1959
May 25
Dec. 3

BETWEEN:

FLORENCE J. GAMBLE .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Superannuation—Supplementary death benefits—Premiums deducted from civil servant's pay despite his irrevocable election not to participate in benefits—Crown not bound by estoppel by acts of its servants—Public Service Superannuation Act, S. of C. 1952-53, c. 47, as amended by S. of C. 1953-54, c. 64—Order in Council P.C. 1954-1017, dated July 6, 1954, Regulation 34(1).

On June 26, 1954, supplementary death benefits were made available under Part II of the *Public Service Superannuation Act* to civil servants and beginning on January 1, 1955, monthly premiums to cover the benefits were deducted from their pay cheques. Section 50 of the Act empowered the Governor in Council to make regulations prescribing forms for the purposes of Part II, and s. 52 provided that a person entitled to the benefits would not be included if by November 1, 1954, such person, in the manner and form prescribed by the regulations, elected not to come under the provisions of Part II.

P.C. 1954-1017 passed on July 1, 1954, provided:

"34(1)—An election under s. 52 of the Act not to come under the provisions of Part II of the Act shall be made by completing and signing

(a) an election in Form P in the case of a person mentioned in paragraph (a) of subsection (1) of s. 52 of the Act . . . and subject to subsection (2) of this section, sending it to the Minister within the time prescribed by the Act for making the election."

The suppliant's husband, G, a Post Office Department employee, on September 3, 1954, signed a Form "P" and sent it to the Minister who received it four days later. Notwithstanding the notice, deductions for premiums for death benefits were made monthly from G's pay cheques. It was not until G's death in 1957 that competent authorities ascertained G had made an irrevocable election not to participate in the death benefit plan.

In an action to recover the benefits covered by the premiums paid, it was admitted that G was aware of the deductions and did not draw them to the attention of the respondent; but it was contended for the suppliant that the so-called election was made in a form which had never been prescribed and was therefore invalid; and that the Crown, having accepted the premiums and led G to believe he was entitled to the benefits, was estopped and could not refuse to pay them.

Held: That in enacting Regulation 34(1) it was not necessary to employ the word "prescribe" so long as the language used expressed its meaning. The word "shall" followed by the words "be made by completing and signing an election in Form P" imposes a peremptory order and lays down that Form "P" and no other must be used.

2. That in determining whether the suppliant is entitled to be paid the sum claimed, acts of omission or commission by servants of the Crown can have no bearing on the issue, the suppliant's rights or lack of rights is a matter of law to be determined in accordance with the provisions of Part II of the Act, and nothing else is relevant. *Nixon v. Attorney General* [1931] A.C. 184, 193.

3. That the theory of estoppel cannot be invoked against the Crown. Where a particular formality is required by statute, no estoppel will cure the defect. Here G, in order to be entitled to supplementary death benefits had to refrain from making an irrevocable option not to participate, and this he failed to do. *The King v. The Royal Bank of Canada* (1919) 50 D.L.R. 293, 304; *Millet v. The Queen* [1954] Ex. C.R. 562, 570 followed.

PETITION OF RIGHT to recover an amount alleged payable to suppliant as supplementary death benefits under the *Public Service Superannuation Act.*

The action was tried before the Honourable Mr. Justice Kearney at Windsor.

James Francis, Q.C. for suppliant.

S. Samuels for respondent.

KEARNEY J. now (December 3, 1959) delivered the following judgment:

The purpose of the suppliant's action is to obtain from the respondent the sum of $3,750, to be taken out of the Public Service Death Benefit Account established under

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Part II of the *Public Service Superannuation Act*, S. of C. 1953-54, c. 64, to which her late husband had allegedly contributed from its inception until his death.

Excepting the relevancy of certain evidence which was given at the hearing, there is no dispute about the facts in this case.

The suppliant's husband, the late William H. Gamble, was in the employ of the Post Office Department, at Windsor, Ontario, from April 20, 1921, until his death on August 27, 1957. On June 26, 1954, supplementary death benefits became available under Part II of the Act. The benefits consisted of what might be called a simple form of term life insurance on a diminishing return basis from age sixty-one. Only those civil servants who elected not to come under the said Part II were excluded, and the others were to pay, beginning January 1, 1955, a monthly premium of 10¢ for each $250 of benefit, through deductions from their monthly pay cheques. Entitlement to a bonus of two months' salary was lost to those members of the public service who did not opt out of the benefits, while it was maintained without contributions by those who declined the new gratuity. It is admitted that the late Mr. Gamble sent to the Minister of Finance a notice known as Form "P" and described hereunder.

PUBLIC SERVICE SUPERANNUATION ACT (PART II)

Form "P"

Name ..... Gamble (surname) William Henry (given names in full)

Date of birth ..... 1897 Jan. 9 Sex ..... Male

Department ..... P.O. Branch ..... Letter Carrier

Location ..... Windsor Annual Salary 3060

Pursuant to section 52 of the Public Service Superannuation Act, I hereby elect NOT to come under the provisions of Part II of that Act and I understand that this my election is irrevocable.

Dated at ..... Windsor this ..... 3rd day of ..... Sept. 1954.

(Sgd.) A. Caird P.S. 3
Signature of Witness

(Sgd.) W. H. Gamble
Signature of Employee

It is also admitted that the said notice was received by the Minister on September 7, 1954, which was within the prescribed delay.

It appears that this notice was not brought to the attention of the Comptroller of the Treasury who was unaware of it until sometime after Mr. Gamble's death. In the meantime monthly deductions totalling $42.12 were made from his salary, and an immediate interim death benefit of $562.50, or one sixth of the death gratuity as mentioned in Document No. 1 attached to the Statement of Agreed Facts, was sent to the suppliant. Subsequently, when the competent authorities had ascertained that the late Mr. Gamble had made an irrevocable election not to participate in the death benefit plan, two cheques were mailed to the suppliant: one for $37.50, representing the difference between $600, or two months of her late husband's salary, payable pursuant to the *Civil Service Act,* R.S.C. 1952, c. 48, s. 56, and the amount of $562.50 already in her possession; and another for $42.12 as refund of premiums deducted.

It is admitted that the late Mr. Gamble was aware of the deductions which were being made, to which he did not draw the attention of the respondent. It is claimed for the suppliant that the so-called election not to participate in the death benefits was not made in a form prescribed and was therefore invalid, and that, having accepted premiums from the suppliant's husband and having led him to believe that he was entitled to the supplementary death benefits, the respondent cannot refuse to pay such benefits.

The first issue is whether a valid form of election was ever prescribed by Regulation passed by Order in Council, as contemplated in ss. 50 and 52 of Part II of the Act, the pertinent provisions of which are hereunder set out and in which I have underlined certain words for the sake of emphasis.

50(1)—The Governor in Council may make regulations for carrying the purposes and provisions of this Part into effect and, without restricting the generality of the foregoing, may make regulations

(*j*) *prescribing forms* for the purposes of this Part.

52(1)—Notwithstanding anything in this Part, the expression "participant" does not include

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(*a*) a person employed in the Public Service on the 1st day of July, 1954, . . . if that person, on or before the 1st day of November, 1954, *in such* manner and *form as the regulations prescribe,* has elected not to come under the provisions of this Part.

By P.C. 1954-1017 Regulation 34(1), *inter alia,* was passed on July 6, 1954, as more fully appears on reference to Vol. LXXXVIII—(page 874 No. 14) of *The Canada Gazette,* Part II, Statutory Orders and Regulations, dated Wednesday, July 28, 1954. It contained under Schedule III, in identical terms, Form "P" as hereinbefore described. The relevant portions of Regulation 34(1), wherein I have supplied the emphasis, read as follows:

34(1)—An election under section 52 of the Act not to come under the provisions of Part II of the Act *shall be made by completing and signing*

(*a*) *an election in Form P* in the case of a person mentioned in paragraph (*a*) of subsection (1) of section 52 of the Act . . .
and, subject to subsection (2) of this section, sending it to the Minister within the time prescribed by the Act for making the election.

The word "prescribe" is nowhere to be found in P.C. 1954-1017 and as far as I can judge, but for this omission, there would be little, if anything, left to support the suppliant's submission that the Order in Council failed to prescribe a valid form of election as required by the Act.

I do not think that in enacting Regulation 34(1) it was necessary to employ the word "prescribe" so long as the language used expressed its meaning. It is not an abstruse word but one which has well-known synonyms, such as "direct" and "order." See Roget's *Thesaurus of English Words and Phrases,* 1958 ed. No. 693, p. 250 and *Words and Phrases,* Permanent Ed., Vol. 33, p. 409. Webster's *Dictionary of Synonyms,* First Ed., p. 645, states:

Prescribe . . . usually implies that the aim is to give explicit directions or clear guidance to those who accept one's authority or are bound to obey one's injunctions.

Among the definitions of "prescribe" the *Shorter Oxford English Dictionary,* Third Ed., p. 1573, includes "to lay down," and at p. 412 of *Words and Phrases* (*supra*) reference is made to decisions which hold that "..... the word 'prescribe' has a well-defined legal meaning, denoting to lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; ....."

The word "shall" followed by the words *"be made by completing and signing an election in Form P"* imposes a peremptory order and lays down authoritatively and clearly that Form "P", and no other, must be used in the present instance. *An Act respecting the Form and Interpretation of Statutes,* R.S.C. 1952, c. 158, s. 35(28) provides that " 'shall' is to be construed as imperative . . ." The language used in the regulation and the form employed in the Order in Council, in my opinion, express the purport of the word "prescribe" almost as forcibly and clearly as if the word itself had been used; and, if after the words which I have underlined in Regulation 34(1)(*a*) a clause such as "which is hereby prescribed and set out in Schedule III hereof" were inserted, it would constitute little more than unnecessary amendment. I do not think there is any need to include by implication the use of the word "prescribe", although this could be done if the existing language of Regulation 34 were insufficient to carry out the intention of Parliament.

The second point in issue is whether the suppliant is entitled to be paid the sum claimed in virtue of Part II of the Act because of the acts of omission or commission by the servants of the Crown. Subject to objection, hearsay evidence was admitted, which indicated that the husband of the suppliant stated on more than one occasion that he thought he was entitled to supplementary death benefits. Objection was also taken to copies of Documents Nos. 1 and 2, attached to the Statement of Agreed Facts filed by the parties, which showed that civil servants in the Post Office and Finance Departments considered that the late Mr. Gamble had been a participant in the supplementary death benefits and that he was treated as such. I do not think it is necessary for me to pass on the admissibility or probative value of this evidence because it does not matter whether or not, or for how long, responsible officers in the Department of Finance, or the Post Office Department, or elsewhere, regarded the husband of the suppliant as a participant whose heirs would be entitled to share in the supplementary death benefits. What certain members of the Civil Service, or the husband of the suppliant, or she herself thought she was entitled to receive can have no bearing on this issue. As clearly pointed out by counsel for the respondent, the suppliant's rights or lack of rights

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is a matter of law to be determined in accordance with the provisions of Part II of the Act, and nothing else is relevant.

The learned president of this Court, in the unreported case of *Martindale v. The Queen,* dated June 27, 1957, which dealt with the rights of a retired civil servant to pension benefits under Part II of the *Civil Service Superannuation Act,* R.S.C. 1927, c. 24, and s. 24(2) of the *Public Service Superannuation Act,* S. of C. 1952-53, c. 47, stated:

> The fact that the responsible administrative officers of the various government departments treated the suppliant first as being subject to the Civil Service Superannuation and Retirement Act and later as being a civil servant to whom Part II of the Civil Service Superannuation Act applied cannot help him. The assumption of the various departmental officers charged with the administration of superannuation that Order in Council P.C. 52/517 of April 6, 1925, had the effect claimed for it did not give it such effect. The suppliant's right or lack of right is a matter of law.

A similar point arose in the United Kingdom under the *Superannuation Act* of 1859 in *Nixon v. Attorney General*[1], affirming the judgment of the Court of Appeal[2]. It was held that a Treasury Minute under which the suppliant had been granted a retirement allowance in excess of that provided in s. 2 of the *Superannuation Act* was not binding on the Crown. Viscount Dunedin stated:

> My Lords, as to a special position being held by these gentlemen on contract, the answer to that, I think, is absolutely conclusive. If you find that the statutes give the Lords of the Treasury a discretion, that is their power, and their only power, and they cannot possibly by contract take themselves out of it. They might by contract possibly involve themselves in personal liability, but they never could involve the Crown, because they are not authorized to make any such contract.

Counsel for the suppliant further submitted that she and her husband had been lulled into a feeling of false security by the silence of the responsible agents of the government whose duty it was to speak, and that the respondent is responsible for such negligence. If this situation existed, it was largely of the suppliant's and her husband's own making. There is no clear-cut evidence as to why Mr. Gamble did not draw the attention of the Department to the election on Form "P" which he had signed. If he had done so his Form "P" card undoubtedly

[1] [1931] A.C. 184, 193. [2] [1930] 1 Ch. 566.

would have been brought to light, thus rendering indefensible the claim herein alleged. It is possible that he may have been advised to refrain from doing so, as the evidence shows that the situation in which he found himself was the subject of discussions inside and outside the Federated Association of Letter Carriers. It may have been thought or hoped that by silence Mr. Gamble might retain some chance of opting one way or the other at a later date according to where his advantage lay. It so happened that he died before reaching the age of sixty-one and his estate stood to gain if it were entitled to participate in the benefits.

It goes without saying that if Form "P" signed by Mr. Gamble had been brought to the attention of the Comptroller of the Treasury, the respondent would not have deliberately continued to make deductions from his salary; but in any event I do not think that this action by one or more responsible government officials had the effect of changing the law or justifying an estoppel whereby the Crown could not show that Mr. Gamble was not a participant. It is well established that the theory of estoppel cannot be invoked against the Crown. As it was said in *The King v. The Royal Bank of Canada*[1] by Cameron J. of the Manitoba Appeal Court,

> It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them.
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> Everest & Strode, Law of Estoppel, page 8. This rule has been frequently applied in Canada, and I am not aware that it has ever been rescinded or relaxed.

Counsel for the suppliant, however, urged that an exception should be made to the applicability of estoppel against the Crown where the equivalent of an insurance policy is involved, as in this case. Jurisprudence cited in support of this submission referred to cases between subject and subject and, in my opinion, is inapplicable in a suit against the Crown. In the case of *Millet v. The Queen*[2], which is very similar to the present one and which concerned a claim under *The Veterans Insurance Act*, S. of C. 1944-45, c. 49 and amendments, Fournier J. considered the question of

[1] 50 D.L.R. 293, 304.

[2] [1954] Ex. C.R. 562, 570.

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whether the Crown, having accepted payment of premiums, was estopped from alleging that the conditions set out in the insurance policy had lapsed or become null and void.

The Veterans Insurance Act and its regulations, in my opinion, is the law of the land applicable to this contract of insurance. The contention that these regulations did not bind the parties or have force of law is not based on any sound reason. They are not repugnant to or beyond the reasonable contemplation or purview of the terms of the Act. This being the case, I would be inclined to follow the principle laid down in *Phipson on Evidence*, 8th ed., p. 667, in fine, viz:—

> Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

The formality required of Mr. Gamble in the instant case was of a negative character. In order to be entitled to supplementary death benefits he had to refrain from making an irrevocable option not to participate, and this he failed to do.

Evidence was given that the late husband of the suppliant had been in the employ of the Postal Department for over thirty-six years and that he was a war veteran who had been wounded four times and was in receipt of a disability pension. It is true that it would have been more advantageous for his widow if Mr. Gamble had not signed an irrevocable option not to participate in the supplementary death benefits, and it is regrettable that by reason of her husband's long and distinguished service she could not receive further benefits on compassionate grounds. Equity or sentiment, however, can play no part under the circumstances and I have no alternative but to dismiss the suppliant's claim with costs.

Judgment accordingly.