

SECRET.

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4/Mesopotamia/14.

Report of the Mesopotamia Commission.

I circulate for the information of the War Cabinet minutes by the Director of Personal Services, the Adjutant General and the Judge Advocate General on the obligations of the Army Council under Article 527 of the Royal Warrant for Pay &c.

DERBY.

25th June, 1917.

The question has arisen as to the circumstances under which an officer can be removed from the Army, called upon to retire or to resign his commission, and by and under what authority such disciplinary action can be taken.

The recent Inquiry set up by the House of Commons into the case of Second Lieutenant Barrett might have produced a situation much as follows and I will suppose for the sake of argument that the recommendations of the Commission were to the effect that certain officers should be called upon to retire. I will suppose that the Commission made recommendations to this effect to the Cabinet and the Cabinet directed the Army Council to give effect to them. I will suppose that the Army Council did not agree with the views and finding of the Commission and that an impasse was reached wherein the Army Council disagreed with the Cabinet. The question arises could the Cabinet enforce upon the Army Council their views and require them to give effect to their decision. In my opinion they could not for the following reasons :-

An officer serves under a particular Act of Parliament, namely, the Army Act. He has certain remedies under that Act contained in Section 42 and I will allude to this again at a later date. The liabilities under which an officer suffers in regard to his removal, retirement, or resignation, are contained in Articles 525 and 527 of the Royal Warrant.

I will leave Article 525 out of the question for a moment as the removal of an officer from the Army can be effected summarily by the Sovereign without any question of opinion arising but under Article 527 it is laid down that an officer may at any time be called upon to retire or resign his commission should the circumstances of the case in the opinion of Our Army Council require it. I should argue that under these circumstances the opinion of Our Army Council, that is to say, a quorum of three members, must be formed upon the facts laid before them having regard to all the evidence which may be available. I hold that it is incumbent upon the Army Council to enquire into all the evidence before coming to that opinion and that they could not in law or in equity accept the opinion or the directions of the Cabinet if in fact their opinion did not coincide with that of the Cabinet.

I wish to further strengthen my argument by emphasizing the fact that every officer has under Section 42 of the Army Act a statutory right of complaint. Section 42 of the Army Act lays down that if an officer thinks himself wronged..... he may complain to the Army Council in order to obtain justice, the Army Council are required to examine into such complaint and through a Secretary of State to make their report to His Majesty in order to receive the directions of His Majesty thereon.

It is here convenient to refer to Note 2 to that Section wherein it is expressed inter alia that the Army Council are required to examine into the complaint and report to His Majesty and that they are not debarred from expressing their own view of the case.

Supposing for the moment that the Army Council dealt with an officer under Article 527 of the Royal Warrant

without

without forming an opinion but merely accepting the directions of the Cabinet it is obvious I submit that if an Appeal were addressed to the Army Council under Section 42 of the Army Act they would in law be required to examine into such complaint. Such examination would, of course, require the scrutiny of all the evidence bearing upon the case and it is conceivable that on the examination required under Section 42 they might come to the conclusion that the Appeal should be so upheld and so recommend through a Secretary of State to His Majesty.

A recent case in the High Courts of Justice has but confirmed the opinion which has been held by lawyers in regard to the rights of an officer. The Lord Chief Justice (I am merely quoting his words from memory) laid down in his judgment that where an officer is serving under a military code he cannot seek redress for supposed wrongs by any other channels than those laid down in the Army Act. Under those circumstances I suggest that his disposal cannot be effected by any other means except under the provisions of the Army Act and the Royal Warrant.

My memorandum may, of course, appear ridiculous and suggest that the Army Council are superior to the Cabinet - that is not my intention. I maintain that the Army Council are by law required under Section 42 to examine and under Article 527 of the Royal Warrant to form an opinion; that opinion I submit must be their own, unfettered and duly formed upon the facts and the evidence which must of necessity be submitted to them. They cannot divest themselves of their statutory obligations which devolve upon them under the Letters Patent which created them. The solution of the problem, of course, is that if the Army Council cannot agree with the Cabinet then the Cabinet would have to find an Army Council that would. They would in fact have to go on until they created an Army Council who in a quorum of three would form the opinion which the Cabinet desired.

In conclusion I would suggest that by law the Army Council in such cases could not accept the ipse dixit of the Cabinet but are required "to examine" and "form an opinion". If the Army Council took action under Article 527 and called upon an officer to retire under the directions of the Cabinet without enquiring into the facts of the case and forming an opinion I would suggest that their action would be ultra vires and that in the event of an appeal against that decision being received from the officer concerned under Section 42 of the Army Act they would be required to "examine into such complaint". Such examination, of course, of necessity would take the form of an examination of all the evidence brought against the officer which led to his being called upon to retire. If it were admitted for the sake of argument that the Army Council could blindly call upon an officer to retire without making any enquiry into the evidence against him how could such action be maintained if in the event of an Appeal they would subsequently be required by law to enquire into it.

(Sgd.) B.E.W. Childs.

23/6/17.

D.P.S.

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2.

I entirely agree with the above minute.

(Intld.) C.F.N.M.,
A.G.

3.

J.A.G.

May I have your remarks please.

(Signed) B.E.W. Childs,
D.P.S.

23/6/17.

4.

D.P.S.

1. I concur in the views expressed in the above minute as to the legal position of the Army Council under Article 527 of the Royal Warrant for Pay and Section 42 of the Army Act.

2. If in the circumstances stated the Army Council were called upon to require a particular Officer to retire or resign his Commission under Article 527 of the Royal Warrant, it would in my opinion be the duty of the Army Council to form and express their own opinion according to the merits and justice of the case, and they would not in my opinion be bound or entitled to act merely upon instructions received from the Cabinet. The duty of forming an opinion is cast upon the Army Council itself by the words of Article 527.

3. If an Officer who had been called upon to retire or resign his commission under Article 527 were to complain to the Army Council under section 42 of the Army Act it would be the duty of the Army Council themselves to examine into such complaint and through a Secretary of State to make their Report to His Majesty in order to receive the directions of His Majesty thereon. This is a statutory duty of a quasi-judicial nature imposed on the Army Council by the Army Act and if it could be proved that they had failed to discharge it I think that they could be compelled to do so.

4. It would, I think, be unreasonable to hold that there was an obligation on the Army Council on the instructions of the Cabinet to express an opinion under Article 527 of the Royal Warrant, which they could not support or endorse in a Report which it might subsequently become their duty to make under section 42 of the Army Act.

5. I have dealt only with the position of the Army Council under Article 527 of the Royal Warrant. The Prerogative of His Majesty to dispense with the services of an Officer at any time is undoubted, and if His Majesty did so on the advice of the Cabinet, the Officer would have no legal remedy.

25/6/17

(Sd.) F. Cassel,

J.A.G.