BETWEEN:

1945
June 8
Oct. 5

TEMAN T. THOMPSON, of Red Head, New Brunswick ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

AND

BETWEEN:

WILLIAM O. ANTHONY, of Red Head, New Brunswick ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petitions of Right—Exchequer Court Act R.S.C. 1927 c. 34, s. 19(c)—Injury to property—Negligence of Officer or Servant of the Crown—Scope of duties and employment—Measure of damages.

Barn and contents of suppliants were destroyed by fire as a result of being struck by a tracer bullet fired by a member of the military forces of His Majesty in the right of Canada, who was being transported from Fort Mispec, N.B., to Partridge Island, N.B.

Suppliants seek to recover damages from the Crown, for such injuries to their property.

Held: That the wrongful act of firing the tracer bullet at the barn, was not so connected with the authorized act, of getting the soldier conveyed to the place where he was to go, as to be a mode of doing it. It was an independent act and the respondent is not responsible. *C.P.R.* v. *Lockhart* (1942) 111 L.J.P.C. 116 *Goh Choon Seng* v. *Lee Kim Soo* (1925) 133 L.T.R. 65 applied.

2. That an unloaded rifle is not an intrinsically dangerous article, but once it is loaded it becomes an intrinsically dangerous article. *Donoghue* v. *Stevenson* (1932) 101 L.J.P.C. 119 applied.

3. That the non-commissioned officers in charge of the party were negligent in failing to stop the firing. It was their duty to get the party transported and to see that all military orders were carried out during the move and this would include the order that the members must not fire their rifles except on an order of an officer.

4. That the destruction of the barn was a natural consequence of this negligence. A reasonable person would have foreseen such damage and the non-commissioned officers ought to have seen it. *Glasgow Corporation* v. *Muir* (1943) 112 L.J.P.C. 1 applied.

5. That the measure of damages is the value of the property at the time of its destruction, based upon its market value at that time, but in arriving at that value, the original cost less depreciation as well as the replacement cost at the time of its destruction less depreciation, may be taken into consideration. *Rosseau v. Lynch & Fournier* (1931) 4 D.L.R. 595 (N.B.C.A.); *Empire Marble and Tile Company v. Northwestern Utilities Ltd.* (1933) 3 W.W.R 225 followed and applied.

1945

WILLIAM O. ANTHONY
v.
THE KING
AND
TEMAN T. THOMPSON
v.
THE KING

O'Connor J.

PETITIONS OF RIGHT by suppliants claiming damages against the Crown for loss by fire alleged to have been caused by the negligence of members of the military forces of His Majesty in the right of Canada while acting within the scope of their duties and employment.

The action was tried before the Honourable Mr. Justice O'Connor, at. St. John, N.B.

C. F. Inches K.C. and *N. B. Tennant* for suppliants.

E. J. Henneberry, K.C. and *W. A. Ross* for respondent.

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

O'CONNOR, J. now (October 5, 1945) delivered the following judgment:

The suppliants bring these petitions of right claiming damages from the Crown (*a*) in the sum of $5,400 for the destruction of a barn owned by the suppliant Anthony and (*b*) in the sum of $705 for the destruction of chattels stored in the barn, owned by the suppliant Thompson, which they allege was caused by the negligence of members of the military forces of His Majesty in the right of Canada, and as such, servants of the Crown, while acting within the scope of their duties or employment.

A draft of gunners of the 4th Coastal Battery was being transported in trucks along the highway from Fort Mispec to the City of Saint John, New Brunswick. While some of the gunners, using blank ammunition, were discharging their rifles out of the back of the truck, one Gunner Arthur Morin joined in the firing using live ammunition. He fired a tracer bullet at the barn of the suppliant Anthony with

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

the result that the barn caught fire and was destroyed together with the contents owned by the suppliant Thompson.

Both actions were tried together, and owing to the illness of Morin and the absence overseas of some of the witnesses, the evidence taken at Morin's trial held on September 8, 1944, was by agreement between counsel accepted as part of the record.

Live ammunition was issued and carried by all ranks because of the nature of their duties at Fort Mispec. Whenever a scheme or test was to take place, the live ammunition was called in and blank ammunition issued. Each man had to account strictly for the live ammunition that had been issued to him and then blank ammunition was issued to him for the scheme. When the "test" was over the blank ammunition was recalled and live ammunition issued. A careful record of the live ammunition issued and recalled was kept at all times. When blank ammunition was recalled it was impossible to check the same, because during the "test" the men fired from time to time and the officers had to accept the men's word for the amount each had fired and the balance to be turned in.

Orders prohibited firing except upon the order of an officer.

The reason for the careful check of live ammunition is obvious.

Prior to the departure of the draft for Partridge Island the live ammunition issued to the battery had been checked and found in balance.

Morin had been in charge of a gun store at Fort Mispec but had become ill and, after turning in his live ammunition to the proper authority and turning his key of the gun store over to his successor, Gunner Bradley, was taken to hospital.

On his return from hospital, and just before the departure of the draft, Morin went to Bradley and asked for the key to enable him to get some of his personal effects from the building in which the gun stores were kept. The store was kept under lock at all times and the key entrusted to one man only. Morin induced his suc-

cessor to give him the key and while there Morin stole about 26 cartridges from one of the Bren guns, consisting of incendiary, tracers and ball. He then returned the key and departed with the draft for Partridge Island.

Some of the gunners commenced firing blank ammunition out of the back of the truck, and Morin fired 26 cartridges, ball, incendiary and tracer. The firing commenced close to Fort Mispec and continued on for a distance of 15 miles. Morin stated that, "I fired the last shot in Saint John (City) by the Marsh bridge". Others continued to fire in Haymarket Square, in the City of Saint John, and when on the ship while it was proceeding out into the harbour.

When the truck in which Morin was being transported reached a point opposite the barn of the suppliant Anthony, Morin aimed at the barn and fired. An empty cartridge case of a tracer bullet was picked up, after the fire, on the highway at a point opposite the barn.

I find that Morin fired a tracer bullet at the barn of the suppliant Anthony and that this resulted in the destruction of the barn and the chattels by fire.

Morin was charged that he did unlawfully and wilfully damage by day the barn of the suppliant Anthony, by setting fire to the same through the means of a bullet from a firearm discharged by him. He made a full confession to the Royal Canadian Mounted Police, pleaded guilty, and was sentenced to "a year deferred sentence".

Under Section 50(*a*) of the Exchequer Court Act as enacted in 1943 for the purposes of determining liability in any action by or against His Majesty, a person who was at any time since the 24th day of June, 1938, a member of the naval, military or air forces of His Majesty in the right of Canada shall be deemed to have been at such time a servant of the Crown. I find that Arthur Morin, Sergeant-Major H. E. Williams and Lance Bombardier Haynes were members of the 4th Coastal Battery, were at the time in question members of the military forces of His Majesty in right of Canada and under this section are deemed to have been servants of the Crown.

1945

WILLIAM O. ANTHONY
v.
THE KING
AND
TEMAN T. THOMPSON
v.
THE KING

O'Connor J.

The suppliants submit:—

(1) That Morin, acting within the scope of his employment as a servant of the Crown, negligently discharged a tracer bullet at the barn causing the damage complained of.

The respondent submits that in discharging his rifle at the barn Morin was not acting within the scope of his employment as a servant of the Crown.

In *C.P.R.* v. *Lockhart* (1), the following statement appears at page 117:

> The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles their Lordships agree with the statement in Salmond on Torts (9th ed.), p. 95, namely: "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts that he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way which he does it .... On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

The first question is, what was the scope of Morin's duties? He was at that time being transported from Fort Mispec to Partridge Island, so his duty was to submit himself for transportation or, in the language of Duff C.J. in *C.P.R.* v. *Lockhart* (*supra*) and quoted with approval in the Privy Council decision at page 116,

> ...he (Stinson) was performing a duty of the service in getting himself conveyed to the place where it was his duty to go.

Morin's wrongful act (in discharging the bullet at the barn) was not so connected with the authorized act (of getting himself conveyed to the place where it was his duty to go) as to be a mode of doing it. In *Goh Choon Seng* v. *Lee Kim Soo* (2), and set out again in *C.P.R.* v. *Lockhart* (*supra*) at page 117, the Privy Council classified the cases on this matter and set out the third classification as one where the servant is doing some work which he is appointed to do but does it in a way which

(1) (1942) 111 L.J.P.C. 116 (2) (1925) 133 L.T.R. 65

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J

his master has not authorized and would not have authorized had he known of it. It cannot be said in this case that Morin's firing his rifle at the barn was a way or mode of doing that work which he was appointed to do, i.e., get himself transported.

I hold that it was an independent act and the respondent is not responsible.

(2) That superior officers of Morin, acting within the scope of their employment, entrusted an intrinsically dangerous article, namely, a ·303 rifle, to the said Morin and negligently failed to prevent him from procuring ball and/or incendiary ammunition for such rifle and/or from discharging such rifle at the barn.

I find that an unloaded ·303 rifle is not an intrinsically dangerous article. *Donoghue* v. *Stevenson* (1) at page 135:

> it is only when the gun is loaded or the apparatus charged with gas that the danger arises.

I find that proper precautions were taken to prevent unauthorized persons from obtaining ammunition.

(3) That Peter J. Bradley was negligent in permitting Morin to have access to the gun stores.

I hold that Bradley was negligent in this, but that the destruction of the barn as a result of this negligence was not what a reasonable person would or ought to have foreseen. *Glasgow Corporation* v. *Muir* (2), page 7.

(4) That someone was negligent in not guarding against Bradley's breach of duty.

There is no evidence of such negligence.

(5) That not sufficient effort was made to relieve the men being transferred of ammunition in their possession, blank or otherwise, as required by military regulations and by dictates of due care under the circumstances.

There is no evidence of this, and on the contrary there is evidence that a proper system was installed to prevent gunners from having either live or blank ammunition in their possession except at times when one or other form of ammunition was authorized.

(1) (1932) 101 L.J.P.C. 119 (2) (1943) 112 L.J.P.C. 1

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

(6) That both Sergeant-Major Williams and Lance Bombardier Haynes were negligent in that neither of them attempted to stop the indiscriminate firing until the trucks reached Haymarket Square in the City of Saint John, about 6 miles beyond the barn and 15 miles from Fort Mispec. The firing started shortly after the trucks left Fort Mispec.

Sergeant-Major Williams was in charge of the party. His duty was to get the party transported to the City of Saint John. He was in command of the party so that it was his duty and it was also the duty of Lance Bombardier Haynes to see that all proper military orders were carried out during the move. There was a military order that gunners must not fire their rifles except on an order of an officer. These non-commissioned officers knew or should have known of that order. Sergeant-Major Williams eventually carried out the order but only after the firing had been going on for a distance of 15 miles.

Morin in answer to a question, "Who else on the truck fired live ammunition?", said, "I never heard any fired. I can tell the difference between a blank and a live round, when it is fired". The non-commissioned officers should have been able to tell the difference in the sound between live and blank ammunition. If they could tell the difference then they knew that live ammunition was being fired. If they could not tell the difference then they should have assumed that it was live ammunition. And therefore in either event they should have at once carried out the order that prohibited the gunners from firing, and to do so was clearly within the scope of their employment.

Sergeant-Major Williams gave evidence that when they first left Fort Mispec they were passing through an area in which a test (military manoeuvre) was being conducted and in which firing of blank ammunition might be taking place, and he could not tell from the sound where the firing was coming from.

He next states that as the trucks proceeded along and he heard the noise, he thought one of the trucks was backfiring.

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

In his evidence Sergeant-Major Williams said: "I didn't stop the truck because I had a certain limited time to get to the boat and I didn't stop to investigate because knowing this alarm was on, it was nothing new to hear blank shots being fired. I wasn't sure at the time it was blank shots—I couldn't swear to that—but it sounded to me like blanks", and again, "I only had a short time to get to the boat and load all our equipment on the boat".

In my view he knew the firing was going on and that he should have stopped it, but because he was pressed for time he did not do so. As a sergeant-major he knew or should have known the difference in sound between a truck backfiring and shots from rifles.

Lance Bombardier Haynes, who was riding in the truck with Morin, must have known that the men were firing all the way along.

I find that both Sergeant-Major Williams and Lance Bombardier Haynes knew that these gunners were firing from the back of the truck from Fort Mispec to Haymarket Square, and that their failure to stop this firing was negligence.

The destruction of the barn and the chattels was a natural consequence of this negligence. A reasonable person would have foreseen such damage, and the non-commissioned officers ought to have foreseen it, see *Glasgow Corporation* v. *Muir* (*supra*).

Once the rifle is loaded it becomes in itself an intrinsically dangerous article and requires, in the language of Lord McMillan in *Donoghue* v. *Stevenson* (*supra*) at page 143, "the high degree of care amounting in effect to insurance against risk", and again on the same page, "a degree of diligence so stringent as to amount practically to a guarantee of safety".

In view of the conclusion which I have reached, it is not necessary for me to deal with a number of the other questions raised.

The measure of damages is the value of the property at the time of its destruction, based upon its market value at that time. And in arriving at that value, the original cost of the building and depreciation thereon, as well as the replacement cost as at the time of its destruction, less

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

depreciation and less the value of the salvage, may be taken into consideration. *Rousseau* v. *Lynch & Fournier* (1) and *Empire Marble & Tile Coy.* v. *Northwestern Utilities Ltd.* (2).

The suppliant Anthony gave evidence that he had constructed the barn 20 years ago at a cost which he now estimates at $3,844.10. He told the Royal Canadian Mounted Police three or four days after the fire that the barn had cost him $3,500. At Morin's preliminary hearing Anthony swore that the damage "of the whole thing", which I presume means the barn and contents, was in the vicinity of $4,000.

He had used the barn only for storage during the last twelve years and for the last four or five years the neighbours had been using it for storage without rent of any kind. During the last twenty years only minor repairs had been made. The assessed value of his whole farm of over 400 acres, including buildings, was $1,200. The barn was large, 56′ x 40′—on concrete foundations 10″ at top all round—the floor was concrete except a part 16′ x 20′. The posts were 20′ and on top was a double hip roof of boards and shingle. The barn was wired for electric lighting and there were fourteen 10″ x 12″ windows and two 8″ x 10″. There were three doors all made of spruce—one 18′ to the threshing floor and one to the cow barn of 5′ x 8′.

On behalf of the suppliant Anthony, Mr. Bates estimated the replacement value at $5,434 less 20 per cent depreciation, viz. $4,347.

On behalf of the respondent Mr. Flood estimated the replacement value at $5,200 and he felt that 25 per cent to 30 per cent should be deducted for depreciation leaving $3,640 if less 30 per cent and $3,900 if less 25 per cent.

Both valuators based these estimates on Anthony's recollection of what he put into the barn and on the measurements of the remains of the barn.

Both estimates are based on the replacement value as at the date of the destruction of the barn and, of course, after deducting the value of the "salvage" such as the concrete floor.

(1) (1931) 4 D.L.R. 595. (2) (1933) 3 W.W.R. 225.

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

I fix the loss in respect of the barn at $3,500.

On the damage suffered by the suppliant Thompson, the only evidence before me is Thompson's estimate of the quantity of hay, oats and straw destroyed, and he then put a value on this quantity. He paid $175 for the separator in 1939 and said he could buy one to-day for $250. He told the Royal Canadian Mounted Police a few days after the fire that the separator was worth $150.

I find that the amount of damages to which the suppliant Thompson is entitled is the sum of $600.

The suppliants will therefore be entitled to their costs to be taxed, with only one counsel fee because the two cases were tried together.

Judgment accordingly.