

No. J. R. ~~7034-42.~~ 143992

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REGISTRY

Department of Justice

STATE.

SUBJECT:

PROPERTY IN PROTECTED AREA.

PROPOSED AMENDMENT TO ORDER IN COUNCIL P.C.2483 LIMITING

LIABILITY TO ASSETS VESTED IN ANY SPECIFIC CASE.

Charged to E.A.D.

ACCESS REVIEWED:

R.G. 13

ACC:

90-91/006

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COPY

P.C. 2483.

P R I V Y C O U N C I L
Canada

AT THE GOVERNMENT HOUSE AT OTTAWA

FRIDAY, the 27th day of MARCH, 1942.

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS BY Order in Council P.C. 1665 dated March 4th, 1942, the British Columbia Security Commission was established for the purpose of planning, supervising and directing the evacuation from the protected areas of British Columbia of all persons of the Japanese race and for such purpose was empowered to determine amongst other things all matters relative to the placement of such persons;

AND WHEREAS it is represented to the Minister of Justice that it is desirable to provide that any plan with regard to the placement of such persons be limited to making provision for the temporary placement only of such persons during the continuation of the state of war now existing and that the authority of the Commission should include power to vary or amend any placement order;

AND WHEREAS recommendations have been made to the Minister of Justice by the British Columbia Security Commission to the effect that a greater degree of protective control over persons of the Japanese race and the property of such persons be provided for than was provided by the Order establishing the Commission, above referred to;

NOW, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and under and by virtue of the powers conferred by the War Measures Act, Chapter 206, R.S.C., 1927, is pleased to amend the Regulations established by Order in Council P.C. 1665 dated March 4th, 1942 as follows:

1. Regulation one is hereby amended by adding thereto the following paragraph:

"(bb) 'Person of the Japanese race' means any person of the Japanese race required to leave any protected area of British Columbia by Order of the Minister of Justice under Regulation 4, as amended, of the Defence of Canada Regulations (Consolidation) 1941."

2. Regulation ten is hereby amended by adding thereto the following paragraphs:

"(5) Any such plan or plans shall make provision for the temporary placement only of such persons during the continuation of the state of war now existing.

"(6) The Commission's authority relative to the placement of persons shall include power to vary or amend any placement order."

3. Regulation eleven is hereby amended by rescinding paragraph two thereof and substituting therefor the following:

"(2) The Commission may make orders respecting the conduct, activities and discipline of any person of the Japanese race who is within any protected area or who is ordinarily resident within any protected area but who has left or leaves such area after February 5th, 1942."

4. Regulation twelve is hereby rescinded and the following substituted therefor:

"12 (1) Subject as hereinafter in this Regulation provided, as a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race (excepting fishing vessels subject to Order in Council P.C. 288 of January 13th, 1942, and deposits of money, shares of stock, debentures, bonds or other securities delivered up to any person by the owner pursuant to an order of the Minister of Justice, or which is turned over to the Custodian by or on behalf of the owner, or which the owner, on being evacuated from the protected area, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations Respecting Trading with the Enemy, (1939); provided, however, that no commission shall be charged by the Custodian in respect of such control and management.

"(2) The Custodian may, notwithstanding anything contained in this Regulation, order that all or any property whatsoever, situated in any protected area of British Columbia, belonging to any person of the Japanese race shall, for the purpose of protecting the interests of the owner or any other person, be vested in the Custodian, and the Custodian shall have full power to administer such property for the benefit of all such interested persons, and shall release such property upon being satisfied that the interests aforesaid will not be prejudiced thereby.

"(3) For the purposes of the control and management of such property by the Custodian, the Consolidated Regulations Respecting Trading with the Enemy, (1939), shall apply mutatis mutandis to the same extent as if the property belonged to an enemy within the meaning of the said Consolidated Regulations".

A.D.P. HEENEY

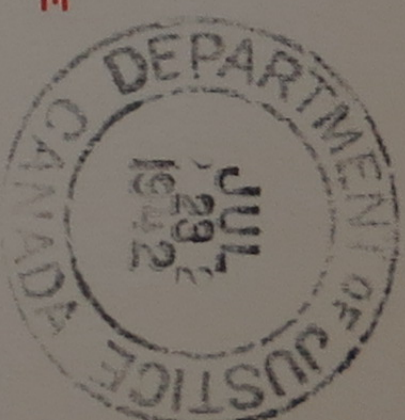
Clerk of the Privy Council.

ATM

Buecker



DEPARTMENT OF THE SECRETARY OF STATE
OF CANADA



Ottawa, July 22, 1942.

Dear Sir,-

You will recollect that under Order in Council P.C. 2483, approved on the 27th March, Regulation twelve, dealing with the Japanese evacuation, vested in the Custodian the property situated in any protected area of British Columbia belonging to any person of the Japanese race. For your convenience I enclose a typewritten copy of the Order in Council.

You will observe that the Order provides for the vesting when the owner is evacuated. The effect of this has been that more than 1,000 parcels of real property have vested in the Custodian, the vesting in many cases taking place on the evacuation of the Japanese owner although, as a matter of fact, on occasion it may be some time before the Custodian's officers have any information as to the actual evacuation of the individual having taken place.

A difficult point has now arisen. Many of these properties which were unoccupied have been offered for rent and prospective tenants have inspected them. In one case a woman who was inspecting a property with the view to renting it fell downstairs and sustained personal injuries including a broken leg. She has now threatened an action for damages against the Custodian and the Solicitor in Vancouver nominated by your Department to advise the Custodian has advised that there is liability.*

The Custodian's representative in Vancouver advises me that the premium rates for insurance appear to be prohibitive and he recommends that the Order in Council be amended limiting the liability to the value of the assets vested in any specific case on the principle set out in the various Provincial Trustee Acts. He further recommends that this amendment should be retroactive.

Will you kindly consider this point and advise me if the Minister of Justice is prepared to recommend an amendment to this effect. I observe that the Order in Council of the 27th March was passed on the recommendation of the Minister of Justice.

Yours sincerely,

E. H. Coleman
E. H. COLEMAN
Under Secretary of State.

The Deputy Minister of Justice,

O t t a w a .

EAD/Mc.

Ottawa, July 31st, 1942.

MEMORANDUM FOR THE DEPUTY MINISTER OF JUSTICE

J.R. 7034-42

This is a reference from the Under Secretary of State as to the liability of the Crown with respect to real property of Japanese which has vested in the Custodian.

Order in Council P.C. 2483 of March 27th, provides that all property situated in any protected area of British Columbia belonging to any person of the Japanese race, which the owner is unable to take with him, shall be vested in the Custodian. The Under-Secretary of State advises that more than one thousand parcels of real property have vested.

A problem has arisen and the Under Secretary of State writes as follows:

"Many of these properties which were unoccupied have been offered for rent and prospective tenants have inspected them. In one case a woman who was inspecting a property with the view to renting it fell downstairs and sustained personal injuries including a broken leg. She has now threatened an action for damages against the Custodian and the Solicitor in Vancouver nominated by your Department to advise the Custodian has advised that there is liability."

The Under Secretary of State now suggests an amendment limiting the liability to the value of the assets vested in any specific case.

I do not agree that there is liability on the part of the Crown. The only possible basis of liability is that the Crown is an occupier of premises and neglected to keep them in repair. It does not seem to me that this comes within the scope of 19(c) of the Exchequer Court Act as amended. A charge of personal negligence cannot of course be imputed to the Crown. I cannot see that any officer or servant of the Crown was negligent in this case. As far as I can see there is no duty on the Custodian to keep the premises in repair and consequently he could not be negligent. See Jokele vs The King, 1937, Ex. 132.

I suggest ~~first~~ that the Under Secretary of State be advised there is no liability on the Crown under the circumstances set out by him and that therefore an Order in Council as he suggests is not necessary.

draft attached

E.A.D.

August 5th,

42.

J.R. 7034-42

Dear Sir:

I wish to acknowledge receipt of your letter dated July 22nd with reference to injuries sustained by persons inspecting property which has vested in the Custodian pursuant to Order in Council P.O. 2483 of March 27th.

I am not satisfied that there is any liability under the circumstances outlined in your letter and I shall therefore be obliged if you will ascertain from the solicitor in Vancouver nominated to advise the Custodian, on what grounds he bases his opinion that there is liability.

Yours truly,

F. P. Varcoe

Deputy Minister.

E.H.Coleman, Esq.,
Under Secretary of State,
Department of the Secretary of
State of Canada,
O T T A W A.

Department of Justice

AUG 8 1942

REGISTRY

ATM

CANADA

DEPARTMENT OF THE SECRETARY OF STATE



7034

Ottawa, October 10, 1942.

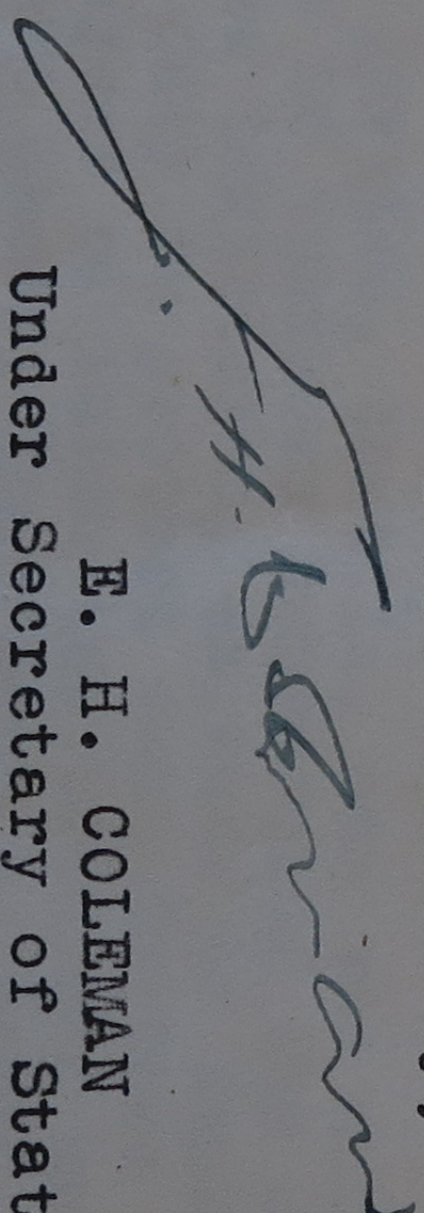
Dear Sir,-

With reference to my letter of July 22nd last, I am enclosing for your perusal a copy of an opinion from Messrs. Locke, Lane, Guild & Sheppard supplied to the Custodian's representative in Vancouver under date of October 1st.

I shall be pleased if you will consider this opinion and indicate whether it alters the view of your Department on the question of possible liability.

You may wish to consider whether we should not amend the Order relating to property of evacuated Japanese to afford the Custodian protection against claims of this nature.

Yours sincerely,


E. H. COLEMAN
Under Secretary of State.

The Deputy Minister of Justice,

O t t a w a .

KE, LANE, Guild & Sheppard
Barristers & Solicitors

Copy

OSU Doc. No.
CHGAL No. de Doc.

C.H.Locke, K.C.C.

W. S. Lane

C.K.Guild, K.C.C. (Man.)

F.A.Sheppard, K.C.C. (Sask)

K.L.Yule

J.R.Young

S.C.Lane

C.C.Locke

703 Rogers Building,

Vancouver, B.C.
October 1st, 1942.

The Custodian,
509-10 Royal Bank Bldg.,
Vancouver, B.C. Attention Mr. McPherson

Dear Sir:-

Re-Public Liability Insurance.

We have your enquiry as to the liability of the Custodian towards third persons by reason of lands of Japanese and the control and management thereof having been vested in the Custodian. Possible liability does not arise through a claim by the Japanese or by a creditor of that Japanese but rather a claim by third persons in tort for damages suffered through conditions existing on the premises.

Firstly, liability may arise through duty imposed in law upon an occupant towards third persons entering on the premises. That duty varies with the particular relation to the person entering as follows:-

- (a) towards an invitee, that is, one who enters on a matter of business concerning the occupant, and on whose invitation, express or implied, there is a duty to protect such invitee against unusual dangers of which the occupant knew or ought to have known, Indermaur v. Dames, 1866 L. R. I C.P. 274.

- (b) Towards a licensee, that is, one entering on a bare permission, who has a duty not to cause injury by reason of a trap, that is a hidden danger covered over to give the appearance of safety, Gautret v. Egerton, 1866, L.R. 2 C.P. 375

The Custodian.

- (c) Towards a trespasser, not to injure him wilfully. In this latter case, because of the restricted nature of this duty, liability would not arise.

While the authorities speak of the obligation here being imposed upon the occupant the essential reason for that liability is because the occupant has the control, and therefore having control is the one deemed at fault. Therefore, it follows that where the person has control of the premises he comes within that duty imposed upon the occupant. This is explained in the judgment of Lord Atkinson in Cavalier v. Pope, 1906 A. C. 433, also by Abbot, C.J. in Laugher v. Pointer (1826) 5 B. & C. 576, where he states:-

"I have the control and management of all that belongs to my land or my house and it is my fault if I do not so exercise my authority as to prevent injury to another"

and by Masten J.A. in Read v. Town of Mimico, 1926 59 O.L.R. at page 584.

In the case of an evacuee, his lands and the control and management thereof are vested in the Custodian (P.C. 2483 amending Regulation 12 of P. C. 1665) and in the case of a Japanese enemy there is at least an equivalent vesting under the Consolidated Regulations respecting trading with the enemy. There is, therefore, vested in the Custodian that control necessary to vest in him those common law duties to third persons entering on the lands in the respective categories of invitee and licensee. There are evident instances where an action may arise, where with the permission of the Custodian or of an officer concerned in the management a third person enters to determine whether he will lease or purchase; then such third person is entering upon a matter of business that concerns the occupant (having regard to the vesting of the duty of management and control.) Therefore there arises the relation of invitee and invitor and the consequent liability for injuries from an unusual danger or from the premises not being reasonably safe. Similarly a third person entering on a bare permission would assume the

The Custodian.

relation of licensee at least, and there would be a liability for injuries which were received from a trap. As for example, an insecurely covered cesspool or other pit.

Again you will remember that under the Japanese system of farming it is not uncommon to find several holdings on the one parcel of land and access to a holding may be over other holdings on the same parcel. It, therefore, follows that a tenant as an incident of a lease from the Custodian may acquire the right of crossing other holdings and in so crossing the tenant would assume the relation of invitee or licensee depending upon whether he had purchased the right or it had been given to him subsequently as a gift. This duty imposed on the Custodian would cease in respect of a particular parcel when it has been leased and repossession taken by the tenant (Cavalier v. Pope) but it would appear that so long as the control remains in the Custodian the common law duty on an occupant would continue.

Secondly, there is a possible liability for nuisance. Whether the Japanese be an enemy or evacuee, there is a vesting of his lands in the Custodian (Consolidated Regulations, Sec. 21, (P.C. 2483 enacting Regulation 12) and it is to be observed that the liability in respect of a nuisance existing at the time of the vesting is not necessarily abrogated by a subsequent leasing, Rich v. Basterfield, 1947, 16 L.J.C.P. 273.

We appreciate that the principle of respondeat superior does not apply to impose upon a superior officer of the Crown any liability for the negligence of a subordinate, but that does not appear to apply here. The duty is on the Custodian in whom is vested the property and control and any omission to perform that duty would be the personal omission of the Custodian in whom is imposed the duty of care, and that would be equally the case though the Custodian had delegated the duty of care to subordinates; while he may delegate the performance that does not divest the obligation. Because of this potential liability there would appear necessary a statutory immunity if that liability were to be excluded. We have read the Regulations and fail to find anything on which can be founded a statutory defence to these types of action. Such a defence could be expected to be effective only if it were expressed and without ambiguity. Consolidated Regulations 6 (3) offers immunity not to the Custodian but to those acting under his express orders, or in the belief that they are authorized.

The Custodian.

This, therefore, would offer the Custodian no defence, Regulation 21 precludes an action by an enemy to recover his property, but could not apply to an action by a third person for damages suffered in tort. Section 45 (2) bars actions by creditors of Japanese and Regulation 50 applies only to charges of Japanese and otherwise. In the case of an evacuee the immunities statutory or otherwise. In the case of an evacuee the immunities of the Consolidated Regulations are made applicable by reference "for the purposes of control and management of such property" and therefore there is no additional statutory defence.

In conclusion we are of the opinion that the control vested in the Custodian would carry with it those corresponding obligations of an occupant and therefore there is a possible liability to third persons for injuries received on the premises while that control remains.

Yours truly,

LOCKE, LANE, GUILD & SHEPPARD,

Per:- (Initialed) FAS.

FAS/EB.

EAD/Mc.

Ottawa, October 29th, 1942.

MEMORANDUM FOR THE DEPUTY MINISTER OF JUSTICE

J.R. 7034-42

This is a reference from the Under Secretary of State as to whether the Custodian is liable to persons injured while inspecting property formerly belonging to persons of the Japanese race and now vested in the Custodian pursuant to Order in Council P.C. 2483 of March 27th, 1942.

On July 22nd the Under Secretary of State wrote that the solicitor for the Custodian had advised that the Custodian would be liable. On August 5th 1942, you replied stating that you were not satisfied there was any liability under these circumstances but you requested a statement of the grounds on which the solicitor to the Custodian based his opinion.

This opinion has now been forwarded. The contention is put forward that this property has vested in the Custodian and the Custodian is therefore liable as an occupier under the principle of Indermaur -vs- Dames, (1866) L.R. 1 C.P. 274.

I do not agree with this conclusion. Section 6 of the Regulations respecting Trading with the Enemy 1939, P.C. 3959 of August 21st, 1940, provides that the Secretary of State is "hereby appointed to receive, hold, preserve, and deal with such property" as may be vested in him, and he is referred to as "the Custodian". The property therefore is vested in him as an officer of the Crown and he holds it for the Crown. The result is that the Crown and not the Secretary of State is the "occupier" of the premises. See Oakes and Stamford, (1926) 3 D.L.R. 102, Graham -vs- Commissioners of Niagara Park (1896) 28 O.R.1. The principle of Indermaur-vs-Dames does not apply to the Crown.

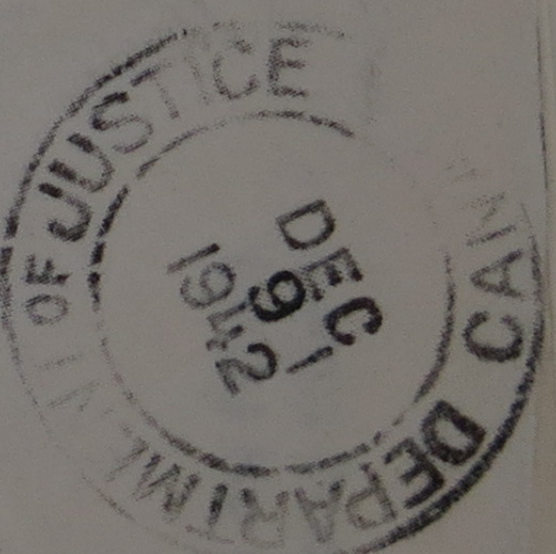
The Under Secretary of State has suggested that the Order relating to the property of the Japanese be amended so as to afford the Custodian protection against claims of this nature. In my opinion such an amendment is not necessary but perhaps out of greater caution, the amendment could be made.

May I be instructed please?

E. A. D.

CANADA

DEPARTMENT OF THE SECRETARY OF STATE



EAD

EHC:DC

JR 7034-42

Ottawa, December 8th, 1942.

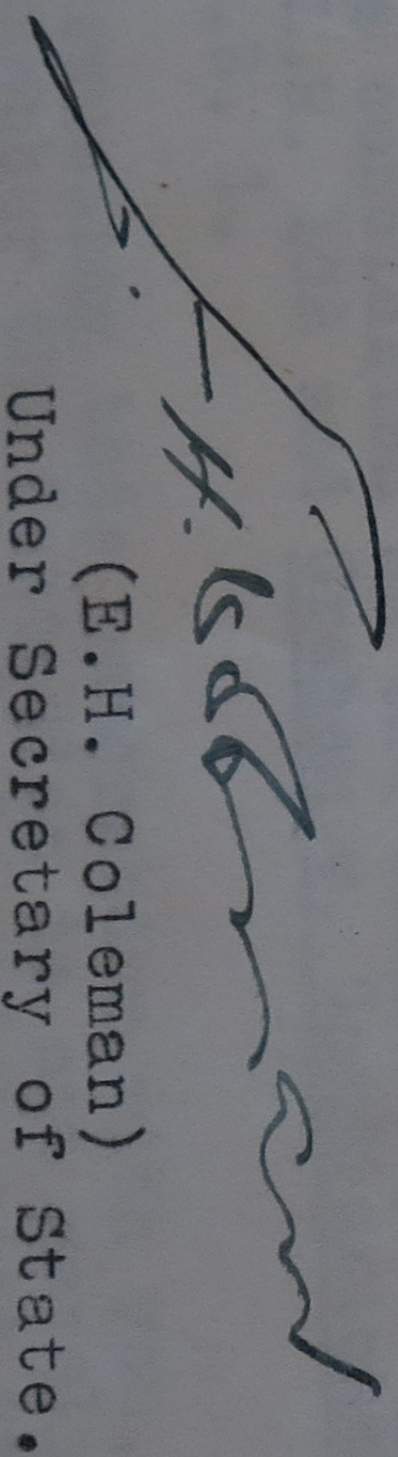
The Deputy Minister of Justice,
O t t a w a.

On October 10th, 1942, I forwarded you a copy of an opinion from Messrs. Locke, Lane, Guild and Sheppard supplied to the Custodian's representative in Vancouver on the question of the liability of the Custodian toward third persons.

I have had a letter from the Custodian's representative advising me that very recently a tenant sustained an injury, a broken leg, in one of the Japanese properties. Our representative is of the opinion that quite possibly we may be confronted with a claim for damages.

In my letter of October 10th enclosing a copy of the opinion from the Solicitors in Vancouver, I inquired if your Department felt that it should give consideration to any amendment to the Order relating to property of evacuated Japanese to afford the Custodian protection against claims of this nature.

I should be obliged if you would advise me at the earliest convenient time whether you desire to express any further opinion on this point.


(E.H. Coleman)
Under Secretary of State.

EAD/Mc.

Ottawa, December 9th, 1942.

MEMORANDUM FOR THE DEPUTY MINISTER OF JUSTICE

J.R. 7034-42

You will recall that the Under Secretary of State previously asked you for an opinion as to whether the Custodian of enemy property is liable to persons who inspect Japanese property taken over by the Custodian and who are injured.

Order in Council P.C. 2483 of March 27th, 1942, vested in the Custodian property belonging to persons of the Japanese race. Many of these properties have been offered for rent and in one case a prospective tenant fell and sustained injuries. She threatened an action against the Custodian and the solicitor in Vancouver appointed to advise the Custodian has advised that there is liability. You then inquired as to the grounds on which the solicitor based his opinion. The Under Secretary of State forwarded a copy of this opinion which is to the effect that the Custodian is liable in damages under the principle of Indermaur v. Dames, (1866) L.R. 1 C.P. 274.

In a previous memorandum to you I suggested that the principle of this case had no application to the facts of the present case because the Crown is the owner of the property. I base this conclusion on the authority of Oakes and Stamford, 1926, 3 D.L.R. 102 and Graham v. Commissioners of Niagara Park, 1896, 28 O.R. 1.

In discussing this memorandum with you, you asked me to consider whether the Custodian is not merely a trustee for the former Japanese owners, in which case the principle of Indermaur v. Dames might apply.

It may be that the property in question is held for the ultimate benefit of the former Japanese owners. However, it is not the Custodian but the Crown who is the owner and the trustee. If there is any "occupier" it must be the Crown. Consequently, I do not think that Indermaur v. Dames applies. Furthermore there is no duty on the Custodian personally to keep the premises in repair. See Jokela v. The King, 1937 Ex. Cr. 132. ✓

The Under Secretary of State has suggested that the Order relating to property of Japanese be amended so as to afford the Custodian protection against such claims. Although such amendment would not appear to be necessary, yet out of greater caution perhaps it could be made.

May I have your instructions please?

E. A. D.

DEPARTMENT OF JUSTICE

MEMORANDUM

December 11, 1942.

MR. DRIEDGER:

With further reference to the position of the Custodian, it might be worth while enquiring what was the legal consequence of a declaration of war on property of the enemy at common law.

F.P.V.

EAD/Mc.

Ottawa, December 13th, 1942.

MEMORANDUM FOR THE DEPUTY MINISTER

J.R. 7034-42

With further reference to the position of the Custodian, I have looked into the rights of enemy aliens with respect to property both at common law and by statute and the various provisions relating to enemy property in England and in Canada during the last war and the present war.

At common law an alien was in the same position as a natural born British subject with regard to all personal property except chattels real and British ships. But he could not hold real estate or chattels real.

Halsbury vol. 1 p. 450

An alien enemy however had no rights at all. He was liable to be seized and imprisoned and debts and goods belonging to an alien found in the realm belonged to the King and could be seized.

Halsbury vol. 1 p. 455
Porter v. Freudenberg (1915) 1 K.B. 857 at 869.

By the Naturalization Act 1870 (33 Vict. C. 14) S. 2 an alien was placed on the same footing as British subjects with regard to real and personal property with the exception of British ships and real estate outside Great Britain. This provision was carried forward into the Naturalization Act of 1914 (4 & 5 Geo. V, c. 17, s. 17) and is the same as sec. 20 of the Naturalization Act, R.S.C. 1927, c. 138.

The position of property belonging to enemy aliens was governed by the Trading with the Enemy Amendment Act, 1914, 5 & 6 Geo. V, c. 12 during the last war. This statute sets up a Custodian of Enemy Property, and by s. 1 the Public Trustee is the Custodian. All dividends etc., payable to an enemy are payable to the Custodian. The Act does not divest alien enemies of their property but under sec. 4 the High Court may upon application of anyone interested or any Government department vest the property in the Custodian.

By sec. 5 the Custodian holds any money paid to him or property vested in him until the termination of the war and thereafter it shall be dealt with in such manner as His Majesty may by Order in Council direct.

The Custodian being the Public Trustee, the Public Trustee Act, 1906, (6 Edw. 7, c. 55) was made to apply. Section 7 of the Public Trustee Act provides that the Consolidated Fund of the United Kingdom shall be liable to make good all sums required to discharge any liability which the public trustee, if he were a private trustee, would be personally liable to discharge, except where the liability is one to which neither the public trustee nor any of his officers has in any way contributed, and which neither he nor any of his officers could by the exercise of reasonable diligence have averted, and in that case the public trustee shall not, nor shall the Consolidated Fund, be subject to any liability.

Section 1 of the Public Trustee Act provides that the public trustee shall be a corporation sole and may sue and be sued.

While at common law the Crown could seize enemy property, it has been held in Inre Ferdinand, (1921) 1 Ch 107 that the provisions of the Trading with the Enemy Acts, 1914 to 1916, are inconsistent with the right of the Crown to claim an absolute forfeiture and show an intention to abandon that common law right.

The situation then in England during the last war was that upon a declaration of war, enemy aliens still owned their property but an order could be made by the Court vesting such property in the Custodian. When such property was vested it would appear that the public trustee was subject to the same liabilities as an ordinary individual. The public trustee is a corporation and "in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing." Per Lord Blackburn in the Mersey Docks case, L.R. 1 H.L. 93 at 110; Gibraltar v Orfila, 15 A C 400

The material available in the Library here is not sufficient to disclose precisely the situation with regard to enemy property in England to-day.

The Act of 1916 has been replaced by the Trading with the Enemy Act, 1939, 2 & 3 Geo. VI c. 89. Section 7 provides that with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property and may make orders for certain purposes including the vesting of enemy property in the custodian. By section 11 the expenses incurred by the Board shall be defrayed out of moneys provided by Parliament.

The regulation of enemy property is left largely to the Board of Trade and certain provisions were made by the Trading with the Enemy (Custodian) Order, 1939 (see Butterworth's Emergency Legislation).

These regulations resemble the Trading with the Enemy Act of the last war. Section 1 provides for payment to the custodian of money otherwise payable to an enemy alien. By section 2 the Board of Trade may by order vest property in the Custodian, which vesting order shall have the same effect as a vesting order under the Trustee Act, 1925. By section 3 the Custodian shall hold property vested in him until the termination of the present war and thereafter as the Board of Trade shall direct.

There is, however, nothing in the Regulations to indicate who the Custodian is, but according to a statement in Estate of Sanpietro - (1940) 4 All E.R. 482, the Custodian in the present war is again the Public Trustee. It would seem therefore that the rights and duties of the Custodian with respect to property of enemy aliens are the same in the present war as in the last war in England.

What is the situation in Canada?

As indicated above, aliens may hold both real and personal property by virtue of the Naturalization Act.

The Consolidated Orders respecting Trading with the Enemy, P.C. 1023 of May 2nd, 1916, provide that the Minister of Finance and Receiver General shall be the Custodian. Section 28 empowers a Superior Court, on the application of any person interested or any department of the Government, to vest in the Custodian real and personal property of an enemy alien. Section 36 provides that money paid to or property vested in the Custodian shall be held until the termination of the war and thereafter as the Governor in Council may direct.

In the last war, therefore, the situation in Canada was the same as in England, with this difference, that the property in Canada would be vested in a Minister of the Crown instead of a public trustee, and such Minister is not created a corporation sole. The matter of the Custodian's liability in England was definitely settled in England, but not in Canada. Until a vesting order was made, however, the property remained the property of the enemy alien. The present Regulations Respecting Trading with the enemy differ somewhat from the Regulations of the last war. Section 6 provides that the Secretary of State shall be the Custodian. Section 21 provides that all property in Canada belonging to enemies at or subsequent to the commencement of the present war is vested in the Custodian. Section 1 (h) defines property as including all real and personal property. Section 25 empowers the Exchequer Court to vest "suspected enemy property" in the Custodian. The Custodian is not created a corporation. Section 66 provides that any restrictions imposed by statute, Proclamation or Regulations on dealings with enemy property shall continue during the present time and until such time as they may be removed by Order in Council. By section 43 the Custodian's office shall be deemed a department of Government for the purposes of the Canada Evidence Act.

EAD/Mc.

Ottawa, December 15th, 1942.

MEMORANDUM FOR THE DEPUTY MINISTER OF JUSTICE

J.R. 7034-42

You will recall that when we were discussing the question of the Custodian's liability you asked me to look into the law respecting enemy aliens with regard to property and to compare the position of Custodians in England with that in Canada. I attach hereto a memorandum accordingly.

You will see that the position in England is somewhat simpler than in Canada. In England the Public Trustee is the custodian. He is a corporation sole and may sue and be sued. The Consolidated Fund of the United Kingdom is liable to make good sums required to discharge any liability of the public trustee. In Canada the property is simply vested in the Secretary of State in his official capacity. He is not a corporation and just what his position is, is not made clear by the Regulations.

You will recall that the Under Secretary of State in his letter of July 22nd asked you to advise him whether the Minister of Justice is prepared to recommend an amendment to the Regulations respecting trading with the enemy limiting the liability ~~to~~ the custodian.

To summarize, the situation appears to be as follows:

An injured person has three possible courses of action. He may sue

- (a) The Secretary of State in his personal capacity.
- (b) The Secretary of State in his official capacity.
- (c) The Crown.

I do not think an action against the Secretary of State in his personal capacity would succeed. The basis of the action must be breach of duty and the Secretary of State as a private individual does not owe a duty to protect visitors from dangers. As an individual he is not the occupier and in any case in relation to him a visitor could not be an invitee. The Secretary of State has no personal interest in the leasing or other disposition of the property.

As far as an action against the Secretary of State in his official capacity is concerned, such an action would be the

*As far as letter
acknowledging
J.R.*

tantamount to an action against the Crown and could not succeed unless there is a right of action against the Crown. This appears to be the effect of Palmer v. Hutchinson, 6. A.C. 619 at 626 and Roper v Public Works (1915) 1 K.B. 45, at 53.

The remaining possibility is an action against the Crown. There is no action against the Crown unless it is given by the Exchequer Court Act. Section 19 (c) as amended includes injuries resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties. A claimant would therefore have to establish that the custodian was negligent. In other words he must show breach of some duty. As indicated in previous memoranda, I doubt whether the Secretary of State in his official capacity owes a duty to protect visitors against dangers of which he ought to have been aware.

However, assuming for the moment that the custodian owes such a duty and that there is a right of action against the Crown, is there any reason why this liability should be limited? Once the principle of liability is admitted ought exceptions to be made? Perhaps the best course would be to leave the claimant to enforce such rights as he may have and leave it to the Courts to decide.

F. A. D.

December 21,

42.

TO: E. H. Coleman, Esq., K.C., Under Secretary of State.

J.R. 7034-42

With reference to the question of liability for damages suffered by persons lawfully entering upon property vested in the Custodian resulting from lack of repair of the premises, I beg to advise that in my opinion liability should be denied. The position of the Custodian in this respect should be differentiated from that of a subject owning property. The vesting of property in the Custodian does not in my opinion cast upon him the full responsibility of a property owner as is established by such precedents as the case *Indermaur v. Dames*. I would advise that you take the position that the Custodian is the representative of His Majesty and that liability is limited to claims arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

On the other hand, I would not be prepared to recommend that the liability of the Custodian should be limited. I see no reason why such a course should be adopted.

Department of Justice

DEC 21 1942

REGISTER

F. P. Varcoe

Deputy Minister.

Reub (see)
Nakashima v. Nakani
[1947] ExCR 486
Japan