IN THE MATTER OF THE PETITION OF RIGHT OF 1921

May 19.

LUCIEN C. G. T. BACON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Officer in Military Service—Gratuity—Nature of—Right of Action—Discretion of Executive Officer—Appeal.

Held: That a gratuity to a military officer is in its very nature a matter depending entirely upon the grace and bounty of the Crown, and that no action will lie against the Crown to recover the same.

2. That the word "entitled" used in orders in council relating to such a gratuity should not be construed as setting up a contractual relation between the officer and the Crown, which would give rise to a right of action.

3. Where there is a discretion vested in an executive officer by order in council having the force of law, no appeal lies to the courts from the exercise of such discretion.

PETITION OF RIGHT seeking to recover a certain amount representing military gratuity provided for under certain orders in council for services in the Imperial Medical Corps.

April 28th, 29th and 30th, 1921.

Case heard before the Honourable Mr. Justice Audette, at Quebec.

R. Guay, K.C., and *J. C. Frémont, K.C.*, for suppliant.

J. P. A. Gravel and *H. H. Ellis*, for the Crown.

The facts are stated in the reasons for judgment.

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AUDETTE J. now (May 19th, 1921) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,503.75, as the amount representing the military gratuity he claims to be entitled to recover under the orders in council No. 2389 and No. 3165 respectively, filed herein as exhibits No. 6 and No. 1, for services in the Imperial Medical Corps.

After having obtained leave of absence, and having temporarily severed his connection with the Canadian Military forces, the suppliant obtained service in the Imperial forces, and as a result of such service he claims to be entitled, under the above mentioned orders in council, to a Canadian military gratuity for which he now sues.

The Crown, by its statement in defence, avers, *inter alia*, that the petition of right does not disclose a right of action; but that if it does a bonus paid to suppliant in England should be deducted therefrom and moreover calls upon him to account for deficiences in accoutrement and equipment under his control during service in his Canadian brigade. The Attorney-General furthermore, by way of set off and counterclaim, asks that before any moneys be paid, if any should be found due by the suppliant, that an account be taken of the moneys received by the suppliant between the 15th April, 1915, and the 10th September, 1915—that is before he left to take service in the Imperial Force—being canteen funds of the 41st Battalion, Canadian Expeditionary Force, amounting to $19,948.70.

The all important question which is met with *in limine* is whether or not a right of action exists for the recovery of a military gratuity under the orders in council, exhibits 1 and 6.

As a prelude, it might be said it would seem that the payment of such gratuity is absolutely discretionary,—that it is left entirely to the discretion of the executive or of the officer charged with the administration of the matter. The 4th paragraph of the order in council, exhibit 6, reads: "It is further recommended when application for gratuity is *approved.*" . . . It is therefore not paid *de plano.* That is, it is subject to approval by the officer in charge, the Paymaster General, Militia and Defence, as defined in clause 15 of the order in council, exhibit No. 1, which also contains by itself another discretionary clause.—The application for the recovery of such gratuities would therefore appear to be subject to approval, involving a discretion to be exercised and under clause 15, there is a particular person (*persona designata*) who is charged with exercising that discretion. If the Crown, by its proper officer, has thus exercised a discretion, the Court would have no jurisdiction to sit on appeal or in review from the exercise of such discretion. Before the suppliant could recover any gratuity, must not his application receive approval, under order in council exhibit No. 6?

It was contended at bar that the word "entitled" made use of in the orders in council gave a right of action, but this word by itself should not be construed as setting up a contractual relation between the officer and the Crown, which would give rise to a right of action. *Matton* v. *the King* (1); *the King* v. *Halifax Graving Dock Co., Ltd.* (2), and cases therein cited.

However that may be, the controlling question to be here determined is whether an action at law will lie against the Crown to recover such a military gratuity.

(1) 5 Ex. C.R. 401 at 407. (2) 20 Ex. C.R. 45.

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Does not the word "gratuity" contain in itself its very meaning and definition and primarily denote a grant of money *ex gratia*? It implies an act of generosity, beneficence, munificence, a gift out of kindness, free from any valuable or legal consideration. It is a voluntary gift or beneficium,—the donation of it being absolutely unilateral and depending entirely upon the inclination or will of the giver. It would seem of the very essence and character of a gratuity not to be bilateral; otherwise it would cease to be a gratuity.

A military gratuity is in its very nature a bounty or a gift. That is its accepted meaning in the dictionaries. See Bouvier, Law Dictionary, 3rd Ed. Verbo Gratuity-Bounty, and cases therein cited. If it be a bounty, it is therefore depending entirely upon the grace and benevolence of the Crown, for its recovery and an action at law will not lie for the recovery of the same.

The whole question involving the right of a military officer to recover money from the Crown in respect of his pay, half-pay, or pension is very fully discussed in the case of *Grant* v. *Secretary of State for India* (1). The result of that case, which was an action by a military officer serving in the Indian Forces, against the Secretary of State for India, representing the Crown, in which he claimed that he was improperly retired from the service, without being paid the proper pension due to him at the time of his retirement, is that in the opinion of the Court, the Crown has a general power of dismissing a military officer at its will and pleasure, and that the defendant "Secretary of State for India" could not make a contract with a military officer in derogation of the prerogative in such a case exercisable

(1) [1877] 2 C.P.B. 445 at pp. 455 et seq.

by the Crown. Furthermore, the case decided that any military customs, or regulations, must be taken to be always subject to this prerogative right of the Crown to dismiss at its will and pleasure.

There is another important case, namely, *In re Tufnell* (1), reported in 1876. That was a Petition of Right by an army surgeon claiming compensation from the Crown, not for dismissal from any office, but for being put on half-pay instead of continuing to hold his office, owing to alterations in the establishment. Malins, V. C., pointed out that although the Crown might order an officer to retire on half-pay, and prescribe that the half-pay should be of a certain amount, as the Crown thought fit to withold that half-pay, it was absolutely impossible to recover it. The doctrine laid down in that case may be summarized as follows:—"Every officer in the army is subject to the will of the Crown, and can be removed and put on half-pay or dealt with as the Crown, with a view to the public convenience, thinks best. It is a power which is always considered to lie in the Crown, a rule which has never been departed from."

In the case of *De Dohse* v. *the Queen* (2) which was a Petition of Right by an ex-captain of the British German Legion formed during the Crimean war, alleging that after the disbanding of the Legion, the Government had promised him other employment but has not provided him with any. The case was carried to the House of Lords, the Crown having succeeded in the courts below on demurrer. Lord Halsbury, L.C., was of the opinion that, even had there been such a contract it must have been subject to a reserve of the right of the Crown's prerogative to

(1) [1876] 3 Ch. D. 164. (2) [1886] 3 T.L.R. 114.

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dismiss the officer at pleasure and that a contract which purported to override that prerogative would be unconstitutional and contrary to the public policy.

In *Mitchell* v. *the Queen* (1) it was held by Fry, L.J.: "I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either present, past or future can be enforced in any court of law." And per Lord Esher in the same case: "I agree with Mathew J. that the law is as clear as it can be and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary on the part of the Crown and give no occasion for an action in respect of any alleged contract."

In Scotland a similar result was arrived at in the case of *Smith* v. *Lord Advocate* (2); it was held there that no action would lie against the Lord Advocate representing the Crown, for the recovery of military pay. Summing up the result of several Acts relating to pensions to civil servants and military officers, in which the term "shall" occurs, but differing very importantly from Canadian legislation in such matters by having a distinct provision that the decision in any case of the Executive authority would be final. Malins, V. C., in *Cooper* v. *the Queen* (3), says: "The Crown in fact, says, 'This is what we intend to give you, but as a matter of bounty only, and you shall have no legal right whatever, and it is not intended to give any person an absolute right of compensation for past services or for allowances under this Act.' He must therefore depend upon the bounty of the Crown whether he is to have the whole amount or any part which the Commissioners may think fit."

(1) [1896] 1 Q.B. 121, n. (2) [1897] 25 R. Scotch Sess. Cases, 4th Seg., 112.
(3) [1880] 14 Ch. D. 311 at p. 315.

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Then we have the recent decision of *Leaman* v. *the King* (1), where, under a well argued and well considered judgment, it was held that the rule that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, applies as well to private soldiers as to officers and that a petition of right will not lie for military pay.

Under sec. 18, ch. 10 of the Imperial "Manual of Military Law" it is enacted that "The enlistment of the soldier is a species of contract between the Sovereign and the soldier." Commenting upon the nature and character of this engagement or enlistment, the case of *Leaman* v. *the King* (ubi supra) decided that the nature of the engagement or enlistment is the same in the case of officers as well as of soldiers.

The expression "contract" used in this 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* that it could not give a legal right of action.

Should the same view be taken with respect to the engagement of officers and soldiers in the Canadian forces? The King's Regulations and Orders for the Canadian Militia does not appear to contain a similar enactment to sec. 18 above referred to of the Imperial Manual of Military Law; however, among the several sections thereof dealing with Enlistment,—from paragraph 288 et seq.—it is found under par. 307 that "When a man is enlisted, etc., etc., he will after passing the medical examination be *attested* by the officer commanding the unit. Attestation will be recorded in duplicate on Form B. 235, etc." Item 12 of this

(1) [1920] 3 K.B. 663.

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attestation paper contains the question: "12. Are you willing to be attested in the Permanent Military Forces of Canada?" And in form M.F.W. 51, used with respect to the attestation of officer, item 10 contains this question: "10. Are you willing to serve in the Canadian Over-seas Expeditionary Force?" These are the only two clauses under which an engagement could be derived.

Would it not appear therefore that these attestation papers, read in the light of sec. 10 of the Militia Act which says that "all the male inhabitants of Canada, of the age of 18 years and upward, and under 60, not exempt or disqualified by law, and being British subjects, shall be liable to serve in the Militia,"—cannot any more under the Canadian law and regulation than under the Imperial enlistment create a right of action for the recovery of pay, pension, etc.? If so, then the *Leaman* case would conclude all actions in Canada in respect to similar matters.

If a petition of right will not lie for the recovery of the pay of an officer, *a fortiori* will it not lie for the payment of a gratuity.

See also *Gibson* v. *East India* (1); Robertson, Civil Proceedings (2); *Dunn* v. *The Queen* (3); *Balderson* v. *The Queen* (4); *Gould* v. *Stuart* (5); *Yorke* v. *The King* (6).

I have come to the conclusion that a petition of right will not lie to recover the military gratuity mentioned in this case.

(1) 5 Bing. N.S. 262.
(2) pp. 611, 359, 35, 643.
(3) [1896] 1 Q.B.D. 116
(4) 28 S.C.R. 261.
(5) [1896] A.C. 575.
(6) 31 T.L.R. 220; 84 L.J.K.B. 947; [1915] 1 K.B. 852.

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I am relieved from labouring the other questions raised by the pleading and at trial, counsel at bar for the Crown having stated that if it were found that the petition of right would not lie at law, that the Crown would not ask any pronouncement upon the counter-claim.

There will be judgment ordering and adjudging that the suppliant is not entitled to the relief sought by his petition of right.

Judgment accordingly.

Solicitors for suppliant: *Guay & Frémont.*

Solicitor for respondent: *H. H. Ellis.*