

JANUARY 23RD, 1905.

C.A.

SMART v. DANA.

Bond—Sheriff—Predecessor in Office—Agreement to Pay Annuity out of Revenues—Appointment Conditional on Payment—Bond for Payment—Effect of Resignation and Unconditional Re-appointment—Res Judicata—Judgment on Issue—Right of Appeal.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., 3 O. W. R. 89, in favour of plaintiff on the trial of an issue directed at the hearing of a petition by way of sci. fa. upon a judgment recovered in an action by the former sheriff of Leeds and Grenville against the present sheriff and his sureties on a bond for \$10,000 to secure payment to plaintiff out of the revenues of the office of \$1,200 a year.

FALCONBRIDGE, C.J., held that defendant Dana could not by resignation and re-appointment to the office relieve himself and his sureties from liability.

The facts are set out in the judgment of STREET, J., 5 O. L. R. 451, 2 O. W. R. 287.

A. B. Aylesworth, K.C., for defendants, appellants.

G. F. Shepley, K.C., and J. A. Ritchie, Ottawa, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

OSLER, J.A.— . . . Upon the evidence it must be taken, although I do not specially rest my decision upon it, that defendant Dana's resignation was made in good faith, that is to say, that it was absolute and unqualified, and not upon any understanding, express or implied, that, if accepted, he should be re-appointed to office. Want of good faith is not to be imputed to the Crown, who undoubtedly had the right to permit, and who did permit, the resignation, and who by accepting it made it effectual. The office thereby became vacant, and a few weeks afterwards, without any solicitation on defendant Dana's part, was again granted to him, as a mere act of grace and favour, discharged of the condition in the former commission.

This, with all due respect, was, in my opinion, an entire discharge of defendants from all further liability upon their bond.

Regard must be had to the peculiar nature of the contract. Apart from the consent of the Crown, authorizing payment of an annuity out of the fees, etc., of the office, testified in