BETWEEN:

JAMES SABISTON RANKIN .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

1937
Sept. 28.
1939
May 8.
Angers J.

Crown—Petition of Right—The Militia Act, R S C , 1927, c. 132, secs. 30, 32, 64, 75 to 85 inclusive—Pay & Allowance Regulations, 1927, Articles 269 & 270—The Interpretation Act, R.S.C., 1927, c. 1, s. 16—Claim for military pay and allowances while temporarily engaged as a Departmental Solicitor and Deputy Judge Advocate General disallowed —Prerogative of the Crown superseded only by express enactment—Order in Council does not constitute a contract between the Crown and suppliant.

Suppliant holds the rank of Colonel in the reserve of Non-Permanent Active Militia under the provisions of the Militia Act, R S C., 1927, c. 132. He was appointed temporary Junior Departmental Solicitor in the Department of National Defence and reported for duty on June 14, 1929. The appointment was for a period of six months, which term was extended from time to time, the last extension expiring on March 31, 1932, suppliant in the meantime having been promoted to the temporary position of Departmental Solicitor. By an Order in Council, dated November 27, 1930, suppliant was appointed Deputy Judge Advocate General and for a period of approximately one year fulfilled the two positions of Departmental Solicitor and Judge Advocate General. Suppliant's appointment as Deputy Judge Advocate General continued to March 31, 1934. The duties of the position of Departmental Solicitor and the qualifications required therefor as set out in the advertisement published by the Civil Service Commission were:

"Duties—To assist the Judge Advocate General in the legal work of his office, including advising in general law pertaining to all the Provinces of the Dominion and particularly Naval, Military and Air Force and Civil Aviation matters, especially in drafting, examining, interpreting and administering Naval, Military and Air Force law and regulations; conducting courses of instruction therein; also, when required, in important cases, to act as Counsel in Naval, Military and Air Force courts-martial, at important Courts of Inquiry and, if necessary, in Civil or Criminal Courts; and to perform other related work as required. Qualifications—Graduation from a recognized school of law; at least five (5) years of successful practice at the Bar; thorough knowledge of and practice in Civil and Criminal law; special knowledge of Military law, regulations and administration; military service, including, preferably, service in the Great War in a position of command, with experience in presiding at and conducting courts-martial; good judgment and ability to conduct courses of instruction and delivery of lectures, with wide experience in administration of Military law in all its branches; wide legal experience in counsel work before Civil Courts and Courts-martial and experience as President or Member of courts-martial."

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Suppliant's claim against the respondent is for the pay and allowances of the rank of Colonel from November 27, 1930, to March 31, 1932, less civil emolument, and for pay and allowances of the rank of Colonel from April 1, 1932, to March 31, 1934.

Held: That the Order in Council of November 27, 1930, appointing suppliant Deputy Judge Advocate General, does not constitute a contract between His Majesty the King and the suppliant, all engagements between the Crown and those in the military service being voluntary only on the part of the Crown.

2. That the prerogative of the Crown can only be superseded by an express provision in a statute and not by implication.

3. That suppliant's appointment as Deputy Judge Advocate General was at best a bare military one, and no provision having been made for payment of a remuneration as required by s. 32 of the Militia Act suppliant has no recourse against the Crown.

PETITION OF RIGHT to recover from the Crown certain pay and allowances claimed by suppliant due him as a military officer while engaged in the service of the Crown as a Solicitor in the Department of National Defence and as Deputy Judge Advocate General.

The action was tried before the Honourable Mr. Justice Angers, at Ottawa.

The suppliant appeared in person.

C. P. Plaxton, K.C. for the respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J., now (May 8, 1939) delivered the following judgment:

The suppliant, by his petition of right, seeks to recover from His Majesty the King the sum of $10,674.30.

The suppliant is a barrister and solicitor, having been admitted to the Bar of the Province of Saskatchewan several years ago, and he holds the rank of Colonel in the reserve of the Non-Permanent Active Militia under the provisions of the Militia Act, R.S.C., 1927, chapter 132.

[The learned judge here referred to the pleadings and then continued.]

The suppliant was appointed, on or about the 29th of April, 1929, temporary Junior Departmental Solicitor in the Department of National Defence for a period of six

months at a salary of $2,640 per annum. The suppliant was informed of his appointment by letter of the Deputy Minister dated April 30, 1929, and was asked to report for duty at the earliest possible date. He reported on June 14, 1929. A notification of the suppliant's appointment was sent to the Department of National Defence by the Secretary of the Civil Service Commission on the 21st of June.

The employment of the suppliant as Junior Departmental Solicitor was extended for a period of six months from the 14th of December, 1929.

Following a memorandum from the Judge Advocate General to the Assistant Deputy Minister dated November 15, 1929, and a letter from the Deputy Minister to the Secretary of the Civil Service Commission dated December 6, 1929, recommending that the classification of the position assigned to the suppliant be changed from Junior Departmental Solicitor to Departmental Solicitor, the Civil Service Commission, on the 8th of March, 1930, promoted the suppliant to the status of Departmental Solicitor; he was appointed as such for a period of six months reckoning from the 14th of December, 1929, at a salary of $3,240 a year.

The suppliant's employment as Departmental Solicitor was extended from time to time for periods of six months. The last extension covered by these certificates expired on December 14, 1931. The suppliant nevertheless continued to occupy the position of Departmental Solicitor. On February 4, 1932, an Order in Council was passed approving the minute of a meeting of the Treasury Board recommending that, in accordance with section 40 of the Civil Service Regulations, authority be granted for the continuance of the temporary position of Departmental Solicitor in the Department of National Defence until March 31, 1932, a copy of this Order in Council was filed as exhibit Q.

On the 27th of November, 1930, an Order in Council was adopted whereby the suppliant was appointed Deputy Judge Advocate General; the Order in Council, a certified copy whereof was filed as exhibit S, reads as follows:

> The Committee of the Privy Council, on the recommendation of the Minister of National Defence, advise that Colonel James Sabiston Rankin, D S O, V.D., at present employed in the Department of National

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Defence as the Departmental Solicitor in the Office of the Judge Advocate-General, be appointed Deputy Judge Advocate-General, it being desirable that there be a Deputy of the Judge Advocate-General to act for him on the occasions when he is absent from Ottawa.

The reason of the suppliant's appointment as Deputy Judge Advocate General was that the Judge Advocate General, Colonel Orde, had to go to England. He went to the Imperial Defence College where he stayed for a period of approximately one year. During that time the suppliant fulfilled the two positions of Departmental Solicitor and Judge Advocate General.

Is the suppliant entitled to receive the pay and allowances of the rank of Colonel from the 27th of November, 1930, date of his appointment as Deputy Judge Advocate General, to the 31st of March, 1932, date of the expiry of the last extension of his temporary employment as Departmental Solicitor in virtue of the Order in Council, exhibit Q, less his civil emolument as Departmental Solicitor for the same period which he declared he was willing to forego? Is the suppliant further entitled to receive the pay and allowances of the rank of Colonel from the 1st of April, 1932, to the 31st of March, 1934, balance of the alleged duration of his appointment as Deputy Judge Advocate General?

Those are the two questions which I have to determine. If the first is answered in the negative, the second of course lapses *ipso facto*.

It was urged by the suppliant that his appointment as Deputy Judge Advocate General was a military one; that he could not be appointed to that position under the provisions of the Civil Service Act which only covers civil appointments. The suppliant relied on section 19 of the Act which reads as follows:

> Save as otherwise provided in this Act or in any regulation made hereunder, neither the Governor in Council nor any minister, officer of the Crown, board or commission, shall have power to appoint or promote any employee to a position in the civil service.

It is evident that, if the provisions of section 19 are strictly complied with, as I assume they are, the appointments to positions in the Civil Service are made exclusively by the Civil Service Commission.

As previously stated, the suppliant was appointed Deputy Judge Advocate General by an Order in Council passed on

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the 27th of November, 1930. It seems to me convenient to look a little more closely at the circumstances surrounding his appointment.

On October 10, 1930, the Judge Advocate General wrote a memorandum for the Deputy Minister, a copy whereof was filed as exhibit A, in which he said (*inter alia*):

As, by reason of my attendance at the Imperial Defence College, I shall be absent from Canada for a considerable period, it is essential that there be some person at Headquarters with power to perform those duties of Judge Advocate-General which, by Statute and Regulation, are required to be performed by that Official, *persona designata*. Colonel Rankin, the Departmental Solicitor in my Office, is qualified to perform these duties and as I will, during my absence, continue to hold my appointment which, therefore, will not lapse, it would, in my opinion, be more regular to have Colonel Rankin appointed Deputy Judge Advocate-General rather than detailed to perform the duties of Judge Advocate-General. Such an appointment must, so far as I can ascertain, be authorized by the Governor in Council and, to that end, I am attaching hereto a draft submission.

While this appointment will not, in itself, carry with it any extra emoluments, I would respectfully bring to your attention the fact that Colonel Rankin has, so far, not received any permanent appointment to the Civil Service which, if it had been made some time ago, would have enabled him to have qualified for a statutory increase in salary. Moreover, this salary which he is receiving as a temporary employee is in the lowest grade authorized for a Departmental Solicitor, namely, $3,260 per annum, which is considerably less than that paid to Departmental Solicitors of other Departments performing duties no less onerous and important. He has been put to extremely heavy expense in moving his family from Regina to Ottawa, and if it would be at all possible to do something whereby his emoluments can be increased, I would recommend accordingly . . .

On December 2, 1930, the Deputy Minister of National Defence prepared a memorandum for the Minister, of which I deem it expedient to quote the first paragraph:

During Colonel Orde's absence from Headquarters next year while attending Defence College in London, Colonel Rankin will be in charge of the office of the Judge Advocate-General This will entail more important work and larger responsibility on his part, and it seems reasonable that he should receive financial recognition I therefore concur in the proposal that the Department ask the Civil Service Commission for a temporary certificate for Colonel Rankin as Senior Advisory Counsel at $4,200 per annum.

It would be understood that at the expiration of the year Colonel Rankin would revert to the position and salary of Departmental Solicitor . . .

It bears at the bottom the note "Not approved by the Minister," with the date December 3, 1930, and the signature of the Deputy Minister.

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On December 19, 1930, the Judge Advocate General wrote to the Deputy Minister attaching to his letter a memorandum of the same date received from the suppliant.

After stating in his letter that he appreciates that it is not possible at the present time to do anything to improve Rankin's status, financially or otherwise, but that such an opportunity may occur during the next year, Colonel Orde adds:

> In the event of such an opportunity occurring, my absence from Ottawa during the next year will, of course, preclude me from directly making any representations to you on Colonel Rankin's behalf, and I am writing you now, forwarding Colonel Rankin's Memorandum mentioned, so that there may be on record an intimation of my own views in the matter
>
> The question as to whether Colonel Rankin should have Military status is a matter of opinion but so far as his emoluments are concerned, whether they be paid by reference to Military or Civilian status, I consider that they should certainly be not less than those received by other Officials of the Department performing work of no greater importance and requiring no greater training than that done by Colonel Rankin

In his memorandum to the Judge Advocate General the suppliant submits the reasons why his appointment to the position of Deputy Judge Advocate General ought to be considered as a military appointment and why, in consequence, his remuneration ought to be on the same basis as that of a G.S.O. or Lieutenant-Colonel. This memorandum is quite lengthy and I do not think that it would serve any useful purpose to quote it, in whole or in part.

On January 15, 1931, the Adjutant General prepared a memorandum for the Deputy Minister; it contains, among others, the following statements:

> The marginally named officer (Colonel Rankin) will be called upon to carry out the onerous duties of Judge Advocate General during the absence of Colonel R. J. Orde, which condition will continue for more than a year, and it may be your desire that he should receive a higher rate of pay and allowances during this period, commensurate with the additional duties he is performing.
>
> In this event, it is suggested that, as it is not possible to increase his pay in the Civil Service during the period in question, that his temporary appointment be suspended until the return of Colonel Orde and that he be appointed temporarily during this period as an officer of the N.P.A.M. with pay and allowances of such rank as may be selected. . . .
>
> This could be accomplished by his employment as an officer of the N P A M, with the pay and allowances of a Lieut-Colonel, under the provisions of Article 269, Pay and Allowance Regulations, 1927.

At the bottom of this memorandum appear the following words: "Seen by Minister who does not wish to take action," followed by the signature of the Deputy Minister and the date (20/1/31).

It is clearly established that the suppliant fulfilled the duties of Departmental Solicitor and of Judge Advocate General satisfactorily. To do this he had to work overtime. The Deputy Minister of National Defence, the Adjutant General, the Judge Advocate General (Colonel Orde), the Financial Superintendent all agreed that Rankin should, during the absence of Colonel Orde, receive more adequate remuneration for his services; the only one who disagreed was the Minister; notwithstanding the suppliant's repeated endeavours to obtain an adjustment of his emoluments, the Minister persistently refused to take action. I do not think, in the circumstances, that the suppliant has any recourse against the Crown.

The only thing he could do, when he was offered the position of Deputy Judge Advocate General without any emolument was to decline to accept it; in doing this however he would likely have exposed his chances of obtaining an extension of his temporary appointment as Departmental Solicitor.

If the suppliant has any claim it must be founded upon a contract or upon statutory provisions or regulations having statutory force.

After giving the matter my best consideration, I must say that I fail to see how the Order in Council of the 27th of November, 1930 (exhibit S) can be considered as constituting a contract between His Majesty the King and the suppliant; all engagements between the Crown and those in the military service are voluntary only on the part of the Crown: *Leaman* v. *The King* (1); *Mitchell* v. *The Queen* (2); *Dunn* v. *The Queen* (3); *DeDohsé* v. *The Queen* (4); *Hales* v. *The King* (5); *Denning* v. *Secretary of State for India in Council* (6); *Grant* v. *Secretary of State for India in Council* (7); *Bacon* v. *The King* (8); *Kidd* v. *The King* (9).

(1) (1920) 3 K B 663.
(2) (1896) 1 Q B 121.
(3) (1896) 1 Q B 116
(4) (1886) 3 T.L R 114
(5) (1918) 34 T L R. 341 and 589.
(6) (1920) 37 T L R 138
(7) (1876) 2 C P D 445
(8) (1921) 21 Ex. C R 25.
(9) (1924) Ex C R 29

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Reference may also be had beneficially to Halsbury's Laws of England, 2nd ed., vol. 6, p. 487, para. 601; Robertson's Civil Proceedings by and against the Crown, pp. 355 *et seq.*

Has the suppliant a claim under statutory provisions or under regulations having statutory force? The suppliant invokes section 63 of the Militia Act; it is worded as follows:

> The Militia or any part thereof, or any officer or man thereof, may be called out for any military purpose other than drill or training, at such times and in such maner as is prescribed.

Section 64 and sections 75 to 85 of the Act contain the only provisions concerning the calling out of the Militia or any part thereof.

Section 64, dealing with active service, reads thus:

> The Governor in Council may place the Militia, or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency.

Sections 75 to 85 inclusive concern the calling out of the Militia in aid of the civil power.

I do not think that the sections above mentioned have any application to the question at issue.

It was further submitted by the suppliant that the Crown's prerogative had, in the present instance, been overridden by statute; in support of this contention the suppliant relied particularly on section 49 of the Act, which reads thus:

> When on active service, during the period of annual drill and training, and when otherwise on duty, the pay and allowances of officers and men of the Active Militia, other than the Permanent Force, shall be at such rates as may be prescribed by the Governor in Council.

And the suppliant invokes article 269 of the Pay and Allowance Regulations, 1927. It seems to me apposite to quote paragraphs (*a*) and (*b*) and part of paragraph (*c*) of article 269:

> 269. (*a*) Officers and soldiers of the Non-Permanent Active Militia detailed temporarily for full time duty, under arrangements authorized by the Minister, will receive pay of their ranks, under the provisions of Part XI of these regulations, for the days actually employed.
>
> (*b*) Such Officers and soldiers who can continue to reside at their usual place of residence will not be entitled to receive allowances in addition to the pay issuable

(c) If their duties preclude them from residing at their usual place of residence, in addition to pay, allowances will be issuable as for Officers or soldiers of the Permanent Force, at the rates pertaining to the rank for which pay is being drawn.

Article 270 enacts that "in cases where the duty may not be full time the proportion of the rates of Pay and Allowances to be paid will be as directed by the Minister according to the circumstances of each case."

It would require explicit language to supersede the prerogative of the Crown. Section 16 of the Interpretation Act (R.S.C., 1927, chap. 1) says:

No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

Speaking of the Crown's prerogatives and the influence of statutes thereon, Maxwell, in The Interpretation of Statutes, 8th edition, page 120, says:

On, probably, similar grounds rests the rule commonly stated in the form that the Crown is not bound by a statute unless named in it. It has been said that the law is *prima facie* presumed to be made for subjects only At all events, the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect.

According to section 16, the Crown cannot be ousted of a prerogative by mere implication; an express provision is required: *Crombie* v. *The King* (1); *Re W.* (2); *Rex* v. *Rhodes* (3); *Théberge* v. *Landry* (4).

In order to bring himself under the provisions of articles 269 and 270 of the Pay and Allowance Regulations the suppliant should have proved that he had been detailed temporarily for military duty. This he has not done; he did not produce any militia order, which is the method by which the Minister of National Defence may call out an officer of the Non-Permanent Active Militia on military duty.

It was contended by suppliant that the appointment made by the Order in Council of November 27, 1930

(1) (1922) 52 O.L.R. 72
(2) (1925) 56 O.L.R. 611.
(3) (1934) O.R. 44, 48.
(4) (1876) 2 A.C. 102, 106

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(exhibit S) was one made under the authority of section 30 of the Militia Act, which is in the following terms:

> The Governor in Council may establish a general staff, headquarters staff, and district staff, and may appoint a chief of the general staff, and such officers to the respective staffs as are deemed necessary, and shall define their duties and authority.

When the establishment provided for in section 30 is amended, it is customary to announce the amendment in the General Orders published in the *Canada Gazette,* which apparently was not done in the present instance.

Moreover, if the suppliant's appointment were equivalent to an appointment to the headquarters staff, his pay and allowance should have been fixed by the Governor in Council as required by section 32 of the Act, which says:

> The pay and allowances of the officers of the general staff, headquarters staff and district staff, including officers seconded for duty in the public service of Canada, shall be fixed by the Governor in Council.

There is nothing in the evidence to show that this was ever done.

If, as submitted by the suppliant, his appointment as Deputy Judge Advocate General were a military one, it was a bare appointment and no provision was made for the payment of a remuneration; the suppliant, in the circumstances, has no recourse against the respondent: see *Tucker* v. *The King* (1).

After a minute perusal of the evidence and a careful study of the law and authorities, I have come to the conclusion that the suppliant has no recourse against the respondent. I must say that I have reached this conclusion somewhat reluctantly, because the suppliant fulfilled concurrently the two positions of a Departmental Solicitor and of Judge Advocate General and did it in a satisfactory manner; in order to do so, he had occasionally to work overtime. I think that, in the circumstances, he deserved a more substantial remuneration than the emoluments allotted to a Departmental Solicitor. Be that as it may, I have no other alternative but to decide that the suppliant is not entitled to any part of the relief sought by his petition. The petition is accordingly dismissed with costs which are hereby fixed at $100.

Judgment accordingly.

(1) (1902) 7 Ex C R 351; (1902) 32 S C R 722.