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Sept. 17.
Nov. 3.

JOHN WILLIAM COOKE .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Militia Act—Enlistment—Military Pay—Right of Action—Jurisdiction

Held, that enlistment by a subject under the Militia Act, is in the nature of a formal transmutation of a citizen into a soldier for the time being, and as required by the defence of the realm, and does not constitute a contract between the subject and the Crown creating mutual rights and obligations.

(2) That Military officers and soldiers, while in the service of the Crown hold their positions at and during the pleasure of the Crown and no action at law lies for their pay.

PETITION OF RIGHT by the suppliant to recover his pay as a soldier in the Overseas Expeditionary Force.

The action was tried before the Honourable Mr. Justice Audette at Vancouver, B.C.

J. A. McInnis and *C. S. Arnold* for the suppliant.

A. B. McDonald, K.C., for the respondent.

The facts are set forth in the reasons for judgment.

AUDETTE J., now (November 3, 1928), delivered judgment.

The suppliant, by his petition of right, sets forth, *inter alia,* that on the 8th of April, 1915, he joined the Canadian overseas expeditionary force, and went to France on active service; that his pay was discontinued in April, 1918, because, as alleged by the Crown, he was a deserter; but the suppliant denying the same asserts that he disappeared because he was taken prisoner by the Germans. Hence the present controversy.

However, the only question of law now to be determined, before going to trial upon the facts, and which comes under Rules 126 and 161 of the Rules and Orders of this Court, is whether or not the suppliant has any right of action, which can be enforced before a Court of Law, for his pay as soldier and separate allowance and war service gratuity, assuming the facts as alleged to be true.

The parties, at the opening of the hearing, filed the following admission:

It is admitted by counsel for the suppliant and the respondent solely for the purpose of argument upon the points of law prior to setting down for trial:—

1. That the suppliant enlisted April 8, 1915, for service in the Great War, and joined the 47th Battalion, a portion of His Majesty's Canadian Expeditionary Force, at New Westminster, British Columbia.

2. That the attestation paper of suppliant completed on that occasion is in Canadian Expeditionary Force attestation paper without change of any kind in the printed portion thereof.

The suppliant was duly enlisted and engaged as a private soldier under the usual attestation paper, filed as exhibit No. 1, whereby he declared his willingness to be so attested, and that he was further willing to fulfill the engagement thus made by him to serve, the nature of which engagement he further declared as being understood by him; taking further the oath of allegiance.

It is contended by counsel for the suppliant that whereas, under the Militia Act (sec. 23 and 54) both the engagement and the remuneration are provided for, there results an engagement with mutual contractual obligation.

With that contention I am unable to agree, as, by a long catena of cases, it has already been decided that an action in law will not lie by a private soldier against the Crown for his pay, and there is in that respect no difference between a private soldier and an officer. *Leaman* v. *The King* (1). Then per Fry L.J., in *Mitchell* v. *The Queen* (2):

I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either past, present and future can be enforced in any Court of Law.

The question of the enforcement of such claims involves a radical departure from the ordinary rules of law.

Military officers and soldiers, while in the service of the Crown, hold their positions at and during the pleasure of

(1) (1920) 3 K.B.D. 663. (2) (1896) 1 Q.B. 121n.

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the Crown, and consequently the civil courts have no power to intervene in any dispute relating to military pay or pensions. 25 Hals. 48. Officers and soldiers are dismissible at will and no petition of right can be brought by them to recover pay and pension. 10 Hals. 29.

In the case of *De Dohse* v. *The Queen* (1), Lord Halsbury L.C., was of opinion, enunciating the very principle of all these engagements, that had there even been a contract it must have been subject to a reserve of the right of the Crown's prerogative to dismiss an officer (and *a fortiori* a private soldier) at pleasure and that a contract which purported to override that prerogative would be unconstitutional and contrary to public policy.

I have already had occasion to consider that question in the case of *Bacon* v. *The King* (2), where I have gathered and reviewed the authorities upon this point of law and would refer to the same.

The question of right of a soldier or officer to recover money from the Crown in respect of his pay has been fully discussed in the cases of *Grant* v. *Secretary of State for India* (3); *In re Tufnell* (4); *De Dohse* v. *The Queen* (ubi supra); *Mitchell* v. *The Queen* (ubi supra); *Smith* v. *Lord Advocate* (5); *Cooper* v. *The Queen* (6); and finally *Leaman* v. *The King* (ubi supra). See also *Gibson* v. *East India* (7); Robertson, Civil Proceedings, pp. 611, 359, 35, 643; *Dunn* v. *The Queen* (8); *Balderson* v. *The Queen* (9); *Gould* v. *Stuart* (10); *Yorke* v. *The King* (11); *Thomas* v. *The King* (12).

Coming now to a consideration of our Statute law as related to the suppliant's claim, there would seem to be no material difference between it and the English Statute law under which the *Leaman* case (*supra*) was decided.

Under the provisions of the Canadian Militia Act (R.S.C. 1906, ch. 41, sec. 10) all male inhabitants of Canada at the age of 18 years, and upwards, and under sixty, being British subjects, are liable to active service, that is (sec. 2, sub-

(1) (1886) 3 T.L.R. 114.
(2) (1921) 21 Ex. C.R. 25.
(3) (1877) 2 C.P.B. 445 at pp. 455 *et seq.*
(4) (1876) 3 Ch. D. 164.
(5) (1897) 25 R. Scotch Sess. Cases (4 Ser.) 112.
(6) (1880) 14 Ch. D. 311 at 315.
(7) (1839) 5 Bing. N.S. 262.
(8) (1896) 1 Q.B.D. 116.
(9) (1898) 28 S.C.R. 261.
(10) (1896) A.C. 575.
(11) (1915) 31 T.L.R. 220; 84 L.J. K.B. 947; (1915) 1 K.B. 852.
(12) (1928) Ex. C.R. 26.

sec. 9) to be enrolled, enlisted, drafted or warned for service. That is the supremacy of the law of the land under which every male Canadian must enlist when circumstances demand his services.

The compliance with this law, whereby the subject is so enlisted, cannot be called a contract creating mutual rights and obligations between the parties, as contended by suppliant at trial. The enlistment is more in the nature of a formal transmutation of a citizen into a soldier for the time being and as required by the defense of the realm. This expression of contract used by laymen in the English Manual has been qualified as a loose expression which is not to be construed too literally,—much more so now since it has been held in the *Leaman* case (*ubi supra*) that it could not give a legal right of action. The enlistment of the soldier in its true substance and merit is absolutely unilateral. Complying with the requirements of the statute, he submits himself to it and consents to abide by it. While, however, he undertakes to serve his sovereign, as required by law, yet there does not, from this enlistment paper or otherwise, flow a bilateral contract whereby the sovereign is deprived of his prerogative to act as he wills it. The soldier is bound to observe and obey all orders of His Majesty and of the generals and officers set over him; he is enlisted or engaged at pleasure and may be displaced by the Crown at any moment while he has no right to resign or vacate his enlistment; nor can he recover his pay, if withheld, by legal proceedings against the Crown. Clode, Military and Martial Law, 73.

The enlistment is more in the nature of a species of compact (which is intelligible and requires only the statement of it to recommend it to the consideration of any one of common sense) whereby the soldier is placed at the pleasure of the State, as referred to by Mr. Justice Willes. See Clode, On Military and Martial Law, 81.

The authority and power given the State under the Act is quite extensive. The King has the right to require the personal service of every man able to bear arms and the allegiance due from the subject renders it incumbent upon him to assist his Sovereign. The prerogative of the Crown is founded on immemorial usage, recognized, admitted and sanctioned by Parliament. Chitty's Prerogative, 46, 47.

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The facts set forth in the Petition of Right, even accepted as true, as said in the *East India* case (*ubi supra*) do not disclose the *vinculum juris,* which is of paramount necessity in a court of justice; they may however disclose an obligation *in foro conscientiae,* but that cannot be enforced in a court of law. The suppliant is left entirely at the mercy of the Crown.

Apart from the question of law, unfortunately the circumstances of the case involve a very serious complexion, in that a soldier's reputation who duly enlisted, exposed his life for the protection of his country, rests now under a cloud, upon the accusation of being a deserter, while he denies the same and asserts he was taken prisoner by the Germans. That question should be immediately and thoroughly investigated by the officers of the Crown who have in hand all the necessary machinery and material to do so. Having done so, with the result that the suppliant has established his contention, while in law he cannot recover, he would be in equity and justice morally entitled to the exercise of the mercy and bounty of the Crown in his favour. It may indeed appear to be a severe measure of justice that will deprive the suppliant of the recovery of his pay. That is the law and the duty of the Court is to decide accordingly. In the result it is a matter to be dealt with by the officers of the respondent who will have to decide whether or not the case commends itself to the bounty and benevolence of the Crown; but it is not enforceable in a court of law.

Therefore there will be judgment adjudging and declaring that the suppliant is not entitled to the relief sought by his Petition of Right, but without cost to either party.

Judgment accordingly.