COMMENTS
COMMENTAIRES

CONFLICT OF LAWS—RECENT DIVORCE RECOGNITION CASES IN ENGLAND AND CANADA.—Perhaps no field of law has undergone as much judicial development in the past two decades as that of recognition of foreign divorce decrees.[1] Nor is there any sign that the pace is slackening. Since the momentous decision of the House of Lords in *Indyka* v. *Indyka*[2] in 1967 the frequency of reported divorce recognition cases in England has increased and several of these decisions have introduced significant developments in the law.

In *Indyka* the House of Lords made a fundamental re-examination of the rules for recognition of foreign divorce decrees. While strictly speaking the *ratio decidendi* of the case appears to be simply that the rule in *Travers* v. *Holley*[3] has retrospective application, the most significant point arising from the case was the view that recognition should be given to foreign decrees on a wider basis than the traditionally accepted domicile rule. There should be recognition when there is a real and substantial connection between the petitioner and the place where the decree was granted.[4]

Some of the cases following immediately after *Indyka* have already been commented on in this *Review*.[5] For this reason the case of *Blair* v. *Blair*[6] seems a convenient starting point. It raises several of the current issues in this area, such as: What did the House of Lords really decide in *Indyka*?; What is the meaning

[1] It is not the purpose of this comment to trace that development. See *e.g.* Bale, Comment (1968), 46 Can. Bar Rev. 113; Castel, Cases and Materials on the Conflict of Laws (2nd ed., 1968), pp. 437-442; Lipstein, Recognition of Foreign Divorces: Retrospects and Prospects (1967), 2 Ottawa L. Rev. 49; MacKinnon, Annual Survey of Canadian Law (Conflict of Laws) (1968), 3 Ottawa L. Rev. 131.

[2] [1969] 1 A.C. 33, [1967] 3 W.L.R. 510, [1967] 2 All E.R. 689.

[3] [1953] P. 246, [1953] 2 W.L.R. 507, [1953] 2 All E.R. 794 (C.A.).

[4] For a discussion of the ratio decidendi of *Indyka*, see MacKinnon, *op. cit.*, footnote 1, at pp. 134-137.

[5] See Bale, *op. cit.*, footnote 1 where in addition to *Indyka*, he discusses: *Angelo* v. *Angelo*, [1968] 1 W.L.R. 401, [1967] 3 All E.R. 314 and *Peters* v. *Peters*, [1967] 3 All E.R. 318.

[6] [1969] 1 W.L.R. 221; [1968] 3 All E.R. 639. See Wade (1969), 32 Mod. L. Rev. 441 for comment on *Blair* v. *Blair* and *Mayfield* v. *Mayfield*, [1969] P. 119.

of real and substantial connection?; Will recognition be given to a decree granted to the husband?; Does it matter that at the relevant time the petitioner had no real and substantial connection with the granting country?

In *Blair* v. *Blair* the husband was English and the wife Norwegian. They were married in Norway in 1957, the wife always having lived there and the husband having acquired a domicile of choice there. A child was born the following year. At the end of 1959 the husband went to England for a training course in connection with his work in Norway. He had at that time no intention of changing his plan to make Norway his permanent home. Shortly afterward he was joined by his wife. The couple resided together in England for fifteen months during which time the wife was homesick for her native land. Her unhappiness affected the child and the tranquility of the household and the husband decided that it would be best if his wife and child returned to Norway. He intended to rejoin them once he had completed his course. In April 1961, the wife and daughter returned to Norway where they re-established themselves in the matrimonial home. By May 1962 the wife had persuaded her husband to join with her in applying for a Norwegian separation licence. In November 1962 that licence was issued to them. The effect of such a licence was that, after a year if both parties agreed they could apply for a divorce together, and normally it would be granted. If both did not so agree to apply for divorce, either could apply for divorce after two years had elapsed, and the Norwegian court might then grant a divorce to the applicant based on the separation. The husband continued to hope that he would be able to restore his relationship with his wife upon his return to Norway. In June 1963, the wife wrote to the husband that she had committed adultery and was pregnant, and asked him to divorce her. In July 1963 the husband decided to accede to his wife's request and instructed his Norwegian attorney to petition the Norwegian court for divorce on the ground of adultery. On August 31st, 1963, the Norwegian attorney instituted proceedings in the Norwegian court and on September 10th, 1963, the court passed sentence of divorce. In 1967 the husband petitioned the English High Court for a declaration that the sentence of the Norwegian court had validly dissolved the marriage.

Cumming-Bruce J., granted the declaration. He found that the husband had abandoned his domicile of choice when he decided to accede to the wife's request and instruct the Norwegian attorney to institute divorce proceedings. At this point in time the husband's English domicile of origin revived. He accepted the expert evidence that the Norwegian court had "accepted jurisdiction on the ground that the wife had been born and was settled in

Norway and that Norway was at all times intended to be the country of the matrimonial home".[7] He observed that it was probable that the Norwegian court also accepted jurisdiction on the grounds of the husband's domicile.[8]

Cumming-Bruce J., observed that before the *Indyka* decision he would have reluctantly considered it his duty to refuse recognition to the Norwegian decree. As a result of the guidance given to the courts by the House of Lords in that case Cumming-Bruce J., was of the opinion that "it is now open to an English court at first instance to consider all the facts appertaining to the grant of a decree by a foreign court, whether to a husband or to a wife, and to determine whether, in spite of the fact that there was no domicile of a petitioner husband at the date of the institution of proceedings, the decree should be recognised".[9]

He considered the relevant facts to be as follows:[10]

> (1) The husband was domiciled in Norway until a few weeks before the proceedings were instituted in the Norwegian court. (2) When he instituted his proceedings he was wholly unaware that the imprint of his recent *animus revertendi* upon his hitherto temporary residence in England had had the effect of changing his personal law. (3) From the date of his marriage in 1957 to the date of the revival of his English domicile in 1963 he had a real and substantial connection with Norway. Features of this connection were (a) he had married a Norwegian girl in Norway having agreed to settle in Norway after marriage; (b) he established a matrimonial home in Norway and, as long as cohabitation continued, intended Norway to be their permanent home; (c) after he left Norway for temporary training in England he continued to look to Norway as the country where the family life would continue permanently; (d) this connection with Norway was only ended by the very event which induced him to institute proceedings in Norway at the request of his Norwegian wife.

Cumming-Bruce J., concluded that on these facts it was "appropriate and just to allow recognition to the decree granted to

[7] *Ibid.*, at pp. 224 (W.L.R.), 641 (All E.R.).

[8] "The evidence is that the Norwegian court would not regard the temporary interruption of residence in Norway as destroying Norwegian domicile and there was no evidence before the Norwegian court to point to the animus revertendi of the husband. Thus it is probable that the Norwegian court also accepted jurisdiction on the ground of the husband's domicile." *Ibid.*, at pp. 224 (W.L.R.), 641 (All E.R.).

[9] *Ibid.*, at pp. 224 (W.L.R.), 642 (All E.R.).

[10] *Ibid.*, at pp. 224-225 (W.L.R.), 642-643 (All E.R.). The meaning of "real and substantial connection" was examined in *Alexander* v. *Alexander*, The Times, April 1st, 1969, noted in (1969), 119 New L.J. 344. Karminski L.J. said: "When she commenced proceedings, the wife had a real and substantial connection with Ohio. Because she went there with her children to join her parents there, the connection was a 'real' one. It was 'substantial' because she had gone to the United States on a permanent or immigrant's visa. Moreover, since she had obtained the decree of divorce, she had been living in Ohio as the wife of the co-respondent. It was proper to recognise the Ohio decree as a valid decree of dissolution of the marriage (*Indyka* v. *Indyka*, [1969] 1 A.C. 33 applied)." See also the discussion in *Welsby* v. *Welsby*, [1970] 1 W.L.R. 877, [1970] 2 All E.R. 467, as to whether the petitioner's residence was substantial.

the husband by the Oslo court although he had just ceased to be domiciled in Norway".[11]

The Indyka ratio

The *Blair* decision marked the first time that a court had expressly accepted the proposition that the *ratio decidendi* of the *Indyka* case was that "recognition should be given to a decree obtained by a wife who has a real and substantial connection with the court which granted the decree".[12] Cumming-Bruce J., had come very close to accepting this in *Brown* v. *Brown*[13] where he stated:[14]

> The second test which clearly emerges from the speeches of their lordships is that where a wife can show a real and substantial connection between herself and the country exercising jurisdiction thereto, this court will recognise the validity of the decree.

A month before the *Blair* decision Payne J., had perhaps come even closer to this position when he said in *Mather* v. *Mahoney*:[15] ". . . that decree would be recognised here, in accordance with the decisions in the *Indyka* and *Angelo* cases, if I am satisfied that the wife at the time of the decree had a substantial connection with Pennsylvania. . . ."

In the cases immediately following *Indyka* the courts had been reluctant to state what the ratio of that case was. Thus in *Peters* v. *Peters*,[16] Wrangham J., dealing with a foreign divorce decree granted on the sole jurisdictional basis that the marriage had been celebrated in that country, commented:[17]

> I have been referred to the recent decision of the House of Lords in *Indyka* v. *Indyka*, and to the decision of Ormrod J., following that case. From the point of view of the petitioner seeking to assert the validity of a foreign decree, it seems to me that the highwater mark of those decisions is the proposition that an English court will recognize the validity of a foreign decree wherever there is a real and substantial connection between the petitioner and the court exercising jurisdiction. I do not pause to enquire whether the decision in *Indyka v. Indyka* went quite as far as that, because I am satisfied that the mere fact that a marriage is celebrated in a particular jurisdiction is not enough to create a real and substantial connection between a petitioning spouse and that jurisdiction.

Ormrod J., in *Angelo* v. *Angelo*,[18] refers to counsel's submission that the ratio in the *Indyka* case was that it was necessary for

[11] *Ibid.*, at pp. 226 (W.L.R.), 643 (All E.R.).
[12] *Ibid.*, at pp. 224 (W.L.R.), 642 (All E.R.).
[13] [1968] 2 W.L.R. 969.
[14] *Ibid.*, at p. 972.
[15] [1968] 1 W.L.R. 1773, at p. 1775. For further discussion of *Mather* v. *Mahoney*, see *infra*.
[16] *Supra*, footnote 5.
[17] *Ibid.*, at p. 320.
[18] *Supra*, footnote 5. Note that this was the "recent decision" referred to in the above-quoted passage from the judgment of Wrangham J. in *Peters* v. *Peters*.

the party obtaining the decree to have a real and substantial connection with the country pronouncing the decree. He does not however expressly adopt that view of the *ratio*.[19]

In the cases since *Blair* v. *Blair* where the point has been discussed, the courts have generally accepted the "real and substantial connection" formulation of *Indyka*—though in none of them is there as clear a statement as that found in *Blair* v. *Blair* that such is the ratio of *Indyka*.[20]

The Husband as Petitioner

With the exception of certain decisions under the *Armitage*[21] rule, the *Blair* case marked the first time that an English court had granted recognition to a divorce decree obtained by the husband when the parties were not domiciled in the granting country.[22] The reason for the emphasis formerly placed on the wife, rather

[19] See, MacKinnon, *op. cit.*, footnote 1, at pp. 137-139; *cf.* Bale, *op. cit.*, footnote 1, at p. 124.

[20] See generally, *Mayfield* v. *Mayfield, supra*, footnote 6; *Alexander* v. *Alexander, supra*, footnote 10; *Kuntsler* v. *Kuntsler*, [1969] 1 W.L.R. 1506. In the *Mayfield* case for example, Sir Jocelyn Simon does not say that real and substantial connection is the ratio of *Indyka*. He refers to it as "an expression that was employed in" *Indyka*. He goes on to use it as though it had been the ratio in *Indyka* however. Having said that the wife had a real and substantial connection with Germany, the granting state, he continued: "If the wife had brought the proceedings and had secured a decree, there can be no question in my view, but that the case would have been covered by *Indyka* v. *Indyka*. . . . What is the material fact is that the German decree operated on the status of the wife, who had such a close, substantial and real connection." At p. 121. The addition of the word "close" here would seem to have no particular significance. Presumably it was added merely to give emphasis to the wife's connection with Germany. The most recent case of *Welsby* v. *Welsby, supra*, footnote 10, is more specific however. There Simon J. said: "Putting it very briefly, the actual decision in *Indyka* v. *Indyka* was that a divorce could be recognised by our courts if the petitioner had a real and substantial connection with the country whose court granted the divorce". At pp. 878 (W.L.R.), 468 (All E.R.).

[21] [1906] P. 135, 75 L.J. 42. For application of *Armitage* rule see Castel, *op. cit.*, footnote 1, pp. 459-461.

[22] It may be argued that the case of *Tijanic* v. *Tijanic*, [1968] P. 181, [1967] 3 W.L.R. 1566, [1967] 3 All E.R. 976, is another instance of such recognition where the decree was granted to the husband. However, in that case Sir Jocelyn Simon P. recognized the divorce because he found it was in reality given to the wife. He said, at pp. 977-978 (All E.R.): ". . . I am prepared to rest my decision on the following ground. Whatever the formal position may have been, the reality of the proceedings in Yugoslavia in 1961 were that the wife joined with the husband in seeking relief. Moreover, under the article under which the proceedings were taken, the decree is granted to both parties whereas, if the decree is on the ground of a matrimonial offence, it is granted only to the aggrieved party. It follows that, in so far as the wife joined in the application and the decree was granted to her, it was granted to a woman who had been for the whole of her life within the jurisdiction of the court concerned. The English court assumes jurisdiction in divorce in such circumstances. It follows that we should accord recognition to a similar assumption of jurisdiction by a foreign court: *Travers* v. *Holley and Holley*, approved in *Indyka* v. *Indyka*." See *infra*, footnote 35 for further discussion of *Tijanic*.

than the husband, obtaining the decree is fairly simple. The starting point for divorce jurisdiction (and it was thought, recognition) was that the parties must be domiciled in the law district granting the decree.[23] According to the common law rules on domicile, the domicile of a wife was the same as that of her husband and this was so even though the parties had obtained a decree of judicial separation.[24] The thrust of legislative and judicial development has been to grant relief to the deserted wife who might otherwise have no effective remedy. Thus statutes such as the Canadian Divorce Jurisdiction Act of 1930[25] were passed which gave courts jurisdiction where the parties had been domiciled in the law district, where the husband had deserted the wife there and a certain period of time had elapsed since desertion. The widespread enactment of such legislation eventually led to the decision of the English Court of Appeal in the celebrated case of *Travers* v. *Holley*.[26] There recognition was granted to a New South Wales' decree obtained by the wife on a jurisdictional basis similar to that which would have been exercised by an English court under the Matrimonial Causes Act had the matter been connected with England in the same way and had the case first arisen for adjudication in England. Lord Justice Hodson said: "I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves."[27]

The full impact of this development to protect the weak position of the wife at common law was felt by the petitioner in the English case of *Levett* v. *Levett*.[28] There the court refused to recognize a German divorce decree on the ground that it had been obtained by the husband, not the wife. It was the view of the court that the English legislation was designed to give relief to the wife and had no application to the situation where the husband obtained the decree.[29]

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[23] *LeMesurier* v. *LeMesurier*, [1895] A.C. 517, 72 L.T.R. (N.S.) 873 (P.C.). See, *e.g.* judgment of Lord Reid in *Indyka, supra*, footnote 2, at p. 524 (W.L.R.).

[24] *Attorney General for Alberta* v. *Cook*, [1926] A.C. 444.

[25] S.C., 1930, c. 15; R.S.C., 1952, c. 84. Repealed by the Divorce Act 1968, S.C. 1968, c. 24. For a list of similar deserted wives' divorce jurisdiction legislation, see the judgment of Lord Wilberforce in *Indyka, supra*, footnote 2, at p. 555 (W.L.R.).

[26] *Supra*, footnote 3.

[27] *Ibid.*, at p. 257 (P.).

[28] [1957] P. 156, [1957] 2 W.L.R. 484, [1957] 1 All E.R. 720 (C.A.).

[29] In the *Levett* case the husband was an Englishman domiciled in England. The wife was German. They were married in Germany, lived in England from 1947 until 1952 when the wife returned to Germany. In 1953 she instituted divorce proceedings on the ground of cruelty. The husband cross-petitioned on the ground of the wife's adultery with another man. The German court held that it had jurisdiction as the wife had her

In the *Indyka* case itself considerable emphasis is placed on the fact that the whole development of the law in this field has been in order to get around the strict view taken by the courts with regard to the wife's domicile of dependence. Lord Pearce in tracing the development away from the *Le Mesurier* rule said: "In respect of one sex the rule, so far as it concerns jurisdiction, has now virtually ceased to exist."[30] He was of course speaking of the female of the species—but what of the male? Did the House of Lords mean to leave the male in an inferior position in so far as recognition of divorce decrees is concerned? Is the sauce for the goose not also for the gander? Later in his judgment Lord Pearce gave a clear negative answer:

> It may fairly be said that *Travers* v. *Holley* creates an untidy recognition situation in its differentiation between men and women. But the situation between men and women is, for social reasons, inherently untidy in the field of matrimonial jurisdiction. He is in control of her domicile. Moreover, she is frequently dependent on him for the support of herself and their children. If he can by residing abroad for three years obtain a decree which is recognised in this country, it will terminate his matrimonial obligations and debar his former wife from seeking financial relief in our courts. Unless Parliament introduces some machinery for granting such relief while acknowledging the foreign severance of the marriage tie, I see no practical means of putting men and women on the same basis with regard to recognition of decrees.[31]

It is clear from Lord Wilberforce's judgment that he agrees with Lord Pearce on the point and he frames his test in relation to divorces given to wives.[32]

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ordinary residence within the area of the jurisdiction of that court. The wife did not proceed with her petition for divorce but the court found the adultery proved and granted the husband a decree on his cross-petition. The Court of Appeal, refused to recognize the German decree but granted a divorce to the husband on the ground of his wife's adultery. It may be argued that the force of the decision is weakened because the German decree would not at that time have been recognized even if it *had* been granted to the wife. Assuming that the Court of Appeal would have taken the position taken later in the same year by Karminski J. in *Robinson-Scott*, [1958] P. 71, [1957] 3 All E.R. 473 (that similar jurisdictional legislation in the granting state was not essential to recognition as long as the factors were such that if they had arisen in connection with the forum, it would have accepted jurisdiction), there were no bases for recognition here. The English Matrimonial Causes Act, 1950, 14 Geo., 6, c. 25, had two provisions for granting an English Court divorce jurisdiction where the petitioning wife was not domiciled there. First, that the parties were domiciled in England prior to desertion and in the alternative that the wife be resident in England for at least three years prior to the institution of the proceedings. On the facts in *Levett*, the wife's connexion with Germany would not meet either of these tests. This aspect of the case was simply not dealt with by the Court of Appeal.

[30] *Supra*, footnote 2, at p. 540 (W.L.R.).

[31] *Ibid.*, at pp. 543-544. This very problem is raised by *Turczak* v. *Turczak*, [1969] 3 All E.R. 317 discussed *infra*.

[32] *Ibid.*, at p. 558. Earlier, on the same page, Lord Wilberforce had observed: "If it be said that it is illogical, or asymmetrical, to sanction a breach in the domicile rule in favour of wives and not in favour of hus-

The other judgments in *Indyka* do not bear as directly on this problem, and nowhere in the case is there express support for the proposition that recognition will be given to a foreign decree granted *to the husband* in a comparable fact situation. In view of this and the explicit statements of Lords Pearce and Wilberforce against such a position it is somewhat surprising to find recognition being granted to the Norwegian decree in the *Blair* case.

I believe however that the *Blair* result is generally to be welcomed. If we accept the proposition that recognition should be given to a foreign divorce decree where there was a real and substantial connection between the parties and the country granting the decree, should it matter who obtained the decree?[33] That may after all be merely a fortuitous matter depending upon who decided to petition first. If we agree that where there is no offence to the forum's notion of "genuine divorce"[34] recognition of foreign decrees should be as broad as possible, why should not the decree obtained by the husband receive the same treatment as one obtained by the wife? To do otherwise gives the appearance of wreaking vengence upon the husband because he had an advantage under the common law rules of domicile. This seems unnecessary and crude.

It is obvious from Mr. Justice Cumming-Bruce's decision in *Blair* v. *Blair* that similar thoughts were in the forefront of his mind when he observed that if the husband,

> . . . had waited until November, 1964, and had then joined his wife in an application for divorce founded upon their continued separation for a year since the separation licence was granted . . . , this court would have recognised the decree upon the principle stated by Sir Jocelyn Simon P. in *Tijanic* v. *Tijanic*, [1968] P. 181. It would be surprising if the inflexibility of the English tests for recognition compelled this court to refuse to recognise a decree sought by the husband who had been persuaded by his Norwegian wife to institute proceedings in the same court three months earlier on the grounds of her adultery, that is to say, in the court which they both regarded as the proper forum, and rightly so regarded up to the moment when he instructed his Norwegian attorney to institute proceedings.[35]

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bands, then the answer must be that experience has shown (and has so convinced our own and other legislatures) that it is the wife who requires this mitigation, that the nature of what is required has been clearly shown, and that (with the possible exception of the case where he is respondent to a wife petitioner and desires to cross-petition) no corresponding case has been shown to exist as regards the husband. He retains his domicile and the right to change it. All that this development does is remove an inequitable inequality arising from the anachronistic dependence of the wife for her domicile on her husband."

[33] Note however the problems raised by the *Turczak* case, *supra*, footnote 31, discussed *infra*. For a contrary view, see Wade, *op. cit.*, footnote 6.

[34] Lord Pearce in *Indyka*, *supra*, footnote 2, at p. 544 (W.L.R.).

[35] *Supra*, footnote 6, at pp. 225 (W.L.R.), 643 (All E.R.). In the *Tijanic* case, *supra*, footnote 22, the English court was asked to recognize a Yugoslav divorce decree granted in proceedings initiated by the husband who at the relevant time was a British national domiciled in England. His wife was Yugoslavian and had been resident and domiciled in Yugoslavia

Within five months of the *Blair* decision the High Court had occasion to come down even more clearly in favour of recognizing a foreign decree granted to the husband by a court other than that of his domicile. The case was *Mayfield* v. *Mayfield*[36] decided by Sir Jocelyn Simon. The husband in that case was petitioning the English court for a declaration that his former marriage was validly dissolved by a German divorce decree. He was of British nationality, domiciled and resident in England. His wife was of German nationality and was resident in Germany. Simon P. considered that the wife had a real and substantial connection with Germany. He went on to say:[37]

> If the wife had brought proceedings and had secured a decree, there can be no question, in my view, but that the case would be covered by *Indyka* v. *Indyka*, [1969] 1 A.C. 33 and that we should recognise the German decree as valid to dissolve the marriage. Is it, then, a material distinction that the proceedings were brought by the husband, who had no close or real or substantial connection with Germany, and not the wife? In my view, the difference is not material. What is the material fact is that the German decree operated on the status of the wife, who had such close, substantial and real connection. If it operated on the status of the wife and should be recognised as such, for the reason which I ventured to give in *Lepre v. Lepre*, [1965] P. 52, 61-63, we should recognise the decree as also operating on the status of the husband.

The *Mayfield* case goes farther than *Blair* v. *Blair* in that there was recognition even though the petitioner husband had no con-

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all her life. Sir Jocelyn Simon P. recognized the decree suggesting that there might be recognition on the basis of *Indyka*, but basing his decision on the ground that while it was the husband who brought proceedings in Yugoslavia, in reality the decree had been granted to both parties. The decree recited that it was pronounced in the presence of the litigants; though the only persons referred to explicitly as being present were the husband's proxy and his solicitor. Expert evidence on Yugoslavian law showed that where, as in this case, proceedings were taken on the basis of separation for a long period, the decree was granted to both parties. In the case of a decree granted on the ground of a matrimonial offence however, the decree was granted only to the aggrieved party. Simon P. considered that the wife had in reality joined in the application for divorce. Having made this suggestion it was then easy to conclude that "in so far as the wife joined in the application and the decree was granted to her, it was granted to a woman who had been for the whole of her life within the jurisdiction of the court concerned" (at p. 977 (All E.R.)) and to grant recognition on the *Travers* v. *Holley* principle.

It should be noted that in the situation posed by Cumming-Bruce J. in *Blair* where the husband waited three months and then joined the wife in an application for divorce, a decree granted in such proceedings would be recognized not primarily on the *Tijanic* rule at all but simply because it was granted to a wife who was resident and national of the granting country. The recognition would be simply either under the *Indyka* rule or under *Travers* v. *Holley* itself. It has nothing to do with whether or not the husband joined in the proceedings. It would be granted because the wife got the decree.

[36] *Supra*, footnote 6. For comment see, Wade, *op. cit.*, footnote 6.

[37] *Ibid.*, at p.121.

nection with the granting country. In *Blair* v. *Blair* the recognition of the husband's decree was based on the assertion that the *husband* had a real and substantial connection with the granting country.[38]

The tendency of the courts to broaden the basis of recognition, while generally to be welcomed, is not without its pitfalls. The result of the case of *Turczak* v. *Turczak*[39] may cause the courts to reflect the advisability of recognizing a foreign decree granted to a husband when he has no connection with the foreign law district at the relevant time. In that case the parties were both of Polish origin and married in Poland in 1939. After the war the husband came to England, acquired an English domicile and British nationality. The wife remained in Poland. The husband requested a divorce and when his wife refused to take proceedings, he obtained a decree *nisi* from a Polish court in March 1967. In May 1967 the wife applied for maintenance in England under the Matrimonial Causes Act. In October 1967 the husband's Polish decree became final. The wife's application was heard in March 1969 and judgment was rendered in May of that year by Lloyd-Jones J. He refused to make a maintenance order because at the time the application was heard there was no subsisting marriage between the parties. This of necessity involved a recognition of the Polish decree. It is somewhat surprising that both sides accepted the proposition that the Polish decree dissolved the marriage. Moreover there is no discussion by the court as to why the decree was recognized. One can only assume that the acceptance of the validity of the Polish decree was based on the *Mayfield* case, though it is never stated. One might have expected that counsel for the wife would have relied on Lord Pearce's judgment in *Indyka*[40] and dis-

[38] It appears that Cumming-Bruce J. in the *Blair* case was willing to overlook the fact that the husband petitioner had no legal connection with Norway at the generally accepted relevant time, that is the time of the commencement of proceedings. It can be inferred from the judgment that recognition was granted because the petitioner had, *just prior to* the commencement of proceedings, been domiciled in Norway and had a real and substantial connection with that country. For example, at the end of his judgment he said: "In my view the present case supplies the context in which it is appropriate and just to allow recognition to the decree granted to the husband by the Oslo court *although he had just ceased to be domiciled in Norway*" (*supra*, footnote 6, at pp. 226 (W.L.R.), 643 (All E.R.) italics mine). Such an imprecise rule as suggested by Cumming-Bruce J. should be avoided. The courts have proved to be very adaptable in this field and a change in such a fundamental point of reference as the relevant time of connection is unnecessary and would lead to confusion. In all probability later cases, such as *Mayfield* and *Turczak* have rendered this aspect of the *Blair* case obsolete. Note that though the *Blair* case was argued by counsel in *Mayfield*, it was neither relied on nor cited by Simon P.

[39] *Supra*, footnote 31; see Cretney, Foreign Divorces—The Other Side of the Coin (1969), 119 New L.J. 1121; Karsten, Maintenance and Foreign Divorces (1970), 33 Mod. L.Rev. 205.

[40] *Supra*, footnote 31.

puted the validity of the Polish decree (granted to the husband who was no longer domiciled, resident in Poland nor a national of that country at the time of bringing the action). This is particularly so in view of the fact that in the *Mayfield* case, and for that matter in the *Blair* case, the subsequent petition for recognition of the foreign decree was uncontested. In the result Mrs. Turczak was left with neither an existing marriage nor a right to financial support. This seems less than just, and if the courts continue to adopt the rule of thumb "if in doubt recognise"[41] legislation should be passed so that the courts will have power to award financial relief to the wife after a foreign divorce decree.[42]

Armitage and Indyka

One of the many questions raised by the *Indyka* case was what its effect would be on the *Armitage* rule.[43] When domicile was considered to be the sole basis of recognition, our courts would recognize a foreign divorce decree when it would be recognized by the domicile of the parties. Now that real and substantial connection is a basis for recognition, should we not recognise if the country of real and substantial connection would recognise? In the earlier case of *Mountbatten* v. *Mountbatten*[44] a similar argument relating to *Travers* v. *Holley* had been rejected by Mr. Justice Davies. In brief the point argued was that if England would recognize a foreign divorce in cases where the domicile would recognize it, England should also recognize a decree if the place where the wife had been resident for three years or more would do so, because English legislation allowed a wife to petition for divorce in England when she had been resident there for at least three years. Davies J. refused to extend the *Armitage* rule, and a Mexican divorce which would have been recognized by New York, the wife's place of residence, was not recognized. Lord Pearce was the only Law Lord in the *Indyka* case to comment on *Mountbatten*. He said:[45]

> In *Mountbatten*, however, Davies, J. rightly refused to apply the principle of *Armitage* to the wife's court of residence, since, though we acknowledge its right to grant her a divorce, in appropriate cases there seems no adequate reason to regard it as the arbiter on her personal law in other respects.

Is it not fair to say that because of the *Indyka* decision real and substantial connection has been given a position of fundamental importance by the courts; a place that the wife's three year residence did not occupy at the time of *Mountbatten*? If that is

[41] See Cretney, *op. cit.*, footnote 39, at p. 1122.
[42] See Karsten, *op. cit.*, footnote 39, at pp. 207 and 209; *Cf.* Cretney, *op. cit., ibid.*, at p. 1122.
[43] See Bale, *op. cit.*, footnote 1, at pp. 126-129; MacKinnon, *op. cit.*, footnote 1, at pp. 141-142.
[44] [1959] P. 43.
[45] *Supra*, footnote 2, at pp. 545 (W.L.R.), 717 (All E.R.).

true then the *Mountbatten* result and the approving comments of Lord Pearce in *Indyka* should not stand in the way of recognition of a foreign decree which would be recognized by the place of real and substantial connection of either of the parties.

The result in the case of *Mather* v. *Mahoney*[46] supports this view. In that case the husband was domiciled in England and married in Italy a girl from Pennsylvania. After the marriage in 1961 the parties lived together for more than three years before the wife returned to the United States. In April 1965 the wife obtained a divorce in Nevada. The husband petitioned the English court for a declaration that the decree had validly dissolved the marriage. Mr. Justice Payne was satisfied that "the wife obtained a valid divorce in Nevada, and that that divorce would be recognised in Pennsylvania, where she was resident and where she had spent most of her life".[47]

He continued:[48]

> In those circumstances that decree would be recognised here, in accordance with the decisions in the *Indyka* and *Angelo* cases, if I am satisfied that the wife at the time of the decree had a substantial connection with Pennsylvania and that in Pennsylvania, the Nevada decree would be recognised. There can be no doubt about that. She had the same connection with Pennsylvania as Mrs. Angelo had with Ravensburg, and the same connection which was established between the petitioner and Czechoslovakia in the *Indyka* case. It follows that upon the authority of those cases, the decree in the present case must be recognised here.

While the result is a logical extension of the *Armitage* rule, the reasoning leaves something to be desired. There is no apparent realization in the judgment that the *Armitage* rule was being used at all. The case is not on all fours with either *Indyka* or *Angelo*. In both those cases the granting state was the place of real and substantial connection whereas in *Mather* v. *Mahoney* it was not. It is unfortunate that the judge in reaching an acceptable conclusion did not deal explicitly with the *Armitage* issue in this the first case where it has arisen since *Indyka*. In view of the *Mountbatten* case and Lord Pearce's comments on it, we are still left in some doubt as to the position because of the silence of Payne J. on the matter. Hopefully the *Mather* v. *Mahoney* result will be followed in subsequent similar fact situations.

Indyka in Canada

On the Canadian scene we still await with baited breath the first divorce recognition case since *Indyka*. Will *Indyka* be accepted by our courts? If so will our courts follow the English post-*Indyka*

[46] *Supra*, footnote 15.

[47] *Ibid.*, at p. 1775. She was of course not domiciled in Pennsylvania at the relevant time because she retained the English domicile of her husband until dissolution of the marriage.

[48] *Ibid.*

trend to wider recognition. The Canadian experience in following *Travers* v. *Holley* would suggest that our courts would follow *Indyka* and succeeding cases.[49] With the exception of the result in *Turczak* this would seem to be a salutary development in the prevention of limping marriages.

The closest that Canadian courts have come so far to dealing with the question is in the recent Ontario decision of *Schwebel* v. *Schwebel*[50] the sequel to the celebrated case of *Schwebel* v. *Ungar*.[51] In *Schwebel* v. *Schwebel* the husband was petitioning for divorce in Ontario. The wife contested the action on the basis that the husband was estopped from petitioning the Ontario Court because he had previously commenced an action for annulment in Hungary and had in 1967 in fact obtained judgment in Hungary that the marriage was invalid. The only connection with Hungary was that the wife had been born there and had lived there for many years. She had however left that country many years previous to the husband's action and had not returned since. In the course of rejecting the wife's estoppel argument and granting the decree *nisi*, Stark J. said:[52]

> It was not disputed that at all material times both the petitioner and the respondent were domiciled in the Province of Ontario; and that it is trite law that under the authority of such cases as *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, and succeeding decisions, that any purported Hungarian divorce or Hungarian decree made concerning the marriage, has no validity in Ontario.

This of course was not a divorce recognition case, and even if it had been *Indyka* would not have provided a different answer. The decree would have been invalid as there was no real and substantial connection between Hungary and either of the parties. It is interesting however that the judge refers to *Le Mesurier* v. *Le Mesurier* rather than to the nullity cases, and that no mention is made of *Indyka*. Having gone as far as he did one might have expected at least a fleeting reference in *Indyka* by Stark J. It would however be far too premature to suggest that this somewhat obscure omission bears any significance for the future fate of *Indyka* in Canada.

STUART G. MACKINNON*

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TRESPASS TO THE PERSON AND THE BURDEN OF PROOF: A CANADIAN COMMON LAW REMNANT.— In his classic article *Res*

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[49] For the application of *Travers* v. *Holley* in Canada see *e.g.* MacKinnon, *op. cit.*, footnote 1, at p. 141.

[50] [1970] 2 O.R. 354.

[51] [1965] S.C.R. 148, 48 D.L.R. (2d) 244.

[52] *Supra*, footnote 50, at p. 355.

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Ipsa Loquitur[1] Dean C. A. Wright exclaimed: ". . . [I] would hope that some [appellate] Canadian court would have the courage . . . [to] . . . put an end to the possibility of a difference in burden of proof depending solely on the direct or indirect application of force."[2] This comment was levelled at the judicial consequences of the decision of the Supreme Court of Canada in *Cook* v. *Lewis*.[3] There Cartwright J. for the majority[4] held that "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove 'that such trespass was utterly without his fault' ".[5] The learned judge considered that Denman J. in *Stanley* v. *Powell*[6] rightly concluded the issue of the burden of proof in such cases by deciding that (apart from highway cases) where a direct forcible injury is established by the plaintiff the defendant has the burden of proving the absence of both intention and negligence on his part.

The rise and fall of the old forms of action—trespass and trespass on the case—in English law has been extensively dealt with by commentators[7] and need not be repeated here. It suffices to say that since the judgment of Diplock J. in *Fowler* v. *Lanning*[8] it has been felt that the old forms of action received their quietus. In that case Diplock J. held that a writ that merely alleged that the defendant shot the plaintiff gave rise to no cause of action since it averred neither intention nor negligence. His Honour there determined that where a cause of action relies on either intention or negligence the burden of proving that necessary element lies on the plaintiff. The same result was thought by Diplock J. to have been reached earlier by Clyne J. in *Walmsley* v. *Humenick*[9] who rejected counsel's attempt to frame an action in trespass thereby sidestepping the necessity of proving negligence. But all that Clyne J. decided in that case[10] was that the plaintiff, a five-year-

[1] Special Lectures of the Law Society of Upper Canada (1955); reprinted in Linden, Studies in Canadian Tort Law (1968), pp. 41-75.

[2] Linden, *op. cit., ibid*, p. 44.

[3] [1951] S.C.R. 830, [1952] 1 D.L.R. 1; noted by Glanville Williams (1953), 31 Can. Bar Rev. 315.

[4] The majority comprised Cartwright, Estey and Fauteux JJ.; Rand J. agreed in the result for different reasons and Locke J. dissented.

[5] *Supra*, footnote 3, at p. 839.

[6] [1891] 1 Q.B.D. 86; approved by the Court of Appeal in *National Coal Board* v. *Evans*, [1951] 2 K.B. 861.

[7] *E.g.* Winfield and Goodhart, Trespass and Negligence (1939), 55 L.Q. Rev. 451; Prichard, Trespass, Case and the Rule in Williams v. Holland, [1964] C.L.J. 234; Millner, The Retreat of Trespass, [1965] C.L.P. 20; Holmes, The Common Law (1945), Lectures II and III; Pollock, Torts (15th ed., 1951), pp. 128-134; T. A. Street, Foundations of Legal Liability (1966), Vol. 1, p. 72 *et seq.*

[8] [1959] 1 Q.B. 426; noted (1959), 75 L.Q. Rev. 161, (1959), 22 Mod. L. Rev. 538 and [1959] Cam. L.J. 33.

[9] [1954] 2 D.L.R. 232 (B.C.S.C.).

[10] *Ibid.*, at pp. 252-253.

old-child was severely injured by another five-year-old-boy while at play, failed to establish his claim for damages either (a) because of *Stanley* v. *Powell* and the inability to prove negligence because of the defendant's tender age or (b) on the basis of the doctrine of *res ipsa loquitur* or the principle enunciated by Cartwright J. in *Cook* v. *Lewis*, that is the defendant could discharge the onus of proving his incapability of negligence. Since Clyne J. had also taken the view[11] that it was doubtful whether the matter was any longer open in Canada as the result of *Cook* v. *Lewis*, it is hardly likely that the former alternative is the basis of his decision and accordingly Diplock J.'s pleasure in noting *Walmsley* v. *Humenick* in support of his own position is probably misplaced.[12]

Any doubts remaining in England after *Fowler* v. *Lanning* concerning the nascent effectiveness of trespass as a form of action not requiring proof by the plaintiff of either intention or negligence were laid to rest by the Court of Appeal in *Letang* v. *Cooper*[13] which held the ordinary three year limitation period applied to personal injury claims based on negligent acts. In that case Lord Denning M.R. expressed the opinion that where a trespass to the person is intentional the plaintiff's cause of action is in assault and battery whereas if it is a negligent trespass the only cause of action is in negligence.[14]

But in Canada the shades of trespass as a form of action still flit uneasily among the cases as a result of the decision in *Cook* v. *Lewis*. There the court was faced with a fact situation that gave rise to extremely difficult problems of proof. A youth was grievously injured by shot apparently fired (on the jury's findings) by one of two hunters both of whom denied being causally responsible. Although the jury was able to decide that one of the hunters was the cause of the injury it was unable to determine whom nor could it find negligence on the established facts. The trial judge ruled in favour of the defendants and the plaintiff successfully appealed to the British Columbia Court of Appeal which ordered a new trial on the ground that the jury's failure to find negligence was perverse. This order was upheld by the Supreme Court of Canada by a majority of four to one.

Besides approving the formulation of the legal effects of a direct forcible injury in *Stanley* v. *Powell* the majority also stated and applied[15] the principle "that where two defendants have committed acts of negligence in circumstances that deprive the plaintiff of the ability to prove who caused the damage, the burden is cast on each defendant to exculpate himself: failing discharge of this burden,

[11] *Ibid.*, at p. 251.

[12] See also Atrens, Intentional Interference with the Person, Linden, *op. cit.*, footnote 1, p. 396, footnote 111.

[13] [1965] 1 Q.B. 232; followed in *Long* v. *Hepworth*, [1967] 1 W.L.R. 19.

[14] *Ibid.*, at p. 239.

[15] *Supra*, footnote 3, at p. 842.

both are liable".[16] The argument of the plaintiff that the two defendants were joint-tortfeasors failed because there was no community of design, that is no agreement to hunt in breach of a duty owed to the plaintiff.

This principle and the rule in *Stanley* v. *Powell* have been consistently applied by Canadian courts since *Cook* v. *Lewis* was decided.[17] But qualms concerning the latter have been expressed:[18]

> . . . [A]part from the supposed historical justification, no convincing reason has been advanced to explain why the burden of proof should depend on the causal sequence. If it is desired to facilitate recovery for personal injuries the reverse onus should apply to indirect injuries as well.

On the other hand Glanville Williams applauded the application of the principle as an important contribution to the law of tort and to the law of evidence:[19]

> It makes a big exception to the rule, recognized by the judges, that where a plaintiff cannot establish which of two defendants did the damage he must generally fail. It seems that this rule now operates only where one defendant (but it cannot be said which) was wholly free from blame. One may, indeed, question whether the rule is a good one even when limited in this way. To deny a remedy means that justice is certainly not done; to give a remedy would mean a fifty per cent possibility that justice is done.

The most recent, and only appellate, decision to discuss and apply *Cook* v. *Lewis* is that of the Manitoba Court of Appeal in *Dahlberg* v. *Naydiuk*[20] in which a number of significant issues relating to direct personal injuries founded on negligent acts were canvassed. Plaintiff had been shot unintentionally by the defendant who was hunting on neighbouring land. Prior to the mishap the defendant had examined the plaintiff's property to see whether anyone was on it. Shortly thereafter the plaintiff and his wife came to their property and carried out farming activities. The plaintiff framed his action both in negligence and trespass and succeeded at trial.

On appeal the defendant argued that he had not been negligent and could only be regarded as liable if his liability was absolute.[21] This argument was rejected by the Court of Appeal which, in a judgment delivered by Dickson J.A., analyzed the duty and standard of care owed by a person who discharges a firearm. His

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[16] Glanville Williams, *op. cit.*, footnote 3, at p. 316.

[17] See Atrens *op. cit.*, footnote 12, p. 396 and the cases collected in footnote 110; see also *Ellison* v. *Rogers* (1968), 67 D.L.R. (2d) 21 and *Dahlberg* v. *Naydiuk* (1970), 72 W.W.R. 210, 10 D.L.R. (3d) 319.

[18] Atrens, *op. cit., ibid.*, p. 396 and the comment by Dean C. A. Wright contained in the opening paragraph of this comment, *supra*, footnote 1.

[19] Glanville Williams, *op. cit.*, footnote 3, at p. 317.

[20] *Supra*, footnote 17. *Tillander* v. *Gosselin*, [1967] O.R. 203 (1966), 60 D.L.R. (2d) 18 was affirmed by the Ontario Court of Appeal but without reasons 61 D.L.R. (2d) 192.

[21] *Supra*, footnote 17, at pp. 214 (W.W.R.), 323 (D.L.R.).

Honour, after discussing the authorities,[22] concluded that the old dichotomy between dangerous and non-dangerous things[23] no longer exists as a separate legal category and, accordingly, the ordinary rules of negligence apply to the use of firearms.[24] He also found that the rule in *Rylands* v. *Fletcher*[25] did not apply[26] to the use of firearms but instead, "the degree of care which will be regarded as 'reasonable' rises in accordance with the degree of danger normally associated with the chattel in question, and when the chattel is a loaded firearm the standard of care is a high one indeed".[27]

Dickson J.A., on the issue whether the cause of action was one of trespass or one of negligence pointed out the apparent anomaly between the two. If the plaintiff relied on negligence the burden of proof would be on him whereas if it was trespass the defendant would have to negative intention and negligence once the direct causal nexus between his acts and the plaintiff's injuries were established. The learned judge had already held *Cook* v. *Lewis* to be good law[28] and concluded that "if a change is to be made in the law it must be made by a Court higher than this. In the present case we have, as we must, reached our decision in accord with the dictates of *Cook* v. *Lewis*".[29] This conclusion was reached despite *Fowler* v. *Lanning*[30] and *Letang* v. *Cooper*, both cases being decided after *Cook* v. *Lewis* and referred to in Dickson J.A.'s judgment without comment. In the event the appeal was dismissed.

It is submitted that there is no good reason why the burden of proof should differ for direct as distinct from indirect personal injuries received where the perpetrator's indentity is not in dispute. If the decision in *Cook* v. *Lewis* is confined to the proposition that where several[31] defendants have acted negligently[32] so that the

[22] *Read* v. *J. Lyons & Co. Ltd.*, [1947] A.C. 156; *Ayoub* v. *Beaupre and Bense*, [1964] S.C.R. 448, 45 D.L.R. (2d) 411, and *Beckett* v. *Newalls Insulation Co. Ltd. et al*, [1953] 1 W.L.R. 8.

[23] *McAlister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562, per Lord McMillan, at p. 611.

[24] *Supra*, footnote 17, at pp. 216 (W.W.R.), 325 (D.L.R.).

[25] (1866) L.R. 1 Ex. 265, aff'd L.R. 3 Ex. 330.

[26] *Cf. Nordstrom* v. *McBurnie* (1968), 63 W.W.R. 626; but Dickson J.A. points out that *Cook* v. *Lewis* was premised on negligence being the cause of liability and not on absolute liability.

[27] *Supra*, footnote 17, at pp. 219 (W.W.R.), 327-328 (D.L.R.).

[28] *Ibid.*, at pp. 218 (W.W.R.), 327 (D.L.R.).

[29] *Ibid.*, at pp. 220 (W.W.R.), 329 (D.L.R.).

[30] Followed in New Zealand by the Supreme Court in *Beals* v. *Hayward*, [1960] N.Z.L.R. 131.

[31] The principle may be restricted to cases of *two* defendants for, as is pointed out in Winfield on Tort (8th ed., 1967), p. 67, it would be very difficult to apply to facts involving numerous possible defendants. But see next footnote.

[32] Presumably their acts and omissions should also be intermingled or at least temporally proximate to each other. The principle should also apply to intentional acts and omissions of several defendants where the participants cannot be classified as joint-tortfeasors.

plaintiff cannot establish who in fact and law caused his injuries the onus of disproof is cast on the defendants, it is hardly open to objection. There seems no good reason why this principle should not also apply to indirect forcible injuries. If such a proposition were accepted by the courts the criticisms levelled at the existing application of *Cook* v. *Lewis* would be met and its substantial justice would be retained.

PETER BURNS*

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NEGLIGENCE—MERE ERROR IN JUDGMENT—SEVERAL APPORTIONMENTS OF FAULT FOR HEADS OF DAMAGE ARISING FROM SEPARATE BUT CONSEQUENT INCIDENTS INVOLVING SAME PARTIES.—The judgment of Brandon J. in *The Calliope*[1] is likely to be viewed as somewhat of a landmark decision in negligence cases because it contains valuable pronouncements on (1) the question whether those involved had been negligent or merely guilty of an error in judgment; and (2) the question of apportionment of fault in respect of separate but consequent incidents or additional heads of damage that flow from the original incident but which came about as a result of different causative factors.

The question when error in judgment becomes negligence has been a subject of judicial pronouncement but rarely so clearly and rationally has the difference been illustrated as by Brandon J., whose remarks on this subject, it is submitted, are of universal application in all negligence cases:

> It follows from the findings which I have made so far that there were two mistakes made in the execution of the turning manoeuvre. The first mistake was by the chief officer in not informing the bridge when the anchor cable led aft and strain came on it. The second mistake was by the pilot in not ordering cable to be paid out when the anchor dragged. The question which now has to be considered is whether these mistakes amount to negligence in all circumstances.
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> Counsel for the defendants . . . said that the manoeuvre was inherently difficult, and the standard of skill and care required only that of the ordinarily competent ship's officer and pilot, [that] . . . the mistakes made should be regarded as no more than errors in judgment. . . . I agree that the difficulty of the operation must be taken fully into account, and that too high a standard of skill and care must not be set. . . . The chief officer was certainly taking part in a difficult and unusual operation in dense fog. This meant that it was easy for him to make a mistake, and that a mistake in itself minor might have serious consequences. On the other hand, he was not faced with any dilemma, nor did he have to make any difficult choice in carrying out his duties. For these reasons, I do not think that it would be right to say that his mistake was a mere error of judgment. In my view, it was

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[1] [1970] 1 All E.R. 627.

more than that, it was a failure to exercise reasonable skill and care in the circumstances. . . .[2]

Different considerations apply, in my view, to the later mistake of the pilot. He was faced with difficult alternatives as a result of the chief officer's error. There were two risks in paying out cable after the anchor began to drag. First, there was the risk, which he feared, of the ship's head paying off to starboard. Secondly, if that risk was overcome by vigorous wheel and engine action, there was a risk of the ship going aground forward. Normally this second risk would not have been serious, since the bank was of mud and refloating would have been easy. But, with the collision damage to the starboard bow, the Elder Brethren advised me that the danger of doing further damage forward had to be taken into account. In these circumstances, it seems to me that, while it can now be said, with hindsight, that the pilot made an error of judgment, it would be unjust to hold that such error amounted to negligence on his part. . . .[3]

On the other question of apportionment of fault, surprisingly enough, no previous case had decided that a court might perform an apportionment within an apportionment.

The question almost came to be decided in British Columbia in the seat-belt defence case *Yuan et al* v. *Farstad et al*[4] where the plaintiff's different heads of damage were tainted, as it were, by the failure of the driver to have used his seat-belt.[5] Although Dr. Yuan was found to have been entirely blameless in the causation of the collision that resulted in his death, it was argued successfully that his failure to use his seat-belt contributed to the injuries sustained. Consequently the entire claim advanced by Dr. Yuan's widow as a dependant and also as executrix for his estate was reduced in proportion to the degree in which the deceased was found to have been at fault.

The difficulty presented by *Yuan* v. *Farstad*[6] is a very small but gnawing difficulty: if the late Dr. Yuan's negligence did not contribute to the cause of the collision (and therefore not to the car damage), how can it be said that the damage to the Yuan car should have been reduced in proportion to the degree in which Dr. Yuan was at fault as to his own safety?

Support for the view that a court may apportion liability for one head of damage or loss on one basis and apportion liability on a different basis for another head of damage or loss involved in the same incident may be found in the judgment of Brandon J. in *The Calliope*.[7] Although the facts were quite different from those

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[2] *Ibid.*, at p. 633.
[3] *Ibid.*, at p. 632.
[4] (1968), 66 D.L.R. (2d) 295, 62 W.W.R. 645.
[5] *Cf. McLaughlin* v. *Long*, [1927] S.C.R. 303 not cited in *Yuan* v. *Farstad*, where a boy negligently riding on a running-board was held entitled to recover because his negligence was not a causative factor in the car collision that followed, and which caused his personal injuries.
[6] *Supra*, footnote 4. The point causing difficulty does not appear to have been argued in *Yuan* v. *Farstad*.
[7] *Supra*, footnote 1.

in *Yuan* v. *Farstad*,[8] *The Calliope*[9] may be authority for the proposition that the damage to the Yuan car ought to have been recovered in full.

In *The Calliope*[10] there was a collision between two ships, the "Carlsholm" and the "Calliope". The parties agreed that the fault in relation to the actual collision was to be apportioned on the basis of forty-five per cent fault on the part of the "Carlsholm" and fifty-five per cent fault on the part of the "Calliope", with damages to be assessed. The decision of Brandon J. came on the determination of the question as to who was responsible to pay for further damage sustained by the "Calliope" the day following the collision. In the aftermath of the collision, the ship was towed to an anchorage close at hand. On the following day, the ship's officers got steam up and attempted to carry out a turning manoeuvre in the narrow quarters of her anchorage, but, by reason of the negligence of the chief officer, she ran aground and sustained the further damage.

The "Carlsholm" argued that the chain of causation had been broken, and that the damage sustained in the next day's grounding was to be laid entirely to the other ship.

The trial judge, however, apportioned the responsibility for the subsequently-incurred damage and found the "Carlsholm" fifty per cent to blame. In so doing, Brandon J. pointed out that he must look to certain time-honoured phrases in shipping cases, and that he must find whether the hand of the negligent navigator was still heavy on the other ship, or in other words, whether those on board the other ship were not, by reason of the hard necessities imposed on them by the collision, free agents or whether those on board the other ship were still in the grip of the collision.[11] Having stated these determining factors, Brandon J. then reached the conclusion that the grounding that occurred the next day was not caused solely by the negligence of the "Calliope" in executing the turning manoeuvre, but partly by such negligence and partly by the joint negligence that had led to the collision the previous day, "the effect of which was still continuing when the grounding took place".

In the result, the "Calliope" was held entitled to recover forty-five per cent of her damages inflicted in the collision, and as well, fifty per cent of forty-five per cent of the damage sustained in the next day's grounding.

In giving his reasons for judgment, Brandon J. said:

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[8] *Supra*, footnote 4.
[9] *Supra*, footnote 1.
[10] *Ibid.*
[11] The foreseeability of subsequent damage in such instances in shipping collision cases is probably beyond question. Such a result is submitted not to be inconsistent with *The Wagon Mound (No.2)*, [1966] 2 All E.R. 709.

> The question of law so raised is interesting and difficult. It also seems to me to be of some general importance in the law of tort, not only in maritime cases but in other cases as well. It involves the interrelationship of the doctrines of contributory negligence and remoteness of damage. Counsel for the plaintiffs relied on decisions on consequential damage in maritime cases as showing that, so far as recovery of such damage was concerned, it was all or nothing, and that there was no room for what I shall for convenience call an intermediate solution. It will be necessary to examine the cases in order to see whether that is really their effect. . . .[12]
>
> I recognise the force of the argument that the suggestion of an intermediate solution does not appear to have been made in any of the cases prior to 1964, and that in all those cases the parties and the court alike . . . treated the matter on an all-or-nothing basis. The fact remains, however, that there is, so far as I know, no express decision against the possibility, as a matter of law, of such a solution. . . .[13]

Brandon J. then referred to *The Kazimah*,[14] which involved a ship that negligently struck a submerged rock while navigating the Suez Canal, ripping open the hull, allowing crude oil to escape. Another ship involved in the resulting mêlée negligently ran aground. Brandon J. observed that this latter ship sustained no direct physical damage by reason of the grounding of the first ship and went on to observe:[15]

> It is, however, interesting to speculate on what the result would have been if she had. Suppose that the fire, spreading along the canal, has caused direct damage to the Olympic Eagle, which would have occurred just the same whether the ship had negligently grounded or not. It seems clear that, on that hypothesis, the Olympic Eagle would have recovered the whole of the fire damage, although at the same time recovering only two-thirds of her grounding damage. If so, there would have been precisely the kind of result which, if the argument for the plaintiffs in this case is correct, is not possible in law. . . .

Brandon J. then referred to the statutory provisions for apportionment of liability, which, as in the case of such legislation in Canada, provided that where, by the fault of two or more, damage or loss is caused to one of them, the liability to make good the damage or loss will be in proportion to the degree in which each was at fault, with the usual provisos. Brandon J., in respect to the legislation, said:[16]

> This sub-section refers to damage or loss being caused by the fault of two or more vessels to one or more of them. It does not refer to a casualty, or event, being so caused. This is logical, for it is damage or loss resulting from a casualty or event which gives rise to a cause of action in negligence, not the casualty or event itself.

Brandon J. then held that in construing the sub-section, he

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[12] *Supra*, footnote 1, at pp. 634-635.
[13] *Ibid.*, at p. 636.
[14] [1967] 2 Lloyd's Rep. 163.
[15] *Supra*, footnote 1, at p. 637.
[16] *Ibid.*, at p. 638.

could see no reason why liability for one head of damage or loss resulting from an event should not be apportioned on one basis and that liability for another head of damage or loss resulting from the same event should not be apportioned on another basis.[17]

Counsel for the "Carlsholm" had argued that when the negligence of a *third party* intervenes between an original casualty and an alleged consequential damage, the court must inevitably make up its mind whether the chain of causation is broken or not. The argument proceeded: if the chain is broken, the claim must fail altogether. If the chain is not broken, the claim must succeed altogether. There is no room for apportionment. If this is the situation where the intervening negligence is that of a third party, why should it not also be the situation where there is no third party intervening, but the intervening act of negligence is that of the person making the claim? Brandon J. dealt with the argument in this way:[18]

> Suppose a casualty to A caused wholly by the negligence of B. Suppose further that consequential damage is claimed by A in respect of which B contends that the chain of causation was broken by the intervening negligence either of A himself, or of a third party C. If the view which appeals to me in principle is right, the court has three choices open to it in either case depending on the facts. It can find: first, that there was no causative intervening negligence; or, secondly, that there was intervening negligence, and that it was the sole cause of the alleged consequential damage; or, thirdly, that there was intervening negligence, but that such negligence was only one of two causes of the consequential damage, the other being the original negligence of B which produced the casualty and the effect of which was continuing. In such a case, if the intervening negligence of A himself is in question, the first finding means that A recovers in full; the second finding that he does not recover at all; and the third finding that he recovers in part. If the intervening negligence of a third party C is in question, the results of the first and second findings are the same. The third finding does, however, admittedly produce a different initial result, namely, that A again recovers in full. But B is entitled to recover contribution from C, and, provided that he does so, the ultimate result (subject to C being solvent) is in both cases the same, namely, that liability is divided between the two persons to blame, B and A in the one case, and B and C in the other. . . .
>
> This situation, where the initial result appears to be different, but the ultimate result after the exercise of the right of contribution is in substance the same, exists equally in cases where all relevant negligence precedes the casualty.

Brandon J. acknowledged that in a great many cases, there would be later negligence of the claimant or a third party intervening between the original casualty and the alleged consequential damage, and that thereby the chain of causation would be broken; but that there could be cases (and *The Calliope* was one of them)

[17] *Ibid.*
[18] *Ibid.*, at p. 639.

where it would be right to find that such damage was caused both by such intervening negligence and by the original negligence. This latter type of case, he said, might be comparatively rare, but that was not the point.

In making what he termed as "sub-apportionment", Brandon J. said that he expressed his views with considerable diffidence:[19]

> First, because I feel the weight of the long line of maritime cases on consequential damage in which the all-or-nothing approach has been consistently adopted. Secondly, because of the expression of a contrary view, based on those cases, by Cairns, J., in *The Fogo*.[20] Thirdly, because of the difference of opinion between textbook writers on the topic: see, for example, Joint Tort and Contributory Negligence by Dr. Glanville Williams,[21] which supports the view at which I have arrived; and Mayne and MacGregor on Damages[22] which is against it. . . .

It is submitted with respect that the judgment of Brandon J. correctly applies the rationale of contributory negligence legislation, and that the law as expounded by him will be valuable to the practitioner.

ROBERT J. HARVEY*

* * *

RECEPTION OF ENGLISH LAW—GENERAL PRINCIPLES—POOR LAW RELIEF ACTS—BRITISH COLUMBIA.—After a number of earlier conflicting decisions,[1] the British Columbia Court of Appeal has now held[2] by a majority that the obligation imposed by two English statutes[3] to support the illegitimate children of one's spouse, is not part of the law of British Columbia. Unfortunately, no reference was made to the contrary decisions on the same subject in Alberta[4] and Saskatchewan,[5] or to the Manitoba decision[6] on point.

In the British Columbia Court of Appeal, the majority[7] based their decision on a conclusion that the particular statutory pro-

[19] *Ibid.*, at p. 640.
[20] [1967] 2 Lloyd's Rep. 208.
[21] (1951), para. 94.
[22] (12th ed., 1961), para. 64.

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[1] *R.* v. *Hall*, [1941] 2 W.W.R. 245 (B.C.); *Lang* v. *Lang*, [1948] 1 W.W.R. 479 (Sask.); *Nelson* v. *Nelson* (1956), 17 W.W.R. (N.S.) 636 (B.C.S.C.); *Dedek* v. *Mantyka* (1960), 32 W.W.R. 361 (B.C. Family Court); *Lukaschuk* v. *Lukaschuk* (1961), 39 W.W.R. 137 (B.C.); *Re Creery* (1962), 39 W.W.R. 620 (B.C.); *Jaeger* v. *Jaeger* (1967), 60 W.W.R. 417 (B.C. Family Court); *Re Drysdale* (1968), 65 D.L.R. (2d) 237 (B.C.S.C.).

[2] *McKenzie* v. *McKenzie* (1970), 73 W.W.R. 206 (B.C.C.A.).

[3] (1601), 43 Eliz., c. 2, and (1834), 4 & 5 Wm. 4, c. 76.

[4] *P.* v. *B.* (1964), 49 W.W.R. 435, at p. 437 (Alta).

[5] *Jamieson* v. *Jamieson*, [1948] 2 W.W.R. 986 (Sask.).

[6] *Montcalm* v. *Lafontaine* (1963), 42 W.W.R. 179, 43 W.W.R. 219 (Man.).

[7] Maclean and McFarlane JJ.A.

visions were an integral part of the whole English system of poor laws, while the minority[8] dissented on this point only.[9] The entire court felt that if they were part of the poor laws, then the poor laws were, in the words of the relevant statute introducing English law into British Columbia,[10] "from local circumstances inapplicable" to British Columbia in 1858. Their Lordships quoted two histories at length to show how rude and simple were the conditions of the colony in 1858 when English law was first introduced. A thoughtful person might ask whether there is very much of the law of England in force in British Columbia, if that is the rule. Surely the complications of property law, wills, trusts, administrative law and insurance law are "from local circumstances inapplicable" to 200 permanent settlers and a few thousand peripatetic American miners.

In fact there is considerable doubt whether the rule is as the Court of Appeal stated it. Though they did not cite them, there are authorities which support the court's view.[11] On the other hand, there is a stronger body of law to the contrary,[12] holding that the time to test the applicability of English law is not the remote past of the territory in question, but its present needs. In support of this latter view, there are two arguments. The first and broader argument is that the courts give us the law by which we are to live now. They are not laying down law for our great-great-grandparents. If a man asks the courts for relief in 1970, is he to be told that "You would not have wanted or needed that in 1858"? The second and more technical argument is that the British

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[8] Taggart J.A.

[9] *Supra,* footnote 2, at p. 219.

[10] Governor's Proclamation of November 1858, carried forward now into R.S.B.C., 1960, c. 129, s. 2. The relevant legislation in the rest of Canada is very similar: see (1964), 3 Alta L. Rev. 262, at pp. 263-264.

[11] (1867), 1 Bl. Comm. 107 ("infant colony"); *Quan Yick* v. *Hinds* (1905), 2 C.L.R. 345, at pp. 356, 367, 368, 378; *Mitchell* v. *Scales* (1907), 5 C.L.R. 405; *Ex p. Lyons* (1839), Legge (N.S.W.) 140, at pp. 152-153; *R.* v. *Valentine* (1871), 10 N.S.W.S.C.R. 113, at p. 121; *Brett* v. *Young* (1882), 1 S.C. (N.Z.) 262, at p. 264; *Sheehy* v. *Edwards, Dunlop & Co.* (1897), 13 N.S.W.W.N. 166, at p. 168; *R.* v. *DeBaun* (1901), 3 W.A.L.R. 1, at p. 9; *Plested* v. *McLeod* (1910), 12 W.L.R. 700, at pp. 702-703 (Sask.); dictum of Martin J. in *Re Hogbin Estate,* [1950] 2 W.W.R. 264, at p. 268 (B.C.).

[12] Story, Commentaries on the Constitution (5th ed., 1891), Vol. 1, § 149, pp. 104-105; *Fitzgerald* v. *Luck* (1839), Legge (N.S.W.) 119, at p. 120; *McHugh* v. *Robertson* (1885), 11 V.L.R. 410; *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, at p. 293 (P.C.); *Delohery* v. *Permanent Trustee Co.* (1904), 1 C.L.R. 283, at p. 289; *Fares* v. *R.,* [1929] Ex. C.R. 144, at p. 151 (reversed on another point, [1932] S.C.R. 78); *Hellens* v. *Densmore,* [1957] S.C.R. 768, at pp. 782-783.

There are other cases which contain expressions on both sides of this question, and they have been omitted. *Jex* v. *McKinney* (1889), 14 App. Cas. 77, at pp. 81-82 (P.C.) is ambiguous, for the colony there was still in its infancy.

Columbia Legislature does not say[13] what the Court of Appeal took them to mean: It adopts English laws "so far as the same *are* not from local circumstances inapplicable . . .". Are we not directed to read legislation as always speaking; and the present tense as referring to the facts as they exist from time to time?[14]

While one might have wished that some of the authorities mentioned here had been cited to the Court of Appeal, it is not really surprising that they were overlooked. No Canadian[15] reference work collects in one place the authorities on the reception of English law, and though fundamental decisions on the subject are frequent, each is given without reference to those which have gone before.

J. E. CÔTÉ*

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CANADA AND ARCTIC SOVEREIGNTY.—Canadians had assumed for some years that the northern areas of the North American land mass, together with the waters between and around them, were part of Canada and clearly within her sovereignty. It came as a rude awakening, therefore, when they learned that some United States oil companies, interested in the mineral resources of the area, had printed maps showing that part of the territory was regarded, by them at least, as being within the jurisdiction of the United States, or as still being *terra nullius* liable to occupation by those who exploited it. As if this were not enough, Humble Oil, with official governmental support, announced its intention to send a giant tanker through the northern waters with a view to creating an all-the-year-round route for oil, contending that the waters in question were international and open to the shipping of the whole world. As a result, public pressure upon the Canadian Government to make a clear proclamation of Canadian sovereignty began to intensify. In March 1970 it became clear that the Canadian Government had decided to act in this matter, when it announced regulations to be observed by the tanker *Manhattan* which was proposing to traverse the Parry Channel in April.[1] This was followed in April by the publication of Bills on Arctic Pollution[2] and to amend the Territorial Sea and Fishing Zones Act[3] of 1964.[4] At the same time it was disclosed that Canada had

[13] *Supra*, footnote 10, emphasis added.
[14] R.S.B.C., 1960, c. 199, s. 23(d).
[15] The Harvard Legal Bibliography has a little-used category for this, but of course it does not list cases.
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[1] Commons Debates, Appendix, March 16th, 1970, S. 156.
[2] Bill C-202 (1970), 9 Int. Legal Materials 543.
[3] Bill C-203 (1970), 9 Int. Legal Materials 553.
[4] S.C., 1964, c. 22.

amended her 1929 declaration[5] accepting the compulsory jurisdiction of the International Court of Justice, adding reservations concerning disputes relating to Canadian marine areas.[6]

It must not be thought that questions concerning Arctic sovereignty had not been considered before, or that the statements of March and April 1970 were the first to be made by the Canadian Government or its representatives on this matter. It is necessary to look at these, for by 1925 David Hunter Miller was saying that:[7] "Whereas Canada makes a precise and definite claim of sovereignty, no other country . . . has announced any claim whatever. Furthermore, the appearance of these islands on the map as a seeming northern extension of the Canadian mainland is a visible sign of an important reality—namely, that many of them are quite inaccessible except from or over some Canadian base. With her claim of sovereignty before the world, Canada is gradually extending her actual rule and occupation over the whole area."

In 1878 the Canadian Parliament sent a Joint Address to the Queen seeking a clear declaration as to the extent of Canada's boundaries.[8] These were to be limited "on the East by the Atlantic Ocean, which boundary shall extend towards the North by Davis Straits, Baffin's Bay, Smith's Straits and Kennedy Channel, including all the islands in and adjacent thereto. . . . On the North the Boundary shall be so extended as to include the entire continent to the Arctic Ocean, and all the islands in the same westward to the 141 meridian west of Greenwich; and on the North West by the United States Territory of Alaska". The Order in Council of 1880[9] which was stimulated by this Address merely transferred to Canada "all British possessions on the American continent, not hitherto annexed to any colony". The probable reason for this vagueness is to be found in the then indefinite state of knowledge as to what the "entire continent to the Arctic Ocean" comprised—islands, water, ice or a continental land mass. In any case, at that time, with scientific and exploratory potential being what they were, it was by no means uncommon, as is clear from the somewhat similar situation concerning the Indo-Chinese border,[10] for a boundary to be indicated in extremely general terms rather than to be clearly demarcated.

Canadian politicians did not consider the 1880 Order in Council as closing the problem of Arctic sovereignty, and in 1907

[5] [1968-69] I.C.J. Yearbook 46.
[6] (1970), 9 Int. Legal Materials 598.
[7] Political Rights in the Arctic (1925-26), 4 Foreign Affairs 47, at p. 51.
[8] Senate Debates (1878), vol. 1, p. 903.
[9] Canada Gazette, Oct. 9th, 1880.
[10] See, *e.g.*, Green, Legal Aspects of the Sino-Indian Border Dispute [1960] The China Quarterly 42, at pp. 46-47, 53, 56.

Senator Poirier moved[11] "That it be resolved that the Senate is of opinion that the time has come for Canada to make a formal declaration of possession of the lands and islands situated to the north of the Dominion, and extending to the north pole". His motion, however, failed for want of a seconder and was not voted upon. But his view has come to be regarded as the basis for claiming that there is a "sector" extending from the northward reaches of Canada to the pole over which Canada possesses sovereignty. "An Arctic sector is deceptively simple, and is compounded of only two ingredients: a base line or arc described along the Arctic Circle through territory unquestionably within the jurisdiction of a temperate zone state, and sides defined by meridians of longitude extending from the North Pole south to the most easterly and westerly points on the Arctic Circle pierced by the state. Under the theory, nations possessing territory extending into the Arctic regions have a rightful claim to all territory—be it land, water or ice—lying to their north. This claim springs from the geographical relationship of the claimant state to the claimed territory; the two areas must be contiguous along the Arctic Circle."[12] According to Poirier, the meridians involved were 141 and 60 West that is to say extending from the Alaska border to approximately Goose Bay. The significance of the 141 parallel as a sector limit may perhaps be seen from the Anglo-Russian Treaty of 1825[13] which provided that: ". . . la même ligne méridienne du 141ième formera, *dans son prolongement jusqu'à la Mer Glaciale,* la limite entre les Possessions Russes et Britanniques sur le continent de l'Amérique Nord-Ouest", and reappears in the Alaska Purchase Treaty,[14] which speaks of "the said meridian line of the 141st degree, in its prolongation as far as the Frozen Ocean".

Even at the time the Senator was putting forward his proposal, there appears to have been some doubt in official quarters whether a title based on contiguity or some other geographic explanation would have any validity. In response to Poirier's motion, Sir John Cartwright, Minister of Trade and Commerce, pointed out that the federal government had sent out an expedition, established posts, "exercised various acts of dominion, . . . levied customs duties and have exercised our authority over the various whaling vessels they have come across, which, I think, will be found sufficient to maintain our just acts in that quarter".[15] With these words he was merely foretelling what has since come to be regarded as the essence of sovereignty, namely some exercise of jurisdiction that

[11] Senate Debates (1906-1907), p. 266.
[12] Head, Canadian Claims to Territorial Sovereignty in the Arctic Regions (1963), 9 McGill L.J. 200, at pp. 202-203.
[13] 12 B.F.S.P. 38 (italics added).
[14] 2 Malloy, Treaties (1867), p. 1521.
[15] *Op. cit.*, p. 274.

amounts to real or quasi-, but nevertheless, effective, occupation.

In so far as geographic claims are concerned, it is perhaps enough, at least in the field of doctrine, to refer to the comments of Sir Humphrey Waldock considering *Disputed Sovereignty in the Falkland Islands Dependencies*,[16] which also involved the sector principle as a basis of claim, although in the Antarctic. "These sector claims are based fundamentally on the principle of geographical continuity of territory. Indeed they are nothing more or less than new examples of the old hinterland doctrine [—a legacy of the colonialist concept of 'spheres of influence']. Arctic sectors, although they also are based on the principle of proximity, are really examples of another proximity doctrine, 'contiguity'. . . . 'Contiguity' is the name given to the doctrine sometimes invoked in support of claims to islands lying near to a state's territory but outside its territorial waters. The mere proximity of the island to the claimant state is represented as a geographical connexion between the two lands as a ground for including the island within the sovereignty of the nearby state. . . . It is not believed that . . . [the] sector doctrine can by itself be a sufficient legal root of title. The hinterland and contiguity doctrines as well as other geographical doctrines were much in vogue in the nineteenth century. They were invoked primarily to mark out areas claimed for future occupation. But, by the end of the century, international law had decisively rejected geographical doctrines as distinct legal roots of title and had made effective occupation the sole test of the establishment of title to new lands. Geographical proximity, together with other geographical considerations, is certainly relevant, but as a fact assisting the determination of the limits of an effective occupation, not as an independent source of title. Any pretensions of the hinterland doctrine to give legal title were scotched once and for all by Article 35 of the General Act of the Berlin Conference of 1885[17] which recognized an obligation in an occupying state to exercise authority in the areas occupied. For Article 35 has ever since been accepted as declaratory of a general rule of international law. Hinterland claims, not reinforced by effective occupation, are political acts which can only be given legal content by being made the subject of a treaty. . . ."

Sir Humphrey's comments as to the doctrine of contiguity are derived from the award of Max Huber as arbitrator in the dispute between the Netherlands and the United States concerning the *Island of Palmas*.[18] "Although States have in certain circumstances

[16] (1948), 25 Br. Y.B. Int. L. 311, at pp. 341-342.
[17] 76 B.F.S.P. 4.
[18] (1928), 2 U.N. Reports of Int. Arbitral Awards 829, at pp. 854-855 (italics added).

maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of [an] island . . . , which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitation between the different parts are not wholly obvious. There lies, however, at the root of the idea of contiguity one [further] point which must be considered. . . .[I]n the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State *cannot prove display as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances.* . . . [I]nternational arbitral jurisprudence in disputes on territorial sovereignty . . . would seem to attribute greater weight to—even isolated—acts of display of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries. As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of

sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory."

In general, most writers and later judicial tribunals have tended to accept Huber's view, and it is therefore apposite to examine the extent to which Canada may have undertaken actions amounting to sufficient occupation for sovereignty to be established, and also such statements as politicians have made to indicate their conviction that the area is under Canadian sovereignty. Huber indicated that such acts may be isolated, and pointed out that such manifestations may assume "different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment of every point of a territory. The intermittency and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory".[19] The World Court has, in fact, shown how tenuous and varied the administrative acts amounting to evidence of occupation may be. Thus, in the *Eastern Greenland* case, 1933,[20] having pointed out that the important thing is "the intention and will to act as sovereign, and some exercise or display of such authority", the court emphasised that, even in contested cases, "the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries". After indicating that many of the early claims put forward to the territory, particularly those arising from the original discoveries and settlements, were made at a time when the "modern notions of territorial sovereignty had not come into being . . . [so that those involved would not have drawn] any sharp distinction between territory which was and territory which was not subject to them", the court looked at such things as the levying of fines in respect of homicides, uncontested claims, grants of trading monopolies, legislation in terms indicating that sovereignty extended throughout the area, and the like, "bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country"—Greenland.[21]

[19] *Ibid.*, at p. 840.
[20] 1933 P.C.I.J., Series A/B, No. 43, p. 46.
[21] *Ibid.*, at pp. 46-50.

Of equal significance from this point of view is the *Minquiers and Ecrehos* case between France and the United Kingdom.[22] As in the earlier case, reference was made to homicide and other criminal proceedings, to which were added inquests, the building of huts and the levying of rates in connexion therewith, contracts of sale relating to real property, the levying of customs, official visits, census enumeration, legislation purporting to extend to the area in question, judicial proceedings and the levying of taxes.[23]

As we have seen, as early as 1907, Sir John Cartwright was reporting to Parliament that Canada was already exercising administrative functions in Arctic areas. In June 1925, after Minister of the Interior Stewart had stated that Canada claimed all the territory between longitude 60 and 141 "right up to the North Pole"[24]—and supported his statement by placing a map of the area before the House of Commons—the Northwest Territories Act was amended,[25] so that in the future entry into the Canadian Arctic would be controlled. This was followed by an Order in Council in 1926 requiring everybody entering the Canadian Arctic to secure a permit, and "this requirement has been fulfilled by the scientists and explorers of many nations since that date".[26] In so far as some of the islands within the area are concerned, third States have expressly acknowledged Canadian sovereignty and the validity of its administrative acts. Thus, in 1930 Norway formally recognized Canada's claim to the Sverdrup Islands, while expressly denying that this meant any acknowledgement of Canada's sector claim. Further, Canada agreed to give favourable consideration to Norwegian requests for fishing, trapping, hunting and other industrial rights on these islands, if the existing regulations for the protection of the aboriginal population should ever be relaxed.[27] At the same time, Canada gave Captain Sverdrup, who had discovered the islands, $67,000.00 in recognition of his services.

There has been a series of statements to indicate that Canada considers she enjoys sovereignty over the Arctic area, although it is not always clear how extensive this area is considered to be. In the last thirty years, contemporaneously with the increase in the possibility of exploitation and exploration of areas hitherto considered as relatively inaccessible, and with the establishment of quasi-permanent scientific bases by the Soviet Union on floating

[22] I.C.J. Reports 1953, p. 47.
[23] *Ibid.*, at pp. 65-66, 68-70.
[24] Commons Debates (1925), vol. 4, p. 4084.
[25] S.C., 1925, c. 48.
[26] 1 Hackworth, Digest of International Law (1940), p. 463 (citing Minister Phillips to Sec. Stimson, Nov. 21st, 1929).
[27] *Ibid.*, p. 465; Can. T.S., 1930, no. 17; H.M.S.O., Cmd 3875.

pieces of the Arctic ice, there has been an increase in the number of such statements. Before examining these, however, it is perhaps as well to note what attitude Canada's other Arctic neighbours were taking at the time. Both Imperial Russia and the Soviet Union had long laid claim to the epicontinental shelf of the Russian mainland and all that lay between the coast and the Pole within her "sector". This culminated in the acceptance by Britain and Canada of the Russian claim to sovereignty over Wrangel Island in 1924, although it would seem that the United States, the property of whose nationals had been confiscated by the Russians, has never abandoned its own claim.[28] The United States, too, has on occasion indicated that it was not prepared to recognize the Canadian claims. Thus, in 1924 Navy Secretary Danby stated before the House Committee on Naval Affairs that: "In my opinion, it is highly desirable that if there is in that region land, whether habitable or not, it should be the property of the United States. . . . And, for myself, I cannot view with equanimity any territory of that kind being in the hands of another Power."[29] Nevertheless, only three years later David Hunter Miller was writing that "the United States has never officially made any claim to any known Arctic lands outside of our well recognized territory . . . [and] as to the islands now known and lying north of the Canadian mainland, the average American would have no objection to the Canadian title. . . . The only other possibilities would be something in the nature of *terra nullius*, an unsatisfactory sort of ownership by everybody [—this is more regularly considered as denoting ownership by nobody, with *res communis* signifying universal ownership—], or else ownership by the United States. No public sentiment here would favour either, as against Canada".[30] He also pointed out that, while "we cannot say that the sovereignty of all the known lands in the Arctic is definitely settled internationally [,] we can say that the sovereignty of substantially all of these territories is now either definitely known or definitely claimed. . . . And the probability is that few of the claims thus far made to lands hitherto discovered will be questioned. . . . So while it cannot be asserted that Canada's title to *all* these islands is legally perfect under international law, we may say that as to almost all of them it is not now questioned and it seems in a fair way to become complete and admitted". Ivan Head echoed this statement in the light of forty years' development, when he wrote of any other potential claim that "Canada's title—even if not 'good', would certainly be 'better' ".[31]

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[28] *Ibid.*, p. 464.
[29] Smedal, Acquisition of Sovereignty over Polar Areas (1931), p. 68.
[30] *Op. cit.*, footnote 7, at pp. 54, 52, 54, 53.
[31] *Op. cit.*, footnote 12, at p. 217.

The extent of Canadian sovereignty or claims thereto as understood shortly after the First World War is made clear by Hunter Miller. "The official Canadian claim, so far as it relates to the unknown, is in the nature of a notice before discovery and before occupation. What Canada says is that if Arctic lands be found—found by anyone [and in 1921 Canada informed the Danish Government 'that any discovery by Rasmussen would not affect Canadian claims'][32]—east of 141° and west of 60° and Davis Strait, they are Canadian or will be".[33] This statement is almost a forecast of what has come to be the law concerning the continental shelf. According to article 2 of the Geneva Convention on the Continental Shelf[34] "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. [The sovereign rights of the coastal State] are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State". Moreover, "the term 'continental shelf' is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea . . . to where the depth of the superjacent waters *admits of the exploitation* of the natural resources of the said areas".[35] This means that the coastal State exercises sovereignty over the shelf *ipso jure* to the extent that the waters are exploitable anywhere in the world by any State, even if the coastal State is unaware of this exploitability or lacks the resources or the will to exploit its own area.[36] It is therefore not unknown in international law for a State to own as of right resources of which it is unaware, and even if it is incapable of making use of them provided some other State can, and what is true of exploitation is undoubtedly also true of visitation.

This Convention likewise makes it clear that the ultimate geographical limit of a State may also be variable and uncertain. Again, Hunter Miller is interesting. In his view "the expression 'as far as the Frozen Ocean' [in the 1825 Treaty] is vague enough . . . to make it at least arguable that the line runs as far as the 141st meridian itself runs, and that runs to the North Pole",[37] and presumably this would apply to land, islands, and whatever else

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[32] *Op. cit.*, footnote 7, at p. 50.
[33] *Ibid.*, at p. 56.
[34] (1958), 499 U.N.T.S. 311.
[35] Art. 1 (italics added).
[36] See, *e.g.*, Mouton, The Continental Shelf (1954), p. 42; Young, The Geneva Convention on the Continental Shelf (1958), 52 Am. J.I.L. 733, at p. 735; Green, The Geneva Conventions and the Freedom of the Seas (1959), 12 Current Legal Problems 224, at p. 232; Slouka, International Custom and the Continental Shelf (1968), pp. 101-103.
[37] *Op. cit.*, footnote 7, at p. 59.

that may be there. This comment on the American view at that time is of importance, because in the *Eastern Greenland* case the World Court stated[38] that among the characteristics "which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger." "In the case of the territory under discussion, until recently there has been no record of any dispute with Russia or America concerning the ownership of any portion of the Canadian Arctic."[39]

While there has been no evidence of claims by either the United States or the Soviet Union, Canadian officials have frequently reiterated that Canada exercises sovereignty in that part of the world. Even before Stewart had spoken in 1925 of Canada's ownership of everything between the relevant lines of latitude extending to the Pole, the Minister of Finance had, when asked in 1922 for Government policy regarding the northern islands, stated quite simply that, although "it is a delicate matter to state the policy of the Government on that matter . . . what we have we hold".[40] In 1938 Government spokesmen were speaking of rights arising from both the sector theory and other principles of international law. Thus, the Minister of Mines and Resources explained that no foreign challenge to Canada's Arctic sovereignty could succeed, since the principles of international custom concerning title in such areas, including those which had never been entered by man, favoured Canada, and that on the basis of the sector principle which "is now very generally recognized . . . as well our sovereignty extends right to the pole within the limits of the sector".[41] Today we may feel that it is unfortunate that the Minister was not more specific as to the principles other than that of the sector on which he based his contention, but he clearly had something more than this merely geographical idea in mind. A similar view as to the extent of Canadian sovereignty was enunciated by Prime Minister St. Laurent in 1953, declaring "We must leave no doubt about our active occupation and exercise of our sovereignty in these lands right up to the pole".[42] Of this all that need be said is that, as made clear in the jurisprudence of international tribunals, occupation does not require actual presence,

[38] *Op. cit.*, footnote 20, at p. 46.
[39] Sec. of State for External Affairs, Commons Debates (1959), vol. 2, p. 1822.
[40] *Ibid.* (1922), vol. 2, p. 1750.
[41] *Ibid.* (1938), vol. 3, p. 3081.
[42] *Ibid.* (1953-54), vol. 1, p. 700.

while sovereignty is exercised by administrative activities which prove effective. In the meantime, Mr. Lester Pearson had entered the fray while Canadian Ambassador to the United States, with a paper in *Foreign Affairs*.

Normally, an ambassador speaking on behalf of his Government and as ambassador in circumstances in which he may be construed as carrying out his official duties may bind his Government, even though he may have gone further than his instructions permitted. This would be the converse of the situation in the *Eastern Greenland* case when the Norwegian Foreign Minister made a statement of governmental intention to the Danish Ambassador in circumstances in which the ambassador was held entitled to assume that the Minister was speaking officially.[43] It is probable that an ambassador speaking as an official guest at a State banquet in the presence of local governmental representatives might be considered as speaking officially on behalf of his State as its representative, a status commented upon by the World Court in its advisory opinion in the *Mosul* case:[44] "Persons delegated by their respective Governments, from whom they receive instructions and whose responsibilities they engage." However, when writing in learned, and even more so in polemical, journals they can hardly be construed as acting in the same capacity.

In Mr. Pearson's case, however, his comments are of more than the usual ambassadorial significance, only because of the fact that from 1948-1957 he was Secretary of State for External Affairs and Prime Minister from 1963-1968, and in so far as they show the way he was thinking and foretell the policy he propounded in his official capacity. Right at the beginning of his paper, it is stated that "a large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northern mainland, but the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries extended to the North Pole".[45] In support of his assertion, Mr. Lester Pearson cited the patrols of the North West Mounted Police, government posts hundreds of miles beyond the Arctic Circle issuing licences, exacting taxes and the like, and though the "official duties . . . performed . . . in some of the more northerly [posts may] be more or less nominal, they have official and international significance. . . . The Canadian Government, while ready to co-operate to the fullest extent with the United States and other countries in the development of the whole Arctic, accepts responsibility for its own sector

[43] *Op. cit.*, footnote 20, at pp. 69-71; See, also, Hambro, The Ihlen Declaration Revisited, in Fundamental Problems of International Law (Spiropoulos Festschrift) (1957), p. 227.

[44] 1925 P.C.I.J., Series B, No. 12, p. 29.

[45] Canada Looks "Down North" (1945-46), 24 Foreign Affairs 638.

[—it is not clear whether he is referring to the traditional sector principle, or merely that portion of the Arctic which Canada regards as under her sovereignty]. There is no reason for sharing that responsibility except as part of any regional or general international arrangement for co-operation and control which may be worked out within the framework of the charter of the United Nations. During the war the United States Government asked permission of Ottawa to establish certain weather and emergency installations in upper Frobisher Bay and Cumberland Sound on Baffin Island,[46] as well as air bases at Coral Harbor on Southampton Island and Cape Dyer on Baffin Island. This permission was, of course, granted, but as a war measure on a temporary basis, subject to the right of Canada to replace the stations, and to the stipulation that all permanent facilities with respect to the air bases, having been paid for in full, should become the property of Canada after the war".[47] This aspect of the situation has not been changed by the establishment of D.E.W. line stations, and United States vessels servicing such stations have to apply to Canada for waivers of the Canadian Shipping Act[48] before proceeding.[49] While Mr. Pearson was fully cognizant of the importance of American co-operation in the area, he also recognized the significance of contacts with the Soviet Union, "which is well ahead of the rest of the world in the development of its polar areas and which Canadians are beginning to realise is their neighbour across the North Pole".[50] Here, Mr. Pearson appears to be applying the principle of potential exploitability that is postulated in the Continental Shelf Convention and seems to be clearly asserting that Canadian jurisdiction reaches the Pole, as seems to underlie his reference to Canada's unwillingness to dig herself, or see anybody else dig for her "any Maginot Line in her Arctic ice".

In view of Mr. Pearson's expressed beliefs concerning Canadian Arctic sovereignty, it is perhaps a little strange that in 1956 the Minister of Northern Affairs in the Government of which he was External Secretary seemed to narrow Canada's claim when stating that "we have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic islands. There is no doubt about it and there are no difficulties concerning it. . . . To our mind the sea, be it frozen or in its natural liquid state, is the sea; and our sovereignty

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[46] "Baffin Island . . . is as certainly Canadian as is Ontario, and we may take for granted Canadian ownership of the other islands directly adjacent to the mainland", Miller, *op. cit.*, footnote 7, at p. 51.

[47] *Op. cit.*, footnote 45, at pp. 640-641.

[48] R.S.C., 1952, c. 29.

[49] Prime Minister St. Laurent, Commons Debates (1957), vol. 3, p. 3186; and see Head, *op. cit.*, footnote 12, at p. 218.

[50] *Op. cit.*, footnote 45, at p. 664.

exists over the lands and over our territorial waters".[51] This apparent rejection of the sector theory appears to have been forgotten by Mr. Pearson when he was Leader of the Opposition in 1958. He then said: "We have claimed sovereignty under what we call the sector theory over the prolongation north, right to their meeting at the pole, of the east and west extensions of our boundary. If we are to make that claim stick, . . . we have to do everything that is possible, everything that is practical, to develop these areas and reinforce whatever rights we may have in law with the right of occupation. . . . [But] the sector theory itself is not enough, it must be followed by rights based on discovery and effective occupation."[52] These comments were stimulated by a statement made by the Conservative Minister of Northern Affairs in response to a query concerning the status of the Arctic waters north of the Arctic archipelago. Mr. Hamilton replied that: "All the islands north of the mainland of Canada, which comprise the Canadian Arctic archipelago are of course part of Canada. North of the limits of the archipelago, however, the position is complicated by unusual physical features. The Arctic ocean is covered for the most part of the year with polar pack ice having an average thickness of about eight feet. Leads of water do open up as a result of the pack ice being in continuous motion, but for practical purposes it might be said for the most part to be a permanently frozen sea. It will be seen, then, that the Arctic ocean north of the archipelago is not open water nor has it the stable qualities of land. Consequently the ordinary rules of international law may or may not have application. Before making any decision regarding the status which Canada might wish to contend for this area, the government will consider every aspect of the question with regard to the best interests of Canada and to international law."[53]

A comment by the great American international lawyer Hyde is perhaps relevant here: "It is not apparent why the substance of which an area is composed, however subject to deterioration or ultimate destruction, or the absence of proof that it remains an immovable mass, renders it unreasonable for states to deal with it as though it were land, to the extent at least of asserting and gaining respect for exclusive rights of control or dominion therein. *States themselves do not appear to discern unreasonableness in such conduct.* . . . From a *point d'appui*, conveniently located, [a State] may exercise regularly a civil or administrative control over a large yet unappropriated area. . . . [T]he claimant state may actively engage itself, through the facilities of transportation by

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[51] Commons Debates (1956), vol. 7, p. 6955.
[52] *Ibid.*, (1957-58), vol. 2, p. 1963, vol. 4, p. 3512.
[53] *Ibid.*, vol. 2, p. 1559.

air, over the entire district which it claims as its own."[54] In his monumental *International Law Chiefly as Interpreted and Applied by the United States*, he went further: "It is not apparent why the character of the substance which constitutes the habitual surface above that level [—land projecting itself above the level of the sea—] or its lack of permanent connection with what is immovable, should necessarily be decisive of the susceptibility of a claim to sovereignty of the area concerned. This should be obvious in situations where the particular area is possessed of a surface sufficiently solid to enable man to pursue his occupations thereon and which also in consequence of its solidity and permanence constitutes in itself a barrier to navigation as it is *normally* enjoyed in the open sea. States at times endeavour to acquire rights of sovereignty over polar areas by acts which would be regarded as inadequate were the regions sought to be acquired within the temperate zone. . . . The severity of climatic conditions in polar regions has thus far balked the settlement thereof by the peoples who inhabit non-polar areas. Those conditions do not, however, prevent the exercise of a measure of control by such peoples within places which they as yet find it impossible really to occupy. The significant fact at the present time is that an aspirant to sovereignty over a polar region . . . may, by means of aircraft and a variety of other devices, make its will felt throughout a district which it claims as its own, and by such process establish its supremacy therein. . . . Canada is understood to approve generally of the sector system. . . . The Dominion appears, however, to deem it necessary to fortify its position by other processes, and to endeavor in fact to exert a degree of administrative control over adjacent polar areas which it claims as its own. . . . If, on account of the rigor of the climate in the polar regions, the minimum requirements of the law of nations for the acquisition of a right of sovereignty over newly found lands are to be deemed to be relaxed when the area concerned is within those regions, the scope and character of the relaxation need careful analysis and observation as practices are in course of development. At the present time, means of communication and transportation as well as control are such as to justify a demand for more than an assertion of dominion by a mere symbolic act, and to cause the perfecting of a right of sovereignty to be dependent upon the exercise of some measure of control over the area involved within a reasonable period after the discoverer shall have accompanied his visual apprehension of the area by a formal taking of possession, with or without governmental authorization [—Hyde was very concerned with the possibility of claims arising from the

[54] Acquisition of Sovereignty over Polar Areas (1933-34), 19 Iowa L. Rev. 286, at pp. 287, 288 (italics added).

activities of Byrd and Peary]. The limits of such period, as well as the nature of such control must depend upon the circumstances of the particular case. In the Arctic regions it must be acknowledged that the sovereign of a contiguous area of land that projects itself well into the Arctic Circle is in a relatively advantageous position to make its supremacy felt within or over an extensive yet unoccupied area. That potentiality which is attributable in large part to geographical considerations, strengthens the applicability of the sector principle in the North Polar regions. Yet it points also to the conditions to be met in order to preserve if not perfect a right of sovereignty therein, as, for example, by Canada or Russia."[55]

Reference to the sovereignty of Russia and the realities of the cold war raise the question of the applicability of the Monroe Doctrine, albeit that it is merely a statement of policy and not of legal right, to North Polar regions. On this aspect of the matter, Hyde makes two comments that are of relevance: "Enunciations of the Monroe Doctrine have doubtless had reference to areas that were susceptible to settlement and occupation by peoples from the temperate zones. It may be contended, therefore, that as the United States has not sought to interfere under cover of that doctrine with the acquisition of rights of sovereignty over areas that were not at the time deemed to be capable of settlement by such peoples, it has left the problem pertaining to the polar regions untouched. . . . The strength of [such a] contention will be weakened if the polar regions prove to be susceptible to control by means that fall short of occupation or settlement, and if such control is sought to be exercised by a non-American power. . . . The extension of Canadian assertions of dominion to adjacent polar areas however wide, if deemed to satisfy the normal requirements for the acquisition of rights of sovereignty over polar areas, may not be regarded by the United States as infringing upon the operation of the Monroe Doctrine, *because of the American statehood of Canada.* Notwithstanding its connexion with the British Empire, *the northward strides of Canada may not, therefore, be looked upon as those of a non-American power.*"[56]

In these extracts, Hyde appears to be using the term "occupation" as a synonym for "settlement", but as Marjorie Whiteman points out in her *Digest of International Law*, published by the State Department, "The word 'occupation' itself is, of course, a legal term of art; it is the Latin *occupatio* meaning appropriation, not occupation in the sense of 'settling on'. Today it means, in international law, the appropriation of sovereignty, not of soil".[57] Has

[55] Vol. 1 (1947), pp. 348, 350, 354-355 (italics added).
[56] *Ibid.*, pp. 290-291 (italics added).
[57] Vol. 2 (1963), p. 1265.

Canada, in fact, appropriated such sovereignty? It has already been seen that a vast number of governmental activities have taken place in the Canadian Arctic over the years, and many of these more than satisfy the requisites considered essential by international tribunals. Further, "one yardstick of occupation may be the amount of money expended in the area by the sovereign power; the trappings of civilization and bureaucracy are expensive. The Government of Canada spent $4,000 in the Arctic in 1920, $300,000 in 1924, and $33.2 million in 1959",[58] and the figure has continued to rise. Perhaps of even more importance is the exercise of judicial activity, for this involves a clear assertion of jurisdiction and of power, and in the case of Canada justice is exercised in the Queen's name, in her courts and over her territories. In November 1969 this issue became germane to judicial proceedings in the Territorial Court in the Northwest Territories. *R.* v. *Tootalik E4-321*[59] concerned the alleged unlawful hunting by an Eskimo of a female polar bear with young contrary to the Northwest Territories Game Ordinance, 1960. It was alleged that the killing had taken place "on the sea-ice offshore from Pasley Bay" in waters frequently icebound even in summer. In fact, it is reported that the R.C.M.P. schooner *St. Roch* was icebound in the Bay "from September 3, 1941, to August 4, 1942".[60] The defence claimed that the court had no jurisdiction. Morrow J. referred to Prime Minister St. Laurent's statement of 1953 as well as Mr. Pearson's *Foreign Affairs* paper, but also pointed out that "it is not declarations of sovereignty that count so much as the actual day-by-day display of sovereign rights". He then mentioned that for at least forty years the R.C.M.P. had been "patrolling the Arctic areas including patrols over the sea-ice and attending to law and order and to the welfare of the inhabitants. Since 1955, when the territorial court of the Northwest Territories was set up under the Northwest Territories Act it has been notorious that this court has administered the laws of Canada in all parts of the territory, including such of the Arctic islands as have inhabitants and this by going on circuit several times a year and by holding court in the various places visited. It is to be observed that on at least one occasion court was actually held in a ski-equipped Otter sitting on the sea-ice off Tuktoyaktuk. Again in early 1956 the late Sissons J. presided over a case involving an Eskimo named Allan Kaotok[60A] who was charged with committing a murder on the sea-ice some 60 miles north-east of Perry River in Queen Maud Gulf. . . . [T]he present alleged offence took place only some

[58] Head, *op. cit.*, footnote 12, at p. 214.
[59] (1970), 71 W.W.R. 435.
[60] Pilot of Arctic Canada (1961), vol. 3, p. 208.
[60A] Sissons, Judge of the Far North (1968), p. 65.

200 miles from the situs of the Kaotok offence and 200 miles is of no real consequence in this large territory".[61] The learned judge held that the question of jurisdiction turned on the meaning of "Territories" in the Northwest Territories Act, section 2 of which refers to "all that part of Canada north of the Sixtieth Parallel of North Latitude, except the portions thereof that are with the Yukon Territory, the Province of Quebec, or the Province of Newfoundland".[62] He asked of this definition, "does it purport to include the waters and, where appropriate, the sea-ice in between the islands or the continent and the islands or does it only embrace the land area itself? If the first interpretation governs then it follows that the commissioner [of the Territories] in council . . . has the power to legislate in respect to game on the sea-ice or on the waters, frozen or otherwise in between. . . . I have already found that the sea-ice, extending off from the land, is within the jurisdiction of the government of Canada. . . . [T]hen it must surely follow that this attribute of land, if it can be so described, went along with and was part of whatever title passed from the Queen in 1870 and 1880 [RSC, 1952, Vol. VI, pp. 6237, 6281]. If it should happen that the recognition of this jurisdiction over the sea-ice has only come in recent times as a result of the comity of nations,[62A] or as the result of the activities of the government of Canada in its exercising of sovereignty in these areas, then it still remains that the parliament of Canada in 1952 had to have intended to include the whole area in its definition of 'Territories'. In section 2 (i) the phrase 'all that part of Canada north of the Sixtieth Parallel' must include the sea-ice off Pasley Bay, as Pasley Bay is in this area. I conclude therefore that the definition in no wise restricts 'Territories' to land only as distinct from 'land' in the larger sense. It may well be that the change in wording here to the more general description was deliberate with the above result as the object".[63]

It is not only Morrow J. who has been unwilling to regard the sea-ice of the Arctic as constituting high seas. In 1930, Lakhtine, one of the most highly respected of commentators concerning the law relative to this part of the world, wrote that "the doctrine of the high seas, if applied to the Arctic Ocean, is quite unsatisfactory. Sovereignty should attach to the Polar States over the Arctic Ocean within their sectors of attraction. The jurisdiction, however,

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[61] *Supra*, footnote 59, at pp. 439-440.

[62] R.S.C., 1962, c. 331.

[62A] The learned judge is probably using the term as a synonym for international law.

[63] *Supra*, footnote 59, at p. 443. On appeal this decision was reversed on the ground that there was no conclusive evidence as to the age of the bears involved. No comment was made on the issue of jurisdiction. (1970), 74 W.W.R. 740.

should be qualified by the assurance to foreign powers of the right of innocent passage of all naval vessels although the littoral State should have *the right to regulate, control and even prohibit* hunting and fishing",[64] in fact these waters are "nearly identical" with territorial waters.

Even if the waters in question were freely open it would still be possible for Canada to claim fairly large tracts as national or territorial sea. Since the *Anglo-Norwegian Fisheries* case[65] it has become clear that a State whose coastline is heavily indented may draw its baseline for the measurement of the territorial sea by means of a series of straight lines from headland to headland, so long as the general direction of the coast is followed, regardless of the sinuosities of that coast. By Article 4 of the Convention on the Territorial Sea, 1958,[66] this straight-line method has been extended to "localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along coasts in its immediate vicinity, . . . and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of inland waters, . . . [and] account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage". In so far as the Canadian Arctic area is concerned, there are but few economic interests involved and they, for the main part, are those of the local aboriginal population, although the problem of oil transport has become important and is the one that has now brought matters into dispute. The Convention provides that the system of straight baselines must not be used so as to cut off the territorial sea of another State from the high seas, but it would be stretching geographical facts more than a little to argue that even if the entire area were a closed Canadian water it, in fact, separated United States territorial seas from the high seas. As was pointed out by the World Court in the *Corfu Channel* case[67] the "decisive criterion" in deciding whether a natural strait is an international waterway is "its geographical situation as connecting two parts of the high seas *and the fact of its being used for international navigation.* Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage. . . . It has nevertheless been a useful route for international maritime traffic". Until the first *Manhattan* voyage it would have been difficult to suggest that these waters have in any way been used for "international maritime traffic" even as an alternative route. It must be

[64] Rights over the Arctic (1930), 24 Am. J.I.L. 703, at p. 713 (italics added).
[65] I.C.J. Reports 1951, p. 116.
[66] 516 U.N.T.S. 205.
[67] I.C.J. Reports 1949, p. 4, at p. 28 (italics added).

borne in mind, however, that the right of innocent passage here envisaged only relates to stretches of the territorial sea, but not to internal or national waters and if the islands to the north of the Canadian mainland constitute an archipelago whose headlands may be joined, the "waters" would be national and not territorial, navigation through which would depend entirely on the discretion of Canada. But even if they are territorial, Canada would be fully entitled to require all shipping passing through to observe the local regulations concerning peace, good order or security of the coastal State, which today would almost certainly include anti-pollution legislation and other measures concerning the preservation of natural resources or the local ecology. Even in the case of the Spitzbergen Treaty[68] recognizing Norwegian sovereignty over this polar area, while the rights of the nationals of all contracting parties with regard to access and maritime, industrial, mining and commercial operations were preserved on a basis of absolute equality, it was still provided that such rights were "subject to the observance of local laws and regulations".

As to the nature of the northern Canadian archipelago, one is tempted to accept the comment of Ivan Head:[69] "The archipelago lying to the north of the Canadian mainland is well-defined geographically, it is orderly in the sense that its outer limits are unbroken by vagrant islands lying far-distant from the regular and symmetrical shape of the whole. The archipelago forms a natural extension of the continent and shares with it a common continental shelf. It does not lie astride any shipping routes. Canada regards the water between the islands as Canadian territorial waters, and this claim has been recognized by the United States.[70] . . . The unitary appearance of the formation and, to a lesser extent, its location suggest support to a claim to these waters as internal waters.[71] Surrounded on all sides by Canadian territory, they possess the *character* of Canadian waters. It is highly unlikely that uninterrupted surface passage from the Labrador Sea to either the Arctic Ocean or the Beaufort Sea, or *visa versa*, will ever be a reality. Future demands for the right of innocent passage through the archipelago are speculative to a degree. The widths of some of the straits and entrances in the archipelago are wider than those limits ordinarily accepted by law for territorial waters, but their

[68] (1920), 1 Hudson, International Legislation, p. 436, Art. 3.
[69] *Op. cit.*, footnote 12, at pp. 218-219 (italics added).
[70] See text to footnotes 48, 49 above.
[71] See Alexander, The Law of the Sea (1967), p. 77: "By analogy perhaps the sea areas enclosed by straight baselines in archipelagos should be so linked to the land domain as to be subject to the regime of internal waters." See, however, McDougal and Burke, The Public Order of the Oceans (1962), who suggest, p. 411, that a better possibility might be "to permit the use of a single territorial sea for the islands as a unit but to regard the waters within the baseline as part of the territorial sea".

remoteness reduces the interest of the international community. . . . The passage of time enures for the benefit of the Canadian claim". However, not all Canadian commentators concur in this view regarding "archipelago sovereignty". Thus, while Professor Pharand concedes that the use of the straight-line method joining all the islands "would certainly be in Canada's best interest, in so far as insuring its national security and future communication between the islands", he contends that "the freedom of international maritime communication would be seriously limited, when one considers that the water areas enclosed would include those of the Northwest Passage. This constitutes a 'legal strait' in that it connects parts of the high seas, regardless whether presently used for international navigation or not. . . . [T]o 'box-in' this route of the Northwest Passage would mean to draw a closing line of at least fifty miles at the eastern end and one of nearly one hundred miles at the other. All of the enclosed water areas, regardless of size, would become internal waters. Under Article 5 of the Territorial Sea Convention, the newly enclosed waters would still be subject to the right of innocent passage, but not so under the *Fisheries* case".[72]

It should be pointed out, however, that these waters would only be subject to the right of innocent passage if "the establishment of a straight baseline . . . has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas"—and it is by no means clear that this was how the areas in question were previously regarded. Moreover, Canada had not yet ratified[72A] the Territorial Sea Convention and, therefore, if the *Fisheries* decision is declaratory of customary law, as it is generally regarded to be, this would have been the law Canada would follow. The recent opinion of the Supreme Court on *Ownership of Off-Shore Mineral Rights*[73] asserts that, despite the lack of Canadian ratification, the Conventions on the Territorial Sea and the Continental Shelf define the present state of international law on these matters and would therefore suggest that the Convention prevails. But in the *North Sea Continental Shelf* cases[74] the World Court expressly rejected the view that the Convention, although ratified and in force, had altered the law one iota in so far as a State which had not ratified it was concerned. Moreover, it might well be questioned whether a strait which is not "presently used for navigation" can, in the light of the *Corfu* decision be regarded as an international waterway open to innocent passage. For these reasons, it seems un-

[72] The Waters of the Canadian Arctic Islands (1969), 3 Ottawa L. Rev., p. 414, at p. 430.

[72A] Canada's ratification took effect on March 8th, 1970.

[73] (1968), 65 D.L.R. (2d) 353.

[74] I.C.J. Reports 1969, p. 3.

necessary to accept Dr. Pharand's suggestion that two territorial sea areas be proclaimed, "one enclosing the islands south of Parry Channel with the mainland, and the other around the Queen Elizabeth Islands north of the channel. As for the few islands in the middle of Parry Channel, all of them could probably fall within the normal rule and be given their own territorial waters. The implementation of this . . . possibility would leave a strip of high seas, bordered by two main belts of territorial waters, throughout Parry Channel. Such a delimitation protects the interests of the coastal state in giving it almost complete sovereignty over all water areas within each group of islands, but respects the principle of freedom of navigation in favour of the international community in retaining a strip of high seas which has considerable *chance* of *eventual* use for important international traffic".[75] The United States, too, seems to reject the idea of "archipelago sovereignty",[76] but it is suggested that too much attention need not be paid to this fact, for the issues which have led that country to protest have been concerned with claims concerning archipelagos lying well and truly in what were formerly regarded as stretches of the high seas open to international maritime navigation, as was the case with Indonesia and the Philippines.

It is submitted that, in the light of the Canadian administrative and other activities in the area, the absence of any concrete claim of opposition by any other State—pace the situation that has now arisen—*sufficient time has enured for Canadian sovereignty over the entire Canadian Arctic as far as the Pole, and embracing land, islands, sea and pack-ice, to have become a fact in law.* Had any question arisen, say, five years before the *Manhattan* effort, there is little doubt that the world at large would have recognized Canada's historic title to the whole area. It is almost certain that this would have been the view adopted by the United States had it been the Soviet Union that sought to deny Canada's claims. After all, in 1954 at the time of the Peruvian seizure of the Onassis whaling fleet in what were regarded as high seas, the United States did not press too strenuously its protest at the Peruvian action.[77] To have done so would have meant clear acceptance of the right of Soviet whalers to operate within 200 miles of an American coast. The fact that, because of later commercial or scientific developments, a State feels that it wishes to change its attitude to a legally established situation must be irrelevant in any system that purports to describe itself as one of law. *It would appear, therefore, that any Canadian proclamation or legislation now issuing, even*

[75] *Op. cit.*, footnote 72, at p. 431 (italics added).
[76] Whiteman, *op. cit.*, footnote 57, vol. 4 (1965), p. 281 *et seq.*
[77] See Territorial Waters and the Onassis Case (1955), 11 The World Today 1; Poulantzos, The Right of Hot Pursuit in International Law (1969), pp. 89-91.

though it be expressed as an assertion of sovereignty, is in reality not that, but an exercise of sovereignty.

In the light of this submission, it is now apposite to consider the recent Canadian declarations and legislation as well as the background which produced them.

It has already been indicated that some of the public interest at least was motivated by the knowledge of the existence of maps questioning Canadian sovereign rights. But maps are only *prima facie* evidence of what they purport to show, and this is true only of certain maps. In the first place, it must be borne in mind that only maps prepared by governments or recognized cartographers can be accepted as authoritative in any case, a fact which becomes clear from the comments of Huber in the *Palmas* case:[78] ". . . only with the greatest caution can account be taken of maps in deciding a question of sovereignty. . . . Any maps which do not precisely indicate the political distribution of territories . . . must be rejected forthwith, unless they contribute—supposing they are accurate—to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not only *referred to already existing maps*—as seems very often to be the case—but that he has based his decision on information carefully collected for the purpose. Above all, then, *official or semi-official maps* seen capable of fulfilling these conditions, and they would be of *special interest where they do not assert the sovereignty of the country of which the Government has caused them to be issued.* . . . The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. . . . A map affords only an indication—and a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights. . . . [A] special map must prevail over [a] general, even though the latter was published later"—but, as the comment makes clear, this would not apply to a partisan map prepared solely for proving a partisan case concerning the area in question.

International tribunals have also examined maps when the terrain to which they refer has not been fully explored or which is only sparsely populated. The Special Boundary Tribunal which dealt with the *Guatemala-Honduras Boundary Dispute*[79] pointed out that "statements by historians and others, of repute, and authenticated maps, are also to be considered, although such descriptive material is of slight value when it relates to territory of which little or nothing was known and in which it does not appear that any administrative control was exercised". When, however,

[78] *Supra*, footnote 18, at pp. 852-854, 859-862 (italics added).
[79] (1933), 2 U.N. Reports of Int. Arbitral Awards 1307, at p. 1325.

such administrative control as is exercised tends to coincide with the views of the commentators and of the maps, their value is obviously increased. It would appear, however, from the decision of the World Court in the *Eastern Greenland* case[80] that, where such territories are concerned, administration might be of less significance and the maps of increasing importance: "It has been argued on behalf of Norway that 'Greenland' as used in documents of this period cannot have been intended to include the east coast because at that time the east coast was unknown. An examination, however, of the maps of the seventeenth and eighteenth centuries shows that the general features and configuration of the east coast of Greenland were known to the cartographers. Even if no evidence of any landings on the coast have been produced, the ships which hunted whales in the waters to the east of Greenland sighted the land at intervals and gave names to the prominent features which were observed." It is true that many of the names to be found in the Canadian Arctic reflect the activities of non-British and non-Canadian explorers, but in modern international law more is necessary to acquiring sovereignty than a sighting and naming. In Canada's case, when such explorations have been undertaken, the Government has issued warning reservations, while the commentators, the maps and the administrators have all indicated an awareness that the territory, although its ultimate limits may remain unknown, is considered to be within Canada's sovereignty.

It would appear, therefore, that *in the light of the judicial assessment of maps*, and especially when such maps are an expression of unofficial partisanship, *there is strong evidence to support the Canadian claim.*

In the Throne Speech debate on October 24th, 1969,[81] Canada's Prime Minister referred to the need for legislation to protect the ecological balance of the Canadian Arctic, indicating that this would be done by anti-pollution regulations, accompanied by an extension of Canada's territorial sea to twelve miles and the establishment of new fisheries zones. Mr. Trudeau declared that these measures were not intended to proclaim Canadian sovereignty but were an expression of Canada's regard for "herself as responsible to all mankind for the peculiar ecological balance that now exists so precariously in the water, ice and land areas of the Arctic achipelago. . . . Canada will propose a policy of use of the Arctic waters which will be designed for environmental preservation. This will not be an intolerable interference with the activities of others; it will not be a restriction upon progress. This legislation we regard, and invite the world to regard, as a contribution

[80] *Supra*, footnote 20, at p. 50.
[81] Commons Debates, vol. 114, pp. 39-40.

to the long-term and sustained development of resources for economic and social progress. We also invite the international community to join with us and support our intiative for a new concept, an international legal régime designed to ensure to human beings the right to live in a wholesome natural environment. . . . A combination of an international régime, and the exercise by the Canadian government of its own authority in the Canadian Arctic, will go some considerable distance to ensure that irreparable harm will not occur as a result of negligent or intentional conduct. Canadian activities in the northern reaches of this continent have been far-flung but pronounced for many years, to the exclusion of the activities of any other government. . . . Arctic North America has, for 450 years, progressively become the Canadian Arctic. . . . [T]here is not now, nor is it conceivable that there will ever be, from any source, challenges to Canadian sovereignty on the mainland, in the islands, in the minerals lying in the continental shelf below the Arctic waters, or in our territorial seas. This . . . is the result of quiet, consistent policies on the part of all Canadian governments. . . . These policies will reflect Canada's proper interest not only in the preservation of the ecological balance . . . , but as well in the economic development of the north, the security of Canada, and in our stature and reputation in the world community . . .".

This statement was followed by a press conference in which the Prime Minister seemed to confuse the assertion and claim of sovereignty with the exercise of sovereign rights. Before looking at his comments, it is as well to recall Huber's remarks in the *Palmas* case,[82] and the assessment of the Truman Proclamation of 1945[83] by such commentators as Brierly[84] and Hurst.[85] According to Huber, "sovereignty . . . in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State". This seems to tally with Brierly's comment at the International Law Commission that "control and jurisdiction, which were exclusive, amounted to sovereignty and could be so described", while Hurst stated simply that "if the rights claimed over the continental shelf and its resources were called sovereignty, they would be no more extensive than what are claimed in the Proclamation". Frequently, for political reasons, politicians deny that their actions or assertions are sufficient to create a particular legal situation, although they purport to have the right to enjoy all the benefits which would accrue if the legal

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[82] *Supra*, footnote 18, at p. 839.
[83] Whiteman, *op. cit.*, footnote 57, vol. 4, p. 756.
[84] Yearbook of the Int. Law Commission (1950), vol. 1, p. 226.
[85] International Law: Collected Papers (1950), p. 160.

situation in fact existed.[86] However, *falso demonstratio non nocet*, and courts have not been hesitant in "redefining" the relevant legal concepts.[87]

Mr. Trudeau reminded the press[88] that "international law is moving from the three to the twelve mile limit", so that this extension of the territorial sea was in line with current trends. Of more significance, perhaps, was his statement that "it is not an assertion of sovereignty, it is an exercise of our desire to keep the Arctic free of pollution and by defining 100 miles as the zone within which we are determined to act, we are indicating that our assertion there is not one aimed towards sovereignty but aimed towards one of the very important aspects of our action in the Arctic". In reply to the question whether a prosecution for breach of the proposed pollution regulations would amount to an exercise of sovereignty, he said: "They would be an exercise of authority given by Parliament to the Executive Branch to apply a certain statute. Now, this doesn't necessarily mean that you're asserting sovereignty over those seas any more than the Continental Shelf Doctrine for instance entails sovereignty with it." It is submitted that Mr. Trudeau is here propounding an entirely new conception of sovereignty, and one that runs completely contrary to current trends of functional interpretation of legal concepts. What he appears to be doing is asserting a right to exercise all the powers that go with sovereignty, while denying that Canada possesses sovereignty. It is a little difficult to perceive how one may legitimately exercise the powers of a sovereign without being at least the *de facto* sovereign. It would also seem that the Prime Minister was excessively dogmatic in his reference to sovereignty and the continental shelf.[89] While it is true that Mr. Truman originally denied that the United States was asserting sovereignty over the shelf area, this was not the case with many of the other countries which put forward claims,[90] although even they frequently stated that sovereignty was not claimed over the waters above the shelf, a principle which was later embodied in article 3 of the 1958 Convention. The attempt to use the continental shelf example reflects, especially as the shelf unquestioningly lies under what was formerly regarded as high seas, the danger of using analogies in international

[86] See, *e.g.*, Prime Minister Macmillan's statement in 1956 that Great Britain was not at war, but "in a state of armed conflict", Hansard (Commons), vol. 558, col. 1645; and the current debate in the United States on the status of the Vietnam operations, Falk, The Vietnam War and International Law, 2 vols (1968, 1969).

[87] See *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co.*, [1939] 2 K.B. 544; *R.* v. *Bottrill, ex p. Kuechenmeister*, [1947] 1 K.B. 41; *Navios Corp.* v. *The Ulysses II* (1958), 161 F. Supp. 932, aff'd 260 F 2d 959.

[88] April 8th, 1970 (1970), 9 Int. Legal Materials, p. 600 *et seq.*

[89] See text to footnotes 84 and 85.

[90] Whiteman, *op. cit.*, vol. 4 (1965), 789 *et seq.*

law and the significance of the *ejusdem generis* rule. Moreover, it completely ignores the views of such authorities as Sir Humphrey Waldock,[91] Chichele Professor of International Law at the University of Oxford, a Member of the International Law Commission and formerly Chairman of the European Commission of Human Rights, who has pointed out that proclamations of the Truman type may "properly be regarded as effective first acts of occupation, [which] in the modern law is the assumption of sovereignty rather than the appropriation of property and [the decisions of international tribunals] lay down clearly that what is required is effective display of state activity in such a manner as the circumstances of the territory demand", a view which has much in common with that of Marjorie Whiteman.[92]

Much of the press conference was devoted to the Canadian reasons for amending its acceptance of the jurisdiction of the World Court and much of the Prime Minister's explanation depended on the need for pollution control, especially as nothing of a practical character appeared to be happening on an international basis. At Geneva in 1958 the sole manifestation of concern with pollution was a provision in the Convention on the High Seas[93] and a Resolution by the Plenary Conference dealing with radioactive waste. This was followed by the International Convention for the Prevention of Pollution of the Sea by Oil of 1954, as amended in 1962 and 1969[94] and the consequential Conventions of 1969 concerning intervention on the high seas in the event of oil pollution casualties and on civil liability for oil pollution damage. But these were intended to deal only with such issues as those like the *Torrey Canyon*, were not signed by Canada, although, as Mr. Trudeau commented, Canada took part in the Conference, and, in so far as intervention is concerned, allowed the Parties to "take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major circumstances". However, even in the event of such a casualty, a coastal state is required to consult with other states which may be affected, especially the flag state, and before taking any measures should consult experts. It is only "in cases of extreme urgency requiring measures to be taken immediately, [that] the coastal State may take measures rendered necessary by the urgency of the situation, without prior noti-

[91] The Legal Basis of Claims to the Continental Shelf (1951), 36 Grotius Transactions 115, at pp. 142, 141.

[92] See text to footnote 57.

[93] 450 U.N.T.S. 11, Art. 25.

[94] (1970), 9 Int. Legal Materials, p. 1 *et seq.*

fication or consultation or without continuing consultations already begun". No wonder Mr. Trudeau felt the existing law to be inadequate. By the time envisaged consultations have taken place there might well be little point in intervening in any way.

By way of explanation, Mr. Trudeau suggested that: "The way international law exists now, it is definitely biased in favour of shipping in the high seas in various parts of the globe. And in the past this has probably been to the benefit of the states of the world because there has been, because of this bias in international law, a great deal of the development of commerce in all parts of the globe. . . . [T]his was fine in the past, but now with the advance of technology and the importance which is coming forth to us all in all parts of the world—of not only thinking of commerce, but also of quality of life. We're saying international law has not developed in this direction. . . . [Canada is willing] to participate in every aspect of the development of international régimes which would prevent pollutions of coastal states. But until this international régime has developed we are stuck with the law as it has developed in the past centuries, and the centuries before when . . . there was no danger of pollution, and it was important for commercial and other reasons that the nations could communicate on the high seas. . . .[W]here no law exists, or where law is clearly insufficient, there is no international common law applying to the Arctic seas, we're saying somebody has to preserve this area for mankind until the international law develops. And we are prepared to help it develop by taking steps on our own. . . . In one case, if there is a problem we will be taken to the courts, and we'll fight it there and . . . we have the trend of international law in our direction—the twelve miles. In the other case [—the 100 mile pollution zone—] there is no law so we can't be taken to the courts".

This statement reads strangely by the side of the Prime Minister's speech during the Throne Speech debate. On that occasion,[95] he stated: "Membership in a community imposes . . . certain limitations on the activities of all members. For this reason, while not lowering our guard or abandoning our proper interests, Canada must not appear to live by double standards. We cannot, at the same time that we are urging other countries to adhere to régimes designed for the orderly conduct of international activities, pursue policies inconsistent with that order simply because to do so in a given instance appears to be to our brief advantage. Law, be it municipal or international, is composed of restraints. If wisely construed they contribute to the freedom and the well-being of individuals and of states. *Neither states nor individuals should feel free to pick and choose, to accept or reject, the laws*

[95] Oct. 24th, 1969, Commons Debates, vol. 114, pp. 38-39 (italics added).

that may for the moment be attractive to them." Yet this is exactly what he appears to have done at his press conference.

When the United States issued the Truman Proclamation and even earlier when Péron made the first claim to the Argentine continental shelf there was no suggestion that, since the law had not yet fully developed, the country concerned was entitled to assert that there was no law and that it would not be sued. This is the type of argument that has been presented every time there has been, for example, a development in military technology and contention concerning the relevancy of the laws of war thereto. In fact, Lord Asquith showed in the *Abu Dhabi* arbitration[96] how it was possible to examine and apply the developing international law of the continental shelf. Similarly, the United States did not consider that the law of neutrality prevented it from declaring extensive neutrality zones around the western hemisphere before and at the beginning of the Second World War, nor did it inhibit that country from declaring a "quarantine" of Cuba, nor in conjunction with Canada from establishing air defence zones. But in no case was it considered necessary to say that no law existed.

The United States protested[97] what it described as Canada's "proposed unilateral extensions of jurisdictions on the high seas, and . . . can neither accept nor acquiesce in the assertion of such jurisdiction". In view of its own actions in connexion with the Truman Proclamation, neutrality and air defence zones, and the Cuban "quarantine", it appears somewhat presumptuous and unctuous for the United States to comment in this way. The reason for its so doing lies in the fact that "we are concerned that this action by Canada if not opposed by us, would be taken as precedent in other parts of the world for other unilateral infringements of the freedom of the seas. If Canada had the right to claim and exercise exclusive pollution and resources jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law. Merchant shipping would be severely restricted, and naval mobility would be seriousy jeopardized". Once again the United States speaks from experience. In the Truman Proclamation she did claim "exclusive resources jurisdiction on the high seas", and her example served "as precedent in other parts of the world" to such an extent that a new doctrine grew in international law which eventually found its embodiment in the Convention on the Continental Shelf. The whole statement gives the impression of a unilateral assertion by the United States to regard as international law only those rules

[96] *Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi* (1951), 18 I.L.R. 144.

[97] Dept. of State Press Release, April 15th, 1970; (1970), 9 Int. Legal Materials, p. 605.

and principles which suit her, and to condemn as without any legal validity any action which, however closely it resembles prior action by the United States, is not today construed as being completely within that country's military or economic interest.

The United States also regretted that because of the amendment to the Canadian acceptance of the "Optional Clause" it was no longer possible to test the validity of Canadian actions before the World Court. There are at least two reasons why even a non-American might regret the Canadian action in this sphere. In the first place, it is unfortunate when a country whose moral stature in the world is high does anything which might encourage others not to behave in a manner which sustains the international rule of law—and the number of countries accepting the court's jurisdiction on a compulsory basis is regrettably small. It is also regrettable when a country which, in its Prime Minister's words, does not believe in double standards nor seeks to pick and choose the rules of law which it finds convenient to obey, shows such lack of faith in its own position and in the integrity of the international bench, some of whose judgments it does not hesitate to uphold against other States and one of whose most honoured members was its own national, that it fears to put its own contentions to the test. Finally, it is perhaps unfortunate that the Government overlooked the fact that the only two countries likely to protest Canada's actions were the Soviet Union which does not recognize the jurisdiction of the World Court, and the United States which, despite the brave words of the Press Release, might well have hesitated before bringing an action. Had it gone ahead and brought its action, the United States would have been hoist with its own petard. In accordance with articles 35 and 36 of the Statute of the World Court, parties appear before it on a basis of equality, and in its original declaration of acceptance of the court's jurisdiction under article 36 Canada stated its intention to "accept as compulsory *ipso facto* and without special convention, *on condition of reciprocity*, the jurisdiction of the Court".[98] This means that in any international dispute which it is sought to bring before the court, Canada can never be in a position in which she is expected to bear any burden exceeding that of any other party to the dispute.

When the United States accepted the compulsory jurisdiction of the court in 1946 a reservation was attached to her acceptance whereby "this declaration shall not apply to . . . disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America . . .".[99] Since article 36 provides that it

[98] Sept. 28th, 1929, [1968-69] I.C.J. Yearbook, p. 46 (italics added).
[99] Aug. 26th, 1946, *ibid.*, p. 72.

is the court which settles any dispute as to the existence of its jurisdiction, it could be argued that any such reservation is contrary to the Statute and invalid as it purports to do the court's task for it,[100] or that it is so inconsistent with the purpose of the Optional Clause that it goes to the very essence of the acceptance and renders the entire declaration void,[101] so that to all intents and purposes the plaintiff country would find itself in the position of never having accepted the jurisdiction. The attitude of the court to this type of reservation is somewhat different. In the *Norwegian Loans* case it held itself to be without jurisdiction on the ground that there was no need to consider the legal validity of the reservation, since this "has not been questioned by the Parties. It is clear that France [which had brought the suit] fully maintains its Declaration, including the reservation, and that Norway [whose Declaration contained no reservation other than that of reciprocity] relies upon the reservation. . . . The Court . . . gives effect to the reservation as it stands and as the Parties recognize it. The Court considers that the Norwegian Government is entitled, by virtue of the condition of reciprocity to invoke the reservation contained in the French Declaration . . .; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the . . . French Government; that consequently the Court is without jurisdiction to entertain the Application".[102] From this it becomes clear that, whether the view of the court or of Judge Lauterpacht be correct, the effect is that a state defending an action brought against it by a plaintiff whose declaration contained such a reservation, would find itself free from any liability to adjudication, without needing to declare itself exempt from the jurisdiction of the court. In the case of Canada, moreover, there would not have been the same merely formal assertion of reciprocity, for the question of the application of legislation with respect to her territory, her environment or her coastal resources is sufficiently "essentially within the domestic jurisdiction"[103] for her rightly to be able to maintain that, even by the measuring rod of international law, the court would have had no jurisdiction, even under the terms of the former declaration, although in accordance with the League Covenant that refers to matters "exclusively" within the domestic jurisdiction.

By her new reservation, relating to "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada

[100] See the comments of Judges Lauterpacht and Guerrero in the *Norwegian Loans* case, concerning the validity of a similar French reservation, I.C.J. Reports 1957, p. 9, at pp. 56, 69.

[101] Lauterpacht, *ibid.*, p. 66, and *Interhandel* case, I.C.J. Reports 1959, p. 6, at p. 116 *et seq.* See also Verzijl, The Jurisprudence of the World Court (1966), vol. 2, p. 284.

[102] *Supra*, footnote 100, at p. 27.

[103] U.N. Charter, Art. 2 (7).

in respect of the conservation or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada",[104] *Canada has achieved nothing*—other than to find herself the recipient of unnecessary international criticism and accusations of hypocrisy and double standards.

As to the legislative measures themselves, not a great deal need be said. As was pointed out repeatedly in the various Canadian statements relevant to the issue, there has been, since 1958, an increasing trend by States to abandon the three mile limit in favour of one of twelve miles. In fact, as is made clear in the Summary of the Canadian Note to the United States Government,[105] "in 1958 . . . some 14 States claimed a 12-mile territorial sea, whereas by 1970 some 45 States have established a 12-mile territorial sea and 57 States have established a territorial sea of 12 miles or more. Indeed, the three-mile territorial sea [is] now claimed by only 24 countries". While both the 1958 and 1960 Geneva Conferences on the Law of the Sea were unable to reach any finally agreed territorial sea limit, it was clear that twelve miles was the figure then acceptable to most countries, and it is probable that if and when a further Conference takes place this limit will be agreed upon. In any case, in view of the practice of the last twelve years or so, and the acceptance of the new limit by the majority of States, there appears little doubt that Canada is fully within her rights in international law in declaring a twelve-mile territorial sea around her entire coasts, and the new Territorial Sea and Fishing Zones Act[106] is accordingly not limited to the Canadian Arctic. In fact, it may well be unfortunate that this Act was part of a package deal with the pollution legislation and the amended Declaration concerning the court's jurisdiction.

The legislation itself is fully in accordance with what are now accepted as the rules of international law concerning the demarcation of baselines from which to measure the territorial sea. Having provided for the proclamation of "fishing zones" within areas of the sea adjacent to the coast of Canada, thus obviating the old legislation with regard to areas "contiguous" to the Canadian territorial sea up to nine miles from the outer limit of that sea, the Act provides[107] for the Governor General to issue lists of "geographical co-ordinates of points from which baselines may be determined". The section continues: "In respect of any area for which geographical co-ordinates of points have been listed . . . and

[104] *Op. cit.*, footnote 6.
[105] Apr. 17th, 1970 (1970), 9 Int. Legal Materials, p. 607.
[106] *Supra*, footnote 3.
[107] S. 3, replacing s. 5 of the Territorial Sea and Fishing Zones Act 1964 (underlining in original).

subject to any exceptions in the list for the use of the low water line along the coast between given points *and the use of the low water lines of low tide elevations situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the coast,* baselines are straight lines joining the consecutive geographical co-ordinates of points so listed." The legislation recognizes that the new territorial sea may encroach upon another State's territorial area or its fishing zone, or come "unreasonably close to the coast of a country other than Canada", and therefore provides for the designation of substituted geographical co-ordinates.

In the view of this writer, since the Canadian Arctic from the landmass to the Pole is already under Canadian sovereignty—even the Canadian Reply to the United States maintains that "it cannot accept the suggestion that the Northwest Passage constitutes high seas"—, *in so far as the Canadian Arctic is concerned, Bill C-203 on the Territorial Seas and Fishing Zones was unnecessary and irrelevant.*

Of far more importance in connexion with the Arctic is Bill C-202 "to prevent pollution of areas of the arctic waters adjacent to the mainland and islands of the Canadian arctic".[108] If one accepts the contention that the whole of what is generally regarded as the Canadian Arctic is subject to Canadian sovereignty, then the Act is in no way world-shattering, save as a possible precedent for anti-pollution legislation, is of no political significance, is a simple exercise of jurisdiction available to any sovereign, and operates on the basis that there is no risk of pollution affecting the landmass more than 100 nautical miles from the nearest Canadian land. In fact, what the Act has achieved is the casting of doubt on the legitimacy of the Canadian title to the area.

It has long been recognized in international maritime law that a coastal state is entitled to extend its jurisdiction beyond the territorial sea limit for specific purposes in such fields as customs regulations, although occasionally, as during the period of prohibition in the United States, bilateral treaties have been used to enable enforcement of such legislation against foreign vessels on the high seas, but whose activities have been directed to breaking the local protective legislation.[109] It has also been pointed out that, in the name of security and self-defence, the United States enacted its neutrality legislation and enforced, at least as against the shipping of some States, its "quarantine" regulations concerning Cuba, and together with Canada has operated the air defence zones regulations. In addition, the Geneva Convention on the

[108] *Supra,* footnote 2.

[109] *E.g.,* Treaty of Washington, 1924 (U.K.-U.S.A.), 27 L.N.T.S. 182 —for the application of this Treaty see *The I'm Alone* (1933, 1935), 3 U.N. Reports of Int. Arbitral Awards 1609.

Territorial Sea recognizes that the coastal State may, within its contiguous zone, defined in the Convention as twelve miles from the baseline from which the territorial sea is measured, exercise "the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea [and] punish the infringement of [such] regulations committed within its territory or territorial sea". The Convention does not refer to measures taken in the name of defence, but the Charter of the United Nations recognizes that this right is "inherent" in all States, even to the point of permitting military action. It is true, that, traditionally, security and self-defence were understood as being connected with military threats against the security or independence of a state. Today, however, it appears that a State's security and wellbeing may be threatened in other ways, including abuses of nature, and one must sympathize with the view of Canada when it states, as it does in its Note to the United States, that "the proposed anti-pollution legislation is based on the overriding right of self-defence of coastal states to protect themselves against grave threats to their environment". The Preamble to the legislation is somewhat different, in that it refers to resources which "are of potentially great significance to international trade and commerce and to the economy of Canada in particular". It also refers to Canada's "obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Eskimo and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic".

While the Act does not define the Canadian Arctic as such, it does[110] specify what it means by "arctic waters"—those "adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles; except that in the area between the islands of the Canadian arctic and Greenland, where the line of equidistance between the islands of the Canadian arctic and Greenland is less than one hundred nautical miles from the nearest Canadian land, there shall be substituted for the line measured seaward one hundred nautical miles from the nearest Canadian land such line of equidistance". In section 6 the Act provides for the criminal liability of "any person who is engaged in exploring for, developing or exploiting any natural resource on any land adjacent to

[110] S. 3.

the arctic waters or in any submarine area subjacent to the arctic waters". To give effect to this provision, section 3 extends the definition of "artic waters" to "all waters adjacent thereto lying north of the sixtieth parallel of north latitude, the natural resources of whose subjacent submarine areas Her Majesty in right of Canada has the right to dispose of or exploit, whether the waters so described or such adjacent waters are in a frozen or a liquid state, but does not include inland waters". Here at least is recognition of the fact that in Canada's view the resources found under ice are amenable to national ownership and the persons seeking to exploit them, presumably from the ice, are liable to Canadian jurisdiction. This coincides with the view of Morrow J. in *R.* v. *Tootalik E4-321*[111] and, despite any disclaimer of sovereignty, is clearly a claim to all the content of sovereignty. In accordance with customary international law, the Act and the regulations thereunder do not apply to State-owned vessels, but even here Canada is asserting some measure of sovereign right, for such vessels do not enjoy exemption automatically, but must be exempted by Order in Council "where the Governor in Council is satisfied that appropriate measures have been taken by or under the authority of [the particular] sovereign power [concerned] to ensure the compliance of such ship with, or with standards substantially equivalent to, standards prescribed by [Canadian regulations], . . . and that in all other respects all reasonable precautions have been or will be taken to reduce the danger of any deposit of waste resulting from the navigation of such ship within [a] shipping safety control zone",[112] defined as any area of arctic waters so specified.[113] Presumably, any State-owned or chartered ship refusing to comply with such regulations would be considered as not on an innocent passage and would be denied access to Canadian territorial waters and without such access would be unable to reach the arctic waters.

Regulations of this kind are considered by the United States, perhaps not surprisingly, as interfering with the freedom of the seas, and if the waters concerned were in fact high seas there would be substance in this protest. However, as the Canadian Reply points out: "It is idle to talk of the freedom of the high seas with respect to an area, large parts of which are covered with ice throughout the year, other parts of which are covered with ice most of each year, and where the local inhabitants use the frozen sea as an extension of the land to travel over it by dogsled and snowmobile far more than they can use it as water. While the Canadian Government is determined to open up the Northwest

[111] *Supra*, footnote 59.
[112] S. 12 (2).
[113] S. 11 (1).

Passage to safe navigation, it cannot accept the suggestion that the Northwest Passage constitutes high seas. . . . The Canadian Government is aware of USA interest in ensuring freedom of transit through international straits, but rejects any suggestion that the Northwest Passage is such an international strait. . . . The Northwest Passage has not attained the status of an international strait by customary usage nor has it been defined as such by conventional international law."[114]

It will be recalled that the Canadian Government based much of its case for legislation and the denial of judicial competence on the lack of international law in this field. In fact, "it is the earnest hope of the Canadian Government that it will be possible to achieve internationally accepted rules for Arctic navigation within the framework of Canada's proposed legislation [, for] it is recognized that the interests of other states are inevitably affected in any exercise of jurisdiction over areas of the sea".[115] Nevertheless, "the Canadian Government does not agree that the Arctic as a whole should be subjected to an international regime protecting its assets both living and non-living,[116] if that is what is proposed by the USA. Canada's sovereignty over the islands of the Arctic Archipelago is not, of course, in issue, nor are Canada's sovereign rights over its northern continental shelf and the Canadian Government assumes that the USA Government is not suggesting an international regime to cover these environments (nor the land near and adjacent submarine resources of Alaska). With respect to the waters of the Arctic Archipelago, the position of Canada has always been that these waters are regarded as Canadian. While Canada would be pleased to discuss with other states international standards of navigation safety and environmental protection to be applicable to the waters of the Arctic, the Canadian Government cannot accept any suggestion that Canadian waters should be internationalized". The scope of this position depends, of course. on the definition of the Arctic continental shelf and Canada's Arctic Archipelago, and it has been submitted that, properly speaking, this would reach the North Pole. In any event, before Canada would agree to participate in any such international conference, "further information will be required as to the scope, nature and territorial application of the rules the USA proposes, since the Canadian Government obviously cannot participate in any international conference called for the purpose of discussing questions falling wholly within Canadian domestic jurisdiction".

Taking this as one's premise, it becomes crystal clear that it

[114] See, above, discussion *re* footnote 67, 72-75.

[115] Reply to the United States.

[116] This is in accord with the recent (1970) rejection of Soviet proposals for joint action to preserve the polar bear.

was unfortunate that the question of pollution control and Canada's rights in the Arctic were allowed to become interwoven and that the whole issue became so emotionally charged. When the position was first apparently challenged, the Government should have issued a simple statement that the whole area was regarded as the Canadian Arctic under Canadian sovereignty—although, in the absence of any practical exercise of jurisdiction by another state, there is no obligation upon a State whose sovereignty has been previously exercised and understood to exist to make any formal statement to that effect. The legislation extending the territorial sea belt should have been enacted in the way of ordinary legislation and publicized in exactly the same way as is done by other States, whose similar legislation has been accepted. The anti-pollution legislation should have been introduced as an ordinary piece of legislation in a field fully within Canada's competence and extending to all areas under her jurisdiction, including the Canadian Arctic, the definition of which should not have been spelled out but should have been left in the form that has been traditionally accepted. The limit of 100 miles should have been clearly restricted to the high seas, outside of all Canadian territorial seas, and would almost certainly not have been considered as applying in the Arctic zone where Canada should have maintained its exclusive right to legislate for the entire area, until such time as a challenge was presented in a formal way by or on behalf of a State and not by a commercial enterprise. Finally, the Government of Canada should never have placed itself in the predicament of denying the jurisdiction of the World Court in this sphere, laying itself open to the challenge that it is not because the law is not clear—it never is in a contested case—that this retreat from the rule of law has been undertaken, but because Canada has no confidence in the legal validity of the stance it has assumed.

All in all, *the Canadian position was sufficiently strong not to have needed these exceptional measures, and certainly not the emotional statements and background against which they were propounded. Far from strengthening the Canadian claim, these acts have cast doubt thereon. Instead of indulging in statements that suggested there was no law, or that what was being done was an extraordinary exercise of jurisdiction, the Government should have been courageous enough to assert that the two statutes,* whether in the published form or in different terms, *were nothing but a normal exercise of jurisdiction by a sovereign State over territories within its sovereignty.*

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INTERNATIONAL LAW—SEA-ICE—JURISDICTION.—On the 14th of April 1969, Tootalik, together with three other Eskimos, went hunting for polar bears on the sea-ice in the vicinity of Pasley Bay, Boothia Peninsula in the Northwest Territories. The hunters came upon a female with two cubs and killed all three. Tootalik was found guilty, in the Territorial Court, of unlawfully hunting a female polar bear, with young, at or near Pasley Bay, Northwest Territories.[1] The judgment of Morrow J., raises interesting questions of international law on which there are very few cases.

The second voyage of S.S. Manhattan in the waters of the Canadian Arctic[2] has brought to a head the latent problem of sovereignty and jurisdiction over floating ice formations. Although there has been a not inconsiderable quantity of discussion on the topic,[3] the few cases which have been collected are not very satisfactory.[4] It is only recently that scholars have attempted to differentiate between the various types of ice formations and formulate tentative rules for each type.[5] Closely connected with this question is that of the status of the sector theory in the Canadian Arctic. On one view the concept has been "officially adopted" by Canada.[6] It is suggested that Canadian government acts do not support this contention.[7] Both matters are of great interest not only to Canada, but also to New Zealand. The Ross Dependency is, *prima facie*, a sector claim, and may include the Ross Ice-Shelf, the largest floating ice formation in the world. The other Antarctic claimants have similar problems and one of the claims asserts sovereignty over pack-ice.[8]

The line of defence relevant to this discussion is that the offence took place on the sea-ice and that the court had therefore no jurisdiction to entertain the case.[9] Section 2 (i) Northwest Territories Act, 1952[10] defines "Territories" as meaning the "Northwest Territories" which comprise "all that part of Canada North of the Sixtieth Parallel" except the portions included in the Yukon Territory, and the provinces of Quebec and Newfoundland. Sec-

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[1] *Reg.* v. *Tootalik E4-321* (1970), 71 W.W.R. 435, rev'd on other grounds (1970), 74 W.W.R. 740.

[2] "S.S. Manhattan breaks free after being stuck in Ice", Humble Oil & Refining Co. Press Release (15/4/70).

[3] For a discussion of this question, see F. M. Auburn, The White Desert (1970), 19 I.C.L.Q. 229, at pp. 239-242 with particular reference to Canada.

[4] (1904), 11 R.G.D.I.P. 340.

[5] D. Pharand, The Legal Status of Ice Shelves and Ice Islands in the Arctic (1969), 10 Cahiers de Droit 461.

[6] D. R. Inch, An Examination of Canada's Claim to Sovereignty in the Arctic (1962), 1 Manitoba L.S.J. 31, at p. 44.

[7] F. M. Auburn, The Ross Dependency—An Undeclared Condominium, [1970] A.U.L.Rev.

[8] Supreme Decree of Chile No. 1747 (6/11/40). O. Pinochet de la Barra, La Antartica Chilena (1948), p. 86.

[9] *Tootalik*, *supra*, footnote 1, at p. 439.

[10] R.S.C., 1952, c. 331.

tion 13 of the Act authorises the Commissioner in Council to make ordinances "for the government of the Territories" including, *inter alia*, the preservation of game in the Territories. The issues were firstly whether the sea-ice areas between the islands of the Canadian Arctic archipelago were part of Canada, and secondly, if they were part of Canada, whether they came within the jurisdiction of the Territorial Court.

It appears from the report that the court did not confine the discussion to the particular position where the offence took place. That position is not given in the judgment, nor is there a discussion of the question whether the offence took place on internal waters, as defined by the straight base line method employed by Canada. Had the situs been on internal waters the jurisdictional problem would not have arisen. The court mentioned two further cases in one of which the offence took place on the sea-ice sixty miles offshore, two hundred miles from the place where the court sat in the present case.[11] Emphasis was laid upon the taking place of acts on sea-ice among the islands of the archipelago, regardless of the geographical location of the acts on the territorial sea or high seas.

The vexed status of sea-ice overlying the waters of the Canadian Arctic archipelago would be solved if the sector theory were part of international law. The judgment cites two well-known positions taken by Canadian statesmen. In 1946 Lester Pearson, then ambassador to the United States, stated in an article that Canada includes the islands "and the frozen sea north of the mainland between the meridians of its east and west boundaries, extended to the pole".[12] Leaving aside the question of the binding nature of such a statement, it may be pointed out that this is an extreme position. It has not been adopted by the Canadian government—otherwise Canada would not recognise Danish sovereignty over much of Eastern Greenland, including Thule. The second statement, of Prime Minister St. Laurent, refers to the exercise of sovereignty "in these lands right up to the pole".[13] It is difficult to regard this as an assertion of sovereignty over frozen seas, or indeed any seas. More recent Ministerial statements adopt a much more limited view of Canada's claims. In 1969 Prime Minister

[11] *Ibid.*, at p. 440.

[12] L. B. Pearson, Canada Looks Down North (1945-46), 24 Foreign Affairs 638.

[13] (1953-54), 1 H. Comm. Deb. (Can.) 700. Prof. Pharand has pointed out that: "These two statements show there was confusion and misunderstanding as to the exact physical nature of the Arctic Regions; and this, in turn, must be responsible for the evident exaggerations contained in the claims." A. D. Pharand, Innocent Passage in the Arctic (1968), 6 Can. Y.B.I.L. 3, at p. 53.

Trudeau carefully avoided any definition of Canada's claim.[14]

The judgment, after quoting the statements mentioned, pointed out that the day-by-day display of sovereignty counts for more than declarations of sovereignty. Reference is made to R.C.M.P. patrols over Arctic areas going back at least forty years. But it is submitted that, if the frozen sea has not been claimed by Canada, the exercise of jurisdicton on sea-ice and the hearing of cases in which the offence took place on sea-ice do not, of themselves, constitute claims to sovereignty. There are many cases of exercise of jurisdiction in foreign countries.[15] The United States conducts Courts Martial at McMurdo Base, Ross Dependency, but has not made any specific claim covering the area of the Base. American courts also hear cases arising from transactions in Marie Byrd Land, the unclaimed sector of Antarctica.[16] The Territorial Sea and Fishing Zones Act, 1964[17] giving jurisdiction to try offences committed on the territorial sea although cited by the court would appear to support the view that the frozen sea beyond the territorial sea is not within the jurisdiction.

It has been previously suggested that *Tootalik* cannot be regarded as a case limited to the actual position on which the offence took place. The quotation from Lester Pearson covering the whole frozen sea within the Canadian sector, and the reference to an offence the situs of which was sixty miles offshore suggest that *Tootalik* was based upon the view that "Canada" included the whole frozen sea within the sector.

The court, having held that sea-ice extending off from the land was within Canadian jurisdiction, was of the opinion that the sea-ice was part of the Territory transferred from the Queen to the Dominion in 1870 and 1880. If this was not the case, recognition of jurisdiction over sea-ice came either from the comity of nations, or from the exercise of sovereignty by Canadian state acts. Sea-ice was regarded as an "attribute of land".[18] But it appears that the ice in Pasley Bay is not permanent.[19] Such an assertion of

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[14] ". . . the waters which Canada claims as its own will be the object of the exercise of sovereignty by the Canadian Government. But I am not prepared to state at this particular time where the lines will be drawn." (1969), H. Comm. Deb. (Can.) 88. It is most difficult to attempt to harmonise the various official statements over the past sixty years (*cf.* I. L. Head. Canadian Claims to Territorial Sovereignty in the Arctic Regions (1963), 9 McGill L.J. 200, at pp. 207-210).

[15] *R.* v. *Crewe (Earl), ex parte Segome,* [1910] 2 K.B. 576; jurisdiction exercised over the Bechuanaland Protectorate (Botswana) under the Foreign Jurisdiction Act. 1890.

[16] *Martin* v. *Commr. of I.R.* (1969), 50 T.C. 9, 63 A.J.I.L. 141.

[17] S.C., 1964, c. 22.

[18] *Tootalik, supra,* footnote 1, at p. 443.

[19] *Ibid.,* at p. 437, mentioning a photograph showing the Bay as completely frozen over and also the fact that the "St. Roch" was ice-bound in the Bay for eleven months. It may be inferred that the area is not permanently entirely covered with ice.

sovereignty involves difficulties. Is the ice alone subject to sovereignty? What of the superjacent air, the water beneath and the floor and subsoil of the sea? How does sovereignty over such ice formations fit in with the continental shelf concept? When the ice melts is the sea in that position still subject to sovereignty? Is Canada liable for damage caused by icebergs and ice islands?[20]

If the view taken in *Tootalik* is followed, then the Arctic Waters Pollution Prevention Act, 1970[21] may have reduced rather than enlarged Canadian jurisdiction. *Tootalik* is authority for jurisdiction if not sovereignty, over all frozen seas in the sector.

Before examining the Act, and accompanying legislation, some recent developments in the Canadian Arctic may be briefly recounted. In June construction commenced of the first of six Arctic airfields at Pangnirtung, Baffin Island.[22] The budget of the Northwest Territories, eighty per cent of which is provided by the Federal Government, rose from 16,100,000.00 dollars in 1968 to 24,600,000.00 dollars in 1969.[23] Fifty-four prospecting permits, principally for uranium and base metals, covering 8,700,000 acres in Central Keewatin, the Melville Peninsula and the Arctic Islands were granted in the first four months of 1970.[24] In July 1970 the Queen visited several settlements in the Arctic Archipelago "obviously for international purposes, and not for the fun of the outing".[25] Plans were announced to send four Canadian ships through the Arctic, to show the flag.[26]

The Arctic Waters Pollution Prevention Act applies to "arctic waters" described as waters adjacent to the mainland and islands of the Canadian Arctic within the area enclosed by 60°N., 141°W., and a line measured seaward from the nearest Canadian land for a hundred miles.[27] As regards persons exploring, developing or exploiting natural resources in submarine areas subjacent to arctic waters, all waters adjacent to "arctic waters" are covered by the

[20] Auburn, *op. cit.*, footnote 3, at p. 247. The U.S.S.R. maintains a fleet of more than twenty ice-breakers to escort vessels through the Northern Sea Route, the Northeast Passage. (Pharand, *op. cit.*, footnote 13, at p.18). Two giant nuclear powered ice-breakers are being built to keep the Route open for six months in the year. Both will be much larger and more powerful than the 25,000 ton, 44,000 h.p. "Lenin". ("New Atomic Ice-breaker for Arctic shipping", 5 (672) Soviet News (20/2/70)).

[21] Bill C-202.

[22] Construction of Airfields in Eastern Arctic, Dept. of Indian Affairs and Northern Development Communiqué 1-7021 (8/6/70).

[23] Hon. J. Chrétien, Address to the House of Commons on second reading of Bill C-212, Dept. of Indian Affairs and Northern Development Communiqué (13/5/70).

[24] Large scale mineral exploration indicated as permits granted in N.W.T., Dept. of Indian Affairs and Northern Development Communiqué 1-7016 (12/5/70).

[25] Canadian Postal Strike Cuts Deep, Christian Science Monitor (16/7/70).

[26] Battle Royal Over Arctic, Christian Science Monitor (8/7/70).

[27] *Supra,* footnote 21, s. 3 (1).

Act.[28] However this provision only applies if Canada has the right to dispose of or exploit the subjacent submarine areas, whether the waters are frozen or liquid. Persons carrying on any undertaking, exploring or exploiting or developing natural resources, ship and cargo owners, will be liable for damage done by the deposit of wastes, including measures taken by Canada to mitigate or remedy the damage. Liability is absolute. Persons within the categories mentioned may be required to provide evidence of financial responsibility.

The Governor in Council is empowered to prescribe "shipping safety control zones" in arctic waters.[29] Regulations may prohibit navigation unless the ship complies with safety requirements which may include, *inter alia*, provision of an ice pilot, ice-breaker assistance, ship construction and manning and also cover the time of the year and ice conditions under which navigation is permitted.[30] Ships belonging to a foreign sovereign may be exempted if the Governor in Council is satisfied that the requirements have, in fact, been substantially complied with.

The accompanying measure, the Territorial Sea and Fishing Zone Amendment Act, 1970, provides for a twelve mile territorial sea.[31] Fishing zones may be prescribed by the Governor in Council.[32] Canada also replaced its acceptance of the compulsory jurisdiction of the International Court of Justice. The new acceptance excludes, *inter alia*, disputes concerning Canadian jurisdiction in respect of the management of living resources of the sea and maritime pollution prevention.

The preamble to the Pollution Prevention Act stresses the primary aim of preventing all pollution. It was from this point of view that the Act was considered in a statement suggesting that it was in the interests of the world community to utilize such constructive national legislation as a potentially useful aid in the development of international law.[33] A commentator has suggested that the two Acts unite the domestic issue of pollution with the international issue of Canadian control of natural resources.[34] There can be little doubt that Canada's interest in pollution is "that of a potential victim".[35] However the Acts, when read together, have

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[28] *Ibid.*, s. 6 (1) (a). The difficulties in construing this provision are apparent.

[29] *Ibid.*, s. 11.

[30] *Ibid.*, s. 12. In the territorial sea "regulation of passage does not mean prohibition" (Pharand, *op. cit.*, footnote 13, at pp. 40 and 60). Therefore the international validity of any future absolute prohibition might be questioned.

[31] Bill C-203, s. 1.

[32] *Ibid.*, s. 2.

[33] R. St. J. McDonald, G. L. Morris, D. M. Johnston, The Canadian Initiative to Establish a Maritime Zone for Environmental Protection: Its Significance for Multilateral Development of International Law (24/4/70).

[34] Au Nord, Citoyens, Economist (2/5/70).

[35] Hon. D. Jamieson, Statement to the Brussels Conference on Pollution of the Sea by Oil (10/11/69).

a cumulative effect much wider than the prevention of pollution. This was noted in the United States' protest note suggesting the danger that such action would be a precedent in other parts of the world: ". . . merchant shipping would be severely restricted, and naval mobility would be seriously jeopardized."[36]

As the Secretary of State for External Affairs pointed out, in introducing the Territorial Sea Amendment Act, Barrow Strait and Prince of Wales Strait are now "subject to complete Canadian sovereignty".[37] Thus two portions of the most passable Northwest Passage have been put under effective Canadian control. The effect of the Acts on the doctrine of innocent passage is far from clear. Professor Pharand has suggested that two belts of territorial waters be drawn. One to enclose the islands south of the Parry Channel. The other round the Queen Elizabeth Islands, north of that Channel. This proposal would leave a strip of high seas throughout the Channel, but would not, apparently, necessitate an extension of the territorial sea.[38] In so far as the United States is concerned, this proposal too would have met severe opposition, due to the fear of creating a precedent for extensive archipelago claims in other parts of the world.

Tootalik supports a Canadian sector claim in the Arctic, for which there has been considerable agitation in the past. The creation of shipping safety zones and the enlargement of the territorial sea must be viewed as a part of the process of development of the Canadian Arctic which will be reflected in the Antarctic in due course. But the economic exploitation of the Canadian Arctic is just beginning. The Acts discussed may very well not be the last word. How are these new concepts related to the continental shelf and the freedom of the high seas? What will be the effect on these new concepts of United Nations deliberations on inner space? Will the Acts be superseded by a new Conference on the Law of the Sea? Are Barrow and Prince of Wales Straits, international straits? What will be the effect of the projected submarine oil tankers sailing under the ice of the Arctic Mediterranean in fulfilment of Stefansson's vision? The Governor in Council may exempt the ships of a foreign state from the operation of the Pollution Act.[39] But what if the Soviet North Pole 20 station, situated on a drifting ice floe, enters the area covered by the Act? How can the Governor in Council be satisfied that Soviet nuclear submarines substantially comply with the Act's requirements, in order to exempt them from the Act?

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[36] U.S. Press Release (15/4/70) (1970), H. Comm. Deb. (Can.) 5923.
[37] Statement introducing the Bill to Amend the Territorial Sea and Fishing Zones Act, H.Comm. (Can.) (17/4/70).
[38] A. D. Pharand, The Waters of the Canadian Arctic Islands (1969), 3 Ottawa L. Rev. 414, at p. 431.
[39] *Supra,* footnote 21, s. 12(2).

One thing is clear. The present legislation can only be regarded as an interim measure, which may be quickly overtaken by the advance of technology, or further development of international law. The choice between a *Tootalik* sector claim and claims of limited jurisdiction over certain areas for certain purposes appears to have been made for the moment, but this decision is not final.

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