In the Privy Council.

No. 92 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

JAMES FORBES ... ... (*Defendant*) *Appellant*,

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF MANITOBA for and on behalf of His Majesty the King in the Right of the Province of Manitoba... ... ... (*Plaintiff*) *Respondent*.

CASE OF THE RESPONDENT.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada (Duff C.J.C., Lamont and Davis JJ.; Cannon and Crocket JJ. dissenting) dated the 15th day of January, 1936, dismissing an appeal from a unanimous judgment of the Court of Appeal of Manitoba (Prendergast C.J.M., Dennistoun, Trueman, Robson and Richards JJ.A.) dated the 12th day of November, 1934, which said judgment was appealed to the Supreme Court of Canada by special leave of the Court of Appeal and which judgment dismissed an appeal from the judgment of the County Court of Winnipeg (Cory C.C.J.) dated the 8th day of June, 1934, in favour of the Plaintiff for the sum of $20.80. Record. p. 63, l. 17. p. 28. p. 20, l. 19. p. 25, l. 11. p. 17, l. 12.

2. The appeal in this case by arrangement between counsel and at the suggestion of the Supreme Court of Canada was argued with the appeal in *Worthington* v. *Attorney-General*, and the reasons for judgment of Duff C.J.C., and Lamont, Crocket and Davis JJ., cover both cases. Mr. Justice Cannon gave separate dissenting judgment in each case. No appeal in the *Worthington* case has been taken.

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Record. p. 7, l. 1, *et seq.* p. 72.

3. The Attorney-General of Canada was duly notified of the trial of the action, the hearing of the appeal before the Court of Appeal and of the hearing of the appeal before the Supreme Court of Canada, and in each case did not appear.

pp. 3-4.

4. The Respondent as Plaintiff brought this action in the County Court of Winnipeg against the Defendant to recover from him a tax of two per cent. imposed by " The Special Income Tax Act " being chapter 44 of the statutes of Manitoba, 1933, for the period from the 1st day of May, 1933, to the 31st day of December, 1933, upon the salary or wages paid to or received by the Defendant, which tax the Defendant refused and neglected to pay and which tax was not deducted from his salary or wages.

p. 12, l. 35.

5. " The Special Income Tax Act " came into effect on the 4th day of May, 1933, and imposed a tax in respect to wages and income earned after the 1st day of May, 1933. Part I of the Act imposed a two per cent. tax in respect to that part of income defined as " wages " and Part II of the Act imposed a two per cent. tax on all other income. The full text of this taxing Act is set out in the appendix to the Respondent's Factum in the Supreme Court of Canada.

6. The main points in issue in this appeal are—

(A) whether or not it is within the competence of a Provincial Legislature in the Dominion of Canada to impose this tax under " The Special Income Tax Act " upon a Dominion civil servant who is within the province in the same manner as it is imposed upon all other persons in the province; and

(B) whether or not the tax imposed by Part I of the said Act is direct or indirect taxation.

p. 14, l. 6.

7. The trial judge in the said County Court held that the tax in question was a direct tax and that the Appellant was within the statute and subject to taxation by the province thereunder. He accordingly gave judgment for the Plaintiff in the action.

p. 17, l. 6.

p. 21, l. 5.

8. The learned judges of the Court of Appeal of Manitoba dismissed an appeal by the Appellant and gave the following among other reasons for the judgment.

p. 22, l. 4.

Mr. Justice Robson (with whom Prendergast C.J.M., Dennistoun and Trueman JJ.A. concurred) held that the Defendant was a servant or employee of the Crown and as such came within the statute, and that in view of the decisions in *Abbott* v. *Saint John* (1908) 40 S.C.R. 597, and *Caron* v. *The King* [1924] A.C. 999, the Appellant was taxable by the province.

p. 22, l. 13, *et seq.*

He also held that the statute when examined showed the tax to be one placed directly upon the person by whom it was intended it should be and was in

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fact borne and that the procedure for the collection through the instrumentality of the employer did not render the tax an indirect one. Mr. Justice Richards dealing with the character of the tax held that Section 3 of the Act clearly indicated that the tax was imposed upon the employee and he rejected the contention of the Appellant that the procedure for the collection of the tax rendered the tax an indirect one.

p. 22, l. *et seq.*

9. In the Supreme Court of Canada the Chief Justice of Canada after stating that he entirely agreed with the reasons for judgment of Mr. Justice Davis dealt with various contentions advanced by the Appellant. With respect to the provincial power of direct taxation within the province he said :—

p. 29.

" I must confess, I have never had any doubt upon the question " raised by these appeals touching the construction and effect of the " British North America Act. The legislative authority of the provinces, " with respect to direct taxation within a province, does, admittedly, " embrace the power to levy taxes upon the residents of the province " in respect of their incomes ; and it would seem to be axiomatic that " a resident of the province is none the less so because he is an official " or an employee, or a servant, of the Dominion Government or Parliament, or a person in receipt of emoluments from that Government " or Parliament."

p. 29, ll. 11-19

He stated that he agreed with Mr. Justice Davis that the provisions of Sections 4, 5 and 6, and the last clause of Section 7, are concerned with the collection and the recovery of the taxes imposed upon the employee by Sections 3 and 7. He admitted the possibility of a province indirectly under the guise of imposing taxation attempting to invade the exclusive legislative authority of the Parliament of Canada under Section 91 (8) of the British North America Act, but he held there was no truth nor reason for imputing such a character to the legislation before the Court. He said :—

p. 31, l. *et seq.*

" The statute, no doubt, specifically mentions wages earned by " employees of His Majesty in the right of the Dominion or in right of " any province of Canada, but there is no suggestion that there is any " discrimination between such employees who are subject to the tax " created by this statute. Nor could there be any ground for a suggestion, nor, indeed, does anybody suggest, that the purpose of this " statute is anything other than that which is expressed in Section 3 (1), " viz., the levying of a tax for the purpose of raising a provincial " revenue."

p. 31, ll. 24-33

He referred to the argument for the Appellant that Sections 4, 5 and 6, and the second branch of 7, were *ultra vires* because they constitute an attempt to impose duties upon the Crown in the right of the Dominion with respect to the disposal of the revenue of the Crown in such right, and that these provisions are inextricably connected with those of Sections 3 and 7, and that the whole of the series of enactments constituting Part I is struck

p. 31, l. 3

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with invalidity because of the Legislature's illegal assumption of authority
p. 31, l. 44. in enacting Sections 4, 5 and 6 and the second part of Section 7. He held that there were three conclusive answers to this contention as follows :—

p. 31, l. 45, *et seq.*

" First of all, assuming everything in Sections 4, 5 and 6 and the " second branch of Section 7 which imposes any duty or liability upon " the employer to be struck from the statute as *ultra vires*, there would " still stand enactments valid and complete for the purpose of making " the taxes in question exigible from the taxpayer. . . .

" Second, the impeached enactments (Sections 4, 5 and 6, and the " second part of Section 7), read by the light of well settled and well " known canons of construction, do not, as it appears to me, extend to " the Crown or to the officers of the Crown in the right of the Dominion " or of any province of the Dominion, other, at all events, than Manitoba, " or to the revenues of the Crown in these respective rights ; and " further, even if this were not so, the form and character of the legis- " lation is such that the enactments, in so far as they relate to such " governments and such revenues, must be treated as severable, and " that the enactments would still have their full operation as regards " other employers and other revenues.

" Thirdly, Section 11 of ' The Manitoba Interpretation Act ' " (ch. 105, R.S.M. 1913) precludes the extension of Sections 4, 5 and 6 " and the second part of Section 7 at least to the Crown in right of the " Dominion or in right of any province other than Manitoba."

In conclusion he says :—

p. 38, ll. 36-43.

" The tax is imposed by Section 3 and the obligation to pay the " tax is created by that section and Section 7, and which includes by " reference Section 25 (1) of ' The Income Tax Act ' (C.A. 1924, ch. 91), " which, by Section 7, applies in all cases within Section 3 :

" ' In addition to all other remedies herein provided, taxes, " ' penalties and costs and unpaid portions thereof assessed or " ' imposed under this Act may be recovered as a debt due to His " ' Majesty from the taxpayer.'

" The Appellants have, in my view, presented no answer to the " claim of the Crown."

p. 39. p. 43, l. 10.

10. The judgment of Lamont and Davis JJ., was delivered by Mr. Justice Davis. After discussing the scheme of the statute he arrived at the conclusion that there was nothing in the statute to justify the contention that the tax was other than an income tax upon the Appellant, and he further held that it was not an indirect tax on the employer's payroll. He considered the somewhat inapt language of Section 7 could not be read, having regard to the statute, taken as a whole, as imposing the tax upon the employer. His view was that Sections 4, 5 and 6 and Section 7 dealt merely with the collection and recovery of the tax and not to its

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imposition, and that Section 3, the charging section, clearly imposed the tax on the employee. In his own words :— p. 44, ll

> " My conclusion, therefore, is that the imposition of the tax on " wages under Part I of the statute is direct taxation to raise revenue " for provincial purposes within the province and valid under Sec. 92, " sub-head (2), of the ' British North America Act.' "

He also said :—

> " It is a tax upon persons within the province who are receiving p. 44, l. " wages within the broad definition of that word as used in the statute " and the amount of the tax (2 per cent.) is not such as can be said to " constitute any interference with the federal government in relation " to its soldiers."

His opinion was that the principle decided in the case of *Abbott* v. *Saint John* applied to the facts in this case. p. 45, *et seq.*

11. Mr. Justice Cannon (dissenting) in a lengthy judgment dealt with a number of points. After quoting a number of statutory provisions and excerpts from Orders in Council he came to the conclusion that it appeared p. 45,

> " abundantly that the federal civil servant is bound by law to render p. 49, l. " his service exclusively to the State. Contrary to the ordinary citizen, " he is—towards the Government, in the public interest—in a state of " servitude. He has accepted this ' *capitis diminutio* ' for an in- " demnity fixed by Parliament."

Again he said

> " Towards the State, he is not, and cannot be, in the same position p. 49, " as the ordinary taxpayer who is required to contribute his share in " money for public purposes."

He dealt with the increased burden of taxation imposed by the Dominion on civil servants since *Abbott* v. *Saint John* was decided and he concluded p. 52, l. that in view of this that authority was no longer binding. He referred to p. 51, *Caron* v. *The King* and distinguished that case on the ground that Caron was not a Dominion civil servant but a minister of the Crown in a province who was not bound by the rigorous rules of employment such as obtained in the case of a civil servant. He adopted the argument rejected in the *Abbott* and *Caron* cases, namely, that Section 91 (8) of the British North America Act protects the Dominion civil servant from any taxation which would result in a diminished amount of remuneration. He further regarded the tax as a tax upon property, namely, wages. He held that the statute was therefore *ultra vires* in attempting to intercept moneys in the hands of the Dominion Crown. He was also of opinion that the taxation was indirect as in his view the statute imposed the tax upon the employer in the first instance allowing recoupment by him from the employee. He also stated p. 57, that without going so far as to declare the statute wholly *ultra vires* he

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would say that the province could not affect in any way the salary paid by the Dominion Crown to its servants. He also adopted the argument that as the tax cannot be intercepted in the hands of the Dominion Crown by the province the recipient of the salary enjoys the same protection as the Crown and is therefore exempt from taxation. His view was that the statute in question affected the status and rights of the civil service and for this reason was *ultra vires*. He also reached the conclusion that as the statute provided for the collection of the tax from the employer it was indirect taxation and the invalid portions could not be severed from the valid
p. 59, l. 39. portions and therefore the statute was wholly *ultra vires*. In conclusion he held that the statute only exacted a percentage from wages and salary not from total income and thus this case was distinguishable from the *Abbott* case which was that of a general indiscriminatory tax.

p. 60, l. 20. **12.** Mr. Justice Crocket (dissenting) came to the conclusion that the normal and general effect of the statute was not to impose an income tax upon the employee personally but to tax his wages in the hands of the employer before they were received by him. He further held that the statute clearly indicated an intention to tax the wages of the civil servant and whatever might be the right of the province to impose further burdening taxation upon the wages of employees in the hands of employers other than Crown there was no authority for the province to tax the wages of civil servants in the hands of the Dominion Government and in so far as the
p. 61, l. 31. statute attempted to do so it was entirely void and inoperative. Dealing with Section 7 under which the action was brought he held that as the statute imposed liability only on the employee when the tax was not collected by the employer and as it could not be collected in this case from the employer, the Dominion Crown, it could not be collected from the civil servant.
p. 63, l. 10. His view was that the employee had only a secondary liability and this could not stand if the primary liability out of which it arose was unconstitutional and void.

13. The Respondent submits that the judgment of the Supreme Court should be upheld for the following among other

REASONS.

(1) Because a Dominion civil servant is liable to general provincial taxation as any other resident of the province.

(2) Because the statute clearly brings the Dominion civil servant and his remuneration within its ambit.

(3) Because the statute in question contemplates the collection of the tax from the employee in those cases where the employer does not act as tax collector or is not bound to act as in the case of the Dominion Crown.

(4) Because even if the collection procedure through the employer is *ultra vires* this is severable and the statute provides a method of collection directly from the employee.

(5) Because the statute viewed as a whole imposes an additional income tax upon the very person whom it is expected shall and who actually does bear the tax and for this reason is a direct tax.

(6) And upon the grounds stated in the reasons for judgment of the Chief Justice of Canada and Mr. Justice Davis in the Supreme Court of Canada and in the Factum filed by the Respondent in that court as well as in the reasons for judgment of Mr. Justice Robson and Mr. Justice Richards in the Court of Appeal of Manitoba and of His Honour Judge Cory in the County Court of Winnipeg.

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ISAAC PITBLADO.

WILSON E. McLEAN.

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CASE OF THE RESPONDENT.

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