JOHN H. BALDERSON (SUPPLIANT).....APPELLANT;

AND

HER MAJESTY THE QUEEN (RESPONDENT) .. .. } RESPONDENT.

1898

*Mar. 2.
*Mar 8.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Statute, construction of—Civil Service—Superannuation—R. S. C. c. 18—Abolition of office—Discretionary power—Jurisdiction.

Employees in the Civil Service of Canada who may be retired or removed from office under the provisions of the eleventh section of "The Civil Service Superannuation Act" (R. S. C. c. 18), have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority.

APPEAL from the judgment of the Exchequer Court of Canada (1) declaring that the suppliant was not entitled to the relief sought by his petition of right.

The appellant was appointed to the Civil Service of Canada on 1st January, 1883, by order of the Governor-General-in-Council, and since that date up to the 26th April, 1897, had been continuously in the employ of the Government of Canada, being a period of over fifteen years. During the last five years of his service, the appellant held office as secretary of the Department of

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 6 Ex. C. R. 8.

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Railways and Canals in Canada, and his average yearly salary, based upon his salary for the last three years of his service was $2,275. All deductions for superannuation, as required by section six of the Civil Service Superannuation Act (1), had been made from time to time from the appellant's salary throughout the whole of his service.

On the 26th April, 1897, to promote economy in the public service, the appellant was, by order of the Governor-General-in-Council, retired from the service and placed upon the retired list with an annual allowance of six hundred and eighty-two dollars and fifty cents, the amount to which he would be entitled for fifteen years service at the average salary paid him for the three years preceding his retirement. He claimed the annual sum of $455 in addition to the allowance granted, alleging that the combined amount of these two sums was the compensation he was entitled to under the statute. This claim was based on the contention that ten years should have been added to his term of service, as provided by section eleven of the Act. The appeal was from the judgment of the Exchequer Court declaring that he was not entitled to the relief sought by his petition of right.

Hogg Q.C. for the appellant. The meaning and intention of the whole Superannuation Act is to give to retired civil servants who have performed good and faithful service a fair consideration and compensation for the service given, and by the deductions made from their salaries, to create a fund towards making good the superannuation allowances provided under the statute.

Under section nine the retired civil servant has a legal right to full superannuation allowance in case his retirement is based upon the causes therein mentioned, pro-

(1) R. S. C. c. 18.

vided the head of the department has not reported against him. The causes for retirement referred to in section nine are also mentioned in section eleven and the allowance, to which under section nine he would "be otherwise entitled," refers to the full or maximum allowance mentioned in section eleven. The correct interpretation is, that upon retirement of a civil servant for the causes mentioned in these sections, *primâ facie*, the amount of the superannuation grant should be the maximum allowance mentioned in section eleven subject to be reduced or dimished only upon a special adverse report, by the application of the provisions of the ninth section.

The appellant was retired to promote economy and comes under section eleven. The maximum compensation in the appellant's case, would be twenty-five-fiftieths of his average salary during his last three years of service, the twenty-five years on which the calculation is based, being made up under section eleven by adding ten years to the fifteen years of his actual service. There can be no reduction upon this estimate unless an adverse report has been made under section nine. The provision in the ninth section as to granting a superannuation allowance less than "that to which he would have otherwise been entitled," shews clearly an intention that when retired under the eleventh section the employee should be entitled to the full or maximum allowance except only upon an adverse report. The statute itself determines the amount of the retiring allowance.

The words "may grant" should be construed as mandatory, following the custom of Parliament when it is sought to lay an obligation upon the Crown or an officer of the Crown. The ninth section clearly gives discretion, for it differs from the eleventh section, which does not, by the insertion of the words "as to him

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seems fit," after the word "may." *Julius* v. *Bishop of Oxford* (1) at page 225; Hardcastle, Statute Law, 2nd ed. 316; Maxwell, Interpretation of Statutes, 3 ed. [1896,] pp. 334, 350. *Reg.* v. *Bishop of Oxford* (2) at page 258; *M'Dougall* v. *Patterson* (3); *Crake* v. *Powel* (4); *The Board of Supervisors of Rock Island* v. *United States* (5) at page 446; *Attorney General* v. *Lock* (6); *In Re Eyre* v. *Corporation of Leicester* (7). The Governor-General-in-Council is bound to grant such an allowance as shall actually be a fair compensation. Such compensation will be estimated, if necessary, by the court and, if there is no adverse report, the court will be bound by the statute to grant the maximum amount. Pollock on Contracts (5 ed.), at pages 45 and 46; *Roberts* v. *Smith* (8); *Bryant* v. *Flight* (9).

The crown can dismiss its servants without compensation only where there is cause for dismissal; or under the Superannuation Act, where an adverse report has been made under section nine, in which case the compensation may be reduced to nothing. Sub-section 2 of section 8 does not confer a right, but only reserves a right already in the Governor-General-in-Council.

The Exchequer Court has jurisdiction under sub-section "*d*" of section 16 of the Exchequer Court Act, and should be directed to declare that the Governor-General-in-Council is bound, under the Act cited, to grant and pay such allowance as the court may find to be fair compensation for loss of office, and that a petition of right lies against the Crown under the above-cited sections of the Exchequer Court Act.

Newcombe Q.C., Deputy Minister of Justice, for the respondent. The appellant was a civil servant appointed

(1) 5 App. Cas. 214.
(2) 4 Q. B. D. 245.
(3) 6 Ex. 337 note.
(4) 2 E. & B. 210.
(5) 4 Wall. 435.
(6) 3 Atkyns, 165.
(7) [1892] 1 Q. B. 136.
(8) 4 H. & N. 315; 28 L. J. Ex. 164.
(9) 5 M. & W. 114.

under the provisions of "The Civil Service Act" (1), on 1st January, 1883, and retired by Order in Council of 26th April, 1897, in order to promote economy in the public service. By the same Order-in-Council, the appellant was granted an annual allowance of $682.50, under the authority of the Superannuation Act (2).

The appointment was during pleasure, and the executive had the undoubted right to dismiss him at any time. Civil Service Act, sec. 10; *Shenton* v. *Smith* (3); *Gould* v. *Stuart* (4); *Dunn* v. *The Queen* (5).

The appellant had not attained the age of sixty, nor was he incapacitated by bodily infirmity, and he was therefore not qualified for superanuation under section three. Section 11 applies and its provisions are merely enabling and intended to vest a discretion in the Governor-General-in-Council which may be exercised favourably or unfavourably to the officer being retired, in any case.

No right accrues until the allowance has been granted by His Excellency in Council. R. S. C. c. 18 s. 8. The courts have no jurisdiction to review the exercise of the discretion vested in His Excellency in Council. *Cooper* v. *The Queen* (6); *Kinloch* v. *The Secretary of State for India* (7); *Gidley* v. *Lord Palmerston* (8); *Matton* v. *The Queen* (9). The jurisdiction of the court in this case, if any, arises under section sixteen of the Exchequer Court Act (10), which is quite inadequate to confer a jurisdiction to review the exercise of discretionary authority.

It has not been shown that Her Majesty contracted with the appellant to the effect that he should receive upon retirement a superannuation allowance.

(1) R. S. C. c. 17.
(2) R. S. C. c. 18.
(3) [1895,] A. C. 229.
(4) [1896,] A. C. 575
(5) [1896,] 1 Q. B. 116.
(6) 14 Ch. Div. 311.
(7) 7 App. Cas. 619.
(8) 3 Brod. & Bing. 275.
(9) 5 Ex. C. R. 401.
(10) 50 & 51 Vict. ch. 16.

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TASCHEREAU J.—This appeal must be dismissed There is no room whatever for the appellant's contention that it was a condition of his contract of employment that, in the event of his being superannuated in order to promote economy in the civil service, he was to have a legal right to any allowance whatever. The superannuation allowance that the Governor-General-in-Council may grant in such a case to any person is a gratuity. It is so called in sec. 11 of the "Civil Service Superannuation Act" (1), and when the statute enacts that this gratuity which, in the discretion of the executive authority, *may* be granted, will be such as to fairly compensate the superannuated officer for his loss of office, it leaves it at the sole discretion of the executive to determine what is the amount he is to receive, if any. The members of the civil service of Canada hold their office during pleasure and have no absolute right to any superannuation allowance under that section. They accept office under that condition. The appellant here has been granted a yearly allowance of $682.50, calculated upon fifteen years of service. He contends that he is entitled to have ten years added to his term of service, amounting to $455, making in all the sum of $1,137.50. His contention cannot be sustained. The courts of the country have no jurisdiction to review the exercise of the discretion vested by the statute in the Governor-General-in-Council.

The appeal is dismissed, but the case must be viewed as a test case, and we give no costs.

GWYNNE J. concurred.

SEDGEWICK J.—The appellant can succeed only upon showing that the Crown contracted with him,

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upon his entering the civil service, that he would receive the increased superannuation allowance claimed upon any compulsory retirement therefrom. He relies upon section 11 of the Act, and argues that that section, though in terms enabling only, is in fact imperative and obligatory.

We are unable to place this construction upon it, or upon the Act as a whole. Its whole scope and object is to confer authority upon the Government to appropriate public funds in a certain way, but as it expressly states (sec. 8), it does not confer "any absolute right to superannuation allowance, or impose any statutory obligation on the Crown to grant it."

KING and GIROUARD J.J. also concurred in the dismissal of the appeal for the reasons stated.

Appeal dismissed without costs.

Solicitors for the appellant: *O'Connor, Hogg & Magee.*

Solicitor for the respondent: *E. L. Newcombe.*