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BETWEEN :

JOHN AINSLIE JACKSON .....APPELLANT;

AND

THE MINISTER OF NATIONAL }  
REVENUE ..... } RESPONDENT.

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—  
“Income”—“Any payment out of any superannuation fund or pension  
fund or plan”—Judges Act, R.S.C. 1927, c. 105, s. 26, 35—“Pension  
Plan”—“Retired judge” and “a judge who resigns office” entitled to  
an annuity under Judges Act—Appeal dismissed.*

Appellant resigned from his position of a judge of the District Court of the District of Southern Alberta and by Letters Patent issued shortly thereafter under the provisions of s. 26 and s. 26(a) of the Judges Act, R.S.C. 1927, c. 105, was granted a life annuity payable by monthly instalments. He received in the taxation year 1945 the sum of \$824.35 from this annuity which, though disclosed in his income tax return for that year, he claimed was exempt from taxation. Respondent added that amount to appellant’s taxable income and assessed him accordingly from which assessment he appealed to this Court.

*Held:* That the payments in question fall within the provisions of s. 3(1) (c) of the Income War Tax Act and constitute taxable income in the hands of appellant.

- 2. That the payments received by appellant are payments “out of any superannuation fund or pension fund or plan” as provided in s. 3(1) (c) of the Income War Tax Act.
- 3. That the right of a judge to an annuity arises from his service in office as a judge and does not depend on whether he was retired compulsorily because of age or resigned voluntarily as provided by the Judges Act and such annuity is taxable income in his hands.

APPEAL under the provisions of the Income War Tax Act.

1950  
 JACKSON  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE  
 —  
 Cameron J.  
 —

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

*R. T. Jackson* for appellant.

*W. R. Jacket, K.C.* and *F. J. Cross* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON, J. now (January 10, 1951) delivered the following judgment:

This is an appeal from an assessment to income tax for the taxation year 1945. The only matter in dispute is whether the sum of \$824.35 received in that year by the appellant under certain Letters Patent of the Dominion of Canada, dated October 2, 1945, is taxable under the Income War Tax Act, R.S.C. 1927, c. 97, and amendments thereto.

On March 19, 1913, the appellant was appointed judge of the District Court of the District of Lethbridge, Alberta, (Ex. 1 is a certified copy of his commission). He continued to be a judge of that court until August 3, 1935, when, upon the reorganization of the District Courts of Alberta, he was appointed a judge of the District Court of the District of Southern Alberta (Ex. 2). On June 1, 1945, he wrote to the Governor General of Canada (Ex. 4) as follows:

Pursuant to the provisions of Section 26 and Amendments of Chapter 105 R.S.C. 1927 I hereby resign my office of Judge of the District Court in the Province of Alberta as of July 1, 1945, after more than thirty-two years of service in that Office.

On October 2, 1945, by Letters Patent (Ex. 3) the appellant, under the provisions of section 26 and section 26A of the Judges Act, was granted a life annuity of \$3,333.33, payable by monthly instalments out of the Consolidated Revenue Fund of Canada. In the taxation year 1945 the appellant received \$824.35 from this annuity and, while he disclosed the receipt of that sum in a schedule attached to his income tax return, he considered it to be exempt from tax and therefore did not include it in his taxable

1950  
 JACKSON  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE  
 Cameron J.

income. The respondent, however, added that amount to his taxable income and assessed him accordingly. From that assessment an appeal is now taken.

The section of the Judges Act under which the appellant was entitled to resign and did resign, and under which the annuity was granted to him, was, in 1945, as follows:

26. Every judge of a county court or of the circuit court of the District of Montreal who has attained the age of seventy-five years shall be compulsorily retired, and any judge of either of the said courts who has continued in office for a period of thirty years or upwards may resign his office; and to any judge who is so retired, or who so resigns, His Majesty may grant an annuity equal to the salary of the office held by him at the time of his retirement or resignation.

2. The annuity in either of the cases mentioned in this section shall commence immediately after the judge's retirement or resignation, and continue henceforth during his natural life.

Counsel for the appellant submits that the Judges Act (particularly section 26) makes a distinction between judges who have been *retired* upon reaching the age of seventy-five years and those who have *resigned*, like the appellant. He says that a judge who has been *retired* may still quite properly be referred to as a judge—or a retired judge—and that even after his retirement such a judge retains certain powers and may be called upon to again perform the duties of a judge as provided for in section 35 of the Act, which is as follows:

35. Any retired county court judge of a province may hold any court or perform any other duty of a county court judge in any county or district of the province on being authorized so to do by an order of the Governor in Council, made at the request of the Lieutenant-Governor of such province; and such retired judge while acting in pursuance of such order shall be deemed to be a judge of the county or district in which he acts in pursuance of the order, and shall have all the powers of such judge. R.S., c. 138, s. 32.

He submits, however, that that is not the case with a judge who has *resigned* under section 26(1); that upon his resignation he ceased in every respect to be a judge, had no powers, duties, rights or responsibilities as a judge; and that not being "a retired judge" he could not be called upon to perform any duties of any sort under section 35, after his resignation. Then he says it must follow that the annuity provided for "judges" in section 26 and "the retiring allowances or annuities of the judges" which are payable out of the Consolidated Revenue Fund of Canada

(section 29(1)) are limited to those judges who have *retired*; that the appellant having resigned on June 1, 1945, had no statutory right to the grant of an annuity and that the annuity granted to him by the Letters Patent of October 2, 1945, was granted to him in his personal capacity, the moneys received by him thereunder being—as his counsel puts it—

1950  
 JACKSON  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE  
 Cameron J.

they are a matter of largesse from a benevolent Monarch, completely independent of contract, completely independent of any obligation whatsoever, and completely independent of any right. They are granted pursuant to a permissive discretion and the annuity is granted to John Ainslie Jackson personally—to the person.

Such payments, he submits, are not taxable under any of the provisions of the Income War Tax Act as it was in 1945. He relies on the judgment of MacLean, J. in the case of *Fullerton v. Minister of National Revenue* (1), to which reference will later be made.

I cannot agree with the interpretation which counsel for the appellant seeks to place upon section 26. In my view, that section is clear and unambiguous. It provides for the termination of office of the named judges in two ways: (a) by compulsory retirement upon reaching the age of seventy-five years; and (b) by voluntary resignation where service has continued for thirty years or more. Then provision is made for payment of an annuity which is the same in either case. The section does not in any way attempt to define the status of the individuals concerned *after* they have been retired or have resigned, and there was no need to do so. The whole purport of the section was to require the withdrawal from office of such judges as had attained seventy-five years of age and to permit others who had been in service for thirty years or more (and were still under seventy-five years of age) to withdraw voluntarily from office should they desire to do so, and in either case to provide a pension or annuity. I have no doubt whatever that Parliament in enacting section 26 intended to confer the same right to an annuity on judges who had attained the age of seventy-five years and were retired compulsorily, as upon other judges who had given thirty years' service or over and who voluntarily resigned. The appellant herein at the time of his resignation was a judge of a district

1950  
 JACKSON  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE  
 Cameron J.

court and therefore, being "a judge . . . who so resigns," became entitled to the same annuity as a "judge who is so retired." The right to the annuity arises from his service in office as a judge and does not depend in any way upon the question as to whether or not he was entitled to the designation of "judge" *after* his resignation.

As I have stated above, appellant's counsel relies on the *Fullerton* case. There it was held that a lump sum payment made by the Canadian National Railways to the appellant after the termination of his office as Chairman of the Board of Trustees of the railways was not an annual net profit or gain or gratuity directly or indirectly received from any office or employment but was a gratuity, personal to Mr. Fullerton, paid to him because he was no longer in office and because of the cessation of his office more than two years before the end of the period for which he was appointed, and was, therefore, not subject to income tax.

That case, in my opinion, is not of assistance to the appellant. There it was sought unsuccessfully to bring the moneys paid to Mr. Fullerton—a lump sum payment—within "the annual net profit or gain or gratuity received from any office or employment." But that is not the case here. It may be noted, also, that the effect of the decision in the *Fullerton* case appears to have been nullified by the introduction of s.s. (8) of section 3 in 1945, which specifically taxed amounts received for loss of office after October 13, 1945, to the extent of one-fifth each year.

In giving his decision on the appeal herein, the respondent affirmed the assessment—  
 as having been made in accordance with the provisions of the Act and in particular on the ground that the taxpayer has been assessed in accordance with the provisions of subpara. (iv) of para. (d) of subsec. (1) of sec. 3 of the Act.

At the hearing, however, counsel for the respondent conceded that the payments made to the appellant would not properly come within "the salaries, indemnities or other remuneration of any judge . . ." as provided by section 3(1) (d) (iv). He relied, however, on the general provisions of section 3(1) and particularly on subsection (c).

3. "Income"—1. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of

computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including

- (c) any payment out of any superannuation or pension fund or plan: provided, however, that in the case of a lump sum payment out of any such fund or plan which is paid upon the death, withdrawal or retirement from employment of any employee or former employee in full satisfaction of all his rights in any such fund or plan, one-third only of such lump sum payment shall be deemed to be income.

The proviso to s.s. (c) is here of no importance. I have no doubt whatever that the payments received by the appellant fall within the opening words of s.s. (c)—“Any payment out of any superannuation fund or pension fund or plan”—and therefore constituted taxable income in his hands. In the sense in which the two words “superannuation” and “pension” are here used, I do not think it is necessary in this case to draw any distinction between them. The Shorter Oxford English Dictionary (Third Edition) defines “to superannuate” as “to dismiss or discharge from office on account of age; esp. to cause to retire from service on a pension; to pension off”; and “pension” is defined as “an annuity or other periodical payment made, esp. by a government, a company, or an employer of labour, in consideration of past services or of the relinquishment of rights, claims, or emoluments.”

An examination of the Letters Patent (Ex. 3) establishes beyond any question that the annuity therein granted to the appellant falls within the above definition of a pension. It provides for payments of an annual amount payable in monthly instalments. It recites the past services of the appellant in his office as District Judge for thirty years and upwards and refers to section 26 of the Judges Act as the authority for granting the annuity upon resignation. Had the services not been rendered there would have been no authorization for the payment of any annuity under section 26.

1950  
 JACKSON  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE  
 Cameron J.

The payments also were made in accordance with a pension plan. "Plan" is merely a "scheme of action, project, design; the way in which it is proposed to carry out some proceeding," (Shorter Oxford English Dictionary, Third Edition). The Judges Act provided such a scheme or plan for all judges who retired or resigned, varying with the time of appointment, the length of service and the court in which the particular judge had held office, and other matters.

I find, therefore, that the payments in question fall within the provisions of section 3(1) (c) of the Act and constituted taxable income in the hands of the appellant.

At the time of the appellant's appointment to office in 1913 the salaries and retiring allowances or annuities of judges were payable "free and clear of all taxes and deductions whatsoever imposed under any Act of the Parliament of Canada" (R.S.C. (1906) c. 138, section 27(3)). In 1917 the Income War Tax Act was enacted. In 1920 the Judges Act was amended by ch. 56-10-11 Geo. V.—and by section 11 thereof the provisions of section 27(3) as to taxes and deductions were thereafter held to be inapplicable to any judge whose salary was increased by ch. 59 of the Statutes of 1919 or by the Act of 1920, and who accepted such increase. It was further declared thereby that as to such judges, their salaries, retiring allowances and annuities "shall be taxable and subject to the taxes imposed by the Income War Tax Act, 1917, and the amendments thereto." It is admitted that the appellant did receive and accept an increase in salary under the Act of 1919. Thereafter, his salary and retiring allowance or annuity were no longer exempt from the provisions of the Income War Tax Act, the statutory exemption in his case having been removed.

It is of some interest, also, to note that in the definition of "earned income" in section 2(m) of the Income War Tax Act, "pensions, superannuation allowances, retiring allowances, gratuities and honoraria" are included. While this definition is for the purpose of distinguishing "earned income" and "investment income" under the provisions relating to surtax on investment income, it does indicate

in a general way that pensions and retiring allowances are to be considered as a form of income unless, of course, they be exempted under specific provisions of the Act.

In my opinion, therefore, the appeal must fail. The assessment will be affirmed and the appeal dismissed with costs.

1950  
JACKSON  
v.  
MINISTER  
OF  
NATIONAL  
REVENUE  
Cameron J.

*Judgment accordingly.*