

IN THE MATTER OF THE PETITION OF RIGHT OF

1905  
April 22.

CHARLES BERKLEY POWELL.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Public officer—Assignment of salary—Public policy—Librarian of Parliament—Auditor-General—Right of, to bind Crown.*

The provisions respecting the assignments of choses in action found in R. S. O., c. 51, s. 58, ss. 5 and 6 are not binding upon the Crown as represented by the Government of Canada.

2. On grounds of public policy the salary of a public officer is not assignable by him.
3. Neither the Librarian of Parliament nor the Auditor-General of Canada has power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the Library of Parliament.

**DEMURRER** to a petition of right for the recovery of a claim against the Crown for moneys alleged to be due to a public officer, and by him assigned to the suppliant.

A. H. Todd, a clerk in the Library of Parliament, was joined with His Majesty the King as a respondent in the petition of right.

The instrument set out in the pleadings, and alleged to be an assignment of salary by Mr. Todd, was as follows:—

“ I, Alfred Hamlyn Todd, of the Library of Parliament, hereby appoint the Union Bank of Canada my lawful attorney to receive from the Receiver General of the Dominion of Canada, or other person authorized to pay the same, all such sum or sums of money as are now due or may hereafter become due, and payable to me by the Government of the Dominion of Canada, and to give a receipt or receipts

“ for the same, hereby revoking and cancelling all  
 “ powers of attorney at any time heretofore made by  
 “ me for the same or any like purpose.”

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“ Witness my hand at Ottawa this 11th day of  
 “ October, one thousand eight hundred and ninety-  
 “ four.”

“ (Sgd.) A. HAMLYN TODD ”

“ Executed in presence of

“ (Sgd.) MARTIN J. GRIFFIN,  
 Parliamentary Librarian.”

The suppliant further alleged that this power of attorney was accepted on behalf of His Majesty the King by the Librarian of Parliament and the Auditor-General of Canada, the properly authorized officers in that behalf, on or about the 10th day of October, 1894, as appears by the following letter:—

LIBRARY OF PARLIAMENT,  
 OTTAWA, October 10th, 1894.

“ DEAR MR. POWELL,—At Todd’s request I write  
 “ you a note to say that by an agreement made with  
 “ the Auditor-General in regular official form, Todd’s  
 “ monthly cheque will hereafter be made payable to  
 “ the Molson’s Bank as a security for the business  
 “ arrangement made for him by yourself with the  
 “ bank.

“ I am, etc.,

“ Very faithfully yours,

“ (Sgd.) MARTIN J. GRIFFIN.”

The suppliant further alleged in substance as follows:—

That in pursuance of the said agreement the monthly pay cheques of the said Todd were made payable to the Union Bank of Canada until on or about the 15th day of May, 1896, when there was due under the said agreement the sum of \$1,812.18. On the said date the

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suppliant, at the request of the said Todd, entered into another agreement in writing whereby he agreed to advance an additional sum to Todd, sufficient to make the whole amount due on that date the sum of \$2,000. By the terms of the said agreement dated the said 15th day of May, 1896, it was agreed that repayment should be made in the same way and credited in the same manner as provided in the said agreement of the 2nd day of March, 1894.

From and after the said 15th day of May, 1896, until the 8th day of August, 1899, the monthly pay cheques due to Todd from the Dominion Government were made payable to the Union Bank. On the said date, however, by arrangement between Todd and the suppliant, and approved of by the Librarian of Parliament, the said power of attorney was replaced by a new power of attorney making all the said moneys payable to the Molsons' Bank, instead of the Union Bank, and from the said 8th day of August, 1899, until the 14th day of March, 1900, the said monthly pay cheques due to the said Todd were made payable to the said Bank as aforesaid, and the sum of \$40.00 per month applied each month in liquidation of the claim of the suppliant.

The suppliant advanced to Todd the further sums of \$700.00 and \$300.00 on the 15th day of January, 1899, and the 15th day of June, 1899, respectively, the said sums to be repaid in the same manner as the sums previously mentioned.

Both of said powers of attorney given by Todd to the said banks were on the regular official form, were approved of by, and were to the knowledge of, the said Librarian of Parliament and the Auditor-General of Canada, and the other officials authorized and empowered to deal therewith on behalf of His Majesty the King, given for good and valuable consideration,

and were, therefore, irrevocable by the said Todd and constituted with the said agreement an absolute assignment of the whole or a portion of the salary of the said Todd.

The suppliant notified the Librarian of Parliament and the other proper officers of the Crown; and the Crown, through its said officers, were at all times well aware that the said amounts had been advanced and that the whole or part thereof remained due and unpaid on the 15th day of March, 1900.

On or about the 15th day of March, 1900, the said Todd notified the Librarian of Parliament that he revoked the power of attorney and thereupon and thereafter the said power of attorney was wrongfully and negligently treated by the said Librarian and other officers of the Crown and by the Crown as being null and void, and all the monthly pay cheques becoming due to the said Todd since that time have been wrongfully and negligently paid to the said Todd and have not been made payable to the <sup>v</sup>Molson's Bank, as required by the said power of attorney.

The Attorney-General of Canada demurred to the sufficiency of the allegation in the suppliants' petition as establishing a claim in law against the Crown.

April 21st, 1904.

The demurrer came on for argument.

*E. L. Newcombe, K.C.*, in support of the demurrer, argued that it was not competent to the suppliant to join a subject with the King as a party respondent in a proceeding by petition of right. Todd is the debtor, and as between Todd and Powell the court has no jurisdiction. Moreover Todd has not appeared to the action. There is no statute authorizing such a proceeding being taken, and there is no contract between Powell, the creditor of Todd, and the Crown.

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The Parliamentary Librarian or the Auditor-General has no authority to bind the Crown; they are both statutory officers and not authorized by the Executive to act for the Crown in such a case.

The assignment is invalid and ineffectual. The Treasury Board regulations will not recognize assignments which purport to be irrevocable. A mere possibility of obtaining money cannot be assigned between subject and subject. The rule at common law is that there cannot be an assignment of a debt not *in esse*. (*Williams on Personal Property*, (1); *Snell on Equity* (2))

It needs a statute to empower the assignee of a chose in action to sue in his own name for the recovery of the debt; this is the rule that prevails between subject and subject, and *a fortiori* the assignee of a claim against the Crown would have no right to sue for it in his own name. There is no Dominion legislation authorizing such a proceeding, and even if the Ontario enactments in this behalf applied to the Crown in right of the Province, of course it could not be contended for a moment that they applied to the Crown in the right of Canada. Therefore I deny the proposition that a debt due by the Crown may be validly assigned.

[THE COURT: There is a dictum to the contrary of your view by Strong J. in *The Queen v. Smith & Ripley* (3).]

That is so; but I imagine that such opinion, expressed *obiter*, as it was, would not weigh against considered authority upon the point. (*Story's Equity Jurisprudence* (4); *Smith's Manual of Equity* (5); *Snell's Equity* (6); *Collyer v. Isaacs* (7); *Bacon's Maxims* (8)).

(1) 15th ed. p. 91.

(2) 13th ed. p. 66.

(3) 10 S. C. R. at p. 66.

(4) Sec. 1040 a.

(5) 14th ed. 293.

(6) 13th ed. 76.

(7) 19 Ch. D. at p. 351.

(8) Works, vol. iii., p. 237.

It is against public policy that the salary of a public officer should be assigned. (*Throop's Public Officers* (1); *Arbuckle v. Cowtan*. (2); *Blackett v. United States* (3).

*J. Lorne McDougall*, contra, argued that modern authority justified the joinder of the subject with the King as respondents in a proceeding by petition of right. (*Kirk v. The Queen* (4); *Kinlock v. The Queen* (5).

At this stage of the case, by consent of parties, the court granted an order to strike out the name of A. H. Todd as party respondent to the petition of right. Leave was given to the suppliant to amend the petition as against the Crown; the costs of the demurrer *quoad hoc* to be costs to the Crown in any event. Further argument of the demurrer was adjourned *sine die*.

January 9th, 1904.

The petition of right having been amended the argument of the whole demurrer was now resumed.

*E. L. Newcombe, K.C.*, in support of demurrer;

*J. Lorne McDougall*, contra.

*Mr. Newcombe*: The petition as amended is substantially open to the same objections in law as it was before. There is no contract with the Crown shewn on the face of the pleadings, and there is no statute allowing a suit to be brought against the Crown upon the facts alleged. On grounds of public policy the Crown cannot be expected to seek out the assignees of claims; its creditors and payees are those it sees fit to primarily and openly do business with. It is upon this principle that garnishee process does not lie against the Crown. It is a question of convenience in the

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(1) Pp. 52, 53.

(2) 3 B. & P. 328.

(3) 7 Metc. 338, 339.

(4) L. R. 14 Eq. 558.

(5) W. N. 1892, p. 164; s. c. W.  
N. 1884, p. 80.

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administration of public business. Such being the case the petition will not lie here. (*Feather v. The Queen* (1).

If the suppliant cannot recover upon a claim as of contract, then he must rely upon tort. He does allege that the Crown negligently and wrongfully disregarded the power of attorney. But my answer to that is that there is no statute making the Crown liable for negligence in such a case.

There is no contract between Todd, the original creditor, and the Crown. He is a mere appointee of the Crown, removable at pleasure. He has no prospective interest in any salary which may be attached to his office. So there being no debt, there can be no assignment of it. (*Story's Equity Jurisprudence* (2); *American and English Encyclopedia of Law* (3); *Benjamin on Sales* (4).

The power of attorney is not an assignment in law. It is revocable, and was, in fact, revoked. If it were to be said that Todd had no right to revoke his power of attorney, it would follow as a corollary that the Government once having acted on this instrument must continue him in office until the suppliant's claim was paid. This is plainly an untenable argument. It means tying the hands of the Government in exercising its pleasure to dispense with the services of its employees

*Mr. McDougall* here intimated that he was not ready to continue the argument now, and asked for an adjournment, which was granted.

January 12th, 1904.

*F. H. Gisborne* in support of demurrer ;

(1) 6 B. & S. 257.

(2) 13th Am. ed. p. 349.

(3) 2nd ed. vol. 24, pp. 1023, 1024,  
1042, 1045.

(4) 4th ed. 85.

*J. Lorne McDougall*, contra.

The argument of the demurrer was resumed.

*Mr. McDougall* contended that Todd was not a civil servant, but an officer of Parliament appointed under the provisions of R. S. C., c. 15. Sec. 7 of that Act shows that the officers and servants of the Library of Parliament, although appointed by the Governor in Council, are not Crown officers in the ordinary sense, because their salaries are especially provided for.

[THE COURT: They are paid out of the moneys voted by Parliament for civil service salaries. Parliament does not specifically appropriate money to pay them.]

[*Mr. Gisborne* explains that the officers of the Library of Parliament stand on the same footing as other branches of the civil service in respect of the fund out of which salaries are paid.]

Even admitting that Todd is under the control of the Governor in Council in respect of his office, that does not dispose of the matter because the Governor in Council, by an order, has expressly sanctioned the practice of assigning salaries.

[THE COURT: You have not set up that order in your pleadings.]

But the Crown is estopped from denying the particular assignment in issue here because its officers have acted on the assignment.

[THE COURT: They did until it was revoked, and you do not complain of anything done before its revocation.]

No; but the power of attorney assigns "all moneys hereinafter to become due." Under that provision it was their duty to see that the future moneys were paid over to the assignee. When the Governor in Council passed the general order (1) it was tantamount

(1) REPORTER'S NOTE.—See Regulations of Treasury Board of 1st Feby., 1870, respecting the mode of acquittal of warrants for the payment of money by the Government of Canada.

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to saying that they waived the common law defence that the Crown is not bound by assignments.

[THE COURT: But is this not merely a provision enabling a creditor of the Crown to appoint an agent to receive money? If what is contemplated is merely a power of attorney, and the instrument contained no representation on the part of the Crown as to irrevocability, the Crown would not become in any way liable on revocation of the power.]

The instrument set out in the pleadings is a power of attorney coupled with an interest, and as such is irrevocable. *American and English Encyclopedia of Law.* (1.)

That a claim against the Crown is assignable is established in *The Queen v. Smith and Ripley* (2).

*Mr. Gisborne* pointed out that the Auditor-General was not a party to the assignment, and had no authority to act for the Crown in such a matter.

THE JUDGE OF THE EXCHEQUER COURT now (April 22nd, 1905), delivered judgment.

The petition is brought upon an alleged assignment to the suppliant by Mr. Alfred Hamlyn Todd, a clerk employed by the respondent in the Library of Parliament, at Ottawa, of his salary as such clerk; and upon the action of the Librarian of Parliament and of the Auditor-General in respect of such assignment. The assignment relied upon consists of an agreement made between Mr. Todd and the suppliant and a power of attorney given by Mr. Todd to the Union Bank of Canada to secure the repayment of advances made by the suppliant to Todd. By the former it was agreed that Todd's monthly pay cheque of \$147.00 was to be made payable to the said bank, and that the bank was, out of the proceeds thereof, to pay \$40.00 to the credit

(1) 2nd ed. vol. 1, "Agency," p. 1218. (2) 10 S. C. R. at p. 66.

of the suppliant and the balance to the credit of Todd. The power of attorney to the Union Bank of Canada was subsequently replaced by one to the Molsons' Bank. It appointed the bank Todd's lawful attorney to receive from the Receiver General of Canada, or other person authorized to pay the same, all such sum or sums of money as were then due or might thereafter become due and payable to him by the Government of Canada and to give a receipt or receipts for the same. It is also alleged that this power of attorney, which is stated to be in the regular official form, was accepted, and that it and the said agreement were approved of on behalf of the respondent by the Librarian of Parliament and the Auditor-General of Canada, the properly authorized officers in that behalf; that the power of attorney was under the circumstances irrevocable and constituted with the said agreement an absolute assignment of the whole or a portion of the salary of the said Todd; that subsequently Todd notified the Librarian of Parliament that he revoked the said power of attorney, and thereupon and thereafter the said power of attorney was wrongfully and negligently treated by the said Librarian and other officers of the Crown, and by the Crown, as being null and void; and all the monthly pay cheques becoming due to the said Todd since that time have been wrongfully and negligently paid to the said Todd and have not been made payable to the Molson's Bank as required by the said power of attorney. To the petition there is a demurrer, and it will be convenient in the first place to consider the objections stated in the eleventh and twelfth grounds thereof, which are as follows:—

“11. A claim, demand or chose in action against  
 “the Crown cannot be assigned so as to give the  
 “assignee any cause of action against the Crown  
 “by Petition of Right or otherwise.

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“ 12. The assignment of the emoluments of a public office thereafter to accrue, and whether consisting of a salary or fees or other official profits, is void on the ground that it is contrary to public policy ”.

The public officer, whose salary is alleged to have been assigned to the suppliant, was, as will have been observed, a clerk employed by the Crown in the Library of Parliament at Ottawa, and as the transaction upon which the petition is founded took place at that city, the question that is raised by the eleventh ground of demurrer, stated in general terms is, whether an assignment of a claim against the Government of Canada, made in the Province of Ontario, gives the assignee a right to bring his petition therefor in his own name; or in other words, whether the Crown, as represented by that Government is bound by the statutes that have from time to time been passed by the Legislature of that Province, to enable the assignee of a *chose in action* to bring an action thereon in his own name. By the Act of that Legislature 35 Vict. c. 12, entitled *An Act to make debts and choses in action assignable at law*, the assignee of a *chose in action* was given a right to sue thereon in his own name (1). By the Act 60th Victoria, c. 15, s. 5, the law of Ontario on this subject was assimilated to that of England under the Judicature Act, 1873, 36 & 37 Vict., c. 66, s. 25 (6), and is now to be found in *The Judicature Act of Ontario*, R.S.O. c. 51, s. 58, ss. (5) and (6). There is, I think, no reason to think that these statutes were or are binding upon the Crown; but even if it were conceded that the Crown, as represented by the Government of the Province of Ontario, was bound thereby, I should be of opinion that the Crown as represented

(1) See also R.S.O. (1877) c. 116, ss. 6 and 7; and R.S.O. (1887) c. 122 ss. 6 and 7).

by the Government of Canada is not bound. The only legislature in Canada that would have power in that respect to bind the Crown, as represented by the Dominion Government, would, it seems to me, be the Parliament of Canada.

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Then with reference to the twelfth ground of demurrer, it is, I think, well settled, that on grounds of public policy the salary of a public officer is not assignable by him (1).

That being the case, it becomes necessary to consider whether what is alleged in respect of the action of the Librarian of Parliament and the Auditor-General in any way alters the position of the Crown, or makes it liable to the suppliant. But before proceeding to that aspect of the matter it may be observed in passing that the power of attorney is on the face of it revocable, and that it is made to the bank and not to the suppliant. It was made for the latter's benefit, but the bank and not the suppliant is the assignee, so far as the transaction rests upon the power of attorney.

With reference to the other question, the strongest way of stating it for the suppliant would be that the Librarian of Parliament and the Auditor-General of Canada had for the Crown agreed with the suppliant that Todd's monthly pay cheque should be made payable to the bank. I do not suggest that what is alleged amounts to that; but if it does not, clearly the Crown is not liable. If, however, that is the construction to be put upon the petition, then it seems to me to be equally clear that neither the Librarian of Parliament nor the Auditor-General had any authority or power to bind the Crown by any such agreement; and if they made it and failed to see it carried out, whether

(1) *Flarty v. Odium*, 3 T. R. 681; *Palmer v. Bate*, 6 Moo. 28; *Wells v. Lidderdale v. Montrose*, 4 T. R. 248; *Foster*, 8 M. & W. 149 and *Arbuthnot v. Cowtan*, 3 B. & P. 328; *not v. Norton*, 5 Moo. P. C. 231.

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wrongfully or negligently, as alleged or otherwise, no petition of right would lie against the Crown for their default or negligence.

**Reasons for Judgment.**

There will be judgment for the Crown upon the demurrer to the petition.

*Judgment accordingly.*

Solicitors for suppliant: *Latchford, McDougall & Daly.*

Solicitor for the respondent: *E. L. Newcombe.*

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