PROVINCIAL TAXATION AS BASED ON JUDICIAL INCOMES.

A superior court Judge in Saskatchewan is now paying in Dominion, Provincial and Municipal taxation out of judicial salary from $1,500 to $2,000 a year. The Judges appointed before 1920 who have served over 15 years, being entitled to earned superannuation, are practically receiving less than $2,000 per annum for their judicial services. The situation calls for consideration.

Consider the commission of a Judge. The Sovereign is the steward of the public to dispense justice to whom it is due. "We will sell to no man, we will not deny to any man, either justice or right." Our sovereigns have delegated their whole judicial powers. The executive represents the sovereign power in government, parliaments control the sovereign power in legislation; the executive and legislative departments are responsible to the people. The exercise of the judicial prerogative is separated as well from the executive as the legislative power. Nothing is more to be avoided in a free constitution, than uniting the province of a Judge with that of a Minister of State.

Under the Imperial Statute, The Act of Settlement, 12 & 13 Will. 3 cap. 2, Judges' salaries are to be ascertained and established, and (section 88) their full salaries are absolutely secured to them during the continuance of their commissions. The judicial commission is determinable only by death or impeachment for proven misconduct.

By the Imperial Statute intituled The British North America Act it is provided that in the Dominion of Canada the Judges of the superior, district, and county courts are to be appointed by the Governor-General. The appointment of a Judge is an exercise of the royal prerogative which is to be performed by the Sovereign personally unless the right of appointment has been parted with. No authority was conferred upon the parliaments in Canada to legislate as to the appointment of Judges or their removal. The salaries, allowances and pensions of these Judges shall be fixed and provided by the parliament of Canada. In Murray's Oxford Dictionary "fixed" is stated in the immaterial sense to mean "securely established"; "secured against alteration or dislodgment." And again: "definitely appointed or assigned; not fluctuating or varying; definite, permanent."

The salary of a Judge is incident to the office for which it is granted and cannot be separated from it. It is paid, said the Judicial Committee, for the purpose of sustaining with decorum and propriety

the high rank in life in which he is placed. It is to keep the recipient in a position in which his services are available for the benefit of the country. It is contrary to public policy to permit it to be assigned or alienated.

Similarly the compensation of an officer of the United States is fixed by a law made by Congress in its exclusive jurisdiction to determine what shall be given, conferring upon the officer the right to receive it when it has been earned.

Prior to 1908 the appellate courts of several provinces had decided that "the fixing and providing for the salaries and allowances of civil and other officers of the Dominion of Canada—section 91, s-s. 8—excluded the power of the Provinces to tax these officials. For at least twenty years the decisions of the provincial courts were accepted throughout the whole Dominion as being settled law. In consequence of a decision in an appeal from Australia decided in the Privy Council, the question was deemed re-opened and in *Abbott* v. *St. John*[1] it was held that the salary of a customs official residing in the City of St. John was subject to taxation by the Municipality. Davies and Idington, JJ., concluded that as there was express provision that "no lands or property belonging to Canada or any province shall be liable to taxation," other implied exceptions to the power of direct taxation conferred on the provinces were excluded. Maclennan, J., found the provincial power to tax in the jurisdiction over "Municipal Institutions." The view of Duff, J., was that he was unable to perceive that the power given in s-s. 8 (s. 91) to fix these salaries in any way restricted the operation of the power of taxation committed to the provinces, the one being quite distinct from the other. Girouard, J., dissented, declining to say that all the decisions, rendered by the most eminent Judges of our country and accepted by the whole country, were wrong. In the judgments it is not conclusively affirmed that the Privy Council judgment was in point on the Canadian statute. There were no similar provisions under consideration in the Australian appeal, and the Canadian decisions were not even noted. Duff, J., observed that judicial opinion on the construction of the British North America Act had swept a rather wide arc since the date of the decision in the Appeal Court in Ontario (1877), it would not be a light task to reconcile the views in that case with the views expressed in later decisions, and that the grounds of it were thoroughly undermined by subsequent decisions in the Judicial Committee. These judgments are unsatisfactory and superficial. They lack the careful examination of the subject and the

[1] 40 S.C.R. 597.

profound learning and reasoning of the Judges whose views were overruled; some of the many include the names of Moss, Morrison, Wilson, Spragge, Hagarty, and Burton, in Ontario, Drake in British Columbia, and Weldon, Wetmore, Duff, Palmer, King, Fraser, McLeod, Tuck, Harrington and Van Wart in the Maritimes, with others in Quebec and elsewhere as well.

It is upon the authority of the decision in *Abbott* v. *St. John* because of the somewhat similarity of wording, that the salaries of the Judges are "to be fixed and provided" by Parliament, that the deduction has been drawn by the Provincial executive that judicial salaries are also taxable. It is the only suggested warrant, for example, for the Saskatchewan legislation defining income of a resident to include the salaries, indemnities or other remuneration of all persons whatsoever,—"paid out of the revenue of His Majesty in respect of his Government of Canada," and the contention that the salaries of Judges are thus included. It is supplemented by provisions requiring all employers to make a return of all persons in their employ, enabling the Minister to require an assessable person to keep such records and accounts as he may prescribe, with an appeal from the Minister to a Judge of the Court of King's Bench, and there shall be no appeal therefrom. From the main salary deductions are allowable only in the discretion of the Minister.

My research fails to find any decision holding that a province has thus power to affect directly the salary payable by the Crown by provisions designed to intercept it and prevent its receipt for maintaining his office by the officer to whom it is due.

On the one hand the view presents itself that the salary of a Judge is intended to be ascertained and established, absolutely secured, fixed, secured against alteration or dislodgement, incident to the judicial office and not to be separated therefrom, for the purpose of maintaining the independence of the judiciary as well from the executive as the legislative power, which it is a Judge's duty ever to observe and maintain in the trust reposed in him. Or is the judicial office like unto that of the customs official in the Port of St. John; and is a Judge to take it that his salary is amenable to taxation at the will of the legislature of the Province in which he resides, and of the municipal council of the municipality in which he lives, as well as by the Parliament of the Dominion of Canada?[2]

[2] What is here stated is based upon not only the cases cited but from Broom & Hadley's Commentaries, Vol. I, p. 209; Clement, 3rd ed. 1916; *Wellesley* v. *Wellesley*, 2 Bligh. N.S. 124, 4 E.R. 1078; *In re Judges Act*, 52 O.L.R. 105; *Rimmer* v. *Hannon*, 60 Dom. L.R. 637; *Ex p. Owen*, 20 N.B.R. 493; *Arbuthnot* v. *Norton*, 5 Moore 219, 13 E.R. 474; *Stone* v. *Litterdale*, 2 Anstruther 533, 146 E.R. 958; *Dobbins* v. *Erie County* (Sup. Court, U.S.A.), 14 Curtis, 370.

What is here written may well be concluded by quoting from the pertinent language of the very last judgment in the Judicial Committee bearing on the matter, *Martineau & Sons* v. *City of Montreal*:[3]

"Once again, as so often before, is the question raised whether, in reference to the administration of justice, Provincial legislation has overrun the limits of Provincial competence. The case made by the appellant company is that in the statutes, to which reference will be made in a moment, the Legislature of Quebec has trespassed upon the power given to the Governor-General in the matter of the appointment of Judges by section 96 of The British North America Act. And a very serious question is thereby raised, for it cannot be doubted that the exclusive power by that section conferred upon the Governor-General to appoint the Superior, District and County Courts in each Province, is a cardinal provision of the statute. Supplemented by section 100, which lays upon the Parliament of Canada the duty of fixing and providing the salaries, allowances and pensions of these Judges, and also by section 99, which provides that the Judges of the Superior Courts shall hold office during good behaviour, being removable only by the Governor-General on address of the Senate and House of Commons, the section is shown to lie at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial judiciary. A Court of construction would accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged upon in any way by Provincial legislation."

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[3] (1932), L.J.P.C. 49 at p. 53.