

In the Privy Council.

No. 92 of 1936.

ON APPEAL FROM THE SUPREME COURT
OF CANADA.

UNIVERSITY OF LONDON
W.C.1.
23 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

JAMES FORBES

(Defendant) Appellant

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF
MANITOBA FOR AND ON BEHALF OF HIS MAJESTY THE
KING IN THE RIGHT OF THE PROVINCE OF MANITOBA

(Plaintiff) Respondent.

APPELLANT'S CASE.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada given on the 15th day of January 1936. The Court consisted of the Chief Justice, The Right Honourable L. P. Duff and Lamont, Davis, Cannon and Crocket, JJ. The Chief Justice, Lamont and Davis JJ. holding that the appeal should be dismissed and Cannon and Crocket JJ. dissenting, and holding that the appeal should be allowed. RECORD. p. 28.

2. By the said judgment the unanimous judgment of the Court of Appeal of the Province of Manitoba given on the 12th day of November 1934 was affirmed. The Court of Appeal consisting of Prendergast C.J.M. and Dennistoun, Trueman, Robson and Richards JJ.A. dismissed the appellant's appeal to that court and upheld the judgment for the respondent rendered by His Honor Judge Cory in the County Court of Winnipeg on the 8th day of June 1934. p. 17.

3. The question at issue is whether the respondent can compel the appellant to pay to the Province of Manitoba a tax of two per centum on the remuneration which the appellant receives from the Dominion of Canada for his services as a Dominion Civil Servant.

4. The appellant is a Civil Servant of His Majesty the King in the Right of the Dominion of Canada and is engaged as a Meat Inspector in

- RECORD. the Health of Animals Branch of the Department of Agriculture. He resides at the City of Winnipeg in the Province of Manitoba. His duties are to be performed in any part of Canada.
- p. 9, l. 17. 5. The appellant receives as his remuneration \$115.25 per month plus 5% of his salary which is deducted for a superannuation fund.
- p. 8, l. 46
et seq. Payment is made by the (Dominion) Crown to the appellant by means of an order issued at Ottawa in the Province of Ontario and is signed by two persons in the Department at Ottawa and is drawn upon the Receiver-General at Ottawa.
6. The action was brought by way of a test case to determine whether 10 the appellant, as well as some two thousand Civil Servants in the Province, are liable for the payment of the said tax and whether such tax is a constitutionally valid one. The action also raises the question of liability for the tax by all wage earners and persons coming within the provisions of the Act in the Province.
7. An arrangement was made between the appellant and the respondent that no costs would be payable by the unsuccessful party to the successful party of the said action or of any appeals that might be taken therefrom and this arrangement extended to the appeal to the Supreme Court of Canada and is also applicable to this appeal. 20
- p. 3. 8. The respondent on the 1st day of February 1934, instituted the action in the County Court of Winnipeg to recover from the appellant the sum of \$20.80 claiming such amount as a tax of two per centum on the appellant's remuneration as such Civil Servant between the 1st day of May 1933 and the 31st day of December 1933.
9. The action is based solely on "The Special Income Tax Act" 23 Geo. V. Cap. 44 (Manitoba) assented to by the Lieutenant-Governor on the 4th day of May 1933. The respondent alleges that under this Act the appellant became liable for payment of two per centum of the amount of the monthly remuneration which the appellant received from His Majesty 30 the King in the Right of the Dominion for the services so rendered by him as such Civil Servant. The material provisions of the said Act are as follows:—

Respondent's
Factum,
p. 29.

" INTERPRETATION."

" 2.—(1) In this Act, unless the context otherwise requires :

" (b) ' Employee ' means any person who is in receipt of or
" entitled to any Wages ;

" (c) ' Employer ' includes every person, manager or represen-
" tative having control or direction of or responsible, directly or 40
" 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 ;

“(d) ‘Wages’ includes all wages, salaries, and emoluments from any source whatsoever, including RECORD.

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

“(2) 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;

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

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

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“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; but no tax shall be paid under this part by

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“(a) a married person, in case his wages be at a rate of forty cents an hour, three dollars and twenty cents a day, eighty dollars a month, or nine hundred and sixty dollars a year or under; nor

“(b) an unmarried person, in case his wages be at a rate of twenty cents an hour, one dollar and sixty cents a day, forty dollars a month, or four hundred and eighty dollars a year or under.

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“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

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“ deduct and retain the amount of the tax from the wages payable
 “ to the employee, and shall, on or before the 15th 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 10
 “ 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. 20

“ 5.—(1) Every employer shall keep at some place in the
 “ province, of the location of which he shall inform the administrator
 “ when requested to do so, a true and correct record of the names
 “ and residential addresses of all his employees, and of the dates upon
 “ which each of them worked, the wages paid to each, and such
 “ other matters as the administrator requires.

“ (2) Every employer shall, on request of the administrator or
 “ any person authorised by him in writing, produce for inspection
 “ all records kept by the employer relating to his employees.

“ 6.—(1) If an employer, in violation of the provisions of this 30
 “ 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 10 dollars for each day of default, but not to more than
 “ 200 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 500 dollars, and each day's con-
 “ tinuance of the act or default out of which the offence arises shall
 “ constitute a separate offence; but nothing contained in this 40
 “ 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 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.”

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Appellant's
Factum,
p. 29.

10 10. The appellant filed a Statement of Defence to the said action denying liability and contending that the Act is ultra vires, it is indirect taxation, the County Court has no jurisdiction to entertain or try the action, the Act in no way affects the appellant or any monies paid to him, the (Dominion) Crown is not an employer and the appellant is not an employee as defined in the Act, that it is discriminating legislation and discriminating taxation, the appellant is not a person liable to taxation or in respect of any monies taxable under the Act or is he in receipt of any monies upon which taxation could be levied by the Province, the Province cannot intercept or tax monies in the hands of the Dominion, the Dominion having drawn Income Tax legislation within its domain the Provincial Legislature cannot legislate upon that subject. p. 5.

20 11. The action was tried in the said County Court and on the 8th day of June 1934 His Honor Judge Cory gave judgment in favour of the respondent for the amount claimed, without costs, but the learned trial Judge stated that he did not take into consideration the constitutionality of the Act as he was informed that the case would go to a higher court. p. 12.
p. 17, l. 1.

30 12. The appellant appealed to the Court of Appeal for Manitoba. The case came on for argument on the 3rd day of October 1934. Judgment was reserved and that court delivered judgment on the 12th November 1934. Robson and Richards J.J.A. gave written reasons for dismissing the appeal and Prendergast C.J.M., Dennistoun and Trueman J.J.A. agreed in dismissing the appeal. An order was thereupon made dismissing, without costs, the appellant's appeal to that court. p. 21.
p. 20.

13. By special leave granted by the said Court of Appeal the appellant appealed to the Supreme Court of Canada and set forth as his principal grounds of appeal the following :— p. 25.

(a) That a County Court in the Province of Manitoba has no jurisdiction to entertain or try Crown Revenue Actions and that such actions can only be brought in The Court of King's Bench and that in such Court relief could on its equitable jurisdiction be granted. Appellant's
Factum.
p. 3, l. 3 and
p. 5, l. 1.

40 (b) That Bills for taxation legislation cannot be enacted by the Legislature of a Province unless the proposed statute is foreshadowed and first recommended in the Lieutenant-Governor's Speech from the Throne in the session in which it is intended to bring in such legislation and that the taxation statute in question was not so Appellant's
Factum.
p. 3, l. 8, and
p. 7, l. 37.

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recommended and therefore could not be passed by the Manitoba Legislature.

Appellant's
Factum, p. 3,
l. 14, and p. 9,
l. 17.

(c) That the relationship of "employer" and "employee" does not exist between the Crown (Dominion) and its servants.

Appellant's
Factum,
p. 3, l. 16,
and p. 9,
l. 30.

(d) That the Act in question does not include the Crown in the Right of the Dominion and such statute does not define the Crown as an "employer" within the meaning of such statute and the Manitoba Legislature cannot include the Crown in the Right of the Dominion as an "employer" and has not attempted to do so by the statute.

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Appellant's
Factum,
p. 3, l. 21,
and p. 12,
l. 1.

(e) That the Crown in the Right of the Dominion not being an "employer" within the meaning of the statute there could be nothing payable by a Dominion Civil Servant under Section 7 of the statute and therefore there was nothing for which the respondent could bring action.

Appellant's
Factum,
p. 3, l. 26,
and p. 13,
l. 16.

(f) That the moneys attempted to be taxed under the Act are the property of the Dominion and are not situated within the Province and the Provincial Legislature would therefore have no power to tax such moneys.

Appellant's
Factum, p. 3,
l. 29, and p. 14,
l. 10.

(g) That the Province cannot tax moneys in the hands of the Dominion.

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Appellant's
Factum, p. 3,
l. 31, and
p. 14, l. 24.

(h) That the Act is invalid as it could by its terms imprison all Dominion Civil Servants by penalty if they failed to pay the tax and thereby prevent the Dominion from carrying out its powers.

Appellant's
Factum,
p. 3, l. 34,
and p. 15,
l. 4.

(i) That the compensation of Dominion Civil Servants is fixed by the Dominion Parliament and no reduction or alteration can be made therefrom nor can any portion of it be taxed or intercepted by the Provincial Legislature.

Appellant's
Factum,
p. 3, l. 38,
and p. 16,
l. 1.

(j) That the Provincial Legislature cannot tax the remuneration of Dominion Civil Servants or intercept moneys in the hands of the (Dominion) Crown and the statute having attempted to do so it is ultra vires. The tax is not an "Income Tax" but merely a "wage tax" attempted to be levied against the wages as such.

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Appellant's
Factum,
p. 4, l. 13,
and p. 18,
l. 1.

(k) That a tax of 2% on the remuneration of the appellant who is only receiving \$115.25 and has a family to support tends to impairment of his efficiency and there is no ability on his part to pay the tax.

Appellant's
Factum,
p. 4, l. 8,
and p. 18,
l. 11.

(l) That the Dominion Parliament having passed legislation respecting "Income Tax" and having drawn income tax legislation within its domain then the Provincial Legislature cannot legislate upon that subject and any legislation passed by the Provincial Legislature would be inoperative so long as the Dominion Legislation remains in force.

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(m) That the Act is indirect taxation and therefore ultra vires the Legislature of the Province.

Appellant's
Factum, p. 4,
l. 13, and
p. 21, l. 10.

(n) That Taxation Statutes should be construed against taxation.

Appellant's
Factum, p. 4,
l. 15, and p. 23,
l. 37.

14. The appellant contended that he is not an "employee" and that the (Dominion) Crown is not an "employer" under the Act and that this case comes within the principle laid down by Lord Cranworth in *Mersey Docks v. Cameron* (1865) 11 H.L. Cas. 443, at page 508, where he says "that the Crown not being named is not bound by the Act and that lands and houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated." The Province cannot 10 compel the Dominion to comply with Sections 4, 5 and 6 of the Act and where "employer" is used in those sections, it is clear that it does not include the (Dominion) Crown and if it did, to that extent would be ultra vires. If the (Dominion) Crown is not included under sections 4 to 6, then it likewise must be interpreted that it is not included in "employer" used in section 7 and that since the appellant did not receive his remuneration from an "employer" within the meaning of sections 4 to 6 of the Act, the appellant cannot be held liable under section 7.

15. At the time the tax is imposed the money is still the property 20 of the Dominion and the Province cannot tax moneys in the hands of the Dominion. This is prohibited under section 125 of the British North America Act, which reads as follows:—

" 125. No lands or property belonging to Canada or any Province shall be liable to taxation."

16. The fixing of salaries or allowances for Dominion Civil Servants lies exclusively within the jurisdiction of the Dominion Parliament under sec. 91, ss. 8 of the British North America Act. Such remuneration is fixed by the Dominion Parliament under the "Civil Service Act" R.S.C. (1927) Cap. 22 as amended by the Act 22 and 23 Geo. V. Cap. 40, sec. 10, 30 ss. 1. The Province cannot compel the Dominion to pay to the Province a portion of those salaries nor can it impose any obligation or penalty in case the Dominion does not carry it out. The Province cannot anticipate or intercept such remuneration and so far as the statute attempts to do so it is ultra vires. The appellant also contended that any deduction from a Dominion Civil Servant's salary would impair his efficiency and affect his mode of living. There is no ability on the part of the appellant to pay any tax out of a salary of \$115.25 per month when he and his family are dependent upon such salary.

17. The subject of indirect taxation lies exclusively within the juris- 40 diction of the Dominion Parliament under the British North America Act. The appellant contends that this Act is indirect taxation and is therefore ultra vires. It is a tax placed on the employer, whilst the money is still his own, he is made liable for payment and he is subjected to severe

RECORD. penalties if he does not do so. The liability of the employer to pay the tax and the penalties are fixed by sec. 4, ss. 1 and sec. 7. The employer is to reimburse himself by deducting it from the employee thereby making it an indirect tax. This case is somewhat similar to the Succession Duty Cases where the Judicial Committee laid down the principle that an executor, compelled by statute to pay a tax and reimburse himself from the beneficiaries' share of the estate, is indirect taxation. *Cotton v. Rex* (1914) A.C. 176 at page 195; *Burland v. The King* (1922) 1 A.C. 215; *Provincial-Treasurer of Alberta v. Kerr* (1933) A.C. 710.

18. The appellant also contended that if the Act is income tax 10 legislation, the same could not be enacted as the Dominion Parliament had already drawn "income taxes" into the domain of Dominion Legislation and that therefore the Province could not deal with it. The Dominion Parliament has by various statutes legislated upon income taxes. The first of them being the Act 7 and 8 Geo. V. Cap. 28 (1917) and the present statute is R.S.C. (1927) Cap. 97 and amendments thereto. The first income Tax statute passed by the Manitoba Legislature was 13 Geo. V. Cap. 19 (1923) which is now Cap. 91 of the 1924 Consolidated Amendments and the Act in question in this action. The Manitoba Income Tax Act has in many of its sections been copied word for word from the Dominion Act. 20 It has been laid down in several cases that where the Dominion and Provincial legislation overlaps then the Dominion must prevail and that where both can legislate upon the subject the Dominion legislation will override the Provincial; *G.T.R. v. Attorney-General* (1907) A.C. 65; *Attorney-General of Canada v. Attorney-General of B.C.* (1930) A.C. 111. In *re Silver Bros., Ltd., Attorney-General of Quebec v. Attorney-General of Canada* (1932) A.C.514, the latter case is one dealing with taxation enactments. In *Attorney-General for Manitoba v. Attorney-General for Canada* (1925) A.C. 561, it was held that the tax imposed being direct in some instances and indirect in others it is impracticable for courts of law 30 to make the exhaustive partition required and the statute has to be pronounced ultra vires altogether.

19. The appeal to the Supreme Court was argued (together with an appeal made by one Captain Worthington in a similar action brought against him as a Military Officer) on the 10th, 13th, 14th and 15th days of May 1935 before the Court composed of the Chief Justice, Lamont, Cannon, Crocket and Davis JJ. Judgment was reserved and was later delivered by the court on the 15th day of January 1936. The Chief Justice, Lamont and Davis JJ. held that the appeal should be dismissed and Cannon and Crocket JJ. dissenting, were of the opinion that the appeal should be 40 allowed. The judgment of the court was accordingly entered dismissing the appellant's appeal without costs.

20. In his reasons for judgment the Chief Justice said that the Province had the right to raise revenue by direct taxation, the statute was a direct tax on the employee, that sections 4, 5 and 6 could be severed from section 7 and that therefore the appellant was liable for the tax. The reasons for

pp. 29 and
39.

pp. 45 and 60.
p. 28.

p. 29, l. 14.

judgment of Lamont and Davis JJ. were delivered by Davis J. in which he held that the tax was a direct one and a general levy which does not create any conflict between Federal and Provincial authority such as to entitle a Dominion Civil Servant to escape from payment. RECORD. p. 39.

21. Cannon J., dissenting, in his reasons for judgment held that the appeal should be allowed. He finds that the Act is indirect taxation and says in part as follows :— p. 45.

10 “ It would seem that the tax is ‘ the exaction . . . of a per- p. 58, l. 36.
 “ ‘ centage 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* (1928) A.C. 117,
 “ at 125, quoted by Rinfret, J., in rendering judgment for this
 “ Court in *City of Charlottetown v. Foundation Maritime Ltd.* (1932)
 “ Can. S.C.R. 589, where the authorities are very accurately and
 “ concisely reviewed.”

He further holds that Dominion legislation has fixed the remuneration of its servants, the Parliament of Canada has exclusive legislative authority over the fixing of and providing for salaries and allowances of Civil Officers of the Dominion Government and that no deduction could be made there- p. 54.
 20 from except by Parliament. The Dominion salaries cannot be changed or reduced by the Province. The Act attempts to intercept in the hands of the Dominion a portion of such remuneration, it strikes first at the source of these wages before they reach the employee and so constitutes indirect taxation, the Act cannot affect salaries of Dominion Officers paid out of Dominion revenues. The (Dominion) Crown cannot be forced to make returns and payments and that such protection should enure to the benefit of the other party to the contract of employment. The salaries or emoluments are attached to the position and that there could be no interference with it by the Provincial Legislature. He says further :—

30 “ It is a patent fact to anyone conversant with Canadian p. 55, l. 19.
 “ 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.”

He further holds that the Act threatened the efficiency of Federal 40 services and in that respect says :—

“ It is my firm view that, as a matter of fact, the Province of p. 59, l. 20.
 “ Manitoba, by the Act under consideration, does, in effect if not
 “ purposely, impair the status and essential rights of the civil service

- RECORD. " 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."
- p. 58, l. 27. Dealing with section 7 he finds that it cannot be severed from the other sections and must be read with the preceding ones and if, admittedly the Federal Crown cannot be forced to make the terms and payments to the Province the same protection should enure to the benefit of the Civil Servants and that there is no liability on the part of the Civil Servant to make payment of the Tax.
- p. 60. 22. Crocket J., dissenting, also held that the appeal should be allowed and in his reasons for judgment says that the real purpose and intention is to impose the tax, not upon the employee or upon the income from wages received from the employer, but upon the unearned wages in the hands of the employer and before they are paid to the employee and that the employee under the provisions of section 7 is to pay the tax only in the event of the employer paying over to the employee the full wages earned and that considering the enactment as a whole it is not a general income tax upon the employee personally and in fact is not an income tax at all. It is to be assumed from his reasons that he holds that it is an indirect and not a direct tax. In his opinion the liability for the payment of the tax has been primarily placed upon the employer and only secondarily and conditionally upon the employee and that 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. Crocket J. also says that he has no hesitation in holding that in so far as the provisions of the Act seek to tax federal salaries or any other payments or allowances in the hands of the Government of Canada, they are entirely void and inoperative, that the Dominion Government very properly ignored the Act and that there is no liability on the part of the appellant under section 7.
- p. 61, l. 43. 20
- p. 62, l. 29. 30
- p. 62, l. 32. 30
23. The appellant humbly submits that the dissenting judgments of and the views expressed by Cannon and Crocket JJ. in the Supreme Court of Canada are correct.
- p. 28. 24. The appellant respectfully submits that the appeal should be allowed and the judgment of the Supreme Court dated the 15th day of January 1936 should be reversed and set aside and that the action should be dismissed for the following among other

R E A S O N S.

1. Because the Act being indirect taxation is ultra vires the Provincial Legislature. 40
2. Because the Province cannot intercept monies in the hands of the Dominion.

3. Because the Province attempts to tax monies in the hands of and the property of the Dominion.
4. Because the Provincial Legislature cannot tax the salaries of (Dominion) Crown Civil Servants.
5. Because the (Dominion) Crown is not an "employer" and its Civil Servant is not an "employee" under the Act.
6. Because the appellant did not receive any remuneration from an "employer" under the Act and is therefore not liable to make payment under section 7.
- 10 7. Because the Dominion Parliament has fixed the remuneration and it cannot be interfered with by the Provincial Legislature and any deduction therefrom would impair the efficiency of the Dominion Civil Service.
8. Because the Dominion Parliament enacted legislation respecting taxes on incomes and having drawn the same into the domain of Dominion Legislation the Provincial Legislature could not enact legislation within that field.
9. Because Taxation Acts should be construed against the statute.

C. E. FINKELSTEIN.

In the Privy Council.

No. 92 of 1936.

ON APPEAL FROM THE SUPREME COURT
OF CANADA.

BETWEEN

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APPELLANT'S CASE.

HERBERT SMITH & CO.,
62, London Wall,
London, E.C.2.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C. 4.