 26th November 1904 the plaintiff was

employed as a skilled labourer, and was paid for such work at the rate of 7/- per day. The plaintiff, since the 26th November 1904, owing to ill-health had not presented himself for duty, had done no work, and had not received any pay.

The defendants refused to pay the plaintiff any compensation or retiring allowance, or anything in lieu thereof. The plaintiff's services were not dispensed with in consequence of any change in the Department or reduction of the number of officers, save and except as far as the mere fact that an employé's services being dispensed with at the pleasure of the Commissioners may amount to a change in the Department or a reduction in the number of officers.

The plaintiff was not charged under the provisions of any of the sections of the Railways Acts with any offence, misconduct, or breach of the regulations of the Department.

Among the questions submitted for the opinion of the Supreme Court was the following :—

"(*c*) By the defendants determining the plaintiff's employment as and in the manner set out in the letter of the 31st December 1904, is the plaintiff entitled to compensation or retiring allowance to be computed under the provisions of Act No. 160 or any other amount in lieu thereof by way of damages for wrongful dismissal or otherwise ?"

It was agreed between the parties that, in considering the above question, the form of such question was not to preclude the Court from having regard to the plaintiff's absence from duty and state of health as set out in the case and the correspondence attached thereto ; that the Court should consider how far, if at all, the defendants were entitled to rely on the circumstances connected with the plaintiff's state of health and absence from duty, having regard to the terms of the letter of the 31st December 1904 ; and that for the purpose of deciding that question the Court should be at liberty to draw any inference of fact from the allegations in the case and correspondence.

The correspondence, so far as is material, is set out in the judgments hereunder.

The case coming on for hearing before the Full Court, the

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question above set out was answered in the negative: *Noonan* v. *The Victorian Railways Commissioners* (1).

The plaintiff now appealed to the High Court.

Duffy K.C. and *Starke* (with them *Moule*), for the appellant. Although the Commissioners may have the power to dismiss at pleasure employés who were in the service before the passing of the *Victorian Railways Commissioners Act* 1883, as was assumed in *Victorian Railways Commissioners* v. *Brown* (2), an employé so dismissed is entitled to compensation or retiring allowance under sec. 93 of the *Railways Act* 1890, unless he is dismissed for misconduct. The last mentioned Act, as altered by the *Railways Act* 1896, contains all the powers of the Commissioners to get rid of their employés, and the ordinary powers as between employer and employé are excluded. The Act of 1883 made a new bargain between the Commissioners and those who were then in their service. For the future there was no way of dispensing with the services of employés except by going through the form of a trial by a Board, or by a conviction for felony, or by a removal under sec. 70 of the *Railways Act* 1890. If the power of removal under sec. 70 be exercised, compensation must be paid: *Gleeson* v. *Victorian Railways Commissioners* (3). Assuming the common law power to rescind contracts with their employés was not abrogated by the *Victorian Railways Commissioners Act* 1883, there was no such breach of his contract by the appellant as entitled the Commissioners to put an end to the contract, and, if there was, the Commissioners did not evince an intention to take advantage of that breach: *Anson's Law of Contracts*, 11th ed., p. 311. It is unimportant to determine whether the Commissioners might have dealt with the appellant in another way, because by the letter of 31st December 1904 they showed their intention to remove him under sec. 70. The Commissioners had no right to order the appellant to work of a lower grade than engine-driver at a lower salary. If that be so, it was the Commissioners who, by their breach, put an end to the contract and not the appellant. Assuming that there was power

(1) (1907) V.L.R., 123; 28 A.L.T., 129.

(2) 3 C.L.R., 316.

(3) (1907) V.L.R., 129.

in the Commissioners to determine this contract if there was repudiation, then the repudiation must be either an absolute refusal, or such conduct as showed an absolute refusal, to do the work; and the repudiation must go to the root of the contract. Then it must be shown that the Commissioners within a reasonable time accepted that repudiation as terminating the contract: *Rhymney Railway Co.* v. *Brecon and Merthyr Tydfil Railway Co.* (1); *Leake on Contracts*, 4th ed., p. 617; *Frost* v. *Knight* (2). There is not in a statutory contract of this kind a warranty of ability to perform the work at all times.

It is not the fault of the plaintiff, within the meaning of that expression in *Victorian Railways Commissioners* v. *Brown* (3), that he was unable to perform his work. Incapacity for which a contract may be terminated must either be permanent or must go to the root of the contract.

[They also referred to *Avery* v. *Bowden* (4); *Cuckson* v. *Stones* (5); *Cutter* v. *Powell* (6).]

Mitchell K.C. (with him *Pigott*), for the respondents. The interpretation put upon sec. 93 of the *Railways Act* 1890 in *Victorian Railways Commissioners* v. *Brown* (7), viz., that compensation is indemnity for an act which but for the Statute would be unlawful, is correct. The section was not intended to give an employé a right to compensation in a case where by virtue of the relationship of master and servant the Commissioners would have a right to dispense with the services of the employé without being liable in an action for wrongful dismissal. The power of removal given in sec. 70 of the *Railways Act* 1890 was intended to be exercisable in cases which must arise, *e.g.*, of employés becoming incompetent, or being of such a character or nature that it was necessary in the public interest to get rid of them, and as to which, apart from the power of removal, there was no power to get rid of the men. If the power of removal is exercised, it depends on the facts whether the employé is entitled to compensation. If the facts would not justify removal as between master and servant where the power

(1) 83 L.T., 111, at p. 117.
(2) L.R. 7 Ex., 111, at p. 112.
(3) 3 C.L.R., 316, at p. 325.
(4) 26 L.J.Q.B., 3; 6 El. & Bl., 953.
(5) 1 El. & E., 248; 28 L.J.Q.B., 25.
(6) H. Sm. L.C., 11th ed., 51.
(7) 3 C.L.R., 316.

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was not to dismiss at pleasure, then compensation is payable, but if the facts would justify such removal, compensation is not payable. As engine-driver the appellant was removed when the Commissioners accepted his statement that he was incapable of doing the work. The letter of 31st December 1904 was a removal of the appellant as a skilled labourer, if he was ever appointed as such. If a servant is incapable of performing his work, the master may terminate the contract: *Poussard* v. *Spiers* (1).

[HIGGINS J.—Even in the case of permanent illness, the contract is not terminated until the master shows an intention to terminate the contract: *K*—— v. *Raschen* (2).]

Although the master may not be justified on the reasons given for dismissal of his servant, if there are reasons which justify the dismissal, the master will not be liable for wrongful dismissal: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3).]

[*Starke* referred to *Warren* v. *Whittingham* (4).

ISAACS J. referred to *Loates* v. *Maple* (5).]

Defective eyesight is in the case of an engine-driver a thing going to the root of the contract.

Starke in reply referred to *Anson on Contracts*, 11th ed., p. 350; *Leake on Contracts*, 3rd ed., p. 607; *Bentsen* v. *Taylor, Sons & Co.* (6); *Barnard* v. *Faber* (7).

Cur. adv. vult.

Sept. 27.

GRIFFITH C.J. This is an appeal from a judgment of the Supreme Court of Victoria upon a special case stated in an action by the appellant against the respondents claiming compensation under the *Railways Act* 1890. Sec. 93 of that Act provides that:—"Every officer and employé holding office in the Railway Department at the time of the passing of '*The Victorian Railways Commissioners Act* 1883' shall be entitled to compensation or retiring allowance to be computed under the provisions of the Act No. 160 and have his rights privileges and immunities saved to him as if such first-mentioned Act had not been passed, but

(1) 1 Q.B.D., 410, at p. 414.
(2) 38 L.T., 38.
(3) 39 Ch. D., 339.
(4) 18 T.L.R., 508.
(5) 88 L.T., 288.
(6) (1893) 2 Q.B., 274, at p. 280.
(7) (1893) 1 Q.B., 340, at p. 343.

shall for the purposes of this Act be deemed to have been appointed by the Commissioners without any other or further appointment." By sec. 70 of the same Act it is provided that:—"The Commissioners shall . . . . from time to time . . . appoint or employ such engineers . . . and other officers and employés to assist in the execution of this Act as the Commissioners think necessary or proper, and such persons shall hold office during pleasure only." The plaintiff was appointed before the day mentioned in sec. 93, and in 1903 he had for some time been, and then was, an engine-driver at a salary which then was 14s. a day. In March 1903 he obtained six months leave of absence on the ground of ill-health. On 22nd September 1903 he made an application for extended leave of absence on the same grounds. On 11th November 1903 he was directed to resume duty. On 13th November 1903 he wrote that, owing to the state of his health, he could not for some time obey that direction. On 27th November 1903 he renewed his application for six months extended leave of absence on the ground of ill-health. That application was not granted, and on 19th January 1904 he wrote to the Commissioners:—"After due consideration I find that your request to me to resume duty at once leaves me but one alternative, namely, to tender my resignation as an employé of the Railway Service." In the same letter he said that his condition unfitted him to perform his duties as engine-driver, adding: "I am therefore obtaining a form of light employment which involves no mental strain or severe physical exertion and I beg of you to accept my resignation with an acknowledgment of compensation rights." On 23rd January 1904 the Commissioners informed the plaintiff that, until he was again fit to take up his old position as driver, light work would be provided for him, and directed him to report himself on 1st February at Bendigo for duty as a pumper at a salary of 8s. a day. On 26th January 1904 the plaintiff replied:—"I . . . respectfully beg to decline the position offered, but am willing to withdraw resignation if extended leave for 12 months is granted." On 24th February 1904 he was informed by the Commissioners that they were not prepared to sanction his retirement on superannuation allowance, nor to authorize leave of absence for twelve

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months, and that, unless he at once resumed duty, there would be no alternative but to dispense with his services. He was, therefore, again directed to report himself at Bendigo for duty as pumper. On 1st March the plaintiff wrote to the Commissioners:—"I claim it as a right consistent with discipline and subordination to refuse the position offered, and, as you refuse the leave of absence applied for, I beg to tender my resignation as an employé of the Department, and give notice that I intend to prosecute my claim for superannuation allowance." On 7th March he was accused of misconduct, and a board was appointed to investigate the charge. The charge having been investigated and the plaintiff's dismissal having been recommended, he was informed on 7th May that the Commissioners would give him another chance, provided that he should forthwith return to his former duties as engine-driver, "Otherwise, if you fail to at once do so, they uphold the decision of the board, and confirm your dismissal." In reply to that the plaintiff wrote on 23rd May saying:—"My nervous system is such that I shrink from the responsibilities of the position, and coupled with a most defective memory I feel that my employment in the capacity of engine-driver would be a serious menace to the Department, the public and myself," and he applied for permission to retire from the Department on superannuation allowance. On 18th July he was informed that his application for permission to retire had been definitely refused, and was required to report himself at North Melbourne on 26th May for duty as a skilled labourer at 7s. per day. He was also informed that, if he failed, or neglected, or refused to resume duty as a skilled labourer at the rate of pay fixed, he would render himself liable to punishment for disobedience. On 27th July the plaintiff acknowledged that communication and wrote:—"I . . . . desire to say that the reduction of wage is such that I am not inclined to accept the position offered." On 13th August he received peremptory instructions to resume duty as a skilled labourer, "otherwise you will render yourself liable to be dealt with for a breach of the regulations." On 26th August he wrote:—"I . . . respectfully decline to accept the position offered, and beg to ask that arrangements may be made to test the matter before the Appeal

Board." On 2nd November, more than two months later, this letter was written for the Commissioners to the plaintiff:—"I am directed to notify you that in view of the condition of your eyesight, the Commissioners are no longer prepared to employ you as an engine-driver, but they are willing to utilize your services in the capacity of a skilled labourer at 7/- a day. I therefore require you to report yourself to Rolling Stock Inspector, Melbourne, at 7.30 a.m. on 18th instant for duty as a skilled labourer, and hereby notify you that if you fail or neglect or refuse to so report yourself and undertake the duties of a skilled labourer your services will be forthwith dispensed with." On 17th November the plaintiff wrote:—"I beg to acknowledge receipt of a memo. dated 2nd November 1904, from the Chief Mechanical Engineer, Melbourne, from which I learn that you have retired me from my office of engine-driver on account of defective eyesight." He then stated that he enclosed an application for leave to retire, and requested that it should be placed before the Governor in Council, "on the ground that I am incapable through bodily infirmity of discharging the duties of my office as an engine-driver." It appears, therefore, that at that time his employment as engine-driver had come to an end. He adds that he would nevertheless report himself for employment as a skilled labourer, but that his attendance to do work as a skilled labourer would be under protest. In that letter was enclosed a request to the Governor in Council that he should be permitted to retire upon a superannuation allowance on the ground that he was incapable through bodily infirmity of discharging the duties of his office. The plaintiff did as a matter of fact attend in pursuance of his letter on seven days during the month of November, and that was the only work that he did during the year 1904, except that on one day in May he drove an engine and found himself incapable of doing such work. On 14th December he was informed that the Governor in Council "has refused your application for permission to retire from the service on superannuation allowance, and this intimation must, as far as the Department is concerned, be accepted as final, and I have to direct you to resume duty at once, otherwise you will be treated as being absent from duty without leave." The plaintiff paid no attention to that com-

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munication, and on 31st December he received this letter from the Commissioners:—"I am directed by the Victorian Railways Commissioners to inform you that they have no longer use for your services, and that the Victorian Railways Commissioners have, under the provisions of the Railways Acts, determined your employment by them and removed you from their service from the date of this notification."

These are the facts set out in the special case, and upon them four questions were submitted for the consideration of the Supreme Court, of which the first three were:—"(*a*) Were the defendants entitled to reduce the wages of the plaintiff while he was in their service except with his consent or for misconduct? (*b*) Were the defendants entitled to reduce the plaintiff in rank, grade or position while he was in their service except with his consent or for misconduct? (*c*) By the defendants determining the plaintiff's employment as and in the manner set out in the letter of 31st December 1904 is the plaintiff entitled to compensation or retiring allowance to be computed under the provisions of Act No. 160 or any other amount in lieu thereof by way of damages for wrongful dismissal or otherwise?" The Court was to be at liberty to draw inferences of fact so far as might be relevant for the purpose of answering the third question. The case came before the Full Court and its judgment was delivered by *Hodges* J. (1). The learned Judge quoted a passage from my judgment in this Court in *Victorian Railways Commissioners* v. *Brown* (2), as follows:—"First, as to the meaning of 'compensation' in sec. 72 of Act No. 767: It is clear that that word is used to signify an indemnity given to an officer who loses his appointment not by reason of any fault of his own. It is, to apply the analogy of compensation for injuries caused by the exercise of statutory powers, compensation given for an act which causes damage, and would be unlawful but for its having been legalized by Statute. That is the meaning of 'compensation.'" Applying that rule, the Court held that the appellant was not entitled to any compensation, using this language (3):—'The plaintiff himself refused to discharge the

(1) (1907) V.L.R., 123; 28 A.L.T., 129.

(2) 3 C.L.R., 316, at p. 325.

(3) (1907) V.L.R., 123, at p. 128; 28 A.L.T., 129, at p. 131.

duties of his office, on the ground that he was mentally and physically unfit. Thereupon the Commissioners offered him other work at reduced pay. This he declined, and then the Commissioners determined his employment, though, speaking more accurately, he determined it himself. This determination, by whomsoever effected, was not, apart from the Statute, a wrong. The employé was no longer able to perform his duties, and was therefore no longer entitled to continue to hold the office the duties of which he was unable to discharge. He himself really determined his employment by alleging his inability to serve and refusing to serve. We are consequently of opinion that the plaintiff is not entitled to compensation."

The inference of fact to be drawn, if it is necessary to draw any, is that the plaintiff was both unwilling to discharge and permanently incapable of discharging his duties as engine-driver, and unwilling, in the sense that he practically refused, to discharge any other duties. Nevertheless he claims compensation. The argument is put in this way, that the *Railways Act* 1890 contains a complete code as to the relations between the Commissioners and their employés, and that the ordinary law of master and servant—and indeed the ordinary law of contract—is excluded, that, in short, everything is to be found within the four corners of the Statute.

In my judgment the relation between the Railways Commissioners and their employés is that of master and servant, and their respective rights are governed by the ordinary law relating to contracts of service except so far as that law is altered by the Statute.

Under the ordinary law, a master who discharges his servant contrary to the terms of the contract of service is liable to make compensation by way of damages, but, if the discharge is in accordance with those terms, he is not liable. If the service is terminable at the will of the master, he is, of course, not liable. The *Railways Act* 1890 (No. 1135) as interpreted in *Victorian Railways Commissioners* v. *Brown* (1) alters this law by providing that an employé, although the service is terminable at will, is entitled to compensation if he loses his appointment not

(1) 3 C.L.R., 316.

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by reason of any fault of his own. The word "fault," in the sense in which it was used in that case, is not limited to acts of commission. It includes any default or failure on the part of the employé which disentitles him to be retained in the service. The effect is that the Commissioners are under a statutory agreement with the employé that they will either retain him in their employment or, if they refuse to do so, pay him compensation on a scale fixed by the Act. They may also dismiss for misconduct or breach of regulations, but the fact of misconduct or breach must be proved in the prescribed manner before dismissal for that cause. In all other respects the ordinary law of master and servant applies.

Now, it is an implied condition of all contracts that a party demanding performance of the contract shall be ready and willing to perform it on his own part. Readiness and willingness includes ability, and this applies as well to a contract of service as to any other contract: *Harmer* v. *Cornelius* (1). When, therefore, a servant is no longer ready and willing to discharge his duties, or becomes permanently incapable of performing them, he relieves his master of any further obligation under the contract. He, in effect, discharges himself.

The present action, then, is founded upon a statutory agreement by the defendants that they would either retain the plaintiff in their service so long as he should be ready and willing to perform his duties, or else pay him compensation at the rate prescribed by the Statute. It was at the defendants' option to take either course, and the plaintiff's claim is for what he is entitled to under the agreement when they have exercised their option by refusing to retain him in their service. It is clearly a good defence to such an action to say that the plaintiff was not ready and willing to perform the agreement on his part. This, indeed, follows from the word "compensation" itself, which means a pecuniary equivalent given to a person in place of some right of which he has been deprived. When a servant is permanently unable to perform his duties the employer does not by refusing to continue to employ him deprive him of any right,

(1) 5 C.B.N.S., 236; 28 L.J.C.P., 85.

for under such circumstances he no longer has any, and there can be no question of compensation.

This is in substance the defence raised upon the special case, and, in my opinion, it is proved by the facts set out.

Some argument was founded upon the terms of the letter of 31st December 1904, but in my judgment the form of that letter is not material. The plaintiff having no right to be retained in his employment, its termination cannot give him any right to complain, in whatever form that termination is announced to him.

For these reasons I think that the appeal should be dismissed.

BARTON J. read the following judgment. The plaintiff was an "employé holding office in the Railway Department at the time of the passing of" Act No. 767, the Victorian *Railways Commissioners Act* 1883, and was therefore entitled, within the meaning of sec. 72 of that Act (now sec. 93 of the *Railways Act* 1890) to compensation or retiring allowance to be computed under the provisions of the Act No. 160 (the *Civil Service Act* 1862). In *The Victorian Railways Commissioners* v. *Brown* (1) this Court, affirming the judgment of the Supreme Court of Victoria, held that a railway employé who, when similarly holding office, had been removed from the service by the Commissioners without any fault of his own, was entitled to compensation under the Act No. 767, sec. 72. It is claimed by the present plaintiff that he was similarly entitled. Brown's services had been determined *in invitum*. Not only was he not charged with misconduct, but there was no suggestion that he was either unwilling or incapable to continue in the fulfilment of due service. Here, it is quite clear from the special case and the correspondence attached to it, that the plaintiff was either unwilling or unable so to continue. It has not even been seriously argued, so strong are the facts, that he was both ready and capable. If we give full credence to his own assertions, he was neither, and I see no reason to disbelieve him. That being the substantial difference in fact between the present case and Brown's, it is argued for the appellant that there is no differ-

(1) 3 C.L.R., 316.

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ence between them in legal effect. In other words, there is attributed to the Statute law a deliberate destruction of the rooted distinction between two such cases. For at common law, under a contract of personal service, Brown could admittedly have recovered compensation by way of damages for the loss of his office, while the claim of Noonan would have been defeated by the proof that exists of his complete and continuing inability or absence of readiness and willingness going, as in this case it did, to the very root of the contract. Of course there are cases in which a defendant may treat the contract as still subsisting, instead of treating it as at an end. But that is not what has occurred here, and the defendants have exercised what would have been merely their right at common law. *Willes* J., delivering the judgment of the Court of Common Pleas in *Harmer* v. *Cornelius* (1), says:— "When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. . . . An engineer is retained by a railway company, for a year, to drive an express-train, and is found to be utterly unskilful and incompetent to drive or regulate the locomotive, are the railway company still bound, under pain of an action, to entrust the lives of thousands to his dangerous and demonstrated incapacity? . . . The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct. . . . It appears to us that there is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired." See further, as to inability, *Poussard* v. *Spiers* (2); as to refusal to perform the contract, *Frost* v. *Knight* (3); *Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Railway* (4). Where, short of absolute refusal, the failure to perform the contract on one part goes to the root of it, then the other party may treat the contract as at an end if he is entitled to conclude that the party committing the breach no longer intends to be bound by its provisions: *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (5). If there

(1) 5 C.B.N.S., 236, at pp. 246, 247.
(2) 1 Q.B.D., 410.
(3) L.R. 7 Ex., 111.
(4) 69 L.J. Ch., 813.
(5) 9 App. Cas., 434, at p. 442.

were no Statute, the defendant Commissioners would beyond doubt be legally entitled on the facts to determine the contract between themselves and the plaintiff without rendering themselves liable to pay compensation. Does the Statute law impose such a liability on them? That is, does it, as regards the railway service, put an end to the implication normally arising out of the contract that the employé will bring to the performance of his duties reasonably competent skill and unceasing readiness to serve? Does it make such an alteration that even complete incapacity (by illness or otherwise) or absolute refusal to serve, no matter how vitally the whole contract be affected, deprives the employers, when they are Railway Commissioners, of their title to exact capable and ready service, and for want of it to put an end to the contract without rendering themselves liable to pay compensation or damages? If the law has been thus drastically altered, it is our duty to declare that strange proposition; but it is equally our duty to see that we do not come to such a conclusion unless the intention to make the change is clearly shown.

Now, I cannot find any evidence at all of such an intention on the part of the legislature of this State. The plaintiff entered the railway service before the passage of the *Railways Act* 1883 (No. 767), sec. 16 of which (now sec. 70 in the *Railways Act* 1890), lays upon the Commissioners the duty of appointing such officers and employés as they think necessary or proper, and, the section says, "such persons shall hold office during pleasure only." The Commissioners are empowered to remove any of such officers and employés, and to discontinue the offices of or appoint others in the room of such as are so removed or as may die or resign &c. No legal claim for amends can be founded upon the exercise of any of these powers save so far as a Statute warrants it. Sec. 72 of the Act of 1883 (which finds its place as sec. 93 in the consolidation of 1890), enacts that every officer and employé holding office in the Railway Department at the time of its passing "shall be entitled to compensation or retiring allowance to be computed under the provisions of the *Public Service Act* 1862 . . . but shall for the purposes of this Act be deemed to have been appointed by the Commissioners without any other or further appointment," so that all of them were

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brought under sec. 16. Sec. 72 of the Act of 1883 was the first statutory grant of rights to compensation and retiring allowances to the railway servants of Victoria, and the grant applied only to such as entered the service before November 1883. Under it this Court, after a very close consideration of all the material enactments, has held that the "compensation" there made claimable is compensation for the deprivation of office, and is payable only where the employé's services have been dispensed with under such circumstances that the deprivation would have been wrongful in law but for its legalization by Statute: *Victorian Railways Commissioners* v. *Brown* (1).

It would be a waste of time on my part to repeat the reasons on which we came to that conclusion. The plaintiff's claim here is for compensation or a retiring allowance. If the former word has the meaning we then attributed to it, the plaintiff cannot be entitled to compensation, for, independently of the legalization by Statute of his removal, the Commissioners would not have infringed his legal rights if they had removed him upon the facts disclosed in the special case and correspondence. To use again a few words already quoted, his "failure to afford the requisite skill which had been . . . promised, is a breach of legal duty, and therefore misconduct": *Harmer* v. *Cornelius* (2); and it is absurd to say that he is entitled to have compensation if such misconduct entails the loss of his office, as it lawfully does. There is no section of any Statute that can be fairly said to carry such a meaning. If there were a doubt, I should be disposed to apply the words which *Lindley* L.J., used with regard not to a Statute but to a contract of insurance:—"When you have a clause which is consistent with the ordinary habits of men if you interpret it one way, and which is utterly inconsistent with their ordinary habits if you interpret it another, I prefer the former interpretation, that is, supposing the language admits of a double interpretation": *Barnard* v. *Faber* (3).

In my view the plaintiff's claim to be paid a retiring allowance is on no sounder footing. It stands or falls on the same reasons in law as his claim to compensation, so far at least as it rests on

(1) 3 C.L.R., 316.
(2) 5 C.B. N.S., 236, at p. 247.
(3) (1893) 1 Q.B., 340, at p. 342.

any alteration of the legal incidents of his relation to the Commissioners by parliamentary action. He cannot found upon his incapacity, or his unwillingness to serve, any claim to an allowance. These are grounds on which the common law would deny him relief, and no Statute has converted them into grounds for the enforcement of relief by law. I would add that if sec. 42 of the Act No. 160 could be held to be applicable to the plaintiff's services, it would still not assist him in his claim as laid. It admits of application to the Governor in Council. But the section is purely permissive, and excludes the idea of enforcement in a Court of law.

I am of opinion for these reasons that the Full Court of this State came to the right conclusion.

ISAACS J. read the following judgment. The power of removal conferred by sec. 70 of Act No. 1135 is unqualified. If, however, the employé is removed without fault on his part he is by sec. 93 entitled to compensation. If he is dismissed for an offence of which he has been formally found guilty he is of course in fault. He is also legally in fault and disentitled to compensation if the removal is due to his permanent incapacity to perform the duties of his office. That readiness and willingness include ability is so trite as scarcely to require reference to authority. But among express recognitions of the rule, in addition to those already quoted, is *De Medina* v. *Norman* (1), where Lord *Abinger* C.B. says:—"If the defendant had traversed the averment of the plaintiff's readiness and willingness to perform it (the contract), he would have put in issue his *ability* to perform it; for the words 'ready and willing' imply not only the disposition, but the capacity to do the act." In *Griffith* v. *Selby* (2) *Alderson* B. observes:—"Readiness and willingness include ability." The whole position applicable to this case was tersely put by *O'Brien* J. in *Grove* v. *Johnston* (3). A servant had become insane, and *O'Brien* J. said:—"The real principle I would take to be that mental health, like physical health, is but a form of the ability to perform, which the law makes an understood condition of the

(1) 9 M. & W., 820, at p. 827. (2) 9 Ex., 393, at p. 394.
(3) 24 L.R. Ir., 352, at p. 363.

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contract, and that the nature and effect of that disability must vary according to the thing performed." This short statement embodies the principles and reconciles the decisions of all the cases cited.

Accepting this as a proper test, the appellant's case must fail. Admittedly he was physically and permanently incapable of ever performing the duties of engine-driver, and he positively and consistently refused to do that or any other work. The Commissioners terminated his official connection with them because of his incapacity as an engine-driver and his refusal to act as a skilled labourer.

It is unnecessary to go through all the correspondence in detail, but, in the face of his two letters of 17th November 1904, it is hopeless for him to contend that defective eyesight did not contribute to his physical inability. The first was addressed to the Commissioners, and without denial or expostulation adverted to the fact of his retirement on the ground of defective eyesight. On the contrary, his second letter of that date addressed to the Governor in Council reiterated his bodily infirmity, enclosed a letter of 2nd November, and drew attention to the reference therein to his defective eyesight, offered further medical evidence of his incapacity, and rested an application for superannuation allowance on the combined statements. In view of his own declared incapacity for the duties of engine-driver, his non-performance of these duties for seven months, and his refusal of all other work, the Commissioners' letter notifying removal was practically an acceptance of the situation taken up by the appellant.

It is meaningless to speak of compensation for the loss of an office from which he was either unable or unwilling to derive any benefit.

I am therefore of opinion that this appeal should be dismissed. The observations I have made do not affect the right of the Governor in Council at his discretion to specially consider as to retiring allowance any case of incapacity necessitating removal.

HIGGINS J. read the following judgment. I am unable, after anxious consideration, to concur with my learned colleagues in

their view of this case. The principal question in the special case —and the only question argued—is the third. "By the defendants determining the plaintiff's employment *as and in the manner set out in the letter of the 31st December* 1904, is the plaintiff entitled to compensation . . . to be computed under the provisions of Act No. 160?" This question, by its very terms, turns on the letter of the 31st December 1904, sent by the secretary of railways to the plaintiff. This letter states:—"I am directed by the Victorian Railways Commissioners to inform you that *they have no longer use for your services*, and that the Victorian Railways Commissioners have, *under the provisions of the Railways Acts*, determined your employment by them and removed you from their service *from the date of this notification*. It is intended to pay you any wages that may be due to you for the period up to and inclusive of the date of this notification, from which date your employment will absolutely terminate."

It will be noticed that this letter is not based on any misconduct or any incapacity on the part of the plaintiff. It simply says that the Commissioners have no longer any use for his service. It is just such a letter as might be written by an employer if his employé were sound in health, perfect in skill, and irreproachable in conduct. In this letter the Commissioners purport "under the provisions of the Railways Acts" to determine the service as from the date—31st December 1904.

Now, looking at the provisions of the Railways Acts, the only ways provided there of getting rid of an employé *in invitum* are (*a*) dismissal under sec. 87, or (*b*) removal under sec. 70. The Commissioners did not act under sec. 87. In cases of dismissal, some definite misconduct or breach of regulations has to be charged and proved, and certain procedure followed. There was no such charge, or proof, or procedure in this case. The removal, therefore, was under the power contained in sec. 70. Under that section the employés "hold office during pleasure only. The Commissioners may from time to time remove such . . . . employés." The employés are, in effect, liable to be removed at the will of the Commissioners—fault or no fault, bad health or good health. I think it must be plain, beyond any cavil, that in this case the plaintiff was removed under this power, and on the

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ground that the Commissioners have "no longer use for" his "services." On a previous occasion, when the plaintiff wanted to resign, with compensation or superannuation allowance, on the ground of ill-health, the Commissioners refused his request, and directed him to act as pumper at Boort. The plaintiff declined to obey the order, and was charged with misconduct in refusing. He was tried before the Appeal Board, and, on appeal from the Board to the Commissioners, he was allowed to return to his duties as engine-driver. This dilatory procedure the railway authorities desired to avoid; so they eschew, in the letter of 31st December 1904, the word "dismiss"; they use the word "remove"; and they base the removal on the fact that they have "no longer use for" his "services."

Looking back, now, at the question asked, and the letter referred to therein, the plaintiff was removed under the absolute power conferred by sec. 70, and not as for any fault as to his part. If there were nothing more, it would be clear that under sec. 93, as interpreted in *Victorian Railways Commissioners* v. *Brown* (1), he is entitled to compensation; for he "loses his appointment not by reason of any fault of his own." The word "fault" is not found in sec. 93; but by a process of inference, amply explained in *Brown's Case*, the compensation given by the Act cannot be successfully claimed if the office be lost by the fault of the officer. But the fault must, in my opinion, amount to misconduct or a breach of the regulations, and be the subject of a charge and a proof, and of the procedure under secs. 86 and 88.

But it is said that the common law rules as to master and servant apply except so far as they are inconsistent with the Railways Acts; and that therefore the Commissioners may, in the case of permanent incapacity, treat the contract as at an end, the plaintiff not being ready and willing to perform the contract on his part; or that they may rescind the contract. I understand that the argument is put in both ways. Assuming that the common law rules do apply, yet the plaintiff was not removed, or his contract treated as at an end, under any common law power. The defendants have not exercised any common law power. The Commissioners have not removed him because of any incapacity,

(1) 3 C.L.R., 316.

or because of any refusal to act as skilled labourer. He was removed expressly "under the provisions of the Railways Acts," and because the Commissioners had no longer any use for his services—not under the provisions of the common law as to master and servant. The Commissioners cannot now treat this letter as an exercise of a different power—an implied power to rescind, or to treat the contract as at an end. The case of *Attorney-General* v. *Vigor* (1), shows that if one has both an express power and an implied power, and he mention and purport to execute the former, he cannot be treated as executing the latter. The question is, is the plaintiff entitled to compensation in consequence of the Commissioners determining his employment "as and in the manner set out in the letter of 31st December 1904"; and I should think that, on these grounds taken alone, the plaintiff is entitled to compensation. Moreover, I fail to see how this common law power to treat the contract as at an end, or to rescind the contract for physical incapacity or for incompetency, has any meaning or application when the office is held at the will of the employer. Such a power is implied where the contract is for a term. The principles applicable in actions for wrongful dismissal are wholly inapplicable where the employé can be removed at pleasure, and where the action is not based on any breach of contract as to employment, but on a statutory provision for compensation payable on lawful—admittedly lawful—removal. Nor, in my opinion, is this theory of the exercise of a common law power open under the terms of the special case agreed to by the parties. Why should we, without their common consent, go behind their case and questions as stated, and treat the matter as if we had to deal with the trial of an action? I may say, by the way, that it is by no means clear that incapacity—even permanent through illness—to perform duties would support a plea at common law that the plaintiff was not "ready and willing" to perform his part of the contract, although such incapacity would, of course, justify dismissal, as in *Harmer* v. *Cornelius* (2). In the case of temporary illness, it is clear that the servant may be "ready and willing," although he absent himself from duty owing to what is called "the visitation

(1) 8 Ves., 256.

(2) 28 L.J.C.P., 85.

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of God:" *Cuckson* v. *Stones* (1); *Smith, Master and Servant*, 5th ed., pp. 122, 123, 159. The case of *Loates* v. *Maple* (2) is somewhat similar. A jockey, retained for three years, met with a serious accident which disabled him from riding at a race-meeting; and he had not got his licence. The employer wrote to him that as he had not got his licence the agreement was at an end; and it was held the employer was not entitled to take this step. The other cases which I have seen, containing expressions to the effect that incapacity is proof of want of readiness and willingness, are not cases of illness—of the visitation of God—at all: *Lawrence* v. *Knowles* (3); *De Medina* v. *Norman* (4); *Cort* v. *Ambergate &c. Railway Co.* (5). But I do not rest my judgment on this point; I merely desire not to be regarded, by my silence, as necessarily accepting this part of the case put for the Commissioners.

But let us suppose that the Commissioners can ignore the terms of the question asked in the special case, and rely on what took place before the letter of 31st December 1904, what then? There certainly was not any mutual agreement that the plaintiff should leave the service. There had been lengthy negotiations. The plaintiff had offered to retire as for infirmity of body, on the terms of getting a superannuation allowance under sec. 42 of the Act No. 160; but the offer had been refused. There was not any rescission of the contract of service by the Commissioners on the ground of the plaintiff's permanent incapacity owing to ill-health or bad eyesight. The plaintiff had urged his heart disease and nervous exhaustion as a ground for retirement on pension; but the railway authorities stubbornly insisted that he was fit for work. On 2nd November 1904, the plaintiff's chief officer wrote to him:—"In view of the condition of your eyesight the Commissioners are no longer prepared to employ you as an engine-driver but they are willing to utilise your services in the capacity of a skilled labourer;" and the letter required him to report himself for duty as a skilled labourer on pain of having his services dispensed with. This letter contained no definitive words of removal from the

(1) 1 El. & E., 248.
(2) 88 L.T., 288.
(3) 5 Bing. N.C., 399.
(4) 9 M. & W., 820.
(5) 17 Q.B., 127, at p. 144.

post of engine-driver, much less of removal from the service, or rescission of the contract of service, such as it was. The Commissioners say merely that they "are no longer prepared to employ" the plaintiff as engine-driver, and "require" him to report himself for duty as a skilled labourer. They are giving orders to a man who is still their servant. If he was not still remaining in their service, the Commissioners had no power to appoint him to the post of skilled labourer without examination &c. (secs. 78, 79, &c.) Indeed, if it were necessary to decide the point for the purpose of this case, I should be strongly inclined to say that the Commissioners have no power to degrade an engine-driver to a skilled labourer except under the procedure prescribed by secs. 86-88. The plaintiff, in consequence of the letter of 2nd November, acted as skilled labourer under protest for a few days, and then found himself utterly unable to continue. He asked for leave of absence without pay until his case could be considered; but on 14th December 1904 this leave was refused, and he was directed to resume duty at once, "otherwise you will be treated as being absent from duty without leave." This was the letter which next preceded that of 31st December 1904. In this letter of 14th December there is not one word about defective eyesight or incapacity. It took up, as I think, the true ground under the Act; that is to say, that if an employé refuse to obey lawful orders, he is guilty of misconduct or breach of regulations, and can be dismissed without compensation under secs. 86-88. But the Commissioners do not want the procedure of dismissal, with all its risks and delays. They elect to remove him as a servant at will, not as for fault, but because his services are no longer wanted; and they are bound by their election. I have dealt with the case on the supposition that the common law principles as to rescission of contract, incapacity &c. applied, but I must add that, in my opinion, the true solution is to be found in the Act itself. There are, in my opinion, two ways, and two ways only, of getting rid of an employé under the Railways Acts against his will. One is by dismissal for misconduct &c., the other is by removal at will, irrespective of conduct under sec. 70; and in the latter case there is a right of compensation given. There are not two kinds of removal, one because a man's services

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are not needed, and the other because he has become permanently incapable. Whether the employé is permanently incapable or not, the Commissioners have power to dismiss him if he has broken the regulations &c., under sec. 87; but if they choose simply to remove a man who has been in the service before 1883, without formulating and proving a charge, they must pay him compensation. The Court is not required to burden itself with an inquiry into the mind of the Commissioners, and find out motives other than the motives expressed. The motive is nothing; the power exercised is everything.

Appeal dismissed with costs.

Solicitors, for appellant, *Hickford & Balmer*, Melbourne, for *Hamilton Clarke*, Benalla.

Solicitor, for respondents, *Guinness*, Crown Solicitor for Victoria.

B. L.

Appl *Gould* v *Vaggelas* 157 CLR 215

Appl *Munnings* v *Australian Government Solicitor* (1994) 118 ALR 385

Expl *Gould* v *Vaggelas* (1984) 56 ALR 31

Cons *Bank of South Australia Ltd* v *Ferguson* (1996) 66 SASR 120

Refd to *Voss Real Estate* v *Schreiner* (1998) 70 SASR 545

Appl *Green* v *Chenoweth* [1998] 2 QdR 372

[HIGH COURT OF AUSTRALIA.]

HOLMES AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

JONES AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

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SYDNEY, *Aug.* 19, 20, 21, 22.

Griffith C.J., O'Connor and Isaacs JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Action of deceit—Contract of sale induced by false representation—Fraudulent intention—Misdescription of property sold—Inspection by purchaser—Measure of damages—Evidence—Contradicting statements of adverse witness.