

Between

HIS MAJESTY THE KING.....PLAINTIFF;

1905
Dec. 9.

AND

C. A. DUGASDEFENDANT.

Public officer—Judge of Yukon Court—Living expenses—“Appointee of Dominion”—Ratification of payments—Recovery of money paid.

The defendant was appointed a Judge of the Supreme Court of the Yukon Territory on September 12th, 1898. By section 5 of *The Yukon Territorial Act, 1898* (61 Vict. c. 6, s. 5 (3)) as such Judge he became a member of the council constituted to aid the Commissioner in his administration of the Territory. An order in council was passed on the 7th October, 1898, appointing him “to aid the Commissioner in the administration of the Territory,” and since that time up to action brought he had continued to act as a member of the council. In addition to the salary paid to him as such Judge, certain provision for living expenses was made from time to time by Parliament in his behalf. By orders in council of 7th of July, 1898, and of the 5th of September, 1899, relating to officers for the administration of the Yukon district, it was provided that such officers were, in addition to their salaries, to be furnished with “quarters” and “such living allowance as may from time to time be fixed by the Minister of the Interior,” and it was further provided therein that the provision mentioned should apply to “all appointees of the Dominion who had been or might be appointed to the staff for the administration of the Yukon Territory.”

From the 19th of October, 1900, until the 30th of June, 1902, the defendant was furnished with a residence at Dawson City, and supplied with light and fuel, the bills for rent and for light and fuel, and for certain other domestic requirements, being paid by or under the authority of the Commissioner of the Yukon Territory. The payments so made were fully reported to the Minister of Public Works, who was responsible for the administration of the appropriation, and vouchers, showing on the face of them the service for which the moneys were expended, and giving full particulars, were forwarded to the Department of Public Works at Ottawa, and no objection was taken thereto at the time by any one in that department. The Commissioner, whose duty it was to administer the government of the Territory under instructions from the Governor in Council or the Minister of

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the Interior, stated he had directions from the latter that in addition to payment for the services of the officers employed in the administration of public affairs "all the public employees were to be sheltered and fed," and that it was in pursuance of these instructions that he made the arrangements and provisions mentioned on behalf of the defendant. Furthermore, a letter was produced in evidence written by the Deputy Minister of Justice to the Deputy Minister of Public Works by which it appeared that at that time the Minister of Justice considered it desirable and necessary that residences should be provided for the Judges of the Territory.

Held, that the defendant was an "appointee of the Dominion" on the staff for the administration of the Yukon Territory within the meaning of the order in council of 5th September, 1899, and so entitled to the quarters and a living allowance provided thereunder.

2. That the circumstances disclosed approval and ratification by the Minister of the Interior and the Minister of Public Works of the action of the Commissioner in making the expenditures in question for the benefit of the defendant.

INFORMATION for the recovery of certain moneys paid by the Crown on behalf of one of its officers.

The facts of the case are stated in the reasons for judgment.

May 31st and June 14th, 1905.

D. J. McDougal, for the plaintiff, contended that the defendant was not entitled to have his rent, light and fuel provided by the Crown in addition to his "living allowances." When Parliament made an appropriation for living expenses, it must be assumed that the Crown was not to become liable for such charges as rent and light and fuel. Parliament having once dealt with the matter, there was no room for construction of orders in council and regulations applying to officers not specifically dealt with by Parliament.

As to payment of these charges by the officers of the Crown, their acts do not estop or bind the Crown in any way. *Anson on the Constitution* (1); *Am. & Eng. Ency. of Law* (2); *Throop on Public Officers* (3); *Mechem on Public Officers* (4). It would require direct parlia-

(1) (Crown) p. 335.

(2) 2nd ed. vol. 23, p. 390.

(3) pp. 445-448.

(4) Secs. 855-857, 862.

mentary authority to validate such payments by the Minister of Public Works. *A fortiori* would this be true of payments by subordinate officers of the Minister's department. Furthermore, if these moneys were paid under a mistake of law they can be recovered back. *Price v. Percival* (1); *Am. & Eng. Ency. of Law* (2).

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[BY THE COURT: Is there not a fund provided by Parliament every year out of which these expenses might have been properly paid?]

There is an appropriation for buildings used for *public* purposes, not for private purposes. The defendant's residence was not a public building of the country.

N. A. Belcourt, K. C., for the defendant, argued that defendant was more than a Judge of the Yukon Territorial Court; he was also specifically appointed as an officer to assist in the administration of justice in the territory. Hence he had an undoubted status to rank as an "appointee of the Dominion" within the terms of the order in council of the 5th September, 1899, which made provision for quarters and rations to the officers in whose behalf it was passed.

There was parliamentary sanction for these payments in question, and if there was not in the first instance, there has been ratification by Parliament in not rejecting the accounts showing such payments.

In answer to the argument that the defendant's residence was not a "public building," all that need be pointed out is that Judge Dugas held chambers at his house, and clearly that was a use of the building for public purposes.

Furthermore, no money was paid to Judge Dugas, and the information must fail as a claim for the recovery of money paid to the defendant.

(1) *Stu. K. B.* 189.

(2) 2nd ed. vol. 23, p. 403.

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Finally, these moneys were paid by the Minister of Public Works out of funds within his disposal for public purposes. The court will not interfere with the exercise of discretion by the Minister in a matter of departmental administration.

THE JUDGE OF THE EXCHEQUER COURT (now December 9th, 1905), delivered judgment.

The defendant is a Judge of the Supreme Court of Judicature in and for the Yukon Territory. From the 19th of October, 1900, until the 30th of June, 1902, he was furnished with a residence at Dawson City, in the said Territory, and supplied with fuel and light for such residence. From the date first mentioned to the 19th of February, 1902, he occupied what is spoken of as the Starnes House, and afterwards the Noel House. An officer of the Crown paid the rent of these houses during the defendants occupation thereof, and also paid for the fuel and light used, and for some materials supplied and work done in connection with the defendant's occupation, such as banking the house and putting in electric light fittings. The sums so paid were paid out of public moneys, and according to the particulars in the information amounted to \$4,216.38. For the recovery of these sums of money the information is filed.

The plaintiff's case is put in the alternative. In the first place the amount mentioned is claimed as money paid for the defendant at his request, and for materials supplied to, and work and labour done for, him at his request. There is also a claim for the use and occupation of the houses mentioned. Then, in the second place, it is said that the residence, fuel, light and other things mentioned were furnished to the defendant by the officers of the Crown without any lawful or other authority for so doing, and that the defendant with

full knowledge of this fact accepted the benefit of the things so furnished, whereby he became liable to restore the same to the Crown or to make due compensation or payment therefor. The substance of the defence is that what was done by the Crown's officers in the premises was done without the defendant's order or request, and with due authority and in accordance with the conditions and arrangements under which he was at the time to perform his duties as such judge.

The defendant was appointed Judge of the Territorial Court of the Yukon Judicial District on the 12th of September, 1898. By the fifth section of *The Yukon Territory Act*, as enacted in 1898, he became *ex officio* a member of the council that was constituted to aid the Commissioner in the administration of the Territory (1). That section was repealed in 1899 (2), and a new section substituted therefor, which did not contain the provision that the judge should be *ex officio* a member of the council, but in the meantime he had by an order in council passed on the 7th of October, 1898, been appointed "to aid the Commissioner in the administration of the Territory"; and he has since continued to act as a member of the council. By the Act of Parliament, 61 Vict. c. 52, s. 4, a salary of four thousand dollars per annum was provided for the Judge of the Territorial Court of the Yukon Territory. By *The Appropriation Act*, (No. 5) 1900 provision was made for a salary of the same amount for a second Judge of the Territorial Court (3), and the salaries of both judges was increased to five thousand dollars in 1901 (4). And then in 1902 provision was made for the salaries of three judges of the court at the rate of five

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(1) 61 Vict. c. 6, s. 5 (3).

(2) 62-63 Vict. c. 11, s. 1.

(3) 63-64 Vict. c. 5, Schedule "B,"

(4) *The Appropriation Act (No. 2)*

1901; Schedule "B," p. 49, and 1

Edward VII., c. 39, s. 4.

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thousand dollars each, per annum. Provision has also been made from time to time for the payment of the travelling expenses of the Judges of the Territorial Court (1). So far there is nothing unusual in the provision made by the judges of this court. But, owing to the exceptional conditions existing in the Yukon Territory, other provision and allowances that are not usual in the case of judges, were made for their maintenance and to enable them to perform the duties attaching to their offices. Some of these allowances were made with the express authority of Parliament. In 1899 Parliament appropriated for the year ending the 30th of June in that year, the sum of \$957.35 for "supplies for Judge Dugas," and the sum of \$1,500 for the "living expenses of one Judge" in the Yukon Territory (2); and for the year ending the 30th of June, 1900, the sum of \$4,000 for the "living expenses of two Judges" in that Territory (3). In 1900 the amount for the living expenses for the two judges for the year ending on the 30th of June, 1901, was increased to \$6,000 (4). The same amount was voted in 1901 for the living allowances of the judges for the year ending the 30th of June, 1902 (5). And in 1902 the sum of \$5,000 was appropriated for the living allowance of each of the three judges of the court for the year ending the 30th of June, 1903 (6). In addition to such allowances the defendant was, prior to June 30th, 1902, furnished, as has been stated, with quarters or a residence, and with fuel and light therefor.

(1) *The Appropriation Act (No.1)* 1899; Schedule "B". p. 35. *The Appropriation Act (No.5)* 1900; Schedule "B", p. 47. *The Appropriation Act (No.2)* 1901; Schedule "B". p. 49. *The Appropriation Act* 1902; Schedule "B" p. 21.
 (2) *The Appropriation Act (No.1)* 1899; Schedule "A", p. 11.

(3) *The Appropriation Act (No.2)* 1899; Schedule "B", p. 28.
 (4) *The Appropriation Act (No.5)* 1900; Schedule "B", p. 47
 (5) *The Appropriation Act* 1901; Schedule "B", p. 49.
 (6) *The Appropriation Act* 1902; Schedule "B", pp. 21 and 22.

By the fourth section of *The Yukon Territory Act* (1); it was provided that the Commissioner should administer the government of the territory under instructions from time to time given to him by the Governor in Council or the Minister of the Interior. That Act came into force on the 13th of June, 1898. On the 7th of July following an order in council was passed on the recommendation of the Minister of the Interior, making provision for the appointment of a number of officers for the administration of the Yukon District, and prescribing the salaries that were to be paid to such officers. And it was thereby provided that in addition to such salaries all of the officers mentioned should be furnished with quarters and rations. By a further order in council on the same subject, passed on the 5th of September, 1899; the order of the 7th of July, 1898, was amended by substituting for the word "rations" the words "such living allowance as may from time to time be fixed by the Minister of the Interior"; and it was further provided that the provision as amended should apply to "all appointees of the Dominion" who had been or might be "appointed to the staff for the administration of the Yukon Territory." So that under the order of July 7th, 1898, as amended, any person appointed to the staff for the administration of the Territory was entitled to (1) his salary as prescribed; (2) quarters as provided; and (3) such living allowance as the Minister of the Interior might determine. The defendant arrived at Dawson on the 17th of October, 1898. At that time Mr William Ogilvie was Commissioner of the Territory. Thinking that the defendant was to be treated in the same way that other persons appointed to office in the Territory were treated, the Commissioner made provision for the defendant to board and lodge at the Fairview Hotel at

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Dawson. That arrangement continued for two months, after which the defendant was furnished with quarters at the court house. When a second judge was appointed for the Yukon Territory it became necessary to take the judge's quarters in the court house to provide a second court room; and the Commissioner leased the Starnes' house for a residence for the judge. The defendant, as has been seen, occupied this house from the 19th of October, 1900, until the 19th of February 1902, when he moved or was moved, to the Noel house in which he resided until the 30th of June of that year. The rent for both houses was paid out of public moneys by an officer of the Department of Public Works; and while the defendant was in the occupation of these houses the materials and work mentioned in the information were furnished and performed for him in connection with the heating and lighting of these houses. What the Commissioner of the Territory did in this behalf he reported to the Minister of the Interior, and what the officer of the Department of Public Works, who made the payments, did, was fully and duly reported to the Minister of Public Works or to the proper officer of his Department. Regular vouchers, showing on the face of them the service for which the moneys were expended, and giving full particulars, were duly forwarded to the Department of Public Works at Ottawa; and so far as appears, no objection was taken thereto by anyone in the Department, or until a comparatively late date by anyone in the Audit Office. The payments were made in the usual way, and as other like payments were made, out of moneys appropriated by Parliament for rents, fuel, lighting etc., of public buildings, in the Yukon Territory, such appropriations having been duly placed by the Governor in Council at the disposal of the Minister of Public Works for the services mentioned. The resi-

dence with free fuel and light was furnished to the defendant and accepted by him as something for which provision had been made, and to which he was entitled, in addition to his salary and living allowance. It is now contended that that was a mistake, and that there was no lawful authority for furnishing the same, and that is the principal question in issue in this case.

The view that there was no lawful authority for the expenditure mentioned in the information is in the main supported by the contention that the expression "living allowance" includes the lodging, quarters, or residence of the person to whom such allowance is made; and that as the defendant had a living allowance he was not entitled to free quarters or a residence. It will of course be conceded that the expression "living allowance" may have the meaning contended for, but it may also be used with propriety in a narrower sense. A living allowance for one who is also provided with free lodging, quarters or a residence will not include his lodging, quarters or residence, while of course it must include these things where no such provision is made. So that the words "living allowance" are not of themselves conclusive of anything. In each case it is a question of intention or agreement to be determined from the terms used, or the arrangements come to. That will be made clear, I think, if we turn to the orders in council of the 7th of July, 1898, and the 5th of September, 1899, to which reference has already been made, where a clear distinction is drawn between quarters and living allowances. As has been seen the persons to whom these orders in council were applicable were entitled to their salaries, to quarters, and to the living allowances provided for them. And that brings us to the question: Did these orders in council apply to the defendant either as a Judge of the Territorial Court,

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or as a member of the Territorial Council? Was he an "appointee of the Dominion," and was he "appointed to the staff for the administration of the Yukon Territory?" Having been appointed by the Governor in Council to be a Judge of the Territorial Court and a member of the Territorial Council, there can be no question that he was an "appointee of the Dominion" within the meaning of the order. It is clear also that his duties in respect of both offices had relation to "the administration of the Yukon Territory." Whether anything less or different was intended by the use in the order of the words "to the staff for the administration of the Yukon Territory" is not so clear. There is nothing, however, to lead to the conclusion that the word "staff" was used to limit the operation of the order to any particular class of officers in the Territory; and that being the case no reason suggests itself why any distinction should in respect of quarters be made between the judges and other persons employed in the administration of public affairs in the Territory. As a matter of fact no such distinction was made. The same exceptional conditions applied alike to all, and all were treated alike. Mr. Ogilvie, the Commissioner at the time, says that he had directions from the Minister of the Interior that in addition to payment for their services "all the public employees were to be sheltered and "fed." Acting as he believed in accordance with his instructions, the Commissioner made the arrangements and provision for the defendant that have been mentioned. From a letter of the 12th of December, 1900, from the deputy of the Minister of Justice to the deputy of the Minister of Public Works, it appears that at that time the Minister of Justice considered it desirable and necessary that residences should be provided for the two Judges of the Yukon Territory. So

that whatever question may have arisen subsequently, it seems to me to have been well settled and understood at the time that the defendant was to have quarters or a residence in addition to the living allowance then being made to him.

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The arrangements for his residence were made by the Commissioner whose duty and authority it was to administer the government of the Territory under instructions from the Governor in Council or the Minister of the Interior. The arrangements made were in accordance with the general policy indicated in the orders in council that have been mentioned; and though the question is not free from doubt, I incline to the view that these orders were applicable to the defendant's case. But whether they were or not, the Minister of the Interior, from whom the Commissioner was to take instructions as well as from the Governor in Council, must I think, be taken to have approved and ratified what the Commissioner did in the premises. When the matter came under the control of the Minister of Public Works, his officer at Dawson continued the arrangements that had been made and the practice that he found in existence. He made no new departure. The house that was provided for the defendant, having been rented by or with the authority of the Commissioner, for what was deemed to be a public purpose, was treated as a public building; and the rent of it, and the cost of heating and lighting it was, as in other like cases, paid out of a parliamentary appropriation for rents, fuel, and light, etc. of public buildings in the Territory; the administration of the appropriation having been entrusted to the Minister of Public Works by the Governor in Council.

Under all the circumstances I think the issue as to whether there was lawful authority for making the expenditure complained of, must be found for the

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defendant. That being so, it is not necessary to consider the further question that would have arisen if the finding had been the other way, namely, whether the defendant would have been liable to make good to the Crown the amounts so expended if such expenses had been incurred by mistake and without lawful authority.

There will be judgment for the defendant.

Judgment accordingly.

Solicitor for the plaintiff: *D. J. MacDougal.*

Solicitors for the defendant: *Belcourt & Ritchie.*
