1948
*Nov. 8, 9
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*Feb. 28

ADO LAANE AND FREDERICK BALTSER, (DEFENDANTS-INTERVENORS), ... APPELLANTS;

AND

THE ESTONIAN STATE CARGO & PASSENGER STEAMSHIP LINE, (PLAINTIFF), ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NEW BRUNSWICK ADMIRALTY DISTRICT

International Law—Conflicts of Laws—Courts of this country no jurisdiction to enforce penal law of foreign country of a confiscatory nature.

A decree of the Estonian Soviet Socialistic Republic, dated October 8, 1940, purported to nationalize all Estonian merchant ships, including those in foreign ports, and fixed the compensation therefor at 25 per cent of each ship's value. The *Elise* was owned by Estonian nationals and registered in that country but, at the date of the decree and always thereafter, was beyond the jurisdiction of Estonia and at the date of suit within that of Canada.

Held: that as the decree was a penal, (Rand J., political), law of a foreign country of a confiscatory nature, it would not be enforced in the Exchequer Court at the suit of a corporation established by Estonia and to which a subsequent decree purported to transfer ownership.

APPEAL from the judgment of the Exchequer Court of Canada, New Brunswick Admiralty District, (1), in favour of the plaintiffs in an action *in rem* respecting the proceeds of the sale of a foreign merchant ship.

The facts and the questions of law raised are stated in the judgments now reported.

J. Paul Barry, (and *P. A. Beck* of the New York Bar), for the appellants

C. F. Inches, K.C., for the respondent.

THE CHIEF JUSTICE: —This action is to determine the ownership of the sum of $44,177, with bank interest, which amount is held in the Admiralty Court, New Brunswick

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock and Estey JJ.

(1) 1948 Ex. C.R. 435.

Admiralty District, and represents the proceeds of the sale of the S.S. *Elise*, after payments of all claims against the vessel.

The *Elise* was a steamship owned by the co-partnership of Laane and Baltser, the appellants. She was of Estonian Registry, and was registered at Parnu, in Estonia, where the office of the appellants was also maintained. The appellants were Estonian citizens.

The *Elise* was engaged in running between the United Kingdom and Canada in the summer of 1940, and in the month of August, 1940, she arrived at the Port of Saint John in New Brunswick, having been damaged by grounding. She was arrested at the instance of certain members of the crew for wages, and sold by Order of the District Judge in Admiralty of the Province of New Brunswick. The sale was held by public auction on January 25, 1941, and the amount realized by the sale was $88,000. After payment of the crew's wages and all other claims against the ship, including one for breach of charterparty, there remained the sum which is the basis of the dispute in the present action.

In the month of June, 1940, the Union of Soviet Socialist Republics (hereinafter referred to as the U.S.S.R.) occupied the Baltic States, including Estonia, and set up a government in Estonia which passed certain laws purporting to nationalize certain properties. Two different sets of Decrees or Declarations were apparently passed.

One of the Decrees purported to establish the company (respondent in this appeal), and another Decree purported to transfer ownership of all Estonian vessels to the latter. In September, 1942, the respondent issued a summons *in rem*, claiming the balance of the proceeds of the sale of the *Elise*, and the appellants appeared in the proceedings and claimed the proceeds for themselves. The basis of the respective claims appears in the admissions which were agreed to by counsel for the appellants and the respondent.

From these admissions it appears that prior to the 17th of June, 1940, there existed the Republic of Estonia, the existence of which and the Government of which was not recognized by the Government of Canada *de facto* as it was constituted prior to June, 1940. This is so stated in a letter,

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signed by the Secretary of State for External Affairs for Canada, required by counsel for both parties for production in the Court in this case. According to this letter, the Republic of Estonia has ceased *de facto* to have any effective existence. In the same letter the Secretary of State for External Affairs stated that the Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics, but does not recognize this *de jure*. It adds that it is not possible for the Government of Canada to attach a date to this recognition. It further states that the Government of Canada recognizes the Government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia; and again it is stated that it is not possible for the Government of Canada to attach a date to this recognition. The letter of the Secretary of State for External Affairs further states that the question of the effect of a Soviet decree is for the Court to decide and not for the Government.

Prior to the 17th of June, 1940, the *Elise* was owned by the appellants, who did business in co-partnership at Parnu, in Estonia, under the firm name of "Laane and Baltser". The steamship was duly registered and was of the approximate gross tonnage of nine hundred and ninety tons. She had left Estonia prior to July, 1939, and had arrived in the Port of Saint John, New Brunswick, on or about the 15th of August, 1940, without having returned to Estonia in the meantime. She had been sailing between the United Kingdom and the Dominion of Canada only during 1940. It was while the *Elise* was in the Port of Saint John that she was arrested by virtue of several processes issued out of the Exchequer Court of Canada, New Brunswick Admiralty District; and she was ordered sold as aforesaid.

On or about June 17, 1940, a new Government was established in Estonia known as the Estonian Soviet Socialist Republic (hereinafter referred to as the E.S.S.R.). The E.S.S.R. became a constituent Republic of the U.S.S.R., and was recognized as such by the Government of Canada, *de facto* but not *de jure*, as already mentioned.

On August 28, 1940, a new constitution of the E.S.S.R. was published, and Article (6) thereof purported to nationalize the shipping enterprises of juridical and natural persons, such as joint stock companies, partnerships and large scale enterprises, together with their whole property, whatsoever it may consist of and wheresoever it may be, including deposits and current accounts in banks of the Republic and abroad, further, all rights belonging to such enterprises, such as claims to insurance sums, etc. The amount of compensation for the nationalized ships was fixed at twenty-five per cent of their value; and the Council of Peoples Commissars of the E.S.S.R. was charged with the approval of the list of shipping enterprises subject to nationalization and with the fixing of the order of payment of compensation for the nationalized ships.

According to an "Extract-Translation" from the Estonian State Gazette, the list of shipping enterprises subject to nationalization, approved by the Government of the Republic on July 28, 1940, included: "Shipping Association whose part-owners are: A. Laane and F. Baltser". This extract from the State *Gazette* of Estonia is certified to by J. Kaiv, Acting Consul General of Estonia in New York.

On October 25, 1940, there was passed a Decree of the Council of Peoples Commissars of the U.S.S.R. on the "Organization of the Estonian State Steamship Line", section (1) of which provides for the organization on the territory of the E.S.S.R. of the aforesaid line in direct subordination to the Peoples Commissariat of Maritime Fleet with the seat of its administration at Tallinn; and a copy was filed of the "Statute of the Estonian State Cargo and Passenger Steamship Line", by virtue of which the respondent line was organized as a corporation under the laws of the U.S.S.R. On June 17, 1940, and on the respective dates of the above mentioned decrees, the appellants were citizens of Estonia, residing and domiciled therein. The appellant Baltser is presently residing in Sweden.

The summons *in rem* against the proceeds of the sale of the *Elise,* claiming ownership of these proceeds by virtue of the laws of the U.S.S.R. and of the E.S.S.R., and, in particular, the Decrees herein above referred to, was issued on the 11th of September, 1942. In the summons the

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respondent claimed all rights of title and possession thereof to have been transferred to and to have become vested in the respondent, and that the latter was, therefore, entitled to the balance of the proceeds of the sale. The respondent claimed that the decrees and the statute purported to transfer and vest in it all rights of title and possession in and out of the steamship line.

Now, the dispute between the appellants and the respondent is as follows:—

In paragraph 18 of the Admissions, the plaintiff (respondent) alleges that:—

> On the basis of the facts herein recited and admitted, as a matter of law, the decrees and statute of the *de facto* government hereinabove referred to, nationalized the said steamship and entitle the plaintiff to maintain this action and to receive the said proceeds; claimed.

And the defendants (appellants) deny this allegation, contending that, as a matter of law, based upon the same facts, the decrees and the statute have not the effect alleged by the respondent; and that the said statute and decrees are (*a*) acts of a *de facto* government only, (*b*) confiscatory in nature and not recognized by our law as effective in transferring property outside of the jurisdiction of the promulgating authority, and (*c*) are contrary to the constitution of Estonia as it existed prior to June 17, 1940. All these facts and statements are borne out, either by the admissions of the parties or by the letter of the Secretary of State for External Affairs, dated January 2, 1947.

The admissions conclude by stating that the questions at issue between the plaintiff (respondent) and defendants (appellants) are:—

> (1) Were the Decrees and Statutes herein recited effective in nationalizing the Steamship *ELISE* and transferring ownership to the plaintiff herein?
>
> (2) Is the plaintiff entitled to maintain the action and receive the proceeds?

The learned trial judge, in an elaborate judgment, was of the opinion that the plaintiff (respondent) was entitled to succeed. He went on to say: (1).

> But I do not think that that conclusion disposes of the elements in the action. Although the defendants claim the entire proceeds in court "and such further and other relief as the circumstances may require," there is no specific claim, and there was no suggestion at the trial by either party, that in the event of the plaintiff succeeding on the main

(1) [1948] Ex. C.R. at pp. 480, 482.

issue the defendants' compensation for the nationalization of the *ELISE* should be first paid out of the fund under dispute. I think that a proper disposal of the case requires that I give this aspect due consideration.

* * *

I would assume from the admissions that the nationalization of the *ELISE* under the decree of October 8, 1940, was to be of immediate effect and, accordingly, the value may be taken as of that date as well. There is, however, no specific evidence of the value of the *ELISE* on that date. Under an order of the late District Judge of this Court the vessel was appraised on January 3, 1941, and reported to have a value of $112,000 "provided that she is placed in running order and back in class at Lloyds". This report adds that the above valuation "does not include extra equipment, stores or fuel on board". The *ELISE* was sold by the marshal at public auction on January 25, 1941, for $88,000. The date of sale having been only about four months subsequent to the date of the decree, it would appear fair to all concerned to take $88,000 as the basis for calculating the compensation. The allowance for compensation may therefore be taken to be $22,000. If anyone concerned places a greater value on the *ELISE*, this sum should, of course, be treated as only partial satisfaction.

H. A. Porter, K.C., on behalf of the Secretary of State of Canada, as Custodian of "enemy property" under the latest Order-in-Council (P.C. 8526) of November 13, 1943, has informed the Court that the Custodian waives the commission of two per centum chargeable on the proceeds in court by the terms of that order. The itemized account for Mr. Porter's costs with respect to all actions in connection with the *ELISE* has been approved by the respective solicitors on the record in the aggregate sum of $978.13, and they have consented to this sum being paid from the proceeds without taxation.

In view of the difficulty of the main point of law involved in this action, and of the distribution of the proceeds between the parties, there will be no order with respect to the costs of the parties in the cause or for the applications in chambers preceding the trial.

There will be a reference to the Registrar to report on the amount of the proceeds in court and the net sums payable to the plaintiff and the defendants respectively. The Registrar's fees hereafter chargeable, and the court stenographer's costs on the trial will be paid from the proceeds before payment to the parties. In the result, the defendants are entitled to the sum of $22,000 less half the above fees and costs, and the plaintiff is entitled to the balance of the proceeds then remaining. All payments will be subject to the consent of the Custodian.

I now proceed to answer the two questions at issue between the parties, referred to above.

I will not pause to inquire whether, on their true construction, the decrees had the effect of immediately nationalizing the ship *Elise,* nor if the transfer to the State or to the respondents became operative before the so-called compensation was paid to the appellants.

Mr. Kaiv, in his affidavit, stated that "the decrees and statute, dated October 8, October 25, and October 29,

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mentioned above, are the same decrees and statute discussed in the English case of *A/S Talinna Laevachisus and others* v. *Talinna S.S. Line and another* (1). The case referred to by the Consul General was decided on April 18, 1946, by Mr. Justice Atkinson, of the King's Bench Division. It was there held that the confiscatory decrees in question issued by the E.S.S.R. Government were illegal and unenforceable in English Courts. This case concerned the winding up of the Vapper Shipping Association, whose ship, *The Vapper,* was among vessels which were purported to have been nationalized under the same decrees as are here in question. It was an interpleader issue to decide the title to insurance policy moneys paid in respect of the loss through war risk; and it was claimed by the representative of the shareholders in the association owning the vessel and also by some of the individual shareholders. The effective defendants were the Estonian State Steamship Line, who contended that, the *Vapper* being among vessels which were nationalized under Estonian law in July, 1940, the plaintiffs were divested of their rights, which became vested in the Estonian State Steamship Line, who were accordingly entitled to receive the money.

Upon appeal before Lord Justice Scott, Lord Justice Tucker and Lord Justice Cohen (2), the judgment of Mr. Justice Atkinson was upheld. In the reasons of Lord Justice Scott, at p. 111, he said:—

> If the decree did apply, the legislation involved taking 75 per cent of the moneys without compensation, and English law treats as penal foreign legislation providing for compulsory acquisition of assets situate in this country, and *a fortiori* of assets which consist of *choses in action* enforceable only in English Courts, unless that legislation provides for just compensation; and 25 per cent of money cannot be just compensation.

Lord Justice Tucker, at p. 113, held that the decree did not have the effect of nationalizing the ship, the *Vapper,* as the final process of nationalization, to wit, the drawing up of a nationalization deed and transfer balance sheet, which effects the transfer of the enterprise and its assets, had not been undertaken with regard to the association or the Tallina Shipping Company. He added:—

> As a matter of construction I would, moreover, have thought that in the absence of express words, which are lacking, these decrees—although perhaps on their face purporting to transfer ships outside the jurisdiction—would not suffice to effect the assignment of a *chose in action*

(1) 79 Ll.L. Rep. 245.

(2) (1947) 80 Ll.L. Rep. 99.

situate in a foreign country * * * This decree of October 8th is legislation which could only be enacted by the Supreme Soviet of the Estonian Soviet Socialist Republic.

In the *Vapper* case evidence had been adduced that the decree was unconstitutional and, in that respect, Lord Justice Tucker added:—

> This reasoning appears on the face of it to be correct and in the absence of any evidence to the contrary must, I think, be accepted.

In *Government of the Republic of Spain et al* v. *National Bank of Scotland, Ltd.* (1), the Court of Session was seized with a somewhat similar case in connection with a claim of the Republic of Spain. In the course of the judgment of the Lord Justice-Clerk (Aitchison), the following appears at p. 426:—

> If the Decree of Requisition of the Spanish Government fell to be regarded as a confiscatory or penal law it could have no validity outside Spanish territory, and the Courts of this country, in accordance with an accepted rule of international law, would not grant their aid to the execution.

The action was dismissed.

Reference might also be made to the decision of the Court of Appeal in *The Jupiter* (No. 3), (2), that the nationalization decrees had no effect on property not situate within the territory of the U.S.S.R.; that the *Jupiter* was not at the date when the decrees were promulgated within the territory of either of the Republics which later, with others, formed the U.S.S.R., and the appeal was dismissed.

I would also like to refer to *Lorentzen* v. *Lydden & Co. Ltd.* (3), where Atkinson J. decided that a decree of the Norwegian Government had an extra-territorial effect and operated to pass the ownership of the *chose in action,* which was situate in England, to the curator appointed by the Norwegian Government, and that, therefore, the curator was entitled to maintain the action, but on the ground that the decree was not of a confiscatory character; if it had been, effect would not have been given to the decree.

On the whole, the respondent, or plaintiff, in this case had the onus of proving its right to claim the moneys in Court. In my opinion, it has completely failed to do so.

(1) [1939] S.C. 413.
(2) [1927] P. 250.
(3) [1942] 2 K.B. 202.

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The decrees relied on by it were declared illegal and unconstitutional by the English Court of Appeal in the *Talinna case*. It may be doubted whether their language was sufficient to vest the steamship *Elise* in the respondent. In the *Talinna case* it was held that they lacked the necessary wording to make them effective in that respect; and, further, that they were incomplete in the sense that the last stage to give them force of law had not been proceeded with. At the material time the *Elise* was in the Port of Saint John, Canada, a foreign country. She was then in possession of the appellants and the respondent never got possession of the ship, nor any control of her, before the ship was sold by the Marshal. The proceedings herein were instituted after the sale and were not directed against the ship herself, but against the proceeds of the sale, then deposited in a Canadian Admiralty Court.

Moreover, the decrees are of an evident confiscatory nature and, even if they purport to have extra-territorial effect, they cannot be recognized by a foreign country, under the well-established principles of international law. Quite independent of their illegality and unconstitutionality, they are not of such a character that they could be recognized in a British Court of Law.

For these reasons, the appeal should be maintained and the proceedings of the respondent dismissed. There should be an order that the proceeds of the sale of the *Elise* in Court should be paid out to Laane and Baltser except that the Registrar's fees, the Court Stenographer's costs and the total amount of the costs of the Solicitor for the Custodian of Enemy Alien Property (all of which I refer to in my judgment) should first be paid out of the fund, the balance going to the appellants as aforesaid. The appellants are entitled to their costs against the respondents in this Court and below.

KERWIN J. (Concurred in by Estey J.):—This is an appeal by Ado Laane and Frederick Baltser against a judgment of the Exchequer Court, New Brunswick Admiralty District, directing that the proceeds of the sale of the steamship *Elise,* now in Court, be paid out to the parties in the proportion of one-fourth to the appellants and three-quarters to the respondents, after the deduction

and the costs of the solicitor for the Custodian of Enemy Property.

The action was fought on the basis of a statement of admissions signed on behalf of the parties, together with the documents thereto attached. From this statement it appears that the *Elise* was owned by the defendants (the present appellants), who did business in co-partnership at Parnu, in the Republic of Estonia, where the ship was registered. It left the Republic prior to July, 1939, and never returned. During 1940 it sailed between the United Kingdom and Canada, arriving on one of its trips at Saint John, New Brunswick, on August 15, 1940. While there in port, it was arrested by virtue of several processes issued out of the Exchequer Court and it was ordered sold, the sale taking place on January 25, 1941. The sum of $88,000 was realized and, after satisfying the claims against the steamship, there was a balance on hand in Court amounting to $43,709.08, together with bank interest from December 31, 1945. Proceedings were taken by the plaintiff, The Estonian State Cargo & Passenger Steamship Line, claiming these proceeds and an appearance was entered on behalf of Laane and Baltser.

Prior to the execution of the admissions, the following letter was received by the solicitor for the appellants from the Secretary of State for External Affairs of Canada:—

Re: Estonian State Cargo and Passenger Steamship Line *v.* Proceeds of the Steamship *ELISE*.

Your letter of December 23 encloses four questions put jointly by you and Mr. C. F. Inches, representing all the parties to this action. You desire my answers to these questions for production to the court in this case.

Question 1. Does the Government of Canada recognize the right of the Council of Peoples' Commissars of U.S.S.R. or any other authority of the U.S.S.R., to make decrees purporting to be effectual in Estonia?

Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics, but does not recognize this *de jure*. The question of the effect of a Soviet decree is for the Court to decide.

Question 2. Does the Government of Canada recognize the existence of the Republic of Estonia as constituted prior to June 1940, and if not when did such recognition cease?

Answer: The Government of Canada does not recognize *de facto* the Republic of Estonia as constituted prior to June 1940. The Republic of Estonia as constituted prior to June 1940, has ceased *de facto* to have any effective existence.

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Question 3. Does the Government of Canada recognize that the Republic of Estonia has entered the Union of Soviet Socialist Republics, and if so, as from what date, and is such entry recognized as being *de facto* or *de jure*?

Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics but has not recognized this *de jure*. It is not possible for the Government of Canada to attach a date to this recognition.

Question 4. Does the Government of Canada recognize the Government of the Estonian Soviet Socialist Republic, and if so, from what date.

Answer: The Government of Canada recognizes the Government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia. It is not possible for the Government of Canada to attach a date to this recognition.

Sincerely Yours
LOUIS S. ST. LAURENT
Secretary of State for External Affairs.

The statement of agreed facts was then completed, containing the following admissions. Prior to June 17, 1940, there existed the Republic of Estonia, the existence of which, and the government of which, was recognized by the Government of Canada. On or about that date, a new government was established in Estonia known as the Estonian Soviet Socialist Republic, hereafter called the E.S.S.R. This E.S.S.R. became a constituent republic of the Union of Soviet Socialist Republics (Soviet Russia), hereafter referred to as U.S.S.R., and according to the letter from the Secretary of State for External Affairs was recognized as such by the Government of Canada *de facto* but not *de jure* but, as appears from the letter, without it being possible to attach a date to this recognition.

On August 28, 1940, a new constitution of the E.S.S.R. was published, of which article 6 declares water transportation to be state property. On August 1, 1940, the newly established government passed a decree or regulation concerning the movement of ships. Considerable discussion occurred in the Court below and at bar as to the precise meaning and effect of paragraph 11 of the admissions, which reads as follows:—

11. That on October 8, 1940, there was passed a decree of the Presidium of the Provisional Supreme Soviet of the E.S.S.R. on Nationalization of Shipping Enterprises and Seagoing Ships and Riverboats, Section 1 of which purports to nationalize, *inter alia*, the Steamship *ELISE* "wheresoever it may be" and Section 2 of which fixes the amount of compensation to be 25 per cent of its value; a copy of this Decree is hereto annexed marked "C".

Coupled with this must be read paragraphs 18 and 19:—

18. The plaintiff alleges that on the basis of the facts herein recited and admitted, as a matter of law, the decrees and statute of the *de facto* Government hereinabove referred to, nationalized the said steamship and entitle the plaintiff to maintain this action and to receive the said proceeds; and the defendants deny this allegation, contending that as a matter of law, based upon the said facts herein recited and admitted, the said decrees do not have the effect alleged by the plaintiff and that the said statute and decrees are (*a*) acts of a *de facto* government only, (*b*) confiscatory in nature and not recognized by our law as effective in transferring property outside of the jurisdiction of the promulgating authority and (*c*) are contrary to the constitution of Estonia as it existed prior to June 17, 1940.

19. That the questions at issue between the plaintiff and defendant, are:

(1) Were the Decrees and Statutes herein recited effective in nationalizing the steamship *ELISE* and transferring ownership to the plaintiff herein?

(2) Is the Plaintiff entitled to maintain the action and receive the proceeds?

Other paragraphs in the admissions show that the plaintiff is a corporation organized under the laws of the U.S.S.R. and no question really arises as to its right to sue. As of June 17, 1940, and on the respective dates of the decrees above mentioned, Laane and Baltser were admittedly citizens of Estonia, residing and domiciled therein.

Reading paragraphs 11, 18 and 19 together, I concur with the trial judge that without it being necessary to call evidence to prove the applicable law, the parties have agreed that the decree of October 8, 1940, nationalized the *Elise* "wheresoever it may be" and fixed the compensation therefor at 25 per cent of its value. This construction is borne out by the proceedings that were taken with a view of taking evidence by commission and then abandoned in view of the agreed statement of facts. I also agree that the affidavit of Mr. Kaiv expresses an opinion with respect to the law of the former Republic of Estonia as constituted prior to June, 1940. The answer of the Secretary of State for External Affairs to question 2 shows that such republic has ceased to have any effective existence and Mr. Kaiv's opinion is therefore irrelevant.

The effect of such a nationalization decree in the Courts of Canada is a different matter. On October 8, 1940, the ship was not in the jurisdiction of the new republic and,

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therefore, the decision in *Luther* v. *Sagor* (1), has no application as the goods there in question were at the date of the decree of the Russian Socialist Federal Soviet Republic within the jurisdiction of that country. Even a public ship in foreign waters is not, and is not treated as, territory of her own nation: *Chung Chi Cheung* v. *The King* (2). The authorities cited in a note to rule 54 in the 5th edition of Dicey's *Conflict of Laws* at page 212 establish that the Courts of this country have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign state. Confiscation of the property in England of the former King of Spain was considered as penal legislation in *Banco de Vizcaya* v. *Don Alfonso* (3). *Huntington* v. *Attrill* (4), referred to in the reasons for judgment in the Court below, was merely a decision that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights was remedial and not penal. I quite agree that the decision in the *Jupiter* (No. 3), (5), was dealing with a decree which the Court found did not even purport to have extra-territorial operation, but the reasoning of the Lord Ordinary in *Government of Republic of Spain* v. *National Bank of Scotland* (6), and that of Lord Justice Scott in *A/S Tallinna Laevahius* v. *Estonia State S.S. Line* (7), appeal to me as being correct statements of the law applicable.

In my view the decree of October 8, 1940, is of a confiscatory nature just as much as if the compensation had been fixed at one per centum. It is not in the same class as that considered by Atkinson J. in *Lorentzen* v. *Lydden & Co.* (8), where the Norwegian Government, on the eve of taking its departure for England, passed an Order in Council by which all ships registered in Norway, that were outside the German occupied area, were requisitioned, and it was provided that compensation should be fixed according to Norwegian law. Nor are we dealing with a case where a foreign government is in possession and attempts are made to implead it. The plaintiffs here bring the action, and the decree in question being of a confis-

(1) [1921] 3 K.B. 532.
(2) [1939] A.C. 160.
(3) [1935] 1 K.B. 140.
(4) [1893] A.C. 150.
(5) [1927] P. 122.
(6) [1939] S.C. 413 at 421.
(7) (1947) Ll. Rep. 99 at 111.
(8) [1942] 2 K.B. 202 at 212.

catory nature, the rule to be applied is correctly set forth in Cheshire's *Private International Law,* 3rd edition, p. 180: —"If the previous owner is in possession, his legal ownership is, in the view of English law, unaffected by the confiscatory legislation of a foreign sovereign."

For these reasons I would set aside the judgment *a quo* and substitute therefor an order that there be paid out of the proceeds in Court of the sale of the *Elise* the total amount of the Registrar's fees and Court Stenographer's costs and the total amount of the costs of the solicitor for the Custodian of Enemy Property (all of which are referred to in the judgment appealed from) and that the balance be paid out to Laane and Baltser. The appellants are entitled to their costs against the respondents in this Court and in the Exchequer Court.

RAND J.:—The facts as, for the purposes of this appeal, I assume them to be, can be shortly stated. The vessel *Elise* during the summer of 1940 was engaged in running between the United Kingdom and Canada. She was owned by the appellants, Laane & Baltser, Estonian citizens carrying on business in partnership at Parnu, Estonia, where the vessel was registered. In August, 1940, while at Saint John, New Brunswick, she was arrested for wages and detained until January 25, 1941, when she was sold under an order of the Admiralty Court.

In June, 1940, the U.S.S.R. occupied Estonia and on or about the 17th of that month a soviet government of the state was set up. In July, 1941, the country was invaded by German forces which maintained military control until driven out in September, 1944, when the former government re-assumed power. On October 8, 1940, a decree passed by the appropriate authority purported to nationalize all Estonian merchant vessels including those in foreign ports; on October 25th a decree of the Council of People's Commissars, U.S.S.R., of which Estonia was a constituent republic, provided for the organization of the Estonian State Steamship Line, which I take to be the respondent, and was followed by what is called a statute of the Line, setting up its constitution. The property in all state vessels thereupon became vested in the respondent.

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The *Elise* was at all times held by those in charge of her for the original owners. The respondent now lays claim to the balance of the proceeds from the sale.

The local Judge in Admiralty held the vessel to be *in transitu* as distinguished from being locally situate at Saint John, that the law applicable to her was that of her registry, Estonia, and that effect must accordingly be given to the decrees. Subject to a deduction of 25 per cent which the October decree provides as compensation for the taking, the funds in court were therefore awarded to the state corporation.

Whatever may be the significance or the legal consequences of a vessel being *in transitu* there can be no doubt that once a private ship is voluntarily brought within a country's territory it is submitted to the laws of that country. The jurisdiction arising is primary and fundamental; but the particular law to be applied to determine legal relations in respect of the vessel is quite another matter. But, whether viewed as recognition of legal effects of foreign law or as affirmative enforcement of foreign law, that its application is through the act and authority of the territorial state follows from the language of Chief Justice Marshall in *Schooner Exchange* v. *M'Fadden* (1):—

> 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.

There is the every-day attribution of the law of the domicile of a deceased person to the succession of moveable property in the foreign territorial jurisdiction; but that attribution lies within the determination of the territorial state and the law of the domicile may in a proper case be modified or disregarded: *Marjoribanks* v. *Askem* (2); *Re Selot's Trust* (3); *Dicey,* 5th Ed., 454 and 535. In such case, the territorial law, subject, it may be, to national interests such as the payment of local debts, vests vacant property in a new ownership; but it would be a contradiction of the original postulate to treat the foreign law as operating through its own jurisdictional efficacy. The result of so conceiving the legal effectuation may make little or no difference in the general run of cases, but it furnishes a guidance in such instances as the present which

(1) (1812) 7 Cranch, 116 at 136.
(2) [1930] 2 Ch. 259 at 275.
(3) [1902] 1 Ch. 488.

the other conception does not appear to do. A like illustration is furnished by bankruptcy where the foreign jurisdiction lends such aid as it thinks proper to what is considered to be a desirable universal distribution of assets among creditors by recognizing the title of the assignee obtained in the principal administration: *Dicey,* 5th Ed., pp. 498-9.

Nor is the operation of the local law here affected by the principle of "immunity". That term connotes the negative aspect, abstention or forebearance of law and its processes. Here the local law must decide ownership to the fund in court and deliver possession of it as it would of the vessel. The principle is illustrated by cases in which the foreign sovereignty itself in some form enters the territorial jurisdiction.

In dealing with ships, there are, undoubtedly, special considerations to be taken into account. Registered vessels have not, ordinarily, an actual localization. They enter world commerce and in the interest of international commercial relations of great magnitude and complexity, rules of practical convenience commanding general assent are a virtual necessity. For that reason, the law of the registry has been accorded special regard, and in important respects it is accepted as governing the vessel: *Dicey,* 5th Ed., pp. 342, 348, 996 *et seq.*

But convenience and expediency are merely relevant factors in reaching the juridical determination; the application is by the territorial power and jurisdictionally with such modifications of a foreign rule as it pleases. It is what we should expect, therefore, that there are certain rules, more or less clearly defined, by which the enforcement in the domestic forum of a foreign law is refused.

It is now established that a common law jurisdiction will not enforce directly or indirectly the penal or the revenue laws of another state, to which Dicey in Rule 54, 5th Ed., adds, political law; and there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy.

The first question then is whether there is some such policy of New Brunswick with which the confirmation of the attempted acquisition of this vessel by Estonia would conflict. The taking of property for public purposes with-

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out compensation certainly clashes with our notions of the conditions which should attend the exercise of that power, and I should not view the proposed award of 25 per cent of the value as avoiding that conflict. The provincial law is invoked to effect the transfer of the appellant's property on those terms: and we must ask whether the considerations of international expediency so far transcend normal policy as to overcome the repugnance of our political conceptions toward such an act. I do not think they do.

The effect of the decrees bears elements also of analogy to the operation of a revenue law. A state imposes a tax as a small fraction of the property of its citizens, and it is taken for a public purpose. But whether the fraction is five or seventy-five per cent and even though limited to certain classes of property, coercion and public object are common to both cases. We refuse to aid a neighbour state in collecting the lesser exaction even though taxation is universally accepted as a proper state faculty; on what ground should we enforce the greater?

But there is what I think a still more important aspect in which the question is to be viewed. The acquisition of property here is not to be dissociated from the larger political policy of which it is in reality an incident. The matters before us evidence the fundamental change effected in the constitution of the Estonian state, of which that acquisition is only one, though an important, particular. What has been set up is a social organization in which the dominant position of the individual, as recognized in our polity, has been repudiated and in which the institution of private property, so far as that has to do with producing goods and services, has been abolished; and those functions, together with the existing means, taken over by the state. If at the time of the decrees every Estonian ship had been sunk, their principal purpose would still have been realized in vesting in the state, apart from ports and immoveable works in Estonia, the monopoly of carrying on shipping services.

What is asked of the foreign territorial law is, therefore, to aid in the execution of a fundamental political law of Estonia which serves no interest of the foreign state. The law of conflicts is concerned with the determination of rights in property and personal relations which are con-

ceived as distinct from the law under which they arise; but laws of the class in question are not migratory and are deemed to be operative only within their own territories. If the transfer of property by such a law of Estonia has been satisfied by the condition of territorial jurisdiction, the title will be recognized and enforced, as in England the similar decrees of Russia: *Luther* v. *Sagor* (1). But where that legislative basis is absent there is no warrant in international accommodation to call upon another state to exercise its sovereign power to supply the jurisdictional deficiency in completing such a political program: *Ingenohl* v. *Wing On & Co.* (2); *Carling* v. *The King* (3); *Emperor of Austria* v. *Day* (4); *Dicey,* 7th Ed. pp. 212, 214. *Lorentzen* v. *Lydden* (5) is quite distinguishable. There the King of Norway, as *parens patriae,* was empowered to act for his subjects held in an enemy occupied zone by taking steps necessary to the protection of their property rights. It was an administrative enactment with procedural incidents which involved no question of political policy.

I would, therefore, allow the appeal and direct judgment in favour of the appellants with costs in both courts.

KELLOCK J.:—It is admitted in this case that the steamship *Elise,* the proceeds of which are here in question, was prior to June 17, 1940, owned by the appellants and that by July of 1939 the ship had left the Republic of Estonia and had arrived at Saint John, N.B., on or about the 15th of August, 1940, without having returned at any time to Estonia. While at Saint John the vessel was arrested and ultimately sold in January, 1941. The admissions further state that on or about June 17, 1940, a new government was established in Estonia known as the Estonian Soviet Socialist Republic, referred to in the admissions as the E.S.S.R., and that the E.S.S.R. became a constituent republic of the Union of the Soviet Socialist Republics, being recognized by the Government of Canada *de facto* but not *de jure.*

The earliest relevant decree of this new state is that of October 8, 1940, which, according to the admissions, pur-

(1) [1921] 3 K.B. 532.
(2) (1927) 44 R.P.C. 343 at 359.
(3) [1931] A.C. 435.
(4) (1861) 3 De G.F. & J. 217; 45 E.R. 861.
(5) [1942] 2 K.B. 202.

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ports to vest the title to the ship in the respondent. The decree entitles the owners to compensation fixed at twenty-five per cent of the *value* of the ship. Seventy-five per cent of the value is thus taken without compensation.

The question at issue between the parties is the efficacy under the law of New Brunswick of this legislation.

In Dicey, 5th Ed., p. 610, note (*k*), it is stated that "if movables are outside the territory of a confiscating power then clearly the extra-territorial effect cannot be claimed as of right". Such effect depends upon the consent of the *lex situs; Schooner Exchange* v. *M'Fadden* (1). In my opinion the law of England or of New Brunswick accords no such consent. All of the decisions and expressions of judicial opinion to which we have been referred or which I have been able to find, support this view.

In *Barclay* v. *Russell* (2), the claim of the State of Maryland to bank stock in England which had been vested in trustees under legislation of the old colony of Maryland before the war of Independence, the claim being rested upon legislation of the state subsequent thereto, was denied. At page 434 the Lord Chancellor said:

> I find no general principle carrying it farther, than that the new-formed Government may invest itself with all the rights, that it can command: no farther.

In *Lecouturier* v. *Rey* (3), Lord Macnaghten said at 265:

> To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market.

Lord Loreburn L.C. said at p. 273:

> * * * but this property * * * is property situated in England, and must therefore be regulated and disposed of in accordance with the law of England.

In *Ingenohl* v. *Wing On & Co.* (4), it was held by the Privy Council, that the purchase from the American Custodian of Alien Property of a business in the Philippines, together with the good will and trade-marks, could not transfer to the purchaser the title to trade-marks or trade names in China. Earlier in the same year in the case

(1) (1812) 7 Cranch 116.
(2) (1797) 3 Ves. Tr. 423.
(3) [1910] A.C. 262.
(4) (1927) 44 R.P.C. 343.

Ingenohl v. *Olsen & Co.* (1), the Supreme Court of the United States had before it an appeal from a judgment of the Supreme Court of the Philippines arising out of the same sale in which the original owner of the Philippine business, who also carried on business at Hongkong, had obtained a judgment for costs against the defendants in an action brought to restrain the defendants from infringing the plaintiff's trade-marks in Hongkong.

In giving the opinion of the court Mr. Justice Holmes said at p. 544:

> A trade-mark started elsewhere would depend for its protection in Hongkong upon the law prevailing in Hongkong and would confer no rights except by the consent of that law * * * If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States.

And at page 545:

> * * * but no principle requires the transfer to be given effect outside of the United States. * * *

In the *El Condado* (2), there was in question a claim by the Government of the Republic of Spain against the National Bank of Scotland for loss alleged to have been sustained by reason of the granting of an interim interdict at the instance of the defendants, under which the use of the steamship there in question had been lost to the plaintiff for a considerable period. The pursuer's claim to the ship was based on a decree of the Republic Government of Spain and it was alleged that the Spanish Consul at Glasgow had taken possession. The defence was, *inter alia*, that the decree was ineffectual to attach property outside Spanish territorial waters. In giving judgment at the trial Lord Jamieson said at p. 87:

> While our Courts will treat as binding legislation of a confiscatory character enacted by a foreign Government recognized by His Majesty's Government as a Sovereign Government so far as affecting property within the foreign Government's jurisdiction, such legislation will not be held to affect property situated in this country or out with the territory administered by such Government.

This judgment was upheld on appeal.

Again in *A.G. Der Manufacturen, I. A. Woronin etc.*, v. *Huth & Co.* (3), in an action brought by a Russian company against a firm of bankers in London claiming certain

(1) 273 U.S. 541.
(2) (1930) 63 Ll. L. Rep. 83.
(3) (1928) 79 Ll. L. Rep. 262.

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war bonds and moneys which it was alleged the defendants held on behalf of the plaintiff company, the defendants' main contention was that by reason of certain Russian legislation either the company had ceased to exist or those claiming to initiate or ratify the issue of the writ in the name of the company had no right so to do.

It was held by Wright J., as he then was, that the confiscatory decrees there in question had no extra-territorial effect. He cited the opinion of Lord Cave, L.C., in *Employers' Liability Assce. Co.* v. *Sedgwick Collins & Co.*, (1), and that of Sargant L.J. in the Court of Appeal in the same case, (2), as well as that of Hill J. in the Court of Appeal in *The Jupiter* (No. 3), (3), *Lecouturier* v. *Rey* (4), and the cases cited in Dicey on Conflict of Laws, 4th Ed., page 576, note (*h*), now 5th Ed., page 610, note (*k*).

The case *A/S Tallinna, etc.* v. *Tallinna Shipping Co., Ltd. et al* (5), before Atkinson J. and on appeal, 80 Ll.L.R., page 99, was an interpleader issue to decide the title to certain policy moneys paid in respect of loss through war risk of the Estonian Steamship *Vapper* in July, 1945. The money was claimed by the plaintiffs and individual shareholders in the association owning the vessel. The effective defendants were the Estonian State Steamship Line, who contended that the *Vapper*, being among vessels nationalized under Estonian law in July, 1940, became vested in them. It was held that this legislation had not been proved, but in the course of his judgment Atkinson J. said at p. 256:

> There can be no question but that this legislation that followed was confiscatory in character, and it is well settled that our Courts will not give effect to legislation of that kind.

The judgment was upheld on appeal, 80 Ll.L.R., 99. In the view of Scott L.J., at p. 111, the legislation, had it been proved, was to be regarded as penal and non-enforceable. As to its penal character however, one might compare what was said by Viscount Haldane in *Ingenohl* v. *Wing On, supra* at 359, and to *Huntington* v. *Attrill* (6).

On the main question reference may also be made to of certain Registrar's fees and Court Stenographer's costs

(1) [1927] A.C. 95.
(2) [1926] 1 K.B. 1
(3) [1927] P. 122, 250.
(4) [1910] A.C. 262.
(5) 79 Ll. L. Rep. 245.
(6) [1893] A.C. 150.

the view of Viscount Cave and Lord Sumner in *Russian, etc. Bank* v. *Comptoir d'Escompte* (1), at 125, and of Lord Finlay at 137.

There remains for consideration the judgment of Atkinson J. in *Lorentzen* v. *Lydden & Co.* (2), at 202. In that case the Norwegian government had issued a decree requisitioning all ships registered in Norway situated outside the area occupied by the Germans and owned by, *inter alia,* a company carrying on business in that area. The decree provided however, for compensation to the owners. The curator appointed under the decree brought action on behalf of the owners of a vessel covered by its terms against the defendants, a firm carrying on business in London, to recover damages for breach by the latter of a contract of charter. The defendants denied any right in the curator to collect claims belonging to the owners of the vessel and denied the right of the Norwegian government by legislative or executive act to transfer the title to claims or other property situated in England. At page 215 Atkinson J. said:

> It seems to me that the English courts are entitled to take into consideration the following matters: that this is not a confiscatory decree, see art. 5 of the decree, that England and Norway are engaged together in a desperate war for their existence, and that public policy demands that effect should be given to this decree * * * It is not confiscatory, it is in the interests of public policy, and it is in accordance with the comity of nations.

Whatever may be the true basis upon which this judgment rests it was not regarded by Atkinson J. himself in the later case of the *Vapper* as being at all relevant to the decision in that case as it was not mentioned.

I would therefore allow the appeal and answer in favour of the appellants the questions asked. I concur in the order proposed by my brother Kerwin.

Appeal allowed.

Solicitor for the appellants: *J. Paul Barry.*

Solicitors for the respondent: *Inches & Hazen.*

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(1) [1925] A.C. 112.

(2) [1942] 2 K.B. 202.