1947
*Oct. 3
1948
*Mar. 22

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

DAME JULIETTE CARROLL, ET AL (SUPPLIANTS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Retired judge receiving a pension—Appointed Lieutenant-Governor—Whether entitled to both salary and pension—Interest against the Crown—Judges Act, R.S.C. 1927, c. 105, s. 27—British North America Act.

In 1921, upon resigning as a judge, the late Mr. Justice Carroll was entitled to a pension of $6,000. During the years 1929 to 1934, as Lieutenant-Governor of the province of Quebec, at a salary of $10,000 a year, he received only $10,000 annually, the appellant withholding the sum of $6,000 each year. The respondents sought to recover from the appellant the sum of $30,000 and interest, and the Exchequer Court, [1947] Ex. C.R. 410, awarded them $30,000 but without interest. Appellant appealed to this Court and respondents cross-appealed on the question of interest.

Held: The appeal and cross-appeal should be dismissed with costs.

Held: There can be no recovery of interest against the Crown unless provided by contract or statute.

Per the Chief Justice and Taschereau and Estey JJ.:—The functions of a Lieutenant-Governor are in respect of the Government of the Province for which he is appointed.

Per Kellock and Locke JJ.:—The office of Lieutenant-Governor cannot be described as an office under the Governor General in Council.

*PRESENT:—Rinfret C.J. and Taschereau, Kellock, Estey and Locke JJ.

APPEAL and Cross-Appeal from the judgment of the Exchequer Court of Canada, Angers J. (1), awarding to the respondent the sum of $30,000 without interest.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

F. P. Varcoe, K.C. for the appellant.

Fernand Choquette, K.C. for the respondents.

The judgment of the Chief Justice and of Taschereau and Estey JJ. was delivered by

TASCHEREAU J.:—The respondents are the daughters of the late Mr. Justice Carroll, who from 1908 until 1921 was a Puisne judge of the Court of King's Bench of the Province of Quebec, and from 1929 until 1934, was Lieutenant-Governor of the same province.

The Honourable Mr. Carroll upon resigning as a judge was entitled to a pension of $6,000, and when he was appointed Lieutenant-Governor, his statutory salary was $10,000 per annum. However, while in office as Lieutenant-Governor, the Honourable Mr. Carroll did not receive the sum of $16,000, as the appellant withheld for a period of 5 years a sum of $6,000, paying only $10,000 annually. The appellant contended that the Honourable Mr. Carroll was not entitled to both his pension and his salary, and based its refusal to pay, on the following provision of the *Judges Act* (R.S.C. 1927, chap. 105) which reads as follows:—

27 (1). If any person become entitled to a pension after the first day of July, one thousand nine hundred and twenty, under this Act, and become entitled to any salary in respect *of any public office under His Majesty in respect of his Government of Canada,* such salary shall be reduced by the amount of such pension.

By their Petition of Right, the respondents claim the sum of $30,000 and interest, namely $6,000 per year, from 1929 to 1934. By order of the Honourable Mr. Justice Angers of the Exchequer Court, dated 21st June, 1944, the following question of law was set down for hearing before trial, upon the application of the appellant:—

Assuming that the Honourable H. G. Carroll became entitled on February 18, 1921, to a pension under the Judges Act at a rate of $6,000

(1) [1947] Ex. C.R. 410.

1948

THE KING
v.
CARROLL

Taschereau J.

per annum and was entitled to receive the same during and in respect of the period from April 2, 1929, to May 3, 1934, and that during the said period he occupied the office of Lieutenant Governor of Quebec to which office there was attached the salary of $10,000 per annum and assuming that he received payment out of the Consolidated Revenue Fund of Canada in respect of the said pension and of salary as Lieutenant Governor during the said period at the rate of $10,000 per annum, are the suppliants entitled to the relief sought by the petition of right?

The judgment of the Exchequer Court (1) ordered and adjudged that the said question of law be answered in the *affirmative,* namely that the suppliants were entitled to the sum of $30,000 without interest. This appeal is from the aforementioned order of the Exchequer Court.

The main question to be determined is whether the office of Lieutenant-Governor is or not "a public office under His Majesty *in respect of his Government of Canada*".

If it is, the appeal must succeed, if not, it must fail.

It cannot be, and it is not disputed that the office of Lieutenant-Governor is a public office under His Majesty, that the Lieutenant-Governor is appointed by the Governor General in Council, that he may be dismissed by the same authority, that his salary, which is paid out of moneys forming part of the Consolidated Revenue Fund of Canada, is fixed by the Parliament of Canada. It is also common ground that the Lieutenant-Governor receives instructions from the Governor General, that he may reserve a bill for the signification of the Governor General's pleasure, and that an act that he has sanctioned may be disallowed by the Governor General in Council.

It has been submitted that this alleged subordination of the Lieutenant-Governor to the Governor General, the Parliament of Canada, and the Governor General in Council, has the effect of making the office of Lieutenant-Governor "a public office under His Majesty *in respect of his Government of Canada*", and that as a consequence *section 27 (1) of the Judges Act* applies.

With this contention, I am with deference, unable to agree, and I come to that conclusion, because I do not think that it can be said, that the functions of a Lieutenant-Governor are *in respect of the Government of Canada.* They are, I believe, *in respect of the Government of the Province* for which he is appointed.

(1) [1947] Ex. C.R. 410.

The Lieutenant-Governor of a Province is constitutionally the head of the Executive of his Province, as the Governor General of Canada, is the head of the Executive of the Dominion. In section *10 of the B.N.A. Act* the Governor General is described as "an officer *carrying on the Government of Canada,* on behalf and in the name of the Queen", while in section 62 of the same Act, the Lieutenant-Governor is referred to as "an officer carrying on *the Government of the Province*".

Under the scheme of the *British North America Act,* the Dominion, and the nine provinces forming part of the Confederation have been assigned certain rights and obligations, and in the exercise of these rights, and the fulfilment of these obligations, they are, as it has been often said, sovereign in their respective fields. They have each their own government, empowered to enact and enforce laws, and as Viscount Haldane said *In Re The Initiative and Referendum Act* (1):—

> The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

In the *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (2), the late Lord Watson had previously said:—

> The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions and that the remainder should be retained by the provinces for the purposes of the Provincial Government.

(1) (1919) A.C. 935 at 942.
(2) (1892) A.C. 437 at 441.

1948

THE KING v. CARROLL

Taschereau J.

Although the words "on behalf of and in the name of the Queen" are absent in *section 62 of the B.N.A. Act*, "it is now" says Clement (Canadian Constitution, 3rd ed., p. 844) "authoritatively settled that a Lieutenant-Governor when appointed, is as such the representative of the Crown for all purposes of *Provincial Government*, as the Governor General himself is for all purposes of Dominion Government."

This distinction is clearly made by Lord Watson in *Liquidators of the Maritime Bank of Canada* (1) when he says:—

> There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government.

Vide also: *Bonanza Creek Gold Mining* (2) where Viscount Haldane expresses the following opinion:—

> Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor General has been dispelled by the decision of this Board in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1). It was there laid down that "the act of the Governor General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government."

As Viscount Haldane also said in *The Initiative and Referendum Act* case (3), the Lieutenant-Governor who directly represents His Majesty, *"is a part of the Legislature"* fulfilling therefore a function in respect of the Government of the Province.

As a consequence of these judicial pronouncements, the nature of the federal and provincial legislative and executive powers is clearly settled, and a Lieutenant-Governor, who "carries on the Government of the Province", manifestly does not act in respect of the Government of Canada. All the functions he performs are directed to the affairs of the Province and are in no way connected with the Government of Canada, and it is the functions that he performs

(1) (1892) A.C. 437 at 443.
(2) (1916) 1 A.C. 566 at 580.
(3) (1919) A.C. 935 at 943.

that must be examined in order to determine the nature of his office. It is only if the functions are in respect of the Government of Canada, that *section 27 (1) of the Judges Act* applies.

It has been argued that the Honourable Mr. Carroll came within the provision of the Act, because he was appointed by the Governor General in Council, and because his salary was paid out of the Consolidated Fund of Canada. The Governor General in Council is of course the instrumentality through which, in view of the *B.N.A. Act,* a Lieutenant-Governor is appointed to represent directly His Majesty. And the Dominion Government is also, under a provision of the same *Act,* obligated to pay the salary of the Lieutenant-Governor. But I fail to see how this can affect the nature of the functions performed. That the Lieutenant-Governor is appointed and paid by the Dominion, does not alter the essentially provincial character of his office, which is to carry on the Government of the Province.

The additional provisions of the Constitution, namely, that the Lieutenant-Governor receives instructions from the Governor General, that bills may be reserved for the signification of the Governor General's pleasure, that an Act that has been sanctioned, may be disallowed by the Governor General in Council, and finally that the Lieutenant-Governor may be removed from office by the same authority, have I think, no important signification.

The framers of our Constitution have reserved to the Governor General in Council the necessary authority to interfere, in a certain way, in provincial matters, but the exercise of these powers, contemplated to be for the better government of the provinces, does not modify the legal status of the provincial executives, and does not purport to make them act, on behalf of the Federal authority. Their functions remain unaltered. These interferences may of course limit the powers of a Lieutenant-Governor, and even in certain cases prevent him from exercising them, but his jurisdiction nevertheless remains entirely within the provincial field. His authority is obviously curtailed

1948

THE KING v. CARROLL

Taschereau J.

when these constitutional powers are exercised by the Governor General in Council, but I do not think that it can be said, that it changes in character.

For these reasons, I believe that the learned trial Judge was right (1), in answering the question submitted in the affirmative. The main appeal should therefore be dismissed with costs.

The respondents have cross-appealed, and claim that the learned trial Judge (1), erred in dealing in his judgment with the question of interest. It is argued that it was not submitted in the question of law, and alternatively, if it were, it should have been answered in the affirmative.

The question submitted to the learned trial Judge, after assuming certain facts, is concluded as follows: "Are the suppliants entitled to the relief sought by the petition of right?"

In their petition, the suppliants claim *$30,000 and interest.* Both items are claimed in the petition, and I therefore think that the learned trial Judge was right in dealing with interest, and I also believe that he reached the proper conclusion in refusing to allow it. It is settled jurisprudence that interest may not be allowed against the Crown, unless there is a statute or a contract providing for it. (King *v.* Miller (2)); (Hochelaga Shipping *v.* The King, (3)); (The King *v.* Racette (4)). In the present case, there is no statutory provision and no contractual obligation in support of the suppliants' claim.

The cross-appeal should be dismissed with costs.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—This appeal involves the construction of *Section 27 of the Judges Act, R.S.C., Cap. 105.* Appellant contends that the words "and became entitled to any salary in respect of any public office under His Majesty in respect of his Government of Canada" applies to the salary paid to the late H. G. Carroll during the period April 2, 1929, to May 3, 1934, when the deceased was Lieutenant-Governor of the Province of Quebec. It is common ground that "Government of Canada" means, as used in the above section, the Governor General in Council. It is also not

(1) [1947] Ex. C.R. 410.
(2) [1930] S.C.R. 293.
(3) [1944] S.C.R. 138.
(4) [1948] S.C.R. 28.

disputed that the office occupied by the deceased is a "public office" within the meaning of the section. What is in dispute is as to whether such office is a public office "under" the Governor General in Council.

It is the Crown's first contention that the office described by the section is any office, the salary of which is paid by His Majesty in right of Canada. It is further contended that even if the test is not the hand by which payment is made, nevertheless the office occupied by the deceased, having regard to appointment, tenure of office, duties, responsibility, as well as payment of salary, was such an office as to be included in the section.

It is first to be observed that whatever may have been in the mind of the draftsman, the words used in the section are not simply "any salary paid by" the Government of Canada. It may well be that such was the intention of the draftsman but the question here is whether the language used is appropriate to effectuate that intention.

Mr. Varcoe referred to a number of sections of the *B.N.A. Act,* including, among others, *Section 58,* which provides for the appointment of a Lieutenant-Governor by the Governor General in Council under the Great Seal; *Section 59* under which the Lieutenant-Governor holds office during the pleasure of the Governor General; *Section 60,* by which the salary is to be fixed and provided by Parliament; *Section 67* under which the Governor General in Council may appoint an administrator to execute the office during inability of the Lieutenant-Governor; as well as to *Section 90,* which in turn refers to *Sections 55, 56* and *57* and substitutes therein the Lieutenant-Governor for the Governor General, and the latter for the Queen and for a Secretary of State, as well as the province for Canada. Our attention has also been called to the instructions accompanying the commission given to the Lieutenant-Governor and it is submitted that where these instructions or any further instructions which might be given are applicable, the Lieutenant-Governor would be obligated to follow them rather than the advice of provincial ministers. It is accordingly argued that the office of Lieutenant-Governor is an office under His Majesty in respect of the Government of Canada.

1948

THE KING v. CARROLL

Kellock J.

In The Liquidators' case (1), it was contended that the effect of the *B.N.A. Act* was "to sever all connection between the Crown and the provinces (and) to make the government of the Dominion the only government of Her Majesty in North America". In rejecting this contention their Lordships point out that the act of the Governor General in Council in appointing a Lieutenant-Governor is, under the *Act,* the act of the Crown itself and the Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as is the Governor General for all purposes of Dominion Government.

In the Bonanza Creek case (2), it was pointed out that the *Act* had made a distinction between the Dominion and the provinces which extends not only to legislative but to executive authority and that the grant of executive in substance follows the grant of legislative authority. The form of commission by which a Lieutenant-Governor is appointed was also referred to with its reference to instructions and it was considered that this commission was in accord with the view taken in the Liquidators' (1) case as to the relationship between a Lieutenant-Governor and the Crown.

In the Initiative and Referendum Act (3), Viscount Haldane said at p. 943:

> For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the sovereign that so gives or withholds assent.

Under the combined provisions of *Section 55* and *90* the act of a Lieutenant-Governor, whether he assents to a provincial bill or withholds his consent, or reserves the bill for the signification of the Governor General's pleasure is "the act of the Crown by the Crown's representative"; the Disallowance Reference (4), per Duff C.J.C. at 76. This is so notwithstanding that in each case the Lieutenant-Governor is, by the statute, subject to the instructions of the Governor General. At page 77 of the same report the Chief Justice said further (4):

(1) (1892) A.C. 437.
(2) (1916) 1 A.C. 566.
(3) (1919) A.C. 935.
(4) [1938] S.C.R. 71 at 76.

1948

THE KING v. CARROLL

Kellock J.

> There is nothing, however, in all this in the least degree incompatible . . . in the disallowance of an act of the Legislature by the Governor General acting on the advice of his Council who, as representing the Sovereign, constitutes the executive government for Canada.

On these authorities therefore, in my opinion, notwithstanding the matters to which Mr. Varcoe has called our attention, which were all before their Lordships, it is not possible to describe the office of Lieutenant-Governor as an office under the Governor General in Council. By reason of *Section 71* the Lieutenant-Governor is a part of the Legislature for Quebec and that Legislature "was to retain its independence and autonomy and to be *directly under the Crown* as its head"; per Viscount Haldane (1).

I would accordingly dismiss the appeal and cross-appeal, both with costs. There can be no recovery of interest against the Crown apart from contract or statute; The *King* v. *Racette* (2), and cases therein referred to.

Appeal and Cross-Appeal dismissed with costs.

Solicitors for the appellant: *F. P. Varcoe and D. H. W. Henry.*

Solicitor for the respondents: *Fernand Choquette.*