HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT; 1949

*May 19, 20
*Dec. 5

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Crown—Petition of right—Retired judge receiving a pension—Appointed Lieutenant-Governor of Quebec—Heirs claiming for salary—Whether prescription—Whether law of Quebec or of Ontario applies—If law of Quebec whether prescription is five years—Whether question of law decided at previous hearing as to the status of Lieutenant-Governor created "res judicata"—Renunciation to prescription—Judges Act, R.S.C. 1927, c. 105, s. 27—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 32—Arts. 449, 1602, 2242, 2250, 2260(6), 2267 C.C.*

This court answered in the affirmative (1948 S.C.R. 126) the question of law, set down for hearing before the trial of the present case, as to whether a pensioned retired judge is entitled to his pension together with the full remuneration attached to the office of Lieutenant-Governor of a Province while occupying that position. At trial before the Exchequer Court, appellant contended that respondent's claim for the part of the salary withheld by the Crown during the years 1929 to 1934 (during which period respondent was Lieutenant-Governor of Quebec), was prescribed when the petition of right was taken on 13 November 1943. The Exchequer Court held that the law of Quebec applied and that the claim was not prescribed.

*Held:* There is no *"res judicata"* in this case as the only issue raised and discussed at the previous hearing was the status of the Lieutenant-Governor and the Court was not empowered to and did not deal with the issue of prescription.

*Held:* If the law of Quebec applies here, the prescription is not of five but of thirty years as the salary of the Lieutenant-Governor is not one of the subject matters found in Article 2250 C.C., nor does it fall under 2260 (6) as this Article contemplates a contract of hire of work which presupposes a relationship of employer and employee, which relationship does not exist between His Majesty and the Lieutenant-Governor.

*Held:* Also, that if the law of Ontario applies, the limitation period being twenty years, the claim would not be barred either.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), holding that the claim for salary

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

(1) [1949] Ex. C.R. 169.

1949

THE KING v. CARROLL

Taschereau J.

of the Lieutenant-Governor of Quebec, who held office from 1929 to 1934, was not prescribed on 13 November 1943 when the petition of right was taken by the respondents.

*F. P. Varcoe, K.C.* and *J. Desrochers* for the appellant.

*Fernand Choquete, K.C.* for the respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—This case now comes before this Court for the second time (1). The facts may be briefly summarized as follows:

The Honourable Mr. Justice Carroll was from 1908 until 1921 a Puisne Judge of the Court of King's Bench, and from 1929 until 1934, Lieutenant-Governor of the Province of Quebec. When he resigned from the Bench in 1921, he was entitled to a pension of $6,000, and was also entitled annually from 1929 until 1934, to an additional $10,000, being the statutory amount paid to the Lieutenant-Governor.

His Majesty however refused to pay both the pension and the salary, and based His refusal on section 27 of *The Judges' Act* (R.S.C. 1927, chap. 105), which reads as follows:—

> 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.

On the 21st of June, 1944, the matter having been brought to the Exchequer Court by way of Petition of Right, the Honourable Mr. Justice Angers ordered that the following question of law be set down for hearing before trial:

> 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 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 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 relief sought by the Petition of Right?

(1) [1948] S.C.R. 126.

This question was answered in the affirmative by Mr. Justice Angers (1), and that judgment was confirmed by this Court (2). It was held that the office of Lieutenant-Governor is not a public office under His Majesty in respect of His Government of Canada, but that it is a public office in respect of the Government of the Province for which he is appointed.

The matter was then referred back to the Exchequer Court, and the plea was amended in order to allow His Majesty to allege that the claim is barred and extinguished by virtue of the statute of limitations, namely, section 32 of the *Exchequer Court Act,* chap. 34, Revised Statutes of Canada, 1927, and articles 2250, 2260 para. 6, and 2267 of the *Quebec Civil Code.* Mr. Justice Angers (3) dismissed this contention and came to the conclusion that the suppliants were entitled to recover from His Majesty the King the sum of $30,500, being the amount withheld by the appellant.

The respondents claim that the present appeal should be dismissed and submit that there is *"res judicata"*, that the law of limitation of the Province of Quebec does not apply, that if it does, the prescription of five years is inapplicable, and that in any event, the appellant has renounced prescription.

Dealing with the first point, the argument raised by the respondents is that when the Exchequer Court and this Court answered the question of law in the affirmative, they also disposed of the question of prescription which is now raised. With this contention I do not agree. The original submission made to the Court was on a particular point, and the only issue raised and discussed was the status of the Lieutenant-Governor. The courts had to decide whether the Lieutenant-Governor fulfilled federal or provincial functions, and they could not go beyond answering the question put, in the affirmative or the negative; they were not empowered therefore to deal with the issue of prescription which now comes for adjudication. The two issues being entirely different, the plea of *"res judicata"* appears quite unfounded.

(1) [1947] Ex. C.R. 410.
(2) [1948] S.C.R. 126.
(3) [1949] Ex. C.R. 169.

1949

THE KING v. CARROLL

Taschereau J.

The second point as to prescription, offers more difficulty. Is it the law of limitation of Ontario where the appointment of the Lieutenant-Governor was made and where the remuneration is paid that applies? Or is it the law of Quebec where the functions are performed and where the payment is received? If the law of Ontario governs this case, the claim is not barred, as the limitation period is twenty years. (Halsbury, 2nd Ed., vol 20, p. 600) (Weaver, "Limitations" p. 301). If the law of Quebec applies, is it the five year or thirty year prescription term? I do not think that for the purpose of determining this case, it is necessary to examine all these questions, as I have come to the conclusion that the claim is not barred, whether the laws of Ontario or Quebec apply. The only possible limitation under the Quebec law would be the five year short prescription, but it does not stand in the respondents' way.

The appellants have invoked sections 2250, 2260 para. 6, and 2267 of the *Civil Code,* and also section 32 of the *Exchequer Court Act* (R.S.C. 1924, chap. 34). These sections read as follows:—

2250. With the exception of what is due to the Crown and interest on judgments, all arrears of rents, including life-rents, all arrears of interest, of house-rent or land-rent, and generally all fruits natural or civil are prescribed by five years.

This provision applies to claims resulting from emphyteutic leases or other real rights, even where there is privilege or hypothec.

Prescription of arrears takes place although the principal be imprescriptible by reason of precarious possession.

Prescription of the principal carries with it that of the arrears.

2260. The following actions are prescribed by five years:—

6. For hire of labour, or for the price of manual, professional or intellectual work and materials furnished, saving the exception contained in the following articles;

2267. In all the cases mentioned in articles 2250, 2260, 2261 and 2262 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.

Sec. 32 *Exchequer Court Act*:—

The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any act of the Parliament of Canada, apply to any proceedings against the Crown in respect of any cause of action arising in such province.

It seems clear that the amount claimed by the respondents, which is the portion of the salary reduced by the amount of the pension, is not any of the subjects found

in section 2250 of the *Civil Code*. It is surely not a rent, and it cannot be included in the words "generally all fruits natural or civil". Natural fruits are those which are the spontaneous produce of the soil, and civil fruits are the rent of houses, interest of sums due and arrears of rents. Section 449 of the *Civil Code* also adds that the rent due for the lease of farms is also included in the class of civil fruits.

The pertinent paragraph of section 2260 of the *Civil Code* is paragraph 6 which has already been cited, and which according to appellant's submission, would bar respondents' claim. This section 2260 C.C. is not found in the *Code Napoleon*, and it is useful I think, to keep in mind that it has been enacted by the Legislature in the same form as suggested by the commissioners in their third report, section 111(*c*), page 549, where they say, that when the prescription is not otherwise provided, "the action for *hire of labour* or for *price of work* either manual, professional or intellectual, and for the materials furnished" will be five years. This section clearly contemplates the contract of *hire of work* as defined in section 1602 of the *Civil Code* and which reads as follows:—

1602. The lease or hire of work is a contract by which one of the parties, called the *lessor*, obliges himself to do certain work for the other, called the *lessee, for a price* which the latter obliges himself to pay.

The section says "for a price", and it also supposes a relationship of *master* and *servant*, of *lessee* and *lessor*, the former obliging himself to pay the price agreed upon and the latter obliging himself to do a certain work. In other words, there must be an employer and an employee.

Marcadé, *Civil Code*, vol. 6, expresses his views in the following manner:—

Le louage d'ouvrage est donc un contrat par lequel une partie, qu'on appelle *locateur*, s'oblige à faire jouir de son travail une autre partie, qui s'oblige à le payer et qu'on appelle *locataire*.

Troplong, in his book "De l'échange et du louage", vol. 2, page 222, expresses similar views:—

Le contrat de louage de services est un contrat par lequel le travailleur s'engage à faire quelque chose *pour une personne* qui s'engage de son côté à lui donner en retour un *prix convenu*.

Dealing with section 2260, Langelier, vol. 6, page 515, says:—

Le sixième cas de prescription de cinq ans mentionné par notre article est celui de l'action résultant de *louage d'ouvrage*.

1949

THE KING v. CARROLL

Taschereau J.

Finally, Mignault, dealing with the same paragraph 6, says at page 530, vol. 9:—

> Le sixième paragraphe de l'article 2260 formule une règle générale qui s'applique à tout *contrat de louage d'ouvrage* à moins que ce contrat ne tombe sous la disposition des articles 2260 et 2262.

Paragraph 6 does not mention only "hire of labour" but adds also "or for the price of manual, professional or intellectual work". It was essential I think, that these words should have been added, in order that the same prescription should be applied, not only to a claim where the price is stipulated, but also to a claim of an employee who sues for the *value* of services rendered, whether they be manual, professional or intellectual.

Langelier is quite clear on this point, and at page 515, vol. 6, he says:—

> Les mots *"prix du travail"* comprennent, non seulement le prix fixé expressément, mais la rémunération à laquelle celui qui a fourni son travail a droit, alors même que le prix n'en a pas été fixé.

But this distinction must not be interpreted as meaning that the essential contractual relationship is not also necessary in the latter case as it is in the former.

In drafting section 2260, the codifiers no doubt had in mind the controversy that existed in France during the past century between the most eminent writers, as to whether the words "hire of intellectual services" included notaries, lawyers, doctors and all those rendering professional services. Vide Huc, "Commentaire du Code Civil", vol. 10, p. 519; Guillouard, "Traité du contrat de louage", vol. 2, p. 251 et suiv.; Merlin, Vol. 21, "Répertoire de Jurisprudence", p. 356; Troplong, "De l'échange et du louage", vol. 2, p. 237 et suiv.; Championnière, "Traité des droits d'enregistrement", vol. 2, pp. 424 et 427.

Obviously, in order to make the law clearer and to avoid any further doubts, the Legislature enacted section 2260 in its present form, with different paragraphs dealing with professionals, and having a special paragraph for "hire of labour" as defined in section 1602 C.C. Any case not mentioned in 2260 C.C. is not covered by it. A short prescription, where the law denies the action and completely extinguishes the debt, must be found in the *Code;* otherwise, it is the thirty year prescription that applies (C.C. 2242).

In the case now before this Court, can it be said that there existed between His Majesty the King in the right of the Dominion, and the late Mr. Justice Carroll, this relationship of *employer* and *employee*, of *master* and *servant*, of *lessee* and *lessor* of services, and enabling the courts to apply the short prescription of five years, found in paragraph 6 of section 2260? In the previous judgment delivered by this Court (*The King* v. *Carroll et al* (1)), when the first appeal was disposed of, this Court, basing itself on numerous decisions of the Judicial Committee, determined the real status of a Lieutenant-Governor. It reached the conclusion that the Lieutenant-Governor did not fulfil federal functions, but that his office was exclusively of a provincial character; that he was for provincial purposes as much the direct representative of His Majesty as the Governor General is for federal purposes; and that it was the functions performed, that had to be examined in order to determine the real nature of the services rendered.

It is true that the appointment of a Lieutenant-Governor is made by the Governor General in Council and that the remuneration is paid by the Federal Government, but these are merely constitutional obligations imposed upon the Dominion, which when fulfilled do not alter the provincial character of the office of a Lieutenant-Governor. The procedure through which the appointment is made does not create any relationship of *employer* and *employee*, of *master* and *servant*, of *lessee* and *lessor* of services. It is the constitutional machinery used to determine who will in a given province represent the Sovereign.

By a fiction of the law, the Lieutenant-Governor stands in a unique position, fulfilling in the Province, for which he is appointed the duties fulfilled by the King himself in England, and which no one else can exercise. (Todd-Parliamentary Government, 2nd Ed., p. 584). And in acting in that capacity, he is not an employee of His Majesty in the right of the Dominion. I fail to see between the appellant and the respondent any of the essential contractual elements necessary to bring the claim within section 2260 C.C.

(1) [1948] S.C.R. 126.

1949

THE KING v. CARROLL

Taschereau J.

Having reached this conclusion, it becomes unnecessary to deal with the last point raised by the respondents that the appellant has renounced prescription.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *F. P. Varcoe and J. Desrochers.*

Solicitor for the respondent: *F. Choquette.*