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Thesis

"WAR - TIME" LEGISLATION

SARAH DHEMAN

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Canada today is a country at war. As such her people are vitally concerned with every phase of the war effort. Amid the maze of political ideas, practical military mechanics and propoganda that becloud the mind of the law student, there still remains a question that calls for consideration in every student mind-----that is the problem of legislation which has arisen as a result of the war.

It might be well to state at the outset that in certain respects a discussion of the effect of this legislation can at best be purely conjectural. The reason for this is obvious the fact that in many cases there have been few if any occasions in which this legislation has been tested, and as a result the number of decided cases is either negligible or completely lacking.

The amount of legislation which has arisen as a result of the war is indeed great and its subject matter varied. There are nevertheless two phases which are particularly significant, and it is with those that I propose to deal.

The first of these is the dominant feature in all war-time regulations the defence and protection of one's country. In connection with this point I propose to deal with the DEFENCE OF CANADA REGULATIONS (1), its purpose and the extent to which that purpose has been successfully carried out by our courts.

(1) 1940 Consolidation

Secondly in order to get away from the conception of war-time legislation as purely defence measures and to deal with the topic from a different (andperhaps wider) aspect, I will briefly point out the effect of war time legislation on trade and commerce, with references to relevant sections of Trading with the Enemy(2).

The principle which the framers of the Defence of Canada Regulations (passed under and by virtue of the War Measures Act (3)) kept in mind in formulating the act is set out in regulation one.

"(1) The ordinary avocations of life and the enjoyment of property will be interfered with as little as may be permitted by the exigencies of the measures which may be required to be taken for securing the public safety and the defence of Canada."

The remainder of Part 1 of the Act is comprized of Regulation 2, which is an interpretation section.

In order to obtain a complete picture of the act I will

(2) 1939 Consolidation

(3) 1927 R. S. C. Chapter 206

skim through the various parts of the act dwelling at greater length on those sections which have been dealt with in decided cases and giving where possible an analysis or criticism of the reasoning in the judgments.

Part 11 of the Act deals with Espionage and Acts likely to assist the enemy. Secs. 3-8 gives the right to set aside certain areas as protected areas or controlled areas and sets out regulations pertaining thereto. "The Minister of National Defence, if he considers it necessary in the interests of the safety of the State so to do, may by order provide for the stopping up or diversion of any highway passing through any protected place or works of defence, or through any land adjoining any such place or works, and for prohibiting or restricting the exercise of any right or way over, or the use of any waterway passing through any such place, works or land as aforesaid" (Sec.8). Secs. 9-19 concern themselves with control of means of communication. Secs. 9-14 deal, inter alia, with the power of the Minister of Transport to control signalling to foreign vessels and aircraft; to enter and control radio, cable, radiotelegraph, telegraph, or telephone companies; and the right of the Postmaster General to regulate postal communications, search persons leaving Canada, censor mail and undeveloped films in the mail.

Regulation 15 (1) reads as follows: "The Secretary of State of Canada may make provision by order for preventing or restricting the publication in Canada of matters as to which he is satisfied that the publication, or, as the case may be, the unrestricted publication, thereof would or might be prejudicial to the safety of the State or the efficient prosecution of the war, and an order under this paragraph may contain such incidental and supplementary provisions as may appear to the Secretary of State to be necessary or expedient for the purposes of the order including provisions for securing that documents, pictorial representations, photographs or cinematograph films shall, before publication, be submitted or exhibited to such authority or person as may be specified in such order." In the case of Yasny v. Lapointe (4) the Manitoba Court of Appeal dealt with this section. The facts of the case are set out below:

A member of the Executive Government, the Acting Secretary of State of Canada, made an order under Regulation 15 of the Defence of Canada Regulations prohibiting the publication of a Russian language newspaper, on the ground that it had disseminated subversive and pro-Nazi propaganda among persons of Russian origin in Western Canada with a view to assisting the enemy and undermining the loyalty of

(4) 48 M.R. 56 and also (1940) 2 W.W.R. 372

such persons to Canada. On an application for a rule nisi in certiorari to quash the order.

HELD that:

[*McLachlin & M. R.*]

- (1) The War Measures Act affords ample statutory foundation for Regulation¹⁵ of the Defence of Canada Regulations.
- (2) The order in question came within the language of Regulation 15.
- (3) The means the Minister may take to satisfy himself that the case is one for action under Regulation 15, must be in his own discretion, with responsibility only to Parl't. He must rely on what seem to him to be worthy sources of information; and the Royal Canadian Mounted Police Force is at hand for that very purpose.
- (4) The question whether a perusal would show that the banned newspaper, instead of being subversive and pro-Nazi, was anti-Nazi and pro-democratic, was one which for the purposes of Regulation 15 was solely within the judgment of the Minister; and
- (5) Where ministerial action is within the scope of the War Measures Act, the exercise of ministerial discretion in applying the Act to any particular matter is not subject to the interference of the Courts, and therefore, so long as no provision of the Act is infringed, the steps taken precedent to such exercise of discretion cannot be inquired into on certiorari.

Per Trueman, J.A. (dissenting): The legality of said order is subject to investigation by the Court and the review is obtainable by a writ of certiorari, since the writ is not limited to judicial orders or acts in the strict sense but extends to acts and orders of a competent authority which has power to impose a liability or give a decision which determines the right or property of the affected parties. The order in question is bad on its face because it does not state that the condition of the exercise of the authority vested by Regulation 15 in the Secretary of State has been fulfilled, viz., that "he is satisfied that the publication is or may be prejudicial to the safety of the State or the efficient prosecution of the war."

It would seem that in respect to certain points this case went too far. The wording of the act with which the case dealt stated that the Secretary of State of Canada may make provision by order for preventing or restricting the publication of MATTERS etc. It is doubtful whether the framers of the Regulation meant the word matters to include the "closing up" of a specific publication in toto---rather the construction that might well have been put upon this section is that it was meant to refer to the subject matter to appear in any newspaper. Gordon in his article on War Measures (5) brings this point forth:

"One question not touched on in the reported judgments that

seemingly might well have been raised, is whether the

framers of the Regulation ever contemplated that the Secretary of State would make an order of the type before the court, that is an order prohibiting a particular publication, and whether the intent was not merely that the Secretary of State should make orders in the nature of proclamations for the purpose of specifying with particularity what type of published matters would be considered from time to time prejudicial to public safety or the efficient prosecution of the war, but leaving the enforcement of these "orders" to ordinary tribunals.

So far as the report shows the Secretary's making his order without any hearing or notice to the publisher does not seem to have been one of the grounds raised for quashing the order. Yet frequently it has been held that administrative tribunals have as much a duty as judicial tribunals to observe the audi alteram partem rule, though they need not give a party affected an oral hearing. Admittedly in peace time the courts would be extremely reluctant to construe any language not absolutely intractable as giving power to any official to take away a man's livelihood without formal trial; but in war time the legislature's intention to confer drastic powers becomes far more probable, for such powers, even if an evil in one sense, become almost a necessary evil.

Let us see how the Regulation would work practically if the Secretary had to be satisfied of a publisher's wrong in the sense that a magistrate is satisfied on convicting,

A finding of guilt is a finding on something already done, but what the Regulation contemplates is the Secretary's being satisfied (on is) that publication "would or might be prejudicial to the safety of the State or the efficient prosecution of the war....." The fact that the Secretary is to prevent what "might" happen suggests also that he is to act from consideration of expediency and not of legal misconduct."

It would appear that on the question of certiorari the Court of Appeal decided rightly, but the decision on the section manifestly indicates that the question of the interpretation of the wording of the section was not thoroughly enough discussed. Dennistoun J.A. stated that "In time of peace the civil rights of the people, the liberty of the subject, the rights of free speech, and the freedom of the press, are entrusted to the Courts. In war time this ^{may} be changed. Parliament may take from the Courts their judicial discretion and substitute for it the autocracy of bureaucrats." The purpose of the Courts then is to enforce these Regulations----they are the law by which we are bound. Even allowing for the exigencies of war it would seem that for reasons of public policy where an administrative officer is permitted to wield an arbitrary weapon that ~~it~~ would be well that he should as far as

possible keep those powers within the four corners of the statute. The section gives the Secretary of State wide powers. He may use any means which he deems correct to determine whether or not the matters are prejudicial to the safety of the State and also may make any provision which may be "necessary or expedient." If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to the Secretary to extend them. In the case at hand the Secretary should have dealt with the particular matter which was subversive rather than to have declared the entire publication to be subversive.

I will further illustrate my point with a brief reference to an English case, E.H. Jones (Machine Tools), Ltd. v. Farrell and Muirsmith (6) which has created a great deal of "eye-brow" raising and comment in legal circles. It was held in that case that the Emergency Powers (Defence) Act, 1939, s.1 (2) authorizing the making of regulations to take "possession and control" of an undertaking, did not include the right to "carry on" an undertaking and the Defence (General Regulations) 1939, reg. 55 made under the powers of that subsection was therefore ultra vires and invalid.

(6) (1940) 3 All England Reports 608.

In discussing this case with Canadian decisions on the Defence of Canada Regulations a writer in a humorous vein stated that: "A succession of cases involving the construction of the Defence of Canada Regulations illustrates a degree of judicial self-restraint in the face of executive action which finds no parallel in time of peace. If E. H. Jones (Machine Tools) Ltd. v. Farrell and Muirsmith is typical of the attitude of the English courts towards similar emergency regulations in England, one might hazard the opinion that judicial abnegation varies directly with the distance from the actual theatre of war

I set forth the English case here neither because I believe that the decision was well founded (on the contrary, I do not), nor because the issues are in any way similar to those in the Yasný case but rather to illustrate that our court of appeal might well have put a stricter interpretation on Reg. 15 without ^{violating} vindicating the principles of British justice as laid down by English courts and also present at the outset to the mind of the reader a challenge as to the degree to which judicial self-restraint should be practiced in time of peace.

Regulations 16-19 of the Defence of Canada Regulations deal with Safeguarding Information Useful to the Enemy.

Regulation 16 reads as follows:

"No person shall, in any manner likely to prejudice the safety of the State or the efficient prosecution of the war, obtain,

record, communicate to any other person, publish, or have in his possession any document or other record whatsoever containing, or conveying any information being, or purporting to be, information with respect to any of the following matters, that is to say:-

- (a) the number, description, armament, equipment, disposition, movement or condition of any of His Majesty's forces, vessels or aircraft;
- (b) any operation or projected operations of any of his Majesty's forces, vessels or aircraft;
- (c) any measures for the defence or fortification of any place on behalf of His Majesty;
- (d) the number, description or location of any prisoners of war;
- (e) munitions of war;
- (f) any other matter whatsoever information as to which would or might be directly or indirectly useful to the enemy.

In Rex v. Bronny (7) the British Columbia Court of Appeal considered the application of ss.d of sec. 16. In that case the wife of an interned enemy alien was found in possession of a detailed sketch of a camp where her husband and prisoners of war were interned.

HELD; Although it was possible she had no criminal intent in possessing such sketch she must nevertheless be convicted, for the safety of the State might be endangered by the escape of prisoners of war, which might be facilitated by the possession, in a confederate's hands of a detailed sketch of the ground.

It was further held that mens rea is not a constituent element of the offence described by sec. 16 (d) of the Defence of Canada Regulations and it is not necessary to prove that the accused's conduct would endanger the safety of the State. The Court need only be satisfied, with that degree of certainty necessary in criminal prosecutions, that accused's conduct was likely to prejudice the safety of the State.

This appears to be a clear cut case. Macdonald C.J.B.C followed the Ontario case of Rex v. Stewart (which I will deal with later) in concluding that mens rea was not a necessary constituent of the offence. The word "likely" precludes the necessity of specifically proving that harm to the safety of the State would ensue, while the use of the word "any" record^{before document or other} etc. also gives a broad scope to the section. However, it would seem that this action might have been brought under sec. 18 (1) (a) which deals more specifically with sketches of protected places. *? Is this a sketch of a protected place?*

Sec. 17 of the Regulations prohibits communications with enemy agents. The restriction of the publication of any photograph, sketch, plan or other representation of protected places is the subject matter of sec. 18. Sec. 18 A deals with the necessity of having insurance inspectors furnished with a card of identification by the Commissioner of the Royal Mounted Police. Sec. 19 illustrates the power to restrict

applications for the grant of patents, to compel persons to give information regarding patents and the right to avoid or suspend licences for patents.

Secs. 20-23 are concerned with Restrictions on Movements and Activities of Persons. Sec. 21 (1) (c) is particularly important. The section reads as follows:

21.(1) The Minister of Justice, if satisfied, that with a view to preventing any particular person, from acting in any manner prejudicial to the public safety or the safety of the State it is necessary so to do, may, notwithstanding anything in these Regulations, make an order:-

(c) directing that he be detained in such place, and under such conditions, as the Minister of Justice may from time to time determine;

and any person, shall, while detained by virtue of an order made under this paragraph, be deemed to be in legal custody.

In re' Penner and Nawizowski (8) dealt with this section. It was held in that case that regulation 21 was an enabling provision, and a general order made by the Minister fixing as the place of detention under regulation 21 the internment camps provided for prisoners of war is a sufficient compliance therewith. Therefore an order in the form of the Minister's initialled approval of a recommendation that he order the detention of certain persons under 21(1) is valid, notwithstanding (8) (1940) 4 D.L.R. 428 On appeal (1941) 1 W.W.R. 32

ing that no place of detention is specified therein and notwithstanding the form of the order. On appeal to the Court of Appeal before Prendergast, C.J.M., Dennistoun and Trueman, JJ. A. from an order of Robson J, the appeal, ^{heard} being on September 5, 1940 (8) was dismissed, without written reasons.

This case expressly indicates that the Defence of Canada Regulations are far more liberally construed than the criminal law.

Regulation 23 forbids any person to knowingly assist a prisoner of war to escape from custody or knowingly harbour an escaped prisoner of war or give an escaped prisoner of war any assistance with intent thereby to prevent, hinder or interfere with the apprehension of the prisoner.

Regulations 24-26B inclusive deal with Enemy Aliens.

Regulation 24 (1) All enemy aliens legally admitted to Canada and ordinarily resident in Canada, so long as they peacefully pursue their ordinary avocations, shall be allowed to continue to enjoy the protection of the law and shall be accorded the respect and consideration due to peaceful and law-abiding citizens, and they shall not be arrested, detained or interfered with, provided they comply with the requirements in respect of registration prescribed in the next following Regulation, unless

the Minister of Justice is satisfied that they have acted, or may act, in any manner prejudicial to the public safety of the State.

In the Ontario case of Trefnick v. Martin, the plaintiff brought herself within Reg. 24 (9). The plaintiff was an Austrian and her husband was a German, born in Germany but he had resided in Canada since 1929. An application for his naturalization was pending. Held: that the plaintiff came within Regulation 24 of the Defence of Canada Regulations, which conferred upon her the right to maintain her action in the Ontario Courts. Defendant's motion to dismiss plaintiff's action because she was an alien enemy was dismissed.

The remainder of the regulations in this part deal with registration of aliens and internment.

Regulations 27-31 concern themselves with Sabotage and Misrepresentation. They forbid impairing the efficiency of any vessel, aircraft etc., interference with telegraphic communications and with His Majesty's forces. Regulation 29 contains the proviso: "Provided that a person shall not be guilty of an offence under this Regulation by reason only of his taking part in, or peacefully persuading any other person to take part in, a strike"

The subject of Part III is Public Safety and Order.

The regulations under this part deal with the powers given in the event of hostilities commencing here. Inter alia, they give the right to evacuate certain areas, right to seek protection during an attack, and further deal with damage to premises, contamination by gas, control of lights and sound, power to require inhabitants to remain indoors, to seize explosives, ammunition and firearms, licences for firearms, and the manufacture of and transport of dangerous articles.

Regulations 39, 39A and 39B have caused considerable controversy. Regulation 39 reads as follows:

39. "No person shall

(a) spread reports or make statements intended or likely to cause disaffection to His Majesty or to interfere with the

success of His Majesty's forces or of the forces of any allied or associated powers or to prejudice His Majesty's relations with foreign powers;

(b) spread reports or make statements intended or likely to

prejudice the recruiting, training, discipline, or administration of any of His Majesty's forces; or

(c) spread reports or make statements intended or likely to be prejudicial to the safety of the State or the efficient prosecution of the war."

Regulation 39B. (2) It shall be a defence to any prosecution for an offence against regulations 39 or 39A to prove that the person accused intended in good faith merely to criticize or to point out errors or defects in, the Government of Canada or any province thereof, or in either House of Parliament of Canada or in any legislature, or in the administration of justice."

This section was dealt with in the Alberta case of

Rex v. Coffin (10) . In that case the statements made by a rural school teacher to his pupils were held to be in their cumulative effect, "likely to be prejudicial to the safety of the state", within the meaning of sec. 39(c) of the Defence of Canada Regulations and therefore were a violation thereof.

Fitch, K.C. P.M., stated that the following matters must be taken into consideration to arrive at a decision.

(1) The truth or falsehood, of any statements made is not material. ^ethat section makes no distinction on that basis.

(2) A person making a statement during this war must take this responsibility: Another person hearing that statement may misunderstand it, place his own interpretations upon the statement, and in the result have an effect which the original speaker never intended.

(3) In determining whether statements are likely to be prejudicial to the safety of the State, Canada must be considered as itself a theatre of war. In other words, it is difficult to conceive that any statement made by a teacher in a country school-house is likely to affect the safety of Canada; but that is not the test. The statement must be tested on the basis of many people making the same statement, any number of times to any number of persons. ----- The intention and effect of these regulations are most sweeping in their restrictions on free

speech-----the lid is on and tight.

(4) The whole intention is to compel individuals to maintain silence or speak in the unconquerable spirit by which troops in action must be moved if they are to win.

He also discusses the decision in *Yasny v. Lapointe*. In summing up he states: "I should add with respect to both these charges that in my opinion the accused did not intend the results which I have held was likely to be effected. He is in my opinion devoutly devoted to Canada his native land, but holds views which I hope are not shared by many. He is a pacifist. Many of us can understand a man of peace, but few of us, certainly not I, can share the views of one who will not fight no matter what the provocation. I am hopeful that Mr. Coffin will yet come to see that there are issues in this war more searching than he has so far realized. If his views prevailed he would be permanently under a system of government in which he would not receive the consideration he has received in this Court the last few days. He thinks this war is purely economic. There are greater issues at stake than that, and I hope a man of his keen intelligence will yet see it. If every Britisher held his views he would not have the privilege of questioning even in peace time the things which in my opinion ~~he~~ he is prohibited from challenging during the period these Regulations are in force

He prizes highly for himself, his pupils, and all others the privilege of thinking for himself and expressing his own thoughts but is not prepared to make the sacrifice which others are making voluntarily to preserve those privileges for the future."

I would be prone to query this case. The facts of the case show that the accused's statements had to do not with errors or defects in the institutions mentioned in the section but with the whole philosophy upon which Canada and the Empire justify their position in the war. One might well argue that 39 B (2) (cited on page 16) would provide a good defence to this cause of action. One cannot help but wonder in reading the summing up of the case whether Fitch, K.C. P.M. was not carried away on a wave of pro-British sympathy to arrive at a decision (no matter how justly) on moral rather than on legal grounds.

The judgment in Rex v. Money (11) will serve to illustrate my point. The headnote of the case reads as follows:

"Books, newspapers or periodicals of the kind referred to in Sec. 39A of the Defence of Canada Regulations must be held in quantity in order for the possession of them to constitute a violation of said regulation. The possession of a single

copy or a few copies of each of a number of different books each of which might be subversive is not prohibited.

One might well conclude that having in one's possession pro-Nazi propaganda, or material likely to cause disaffection toward his Majesty, written material which could be distributed and read in a neighborhood or rural district and which has been deliberately and cleverly compiled to appeal to the palate of doubtful pro-Britishers, could conceivably cause more damage than a piece-meal dissertation on pacifism by a rural school teacher.

Yet I must concede two things :

- (1) that each of these cases must be decided strictly on the particular facts therein and the facts have not been set out in any great detail in the reported cases.
- (2) that in the Money case the ^{judge} expressed his willingness to grant a stated case as to the correct interpretation of "in quantity".

Despite this however I would say that the decision in the Money case was too strict. In construing the words "in quantity" the court might well have gone behind the statute and considered the evils that it was passed to overcome. It is true that the statute might well have been worded differently in order to counteract the evils that it was passed to eradicate ---but considering the nature of the regulations I would say that the interpretation was too narrow.

In cases of this kind we must look to the question of result and not intendment. This point was clearly made in the two cases with which I have just dealt and also in Rex v. Stewart (12). It was held there that mens rea is not a constituent element of the offences created by section 39A. The business manager of a periodical which contains an article contravening s.39A may be convicted of the offence although he was unaware of the article until after the distribution of the periodical.

Since writing this comment on Rex v. Coffin and Rex v. Money the decision of the Supreme Court of British Columbia in Rex v. Ravenor (13) has been reported. The decision in several respects substantiates the arguments I have set forth. The facts of the case are set out below:

This was an appeal from the decision of H.S. Wood, Esq. K.C. police magistrate on the following charge: That at the City of Vancouver on Aug. 20, 1940 Wilfred Ravenor unlawfully did knowingly have in his possession in quantity documents containing material likely to be prejudicial to the safety of the State, contrary to Regulation 39A of the Defence of Canada regulations, and was sentenced to a fine and imprisonment.

The accused was in charge of a book shop which was managed by him on behalf of a company owned by the Communist

(12) (1940) 1 D. L. R. 689

(13) (1941) 1 W.W.R. 191

Party of Canada. Most of the exhibits put in by the Crown were books and pamphlets seized in that shop, and included in the exhibits was correspondence that left no doubt but that the accused was a highly prized member of and zealous worker of said Party, which by Regulation 39C (1) (a) of said Regulations is declared to be an illegal organization.

Held: That the seized books and pamphlets put in as exhibits in support of a charge under sec. 39A (c) of said Regulations must be read, not in an academic perspective but in the light of and having in mind the Defence of Canada Regulations and the fact that Canada is at war; the test question being: Are they likely to be prejudicial to the safety of the State or the efficient prosecution of the war? The conviction of the appellant was affirmed.

It would be interesting to note here the evidence adduced by one of the witnesses, namely, Professor Angus, who among his many attributes to distinction as a man of parts, in addition to being a professor of Economics at the University, is a member of the legal profession, one of the Rowell-Sirois Commission and a student of political theory. Mr Angus had read a number of the exhibits seized from the possession of the accused but was ashamed he had not read more. He was of the opinion that the circulation of the books at the present time would not be prejudicial. He had been, or is, a student of

of Marxism, and this philosophy has profoundly affected human thought in the last few years.

It was argued on behalf of the accused that if the construction that Crown counsel asked be put on the Regulations was in fact applied ~~that~~ it would be an outrage on liberal and intelligent opinion and a vindication of democracy in its restraint on personal conduct and liberty. Ellis C.C.J. pointed out that most, if not all, laws are a restraint, and a necessary restraint, on personal conduct and liberty. War increases that restraint.....and to quote: "My duty is to interpret and give effect to the laws as they exist."

Dealing with regulation 39B we have the case of Rex v. Kluge (14). In this case a prosecution was instituted by the laying of an information and complaint on July, 1940 before Police Magistrate Rankin on which date Kluge was placed under arrest. Sec. 39B(1) provided as follows: " A prosecution for an offence against either Regulation 39 or 39A of these Regulations shall not be instituted except by or with the consent of counsel representing the Attorney General of Canada or of the province." The necessary consent to authorize the institution of this prosecution was not given until July 20, 1940, that is, three days after institution of proceedings.

It was held that where the consent is not given until after the prosecution has been instituted the Court is without jurisdiction and the whole proceedings are a nullity ab initio and therefore in such a case where the charge is heard and dismissed there is nothing to appeal from.

The Kluge case illustrates the necessity for strict compliance with imperative provisions of the act. This case was followed by an amendment to Regulation 39B which states that "Provided that this paragraph shall not prevent the arrest or the issue, or the execution of a warrant for the arrest, of any person in respect of any such offence, or the remanding, in custody or on bail, of any person charged with such an offence notwithstanding that the consent herein required for the institution of a prosecution for the offence has not been obtained"

The amendment to the act serves to illustrate that it was fairly possible that the original intent of the legislature was to make this section directory and not imperative. However, on the wording of the statute as it stood at that time the decision of the Police Magistrate was the only one that could be rendered. "Where the act or thing required by a statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with. It would not be competent to a Court to dispense with what the Legislature had made the indispensable foundation of its jurisdiction."

[*Discretion - authority.*]

It is conceivable that an even greater miscarriage of justice could occur by requiring strict compliance with procedural requisites than could with questions regarding substantive portions of the statute.

I might point out at this time a few general observations on war-time legislation. It is clear that the drafting of statutes has not nor is it likely to reach a state of perfection. There has been in the war-time legislation mistakes and thus as is necessarily the case the need for amendment. The question is then resolved down to the extent to which the court can give a broad interpretation to this legislation, thus putting into effect the efforts of the legislators in order to avoid three unhappy results:-

- (1) the setting aside of a case on a technicality.
- (2) the failure to make the legislation effective at the time of the breach. The war is of limited duration and therefore to be of any practical value war-time legislation must be enforced at the time of the breach. (Example-an element which is subversive.)
- (3) the resultant failure to deal with the particular point and thus create a precedent.

I might illustrate my point with a reference to a case which does not deal with the Defence of Canada Regulations but which nevertheless bears out my comments. In Rex v. Singer (15) the defendant a retail druggist was charged under paragraph two of the regulations, dated 11th September, 1939, of the War Measures Act, Chapter 206 of the R.S.C. 1927, by wilfully selling codeine, a narcotic drug mentioned in part two of the schedule to

(15) (1940) 4 D.L.R. 151

See now Section 1(94) 75 Can.C.C. 17 *app. dismissed*

the Opium and Narcotic Drug Act, without first having had and obtained a written order or prescription therefor signed and dated by a physician, the whole being contrary to sec. 164 of the Criminal Code.

It was held that since section 3 (2) of the War Measures Act, merely enacts that orders and regulations made by the Governor-in Council under s.3 "shall have the force of law", without adding that such orders and regulations shall be deemed to be part of the Act, the violation of a regulation made under section 3 which prescribes no sanction for its enforcement is not punishable under section 164 of the Criminal Code, which relates only of Acts of Parliament or of the provincial legislatures.

Bond J. pointed out the necessity of having in the section ^{words} such as (or their equivalent)-----"Such orders and regulations shall have the same force and effect as if embodied in this Act." He goes on to say that if Parliament intends to provide that regulations so made shall have the same effect as if enacted by the Act, then Parliament must surely say so.

This case was also followed by amendment ----but despite that, one might easily infer that the intention of the legislature was not carried out and that the interpretation placed on the section was indeed narrow.

It can readily be seen that the courts took the more reasoned view in the Penner case (which I have already dealt with).

Part IV of the Defence of Canada Regulations deals with Ships and Aircraft. Part V. of the act deals with Essential Supplies and gives the Minister of National Defence wide powers to requisition essential supplies when and if it should become expedient, so to do. Part VI of the act contains the general and supplementary provisions and also includes several saving clauses.

As I pointed out at the outset of my thesis, I will deal briefly with another act passed under and by virtue of the War Measures Act, in order to get away from war time legislation as strictly applicable to the defence of Canada. My dissertation can at best be sketchy, but I will attempt to point out the attitude of the courts to trade and commerce while their country is a country at war.

I might indicate here that in general the provisions of Trading with the Enemy are more specific than the regulations set out in the Defence of Canada. Many of the provisions in the Defence of Canada Regulations have been stated in wide terms in order to allow for the exercise of the discretion of the various persons who have power over the orders therein contained. On the other hand this would seem to have only one parallel in Trading with the Enemy, and that is in regard to the Custodian. The wording of the sections is less arbitrary and more concise

and the subject matter is more clearly defined. The relevant sections in the interpretation sections are in no way synonymous. In J.G. White Engineering Corporation v. Canadian Car and Foundry Co. (16) it was held that the definition of "enemy alien" in Regulation (1) (c) of the Defence of Canada Regulations, 1939, relates only to defence matters and does not apply to the definition of enemy alien for financial and trading purposes, which is governed by the regulations respecting Trading with the Enemy, 1939. Thus a plaintiff who alleges himself to be a German refugee of Polish origin, domiciled in the United States and resident in France is not an "enemy" within the last mentioned Regulations and is not prevented from bringing action in Canada for a debt, and there being no allegation by the defendant impugning the truth of the plaintiff's statements defendant will not be allowed to examine such plaintiff before adjudication on the action.

The purpose of our courts in dealing with contracts made with alien enemies has been aptly set out in the judgment of Maclean J. in Spitz v. Secretary of State of Canada (17):

"There can be little room for doubt but that the purpose of the Trading with the Enemy Acts enacted throughout the British Empire and the United States was to interdict all intercourse, commercial and non-commercial with all enemy nationals, and to

(16) (1940) 4 D.L.R. 812

(17) (1939) 2 D.L.R. and particularly at 548

prohibit the doing of acts tending to the financial benefit of such nationals, and judicial decisions during the war show that the guiding principle was the destruction of the credit and trade of the enemy, to prevent his power of resistance being increased and to ensure that the property of the enemy tangible and intangible, through governmental agencies, could not be used as the basis of credit in foreign countries by the enemy owner for his Government. I quite agree---- that when you come to interpret Consolidated Orders or any other war measures the objects of the same must be held strictly in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment and the conditions prevailing at the time. In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside." The facts of the case were: The claimant in 1919 bought from a Berlin Bank shares of the common stock of the C. P. R. Rly. whose head office was in Canada the shares of which were registered in New York. The claimant seeks an order inhibiting the Custodian from interfering with the claimant's right to have the certificate of said shares registered in his name, in the share register of the Canadian Pacific. The certificate for the said shares are in the possession of the claimant. Held: that he was not entitled to this order by virtue of sec. 6 (now sec. 5) of the 1939 consolidation of

Trading with the Enemy.

It might be well to note here that the courts have not allowed the Trading with the Enemy Act to be used to over-ride the ordinary laws of contract where the party invoking its provisions is not properly within the ambit of the act.

The obligation of a del credere agent was enforced in the case of Kohnstamm Ltd. v. Ludwig Krumm (18) . The facts are set out below:

By a guarantee in writing the defendants, an English company guaranteed payment to the plaintiffs another English company for goods to be supplied by the plaintiffs to a German Company . Before the outbreak of the present war the plaintiffs had sold and delivered to the German company certain goods, the price of which had not been paid. After the war had begun the plaintiffs brought an action against the defendants (guarantors) claiming payment of the price of these goods:-

Held:(1) that the plaintiffs by recovering the amount which they claimed from the defendants could not be deemed to have traded with the enemy within the meaning of the act, inasmuch as by accepting payment of that amount from the defendants as guarantors, they would not discharge any obligation of the German company who as principal debtors, would still remain liable for the amount to the defendants, and further because they had in fact only traded with the English plaintiff.

Nor will the court allow a party to escape from liability that has been properly incurred in the ordinary course of business. Where the terms of the contract can be carried out without infringing the terms of the contract the court will order this to be done. In the case of Hindley and Company v. General Fibre Company Limited (19), by a contract dated July 27th, 1939, jute was to be shipped from Calcutta for Hamburg, Antwerp, Rotterdam, Bremen, between September 1st, and October 21st, 1939. The buyers had to declare the port of destination. War between Great Britain and Germany broke out on September 3rd, 1939 and thereafter trading with the enemy became illegal under the Trading with the Enemy Act, 1939. On September 11th the buyers declared Bremen as the port of destination. The seller thereupon claimed that the contract must be regarded as cancelled. The buyers on September 27th withdrew their declaration of Bremen and on October 3rd declared Antwerp as the port of destination. Held: that the declaration of Bremen was a nullity and that as the contract could be performed in a legal manner the buyers were entitled to withdraw the bad declaration of Bremen and to declare Antwerp as the port of destination, so that as the sellers had not delivered the jute there the buyers were entitled to damages for the seller's breach of contract.

Before leaving Trading with the Enemy, I will point out one of the many concrete examples of the thoroughness and comprehensiveness of this statute. I have set out the purpose of the act in the Spitz case. The act has endeavoured to prohibit the doing of acts tending to the financial benefit of enemy nationals. The framers of the act have sought to cover every possible and conceivable source of gain to the enemy. Section 29 of the act reads as follows:

29. (1) Any money which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, and any such money which shall become so payable after the commencement of the present war shall be paid to the Custodian by the person by whom it would have been payable, and the payment shall be accompanied by such particulars as the Custodian may prescribe and require and shall be held by him subject to the provisions of these and any future Regulations.

(2) Without restricting the generality of paragraph (1) of this Regulation it shall be deemed to extend to and include moneys payable by way of-

- (a) dividends, interest or share of profits,
- (b) any payment in respect of securities, including the payment of any securities which have become payable on maturity or by being drawn for payment or otherwise,
- (c) any moneys due under or in respect of any policy of assurance, or insurance,
- (d) any payment in respect of requisitioned property,

- (e) any payment under any trust, will or settlement,
- (f) any other payment required to be made to the Custodian under these or any other Regulations.

An example of the working of this section is that today the following stipulation is put on all grants of letters of administration:

"This grant is made upon the condition that no portion of the assets shall be distributed or paid during the war to any beneficiary or creditor who is an enemy, as defined by the regulations respecting Trading with the Enemy (1939) or to anyone on such enemy's behalf and that if there is any such enemy interest now or subsequently in this estate it must be immediately reported to the Custodian of Enemy Property, Ottawa, Canada, and if any distribution or payment is made contrary to this condition, this grant will be forthwith revoked."

I point out this section as an example of the all-embracing provisions of the act and the English cases to indicate that the courts have not allowed its provisions to be invoked where they do not in fact actually apply.

The whole tenor of war-time legislation has been to present a united front in the face of aggression and bloodshed. It is obvious that the ordinary rules regarding freedom of speech, of trade and commerce and of the liberty of the subject must be put

into abeyance for a time at least. The question (which is one of some nicety) is how far the legislature may go without ^{violating} vindicating that very principles of justice for which we are fighting. I have attempted in this thesis merely to point out some of the problems that have been and must be dealt with in war-time legislation, by reference to two of the more important war-time statutes. My purpose has been to present to the mind of the reader a discourse on the principles and reasons underlying this legislation and the extent to which they have found expression in the statutes and decided cases dealing with them.

In conclusion may I express the sincere hope that the ideals of British justice and democracy will be maintained and that proceedings in our Courts of Justice will soon return to their normal beat as in peace-time.

-SARAH DOREMAN-