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* May 10, 13, 14, 15.
1936
* Jan. 15.

FREDERICK FRANKLIN WORTHINGTON (DEFENDANT) ..... } APPELLANT;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF MANITOBA (PLAINTIFF) ..... } RESPONDENT.

JAMES FORBES (DEFENDANT)..... APPELLANT;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF MANITOBA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Assessment and taxation—Constitutional law—The Special Income Tax Act, Man., 1933, c. 44 (Part I: Taxation of Wages)—Constitutionality—Direct or indirect taxation—Whether tax imposed on employee or upon wages in employer's hands—Application, effect, and validity of the Act as to pay, allowance, or wages, received by an officer of the permanent force of the active militia of Canada, or by a civil servant of the Dominion Government—B.N.A. Act, ss. 92 (2), 91 (7) (8).

The imposition of the tax on wages by Part I of *The Special Income Tax Act* of Manitoba, 1933, c. 44, is direct taxation, and is *intra vires*. The tax is imposed upon the employee; it is not in substance a tax on the employer's pay roll. Secs. 4, 5, 6 and the second part of s. 7 of the Act do not attempt to impose the tax as such upon the employer but merely provide for the collection and recovery of the tax.

The appellants, both resident within the province, one an officer of the permanent force of the active militia of Canada, the other a civil servant of the Dominion Government, were each held to be liable for the said tax in respect of the pay, allowance or wages received by him from the Government of Canada.

Abbott v. *City of Saint John*, 40 Can. S.C.R. 597, cited and applied.

Judgments of the Court of Appeal for Manitoba, 42 Man. L.R. 540, 569, affirmed.

Cannon and Crocket JJ. dissented.

Per Duff C.J.: (1) Even assuming everything in said ss. 4, 5, 6 and second part of s. 7 which imposes any duty or liability upon the employer to be struck from the Act as *ultra vires*, there would still stand enactments valid and complete for the purpose of making the taxes in question exigible from the taxpayer. (2) Said ss. 4, etc., read by the light of well settled and well known canons of construction, do not extend to the Crown or to the officers of the Crown in the right of the Dominion or of any province, other, at all events, than Manitoba, or to the revenues of the Crown in these respective

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

rights; and further, even if this were not so, the form and character of the legislation is such that the enactments, in so far as they relate to such governments and such revenues, must be treated as severable, and the enactments would still have their full operation as regards other employers and other revenues. (3) Sec. 11 of *The Manitoba Interpretation Act*, R.S.M. 1913, c. 105, precludes the extension of said ss. 4, etc., at least to the Crown in right of the Dominion or in right of any province other than Manitoba.

Per Cannon J. (dissenting): A provincial government cannot by a tax such as that in question affect the salary or wages paid, or the pay or allowance made, by the Government of Canada to a Dominion civil servant or a soldier of the permanent force. To do so would impair the status and essential rights of such civil servant or soldier, which are under exclusive Dominion authority. *Abbott* v. *City of Saint John (supra)* cannot be regarded as binding in the present case, owing to changes in conditions, and is distinguishable in regard to the nature of the tax there in question. *Caron* v. *The King*, 64 Can. S.C.R. 255, [1924] A.C. 999, is distinguishable, having regard to the nature of the position of the person there objecting to the tax. Moreover, it is at least doubtful if the pay and allowances to a soldier of the permanent force of the active militia of Canada are "wages" within the meaning of the Act in question, and in construing it (a taxing Act) the subject should be given the benefit of that doubt. Moreover, Part I of the Act attempts to strike first directly at the source of wages, before they reach the employee, expecting direct payment from the employer, and through him to reach the employee indirectly; such legislation is *ultra vires;* and, having regard to the design of the Act, the part so *ultra vires* cannot be severed from the provision in s. 7 for payment by the employee, so as to save the latter provision from invalidity (*Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1925] A.C. 561, at 568).

Per Crocket J. (dissenting)—The primary purpose and effect of Part I of the Act is to impose the tax, not upon the employee or upon the income from wages received by him, but upon the earned and accruing wages of the employee in the hands of the employer before they are paid to the employee; and so far as its provisions seek to tax federal salaries or other pay or allowances in the hands of the Government of Canada they are entirely void and inoperative. The provisions of s. 7 purporting to impose upon the employee the liability to pay the tax only in the event of its not having been deducted from his wages and paid by the employer, cannot reasonably be severed, in an action brought against an employee of the Dominion Government, from the provisions of the previous sections, which in their application to the salaries, pay and allowances of civil and other employees of the Dominion Government are *ultra vires* of the legislature, the liability for payment of the tax having been primarily placed upon the employer and only secondarily or conditionally upon the employee. The secondary liability of the employee cannot fairly be held, in a taxing statute, to stand alone if the primary liability out of which it arises or for which it is substituted is unconstitutional and void.

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APPEALS by the defendants from the judgments of the Court of Appeal for Manitoba (1) dismissing their appeals from judgments in favour of the plaintiff in the County Court of Winnipeg.

The plaintiff, the Attorney-General of the Province of Manitoba, suing for and on behalf of His Majesty the King in the Right of the Province of Manitoba, claimed in each case from the defendant, under the provisions of *The Special Income Tax Act,* ch. 44 of the Statutes of Manitoba, 1933, a tax of two per centum upon certain sums alleged to have been "wages" within the meaning of said Act earned by the defendant from May 1, 1933, to December 31, 1933, and paid to him by the Government of Canada without the said tax having been deducted therefrom.

Both defendants were at all material times continuously resident within the province of Manitoba. The defendant Worthington was an officer of the permanent force of the active militia of Canada. The defendant Forbes was a civil servant employed by the Government of Canada in the Department of Agriculture. The sums in respect of which the tax was sought to be recovered were alleged by plaintiff to have been respectively earned by each defendant as such officer and as such civil servant respectively.

The defendants each denied any liability to pay the said tax.

The defendant Worthington claimed (*inter alia*) that his presence in Manitoba was solely in performance of his duties as an officer as aforesaid, and according to the duties and exigencies of his service to the King; that any sums in question in fact received by him were received by him from the King pursuant to royal warrant for the payment thereof, under sign manual of the Governor General of Canada, as the King's representative, from and out of moneys appropriated to His Majesty for the upkeep of His forces in Canada and in accordance with rates laid down by pay and allowance regulations for the militia of Canada; that in so far as the Act in question assumes or purports to declare such sums to be "wages" within the meaning of the Act and purports to tax the defendant upon said sums, it is *ultra vires* because: the taxes provided to

(1) 42 Man. L.R. 540; 569; [1934] 3 W.W.R. 658; 681; [1935] 1 D.L.R. 376; 410.

be levied and collected under Part I of the Act are indirect taxation; the Act attempts to legislate in respect of the status, privileges and prerogatives of His Majesty the King as Commander in Chief of the militia of Canada and of the authority thereover exercised by His Excellency the Governor General of Canada as His Majesty's representative in that behalf; by various (specified) provisions of the Act the legislature has sought to impose certain duties and obligations and penalties on His Majesty and His said representative; by the Act the legislature attempts to interfere with and legislate in respect of the relationship between His Majesty the King and the officers and men of His militia in Canada; by Imperial and Dominion legislation and regulations, in force in Canada, it is provided that the pay of any officer or soldier shall be paid without any deduction other than the deductions authorized by *The Army Act* (Imperial) or any other Act to be enacted by the Parliament of Great Britain, or by any royal warrant for the time being. The defendant claimed that if Part I of the Act were construed as applicable to him it was *ultra vires;* and alternatively claimed that the sums alleged to have been received by him included the value of allowances for lodging, fuel and light, which sums were in fact never received by him, and that the provisions of the Act empowering the administrator to determine the monetary value of any such allowances were *ultra vires,* and constituted indirect taxation and taxation of property held by the King in right of the Dominion of Canada; that, should it be held that the Act was competently enacted, the King is not an "employer" within the Act.

The defendant Forbes claimed (*inter alia*) that he was not a person who would be liable to any such taxation; that he was not an employee as defined in the Act; that he had not received any moneys upon which any taxation could be levied by the provincial legislature; that the provincial legislature could not pass legislation intercepting or attempting to intercept moneys in the hands of the Dominion; that the statute is *ultra vires,* as providing for indirect taxation, and otherwise.

In the Court of Appeal, in the Worthington case, Dennistoun and Robson, JJ.A., dissented from the judgment

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of the Court dismissing the defendant's appeal; in the Forbes case, the Court was unanimous in dismissing the defendant's appeal.

In each case special leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Manitoba.

H. Phillipps, K.C. for the appellant Worthington.

C. E. Finkelstein for the appellant Forbes.

I. Pitblado K.C. and *W. E. McLean* for the respondent.

DUFF C.J.—I agree entirely with the judgment of Mr. Justice Davis.

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.

In *Abbott* v. *City of Saint John* (1) it was held that there is nothing in the statute which exempts such persons, or the salaries, wages or emoluments received by such persons, from the jurisdiction of the provinces in relation to the subject of taxation. In that case, this Court had to consider the judgment of the very able judges who decided *Leprohon* v. *City of Ottawa* (2); and it may be worth while to devote a sentence or two to *Leprohon's* case (2).

The trial judge was Mr. Justice Moss (3) (afterwards Chief Justice of Ontario). He proceeded upon principles which had been laid down in judgments of the Supreme Court of the United States, notably in the judgment of Marshall C. J. in *McCulloch* v. *Maryland* (4), the effect of

(1) (1908) 40 Can. S.C.R. 597.

(2) (1878) 2 Ont. App. R. 522.

(3) His judgment is reported in 40 U.C.Q.B. at 480-484.

(4) (1819) 4 Wheat. 316.

which may be summed up in these words, quoted by Moss J. (1) from the judgment of Nelson J. in *Buffington* v. *Day* (2):

* * * there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the General Government; but it was held, and we agree properly held, to be prohibited by necessary implication, otherwise States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

Mr. Justice Moss himself proceeds:

In this case the Central authority, in the exercise of its appropriate functions, appointed the plaintiff to a position of emolument. In the exercise of its proper powers it assigned to him a certain emolument. This emolument the plaintiff is entitled to receive for the discharge of duties for which the Central Government is bound to provide. I do not find in the *British North America Act* that there is any express constitutional prohibition against the Local Legislatures taxing such a salary, but I think that upon the principles thus summarized in the case which I have just cited there is necessarily an implication that such power is not vested in the Local Legislature.

The learned judges in the Court of Appeal for Ontario base their conclusions upon the same grounds.

In *Abbott* v. *City of Saint John* (3), four of the five judges of this Court were clearly of the view that this reasoning was not admissible for the purpose of determining the limits of the powers vested in the provinces by the *British North America Act*. Davies J. said (at p. 606):

Time and again the Judicial Committee have declined to give effect to this anticipatory argument or to assume to refuse to declare a power existed in the legislature of the province simply because its improvident exercise might bring it into conflict with an existing power of the Dominion.

At page 618, I observed,

* * * *Leprohon* v. *The City of Ottawa* (4) * * * was decided in 1877. Judicial opinion upon the construction of the *British North America Act* has swept a rather wide arc since that date; to mention a single instance only, it would not be a light task to reconcile the views upon which *Leprohon* v. *The City of Ottawa* (4) proceeded with the views expressed by the Judicial Committee in the later case of *The Bank of Toronto* v. *Lambe* (5). Indeed, although *Leprohon* v. *The City of Ottawa* (4) has not been expressly over-ruled, the grounds of it have been so thoroughly undermined by subsequent decisions of the Judicial Committee, that it can,—I speak, of course, with the highest respect for the eminent judges who took part in it,—no longer afford a guide to the interpretation of the *British North America Act*.

(1) 40 U.C.Q.B. at 484.
(2) (1870) 11 Wallace 113, at 123-124 (reported *sub nom.* *The Collector* v. *Day*).
(3) (1908) 40 Can. S.C.R. 597.
(4) 2 Ont. App. R. 522.
(5) (1887) 12 App. Cas. 575.

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Abbott v. *City of Saint John* (1) was approved in *Caron* v. *The King* (2) and both decisions are, of course, binding upon this Court.

In view of an argument addressed to us, one may, perhaps, observe that *Abbott* v. *City of Saint John* (1) was not founded on the decision of the Privy Council in *Webb* v. *Outrim* (3), a decision upon the Commonwealth Act of Australia. It proceeded, as plainly appears from the judgments, upon the view that the reasoning in *Leprohon's* case (5) had been swept away by subsequent decisions of the Judicial Committee of the Privy Council on the *British North America Act.*

I agree 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.

It is conceivable, no doubt, that a province might, while professing to act under clause 2 of section 92 of the *British North America Act,* attempt to invade the exclusive legislative authority of the Parliament of Canada under clause 8 of section 91 in respect of the

> fixing of * * * the salaries and allowances of civil and other officers of the Government of Canada.

Attempts on the part of both the Parliament of Canada and the legislatures of the provinces to employ their admitted powers for the purpose of legislating in a field from which they are excluded by the terms of the *British North America Act* have sometimes come before the courts. One of the most recent cases of the kind concerned an attempt on the part of the Dominion to make use of its powers in respect of taxation in order to exercise legislative control over a subject withdrawn from its jurisdiction by the *British North America Act.* The attempt failed for the reasons given by Lord Dunedin, speaking on behalf of the Judicial Committee, in *In re the Insurance Act of Canada* (4).

If a province should attempt to employ its authority in respect of taxation for the purpose of invading the field of jurisdiction marked out and exclusively appropriated to the Dominion by clause 8 of section 91, then such an attempt must necessarily fail. But there is in truth no reason

(1) (1908) 40 Can. S.C.R. 597.
(2) [1924] A.C. 999.
(3) [1907] A.C. 81.
(4) [1932] A.C. 41, at 52 and 53.
(5) 2 Ont. App. R. 522.

for imputing such a character to the legislation now before us. 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.

Counsel for the appellant emphasized sections 4, 5 and 6 and the second branch of section 7. The argument, if I understood it, appeared to be that these sections are *ultra vires* because they constitute an attempt to impose duties upon the Crown, or the officers of the Crown in the right of the Dominion, or of provinces of Canada other than Manitoba, with respect to the disposal of the revenues of the Crown in such rights; that these provisions are inextricably connected with those of sections 3 and 7, and that the whole of the series of enactments beginning with section 3 and ending with section 7 form a *unum quid* which is struck with invalidity because of the legislature's illegal assumption of authority in enacting sections 4, 5 and 6 and the second part of section 7.

There are, as I conceive, three conclusive answers to this contention. 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. I shall elaborate this later.

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 legislation is such that the enactments, in so far as they

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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.

Reading sections 4, 5 and 6 without reference to the interpretation clauses, but in light of accepted rules of construction, it is clear that these sections must be construed as imposing duties and liabilities only upon employers within the territorial jurisdiction of the Legislature of Manitoba, and as dealing with moneys or revenues having a situs which would enable the Legislature to exercise control over them. The general rule, I think, is stated with perfect accuracy in the treatise on Statutes in Lord Halsbury's collection, Vol. 27, section 310, at p. 163,

> When Parliament uses general words it is dealing only with persons or things over which it has properly jurisdiction; it would be futile to presume to exercise a jurisdiction which it could not enforce.

The presumption in favour of this general rule is fortified in this case by the penal provisions of section 6, which become operative in any case in which an employer fails to observe the duty created by sections 4 and 5 to collect and pay over any tax imposed by Part 1, that is to say, by sections 3 and 7. Such penal provisions, expressed in general terms, ought not to be construed so as to bring within their sweep employers who are neither domiciled nor resident in Manitoba and whose moneys, out of which the wages are paid, are in their possession beyond the limits of that province, nor to acts or defaults of such employers committed outside the province (*MacLeod* v. *Attorney-General for New South Wales* (1)). Since subsection 1 of section 6 applies to all employers who fail to collect and pay over taxes under the provisions of Part 1, and subsection 2 applies to everybody who contravenes any provision of Part 1, this is solid ground for the inference that the duties imposed by sections 4 and 5, in respect of which section 6 provides the sanctions, are duties which the statute contem-

(1) [1891] A.C. 455.

plates shall be performed in the province. The last sentence of the first paragraph of section 4 ought not to be overlooked. It professes to provide for a discharge *pro tanto* of the obligation of the employer to pay the wages of the employee in the manner prescribed, that is to say, by payment of the tax to the province. Now the obligation of the employer would, as a rule, being a simple contract debt, have its situs at the residence of the employer; and the legislature of the province would be impotent to regulate the conditions of its discharge when the employer's residence is not in the province (*Royal Bank of Canada* v. *The King* (1)). This observation applies equally to subsection 3 of section 4.

This construction of sections 4, 5 and 6 receives powerful support by reference to the definition of "employer" in clause (*c*) of section 2 (1). It is in these words:

> 2 (1) (*c*) "Employer" includes every person, manager, or representative having control or direction of or responsible, directly or indirectly, for the wages of any employee, and in case the employer resides outside the province, the person in control within the province shall be deemed to be the employer;

The Legislature seems to have recognized that the enactments of Part 1, imposing duties upon employers and penalties for failing to perform them, could not be operative in respect of employers and their acts and property outside of the province. The last part of section 7 is not without its significance. It, by reference, makes the procedure established by sections 23, 23A and 24 of the *Income Tax Act* (C.A. 1924, ch. 91, as amended) available for the collection and recovery of the tax. They are made available for recovery and collection, not only from the taxpayer, the person on whom the tax is imposed, but, as well, for the enforcement of payment by the employer pursuant to the obligation created by section 4. Now, it is obvious from inspection that these sections of the *Income Tax Act* are only intended to apply to employers having goods in Manitoba susceptible to distress.

The provision upon which the argument of the appellant largely rests is that of section 2 (1) (*d*) (ii), which is in these words:

> (ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof,

(1) [1913] A.C. 283.

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members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial court, and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person;

The argument, as I understand it, proceeds thus: Where the word "wages" occurs in sections 4, 5 and 6, you must substitute therefor the explanatory phrases of the interpretation section. Now, in the first place, it is important to observe that under this interpretation section, these explanatory clauses only apply "where the context does not otherwise require" (sec. 2 (1)). I should have thought it reasonably clear, in view of the considerations I have mentioned, and especially in view of section 2 (1) (c), that the definition in section 2 (1) (d) (ii) could not properly be applied in such a way as to give to sections 4 and 5 the scope necessary to make them applicable to the payment of wages by, for example, a provincial government, other than that of Manitoba, or to an employee of that government. It is unnecessary to discuss the effect of the words "resident" and "residence" as applied to the Crown. The general principle of construction to which I have referred would, I should have thought, obviously have excluded from the scope of the general words of sections 4, 5 and 6 wages payable by the Crown in the right of another province and, necessarily, out of the revenue of that province and by authority of legislative appropriation or statute. Every consideration in favour of the rule which restricts the operation of the general words of a provincial statute, in such a way as to exclude from them property situate outside the territorial jurisdiction of the legislature and persons and the acts of persons outside that jurisdiction, applies with greatly multiplied force in favour of the view that these sections ought not to be construed as extending to the officials of the government of another province, or to the acts of such officials in dealing with the assets and revenues of the province. *A fortiori,* they ought not to be construed as attempting to impose legal obligations and duties on the Crown in the right of the Dominion, or the officials of the Crown in the right of the Dominion, or as assuming to direct under penal sanc-

tions the disposition of the revenues of the Dominion. No court ought, it seems to me, to attribute to the legislature of a province an intention to enact legislation so obviously beyond the scope of its legitimate action in absence of almost intractable words.

Again, subsection 3 of section 4 provides that the amount of the tax, after having been deducted and retained by the employer, shall be held in trust for His Majesty in the right of the province. This seems to be an illuminating provision. The term employer, must, as we have seen, receive some qualification. What is the qualification here? In the first place, the moneys deducted would in most cases where payable by the Dominion, or a provincial government, not have a situs in Manitoba, and that alone is sufficient for excluding such governments from the scope of the term. But beyond that, is it conceivable that a legislature of a province of Canada would assume to declare the Dominion Government or another provincial government a trustee of its revenues for that province? We cannot, I think, in the absence of some plain words, impute such an intention to the legislature.

Then, there is a special observation as regards section 5. By that section, the employer is required to keep "at some place in the province" a list of his employees with their residences. Obviously, such a provision is inoperative in relation to employers not domiciled or resident in the province. Plainly here effect must be given to the presumption excluding persons outside the jurisdiction of the legislature.

I now turn to the effect of section 11 of *The Manitoba Interpretation Act* (R.S.M. 1913, ch. 105) which contains this provision:

> No provisions or enactment in any Act shall affect in any manner or way whatsoever the rights of His Majesty, His heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby; * * *

By section 2 of the Act, there are certain cases in which section 11 does not apply. These cases are where that section,

> (*a*) is inconsistent with the intent and object of any such Act, or (*b*) would give to any word, expression or clause of any such Act an interpretation inconsistent with the context, or (*c*) is in any such Act declared not applicable thereto.

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There is nothing in the statute before us which declares section 11 to be inapplicable thereto, nor, in view of what I have said, can it, I think, be affirmed that section 11 is in any way inconsistent with the intent and object of the statute.

Can it be said then that section 11, if given effect to, "would give to any word, expression or clause" of the statute "an interpretation inconsistent with the context?" There is nothing in the context which is inconsistent with section 11 unless it can be discovered in the word "wages," reading that word by reference to the explanatory clause in the interpretation section 2 (1) (d).

It does not appear to be necessary to consider the question whether, by force of section 2, the word "employer" in these sections (sections 4, 5, 6 and the second part of section 7) should be extended to include His Majesty in right of the province of Manitoba. The statute as a whole is for the behoof of His Majesty in right of that province. On the other hand, the tone of the sections in question (4, 5, 6 and the enactments of the *Income Tax Act* referentially introduced by the second part of section 7), as well as the substance of some of the provisions of these sections, are not entirely consonant with the idea that they are intended to apply to His Majesty in any capacity.

It is, however, unnecessary to pass upon this point. Our concern is with the application of these provisions to His Majesty in right of the Dominion and of the other provinces of Canada. Is His Majesty in these capacities comprehended within the general term "employer"?

In re Silver Brothers, Ltd. (1) contains observations by Lord Dunedin, delivering the judgment of the Judicial Committee, valuable for our present purpose touching the effect of an enactment by the legislature of a province which, if operative, would prejudicially affect the rights of the Crown in relation to its revenues and assets under the control of another legislative jurisdiction in Canada. He says:

> The next point made was that the provisions of s. 16 do not apply when what is being done is not to affect the Crown prejudicially, but to give a benefit to the Crown, and along with this it is urged that there is only one Crown, and reference is made to the case of *Attorney-General for Quebec* v. *Nipissing Central Ry. Co.* (2). It is quite true that the

(1) [1932] A.C. 514, at 523-4. (2) [1926] A.C. 715.

section refers to cases where the Crown would be "bound," i.e., subjected to liability, and not to those where the Crown is benefited. But the fallacy lies in the application of this truth to the case in question. Quoad the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different.

I have already called attention to the fact that the legislature in the interpretation clause (s. 2 (1) (*c*)) seems to recognize the rule of interpretation which presumptively imputes to the legislature an intention of limiting the direct operation of its enactments to persons and things within its jurisdiction. When these sections are examined as a whole, the form, as well as the substance of them, enormously strengthens this presumption. The immediate context, therefore, offers no obstacle whatever to the application of section 11 to them. Indeed, these sections, read by themselves, in the absence of section 11 and in the absence of the interpretation clause, would be applied upon the footing that "employer" does not include His Majesty in right of the Dominion or of another province. Such being the case, it would appear that effect ought to be given to the introductory words of section 2 (1): "unless the context otherwise requires." It results, therefore, from the terms of section 11 of *The Manitoba Interpretation Act*, applied by the light of the general considerations adverted to above, and of the definition of the term "employer" in the interpretation section, that that part of clause (ii) of section 2 (1) (*d*) which refers to remuneration

> paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof

ought not, by reason of the restriction which must be placed upon the general term "employer," to be regarded as governing the interpretation of the term "wages" in these sections.

Apart from these considerations, it would appear that those parts of the definition of "wages" which relate to moneys payable out of revenues of the Dominion are severable from the other parts of the definition. If you excise these references, you do not affect the meaning of the enactments of sections 4, 5 and 6 in their application to other

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persons. Since the application of these enactments to His Majesty in the right of the Dominion, or His Majesty's officers, or to the revenues of His Majesty in the right of the Dominion, would be *ultra vires*, there seems to me no reason why, in treating that part of the statute as null, the validity of these enactments in other respects should be impeachable. In *Brooks-Bidlake and Whittal Ltd.* v. *Attorney-General for British Columbia* (1), the Judicial Committee, dealing with the statutory stipulation of a timber licence under the British Columbia *Crown Lands Act*, which provided that

> this licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith,

held that, by reason of the *Japanese Treaty Act, 1913*, enacted by the Dominion Parliament, the stipulation as regards Japanese was void; but that it must prevail as regards the employment of Chinese. The words of the judgment (at p. 458) are:

> The stipulation is severable, Chinese and Japanese being separately named; and the condition against employing Chinese labour having been broken, the appellants have no right to renewal.

The present case seems clearly to fall within this rule.

In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), the Judicial Committee had to deal with a case in which they were obliged to hold that an enactment which was *ultra vires* in some respects, but which would, in a separate enactment, have been valid in some other respects, must be treated as invalid as a whole, because, in view of the circumstances, it was quite impracticable for a court of law to effect the necessary division. The words of the judgment are,

> If the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form.

(1) [1923] A.C. 450.

(2) [1925] A.C. 561, at 568.

There can be no doubt, if in substance the severance of part of the legislation which is *ultra vires* from the statute as a whole would have the effect of " transforming it into one to which the legislature has not given its assent," then it would be beyond the province of any court to deal with the matter in that way (*Attorney-General for Ontario* v. *Reciprocal Insurers* (1). In view of what has already been said, such an objection would, as it appears to me, in the present case, be groundless.

Again, even if one could come to the conclusion that sections 4, 5 and 6 must be treated as inoperative as a whole, sections 3 and 7 are, in themselves, quite sufficient. Section 3 provides:

> 3. (1) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part;

It is the employee on whom it is to be imposed, but the tax is to be " collected at the times and in the manner prescribed by this part." Now, it is perfectly clear, as I have already pointed out, especially in view of section 2 (1) (*c*), that the legislature must have contemplated that sections 4, 5 and 6 would fail of application in many cases; in all cases in which the employer is resident outside of Manitoba, has all his assets and revenues outside of Manitoba, and has no representative in Manitoba who has any control or direction or responsibility in relation to the wages to be taxed. It would be quite inadmissible to hold that in such cases sections 3 and 7 have no application. The rule laid down by Lord Cairns in *Partington* v. *Attorney-General* (2) is this:

> If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The operation of sections 3 and 7 is not in any way dependent upon sections 4, 5 and 6 or any of them taking

(1) [1924] A.C. 328, at 346. (2) (1869) L.R. 4 H.L. 100, at 122.

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effect against the employer. There is no ground for holding that, when the last mentioned sections do not affect the employer, because he and his assets are beyond the territorial jurisdiction of the legislature, the operations of sections 3 and 7 are in any degree impaired. Section 7 plainly includes such a case, which already falls within the words:

> In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, * * *

And in all cases in which the employer is not within the general terms of sections 4, 5 and 6, section 7 equally applies.

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, as amended) 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.

The judgment of Lamont and Davis JJ. was delivered by

DAVIS J.—These appeals were heard together as they raise substantially the same question. The appellant Worthington is an officer of the permanent force of the active militia of Canada, having been duly commissioned under the provisions of the *Militia Act* of Canada. The appellant Forbes is a civil servant employed by the government of the Dominion of Canada in the Department of Agriculture. Both appellants were at all material times continuously resident within the Province of Manitoba. Both appellants seek to escape from the imposition of an income tax upon them by the Province of Manitoba. While several grounds of escape were urged upon us by counsel for the appellants, the main contention was that the Province had no right to impose an income tax upon members of the permanent force of the Canadian militia or upon Dominion civil servants, as such imposition of income tax would result in diminution of the pay or salary of such persons and constitute interference with the conduct of the Federal Government in matters of militia and of the civil service of the Dominion. These two actions were brought

as test cases and we have had the benefit of full and helpful argument by counsel in the appeals.

Apart from the special considerations that may apply to persons holding office or employment in the two classifications with which we are specially concerned in these appeals, there can be no doubt of the general proposition that every province has a right to raise revenue for provincial purposes by direct taxation within the province. That power was very clearly given to the provinces by sec. 92, sub-head (2), of the *British North America Act.*

Turning then to the special legislation with which we are concerned, the Province of Manitoba has what may be called a general income tax, imposed under the provisions of *The Income Tax Act,* being ch. 91 of the Manitoba Statutes Consolidation of 1924 with subsequent amendments. By sec. 8 of that statute there shall be assessed, levied and paid upon the income during the preceding year of every person:—

(*a*) residing or ordinarily resident in Manitoba; or
(*b*) who remains in Manitoba during any calendar year for a period or periods equal to one hundred and eighty-three days;
(*c*) who is employed in Manitoba during such year;
(*d*) who not being resident in Manitoba is carrying on business in Manitoba during such year;
(*e*) who not being resident in Manitoba derives income for services rendered in Manitoba during such year otherwise than in the course of regular or continuous employment for any person resident or carrying on business in Manitoba;

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first schedule of this Act upon the amount of income in excess of the exemptions provided in this Act; provided that the said rates shall not apply to corporations and joint stock companies, but shall apply to income of personal corporations, as provided for in 8B of this Act. (1931, c. 25, s. 11).

In addition to the taxes provided by the schedule there shall be assessed, levied and paid a tax of five per cent., on the tax payable by persons with an income of five thousand dollars or over, before any allowance is made for deductions and exemptions. (1932, c. 49, s. 8).

By the interpretation section of the statute (sec. 2 (*j*)) "taxpayer" is defined to mean

any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act.

For the purpose of the statute an extended meaning is given to the word "income" by sec. 3 and the word is used as

including the salaries, indemnities or other remuneration of all persons whatsoever whether the said salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in respect of His government of Canada or of any province thereof, or by any person, and all

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other gains or profits of any kind derived from any source within or without the province whether received in money or its equivalent, with the exemptions and deductions hereinafter respectively set out.

A long list of detailed exemptions and deductions from taxation under the Act is provided by secs. 4 and 5, with none of which exemptions or deductions we are specially concerned in these appeals. Sections 23A, 24 and 25 of the statute deal with the collection and enforcement of the tax. It may be observed in passing that sec. 25 (1) provides that,

> 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.

In 1933 the Province of Manitoba passed an Act to impose a special tax on incomes. This Act is known as *The Special Income Tax Act,* and it is with this statute that we are particularly concerned. It is divided into two main parts. Part I is headed "Taxation of Wages" and Part II is headed "Taxation of Income other than Wages." The question before us falls to be determined mainly under Part I of this statute, it being admitted that the tax sought to be collected from each of the appellants has been imposed under Part I of the statute. To fully understand and appreciate the nature and scope of the taxation under Part I, it is necessary to study the provisions of Part II as well as the provisions of the general income tax Act above mentioned, being *The Income Tax Act* of 1924 with amendments.

Part II of *The Special Income Tax Act* imposes (sec. 8 (1)) upon every person other than a corporation an annual tax of two per centum upon the value of his taxable income, other than wages as to which a tax has been paid under Part I, and such tax shall be ascertained and collected in accordance with the provisions of this part. By sec. 8 (2) the tax imposed by this part shall apply in respect of all taxpayers, other than corporations, within the scope of *The Income Tax Act,* or who would be within the scope of that Act if no deductions or exemptions were allowed therein. I have set out above the definition of "taxpayer" in the general Act. *The Special Income Tax Act* having been assented to on May 4, 1933, it was provided by sec. 9 that the tax imposed by Part II for the year 1933 should be based on the income of the taxpayer for the year 1932 and the tax for each year thereafter on the income

for the previous year; and by sec. 12 (2) the tax imposed on a taxpayer by Part II shall be assessed and levied and payable annually at the same times as the annual income tax under *The Income Tax Act* is assessed, levied and made payable. The legislature of Manitoba, faced with the obvious delay in raising revenue under Part II of the special Act on the basis of an annual assessment, adopted for practical expediency a method of taxation whereby revenue would be raised at once in monthly payments on the basis of a tax of two per centum upon the amount of all wages earned or accruing due on or after the first day of May, 1933. This monthly assessment and collection of the taxes on wages was undoubtedly adopted as a matter of practical expediency to produce revenue at once without awaiting an annual payment on the basis of the provisions of Part II of the Act. It is to be recalled that by sec. 8 (1) of Part II the annual tax of two per centum upon the value of the taxpayer's taxable income excludes "wages as to which a tax has been paid under Part I." Now in Part I it is provided, sec. 3 (1), that in addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part. "Employee" by sec. 2 (1) (*b*) "means any person who is in receipt of or entitled to any wages"; and "wages" by sec. 2 (1) (*d*),

includes all wages, salaries, and emoluments from any source whatsoever, including

(i) any compensation for labour or services, measured by the time, piece, or otherwise;

(ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial court and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person;

(iii) personal and living expenses and subsistence when they form part of the profit or remuneration of the employee; and

(iv) emoluments, perquisites, or privileges incidental to the office or employment of the employee which are reducible to a money value.

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It was argued that sec. 4 under part I indicates that the tax in substance is on the employer's payroll rather than on the employee and that the tax is therefore indirect and beyond the power of the province to impose. Sec. 4 is as follows:

4. (1) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the fifteenth day of the month next following that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

(2) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

(3) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

Sec. 4 is the machinery set up for the collection of the tax. For the purpose of carrying into effect the provisions of parts I and II of *The Special Income Tax Act*, it is provided by sec. 16 thereof that the Lieutenant-Governor-in-Council may make regulations governing the administration of the Act and that such regulations shall have the force of law as if made part of the Act. Turning to the regulations made by the Lieutenant-Governor-in-Council we find the following:

3. If an employer be satisfied that the total wages of an employee during a period of twelve months will not exceed a sum which entitled the employee to exemption under this Act, the employer shall not be obliged to collect or remit the tax. He shall, nevertheless, show the total amount paid such employee.

4. An employer shall not be liable to collect a tax from a person casually and not regularly employed where in any case he is satisfied that the wages of the employee during the period of twelve months will not exceed a sum which entitled the employee to exemption under this Act.

6. Every employer who levies and collects any tax imposed under said Act with respect to wages of any employee shall, as remuneration for his collection and payment thereof to the Provincial Treasurer, be entitled to deduct from the amount so paid two per centum of such payments and in no case shall such deduction be less than ten cents.

There is nothing to justify the contention of the appellants that the taxation of wages under the statute is in substance an indirect tax on the employer's payroll. Sec. 3 of Part I above set out is the charging section and as Lord Thankerton said in *Provincial Treasurer of Alberta* v. *Kerr* (1),

> The identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary.

Sec. 7 of Part I provides that in case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee to forthwith pay the tax. That section does not impose a liability upon the employer for the tax. Sec. 6 (1) provides that, if an employer in violation of the provisions of Part I fails to collect and pay over any tax imposed by Part I, the administrator of the Act may demand and collect from him, that is the employer, as a penalty ten per cent. of the tax payable and in addition the employer is liable to a fine. Sec. 6 (2) draws the distinction between the tax payable and moneys in the hands of an employer.

> Nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

The somewhat inapt language used in sec. 7, that

> all the provisions of sections 23, 23A, 24 and 25 of "The Income Tax Act" shall, *mutatis mutandis*, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them.

cannot be read, having regard to the statute taken as a whole, as imposing the tax upon the employer. The collection and recovery of the tax, and not its imposition, is the substance of the language used.

The imposition of the tax upon the employee is clearly made in the charging section (sec. 3 (1)) and secs. 4, 5, 6 and 7 do not attempt to impose the tax as such upon the employer but merely provide for the collection of the tax by the employer, and in respect of which collection the employer is entitled, under regulation 6 above set out, to remuneration to the extent of two per centum of the amount collected and paid over by him to the Pro-

(1) [1933] A.C. 710, at 720.

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vincial Treasurer. The collection and recovery provisions are clearly within the competence of the provincial legislature.

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.*

The appellant Worthington, an officer of the permanent force of the active militia of Canada, contends through his counsel, firstly, that the pay of a soldier is a gratuity from the Crown and cannot in any sense be regarded as wages, and secondly, that in any case a soldier is immune from income taxation by provincial governments, as such taxation involves a diminution in the pay and allowance of the soldier and constitutes an interference with national defence and is beyond the competence of any province. The *Militia Act,* R.S.C. 1927, ch. 132, sec. 48, provides in part as follows:

> (1) Officers, warrant officers and non-commissioned officers of the Permanent Force shall be entitled to daily pay and allowances at rates to be prescribed,

and the Regulations issued pursuant to the *Militia Act,* called Pay and Allowance Regulations, state (No. 43):

> In compliance with section 8 of the Militia Pension Act, a deduction of 5 per cent. will be made from the pay of every officer and warrant officer, and this will be calculated on his total emoluments, including the amounts granted for lodging, fuel, light, rations, and servant, as set forth in article 74, notwithstanding that he may be provided with these in kind instead of in money, but excluding any married allowance or allowances for forage, travelling or transfer.

The word "emoluments" is used. The word "wages" in *The Special Income Tax Act* is defined (sec. 2 (1) (*d*) as above set out) to include "all wages, salaries, and emoluments from any source whatsoever," and the definition is sufficiently wide to cover the pay and allowance of an officer in the militia. As to the second point, that this taxation by the province is unconstitutional as causing a diminution in the soldier's pay and interfering with national defence, the statute imposes a provincial tax of general application and cannot be construed as legislation respecting the salaries of soldiers as such. It is taxation aimed at citizens at large and there is no ground, in the absence of express provision, to protect the military

man from the incidence of the general tax. It is a tax upon persons within the province who are receiving 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. The *British North America Act* has made two broad divisions in the distribution of legislative power, one Dominion and the other Provincial. Within these two divisions the different legislatures possess their own legislative jurisdiction. To the provinces have been given generally all matters of local municipal government. The execution of certain prescribed duties of a local character are entrusted to the provinces in relation to education, the establishment, maintenance and management of public and reformatory prisons, hospitals and asylums in and for the province, the administration of justice, municipal institutions, local works and undertakings, property and civil rights, and generally all matters of a merely local or private nature in the province. These public services entail enormous expenditures of money by the provinces, and when a general levy upon all its citizens is imposed by a province for the purpose of raising revenue by direct taxation within the province, it does not create any conflict between federal and provincial authority such as to entitle a military officer who actually resides in the province to escape from the incidence of the purely local taxation. There is nothing in the legislation directed against the salary of the military officer as such and he must, like all other good citizens, carry his burden of the local taxation of the province within which he resides.

This Court in *Abbott* v. *City of Saint John* (1) held that notwithstanding No. 8 of section 91, which provides that the Dominion Parliament shall have exclusive legislative authority over the fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada, a civil or other officer of the government of Canada may be lawfully taxed in respect of his income, as such, by the municipality in which he resides, under the authority of provincial legislation. The

(1) (1908) 40 Can. S.C.R. 597.

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principle of that case applies to the facts of this appeal and is clearly binding upon us.

The appellant in the other case, Forbes, who is a Dominion civil servant, stands in no different position from that of the appellant Worthington.

Both appeals should be dismissed, but under the circumstances without costs.

Cannon J. (dissenting) delivered the following judgment in the Forbes appeal:

CANNON J. (dissenting).—In support of the competency of the provincial legislature to impose this 2 per cent. tax under *The Special Income Tax Act* upon the salary or wages of a Dominion civil servant who is within the province in the same manner as it is imposed upon all other persons of the province, the respondent invokes the decision in *Abbott* v. *City of Saint John* (1), which was applied in *City of Toronto* v. *Morson* (2), and approved by the Judicial Committee of the Privy Council in *Caron* v. *The King* (3). In this last case, their Lordships could see no reason in principle why any of the sources of income of a taxable citizen should be removed from the power of taxation of the Parliament of Canada. They also referred with approval to the judgment of Sir Louis Davies, J., in *Abbott* v. *City of Saint John* (1) as follows:

> He was dealing with the imposition of tax by the Province upon a Dominion official, which imposition, it was contended, contravened the provisions of head 8 of s. 91, a provision which gives to the Dominion "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." He said: "The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents. * * * It is said," he continued, "the Legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income, and, in this way, paralyze the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials but for a general undiscriminatory tax upon the incomes of residents and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it

(1) (1908) 40 Can. S.C.R. 597. (2) (1917) 40 Ont. L.R. 227.
(3) [1924] A.C. 999.

would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power."

Moreover, the Privy Council considered that the Dominion Income Tax Acts were not discriminating statutes. They were statutes for imposing on all citizens contributions according to their annual means regardless of, or, it may be said, not having regard to the *source* from which their annual means are derived. The appellant says:

> That case is clearly distinguishable from the one at bar for there the Court was dealing with a general income tax statute and held that a Dominion Government Official's salary should be included in computing his general income but that case was not one of a statute placing a tax upon his salary but was merely a general income statute.

I

Are Dominion civil servants entitled to retain the full salary which the Legislature of Manitoba is attempting to reduce by a tax as " wages " earned and paid within the province?

Without discussing, for the moment, whether or not the statute under consideration imposes a direct or indirect tax, it might be advisable to ascertain what is the meaning of the word " taxation " used in sections 91 and 92 of the *British North America Act.* A tax is an enforced contribution in *money* levied on persons, property or income by the proper authority for the support of government. The province is empowered to make laws in relation to direct taxation within the province in order to the raising of a revenue for provincial purposes. This is evidently confined to the levying of *money* and this taxation must be imposed equally on all citizens. No one is supposed to be conscripted into the public service under the guise of taxation. Can there be equality of taxation as between the ordinary citizen enjoying all the civil rights and liberties and privileges of free agents and a person living in the province who is in the service of the federal government? Does the civil servant enjoy the same liberties as the other subjects in the province? Has he the same rights to freedom of speech and discussion at public meetings? and especially, does he enjoy the right to strike or the right to withhold his labour, so long as he commits no breach of contract or tort or crime? See Halsbury, Laws of England, 2nd Edition, Vo. Con-

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stitutional Law, No. 437—pages 391-392. Can he, at will, leave the province to earn his living elsewhere? Has he, like other citizens, absolute freedom to use as he intends his working power or his earning capacity? In other words, is he, as far as his wages are concerned, to be considered as a free agent who can refuse to work?

The *Civil Service Act* (R.S.C. 1927, c. 22) contains these provisions:

44. The Commission shall by regulation prescribe working hours for each portion of the civil service, and there shall be kept and used in each branch of the civil service a book, system or device approved by the Commission for preserving a record of the attendance of the employees.

46. The deputy head may grant to each officer, clerk or other employee a yearly leave of absence for a period not exceeding eighteen days in any one fiscal year, exclusive of Sundays and holidays, after they have been at least one year in the service.

2. Every such officer, clerk or employee shall take the leave so granted at such time each year as the deputy head determines.

55. No deputy head, officer, clerk or employee in the civil service shall be debarred from voting at any Dominion or provincial election if, under the laws governing the said election, he has the right to vote; but no such deputy head, officer, clerk or employee shall engage in partisan work in connection with any such election, or contribute, receive or in any way deal with any money for any party funds.

2. Any person violating any of the provisions of this section shall be dismissed from the civil service.

Moreover, any permanent or temporary employment in the service of the Government of Canada disqualifies the holder thereof as a candidate to a seat in Parliament. See also article 160 of the *Criminal Code*—imposing special criminal liability on civil servants.

This means that the civil servant must give and is considered as having dedicated all his activities and work to the State and is entitled to receive in return the compensation fixed for the class in the civil service to which he belongs.

His activities are even restricted during his vacation or outside of his office hours. This appears clearly by the following Orders in Council:

(*a*) P.C. 1802, of the 7th day of August, 1931, which enacts that

Where any employee is known to be using any of his annual leave for the purpose of engaging in temporary employment in connection with the operation of any race track, exhibition, or in the selling of goods of any kind, thereby depriving wholly unemployed people of such temporary work, he shall, on the production of evidence proving the said offence to the satisfaction of the Deputy Head, be subject to immediate suspension,

investigation and appropriate discipline, except in cases where, for sufficient cause shown, the Minister of Labour shall have granted special permission authorizing such temporary employment.

(*b*) P.C. 95, of the 16th day of January, 1932:

Whereas section 2 of the Civil Service Superannuation Act, chapter 24 of the Revised Statutes of Canada, 1927, provides that:

"Civil servant" means and includes any permanent officer, clerk or employee in the Civil Service as herein defined,

(i) who is in receipt of a stated annual salary of at least six hundred dollars; and

(ii) who is required, during the hours or period of his active employment, to devote his constant attention to the performance of the duties of his position and the conditions of whose employment for the period or periods of the year over which such employment extends precludes his engaging in any other substantially gainful service or occupation.

And whereas the Secretary of State of Canada reports that "civil servants" within the meaning of the said Act have heretofore been accustomed to become candidates in municipal and civic elections, and thereafter, if elected, to accept municipal and civic offices, or to engage in other substantially gainful services and occupations, which preclude such civil servants from devoting their constant attention to the performance of the duties of their respective positions in the Civil Service of Canada;

Now therefore His Excellency the Governor General in Council, on the recommendation of the Secretary of State of Canada, is pleased to order and it is hereby ordered that anyone, who may now be or hereafter may become a civil servant within the meaning and intent of said Act, shall hereafter be precluded from becoming a candidate at any municipal or civic election, or *from engaging in any other substantially gainful service or occupation,* without first having obtained leave of absence, without pay, from his duties as such civil servant for the term of the municipal or civic office which he proposes to accept or for the period or periods of the year over which it is proposed that such other gainful service or occupation shall extend.

which was amended by

(*c*) P.C. 2463, of the 7th day of November, 1932, as follows:

Provided always that the Minister administering or in charge of any Department may, in his discretion, grant permission to any of his officers, clerks or employees, to accept a municipal or civic office which does not carry with it a salary, honorarium or other emolument exceeding five hundred dollars per annum, if, in the opinion of the Minister, the acceptance of such office does not interfere with the proper and regular performance of his duties as a civil servant.

It therefore appears abundantly that the federal civil servant is bound by law to render 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 indemnity fixed by Parliament.

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II

Since the *Abbott* case (1), new elements have appeared in this constitutional problem. Parliament has imposed on federal employees the War Time Income Tax. It has even introduced the dangerous practice—which has found ready imitators—of disregarding the respectable principle of the sanctity of contracts by reducing by 10 per cent. the salaries by the unilateral action of one of the contracting parties claiming inability to pay.

Now, what is the position of a civil servant when a proportion of his salary is taken away by provincial legislation? Towards the State, he is not, and cannot be, in the same position as the ordinary taxpayer who is required to contribute his share in money for public purposes. The civil servant, if subject to this taxation, is required to contribute the same quota in money plus his services which must nevertheless be given to the nation gratuitously in the proportion of the deduction made from his salary by the impost. In this case, he would be bound by provincial legislation to give 100 per cent. services for 98 per cent. indemnity. I see nothing in the *British North America Act,* either in section 91 or 92, empowering any provincial government to compel any citizen to give gratuitously, in whole or in part, his services to the central government and to the public. Taxation under the *British North America Act* must be in money and not in money plus services.

Now in this case the effect of taxation on men bound to give all their working hours to the public is to discriminate against them by imposing a levy of money plus 2 per cent. of their services as a gratuitous extra contribution to the nation more than what the other citizens of the Province are called upon to contribute—for local purposes. Under the old system of serfdom the State had a direct claim upon the bodies, the goods, the time of the serfs. This has long ago disappeared; but the effect of this kind of legislation is to impose statutory labour upon public servants who, having to bear the disadvantages, disabilities and the reduction of their status as citizens, have a right to claim as their own, as intangible by no authority but that of Parliament, the compensation fixed for their work.

(1) (1908) 40 Can. S.C.R. 597.

Common sense indicates that, in order to have a contented public servant, willing and ready to renounce some of the rights and privileges of ordinary citizens, he must feel that both his tenure of office and his salary are secure and not subject to reductions in proportion to the means and needs of the province or municipality where his superior officers may send him to perform his public duties.

It may be noted that in rendering judgment in *Abbott* v. *City of Saint John* (1), Sir Louis Davies expressly reserved to this court the faculty of reconsidering the question involved if confiscation of a substantial part of official or other salaries were attempted. *Rebus sic stantibus,* the decision was supposed to stand. But the situation is now entirely different. A small provincial or municipal tax in 1908, in the happy pre-war days, before any federal War Income Tax could be anticipated, when a 10 per cent reduction of the federal salaries was not within the realm of possibilities, before Canada plunged into the vortex of European militarism, when a world-wide depression did not threaten the municipalities and provinces with bankruptcy, may have seemed a negligible matter, and *de minimis non curat praetor.* But now we must face the situation as it is; the fact indisputedly is that the efficiency of federal services is threatened if they have to provide besides the exigencies of Parliament, to the pressing and ever increasing needs of the local administrations. As Sir Frederick Pollock says in 45 Law Quarterly Review (1929), pp. 293 and foll.:

> [The court] must find and apply the rule which in all the circumstances appears most reasonable * * * The duty of the court is to keep the rules of law in harmony with the enlightened common sense of the nation. Such a duty, being put upon fallible men, cannot be performed with invariable and equal success. It is a matter of judgment, knowledge of the world, traditional or self-acquired bent of opinion, and perhaps above all of temperament. Caution and valour are both needed for the fruitful constructive interpretation of legal principles. The court should be even valiant to override the merely technical difficulties of professional thinking, and also current opinions having some show of authority, in the search for a solution which will be acceptable and in a general way intelligible to reasonable citizens, or the class of them whom the decision concerns. * * * Discretion is good and very necessary, but without valour the law would have no vitality at all.

We are, therefore, free, notwithstanding the doctrine of *stare decisis,* and I deem it our duty, to reopen the broad question of the power of the legislature under the guise of

(1) (1908) 40 Can. S.C.R. 597.

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direct taxation within the province to interfere with the salaries fixed and provided for by the Parliament of Canada for its civil and other officers. Moreover, it may not be amiss to point out that Abott was a tide waiter in the outside service of the Department of Customs, at a salary of $600 per year; and it is not clear, from the report of the case, that in the year 1907 such employees were precluded from engaging in gainful occupation outside of official duties. He complained that the City of Saint John assessed his salary and attempted to levy the sum of $2.22 for county taxes and $11.30 for city taxes. The court of New Brunswick, relying on a decision of the Privy Council in *Webb* v. *Outrim* (1), affecting the Commonwealth of Australia, set aside the jurisprudence which had prevailed in Canada since Confederation and which had been very ably set forth and established in the powerful judgments of Spragg C., Hagarty C.J.C.P. and Burton & Patterson JJ.A. in *Leprohon* v. *Corporation of The City of Ottawa* (2). When the *Abbott* case (3) came before this court, Girouard, J., wrote a strong dissenting opinion and refused to set aside the consistent and almost unanimous doctrine of our courts on the sole authority of *Webb v. Outrim* (1).

It is difficult to understand why the considered conclusions of most eminent judges of our country, who, being in a better position to determine exactly the spirit and effect of the Confederation pact adopted in their lifetime, thought that, on this continent of America, the principles accepted by Chief Justice Marshall and other eminent judges of the Supreme Court of the United States with reference to the constitution of the neighbouring country and the reciprocal independence of National and State instrumentalities were to be adopted as a simple matter of common sense and propriety, should have been set aside to follow a decision of the Judicial Committee concerning the interpretation of the Australian constitution which is substantially different from ours, as appears in the judgments of the High Court of Australia when it subsequently refused to accept the Privy Council views in *Baxter* v. *Commissioners of Taxation, New South Wales* (4), and *Cooper* v. *Commissioner of Income Tax for the State of Queensland* (5).

(1) [1907] A.C. 81.
(2) (1878) 2 Ont. App. Rep. 522.
(3) (1908) 40 Can. S.C.R. 597.
(4) (1907) 4 Commonwealth Law Reports, 1087.
(5) (1907) 4 Comm. L.R. 1304.

It will be sufficient to quote sec. 107 of the Australian constitution to show the complete divergence with Canada as to the division of powers:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

See Clement on the Canadian Constitution, 3rd ed., pages 375 and 642, and 23 Law Quarterly Review (1907) 373—about this much criticized decision.

In *Caron* v. *The King* (1), the appellant refused to pay the Dominion Income Tax on his salary as Minister of Agriculture for the province of Quebec and his indemnity as a Member of the Legislature. This Court said that the case was the converse of *Abbott* v. *The City of Saint John* (2), considered the authority of the Dominion to impose a tax on the salary of a provincial official and declared itself unable to distinguish the two cases.

With all due deference and diffidence, I would point out, however, that the facts in those two cases differed, because the Minister of Agriculture or a Member of the Legislature of the province of Quebec is not bound, for the salary or indemnity received as such, to devote his entire time or earning power to the province. These positions are not permanent and, as members of the Executive or of the Legislature, they are entirely free to enjoy all the civil rights of citizens; they are expected to have other gainful occupation and are not restricted as are members of the federal civil service. In view of this material difference as to the fundamental facts of the present case with those in *Caron* v. *The King* (3), I am of opinion that the judgments of this Court and of the Privy Council in *Caron* v. *The King* (3) are not binding on us in the premises.

The respondent has also quoted *City of Toronto* v. *Morson* (4), where the Appellate Division of Ontario held that the defendant, one of the judges of a county court, was not exempt from municipal taxation under provincial legislation in respect of his salary or income as such judge.

(1) (1922) 64 Can. S.C.R. 255.
(2) (1908) 40 Can. S.C.R. 597.
(3) 64 Can. S.C.R. 255; [1924] A.C. 999.
(4) (1917) 40 Ont. L.R. 227.

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The fundamental error of this finding is to be found in the reasons of Mulock, C.J., and Riddell, J., put tersely by the latter as follows (p. 232):

> As to the power of the province to tax such salaries, *Leprohon* v. *City of Ottawa* (1) decided that this power did not exist; and, had that decision stood, we should be bound to allow this appeal. But the Supreme Court of Canada, in the case of *Abbott* v. *The City of Saint John* (2), has deprived it of all authority; and, unless we are to disregard the Supreme Court decision we must hold that the power exists.

Clearly the learned judges in appeal assimilated one of His Majesty's judges to a civil servant. The exemption from taxation by provincial legislation of the salaries of judges would be based partly on different considerations than those that would apply to civil servants. Judges are not servants of the Crown; they are called to decide as between the subject and the Crown; and since the Act of Settlement their complete independence, economic and otherwise, has to be safeguarded in the public interest. Even Parliament, in order to reduce their salaries, had to impose a special tax whose validity is not to be affirmed or denied in the present case where the question does not arise. Suffice it to say that the case of *Abbott* v. *City of Saint John* (2) should not have been considered as a binding precedent by the Court of Appeal of Ontario when a substantially different question was before them. Therefore, the *Morson* decision (3) has nothing to do with the case we are now considering and, in any event, was based on a wrong appreciation of the subject-matter that was at the root of this court's decision in the *Abbott* case (2).

III

It has been said that both the Dominion Parliament and the Provincial Legislature have each been given sovereign powers within the scope of sections 91 and 92 of the *British North America Act*. The Imperial Parliament also gave to each of them the fixing of, and providing for, the salaries and allowances of civil and other officers for the respective government of Canada and of the provinces. These salaries or emoluments are attached to the position and are paid to the individual who happens to discharge

(1) (1878) 2 Ont. App. R. 522. (2) (1908) 40 Can. S.C.R. 597.
(3) (1917) 40 Ont. L.R. 227.

the commission or the public duties assigned to him. In this case, the salary is payable by the federal departments. If the Dominion, to carry on the nation's business, has one of its officials living in one of the provinces, can it be said that the salary attached to the position whose duties for federal purposes are carried out within the geographical limits of the province, becomes a "thing" within the province and may be taxed for local purposes for the sole reason that the remittance may reach the recipient outside of the Capital of the Country? It seems to me that the principle of extra-territoriality, as in the case of the representative of a foreign power, should apply *qua* salary to the mutual benefit and advantage of the officials of the two sovereign powers co-existing and organized in this country under sec. 91 (8) and sec. 92 (4) of the *British North America Act.*

In *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), Lord Loreburn said:

> In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the *British North America Act,* if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

The purpose of the constitution was the creation of a new Dominion. Canada was intended to take its place among the free nations with such attributes and sovereignty as were consistent with its being still under the Crown. It is essential to the attribute of the sovereignty of any government that it shall not be interfered with by any external or internal power. The only interference, therefore, to be permitted is that prescribed by the constitution itself. A similar consequence follows with respect to the constituting provinces. In their case, however, the central government is empowered to interfere in certain prescribed cases. But under the scheme of the document, there are a number of subjects upon which the legislative power of both the Dominion and the provinces may be exercised. In such a state of things, if questions arise which interfere with the exercise of the sovereign power of the two sovereign

(1) [1912] A.C. 571, at 583.

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authorities concerned, then the doctrine *Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest* applies, as it must be the construction of all grants of powers. It follows that a grant of a sovereign power includes a grant of a right to disregard any attempt by any authority to control its exercise. A remarkable illustration of the application of this maxim is afforded in *Attorney-General for Canada* v. *Cain* and *Attorney-General for Canada* v. *Gilhula* (1), where it was held that the doctrine might be applied so as to exercise said powers even beyond territorial limits.

This view is emphasized in *British Coal Corporation* v. *The King* (2).

Under section 91 of the *British North America Act,* the *exclusive* Legislative Authority of the Parliament of Canada extends to *all* matters coming within the classes of subjects next hereinafter enumerated; that is to say:

* * *

(8) The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

* * *

And any matter coming within any of the classes of subjects enumerated in this section *shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.*

Therefore, the Dominion Parliament alone can fix compensation to the Dominion civil servants and the same cannot be altered and no deduction made therefrom except by Parliament.

By the *Civil Service Act,* R.S.C. (1927), Cap. 22, as amended by the Act 22 and 23 Geo. V, Cap. 40, Parliament has enacted new legislation regarding the civil servants that come within that statute.

This remuneration is fixed under this statute, and sec. 10, subs. 1, provides as follows:

10. (1) The civil service shall, as far as practicable, be classified and compensated in accordance with the classification of such service dated the first day of October, one thousand nine hundred and nineteen, signed by the Commission and confirmed by chapter ten of the statutes of the year one thousand nine hundred and nineteen, second session, and with any amendments or additions thereto thereafter made; and references in this Act to such classification shall extend to include any such amendments or additions.

(1) [1906] A.C. 542.

(2) [1935] A.C. 500, at 518.

This being an Act of Parliament, it is evident that no Provincial Legislature could interfere with, deduct from or pass any legislation compelling a Dominion civil servant to give up his salary or any portion thereof. It is Parliament and Parliament alone that can make any alterations in the law as it stands under the *Civil Service Act*. Even the Dominion Government itself could not without special enactment by Parliament change, alter or deduct from a Dominion civil servant any portion of the compensation to which he would be entitled and which has been set by the *Civil Service Act*.

IV.

If *The Special Income Tax Act* of the Manitoba Legislature taxes and attempts to intercept in the hands of the Dominion a portion of the remuneration which is fixed by the Dominion Parliament as compensation to the Dominion civil servant, would this be within the legislative power of the Provincial Legislature? The answer must be in the negative.

Is the exemption from provincial interference by taxation or otherwise necessarily incidental to the exercise of the powers conferred upon the Parliament of Canada by head (8) of section 91? It is for the courts to lay down the line of necessity in this case. See: *Montreal Street Ry. Co.* v. *City of Montreal* (1), per Duff, J., at p. 229—with whom Chief Justice Sir Charles Fitzpatrick and Girouard, J., concurred, which decision was upheld in the Privy Council (2).

The same law which has prescribed bounds to the legislative power has imposed upon the judges the duty of seeing that these bounds are not overstepped. *L'Union St. Jacques* v. *Belisle* (3), per Duval, C. J.

Can it be denied that, under existing conditions in Canada since the war, the reduction of the salaries of Dominion employees in proportion to the needs of the provinces or municipalities, which in some cases are very great and are increasing alarmingly, would, if added to the reductions imposed by the Dominion Parliament, amount to confiscation of a substantial part thereof and would as a

(1) (1910) 43 Can. S.C.R. 197. (2) [1912] A.C. 333.
(3) (1872) 20 L.C. Jurist 29, at 39.

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necessary consequence seriously impair the efficiency, *morale* and economic independence of the national service? It is a patent fact to anyone conversant with Canadian conditions, and any attempt by a Province to confiscate even in part the stipend fixed by Parliament, whatever name may be given to the operation, under whatever disguise it may be presented, is an unauthorized assumption of a power which is essentially national in its scope and operation and is expressly denied to the Province by the last phrase of section 91. The Dominion alone can fix the salaries; and once fixed, they cannot be changed or reduced by the Province. According to elementary common sense, without the necessity of recourse to learned legal distinctions or disquisitions, a salary minus a tax of 2, 5 or 10 per cent. is a reduced salary *pro tanto*. Such reduction in the case of Dominion servants can be effected by Parliament only in the exercise of its exclusive jurisdiction under head (8) of 91. Now the respondent contends that the Act contemplates and contains such an interference. I quote from the factum of the Attorney-General:

> It is submitted that the Civil Servant is an "employee" and that which he receives, viz., salary, is "wages" within the meaning of the statute.
>
> The "employee," who is required to pay the tax imposed by section 3 of the Act, is defined by section 2 (1) (*b*) as meaning "any person who is in receipt of, or entitled to, any 'wages.'" The final determination, therefore, of who is an "employee," must depend upon the definition of "wages."
>
> The opening words of the definition of "wages" contained in section 2 (1) (*d*) are as follows:
>
> "'Wages' include all wages, salaries and emoluments from any source whatsoever * * * "
>
> It is submitted that no matter what term is used in describing the remuneration paid to a Civil Servant for his services, such remuneration will fall within the scope of that portion of the definition of "wages" quoted above. But the definition of "wages" is still broader in its scope for it continues:
> "including
>
> (i) any compensation for labour or services, measured by the time, piece or otherwise;
>
> (ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial court, and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person."

It is submitted on behalf of the respondent that the words "the salaries, indemnities or other remuneration * * * of all persons whatsoever," in the above quotation, plainly comprehend the salary or remuneration of the Civil Servant.

I should now come to the legislation submitted to our scrutiny, which provides in part:

PART I

TAXATION OF WAGES

3. (1) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be *levied* and collected at the times and in the manner prescribed by this part; * * *

4. (1) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the fifteenth day of the month next following that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

(2) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

(3) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

6. (1) If an employer, in violation of the provisions of this part fail to collect and pay over any tax imposed by this part, the administrator may demand and collect from him as a penalty ten per cent. of the tax payable, and he shall in addition be liable to a fine of ten dollars for each day of default, but not to more than two hundred dollars.

(2) Every person, who contravenes any provision of this part in respect of which no penalty is otherwise provided, shall be liable to a fine not exceeding five hundred dollars, and each day's continuance of the act or default out of which the offence arises shall constitute a separate offence; but nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

7. In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee to forthwith pay the tax, and all the provisions of sections 23, 23A, 24 and 25 of *The Income*

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Tax Act shall, *mutatis mutandis*, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them.

It would appear that section 7 makes the employee liable secondarily and conditionally, if—against the clear purpose of the legislator—the salary has been paid to him; the operation of the whole Act as contemplated by the legislature seems to strike at the employer first and directly for the recovery of the tax on his accruing obligation to pay wages; this is intercepting it and preventing its receipt by the officer to whom it is due. This, as pertinently remarked by Mr. Clement in his work on the Constitution, 3rd ed., p. 642, can be enacted by the federal parliament only. Moreover, if the employer pays the tax, it is expected, and in fact it is embodied in the Act, that he will recoup himself: "he shall deduct and retain the amount of the tax from the wages payable to the employee" to whom a right of action is denied by section 4 (1) against the employer in respect of any moneys so deducted and paid over to the provincial collector.

Now, direct taxes are those that are levied upon the very person who is supposed as a general thing to bear their burden. When a person pays one of these taxes, he is likely to bear the burden himself and is not likely to shift it to another. Indirect taxes are those that are collected from one person (the employer according to the operation of Part I of the Act) and then transferred in whole or in part by that person to another (in this case the employee). The distinction between direct and indirect taxation is made clear by considering the manner in which the tax is levied.

> Direct taxes are amongst those levied on permanent and recurring occasions and are assessed according to some list or roll of persons. The taxpayer is regarded as definitely and permanently ascript to the treasury. Indirect taxes, on the other hand, are levied according to a tariff on the occurrence of transactions and events which are not previously ascertainable as regards particular persons. The amount of a direct tax assessed in this way is certain and regular, while an indirect tax is uncertain and irregular, as regards individuals. (Nicholson).

Under Part I of the Act, no employee is required to make returns—only the employer. No penalty against the employee is enacted; but we find a heavy one against the employer who would dare not to disclose his payroll and deduct the tax.

Reading the whole *modum operandi* of this Part I, I feel inclined to classify it as a clear attempt by the legis-

lature to strike first directly at the source of these wages, before they reach the employee, expecting direct payment from the employer and indirectly by the wage earner; this would be *ultra vires* of sec. 92 (2), as understood and applied in a long line of decisions. But is it necessary to declare the Act *ultra vires* in its entirety? Would it be sufficient in this case to say that it cannot affect the salaries or "wages" or other remunerations paid out of the revenues of His Majesty in the right of the Dominion?

It seems obvious that the bones and sinews of Part I consist in the interception of wages in the hands of the employer. Now, as shown above, the respondent says that the "employer" referred to in the statute includes the Crown, but does not claim that the rights of the Dominion Crown can be or are affected by the collecting sections 4, 5, 6 and 7. The contract of employment by the Crown cannot be severed and if the salary cannot be intercepted in the hands of the government because it is earned and paid purely and solely to carry out the business of the country, it should also be left alone by provincial taxation after it reaches the employee. Section 7 must be read with the preceding sections, and if, admittedly, the Federal Crown cannot be forced to make returns and payments to the Province, the same protection should enure to the benefit of the other party to this particular contract of employment.

It would seem that the tax is "the exaction * * * of a percentage duty on services" of which Lord Cave said that it "would ordinarily be regarded" and should be classified "as indirect taxation"—*City of Halifax* v. *Fairbanks Estate* (1), quoted by Rinfret, J., in rendering judgment for this Court in *City of Charlottetown* v. *Foundation Maritime Ltd.* (2), where the authorities are very accurately and concisely reviewed.

V

The appellant does not claim protection as a resident of Manitoba, but as an instrumentality of the Dominion government. The present Chief Justice, in his judgment in the *Abbott* case (3), referred to *Bank of Toronto* v. *Lambe* (4). But we cannot at this date overlook the

(1) [1928] A.C. 117, at 125.
(2) [1932] Can. S.C.R. 589.
(3) (1908) 40 Can. S.C.R. 597.
(4) (1887) 12 App. Cas. 575.

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reasoning of the Privy Council in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), where was declared *ultra vires* a provincial Act which interfered, directly and substantially, with the status and capacity conferred on certain companies by Dominion legislation *intra vires* under sec. 91. In this present case also, this legislation is not saved by the fact that all wage-earners in the Province are aimed at and that there is no special discrimination against Dominion employees. "The matter," says Lord Sumner at p. 268, "depends upon the *effect* of the legislation not upon its *purpose*." The effect in this case is clearly to impair the status and earnings of a class of persons who are entitled to look to the Dominion Parliament as the exclusive authority with power to fix and determine such matters. *A fortiori* in the case of a federal civil servant, should the words of Lord Sumner apply, *mutatis mutandis*, when he says at p. 267:

> As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the provinces generally, it is *not competent* to the legislatures of those provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree.

It is my firm view that, as a matter of fact, the Province of Manitoba, by the Act under consideration, does, in effect if not purposely, impair the status and essential rights of the civil service to receive whole and without reduction the salary fixed and voted by Parliament. By doing so, the statute is bound to affect and reduce the efficiency of the service for the reasons above given.

Now, if admittedly Part I of the statute is *ultra vires*, as applying to the employer, because the tax as collected would have to be charged back to the employee, can the illegal part of the statute be severed from the allegedly legal part, section 7? The answer is found in a judgment of the Privy Council in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), where Lord Haldane said:

> * * * If the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any court to presume that the legislature intended to pass it in what may prove to be a highly truncated form.

(1) [1929] A.C. 260.

(2) [1925] A.C. 561, at 568.

VI

This statute is designed to exact a percentage not from the total income, but from the "wages or salaries" at their source. This would be sufficient to distinguish this case from *Abbott* v. *City of Saint John* (1), in which, as pointed out by Sir Louis Davies, the statute did not provide for a special tax on the wages of Dominion officials, but was a general undiscriminatory tax upon the *total* incomes of all residents in the province. In this view, this appeal could be maintained, even if this Court considered itself bound by the rule *stare decisis*.

VII

The statute is essentially an attempt to reach the wage earner indirectly through the employer who, to all intents and purposes, is the taxpayer and the only one subject to penalties under the scheme of Part I of the Act. In this respect, this Part I of the statute providing for the interception before payment, with such provisions for recoupment as shown above, must be held to be obnoxious to the restrictions imposed upon the provincial authority.

I would, therefore, allow the appeal without costs, as agreed between the parties, and dismiss the action.

Cannon J. (dissenting) delivered the following judgment in the Worthington appeal:

CANNON J. (dissenting).—*Mutatis mutandis*, my reasons in the case of *James Forbes* v. *The Attorney-General of Manitoba* would apply to this case.

In addition, s. 91 (7) of the *British North America Act* confers exclusive authority to the Parliament of Canada on "Militia, Military and Naval Service, and Defence." The power was exercised by the enactment of the *Militia Act*, R.S.C. 1927, ch. 132. Section 32 of the latter provides for the fixing of pay and allowances of the officers and men of the permanent force which, under section 22, consist of such permanently embodied corps, enrolled for *continuous* service. Appellant, therefore, must give all his

(1) (1908) 40 Can. S.C.R. 597.

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time to the nation and cannot engage in any other gainful occupation. He is entitled to receive from the Consolidated Fund upon warrant directed by the Governor General to the Minister of Finance the emoluments granted to him for the dignity of the State and for his decent support. *Flarty* v. *Odlum* (1).

Sections 139, 140 and 141 of the *Militia Act* provide that "regulations for the organization, discipline, efficiency and good government" of the militia made by the Governor in Council shall, on publication, have the same force in law as if they formed part of the *Militia Act*. Accordingly, the following regulations may be noted:

35. Officers shall, on appointment in or promotion to the ranks or grades set forth in these Regulations, be entitled to receive the rates of pay therefor as herein prescribed, subject to such deductions, forfeitures or limitations as may from time to time be authorized by statute or by regulations duly approved by the Governor-General-in-Council.

46. Warrant officers, non-commissioned officers and men shall on enlistment in or promotion to the ranks or grades hereinafter specified be entitled to pay at the following daily rates, subject to such deductions, forfeitures or limitations as may from time to time be authorized by regulations duly approved by the Governor-General-in-Council.

In my opinion, no deductions from such pay may be lawfully made by any other authority, and the provisions of Part I of the Act in question, if they really, as the respondent contends, require deductions to be made in respect of "Pay and Allowances" of any officers, warrant officers, non-commissioned officers or men, are beyond the competence of the Legislative Assembly of the province of Manitoba to enact.

The Pay and Allowances prescribed, being matters of the King's bounty, are such as in the discretion of His Majesty will be sufficient for the maintenance of the position and dignity of the King's officers and soldiers. This is exemplified by considering the following regulation, which likewise has the force of law, namely:—

King's Regulations and Orders, Paragraph:

1006. (2) A subaltern with sufficient means to maintain himself and family in a manner befitting his position as an officer may, upon the recommendation of his Commanding Officer, be permitted by the Minister to marry.

Quite obviously, such law, denying the civil right of marriage to a subaltern officer, except with the approval

(1) (1790) 3 Term. Repts. 681 (100 E.R. 801).

of his Commanding Officer and permission of the Minister, is enacted for no other purpose than that no calls shall be made upon the "Pay and Allowances" of such subaltern officer beyond those which, in the opinion of constituted authority, such "Pay and Allowances" will enable him to discharge and still maintain himself in the position and with the dignity befitting an officer.

This, under our system, has always been considered as a matter of policy in the interest of the public weal.

Even if the Legislature were competent, it is at least doubtful whether or not the "pay and allowances" are "wages" within the meaning of Part I of the Act, and, therefore, as this is a matter of taxation, the appellant subject should be given the benefit of the doubt and should not be compelled to pay by straining the definition of the word. *The King* v. *Crabbs* (1).

I would agree with the conclusions of Mr. Justice Robson that the province could not by any means take away from the pay and allowances of military officers and, further, that the Act should not be read as intending to do so.

I would allow the appeal, without costs, as per agreement of parties, and dismiss the action.

CROCKET J. (dissenting).—As I read Part I of *The Special Income Tax Act* of 1933, with the provisions of its interpretation section, its primary purpose is to tax, subject to the exemptions set forth in s. 3, the wages of all employees in the hands of their respective employers.

While s. 3 (1) enacts that in addition to all other taxes to which he is liable "every employee shall pay to His Majesty * * * a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933," it specifically provides in the succeeding clause that this tax "shall be levied and collected at the times and in the manner prescribed by this part."

S. 4 then prescribes, not only the times at which and the manner in which the tax shall be levied and collected, but in the most explicit terms imposes upon every employer at the time of payment of wages to an employee

(1) [1934] Can. S.C.R. 523.

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the duty of levying and collecting the tax "in respect of the wages of the employee *earned* or *accruing due* during the period covered by the payment" by deducting and retaining "the amount of the tax from the wages *payable* to the employee," and of paying the full amount thereof to the administrator on or before the fifteenth day of the month next following that in which the payment of wages takes place or at such other time as the regulations prescribe. It then enacts that no employee shall have any right of action against his employer in respect of any moneys "deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section."

With all deference, I cannot think that these provisions of s. 4 (1) are mere provisions of procedure. Read in connection with the language of s. 3, as they are expressly required to be by the words of reference above quoted from that section, they are the vital provisions which specifically indicate the real incidence and effect of the tax, fixing not only the time or times at which the tax shall be paid and the manner in which it shall be levied and collected, but the particular moneys upon and from and out of which it shall be levied, deducted and paid, and the person (the employer) who shall so levy and deduct it and ultimately pay it to the income tax administrator.

If it is the normal or general tendency of the tax which is to be considered and the intention is to be inferred from the form in which the tax is imposed, as laid down in the *Fairbanks* case (1), quoted by Rinfret, J., in delivering the judgment of this Court in *City of Charlottetown* v. *Foundation Maritime Ltd.* (2), it seems to me to be perfectly clear that, notwithstanding the tax is described as imposed on the employee in respect of his wages, ss. 3, 4, 5 and 6 of Part I plainly demonstrate that the real purpose and intention, primarily at least, is to impose the tax, not upon the employee or upon the income from wages received by the employee, but upon the earned and accruing wages of the employee in the hands of the employer before they are paid to the employee. The words "upon

(1) [1928] A.C. 117, at 122.

(2) [1932] Can. S.C.R. 589, at 594-5.

the amount of all wages earned by or accruing due to him" in s. 3; the obligation so expressly imposed on the employer in s. 4 to "deduct and retain the amount of the tax from the wages *payable* to the employee" and "pay to the administrator the full amount of the tax"; the duty cast upon the employer by s. 4 (2) to "furnish to the administrator a return showing all taxes imposed by this part"; and the penalty provisions of s. 6 (1 and 2), it seems to me, all shew that this is the only fair and reasonable construction of these four sections.

The provisions of s. 7 completely accord with this conclusion, requiring, as they do, the employee to pay the tax only in the event of the employer paying over to the employee the wages earned or accruing due to him without deducting the tax imposed thereon, and prescribing, as they do by their reference to s. 25 of *The Income Tax Act* (C.A. 1924, c. 91, as amended), the only manner in which the tax may be recovered from the employee in such a contingency, viz., by action for its recovery as a debt due to His Majesty. This remedy obviously is not available against the employee if the employer has deducted and withheld the full amount of the tax from the employee's wages and paid it to the tax administrator, as he is explicitly obliged to do by the provisions of s. 4 (1), on pain of the fines and penalties prescribed by s. 6.

Considering the enactment, therefore, as a whole, I cannot for my part accede to the proposition so strenuously pressed upon us by the learned counsel for the respondent that its real intent and effect is to impose the tax upon the person of the employee in respect of his income. In my view, as I have already indicated, its normal and general effect is, not to impose the tax as a general income tax upon the employee personally, but to tax his earned and accruing wages as such in the hands of the employer before they are received by the employee. Earned and accruing wages, payable to an employee, but not in fact paid to him, cannot well be said to be income at all.

That the enactment was intended to apply to the salaries, pay and allowances of civil servants and other employees of the Dominion Government and of officers and men of the Militia of Canada, as well as to the salaries

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and wages of all other persons, is plainly shewn by s. 2 (1) (*b*), (*c*) and (*d*). S. 2 (1) (*d*), after defining "wages" as including "all wages, salaries and emoluments from any source whatsoever," specifically provides that the term shall include *inter alia* the salaries, indemnities or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, and of any Judge of any Dominion or Provincial Court, and of all persons whatsoever "whether such salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person."

Whatever may be said as to the constitutional right of a provincial legislature to impose, in addition to the increasingly burdensome federal income and other taxes, a tax of two per cent. upon earned or accruing wages in the hands of other employers, there can, I think, be no doubt that no provincial legislation can validly tax the funds of the Government of Canada, appropriated and held in its hands for the payment of the salaries, pay and emoluments of its own civil servants and other employees and the officers and men of the Militia of Canada, or compel the Government of Canada or any of its representatives by means of fines and penalties to withhold any portion of such salaries, pay and emoluments, from those to whom they are due and payable, and hand it over to a provincial tax receiver in payment of any provincial tax.

As regards the enactment now under review, I have, for my part, no hesitation in holding that, in so far as its provisions seek to tax federal salaries or other pay or allowances in the hands of the Government of Canada, they are entirely void and inoperative. The Dominion Government very properly ignored the Act, and the appellants Worthington and Forbes continued to receive their pay and salary cheques in full as before, the former as an officer of the Active Militia of Canada and the latter as a member of the Civil Service of Canada.

These actions were afterwards brought against them to recover the tax of two per cent. on all wages earned by them as employees of the Government of Canada, and paid to them respectively out of the revenues of His Majesty in right of the Dominion of Canada, monthly

between May 1 and Dec. 31, 1933, without the said tax having been deducted therefrom. They are, as the statements of claim in both cases clearly shew, actions for the recovery of the tax upon wages, not only "earned or accruing due," but upon wages "paid to the defendant without the said tax having been deducted therefrom," and as such clearly can be supported, if at all, only under the provisions of s. 7.

The question accordingly arises as to whether this section, which purports to impose upon the employee the liability to pay the tax only in the event of its not having been deducted from his wages and paid by the employer, can reasonably be severed, in an action brought against an employee of the Dominion Government, from the provisions of the previous sections, which in their application to the salaries, pay and allowances of civil and other employees of the Dominion Government are *ultra vires* of the legislature. In my opinion they cannot, the liability for payment of the tax having been primarily placed upon the employer and only secondarily or conditionally upon the employee. The secondary liability of the employee cannot fairly be held in a taxing statute to stand alone if the primary liability, out of which it arises or for which it is substituted, is unconstitutional and void.

For these reasons I concur in the conclusions of my brother Cannon that both these appeals should be allowed and the actions against the appellants dismissed.

Appeals dismissed.

Solicitors for the appellant Worthington: *Phillips, Gemmill & Smith.*

Solicitors for the appellant Forbes: *Finkelstein, Finkelstein & White.*

Solicitor for the respondent: *John Allen.*