FRANCIS C. ABBOTT.....APPELLANT; 1908

AND *May 21. *Oct. 6.

THE CITY OF SAINT JOHN.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Constitutional law—Municipal taxation—Official of Dominion Government—Taxation on income—B.N.A. Act, 1867, ss. 91 and 92.*

Sub-sec. 2 of sec. 92 B.N.A. Act, 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province, etc.," is not in conflict with sub-sec. 8 of sec. 91 which provides that 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." Girouard J. *contra.*

*Held,* therefore, Girouard J. dissenting, that a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides.

APPEAL from the judgment of the Supreme Court of New Brunswick discharging a rule *nisi* for a writ of certiorari to quash an assessment.

The City of St. John, N.B., assessed the appellant, an official of the Dominion Government in the customs service, on his income as such. He obtained a rule for a writ on certiorari to quash the assessment on the ground that under the provisions of the B.N.A. 1867, no power exists by which a provincial legislature can authorize a municipality to impose such taxes. The Supreme Court of New Brunswick, in refusing the writ, followed the decision of the Judicial Com-

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff, JJ.

1908

ABBOTT
v.
CITY OF
ST. JOHN.

mittee of the Privy Council in *Webb* v. *Outrim*(1) a case from Australia and held that there is no substantial distinction between the constitution of the Australian Commonwealth and that of the Dominion of Canada in respect to the matter in question.

*Powell K.C.* for the appellant. The court below erred in saying that there is no distinction between our constitution and that of Australia. The Australian States had power, before the federation, to impose these taxes and such power was expressly reserved to them by not being given to the Federal Parliament. In Canada the provinces could only have the power, under the B.N.A. Act, by its being expressly bestowed which was not done.

At common law a public office could not be sold and the salary attached to it could not be assigned. Hence the salary could not be taken away by process of law. See *Flarty* v. *Odlum*(2); *Arbuckle* v. *Cowtan*(3); *Crowe* v. *Price*(4). The power to tax it, therefore, must be expressly given by the constitution or it does not exist.

And property used in the public service is exempt from taxation at common law. *Amherst* v. *Sommers* (5); *The King* v. *Cooke*(6).

*Skinner K.C.* for the respondents.

GIROUARD J. (dissenting).—The appeal involves a very important question of constitutional law which has already received the attention of the provincial courts of the Dominion on several occasions and has

(1) [1907] A.C. 81.
(2) 3 T.R. 681.
(3) 3 B. & P. 321.
(4) 22 Q.B.D. 429.
(5) 2 T.R. 372.
(6) 3 T.R. 519.

obtained the same solution, almost unanimously, so much so that the counsel of the City of St. John in this case relies only upon the judgment appealed from and also upon the recent decision of the Privy Council in *Webb* v. *Outrim*(1), an appeal from Australia. None of these cases has ever reached our own court. For at least twenty years the decisions of the provincial courts were accepted throughout the whole Dominion as being settled law. It is high time that the point involved should be carried to the Privy Council in order to set at rest what is becoming now the unsettled condition of the courts. I do not intend to review all those decisions. They number about twelve or fifteen. I will merely indicate some of them: *Ex parte Owen*(2); *Ackman* v. *Town of Moncton*(3); *Coates* v. *Town of Moncton*(4); *Ex parte Burke*(5); *Ex parte Killam*(6); *Evans* v. *Hudon*(7); *Crevier* v. *DeGranpré*(8); *Leprohon* v. *City of Ottawa*(9); *Bucke* v. *City of London*(10); *Reg.* v. *Bowell*(11).

I am not prepared to say that all these decisions, rendered by the most eminent judges of our country and accepted by the whole community, are wrong. I will wait till the Privy Council so declares under our own constitution. The New Brunswick judges in this case, without, however, offering any reasoning, express the view that the rule laid down in this very long array of decisions has been disapproved by the judicial committee in *Webb* v. *Outrim*(1). There the Privy Council held that the respondent, an officer of

(1) [1907] A.C. 81.
(2) 20 N.B. Rep. 487.
(3) 24 N.B. Rep. 103.
(4) 25 N.B. Rep. 605.
(5) 34 N.B. Rep. 200.
(6) 34 N.B. Rep. 530.
(7) 22 L.C. Jur. 268.
(8) 5 Legal News 48.
(9) 2 Ont. App. R. 522.
(10) 10 Ont. L.R. 628.
(11) 4 B.C. Rep. 498.

1908

ABBOTT v. CITY OF ST. JOHN.

Girouard J.

the Australian Commonwealth, resident in Victoria, and receiving his official salary in that state, is liable to be assessed in respect thereof for income taxes imposed by an Act of the Victorian Legislature. This decision has been severely criticised in the Law Quarterly Review (vol. 23, pages 129, 373), and has given very little satisfaction in Australia, especially in the High Court of that Commonwealth whose former decisions in *D'Emden* v. *Pedder* and *Deakin* v. *Webb* (1) were disapproved. On a subsequent occasion, in *Baxter* v. *Commissioners of Taxation* (2), and *Commissioners of Income* v. *Cooper* (3), the High Court of Australia refused to follow *Webb* v. *Outrim* (4). This may be strictly correct as it was not rendered on appeal from that court. On more than one occasion the courts of appeal in England refused to follow the rules laid down by the Privy Council, as that tribunal does not form part of the judicial hierarchy of the kingdom, although some, if not the majority of the learned judges sitting in that tribunal frequently sit in the House of Lords; see *Dulieu* v. *White* (5). The Commissioners of Taxation thereupon applied for special leave to appeal from that judgment of the High Court, but the Privy Council refused to interfere upon the ground that since the decision in *Webb* v. *Outrim* (4), the Commonwealth had passed a statute especially authorizing the states to impose taxation of the kind in question, so that the controversy was at an end.

If in the above cases the decisions of the Privy Council upon the Constitution of Australia were not

(1) 1 Commw. L.R. 91, 585.
(2) 4 Commw. L.R. 1087.
(3) 4 Commw. L.R. 1304.
(4) [1907] A.C. 81.
(5) 2 K.B.D. 667.

binding upon all the courts of that Commonwealth, *a fortiori,* it cannot be binding upon us, unless clearly applicable to our own constitution; and that is exactly the point upon which, with due deference, I cannot agree with the court below.

Section 91 of the British North America Act, 1867, declares that

> 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:—
>
> Par. 8. The fixing of and providing for the salaries and allowances of the civil and other officers of the Government of Canada.

And the same clause of the Act adds:—

> 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.

The power of a province to impose this tax must be found in section 92 of the British North America Act, 1867, which enumerates all the powers given to the provinces under our system, which, in that respect, differs entirely from the Australian system.

Whatever is not given by the British North America Act, 1867, to the provincial legislatures rests with the Parliament of Canada. Newcombe, p. 193. In the Commonwealth Constitution the states retain exclusive control on all subjects, authority which has not been conferred even on the Commonwealth. Teece Companion, p. 34.

As I read clause 91, I believe the provincial legislatures have no power to do anything that may interfere with the "fixing of and providing for the salaries," etc.; and, if they do so, their legislation is *ultra vires.* The power of direct taxation as provided for in para.

1908

ABBOTT
v.
CITY OF
ST. JOHN.

Girouard J.

2 of section 92 cannot mean taxation of these salaries as the effect of that taxation would, undoubtedly, be the reducing of the same more or less as the legislature or the municipality might deem proper, and this, I submit, is contrary to para. 8 of section 91. The local legislatures and municipalities might by levying excessive taxation on the salaries of federal government officers either make it impossible for the government to maintain the present scale of renumeration or make it impossible to retain their present officials. That is the view taken by our own courts.

In the application on behalf of the Crown for leave to appeal to the Judicial Committee in the case of *Armstrong* v. *The King,* involving the question under the "Exchequer Court Act" of the liability of the Crown for negligence and other questions, Lord MacNaghten stated as a ground for refusing the application—"This seems to have been the law for eighteen years."

His Lordship was referring to the decisions of the Supreme Court of Canada in the case of the *City of Quebec* v. *The Queen*(1), and *Filion* v. *The Queen*(2). This application is, therefore, a distinct precedent for the position that the committee will not grant leave to appeal from a decision, right or wrong, where it is in accordance with the law which has been observed in the colony for many years.

The case of *Leprohon* v. *The City of Ottawa*(3), is a distinct authority which has been uniformly followed for many years that the local legislatures cannot tax salaries of the Dominion officials. The deci-

(1) 24 Can. S.C.R. 420. (2) 24 Can. S.C.R. 482.
(3) 2 Ont. App. R. 522.

sion proceeds upon reasons which are fully elaborated by the various judges who pronounced opinions in that case. Their conclusions may be right or wrong, but the fact remains that it was acquiesced in for a long period, and the only thing which has now happened to disturb it seems to be the decision of the Judicial Committee in the Australian case of *Webb* v. *Outrim*(1).

That decision, however, is not, owing to the difference of constitutional provisions, in anywise inconsistent with the *Leprohon Case*(2), and if the Supreme Court of Canada were to follow the latter decision, the committee could not, consistently with what they state in the *Armstrong Case*, grant leave to appeal.

For these reasons, I am of opinion that the appeal should be allowed with costs.

DAVIES J.—This appeal raises for the first time before this court the important constitutional question of the right of the provinces of the Dominion to impose income taxes upon the Dominion officials resident in the respective provinces in respect of the official salaries paid to them in those provinces by the Dominion.

The same question had been raised years ago in several of the provinces and had been decided by the provincial courts adversely to such right. In the Province of New Brunswick the Supreme Court of that province so decided in the cases of *Ex parte Owen*(3) in 1881, and in *Ackman* v. *The Town of Moncton*(4) in 1884. When the case now in appeal came before that learned tribunal, the Chief Justice,

(1) [1907] A.C. 81.
(2) 2 Ont. App. R. 522.
(3) 20 N.B. Rep. 487.
(4) 24 N.B. Rep. 103.

1908

ABBOTT v. CITY OF ST. JOHN.

Davies J.

speaking for the full court, held that its previous decisions had been practically overruled by the Judicial Committee of the Privy Council in *Webb* v. *Outrim* (1), and that, as they could not distinguish that case from the one then before it, they were bound to reverse their previous decisions and uphold the constitutionality of provincial legislation imposing income taxation upon Dominion Government officials which they held that Act in dispute did.

On the argument before us it was contended that the radical and underlying differences in the constitutions of the Dominion and the Commonwealth were so great that little weight ought to have been given to a decision upon any one of them when sought to be applied to the other. Speaking generally, there is no doubt weight in the contention and care has to be taken, of course, so as to avoid necessarily applying observations alike apt and applicable to one constitution when the proper construction of the other is under consideration. In every case it is a question as to the proper construction of the language of the constitutional Acts and, in reaching such construction, due weight must, necessarily, be given to the general scheme involved in the construction so far as that is apparent. But with this general and probably trite observation in every case the *meaning* of any clause is a simple question of the construction of the language used. Chief Justice Barker in his judgment correctly summarizes, in my opinion, the cardinal distinction between the two constitutions when he says:

> In the case of Australia, general powers were carved out of the powers which the provinces had previous to federation, and given

(1) [1907] A.C. 81.

to the federal parliament, the residuum of power remaining in the provinces. In Canada, specific powers of legislation were given to the provinces and the residuum of power was given to the Dominion.

And so it has been laid down by the Judicial Committee as a canon of construction for the British North America Act, 1867, that, in order to ascertain whether any claimed power of legislation belongs to the provincial legislature you must seek and find it in some one of the various sub-sections of section 92. If you cannot find it there, then it must be held not to exist. But, even if you have found it there, you must go further and see whether the same or an equivalent power is not given to the Dominion Parliament under section 91. If it is not, then, of course, provincial legislation on the subject is constitutional. But, if it is found in section 91 also, then, at any rate in cases where the Dominion Parliament has legislated and to the extent it has legislated, the local legislature is incompetent to legislate.

Now, it seems to me the questions before us are: First—Whether or not the power to legislate upon the subject of taxation given to the provinces are wide and broad enough to cover the cases of Dominion officials resident within the province; and, if they are, whether or not such power is in conflict with or inconsistent with the powers given to the Dominion Parliament under the 91st section?

Section 92 gives the provincial legislatures

power exclusively to make laws in relation to matters coming within the classes of subjects next hereinafter enumerated.

Sub-sec. 2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

Now, it does not seem to me open to argument that these words are large and broad enough to cover

1908

ABBOTT
v.
CITY OF
ST. JOHN.

Davies J.

a provincial income tax reaching all residents of the province.

Unless, therefore, there is some implied exception, or some conflict with a power given to the Dominion Parliament in the 91st section, there would be an end to the case.

Such conflict, however, it is contended is found in sub-sec. 8 of section 91:—

> The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

I am unable, however, to see any necessary conflict between the two powers conferred.

The Dominion fixes and provides the salary and the province says "you shall pay to us the same income tax upon your salary as all other residents of the province have to pay upon their incomes." The conflict is, to my mind, an imaginary one. 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.

But, then, it is suggested, the power, if conceded to the provincial legislature, may be so exercised as to practically defeat the power of the Dominion Government in fixing the salaries. In other words, the power which exists in plain language in sub-section 2 must be limited by the courts for fear of its improvident exercise by the legislature. 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.

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

Then, it was argued that inasmuch as at common law the salaries of officials of the Crown were incapable of being assigned, pledged or charged by the acts of the officials or by process of law any attempt to make them liable, like other residents, as income-tax-payers would be an illegal interference with the prerogative of the Crown as executive head of the Dominion.

I confess myself quite unable to follow this argument.

The question before us has nothing to do with the common law privileges or immunities of office holders. It is a question of statutory construction. Has the statute or has it not conferred the power claimed? It is admitted it has so far as provincial officials are concerned, and I am unable to appreciate the fine distinction which admits the King's prerogative was constitutionally interfered with in right of the province

1908

ABBOTT v. CITY OF ST. JOHN.

Davies J.

while it was excepted in right of the Dominion. The words conferring the power are, to my mind, too clear and broad and general to admit of the exception sought to be read into them.

I fail to find any provisions in our British North America Act exclusively vesting in its Parliament or withdrawing from the provincial legislatures the power of taxing incomes earned within the state whether by Dominion officials or others.

Then, as to the argument as to the implied exemption of Dominion officials' salaries sought to be supported by the decision of Chief Justice Marshall in *McCulloch* v. *The State of Maryland*(1), the Judicial Committee have in the case of *Webb* v. *Outrim*(2), while declaring (page 89),

> that it was obvious there was no such analogy between the two systems of jurisprudence

of the United States of America and the Australian Commonwealth as the learned Chief Justice of the latter suggested did exist, and that, therefore, the reasoning of Chief Justice Marshall and his conclusions did not apply, went on to say:

> The enactments to which attention has been directed do not seem to leave room for implied prohibition—*expressum facit cessare tacitum;*

and, again, at page 91, their Lordships say:—

> The 114th section of the Constitution Act sufficiently shews that protection from interference on the part of the federal power was not lost sight of. It is impossible to suppose that the question now in debate was left to be decided on an implied prohibition when the power to enact laws on any subject whatsoever was before the legislature.

The 114th section of the Commonwealth constitu-

(1) 4 Wheaton 316. (2) [1907] A.C. 81.

tion to which the Judicial Committee call attention, reads as follows:—

> A state shall not without the consent of the Parliament of the Commonwealth raise or maintain any naval or military force or *impose any tax on property of any kind belonging to the Commonwealth* nor shall the Commonwealth impose any tax on property of any kind belonging to a state.

For the purposes of determining such a question as we have before us now as to reading into the subsection 2 of section 92 an implied prohibition upon the taxation of Dominion officials' salaries, I am unable to discern any substantial distinction between the 114th section of the Commonwealth Act and the 125th section of the British North America Act, 1867, which reads:—

> No lands or property belonging to Canada or any province shall be liable to taxation.

For these reasons I am of opinion that, upon the true construction of the British North America Act, 1867, the power of

> direct taxation within the province in order to the raising of a revenue for provincial purposes,

having been given to the provincial legislatures, and the 125th section of the same Act having exempted the lands and property of the Dominion from liability to taxation, the argument seeking to read into the power a further prohibition and an implied one cannot prevail but that the fair and reasonable construction of the words conferring the power must be held to include resident Dominion officials and their salaries as well as all other residents.

IDINGTON J.—The question is raised in this appeal of the power of a municipal corporation to tax the appellant (in common with other ratepayers taxable

1908

ABBOTT v. CITY OF ST. JOHN.

Idington J.

for income), in respect of that part of his income derived from salary for services in the civil service of the Dominion Government.

It was decided over thirty years ago in the case of *Leprohon* v. *The City of Ottawa*(1), first by the learned trial judge and, on appeal by the Court of Appeal for Ontario, that the municipalities had no such power. The late Chief Justice Spragge, in that case at page 526, put this holding on the ground of the incompatibility between the power of the Dominion, under the British North America Act, to fix a salary and the exercise of a municipal taxing power derived from the province to tax for municipal purposes such a salary in common with all other incomes by way of salaries.

It is a fundamental principle that must be observed in the exercise of any municipal power, either of taxation or otherwise, that it must be exercised uniformly and without discrimination of persons or corporations or classes. Such had been the exposition of municipal law in this country before confederation.

It therefore seems hard to conceive of it being intended that there should be implied (for it is not expressed) in section 92 of the British North America Act, in assigning to each province the exclusive power of making laws in relation "to municipal institutions in the province" that there must be one class which was to have this partial discrimination reserved in its favour. That, up to 1867, incomes had not been assessed or incomes derivable from this or other specified sources had not been assessed seems to me quite an irrelevant consideration.

(1) 2 Ont. App. R. 522.

Municipal institutions such as those conceived of could only be carried on by some taxing power being confided to the municipal authorities by the legislature creating them and, when such comprehensive language was used as I have referred to it seems to me that it must have been intended that such subjects of taxation and modes of levying such necessary taxes thereon as the legislature saw fit to empower, was the only limit thereto save that reserved in the veto power given the Dominion Government.

It is said, however, that the power of taxation does not rest upon that which might, I submit, be very reasonably assumed as the basis upon which to have rested it, but upon the power of direct taxation given the provinces.

Let us, if need be, assume that to be so; then, if it has been delegated to the municipality created by such legislature, what difference can it make in the disposition of this question? No one questions the right of taxation in either municipal or school corporations, however it be derived.

Then why, if incomes be taxable, should not the salary of the civil servant be so also? If we assume the salary is given for a civil servant to live upon, then must we not suppose he has been given it to help to bear the burthen of the daily necessary expenses of living; such as educating his children; as clearing and making a road to his dwelling; as lighting; watering, or cleaning and keeping in order such road when so made; as trunk sewers for the common benefit; as the maintenance of the poor and the sick; and as the payments of what the Dominion has imposed, by virtue of its powers held to exist, in the imposition, through these very municipal organizations,

1908

ABBOTT v. CITY OF ST. JOHN.

Idington J.

of a tax directed by the Dominion to meet the demands of railways for providing and guarding street crossings; and, in short, the entire expense of municipal government. That expense flowing from the Dominion impositions I refer to is as yet trifling but it may grow and it illustrates in principle better than the others how little there is in the reasoning from incompatibility relied upon in the *Leprohon Case*(1).

Surely, at least in the absence of express declaration of the Dominion to the contrary, it must be assumed that, at all events in those cases where the civil servant is prohibited from earning by other means of livelihood than his salary, the Dominion has given or intended to give a sufficient salary to meet the ordinary expenses of living, and that not to the extent of a single cent is the Dominion servant to live upon the products of the labours or incomes of other fellow townsmen.

He is entitled to live upon and be supported by the labour or at the expense of all those he serves that is of the inhabitants of the entire Dominion, not at the expense of the other persons in some particular places therein. It does not, I imagine, comport with the dignity of the Crown or the proper observation of justice on the part of the Dominion Parliament that any other rule should obtain.

I will not impute to the framers of the British North America Act the intention of creating a condition of things that in principle is fraught with inequality and injustice.

The Dominion is and has always been able to keep in respectable condition all her civil servants and

(1) 2 Ont. App. R. 522.

not to make them dependent on the bounty of any one part of the Dominion more than another.

These matters all bear upon the construction of the Act as an instrument of government.

Nor does this construction interfere with these questions of the expediency of taxing these incomes when such considerations of state or municipal interest may arise as to lead to a proper modification or abandonment of the exercise of the right.

The expediency of an income tax as a method of taxation and the risks of unjust results therefrom are also entirely another matter.

One thing is quite clear that the subject of taxation so far as it might call for exemptions which were within the range of vision which the framers of the Act had, was foreseen and considered and the line drawn deliberately at the taxation of government property.

The express provision thus made was, I think, an exclusion of this exemption now contended for.

The case of *McCulloch* v. *Maryland*(1) cited and relied upon in nearly all the cases decided on this question since, as well as in, the *Leprohon Case*(2), seems to me to have little to do with the matter. The history leading up to the former decision is not to be overlooked in weighing it.

Besides; the case of *The Bank of Toronto* v. *Lambe* (3), has, (if the line of argument in the *McCulloch Case*(1) can have any bearing on the question, since that case was first thus used) conclusively established the right of the province to tax banks created by and solely within the creative power of the Dominion and

(1) 4 Wheaton 316. (2) 2 Ont. App. R. 522.
(3) 12 App. Cas. 575.

1908

ABBOTT v. CITY OF ST. JOHN.

Idington J.

yet doing business within the province seeking to tax it.

I am not at all clear that *Webb* v. *Outrim*(1) relied upon here and in the court below can be said, upon close analysis, to have very much to do with the question presented here.

I am unable, notwithstanding the array of judicial authority supporting and following the judgment in the *Leprohon Case*(2), to find that it proceeded upon a correct interpretation of the British North America Act.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I am of opinion that this appeal should be dismissed. Even if *Webb* v. *Outrim*(1) had been otherwise decided it would not, in my opinion, necessarily govern the present case, inasmuch as the act establishing the Australian Commonwealth differs in a very important respect from the British North America Act.

I think the tax in question is within the powers conferred on the Canadian provinces by section 92, sub-sections (2), (8) and (13) of the latter Act, and is not affected by anything contained in section 91.

By those sub-sections jurisdiction is conferred upon the provinces, within their respective limits, over property and civil rights, direct taxation, and municipal institutions.

The Act contains no definition of "municipal institutions." That was unnecessary, inasmuch as such institutions had existed in the several provinces for many years, and their nature and functions were well known and understood.

(1) [1907] A.C. 81. (2) 2 Ont. App. R. 522.

These institutions included city and town corporations, which had numerous public duties to perform for the benefit of their respective inhabitants, and which required the annual expenditure of large sums of money, which was raised by taxation of real and personal property, and also of income.

The City of St. John is probably the oldest municipality in the Province of New Brunswick, and its present charter of incorporation is the statute, 52 Vict. ch. 27, which makes provision for the levy of the taxes required for the public service by a number of sections, beginning with number 112, and of which those bearing on this appeal are numbers 115, 116, 120, 149, and a "Schedule A."—"Title Income."

Section 120 provides that all taxes shall be raised by an equal rate upon the value of the real estate situate within the city, and upon the personal estate and the income of the inhabitants, being the income derived and coming in any manner except from real or personal estate actually assessed.

Section 149 declares that income shall mean the annual gross sum arising to any male inhabitant, or rateable person, from any place, office, profession, trade, calling, employment, etc., except from real or personal estate actually assessed.

Section 115 provides that the Board of Assessors shall on or before the first day of April in each year publish a notice within the city, requiring all persons liable to be taxed to furnish to the assessors true statements of their real estate, personal estate, and income, on forms obtainable at the office of the assessors.

Section 116 requires every person liable to be rated, within thirty days after the foregoing notice,

1908

ABBOTT
v.
CITY OF
ST. JOHN.

Maclennan J.

to furnish the assessors with a written statement, under oath, of his real and personal estate and income, in the form expressed in Schedule A.

Schedule A. (Income) defines the income to be taxed as follows:

> Income derived from office, profession, work, labour, trade, business, place, occupation, employment, skill or ability, during the twelve months next preceding the first day of April, and which has not before this date been invested in property subject to taxation. This amount has not been offset by household or personal expense.

From all this it is apparent that the tax to be levied in any year is not a part of the income, as such, of the inhabitant, but a sum of money to be measured by, or in proportion to the amount of his income during the preceding year. It is the inhabitant who is taxed for his fair and reasonable share of the expenses incurred by the municipality on his behalf, and on behalf of all the other inhabitants, and his income for the preceding year is referred to solely for the purpose of ascertaining what it is just and reasonable that he should be required to pay. No attempt is made to seize or appropriate the income itself, or to anticipate its payment. He receives it, and applies it as he thinks fit, in discharge of his obligations. Or if he invests it in real or personal property liable to taxation, then to the extent of such investment his income is exempt.

Such being the nature and purpose of what is called income tax, I see no ground whatever on which the appellant, merely because he is a civil servant of the Dominion Government, can claim exemption.

He is a citizen, an inhabitant of the municipality enjoying his due share of all the advantages of municipal government, in common with all other inhabitants, and if he were exempt, his exemption would be

1908

ABBOTT
v.
CITY OF
ST. JOHN.

Maclennan J.

a plain injustice to the other inhabitants. *Qui sentit commodum sentire debet et onus.*

The same thing may be said of the other taxes, the taxes upon real and personal property, or the poll-tax or the dog-tax. It is not the property, or the poll, or the dog, which is taxed, but the individual inhabitant or property owner, and I think there is absolutely nothing in the "British North America Act" which gives any ground for the exemption claimed on behalf of the appellant.

The appeal should be dismissed and with costs if asked for.

DUFF J.—It is no longer open to dispute that by the combined operation of clauses numbered 2 and 8 of section 92 of the British North America Act, 1867, a province may confer upon a municipality the power to tax persons resident within the territory subject to its control in respect of their incomes. Any question which might have been raised concerning that point was finally put at rest by the decision of the Judicial Committee in *The Attorney-General of Ontario* v. *The Attorney-General of Canada*(1). The question presented by this appeal, therefore, is the question whether any of the enactments of section 91 of that Act have the effect of creating an exception in favour of officers of the Dominion Government in respect of the allowances paid to them by that Government.

The appellant argues that the authority vested in the province to impose taxes in respect of income does not extend to such allowances because the whole of the authority to legislate in respect to them (as

(1) [1896] A.C. 348.

1908

ABBOTT v. CITY OF ST. JOHN.

Duff J.

subjects of taxation or otherwise) is exclusively conferred upon the Dominion by sub-section 8 of section 91, which assigns to the Dominion as a subject of legislation

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

It is said that the attempt by a province to impose taxes in respect of such salaries and allowances is an invasion of the field defined by this sub-section. I am quite unable to perceive that the power thus conferred in any way restricts the operation of the power of taxation committed to the province. The fixing and providing for salaries seems to be, as a subject of legislation, quite distinct from the power to levy taxes in respect of income. The principle upon which the burden of the fiscal contributions exacted by a municipality or a province shall be distributed among those persons subject to its fiscal jurisdiction seems to be a subject as far removed as possible from that dealt with in sub-section 8 of section 91. If one were to speculate upon the intentions of the framers of the Act, I should suppose nothing further from their intentions than the exemption of federal office holders as a class from the fiscal burdens incident to provincial or municipal citizenship.

I do not think it would be profitable to examine in detail the decisions of the provincial courts to the opposite effect. Those decisions were largely founded upon reasoning of the Ontario Court of Appeal in *Leprohon* v. *The City of Ottawa*(1), which was decided in 1877. Judicial opinion upon the construction of the British North America Act has swept a rather

(1) 2 Ont. App. R. 522.

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* (1) proceeded with the views expressed by the Judicial Committee in the later case of *The Bank of Toronto* v. *Lambe*(2). Indeed, although *Leprohon* v. *The City of Ottawa*(1) has not been expressly overruled, 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.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Powell & Harrison.*
Solicitor for the respondent: *C. N. Skinner.*

(1) 2 Ont. App. R. 522. (2) 12 App. Cas. 575