

the commission itself, such a contract would be illegal as being contrary to the 5 & 6 Edw. VI. and 49 Geo. III. ch. 126: *Regina v. Mercer*, 17 U. C. R. 601; *Regina v. Moodie*, 20 U. C. R. 389: and, by the very terms of the condition, and of the obligation referring to and reciting it, the annuity was payable out of the fees of the office held under the particular commission of the 1st November, 1898. It was attached to that commission, and was payable only during the occupancy of the office thereunder, and when the commission was gone there ceased to be any contract to pay it. The office is now held under the new commission, and the former, which alone gave any force to defendants' obligation, has ipso facto been revoked or discharged.

Whether, in any circumstances, an action would have lain against defendant Dana for procuring or inducing the Crown to cancel the former, it is not necessary to determine. I do not suggest that it would. The office was not one from which defendant Dana could have discharged himself by his own act. So long as he held it under the earlier commission, he was bound to pay the annuity to the extent to which the fees, etc., receivable thereunder would have enabled him to do so, but I can see no implied obligation on his part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him. By his own act alone he could not disable himself from complying with it, but, if the Crown should think it right, in all the circumstances of the case, to do so, either by accepting his resignation or discharging him, there can be no reason, in my opinion, why that should not effectually be done.

For these reasons, the principle of such cases as *McIntyre v. Belcher*, 14 C. B. N. S. 654, *Ogden v. Nelson*, [1904] 2 K. B. 410, and *Day v. Singleton*, [1899] 2 Ch. 320, is inapplicable, the liability having been put an end to, or the defence to any further claim upon the bond having arisen from the act of the Crown, not the act of defendant.

It was contended that the question was *res judicata* by the principal judgment, but I do not think so. The defence is one which arose after that judgment was recovered, and was in no way involved in the decision. It is as much open to defendants now as a release or discharge of that judgment would have been.

I am also of opinion that the judgment on the trial of the issue is appealable as a final judgment upon the matters set up as a defence to any further liability to damages in respect of alleged breaches of condition occurring subsequent to the new appointment.

I think the appeal should be allowed, and the petition dismissed.