IN THE MATTER OF A REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

1943

*June 14, 15, 16, 17, 18.
*Aug. 3.

International law—Constitutional law—Military and naval forces of United States of America—Present in Canada with consent of Dominion Parliament for military operations in connection with present war—Whether exempt from criminal jurisdiction of Canadian courts—If not exempt, whether Dominion Government, or Governor General in Council under War Measures Act, have jurisdiction to enact legislation to grant such exemption.

The following questions were referred to this Court:

1. Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Govern-

*PRESENT:—Duff C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

ment of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

2. If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the *War Measures Act,* jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942?*

On these questions, opinions were given as follows:

Per curiam: Question 2 should be answered in the affirmative. The Dominion Parliament, more especially under head 7 of section 91 of the B.N.A. Act, has jurisdiction to enact legislation similar to the statute of the United Kingdom entitled *The United States of America (Visiting Forces) Act, 1912,* i.e. to exempt visiting American troops during the present war from the criminal jurisdiction of the Canadian courts. The Governor General in Council, acting under the *War Measures Act,* has also jurisdiction to enact similar legislation.

As to question 1:

Per the Chief Justice and Hudson J.:—

As a preliminary observation:

In virtue of the Order in Council of the 15th of April, 1941 (set out in the reasons *infra*), as amended by the Order in Council of the 6th of April, 1943, the service courts and service authorities of the United States of America may, subject to the provisions of the first-mentioned Order in Council, in relation to members of its forces (military, naval and air) present in Canada, or on board a Canadian ship or aircraft, exercise within Canada all such powers as are conferred upon them by the law of the United States in matters concerning discipline and internal administration. The code of discipline in force in the United States army is very sweeping in its provisions and seems to be broad enough to embrace almost any offence against the criminal law of this country.

As to the jurisdiction of Canadian courts:—

First, as to land forces. There is no rule of law in force in Canada which deprives the Canadian civil courts (that is to say, non-military courts) of jurisdiction in respect of offences against the laws of Canada committed by the members of such forces on Canadian soil. The Canadian criminal courts do not in fact exercise jurisdiction in respect of acts committed within the lines of such forces, or of offences against discipline generally committed by one member of such forces against another member in cases in which the act or offence does not affect the person or property of a Canadian subject.

Secondly, as to naval forces. The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by

members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship.

Per Kerwin and Taschereau JJ.: The members of the military and naval forces of the United States of America present in Canada with the consent of the Canadian Government for purposes of military operations in connection with or related to the state of war now existing, whether such members are attached to a unit or ship stationed in Canada or elsewhere or are absent on duty or on leave from their unit or ship stationed here, are exempt from criminal proceedings prosecuted in Canadian criminal courts. This immunity may be waived by the United States and in any event does not apply to members of the forces who may enter Canada as tourists or casual visitors. The powers of arrest, search, entry or custody by Canadian authorities are not interfered with.

Per Rand J.: The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their government; but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.

Per The Chief Justice and Hudson J.: The United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them; in other words, no rule of international law, by which the visiting forces of an Ally in the United Kingdom would be exempt as of legal right from the jurisdiction of the British civil courts, has ever been a part of the law of England. This applies equally to Canada: the fundamental constitutional principle with which it is inconsistent is a part of the law of every province of Canada, the constitutional principle by which a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country. Nothing short of legislative enactment, or its equivalent, can change this principle.

Per Kerwin J.: The general rule is that every one in Canada is subject to the laws of the country and to the jurisdiction of its courts. But there are exemptions grounded on reason and recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary. By international law, there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the visiting members of the United States forces; and, as a result of the order in council of April 6th, 1943 (set out in the reasons), nothing that had been done by Canada should be taken as prejudicing or curtailing such exemption. The Government of Canada having invited into the Dominion the military and naval troops of the United States of America as a part of the scheme of defence of the north half of the Western Hemisphere and, therefore, not merely for the benefit of the United States but for that of both parties and, in fact, for the benefit of all allied

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

nations in the present conflict, the invitation must be taken to have been extended and accepted on the basis that complete immunity of prosecution in Canadian criminal courts would be extended to members of the United States forces.

Per Taschereau J.: There exist rules of international law adopted by the civilized nations of the world granting immunity to organized forces visiting a country with the consent of the receiving Government. These immunities are not based on the theory of exterritoriality, but they rest on the ground that "a sovereign" extending the invitation "is understood to cede a portion of his territorial jurisdiction, when he allows the troops of a foreign prince to pass through his dominions". *Schooner Exchange* case (7 Cranch 116) These rules of international law have been accepted by the highest courts of the United States and some of them, applicable to the present case, have also been accepted by the Judicial Committee; their existence must be ackowledged and they must be treated as incorporated in our domestic law. There is nothing in the laws of the land inconsistent with their application within our territory.

Per Rand J.: Constitutional principle in England has for several centuries maintained the supremacy of the civil law over the military arm. That principle, however, cannot be said to be infringed by jurisdiction in a military court of the United States over its own forces which for the purposes of both countries are temporarily on Canadian soil. But that principle stands in the way of implied exemption under international rules, when the act complained of clashes with civilian life. The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system to which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted. It cannot be said to be clear that there has been a recognition of either a usage or principle, emanting from rules of international law, by the parliament or the courts of this country or of Great Britain that would raise the immunity against the constitutional safeguard of accountability before a common tribunal. That safeguard, however, is concerned primarily to vindicate, not Canadian courts, but Canadian civil liberty. It does not, therefore, stand in the way of a rule limited to the relations of members of a foreign group admitted into Canada for temporary national purposes with persons other than members of the Canadian public.

REFERENCE by His Excellency the Governor General in Council, under the authority of section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of certain questions which are cited in full in the head-note and in the Order in Council below, to the Supreme Court of Canada for hearing and consideration.

The Order in Council referring the questions to the Court is as follows:

The Committee of the Privy Council have had before them a report, dated 8th April, 1943, from the Minister of Justice, representing:—

That, with the consent of the Government of Canada, the Government of the United States of America has stationed and will station units of its military and naval forces in Canada;

That a question has arisen as to the relationship of the authorities and courts of Canada to the aforesaid forces and more particularly as to whether criminal proceedings may be prosecuted in Canada before any Canadian court against a member of the military or naval forces of the United States of America;

That United States authorities contend that the members of their military and naval forces aforesaid present in Canada with the consent of the Government of Canada are exempt from prosecution as aforesaid;

That cases have already occurred in which members of the military forces of the United States of America present in Canada have been charged with having committed criminal offences in Canada and questions have arisen as to whether such members are subject to be prosecuted in the criminal courts of Canada or whether service courts established for the purpose by the United States military authorities have exclusive jurisdiction in that behalf;

That certain regulations enacted under the *War Measures Act* enttiled the Foreign Forces Order, 1941, provide that, when a foreign force to which the Order is made applicable is present in Canada, the service courts of the foreign power may exercise within Canada, in relation to members of that force, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that power, subject to certain exceptions set out in a proviso to section three of the said Regulations, which exceptions, however, are not applicable in the case of the forces of the United States of America; and

That these Regulations have, subject to the qualification mentioned in the next preceding paragraph, been extended to the forces of the United States of America, which extension was made for the purpose of placing service courts of the forces of the United States of America in no less advantageous position than those of our other allies and it was expressly provided in the Order that the application of the Foreign Forces Order, 1941, to the forces of the United States of America shall not be construed as prejudicing or curtailing in any respect whatsoever any claim to immunity from the operation of the municipal laws of Canada or from the processes of Canadian courts exercising either criminal or civil jurisdiction by members of the forces of the United States of America (P.C. 2813 dated 6th April, 1943).

The Minister is of opinion that important questions of law are raised, and recommends that, pursuant to the powers vested in the Governor in Council by section fifty-five of the *Supreme Court Act*, the following questions be referred to the Supreme Court for hearing and consideration:

1. Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

2. If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from Criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

under the *War Measures Act*, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942*?

The Committee concur in the foregoing recommendation and submit the same for approval.

A. D. P. Heeney,
Clerk of the Privy Council.

F. D. Smith K.C., G. E. Read K.C. and *C. Stein* for the Attorney-General of Canada.

C. R. Magone K.C. for the Attorney-General for Ontario.

G. C. Papineau-Couture K.C. for the Attorney-General for Quebec.

W. S. Gray K.C. and *H. J. Wilson K.C.* for the Attorney-General for Alberta.

E. Pepler K.C. for the Attorney-General for British Columbia.

The judgment of The Chief Justice and Hudson J. was delivered by:

THE CHIEF JUSTICE.—The two questions referred to us are these:—

(1) Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

(2) If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the *War Measures Act*, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942*?

It is more convenient to deal first with the second question. Under head 7 of section 91 of the *British North America Act* exclusive jurisdiction "in relation to Militia and Defence" is vested in the Dominion Parliament "notwithstanding anything in this Act". Construing and applying section 91 in light of the judgment in the *Fort Frances* case (1) and the judgment of this Court in *Re Gray* (2), the Dominion Parliament has, in my view,

(1) [1923] A.C. 695. (2) (1918) 57 Can. S.C.R. 150.

jurisdiction to legislate in the sense indicated in the second question: that is to say, to exempt visiting American troops during the present war from the criminal jurisdiction of the Canadian courts. Further, by the enactments of the *War Measures Act* the Governor General in Council has full discretionary authority to pass any such measure.

A similar proposal was made in 1942 in England and, while it was unanimously agreed by competent authorities that the proposal to divest the British courts of jurisdiction in relation to offences committed by the members of any army, domestic or foreign, in Great Britain was "unprecedented", there was a general agreement that in the circumstances the necessary legislation should be passed granting the exemption which the American Government desired. The general view was expressed by Lord Atkin in a letter to *The Times* during the progress of the measure through Parliament in this sentence:—

> It is a proposal unique in the constitutional history of this country, but the Government of the United States have been so ungrudging in the aid given to this country that if they expressed a desire for such legislation no one would hesitate to grant it.

I cannot doubt that this is the spirit in which any such legislation would be regarded in this country.

In this view of the second question it seems to me, if I may say so without disrespect, that the first question is (as regards the American forces) almost academic in its nature. Nevertheless, the Governor General in Council, in the exercise of his undoubted authority and discretion, has considered that the question ought to be answered and it is our duty to examine and pronounce upon it.

I apply myself first to the consideration of the position of the members of a land force; afterwards I will discuss the case of the naval forces. First then as to a visiting army. The rule, it should be recalled, which it is now said is a part of the law of this country restricting the jurisdiction of the criminal courts of this country, is deduced from the doctrine laid down in a passage in the judgment of Marshall C.J., in *Schooner Exchange* v. *M'Faddon* (1):

> The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

(1) (1812) 7 Cranch 116.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Duff C.J.

It is not contended, it is important also to observe, that there is any statute or any legislative enactment in the form of an Order in Council having the force of a statute which gives legal effect to any such rule. No such contention is advanced and there could be no basis for it. The rule contended for is not put and could not be put upon any pretended statutory sanction. If there is such a rule in force in this country in the sense contended for, it derives its validity solely from alleged principles of international law to which the nations, including the United Kingdom and Canada, are supposed to have agreed.

My view can be stated very briefly. It is, I have no doubt, a fundamental constitutional principle, which is the law in all the provinces of Canada, that the soldiers of the army of all ranks are not, by reason of their military character, exempt from the criminal jurisdiction of the civil (that is to say, non-military) courts of this country. In fact, at the time the United States forces entered this country there was in the Order in Council of the 15th of April, 1941, a declaration in these terms:—

> 4. (1) Nothing in the last preceding section shall affect the jurisdiction of any civil court in Canada to try a member of any foreign force for any act or omission constituting an offence against any law in force in Canada.
>
> (2) If a person sentenced by a court exercising jurisdiction by virtue of the last preceding section to punishment for an offence is afterwards tried by any such civil court as aforesaid in respect of any act or omission which constituted that offence, the civil court, shall, in awarding punishment in respect of that act or omission, have regard to any punishment imposed on him by the said sentence.
>
> (3) A court shall not have jurisdiction by virtue of the last preceding section to try any person for any act or omission constituting an offence for which he has been acquitted or convicted by any such civil court as aforesaid.

The subsequent amendment of this Order in Council by the Orders in Council of the 27th of July, 1942, and the 6th of April, 1943, does not affect this declaration in its relation to powers other than the United States; and as regards the forces of such other powers it is still in full vigour and effect.

That is a well-settled principle which has always been jealously guarded and maintained by the British people as one of the essential foundations of their constitutional liberties. I quote two passages on the subject—the first is from Dicey's "Law of Constitution", and the second is

from Dr. Goodhart, the distinguished lawyer who is the successor of Maine and Pollock in the chair of jurisprudence at Oxford University and is the editor of the Law Quarterly Review; this passage is taken from an article written by Dr. Goodhart for the American Bar Association Review for the information of American lawyers. At page 300 of Dicey it is stated:—

> A soldier's position as a citizen—The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. "Nothing in this Act contained" (so runs the first Mutiny Act) "shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law." These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.
>
> The results of this principle are traceable throughout the Mutiny Acts.
>
> A soldier is subject to the same criminal liability as a civilian. He may when in the British dominions be put on trial before any competent "civil" (i.e. non-military) court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal. Thus, if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Diemen's Land, his military character will not save him from standing in the dock on the charge of murder or theft.

Referring to the legislation introduced in 1942 and passed by the Parliament of the United Kingdom, Dr. Goodhart says:—

> The important constitutional principle which was involved is one of the essential ones on which the English constitution is based. It is described by Dicey as "the fixed doctrine of English law that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen". It is part—and perhaps the most important part—of "the rule of law" which is the distinctive feature of the British system. "It becomes, too, more and more apparent that the means by which the courts have maintained the law of the constitution have been the strict insistence upon the two principles, first of "equality before the law", which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts, and, secondly, of "personal responsibility of wrong-doers", which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors. This means that the British soldier is subject to the jurisdiction of the ordinary courts, and is responsible to them for any breaches of the law which he may commit. So long as this principle is maintained, it will be impossible for anyone to establish a military dictatorship in Great Britain.

I have no doubt that this principle applies to all armies, British or foreign, except in cases in which by the legisla-

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Duff C.J.

tion mentioned dealing with the American forces in England, it has been changed by legislative enactment, or the equivalent thereof. There can be no doubt that in Great Britain it is settled as indisputable that this is a principle of law applicable in strict law to all armies there, except in so far as it has been modified by statute. The circumstance that in the United Kingdom and in Canada the civil courts would not, except at all events at the request of the commander of the visiting military forces, exercise jurisdiction in respect of acts beginning and ending within the lines of those forces and taking no effect externally to them, or probably in matters which exclusively concern the discipline of the visiting forces and/or the relations of the members of those forces to one another, is not, of course, in any way inconsistent with what I am saying. The course of the proceedings in England in the years 1940 and 1942 in relation to foreign forces present there illustrate this in the most striking way.

In 1940 an Act was passed by the Parliament of the United Kingdom to make provision with respect to the discipline and internal administration of allied and associated forces, and for the application in relation to those forces of the *Visiting Forces (British Commonwealth) Act, 1933*. This Act dealt with the authority of military, naval and air force courts of any foreign power allied with His Majesty for the time being present in the United Kingdom, or on board any of His Majesty's ships or aircraft. The Act authorized the Government by Order in Council *inter alia* to empower the naval, military and air force courts of such powers, subject to the provisions of the statute, to exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power.

In 1942 an Order in Council was passed applying to the Visiting American Forces (with all necessary modifications) the terms of section 1 (1) of the *Visiting Forces (British Commonwealth) Act, 1933*. The effect of these provisions was that the American service courts could exercise the necessary jurisdiction, while the English government departments were enabled to assist them, for example, by detaining in an English prison or detention barrack any person convicted in those courts.

By section 2 of the Act of 1940 it was enacted as follows:—

2. (1) Nothing in the foregoing section shall affect the jurisdiction of any civil court of the United Kingdom or of any colony or territory to which that section is extended, to try a member of any of the naval, military or air forces mentioned in that section for any act or omission constituting an offence against the law of the United Kingdom, or of that colony or territory, as the case may be.

(2) If a person sentenced by a court exercising jurisdiction by virtue of the foregoing section to punishment for an offence is afterwards tried by any such civil court as aforesaid in respect of any act or omission which constituted that offence, the civil court shall, in awarding punishment in respect of that act or omission, have regard to any punishment imposed on him by the said sentence.

(3) A court shall not have jurisdiction by virtue of the foregoing section to try any person for any act or omission constituting an offence for which he has been acquitted or convicted by any such civil court as aforesaid.

The visiting forces, therefore, were subject to the jurisdiction of the British courts. The Attorney-General, in introducing the Bill, explained that the British courts did not in fact exercise jurisdiction within the lines of the visiting forces, unless the person or property of a British subject was involved.

Then followed the Act of 1942 by which the jurisdiction of the British courts, in respect of offences committed by members of the American forces, was withdrawn. The Bill was introduced into the House of Lords and the observations of the Lord Chancellor in relation to it are important. There could be no doubt, he said, and, of course, there could be no doubt about it, that the jurisdiction of the British civil courts in relation to the members of the American forces could only be taken away by legislation. The Lord Chancellor made it perfectly plain that this legislation was being enacted in response to the desire of the Government of the United States. It is quite clear that, speaking on behalf of His Majesty's Government, he did not recognize any right (in virtue of international law) of an allied power to the exclusion of the jurisdiction of His Majesty's courts in relation to its visiting forces in Great Britain. The Lord Chancellor does refer to the fact that in the First Great War there was an agreement between the Government of Great Britain and the Government of the French Republic, by which jurisdiction over the members of the British Forces in respect of offences committed in France was given exclusively to the

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Duff C.J.

British military courts. But at the conclusion of his speech he says:—

> I think your Lordships will see that this is a very interesting and, I admit, a most unusual proposal; one which would never be justified or tolerated except under conditions of war, and except under conditions of the closest feeling of comradeship and of common legal traditions which exist between the United States and ourselves. I commend the Bill to the House; and, if you will allow me to say so, His Majesty's Government tender it to the United States as a proof and a pledge of the genuineness of our confidence in them and our sense that we are indeed in this business together from the beginning to the end. In that spirit I feel sure that American Courts will seek to administer the exclusive powers they will now possess, and in that spirit I beg to move the Second Reading of the Bill.

It is very obvious that the British Government recognized, and recognizes, no such right as that now claimed as arising out of any rule of international law.

In the House of Commons there was an important statement by the Attorney-General. He emphasized the principle that legislation is necessary to restrict the jurisdiction of British courts in relation to the members of any army on British soil, and he says:—

> May I say a word or two on the more general issues that are raised? Obviously this is an unprecedented proposal, but we live in unprecedented times. It is undoubtedly true that in the course of our history we have on many fewer occasions had the Forces of an Ally present on British soil than in the case of Continental countries. There have been some Dutch Forces here from time to time in our past history, and I was told of an assault committed by a Dutch soldier on a local inhabitant and the magistrate having great difficulty in preventing the commanding officer stringing him up the nearest oak tree. But that was a long time ago. We had American troops in the last war, and the Americans made exactly the same request that they are making to-day; it was only because the time was shorter, and that agreement was not come to, that Parliament was not asked to legislate on these lines. But in fact American soldiers were dealt with by our courts, and they made exactly the same request.

There was indeed unanimity in both Houses upon the point that the proposal to restrict the jurisdiction of British courts in the manner suggested was absolutely unprecedented, and that the proposal affected a fundamental constitutional principle that could only be modified by statute.

Indeed it is plain that the correspondence which is attached as a schedule to the Bill, when carefully read, embodies the same assumptions. Mr. Eden's phrase

> in view of the very considerable departure which the above arrangements will involve from the traditional system and practice of the United Kingdom

expresses in measured language the substance of what is stated by the Lord Chancellor and the Attorney-General. The necessity for Parliamentary authority is emphasized in the first sentence of Mr. Eden's note and is recognized in the last paragraph of Mr. Winant's note (1).

I repeat that the practice followed in 1940 before the passing of the statute in 1942, as explained by the Attorney-General, in refraining from exercising or claiming jurisdiction in relation to acts within the lines of the visiting troops, in which neither the person nor property of a British subject was involved, in no way militates against this attitude of His Majesty's Government with regard to the strict law of the matter.

The attitude of His Majesty's Government from beginning to end was quite unambiguous. The authority of the service courts of the United States to exercise their powers under American law in the United Kingdom was given by Order in Council under the statute of 1940. The jurisdiction of the British courts in relation to American soldiers could only be abrogated or limited by Parliamentary action. There is nowhere a suggestion that His Majesty's Government recognized the existence of any rule of international law by which the visiting forces of an Ally in the United Kingdom would be exempt as of legal right from the jurisdiction of the British civil courts; and the proceedings from beginning to end are quite inconsistent with the assumption that any such view would have received any countenance from Parliament or His Majesty's Government.

(1) Reporter's note.—The first sentence of Mr. Eden's note is:

"Following the discussions which have taken place between representatives of our two Governments, His Majesty's Government in the United Kingdom are prepared, subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should, during the continuance of the conflict against our common enemies, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces, and they are ready to introduce in Parliament the necessary legislation for this purpose."

The last paragraph of Mr. Winant's note is:

"It is my understanding that the present exchange of notes is regarded as constituting an agreement between the two Governments to which effect shall be given as from the date on which the necessary Parliamentary authority takes effect."

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Duff C.J.

In considering the question whether the United Kingdom has or has not assented to some rule of international law modifying one of her fundamental constitutional principles, it is, in my opinion, legitimate to refer to the statement made by the Lord Chancellor, not in his judicial capacity, but on his responsibility as representing the Government of the United Kingdom in introducing a Bill giving legislative sanction to an arrangement entered into between the Government of the United Kingdom and the Government of the United States subject to such sanction. It is also, in my opinion, legitimate to refer to the statements made by the Attorney-General to the House of Commons on his responsibility as Attorney-General on the existing state of the law in the United Kingdom. The decisive thing is, of course, as it seems to me, the position taken by the Government of the United Kingdom and by the Parliament of the United Kingdom in relation to the expressed desire of the Government of the United States that its forces in the United Kingdom should be exempt from the criminal jurisdiction of the British courts; that position has been fully explained.

Some comment is perhaps desirable upon an argument which was based upon negotiations which took place between the British and American Governments in 1917-18. I have already quoted from the speech of the Attorney-General in the House of Commons in which he deals with this subject. The important points are, first: that only by the authority of Parliament could an agreement restricting the jurisdiction of British courts have been validly effected, and, secondly: that in point of fact American soldiers were dealt with by British courts. What the Attorney-General says is incompatible with any recognition of the notion that there is some rule of international law which deprives the courts of jurisdiction, in the absence of legislative enactment or its equivalent.

I find it impossible to escape the conclusion that the United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them. In other words, no such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada. The fundamental constitutional principle with which it is inconsistent is a part of

the law of every province of Canada, the constitutional principle by which, that is to say, a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country. Nothing short of legislative enactment, or its equivalent, can change this principle.

Some stress was laid upon the agreement between the United Kingdom and the Republic of France in the last war; and it might conceivably be argued that the agreement places the Government of the United Kingdom under a diplomatic obligation at least to introduce legislation into the British Parliament, if any question should arise as to the jurisdiction of British criminal courts over French soldiers in the United Kingdom; but it is beyond doubt that His Majesty's Government did not and could not regard this arrangement with France as having in itself, without legislative sanction, the effect of depriving the courts of the United Kingdom of their jurisdiction.

Reverting to the agreement with the United States in 1942, it was pointed out by the Lord Chancellor that such an agreement should at least in principle be reciprocal. Paragraph 7 of Mr. Eden's note is in these words:—

> It would accordingly be very agreeable to His Majesty's Government in the United Kingdom if Your Excellency were authorized to inform me that in that case the Government of the United States of America will be ready to take all steps in their power to ensure to the British forces concerned a position corresponding to that of American forces in the United Kingdom.

In Mr. Winant's note the only reference is in the general words:—

> My Government agrees to the several understandings which were raised in your note.

In this correspondence both Governments treated the matter, as the Lord Chancellor did in the House of Commons, as a subject of reciprocal arrangements. There is no declaration on either side of the existence of any rule of law such as that now contended for; nor indeed is there any formal or unqualified undertaking by the American Government that the State courts of the United States, or indeed the United States courts, will enter into a valid waiver of jurisdiction.

I ought perhaps to say a word upon the argument of Mr. Read founded upon the special circumstances in which the United States forces came into Canada. If the assent

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Duff C.J.

of the Government of Canada to the presence of those troops in this country in those special circumstances could properly be interpreted as involving an implied diplomatic obligation in relation to the jurisdiction of Canadian criminal courts over the members of such forces, it could not, in my opinion, fairly be supposed to extend beyond an undertaking on behalf of the Government to do everything in its power by legislation, for example, to exempt the members of such forces from such jurisdiction. No such diplomatic obligation could have the effect *ipso jure* of depriving the Canadian courts of jurisdiction.

I now turn to the naval forces. In the memorandum of the Lord Chief Justice, Sir Alexander Cockburn, a memorandum which Lord Atkin in the *Cheung case* (1), at p. 171 says "is worthy to be compared with the judgment of Marshall C.J.", and which he quotes at p. 172, it is stated:—

> The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship, and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject, or if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities.

That was the view of the Lord Chief Justice as to what the law ought to be and it will be observed that it is not inconsistent with the statement of the Attorney-General made in the House of Commons in 1942 on the occasion of the passing of the Bill to which reference has been made. The view of the Lord Chief Justice was that, as regards offences committed on board a ship by a member of the crew as against a member of the crew, matters should be left to the law of the ship and, if the offender should escape to the shore and should be taken, he should be given up to the commander of the ship on demand and should be tried on shore only if such demand were not made. His view is that the jurisdiction should not be exercised if the authorities of the ship desired themselves to exercise it. On the other hand, he recognizes the jurisdiction of the local courts where the crime is committed

(1) [1939] A.C. 160. *Chung Chi Cheung* v. *The King.*

on shore, and expresses the view that in such a case, if the offender escapes to the ship, he should be given up to the local authorities.

In the judgment of Lord Atkin in the *Cheung case* (1) at p. 173 reference is made to para. 55 of Hall's International Law, as follows:—

> There the author states that a public vessel is exempt from the territorial jurisdiction; but that her crew and persons on board of her cannot ignore the laws of the country in which she is lying as if she were a territorial enclave. Exceptions to their obligation exist in the case of acts beginning and ending on board the ship, and taking no effect externally to her, in all matters in which the economy of the ship, or the relations of persons on board to each other, are exclusively concerned.

And at p. 175 Lord Atkin says:—

> In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction.

It will be observed that Lord Atkin's proposition is confined to the case of an offence committed by one member of the crew upon another and does not extend to the case considered by Sir Alexander Cockburn, that of an offence committed by a member of the crew on board the ship against a subject of the local jurisdiction. The next sentence in the judgment seems to recognize this distinction:—

> The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction.

Lord Atkin proceeds:—

> Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these.

I do not think Sir Alexander Cockburn had any doubt about the jurisdiction of the local courts in such a case, and it is possible Lord Atkin's sentence, standing in its context, ought to be read as restricted to offences committed by one member of the crew against another. In such a case, assuming there was no legislation dealing with the matter, and assuming the offence was not murder or one of like gravity, it is probable that the local jurisdiction would recognize the disciplinary jurisdiction of the ship. The question we are asked, however, is a question relating

(1) [1939] A.C. 160.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Duff C.J.

to jurisdiction; and, if I were not under a legal obligation to answer it, I should leave it where Lord Atkin leaves it. Being under an obligation to answer it, it must, I think, be answered on principle in the negative, in the sense, that is to say, that in the United Kingdom, or in Canada, the offender is not in point of law exempt from local jurisdiction.

Some reference ought perhaps to be made to the judgment of this Court on the Reference respecting the taxation of Legations (1). The immunities of displomatic representatives have been recognized for centuries by common consent of the nations, and evidence of the adherence of the United Kingdom to this principle is to be found, as was pointed out in the judgments on that Reference, in the legislative enactments beginning with the Statute of Anne and extending down to the nineteenth century, and in numerous decisions in the eighteenth and nineteenth centuries, including judgments of great judges, like Lord Campbell, and judgments of the Court of Appeal. The immunity of diplomatic representatives from judicial process extends, speaking broadly, to the public property of the foreign country in use for diplomatic purposes, as well as at least to foreign public ships of war. The precise limits of this immunity in relation to public property is not, as regards the courts of the United Kingdom, finally settled. There is nothing in these principles in any way inconsistent with the views I have expressed in this judgment.

The following are my answers to the questions referred:

As to the first interrogatory. To prevent a misconception a preliminary observation is necessary. In virtue of the Order in Council of the 15th of April, 1941, as amended by the Order in Council of the 6th of April, 1943, the service courts and service authorities of the United States of America may, subject to the provisions of the first-mentioned Order in Council, in relation to members of its forces (military, naval and air) present in Canada, or on board a Canadian ship or aircraft, exercise within Canada all such powers as are conferred upon them by the law of the United States in matters concerning discipline and internal administration. The code of discipline in

(1) [1943] S.C.R. 208.

force in the United States army is very sweeping in its provisions and seems to be broad enough to embrace almost any offence against the criminal law in this country.

As to the jurisdiction of Canadian courts:

First, as to land forces. There is no rule of law in force in Canada which deprives the Canadian civil courts (that is to say, non-military courts) of jurisdiction in respect of offences against the laws of Canada committed by the members of such forces on Canadian soil. The Canadian criminal courts do not in fact exercise jurisdiction in respect of acts committed within the lines of such forces, or of offences against discipline generally committed by one member of such forces against another member in cases in which the act or offence does not affect the person or property of a Canadian subject.

Secondly, as to naval forces. The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship.

As to interrogatory no. (2), the answer is "Yes".

KERWIN J.—The first question submitted for our consideration by the Governor General in Council is as to whether certain members of military and naval forces of the United States of America are exempt from criminal proceedings prosecuted in Canadian criminal courts. The members referred to are those who are now in Canada with the consent of the Canadian Government for purposes of military operations in connection with or related to the state of war now existing.

The general rule is that everyone in Canada, even though he be an alien and here only temporarily, is subject to the laws of the country and to the jurisdiction of our courts, but to this, there are several well-known

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Kerwin J.

exemptions. These exemptions are grounded on reason and are recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary. The question is whether the members referred to are within any of these exemptions.

The genesis of our Government's consent to the presence in Canada of the United States forces is found in the declaration by the Prime Minister of Canada and the President of the United States of America regarding the establishing of a permanent joint board of defence. This declaration was made on August 18th, 1940, at the conclusion of conversations held at Ogdensburg in the State of New York and is as follows:—

> The Prime Minister and the President have discussed the mutual problems of defence in relation to the safety of Canada and the United States.
>
> It has been agreed that a Permanent Joint Board on Defence shall be set up at once by the two countries.
>
> This Permanent Joint Board on Defence shall commence immediate studies relating to sea, land, and air problems including personnel and material.
>
> It will consider in the broad sense the defence of the north half of the Western Hemisphere.
>
> The Permanent Joint Board on Defence will consist of four or five members from each country, most of them from the services. It will meet shortly.

At this time there was already on the statute books of the Dominion, *The Visiting Forces (British Commonwealth) Act, 1933*. In that Act, "Visiting force" was declared to mean:—

> any body, contingent or detachment of the naval, military and air forces of His Majesty raised in the United Kingdom, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State, or Newfoundland, which is, with the consent of His Majesty's Government in Canada, lawfully present in Canada;

by subsection 1 of section 3:—

> 3. (1) When a visiting force is present in Canada it shall be lawful for the naval, military and air force courts and authorities (in this Act referred to as the "service courts" and "service authorities") of that part of the commonwealth to which the Force belongs, to exercise within Canada in relation to members of such Force in matters concerning discipline and in matters concerning the internal administration of such Force all such powers as are conferred upon them by the law of that part of the Commonwealth.

On April 15th, 1941, by the Foreign Forces Order, 1941, the Governor General in Council promulgated provisions

similar to some of those contained in this Act, with respect to the naval, military and air forces of certain foreign powers carrying on naval, military and air training in Canada with the consent of the Government of Canada. These foreign powers were Belgium, the Czechoslovak Republic, The Netherlands, Norway, Poland, and any other Power which might be designated by the Governor General in Council as a foreign power to which the order should apply. This order does not purport to permit the exercise of any jurisdiction by the service courts of foreign powers except in matters concerning discipline and internal administration and, in fact, by section 4 it was provided that nothing should affect the jurisdiction of any domestic court in Canada to try a member of any foreign force for any act or omission constituting an offence against any law in force in Canada.

The attack on Pearl Harbour occurred on December 7th, 1941, and on June 26th, 1942, the Governor General in Council, by an order reciting that, with the consent of the Canadian Government, the Government of the United States of America had stationed and would station units of its armed forces in Canada, and that it was necessary, as an interim measure, to make immediate provision therefor, designated the United States as a foreign power to which the Foreign Forces Order, 1941, should apply.

This interim measure was revoked on April 6th, 1943, by another order in council which designated the United States as a foreign power to which the Foreign Forces Order, 1941, except the proviso contained in section 3, should apply. Clause 3 is the one which, when a foreign force is present in Canada or on board any of His Majesty's Canadian ships or aircraft, permitted the service courts and service authorities of the foreign power to which the force belonged to exercise, subject to the provisions of the order, within Canada or on board any such ship or aircraft, in relation to members of that force, in matters concerning discipline and internal administration, all such powers as were conferred upon them by the law of that Power. The proviso thereto, which applies to the foreign powers named in the Foreign Forces Order, 1941, but which by the Order in Council of April 6th, 1943, does not apply in the case of the forces of the United States, reads as follows:—

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Kerwin J.

Provided that such service courts or authorities shall not have jurisdiction in respect of any acts or omissions which would constitute the offences of murder, manslaughter or rape under the Criminal Code; and provided further that such service courts or authorities acting under or pursuant to the provisions of this section shall not have jurisdiction to sentence any person to death for any offence, except for an offence which, under the law of the foreign Power to which the force belongs, is an offence for which a member of that force may be so sentenced and which is an offence of the same nature as one for which a member of a like home force would, under the law applicable to such home force, be liable to be sentenced to death.

Section 2 of the Order in Council of April 6th, 1943, provides:—

2. The application of the Foreign Forces Order, 1941, as aforesaid, to the forces of the United States of America shall not be construed as prejudicing or curtailing in any respect whatsoever any claim to immunity from the operation of the municipal laws of Canada or from the processes of Canadian courts exercising either criminal or civil jurisdiction by members of the forces of the United States of America founded on the consent granted by His Majesty's Government in Canada to such forces to be present in Canada;

The result of this last Order in Council of April 6th, 1943, is that if by international law there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the members of the United States forces referred to in the first question, nothing that had been done by Canada should be taken as prejudicing or curtailing such exemption.

In determining whether such an exemption exists, we might note what happened on the continent and in Britain during the last great war. On December 15th, 1915, an agreement was arrived at between the British Government and the Government of the French Republic by which they

agree to recognize during the present war the exclusive competence of the tribunals of their respective armies with regard to persons belonging to these armies in whatever territory and of whatever nationality the accused may be.

In Le Statut Juridique des Troupes Alliées pendant la Guerre, 1914-1818, thèse, Paris, Les Presses Modernes, 1927, by Miss Aline Chalufour, the author states that this agreement continued the practice that had prevailed from the first appearance of British troops on French soil. Her exact language is:—

Le texte relatif à la compétence pénale de l'armée britannique date du 15 décembre 1915; il avait été préparé par la conférence franco-anglaise des 19-23 mars 1915 dont le projet contient toute la substance de la convention; il paraît surprenant que seize mois et demi de séjour

continu des troupes britanniques sur le sol français aient précédé la parution d'une déclaration officielle sur la matière, mais d'après une enquête faite auprès d'officiers anglais et d'interprètes français, il ressort que la pratique des premiers mois coïncidait sensiblement avec les principes émis dans la déclaration du 15 décembre 1915.

In an exchange of notes between the United States and France dated January 3rd and January 14th, 1918, it was provided in part as follows:—

The Government of the United States of America and the Government of the French Republic agree to recognize during the war the exclusive jurisdiction of the tribunals of their respective land and sea forces with regard to persons subject to the jurisdiction of those forces whatever be the territory in which they operate or the nationality of the accused. In the case of offences committed jointly or in complicity with persons subject to the jurisdiction of the said military forces, the principals and accessories who are amenable to the American land and sea forces shall be handed over for trial to the American military or naval justice, and the principals and accessories who are amenable to the French land and sea forces shall be handed over for trial to the French military or naval justice.

A similar agreement between the United States and Belgium provided for the exclusive jurisdiction of the military authorities of each country over members of their armed forces on the territory of the other. Agreements recognizing the same immunities in the cases of other foreign forces on French territory were also concluded. Clunet in Journal du Droit International, vol. 45, 1918, pp. 516 and 517, as to the presence in France of armed forces of the allies and the agreements referred to, comments as follows:—

En principe, là où une armée est réunie sous le drapeau national, pour défendre le cause nationale, elle transporte avec elle un pouvoir juridictionnel et les éléments de puissance utiles à sa propre conservation. Par le moyen de ses conseils de guerre et dans l'aire du territoire où ses troupes évoluent—encore que ce territoire soit étranger—l'armée occupante réprime les infractions commises par les individus, militaires ou non prévues par la loi militaire.

Cette situation s'est produite, dans un cas notoire "d'occupation consentie" lors de la présence d'une armée française dans les Etats pontificaux, du consentement du Pape, souverain territorial (1849-1870).

Les conseils de guerre français ont puni les attentats commis contre la troupe, sans distinction de la qualité ou de la nationalité des délinquants. A maintes reprises, la Cour de Cassation française a reconnu cette compétence (Cf, Juridiction des armées d'occupation, etc. Clunet 1882, p. 516).

En 1859, la présence de l'armée française accourue à l'aide du roi Victor-Emmanuel, dans sa lutte contre l'Autriche, avait été l'occasion d'appliquer ces règles.

La présente guerre nous fournit déjà le cas d'armées étrangères occupant des territoires amis en France, en Italie, en Grèce, etc.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Kerwin J.

Aucune difficulté en France sur les effets juridiques de cette "occupation consentie". Des accords sont intervenus pour confirmer les règles issues de la coutume—entre le France et l'Angleterre (15 décembre 1915, Clunet 1916, p. 356)——entre la France et la Belgique (29 janvier 1916, Clunet 1916, p. 726)—entre la France et la Serbie (14 décembre 1916, Clunet 1917, p. 1169)—entre la France et le Portugal (le 15 octobre 1917, Clunet 1918, p. 418).

En conséquence, notamment de l'accord franco-belge, des conseils de guerre belges ont été installés et fonctionnent tant sur la fraction du territoire français où "opère" l'armée belge, que sur d'autres points du même territoire, en dehors de la zone de combat, au Havre, à Calais, à Dieppe, à Cherbourg, puis à Caen, à Parigné-l'Evêque, etc.

En fait matériel de "l'occupation" du territoire "consentie" à une armée alliée, les pouvoirs juridictionnels reconnus à cette armée dans sa sphère d'action immédiate pour sa protection personnelle, l'installation de ses tribunaux militaires sur le front ou, par commodité dans telle ou telle ville du pays, ne modifient point le caractère juridique de "l'occupation". Le sol où combattent les armées alliées n'est devenu ni anglais, ni belge, ni américain, etc. Les villes du Havre, de Calais, de Dieppe, de Caen où siègent les conseils de guerre et les autres services militaires des Alliées sont demeurées françaises.

Toutes ces portions du territoire ne sont en quoi que ce soit provisoirement "dénationalisées" par les concessions qui y ont été octroyées; elles persistent en l'obédience française. Tout individu qui s'y rencontre est en France. Nul ne peut s'y prétendre en Angleterre, en Belgique, aux Etats-Unis, etc.

Courtoise et déférente, la France offre à ses Alliés une hospitalité pleine d'élan et sans limites; elle reste cependant la maitresse de la maison.

Correspondence occurred between the Governments of Great Britain and the United States upon the same subject-matter but the armistice intervened before a formal arrangement was arrived at. In this exchange of notes the United States Government throughout took the position that members of her forces in Britain were exempt from prosecution in the British courts. As to the present conflict, on July 27th, 1942, after the United States had entered the war as one of the allied nations, Mr. Eden, the Foreign Secretary of the United Kingdom, and the United States Ambassador exchanged notes by which an agreement was made defining the relationship of the authorities and courts of the United Kingdom to the military and naval forces of the United States who were, or might thereafter be, present in the United Kingdom or on board any of His Majesty's ships or aircraft, and facilitating the exercise in the United Kingdom or on board any such ships or aircraft of the jurisdiction conferred on the service courts and authorities of the United

States by the law of that country. In order to give effect to this agreement, the Imperial Parliament passed *The United States of America (Visiting Forces) Act, 1942.*

Section 1 of this Act provides:—

(1) Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America:

Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this subsection shall not apply in that case.

(2) The foregoing subsection shall not affect any powers of arrest, search, entry or custody, exercisable under British law with respect to offences committed or believed to have been commited against that law, but where a person against whom proceedings cannot, by virtue of that subsection, be prosecuted before a court of the United Kingdom is in the custody of any authority of the United Kingdom, he shall, in accordance with such general or special directions as may be given by or under the authority of a Secretary of State, the Admiralty, or the Minister for Home Affairs in Northern Ireland, for the purpose of giving effect to any arrangements made by His Majesty's Government in the United Kingdom with the Government of the United States of America, be delivered into the custody of such authority of the United States of America as may be provided by the directions, being an authority appearing to the Secretary of State, the Admiralty, or the Minister, as the case may be, to be appropriate having regard to the provisions of any Order in Council for the time being in force under the Act hereinbefore recited and of any orders made thereunder.

(3) Nothing in this Act shall render any person subject to any liability whether civil or criminal in respect of anything done by him to any member of the said forces in good faith and without knowledge that he was a member of those forces.

By section 2, all persons who are by the law of the United States for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces, and the purpose of any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may be appointed for the purpose by the United States Government, stating that a person of the name and description specified in the certificate is or was at the time so specified subject to the military or naval law of the United States, shall be conclusive evidence of that fact.

It has not been overlooked that in paragraph 3 of Mr. Eden's letter to Mr. Wynant it is stated:—

In view of the very considerable departure which the above arrangements will involve from the traditional system and practice of the

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Kerwin J.

United Kingdom, there are certain points upon which His Majesty's Government consider it indispensable first to reach an understanding with the United States Government.

I take it that refers to a departure in the sense that foreign troops had not been on the soil of Great Britain for many years with the exception of the last great war.

The particular rule of international law with which we are concerned is referred to in the famous judgment of Chief Justice Marshall in *Schooner Exchange* v. *M'Faddon* (1). The Chief Justice was immediately concerned with the question of the immunity of a foreign vessel of war from the local jurisdiction but his reasoning and conclusion are based upon the foundation that by the very reason of the thing there is a rule of international law which permits such an immunity. In discussing the exceptions to the full and complete power of a nation within its own territory, he pointed out that they must be traced to the consent of the nation itself, which consent may be either expressed or implied. This consent was to be tested by common usage and by common opinion growing out of that usage, and these tests revealed classes of cases in which every Sovereign was understood to waive the exclusive territorial jurisdiction which was an attribute of his nation. After discussing two cases of exemptions, i.e., the exemption of the person of the sovereign from arrest or detention within a foreign territory and the immunity which all civilized nations allow to foreign ministers, he stated:—

> A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and dispositions of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

(1) (1812) 7 Cranch 116.

After quoting Vattel on the immunity of ambassadors and ministers, the Chief Justice continues:—

> Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

In *Chung Chi Chueng* v. *The King* (1), Lord Atkin, speaking on behalf of the Judicial Committee, states that this judgment is one "which has illumined the jurisprudence of the world". He further points out that there was a difference of opinion among writers on the subject of international law as to the theory upon which the immunity exists but that it must now be taken as settled that the correct theory is that it is a mere right of immunity which may be waived by the foreign state.

The Government of Canada having invited into the Dominion the military and naval troops of the United States of America as a part of the scheme of defence of the north half of the Western Hemisphere and, therefore, not merely for the benefit of the United States but for that of both parties and, in fact, for the benefit of all the allied nations in the present conflict, the invitation must be taken to have been extended and accepted on the basis that complete immunity of prosecution in Canadian criminal courts would be extended to members of the United States forces. A member of a military or a naval force stationed here is immune whether he be absent from his unit or ship on duty or on leave. The immunity would extend to any member of the forces, whether attached to a unit stationed, or a ship present, in Canada or not, so long as his presence in Canada is in pursuance of the invitation and consent of our Government. Because of the nature of the services that he is sent here to perform, such a member must be subject only to the laws of his country. The immunity does not extend to a member of the United States forces coming to Canada on his own business or pleasure as he would not be here for the purpose of military operations.

However, as Lord Atkin pointed out in the decision referred to (1), this immunity may be waived by the

(1) [1939] A.C. 160.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Kerwin J.

United States in any particular case, in which event the courts of Canada would not be without jurisdiction to try a member of a United States force for an offence alleged to have been committed against our laws. Furthermore, the powers of arrest, search, entry or custody exercisable under Canadian law with respect to offences committed or believed to have been committed against that law are not interfered with. My answer, therefore, to the first question would be that the members of the United States forces referred to are exempt from criminal proceedings prosecuted in Canadian criminal courts to the extent and under the circumstances mentioned.

I turn now to the second question. The waiver of immunity by the United States is provided for in *The United States of America (Visiting Forces) Act, 1942,* in a manner that might, on occasion, be different from that which I conceive applies by international law and many matters of detail are covered by the statute that might properly be reduced to writing. In my opinion Parliament or the Governor General in Council acting under the *War Measures Act* has jurisdiction to enact legislation similar to that statute. Without attempting to exhaust all the provisions of *The British North America Act* that might apply, such jurisdiction falls under head 7 of section 91 thereof. It would appear too clear for argument that Parliament, and therefore the Governor General in Council under the *War Measures Act* must have, under that head, complete authority to legislate for the defence of Canada.

TASCHEREAU J.—By Order in Council dated April 9th, 1943, the following questions have been referred to this Court for hearing and consideration:—

(i) Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

(ii) If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the War Measures Act, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942?*

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Taschereau J.

The Foreign Forces Order enacted in April, 1941, has been made applicable to the United States forces in Canada by Order in Council, and, the military and naval forces of the United States of America are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the war.

The United States forces are therefore subject to all the provisions of the Foreign Forces Order but, the United States Service Courts, however, are exempted from the limitations in that Order which prevent other foreign Service Courts from exercising jurisdiction in cases of murder, manslaughter and rape, and which limit their power to impose the sentence of death.

The last Order in Council passed on the 6th of April, 1943, and by which the previous Order in Council of June 24th, 1942, was revoked, stated that the application of the Foreign Forces Order 1941 to the forces of the United States shall not be construed as prejudicing or curtailing any claim to immunity from the operation of the municipal laws of Canada, by the members of the forces of the United States of America.

The first question therefore raises the question as to whether under international law the members of the United States forces are exempt from criminal proceedings prosecuted in Canadian courts.

The Attorney-General of Canada has submitted, that the first question should be answered in the affirmative, because under international law, Canada is under an obligation to accord immunity from jurisdiction in such cases, and the doctrine of international law involved has become a part of our municipal law. He also submits that question 2 should receive an affirmative answer. The various provinces represented, namely, Ontario, Quebec, British Columbia, Nova Scotia, and Alberta, claim that both questions should be answered in the negative.

The answer to the first interrogatory raises many questions of public international law, on which many distinguished text-writers in the leading countries of the world have expressed opinions, which have not always been unanimous. In order to reach a proper judicial conclusion it is necessary first to seek if there exists, and if the Court can acknowledge a body of rules accepted by the nations of the world, to the effect that the troops of a foreign sovereign visiting a country, with the consent of

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Taschereau J.

the latter's Government, are exempt from criminal proceedings prosecuted in that country. And secondly, having reached on that point an affirmative conclusion, the further question that must be solved is: Are these recognized principles of international law adopted by our domestic law?

It will be useful, I think, to cite here the opinion of some authors who have written on the matter.

Lawrence "Principles of International Law", 7th ed., p. 225:—

> We will first consider the case of land forces and then discuss the extent of the immunities of sea forces. It is necessary to separate the two because the rules with regard to them differ. The universally recognized rule of modern times is that a state must obtain express permission before its troops can pass through the territory of another state, though the contrary opinion was held strongly by Grotius, and his views continued to influence publicists till quite recently. Permission may be given as a permanent privilege by treaty for such a purpose as sending relief to garrisons, or it may be granted as a special favour for the special occasion on which it is asked. The agreement for passage generally contains provisions for the maintenance of order in the force by its own officers, and makes them, and the state in whose service they are, responsible for the good behaviour of the soldiers towards the inhabitants. In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise. * * *

Strupp "Recueil des Cours de l'Académie de Droit International de La Haye", vol. 47, pp. 529-531, entertains the following opinion:

> Les corps de troupes séjournant en temps de paix sur un territoire étranger, avec la permission de l'Etat souverain dudit territoire, jouissent de l'immunité, en tant qu'*unité* représentant leur Etat, donc seulement tant que les liens de la hiérarchie et de la discipline militaires subsistent, réunissant les divers membres dudit corps en *un seul tout*. Si ces conditions sont réalisées, les membres de la troupe sont soustraits à la juridiction civile du territoire où se trouve leurs corps. Ils restent soumis à leur juridiction militaire, en vertu du principe: *la loi suit le drapeau*.

Calvo "Le Droit International", 1896, tome 3, p. 341, says:

> Lorsqu'un Etat indépendant accorde à une armée étrangère la permission de passer ou de séjourner sur son territoire, les personnes qui composent cette armée ou se trouvent dans ses rangs ont droit aux prérogatives de l'exterritorialité. Une semblable permission implique, en effet, de la part du gouvernement qui l'accorde, l'abandon tacite de ses droits juridictionnels et la concession au général ou aux officiers étrangers du privilège de maintenir exclusivement la discipline parmi leurs soldats et de rester seuls chargés de réprimer les méfaits qu'ils viendraient à commettre.

Valéry "Droit International Privé", p. 100, says also:

107. Un corps de troupe français peut être amené à séjourner sur un territoire étranger soit par des opérations de guerre, soit à la demande d'un Etat anxieux d'être protégé contre certains dangers, ainsi que cela se produisit lorsque le Saint-Père obtint en 1849 et en 1866 l'envoi à Rome d'une armée française, soit à raison de la nécessité de sauvegarder des intérêts nationaux comme l'occupation de Casablanca en fournit un exemple (1907-1910). Ce sont là des faits qui se présentent, d'ailleurs, rarement. Il est très fréquent, au contraire, qu'un ou plusieurs navires de guerre français pénètrent dans les eaux littorales d'un Etat étranger et mouillent dans ses ports. Mais dans l'une et l'autre de ces deux hypothèses le droit des gens admet que la force militaire ou navale n'est pas assujettie aux lois du territoire où elle séjourne.

Aline Chalufour "Le Statut Juridique des Troupes Alliées pendant la Guerre", p. 45:

Comment fut résolue, au point de vue pénal, la compétence respective des autorités françaises et alliées?

Le principe dominant en la matière est celui-ci: une armée opérant sur un territoire étranger est entièrement soustraite à la souveraineté territoriale et possède une juridiction exclusive sur les membres qui la composent. Sur ce point la doctrine, les législations et la pratique sont d'accord, qu'il s'agisse d'occupatio bellica, d'occupation convenue résultant d'un traité, d'occupation de police ou simplement comme dans le cas qui nous occupe, de la présence des troupes sur un territoire dans un but de coopération avec l'armée du pays.

And also, Travers "Le Droit Pénal International", vol. II, para. 879:

Le principle est que la loi pénale locale est inapplicable aux membres des armées étrangères, amies ou alliées, autorisées implicitement ou formellement à venir, en cette qualité, sur le territoire. Cette règle découle, au cas où il n'y a pas d'occupation, seule hypothèse que nous envisageons ici, de la considération suivante.

Le membre d'une armée étrangère, pris en cette qualité, c'est-à-dire considéré comme partie intégrante de la force publique de l'Etat étranger, ne peut être soumis à la juridiction répressive locale sans qu'il y ait conflit avec la souveraineté de l'Etat étranger, et entrave à son droit de libre disposition de sa force armée.

En outre, le gouvernement, qui accepte la présence sur son territoire de troupes étrangères consent implicitement à ce que l'autorité étrangère conserve sur ces troupes la juridiction exclusive qui est nécessaire pour le parfait maintien de la discipline.

One of the leading cases on this subject is that of *The Schooner Exchange* v. *M'Faddon and others* (Supreme Court of the United States) (1). Chief Justice Marshall speaking for the Court said:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their

(1) (1812) 7 Cranch, pp. 116 to 147.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Taschereau J.

sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

And, after dealing with the immunity which all civilized nations allow to foreign ministers, he expressed the following views as to troops:

> A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

There seems to be a strong preponderance of authority in favour of the view that there exists a rule of international law amongst the civilized nations of the world, granting immunity to organized forces visiting a country with the consent of the receiving Government. These immunities are not based on the theory of exterritoriality which has been definitely rejected by Lord Atkin in *Ching Chi Cheung* v. *The King* (1). In that case, the doctrine of the "floating island", as expressed by Mr. Oppenheim, was found quite impracticable when tested by the actualities of life, on board ship and ashore; but it was held that the ground upon which rested the immunities, was that the sovereign extending the invitation is understood to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass

(1) [1939] A.C. 160, at 174.

through his dominion. Their Lordships had to determine the jurisdiction of the Hong Kong courts. The murder had been committed on board a Chinese armed public ship in the territorial waters of Hong Kong. It was held that the immunities granted are conditional and can themselves be waived by the nation to which the ship belongs. The Chinese Government not having made a request for the surrender of the accused, the jurisdiction of the British court was held to have been validly exercised.

From this judgment of the Judicial Committee it flows clearly to my mind, that some immunities exist in favour of foreign troops. It is true that in the *Cheung* case (1) the Judicial Committee was dealing with the legal status of an armed ship, but, the essence of the decision does not apply only to ships in territorial waters, but applies equally to all armed forces.

If the principle of exterritoriality, or of the "floating island", had been admitted by their Lordships, the position might be different, but it has been clearly established, as Lord Atkin said, that the immunities flow from "a waiver by the local sovereign of his full territorial jurisdiction". If the receiving sovereign is presumed to waive his jurisdiction as to members of the crew of a foreign ship, can it not be said that the same presumption exists as to land troops visiting a foreign country?

This view, I think, has been implicitly accepted by the Judicial Committee, and is in accordance with the doctrine of the authors, the practice followed by the nations of the world and by the Supreme Court of the United States.

Dealing with the immunities of public ships owned by other nations, Lord Atkin says:

> * * * What, then, are the immunities of public ships of other nations accepted by our Courts, and on what principle are they based?
>
> The principle was expounded by that great jurist Chief Justice Marshall in *Schooner Exchange* v. *M'Faddon* (2), a judgment which has illumined the jurisprudence of the world: "The jurisdiction of Courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. * * * All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being

(1) [1939] A.C. 160.

(2) (1812) 7 Cranch 116.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Taschereau J.

composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. * * *

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."

* * *

The judgment then proceeds to the third case "in which a sovereign is understood to cede a portion of his territorial jurisdiction," namely, "where he allows the troops of a foreign prince to pass through his dominions". The Chief Justice lays down that "The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage; and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

This decision of the Judicial Committee covers a very broad field, and must be construed as including not only the members of the crew of an armed ship, but also all land forces. The principles enunciated cannot but lead to that conclusion.

Of course, I do not forget that international law has no application in Canada unless incorporated in our own domestic law. In the *Cheung* case (1) it was said:

> It must be always remembered that, so far at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure.

The same principle has been held by this Court in the *Foreign Legations Reference* (2), where my Lord the Chief Justice said at page 230:

> I think, I repeat, that the proper conclusion from the legislation of the Imperial Parliament, particularly in the eighteenth century, in force, as some of the statutes were, when the common law was formally introduced into Upper Canada, from the decisions and judgments I have cited, and from the text writers, is that this rule, recognized by France, is also implicit in the principles of international law recognized by the law of England; and, consequently, by the law of Ontario.

(1) [1939] A.C. 160. (2) [1943] S.C.R. 208.

If not accepted in this country, international law would not be binding, but would merely be a code of unenforceable abstract rules of international morals.

But the Judicial Committee further added:

> The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

I have to come to the conclusion that there exists such a body of rules adopted by the nations of the world. These rules have been accepted by the highest courts of the United States, and some of them, applicable to the present case, have also been accepted by the Judicial Committee. I have to acknowledge their existence, and treat them as incorporated in our domestic law, following the direction given in the *Cheung* case (1). And I see nothing in the laws of the land inconsistent with their application within our territory.

I have read with much care various agreements which have been entered into during the last war between the British Government and the Government of the French Republic, and also between the United States of America and the French Republic, and the United States of America and Belgium. All these agreements tend to show the existence of this universally adopted rule of international law, and the agreement between England and France embodied in the declaration of both Governments is drafted in unequivocal terms:

> His Britannic Majesty's Government and the Government of the French Republic agree to recognize during the present war the exclusive competence of the tribunals of their respective armies with regard to persons belonging to these armies in whatever territory and of whatever nationality the accused may be.
>
> The two Governments further agree to recognize during the present war the exclusive competence in French territory of French justice with regard to foreign persons in the British Army who may commit acts prejudicial to that army, and the exclusive competence in British territory of British justice with regard to foreign persons in the French Army who may commit acts prejudicial to the said army.

The words "in whatever territory" can leave no room for doubt, that the British Government recognized the competence of the French military courts over members of the French army on British soil. If I held different views, I

(1) [1939] A.C. 160.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Taschereau J.

feel I would disregard what I think is an established practice, which is a source of public international law, and which has been accepted since many decades amongst nations, not only to prevent unfortunate conflicts between the judicial authorities of different countries, but also to safeguard the dignity of the sovereign, and ensure the necessary discipline of the army.

I would therefore answer the first interrogatory in the affirmative. But what I have said cannot be interpreted as meaning, that my conclusion is that the Canadian judicial authorities have completely waived their jurisdiction over American troops visiting this country. The principles enunciated in the *Cheung* case (1) must be kept in mind.

In coming into Canada, American naval and land troops import with them the jurisdiction of their service courts, and there is an implicit waiver by the Canadian authorities of their territorial jurisdiction, which can be waived by the visiting forces, implicitly or explicitly, and if this is done, then, to borrow the expression of Lord Atkin, "the original jurisdiction of the receiving sovereign flows afresh".

This immunity, as I have said, applies to all forces, whether on duty or on leave, but not to members of the forces who may enter Canada as tourists or casual visitors.

Moreover, the powers of arrest, search, entry or custody which may be exercised by Canadian authorities with respect to offences committed or believed to have been committed are not interfered with.

As to the second question, I would like to point out that the *United States of America (Visiting Forces) Act, 1942,* enacted by the United Kingdom, differs from what I think are the settled and accepted principles of international law in relation to immunities.

As I have said in dealing with the first interrogatory, the jurisdiction of the Canadian courts exists, if the American authorities waive implicitly or explicitly their right to exercise their own jurisdiction; but under the Imperial statute, the British courts may act only if representations are made to the Secretary of State on behalf of the Government of the United States, with respect to any particular case.

(1) [1939] A.C. 160.

These differences, however, do not affect in any way the powers of Parliament or of the Governor General in Council acting under the *War Measures Act*, to enact legislation similar to the statute of the United Kingdom, entitled *The United States of America (Visiting Forces) Act, 1942*, and, in view of the decisions of the Judicial Committee and of this Court on the matter, I would unhesitatingly answer the second interrogatory in the affirmative.

RAND J.—His Excellency in Council has been pleased to refer to this Court the following questions:

(1) Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

(2) If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the *War Measures Act*, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942*?

As is seen, they are related directly to the presence in Canada, at this time and in existing circumstances, of units of United States military and naval forces. What those circumstances are is a matter of public knowledge. Canada and the United States are not only allies in a world struggle; they have joined in special and concerted measures for the common defence of the two countries. On what must be taken as an invitation from the Canadian Government, United States forces have entered this country for the purposes of that joint program. They are serving the strategic necessities of the greater part of North America, for which the territories of both countries have become one field of operations. It is unnecessary to add that the measures taken are of an exceptional nature and are justified only by the grave threat to national safety.

By an order in council of April 6th, 1943, the Foreign Forces Order of 1941, with the proviso to section 3 eliminated, was made applicable to those forces; but that application reserved all immunities which by international law

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Rand J.

attached to them in the circumstances of their entry into this country. Under the authority of that order the service courts of these forces are exercising the disciplinary jurisdiction vested in them by United States law. The order, however, does not affect the jurisdiction of the Canadian civil courts over acts which are offences against any law in force in Canada. The point of the first question is, therefore, whether an immunity, absolute or qualified, from Canadian jurisdiction has, under the law of nations, arisen in favour of the members of these forces.

The conventions and usages of international law are of voluntary adoption by sovereign states as rules according to which their international relations shall be governed. These relations are of many kinds and those here dealt with fall within a class in which representatives of a foreign state enter and continue upon the territory of another. Territorial jurisdiction is absolute and exclusive over all persons and things within it: but when this impact of a foreign power takes place, at once the questions of sovereignty, its dignity, its freedom from all other authority, and its equality of rank and attribute, to the formal recognition of which all states are peculiarly sensitive, present the necessity for that international etiquette which is embodied in legal formulations. For many of these contacts, the rules are precise and settled. The person of a foreign sovereign, or other chief officer of a state, and generally his property are accorded, within another jurisdiction, and under conditions of amity, an absolute immunity from the local law: *Reference as to Powers to levy rates on Foreign Legations* (1). Likewise, with qualifications unnecessary for the present purposes to consider, are diplomatic representatives of a foreign state, their staffs and their property used for official purposes, privileged.

Apart from treaties, these rules lie in practices and principles, and each depends upon its special circumstances and their significance in the reasoning to which courts subject them. What we have to determine in this case is the compromise in jurisdictional conflict which is presumed to be deduced from "the nature of the case and the views under which the parties requiring and conceding" the privilege must be supposed to have acted: *The Schooner Exchange* v. *M'Faddon* (2).

(1) [1943] S.C.R. 208.

(2) (1812) 7 Cranch 116.

The usages of nations in relation to the armed forces of one state within the territories of another, have not, in the past, been given that consideration by jurists which the present importance of the question would lead us to expect. Hall speaks of the scanty references by commentators in the following language:

> Either from oversight or, as perhaps is more probable, because the exercise of exclusive control by military and naval officers not only over the internal economy of the forces under their command, but over them as against external jurisdiction, was formerly too much taken for granted to be worth mentioning, the older writers on international law rarely give any attention to the matter * * *

In the case of *The Schooner Exchange* (1), Marshall C.J., in a judgment of characteristic power, puts the matter thus:

> 3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> In such cases, without any express declaration waiving, jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.
>
> Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.
>
> The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

Westlake, in International Law (1910), vol. 1, pp. 264-265, treats the matter in these words:

> * * * In each case the physical extent of the normal operation of a foreign force penetrates a geographical territory, and in each that circumstance is only brought about by the express or tacit permission

(1) (1812) 7 Cranch 116.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Rand J.

of the geographical sovereign. Consequently, in both, the international rules of jurisdiction to be applied are often treated, especially by British and American writers, as dependent on the terms on which the geographical sovereign may be presumed to have given his consent to the presence of the foreign element. But since usage and reason furnish the only arguments which can be employed in ascertaining the terms to be presumed, the mode of treating the question is merely a veiled method of referring it to usage and reason. And it cannot even in theory be applied to the case of foreign ships passing through littoral seas, which presents the same circumstance of the interpenetration of territorial and quasi-territorial rights, since the ships are there by virtue of no permission, even tacit, but by virtue of the right of innocent passage, which has always been deemed to be reserved when the right of a land sovereign over any part of the sea has been described as one of sovereignty.

Standing then on the ground of usage and reason, the case which may occur on land is one on which no doubt has been felt, and it may be disposed of in the words of Wheaton. "The grant of a free passage (to an army) implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."

The preponderance of opinion would seem to support the foregoing views but a qualification appears in Oppenheim's International Law, 5th ed., vol. 1, p. 662, sec. 445:

> 445. Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain therefore under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply if, for example, soldiers belonging to a foreign garrison of a fortress leave the rayon of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them * * *

The immunity of a foreign vessel of war is frequently said to apply in respect of members of the crew while on shore and "on duty". This undoubtedly has furnished the concept applied by Oppenheim to an army. Based on the theory of exterritoriality, the latter is a "body" and immunity beyond its "lines" is confined to members "on duty". In the case of United States troops in Canada, however, there is no defined area; they are here generally and are available wherever they may be required.

Now it is of interest to observe how, in practice, these rules were worked out during the Great War. On December 15, 1915, a joint declaration by Great Britain and France provided for

the exclusive competence of the tribunals of their respective armies with regard to persons belonging to those armies in whatever territory and of whatever nationality the accused may be.

That declaration confirmed the practice followed up to its date from the time the British force reached France late in August, 1914. Canadian troops from the latter part of 1914 until December 15, 1915, formed part of the British Army in France and came within that practice. In January, 1918, a similar declaration was passed between the Secretary of State for the United States and the French Ambassador in Washington. During 1918 negotiations for an agreement on the same matter took place between Great Britain and the United States. Although the correspondence indicates an original view on the part of Great Britain possibly more restrictive than that expressed by Oppenheim, it was not pressed, and acceptance was given to the proposal of the United States for a convention on the terms of the declaration with France. The early withdrawal of United States troops from Britain rendered its formal conclusion unnecessary. But it appears that over offences committed outside the camps of these forces, the British courts exercised jurisdiction.

There seems to have been some doubt whether the declaration of December 15th, 1915, was valid as applied to French troops in Britain. A similar doubt was expressed as to what effect the courts in the United States would give to the informal agreement proposed by that country and Great Britain: (Letter of February 15th, 1918, The Acting Secretary of State to the United States Ambassador in London). In each case the doubt arose from the lack of legislative confirmation.

In the present war, a treaty between Great Britain and Egypt excludes the criminal jurisdiction of the latter country over members of the British forces. By the *United States of America (Visiting Forces) Act (1942)* no prosecution in Britain against persons subject to the military law of the United States can be instituted except upon a request from a proper representative of that country. That Act goes beyond the declaration of 1915 and international usage in its inclusion of persons and groups who are not technically members of military forces but are associated with them and are subject to military law. Agreements substantially to the same effect have been made between most of the allied countries.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Rand J.

In determining what has been implied in the invitation, its scope and the object to which it is addressed become significant circumstances. What has been invited into Canada is an army with its laws, courts and discipline. It cannot be assumed that such an organization would take the invitation to mean that, once the international border was crossed, its disciplinary powers should be suspended and its functions, except as to innocuous motions, come to an end. To these circumstances there is to be applied, in the words of Sir Alexander Cockburn, quoted by Lord Atkin in *Chung Chi Cheung* v. *The King* (1): "the rule which reason and good sense * * * would prescribe".

Lord Atkin, in the same decision, says:

> When the local court is faced with a case where such immunities come in question, it has to decide whether, in the particular case, the immunity exists or not. If it is clear that it does, the court will, of its own initiative, give effect to it. * * * The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with and members of the crew withdrawn from its service by the local jurisdiction.
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> It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

From that language, I do not understand that the ordinary methods of judicial determination are not to be resorted to. To insist upon precise precedent in usage would sterilize judicial action toward changing international relations: and in the reduction of terms of an implied arrangement the court must be free to draw upon all sources of international conventions, including "reason and good sense".

But the question remains whether any conclusion that might follow from these circumstances and views is in conflict with a rule or principle declared or adopted by the courts or Parliament of this country or accepted as embodied in its constitutional practices. There is no doubt that constitutional principle in England has for

(1) [1939] A.C. 160.

several centuries maintained the supremacy of the civil law over the military arm. If that principle meets the rule of immunity to foreign forces arising in the circumstances stated, then the latter must give way. The principle is intended to maintain a nation of free men through an equality before the law and a common liability to answer to the same civil tribunals. The citizen taking on the special duties of a soldier abates no jot of that accountability. The independence of that law and its courts in the armed forces would open the way to military domination and the loss of that freedom which equality secures.

Can that principle be said to be infringed by jurisdiction in a military court of the United States over its own forces which for the purposes of both countries are temporarily on our soil? It is, of course, not foreign but domestic military usurpation against which the principle is a bastion and it might be strongly argued that the objection to conceding such a jurisdiction is not that it is military but that it is foreign. But I have come to the conclusion that that principle stands in the way of implied exemption when the act complained of clashes with civilian life. The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system to which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted. It cannot be said to be clear that there has been a recognition of either a usage or principle by the parliament or the courts of this country or of Great Britain that would raise the immunity against the constitutional safeguard of accountability before a common tribunal. That safeguard, however, is concerned primarily to vindicate, not Canadian courts, but Canadian civil liberty. It does not, therefore, stand in the way of a rule limited to the relations of members of a foreign group admitted into Canada for temporary national purposes with persons other than members of the Canadian public: *Cheung* case (1) and the memorandum of Sir Alexander Cockburn in the Report of the Royal Commission on Fugitive Slaves quoted therein.

The point of the controversy is whether the adjudication upon infractions of the local law by members of foreign forces shall be carried out by the tribunals of those forces.

(1) [1939] A.C. 160.

1943

REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

Rand J.

The principle enunciated in the *Schooner Exchange* decision (1) has as a necessary corollary the implied obligation on the foreign court to accept that responsibility. The principle of immunity laid down in the case of *Chung Chi Cheung* v. *The King* (2) is that the local jurisdiction withdraws before the assertion of jurisdiction by the foreign authority: if the latter fails to make that assertion, it must be taken as waiving it and in such a case the local processes are considered not to have been displaced. Likewise the foreign jurisdiction may waive the local exercise of preliminary or ancillary process. In such a conception, an act in violation of the local law is not permitted an escape, jurisdictionally, from appropriate juridical action.

On the second question, it is not necessary to say much. The decision of the Privy Council in the case of *Fort Frances Pulp & Paper Co. Ltd.* v. *The Manitoba Free Press* (3) puts beyond question the powers of the Dominion to provide for the defence and security of the country. These powers place upon Parliament and Government the duty and responsibility of acting in the fullest exercise of them for the preservation of the nation. In the aspect of measures for the country's safety, questions of the distributed normal peace powers seem somewhat irrelevant. What these measures are designed to do is to defend the constitution which provides for that distribution; and the suspension or supersession of normal functions in the means adopted must be regarded as incidental to the necessities of the nation's purpose. In that sense, the exercise of judicial functions by courts of foreign forces is not an encroachment on the jurisdiction of provincial courts. It lies within a zone underlying that jurisdiction and essential to its continued existence. In any other view, constitutional formalities might bind us to impotence in the supreme effort of self-preservation.

The powers committed by the *War Measures Act (1914)* to the Dominion Government are necessarily of wide scope: *Fort Frances Pulp & Paper Co. Ltd.* v. *The Manitoba Free Press* (3); *Reference on Validity of Regulations in Relation to Chemicals* (4); and they would, in my opinion, be competent to the legislative measures mentioned.

(1) (1812) 7 Cranch 116.
(2) [1939] A.C. 160.
(3) [1923] A.C. 695.
(4) [1943] S.C.R. 1.

1943

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I would therefore answer the questions as follows:

1. The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law wherever committed, against other members of those forces, their property and the property of their government, but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.

2. Both Parliament and the Governor General in Council acting under the *War Measures Act* have jurisdiction to enact legislation similar to that of the *United States Visiting Forces Act (1942)*.