BETWEEN:

GEORGE ALEXANDER MORRISON ...SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1937
June 2-5,
1938
May 27.

Crown—Petition of right—Exchequer Court Act, R.S.C., 1927, c. 32, s. 19 (c)—"Public work"—"Public service"—Negligence—R.C.M.P. constable patrolling the Driveway in Ottawa not engaged on a public work—No liability on part of the Crown.

Suppliant by his petition of right seeks to recover damages from the Crown for injuries suffered by him through the alleged negligence of

(1) (1924) 40 T.L.R. 186.

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one, Glencross, a constable in the Royal Canadian Mounted Police, while engaged in patrolling a paved roadway in the City of Ottawa, known as the Driveway. The Driveway is part of a certain area leased by the Crown to the City of Ottawa in July, 1904, during pleasure, for agricultural purposes only. It was constructed by the Federal District Commission, a body corporate created by Act of Parliament, R.S.C., 1927, c. 55, which retains some degree of supervision and control over it. There is no agreement between the Federal District Commission and the City of Ottawa respecting the maintenance of the Driveway. It is patrolled by the motor cycle squad of the R.C.M.P. at Ottawa, in accordance with certain standing orders promulgated by the Commissioner of the Force, and to this squad Glencross was attached at the time suppliant was injured

The Central Canada Exhibition Association annually holds an exhibition on the area north and west of the Driveway, and since 1929 it has been the practice of the Federal District Commission to authorize the Exhibition Association, during the exhibition period, to place barriers in the form of gates across the Driveway at Fifth avenue and at Bank street, which is carried over the Driveway by a bridge. The Exhibition Association was authorized by the Federal District Commission to erect and keep in place such barriers from 6 p.m. August 22, 1936, to 6 p.m. August 30, 1936

On Sunday, August 23, 1936, there was no barrier at Fifth avenue whilst that at Bank street was closed. Glencross, in patrolling the Driveway on that date, passed the point where Fifth avenue meets it and proceeded at a rate of speed within the limit established by the Standing Orders, towards the Bank street bridge. Suppliant was in charge of the gates at that point, with instructions to exclude the public from passing through. Glencross was at a point approximately 50 or 60 feet or a little further away from the barricade before he became aware of it being in place. Suppliant, who had been sitting on the grass alongside the pavement, proceeded from the side of the roadway to the centre to open the gates and whilst doing so was struck by Glencross' motorcycle and seriously injured

Held: That the constable was not employed upon a public work within the meaning of the Exchequer Court Act, R.S.C., 1927, c. 32, s. 19 (*c*)

2 That negligence on the part of the constable had not been established.

PETITION OF RIGHT to recover damages from the Crown for injuries suffered through the alleged negligence of a constable in the R.C.M.P. Force, while acting within the scope of his duties or employment upon a public work.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

R. A. Hughes and *E. A. Anglin* for suppliant.

Auguste Lemieux, K.C. for respondent.

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

THE PRESIDENT, now (May 27, 1938) delivered the following judgment:—

This is a petition of right proceeding for injuries to the person of the suppliant, allegedly suffered through the negligence of one, Glencross, a traffic constable in the Royal Canadian Mounted Police Force, while acting within the scope of his duties or employment upon a public work. The facts of this case differ in several respects from those found in a line of well known cases where liability against the Crown was claimed, under s. 19 (*c*) of the Exchequer Court Act. I shall attempt first to state, as fully and clearly as possible, the facts as they appear to me.

Skirting close to the Rideau canal within the bounds of the City of Ottawa, and between two streets leading thereto, namely, Fifth avenue and Bank street, there is what is called the Driveway, a paved roadway for vehicle and pedestrian traffic, which was constructed by the Federal District Commission, a body corporate created by Chap. 55 of the Statutes of Canada, 1927. While the Driveway, speaking precisely, includes narrow strips of land on either side of the travelled roadway, on which trees and shrubs have been planted, and which on the north and west sides is largely fenced off from the contiguous area, yet, when I refer to the "Driveway," I usually shall have in mind only the travelled roadway.

The Driveway, with the strips of land on either side, together with a substantial area of land on the north and west sides thereof, now occupied by the Central Canada Exhibition Association, was leased by the Crown to the City of Ottawa in July, 1904, during pleasure and at a nominal annual rental, for agricultural exhibition purposes only. An agricultural exhibition is held annually by the Central Canada Exhibition Association on the area north and west of the Driveway. The Driveway is within the area leased to the City of Ottawa and was constructed through the lands leased by the Federal District Commission at the request of the City of Ottawa. It would appear that the Federal District Commission continues to exercise some degree of supervision and control over the Driveway, and, also, over the strips of land on either side of the Driveway which reach the Rideau canal on the one side, and the exhibition grounds on the other side. As already stated, the Driveway area is, to a considerable extent, fenced off from the exhibition grounds. There is no written agreement between the Federal District Commis-

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sion and the City of Ottawa respecting the maintenance of the Driveway, nor so far as I know is there any specific verbal understanding respecting the same. The terms of the lease therefore stand unvaried.

The Federal District Commission consists of ten members of whom nine are appointed by the Governor in Council, and one by the Corporation of the City of Ottawa. It may acquire and hold real property for the purposes of public parks or squares, streets, avenues, drives or bridges, and may build, improve, repair, maintain, and protect all or any of the works of or under the control of the Commission, and preserve order thereon. It may co-operate with any local municipality in the improvement and beautifying of the same or the vicinity thereof by the acquisition, maintenance and improvement of public parks, squares, streets, avenues, drives, thoroughfares or bridges in such municipality or in the vicinity thereof. It is to be inferred from the evidence that the Federal District Commission constructed the section of the Driveway in question, at the request of the City of Ottawa, and has since maintained the same at its own expense. The City of Ottawa and the Federal District Commission apparently were co-operating to beautify this particular area, that is, the Driveway and the narrow strips of land on either side. Earlier the City of Ottawa in furthering of the project had, I understand, removed some buildings, stables, I think, from the Driveway area. As already pointed out, the Commission was authorized to co-operate with any local municipality in the improvement and beautifying of the same by the maintenance and improvement of any park or drive, etc. Whether the Federal District Commission was authorized by the City of Ottawa to exercise control over the section of the Driveway in question, after its construction, is entirely a matter of inference.

The Royal Canadian Mounted Police Force is a police force constituted for Canada under the Royal Canadian Mounted Police Act, Chap. 160, R.S.C., 1927, and may be employed in such parts of Canada as the Governor in Council may prescribe. The Governor in Council may enter into arrangements with the government of any province of Canada for the use or employment of the Force, in aiding the administration of justice in such province, and in carrying into effect the laws of the legislature thereof,

upon terms to be agreed upon. The duties of members of the Force are prescribed by s. 17 of the Act. Sub-s. (*a*) of s. 17 enacts:—

> It shall be the duty of members of the Force, subject to the orders of the Commission,
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> (*a*) to perform all duties which now are or hereafter shall be assigned to constables in relation to the preservation of the peace, the prevention of crime, and of offences against the laws and ordinances in force in any province or territory or territories in which they may be employed, and the criminal and other laws of Canada, and the apprehension of criminals and offenders, and others who may be lawfully taken into custody.

Sections 18 and 19 further define the duties of members of the Force.

With the approval of the Governor in Council, the Federal District Commission enacted, in May, 1931, by-laws dealing with traffic regulations in respect of "driveways" which are therein defined to "include any property owned by or under the control of the Commission." These by-laws are very general and do not appear to be of any assistance here except that they suggest the exercise of control over the Driveway to the extent of regulating motor vehicle traffic thereon. It is not clear whether "Peace Officer" therein mentioned was intended to include members of the R.C.M.P. Force. I might mention that it is enacted by these by-laws that motor vehicles shall not be driven upon any driveway at a greater speed than 35 miles per hour, subject to some exceptions, but apparently this would not apply to a Peace Officer. The Governor in Council, on the recommendation of the Minister of Public Works, enacted regulations for controlling vehicular traffic on Dominion property, but it is specifically stated that the same were not to apply to properties under the control of the Federal District Commission. There is what is called "Standing Orders," for members of the Motorcycle Squad of "A" Division, and to which squad Glencross was attached at the material time. These Standing Orders, I assume, were promulgated by the Commissioner of the Force, and there is nothing to suggest that they were made at the request of or with the approval of the Governor in Council. The duties of this section of the Force are defined at great length, and one of such duties is the patrol of certain areas, including the section of the Driveway in question between Fifth avenue and Bank street. No question was raised as to the validity of these Standing Orders. There

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is no evidence that the patrol of the driveways owned or controlled by the Federal District Commission, by the R.C.M.P. Force, was authorized by the Governor-in-Council, or that the same was at the express request of the Federal District Commission, though this might be inferred. The Force patrols parks and driveways on property owned by the Crown, and Dominion buildings. The extension of the patrol to property owned or controlled by the Federal District Commission probably developed without any specific authorization by the Governor in Council, but by arrangement reached between the Commissioner of the Force and the Minister of Justice, at the request of the Federal District Commission. At any rate, there is no very satisfactory evidence on the point, but, as the Force had to be equipped for such a service, with motorcycles for example, it may be assumed that this was made possible by means of a parliamentary vote. The patrol service of the Force, over property controlled by the Federal District Commission, could not well have been sustained except by a vote of public moneys. Whether the exercise of a patrol service on or over a driveway constitutes such driveway a "public work" is one of the questions that arises for decision, but this will be considered later.

As I have already stated, the Central Canada Exhibition Association annually holds an exhibition on the area north and west of the Driveway, by the leave and licence of the City of Ottawa, I assume. Since 1929 it has been the practice of the Federal District Commission to authorize the Exhibition Association, during the exhibition period, to place barriers in the form of gates across the Driveway at Fifth avenue, and at Bank street which is carried over the Driveway on a bridge. A bridge pier or abutment bifurcates the Driveway under the bridge and it there, and for a distance before reaching the bridge on the eastern side, and for quite a considerable distance on the western side, becomes a two-way roadway. It was on the west or right hand section of the two-way Driveway that Glencross was proceeding when the accident in question, which I am soon to describe, occurred. On August 4, 1936, the Federal District Commission authorized the Exhibition Association to erect the barriers during the exhibition period which was soon to open, that is to say, between Saturday, August 22,

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at 6 p.m., until Sunday, August 30, at 6 p.m. It is not clear whether the exhibition was open to the public on Saturday, August 22, but I think not; possibly there was a formal opening on that date though actual proceedings apparently commenced only on the following Monday, because on Sunday exhibits were entering the grounds and general preparations for the exhibition were under way.

On August 23, Glencross, a traffic constable of the R.C.M.P. Force, was assigned for duty in patrolling the Driveway, from Confederation Park on the southerly side of Sparks street, along the Rideau canal, to Hog's Back, a point beyond Bank street bridge, within which limits falls the section of the Driveway which concerns us here, that is, from Fifth avenue to Bank street, and in pursuance of such duties he left headquarters shortly before four o'clock in the afternoon. Proceeding along the Driveway he came to the point where Fifth avenue strikes the Driveway. He found there no gate or barrier, and by some official there was directed to proceed, which he did, towards the Bank street bridge, at a speed of from 23 to 25 miles per hour, which was within the speed limit laid down by the Standing Orders of the Force, and the evidence of Glencross as to his speed I accept.

The Driveway, practically all the distance from Fifth avenue, approaches the Bank street bridge on a gradual curve, and the right hand subway or Driveway under the bridge, over which Glencross was to pass, is only visible when one comes to a point 300 or more feet from the bridge. And it was the right hand subway, or Driveway, under the bridge, that anyone would take in proceeding in the direction Glencross was travelling, and this Glencross was doing. The two bridge subways were closed by gates, two gates under each, closing towards the centre of each subway. These gates were made of fairly large meshed galvanized wire, dull grey in colour and much like the pavement. It was urged that a view of the gates by Glencross was hindered by reason of the fact that they were shaded by the roof of the bridge subway, but of this I cannot be sure. The gates were unpainted, no flagman was stationed in front of the gates, no flag was displayed in any form on the approach to the gates, and there was no sign of any kind in front of the gates indicating danger or warning.

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Glencross stated that having passed along the Driveway at Fifth avenue without finding any barrier there he had no reason to anticipate there would be one under the Bank street bridge, and this seems to be a very reasonable conclusion to reach, particularly when the exhibition was not yet open to the general public. It is true that he had in previous years patrolled this section of the Driveway during exhibition periods, and when the Driveway under the bridge was barricaded, as on the occasion in question. I do not accept the contention that he was bound to conclude that the Bank street subway would be barricaded on this occasion. Since there was no barricade across the Driveway at Fifth avenue, it would be natural to assume that there would be no barricade at Bank street.

The gates in question, however, were at the time in charge of the suppliant Morrison, as a gateman, whose instructions were to exclude the public, and to pass only R.C.M.P. constables patrolling the Driveway, and those in the service of the electric light company which was supplying the Driveway and the Exhibition Grounds with electric lighting. Glencross stated that he was some 200 feet or more from the gates when he observed some person, who turned out to be Morrison, moving towards the centre of the Driveway from the side, and that he was only 50 or 60 feet away, possibly a little more, when he realized that the Driveway was barricaded. He instantly applied his brakes which were in perfect order, and it has been shown that the motorcycle skidded 50 feet before it was stopped. When Morrison first observed the oncoming motorcycle he was on one of the sides of the Driveway, off the travelled portion, where he apparently was engaged in conversation with two or three other men. While Morrison was engaged in the act of opening the two gates at the point where they converged, he was struck in the back by the motorcycle, and the impact forced Morrison and the gates a few feet onwards and outwards, and he was seriously injured. At the moment of impact the motorcycle had almost stopped, and in any event would have proceeded but three or four feet further even if the gates had not been there.

The first question which I propose discussing is whether or not the Driveway here was a public work under sec.

19 (*c*) of the Exchequer Court Act. This provision of the Exchequer Court Act has been the subject of much judicial discussion in the past. In the case of *The King* v. *Dubois* (1), the facts of which fully appear therein on pages 2 and 3 and I need not take time to repeat them, Duff, C.J., in an illuminating and comprehensive manner, discusses the history and result of judicial decision in actions founded upon s. 19 (*c*) of the Exchequer Court Act. His exposition of the authorities, and the grounds for the conclusion which he reached, will be best understood if I quote from his judgment. He said:—

> The amendment with which we have to deal was an amendment introduced into the Exchequer Court Act, an amendment effected, as already observed, by a change in the order of the words in one paragraph of section 16 of that Act. The term "public work" was already there in paragraph (*b*). It was already there and remained there in the amended paragraph (*c*). The scope of the phrase in section 16, as ascertained by reference to the legislation in which those provisions took their origin and definitions in that legislation, and as determined by the decisions of this court, was plainly settled. No expansion of the meaning of the term "public work," so determined, was necessary to give full effect to the amendment. There is nothing in the amendment requiring any alteration in the sense of the term as settled. The amendment, so to speak, was an amendment within the framework of the existing statute; which framework is not altered by it. "Public work" still, in paragraph (*c*) as well as in paragraph (*b*), designates a physical thing, and not a public service. Indeed, I find it impossible to suppose that anybody drafting an amendment to paragraph (*c*), by which he proposed to make the Crown liable for the death or injury resulting from the negligence of any officer or servant of the Crown acting within the scope of his duty or employment in the public service, would have retained the phrase "public work." Either the term public service, or public employment, or public labour, or public business, or public duty, would have been made use of, or the phrase "upon any public work" would have been dispensed with altogether; because it is quite clear that the contention that "public work," in the amended statute, is equivalent to public service leads to the conclusion that the phrase "upon any public work" is merely redundant, if not tautological
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> Moreover, if you substitute "public service" for "public work," or "public employment" or "public labour" for "public work," you establish a liability on the part of the Crown generally for the negligence of its servants. It is not a liability for every tort, but it is a liability embracing the vast majority of torts committed by public employees. Maritime torts committed by His Majesty's vessels, for example, would, speaking generally, fall within it. Such a construction, in a word, adopts the doctrine of *respondeat superior* generally throughout the whole field of negligence.
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> My view has always been that where you have a public work, in the sense indicated in the course of the preceding discussion, and an

(1) (1935) S.C.R. 378.

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injury is caused through the negligence of some servant of the Crown in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work, you are not deforming the language of the section, as amended in 1917, by holding that such an injury comes within the scope of the statute; that is to say, that it is an injury due to the negligence of an employee of the Crown while acting in the scope of his duties or employment "upon a public work" I have always thought, moreover, that the principle ought not to be applied in a niggardly way and that it ought to extend to the negligent acts of public servants necessarily or reasonably incidental to the construction, repair, maintenance, care, working of public works.

My reason for this view I can state in a sentence or two. The purpose of the legislation having been, as I have said, to correct the "stupid" inequalities to use the phrase of Mr. Justice Idington, arising in the application of the statute as it stood before 1917, it seemed to me that that purpose would be largely frustrated if you read the word "upon," which had been substituted for the word "on," strictly as a preposition of place. In a very large number of cases the officer of the Crown responsible for the injury would be a person whose duties were not carried out on the public work in the physical sense. These considerations have seemed to me to be sufficient to justify the construction I have indicated

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Having regard to all this, I find it very difficult to convince myself that anybody intending to subject the Crown to liability for negligence of its servants engaged in driving vehicles belonging to the Crown, or in navigating a vessel belonging to the Crown, could employ the procedure followed in effecting the amendment of 1917. If such had been the purpose of that amendment a different procedure would most assuredly have been resorted to.

I should add that if "public work" embraces employment and service as well as physical things, then the reference in *Schrobounst's* case (1) to the "public work" at Thorold was entirely superfluous; because the driver of the motor vehicle was admittedly, "acting within the scope of his duties or employment" upon a public service—that of driving the vehicle. On the construction now contended for, that, in itself, was sufficient to establish liability.

The Chief Justice there lays down that a cause of action lies where the injury is caused through the negligence of a servant of the Crown "in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work," and that the liability extends to the negligent acts of public servants necessarily or reasonably incidental to the construction, repair, maintenance, care, or the working of public works; he would exclude from the ambit of "public work" public employment on public service, as such. If the liability extended to employment in the "public service" there would, he states, be no purpose in the use of the phrase "upon any public work" in the statute. If the words "upon

(1) (1925) S C R 458

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any public work" were struck out of s. 19 (*c*) as I understand is now proposed, then the Crown would be liable for any injury resulting from the negligence of any officer or servant of the Crown acting within the scope of his duties or employment, whether upon a public work or not.

Now, does the patrol, by a member of the R.C.M.P. Force, on the Driveway in question here, for the purposes which I have mentioned, constitute employment upon a public work, or is it in the nature of employment in the "public service," as held in the *Dubois* case? I should perhaps refer with more particularity to the general duties of members of the R.C.M.P. Force, as set forth in the Standing Orders, and which I omitted to do earlier, when referring to the specific duties assigned to Glencross, by such Standing Orders. They must report accidents coming to their attention while patrolling on the property of the Federal District Commission. In the case of criminal negligence they may detain the offending party, they may detain persons found intoxicated, with certain exceptions they are to prevent parking on the driveways, they may stop and examine noisy motorcycles or motor cars with defective lights and stop and turn about motor vehicles travelling against the traffic on a one-way road, they must watch for damage to Government property, they are to require motorists to observe stop signs, they are expected to prevent violations of the Migratory Birds Convention Act, and there are other duties which they are to perform. In the performance of such duties there is conferred by statute upon members of the Force, "all powers, authority, protection and privileges which any constable has by law." The duties or employment of Glencross cannot, I think, be said to relate to the construction, maintenance, repair or care of the Driveway, which was constructed for vehicular and pedestrian traffic. To say so is, I think, to allow the fundamental to be obscured by the incidental. It was the conduct of members of the public using the Driveway, the protection of public property on or off the Driveway, the enforcement of law, and the preservation of order on the Driveway and elsewhere, with which he was concerned, and not duties incident to employment upon a public work. His duties primarily related to police work on the Driveway when thereon, and elsewhere, and he was assigned no

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duties relative to the care or maintenance of the Driveway as such, which would be in other hands. His only equipment was a motorcycle and a revolver which would hardly be appropriate instruments for the repair, maintenance or care of the Driveway. It was not, I think, a part of his duties or employment to "care" for the Driveway in the sense that that word is used by Duff, C.J., in the *Dubois* case. It matters not, I think, that the greater part of Glencross' duty was carried out upon the Driveway, as he proceeded on his patrol.

These and other considerations impel me to the conclusion that, for the purposes of this case, Glencross was not employed upon a public work, within the meaning and intent of the statute. I think the "duties or employment" referred to in s. 19 (*c*) of the Exchequer Court Act, were intended to mean duties and employment relating to some public work, constructed or being constructed, the repair, maintenance and care of which would not be a duty ordinarily assigned to a peace officer of the Crown, though as a peace officer, and not as a caretaker, it was his duty to patrol the same by passing over it each day.

Regardless of whether the Driveway here is a public work I feel that I should express my opinion as to whether there was in fact negligence on the part of Glencross. I am disposed to think that negligence on the part of Glencross has not been established. The fact that there was no barrier at Fifth avenue, that the exhibition was not open to public patrons on the day in question, was calculated to lead Glencross to believe that Bank street was open as usual, if indeed his mind were ever directed to the matter. I fail to understand how it can be urged that Glencross should have anticipated that Bank street would be barricaded, and if I am accurate in this then much that occurred will be readily explained. I believe Glencross when he states that he did not observe that the gates were in place until he was fifty, sixty, or more feet away, largely because their colour was similar to the pavement and would not be readily recognized. So far as I can see the R.C.M.P. authorities were not advised by anybody that Bank street was closed. Nor, do I think his speed was excessive. When he first saw Morrison, whom he first took to be an ordinary pedestrian crossing the Driveway, he was on a one-way

roadway, on the proper side, and he naturally would consider that he would meet no traffic coming in the opposite direction, that is towards him, and even if the sun somewhat obstructed his vision, having no reason to fear oncoming traffic, he therefore would not deem it necessary to reduce his speed. The exhibition authorities, even if authorized to close the Bank street subways, should have placed warnings or signs on either side of the gates, or the gates should have been painted in some way to warn persons of their existence, or Morrison should have in some way put himself in a position to warn traffic some distance in advance of the gates, and should not have acted merely as a gate-opener. Instead of this there was no warning of any kind, and Morrison when he first observed Glencross, was standing to one side of the Driveway engaged in conversation with other persons. To me it is altogether improbable that Glencross saw the gates earlier than the time he states he did, though he may be in error as to the exact distance he then was from the gates; he was not looking for the gates because he did not know they were there, and had some proper sort of warning been given Glencross I have no doubt he would have had ample time to stop his motorcycle. I think the suppliant's employer was extremely negligent and that the accident was due to the employer of Morrison, or Morrison himself, and not Glencross.

I observe that when the Federal District Commission gave leave to the Central Canada Exhibition Association to close the same two streets in 1937, it was upon the condition that a flagman would be stationed at a distance approximately 150 feet from the barricades to be erected at Fifth avenue and Bank street, to warn approaching traffic that the Driveway was closed; that the flagman be equipped with a red flag during the daylight and with a lighted red lantern at night; that suitable danger lights be placed on the barricades clearly visible to traffic in both directions; that both sides of the barricades be painted in the pattern of black and white squares, six inches in size; and that a wooden sign of suitable size lettered "Danger Ahead" be placed about 150 feet from the barricades outside of the exhibition grounds on the right hand side of the

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Driveway in each case. All this the exhibition authorities should have done, without request of the Federal District Commission, in 1936.

I therefore dismiss the petition, and with costs.

Judgment accordingly.