1921
March 19.

WILLIAM EGERTON HODGINS.. SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Pensions—Interpretation of Statutes—Militia Act—Orders in Council—Discretion of Minister.

In August, 1917, H., then in receipt of yearly salary of $4,000, was retired, but, instead of taking the six months' leave, by an order-in-council passed on 3rd September, 1917, he was appointed on the Overseas Demobilization Committee "for a period of six months pending retirement" at the yearly salary of $6,000, this order further declaring that "at the expiration of his six months' tenure of appointment * * * * would be entitled to pension in accordance with the Militia Pension Act, 1902." On the 9th January, 1918, under the direction of the Minister of Militia the Pension Board fixed H's. pension at $4,200, on the basis of $6,000 salary, this being subsequently approved of and affirmed by the Treasury Board and the Governor in Council.

Between the 3rd September, aforesaid, and the date of his actual retirement, in March, 1918, namely, on the 29th November, 1917, two orders-in-council were passed providing field and ration allowances for officers of the permanent force, amounting, as regards officers of H's. rank, to $1.75 a day over and above the consolidated rate of pay and allowances. By his petition H. claimed that his pension should be based on a salary of $6,000 plus these allowances.

Held: That, applying to the orders-in-council in question, the statutory rule that a general act is not to be construed to repeal a previous particular act unless there is some express reference therein to such previous legislation, or unless they are necessarily inconsistent, the general orders-in-council of the 29th November, 1917, did not affect the special and particular order of the 3rd September, 1917, which stands by itself as representing the true position between the parties.

2. Section 42 of the Militia Act provides that a retiring officer "shall be entitled to pension, etc., not exceeding 1-50 of the pay and allowance of his rank or permanent appointment."

Quaere? Does the word "shall" in said section come within the class of cases in which the authority given thereby is coupled with the legal duty to exercise such authority, creating a discretion that must be exercised; furthermore, the Minister and Pension Board having exercised this discretion by fixing the amount of the pension, and their decision having been approved and affirmed by the Governor in Council, has the court any jurisdiction to sit on appeal or review from the exercise of such discretion?

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PETITION OF RIGHT to have it declared that the amount upon which pension was based was not the proper figure and that the pension should be increased.

March 10th, 1921.

The case now heard before the Honourable Mr. Justice Audette at Ottawa.

W. D. Hogg K.C. for suppliant.

R. V. Sinclair K.C. and H. H. Ellis for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 19th March, 1921) delivered judgment.

This is a Petition of Right whereby it is claimed, by the suppliant, who is a retired Major-General of the Canadian Militia Force, receiving a yearly pension of $4,200,—that his pension instead of being $4,200, should be $4,647.00, under the circumstances hereinafter set forth.

In August, 1917, the suppliant having served 36 years, his retirement from the force was decided upon and he agreed and undertook to so retire. He was officer commanding District No. 1, when in January, 1915, he was detailed to Ottawa to perform the duties of Acting Adjutant General,—still retaining the command of that district while it was administered by Lt.-Col. Shannon, and from the first of January, 1915, up to the 7th September, 1917, the suppliant was receiving an annual salary of $4,000,—made up, as shown by the pay-list, filed as exhibit A, of pay of $2,900, together with $1,100 for consolidated allowances.

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When in August the question of his retirement had been passed upon and decided, instead of taking his six months' leave and remaining idle, he declared his willingness to forego the leave and do some work. (See exhibit No. 8). Then by the order-in-council of the 3rd September, 1917, passed upon the recommendation of the Minister, made on the 30th August 1917, the suppliant was specifically "appointed as the representative of the Militia Department, on the Overseas Demobilization Committee, *for a period of six months, pending retirement, at the consolidated rates of pay and allowances of $6,000 per annum * * * (the consolidated rates of $6,000 per annum being equal to the pay and allowances of the chief of the general staff, and both inspector-generals in Canada).*" And in the 4th paragraph of this order-in-council it is further declared that "At the expiration of his six months tenure of appointment,—this officer having reached the age limit—will be entitled to pension, in accordance with the Militia Pension Act of 1902."

On the 9th January, 1918, under the order of the Minister of Militia and Defence, the Pensions and Claims Board assembled for the purpose of reporting as to the pension due to Major-General W. E. Hodgins, who was to be retired from the service in March, 1918 (See exhibit No. 2). And the board fixed his pension at $4,200 upon the basis of pay at $4,600 and allowances at $1,400. This finding was subsequently—namely, during January, 1918—approved by the treasury board and the Governor General in Council.

Now, subsequent to the passing of the order-in-council of the 3rd September, 1917, appointing the suppliant to this service in England at a fixed salary, specially created for him as said by the Deputy Minister in his evidence, and prior to his retirement in

March, 1918, two orders-in-council were passed on the 29th November, 1917, whereby officers of the permanent force of the same rank as the suppliant, were, in addition to their consolidated rates of pay and allowances, allowed field allowance at the rate of $1.50 per diem and also to a ration allowance of 50 cents per diem (less 25 cents already included in allowances) making in all $1.75,— and the suppliant claims that such allowances should have been added to the said sum of $6,000 as the proper amount upon which his pension should have been based. Furthermore, that such additional allowances amount to the yearly sum of $638 and that his pension should have been calculated on $6,638 instead of $6,000 with the result that the pension instead of being $4,200 should be $4,647.00.

Hence the present controversy.

The well-established rule of law for the construction of statutes embodied in the maxim of *generalia specialibus non derogant*, clearly applies here—"A general statute does not abrogate an earlier special one by mere implication; the law does not allow an interpretation that would have the effect of revoking or altering, by the construction of general words, any particular statute when the words may have their proper operation without it." This principle was applied to the construction of by-laws of a Municipality in the case of *The City of Vancouver* vs. *Bailey* (1).

And Maxwell, 2nd Ed., p. 213, upon the same question expresses the following opinion: "Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision

(1) 25 S.C.R. 62, 67.

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by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

In *Gagnon* vs. *S.S. Savoy* (1), it was further held that: "A general law may be impliedly repealed by a subsequent special law, in *pari materia*, if such special law is in conflict with the former, but the converse is not the case." That is *generalia specialibus non derogant*—but *gerenalibus specialia derogant*.

As said in Broom's Legal Maxims (p. 20) "when there are general words in a later date capable of reasonable application without being extended to subjects specially dealt with by earlier legislation, then, in the absence of an indication of a particular intention to that effect, the presumption is that the general words were not intended to repeal the earlier and special legislation."—Per Lord Selborne. *Seward* vs. *Vera Cruz* (2), citing *Hawkins* vs. *Gathercole* (3). "The law will not allow the exposition to revoke or alter by construction of general words any particular statute, when the words may have their proper operation without it," *Lyn* vs. *Wyn*, Bridgeman's Judgment 122, 127 (4).

(1) 9 Ex. C.R. 238.
(2) 10 A.C. 59, at 68.
(3) 6 D. M. & G. 1.
(4) *Cited in* L.R. 3 C.P. 421; 6 C.P. 135, 1 Ex. D. 78.

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We also find In re Smith's Estate (1), the following rule of construction that "where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the court ought not to hold that general words in such a general act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal."

The same principle was adopted in the case of *Thorpe* vs. *Adams* (2) where it is held that: "The general principle to be applied to the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous *particular* Act, unless there is some express reference to the previous legislation on the subject, or unless the two Acts are necessarily inconsistent."

This rule of construction is of such wide acceptance in the courts that it is unnecessary to multiply authorities to the same effect.

Having adopted this rule of construction, I must find that the general orders-in-council of the 29th November, 1917, do not affect the special and particular order-in-council of the 3rd September, 1917, which stands by itself, as representing the true position between the parties. The Petition of Right fails on that ground without more. Accepting this view, I am relieved from labouring many questions raised at bar; however, it is but right to state that I have not witheld consideration from any point relevant to the case and stressed by counsel.

(1) 35 Ch. D. 589, at 595. (2) L.R. 6 C.P. 125.

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Let me refer to some of them. Sec. 4 of the Military Pension Act provides that a retiring officer "shall be entitled to a pension * * * not exceeding 1-50 of the pay and allowances of his rank or *permanent* appointment." Was not the suppliant's salary the sum of $4,000 a year on his permanent appointment?—and was not the salary he was receiving at the time of his retirement a *temporary* salary limited for this period of six months, following the time his retirement had been decided? If the temporary and higher salary has been used as a basis for the calculation of the pension, it follows the suppliant has been handsomely treated.

On the other hand, if this special order-in-council of the 3rd September, 1917, is to be cast aside and ignored, then the suppliant has to fall back upon his rank and *permanent appointment* before that date at a salary of $4,000, whereby the pension would be much lower.

Does the word "shall" in section 42, so much relied upon at trial, come within the class of cases in which the authority given thereby is coupled with the legal duty to exercise such authority,—especially when the words immediately following are, "not exceeding 1-50"—in other words creating a discretion that must be exercised. Conceding this, then the answer is such discretion has been exercised by the Minister and the Pension Board, and approved and confirmed by an order in council. Has the court under such circumstances any jurisdiction to sit on appeal or in review from the exercise of such discretion? Does not the fixing of the amount of the pension rest primarily and finally in the discretion of the executive authority? It would seem so on the authorities, see *Matton* vs. *The Queen* (1); *The King* vs. *Halifax Graving Dock Co., Ltd.*, (2) and cases therein cited.

(1) 5 Ex. C.R. 401, at 407. (2) 20 Ex. C.R. 45.

There are a number of decisions given in England upon similar cases, but again I may repeat in the view I take of the case it is unnecessary to ascertain whether these decisions are given upon a similar state of law as in Canada. The nature of the engagement of a soldier or officer has been reviewed in the case of *Leaman* vs. *The King* (1). The following authorities may also be referred to: *Gibson* vs. *East India* (2); In *re Tuffnell* (3); Robertson, Civil Proceedings (4); *Dunn* vs. *The Queen* (5); *Mitchell* vs. *The Queen* (6); *Balderson* vs. *The Queen* (7); *Cooper* vs. *The Queen* (8); *Gould* vs. *Stuart* (9); *De Dohse* vs. *The Queen* (10); *Yorke* vs. *The King* (11).

There will be judgment declaring that the suppliant is not entitled to the relief sought by his Petition of Right.

Judgment accordingly.

Solicitors for suppliant: *Hogg and Hogg.*

Solicitor for respondent: *F. E. Newcombe.*

(1) 36 T.L.R. 835.
(2) 5 Bing. N.S. 262.
(3) 3 Ch. D. 164 at 167.
(4) p.p. 611, 359, 35, 643.
(5) [1896] 1 Q.B.D. 116.
(6) 6 T.L.R. 181; [1896] 1 Q.B.D. 121.
(7) 28 S.C.R. 261.
(8) 14 Ch. D. 311, at 314.
(9) [1896] A.C. 575.
(10) Times, 24 Nov. 1886.
(11) 21 T.L.R. 220.