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Apr. 8
May 19

BETWEEN:

HER MAJESTY THE QUEEN, PLAINTIFF;

AND

HILBOURNE LESLIE MURRAY and BURTON CONSTRUCTION COMPANY LIMITED ..... DEFENDANT.

Crown—Motor vehicle accident—Loss of services of serviceman—Gratuitous passenger in motor vehicle—Provincial statute barring recovery from owner and driver—Right of Crown to recover full loss—Common law of England—Legislative jurisdiction of provincial legislature—Prerogative of Crown.

One Briggs, a member of the Canadian Forces, was a gratuitous passenger in a motor vehicle which was involved in a collision in Manitoba with a vehicle owned by the defendant company and operated by the defendant Murray. Action was brought by Her Majesty in right of Canada to recover the damage, *viz.* $5,096, sustained by the Crown through the loss of Briggs' services as a result of injuries suffered by him in the accident. The parties agreed that the operator of the vehicle in which Briggs was a passenger was 75% at fault and that the defendant Murray was 25% at fault.

Section 99 of the Manitoba *Highway Traffic Act* deprives a gratuitous passenger in a motor vehicle of a cause of action against its owner or operator in case of accident unless the accident was caused by gross negligence or wilful and wanton misconduct of the owner or operator; and s. 5 of the Manitoba *Tortfeasors and Contributory Negligence Act* provides that where no cause of action exists against the owner or operator of a motor vehicle by reason of the above enactment no damages or contribution of indemnity shall be recoverable from any person for the portion of the loss or damage so caused by the negligence of said owner or operator.

Section 9(2) of the *Tortfeasors and Contributory Negligence Act* provides

(2) This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof.

It was contended on behalf of Her Majesty that the above enactments did not apply to prevent the Crown from recovering the full amount of the loss sustained by it in consequence of the negligence of the defendants, being the amount recoverable at common law notwithstanding the negligence of the driver of the car in which Briggs was a passenger.

Held: That Her Majesty was entitled to recover only 25% of the loss sustained, for the following reasons:

1. Under our constitution when the Sovereign in right of Canada relies upon a right in tort against a common person She must, in the absence of some prerogative or statutory rule to the contrary, base Herself upon the general law in the province where the claim arises governing similar rights between common persons. She must take the cause of action as She finds it where Her claim arises and, if the legislature of the province has changed the general rules applicable as

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between common persons, Her Majesty must accept the cause of action as so changed.

2. By the common law of England as of July 15, 1870, (being the law in force in Manitoba to the extent that it has not been amended by Parliament or the Legislature of Manitoba) the Sovereign, in the absence of some special law to the contrary, had the same right of action in tort as a common person, including a claim as master to recover the negligence of a third person.

3. While members of the armed forces were not at common law servants for the purposes of the action above-described Parliament, in the exercise of its legislative authority in relation to Defence, could, and did, make a special law changing the common law as applicable to Her Majesty's right to recover for loss of services of a member of the armed forces. (*Nykorak v. Attorney General of Canada* [1933] S.C.R. 331, followed.)

4. The Manitoba Legislature, in the exercise of its legislative authority in relation to property and civil rights, could change the law defining the cause of action for loss of services as it affects persons generally in the Province.

5. The prerogative rule that the Sovereign in right of Canada is not bound by a provincial statute unless it is made applicable to Her has no application to the provincial legislation of the nature involved here, which relates to the creation of rights in tort as between ordinary persons. The Sovereign can avail herself of that law but must take it as She finds it.

(*Toronto Transportation Commission v. The King* [1949] S.C.R. 510; *Schwella v. The Queen* [1957] Ex. C.R. 226; *Gartland Steamship Company v. The Queen* [1960] S.C.R. 315; *Gauthier v. The King* (1917) 56 S.C.R. 176; *Dominion Building Corporation v. The King* [1933] A.C. 533, discussed; *Attorney General of Canada v. Patterson and Content* (1958) 13 D.L.R. (2d) 90, disapproved.)

ACTION by Crown to recover damages sustained through the loss of services of a Crown servant injured in a collision.

The action was tried by the Honourable Mr. Justice Jackett, President of the Court, at Winnipeg.

C. R. O. Munro, Q.C. and *R. A. Wedge* for plaintiff.

Vern Simonsen for defendants.

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

JACKETT P. now (May 19, 1965) delivered the following judgment:

This is an action by Her Majesty in right of Canada for damages for loss of services of a member of Her Majesty's Canadian Forces.

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The case was tried upon an agreed Statement of Facts, by which the parties admitted, for the purpose of the action, certain facts which may be summarized briefly. One Briggs, a member of the Canadian Forces, was injured in Manitoba in a collision between two automobiles. Briggs was a gratuitous passenger in one of the vehicles and the other vehicle belonged to the corporate defendant and was operated by the individual defendant. Her Majesty sustained loss in the amount of $5,096.34 by being deprived of Briggs' services while he was incapacitated as a result of his injuries. That loss was caused by the operator of the vehicle in which Briggs was riding and by the individual defendant "in the respective degrees of 75% and 25%."

The sole question upon which the parties differed in this Court is whether or not certain provisions in the *Highway Traffic Act* of Manitoba, R.S.M. 1954, chapter 112, and the *Tortfeasors and Contributory Negligence Act of Manitoba*, R.S.M. 1954, chapter 266, are applicable to the determination of the amount of the judgment to which Her Majesty is entitled.

Those provisions are

(*a*) the *Highway Traffic Act:*

> 99. (1) No person transported by the owner or operator of a motor vehicle as his guest without payment for the transportation shall have a cause of action for damages against the owner or operator for injury, death, or loss, in case of accident, unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death, or loss for which the action is brought.[1]

(*b*) the *Tortfeasors and Contributory Negligence Act:*

> 5. Where no cause of action exists against the owner or operator of a motor vehicle by reason of section 99 of the Highway Traffic Act no damages or contribution or indemnity shall be recoverable from any person for the portion of the loss or damage caused by the negligence of such owner or operator and the portion of the loss or damage so caused by the negligence of such owner or operator shall be determined although such owner or operator is not a party to the action.[2]

It is also worthy of note that section 9(2) of the *Tortfeasors and Contributory Negligence Act* reads as follows:

> (2) This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof.

[1] First enacted by section 10 of chapter 20, Statutes of Manitoba of 1935.
[2] First enacted by chapter 75, Statutes of Manitoba of 1939.

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The final paragraph of the agreed Statement of Facts reads as follows:

> 9. The Defendants' position is that by virtue of section 99(1) of the *Highway Traffic Act* and section 5 of the *Tortfeasors and Contributory Negligence Act* the Defendants are liable for only 25% of the total loss sustained by Her Majesty. The position taken on behalf of Her Majesty is that the Defendants are liable for the total loss sustained by Her Majesty. This is the sole issue between the parties in this action.

Her Majesty's right to recover for loss of services of a member of Her Majesty's Canadian Forces, when the claim arises in one of the common law provinces, was established by the Supreme Court of Canada in *Attorney-General of Canada v. Jackson*[3] and *The King v. Richardson.*[4] The right to recover for such a loss is a right that accrues to Her Majesty as a "master" by virtue of the old common law cause of action of a master for loss of services of a servant. The relationship of master and servant between Her Majesty and a member of Her Canadian Forces, which is essential to Her Majesty being entitled to base a claim on that cause of action, is created by section 50 of the *Exchequer Court Act.*[5]

One of the essential elements of the cause of action of a master for loss of services of a servant is that the defendant has committed an actionable civil wrong or tort against the servant. Whether or not, in any particular case, the defendant has committed an actionable civil wrong or tort against the servant depends upon the law of the province where the claim arises. In a case where the Crown servant was a gratuitous passenger in the defendant's vehicle and the provincial legislature had taken away the right of a gratuitous passenger to recover against the owner or operator of the vehicle in which he was riding when he was injured, there was no actionable civil wrong or tort committed against the servant by such owner or operator and the Crown as master had therefore no right to recover against them for loss of services of the Crown servant. See *Attorney-General v. Jackson, supra.*

[3] [1946] S.C.R. 489.

[4] [1948] S.C.R. 57. There is no corresponding cause of action in the Province of Quebec. See *La Reine v. Dr. J. L. Sylvain*—an unreported judgment delivered by the Supreme Court of Canada on November 19, 1964.

[5] First enacted by the Parliament of Canada by chapter 25 of the Statutes of 1943-44 and repealed and re-enacted by section 7 of chapter 7 of the Statutes of 1951 (2nd Session).

In this case, a quite different problem arises. By virtue of the provincial legislation quoted above, if the master of the injured man were any person other than the Crown, the master would be able to recover against the defendants for loss of services because the defendants did commit an actionable civil wrong or tort against the servant; but, in such a case, the master would, by virtue of the provincial legislation quoted above, be able to recover only twenty-five per cent of the damages flowing from the loss of services. The contention on the part of Her Majesty is, however, that, while that is all that any other "master" could recover, Her Majesty in right of Canada can recover one hundred per cent of Her damages because the provincial legislation can have no application to take away or reduce any rights that Her Majesty in right of Canada would otherwise have.

The laws of England as they were at some date, which does not, for present purposes, have to be fixed with precision, were introduced into the territory that now constitutes the Province of Manitoba. Upon the creation of the Province of Manitoba, such laws as amended prior to that time continued in force "subject . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of that . . . Province, according to the authority of the Parliament or of the Legislature . . ." See section 129 of the *British North America Act*, 1967.[6] By virtue of appropriate legislation of Parliament and of the provincial legislature,[7] the law in Manitoba is now the law of England as it was on July 15, 1870, subject to any amendments that have been made to that law by Parliament and the Manitoba legislature in their respective spheres of legislative jurisdiction. See *Walker v. Walker*.[8]

The common law of England relating to the civil rights and obligations of the Sovereign may be summarized very

[6] Made applicable to Manitoba by section 2 of *The Manitoba Act*, 1870, chapter 3 of the Statutes of Canada of 1870, which was confirmed by chapter 28 of the Imperial Statutes of 1871. Presumably, it is by virtue of section 129 that the Crown in right of Canada is bound, in respect of matters arising in the Province of Quebec, by the two Codes of Lower Canada. Compare *The Exchange Bank of Canada v. The Queen* (1886) 11 A.C. 157.

[7] Section 1 of chapter 12 of the Statutes of Manitoba of 1874 and section 4 of chapter 124 of R.S.C. 1927. There is a question in my mind as to whether section 1 of chapter 12 of the Statutes of Manitoba of 1874, extends to all laws within the legislative jurisdiction of the provincial legislature or only to those "relative to property and civil rights". For purposes of the present judgment, this doubt is immaterial.

[8] [1918] 2 W.W.R. 1 (C.A.); [1919] A.C. 947 (P.C.).

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briefly for present purposes. (I refer only to the law governing the creation of substantive rights and obligations and I exclude such matters as property or rights *in esse*, the jurisdiction of the Courts and practice and procedure.) While not a common person, the Sovereign was—and is—a person[9] and, at common law, was just as subject to the general law of property and civil rights regulating the creation of rights and obligations of persons as any common person, subject to this that there were a number of special rules applicable only to the Sovereign, which rules were in part the Sovereign's common law prerogatives and in part special rules of law made by statute in relation to the Sovereign.[10] Speaking generally, there are four classes of cases in which the question of the law applicable to the creation of the Sovereign's civil rights and liabilities may arise, namely,

(*a*) claims in tort by an ordinary person against the Sovereign,

(*b*) claims in tort by the Sovereign against an ordinary person,

(*c*) claims in contract by an ordinary person against the Sovereign, and

(*d*) claims in contract by the Sovereign against an ordinary person.

The Sovereign had, at common law, a prerogative immunity from claims in tort other than claims for property of the subject in Her possession. See *Feather v. The Queen*.[11] There

[9] Compare *Magdalen College* case, (1615) 11 Co. Rep. 67a; 77 E.R. 1236 at page 1240; and *Boarland v. Madras Electric Corporation*, [1954] 1 All E.R. 52.

[10] See Chitty's *"Prerogatives of the Crown"*, (1820 page 4; *Attorney General v. Jane Black* (1828) Stuart's Reports 324; *Black v. The Queen* (1899) 29 S.C.R. 693.

[11] (1865) 6 B. & S. 257; 122 E.R. 1191 This prerogative is now replaced, as far as the Sovereign in right of Canada is concerned, by the *Crown Liability Act*, chapter 30 of the Statutes of 1952-53, which replaces the liability created by section 18(1)(c) of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, and the corresponding provision in earlier versions of the statute. See, for example, *The King v Armstrong*, 40 S.C.R. 229; *The King v. Desrosiers*, 41 S.C.R. 71; *The King v. Murphy* [1948] S.C.R. 357. The liability under the *Exchequer Court Act* provision was determined in accordance with the general law of the province where the claim arose as it prevailed when the particular *Exchequer Court Act* provision was enacted by Parliament. *Ryder v. The King*, 36 S.C.R. 462, and *Canadian National Railway Company v. Saint John Motor Line Limited*, [1930] S.C.R. 482. Liability of the Sovereign under the *Crown Liability Act* depends upon the law applicable to a private person. See *Lamoureux v. Procureur Général du Canada*, [1964] Ex. C.R. 641, where Noël J. has decided that the liability is to be determined by reference to the provincial law as it was when the liability was imposed. I should have thought that a higher court might conclude that Parliament intended the Crown's liability to be that which it would have been if a private person were in the position of the Crown at all relevant times.

were, however, generally speaking, no special rules governing the creation of rights of an ordinary person against the Sovereign in contract[12] or the creation of Her rights against a common person in contract or in tort. Her Majesty was therefore entitled to avail Herself of the general laws of the realm governing the obligations of one person to another in contract or tort because, I repeat, She was a person and entitled to every right to which any common person was entitled in the absence of some special rule of law to the contrary.

That brief summary of the law governing the legal rights and obligations of the Crown represents the position as I understand it as of July 15, 1870, the time as of which Parliament has adopted, for Manitoba, the laws of England "relating to matters within the jurisdiction of Parliament" (R.S.C. 1927, chapter 124, section 4) and as of which the Legislature of the province has adopted such laws "relative to property and civil rights" (Statutes of Manitoba 1874, chapter 12, section 1).

Three propositions are, I think, clear: First, under the common law of England as of July 15, 1870, if any person, including Her Majesty, sued one of two joint tort feasors for loss of services of a servant in circumstances such as those agreed upon in this case, the plaintiff would be entitled to recover the full amount of the damages flowing from the loss of services. Second, if any common person brought such an action at the present time, he would be entitled to recover only twenty-five per cent of his damages having regard to section 5 of the *Tortfeasors and Contributory Negligence Act*. Third, Parliament has the exclusive legislative authority to make laws in relation to claims in tort by Her Majesty in right of Canada against a common person (in any event, in respect of claims such as the one in issue in this case). See *Nykorak v. Attorney General of Canada*.[13] The submission of the Attorney General in this case is, in effect, that the common law under which a master could recover damages for loss of services of a servant is unaffected by provincial legislation in so far as Her Majesty in right of Canada is concerned.

[12] See *Thomas v. The Queen* [1874] L.R. 10 Q.B. 31, *Isbestor v. The Queen* [1878] 7 S.C.R. 696, *R. v. Doutré* [1874] 9 A.C. 745, and *Windsor and Annapolis Railway Co. v. The Queen and Western Counties Railway Co.* [1886] 11 A.C. 607 at p. 615.

[13] [1962] S.C.R. 331.

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If the common law of England in force in Manitoba, in effect, confers on Her Majesty a right to recover damages for loss of services from any common person by whose negligence a Crown servant was injured, I can appreciate the force of the Attorney General's argument.[14] If, on the other hand, the principle on which the Sovereign must depend at common law is that She is a person and entitled, in the absence of some special common law or statutory rule to the contrary, to avail Herself of the general law regulating the creation of rights and obligations of persons *inter se*, the situation, in my view, is quite different. As indicated earlier in this judgment, the latter alternative represents my understanding of of the Crown's position when proceeding against a common person at common law.

As far as the particular claim that is the subject matter of this action is concerned, the position, as I see it, is therefore that

(*a*) as long as the common law of England remained unchanged, the Sovereign was, like any common person, entitled to avail Herself of the action for loss of services of a servant, but

(i) she had to accept that cause of action as defined by the rules applicable between common persons, and

(ii) members of the armed forces were not servants for the purpose of the cause of action;[15]

(*b*) Parliament, in the exercise of its exclusive legislative authority to make laws in relation to "Defence" could make a special law changing the common law as applicable to Her Majesty's right

[14] Compare *Gauthier v. The King* (1917) 56 S.C.R. 176, per Anglin J., at pages 191-2, where, dealing with the liability of the Sovereign in right of Canada in contract, he said:

> But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action arises, it is not that law as applicable between subject and subject, but the general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

This dictum must be read with *Dominion Building Corporation v. The King* [1933] A.C. 533.

[15] See *McArthur v. The King* [1943] Ex. C.R. 77, and *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ld)* [1955] A.C. 457.

to recover for loss of services of a member of the armed forces (see *Nykorak v. Attorney General of Canada, supra*); and

(c) the legislature of Manitoba, in the exercise of its exclusive legislative authority to make laws in relation to "property and civil rights" in Manitoba could make a law changing the law defining the cause of action for loss of services as it affects persons generally in the province.

It follows that, as long as the Sovereign relies upon Her common law status as a person to take advantage of a cause of action available to persons generally in the province, and not upon some special right conferred on Her by Parliament, She must take the cause of action as She finds it when Her claim arises and, if the legislature of the province has changed the general rules applicable as between common subjects, the Sovereign must accept the cause of action as so changed whether the change favours Her claim or is adverse to it.

To put the matter in other terms, I have reached the conclusion that this case should be decided against the view put forward by the Attorney General, and in favour of that put forward by the defendant, because I am of opinion that, under our constitution, when the Sovereign in right of Canada relies upon a right in tort against a common person, She must, in the absence of some special prerogative or statutory right to the contrary, base Herself upon the general law in the province where the claim arises governing similar rights between common persons.[16]

In reaching that conclusion, I have endeavoured to apply the relevant principles as I understand them without reference to decisions in other cases because, as far as I have been able to ascertain, there are no decisions on the question that I have to decide that, in accordance with the principles of *stare decisis,* would be binding upon this Court. I shall now refer, as briefly as possible, to the various decisions that might be regarded as having some bearing on the matter for the purpose of showing why I have concluded

[16] Compare *Black v. The Queen* (1899) 29 S.C.R. 693, *Zakrzewski v. The King* [1944] Ex. C.R. 163, per Thorson P. at pages 169-70, *The King v. Richardson* [1948] S C.R. 57 per Kerwin J. (as he then was) at page 59, and *Gartland Steamship Company v. The Queen* [1960] S.C.R. 315, per Locke J., at pages 344-5.

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that either they do not bear on the particular question that I have to decide or they support the conclusion that I have reached. (I shall also refer to a decision of a court of concurrent jurisdiction, the correctness of which I have not been able to accept.)

The cases that bear most closely on the problem that has to be decided in this case are

Toronto Transportation Commission v. The King[17]

Schwella v. The Queen[18]

Gartland Steamship Company v. The Queen[19]

In *Toronto Transportation Commission v. The King*, as in the present case, there was a claim in tort by the Sovereign in right of Canada against an ordinary person. The Sovereign had sued the appellant for damages to personal property arising out of a collision between a vehicle operated by a servant of the appellant and a vehicle operated by servants of the Crown. The trial Judge found the operators of the respective vehicles to be equally at fault. The Attorney General of Canada took the position that the Sovereign was entitled to recover one hundred per cent. of His damages on the view of the law that the Sovereign was not responsible for the negligence of His employees and the defence of contributory negligence was therefore not available against Him. This contention was upheld by the trial Judge. In the Supreme Court of Canada, that view of the law was rejected but it was held that, whereas at common law a plaintiff found guilty of contributory negligence could recover nothing, the Sovereign in this case was entitled, by virtue of provincial legislation enacted after 1867, to recover one-half of His damages. Kerwin J. (as he then was), delivering the judgment of the majority of the Supreme Court of Canada, said at page 515:

> . . . The Crown coming into Court could claim only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown. . . . Here, if the common law alone were applicable, the Crown would have no claim by reason of the fact that it failed to prove that the negligence of the Commission's servants caused the damage. . . .
>
> The Crown is able to take advantage of the Ontario *Negligence Act* and is therefore entitled to one-half of the damages.

[17] [1949] S.C.R. 510. [18] [1957] Ex. C.R. 226. [19] [1960] S.C.R. 315.

In the *Toronto Transportation Commission* case, the Supreme Court of Canada held that provincial legislation changing the general law governing the creation of rights in tort operated to enable the Sovereign in right of Canada to recover where at common law He would have had no right. The only difference between that case and the case that I now have to decide is that the provincial legislation here in question cuts down the rights that a person would otherwise acquire under the general law of the province.

Schwella v. The Queen also involved a proceeding by the Sovereign in right of Canada against an ordinary person in tort. There was a motion to strike out third party proceedings by which the Sovereign, as respondent in petition of right proceedings, sought to recover over against two ordinary persons as third parties. There being no common law right to claim contribution or indemnity against a third party in respect of a tortious liability, the Sovereign based Her third party proceedings upon the Ontario *Negligence Act,* which was enacted by the Ontario legislature subsequent to 1867. One of the grounds upon which the application was made to strike out the third party proceedings was that the Ontario *Negligence Act* did not confer upon the Sovereign the right to contribution or indemnity which it conferred upon ordinary persons in the province. Mr. Justice Thurlow pointed out, at page 230 of the report, that the applicant's contention that no right of contribution or indemnity is conferred on the Crown by the *Negligence Act* is "that the legislature of a province cannot confer rights or impose obligations on the Crown . . . and that, as the Crown is not bound by the obligation, it is not entitled to take the benefit of the right." Thurlow J. held that when the Crown

> . . . in exercise of the same rights possessed by any individual sues to recover damages caused by negligence, the *Negligence Act* may apply to afford to the Crown a claim where, but for the provisions of the *Negligence Act,* the Crown would have no claim at all.

He emphasized that

> . . . in such a case the Crown can claim "only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown."

He relied upon *Toronto Transportation Commission v. The King, supra.* Thurlow J. further stated that

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. . . the right of the Crown to take advantage of the provisions of the *Negligence Act* does not depend on a statute of the Parliament of Canada but on a recognized right of the Crown to take advantage of a provincial enactment. . . .

The *Gartland Steamship Company* case is one in which the Sovereign in right of Canada proceeded against a common person in tort for damages caused by the defendant's ship to property belonging to the Government of Canada. In addition to applying the decision in the *Toronto Transportation* case, *supra,* to enable the Sovereign to recover a portion of Her loss notwithstanding that the defence of contributory negligence had been established, the Supreme Court of Canada held that the defendant was entitled to limit its liability to the Crown, by virtue of section 712 of the *Canada Shipping Act,* notwithstanding that there was nothing in the Act making that provision binding upon the Sovereign in favour of the defendant. In holding that the defendant was entitled to limit its liability by virtue of section 712, Locke J., whose judgment, while otherwise dissenting, was adopted by all the other judges on this point, said at page 345:

> It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed by the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law.

In none of these cases was provincial legislation having the effect of changing the general law so as to restrict the creation of rights in tort held applicable to the Sovereign in right of Canada. For that reason none of them decides the precise question that I have to decide. On the other hand, in each of these cases, the Sovereign in right of Canada sued a common person in tort, and, in each of them, statutes regulating the creation of rights as between ordinary persons were held to be applicable to the creation of the rights of the Sovereign notwithstanding that such statutes were not expressed to be applicable to the Sovereign. Moreover, in two of these cases, that is, all except the *Gartland Steamship* case, provincial legislation was held to be applicable to the creation of rights of the Sovereign in right of

Canada in tort, without having been adopted, by some reference express or implied, as part of a federal legislative scheme. It is true that, in none of these cases, did the Court find it necessary to express, in the terms that I have adopted, the principle which, as I have concluded, is applicable to the determination of the case before me. That principle does, however, as it seems to me, constitute the basic premise or assumption upon which each of them was decided.

The next authority to which I must refer is the decision of the Supreme Court of Canada in *Gauthier v. The King*[20] which, according to the submission of counsel for the Attorney General, is authority for the contention that section 5 of the Manitoba *Tortfeasors and Contributory Negligence Act* is not applicable to this claim by the Sovereign in right of Canada. In the *Gauthier* case, there was a claim in contract by an ordinary person against the Sovereign in right of Canada and the Attorney General did not deny, when the case was before the Supreme Court of Canada, that the Sovereign was answerable for breach of the contract. The sole question in issue was whether there was an arbitration award which, in accordance with the terms of the contract, was binding on the Sovereign. The contract did provide for an amount payable by the Sovereign to be determined by arbitration. That amount was determined in the manner contemplated by the contract. However, before the Arbitration Board made its award, the Sovereign revoked the authority that it had conferred on the Board by the contract. At common law, such a revocation would have put an end to the Board's power to function and would have made the award a nullity but the revocation would have been a breach of the contract for which the Sovereign would be liable in damages. This was the position adopted by the Attorney General in the Supreme Court of Canada. Gauthier, however, relied upon the Ontario *Arbitration Act*, under which a party to a contract was deprived of his common law capacity to revoke the appointment of arbitrators unless he obtained the consent of the Supreme Court of Ontario, and under which a contractual arbitration award, when made, acquired the status of an order of that Court. If this statute applied, it followed that, in the *Gauthier* case, there was a

[20] (1917) 56 S.C.R. 176.

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valid arbitration award and Gauthier was entitled to judgment for payment of the amount thereof. The Supreme Court of Canada held that this provincial legislation did not apply to the Sovereign in right of Canada and that Gauthier was entitled only to such damages as he sustained by the Sovereign's having revoked the arbitrators' authority in breach of the contract.

In considering the decision of the Supreme Court of Canada in the *Gauthier* case, it is important to have in mind that the provincial legislation did not change the common law concerning the creation of claims by one person against another in contract. What it did was limit the capacity of a party to a contract to do something that would be a breach of the contract. Having this in mind, if we turn to the judgment of Anglin J., whose reasons would appear to have been adopted by the Chief Justice as well as by Davies J., we find that he says, at page 190:

> . . . no doubt the construction and legal effect of a contract made and to be performed in any province of Canada must ordinarily be determined in the Exchequer Court according to the general law of that province.

After making that general statement of principle, Anglin J. discussed, and rejected, a contention on behalf of Gauthier that the then section 19 of the *Exchequer Court Act*, whereby this Court was given jurisdiction in claims in contract against the Sovereign, imposed a liability in contract to "be determined according to the law of the province in which the cause of action arises". This contention had apparently been based upon an analogy with the then section 20(*c*) of the *Exchequer Court Act*, which, it had been held, not only gave the Court jurisdiction in negligence claims against the Sovereign but created a legal liability in negligence, which did not previously exist.[21] Anglin J. held that section 19, unlike section 20, did not "create or impose new liabilities" but, "Recognizing liabilities (*in posse*) of the Crown already existing, it confers exclusive jurisdiction in respect of them upon the Exchequer Court and regulates the remedy and relief to be administered". Having reached that conclusion, Anglin J. said, at pages 191-2:

> But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action

[21] See footnote 11, *supra*.

arises, it is not that law as applicable between subject and subject, but the general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

After thus stating his view of the general principle, Anglin J. proceeded to show that English statutes taking away the Crown's right to revoke a submission to arbitration were not part of the English law introduced into Upper Canada, and then held that the Ontario legislation to the same effect did not apply to the Sovereign in right of Canada both because Ontario legislation could not, in his view, of its own force take away "any privilege of the Crown in right of the Dominion" and because the provincial legislature never intended "to subject the Crown in right of the Dominion to the jurisdiction" of the provincial court in a matter in respect of which Parliament had given the Exchequer Court exclusive jurisdiction.

As already indicated, in considering the effect of the *Gauthier* decision, it must be borne in mind that the statute under consideration was not one that changed the common law in respect of the "construction and legal effect of a contract" but was one that superimposed a particular legal regime upon parties that had entered into arbitration agreements. Furthermore, it was a legal regime which was incompatible with the laws made by Parliament with reference to the adjudication of claims against the Sovereign in right of Canada. Finally, some weight must be given to the later decision of the Privy Council in *Dominion Building Corporation v. The King.*[22]

In *Dominion Building Corporation v. The King,* it appears that the Attorney General of Canada took the position that Ontario law was applicable to determine the rights of the parties under a contract between the Sovereign in right of Canada and a common person for Lord Tomlin (delivering the judgment of the Judicial Committee of the Privy Council), in summarizing an argument made on behalf of the Crown with reference to the effect of an Ontario statute said, at page 547, parenthetically, "it being Ontario law which governs the present case". The argument on behalf of the Crown was that the Sovereign was not bound by section 14 of the Ontario *Mercantile Law Amendment Act,* which, if

[22] [1933] A.C. 533.

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the matter had been between subject and subject, would have entitled Dominion Building Corporation to succeed in its claim for breach of contract notwithstanding its failure to fulfil its obligations under the contract within the stipulated times. Obviously, if the Attorney General had been of the view that laws made by the Ontario legislature had no application to cut down the rights that the Crown would otherwise have under contracts between the Sovereign in right of Canada and a common person, he would have so contended. That point was not, however, taken, and for that reason the judgment of the Judicial Committee cannot be said to be a decision on it. It was, however, argued that the provincial statute was not binding upon the Sovereign by reason of the provision in the Ontario *Evidence Act* that no act "affects the rights of His Majesty" unless it is expressly stated that His Majesty is bound and it was held, in rejecting this argument, that His Majesty was bound thereby.

The decision in *Gauthier v. The King,* taken by itself, does seem to constrain one to the conclusion that the law applicable to determining claims in contract against the Sovereign in right of Canada being, "the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion" is unaffected by legislation of a provincial legislature. Having regard, however, to the character of the provincial statute under consideration in the *Gauthier* case and to the fact that no question arose in that case as to the applicability of a provincial statute dealing with the construction or legal effect of contracts between ordinary persons, I cannot reach the conclusion that that decision is inconsistent with the view of the law concerning the rights of the Sovereign in contract and tort, upon which, as I have already indicated, I propose to decide this case. I am strengthened in this view by the course of events in the *Dominion Building Corporation* case.

Counsel for the Attorney General, when confronted with the apparent anomaly, from the point of view of our constitutional law, between his submission in this case that the Sovereign in right of Canada is not subject to the rule in section 5 of the Manitoba *Tortfeasors and Contributory Negligence Act* and the decision of the Supreme Court of

Canada in the *Toronto Transportation Commission* case that the Ontario *Negligence Act* is applicable to confer on the Sovereign in right of Canada a valid claim in negligence notwithstanding contributory negligence, fell back on the prerogative rule that the Sovereign is not bound by a statute unless named expressly or by necessary implication but may nevertheless take advantage of a statute in which She is not so named. I am quite clear in my mind that this is not a satisfactory explanation of the matter. It is, however, not so easy to formulate a view that expresses the fallacy involved in his explanation and is, at the same time, consistent with the long, and seemingly inconsistent, line of authorities involved.[23]

In *Gauthier v. The King, supra,* Anglin J. said at page 194 that he thought "it may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense". He said that "This would seem to be a corrollary of the rule that the Crown is not bound by a statute unless named in it." This corollary is, with respect, clearly sound if the provincial legislature is legislating in a field where it can make laws in relation to the rights, property or prerogatives of the Sovereign in right of Canada as well as those of the Sovereign in right of the province. The more usual thing, I should have thought, would be that, while the legislature may extend a rule made for the public generally so as to restrict the prerogatives or affect the rights or property of Her Majesty in right of the province, the exclusive legislative authority to extend such a rule so as to restrict the prerogatives or affect the rights or property of Her Majesty in right of Canada is vested in Parliament,[24] so that, no matter what reference is made in such a provincial statute to the Crown, it could have no application to Her Majesty in right of Canada. As I understand Anglin J.'s judgment in the *Gauthier* case, he holds that the provincial legislature did not intend to apply the legislation there in question to the Crown in right of Canada

[23] See Appendix "A".
[24] *Nykorak v. Attorney General of Canada* [1962] S.C.R. 331; *Burrard Power Co. v. The King* [1911] A.C. 87.

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and that, if it had intended to do so, the legislation "would ...be *pro tanto ultra vires*".

It is important to bear in mind in considering the *Gauthier* case that Anglin J. did not say that a change in the general law of contract could not affect the rights *in posse* of the Sovereign in right of Canada. He said that "Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion". In other words, the legislature cannot make laws "in relation to" the "privileges" of the Sovereign in right of Canada. Where, however, the "privilege" of the Sovereign is, as appears from the decision of the Supreme Court of Canada in the *Gartland Steamship Company* case, *supra*, a "privilege" to claim against the subject in accordance with "law by legislation lawfully enacted" for ordinary persons, and the particular field of law is a field within provincial competence, a general law made by the legislature will "affect" the rights *in posse* of the Sovereign in right of Canada.

As I see it, therefore, the provincial statute in this case is *not* one that is *not* binding upon the Sovereign in right of Canada by reason of the prerogative rule that She is not bound unless the statute is made applicable to Her, in which event She could nevertheless take advantage of it. This provincial legislation could not be made expressly applicable to Her Majesty in right of Canada because the legislature has not the legislative jurisdiction to do so. However, this provincial legislation does change the general law relating to the creation of rights in torts as between ordinary persons; Her Majesty has the privilege of availing Herself of that law but, if She does, She must accept that law as it is at the time Her claim arises; and, if it has been amended by the appropriate legislative authority, She must accept the law as so amended.[25]

As indicated earlier, there is a decision on the very point that I have to decide in this case. I refer to *Attorney-General of Canada v. Patterson and Content*[26] where, dealing with provincial legislation to the same effect as the Manitoba legislation under consideration in this case, Currie J. said, at page 94: "Under the circumstances and the nature and form of the action it is my opinion that the Attorney-General of

[25] See Appendix "B". [26] (1958) 13 D.L.R. (2d) 90.

Canada is not bound by the provisions of s. 3 of the *Contributory Negligence Act*, R.S.N.S. 1954, c. 51." Currie J. cited, in support of his opinion:

> *The King v. Lithwick & Cole* (1921), 57 D.L.R. 1, 20 Ex. C.R. 293; *Halifax v. Halifax Harbour Com'rs*, [1935] 1 D.L.R. 657, S.C.R. 215; *C.N.R. v. St. John Motor Line, Ltd.*, [1930], 3 D.L.R. 732, S.C.R. 482, 37 C.R.C. 29; *T.T.C. v. The King*, [1949] 3 D.L.R. 161, S.C.R. 510, 63 C.R.T.C. 289; *A.-G. Can. v. Jackson*, [1946], 2 D.L.R. 481, S.C.R. 489, 59 C.R.T.C. 273.

I have already discussed what was decided in the *Toronto Transportation Commission* case and in the *Jackson* case. The *Saint John Motor Line* case is an application of the line of jurisprudence that held that section 19 (*c*) of the *Exchequer Court Act* made the Sovereign liable for the negligence of His servants in accordance with the law applicable between subject and subject at the time that the liability was created. In the *Halifax* case and in the *Lithwick* case, there were applications of the rule that laws made for ordinary persons do not apply to deprive His Majesty of prerogative rights or to impose taxes on His Majesty's property. With great respect, I have been unable to accept the rule applied in the *Patterson* case for the determination of the case before me.

Having regard to the conclusion that I have reached for the reasons already stated, I need come to no conclusion with regard to a submission made on behalf of the defendants that the decision in the *Jackson* case is directly applicable in this case because, according to the submission, having regard to section 5 of the Manitoba *Tortfeasors and Contributory Negligence Act*, no tort was committed by the defendants against Briggs in respect of seventy-five per cent of Her Majesty's damages. In that connection, I need only say that I have not been able to satisfy myself that section 5 can be read in that way.

There will be judgment in favour of the plaintiff in the sum of $1,274.09 with costs of the action incurred on or before March 12, 1965, the date upon which a confession of judgment in that amount was served on the Attorney General. The defendant will have judgement against the plaintiff for its costs incurred after March 12, 1965.

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APPENDIX "A"

The following is a list of representative authorities concerning the prerogative and statutory rules that the Crown is not bound by legislation unless the legislation is made applicable to the Crown either expressly or by necessary implication, and that the Crown may, nevertheless, take advantage of such legislation.

Case of Non Abstante, (1582) 12 Co. Rep. 18; 77 E.R. 1300.

The Case of the Master and Fellows of Magdalen College in Cambridge, 11 Co. Rep. 67a at 77—E.R. 1236 (1615).

Chitty's "Prerogatives of the Crown", (1820) 382.

Lambert v. Taylor, (1825) 4 B. & C. 138: 107 E.R. 1010.

Attorney-General v. Donaldson, (1842) 10 M. & W 117; 152 E.R. 406.

Baron de Bode v. The Queen, (1848) 13 Q.B. 364; 116 E.R. 1302.

Moore v. Smith, (1859) L.J. 28, Mag. Cas. 126.

The Mersey Docks and Harbour Board Trustees v. Cameron, (1865) 11 H.L.C. 443; 11 E.R. 1405.

Weymouth v. Nugent, (1865) 6 B. & S. 22; 122 E.R. 1106.

In re Henley & Co., (1878) 9 Ch. Div. 469.

Ex parte Postmaster-General. In re Bonham, (1879) 10 Ch. D. 595.

The Attorney General and the Humber Conservancy Commissioners v. Constable, (1879) 4 Ex. D. 172.

The Queen v. Justices of Kent, (1889) 24 Q.B.D. 181.

Perry v. Eames, [1891] 1 Ch. 658.

Wheaton v. Maple & Co., [1893] 3 Ch. 48 (C.A.).

The Hornsey Urban District Council v. Hennell, [1902] 2 K.B. 73.

Cooper v. Hawkins, [1904] 2 K.B. 164.

Attorney-General for New South Wales v. Curator of Intestate Estates, [1907] A.C. 519.

Commissioners of Taxation for the State of New South Wales v. Palmer, [1907] A.C. 179.

Gauthier v. The King, [1915] Ex. C.R. 444: (1917) 56 S.C.R. 176.

Hamilton v. The King, (1916) 54 S.C.R. 331.

In re Buckingham, [1922] N.Z.L.R. 771.

The Loredano, [1922] P. 209.

Cayzer, Irvine & Co. v. Board of Trade, [1927] 1 K.B. 269.

In re Silver Brothers Ltd., [1932] A.C. 514.

Dominion Building Corporation v. The King, [1933] A.C. 533.

City of Halifax v. Halifax Harbour Commissioners, [1935] S.C.R. 215.

Attorney-General v. Hancock, [1940] 1 K.B. 427.

Attorney-General v. Randall, [1944] All E.R. 179.

The King v. City of Verdun, [1945] Ex.C.R. 1.

Province of Bombay v. Municipal Corporation of Bombay, [1947] A.C. 58.

Attorney-General for Ceylon v. Silva, [1953] A.C. 461.

APPENDIX "B"

The principle that I have adopted for the decision of this case would achieve the result reached (although not by the same reasoning) by the Privy Council in the *Dominion Building Corporation* case, *supra*, where Lord Tomlin said at page 549:

> Is the Crown bound by the enactment? Their Lordships are of opinion that it is. Under the provisions of the *Interpretation Act* (R. S. Ont., 1927, c. 1), s. 10, no Act shall affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby. The expression "the rights of His Majesty", in this context means, in their Lordships' view, the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract. Upon this view of the matter the statutory provision operates in the present case.

As previously indicated, however, no question was raised in that case as to the authority of the provincial legislature to enact the particular law in relation to the contracts of the Sovereign in right of Canada and there is no indication, in the judgment, of the constitutional basis upon which the provincial law in question became applicable to such contracts. It must have been either

(*a*) because the provincial legislature had authority to make laws in relation to contracts of the Sovereign in right of Canada, in which event there must be, from this point of view, a difference between the legislature's authority in relation to such contracts and its

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authority in relation to claims in tort by the Sovereign in right of Canada for injuries to members of the armed forces (*Nykorak v. Attorney General of Canada, supra*), or

(*b*) because the Sovereign has the same privilege as any other person to make claims in tort under the general laws applicable where the claim arises, in which event, it is difficult to understand why it was relevant to consider the rule that the Crown is not bound by a statute unless mentioned.

My view is that, no consideration was given to the constitutional question because it was not raised and, for that reason, the *Dominion Building* case cannot be regarded as a binding authority except for the result, which is that provincial legislation changing the law relating to the construction or legal effect of contracts will apply to contracts of Her Majesty in right of Canada.