LAWRENCE KIDD .....SUPPLIANT:

AND

HIS MAJESTY THE KING.....RESPONDENT.

1923
Oct. 22.

Crown—Dismissal of a civil servant or military officer—Prerogatives of the Crown—Power of Parliament to take away—Conditions.

Held, that the right of the Crown to fix the amount of a pension or superannuation allowance, must be deemed to be imported into every appointment of a civil servant or a military officer. This is a right of the Crown in virtue of its prerogative, which Parliament may take away, but its intention so to do must be clear beyond all manner of doubt. In case of doubt the courts should regard the prerogative as unimpaired.

PETITION OF RIGHT to recover military pension under R.S.C., 1906, c. 42, secs. 11 and following.

11th September, 1923.

Case now heard before the Honourable Mr. Justice Audette at Halifax.

R. M. Fielding for suppliant.

J. E. Routhledge for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J.—Now October 22nd, 1923, delivered judgment.

The suppliant, by his Petition of Right, seeks to recover an annual military pension, dating from 15th March, 1920, and interest on alleged overdue instalments of the same, the whole under the provisions of sections 11 et seq. of ch. 42 of R.S.C., 1906, being "An Act respecting Pensions to Permanent Staff and Officers and men of the Permanent Militia and for other purposes."

Before the amendment to this Act, in 1919 (1), sec. 11 thereof read as follows:—

11. Subject to the provisions of this Act, every militiaman shall be entitled to retire and receive a pension for life who.—

(*a*) has completed not less than twenty years service, or etc., etc.

This Act was amended on the 7th July, 1919 (1), by, among other things, substituting for this period of "twenty" years a period of "ten" and this period of twenty years was restored, in 1923 (2).

(1) 9-10 Geo. V, c. 61, sec. 5. (2) 13-14 Geo. V, c. 58.

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The period of the suppliant's services, as set forth in the Petition of Right, is as follows:—

	Yrs.	Mos.	Dys.
1. Served in Boer War in South Africa, 23rd December, 1899, to 30 July, 1902	2	7	7
2. As Lance-Corporal in Royal Canadian Regiment, a unit of Permanent Militia, from 10th January, 1906, to 4th November, 1916. This period includes time served in France on active service, in war commenced on 4th August, 1914	10	9	24
3. Served as private in 66th Regiment, Princess Louise Fusiliers, a unit of Canadian Expeditionary Force, on active service in war from 4th Nov., 1916, to 31st May, 1918	1	6	27
4. Served as Acting Company Sergeant-Major, with pay of that rank in Canadian Military Police Corps,—a unit of Permanent Militia of Canada and of the Canadian Expeditionary Force, on active service in war, from 31st May, 1918, to 15th March, 1920	1	9	15
	16	9	13

Now the primary or paramount question submitted to the court for determination is really whether an action will lie against the Crown for the recovery of such a military pension as that claimed.

I have already had occasion to consider whether an action would lie against the Crown for a military gratuity in the case of *Bacon* v. *The King* (1). However, the present issues are quite different.

A careful study of the cases concerning the rights of military officers and civil servants to obtain compensation for pensions or superannuation allowances seems to lead to the conclusion that the Crown's absolute power to allow and fix the amount of its bounty as expressed in a pension or superannuation allowances must be deemed to be imported into every appointment of a civil servant or a military officer. *Mitchell* v. *The Queen* (2); *Dunn* v. *The Queen* (3); *In re Tufnell* (4); *Gibson* v. *East India Co.* (5); *Grant* v. *Secretary of State for India* (6); *De Dohsé* v. *The Queen* (7); *Shenton* v. *Smith* (8); *Yorke* v. *The King* (9); *Gould*

(1) [1921] 21 Ex. C.R. 25.
(2) [1896] Q.B.D. 121.
(3) [1896] Q.B.D. 116.
(4) [1876] 3 Ch. D. 164.
(5) [1839] 5 Bing (N.C.) 262, 275.
(6) [1877] 2 C.P.D. 445.
(7) [1886] 3 T.L.R. 114.
(8) [1895] A.C. 229.
(9) [1915] 31 T.L.R. 220.

v. *Stuart* (1); *Young* v. *Waller* (2); *Rederiaktiebolaget Amphitrite* v. *The King* (3); *Edmunds* v. *Attorney-General* (4); *Balderson* v. *The Queen* (5), 25 Hals. 89, 90, There is also the case of *Sutton* v. *Attorney-General* (6) which stands by itself in that the engagement in that case amounted to a contract.

However, the Crown's right to dismiss or to superannuate or pension a civil servant or a militiaman may be entirely regulated by statute, cutting out the prerogative rights. In the case of *Williams* v. *Delohery* (7) it was held that a member of the Civil Service of New South Wales had an absolute right under the Civil Service Act, 1884, to superannuation allowances. The judgment of the Colonial Court allowing the plaintiff his claim for superannuation allowances was affirmed by the Judicial Committee. But these cases depend wholly upon the terms of the Acts under consideration in each case. Of course the Crown's prerogative may be taken away by Parliament in respect of any such matter, but, that the prerogative should be taken away beyond all manner of doubt by the Statute, is insisted upon in all the cases, and when there is a doubt upon the face of the Act it is the duty of the Court to hold that the prerogative is maintained.

Now, without deciding whether or not the Canadian Act, section 11, ch. 42, R.S.C., 1906, takes away the prerogative and gives the subject a right of action, I will, for the purposes of argument in this case assume that it does. Even upon that assumption the suppliant is out of court, as we shall see.

Section 11, as above recited, states that

> every militiaman shall . . . be entitled to a pension.

The first question to consider is what is a "militiaman"?

Referring to the Interpretation clause of that Statute (8) we find that a

> militiaman means a non-commissioned officer or private of the force.

And that "force" means

> the officers, non-commissioned officers and men of the permanent militia corps and includes the permanent staff of the militia.

(1) [1896] A.C. 575
(2) [1898] A.C. 661.
(3) [1921] 3 K.B. 500 at p. 503.
(4) [1878] 47 L.J. Ch. 345.
(5) [1898] 28 S.C.R. 261.
(6) [1923] 39 T.L.R. 294.
(7) [1912] 29 T.L.R. 161.
(8) R.S.C. [1906] Ch. 42.

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Therefore, the suppliant to succeed must show a complete service in the Permanent Militia, not less than twenty years' services up to the 7th July, 1919, or ten years if between 1919 and 1923.

It is admitted by both parties, as per the admission filed at trial, that the Canadian Military Police Corps was not, at all times material to this proceeding, a unit of the Permanent Militia of Canada. Therefore the suppliant's time of service up to the 31st May, 1918, did not amount to twenty years as a militiaman, and he accordingly does not come within the provisions or ambit of section 11 above referred to. It is unnecessary to advert to or consider the other questions raised during the argument of the case.

There will be judgment ordering and adjudging that the suppliant is not entitled to any portion of the relief sought by his Petition of Right.

Judgment accordingly.