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88, 1936

*Argued in S.C. with Forbes v. A.-G. of Manitoba  
Privy Council Appeal no. 92 of 1936.*

# In the Supreme Court of Canada

BETWEEN :

CAPTAIN FREDERICK FRANKLIN WORTHINGTON,  
(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.

APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Respondent's Action*  
**APPEAL CASE**

Phillipps, Gemmill & Smith,  
201, Montreal Trust Building,  
Winnipeg, Manitoba,  
Solicitors for the Appellant.

Newcombe & Company,  
Ottawa Agents for the  
Appellant.

John Allen, Esq.,  
Parliament Buildings,  
Winnipeg, Manitoba,  
Solicitor for the Respondent.

Chrysler & Chrysler,  
Ottawa Agents for the  
Respondent.

**INSTITUTE OF ADVANCED  
LEGAL STUDIES,  
25, RUSSELL SQUARE,  
LONDON,  
W.C.1.**

UNIVERSITY OF LONDON  
W.C.1.  
15 NOV 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

45357

# In the Supreme Court of Canada

BETWEEN :

CAPTAIN FREDERICK FRANKLIN WORTHINGTON,  
(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.

APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Respondent's Motion*  
~~APPEAL CASE~~

Phillipps, Gemmill & Smith,  
201, Montreal Trust Building,  
Winnipeg, Manitoba,  
Solicitors for the Appellant.

Newcombe & Company,  
Ottawa Agents for the  
Appellant.

John Allen, Esq.  
Parliament Buildings,  
Winnipeg, Manitoba,  
Solicitor for the Respondent.

Chrysler & Chrysler,  
Ottawa Agents for the  
Respondent.

## INDEX TO CASE

## PART I.

	Date	Page
✓ Particulars of Claim.....	March 15, 1934.....	1-2
Order to <del>Amend</del> Claim.....	April 12, 1934.....	3
Amended <del>Claim</del> .....	April 18, 1934.....	4-5
↓ Statement of Defence.....	May 21, 1934.....	6-10
✓ Motion of Appeal to Court of Appeal.....	June 5, 1934.....	23-27
✓ Order Granting Special Leave to Appeal to The Supreme Court of Canada .....	November 12, 1934.....	46
✓ Bond of Security for Costs.....	December 18, 1934.....	47-48
✓ Order Allowing Security and Appeal.....	January 2, 1935.....	49
✓ Certificate Registrar Court of Appeal.....		50-51
✓ Solicitor Certificate of Comparison.....		52

## PART II.

✓ Proceedings before Whitla, C.C.J.....	May 22, 1934.....	11-14
---	-------------------	-------

## PART III.

✓ Exhibit 1. Letter Wilson E. McLean to Hon. Hugh Guthrie, K.C. ....	May 15, 1934.....	14-15
Letter W. Stuart Edwards to Wilson E. McLean.....	May 19, 1934.....	15
Exhibit 2. Statement of Facts.....	May 22, 1934.....	16-21

## PART IV.

	Date	Page
✓ Judgment, Whittle, C.C.J. in County ✓ Court of Winnipeg.....	May 22, 1934.....	22
✓ Judgment Court of Appeal of Manitoba .....	November 12, 1934.....	28
✓ Reasons for Judgment, Hon. Mr. Justice Trueman, J.A., concurred in by Hon. The Chief Justice of Mani- toba and Hon. Richards, J.A.....	November 12, 1934.....	29-36
✓ Reasons for Judgment, Hon. Mr. Justice Dennistoun, J.A. dissenting.....	November 12, 1934.....	36-40
✓ Reasons for Judgment, Hon. Mr. Justice Robson, J.A. dissenting.....	November 12 1934.....	40-45

# In the Supreme Court of Canada

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**BETWEEN :**

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Officers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,  
(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.

THIS is an appeal by the (Defendant) Appellant from the judgment of the Court of Appeal for Manitoba pronounced on the 12th day of November, A.D. 1934, dismissing the appeal of the said (Defendant) Appellant from the judgment rendered and pronounced by His Honour Judge Whitla, Senior Judge of the County Court of Winnipeg, in the Province of Manitoba, on the 22nd day of May, A.D. 1934, whereby it was adjudged that the (Plaintiff) Respondent do recover against the (Defendant) Appellant the sum of \$44.58.

## In the County Court of Winnipeg

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**BETWEEN :**

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba, Defendant.

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### PARTICULARS OF CLAIM

1. The plaintiff is the Attorney-General of the Province of Manitoba and sues for and on behalf of His Majesty the King in the Right of the Province of Manitoba.

2. The defendant is a married person and an officer of the Active Militia of Canada, Permanent Force, and resides and lives at or near the City of Winnipeg in the Province of Manitoba. The defendant has been a married person and an officer as aforesaid and has resided and lived as aforesaid at all times material to this action.

3. The defendant as such officer aforesaid has earned or had accru-  
20ing due to him wages continuously from the 1st day of May, A.D. 1933 to the 31st day of December, A.D. 1933, both inclusive, which said wages earned by or accruing due to him as aforesaid were paid to the defendant by His Majesty the King in the Right of the Dominion of Canada on or about the last day of each and every month during the said period, which said sums of wages were in the sum of \$282.10 for the months of May, July, August, October and December in the said year 1933 and in the sum of \$273.00 for the months of June, September and November in the said year 1933.

4. The defendant having had paid to him such wages earned by or  
30accruing due to him as aforesaid at the times aforesaid without the tax of 2 per centum imposed upon the amount of all wages earned by or accruing due to him during the said period, which said tax is payable to His Majesty the King in the Right of the Province of Manitoba under the provisions of "The Special Income Tax Act" being chapter 44 of the statutes of Manitoba 1933, being deducted therefrom, has refused and neglected to forthwith pay such tax as aforesaid to His Majesty the King in the Right of the Province of Manitoba and still refuses and neglects to pay the same.



5. The following are the particulars of the plaintiff's claim:

	1933		
10	May 31	Tax of 2 per centum payable on wages of \$282.10 received for May .....	\$ 5.64
	June 30	Tax of 2 per centum payable on wages of \$273.00 received for June .....	5.46
	July 31	Tax of 2 per centum payable on wages of \$282.10 received for July .....	5.64
	August 31	Tax of 2 per centum payable on wages of \$282.10 received for August .....	5.64
	September 30	Tax of 2 per centum payable on wages of \$273.00 received for September .....	5.46
	October 31	Tax of 2 per centum payable on wages of \$282.10 received for October .....	5.64
	November 30	Tax of 2 per centum payable on wages of \$273.00 received for November .....	5.46
	December 31	Tax of 2 per centum payable on wages of \$282.10 received for December .....	5.64
			<hr/>
			\$44.58
			<hr/>

20 6. The plaintiff therefore claims:

- (a) payment of the said sum of \$44.58;
- (b) the costs of this action;
- (c) such further and other relief as the nature of the case may require or as to this Honourable Court may seem meet.

DATED this 15th day of March, A.D. 1934.

JOHN ALLEN,  
Winnipeg, Manitoba,  
Solicitor for the plaintiff.

## In the County Court of Winnipeg

BETWEEN :

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba, Defendant.

### 10 ORDER TO AMEND STATEMENT OF CLAIM

Upon the application of the plaintiff herein,

IT IS ORDERED that the plaintiff be at liberty to amend his state-  
ment of claim in this action as he may be advised.

DATED at the city of Winnipeg in the Province of Manitoba this 12th  
day of April, A.D. 1934.

(Sgd.) H. W. WHITLA,  
C.C.J.

## In the County Court of Winnipeg

BETWEEN :

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba, Defendant.

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### AMENDED STATEMENT OF CLAIM

1. The plaintiff is the Attorney-General of the Province of Manitoba and sues for and on behalf of His Majesty the King in the Right of the Province of Manitoba.

2. The defendant is a married person and an officer in the Active Militia of Canada, Permanent Force, holding the rank of Captain in the said Militia and was at the date of the service of the writ herein and during the whole of the year 1933 and prior thereto within the Province of Manitoba and resided or lived at the date of the service of the writ herein and during the whole of the year 1933 and prior thereto in the said Pro-  
20 vince.

3. The defendant as such officer aforesaid has earned "wages" within the meaning of "The Special Income Tax Act" being chapter 44 of the statutes of Manitoba 1933 continuously from the 1st day of May, A.D. 1933 to the 31st day of December, A.D. 1933, both inclusive, which said "wages" earned as aforesaid were paid to the defendant by and out of the revenues of His Majesty in the Right of the Dominion of Canada on or about the last day of each and every month during the said period, and which said payments were in the amount of \$282.10 for the months of May, July, August, October and December in the said year 1933 and were in the  
30 amount of \$273.00 for the months of June, September and November in the said year 1933.

4. Under the provisions of the said "The Special Income Tax Act" the defendant became liable to pay to His Majesty the King in the Right of the Province of Manitoba for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all such "wages" earned by him as aforesaid, all of which "wages" were paid to the defendant without the said tax having been deducted therefrom, but the defendant has neglected and refused and still neglects and refuses to pay the said tax or any part thereof.

5. The following are particulars of the plaintiff's claim herein:

	1933		
10	May 31	Tax of 2 per centum payable on wages of \$282.10 received for May 1933 .....	\$ 5.64
	June 30	Tax of 2 per centum payable on wages of \$273.00 received for June 1933 .....	5.46
	July 31	Tax of 2 per centum payable on wages of \$282.10 received for July 1933 .....	5.64
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	December 31	Tax of 2 per centum payable on wages of \$282.10 received for December 1933 .....	5.64
			<hr/>
			\$44.58

20 6. The plaintiff therefore claims:

- (a) payment of the said sum of \$44.58;
- (b) the costs of this action;
- (c) such further and other relief as the nature of the case may require or as to this Honourable Court may seem meet.

DATED this 12th day of April, A.D. 1934.

JOHN ALLEN,  
Winnipeg, Manitoba,  
Solicitor for the plaintiff.

## In the County Court of Winnipeg

BETWEEN :

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba, Defendant.

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### STATEMENT OF DEFENCE

1. The defendant admits the allegations contained in paragraph 1 of the amended Statement of Claim herein.

2. In respect of the allegations contained in paragraph 2 of the amended Statement of Claim, the defendant admits that he is a married person and at all material times was and now is an officer of the Active Militia of Canada, Permanent Force, holding the rank of Captain in Princess Patricia's Canadian Light Infantry, a corps of the said Permanent Force, and alleges, as the fact is, that he was commissioned as an officer of the said Permanent Force by His Majesty King George V. on January 20 1st, 1920; but the defendant denies at any material time residing or living within the Province of Manitoba as in said paragraph 2 of the amended Statement of Claim alleged, or at all, and alleges that his presence within the Province of Manitoba at any material time was in his capacity as an officer of said Active Militia of Canada, Permanent Force, according to the exigencies of his service therein, and not otherwise.

3. In respect of the allegations contained in paragraph 3 of the said amended Statement of Claim herein, the defendant denies that he ever earned the alleged or any "wages" in the said paragraph mentioned from the 1st day of May, A.D. 1933, to the 31st day of December, A.D. 1933, 30 or at any other time, and denies that the alleged or any "wages" in said paragraph 3 referred to were ever paid to the defendant by and out of the revenues of His Majesty the King in right of the Dominion of Canada at any of the times in said paragraph mentioned or at all; and further denies that he ever received any of the payments in the said paragraph mentioned upon any of the dates therein referred to.

4. In respect of the allegations contained in paragraph 4 of the amended Statement of Claim herein, the defendant denies that as in said paragraph alleged or at all he ever became liable to pay to His Majesty the King in right of the Province of Manitoba for the raising of a revenue

for provincial purposes or for any other purpose the alleged tax therein mentioned or any tax whatever upon the alleged or any "wages" therein mentioned, and denies that he ever earned any "wages" in the said paragraph referred to; and further denies that the alleged or any "wages" in the said paragraph mentioned were ever paid to the defendant in manner therein alleged or at all; and the said defendant admits that he has refused to pay the tax in said paragraph referred to, but denies that he neglected so to do, alleging, as the fact is, that such tax never became payable by the defendant to His Majesty the King in the right of the Province of Manitoba, as in said paragraph alleged, or at all.

5. In respect of the allegations contained in paragraph 5 of the amended Statement of Claim, the defendant says that none of the items in the said paragraph claimed are percentages of any sums which ever became payable to the defendant in respect of any "wages" earned or accruing due to the defendant.

6. By way of further defence to the whole of the plaintiff's amended Statement of Claim, the defendant, repeating all of the denials hereinbefore contained, alleges, as the fact is, that at all material times during which the defendant was within the Province of Manitoba, his presence therein was in the performance of his duties as an officer of the Active Militia of Canada, Permanent Force, with the rank of Captain in Princess Patricia's Canadian Light Infantry, a corps of said Permanent Force, and not otherwise, and according to the duties and exigencies of his service to His Majesty the King as such commissioned officer, and the defendant alleges that any sums of money alleged to have been received by him, mentioned in said amended Statement of Claim (receipt whereof the defendant denies) were, as to any portions thereof which were in fact received by the defendant, received by him from His Majesty the King pursuant to royal warrant for the payment thereof, under sign manual of His Excellency the Governor-General of Canada, as his said Majesty's representative from and out of moneys appropriated to his said Majesty for the upkeep of His Majesty's Forces in Canada and in accordance with rates laid down by Pay and Allowance Regulations for the Militia of Canada for a married officer of the said rank of Captain, and not otherwise; and the defendant alleges that insofar as "The Special Income Tax Act" (Chapter 44, Statutes of Manitoba, 1933) assumes or purports to declare such sums to be "wages" within the meaning thereof as defined by the said Act, and purports to tax the defendant and render him liable to pay to His Majesty the King in Right of the Province of Manitoba a tax of 2% or any tax upon the said sums, the said Act and all such provisions thereunto relating are and each of them is beyond the power of the Legislative Assembly of the Province of Manitoba to enact, because—

(a) the taxes referred to in Part I. of the said "Special Income Tax Act," Chapter 44, Statutes of Manitoba, 1933, directed to be levied and collected under the provisions thereof, are indirect taxation;

(b) sub-section (c) of Section 2 of the said Act attempts to legislate in respect of the status, privileges and prerogatives of His Majesty the King as Commander in Chief of the Militia of Canada and of the authority thereover exercised by His Excellency the Governor-General of Canada as his said Majesty's representative in that behalf.

(c) the said legislature, by enacting sub-section (1) of Section 4 of the said Act, attempts to exercise jurisdiction and authority over His said Majesty and His said representative, His Excellency the Governor-General of Canada, by seeking to impose the duty of levying and collecting the  
10 taxation in the said sub-section referred to, and presumes without lawful authority to impose on His said Majesty and His said representative the duty and obligation of making payments of sums of money in the said sub-section described, in manner and form therein enacted, and to observe, follow and obey such regulations as may be prescribed by an official and/or appointee of the government of the Province of Manitoba, to wit, the Administrator of Income Tax for the said Province.

(d) By sub-section (2) of Section 4 of the said Act, the said Legislative Assembly has presumed to impose upon His Majesty and His said representative the duty and obligation of making to the Administrator of  
20 Income Tax for the Province of Manitoba the returns in the said sub-section mentioned, and to verify the same in such manner as the said Administrator may prescribe.

(e) By sub-section (3) of Section 4 of the said Act, the said legislature, without lawful authority, has presumed to declare His Majesty the King and His said representative to be trustees for His Majesty the King in the right of the Province of Manitoba.

(f) By sub-section (1) of Section 5 of the said Act, the said legislature, without lawful authority, has presumed to impose on His said Majesty and His said representative the duty and obligation, subject to  
30 the penalties in the said Act mentioned, of keeping and maintaining in the Province of Manitoba the records in the said sub-section mentioned, and in obedience to the request of the Administrator of Income Tax of the said Province of Manitoba to produce, suffer and permit inspection thereof.

(g) By sub-section (1) and (2) of Section 6 of the said Act, the said Legislative Assembly, without lawful authority, attempts and presumes to impose upon His Majesty and His said representative the penalties in the said sub-sections mentioned.

(h) By the provisions of Section 7 of the said Act, the said Legislative Assembly, without lawful authority, has presumed to declare and to  
40 make applicable to His Majesty the King Sections 23, 23a, 24 and 25 of "The Income Tax Act," in the said section mentioned.

(i) By the said Act, the said Legislative Assembly, without lawful authority, attempts to interfere with and legislate in respect of the relationship between His Majesty the King and the officers and men of His Majesty's Militia in Canada.

(j) By Section 69 of "The Militia Act," Chapter 132, Revised Statutes of Canada, 1927, and amendments, "The Army Act" for the time being in force in Great Britain, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with the said "The Militia Act," or the regulations made thereunder, are thereby declared to have force and effect as if they had been enacted by the parliament of Canada for the government of the said Militia, which said "The Army Act" and the King's Regulations, at the time of the passing of the said "The Special Income Tax Act," were and have ever since been in force in  
 10 Canada; and did and do thereby provide that the pay of any officer or soldier of His Majesty shall be paid without any deduction other than the deductions authorized by the said "The Army Act" or any other Act to be enacted by the parliament of Great Britain or by any royal warrant for the time being.

7. By way of further defence to the whole of the Statement of Claim herein, the defendant, repeating the denials hereinbefore contained respecting the receipt by him of any "wages" within the meaning of the said "The Special Income Tax Act," and repeating the allegations hereinbefore contained, says that if Part I. of the said Act, properly construed, should be  
 20 deemed applicable to the defendant as an officer of the Active Militia of Canada, Permanent Force, the same and all the provisions thereof are ultra vires of the Legislative Assembly of the Province of Manitoba to enact, and in the alternative says that if it should be held within the power of the said Legislative Assembly to enact the same and that the provisions thereof are applicable to any moneys received by the defendant as such officer, then the defendant says that the sums respectively claimed in the said Statement of Claim include the value of allowances for lodging, fuel and light, which sums were in fact never received by the defendant; and that the provisions of sub-section (2) of Section 2 of the said "The Special  
 30 Income Tax Act," empowering the Administrator in said sub-section referred to to determine and value in accordance with prevailing rates the monetary value of any allowances to the defendant for lodging, fuel and light, are ultra vires and beyond the power and authority of the Legislative Assembly of the Province of Manitoba to enact, and constitute indirect taxation and taxation of property held by His Majesty the King in right of the Dominion of Canada.

8. The defendant, repeating all denials hereinbefore contained respecting receipt by him of any wages, further says that Section 3 of the said "The Special Income Tax Act," Chapter 44, Statutes of Manitoba, 1933, is  
 40 beyond the power of the Legislative Assembly of the Province of Manitoba to enact, because the said section purports to levy the tax of two per centum therein mentioned in respect of wages earned or accruing due to any person in said section referred to on and after the 1st day of May, A.D. 1933, whether or not any such wages so earned or accruing due ever in fact have been or were paid or not to an "employee" within the meaning



of the said section and whether or not any such person to whom such payments were due was or is by law entitled to sue for and recover any sums so earned or accruing due to him.

9. The defendant further says that the said "Special Income Tax Act," Chapter 44, Statutes of Manitoba, 1933, is ultra vires the Legislature of Manitoba to enact, insofar as the same attempts to impose upon His Majesty the King and His representative the duty of maintaining within the Province of Manitoba, at a location of which he shall inform the Administrator of Income Tax for the Province of Manitoba, and whenever  
10 requested so to do, a true and correct copy of the names and residential addresses of all officers and persons performing any duties required by His said Majesty as Commander in Chief of the Militia of Canada or by His Excellency the Governor-General as His representative, thereby requiring in such manner and form to be made known and publicly exposed the names of all persons, officers and men of the said Militia rendering duties to His Majesty as such, concerning His Majesty's Secret Service, as well civil as criminal, contrary to public policy and in derogation of the prerogative rights of his said Majesty.

10. By way of further alternative defence to the whole of the said  
20 Statement of Claim, and repeating all of the denials hereinbefore contained, the defendant says that if it should be held that the said "Special Income Tax Act," Chapter 44, Statutes of Manitoba, 1933, is competently enacted by the Legislative Assembly of the Province of Manitoba, His Majesty the King is not an "employer," within the definition of "employer" within the said Act contained.

DATED at the City of Winnipeg in the Province of Manitoba this 21st day of May, A.D. 1934.

PHILLIPPS, GEMMILL & SMITH,  
201 Montreal Trust Building,  
WINNIPEG, MANITOBA,  
Solicitors for the Defendant.

## In the County Court of Winnipeg

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May 22nd, 1934.

PRESENT: His Honour Judge Whitla.

**BETWEEN :**

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Defendant.  
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Wilson E. McLean, Esq., appears for the plaintiff;  
Hugh Phillipps, Esq., K.C., appears for the defendant.

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MR. PHILLIPPS: Your Honour, for the purposes of the record I wish to state that I intend to draw the attention of the Court of Appeal to the fact that this matter of taxation does affect them and there is a rule that a judge does not become a judge in his own cause. It is rather a difficult thing to ask a judge to pass on the construction of a statute and say "I find it does operate to take something off my remuneration."

THE COURT: I think the judges are broadminded enough to look at  
20 the thing in a legal way.

MR. McLEAN: In connection this matter, your Honour, speaking to it, I do not suppose it is necessary for me to outline what is on the record having regard to the circumstances existing between my learned friend and myself. Under the K.B. Act, which we always believed applies to proceedings here in connection with notice, when the question of the constitutional validity of the Act was raised, I wrote to the Minister of Justice, the Attorney-General of Canada, notifying him of the proceedings today and also of the fact that it would come on before the Court of Appeal, and while I have not the original here, I have a copy of my letter and a copy  
30 of the reply. I think they should be marked, so that the matter is in order.

(Read)

THE COURT: I can quite imagine a case where a provincial Act was being attacked the Dominion might step in to ascertain whether in its view the Act should be disallowed or take such action as the Dominion has power to take.

MR. McLEAN: Take the case of those insurance matters, and matters of that kind.

MR. PHILLIPPS: There is no question about it, the Attorney-General of Canada does not want to appear.

MR. McLEAN: No. I will file this in order to make the record complete.

EXHIBIT No. One: Copy of letter dated May 15, 1934, Wilson E. McLean, Esq., to Honourable Hugh Guthrie, K.C., and copy of reply dated May 19, 1934, referred to, filed and marked as Exhibit No. 1.

MR. McLEAN: Then in respect to the facts in this particular case, your Honour, no examination for discovery was held, but they are contained in a statement of facts which has been settled by consultation with Mr. Phillipps, Mr. Pitblado and myself, and signed by Mr. Pitblado as counsel for the plaintiff and by Mr. Phillipps as counsel for the defendant, and there is no question about them.

I offer this as Exhibit Two. They really constitute an examination for discovery.

EXHIBIT No. Two: Statement of facts referred to filed and marked as Exhibit No. 2.

MR. McLEAN: I am moving for pro forma judgment on the material before your Honour. That course was adopted in re The Initiative and Referendum Act, 1916, reported in 27 Manitoba Reports, page 1. My learned friend naturally cannot consent to judgment because that would preclude him from appealing, but he agrees to have a pro forma judgment against him for the amount of the claim only. By interchange of letters it has been agreed that matters of costs in this Court and in the Court of Appeal, no matter what the event, will be neither asked for nor taken by either side. The amount of the claim set out in the amended statement of claim is the sum of \$44.58.

THE COURT: There is no discrepancy, is there, in the amounts claimed? You state in paragraph five of the amended statement of claim the amount of wages received for each month and you charge 2% thereon. Now in the agreed statement of facts the pay is lumped from May 1st to December 31st and so on and then there are deductions under the Militia Pension Act and The Income War Tax Act, and the total after making those deductions—that seems to be added.

MR. McLEAN: What has happened, your Honour, if you will notice, if you look at page four of the agreement of facts, you will notice the figure there, your Honour, for a 31-day month is \$282.10. There is a figure \$282.10 given there.

THE COURT: \$238.70.

MR. PHILLIPPS: Less \$32.86.

THE COURT: Less \$32.86 is \$205.84.

MR. PHILLIPPS: Which is the amount of the two deductions.

MR. McLEAN: I will explain that to your Honour—I may have the wrong one—it is on page four again—it is \$238.70, to which is added—

MR. PHILLIPPS: I think I can explain that. What really happened is this; an officer living in barracks receiving under pay and allowances, or would receive under pay and allowances—that is the more accurate way to put it—the same allowances for fuel, light and lodging, as an officer living out of barracks, only, in fact, he does not receive them. In making the 5% deduction for pension allowance all officers are treated the same as if they all received it although the married officer living in barracks does not receive it. For example, he gets 10c a day for light—that is all he is allowed if he lives out of barracks—he might burn 25c a day but he only gets 10c; if he lives in barracks he might spend more than 25c worth a day but he would not be charged for it, but in order to arrive at a pension allowance we settled that with Mr. Pitblado with the 5% deduction. 10% Income War Tax deduction amounting to \$32.86 is deducted off the pay because in fact he does not receive it. So we are estimating the pay and allowances given on top of page four in the aggregate to be \$238.70. There is deducted off, what he does not in fact actually receive, \$32.86, which for a 31-day month comes to \$205.84.

THE COURT: But the point is, if there is to be a pro forma judgment here, the amount claimed in the statement of claim should correspond with the 2% on the amount admitted in the statement of facts. Does it do that?

MR. McLEAN: Your Honour, there has been considerable discussion about this figure. There is the \$238.70, and, if your Honour will look, there is \$43.40 "Allowances to officers living out of Barracks, Article 74." If you add \$238.70 to this \$43.40, you get \$282.10, and we claim that that \$43.40 under the provisions of section two is to be taken by reason of the definition as part of the wages.

MR. PHILLIPPS: I quite agree with you. My learned friend wants to have it open to him to claim that is really something that is taxable and Mr. Pitblado and I agreed that that should be there. We thought we would try to show it.

THE COURT: There is no discrepancy. In the summary paragraph, you make the total paid for the period mentioned \$2,229.50, and 2% on that is really \$44.58, which is claimed in the action.

40 MR. PHILLIPPS: Whether that is taxable is a matter to be discussed.

THE COURT: The only way to dispose of this in a summary way is for the Court to deliver a pro forma judgment in favour of the plaintiff for the amount claimed. No reasons, no reasons assigned.

MR. McLEAN: That is satisfactory.

MR. PHILLIPPS: Quite. It is a pro forma judgment.

THE COURT: No costs.

MR. PHILLIPPS: No costs to be asked or taken.

THE COURT: The judgment will go that way.

(Court Rises)

10

CERTIFIED CORRECT TRANSCRIPT  
W. Killey  
Official Court Reporter.

157

No. 50261 - Ex. 1. W. K.  
May 15th, 1934.

Honourable Hugh Guthrie, K.C.,  
Minister of Justice,  
Ottawa, Canada.

Dear Sir:

Re Attorney-General v. Captain F. F. Worthington

20

Re County Court Suit No. 50261

The above mentioned case is a suit commenced by the Attorney-General of Manitoba in the County Court of Winnipeg for the recovery of the 2 per cent. tax imposed upon employees on the amount of wages earned under the provisions of "The Special Income Tax Act," being chapter 44 of the Statutes of Manitoba 1933.

The defendant is an officer in the Active Militia of Canada, Permanent Force, holding the rank of Captain in the said Militia.

This defendant is represented by Mr. Hugh Phillipps, K.C., and he has filed a statement of defence raising the question of the constitutional  
30 validity of the said Act.

I enclose a copy of the amended statement of claim and a copy of the statement of defence in the said case. The statement of defence sufficiently indicates the objections raised to the constitutional validity of this statute.

Section 72 of "The King's Bench Act" being chapter 6 of the Statutes of Manitoba 1931 requires notice to be given to the Attorney-General of Canada before any statute is adjudged invalid and this letter is therefore written in consequence of this statutory provision and to give you notice as therein required.

I understand the defendant has not already given you the required notice.

This letter is also to give you notice that this case by agreement between counsel will be disposed of in the County Court by a pro forma judgment against the defendant and that an appeal will be taken by the defendant to the Court of Appeal of Manitoba which appeal will come on for hearing during the present sitting of the Court of Appeal, at which time the matters raised in the defence including the constitutional question will undoubtedly be argued.

10 I would ask that you advise at your earliest convenience whether or not you propose to be represented by counsel at the hearing of the appeal.

Yours truly,

(sgd.) Wilson E. McLean  
Counsel for the Attorney-  
General of Manitoba.

McL. A.  
Encs.

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DEPARTMENT OF JUSTICE—CANADA

WSE/ELJ.

20

Ottawa, May 19, 1934.

A.457—1.

Re Attorney General v. Captain F. F. Worthington

Dear Sir,

In reply to your letter of the 15th instant, I beg to inform you that the Attorney General of Canada does not desire to be heard before the Court of Appeal of Manitoba, but reserves the right to intervene should the case go to a higher court.

Yours truly,

(sgd.) W. Stuart Edwards  
Deputy Minister of Justice.

30

Wilson S. McLean, Esq.,  
Counsel for the Attorney General of Manitoba,  
Winnipeg, Manitoba.

# In the County Court of Winnipeg

No. 50261 Ex 2 W.K.

**BETWEEN :**

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Defendant.  
10

## STATEMENT OF FACTS

The parties hereto by their respective Counsel agree as follows:—

**1. Name and Rank of Defendant:**

Captain Frederick Franklyn Worthington, M.C., M.M., was at all times material hereto an officer with the rank of Captain in Princess Patricia's Canadian Light Infantry, a Corps of the Permanent Force of the Active Militia of Canada, having been commissioned as an officer in the Permanent Force of the Active Militia of Canada by His Majesty King George V. on January 1st, 1920, pursuant to "The Militia Act," he upon  
20 being so appointed was stationed at the City of Montreal, in the Province of Quebec, until January, 1923, as hereinafter mentioned.

**2. Appointment and Station:**

The Defendant as such officer held the appointment of General Staff Officer, Grade III., at Headquarters Military District No. 10 at the Town of Tuxedo, in the Province of Manitoba, from January, A.D. 1923, until the 18th day of March, A.D. 1934, and while holding such appointment was stationed at Fort Osborne Barracks, in the Town of Tuxedo, in the Province of Manitoba. The Province of Manitoba and the territory of Keewatin and the Districts of Thunder Bay and Rainy River, in the Province  
30 of Ontario, are formed into Military District No. 10, with Headquarters at Winnipeg, Manitoba, by paragraph 29, page 9, King's Regulations and Orders for the Canadian Militia, 1926.

**3. Nature of Duties:**

The Defendant as such officer and while holding such appointment was required to perform the usual duties of a General Staff Officer, Grade III., in the said Military District No. 10, and during the whole of the period

referred to in paragraph 2 hereof was continuously within the Province of Manitoba excepting when required to be absent therefrom for the periods hereinafter stated, namely:—

<b>Dates absent from Manitoba</b>	<b>Place</b>	<b>Reason for absence</b>
Summer of 1923	Sydney, Nova Scotia	In aid of the Civil Power.
February and March, 1924	Fort William, Ontario	Conducting school of instruction.
10 January to October, 1925	England	Attending the English Small Arms School.
October to December, 1925	Ottawa, Ontario	Attending the Canadian Small Arms School.
1926	Occasional visits to Fort William and Saskatchewan	
1927—July, August and part of September	Sarcee Camp, Alberta	Canadian Small Arms School and unit training.
20 1928—July, August and part of September	Sarcee Camp, Alberta	Canadian Small Arms School and unit training.
1929—July, August and part of September	Sarcee Camp, Alberta	Canadian Small Arms School and unit training.
1929—Part of September and October	Ottawa, Ontario	At Connaught Ranges.
1930—July, August and part of September	Sarcee Camp, Alberta	Canadian Small Arms School.
30 1931—January to September	Kingston and Petawawa, Ontario	Conducting course of instruction.



#### 4. Married Officer and Quarters:

The Defendant as such Officer at all times relevant hereto was a married officer, having married in England in 1925, and during the whole of the period referred to in paragraph 2 hereof, excepting that portion prior to December, 1925, the Defendant occupied quarters and lived with his wife and family at Fort Osborne Barracks, in the Town of Tuxedo, in the Province of Manitoba, as required by Pay and Allowance Regulations for the Militia of Canada and in accordance with a direction of the District Officer commanding Military District No. 10, excepting that the Defendant  
10 himself was absent as mentioned in paragraph 3 hereof.

#### 5. Nature of Quarters Occupied:

At the said Fort Osborne Barracks there are a number of separate suites of rooms in a building known as "Married Officers' Quarters" situate wholly within the fenced-in confines of the Barracks and in close proximity to the Single Officers' Quarters and Quarters of the Non-Commissioned Officers and men of the various Corps stationed in the said Barracks and similarly within the fenced-in confines thereof. The Defendant and his wife on returning from England in December, 1925, thenceforward occupied and lived with his family in one of the said suites  
20 separately from the occupants of any of the other said suites, which said suite was heated and lighted pursuant to the provisions of Pay and Allowance Regulations relating to the occupation by a Married Officer of living quarters in Barracks, and he received for rations used and consumed by himself and his family in the said suite the ration allowances for himself and his wife at the rates provided therefor under Pay and Allowance Regulations pertaining thereto.

6. The Defendant and his wife and family were continuously within the Province of Manitoba during the whole of the year 1933 and occupied and lived in the said suite.

#### 307. Pay and Allowances:

The Defendant as such officer and by reason of his appointment as aforesaid received pay and allowances during the period from the 1st day of May, 1933, up to and including the 31st day of December, 1933 from and out of the Consolidated Revenue Fund of Canada pursuant to "The Militia Act" and "The Consolidated Revenue and Audit Act" and in accordance with the rates laid down by Pay and Allowance Regulations for the Militia of Canada for a married officer of the Rank of Captain with a Staff Appointment as follows:—

(a)

Pay and Allowances for each of the months of May, July, August, October and December, A.D. 1933.

Article 38 Pay 31 days at \$6.00 per diem .....	186.00
Article 82 Ration Allowance at 50c per diem .....	15.50
Article 88 Servant Allowance at 40c per diem .....	12.40
Article 36 Staff pay at 30c per diem .....	9.30
Article 89 Married allowance (rations) at 50c per diem .....	15.50
	<hr/>
	238.70

10 Deduction of 5% under Article 43 for pension under "Militia Pension Act" R.S.C. 1927, Cap. 133, computed as follows: (See Pay and Allowances supra)—

Article 38 .....	\$186.00
Article 82 .....	15.50
Article 88 .....	12.40
Article 36 .....	9.30

20 Allowance to officer living out of Barracks, Article 74—lodging \$1.00 per day; fuel 30c per day; light 10c per day, namely \$1.40 per day for each 31 day period, but not paid in cash (see Article 76) .....

43.40

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 \$266.60

5% deducted .....

13.33

Deduction of 10% made under "The Income War Tax Act" R.S.C. 1927, Cap. 97 and Amending Acts .....

19.53

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 32.86 238.70

32.86

Amount of order on the Receiver General of Canada received by the Defendant for each month of 31 days .....

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 \$205.84
 

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(b)

Pay and Allowances for each of the months of June, September and November, A.D. 1933.

Article 38 Pay 30 days at \$6.00 per diem .....	180.00
Article 82 Ration Allowance at 50c per diem .....	15.00
Article 88 Servant allowance at 40c per diem .....	12.00
Article 36 Staff pay at 30c per diem .....	9.00
Article 89 Married allowance (rations) at 50c per diem .....	15.00

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231.00

10 Deduction of 5% under Article 43 for pension under "Militia Pension Act" R.S.C. 1927, Cap. 133, computed as follows: (See Pay and Allowances supra)—

Article 38 .....	\$180.00
Article 82 .....	15.00
Article 88 .....	12.00
Article 36 .....	9.00

Allowance to officer living out of Barracks, Article 74—lodging \$1.00 per day; fuel 30c per day; light 10c per day, namely \$1.40 per day for each 30 day period, but not paid in cash (see Article 76) .....

20 .....

42.00

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\$258.00

5% deducted .....

12.90

Deduction of 10% made under "The Income War Tax Act" R.S.C. 1927, Cap. 97 and Amending Acts .....

18.90

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31.80 231.00

31.80

Amount of order on the Receiver General of Canada received by the Defendant for each month of 30 days .....

\$199.20

(c) The Defendant during the said period in addition to receiving the 30 pay and allowances hereinbefore mentioned was provided with lodging, fuel and light as set forth in paragraph 5 hereof, which if not provided would have entitled the Defendant to be paid the allowances laid down in Articles 74 and 76 of Pay and Allowance Regulations, namely:—

For each month of 31 days .....	\$43.40
For each month of 30 days .....	\$42.00

#### 8. Summary:

Amount of pay received as aforesaid from May 1st to December 31st, 1933, inclusive .....

\$1,626.80

40 Deductions of 5% under "Militia Pension Act" as aforesaid from May 1st to December 31st, 1933 .....

105.35

Deductions of 10% under "The Income War Tax Act" as aforesaid from May 1st to December 31st, 1933 .....

154.35

Allowances referred to in paragraph 7 (c) hereof from May 1st to December 31st 1933 .....

343.00

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\$2,229.50

9. The moneys received by the Defendant for pay and allowances here-  
 inbefore mentioned were provided by delivery to the Defendant by the  
 duly appointed agent for Military District No. 10 of the Comptroller of the  
 Treasury of Canada of an order for the respective amounts thereof signed  
 by the said agent and drawn upon the Receiver General of Canada at  
 Ottawa payable to the Defendant. Such orders could and may be cashed  
 at any chartered bank in Canada without payment of any exchange  
 thereon. Such orders covering the period in question, namely, from and  
 including the 1st day of May to and including the 31st day of December,  
 10 A.D. 1933, were received by the Defendant in Manitoba from the said  
 agent and were all either cashed by the Defendant or deposited to his credit  
 at chartered banks in Manitoba, and such orders are chargeable against  
 the appropriation item 89, "The Appropriation Act," No. 5, 1932-1933, in  
 pursuance of the provisions of Section 24 of "The Consolidated Revenue  
 and Audit Act" and Section 143 of "The Militia Act."

**10. Present Station:**

The Defendant as such officer was at all material times subject to being  
 posted to other Military Districts in other Provinces of Canada and to  
 England and elsewhere, according to the exigencies of his service, and on  
 20 the 18th day of March, 1934, after the institution of this action and after  
 service of the writ herein upon the Defendant he was transferred from the  
 said Military District No. 10 to the appointment of Deputy Assistant  
 Adjutant and Quartermaster General at Military District No. 2 in the City  
 of Toronto, in the Province of Ontario, and is now stationed at that station.

11. It is agreed that the pamphlet called "Pay and Allowance Regula-  
 tions for the Permanent and Non-Permanent Active Militia of Canada  
 1927," together with the amendments which have been made to the said  
 pamphlet, and the pamphlet called "King's Regulations and Orders for the  
 Canadian Militia" may be marked as exhibits at the trial and that either  
 30 party may use at the trial any relevant portions thereof.

12. The Defendant admits that he has not paid the tax of 2% claimed by  
 the Plaintiff herein, nor any part thereof, and further admits that the said  
 tax has not been deducted from his said pay and allowances.

DATED at the City of Winnipeg, in the Province of Manitoba, this  
 22nd day of May, A.D. 1934.

(sgd.) I. PITBLADO  
 Counsel for the Plaintiff.

(sgd.) HUGH PHILLIPPS  
 Counsel for the Defendant.

## In the County Court of Winnipeg

BETWEEN :

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,

10

Defendant.

This action coming on for trial this 22nd day of May, A.D. 1934 be-  
fore this court in the presence of counsel for the plaintiff and defendant  
and upon hearing read the pleadings and the statement of facts agreed to  
by counsel and what was alleged by counsel aforesaid,

THIS COURT DID ORDER AND ADJUDGE that the plaintiff for  
and on behalf of His Majesty the King in the Right of the Province of  
Manitoba do recover from the defendant the sum of \$44.58 as claimed in  
the pleadings.

(sgd.) H. W. WHITLA

C.C.J

20

## In the Court of Appeal

BETWEEN :

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,  
(Defendant) Appellant.

10 TAKE NOTICE that a Motion by way of Appeal will be made in this action to the Court of Appeal for Manitoba at the next sittings thereof by the Appellant from the judgment, order or decision of His Honour Judge H. W. Whitla, Senior Judge of the County Court of Winnipeg, pronounced on the 22nd day of May, A.D. 1934, and entered in the County Court of Winnipeg on the 26th day of May, A.D. 1934, whereby judgment was given against the Appellant in the sum of \$44.58.

UPON the hearing of the said Motion by way of Appeal the Appellant will seek to have the whole of the said judgment, order or decision of the said His Honour Judge H. W. Whitla, Senior Judge of the County Court 20 of Winnipeg, set aside.

THE grounds upon which the Appellant appeals are as follows:

1. The said judgment, order or decision of the said His Honour Judge H. W. Whitla is against law, the evidence and the weight of evidence.
2. That the evidence adduced discloses that the Appellant did not at any material time reside or live within the Province of Manitoba and that the Appellant was present in the Province of Manitoba, at any material time, only in his capacity as an officer of the Active Militia of Canada, Permanent Force, according to the exigencies of his service therein.
3. The evidence discloses that the Appellant never earned any 30 "wages" between the 1st day of May, A.D. 1933, and the 31st day of December, A.D. 1933, or at all, and that no "wages" were paid to the Appellant by and out of the revenues of His Majesty the King in right of the Dominion of Canada at any time material to this action.
4. That the Appellant never became liable to pay to His Majesty the King in right of the Province of Manitoba for the raising of a revenue for provincial purposes or for any other purpose any tax whatever under the provisions of the "Special Income Tax Act," being Chapter 44 of the

Statutes of Manitoba, 1933, and that such tax never became payable by the Appellant to His Majesty the King in the right of the Province of Manitoba.

5. That the evidence discloses that the amount of the Judgment is not a percentage of any sum or sums which ever became payable to the Appellant in respect of any "wages" earned or accruing due to the said Appellant.

6. The evidence discloses that at all material times during which the Appellant was within the Province of Manitoba, his presence therein was in  
10 the performance of his duties as an officer of the Active Militia of Canada, Permanent Force, with the rank of Captain in Princess Patricia's Canadian Light Infantry, a corps of the said Permanent Force, and not otherwise, and according to the duties and exigencies of his service to His Majesty the King as such commissioned officer, and that any sums of money received by the Appellant were received by him from His Majesty the King pursuant to royal warrant for the payment thereof, under signed manual of His Excellency the Governor-General of Canada, as His said Majesty's representative, from and out of moneys appropriated to His said Majesty  
20 for the upkeep of His Majesty's Forces in Canada and in accordance with rates laid down by Pay and Allowance Regulations for the Militia of Canada for a married officer of the said rank of captain.

7. That in sofar as "The Special Income Tax Act" (Chapter 44, Statutes of Manitoba, 1933) assumes or purports to declare any of the sums mentioned in the preceding ground of appeal to be "wages" within the meaning of the said "The Special Income Tax Act," and purports to tax the Appellant and render him liable to pay to His Majesty the King in Right of the Province of Manitoba a tax of Two (2) per centum or any tax upon the said sums, the said Act and all such provisions thereunto relating are and each of them is beyond the power of the Legislative Assem-  
30 bly of the Province of Manitoba to enact, because—

(a) the taxes referred to in Part I. of the said "The Special Income tax Act," Chapter 44, Statutes of Manitoba, 1933, directed to be levied and collected under the provisions thereof, are indirect taxation;

(b) sub-section (c) of Section 2 of the said Act attempts to legislate in respect of the status, privileges and prerogatives of His Majesty the King as Commander in Chief of the Militia of Canada and of the authority thereover exercised by His Excellency the Governor-General of Canada as His said Majesty's representative in that behalf;

(c) the said legislature, by enacting sub-section (1) of Section 4 of  
40 the said Act, attempts to exercise jurisdiction and authority over His said Majesty and His said representative, His Excellency the Governor-General of Canada, by seeking to impose the duty of levying and collecting the taxation in the said sub-section referred to, and presumes without lawful authority to impose on His said Majesty and His said representative the

duty and obligation of making payments of sums of money in the said sub-section described, in manner and form therein enacted, and to observe, follow and obey such regulations as may be prescribed by an official and/or appointee of the government of the Province of Manitoba, to wit, the Administrator of Income Tax for the said Province;

(d) by sub-section (2) of Section 4 of the said Act, the said Legislative Assembly has presumed to impose upon His Majesty and His said representative the duty and obligation of making to the Administrator of Income Tax for the Province of Manitoba, the returns in the said sub-  
10 section mentioned, and to verify the same in such manner as the said Administrator may prescribe;

(e) by sub-section (3) of Section 4 of the said Act, the said Legislature, without lawful authority, has presumed to declare His Majesty the King and His said representative to be trustees for His Majesty the King in the right of the Province of Manitoba;

(f) by sub-section (1) of Section 5 of the said Act, the said Legislature, without lawful authority, has presumed to impose on His said Majesty and His said representative the duty and obligation, subject to the penalties in the said Act mentioned, of keeping and maintaining in the Province of  
20 Manitoba the records in the said sub-section mentioned, and in obedience to the request of the Administrator of Income Tax of the said Province of Manitoba to produce, suffer and permit inspection thereof;

(g) by sub-sections (1) and (2) of Section 6 of the said Act, the said Legislative Assembly, without lawful authority, attempts and presumes to impose upon His Majesty and His said representative the penalties in the said sub-sections mentioned;

(h) by the provisions of Section 7 of the said Act, the said Legislative Assembly, without lawful authority, has presumed to declare and to make applicable to His Majesty the King Sections 23, 23a, 24 and 25 of the "In-  
30 come Tax Act," in the said section mentioned;

(i) by the said Act, the said Legislative Assembly, without lawful authority, attempts to interfere with and legislates in respect of the relationship between His Majesty the King and the officers and men of His Majesty's Militia in Canada;

(j) by Section 69 of "The Militia Act," Chapter 132, Revised Statutes of Canada, 1927, and amendments, "The Army Act" for the time being in force in Great Britain, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with the said "The Militia Act," or the regulations made thereunder, are thereby declared to  
40 have force and effect as if they had been enacted by the parliament of Canada for the government of the said Militia, which said "The Army Act" and the King's Regulations, at the time of the passing of the said "The Special Income Tax Act," were and have ever since been in force in Canada; and did and do thereby provide that the pay of any officer or soldier of His Majesty shall be paid without any deduction other than the



deductions authorized by the said "The Army Act" or any other Act to be enacted by the parliament of Great Britain or by any royal warrant for the time being.

8. That if Part I. of the said "The Special Income Tax Act," properly construed, is applicable to the Appellant as an officer of the Active Militia of Canada, Permanent Force, the same and all the provisions thereof are ultra vires the Legislative Assembly of the Province of Manitoba to enact.

9. That if the said "The Special Income Tax Act" is within the power 10 of the Legislative Assembly to enact and the provisions thereof are applicable to any moneys received by the Appellant as an officer of the Active Militia of Canada, Permanent Force, the evidence discloses that the sums claimed in the said action in respect of which judgment was given include the value of allowances for lodging, fuel and light, which sums, the evidence discloses, were never in fact received by the Appellant; and that the provisions of sub-section (2) of Section 2 of the said "The Special Income Tax Act" empowering the Administrator in said sub-section referred to to determine and value in accordance with prevailing rates the monetary value of any allowances to the Appellant for lodging, fuel and light, are ultra 20 vires and beyond the power and authority of the Legislative Assembly of the Province of Manitoba to enact, and constitute indirect taxation and taxation of property held by His Majesty the King in right of the Dominion of Canada.

10. That Section 3 of the said "The Special Income Tax Act," Chapter 44, Statutes of Manitoba, 1933, is beyond the power of the Legislative Assembly of the Province of Manitoba to enact, because the said section purports to levy the tax of two per centum therein mentioned in respect of wages earned or accruing due to any person in said section referred to on and after the 1st day of May, A.D. 1933, whether or not any 30 such wages so earned or accruing due ever in fact have been or were paid or not to an "employee" within the meaning of the said section and whether or not any such person to whom such payments were due was or is by law entitled to sue for and recover any sums so earned or accruing due to him.

11. That the said "The Special Income Tax Act," Chapter 44, Statutes of Manitoba, 1933, is ultra vires the Legislature of Manitoba to enact, insofar as the same attempts to impose upon His Majesty the King and his representative the duty of maintaining within the Province of Manitoba, at a location of which he shall inform the Administrator of Income 40 Tax for the Province of Manitoba, and whenever requested so to do, a true and correct copy of the names and residential addresses of all officers and persons performing any duties required by His said Majesty as Commander in Chief of the Militia of Canada or by His Excellency the Governor-General as His representative, thereby requiring in such manner and form

to be made known and publicly exposed the names of all persons, officers and men of the said Militia rendering duties to His Majesty as such concerning His Majesty's Secret Service, as well civil as criminal, contrary to public policy and in derogation of the prerogative rights of His said Majesty.

12. That if the said "The Special Income Tax Act," Chapter 44, Statutes of Manitoba, 1933, is properly enacted by the Legislative Assembly of the Province of Manitoba, His Majesty the King is not an "employer" within the definition of "employer" within the said Act contained.

AND TAKE NOTICE that upon the hearing of the said Motion by way of appeal, there will be read this Notice of Motion, the Particulars of Claim, the Order to amend Statement of Claim, the Amended Statement of Claim and the Statement of Defence in the said Action, the Statement of Facts filed at the hearing of the said action as agreed between counsel as well for the Appellant as for the Respondent and the Exhibits filed at the hearing of the said action before His Honour Judge H. W. Whitla, Senior Judge of the County Court of Winnipeg, the proceedings and evidence taken before the said His Honour Judge H. W. Whitla, upon the trial of the said action and the judgment thereupon rendered and entered in the said action.

20 DATED this 5th day of June, A.D. 1933.

Yours, etc.,

PHILLIPPS, GEMMILL & SMITH,  
Solicitors for the amove-named  
(Defendant) Appellant.

TO:

The Honourable 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, the  
30 above-named (Plaintiff) Respondent.

## In the Court of Appeal

The Honourable  
 The Chief Justice of Manitoba  
 The Honourable R. M. Dennistoun  
 The Honourable W. H. Trueman  
 The Honourable H. A. Robson  
 The Honourable S. E. Richards  
 Judges of Appeal

Monday, the 12th day  
 of November, A.D. 1934.

**BETWEEN :**

**10** 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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
 cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,  
 (Defendant) Appellant.

The appeal of the above-named defendant appellant from and against  
 the judgment given or pronounced by His Honour Judge Whitla in the  
**20** County Court of Winnipeg on the 22nd day of May, A.D. 1934 having come  
 on for hearing before this Court on the 1st and 2nd days of October, A.D.  
 1934 in the presence of counsel as well for the said appellant as for the said  
 respondent, whereupon and upon reading the pleadings and proceedings  
 and upon hearing what was alleged by counsel aforesaid, this Court was  
 pleased to direct that the said appeal should stand over for judgment and  
 the same having come on this day for judgment;

THIS COURT DID ORDER AND ADJUDGE that the said appeal  
 should be and the same was dismissed with the exception that the said judg-  
 ment be and the same was reduced by the sum of \$3.08.

30

Certified

[SEAL]

A. J. CHRISTIE,  
 Dep. Registrar.

## In the Court of Appeal

ATTORNEY-GENERAL OF MANITOBA

vs.

WORTHINGTON

**Trueman, J. A.**

This is an action in the County Court of Winnipeg by the Attorney-General of the Province on behalf of the King in the right of the Province to recover from the defendant Frederick F. Worthington a two per cent tax levied by the Province under "The Special Income Tax Act," ch. 44 of the  
10 Acts of 1933, on wages paid to him from the revenues of the King in the right of the Dominion from May 1, 1933, to December 31, 1933, which wages were earned by him in said months as an officer of the Active Militia of Canada, Permanent Force, while resident during said months in the Province. The amount sued for is \$44.58. A pro forma judgment for that amount was entered by His Honour Judge Whitla.

Sect. 3 of Part I. of the Statute provides that "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  
20 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."

Sect. 4 enacts as follows:

"(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 deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the fifteenth day of the month next following that in which the payment of wages takes  
30 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 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."

Sect. 5 provides that certain records shall be kept by every employer, to be produced for inspection when requested by the Income Tax Administrator. By sect. 6 payment of a penalty by an employer who fails to collect and pay said tax is provided for. The concluding provision is sect. 7, which is as follows:

10 "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."

By sect. 2 (1),

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

(c) 'Employer' includes every person, manager or representative  
20 having control or direction of or responsible, directly or 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

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

(ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof,  
30 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;

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

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

40 (2) The value of that part of the wages of an employee which is within the scope of sub-paragraphs (iii) or (iv) of the definition of wages

in subsection (1) shall be determined by the administrator at the actual amount thereof if payable in money, or otherwise in accordance with any prevailing rates."

By sect. 92 (2) of the British North America Act, 1867, a Provincial legislature may exclusively make laws relating to direct taxation within the Province for raising revenue for provincial purposes. In *Abbott v. City of Saint John* (1908) 40 S.C.R. 597, the Supreme Court of Canada held that as under this power a provincial income tax applying to all residents of the Province may be enacted, a civil or other officer of the Government of  
10 Canada may be lawfully taxed in respect to his income, earned by him as such, by the municipality in which he resides, there being no conflict or inconsistency between the power so vested in the Province and the exclusive authority given by sec. 91 (8) of the Constitutional Act to the Parliament of Canada to fix and provide "for the salaries of the civil and other officers of the Government of Canada." Davies, J., as he then was, said (p. 606): "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 Province does not attempt to interfere directly with the exercise of the Dominion  
20 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. . . . 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 the 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,  
30 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  
40 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 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."

Abbott v. City of Saint John was applied in *City of Toronto v. Morrison*, (1917) 40 O.L.R. 227, where it was held by the Appellate Division that the salary of the defendant, as one of the Judges of the County of York, was not exempt from municipal taxation authorized by the assessment Act of the Province. The Court dealt with the further point that the defendant had exemption from taxation by a provision of the Assessment Act, which exempted "The full or half-pay of any officer, non-commissioned officer or private of His Majesty's regular Army or Navy; and any pension, salary, gratuity or stipend derived by any person from His Majesty's Treasury, and the income of any person in such Naval or Military services, on full pay, or otherwise on actual service." In holding that the exemptions referred to Imperial officers only, *Mulock, C. J. Ex.*, pointed out that Canada maintains no regular army or navy. The Court also brushed aside the contention that a "judge" is not a "person" and that his "salary," which is paid out of the Consolidated Revenue Fund, is not "income" within the Assessment Act.

As it always has been and continues to be the attitude of Canada that a constitutional question is not disposed of until passed upon by the Judicial Committee, the occasion was presented in *Caron v. The King* (1924) 20 A.C. 999, to have *Abbott v. City of Saint John* reviewed. The question there for consideration by the Judicial Committee was whether or not the Income War Tax Act, 1917, and the amending Act of 1919, which imposed an income tax on every person residing or ordinarily residing, or carrying on business in Canada, applied to the appellant, a Minister of the Government of the Province of Quebec, in respect of his salary as such and his sessional indemnity as a member of the Legislative Assembly. The Judicial Committee, affirming the judgment of the Supreme Court of Canada (1923) 64 S.C.R. 255, held that it did apply. In their reasons for judgment, which was delivered by Viscount Cave, the Board adopted views expressed in the 30 judgment of *Davies, J.*, above quoted, and expressly approved the reasoning in the *Abbott* case. Viscount Cave (p. 1006) characterized the Income Tax Acts in question "as statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said not having regard to, the source from which their annual means are derived."

What then is there in this appeal that calls for attention? One contention is that in its application to the appellant the tax is not direct taxation. How can that be said? It is levied on his wages; its payment is demanded from him; he alone bears it; he is now sued for it in an action of debt under the provisions of the Act. It is useless to submit that as under sect. 4 40 provision is made for the collection of the tax by the employer and payment over to the Province, the tax is primarily placed on the employer, to be passed on by him to the employees. See *City of Brandon v. Municipal Commissioner for Manitoba*, (1931) 39 M.R. 582. Equally outside serious argument is the view with which the Court was pressed that the Act does not apply since the appellant's employer, His Majesty the King in the right of the Dominion, is not and cannot be made subject to the duties imposed

on employers by sect. 4, for which reason it is said the appellant is not an "employee." The Province is not obliged to rely upon this section in enforcing payment of the tax but may proceed, at its option, against the delinquent employee under the provisions of sect. 7, as it is now doing. An effort was made to invest the position occupied by Captain Worthington in the Permanent Force with a personal or mystical relationship to His Majesty the King, which gave to the appellant the same immunity from legislation that the Crown enjoys unless expressly named. With every respect, I do not know from what source this idea is derived. The Militia Act, ch. 132 R.S.C. 1927, certainly gives no countenance to it. It provides (inter alia) that there shall continue to be a Permanent Force which shall consist of such permanently embodied corps, not exceeding ten thousand men, enrolled for continuous service, as are, from time to time, authorized by the Governor in Council, and for the appointment by the Governor in Council of a general staff, etc., and such other officers as are from time to time deemed expedient. By sect. 32, the pay and allowances of the officers of the general staff, etc., shall be fixed by the Governor-in-Council. By sect. 48, officers, warrant officers and non-commissioned officers of the Permanent Force shall be entitled to daily pay and allowances at rates to be prescribed. There is thus left no ground for thinking that the pay received by the appellant in respect to which the tax in question is imposed is not "wages" within the statute. It may here be pointed out that by Schedule E of the Income Tax Act, 1918, 8 & 9 Geo. V., ch. 40, (Imp.), and the Rules applicable thereto, income tax is required to be paid by officers in His Majesty's navy; commissioned officers in His Majesty's Military forces, and commissioned officers in His Majesty's Air Force.

The amount sued for is based on an income of \$2,229.50, made up as follows: \$1,626.80, pay for the eight months in question; \$105.35, deductions for said period under the Militia Pension Act, ch. 133, R.S.C. 1927; \$154.35, deductions of 10% for said period under "The Income War Tax Act"; and \$343.00, for allowances for said period for lodging quarters, fuel and light at Fort Osborne Barracks, where Captain Worthington and his family resided.

The deduction of 5 per cent. under the Militia Pension Act is made from the appellant's pay, which is calculated on his total emoluments, including the amounts granted for lodging, fuel and light, notwithstanding that he may be provided with these in kind instead of money: See sect. 10 (1) of the Act and Art. 43 of the Pay and Allowance Regulations. I think it is not open to question that this deduction is subject to the Provincial Act, there being no provision therein for its exclusion. Imperial legislation allows deductions in computing the amount on which income tax shall be paid in respect of any sums paid by an employed person towards a pension or superannuation fund, or to secure an annuity to his widow or provision for his children after death. A like exemption is provided for in the Dominion and the Manitoba Income Tax Acts.



The inclusion in the appellant's pay of ten per cent. tax paid by him to the Dominion under "The Income War Tax Act" is, in my opinion, wrong. This tax was first imposed upon the salaries or pay paid by the Dominion to, among others, the commissioned officers of the military, naval and air forces of Canada by ch. 44 of the Dominion Acts of 1932. It is therein referred to as a special income tax and is applied only to the salaries or pay received during or in respect of the fiscal year commencing April 1, 1932, and ending March 31, 1933. It is made payable in eleven equal monthly instalments on the last day of each month, commencing in May, 10 1932. A provision in the amendment is that "Every payment made on account of the said special tax shall be deductible from income of the year in which the payment is made, for the purpose of determining income liable to income tax other than the special tax imposed by this section." The Act was expected to be required for no more than the time mentioned in it and was not an income tax measure but a means of bringing about a reduction for the time being in the salaries affected by it. Due to the continuance of the exigency which prompted the legislation, the amendment was continued in force until March, 1934, by ch. 15 of the statutes of 1932-33. Sect. 2 of this enactment made provision, the details of which 20 need not be stated, by which instead of making payment by monthly instalments, direction could be given that the amount should be deducted from the salary in accordance with The Salary Deduction (Continuance) Act, 1933. A further renewal of the ten per cent. tax for the year from April 1, 1934, and ending March 31, 1935, is provided for in ch. 19 of the Statutes of 1934. Sect. 3 of the Provincial Act, quoted supra, provides that "every employee shall pay to His Majesty for the raising of revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him . . . ." In one construction it can be said that the salary earned by the appellant was the amount paid to him, and thus the amount 30 on which he should pay the Provincial tax. The opposing view called for by the circumstances is that his salary was reduced ten per centum not by an income tax in its characteristic and universal sense but by a method which, while denominated a tax, was preferred to the alternative device of making a deduction from the salary at the time it was paid. The judgment should therefore be reduced by \$3.08.

Allowances for lodging, fuel and light are within the inclusive language of the Act, which provides (Sec. 2 (1) ) that "wages" includes "(d) emoluments from any source whatsoever, including (iii) personal and living expenses and subsistence when they form part of the profit or remuneration 40 of the employee; and (iv) emoluments, perquisites, or privileges incidental to the office or employment of the employee which are reducible to a money value." By sub-sect. (2) "The value of that part of the wages of an employee which is within the scope of sub-paragraphs (iii) and (iv) of the definition of wages in subsection (1) shall be determined by the Administrator at the actual amount thereof if payable in money or otherwise in accordance with any prevailing rates." The Pay and Allowance Regulations

provide (Art. 76) that if an officer or soldier is not provided with quarters, the allowance for lodging, fuel, light, etc., laid down in Art. 74 will be paid. Rates therefor in accordance with rank are set out in tabulated form in Art. 74. There can thus be no question that lodging, fuel and light furnished to the appellant under the Pay and Allowance Regulations are "wages" within the above definition. The language of the Act is much wider than that of the Imperial statute and considered in *Robinson v. Corry*, (1933) 2 K.B. 521; aff. (1934) 1 K.B. 240. There an established civil servant was appointed by the Lords Commissioners of the Admiralty to a  
10 post which necessitated his residing in a colony for several years. During that time he received, in addition to the salary appropriate to his rank in the Civil Service, a colonial allowance to provide for the increased cost of living in the colony. During part of the time he occupied an official house provided for him, and during other parts of the time he received a housing allowance in lieu of an official house. By The Income Tax Act, 1918, Sch. E. "Tax under Schedule E. shall be charged in respect of every public office or employment of profit . . ." By Rule 1 applicable to the Schedule, "Tax under this Schedule shall be annually charged on every person  
20 having an office or employment of profit mentioned in this Schedule . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom . . ." It was held that the tax was chargeable not only on salary, but also on the colonial allowance and housing allowance and that the annual value of the official residence was not income chargeable with tax, since it was not money, nor convertible into money.

Pertinent to the general discussion are some trenchant remarks by Stratford, J. A., in *Krause v. Commissioner for Inland Revenue*, (1929) App. D. 286, (referred to in Vol. 45 Law Quarterly Review, p. 291) in which the Appellate Division of the Supreme Court of South Africa decided that the salary of a Judge of the Transvaal Division of the Supreme Court  
30 was subject to tax under the Income Tax Act. Sect. 100 of the South Africa Act, 1909, taken from Article 3, section 1 of the American Constitution, provides that Judges of the Supreme Court shall receive such remuneration as Parliament prescribes and that their remuneration shall not be diminished during their continuance in office. The argument was made that while the Income Tax Act was in its terms wide enough to include the salary of a Judge it did not override the foregoing provisions of the Union Act. Stratford, J. A., said that before this contention could be accepted the proposition would have to be established that the effect of  
40 sect. 100 was to relieve Judges from the duty of paying income tax. "The prohibition is directed against the diminution of the salaries of Judges as such, and cannot be construed to protect Judges from the incidence of a tax of general applicability."

I would dismiss the appeal.

**Dennistoun, J. A.**

I agree with the reasons for judgment of my brother Robson.

The Act to Impose a Special Tax on Incomes, 1933, cap. 44, passed by the Legislature of the Province of Manitoba, imposes a wage tax of two per cent. upon the amount of all wages earned or accruing due to employees after the 1st of May, 1933.

The defendant is an officer of His Majesty's Forces holding a Captain's commission in The Princess Patricia's Canadian Light Infantry, a regiment which is part of the Permanent Militia Force.

10 After being served with a County Court writ in this action, and before trial, he was transferred from Military District No. 10 at Winnipeg to Military District No. 2 at Toronto, where he is now serving.

Judgment has been given against him for \$44.58, being 2% on \$2,229.50, the amount of his pay and allowances from May to December, 1933, made up as follows:

20	Pay received in cash .....	\$1,626.80
	Deduction for pension dues .....	105.35
	Deduction under Dominion Income War Tax Act 10% .....	154.35
	Allowances for lodging, fuel and light in married officers' quarters in barracks .....	343.00
		<hr/>
		\$2,229.50

We have now to decide whether the pay so received, and the allowances made, are "wages," within the meaning of the Provincial statute, and subject to the two per cent. tax.

The statute, sec. 2 (d) (ii) specifically mentions certain classes of persons as in receipt of "wages" who obviously would not be considered "employees" unless expressly declared to be such. They are members of the Senate and House of Commons of the Dominion, members of Provincial Legislative Councils and Assemblies, members of municipal councils, 30 Judges of any Dominion or Provincial Court, all of whom are to be taxed two per cent. on the amount of their salaries, indemnities, or other remuneration. It will be noticed that officers and soldiers of His Majesty's Forces are not mentioned, though it is argued that the final words of the section, "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," are wide enough to include them.

In my view these general words do not make taxable the pay and allowances of His Majesty's Forces for several reasons.

40 The status of the soldier is different from the status of those specifically named, in this respect, that the soldier has no enforceable contract with the Crown for the payment of wages or emoluments. What the soldier

receives is the King's bounty, not an earned wage, and no one but the King can interfere with it, or deprive the soldier of the full use and enjoyment of that bounty. The King in relation to the soldier, is the King in right of the Dominion. The organization and administration of Militia and Defence is committed by the British North America Act to the Dominion alone, by sec. 91 (7).

The Dominion, with the King's consent, may withhold the bounty or tax it at pleasure, but the King in right of the Province has in my, judgment, no such right.

10 To attempt to do so is to derogate from the King's prerogative in respect to his troops who are maintained for the defence of the whole of Canada and all the Provinces thereof, and may be moved from one Province to another at will.

That the pay of the soldier is a Royal Bounty and not enforceable except at the King's pleasure is clear from the following cases.

In *Williams v. Howarth*, 1905, A.C. 551, the Judicial Committee of the Privy Council considered a contract made by the government of New South Wales with the respondent for military services in South Africa at a certain rate of pay. The New South Wales government deducted from  
20 the pay agreed upon certain sums which were paid to the soldier by the Imperial Government, and he sued for the amount so deducted. The trial Judge held that there was no evidence that the Imperial Government purported to pay on behalf of the local government and directed a verdict for the balance claimed. The Lord Chancellor, The Earl of Halsbury, in giving judgment, said, at p. 554:

"The plaintiff was in the service of the Crown, and his payment was to be made by the Crown. Whether the money by which he was paid was to be found by the Colony or the Mother Country was not a matter which could in any way affect his relation to his employer, the Crown.

30 "The learned trial Judge in giving his judgment in this case said: 'The King has no concern with payments for services rendered in this Colony; the obligation is with the government of New South Wales,' and so far as their Lordships can understand this is the ground upon which the judgment rests. But with great respect to the learned Judge, this is entirely erroneous. The government in relation to this contract is the King himself. The soldier is his soldier, and the supplies granted to His Majesty for the purpose of paying his soldiers, whether they be granted by the Imperial or the Colonial Legislature, are money granted to the King, and the Appropriation Act, whenever an Appropriation Act is passed,  
40 simply operates to prevent its being applied to any other purpose."

"Under these circumstances the money paid was money paid for services rendered to the King and no other payment could possibly be due upon the contract declared in."

In *Mitchell v. The Queen*, reported in a foot-note, in 1896, Q.B.D. 121, Lord Esher, M.R., said:—

“I agree with Mathew, J., that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract.”

The head-note summarizes the judgment in these words:

“No engagement made by the Crown with any of its military or naval officers in respect of services either present, past, or future, can be enforced in any court of law.”

In *re Tuffnell*, 3 Ch. D. 164, is to the same effect, where Malins, V. C., at p. 176, says:

“Nothing can be more clear than that, now that Mr. Tuffnell is retained on half pay, if the Crown thinks fit to withhold the half pay, he has no remedy whatever, but is entirely at the mercy of the Crown, and by no petition of right, or any other proceeding can he enforce the payment even of his half pay.”

It is argued on behalf of the Attorney-General that this is an Income Tax, and that when money is received it matters not where it comes from so long as the recipient is able to use it as income, but the words of the statute make it a tax on wages specifically, and impose the duty on the employer of paying it before the money reaches the hands of the employee. The crown (Dominion) has ignored this provision and has declined to become a tax gatherer for the Province.

It is a matter of common knowledge, and of special knowledge on my own part, that no taxation of the pay and allowances of Canadian soldiers was made by the Imperial Government when they were serving overseas. Canadian soldiers were in receipt of the bounty of the King in right of the Dominion of Canada, and The Crown (Imperial) while taxing its own soldiers who had resided in England for more than six months, recognized that the taxing power in respect to Canadian soldiers was the Dominion and not the Mother Country. It may be said that this was a matter of state policy or comity as between countries which had independent jurisdictions, but is it too much to suggest that state policy, or comity, should be recognized between Provinces and the Dominion, as well as between the Dominion and the Mother Country?

Returning to the case before us, the B.N.A. Act, sec. 125, prohibits the taxation of lands or property belonging to Canada. The Barracks containing officers' quarters in Military District No. 10 are exempt under this section. Nevertheless, so soon as a married officer is put into possession of a suite of rooms, the Government of Manitoba attempts to collect from him 2% of the value of that apartment on a rental basis. In my

opinion this is equivalent to a tax on Militia quarters which is prohibited. The quarters are assigned to the officer to enable him to perform his military duties, and any diminution of their value by an outside agency, to that extent decreases their value to the occupants: *Tennant v. Smith*, 1892, A.C. 150; *Bent v. Roberts*, 3 Ex. D. 66; *Lidster v. Regina*, 1922, 2 W.W.R. 1162; and the important judgment of McCardie, J., in *Bayley v. Bayley*, 1922, 2 K.B. 227, in which it was held that allowances for lodging, fuel, light, and rations, were not part of an officer's pay, and were not to be taken into account in fixing alimony to be paid a former wife.

10 Similarly the officer is taxed on the value of the heat and light which are necessary to enable him to perform his duty. The value of the uniform, rations, boots, clothing of the private soldier may be taxed in the same way if the judgment appealed from is sound.

By section 6 (2) of the Act under consideration every person who contravenes any provision of the Act for which no other penalty is provided is liable to a fine not exceeding \$500 for each day's default, and may be proceeded against under sec. 7 by the procedure laid down in the Summary Convictions Act which may involve imprisonment.

As this is said to be a test case it may be that at the present time all  
20 the military forces in the province are liable to incarceration. Such a possibility is a direct interference with the powers of the Dominion to use its troops for military purposes as it sees fit.

I refer to *The King v. Anderson*, 39 M.R. 84, in which this Court recently held that the Provincial Government has no power to compel an officer driving a motor car belonging to the Crown (Dominion) to take out a driver's license. At p. 86, my brother Trueman said:

30 "The issue is a constitutional one, affecting the sovereignty of the Dominion and the powers of the Province. As it is apparent that if the respondent may not use the car without taking out a chauffeur's license or permit, the cost of which must be borne by the Dominion Crown, unless he voluntarily assumes it, there is interference by the Province with Dominion property and agencies as well as taxation thereof, it is difficult to conceive how anyone considered it worth while to raise the question."

I would adopt this reasoning and apply it to the present case. Here the soldier may be prevented from performing his military duties, and the property of the Crown, quarters, light, and heat, are made subject to taxation.

There is the further objection that the deductions which are made by the Dominion from the King's bounty to provide the soldier with a pension  
40 on retirement are taxed, though they have never come into the soldier's hands, and will never be available to him unless the Crown so determines.

Moreover a tax of ten per cent. of the soldier's pay and allowances imposed by the Crown (Dominion) and which never reaches the soldier,

is taxed 2% by the Province, something the Act never contemplated, in my humble judgment.

My brother Robson has referred me to the case of *The King v. Crabbs*, 1934, S.C.R. 523, in which Hughes, J., delivering the judgment of the Supreme Court of Canada, collects, and comments on a number of leading cases which deal with taxing Acts, and quotes with approval the words of Fitzgibbon, L. J., in *re Studdert*, (1855) 11 Ex. 452, at 456:

“If it be doubtful or difficult of interpretation, which I do not think it is, the Finance Act is subject to the rule that no tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject.”

I would allow the appeal with costs.

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**Robson, J. A.**

This action was commenced in the County Court of Winnipeg by the Attorney General for Manitoba, who sues for and on behalf of His Majesty the King in the right of that province. The defendant is in the amended statement of claim, stated to be a married person and an officer in the Active Militia of Canada, Permanent Force, holding the rank of Captain in the said Militia, and it is alleged that at the date of the service of the writ herein and during the whole of the year 1933 and prior thereto the defendant was within the Province of Manitoba and resided or lived at the date of the service of the writ and during the whole of the year 1933 and prior thereto in the said province; that the defendant as such officer aforesaid has earned “wages” within the meaning of The Special Income Tax Act, being chapter 44 of the statutes of Manitoba 1933, continuously from the 1st day of May 1933 to the 31st day of December, 1933, both inclusive which said “wages” earned as aforesaid, it is alleged, were paid to the defendant by and out of the revenues of His Majesty in the right of the Dominion of Canada on or about the last day of each and every month during the said period and which said payments were in the amount of \$282.10 for the months of May, July, August, October and December in the said year 1933 and were in the amount of \$273.00 for the months of June, September and November in the said year 1933.

The plaintiff proceeds to allege that under the provisions of the said Act the defendant became liable to pay to His Majesty the King in the right of the Province of Manitoba, for the raising of a revenue for provincial purposes, a tax of two per centum upon the amount of all such “wages” earned by him as aforesaid, all of which “wages” were paid to the defendant without the said tax having been deducted therefrom, but that the defendant has neglected and refused to pay the said tax or any part thereof.

The Attorney General claimed \$44.58.

There is a long statement of defence which raises all important points.

Admissions of fact were made and a pro forma judgment in favor of plaintiff was taken in the County Court. The defendant appealed.

From the statement of facts it appears that defendant was a Captain ~~in Princess Patricia's~~ Canadian Light Infantry having been commissioned on January 1, 1920; he was stationed at Montreal till January, 1923. Defendant was General Staff Officer at Tuxedo, Manitoba, from January, 1923, till March, 1934, when he was transferred to Toronto. Defendant's  
10 residence at Tuxedo was, till and including, 1931, featured by certain absences in other provinces on military duty. Defendant's "pay and allowances" are set forth: pay \$6.00 per diem; ration allowance, 50c per diem; servant allowance, 40c per diem; staff pay at 30c per diem; married allowance 50c per diem. There are deductions from pay and certain items of 5% for Pension under the Militia Pension Act, also 10% under The Income War Tax Act. So that in 31-day months defendant received in cash \$205.84 and in 30-day months \$199.20.

In the argument much was said as to the voluntary nature of pay for army officers. Several cases so stating the law for a long time back are  
20 collected by Audette, J., in *Bacon v. The King*, 21 Exch. (Can.) 25. That circumstance does not, in my view, form the chief consideration in this case.

Blackstone, Vol. One, p. 417, says: "Although soldiers are placed under stricter discipline and severer restrictions than most other subjects of the realm yet they enjoy some peculiar advantages" and the text goes on to mention pensions and other relief.

Chapter 4 of 32 Victoria (1869) Imp., is intituled, "An Act for penalising Mutiny and Desertion and for the better payment of the Army and their quarters."

The association of topics is significant.

30 The preamble recites "whereas it is adjudged necessary by Her Majesty and this present parliament that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of Her Majesty's Crown."

The fact that military officers have a special status is in my view important here. In the case of *Grimley*, In Re., 187 U.S. 147, Mr. Justice Brewer, at 155, referred to the case of *Tyler v. Pomeroy*, 8 Allen 480, and said:

40 "In that case, Mr. Justice Gray, then a member of the Supreme Court of Massachusetts, in an opinion reviewing all the authorities in England and in this country, drew a distinction between an agreement to enlist, which, if broken, simply gives a right of action for damages, and an enlistment, which changes the status of the party, transfers him from civil to military life, and renders him amenable to military jurisdiction."



Mr. Justice Brewer elaborated on the subject himself in the following words:

“By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not  
10 have entered into the new relations with him, or permitted him to change his status.” . . . .

“While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence  
20 of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed.”

An infant who enlists “becomes subject to the paramount control of the state”; per Bayley, J.; *R. v. Lytchet Maltravers*, 7 B. & C. 226, at 232; and *R. v. Rotherfield Greys*, 1 B. & C. 345, at 347.

The pay of an officer may be subject to penal deductions. Army Act 137.

The being in pay as a soldier fixes the military character upon him and very wisely: per Lord Loughborough in *Grant v. Sir Chas. Gould*, 2 H. Bl. 69, at 103.

The upkeep of the personnel of the army required extraordinary provisions, some of which are found in Cap. 4 of 32 Vict., and in The Army Act (1881), whereby limit was placed upon the legal processes under which a soldier might be liable to be taken out of the Crown’s service. (Army Act, sec. 144.)

It appears to me that section 136 of The Army Act, which is in force here as applicable to Canada, reading as follows:

“136. The pay of an officer or soldier of His Majesty’s regular forces shall be paid without any deduction other than the deductions authorised by this or any other Act or by any Royal Warrant for the time being or by any law passed by the Governor-General of India in Council.”

40 is a declaration of state policy (of which section 141 mentioned later is an example) that the soldier shall get his pay for his own use.

In *Flarty v. Odlum*, 3 T.R. 681, Lord Kenyon said, (p. 682):

2. "Emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. Besides an officer has no certain interest in his half-pay; for the king may at any time strike him off the list."

and Ashhurst, J. (p. 683): "All voluntary donations of the Crown are for the honor and service of the State."

It seems to me that if half pay or pension should be so classified a fortiori full pay of an officer on duty should.

See also *Lidderdale v. Montrose (Duke)*, 4 T.R. 248, where the principle of public policy was again applied.

Reference may be made to the reporter's note to *Stuart v. Tucker*, 2 W. Bl. 1137, referring to *Arbuckle v. Cowtan*, 3 B. & P. 321, where, at 328, Lord Alvanley said: "It is now clearly established that the half pay of an officer is not assignable and unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it is intended."

This rule was, with respect to the army, put into statutory form at least as early as *The Army Act 1881*, 44 & 45 Vict. ch. 58, sec. 141. That Act, as already noted, is declared to apply to the Canadian militia. See *The Militia Act*, sec. 69.

Section 141 is as follows:

"141. Every assignment of, and every charge on, and every agreement to assign or charge, any deferred pay, or military reward payable to any officer or soldier of any of Her Majesty's forces, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child or other relative, or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a Royal Warrant for the benefit of the family of the person entitled thereto, or as may be authorized by any Act for the time being in force, be void."

Sec. 141 was applied in Ontario with respect to the assignment by an officer of a gratuity in *Union Bank v. Newcomen*, 55 O.L.R. 17.

I would take it to be clear that the application of section 141 to Canada amounted likewise to a declaration of parliamentary policy here as to the destination and purpose of Army pay.

I think it must be that the matter of pay is fixed by parliament with relation to the various considerations present as to upkeep of the forces and that no outside authority can by taking a percentage reduce the measure so made of what should be the soldier's or officer's pay.

I think it is too narrow a view to suggest that while the province cannot require the Dominion to make the deduction of the tax from a soldier's pay yet when the soldier once receives the pay he shall be liable to pay the tax himself.

I think that although the matter of payment for services is ordinarily a provincial subject, yet the pay of an army is a matter of importance vital to its upkeep and morale and that as the subject of Militia and Defence is especially and exclusively a federal one, the matter of pay is wholly within federal power as a matter pertaining to efficiency and that therefore the  
10 federal authority can prohibit assignments as it has done. In the New-comen case a Court that could not miss the point held that section 141 prevailed.

In view of the considerations I have mentioned, it seems to me that officers' "pay" is here one of the incidents of status and that taxing an officer because of pay is infringing upon status. It seems to me that the alleged right to tax in respect of value of quarters and allowances merely emphasizes the objections there are to the tax itself.

In The Special Income Tax Act, 2 (1) (b) "Employee" means any person who is in receipt of or entitled to any wages;

20 (d) "Wages" includes all wages, salaries, and emoluments from any source whatsoever, including

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

(ii) 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  
30 the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person;

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

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

(2) The value of that part of the wages of an employee which is within the scope of sub-paragraphs (iii) or (iv) of the definition of wages in subsection (1) shall be determined by the administrator at the actual amount thereof if payable in money, or otherwise in accordance with any  
40 prevailing rates."

I think there is no analogy in law between the relation of military officer or soldier to the Crown and that of a servant to his master. There is

only the appearance of one. I think employees in governmental business services are in entirely different position.

I would think that where there is already a wide field of clear application for the general meanings given by the statute to "Employee" and "Wages" those terms should not be strained to cover a doubtful category. In a taxing statute this cannot be done. See *The King v. Crabbs*, (1934) S.C.R. 523, and the authorities cited there by Mr. Justice Hughes.

I think that the legislature used clause (ii) of (d) above to specify the persons of special status who were intended to be taxed and that it exhausted its list with the enumeration it made. I do not think the words "military officers" can be read into clause (ii) so as to introduce another class merely on the strength of the words "and of all persons whatsoever."

In the result, I would hold that the province could not by any means take away from the pay or allowances of military officers and further that the Act should not be read as intending to do so.

I would allow the appeal.

## In the Court of Appeal

<p>The Honourable  The Chief Justice of Manitoba  The Honourable R. M. Dennistoun  The Honourable W. H. Trueman  The Honourable H. A. Robson  The Honourable S. E. Richards  Judges of Appeal</p>	<p style="font-size: 3em;">}</p>	<p>Monday the 12th day of  November, A.D. 1934</p>
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**BETWEEN :**

**10** 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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,  
(Defendant) Appellant.

UPON MOTION on behalf of the above named Appellant, in the  
presence of counsel as well for the Appellant as for the Respondent herein,  
**20** for special leave of this Honourable Court to appeal to the Supreme Court  
of Canada against the judgment, order and decision of this Honourable  
Court rendered and pronounced herein on Monday the 12th day of Novem-  
ber, A.D. 1934,

THIS COURT DOTH ORDER AND ADJUDGE that special leave  
to appeal to the Supreme Court of Canada by the above named Appellant  
against the judgment, order and decision of this Honourable Court ren-  
dered and pronounced herein on the 12th day of November, A.D. 1934, be  
and the same is hereby granted unto the said Appellant.

Certified,

**30**

[SEAL]

A. J. CHRISTIE,  
Deputy Registrar.

## In the Supreme Court of Canada

BETWEEN :

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,

—AND—

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,

10

(Defendant) Appellant.

KNOW ALL MEN BY THESE PRESENTS that I, JAMES LIND-  
SAY GORDON, of the Town of Tuxedo in the Province of Manitoba,  
Brigadier, AM HELD AND FIRMLY BOUND UNTO 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, in the penal sum of Five  
Hundred Dollars (\$500.00) of good and lawful money of Canada to be  
paid to the said 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, his attorneys, successors or assigns, for which payment well  
20 and truly to be made I bind myself, my, and each of my, heirs, executors and  
administrators, firmly by these presents sealed with my seal and dated this  
18th day of December, A.D. 1934.

J. L. GORDON. [Seal]

WHEREAS a certain action was brought in the County Court of  
Winnipeg in the Eastern Judicial District of the Province of Manitoba by  
the said The Attorney-General of the Province of Manitoba for and on be-  
half of His Majesty the King in the Right of the Province of Manitoba,  
as plaintiff, against the said Captain Frederick Franklin Worthington,  
Married Officers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba, as  
30 defendant;

AND WHEREAS judgment was given in the said Court against the  
said Captain Frederick Franklin Worthington, who appealed from the said  
judgment to the Court of Appeal of the Province of Manitoba;

AND WHEREAS judgment was given in the said action in the said  
last mentioned court on the 12th day of November, A.D. 1934;

AND WHEREAS the said Captain Frederick Franklin Worthington  
complains that in the giving of the last mentioned judgment in the said

action upon the said appeal manifest errors hath intervened, wherefore the said Captain Frederick Franklin Worthington desires to appeal from the said judgment of the Court of Appeal of the Province of Manitoba to the Supreme Court of Canada;

NOW THE CONDITION of this obligation is such that if the said Captain Frederick Franklin Worthington shall effectually prosecute his said appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada, then this obligation shall be void, otherwise to remain in full force and effect.

10 SIGNED, SEALED AND DELIVERED }  
in the presence of } J. L. GORDON. [Seal]  
R. O. ALEXANDER. }

PROVINCE OF MANITOBA }  
EASTERN JUDICIAL DISTRICT }  
TO WIT: }

I, Ronald O'Keden Alexander, of the City of Winnipeg in the Province of Manitoba, Lt.-Colonel, make oath and say:

- 1. That I was personally present and did see the within instrument duly signed, sealed and executed by James Lindsay Gordon, one of the parties  
20 thereto.
- 2. That the said instrument was executed at the said City of Winnipeg.
- 3. That I know the said James Lindsay Gordon.
- 4. That I am a subscribing witness to the said instrument.

SWORN before me at the City of }  
Winnipeg in the Province of Mani- }  
toba this 21st day of December, } R. O. ALEXANDER.  
A.D. 1934. }

T. HORNE

A Notary Public in and for the Province of Manitoba.

30 [Seal]

## In the Court of Appeal

THE HONOURABLE  
MR. JUSTICE RICHARDS  
IN CHAMBERS

} Wednesday, the 2nd day of January,  
A.D. 1935.

**BETWEEN :**

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,

—AND—

10 CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Offi-  
cers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,  
(Defendant) Appellant.

UPON the application of the above named Appellant for an order  
allowing the Bond hereinafter referred to as security that the said Appel-  
lant the said Captain Frederick Franklin Worthington shall effectually  
prosecute his appeal to the Supreme Court of Canada from the judgment  
of the Court of Appeal of the Province of Manitoba pronounced on Mon-  
day the 12th day of November, A.D. 1934, and will pay such costs and  
damages as may be awarded against him by the Supreme Court of Canada;  
20 upon hearing read the said Bond and upon hearing what was alleged by  
counsel as well for the said Appellant as for the Respondent herein, the  
said Attorney-General of the Province of Manitoba for and on behalf of  
His Majesty the King in the Right of the Province of Manitoba;

IT IS ORDERED that the Bond entered into on the 18th day of  
December, A.D. 1934, in which James Lindsay Gordon, of the Town of  
Tuxedo, in the Province of Manitoba, Brigadier, is the Obligor, and the said  
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 is the  
Obligee, duly filed in this Honourable Court as security that the said  
30 Appellant will effectually prosecute his appeal from the judgment of this  
Honourable Court dated the 12th day of November, A.D. 1934 and will pay  
such costs and damages as may be awarded against him by the Supreme  
Court of Canada, BE AND THE SAME IS HEREBY ALLOWED as  
good and sufficient security.

AND IT IS FURTHER ORDERED that the said appeal be and the  
same is hereby allowed.

S. E. RICHARDS  
J.A.

Approved  
Wilson E. McLean  
40 Counsel for the Attorney General.



## In the Supreme Court of Canada

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BETWEEN :

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Officers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,

(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,

10

(Plaintiff) Respondent.

I, THE UNDERSIGNED, Deputy Registrar of the Court of Appeal for Manitoba, DO HEREBY CERTIFY that the foregoing printed document from pages one (1) to forty-nine (49) both inclusive is the Case stated by the parties pursuant to Section 68 of "The Supreme Court Act," Cap. 35, Revised Statutes of Canada, 1927, and Amendments, and the Rules of the Supreme Court of Canada, in an appeal to the Supreme Court of Canada by said Appellant in a certain case pending in said Court of Appeal of Manitoba between the said Captain Frederick Franklin Worthington, Appellant, and the said The Attorney-General of the Province of Manitoba, for and on  
20 behalf of His Majesty the King in the Right of the Province of Manitoba,  
Respondent.

AND I DO FURTHER CERTIFY that the said Captain Frederick Franklin Worthington, Appellant, has given proper security to the satisfaction of the Honourable Mr. Justice Richards, a judge of the said Court of Appeal of Manitoba, as required by Section 70 of the said "The Supreme Court Act," being a Bond to the amount of Five Hundred Dollars (\$500.00), a copy of which security, and a copy of the Order of the Honourable Mr. Justice Richards allowing the same, may be found in pages 47, 48 and 49 of the annexed Case.

30 AND I DO FURTHER CERTIFY that I have applied to the judges of the Court of Appeal of the Province of Manitoba for their opinions or reasons for judgment in this case, and that the only reasons delivered to me by the said judges are those of the Honourable Mr. Justice Trueman, concurred in by the Honourable the Chief Justice of Manitoba and the Honourable Mr. Justice Richards, and the opinions and reasons of the Honourable Mr. Justice Dennistoun and the Honourable Mr. Justice Robson.

AND I DO FURTHER CERTIFY that I have received a certificate from the Clerk of the County Court of Winnipeg to the effect that he has applied to His Honour Judge Whitla, Senior Judge of said County Court, for his opinions or reasons for judgment and no reasons or opinions for the judgment of the said judge were delivered by the said judge.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Court of Appeal of the Province of Manitoba, this 31st day of January, A.D. 1935.

A. J. CHRISTIE

Deputy Registrar of the Court of Appeal  
for the Province of Manitoba.

10 [Seal]

## In the Supreme Court of Canada

BETWEEN :

CAPTAIN FREDERICK FRANKLIN WORTHINGTON, Married Officers' Quarters, Fort Osborne Barracks, Tuxedo, Manitoba,  
(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,

10

(Plaintiff) Respondent.

I, HENRY GORDON HARVEY SMITH, of the City of Winnipeg, in Manitoba, a Solicitor for the Appellant, hereby certify that I have personally compared the annexed print of the case in appeal to the Supreme Court with the originals, and that the same is a true and correct reproduction of such originals.



Solicitor for the Appellant.