1931

Nov. 17.
Nov. 27.

CLIFFORD B. REILLY.....SUPPLIANT;

VS.

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Contract—Dismissal of Civil or Military Officers

R. was, by Order in Council, appointed a member of the former Federal Appeal Board, which was created by 13-14 Geo. V, c. 62. By 20-21 Geo. V, c. 25, the above statute was repealed, two new tribunals formed, and R's position in consequence abolished. R. now claims that, as he was re-appointed in 1928 for five years, he is entitled to recover from the respondent the balance of his salary for the unexpired term. No provision was made in the repealing statutes with regard to such payments.

Held, that, except where there is statutory provision for a higher tenure of office, or, that the power of the Crown is otherwise expressly restricted, the Crown has by law authority to dismiss at pleasure, either its civil or military officers, a condition to that effect being an implied term of the contract of service.

2. That it is a settled principle of law that public office is a distinctive thing and is not contractual in its nature.

PETITION OF RIGHT by the suppliant claiming damages due to loss of salary for the unexpired term of his alleged contract of employment.

The action was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Redmond Quain, K.C., for suppliant.

A. E. Fripp, K.C., for respondent.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (November 27, 1931), delivered the following judgment.

The petitioner here claims damages for breach of an alleged contract. The facts may be briefly stated. Chap. 62 of the Statutes of Canada, 1923, amending the Pension Act, authorized the creation of a Board, to be known as the

Federal Appeal Board, the members thereof to be appointed by the Governor in Council on the recommendation of the Minister of Justice. The function of the Board was to hear and determine certain appeals from decisions of the Board of Pension Commissioners refusing applications for pension under the provisions of The Pension Act. The statute provided that of the members first appointed to the Board, other than the Chairman, one half should be appointed for a term of two years, and the others for a term of three years; by an amending statute a member of the Board was eligible for re-appointment and for a term not exceeding five years. The Chairman was to hold office during pleasure, and any member might be removed for cause at any time. In August, 1923, by Order in Council, the petitioner was appointed a member of the Board for the term of three years, at a salary of $6,000 per annum. Upon the expiration of this period the petitioner was re-appointed for a term of two years. By an Order in Council, dated August 16, 1928, the petitioner was again re-appointed a member of the Board, for the period of five years from August 17, 1928, and it is this period with which we are concerned. In the last mentioned Order in Council it was provided that the appointment of the petitioner and others therein named, might be terminated at any time "in the event of reduction in the Board's work to an extent sufficient to permit of its performance by fewer Commissioners." By Chap. 35 of the Statutes of Canada, 1930, the provisions of The Pension Act relating to the creation of the Federal Appeal Board were repealed, and provision was made for the establishment of two new tribunals to be respectively called a Pension Tribunal and a Pension Appeal Court, for the purpose of adjudicating upon applications for pensions refused by the Board of Pension Commissioners for Canada; the provisions of this statute came into force on the 1st of October, 1930, and thereupon the Federal Appeal Board ceased to exist. It is the salary for the unexpired term of the five year period which the petitioner claims as damages, amounting to $17,000 or thereabouts.

While the petitioner may have grounds for feeling that he has not been justly dealt with, still I have come to the conclusion that he cannot succeed in this proceeding. The issue in this case has a somewhat ancient lineage; that is

1931

REILLY
v.
THE KING.

Maclean J.

to say it raises the question whether, in the absence of legislation on the matter so clear and positive as to dispel reasonable doubt, an appointment to serve the State in a public capacity creates a contractual relationship between the Crown and the appointee; if there is not that relationship, actions of this nature are groundless. The cases both in England and the Dominions and also in the United States, on the question, are legion, because, as has been said, persons extruded from office are prone to wage their law against the Crown or State under which the office was held.

In British constitutional practice since 1689, and the date of the Act of Settlement, these appointments generally follow upon a statute requiring them to be made. Legislation of this sort is construed as not altering the settled law of the land unless it uses apt words for the purpose. The settled principle of law is that public office is a distinctive thing and is not contractual in its nature. Public offices are either judicial or ministerial. Judicial offices are now generally held during good behaviour, while ministerial offices are determinable at pleasure. See Chitty on Prerog. Chap VII. The Crown has by law authority to dismiss at pleasure, either its civil or military officers, because a condition to that effect is an implied term of the contract of service unless it be that there is some statutory provision for a higher tenure of office, or, that the power of the Crown is otherwise expressly restricted. *Gould* v. *Stuart* (1) and *Dunn* v. *The Queen* (2). *In De Dohsé* v. *The Queen* cited in *Dunn* v. *McDonald* (3) Lord Watson said that if a concluded contract had been made, it must have been held to have imported into it a condition that the Crown had the power to dismiss, and that if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown. See also *Nixon* v. *Attorney General* (4). Halsbury's Laws of England, Vol. 23, p. 352, lays down the law

(1) 1896 A.C. 575.

(2) 1896 1 Q.B.D. 116, at p. 117.

(3) 1897, 66 L.J.Q.B. 420 and at p. 423.

(4) 1930, 1 Ch. Div. 566 at p. 595.

in respect of the right of a public officer to compensation when his office has been abolished as follows:

> At common law no public officer has any right to compensation for abolition of his office; but when such an office is abolished by statute it is not unusual for the legislature to grant the right. In such cases the extent of the right and the person entitled thereto must be ascertained from the particular statute;

in the case before me there is no such statutory provision. American law is to the same effect. Mechem on Public Offices and Officers, p. 4, says:

> A public office is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power.

The same principle is exhaustively discussed in the case of *Connor* v. *The Mayor of the City of New York* (1). The fact that here the appointment purports to be for the term of five years does not make it any more a contract than one made to continue during good behaviour.

It is also to be observed that, on the part of the Crown, there is nothing suggestive of an agreement that the office in question here should continue for the full period for which the petitioner was appointed, or, that if the office was abolished the salary would continue for that period; in fact there could not be such an engagement, because the statute does not bestow authority upon the Governor in Council so to do. On the part of the petitioner there is nothing in the nature of a contract. He did not enter into any obligation to continue in office for the full term of the appointment; he was at liberty to resign at any time.

It is not necessary in the case before me to discuss the essentials of a public office, because the Commission under which the suppliant was empowered to act uses the word "office" as descriptive of the field of public duty to which he was appointed. There being no contract, there cannot be force in the contention of Mr. Quain for the petitioner, that the petitioner possessed a "right" which sec. 19, ss. "*c*" of the Interpretation Act preserves and which no repealing legislation could affect. There being no contract there can be no "right." As to the contention based upon the theory of a contract arising between the suppliant and the Crown, that the repealing Act of 1930 is *ultra vires* of the Parliament of Canada as interfering with property and civil rights in that it undertakes to vacate or determine the

(1) (1849) 4 N.Y. Superior Court R. (2 Sandford), p. 355.

1931

REILLY
v.
THE KING.

Maclean J.

suppliant's office, it, of course, fails of force when it is found that he is not before the Court on the basis of contract; but it is fairly obvious that the argument is a two-edged sword, for if Parliament was forbidden by the reason put forward from breaking the alleged contract, then it had no power or capacity to create a contract in the first instance. The contention that a subsequent Parliament cannot repeal a statute of a former Parliament does not require demonstration of its unsoundness: It offends an elementary doctrine of constitutional law.

The petition is therefore dismissed. In the circumstances of the case there will be no order as to costs, except, that the respondent will have the costs of and incidental to the application to re-open the argument.

Judgment accordingly.