CASE AND COMMENT

LEGISLATIVE POWER — CONFLICT OF LAWS.—CHARACTERIZATION OF PARENTAL CONSENT TO MARRIAGE OF MINOR—The cases of *Kerr* v. *Kerr*[1] and *Attorney-General of Alberta* and *Neilson* v. *Underwood*[2] are interesting not only because the Supreme Court of Canada has upheld provincial legislation requiring the consent of parents as a condition of the validity of the marriages of minors in certain circumstances, but also, and chiefly, because of the reservation made by members of the court[3] in favour of the possible or probable validity of Dominion legislation requiring the consent of parents to the marriage of minors. This reservation impliedly suggests that a requirement as to parental consent cannot be characterized in the abstract as being part of the solemnization of marriage as distinguished from an element of the capacity of a person to marry. The requirement must be characterized in the light of the legislation in which it occurs. Not being mentioned *eo nomine* in either s. 91 or s. 92 of the British North America Act, 1867, and not falling exclusively under either Solemnization of Marriage in the Province in s. 92 or Marriage and Divorce in s. 91, it is a matter which may be the subject of provincial legislation for one purpose and from one point of view and may be the subject of Dominion legislation for another purpose and from another point of view[4]. In the absence of Dominion legislation as to parental consent, provincial legislation as to solemnization of marriage in the province is valid notwithstanding that in certain circumstances it requires parental consent as a condition of the validity of the solemnization of a marriage within the province. It may, on the other hand, be within the legislative power of the Dominion Parliament to deprive minors domiciled in Canada of the capacity to marry without the consent of their parents, and in the event of valid Dominion legislation of this kind being enacted, the Dominion legislation would be paramount.

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[1] [1934] S.C.R. 72, 2 D.L.R. 369.

[2] [1934] S.C.R. 635, 4 D.L.R. 167.

[3] The reservation is expressed by Duff, C.J., in the Kerr case and by Rinfret, J. (on behalf of the Court) in the Underwood case. The judgments of Lamont, J. and Crocket, J. in the Kerr case contain observations, including references to Sottomayor v. De Barros, 1877, 3 P.D. 1, which are inconsistent with the theory put forward in the present note.

[4] This is merely one example of the application of what is commonly known as the "aspect doctrine"; a doctrine which has been applied to a great variety of subjects. Cf. Hodge v. The Queen, 1883, 9 App. Cas. 117, at p. 130.

Almost precisely the same point arises in a different form in the conflict of laws, by reason of the rules that the validity of a marriage as regards formalities of celebration is governed by the *lex loci celebrationis* and that its validity as regards capacity of parties is governed by the *lex domicilii* of the parties. While it is true that in *Simonin* v. *Mallac*[5] and *Ogden* v. *Ogden*[6] consent of parents was apparently characterized as being part of the formalities of a marriage, other explanations of the decisions might be given, and neither Westlake[7] nor Dicey[8] was satisfied with the generality of this characterization[9].

It appears that in *Simonin* v. *Mallac* as well as *Ogden* v. *Ogden*, a decree annulling the marriage was made in France. In the former case the applicant for a decree of annulment in England did not rely upon the French decree. In the latter case the English court held that the French decree was not entitled to recognition in England. Today, it is probable that in circumstances similar to those existing in either of these two cases, the French decree would be entitled to recognition in England. I have elsewhere submitted[10] that the joint effect of *Salvesen* v. *Administrator of Austrian Property*[11] and *Inverclyde* v. *Inverclyde*[12] is that a decree of annulment made by a court of the common domicile of the parties is entitled to recognition in England, whether that common domicile results from the fact that the parties are resident in the same country with the necessary *animus manendi*, as in the *Salvesen* case, or from the fact that the marriage is voidable, not void, and therefore the wife's domicile is that of the husband, as in the *Inverclyde* case.

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[5] 1860, 2 Sw. & Tr. 67. The view expressed in Sottomayor v. De Barros, 1877, 3 P.D. 1, as to the consent of parents was *obiter dictum*, as the objection to the marriage there in question was that the parties were within the prohibited degrees.

[6] [1908] P. 46.

[7] Private International Law, secs. 18, 23.

[8] Conflict of Laws, notes to his rule 182, and appendix, note 23. According to Dicey's view the doctrine that consent of parents is part of the ceremony of marriage is fully established by decided cases but is logically open to criticism.

[9] The cases are reviewed and the question of characterization is discussed in a report on Conflict of Laws relating to the Formation and Dissolution of Marriage submitted by me to the International Congress of Comparative Law, The Hague, 1932, republished in part *sub tit.* Conflict of Laws as to Nullity and Divorce, [1932] 4 D.L.R. 1, at pp. 9 ff.

[10] [1932] 4 D.L.R. 1, at pp. 28 ff. The subject is fully discussed in Johnson, Conflict of Laws, vol. 2 (Montreal, 1934), pp. 233-259.

[11] [1927] A.C. 641; cf. J. D. I. Hughes, Judicial Method and the Problem in *Ogden* v. *Ogden*, 44 L.Q.R. 217 (April, 1928).

[12] [1931] P. 29; followed in *W.* v. *W.*, 1934, Man. R. 466, [1934] 3 W.W. R. 230, and in *Fleming* v. *Fleming*, [1934] O. R. 588, 4 D. L. R. 90.

Inasmuch as *Simonin* v. *Mallac* and *Ogden* v. *Ogden* are obviously open for reconsideration from one point of view, and that in each case a different result would probably be reached today on the basis of the recognition of the foreign decree, the time seems to be opportune for a reconsideration of the grounds upon which, without regard to the foreign decree, each of the marriages in question was held to be valid in England. The marriages were both solemnized in England. In the former case both parties were domiciled in France, and in the latter case the man was domiciled there, and none of the parties had obtained the parental consent required by the French Civil Code. It is submitted, in accordance with the principle stated in *Kerr* v. *Kerr*, that a requirement of English law as to parental consent may properly have been characterized as part of the solemnities of a marriage (regard being had to the fact that the requirement was contained in a statute[13] primarily relating to the solemnization of marriage), and therefore was inapplicable to a marriage solemnized in Scotland[14], but that the requirement of French law as to parental consent may have to be differently characterized. If the requirement of French law is read in the context in which it occurs, it would seem to be clear that the French legislature has not legislated with regard to parental consent for the purpose of solemnization or from the point of view of solemnization, but for the purpose of defining capacity to marry and from that point of view. Therefore the English court should in *Simonin* v. *Mallac* and *Ogden* v. *Ogden* have characterized the requirement of French law as to consent of parents as a matter of capacity. Consequently the marriage in question in *Simonin* v. *Mallac* ought to have been declared void in England on the ground of the incapacity of both parties by the law of their domicile. The situation in *Ogden* v. *Ogden* was more complicated because, although the man was incapable of marrying by the law of his domicile, the woman was not incapable by the law of her domicile. It is not intended, however, to discuss here the difficulties that may arise in particular situations. The main point suggested is that in questions of conflict of laws, as well as in questions of legislative power, parental consent must not be characterized in English conflict of laws as being a matter of formalities (and therefore governed by the *lex loci celebrationis*) merely because it may be so characterized in English internal law. If a requirement as to

[13] See, e.g. Lord Hardwicke's Act (1753), which was in force when *Dalrymple* v. *Dalrymple*, infra, was decided.

[14] *Dalrymple* v. *Dalrymple*, 1811, 2 Hagg. Cons. 54, 17 Eng. R. C. 11.

parental consent occurs in some foreign law which may by English conflict of laws be the governing law as to either the formal or the intrinsic validity of a marriage, an English court before which the question of the validity of the marriage arises ought to look at the provisions of the foreign law relating to marriage, and then characterize the requirement as to parental consent in accordance with the Court's view of the purpose for which, or the point of view from which, the requirement in question has been enacted as part of the foreign law of marriage. The court will then, in accordance with its characterization of the requirement, decide whether or not it has any application to the marriage in question as the *lex loci celebrationis* or the *lex domicilii* or as the case may be.

The suggestion made in the present note that when a question arising under a foreign law comes before an English court, the court should characterize a provision of the foreign law in the light of full knowledge of the concrete provision and its context in the foreign law is not revolutionary in English conflict of laws. The suggested mode of reasoning has been adopted in reported cases[15] but it merits fuller discussion, with the view of restating the whole problem of characterization in the conflict of laws in a logical form. Such discussion of the problem must, however, await a more convenient occasion.

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CONSTITUTIONAL LAW—GOVERNMENT COMMISSION—LIABILITY FOR TORT.—The recent decision of the Ontario Court of Appeal in *Peccin* v. *Lonegan* and *T. & N. O. Ry. Commission*[1] raises in startling form the problem of the liability of the Crown and Government Commissions in particular for torts. In view of ever-increasing Governmental activities, the decision should serve to call attention once more to the urgent necessity for some thorough overhauling of a situation that can best be described as iniquitous.

In the present case, the plaintiff's motor car was demolished as the result of a collision with a train of the Temiskaming &

[15] See, e.g., *Bristow* v. *Sequeville*, 1850, 5 Ex. 275; *De Nicols* v. *Curlier*, [1900] A. C. 21, distinguishing *Lashley* v. *Hog*, 1804, 4 Paton 581.

[1] [1934] O.R. 701.

Northern Ontario Railway. The plaintiff sued the T. & N. O. Railway Commission and the defendant Lonegan who was driving his car. At the trial the judge entered a non-suit against the Commission, despite a finding of negligence by the jury, and judgment was entered against the defendant Lonegan.[2] On an appeal against granting the non-suit, the Court of Appeal of its own motion, raised the question whether, even admitting negligence on the part of the servants of the Commission, any action would lie against the Commission by reason of it being a department of government. The fact that counsel for the Commission had not raised the point, is some indication of a prevailing view that liability did exist. The Court, however, denied any liability by finding that the Commission was a government department, and that there had been no "distinct statutory authority enabling such an action for tort to be brought against the particular department of government in question." If the decision be correct, the situation in Ontario becomes alarming in view of the fact that the same language the Court found insufficient to give a cause of action in the present case, is used in connection with other Commissions, for example the Hydro Electric Power Commission.[3]

The construction of the T. & N. O. Railway was authorized in 1902 by Ontario legislation,[4] for the purpose of opening certain parts of Northern Ontario, and the Lieutenant-Governor in Council was given authority to appoint Commissioners to manage and operate the road. By Statute, the Commission is a body corporate,[5] and by virtue of sec. 27 of the Interpretation Act,[6] has power to sue and be sued. Furthermore, sec. 34 of the Commission's Statute provides that "No action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office without the consent of the Attorney-General of Ontario." In the present case, the plaintiff had procured the fiat of the Attorney-General.

[2] The jury had apportioned the degrees of negligence as 15% against Lonegan and 85% against the Commission. The trial judge on these findings entered judgment against Lonegan for 15% only of the total amount of the plaintiff's damages. This was patently erroneous as the Ontario Negligence Act, 1930, 20 Geo. V., ch. 27, as amended by 1931, 21 Geo. V., ch. 26, does not disentitle a plaintiff to the full amount of his damages against each defendant found guilty of negligence, but only provides for contribution between the parties in the degree in which the jury finds them in fault. Accordingly, the Court of Appeal allowed the appeal against Lonegan and entered judgment against him for the full amount of the plaintiff's damages.

[3] See the Power Commission Act, R.S.O. 1927, ch. 57, sec. 6 (4).

[4] 2 Edw. VII., ch. 9.

[5] The T. & N. O. Railway Act, R.S.O. 1927, ch. 53, sec. 2 (1).

[6] R.S.O. 1927, ch. 1.

On these facts, two problems arose. First, did the fact of incorporation and the resultant power "to be sued" impose liability on the Commission, and secondly, if not, did the clause as to the Attorney-General's consent impose such liability?

In holding that the mere fact of incorporation did not subject a servant of the Crown to liability for the torts of subordinates, the Ontario Court was supported by English authority,[7] although in none of the English cases were the activities of the corporation of such a commercial nature as the operation of a railroad.[8] The fact that some members of the Supreme Court of Canada have indicated that an express authority to sue an incorporated servant of the Crown in tort is not necessary in all cases, but that "the power to sue and be sued may be inferred or implied",[9] indicates an attitude that might well be encouraged in this country, to avoid obviously unjust results. Accepting the present decision on this point as correct, however, it seems impossible to justify on any satisfactory theory, cases in which incorporated government departments have been held liable on contracts made by them. The ordinary contract rule is to the same effect as the tort rule, namely that a servant of the Crown cannot be sued in an official capacity,[10] the idea being that to allow such an action would be indirectly to reach the revenue of the Crown.[11] The only difference between the two lies in the fact that by petition of right against the Crown, contract claims may be adjudicated upon, while tort claims, because of the maxim that the King can do no wrong, cannot be. There are, none the less, many cases which hold that an action may be brought against an incorporated servant of the Crown on a contract made by such servant.[12] Thus, in *Wallace* v. *T. & N. O. Railway Commission*,[13] a contract with the same Commission in question

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[7] *Roper* v. *Public Works Commissioner*, [1915] 1 K.B. 45; *Mackenzie-Kennedy* v. *Air Council*, [1927] 2 K.B. 517.

[8] See the suggestion that the fact of a Dominion or Provincial Government engaging in commercial enterprises may amount to a *pro tanto* abrogation of the prerogative exemption from liability for torts, in *The King* v. *Zornes*, [1923] S.C.R. 257 at 266.

[9] Newcombe J. in *Rattenbury* v. *Land Settlement Board*, [1929] S.C.R. 52 at 61.

[10] *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619; *Hosier Bros.* v. *Earl of Derby*, [1918] 2 K.B. 671, 675.

[11] *Palmer* v. *Hutchinson, supra.*

[12] See the dicta in *Palmer* v. *Hutchinson, supra,*: "He [the defendant] is not a corporation, and he has no property or assets in his official capacity which could be seized or attached in execution against him in that capacity." See also *Graham* v. *Public Works Commissioners*, [1901] 2 K.B. 781; *Roper* v. *Public Works Commissioners*, [1915] 1 K.B. 45.

[13] (1906), 12 O.L.R. 126; 37 S.C.R. 696.

here, was the subject of suit. If the present case be correct, it would seem that the proper procedure should have been by petition of right against the Crown.[14] Allowing an action in one type of case and disallowing it in another, seems unjustified by the Statute and common law principles alike.

In addition to the fact of incorporation with its "power to be sued", sec. 34 (which speaks of actions with the consent of the Attorney-General) might well have furnished the Court an opportunity of distinguishing the English cases to which they gave so much weight. In *Howarth* v. *Electric Steel and Metals Co. Limited*,[15] Sutherland J. upheld a claim in tort against the Hydro-Electric Power Commission, on the ground that a similar clause in The Power Commission Act,[16] impliedly gave the right to pronounce judgment against the Commission in an action. The Court of Appeal in the present case presumably overrules this decision,[17] and states that the statutory provision is not sufficiently express to destroy the Crown's prerogative right to immunity. This seems a narrow, even though justifiable view to take, particularly in view of the fact that the Court expressed a desire to see the liability of the Crown for its servants' torts established.[18] It is in view of the effect the decision on this point may have on other Commissions' liability in Ontario, that the situation becomes serious. Thus, by special Act in Ontario,[19] it is provided that "Notwithstanding anything contained in any other Act, it shall not be necessary to secure the consent of the Attorney-General before commencing any action against the Hydro-Electric Power Commission of Ontario for damages arising through the negligence of the agents, contractors, officers, employees or servants of the Commission in the construction, equipment or operation of any electric railway constructed or acquired, equipped and operated by the said Commission. . . . . ." Although undoubtedly designed to facilitate litigation by the private litigant, and to remove the bar of a fiat from an action which was believed to lie on grounds rejected in the present case, it is likely, in view of the present decision, that the section

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[14] See this view taken in *Gilleghan* v. *Minister of Health*, [1932] 1 Ch. 86, and see 10 Can. Bar Rev. 251.

[15] (1916), 35 O.L.R. 596.

[16] See now, R.S.O. 1927, ch. 57, sec. 6 (4).

[17] See the remarks of Davis J. A. in the present case at p. 708, to the effect that the *Howarth* case "was a decision of a single Judge."

[18] Compare the more liberal attitude of the majority of the Supreme Court of Canada in construing an Alberta Statute to allow a petition of right against the Crown for torts, in *The King* v. *Zornes*, [1923] S.C.R. 257.

[19] The Hydro-Electric Negligence Act, R.S.O. 1927, ch. 61.

accomplishes nothing, for it confers no right of action expressly, nor does it abrogate the prerogative in any clearer language than the sections before the Court in this instance.

Another view which might have assisted in taking the present case out of the rule applied, is suggested by a statement of Lord Tomlin in *St. Catherines* v. *Hydro-Electric Power Commission*,[20] which dealt with a contract made by the latter Commission. Speaking of the Hydro Commission, he described it as "a statutory corporation created by the Legislature of Ontario with limited powers, [which] cannot be regarded as a Government Department so as to treat an agreement entered into by the respondent [the Commission] as an agreement entered into by the Government."[21] In view of the fact that contracts of the T. & N. O. Commission have also been held the subject of an action, can we not say that these words apply equally to such Commission? If this be so as regards contracts, there seems some difficulty in describing the Commission as a Government Department for the purpose of torts.

At any rate, the confusion on the whole topic demands an immediate revision of all the present statutory provisions and the adoption of some comprehensive legislation establishing in no uncertain language, the liability of the Crown and Governmental Commissions for the torts of their servants.

C. A. W.

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[20] [1930] 1 D.L.R. 409 at 418 (Privy Council).

[21] See to the same effect, *Beach* v. *Hydro-Electric Power Commission* (1925), 57 O.L.R. 603, affirmed in the Supreme Court of Canada, [1927] S.C.R. 251.