for the defence will still be, where at all possible, to prove conclusively the existence of an operative mistake wherever applicable, whether in strict theory the onus be upon them or not. However, those students of jurisprudence who adhere to the theory of deterrence as the *raison d'être* of the criminal law will view with alarm this further encroachment on the necessity for a guilty mind to make out the complete offence in the field of serious crimes.

J. K. CONNOR

KAYE v. ATTORNEY-GENERAL OF TASMANIA[1]

Crown Servants—Right to Dismiss at Will—Abrogation by Statute—Police Constable

A Board of Enquiry on allegations made against members of the Tasmanian Police Force found that officers of police had been guilty on a particular occasion of using 'unjustifiable force' and that K. a senior constable, even if he had taken no actual part in extending violence, had been fully aware of what was happening. In order that K. should not evade discharge for lack of admissable evidence against him, he was dismissed by order of the Governor-in-Council, a form of dismissal from which there was no appeal available to policemen of less than officer rank. The only course then open to K. was to have this purported dismissal declared ineffective by the Tasmanian Supreme Court. On a special case, the material questions asked of the court were whether he had held office in the force at Her Majesty's pleasure, so as to be subject to dismissal at will by the executive government, and whether he was validly dismissed from the force. The Tasmanian Full Court[2] answered both these questions in the affirmative. The High Court unanimously dismissed an appeal from this decision.

Two judgments were delivered, the first by Dixon C.J., Fullagar, Kitto, and Taylor JJ., and the second by Williams J. It is the former which is hereafter analysed, as Williams J. did little more than concur.[3] The joint judgment first gave a brief summary of the parties' position at common law.[4] Quoting from *Fletcher v. Knott*[5] and the leading case of *Shenton v. Smith*[6] their Honours confirmed

[1] (1956) 94 C.L.R. 193. High Court of Australia; Dixon C.J., Fullagar, Kitto, Taylor and Williams JJ.

[2] Crisp, Green, and Gibson JJ.

[3] It is of note, however, that Williams J. tends to use more sweeping language than the other members of the court in confirming the common law right of the Crown to dismiss any of its servants, 'naval, military, or civil, . . . at any time without notice'.

[4] A useful reference on the common law position of the civil servant will be found in D. W. Logan, 'A Civil Servant and his Pay', (1944) 61 *Law Quarterly Review*, 246.

[5] (1938) 60 C.L.R. 55, 77.

[6] [1895] A.C. 229, 334-335.

the common law rule as being that any person employed by the Crown,[7] whether for military or civil purposes, is dismissable at the Crown's pleasure.[8]

The judgment proceeded to deal with the appellant's argument that this common law right had been taken away from the Crown in Tasmania by statute, namely the Police Regulation Act, 1898-1955. That the right may so be taken away, either expressly or by necessary implication, was established by the Privy Council in *Gould v. Stuart,*[9] and it seems that there is quite a strong case for arguing that the Crown's right to dismiss members of the Tasmanian Police Force at pleasure has been taken away by necessary implication of the Act, as amended in 1955.

The relevant sections of the Act may be summarized as follows. Section 5 distinguishes between officers of police and other ranks. Section 10 provides that the Governor may appoint such officers of police as he may think necessary, and section 11 provides that the Governor may at any time dismiss any *officer of Police* appointed by him under the Act. Section 12 provides that the Commissioner of Police (with the Minister's approval) may appoint such sergeants of police, constables, and junior constables, as he may think fit, and may also dismiss them. Section 18 provides, *inter alia,* that no agreement of a member of the force to serve the Crown shall be 'set aside, cancelled or annulled for want of reciprocity'. The appellant argued that these provisions were intended to define exhaustively the extent of the powers of the Governor and the Commissioner with respect to the dismissal of police, so that only the Commissioner had the right (under section 12) to dismiss constables, the Crown's *prima facie* right to do so having been abolished by necessary implication.

This seems a sound argument, for why, if the legislature did not mean to limit the Crown's right to dismiss at will, did it include a section (11) confirming this right in respect only of officers of police?

The High Court, however, rejected the appellant's contention by reference to *Ryder v. Foley,*[10] in which in 1907 it had held that a section of a Queensland Act, which corresponded exactly to section 12 of the Tasmanian Act in giving the Commissioner power to dismiss constables, merely gave a special power to the former without in any way affecting the right of the Crown to dismiss at pleasure. The High Court, moreover, approved of the opinion of Barton J. that the section in both statutes which provides that no agreement shall be set aside 'for want of reciprocity' would be 'meaningless if

[7] Members of the police force come under this category in Australia: *Fletcher v. Knott* (1938) 60 C.L.R. 55, 77, *per* Dixon J; *A.G. of N.S.W. v. Perpetual Trustee Co.* [1955] A.C. 459, 477-481.

[8] For a justification of this rule, see *per* Lord Herschell in *Dunn v. Reg.* [1896] 1 Q.B. 116, 119-120.

[9] [1896] A.C. 575.

[10] (1906) 4 C.L.R. 422.

there were reciprocity in the contract – if there was a right on the constable's part to demand that his dismissal should not take place except under (certain) conditions'. This is a valid argument in relation to the Queensland Act, but in the Tasmanian Act no regulation is made of the manner of dismissal; the power of dismissal is simply given to the Commissioner. Thus no right is given to constables to demand dismissal in a certain manner, and section 12 of the Tasmanian Act may therefore be said to bestow the sole legal right to dismiss without being inconsistent with the later provision on lack of reciprocity. *Ryder v. Foley* is made even weaker as a precedent by the absence in the Queensland Act of any section corresponding to section 11 of the Tasmanian Act, which gives the Governor the right to dismiss only officers of police.

Reference was also made in the instant case to the High Court's decision in *Fletcher v. Knott*,[11] in which the court once again held that similar statutory provisions did not abrogate the Crown's right to dismiss at will. However, the case is distinguishable in exactly the same manner as *Ryder v. Foley*, for not only did the Act concerned differ in its terms from the Tasmanian Act, but once again the right of the Crown was admitted, the only issue being whether it had to be exercised in a certain manner.

The court then proceeded to deal with the 1955 amendments of the Tasmanian Act. That these amendments should be considered separately is in itself questionable, for it will be shown below that when they are read together with sections 10, 11 and 12 the implication that these earlier sections were intended to define exhaustively the limits of the Crown's power of dismissal becomes even stronger. The amendments were undoubtedly intended for the benefit of members of the police force. They gave a right of appeal to all police against dismissal by the Commissioner, but only to *officers of police* appointed by the Governor against dismissal by the Governor. The appellant, as a non-officer, was correctly held to have no right of appeal against dismissal by Order-in-Council, and his argument that the giving of these rights of appeal was inconsistent with continued recognition of the Crown's common law right was properly met by the court's saying that the giving of a right of appeal from dismissal is a different thing from taking away the right to dismiss.

However, it does seem that the court gave scant consideration to the appellant's claim that the wording of the 1955 amendments, being evidently intended to give general rights of appeal, plainly indicated that the intention of the legisature in passing the principal Act had been to cut down the general common law power of the Crown to dismiss at will to a right of dismissing at will only officers

[11] (1938) 60 C.L.R. 55.

of police. For since the object of the amendments was to give all police a right of appeal against any and every legal form of dismissal, Parliament would hardly have left such an obvious loophole as the omission of non-officers from the sub-section giving a right of appeal against dismissal by the Governor. The logical conclusion is that non-officers were not included in the protection of this sub-section for the simple reason that Parliament did not believe that it was within the power of the Governor to dismiss them, his power of dismissal having been limited and defined by sections 11 and 12 of the principal Act. If this were the correct interpretation, then clearly the dismissal of K. by order of the Governor-in-Council was invalid.

The High Court, however, dismissed this forceful contention with the observation that, even if 'the Act of 1955 was framed on the assumption that (sections 11 and 12) did exhaustively define the powers of the Crown and the Commissioner respectively, yet a different effect could not be given to those sections after 25 May 1955 from that which must inevitably, *in view of the authorities,* have been given to those sections before that date'.

This is a disputable statement. The authorities to which they refer are *Ryder v. Foley* and *Fletcher v. Knott* which (it has been shown) are clearly distinguishable, and thus scarcely deserving of the title 'authorities' at all. Moreover, there would have been some judicial authority to support the High Court if it had decided to ignore those of its earlier decisions which conflicted with the plain intention of the Tasmanian Parliament. For in *Salvation Army (Vic.) Property Trust v. Ferntree Gully Corporation,*[12] the majority of the High Court refused to give to a word in a Victorian statute the same meaning as it had previously been given by the Victorian Full Court, and which the Victorian Parliament in thrice reenacting the relevant sections without change could be said to have approved. The High Court overruled the previous decision of the Full Court of the Victorian Supreme Court as being an erroneous interpretation even in the face of *prima facie* Parliamentary approval. Why, then, could not the interpretation of the sections in *Ryder v. Foley* and *Fletcher v. Knott,* even if considered relevant, have been ignored here in deference to a clear contrary opinion in the Tasmanian Parliament?

There seems little doubt that the Tasmanian Parliament, when it passed the 1955 amendments, did not intend the Governor to have the right to dismiss at will, and also that, if the High Court had regarded this intention with favour, it could have avoided the difficulty of the conflicting interpretation of similar legislation in the two earlier cases by distinguishing these two cases as has been done above. That the court was not prepared to do so seems to in-

[12] (1952) 85 C.L.R. 159, 174-175.

dicate an unwillingness to facilitate the qualification or abrogation of the Crown's prerogatives by statute. Where such a fundamental principle as the right of appeal is involved this attitude is perhaps to be regretted.

One other point of interest in the case is raised by the final paragraph of the joint judgment, in which it is found unnecessary to decide whether the plaintiff could, in any circumstances, 'obtain the relief sought by him in his action (i.e. a court declaration reinstating him as a police constable) if there were actually a *de facto* exclusion of him from the duties and emoluments of his office.' Obviously the plaintiff has no action for wrongful dismissal, nor any other remedy against his discharge, when he holds office simply at pleasure,[13] but the court is here suggesting that even if he had been successful in showing his dismissal to have been invalid, it is unlikely that he could have succeeded in obtaining the court declaration of reinstatement that he sought, if in actual fact his services had been disposed of by the police force, and his salary stopped. This view was espoused by the High Court in both *Williamson v. The Commonwealth*[14] and *McVicar v. Commissioner for Railways (N.S.W.)*[15] and in the former case Higgins J. went as far as to say[16] 'I know of no authority or ground for any such order or declaration; and I certainly shall not declare the plaintiff to be still in Government service when . . . he has been put out of the service, and remains out.'

This dictum may, however, need some qualification in view of the recent House of Lords decision in *Vine v. National Dock Labour Board*,[17] in which the plaintiff was not only awarded damages for wrongful dismissal, but was reinstated in his former position by a court declaration, despite his *de facto* dismissal.

It was stressed[18] that this case was 'entirely different . . . from the ordinary master and servant case,' where such a court declaration would not be available, even in the event of a dismissal constituting a breach of contract. The House of Lords was willing to approve the granting of a declaration, as this did not involve ordering specific performance of a contract for personal services, but meant merely the restoration of the plaintiff to the *status* of a registered dock worker. Whether a police officer, admittedly not regarded as being in an ordinary master and servant relationship with the Crown,[19] could now claim a similar remedy for invalid dismissal is a matter for interesting speculation.

A. G. HISCOCK

[13] This is not to say that a policeman may not, by way of petition of right successfully claim arrears in wages from the Crown, as did the plaintiff in *Bertrand v. The King* [1949] V.L.R. 49. *Quaere*, this decision would be followed by the present High Court. [14] (1907) 5 C.L.R. 174.

[15] (1951) 83 C.L.R. 521. [16] (1907) 5 C.L.R. 174, 185. [17] [1957] 2 W.L.R. 106.

[18] *Ibid.*, 112, *per* Viscount Kilmuir L.C.

[19] *Attorney-General of N.S.W. v. Perpetual Trustee Co.* [1955] A.C. 457.