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Dec. 2.
Dec. 23.

GEORGE S. HOLMSTEAD.....APPELLANT;

AND

THE MINISTER OF CUSTOMS AND EXCISE ..... } RESPONDENT.

Revenue—Income Tax—Exemption—B.N.A. Act—Interpretation of Statute

By an Act of the province of Canada (12 V, c. 64, 1849), the salary of the Registrar of the Court of Chancery of Upper Canada was fixed at £400 "free and clear from all taxes and deductions whatsoever." This exemption is repeated by section 14 of ch. 12 of the Consolidated Statutes of Upper Canada (1859), save that the word "whatsoever" is left out. In 1876, by letters patent, H. was appointed to this office "with all the rights, privileges and emoluments, fees and perquisites," appertaining thereto, and now claims exemption from the Dominion Income Tax levied under The Income War Tax Act, 1917, and amendments thereto.

Held, that the power and authority to raise revenue for Dominion purposes is specially given the Parliament of Canada under the B.N.A. Act, and any legislation passed by the Old Province of Canada denying the right to tax or exempting any subject in Ontario to pay such tax could not obtain and be valid after the passing of the B.N.A.

Act, and that the claim of the appellant herein to exemption should be dismissed.

2. Exemptions are matters of favour and special privilege and should be limited in their operation to the field of legislative authority in which they were created. They disappear in the event of a change in the constitution of the political community, such constitution depriving, either expressly or by implication, the pre-existing legislature of authority over any new field of taxation.

APPEAL by the appellant herein from the decision of the Minister assessing his income as Registrar of the Supreme Court of Ontario.

This appeal was heard by the Honourable Mr. Justice Audette, at Ottawa.

F. H. Chrysler, K.C., and *P. H. Chrysler* for appellant.

F. P. Varcoe for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 23rd day of December, 1926, delivered judgment.

This is an appeal, under the Income War Tax Act, 1917, and amendments thereto, as in force in 1922, from the assessment for the year 1921, upon that part of the appellant's income only which comprises his salary as Registrar of the Supreme Court of Ontario, and in respect of which he claims exemption from taxation by the terms of his appointment.

The appellant was appointed, on the 1st April, 1876, by letters patent (Exhibit No. 1), under the Great Seal of the province of Ontario, as

Registrar of the Court of Chancery, with all the rights, privileges and emoluments, fees and perquisites, which to the said office belong, or of right appertain.

The exemption from taxation claimed is under legislation dating as far back as 1849, which it is contended was maintained by subsequent legislation up to and inclusive of the period of taxation in question in this case.

Proceeding chronologically to the examination of the several statutes bearing upon the present controversy, it is first found that by ch. 64 of 12 Vict. (1849) intituled

An Act for the more effectual administration of justice in the Court of Chancery of the province of Upper Canada,

it was thought expedient to alter the constitution of the Court of Chancery of that province and by sec. 12 of that

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Act it was, among other things, provided that a fixed salary of £400 be paid to the Registrar of the Court instead of fees, *free and clear from all taxes and deductions whatsoever*. This exemption was obviously part of the salary paid by the province of Canada and the Act is dealing with the province of Upper Canada.

The exemption is repeated by sec. 14 of ch. 12 of the Consolidated Statutes for Upper Canada, 1859, with the exception that the word "whatsoever" is left out.

Then comes the B.N.A. Act, 1867, wherein is to be found sec. 129, reading as follows:

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that Legislature under this Act.

The effect of this section will be hereinafter referred to.

Now it is contended at bar that the appellant was appointed under chapter 14 of the Consolidated Statutes for Upper Canada, 1859, and that he is entitled to the privileges therein mentioned with respect to the salary of Registrar of the Court of Chancery.

Proceeding in sequence of time with the review of the statutes affecting the office in question we find, in 1880, that by sec. 5 of ch. 27, an Act respecting Municipal Assessments and Exemptions, an Act passed by the province of Ontario, it is provided that:

5. The exemption to which certain officers connected with the Superior Courts were at the time of their appointment and are now entitled by statute, in respect of their salaries, is hereby abolished as respects all persons who may hereafter be appointed by the Lieutenant Governor to such offices.

And by ch. 7, sec. 19, of the Act of 1887, the following words were, by amendment, added:

And continues in respect of such officers only as were appointed before that date.

Appellant's counsel then contends that while these changes do not affect the present incumbent in office, it duly recognizes the exemption.

The obvious answer to this is that the two last mentioned acts contemplate taxation in Ontario only and that *ex proprio vigore* they cannot bind the Crown in the right of the Dominion.

Coming to 1881, it is found that the Legislature of Ontario passed an act to consolidate the Superior Courts, etc., (ch. 5) and that by sec. 3 thereof the Court of Chancery is united and consolidated with other courts to constitute "one Supreme Court of Judicature for Ontario." And by sec. 58 of that Act it is further provided that, subject to orders of the Lieutenant-Governor in Council,

all officers . . . who at the time of the commencement of the Act shall be attached to the Court of Chancery shall be attached to the Chancery Division of the High Court.

The next change took place under the Judicature Act of 1913 (ch. 19) where it is provided by sec. 3 that the Supreme Court be continued as a Superior Court of Record. The two divisions were then created. And by sec. 76 of that Act it is, *inter alia*, provided that the official names of the officers should be changed and duties assigned to them.

These two last acts are silent as to exemptions from taxation.

The appellant held office under all of such changes down to the time of his superannuation in 1923, and he is not mentioned in the enumeration of the persons exempted from paying income tax under sec. 5 of The Income War Tax Act, 1917, and amendments thereto.

The exemption from taxation under the Act of 1859 may be regarded as part of the salary which was then paid by the Old Province of Canada. Since Confederation, the salary, with its exemption from taxation, and with its increases, controlled exclusively by the province, were payable and paid from 1867 by the province of Ontario in pursuance of subsec. 4, sec. 92 (B.N.A Act), wherein it is enacted that

the province has exclusive power over The Establishment and Tenure of Provincial Offices and Appointment and Payment of Provincial Officers.

The Dominion takes care of its officers pursuant to subsec. 8 of sec. 91 of the Act.

The province has availed itself of this power and has increased the appellant's salary with the result that the

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burden of taxation is doubly increased. What is now claimed is the exemption from the payment of a tax upon a fixed salary which is now different as to amount from that of 1859. At this time, of course, there was no such thing as income tax and it was not contemplated. If this exemption were still valid, it would have to be confined to the amount mentioned in 1859 and to be also confined to such taxation as the Legislature of the Old Province of Canada could validly impose.

By sec. 129 of The B.N.A. Act, 1867, it is enacted that *except as otherwise provided by this Act,* all laws in force in Canada . . . all legal commissions . . . and all officers, judicial . . . shall continue in Ontario . . . as if the Union had not been made: *subject* nevertheless . . . to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the province, according to the authority of the parliament or of the legislature under this Act.

The legislative power of the Old Province of Canada to tax or exempt from taxation cannot prevail as against the legislative power of the Dominion conferred by the B.N.A. Act. Exemptions are matters of favour and special privilege and should be limited in their operation to the field of legislative authority in which they were created. They disappear in the event of a change in the constitution of the political community, such constitution depriving either expressly or by implication, the pre-existing legislature of authority over a new field of taxation.

The power and authority to raise revenue for Dominion purposes is specially given the Parliament of Canada, under the B.N.A. Act, and any legislation passed by the Old Province of Canada denying the right to tax—or exempting any subject in Ontario to pay such tax—could not obtain and be valid after the passing of the B.N.A. Act.

The effect of sec. 129 of the B.N.A. Act has been only once construed by the court and that is in the case of *Dobie* v. *Temporalities Board* (1), wherein it was held that the powers conferred by that section upon the Provincial Legislatures of Ontario and Quebec to repeal or alter the statutes

(1) (1881) 7 A.C. 136.

of the Old Parliament of Canada, are precisely co-extensive with the powers of

direct legislation with which those bodies are invested by the other clauses of the Act of 1867.

Indeed, this section enacts that "*except as otherwise provided by this Act,*" all laws in force and all legal commission are subject to be repealed, abolished or altered by the Parliament of Canada, according to its authority under the B.N.A. Act. That is, in the present instance, its authority to tax. *Leges posteriores priores contrarias abrogant.* The generality of this expression "except as otherwise provided by this Act," supports the right of the Dominion to tax residents in the provinces. When the Dominion passed the Income Tax Act of 1917, it entered upon a proper field of legislation hitherto lying dormant. This legislation cannot be controlled or limited by any inconsistent or repugnant legislation enacted by a legislature whose powers were taken away *quoad hoc* by the provisions of a new Constitution.

Under the Act, by subsec. 3 of sec. 92 the Dominion has been given exclusive legislative authority for

the raising of money by any mode or system of taxation.

The Dominion has done so by the Act of 1917, therefore by necessary implication and intendment the enactment for exemption of that salary in Ontario has been repealed.

It has also been abolished by obsolescense. The Consolidated Statutes of Upper Canada, 1859, under which the exemption is claimed, enacted in its preamble, ch. 1, that the acts therein mentioned

apply exclusively to Upper Canada, including both these statutes passed by the Legislature of the late Province of Upper Canada and those passed by the Province of Canada.

And by sec. 6 of the Interpretation Act (ch. 2 Consolidated Statutes of Upper Canada), it is further enacted that:

The words "Upper Canada" shall mean that part of this province which formerly constituted the province of Canada.

It cannot now be contended upon this exclusive legislation, affecting only Ontario, that an exemption from taxation could arise as against the Dominion of Canada. That exemption became obsolete and void by mere operation of law, under sec. 129 of the B.N.A. Act. Perhaps this legislation should receive the interpretation that the exemption,

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under the statute of 1859 applying only to Ontario, should remain in force only in Ontario and be then controlled by sec. 92 of the B.N.A. Act, 1867. That is Ontario alone could retain or repeal the Act of 1859 with respect to taxation in the province under sec. 92 of the B.N.A. Act.

Clearly the taxing Act of 1917 comes within the authority of the Parliament of Canada under sec. 91 and was not in the mind of the legislature when it enacted the Consolidated Statutes of Upper Canada in 1859.

The power and authority of a legislature to exempt from taxation must be measured by its capacity to reconstruct that which it could destroy. The Dominion with whom such power rests, has enacted this taxation of 1917 and therefore by necessary implication, intendment and obsolescense, has, under sec. 129, B.N.A. Act, repealed and abolished the exemption. *Western Counties Ry. Co.* v. *Windsor and Annapolis Railway* (1).

Section 129 continues in force any legislation of the province of Canada in exactly the same manner and effect and no more than if it had been enacted by the power which could enact it in 1867. That is to say the exempting provision before 1867 has no more effect upon the Parliament of Canada than it can have if enacted by the legislature of Ontario after Confederation, which could not as said before, *proprio vigore,* pass any legislation binding upon the Dominion of Canada. And under the *Dobie* case (*ubi supra*) the power to repeal or alter is co-extensive with direct legislation. The province of Ontario since Confederation has seen fit by legislation to modify the exemption limited by statute by increasing the salary, and the appellant now relies upon such legislation to be exempted from federal taxation; but there is no such power in the Provincial Legislation to bind the Crown in the right of the Dominion. There is now no Court of Chancery in Ontario, therefore the exemption has become obsolete, the mere provincial legislation granting exemption from taxation to some judicial officer can only apply to provincial taxation.

The question of contract, as flowing from the appointment was raised at bar; but the contract, if any, which

(1) (1881) 7 A.C. 178 at p. 188.

would be thereby entered into could only be between the appellant and the province of Ontario which appointed him. Moreover, in dealing generally with the question of such exemption from taxation must it not be considered whether the subject matter involves a national undertaking or merely a private matter and in the latter case it cannot be applied to rates and taxes not in existence at the date of the Act or substituted for what was then in existence, and it is especially so when the intention of Parliament would by necessary intendment deny such exemption.

As before pointed out a later Act which confers new rights such as the B.N.A. Act, repeals by necessary implication and intendment an earlier Act governing the same subject matter if the co-existence of the right which the latter gave would be productive of inconvenience, for the just inference from such a result would be that the legislature intended to take the earlier right away. Maxwell, On the Interpretation of Statutes, 5th ed., p. 294.

An intention to repeal an Act may be gathered from its repugnancy to the general course of subsequent legislation,

as in the present case and explained above. Idem 295.

This special enactment granting exemption from taxation as far back as 1859 is absolutely repugnant and inconsistent with the B.N.A. Act, and this court has no alternative but to declare, for the reasons above mentioned, that this special enactment was repealed by the B.N.A. Act.

The appeal is dismissed with costs.

Judgment accordingly.