DAME EDMÉE DIONNE ET VIR (PETITIONERS) ..... } APPELLANTS;

AND

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

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*Feb. 21,
*May. 6.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT QUEBEC.

Pension—Commutation—Transfer or cession—R.S.P.Q. Arts. 676 to 691.

D. a retired employee of the government of Quebec in receipt of a pension under arts. 676 and 677 R.S.Q., surrendered said pension for a lump sum to the government, and subsequently he and his wife brought an action to have it revived and the surrender cancelled. By art. 690 of R. S. P. Q. the pension or half pension is neither transferable nor subject to seizure, and by art. 683, the wife of D. on his death would have been entitled to an allowance equal to one-half of his pension.

Held, reversing the decision of the Court of Review, Strong C.J. and Sedgewick J. dissenting, that D. after his retirement was not a permanent official of the government of Quebec and the transaction was not, therefore, a resignation by him of office and a return by the government, under art. 688, of the amount contributed by him to the pension fund; that the policy of the legislation in arts. 685 and 690 is to make the right of a retired official to his pension inalienable even to the government; that D.'s wife had a vested interest jointly with him during his life in the pension and could maintain proceedings to conserve it; and therefore that the surrender of the pension should be cancelled.

APPEAL from a decision of the Superior Court for Lower Canada, sitting in review at Quebec (1), dismissing the petition of the appellants for cancellation of a surrender of pension to the government.

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*PRESENT:—Sir Henry Strong C.J. and Fournier, Gwynne, Sedgewick and King JJ.

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The facts are sufficiently set out in the above head-note and in the judgments of the court.

Burroughs for the appellants.

Cannon Q.C. Assistant Attorney General of Quebec for the respondent.

THE CHIEF JUSTICE.—This is an action by Charles John Burroughs and Edmée Dionne, his wife, asking that a pension of $242 a year, payable monthly, awarded to the husband as a retired employee of the Provincial Government of Quebec, pursuant to the provisions of the Revised Statutes of Quebec regulating the civil service of that province, and which pension he commuted some four months after it was granted, for $382, may be revived and the surrender cancelled.

In the Superior Court Mr. Justice Andrews dismissed the action, and his judgment was affirmed by the Court of Review.

The wife sues claiming to be interested, as, in the event of her husband dying in her lifetime entitled to the pension, she would be entitled to an allowance equal to one-half of that granted to the husband.

The validity of the commutation is impugned for three reasons:—1. It is said that the commutation or surrender of the pension was illegal and void under section 690 of the Revised Statutes. 2. Because the surrender was void under the general law, as being against public policy. 3. Because it prejudicially affected the rights of the wife (conferred by section 683 of the Revised Statutes) to receive a half pension on the death of her husband.

Section 690 enacts that:

> The pension or half pension is neither transferable nor subject to seizure.

It is clear that the surrender of the pension was not a transfer or cession. The plain object of this provision

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was, that pensions should not be sold or assigned to speculators or others, and to assure that the pension, which was intended as an alimentary allowance to persons who whilst they remained under sixty years of age might be recalled to the public service, should be applied to its legitimate uses. There was nothing inconsistent with this that the government itself should be able to take a surrender from a superannuated officer, who, for his own reasons, might wish to be rid of the conditions imposed by section 686, which make it imperative upon him to reside within the limits of the province.

I am equally clear that the general law, on principles of public policy, does not forbid such a surrender. It would be a great hardship upon a retired civil servant, who might for many reasons, health, business, employment or convenience, have to live out of the province, if he should be unable to commute his pension and consequently be compelled to forfeit it. The commutation was therefore unimpeachable on this ground.

Mrs. Burroughs has no *locus standi* to maintain the action. She has no vested interest, but merely a contingent right to a pension in the event of surviving her husband, provided he dies in active service, or whilst in the enjoyment of a pension. It would indeed be a strange result if a superannuated civil servant under sixty years of age should be unable to reside beyond the limits of the province without his wife's assent, or without giving her a right of action against the government, if they commuted the pension at his request, in order that he might not forfeit it by taking up his residence outside the province of Quebec, yet that would be the consequence of a judgment in favour of the appellants.

The appeal must be dismissed with costs.

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FOURNIER J.—I would allow this appeal for the reasons given by Mr. Justice Gwynne.

GWYNNE J.—This is a proceeding by petition of right instituted in the province of Quebec against the government of that province by Charles John Burroughs and his wife, *séparée de biens*, wherein they allege that on or about the 28th day of December, 1878, the said Charles John Burroughs was appointed a permanent clerk in the civil service of the province and continued in such employment until the 31st day of January, 1891, when he was compelled by ill-health to resign the office which as such civil servant he had held and for that reason to retire from the public service, and that by an order in council bearing date the said 31st day of January, 1891, he was permitted to retire from the civil service under the provisions of the law in that behalf as a person no longer capable by reason of ill-health to discharge the duties of his office, and by the same order another person was appointed to fill the office which he had filled in the employment of the government, that he thereby became entitled in virtue of the law of the province of Quebec to a pension which as provided by law was paid to him (to wit, $21.33 per month for the months of February and March, 1891. The law of the province of Quebec by which he became entitled and in virtue of which he received such pension, was first enacted by statute of the legislature of the province 40 Vic. ch. 10, intituled "An Act to establish a pension and aid fund in favour of certain public servants and their families." This fund was created by the payment by each public servant of certain monthly sums of a stated percentage upon the amount of his salary. This Act was amended by 44 & 45 Vic. ch. 14, by which among other amendments, it was enacted that these monthly payments should be

made into the consolidated revenue fund of the province, which fund was charged with the payment of the pensions granted by the provisions of the Acts in that behalf. These provisions are now contained in the Revised or Consolidated Statutes of the province of Quebec in articles 676 to 691 inclusive. By article 676 a pension is granted to, (among others) every permanent member of the civil service who is incapable of discharging his ordinary duties, by reason of physical or mental infirmity, if such infirmity is not the result of bad conduct. By article 677 the amount of the pension to which such person is entitled is determined upon a scale varying according to the number of years during which the person so retiring and thereby becoming entitled to the pension has been in the public service.

It was under the provisions contained in these articles that upon the order in council of the 31st day of January, 1891, being passed, by which Burroughs was permitted to retire from the public service and another person was appointed in his place, that he became entitled to his pension and which was paid to him in the months of February and March, 1891. This pension was guaranteed to him for his natural life by art. 685 of the statutes which enacts that the pension of every public officer or employee *en retraite*, that is, in retirement, or who has retired from the public service or been superannuated "is paid by the treasurer by monthly payments but not in advance."

By art. 683 it is enacted that:

From and after the first day of the month which follows the date of the death of a public officer or employee, half the pension which the deceased received or which he would have been entitled to receive if he had been superannuated is paid to his widow for life during her widowhood.

That is to say, one-half of the pension which by the law a superannuated or retired public servant was

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entitled to receive and received during his life, or which, if at the time of his death a public servant was still in the service of the government, he would by law be entitled to receive if he had been superannuated, is paid to his widow during her widowhood, and upon her death or marriage again, the article proceeds to enact that such half pension be paid by monthly instalments to those of the children of such person as had not attained the age of eighteen years, until they should attain such age.

The suppliants then proceed to allege in their petition of right, that about the end of the month of March, 1891, the said Charles John Burroughs without the knowledge of his said wife, and in a moment of despondency consented, "*à vendre céder et abandonner à toujours au gouvernement*" all his rights to the said pension for an insignificant sum, that is to say, $382.82; "*que la dite vente, cession et abandon*" of the said pension was accepted and ratified by an order in council dated the 24th day of April, 1891. The petition of right then submits that such "*vente, cession et abandon*" so made of the said Charles John Burroughs of said pension so accepted by the government was illegal and void for the following reasons: 1. Because by the law said pension and half pension "*sont incessibles et insaisissables.*" 2. By force of the said order in council dated the 31st of January, 1891, the right to the said pension had become a right acquired by (or vested in) not only the said Charles John Burroughs but his wife and children also, and that he could not alone dispose of it or renounce it to their prejudice. 3. Because the said sale would have the effect of depriving the female suppliant, his wife, of the half pension (to which she hath right by force of the law) after the decease of her husband. 4. Because the suppliants have children who would be deprived

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of the interest which the law gives to them in the said pension in the event of their surviving their father. 5. Because the said transaction is prohibited by the law. The suppliants then pray that the renunciation, sale, surrender and relinquishment of his said pension by the said Charles John Burroughs to the government, as well as the order in council of the 24th April, 1891, accepting such surrender, are illegal and void, and that the government may be condemned to pay to the said Charles John Burroughs the balance due for monthly instalments of his said pension upon and from the 1st April, 1891, after deducting as payments on account thereof the said $382.82, and that it may be declared that the said Charles John Burroughs is entitled to his said pension in the future.

The Attorney General for the province of Quebec for defence of the Provincial Government to the said petition of right pleads:—1st. The general issue. 2nd. That the said Charles John Burroughs was of full age and stricken with no legal incapacity at the date of the order in council of the 24th April, 1891, by which the government accepted the sale and surrender of the said suppliant's pension, previously made by him about the end of the month of March, 1891, for the price and sum of $382.82. 3rd. That the said Charles John Burroughs had a right to surrender that pension as he did do in manner aforesaid. 4th. That the said order in council of the 24th April, 1891, is regular and legal and ought to be maintained. 5th. That all and each of the allegations in the said petition of right are unfounded in law.

The case came down for hearing in the Superior Court for the district of Quebec, upon the matters alleged in the said petition of right, the answer of the Attorney General thereto by way of defence, an admission of facts signed by the attorney of the sup-

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pliants upon their behalf and by the Attorney General of the province for the defence, and the production of copies of the orders in council of the 31st January and 24th April, 1891.

The learned judge of the Superior Court before whom the case was heard by his judgment has adjudged that art. 690 R.S.Q. which enacts that "*la pension et demi pension sont incessibles et insaisissables*" has no application whatever to the arrangement entered into under the order in council of the 24th April, 1891; That such arrangement was in effect a mere consent on the part of the government to an *election* made by Charles John Burroughs to retire from the public service and take the benefit of art. 688 rather than avail himself of the advantages offered to him by art. 676 coupled with the conditions and restrictions contained in articles 690 and 691.

While of opinion that the transaction could not be assimilated to a commutation of his pension he adjudged that, even if it could, it would not therefore be illegal, and in support of this view he referred in his reasons for his judgment to a case of *Wells* v. *Foster* (1), and to the Imperial statutes 47 Geo. 3 2nd. Sess ch. 25 sec. 4 and 34 & 35 Vic. ch. 36.

He adjudged further that the wife of Burroughs had no present legal interest in the matter and finally that the arrangement complained of, that is to say, that contained in the order of council of 24th April 1891, violates no law and is not contrary to public policy, and he therefore dismissed the petition of right with costs.

With reference to this judgment I may here observe that the learned judge in the reasons given for his judgment seems to have arrived at the conclusion in the second *considérant* of his judgment upon the assump-

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tion that Burroughs' motive for the arrangement which is embodied in the order in council of the 24th April was simply this—

That Mr. Burroughs who, as the record shows, was comparatively a young man preferred not to be fettered by these two articles (686 and 691) by which he found himself restrained as to his residence and compelled to give up at any time any employment he might obtain, chose rather to completely sever his connection with the civil service and take the benefit of the art. 688 only available to those who do so.

I must say that I can see nothing in the case in support of this assumption, although no doubt the suggestion may be true, but assuming it to be true it does not appear to me that his having been, if he was, influenced by such motive can have any bearing upon the questions raised by the petition of right, namely, whether in April, 1891, Burroughs was a person then filling any office in the permanent employment of the government as a civil servant, who was retiring from such office, service or employment in such a manner as to demand and have repaid to him under the provisions of art. 688 his contributions to the pension fund; whether in point of fact he did then retire from any office or employment held by him in the civil service under the provisions of art. 688.

If he was then in a position to avail himself of, and did in point of fact retire from, the office which he had held in the civil service under the provisions of that article, and if the order in council of the 24th April was simply a submission by the government to the provisions of that article, then undoubtedly, neither Charles J. Burroughs or his wife has now, nor can his wife or his children upon his death, maintain any claim whatever against the government; this is the main point in the case, but there seems to me to be many points of difficulty which are entitled at least to very grave consideration before that conclusion can be

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reached, as likewise, if such conclusion can not be reached, do there appear to be many points entitled to equally grave consideration in determining upon what ground the order in council of the 24th April, if maintained, can be rested. The Court of Review have simply maintained the judgment of the Superior Court as free from error, but we have very fully presented to us their reasons for arriving at that conclusion which are as follows:

1. They are of opinion that by force of art. 691 every civil servant who has been superannuated or permitted to retire from the public service upon a pension, under 60 years of age, by reason of physical or mental infirmity, is still in the public service as a public officer or employee, who is entitled to retire voluntarily from such service, and thereupon to demand as of right and to receive repayment of all the sums contributed by him to the pension fund. That under that article the will of the person employed is the law, and that the sole obligation cast upon the government is to repay to the person who has so voluntarily resigned his office or employment the sums which he had paid to the pension fund. They hold that the order itself shows that this was precisely what was done in Burroughs' case, and that the transaction did not constitute a sale or cession or commutation of his pension notwithstanding the admissions to the contrary in the answer of the Attorney General to the petition of right, and in the admissions of facts put in as evidence, namely, that the transaction was in fact a sale and surrender, but as is contended a legal sale and surrender, by Burroughs of his pension to the government for a pecuniary consideration paid in one sum in advance, and finally, they are of opinion that the transaction being of the nature which they hold it to have been, it was perfectly legal, and that the wife

of Burroughs has not now and never can acquire any right to set aside or call in question its legality; and that even if it were illegal she would have no such right until after her husband's decease, if she should then be living.

If these reasons be well founded undoubtedly the appeal must be dismissed but the whole argument of the learned counsel for the appellants was that they are not well founded. The case rests wholly upon the construction of the articles of the Revised Statutes of Quebec relating to the civil service and its officers and their retirement therefrom, and the right of each party so retiring either to a pension or to repayment out of the pension fund of his subscriptions to the fund, as the case may be, in view of the circumstances attending his retirement. By article 685 which is a transcript of sec. 1 of the provincial statute 40 Vic. ch. 9, it is enacted that—

> The members of the civil service are the deputy heads, clerks and messengers permanently employed in the departments at the seat of government and the special officers similarly (that is permanently) employed if with respect to the latter the lieutenant governor in council so orders.

It is alleged in the petition of right and admitted in the admission of facts that Burroughs was a permanent clerk in the civil service of the province of Quebec from the 28th day of December, 1878, until the 31st day of January, 1891. By art. 676, which is a transcript of sec. 1 of the provincial statute 40 Vic. ch. 10, intituled an Act to establish a pension and aid fund "*en faveur*" (*i.e.* for the benefit or on behalf) of certain public employees and their families, there is granted a pension—

> to every permanent member of the civil service who has served as such during ten years or more and has attained the full age of sixty years; or who has become incapable of discharging his ordinary duties by reason of physical or mental infirmity, provided such infirmity be not caused by bad conduct.

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Upon the said 31st of January, 1891, Burroughs being then, as he alleged, incapable of discharging his ordinary duties by reason of physical infirmity within the meaning of that article, claimed and demanded the right to retire from the office which he held in the civil service and to be pensioned under the provisions of the said art. 676 and of art. 677.

By an order in council made on the said 31st day of January, 1891, such his claim and demand were recognized by the government and his resignation of his said office for the cause alleged was accepted and another person was appointed to fill the permanent office which he had filled; and thereupon Burroughs was put upon the pension list as a person entitled to the pension guaranteed to him under the provisions of the said articles 676 and 677 having regard to the duration of his service as such permanent clerk from the 28th day of December, 1878, to the 31st of January, 1891. Upon such acceptance by the government of the only permanent office Burroughs had held in the civil service he ceased under the provision of said art. 685 to be any longer a member of the civil service.

By art. 685, which is a transcript of sec. 8 of the above statute 40 Vic. ch. 10, it is enacted that the pension of every public officer or employee "*en retraite*," that is who has retired upon a pension from the permanent public office which he had filled in the civil service, "is paid to him during his life by the provincial treasurer by monthly payments, but not in advance," and by art. 683, which is a transcript of sec. 10 of said provincial statute 40 Vic. ch. 10, it is enacted that where a person in receipt of a pension dies, one-half of the pension of which he is in receipt, or in the event of an employee dying in the civil service one-half of the pension which such employee would have received if he had been superannuated, "is paid to his widow

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for life during her widowhood, to be paid to her monthly until her death or second marriage, in either of which events occurring, such half is made payable in like monthly instalments to the children under 18 until they attain that age. It is admitted that during the months of February and March, 1891, Burroughs received from the provincial treasurer the monthly instalments of his pension which in these months became due to him under the provisions of the articles 676 and 677.

Now from the above articles of the statute it is apparent that no one is a member of the civil service within the meaning of the articles but a person holding some permanent office in some department of the civil service. Burroughs held such office only as a clerk in the audit office of the treasurer's department, which office he resigned upon the 31st January, 1891, for the cause already stated. That resignation was accepted and another person was appointed to fill the office resigned by him by the order in council of the 31st January, 1891. The acceptance of Burroughs' resignation and the appointment of another person to the office he had held was the sole effect and purpose of that order. Not a word is said in it as to the pension to which by such resignation Burroughs became entitled, that was determined by the statutory articles, and the amount to which he became entitled under art. 677, having regard to the number of years of his service and the salary of which he had been in receipt, was granted and guaranteed to him by art. 685, which imposed upon the treasurer the duty to pay him the pension to which he had such statutory right by monthly instalments and not otherwise. Burroughs never subsequently to the 31st January, 1891, has held any permanent office or employment in the civil service, and as it is only a person in possession of a permanent office

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in the civil service who becomes entitled by voluntary resignation of such office to be repaid under art. 688 the sums contributed by him out of his salary to the pension fund, it is obvious, I think, beyond all controversy, that in April, 1891, Burroughs was not in a position to be capable of availing himself of art. 688. But it is argued that art. 691 shows that he was then in such a position, and it is further contended that the order of that date was made by the lieutenant governor in council in simple discharge of an obligation imposed upon the government by that article to refund to Burroughs as a person then retiring from the civil service under the art. 688 his contributions to the pension fund. With great deference art. 691, instead of supporting that view, has in my judgment the contrary effect, and the case of *Wells* v. *Foster* (1), referred to in support of the contention, is very distinguishable from the present case. The art. 691 recognizes in very plain language the complete resignation of an office in the civil service formerly held by the person with whom the article deals, and his right to a pension acquired by such resignation, and provision is made which is obligatory on the person so in receipt of pension to accept another appointment in the civil service at a future time if it should be offered to him in conformity with the conditions stated, or in default that he should lose his pension. From this case *Wells* v. *Foster* (1), is quite distinguishable. There the question was whether an annual allowance made to a person who had held a place in the audit office and who upon the reduction of the department was paid this allowance for maintenance until he should be called upon to serve again with an express understanding that he was bound whenever he should be called upon to re-enter the audit office or to take any

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other office under the Crown of equal value, and the question was whether such an allowance was assignable, and it was held that it was not upon grounds of public policy and upon the grounds that the allowance was made to him by way of retainer in the public service and in consideration of his holding himself ready, so long as it should be paid to him, for future employment, and that he was by the arrangement still in the service of the government at a salary upon such a contract which, however, could be determined by the government by dismissal or otherwise as pointed out in the report of the case. It was held, however, that it was against public policy that such a salary should be assignable, and in so far it is an authority in support of the present appeal; but we are not at present concerned with any such question as whether Burroughs' pension was assignable. By and by we shall have to deal with that question but at present we are only dealing with the question, whether in April, 1891, he held any permanent public office or employment in the civil service which he could then resign under art. 688, that is to say, which he could retain or resign at his own sole pleasure. He certainly held none from which he could then have been dismissed as it was held that the person whose allowance by way of salary was under consideration in *Wells* v. *Foster* (1) could have been; nor had he any of which he was in possession and could have retained. In my opinion it is very clear that in April, 1891, Burroughs held no office in the civil service which he could then resign under art. 688 or otherwise, and the order of the 23rd April cannot be sustained as one authorized by and made under said article. If made under that article where is to be found the authority for revoking the order in council of 31st January, 1891, which appointed Mr. Tessier as a permanent clerk in the civil

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service in the office which Burroughs is by the order stated to have resigned? Such authority cannot be found in the art. 688 nor, so far as appears, in any of the articles regulating the civil service. But in truth the order in council of the 24th April properly construed does not upon its face purport to have been made under the art. 688, that is to say, as an order made in a matter in respect of which the government had no discretion to exercise, but had imposed upon them the simple obligation of refunding to Burroughs, as a person then retiring voluntarily from a permanent office in the civil service then held by him, the contributions made by him out of salary monthly to the civil service pension fund, without interest. The order recites that Mr. Burroughs "*qui est à sa retraite depuis le 1er février dernier*," had written to the treasurer of the province a letter informing him that he is ready to relinquish—what? A permanent office in the civil service then held by him? No such thing—but all right to the pension of which he is in receipt, provided that the government grant to him the benefit of art. 688 of the Revised Statutes of the province. Now what is the true construction of the offer as here recited? It plainly is not an offer to resign any permanent office then held by Burroughs, as it must needs have been if made under art. 688, for he then held no such office. It is an offer to surrender or relinquish to the government the pension of which he was then in receipt provided government would grant him the benefit of art. 688; it was simply an offer by Burroughs to give up to the government all right to his pension, if they would pay him the amount he would have been entitled under art. 688 to have received if he had resigned under that article, which he had not. Then again it is plain that the government did not regard the offer as one which imposed upon them the simple obligation of refunding

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without interest the sums contributed by Burroughs to the pension fund, as they would have been if Burroughs was in point of fact then resigning under the provisions of art. 688, for the order recites that the amount which would be payable to Burroughs if his offer should be accepted was under $400, and that an arrangement closed with Burroughs for such sum in view of his age and the amount of his pension would be plainly to the advantage of the government which they should accede to. It was not then a transaction in which the government were not given any discretion to exercise as to acceptance or refusal of the offer but must simply have paid the money asked in obedience to an obligation imposed upon them by the art. 688. In fact the order thus shows upon its face that the transaction was precisely what it is alleged in the petition of right, and admitted in the answer of the Attorney General and in the admission of facts, to have been, namely, a sale, surrender or relinquishment of his pension by Burroughs to the government in consideration of the paltry sum of $382.82, paid by the government therefor, and this the Attorney General in the answer to the petition of right claims to have been perfectly legal; whether it was or not is the sole issue raised by the pleadings. The learned judges in the courts below are, as we have seen, of opinion that the transaction was neither a sale, transfer or commutation of his pension. If it was neither, and if it cannot be, as I think it cannot be, supported as a transaction within the authority of art. 688, then it cannot be supported at all, and of necessity the order of the 24th April, 1891, being in that case null, Burroughs' right to his pension must still remain, and the relief prayed by the petition of right seems reasonable and proper. I do not think, however, that we can so deal with the question raised by the pleadings, which is as to the legality

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of the transaction wholly independently of art. 688 as one of bargain and sale, surrender, relinquishment and cession of his pension by Burroughs to the government for the sum of $382.82.

By art. 690 it is enacted "*La pension et la demi-pension sont incessibles et insaissables.*"

This language seems to have been used by the legislature by way of amendment of sec. 14 of the above provincial statute 40 Vic. ch. 10 from which the article purports to be taken, for the language used in the said section 14 is—"*La pension ou demi-pension payable en vertu de cet acte ne sera ni transferable ni saisissable.*" This alteration in the language would seem to impart that the legislature considered the expression "sont incessibles" as imposing a more extensive restriction upon, and greater security against, the pension being capable of being parted with in any manner than was obtained by the 14th sec. of 40 Vic. ch. 10. In Fleming & Tibbins' *Dictionnaire Français* the term "*incessible*" is explained to be "*qui ne peut être cédé*" and the term "*céder*" is by the same authority explained to be "*laisser*," "*abandonner une chose à quelqu'un*" and the term "*cession*" which is involved in "*céder*" and "*incessible*" is explained by the same authority to be, "*action de céder*"—"*de transporter à un autre ce dont on est proprietaire*,"—"*il se dit principalement du transport des droits.*" The English equivalents of the above expressions are, that which cannot be sold, given away, pledged, surrendered, transferred, parted with, relinquished or abandoned to any one. I cannot entertain a doubt that the provisions of the above articles 690 and 685 were intended to prevent and are sufficient to prevent a person in the enjoyment of a civil service pension from parting with it in any way whatever either to the government or to any person whomsoever, the policy of the law being that the pensioner and his

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wife and family shall receive the pension by monthly instalments and not otherwise and direct from the treasury. Indeed there is no provision in law by which the government could, under our system, apply any public money by way of commutation or purchase of a pensioner's right to such a pension unless under the express provision of some Act of Parliament. So indeed it may be said that civil service pensioners and other pensioners upon funds provided by Parliament have this additional restraint upon their being able to part with their pensions by surrender to the government for a present pecuniary consideration or by commutation in any way and this additional security in the enjoyment of their pensions in the precise way in which the payment of them is directed by the Act of the legislature which grants them, as in the present case by payments in monthly instalments and not otherwise.

In England commutations when authorized are so by special Acts of Parliament for that purpose, as—32 & 33 Vic. ch. 32, 33 & 34 Vic. ch. 101, 34 & 35 Vic. ch. 36, 39 & 40 Vic. ch. 73, 45 & 46 Vic. ch. 44.

The policy of the articles in the Revised Statutes of the province of Quebec relating to the civil service and civil service pensions, is, in my opinion, that no such pensioner shall be able to divest himself by any act of his own of his right to receive the pension granted to him by the legislature, and made to him by monthly instalments only, nor shall be deprived of such right by any process of law, and that the pension shall be applied for the purpose for which it is granted, namely, the maintenance not only of the pensioner but of his wife and children also, for which purpose it is made payable by monthly instalments only, and this is what the true construction of the articles above quoted does effect. The suppliants, therefore, are

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entitled to the relief prayed for in their petition of right.

As to the joinder of Burroughs' wife, I am of opinion, that the policy of the law, and its true construction is that immediately upon a married civil servant retiring and acquiring a pension under the statute, his wife acquires a vested interest, not only in the half pension made payable to her after her husband's death, but jointly with him during his life in the monthly instalments which are made payable in that manner for supplying maintenance and support not only to the husband for himself alone, but for his wife and children also; and that, therefore, she has during his life a right to maintain conservatory proceedings in law for the purpose of preventing his improvident squandering of the fund granted by the legislature for their joint support and of preventing herself and her husband being in any way deprived of the statutory right to receive, by monthly instalments, the provision made by the legislature for their maintenance.

The appeal must be allowed with costs and a decree made to the effect prayed in the petition of right.

SEDGEWICK J.—I concur in the opinion of the Chief Justice that we should dismiss this appeal.

KING J.—Burroughs having been a permanent officer in the civil service of Quebec, and having applied for superannuation on the ground of ill-health, his request was complied with; and by order in council of 31st January, 1891, he was superannuated as from the 1st day of February, 1891. By the same order in council the vacancy so caused was filled by the appointment of another.

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This entitled him to receive an annual pension during his life by monthly payments, and entitled his wife and children to half pension after his death for certain times and on certain conditions.

One consequence following upon this was that in case he should become able to render services, he might (up to the age of 60 years) be called upon to fill certain public offices. During such service he would, of course, receive the ordinary salary therefor, but payment of his pension would, in the meanwhile, be suspended. If he should decline to discharge the duties of the office so offered he, *ipso facto* (as well as his widow and children) lost all further right to the pension or half pension. (Art. 691).

There is another provision of the law (art. 688) that if any public officer or employee retires voluntarily from the service, or his office be abolished, the sums previously deducted from his salary and paid into the consolidated revenue fund are forthwith returned to him without interest.

After Burroughs had been for about two and a half months superannuated and had received two months' payments of pension, he applied to the government, stating that he was ready to abandon all his rights to the pension provided that the government would accord to him the benefit of art. 688.

The government being of the opinion that such an arrangement would be advantageous to the treasury acceded to it, and by order in council of 24th April, 1891, it was declared that the order in council of 31st January be revoked in order to permit of Burroughs taking advantage of the privilege which article 688 gives to public officers.

Burroughs was not in fact reinstated in office; nor could he well be, for the office had been filled by another. Could he then in any sense be said to be

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still in office, for art. 688 deals with the case of a public officer retiring (voluntarily) from the service?

It is said by the learned judge of the Superior Court, before whom the case first came, that because of his liability under art. 691, to be called upon to fill certain public offices he must still be considered as in the public service. And he cited *Wells* v. *Foster* (1), as an authority for this. In that case, however, the person was liable to be dismissed at any moment either for positive misconduct or on any ground which would render him an unfit person to remain in the service of the Crown. On this account he was deemed to be still in the public service, and the so-called pension was really retainer or compensation in the way of salary.

If, in the case before us, the contingent liability to be called to the public service constituted a pensioner a public officer under sec. 688, it would follow that under that art. he might retire and so become entitled, not only to his pension but to the retiring allowance under art. 688 as well. Clearly art. 688 has no reference to the contingent responsibility or service of a pensioner.

But may not an order be made under art. 688 *nunc pro tunc*, treating it as though the original application for superannuation had not been made, and as though the original application had been for the voluntary retirement referred to in the article?

Suppose the case reversed. Could one who had retired under art. 688 come in after a couple of months and claim, and be allowed, superannuation under art. 676? Would it be competent for the government to pass an order in council revoking what had been done under 688 in order that the person might come in under 676?

It seems to me that it would lead to bad administration and confusion to allow one who had exercised his

(1) 8 M. & W. 153.

election in one way to withdraw it and exercise another option.

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In my view, the Act does not contemplate anything of the sort. An election is given; when exercised in one way or the other certain statutory consequences follow, leaving no room for acts of grace or favour on the one hand, or for turning to advantage the necessities of pensioners upon the other.

I agree also that by force of the term "*incessible*" as used in the statute the right, while forfeitable for non-compliance with conditions, is an inalienable right.

Ordinarily this would operate to restrain alienation to individuals. But the inalienable quality of the right is expressed in terms covering every attempted giving up of rights. It seems inconsistent with the very particular provisions controlling the action of the Crown in the dispensing of the statutory aid for the benefit of the pensioner, and of persons having a natural claim upon him for support, that the Crown, who in such matter exercises what are, as it were, the duties of a statutory trustee, should come into the field in competition with any of these objects of bounty and make terms advantageous to the treasury with those for whom Parliament had made certain provision.

I am to some extent influenced by the mischievous consequences that might follow and, while believing that what was done here was done wholly in the supposed interests of the pensioner, I think it should be held null and void, as being entirely wanting in power.

Appeal allowed with costs.

Solicitor for the appellants: *L. F. Burroughs.*

Solicitor for the respondent: *L. J. Cannon.*