NEW BRUNSWICK ADMIRALTY DISTRICT

1947
April 14
1948
May 13

BETWEEN:

ESTONIAN STATE CARGO AND PASSENGER STEAMSHIP LINE } PLAINTIFF;

AND

PROCEEDS OF THE STEAMSHIP *ELISE*

AND

MESSRS. LAANE and BALTSER ..... } (INTERVENORS) DEFENDANTS.

Shipping—International law—Canada Shipping Act 24-25 Geo. V, c. 44, s. 705—De facto government—Action in rem against proceeds of sale of foreign ship arrested in Canadian port—Recognition of decree of de facto government—Distribution of proceeds of sale of ship—Ship's register not conclusive of national character of ship—Flag prima facie evidence only of ship's national character except in matters of prize—Intra vires acts of de facto government purporting to have extra-territorial effect.

In October, 1940, a decree of the *de facto* government of Estonia purported to nationalize the vessel *Elise* privately owned by the (intervenors) defendants, "wheresoever it may be" and further legislative acts of that government purported to vest in the plaintiff "all rights, title and

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possession in, to and out of" the vessel. All legislative acts purported to apply within and without the territory of Estonia. The *Elise* was in Canadian territorial waters at any material date herein and at all material times was *in transitu*. The defendants were citizens of Estonia, residing and domiciled therein and subject to the said *de facto* government. The *Elise* was registered in Estonia. The defendants owned the *Elise* prior to June 17, 1940, when the *de facto* government commenced functioning and their ownership continued in so far as the issues herein are concerned. In November, 1940, the *Elise* was arrested initially at the suit of the crew for wages and then on various other claims. She was sold in 1941 by order of the Court. The claims referred to were paid from the proceeds of the sale and the balance remained in Court. The plaintiff issued a writ *in rem* claiming that it is entitled to the money in Court. The (intervenors) defendants also claim this money. At the trial it was admitted *inter alia* 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."

Held: That for the purposes of this action the legislative acts of both the Estonian Soviet Socialist Republic and the Union of Soviet Socialist Republics with respect to Estonia are to be treated as taken by a *de facto* Government.

2. That the decree and statute mentioned in the admissions were within the constitutional powers of the government in question.

3. That in the absence of evidence to the contrary the presumption of the continuance of a new government applies.

4. That the effect of recognition of a *de facto* government is retroactive to the time of the original establishment of that government.

5. That for the purposes of this action there is no distinction between a *de facto* and a *de jure* government in the matter of legislative power.

6. That the register is not conclusive evidence of a ship's national character.

7. That in cases in prize a ship is clothed with the nationality of the country whose flag she flies, but otherwise the flag is only *prima facie* evidence of such national character.

8. That the law of Canada recognizes that the legislative acts of the *de facto* government in question were *intra vires* in purporting to have extraterritorial effect.

9. That the national character of the *Elise* is to be identified with the country controlled by the *de facto* government in question and in Canadian law there may be implied an immunity to the extent of permitting the legislative acts of that government to take effect upon the proprietary rights in the *Elise* while at a Canadian port; the recognition of the title of the plaintiff in the *Elise* is only conforming to the long established principle of protecting a proprietary interest acquired under the foreign law which had complete jurisdiction to establish that right.

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ACTION *in rem* against the proceeds of a foreign ship arrested in a Canadian port and sold pursuant to Court order.

The action was tried before Mr. Arthur W. I. Anglin, now the Honourable Mr. Justice Anglin, District Judge in Admiralty for the New Brunswick Admiralty District, at Saint John New Brunswick.

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

J. Paul Barry for (intervenors) defendants.

H. A. Porter, K.C. for Custodian of Enemy Property.

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

ANGLIN, D.J.A., now (May 13, 1948) delivered the following judgment:

The Steamship *Elise* was a merchant vessel registered at Parnu, Estonia, on the Baltic, and during 1940 carried cargoes between the United Kingdom and Canada. While at the port of Saint John, New Brunswick, in November, 1940, she was arrested initially at the suit of the crew for wages and then on various other claims, and sold in 1941 under process of this court. Those claims were paid from the proceeds of the sale, and the plaintiff has issued a writ *in rem* claiming that it is entitled to the balance in the sum of approximately $44,000 remaining in court. The plaintiff admits that the *Elise* was originally owned by Messrs. Laane and Baltser, who did business in co-partnership at Parnu, but alleges that after a Soviet regime was established in Estonia in June, 1940, the vessel was nationalized and the title thereto transferred to the plaintiff by virtue of certain legislative acts of the Estonian Soviet Socialist Republic and of the Union of the Soviet Socialist Republics. An appearance was entered for Messrs. Laane and Baltser as intervenors. They allege that this court may not, on various grounds, recognize or implement those acts, and claim to be entitled to the balance of the proceeds. The intervenors will hereafter be referred to as defendants.

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The Court's Order of March 12, 1947, fixing the time and place for trial was made on the application of the solicitor for the defendants, and it contained the following:

AND IT IS FURTHER ORDERED (the Solicitors for the parties herein having consented thereto) that evidence purporting to establish any document or fact in the action may be given at the said trial by signed admission of Counsel or by affidavit filed and served on or before the 31st day of March, 1947, and that evidence in rebuttal of any such evidence given by affidavit may also be given by affidavit.

Pursuant thereto a statement as follows was filed with the court for the trial held on April 14, 1947:

ADMISSIONS

The parties in this cause, for the purpose of this cause only, hereby admit the following statements.

1. That prior to the 17th day of June, A.D. 1940, there existed the Republic of Estonia, the existence of which and the Government of which was recognized by the Government of Canada.

2. That prior to June 17 1940, the Steamship *Elise* was owned by Ado Laane and Frederick Baltser, hereinafter sometimes referred to as defendants, who did business in co-partnership at Parnu in the said Republic of Estonia under the firm name and style of "Laane & Baltser" and the said steamship was registered at Parnu aforesaid and was of the approximate gross tonnage of nine hundred ninety tons.

3. That prior to July 1939, the said steamship *Elise* had left the Republic of Estonia, and had arrived in the Port of Saint John in the Province of New Brunswick in the Dominion of Canada on or about the 15th of August, 1940, without having returned to Estonia in the meantime, the said steamship having been sailing between the United Kingdom and the Dominion of Canada only during 1940.

4. That while the said steamship *Elise* was in the said port of Saint John it was arrested by virtue of several processes issued out of this Honourable Court and it was ordered sold by this Honourable Court, the sale taking place on the 25th day of January, 1941.

5. That the proceeds of the said sale, namely: $88,000 were received by this Honourable Court and, after satisfying the claims against the said steamship there is a balance on hand in the custody of this Honourable Court amounting to $43,709.08 with bank interest from December 31, 1945, which balance is claimed by said Laane & Baltser on the one hand and by the plaintiff on the other.

6. That 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.

7. That the E.S.S.R. became a constituent Republic of the Union of the Soviet Socialist Republics (Soviet Russia) hereinafter referred to as the U.S.S.R., and was recognized as such by the Government of Canada, *de facto* but not *de jure*

8. That on August 28, 1940, a new constitution of the E.S.S.R. was published of which Article 6 declared, *inter alia,* water transport to be state property.

9. That on July 23, 1940, the newly established government passed a decree in the form of a declaration, as to the nationalization of banks

and large industries, a copy of which decree is hereto annexed marked "A".

10. That on August 1, 1940, a further decree was passed in the form of a regulation concerning the movement of ships, a copy of which decree is hereto annexed marked "B".

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".

12. That on October 25, 1940, there was passed a decree of the Council of People's Commissars of the U.S.S.R. on 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 Estonian State Steamship Line in direct subordination to the People's Commissariat of Maritime Fleet of the U.S.S.R. with the seat of its administration at Tallinn. A copy of this decree is hereto annexed marked "D".

13. That hereunto annexed marked "E" is a copy of the Statute of the Estonian State Cargo and Passenger Steamship Line by virtue of which the plaintiff is a corporation organized under the laws of the U.S.S.R.

14. That on said June 17, 1940, and on the respective dates of the said decrees, the said Ado Laane and Frederick Baltser were citizens of Estonia, residing and domiciled therein, and Frederick Baltser is presently residing in Sweden.

15. That on or about the 11th day of September, 1942, the plaintiff herein issued a summons in *Rem* against the proceeds of the sale of the Steamship *Elise,* claiming ownership of the said proceeds by virtue of the laws of the U.S.S.R., and E.S.S.R. and in particular the decrees hereinabove referred to, the said Steamship *Elise* and all rights of title and possession thereof, were transferred to and became vested in the plaintiff herein and the plaintiff therefore is entitled to the said balance of the proceeds of sale.

16. That the Government of Canada recognizes the Government of the E.S.S.R. as the *de facto* government, but not as the *de jure* government, and the attitude of the government of Canada is expressed in the hereto attached questions and answers marked (1).

17. That the said decrees set forth in paragraphs 11 and 12 herein and the statute set forth in paragraph 13 herein purport to transfer and vest in the plaintiff all rights, title and possession in, to and out of the said steamship *Elise.*

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.

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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?

Dated this 7th day of April 1947.

(Sgd.) C. F. Inches
of Counsel for Plaintiff.

(Sgd.) J. Paul Barry
of Counsel for Defendants
Laane and Baltser.

I am not reciting, nor making any extracts from, the translated decrees and statute attached to the admissions, because, as will be shown later, the court may not under our law examine or construe foreign legislative acts without the assistance of expert evidence, and there was no evidence of that nature adduced.

The letter referred to in paragraph 16 of the admissions is as follows:

DEPARTMENT OF EXTERNAL AFFAIRS
CANADA

OTTAWA
January 2, 1947

Dear Sir,

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.

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,
(Sgd.) Louis S. St. Laurent
Secretary of State for
External Affairs.

J. Paul Barry, Esq.,
Barrister,
P.O. Box 33,
Saint John, N.B.

At the trial the following affidavit under date of April 3, 1947, was placed in evidence on behalf of the defendants subject to objection by counsel for the plaintiff that paragraph 4 thereof "would be only opinion evidence" on the part of the deponent:

1, Johannes Kaiv of the City of New York in the State of New York in the United States of America, Estonian Consul, make oath and say:

(1) that I am Acting Consul-General for the Republic of Estonia in the United States of America.

(2) that I have knowledge of the matters and facts to which I hereinafter depose.

(3) that I do depose and swear that none of the acts, decrees, statute or change of constitution dated July 23, August 1, August 28, October 8, October 25, October 29, 1940, were adopted in accordance with the Constitution of the Estonian Republic as it existed on the 17th day of June A.D. 1940, but, on the contrary, are in contravention thereof.

(4) that the decrees mentioned in paragraph (3) herein are confiscatory in nature and contrary to the said Constitution as it existed in June 1940.

(5) that the Master of the Steamship *Elise* in 1940 and until the sale of the said vessel in January A.D. 1941 was Robert Onno.

(6) that I am informed and verily believe that the said Robert Onno did not recognize the change of government in Estonia and always regarded Laane and Baltser as his employers.

(7) that no compensation has been paid to Ado Laane or Frederick Baltser on account of the purported nationalization and the plaintiff herein never had actual or physical possession of the steamship *Elise* nor of the proceeds of the said steamship.

(8) that the decrees and statute dated October 8, October 25, and October 29, mentioned above are the same decrees and statute discussed in the English case of A/S Talinna Laevaehisus and others *versus* Talinna Shipping Company Limited and another.

(Sgd.) J. Kaiv

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The only other item of evidence adduced at the trial was an extract-translation from the Estonian State Gazette of July 28, 1940, which was described by counsel for defendants in submitting it as "a list of shipping enterprises subject to nationalization . . . based on the declaration of the Chamber of Deputies of July 23rd."

Horace A. Porter, K.C., attended at the trial on behalf of the Secretary of State of Canada who is the Custodian of "enemy" property. It appears that when the Germans invaded Estonia it became necessary for Canada under appropriate Orders-in-Council to declare that country "enemy territory", which it did as of August 2, 1941. The proceeds in court then came under the Custodian's control on behalf of the foreign parties in interest. Mr. Porter stated that "the Custodian wants the court to adjudicate on it and according to the finding of the court the Custodian's consent (to payment out) will be given."

It is well settled that an action *in rem* may be brought against the proceeds in court, and that the balance on hand after payment of all claims of third parties, should be paid out to whomever is beneficially entitled thereto. *The Neptune* (1); *The Nordcap* (2); Mayers on Admiralty Law and Practice, (1916), 301. Lord Atkin in *The Colorado* (3) said:

> Now when an action *in rem* has been brought in these Courts in respect of a ship, the Court by its decree controls the money which represents the *res* as the result of sale or bail, and directs payment to be made to such claimants as prove their claims in the order of priority directed by the Court. To give the necessary directions the Court may have to consider foreign law in order to ascertain whether the claimant has any and what right in respect of the *res* at all.

The parties admit, and I so find, that "the plaintiff is a corporation organized under the laws of the U.S.S.R." The admissions refer to the act incorporating the plaintiff as a "statute", and to other legislative acts in question as "decrees." All such acts are stated to be enactments of a "*de facto* government." It is patent, however, from the admissions that the decree of October 25, 1940, and the statute relating to the organization of the plaintiff both emanated from the U.S.S.R. There is no evidence that the U.S.S.R. is other than a government recognized as

(1) (1853) 3 Knapp 94.
(2) (1888) Stockton 172.
(3) (1923) P. 102 at 110.

de jure by Canada and having normal legislative power. The plaintiff as a foreign corporation may of course sue in our courts.

The parties admit that certain decrees and the statute "purport to transfer and vest in the plaintiff all rights, title and possession in, to and out of the said Steamship *Elise*." In paragraph 18 of the admissions "the plaintiff alleges that on the basis of the facts herein recited and admitted, as a matter of law, the decrees and statute . . . nationalized the said steamship and entitle the plaintiff to maintain this action and to receive the said proceeds," and the defendants, as the initial attack in their case, "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."

As to the effect of the decrees and the statute in that regard no expert evidence was adduced to resolve this question of foreign law. At the trial Mr. Beck, a member of the Bar of the State of New York who acted with counsel for the defendants, reviewed the specific terms of the translated decrees and statute in evidence under the admissions, and contended that all that could be spelled out of the decrees was that the *Elise* is "subject to be nationalized, but it is not nationalized," and, further, that, if it was nationalized, there are no words in particular which provide for the granting of title in the *Elise* to the plaintiff. Mr. Beck's views may very well be sound, but I am precluded in our law from making a finding as to the nature or effect of these decrees and the statute by construing them myself. As Mr. Justice Strong has said in the Supreme Court of Canada, "it is not sufficient proof of foreign law thus to produce a code or statute, without showing by the evidence of experts, what the written law so referred to actually establishes"; *Worthington* v. *Macdonald* (1). And Mr. Justice Duff has in addition said that "it is settled law that if the evidence of such experts is conflicting or obscure the court may go a step further and examine and construe the passages cited itself in order to arrive at a satisfactory conclusion"; *Allen* v. *Hay* (2). See also *Lazard Bros.* v. *Midland Bank* (3), where Russian decrees were under

(1) (1884) 9 S.C.R. 327 at 334.
(2) (1922) 64 S.C.R. 76 at 81.
(3) (1933) A.C. 289 at 298.

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consideration. According to Mr. Kaiv's affidavit (paragraph 8) these two decrees and the statute were before the court in a recent English action which I shall call for brevity *The Vapper Case. A/S Tallinna Laevauhisus and Others* v. *Tallinna Shipping Co. Ltd., and Estonian State Steamship Line* (1). In that case the Estonian State Steamship Line (a short form of the name of the plaintiff in the present action) claimed the insurance moneys which had been paid into court upon the *Vapper* being sunk in July, 1940. The *Vapper* had been a vessel owned by a shipping enterprise of Estonia, and the claimant maintained that the decrees and statute entitled it, and not the original owners, to be paid the fund in court. The Foreign Office advised the court that the E.S.S.R. was recognized as the *de facto* government of Estonia, and also that the Republic as constituted prior to June, 1940, had "ceased *de facto* to have any effective existence." Mr. Justice Atkinson in the trial court said at p. 258: "The trouble is that I have no evidence whatever of the meaning or effect of these decrees." In the Court of Appeal (2) Lord Justice Scott said:

> Under the new regime the old Estonian law, written and unwritten, would under international law, as recognized in English courts, continue to apply save in so far as it was displaced or amended by the new legislation.
>
> As questions of foreign law are in our courts questions of fact and have to be solved by properly admissible evidence, one would naturally have expected the Soviet side to have been prepared with and to have called evidence proving the various stages of Estonian law introduced by the new Sovereign State—whether that was the E.S.S.R. or the U.S.S.R. The defendants, however, did not take that course. They called no evidence. Mr. Devlin for the plaintiffs called a very distinguished Estonian lawyer, Dr. Rei, who was exceptionally well qualified to give evidence about Estonian law as it was before the Russian assumption of sovereignty; and was also adequately qualified to speak of the new Estonian law gradually introduced thereafter by the E.S.S.R.; but he expressly disclaimed qualification to give evidence about the law or legislation of the U.S.S.R. . . . Whether any of the U.S.S.R. decrees were, even as documents, really in evidence, was discussed before us. Mr. Devlin below, naturally enough as the case was in the Commercial List, asked questions of his expert witness about documents which he anticipated his opponent would call evidence to prove; but he did so *de bene esse,* not as either proving or admitting them, but in order to make plain to the court and to his opponent what his case would be about them if and when proved by the defendants, and under express reservation of his rights to disregard them altogether, if the defendants did not choose to call evidence to prove them. (pp. 105-6).

(1) (1945) 79 Lloyd's L.L.R. 245. (2) (1946) 80 Lloyd's L.L.R. 99.

The fact and content of foreign law must be proved by expert evidence . . . The illegality of the various legislative steps taken under Russian domination, as judged by the criterion of the law and constitution of old Estonia and demonstrated by Dr. Rei, would, of course, have become immaterial if the Russian legislation had been proved below: but it is on that probative step that the defendants' case in my opinion failed, for they called no evidence to prove it effectively. (p. 109).

Lord Justice Tucker in his judgment (on this appeal) expresses the view that those documents in Bundle 29 which purport to be decrees of the Soviet Estonian government must be regarded by this court as having been sufficiently proved by Dr. Rei; though the necessary proof, that their contents established the allegations in the defence and counterclaim of their effect, was lacking. In view of the other conclusions at which my brethren arrive at a decision on this point is not necessary: but, as I have said, my own view is that Mr. Devlin's caveats which I have quoted prevent us treating Dr. Rei's production of, or comments upon, those documents as constituting proof of the documents as legislation; in other words that Mr. Pritt was not entitled to treat them as having been "put in", or as being before the court at all. But be that as it may, putting the foreign legal documents in was only the first of several steps in proof incumbent on the defendants, and I agree with Lord Justice Tucker's view that the further steps were never accomplished. (p. 111).

Accordingly, on the issue of whether the said decrees and statute nationalized and vested in the plaintiff "all rights, title and possession in, to and out of the said Steamship *Elise,*" I may only consider the admission that they "purported" to do so. The question arose at the trial as to what had been the intention of the parties in employing the word "purport". The following statements were made by the respective counsel:

Mr. Inches . . . I applied for a commission to prove the passing of these decrees and their legal effect. That was to be taken in Moscow My learned friend also wanted to put in evidence with reference to the laws of Estonia. He realized that if I had to prove my case by commission without him admitting anything, that naturally he would have to prove his own case by putting in expert testimony. Finally we came to an agreement that these decrees would be admitted in evidence . . . Then my learned friend brought up the point that he would have the right in court to interpret these decrees . . . Then we got together again and we added something. Section 11. (Reads) That is what we agreed that decree purported to do. That is why that was put in there—to obviate the necessity of putting an expert in Russian law to tell us what the decree purported to do. If you look at section 17. (Reads) Mr. Beck says there are no words of granting or vesting in those decrees. We admitted that the purport of the decree was to do that . . . We cannot argue that these decrees do not vest when we admit that they purport to vest the title.

Mr. Barry: I admit that they purport to vest.

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In so far, therefore, as the issue of the moment involves the intended effect of the relevant decrees and statute I must find for the plaintiff.

It is appropriate at this stage to consider next the ultimate contention of the defendants that the decrees and statute of the *de facto* government in question "(*c*) are contrary to the constitution of Estonia as it existed prior to June 17, 1940". The evidence adduced in support of that contention is contained in the affidavit of Johannes Kaiv, paragraph 3. It appears from statements made at the trial by Mr. Beck that Mr. Kaiv is a lawyer learned in the law of the former Republic of Estonia, and was the Consul-General at New York for that Republic when the Second World War began. Mr. Beck also said:

> The United States government has not gone as far as the British government because we do not recognize the *de facto* existence of the Soviet government in Estonia . . . The invasion took place in a few hours and the Estonian minister in London was there at the time and Mr Kaiv was in New York and they continued to function . . . The old Estonian constitution is still alive . . . Mr. Kaiv's jurisdiction is in the United States and North America.

Mr. Kaiv states in his affidavit that the decrees and statute here under reference are in contravention of the constitution of Estonia as it existed on June 17, 1940. I do not doubt that this may be true. But it is stated in the letter in evidence from our Department of External Affairs that the government of Canada "does not recognize *de facto* the Republic of Estonia as constituted prior to June, 1940," and that it "has ceased *de facto* to have any effective existence." Furthermore, the letter states that the government of the E.S.S.R. is recognized "to be the *de facto* government of Estonia", and that the E.S.S.R. "has *de facto* entered the U.S.S.R." The decrees and statute in question having been proved by the admissions to be enactments of the *de facto* government so recognized I am precluded in our law from considering whether they are contrary to the constitution of the Republic of Estonia. The plaintiff is therefore entitled to succeed on this issue. The point in law is illustrated by the following cases. In *Banco de Bilbao* v. *Sancha* (1) the reasons for judgment, concurred in by all members of the Court of Appeal, contain the following at pp. 194-6:

(1) (1938) 2 K.B. 176

The question what body of directors have the legal right of representing the Banco de Bilbao, a commercial entity organized under the laws prevailing in Bilbao and having its corporate home in Bilbao, must depend in the first place on the articles under which it is constituted. The interpretation of those articles and the operation of them, having regard to the general law, must be governed by the *lex loci contractus* . . . i.e. by the law from time to time prevailing at the place where the corporate home was set up . . . What is the government whose laws govern in such a matter the Banco de Bilbao? The answer would seem necessarily to be: the laws of the government of the territory in which Bilbao is situate. Should the question arise as to what government must be recognized in this court as the government of the territory in which Bilbao is situate, the question must, in case of doubt, be resolved by a statement made by His Majesty through the appropriate channel.

The propositions so far enunciated seem to be indisputable. The only question open to argument arises from the fact that His Majesty's government recognize the Spanish Republican Government with its seat in Valencia or Barcelona as the *de jure* government of the whole of Spain, but at the same time recognize the insurgent government of General Franco as the government *de facto* of the area in which Bilbao is situate . . . This court is bound to treat the acts of the government which His Majesty's government recognize as the *de facto* government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's courts.

Thus in the courts of this country no regard can be paid for the present purpose to the legislation enacted by the Republican Government which during the material period cannot be treated in this court as the government of the area in which Bilbao is situated.

In *The Maret* (1), it was held in the United States that in view of the non-recognition by the American government of the E.S.S.R. and of its decrees nationalizing Estonian ships the Circuit Court of Appeals could not recognize the Estonian State Steamship Company as the owner of Estonian ships requisitioned by the United States Maritime Commission. In *The Ramava and The Otto* (2), the decrees in the present case were under consideration by the Supreme Court of Eire with respect to merchant ships registered in Estonia and owned by citizens of the latter country. When the ships arrived at ports in Eire the masters signed "Certificates of Delivery" to the agents of the Sovfracht through which the U.S.S.R. operated their nationalized mercantile marine, but the masters retained physical possession. The plaintiffs issued writs *in rem* claiming declarations that they, as duly accredited repre-

(1) (1946) 145 Fed. R. 2nd 431. (2) (1942) Ir. R. 143.

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sentatives of Estonia, were trustees of the lawful owners of the vessels. The U.S.S.R. moved to set aside the proceedings on the ground that they, a sovereign state, were impleaded by the proceedings and that they had not consented to the jurisdiction. The government of Eire did not recognize the U.S.S.R. as a sovereign state in Estonia either *de jure* or *de facto*. It was held that, having regard to that circumstance, the court must treat as nullities the various transactions and documents alleged to culminate in the sovereignty of the U.S.S.R. in Estonia and purporting to pass the property in the ships, and that the U.S.S.R. was not in any way affected by the proceedings.

I shall now return to consider the defendants' second contention, namely, that the decrees and statute in question are "(a) acts of a *de facto* government only." By this I take it that it is contended, as indicated in the statement of defence and at the trial, that those legislative acts did not operate extraterritorially with respect to the *Elise* at Saint John because the Estonian government was recognized as *de facto* and not as *de jure*. Actually, as will be shown later, it is well settled that our law does not make any distinction in this connection between a *de facto* and a *de jure* government, but as to whether a foreign decree or statute, where enacted with that intent, does have extraterritorial effect upon a ship in a Canadian port, and, if so, whether our law will recognize this and implement the decree or statute, are questions upon which there is not the same consensus of juridical opinion. I shall therefore deal with the defendants' contention on this broader footing after disposing briefly of some minor but relevant matters.

One of such matters is that if the evidence established that the *Elise* was on the high seas while such legislative acts as purported to apply to her were in force, there is ample authority that they would be considered as operating upon the proprietary rights in the vessel. Counsel for the plaintiff said at the trial:

> At the time that this property was nationalized by virtue of these decrees, the vessel was not within the territorial limits of the country of Estonia. It was somewhere in the Atlantic ocean I believe, plying between America and England. I am not sure.

But there is no evidence that the *Elise* was on the high seas outside any territorial waters at a time when any material legislation could have had such effect. According to the admissions the vessel sailed between the United Kingdom and Canada during 1940, and arrived at the port of Saint John about August 15th, from which she did not depart until sold in January, 1941. There is no evidence of the relevant terms and effect of the decrees of July 23, and August 1, 1940. The admissions only speak of the former as "a decree in the form of a declaration as to the nationalization of banks and large industries," and of the latter as being "in the form of a regulation concerning the movement of ships." The new constitution for the E.S.S.R. declaring "water transport to be state property" is stated in the admissions to have been "published" on August 28, 1940. It will be noted that in paragraph 13 of the admissions no date is given for the statute "by virtue of which the plaintiff is a corporation organized under the laws of the U.S.S.R." Mr. Kaiv, however, in paragraph 3 of his affidavit of April 3, 1947, obviously assigns October 29, 1940, to that statute, and I would, therefore, adopt that as the actual date thereof. It is quite clear from paragraph 17 of the admissions that the parties consider, and I so find, that the nationalization decree of October 8, 1940, the decree of October 25, 1940, providing for the organization of the plaintiff on the territory of the E.S.S.R., and the statute of October 29, 1940, incorporating the plaintiff, are the legislative acts which are material in this action, and they were all enacted while the *Elise* was at Saint John.

There are several other matters which should first be clarified or determined. They are in brief as follows:

(i) As the decree of October 8, 1940, is attributed in the admissions to the E.S.S.R., and the decree of October 25, 1940, and the statute of October 29, 1940, are therein attributed by the parties to the U.S.S.R., what precisely is the "*de facto* government" which is contemplated in the admissions?

(ii) May the decree and statute organizing the plaintiff corporation be impugned on the ground that there is no evidence of the legislative authority of the enacting body?

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(iii) What consequence, if any, is to be accorded in law to the circumstance that the Germans apparently superseded the *de facto* government of Estonia during their occupation of that country from August, 1941, to October, 1944?

(iv) May any retroactive effect be given to the recognition by Canada in January, 1947, of the *de facto* government of Estonia, and, if so, to what date?

(v) With respect to its legislative power, is there any distinction in our law between a *de facto* and a *de jure* government?

As to the above question (i), the content of paragraphs 6 and 7 of the admissions is "that on or about June 17, 1940, a new government was established in Estonia, known as . . . the E.S.S.R." and "that 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*." The Department of External Affairs in its letter of January 2, 1947, advises that "the government of Canada recognizes that Estonia has *de facto* entered the U.S.S.R. but has not recognized this *de jure*", and that it "recognizes the government of the E.S.S.R. to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia." There is no further evidence on the relationship of, or on the division of legislative authority between, the E.S.S.R. and the U.S.S.R. Even if I had the necessary knowledge, I do not think that I may take judicial notice of the constitutional relationship of those two foreign countries. *A/S Rendal* v. *Arcos, Ltd.* (1), reversed on other grounds (1937) 3 All E.R. 577. In the circumstances and on the material of record I think it fair to the parties and the issue to assume that what was intended to be meant by "*de facto* government" was the legislative and executive authority over Estonia exercised by the E.S.S.R. and also by the U.S.S.R., in so far as the latter had, or it is admitted to have had for the purposes of this case, jurisdiction with respect to that country. In brief, for the purposes of this case, the legislative action of both the E.S.S.R. and the U.S.S.R. with respect to Estonia is to be treated as taken by a *de facto* government. If I am correct in this assumption, there is no occasion to

(1) (1936) All E.R. 623 at 631.

consider in particular the effect on the E.S.S.R. of a decree of the U.S.S.R., which the Department of External Affairs said in its answer to the first question submitted by counsel was a question for the court to decide.

In this connection, however, there is for consideration the above question (ii) respecting the constitutional validity of the said decrees and statute. Counsel for the defendants said at the trial: "We have no evidence in this case as to the right of the Council of Peoples' Commissars to pass decrees." (Actually, on the admissions, it was only the decree of October 25, 1940, which was enacted by that council. The statute of October 29, 1940, is not therein attributed to any legislative body of the U.S.S.R.) It appears from the authorities that the court has a right and duty, even where the foreign legislative act was enacted by a state duly recognized, to examine its constitutional validity. *Re Amand (No. 1)* (1); Mann, The Sacrosanctity of the Foreign Act of State, (1943), 59 L.Q.R. 42 at 44, 159; McNair, Legal Effects of War, 2nd Ed., (1944), 374-377. But, as foreign law is a question of fact, this examination may only be accomplished through appropriate evidence. See *The Amand Case, supra,* and *Lorentzen* v. *Lydden & Co.* (2). It is true that there is no evidence in this regard in the present action either supporting or attacking the validity of those legislative acts, and I assume that the reason therefor is that given above by counsel with respect to the question of the effect of the content of those acts. In the result, again I must resort to the admissions, and I think it is implicit therein that the said decree and statute were within the constitutional powers of the *de facto* government in question.

As to the above question (iii), Mr. Beck argued that the *de facto* government which may have existed in Estonia in 1940 fled before the Germans when they overran the Baltic states in August, 1941, after declaring war on the U.S.S.R. He claimed that when that government failed to maintain itself *de facto*

> All these decrees and acts go by the board . . . It was not able to maintain its power . . . It cannot govern today and run away and govern tomorrow . . . The government in existence in Estonia today existed there about October, 1944 . . . We come back to the question of the recognition by your government of the *de facto* existence of the

(1) (1941) 2 K.B. 239 at 253. (2) (1942) 2 K.B. 202.

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government in Estonia. There is no date. Apparently it is the government that is functioning there now. But the government that is functioning there now is not the government that passed these decrees that this plaintiff is relying on.

Counsel for the plaintiff objected to this construction of the questions submitted to the Department of External Affairs, and counsel for the defendants then said:

> When I framed the questions and they were agreed to by my learned friend, we did not distinguish between the government which passed the decrees and the government that is now in existence in Estonia.

It appears therefore that the admissions were drafted on the assumption that there is no material distinction to be made between the government having authority over Estonia from June, 1940, down to the time of the invasion by the Germans, and the government having such authority from the expulsion of the Germans until the present time. It also seems clear that the Department of External Affairs in answering the questions submitted had this same assumption in mind. In brief, all concerned assume that the period of the German occupation of Estonia was simply a hiatus in the *de facto* government of that country which was inaugurated in June, 1940. In any event, there is no evidence that the present government is not for the purposes of this case the government which was newly established there in 1940, and the presumption of the continuance of the new order applies.

There remains, however, Mr. Beck's initial point that because of the hiatus in the government of Estonia "all these decrees and acts go by the board." Mr. Beck cited a passage from *Williams* v. *Bruffy* (1), where it was observed that one kind of *de facto* government was where a portion of the inhabitants of a country separate themselves from the parent state and establish an independent government. Mr. Justice Field said:

> The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it.

I do not think that those statements are relevant in the present case. As already discussed, it is to be taken that the Estonian government of the latter half of 1940 did succeed in re-establishing itself permanently after the

(1) (1877) 96 U.S. 176.

Germans were driven out of the country in 1944. And, as cited in *Republic of Peru* v. *Dreyfus Bros.* (1), Wheaton in his International Law says:

> If the revolution in the government of the state is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate government, as in the case of conquest they revert to the former owners, on the evacuation of the territory occupied by the public enemy.

As to the above question (iv), the Department of External Affairs in its answer to questions 3 and 4 said that it was not possible to attach a date to the recognition of the *de facto* government of Estonia. It was first settled by the Supreme Court of the United States in *Williams* v. *Bruffy, supra,* that the effect of such recognition is retroactive to the time of the original establishment of the government. That decision on that point was followed by the English Court of Appeal in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (2) (hereafter to be referred to in brief as *Luther* v. *Sagor*), and by the House of Lords in *Lazard Bros.* v. *Midland Bank, supra,* at 297. As there are no Canadian decisions on this point I should follow those high authorities on a question of international law; *The Ship North* (3). The parties in their admissions assign June 17, 1940, as the date of the establishment of "a new government" in Estonia, known as the E.S.S.R. No date is therein assigned to the entry of the E.S.S.R. as a constituent member of the U.S.S.R. Mr. Justice Atkinson in his judgment at p. 256 on the trial in *The Vapper Case, supra,* says that this latter date was August 6, 1940. In view of the nature of the *de facto* government already adopted above for the purposes of this action that date would be appropriate, and the decrees and the statute which are material were all enacted in October, 1940.

Finally, as to the above question (v), again I must follow high authority in British-American jurisprudence and hold that for the purposes of this action there is no distinction between a *de facto* and a *de jure* government in the matter of legislative power. In the *S.S. Arantzazu Mendi* (4), in the House of Lords the Foreign Office by letter informed the court that His Majesty's government recognized that the Nationalist government exercised *"de*

(1) (1888) 38 Ch. D. 348 at 360
(2) (1921) 3 K.B. 532 at 549.
(3) (1906) 37 S.C.R. 385.
(4) (1939) A.C. 256.

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facto administrative control over the larger portion of Spain" and "effective administrative control over all the Basque provinces of Spain," and was "not a government subordinate to any other government in Spain." Lord Atkin said at p. 264:

> My Lords, this letter appears to me to dispose of the controversy. By "exercising *de facto* administrative control" or "exercising effective administrative control", I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a government as possessing all those attributes in a territory while not subordinate to any other government in that territory is to recognize it as sovereign, and for the purposes of international law as a foreign sovereign state.

It is clear from those remarks of Lord Atkin that in the present case the legislative acts of the *de facto* government in question must be treated as if they emanated from a *de jure* government. Other cases supporting this conclusion are: *Republic of Peru* v. *Peruvian Guano Company* (1); *White* v. *The Eagle Star and British Dominions Insurance Co.* (2); *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (3); *Banco de Bilbao* v. *Sancha, supra.* In *Luther* v. *Sagor, supra,* the Soviet government was recognized by the United Kingdom as the *de facto* government of Russia. Lord Justice Bankes said at p. 543, citing an American authority on international law:

> Wheaton quoting from Mountague Bernard states the distinction between a *de jure* and *a de facto* government thus: "A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious." For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign state of the one form of government or of the other, but for the present purpose in my opinion no distinction can be drawn. The government of this country having, to use the language just quoted, recognized the Soviet government as the government really in possession of the powers of sovereignty in Russia, the acts of that government must be treated by the courts of this country with all the respect due to the acts of a duly recognized foreign sovereign state.

It will be noted that no attempt is made in the above cases to determine what is the legal difference between a

(1) (1887) 36 Ch. Div. 489 at 496.
(2) (1922) 127 L.T.R. 571.
(3) (1937) 1 Ch. Div. 513 at 521

de jure and a *de facto* government. Oppenheim on International Law, 5th Ed., Vol. 1 at 136, says:

> The political reasons for deciding in certain circumstances to grant *de facto* recognition rather than *de jure* recognition are obvious. The legal difference, however, between them is not so clear. It is believed that in International Law the tendency is to regard *de facto* recognition as revocable and *de jure* recognition once given as definitive and irrevocable.

But it does not appear that municipal law attributes any legal effects to this distinction. McNair, *op. cit.* at 353.

Accordingly, in the present case the decrees and statute are not invalid because they are "acts of a *de facto* government only," and a *de facto* government has no less power than a *de jure* government to enact legislation with the intent that it apply extraterritorially.

We may deal now with what to my mind is the major issue on this branch of the present case, namely: In the eyes of Canadian law are the legislative acts of the *de facto* government in question *intra vires* in purporting to apply to the *Elise* while in Canadian territorial waters, and, if so, are they to be recognized and implemented?

Counsel for the parties cited in argument cases containing only dicta relating to this issue, and they are in conflict. There is apparently only one decision in British-American jurisprudence (a judgment in Scotland in 1939) where the circumstances with respect to a ship were similar to those in the present case, and, as will be noted later, implementation of a Spanish requisitioning decree was refused. The views of text-writers are at variance. It is necessary, therefore, to examine the legal aspects of this issue at some length. But, first, it is essential that the precise facts under consideration be settled.

In October, 1940, a decree of the said *de facto* government purported to nationalize the privately owned *Elise* "wheresoever it may be," and to fix the amount of compensation at 25 per centum of its value. Further legislative acts of that government in the same month purported to vest in the plaintiff "all rights, title and possession in, to and out of" the vessel. It is implicit in the admissions that all relevant legislative acts purported to apply within and without the territory of Estonia. There is no evidence that the *Elise* was other than in Canadian territorial waters at any material date.

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At all material times the defendants Laane and Baltser were citizens of Estonia, residing and domiciled therein, and subject to the said *de facto* government. The *Elise* was registered in that country, but there is no evidence of the flag she flew at any time. On the admissions the defendants owned the vessel "prior" to June 17, 1940, when the *de facto* government commenced functioning, and I assume that their ownership continued in so far as the issues in this action are concerned therewith. It is in evidence that the master of the *Elise* "did not recognize the change of government in Estonia and always regarded Laane and Baltser as his employers." The master, therefore, and, I think I may fairly assume, the defendants also, did not attorn either to the authorities of the *de facto* government or to the plaintiff with respect to any proprietary interest in the *Elise* upon or after her alleged nationalization. In my opinion there is no significance to be attached to this circumstance on the present issues. The master, the crew and the vessel were subject to the same law (if it had any extraterritorial effect) as her owners were subject. *The Queen* v. *Anderson* (1). The master in our law (which I may apply in the absence of evidence of the foreign law) was a custodian of the vessel, and the actual possession thereof was in whoever at any material time were the owners. *The Jupiter No. 3* (2).

On the strength of the ownership and citizenship of the defendants the national character of the *Elise* is to be identified with the country over which the said *de facto* government had jurisdiction. *Chartered Mercantile Bank of India* v. *Netherlands Indian Steam Navigation Co.* (3); *John S. Darrell & Co.* v. *The Ship American* (4). The register is not conclusive evidence of a ship's national character. *Le Cheminant* v. *Rearson* (5); *The Queen* v. *Moore* (6); *Stone* v. *S.S. Rochepoint* (7); 30 Halsbury's Laws of England, 2nd Ed., p. 176. In cases in prize a ship is clothed with the nationality of the country whose flag she flies. *The Vrow Elizabeth* (8); *The Bellas* (9), more fully reported in Mayers, *op. cit.* at 512. But other-

(1) (1868) 38 L.J.M.C. 12 at 19.
(2) (1927) P. 122 at 131.
(3) (1883) 10 Q.B.D. 521 at 535.
(4) (1925) Ex. C.R. 2.
(5) (1812) 4 Taunt. 651.
(6) (1881) 2 Dorinis C.A.S. 2.
(7) (1921) 21 Ex. C.R. 143.
(8) (1803) 5 C. Rob. 2.
(9) (1914) 20 D.L.R. 989.

wise the flag is only *prima facie* evidence of such national character. *Chartered Mercantile Bank of India Case, supra,* at 535.

I also hold that at all material times the *Elise* was *in transitu.* The parties state in their admissions that the vessel arived at Saint John in August, 1940, "having been sailing between the United Kingdom and the Dominion of Canada only during 1940." From this, I assume that she was engaged in the commercial business of her private owners, and that, but for the call at Saint John and the arrest there on November 9, 1940, at the instance of the crew for wages, she would have continued in that business. At the time, therefore, of the decree of October 8, 1940, and until her initial arrest the *Elise* may fairly be considered to have been *in transitu.* In any event, there is no evidence in this regard that other than the normal circumstances obtained with respect to a privately owned merchant vessel carrying on in international trade. If the vessel was not *in transitu* it may fall to be treated in law as an ordinary chattel on land with the result that the present problem in the conflict of laws might be quite different. There appears to be no decision on the point. Lord Wright once remarked in the House of Lords "that the *Cristina,* even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land." *Compania Naviera Vascougado* v. *Steamship Cristina* (1). It is not clear whether His Lordship had the *in transitu* quality in mind, but it seems fair to assume that he was visualizing a vessel moored at a dock. The *in transitu* quality, as Hellendall observes, only comes to an end when some "legal contact" has been established with the place where the chattel is actually situate. Hellendall on The Res in Transitu and Similar Problems in the Conflict of Laws, 1939 Canadian Bar Review pp. 7 and 105 at 111. To illustrate the meaning of "legal contact" Hellendall says:

> Thus the question whether an inn-keeper has a lien on a motor car for his claim against a lodger would be determined by the *lex situs,* a legal contact having been established by the contract between the lodger and the inn-keeper by which the car was subjected to such lien.

I would not think that the unloading and loading, or the surveying and repairing of a vessel, even if done under

(1) (1938) A.C. 485 at 509.

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local contract, were sufficiently significant in the case of a merchant vessel engaged in its normal commercial function to warrant holding that it had established a legal contact at a port of call where such activities were carried out. It would in my opinion be unrealistic and forced to hold otherwise.

Such are the circumstances of the present case which I have in mind in proceeding to examine the authorities on that part of the immediate issue which involves the *intra vires* aspect of such foreign legislation. Dicey in his Conflict of Laws, (1932), 5th Ed., at p. 20 says:

> A state's authority, in the eyes of other states and the courts that represent them is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory.

It is to be noted, as Mr. Justice Atkinson did in the *Lorentzen Case, supra,* at 206, that the above quotation contains the qualifying words "speaking very generally". The lack of such authority to legislate for things abroad may be a concept of international law which is adopted in some instances by municipal law, but it is certainly not universally accepted. The Emergency Powers (Defence) Act of the United Kingdom enacted in 1939 provided that any Defence Regulation made thereunder would, unless the contrary appears therefrom, "apply to all ships, vessels or aircraft in or over the United Kingdom and to all British ships or aircraft, wherever they may be." The Statute of Westminster, 1931, declares and enacts "that the Parliament of a Dominion has full power to make laws having extraterritorial operation." Sec. 35 of the Canada Shipping Act, 1934, provides that "if at a port not within His Majesty's dominions . . . a ship becomes the property of persons qualified to own a British ship and if such persons declare to him an intent to apply to have her registered in Canada, the British Consular officer there may grant to her master a provisional certificate," which shall have the effect of a certificate of registry under the Act. In *Cunard S.S. Co.* v. *Mellon* (1), the Supreme Court of the United States said:

> We do not mean to imply that Congress is without power to regulate the conduct of domestic ships when on the high seas, or to exert such

(1) (1923) 262 U.S. 100 at 129.

control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign, for it long has been settled that Congress does have such power over them.

Maxwell's The Interpretation of Statutes, (1946), 9th Ed., at 148 contains the following:

> Primarily, the legislation of a country is territorial . . . The laws of a nation apply to all its subjects and to all things and acts within its territories, including in this expression not only its ports and waters which form, in England, part of the adjacent country, but its ships, whether armed or unarmed, and the ships of its subjects on the high seas or in foreign tidal waters, and foreign private ships within its ports.

Counsel for the defendants cited the case of *Lecouturier* v. *Rey,* (1), but the following remarks of Lord Macnaghten at p. 265 were actually *obiter,* even if they were in fact pertinent to the present issue:

> To me it seems perfectly plain that it must be beyond the power of . . . any foreign legislature to prevent the (Carthusian) 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. But it is certainly satisfactory to learn from the evidence of experts in French law that the Law of Associations (under which the Carthusian Order was dissolved by France) is a penal law—a law of police and order—and is not considered to have any extra-territorial effect.

Whether Dicey's proposition is in general valid or not with respect to chattels, he and most authorities feel impelled to make an exception for ships, and a few are inclined to the view that a state may effect by legislation an involuntary transfer of the ownership of a vessel abroad which has the national character of that state. The following is a brief review of such authorities as I have been able to find. Dicey in his treatise, *supra,* at p. 996 says:

> It is, in fact, impossible to accept the view of a ship as being in the same position as an ordinary movable, so that its *lex situs* is the law of any place where it may be for the time being . . . A real difficulty unquestionably arises when there is a possible competition of laws, as when a ship is actually at a port in a foreign country, so that a transfer by sale or mortgage is capable of being carried out under two distinct laws, either having obviously a *prima facie* claim to validity. But clearly the balance of reason is in favour of making the country to which the ship belongs decisive as to voluntary transfers of ships, and it is difficult to see any ground on which this principle can be impugned.

Again, to his Rule 154 (1) at p. 620 laying down that "the transfer or assignment of a movable, wherever situate, in accordance with the law of the owner's domicil (*lex*

(1) (1910) A.C. 262.

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domicilii) or the place where such transfer or assignment is made (*lex actus*) may be presumed to be valid," Dicey adds a footnote at p. 622:

The case of ships is sometimes adduced as illustrating this rule. But it seems best to regard transfers as regulated by the law of the flag as the *lex situs* (Rule 152), the *situs* being in the case of ships the country of registration. The transfer of British ships can only be carried out voluntarily under the Merchant Shipping Act, 1894; similar provisions exist in the United States . . . See *Simpson* v. *Fogo*, (1863), 1 H. & M. 195; *The Segredo*, (1853) Spinks Eccl. and Adm. 36, where the sale of a ship was denied validity on the score of the *lex loci contractus* and referred instead to a general maritime law, which we may fairly reduce to the English law in matters maritime.

Westlake in his Private International Law, (1925), 7th Ed., at 202 and 210 says:

If the question refers to a ship which was at sea at the moment of the alleged transfer or acquisition, it must be decided by the personal law of the owner . . . that law will operate either as the *lex situs*, on the ground of the fiction which makes ships a part of the territory ascertained by their flag, or in its own character of the personal law, in obedience to which alone the owner can lose his right when no *lex situs* is applicable against him. It would however be pedantic to apply the general doctrine (i.e. that the *lex situs* generally applies to the transfer or acquisition of property in corporeal movables) so as to bring in the law of a casual and temporary *situs*, not contemplated by either party in the dealing under consideration, as in the case of goods which at the moment of the dealing may be on board a ship of a third country, or temporarily warehoused in a port of a third country.

A British ship is British territory so long as she is sailing on the high seas, or in a foreign tidal river below all bridges, although in the latter case, if she is a private ship, the state to which the river belongs may have concurrent jurisdiction. If she belongs to an English port, the law applicable in consequence of her being British territory is that of England.

McNair, *op. cit.*, at p. 378 says:

There is considerable amount of authority in favour of the existence of a rule that the essential nature of ships and their peculiar connection with the State whose flag they fly keep them notionally within the territorial jurisdiction of the flag State, wherever physically they may be.

In 1939 the Privy Council exploded the floating island theory in a case where a cabin boy had killed by shooting on board the captain of a Chinese cruiser when the vessel was in the territorial waters of Hong Kong. The accused was convicted and sentenced to death by the British court in that city, and he appealed to the Privy Council claiming that the court had no jurisdiction. *Chung Chi Cheung* v. *The King* (1). The Judicial Committee said at p. 174:

Their Lordships have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim (*International*

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

Law, 5th Ed., 1937, Vol. 1, para 450), which regards the public ship "as a floating portion of the flag-State" However the doctrine of exterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts.

In Hellendall's article, *supra,* ships are dealt with specially in Part C. British-American and European cases are reviewed and then the author says at p. 123:

> The fact that this branch of the law can hardly be regarded as settled in any of the legal systems which have been the object of this investigation may considerably affect the chances of obtaining credit for those persons whose principal assets are ships. For this reason it is not surprising that it has been attempted to settle and unify this branch of the law by way of international convention. Thus, as early as 1885, the Institut de Droit International in its Brussels conference suggested . . . that the law of the flag should govern all questions of title to a ship.

But nothing has yet come of this suggestion, and the author concludes at p. 125:

> Thus, although it is desirable that the law of the flag should be applied, if it could be applied universally, it would seem that as no unification of this branch of the law is achieved, the solution at present adopted by the English courts is more realistic and more practical.

This solution he lays down at p. 113 in the following principle, in so far as we are presently concerned:

> If the creation, acquisition or transfer of a proprietary right takes place while the vessel is situate within the territorial limits of a certain country, the validity of such a transaction is always governed by the *lex situs,* whether the transaction is voluntary or involuntary.

The only authority cited by the author with respect to an involuntary transaction is *The Jupiter (No 3),* (so numbered in the reports because there had been two previous actions concerning this ship), *supra,* and (1927) p. 250, (C.A.). He says at p. 112:

> The judgment of the court was based on the principle that undoubtedly property passes according to the law of the place where it "is situate", and that . . . the title to the ship could not be affected by a confiscation decree which came into force when the ship was not on territory controlled by the Soviet government. Thus it was held that the law of the flag, Russian law, was immaterial to the decision.

In my view, on the facts in that case the matter of an involuntary transaction, and the application of Russian law, did not arise, for both the trial and appellate courts clearly found that the Soviet decree did not purport to have any extraterritorial effect. It is necessary to examine the case in some detail because of a dictum therein, relevant to the present action, which was not questioned in the British courts until 1942.

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The *Jupiter* belonged to a Petrograd company, and was registered at Odessa which was not within the territory controlled by the U.S.S.R. when nationalization decrees were enacted by it in 1918 and 1919. Following the passing of the last decree the company moved its ships to Marseilles and carried on business from France. In 1920 the *Jupiter* was in England and the master handed the vessel over to the representatives in London of the U.S.S.R., who then purported to sell her to an Italian company. The owners brought an action claiming possession, and the U.S.S.R. supported the Italian company in the defence. There was judgment for the plaintiff on the trial, which was affirmed by the Court of Appeal. Mr. Justice Hill in his trial judgment said:

> Undoubtedly property passes according to the law of the place where it is situate. But if it is said to have passed by an act of State of the foreign sovereign, is that not a fact which must be proved in the ordinary way by proof of the act of State, of its application to the property, and of the local situation of the property? (p. 139) . . .
>
> Mr. Dunlop has not refrained from contending that the effect of the decrees was at once to transfer to the R.S.F.S.R. the property in the ships of the company, wherever situate. Two questions are here involved: First, whether they at once transferred the property; and secondly, whether they transferred the property, though it was not locally situate within he terriory of he R.S.F.S.R. As to the first, it seems to me that if the decrees only provided for the liquidation of the company, they equally only provided for the transfer of the property upon the completion or in the course of the liquidation. (p. 143) . . . As to the second question—that is, whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the Jupiter was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property.* (Italics mine. W.A.I.A.) This seems to me to be recognized in all the cases: see, for instance, per Atkin, L.J. in *Goukassow's Case,* (1923) 2 K.B. 682, 693; per Sargeant, L.J. in *Sedgwick, Collins & Co.'s* case in the court of appeal (1926) 1 K.B. 1, 15; and per the Lord Chancellor in the latter case in the House of Lords, (1927) A.C. 95. The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation. I am strengthened in this opinion by the view taken by the R.S.F.S.R. itself, as set forth in two circulars . . . (one) addressed by the People's Commissariat for Foreign Affairs to the Plenipotentiary Representatives of the R.S.F.S.R. abroad . . . (and the other) issued by the People's Commissariat of Justice to all District Courts . . . These circulars show that the R.S.F.S.R. recognizes and enforces the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular recognizes that the nationalizing decrees do not operate upon property outside the territory of the

R.S.F.S.R. . . . I may at once say that I find . . . that it is not proved that the Jupiter ever was within the territory of the R.S.F.S.R. (pp. 144-145).

The decision of Mr. Justice Hill was upheld in the Court of Appeal without any adverse comment by anyone of the three judges. No specific observations were made upon the above dictum shown in italics. McNair, *op. cit.* says at p. 365 with respect to this dictum that "as Hill, J. found that the Soviet decrees did not purport to have extra-territorial operation and that *The Jupiter* was not within Soviet jurisdiction at the relevant time, his opinion was doubly *obiter.*"

Before leaving *The Jupiter* case I should mention that counsel for the defendants in his brief refers to some remarks in the Court of Appeal and submits that they indicate that the law is that "the promulgating authority must be in a position to take possession and must have taken possession of nationalized property" before title to a ship under such a decree would be complete. But it was held in *Hooper* v. *Gumm* (1) that "a ship is not like an ordinary chattel; it does not pass by delivery, nor does the possession of it prove the title to it." Furthermore, we are dealing here with legislation and not a transaction between private parties.

The dictum in *The Jupiter (No. 3)* case was considered by another trial judge in an English court in 1942 when in *Lorentzen* v. *Lydden & Co., supra,* at 210, he declined to accede to a contention "that under no circumstances will our courts give extra-territorial effect to decrees of a foreign state." The facts in that case were that the Norwegian government, recognized as the *de jure* government of Norway by His Majesty's government, made an Order in Council requisitioning all Norwegian shipping outside of Norway and at the same time making provision for compensating the owners. The order further provided that the Norwegian Director of Shipping was entitled to collect outstanding claims of Norwegian shipowners and to enforce them by action. In this case the director was suing an English firm for damages for breach of a contract to charter a Norwegian vessel which had been entered into with the Norwegian owners prior to the Order in Council. The defendants maintained that the Norwegian government

(1) (1867) L.R. 2 Ch. 282 at 290.

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could not by any legislative or executive act transfer the title to claims or other property situate in England. The first case relied upon by the defendants was *The Jupiter (No. 3)*, and Mr. Justice Atkinson disposed of it, after close analysis, by saying: "It seems to me that so far from being an authority in support of the defendants' contention it is all the other way." His Lordship's view was (p. 209) that the case stood for nothing more in this connection than that on "the construction of the decrees themselves they did not purport to affect the title to property outside Russian territory." He referred to the authorities which Mr. Justice Hill had felt supported his statement, and was satisfied there was nothing therein which should be so construed. He treated the dictum as being addressed to the facts in *The Jupiter (No. 3)* case rather than to the law that might be applicable. After reviewing other cases put forward by the defendants his Lordship concluded at pp. 212 and 216:

> There is no authority which has been cited to me which prevents me from giving effect to this Order in Council . . . To suggest that the English Courts have no power to give effect to this decree making over to the Norwegian government ships under construction in this country seems to me to be almost shocking . . . It is not confiscatory, it is in the interests of public policy, and it is in accordance with the comity of nations. Therefore I determine that issue in favour of the plaintiff.

I am constrained to comment, with respect, that the above reference to ships is actually *obiter* in an action which was founded only on a claim for breach of contract. In passing I may add that where *The Jupiter (No. 3)* case is cited in 26 Halsbury, *op. cit.* at p. 255 as authority for the footnote—"Decrees of the Soviet government had not the effect of transferring property outside its jurisdiction"—one should not construe that statement as enunciating a legal principle.

As already mentioned there was in 1939 a Scottish case which dealt with the effect on Spanish ships abroad in foreign ports of a requisitioning decree made by the government of the Republic of Spain. *The El Condado* (1). The vessel was registered at Bilbao; her owner was a Spanish company; and at the date of the decree she was at Greenock Harbour. It is not necessary to state the complicated

(1) (1939) S.C. 413; 63 Lloyd's L.L.R. 83, 330.

circumstances of the action which the trial judge dismissed. McNair's comment on the trial judgment in his *op. cit.* at p. 380 is:

> Lord Jamieson, apparently treating the Spanish decree (erroneously, we submit, as it was a requisition for public purposes) as confiscatory, declined to give effect to it as regards property situated outside the territory of the government issuing the decree (*semble,* at the time when the decree became or remained operative).

The Court of Session dismissed an appeal therefrom, and I must examine closely the reasons given as this Scottish case is the only one I have had cited to me, or been able to find, where the circumstances are almost identical with those in the present action. The Lord Justice-Clerk (Aitchison) said:

> 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 its execution . . . Does that rule apply equally to legislation which is not confiscatory or penal in the full sense, but the effect of which is to subject the owner of moveable property in his use and control of that property, to the overriding control of the State where, as in this case, the property is requisitioned by the State for public purposes There is no direct authority upon the point. The nearest case is *The Jupiter No. 3.* It was there held that the nationalization decrees of the U.S.S.R. did not operate on moveable property outside the territory of the Republic, whether such property belonged to a Russian citizen or not . . . In the *Jupiter,* Hill, J, pointed out that no distinction could be drawn between ships and other chattels and that the same principles were applicable to both, and he reached the conclusion that the decree of nationalization was ineffectual to transfer the property in the ship, which was not within the jurisdiction at the date of the decree. His judgment both as regards fact and law was affirmed by the Court of Appeal. The case is not on all fours, but in my opinion the principle of Hill, J's, judgment applies to the present case . . . it was moveable property that was out with the territory and jurisdiction of the foreign Sovereign State, and having been so at the date of the decree, it was not capable of being affected by the requisition.

It was apparently not drawn to his Lordship's attention that Mr. Justice Hill and the Court of Appeal clearly established that the decrees in *The Jupiter (No. 3)* case did not purport to have any extraterritorial effect. Furthermore, the Court of Session had under consideration *The Cristina, supra,* but apparently again the above mentioned dictum of Lord Wright was not drawn to their attention.

Lord Mackay of the Court of Session said:

> I had prepared an examination of the cases referred to by your Lordship. I shall not repeat, but only say that I find in them a most

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emphatic train of eminent English judges in favour of the view that such "decrees" of a foreign country as purport to have extraterritorial effect, and to attach property in a subject situated, and at a time when it is situated, in this country or its territorial waters, will not be recognized by our laws and courts . . . I am of opinion that such extraterritorial validity is not recognized by Scots law.

Lord Pitman said:

Requisition is not a legal method in this country of transferring property or rights of user of property, except at the instance of the Crown . . . It would be strange, indeed, if a foreign State were allowed to exercise similar powers and by its officials take forcible possession of property requisitioned.

Lord Wark said:

On such a matter as this there is no difference between the law of England and the law of Scotland, and the decisions of the English courts to which the Lord Ordinary refers, especially the case of *The Jupiter (No. 3)*, appear to me to be sufficient authority to support his decision . . . It is true that that case dealt with the question of transfer of property, but the *ratio* upon which it proceeds is that the decree of a foreign government has no effect whatever upon moveable property, including ships, outwith the territory. This doctrine rests upon the principle that jurisdiction is limited by effectiveness. It is recognized in several recent cases. (His Lordship then referred to English cases dealing with the Russian nationalization decrees in connection with banking and insurance, and also quoted Dicey's statement on a state's legislative authority, as already mentioned above.)

In view of this Scottish decision adopting what was actually only a dictum in *The Jupiter (No. 3)* case, which was not followed in *Lorentzen* v. *Lydden, supra,* by the English court, I do not feel, with great respect, that I am justified in accepting the result without question.

In the American case of *The Navemar* (1) in 1939 the Circuit Court of Appeals for New York held (per headnote) that:

The decree of the Spanish Republican Government was effective to appropriate the vessel when she was on the high seas and to transfer the title and right to possession in her to the Republican government, rendering her immune from seizure in a possessory action brought by her owners in the United States courts. (For previous litigation over *The Navemar* see (1937) 59 Ll. L.L.R. 17, (1938) 62 Ll. L.L.R. 76 and note appended reporting a decision in the Supreme Court of the United States.)

The Circuit Court of Appeals said:

It is not necessary to say that the decree effected an expropriation of the vessel while she was in foreign territorial waters at Buenos Aires, though it was promulgated and notification thereof was given to the

(1) (1939) 64 Lloyd's L.L.R. 220.

master when the ship was at that port. Even if the decree might not be effective while *The Navemar* was at Buenos Aires, nevertheless it was an instrumentality of expropriation that would become operative upon the vessel as soon as she reached the high seas . . . We have seen that in *Crapo* v. *Kelly*, 16 Wall. 610, jurisdiction was exercised upon the theory that a ship on the high seas is part of the territory of the sovereign whose flag she flies. Later and more generally accepted reasoning supports jurisdiction upon the theory of personal allegiance rather than of territoriality. As Mr. Justice Van Devanter said in *Cunard S.S. Co.* v. *Mellon*, (1922), 262 U.S. 100 at 123, when dealing with the theory sometimes adopted that a merchant ship is a part of the territory of the country whose flag she flies:

But this . . . is a figure of speech, a metaphor . . . The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty . . . It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign.

Finally, McNair in his *op cit.* (published in 1944) reviews some of the British-American cases above mentioned and in conclusion says at p. 382:

Thus the question of the extraterritorial operation of legislation upon privately-owned merchant ships cannot be regarded as settled. It is clear that for many purposes such a ship carries the law of her flag state with her, and it would not be surprising if this body of law included legislation involving a compulsory change of ownership. So far as the Crown is concerned, the statutory power of requisitioning ships in times of national emergency is wide, but, of course, that does not involve the proposition that other countries enforce our municipal powers of requisitioning to the full extent or that we enforce theirs. Nevertheless, the requisitioning by a State of merchant ships flying its national flag while in foreign ports is now becoming frequent and widespread, and it would not be surprising if this practice were upheld by British and other courts.

On the question of the extraterritorial operation of foreign enactments respecting ships I think it pertinent to note the attitude of our own legislature. I have already mentioned that under the Canada Shipping Act, 1934, Canada has legislated with respect to ships over which she has jurisdiction and laid down a procedure by which registration may be effected upon a change of ownership while those vessels are in foreign waters. There are several other provisions in that Act which are intended to apply to Canadian merchant ships and seamen when they are within the jurisdiction of a foreign state. Furthermore,

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it is patent from the following section of the Act that our legislature contemplates that foreign law may apply to foreign ships while in our ports:

705. Where the Governor in Council is satisfied that—

(*a*) ships of a foreign country are required by the law of that country to comply with any provisions which are substantially the same as or equally effective with any provisions of this Act which apply to foreign ships while they are within a port of Canada; and

(*b*) that country has made or has undertaken to make provision for the exemption of ships registered in Canada, while they are within a port of that country, from the corresponding requirement of the law of that country;

the Governor in Council may direct that any such provisions of this Act, as aforesaid, shall not apply to any ship of that country within a port of Canada, if it is proved that the ship complies with the corresponding provisions of the law of that country applicable to that ship.

I feel that where the Canadian legislative authorities have thus exercised their power of dealing with our merchant ships and seamen while in foreign territorial waters and no doubt fully anticipate that their enactments will be recognized and implemented on appropriate occasions, and where they also concede that foreign law relating to matters peculiar to shipping has effect in our ports, the judiciary should act consistently therewith and reciprocate with respect to foreign legislation which deals with matters in no way connected with Canadian interests. Professor Brierly has noted in reviewing the decisions in England on international law over a period of fifty years that the trend has been for the judiciary to accept without question the rulings of the Foreign Office on the status of a foreign government. He adds that "foreign affairs are pre-eminently the province of the executive department of government, and public policy requires that the country should not speak with a divided voice." International Law in England, (1935), 51 L.Q.R. 24 at 32. There would seem to be every reason for the judiciary to act in harmony with the legislature as well as with the executive branch of the government in any case arising under the present circumstances. Accordingly, I hold that in the eyes of Canadian law the legislative acts of the *de facto* government in question were *intra vires* in purporting to have extraterritorial effect.

There remains, therefore, on this branch of the case the question of whether a court may aid in implementing that

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legislation with respect to the *Elise*. In my opinion this question involves the determination of the extent of the immunity to be accorded in our law to a foreign merchant vessel calling at our ports in the course of international trade. There appears to be no Canadian decision expressly so holding but it is implicit in the cases that Canadian law subscribes to the general doctrine that "the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn." Per Lord Atkin in the Judicial Committee (repeating the remarks of Chief Justice Marshall of the United States) in *Chung Chi Cheung* v. *The King, supra,* at 169. "The implied consent to permit them to enter our harbours may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose." Per Mr. Justice Brewer in *Patterson* v. *Bark Eudora* (1). This tacit leave to enter a port is upon the understanding that "the general rule of the law of nations is that a merchant or private vessel entering a foreign port subjects herself to the local jurisdiction and territorial law of the place." Per Mr. Justice Angers in *Cashin* v. *The King* (2). And it is also accepted that foreign vessels are "still subject to the laws of their own country as though they were on the high seas." Per Mr. Justice Martin in *The Ship North* (3). The Supreme Court of the United States in *Cunard S.S. Co.* v. *Mellon* (4) (deciding that the Eighteenth Amendment and the National Prohibition Act forbade foreign merchant ships carrying, as ships stores, intoxicating liquors for beverage purposes into ports of the United States) said at p. 124:

> A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter . . . Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

I think it must also be accepted that such immunity will be accorded the foreign vessel in port as may reasonably be taken as being consistent with such leave to enter. Thus

(1) (1903) 190 U.S 169 at 178
(2) (1935) Ex. C R 103 at 109
(3) (1905) 11 Ex. C.R. 141 at 144.
(4) (1923) 262 U.S. 100

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the local sovereign would seldom, if ever, interfere with the internal administration of the foreign ship, because he would desire that his own ships be so treated abroad, and, in any event, internal administration is not a matter which would ordinarily impinge upon the peace, order and good government of his domain. The remarks of Lord Atkin in the *Chung Chi Cheung* case, *supra,* at 176, with respect to a public ship, are to my mind equally applicable to a privately owned vessel after substituting "owner" for "sovereign", where he said:

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

In *Wildenhus's case* (1) Chief Justice Waite said:

> From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce required.

It is not necessary to attempt to review the nature and extent of such immunities vouchsafed to foreign ships. A survey of the practices of various nations is to be found in Chapter III of Jessup's Law of Territorial Waters and Maritime Jurisdiction, (1927), and the concluding remarks at p. 192 are:

> It is undoubtedly true that nations are more and more finding it to their interests to avoid mixing in the internal affairs of foreign vessels and the multitude of treaties which incorporate this principle bear witness to its desirability.

But before proceeding to determine whether those immunities may be considered in our law to embrace an involuntary transfer of ownership intended by foreign law I would refer again to the remarks of Lord Atkin in the *Chung Chi Cheung* case, *supra.* It is to be appreciated that His Lordship is dealing with a public ship, but I consider that the spirit of his observations on the question of immunities applies also to a private ship under the

(1) (1886) 120 U.S. 1 at 12.

circumstances of the present case. After repudiating the floating island theory His Lordship went on to say at pp. 167-176:

The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs. Their lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our domestic law. There is no external power that imposes its rules upon our code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our courts, and on what principle are they based?

The principle was expounded by that great jurist Chief Justice Marshall in *Schooner Exchange* v. *McFadden*, (1812), 7 Cranch. 116, a judgment which has illumined the jurisprudence of the world: . . . "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." The Chief Justice then proceeds to illustrate the class of cases to which he has referred. (Reference is then made to the exemption of a sovereign himself within a foreign territory, the immunity allowed to foreign ministers, and the granting of free passage to foreign troops.) He points out that, differing from the case of armed troops, where an express license to enter foreign territory would not be presumed, the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn. When in foreign waters private vessels are subject to the territorial jurisdiction: "But in all respects different is the situation of a public armed ship . . . It seems then to the court, to be a principle of public law, that national

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ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."

This conclusion is based on principles expounded in the extracts from which the Chief Justice summarized: "The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; and that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act." . . .

Their Lordships agree with the remarks made by Professor Brierly in the *Law of Nations*, (1928), p 110: "The term exterritoriality is commonly used to describe the status of a person or thing physically present in a state's territory, but wholly or partly withdrawn from that state's jurisdiction by a rule of international law, but for many reasons it is an objectionable term . . . At most it means nothing more than that a person or thing has some immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends." . . .

When the local court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the court will of its own initiative give effect to it . . .

But if the principles which their lordships have been discussing are accepted, the immunities which the local courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign court over his rights of property.

In conclusion, therefore, on this issue, I am satisfied that in the circumstances of the present case the national character of the *Elise* is to be identified with the country controlled by the *de facto* government in question, and that in Canadian law there may be implied an immunity to the extent of permitting the legislative acts of that government to take effect upon the proprietary rights in the *Elise* while at Saint John. I find nothing in the nature of this case precluding my extending that far the undefined immunity enjoyed by a foreign merchant ship in one of our ports, and, to employ the words of Chief Justice Marshall endorsed by the Privy Council, I feel that this conclusion is in accord with "the views under which the parties (i.e. the E.S.S.R. and Canada) requiring and conceding it must be supposed to act." Both nations enact legislation purporting to operate extraterritorially on their respective merchant vessels, and it does not appear to me

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unwarranted that it may deal in any manner with proprietary interests in those vessels. In the result, recognition of the title of the plaintiff in the *Elise* is only conforming to the long established principle of protecting a proprietary interest acquired under the foreign law which to my mind had complete jurisdiction to establish that right. If there is any question of policy or comity involved in such a conclusion on this issue, then I feel that it is simply a matter of pragmatic, reciprocal advantage, and in the present case there is no aspect of that conclusion which derogates from any Canadian policy or interest of which I am aware or can conceive. Furthermore, if a foreign state for itself or its subjects accepts that the purchaser of a ship of that state, which is sold abroad under the judgment of a court having effective jurisdiction, acquires an indisputable title thereto, is it not consistent that a like respect should be paid by the court to the decree of a foreign government dealing with the proprietary interests in a vessel over which that government could fairly assume that it had effective, even if not physical, jurisdiction?

I will confess that if it were not indicated by the decisions that one should resolve an issue of this nature in the manner I have attempted above, I think the solution rests on as simple a proposition as that shown by Mr. Justice Frankfurter in *United States* v. *Pink* (1), where he said at pp. 234, 237 and 240:

> Legal ideas, like other organisms, cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of private litigation, is to invoke a narrow and inadmissible frame of reference . . .
>
> In the immediate case the United States sues, in effect, as the assignee of the Russian government for claims by that government against the Russian Insurance Company for monies in deposit in New York to which no American citizen makes claim. No manner of speech can change the central fact that here are monies which belonged to a Russian company and for which the Russian government has decreed payment to itself . . . No invocation of a local rule governing "situs" . . ., however applicable in the ordinary case, is within the competence of a state court if it would thwart to any extent the policy which the United States has adopted when the president reestablished friendly relations in 1933.

(1) (1941) 315 U.S. 203.

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Furthermore, it is to be observed with respect to requisitioning decrees and legislation of a nature under review in the present case that the process of a foreign court is a convenient means for enforcing abroad the home law which is being disregarded by a recalcitrant crew. To my mind such reciprocal aid outweighs the objections put forward in *The El Condado, supra,* and it is not a new or novel proposition. In *The See Reuter* (1) Lord Stowell said at p. 23:

> I think it is a very powerful ingredient in this case that the master has detained this ship five years together in foreign ports, and still refuses to return to Rostock to abide the decisions of the court there, though called upon by a large majority of the owners to do so . . . These are questions which . . . depend on the municipal regulations of different countries, with which this court can be but very imperfectly acquainted . . . (But) here is an order of the court at Rostock, that this ship be given up to the representative of the owners; this is a positive declaration of the law by the proper tribunal, and I think that I am bound to support the sentence.

It is to be noted that well over a hundred years ago Lord Stowell found no difficulty in the submission that foreign law should be implemented by the Admiralty Court with respect to a foreign vessel in an English port. The only concern his Lordship had in exercising his discretion to entertain the suit was whether the foreign state consented to his doing so. This he found implied in the decree of the appropriate authority in Rostock directing the master to deliver up the possession of the ship to the agent in England of the majority of the owners. The modern view in the United Kingdom is that there is no established rule that the Admiralty Court will not entertain possession suits in respect of foreign vessels except at the request of both parties or with the consent of the accredited representative of the country to which the vessel belongs; the matter is one for the discretion of the court. *The Jupiter (No. 2)* (2); Roscoe's Admiralty Practice, (1931), 5th Ed., p. 42. This view has been followed in Canada. *Michado* v. *The Hattie and Lottie* (3). I should like to record in respect of the present case that there was no suggestion by either of the parties, nor any request through diplomatic channels, that this court should decline to exercise its jurisdiction. Furthermore, as the plaintiff is ostensibly a public corporation and "in direct subordination to the

(1) (1811) 1 Dods. 22.
(2) (1925) P. 69.
(3) (1904) 9 Ex. C.R. 11.

People's Commissariat of Maritime Fleet of the U.S.S.R.", it would appear that the Soviet authorities have at least acquiesced in the present proceedings. See *The Annette*: *The Dora* (1); *The Cristina, supra,* at 507 and 523.

The last contention of the defendants for consideration is that the decrees and statute in question are "(*b*) confiscatory in nature and not recognized by our law as effective in transferring property outside the jurisdiction of the promulgating authority." Actually, on the admissions, there is only one legislative act at which this attack could be directed, namely, the E.S.S.R. decree of October 8, 1940, "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."

Mr. Kaiv says in his affidavit that the decrees "are confiscatory in nature and contrary to the said Constitution as it existed in June, 1940." I take this as an expression of opinion by Mr. Kaiv with respect to the law of the former Republic of Estonia. Under the circumstances already discussed his view is of course irrelevant. The contention as above framed, and as indicated by the argument at the trial, is that the decree is confiscatory in the eyes of Canadian law. Some remarks of Lord Justice Scott in *The Vapper Case, supra,* with reference to this same decree were strongly advanced by counsel for the defendants. His Lordship said at p. 111:

> 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 the legislation provides for just compensation: and 25 per cent of money cannot be just compensation. In *Luther* v *Sagor* the crucial point was that the property, which was held to have passed, was within the territory of the foreign state, and not in England.

Those remarks upon the compensation were clearly *obiter,* and, with respect, I do not think it strictly correct to describe legislation of this type as "penal". In the Canadian case of *Huntington* v. *Attrill* (2) the judicial committee said:

> Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the

(1) (1919) P. 105.
(2) (1893) A C. 150 at 161.

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of an offence against their municipal law, their lordships will humbly advise Her Majesty to reverse the judgments appealed from.

In *Banco de Vizcaya* v. *Don Alfonso de Bourbon y Austraia* (1), cited at the trial in the present action, the court refused to enforce a foreign confiscatory decree on the ground that it was penal in the above sense. The government of the Spanish Republic had declared the ex-King of Spain a traitor, and decreed that all his property should be seized for the benefit of the state. I appreciate that the dictionary meaning of "confiscate" is to appropriate to public use by way of penalty, but it is also used colloquially without the penal connotation. It would appear that the nationalization decree in question should not be considered as of a penal nature, for so far as I am aware it was designed to carry out the economic or social programme of the Soviets, and not as an instrument for the punishment of those engaged in private enterprise.

It is to be noted that Dicey in his *op. cit.* does not deal with confiscatory legislation under his Rule 54 at p. 212: "The court has no jurisdiction to entertain an action—(1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign state", but mentions it at p. 25 under his "General Principal No. II—English courts will not enforce a right otherwise duly acquired under the law of a foreign country; . . . (B) where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political and judicial institutions." In his notes thereon at p. 27 Dicey remarks that "wholesale confiscation of private property in the U.S.S.R. is not treated in England, though it is in France, as immoral."

But if, as I have already held, the decree in question may be treated as having extraterritorial effect, I do not think that it is necessary to inquire into the question of whether the recognition of the decree and the rights acquired by the plaintiff thereunder would be inconsistent with our public or moral interests. In my opinion the

(1) (1935) 1 K.B. 140.

following remarks of Viscount Cave in the House of Lords are conclusive on the issue under the circumstances of this action:

My Lords it is not an agreeable task for a British court of justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign state of the assets of private persons "on the basis of complete confiscation." But the Soviet government has been recognized by Great Britain as the lawful government of Russia; and this being so its decrees must, as Bankes, L J. said in *Luther* v. *Sagor & Co.*, be treated by the courts of this country as binding so far as the jurisdiction of the Russian government extends. *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1).

In *Luther* v. *Sagor, supra,* the facts were that the Soviets had nationalized all privately owned woodworking establishments in 1918. In 1920 agents of the U.S.S.R. sold some plywood from a mill in Russia to the defendant firm in London, who imported it to England. In 1921 the Soviet government was, as already mentioned above, recognized by the United Kingdom as the *de facto* government of Russia. The plaintiff, the original owner of the plywood, claimed, but did not succeed in obtaining, a declaration that the goods were its property. In the Court of Appeal Lord Justice Bankes said at pp. 145-6:

It is necessary now to deal with the point made by the respondents that the decree of confiscation . . . is in its nature so immoral, and so contrary to the principles of justice as recognized by this country that the courts of this country ought not to pay any attention to it . . . The court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think any authority can be produced to support the contention . . . Even if it was open to the courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the courts could treat this particular decree otherwise than as the expression by the *de facto* government of a civilized country of a policy which it is considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws.

On the same appeal Lord Justice Scrutton said at p. 559:

The English courts act on the rule "that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intenion is expressed in unequivocal terms:" *Central Control Board* v. *Cannon Brewery Co.*, (1919) A.C. 744, 752. If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of

(1) (1925) A.C. 112 at 123.

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their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges.

The above remarks were cited with approval by the Supreme Court of the United States in *United States* v. *Belmont* (1). In that case a Soviet decree nationalized a Russian corporation and all its assets wherever situated. A sum of money previously deposited by the company with August Belmont, a private banker in New York, was assigned by the Soviet government to the United States government. Mr. Justice Sutherland said at p. 332:

> The public policy of the United States relied upon as a bar to the action is that declared by the Constitution, namely, that private property shall not be taken without just compensation . . . What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.

Reverting to the above quoted dictum of Lord Justice Scott in *The Vapper Case, supra,* I submit, with great respect, that the "crucial point" in *Luther* v. *Sagor, supra,* and also in *Princess Olga Paley* v. *Weisz* (2), was not that the property was within "the territory of the foreign state, and not in England", but that it was within the ambit of the jurisdiction of the foreign state. This appears to be the view of Viscount Cave in *The Mulhouse Case, supra,* and is clearly the view of the Supreme Court of the United States even with respect to choses in action. In the result, a court is not in such cases enforcing foreign law with respect to chattels having a local *situs,* but is recognizing and protecting rights acquired under foreign law. Hence the alleged confiscating character of Soviet nationalization decrees is immaterial. See McNair, *op. cit.,* p. 361, and Mann, *op. cit.,* pp. 168-171.

I should speak of the case of *Wolff* v. *Oxham* (3) which counsel for the defendants cited in his brief. As summarised by Lord Sterndale, M.R., in *In re Ferdinand, Ex-Tsar of Bulgaria* (4), it was a case where

(1) (1936) 301 U.S. 324 at 329.
(2) (1929) 1 K.B. 718.
(3) (1817) 6 M. & S. 92.
(4) (1921) 1 Ch. 107 at 125.

a Danish subject ordinarily resident in Denmark was sued for a debt due to the plaintiffs who were carrying on business in England. His defence was that he had during the war between England and Denmark paid the debt to commissioners appointed by the Danish government, by whose order all debts due to English subjects by Danes were sequestrated and made payable to the commissioners. Lord Ellenborough delivering the judgment of the court of King's Bench in 1817 held the defence bad and the ordinance to be contrary to the law of nations.

Lord Sterndale reviewed the grounds of error in that early case and the subsequent decisions contra, and concluded: "Taking these matters into consideration I do not think *Wolff* v. *Oxholm* displaces the other authorities to which I have referred." For further criticism of the case see 6 Halsbury's Laws of England, 2nd Ed., p. 504 fn; Dicey, *op. cit.*, pp. 610 fn, 615 fn, and 678 fn. *Wolff* v. *Oxholm* is better taken as authority for the proposition stated in 6 Halsbury, *op. cit.*, p. 198, that English courts will not recognize a foreign war ordinance intended to injure enemy countries by penalizing particular classes of English persons. And so also *Simpson* v. *Fogo* (1) may be treated, as observed by Scrutton, L.J. in *Luther* v. *Sagor, supra,* at p. 558, "as a retaliation by English courts on foreign states whose tribunals refuse to recognize rights acquired by English law."

Before leaving this branch of the present case I would like to add that if for any reason the alleged confiscatory aspect of this foreign legislation may be considered material, then I have grave doubt that I would consider nationalization with twenty-five per centum compensation as being regarded in Canadian law as contrary to essential principles of justice and morality. We may not be willing to support a like programme of nationalization in our own country, but that is not the ground on which to resolve a problem of this nature. As Westlake says, *op. cit.*, p. 307:

> The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation.

I would take a view on the present issue in accord with the decision of the British Columbia Court of Appeal in *National Surety Co.* v. *Larsen* (2). Mrs. Larsen's husband and son had been arrested and charged in the State of Washington with smuggling aliens into the United States.

(1) (1863) 1 H. & M. 195.

(2) (1929) 42 B.C.R. 1; (1929) 4 D.L.R. 918.

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They were released on bail furnished by the plaintiff to whom Mrs. Larsen gave a mortgage on land in British Columbia by way of indemnity. The bail was forfeited, and the plaintiff sued Mrs. Larsen to enforce payment of the mortgage. Indemnification of bail is unlawful in British Columbia as being against public policy, but it is lawful in the State of Washington. Mr. Justice Macdonald said:

> It is, I think, difficult to say that where the courts of a highly civilized country regard a course of procedure as legitimate and legal it should offend against the principles of natural justice in this country to give effect to it. I do not say that it is not sound practice to prevent one giving bail from accepting security, it may be from a friend of the accused or from the accused himself thus permitting the latter if so disposed to escape without loss to the bailor. It goes further than a question of practice. It is based on principles of the greatest importance. But we must go further if this mortgage is to be regarded as unenforceable and say that for our courts to countenance the practice followed elsewhere would mean the violation of public, moral and social interests . . . On the whole, therefore, in view of the parties concerned, viz., the wife, husband and son, the validity of the transaction in the State of Washington I think it is just that the mortgage security should be enforced. I cannot say that it is essentially and inherently repugnant to moral and public interests in this provice to permit the appellant to prosecute the action.

Accordingly, on all the issues raised I am of the opinion that the plaintiff is entitled to succeed. But I do not think that that conclusion disposes of all 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 issues 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.

As already mentioned, the parties admit that on October 8, 1940, there was passed a decree of the E.S.S.R. nationalizing the *Elise* "Section 2 of which fixes the amount of compensation to be 25 per cent of its value." Mr. Kaiv states, and it is not denied, that Laane and Baltser have not been paid any compensation. It might be said that a fair inference from the admissions, and in any event, would be that the state was solely responsible for compen-

sation on nationalization, but that is not abundantly clear nor necessarily so. The parties admit in paragraph 17 that the nationalization decree, together with the further decree and statute organizing the plaintiff corporation, "purport to transfer and vest in the plaintiff all rights, title and possession in, to and out of the said Steamship *Elise*." Having no expert evidence before me on the construction of the legislative acts in question, nor on the laws of Estonia generally, I must, as already explained, rely solely on the admissions of the parties. And I think it is indicated by the admissions that the title to the *Elise* vested in the plaintiff *cum onere* with respect to the compensation for the defendants provided for in the decree through which the plaintiff claims to be entitled to the *Elise*. In any event, it is well settled that in dealing with remedies the court applies the *lex fori*. *The Colorado, supra.* In *The American* (1) Mr. Justice Audette said on an appeal to the Exchequer Court of Canada on its Admiralty side:

> The Court is not absolutely ministerial, and it is at liberty to hold its hand when it appears equitable to do so.

In *Montreal Dry Docks and Ship Repairing Co.* et al. (Plaintiffs) v. *Halifax Shipyards Ltd.*, (Intervenor) (2), after the arrest of the vessel by the plaintiffs the intervenor was left in possession, and, without any instruction from the court, completed work on the ship previously ordered by the owner. The intervenor claimed payment in full from the proceeds of sale on the value of work done and materials supplied after as well as before the arrest. Mr. Justice Anglin in the Supreme Court of Canada referred to precedents in respect of the equitable jurisdiction of the Exchequer Court and said:

> In determining the question as to the extent of the plaintiffs' rights the court may properly so deal with the *res* under its control that an injustice shall not be done to a person who by the expenditure of money in good faith has improved the subject matter of the common security and increased its saleable value.

The judgment of the court was in favour of the intervenor, although the latter had carried out work on the ship without appropriate authority. In the present case the owners have been involuntarily divested of their title to the *Elise* and it does not seem improper to allow them

(1) (1920) Ex. C.R. 274; 61 D.L.R. 661.
(2) (1920) 60 S.C.R. 359; 54 D.L.R. 185.

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the decreed compensation from the proceeds of their own property where no explanation has been offered as to why they have not been paid or should not be paid.

I would not feel justified in contemplating what to my mind is a convenient and possibly final disposal of the matter for the parties if I did not think that there is available a valuation of a minimum nature which may be used for calculating the portion of the proceeds to be applied to such compensation. 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

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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 payments 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.

There will be a stay of sixty days or until such prior time as may be agreed by the solicitors.

Judgment accordingly.