THE QUEEN (RESPONDENT) .....APPELLANT; 1952

AND *Mar. 10, 11, 12

TREVELYN SPENCE (SUPPLIANT) .....RESPONDENT. *Oct. 7

AND

THE QUEEN (RESPONDENT) .....APPELLANT;

AND

IVAN BRADSHAW (SUPPLIANT) .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Master and Servant—Negligence of Servant—Scope of authority —Scope of employment—Soldier receiving unauthorized order—Duty to obey—Liability of Crown—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c). The Militia Act, R.S.C. 1927, c. 132, as amended by 1947 (Can.) c. 21, ss. 14, 20, 69(2), 115, 117 and 138.

In an action for damages arising out of the collision between a taxicab and an army truck owned by the Crown and driven by a soldier of the Royal Canadian Armoured Corps (Reserve), who on the order of his commanding officer was using the truck to convey a civilian baseball team, Cameron J., in the Exchequer Court, held that the accident was solely due to the negligence of the soldier; that the truck was used contrary to army regulations and that the commanding officer had no authority to use it for such purposes. He found further that the soldier was on duty and that it was within the scope of his duties to drive military vehicles when directed to do so by his commanding officer and not open to him to question such an order; and that as the soldier at the time of the accident was a servant of the Crown acting within the scope of his duties or employment, the principle of *respondeat superior* applied and the Crown was therefore liable for the damages sustained.

On appeal to this Court the finding of negligence was not questioned but the Crown contended that under the relevant legislation, army regulations and orders, the commanding officer had no authority to make use of the truck for the purposes described, and that while the soldier was under a duty to obey the lawful orders of his superior officer, the order in question was an unlawful one and that consequently in driving the truck pursuant thereto he was not acting within the scope of his duties or employment.

Held: (Rand and Locke JJ. dissenting), that in the circumstances of the case, the soldier was acting within the scope of his duties or employment.

Per: Kellock J. Under the circumstances of the case, there was nothing to indicate that the order was an unlawful order. It was therefore the duty of the soldier to obey. *Keighly* v. *Bell* 4 F & F 763 at 790, applied.

Per: Estey J. The commanding officer was authorized to promote recruiting. It was part of his duty to direct the use of Army vehicles for military purposes, including that of recruiting. In issuing the transport work

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

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ticket authorizing the use of the vehicle here in question he misconstrued the regulations, but this issue was so closely associated with that authority which it was his duty to exercise that it cannot be said that in doing so he acted without the scope of his employment. Neither could it be said of the sergeant to whom the transport work ticket was issued, nor of the driver, who received the instructions from him. *Dyer* v. *Munday* [1895] 1 Q.B.D. 742 at 746; *Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716 at 737; *Percy* v. *Corporation of the City of Glasgow* [1922] A.C. 299 at 306; *Goh Choon Seng* v. *Lee Kim Soo* [1925] A.C. 550 and *Lockart* v. *C.P.R.* [1942] A.C. 591, applied.

Per: Cartwright J. In the circumstances of the case it was the soldier's duty to obey the order and in doing so he was acting within the scope of his duty. *Irwin* v. *Waterloo Taxi-Cab Co. Ltd.* [1912] 3 K.B. 588. He did not know his commanding officer had no right to give him the order nor could it be said on the evidence that as a reasonable man he should have known. *Evans* v. *Bartlam* [1937] A.C. 473 at 479; *Hodgkinson* v. *Fernie* (1859) 11 C.B.N.S. 415 at 421.

Per: Rand J. (dissenting): It was not within the scope of the authority of the commanding officer, directly or indirectly, to give a lawful order which could make the driving of the truck an act of the soldier within the course of his duties. A campaign for recruits was authorized and the means was assumed to be in the commanding officer but its scope could not extend to the violation of express regulations dealing with the use of equipment by which he was bound. The trip was an act of an extra-service nature and there was nothing before the Court to warrant the conclusion that, since the trip would involve the expense of conveyance, a bus could be hired on behalf of the Government, nor that in the face of the regulations cited, the truck could be used for such a purpose. *Irwin* v. *Waterloo Taxi-Cab Co. Ltd., supra,* on which the Court below relied, distinguished. There the servant was bound to obey, here the only order the soldier was bound to obey was a lawful order. The special character of military relations might justify his obedience but that did not make the act done that of the Crown. If the commanding officer himself had driven the truck, he would not have bound the Crown, nor could he engage the Crown's responsibility by ordering a subordinate to do the same act.

Per: Locke J. (dissenting): The use of the Army truck to carry the baseball team was contrary to the Army Regulations and the commanding officer had no authority to authorize its use for such purpose. The general instructions given him to recruit could not be construed as authorizing the carrying on of such activities by means forbidden by Army Orders. The obligation of the soldier who drove the truck under *The Militia Act* and the King's Regulations and Orders was to obey lawful orders only. In acting in accordance with an order not lawfully given, he was not acting within the scope of his duties or employment within the meaning of s. 19(c) of the *Exchequer Court Act* (*Bourton* v. *Beauchamp,* [1920] A.C. 1001; *Moore* v. *Donnelly,* [1921], 1 A.C. 329 applied). The scope of the duties and employment of the soldier could not be extended by his mistaken understanding as to what they were (*Wardley* v. *Enthoven* (1917) 86 L.J.K.B. 309).

APPEAL by the Crown from two judgments of the Exchequer Court of Canada, Cameron J. (1), allowing the suppliants' Petition of Right to recover damages because of the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

W. R. Jackett Q.C. and *K. E. Eaton* for the appellant. The trial judge erred in holding that the driver, Ryan, was acting within the scope of his duties or employment as a servant of the Crown at the time of accident. Ryan was not engaged on any business of the Crown in the right of Canada. The transportation of a baseball team was wholly unconnected with the business activities of the Government of Canada. *Poulton* v. *London & Southwestern Ry. Co.* (2); *Halparin* v. *Bulling* (3); *Battistoni* v. *Thomas* (4); *Dallas* v. *Hinton* (5). The Crown is not liable for what is done in the course of an undertaking which is not part of the Crown's business merely because some of the participants are servants of the Crown for other purposes and because there may be an indirect benefit from the undertaking. *Offerdahl* v. *Okanagan Centre Irrigation & Power Co.* (6). If Ryan received an "order" to go on a trip, it could not have been obeyed by him as a military order, since under the *Militia Act*, s. 69(2) as enacted by 1947 (Can.) c. 21, s. 22, he was not subject to laws, regulations and orders relating to the Canadian Army at the time it was communicated to him because: (i) he was not then on active service, (ii) it was not issued during a period of annual training or drill under the Act, (iii) it was not issued while he was on military duty, in the uniform of his unit or within any place used for the purposes of the Canadian Army, and (iv) it was not issued to him during any drill or parade of his unit at which he was present in the ranks or as a spectator nor was it issued to him when he was going to or from the place of the parade. When obeying an "order" not given within the limits laid down by this provision, Ryan was not acting within the scope of his duties or employment as a member of the Canadian Army. The order he received could not operate to extend such scope beyond the statutory limits

(1) [1950] Ex. C.R. 488.
(2) (1867) 2 Q.B. 534.
(3) (1914) 50 Can. S.C.R. 471.
(4) [1932] S.C.R. 144.
(5) [1938] S.C.R. 244.
(6) [1937] 4 D.L.R. 405.

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established by s. 69(2). Cases such as *Irwin* v. *Waterloo Taxi-Cab Co.* (1); *Smith* v. *Martin* (2); *Risdale* v. *S.S. Kilmarnoch* (3), apply only where the orders are such, as by terms of the servant's employment, he was bound to obey. They do not apply to an order requiring an inferior servant to do something outside the scope of his employment whether or not the inferior servant was aware of the limits imposed by the employer on the employment. *Gaskell* v. *St. Helen's Colliery Co.* (4).

The baseball club's trip was arranged by Reid probably as Director of the Prince Edward Island Department of Physical Fitness and certainly was not arranged by or on behalf of the Crown in the right of Canada or the Canadian Army. He could not as commanding officer of the Regiment have directed the Knights of Columbus ball team to take the trip nor have instructed their manager as such regarding the trip. His *ex post facto* justification of the use of the military vehicle on the ground that the trip was a recruiting activity is not borne out by the facts.

The trial judge erred in holding that Ryan was operating the military vehicle pursuant to an order given him as a member of the armed forces. Reid said the work ticket was issued to "enable" Ryan to proceed with a ball team to Souris and return and that he gave Ryan no other orders. Sergeant Charles Ryan said that Reid told him there was a trip for a baseball team and that he told the driver Harrison Ryan, where he was to pick it up and his destination. On the face of it, none of these arrangements had anything to do with the Canadian Army and none of the men who went on the trip gave evidence that at the time they thought that they did. Sergeant Ryan knew nothing of a recruiting campaign. In any event it was outside Driver Ryan's duties or employment to operate a military vehicle on a trip prohibited by regulations respecting the operation of such vehicles. It did not fall within the permitted use of vehicles to transport service personnel to sports fields because the persons being transported were not "service personnel" and because the trip was to a place more than twenty miles distant and no special authority had been obtained therefor.

(1) [1912] 3 K.B. 588.
(2) [1911] 2 K.B. 775.
(3) [1915] 1 K.B. 503.
(4) [1934] 150 L.T.R. 506.

It was not permitted by the Regulation providing for transportation of "prospective army recruits" because the persons transported were not being transported as "prospective army recruits" and their transportation had not been authorized in the prescribed manner. The trip was not authorized by the special provision concerning the transportation of the Royal Canadian Cadet Corps because the persons being transported were not being transported as cadets and were not being transported in connection with a "duly authorized parade or training activity." The Regulations made by the Quarter Master General pursuant to s. 11 and Appendix VI of the King's Regulations and Orders, made by the Governor in Council under s. 139 of the *Militia Act*, limit the scope of employment of members of the armed forces operating military transport. *Whelan* v. *Moore* (1); *Knowles* v. *Southern Ry. Co.* (2); *Bourton* v. *Beauchamp* (3); *Moore* v. *Donnelly* (4). The regulations restricted the scope of Ryan's employment and it is immaterial whether he was aware of them. *Wardle* v. *Enthoven & Sons Ltd.* (5); *Cartwright* v. *Shell-Mex & B.P. Ltd.* (6). The front cover of "Regulations for Military Operated Vehicles, 1947" require that "this pamphlet must be carried at all times by every qualified driver of a military operated vehicle irrespective of rank . . ." The prohibitions made the trip something outside of Ryan's employment and not merely an unauthorized way of doing some work he was appointed to do. Compare *Goh Choon Seng* v. *Lee Kim Soo* (7) and *Lockart* v. *C.P.R.* (8).

Even if Ryan can be regarded as having acted pursuant to a military order he was not at the time of the accident acting within the scope of his duties or employment as a servant of the Crown because his services were loaned or transferred, for the purpose of the trip, either to the Knights of Columbus ball team, the Provincial Department of Physical Fitness, Reid, or some other person or authority other than the Crown in the right of Canada. Salmond on

(1) (1909) 43 Ir. L.T. 205.
(2) [1937] A.C. 463.
(3) [1920] A.C. 1001.
(4) [1921] 1 A.C. 329.
(5) (1916) 10 B.W.C.C. 79.
(6) (1932) 25 B.W.C.C. 650.
(7) [1925] A.C. 550.
(8) [1941] S.C.R. 278; [1942] A.C. 591 at 599.

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Torts 10 Ed. 86-7; *Donovan* v. *Laing* (1); *Bull & Co.* v. *West African Shipping Agency* (2); *Century Insurance Co.* v. *Northern Ireland Road Transport Board* (3).

D. L. Mathieson Q.C. and *G. R. Foster* for the respondents. The only point in issue is whether the trial judge was correct in finding that at the time of the accident Corporal Ryan, the admitted servant of the appellant was acting within the scope of his duties or employment within the meaning of the *Exchequer Court Act,* as amended, s. 19(c), as alleged by the respondents in the Petitions of Right. The respondents submit that the trial judge was correct in confining his inquiry to the ascertainment of the scope of Corporal Ryan's duties or employment in order to determine the jurisdiction of the Court and in holding that "while Reid committed a breach of the regulations regarding the use of military vehicles . . . . such breach did not narrow the scope of Ryan's duties or employment". His decision was based on the common sense principle that a soldier in Ryan's position must give implicit obedience to the orders given him by his commanding officer in the ordinary matters of the service, except where such orders are clearly contrary to law. The evidence clearly establishes that Brigadier Reid as Corporal Ryan's commanding officer gave the order to make the trip in the normal manner, that is by issuing a transport work ticket and by passing this order to Corporal Ryan through the sergeant in charge of transport. No evidence was submitted to show that on receipt of this order Corporal Ryan knew it was contrary to regulations, or, in fact, that Corporal Ryan had any knowledge of the regulations. Reid as commanding officer was obviously designated by the appellant as one authorized to give orders on its behalf. In exercising that authority he ordered Ryan to make the trip as a military driver, an order which by its nature Ryan would have the right to assume as coming under the authority of his commanding officer. It was therefore his duty as a soldier to obey. The trial judge was correct in applying to the facts of this case, *Irwin* v. *Waterloo Taxi-Cab Co. Ltd.* (4); Charlesworth on Negligence at p. 50.

(1) [1893] 1 Q.B. 629.
(2) [1927] A.C. 686.
(3) [1942] A.C. 509.
(4) [1912] 3 K.B. 588.

If the jurisdiction of the Court depends not only on the scope of Corporal Ryan's duties or employment but also on Brigadier Reid's, then the respondents submit that the appellant is still liable, despite the breach of the regulations by Brigadier Reid, because he was engaged in a matter incidental to and arising out of the business of the appellant. It is not disputed that the latter did an act which his master, the appellant, had not authorized, in permitting the army truck to make the journey without first obtaining the proper consent under the regulations. However the act was so connected with his duty to encourage recruitment, an act which the appellant authorized, that it may rightly be regarded as a mode—although an improper mode—of doing that act, and the appellant remains liable. *Goh Choon Seng* v. *Lee Kim Soo* (1); *Limpus* v. *The General Omnibus Co.* (2); *Salmond on Torts* 10 Ed., 90; *Bayley* v. *Manchester* (3).

It was urged on behalf of the appellant that Corporal Ryan could not be said to be the servant or agent of the appellant acting within the scope of his duties or employment because he was at all relevant times the servant or agent of the Knights of Columbus working for them and under their control. The burden of proof rests on the appellant, and this burden is a heavy one. *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.* (4). Not only is the burden a heavy one but the presumption is all against there being such a transfer. *Century Insurance Co.* v. *Northern Ireland Road Transport Board* (5); *Nicholas* v. *F. J. Sparks & Son* (6); *Chowdhary* v. *Gillot* (7). Not only have the appellants failed to discharge the burden of proof and overcome the presumption but on the contrary the evidence clearly establishes that the appellant retained control over its admitted servant, Corporal Ryan. See also *Jones* v. *Scullard* (8).

In the *Mersey Docks* case, *supra,* Lord Porter at p. 17 points out that where both a mechanical device, in this case the army truck, and its driver are both loaned the inference is that the servant remains the servant of the general

(1) [1925] A.C. 550 at 554.
(2) 7 L.T. (N.S.) 641 at 644.
(3) (1872) L.R. 7 C.P. 420.
(4) [1947] A.C. 1 at 10.
(5) [1942] 1 All E.R. 491 at 496.
(6) 61 T.L.R. 311.
(7) [1947] 2 All E.R. 544.
(8) [1898] 2 Q.B. 565 at 574.

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employer. See also *Jones* v. *Scullard, supra.* If therefore the vehicle and Corporal Ryan were loaned to the Knights of Columbus the presumption is against Corporal Ryan being transferred because in the words of Lord Wright in the *Century Insurance* case, *supra,* at p. 497, "he was bound to have regard to paramount directions given by the respondents (the permanent employers) and was to safeguard their paramount interests."

It was established that Corporal Ryan was paid by the appellant for the performance of his duties as a military driver on the day in question, and it was found as a fact by the trial judge that he was "undoubtedly on duty that day", therefore there can be no dispute that the appellant was the only person with power to dismiss him, and therefore retained control of his servant. No evidence was adduced to show that Ryan, either expressly or impliedly, consented to being transferred to the Knights of Columbus, and the absence of such consent implies that he remained the servant of the appellant. *Mersey Docks* case, *supra,* per Lord MacMillan at p. 14. Nor was it shown Ryan was working with the Knights in response to any request from them or under any agreement between them and the appellant. *Clelland* v. *Edward Lloyd Ltd.* (1). The evidence as a whole, and the findings of fact by the trial judge, point conclusively to the fact that only "the use and benefit" of Corporal Ryan's work could be considered as transferred but that Corporal Ryan at all times remained the servant of the appellant.

RAND J. (dissenting):—I am unable to agree that it was within the scope of the authority of Col. Reid, directly or indirectly, to give a lawful order which could make the driving of the lorry an act of the corporal within the course of his duties as a member of the 17th Reconnaissance Regiment, Reserve, Armoured Corps.

The original arrangement had been that a baseball team from Charlottetown, which the regiment sponsored, should go to Souris, but for some reason this could not be carried out; and Col. Reid, in order not to disappoint the community of Souris, which he thought might do harm to recruitment there, arranged to send another sponsored by

(1) [1938] 1 K.B. 273.

the Knights of Columbus. Both of these teams played in a local baseball league, and the players included members of the cadet corps of one of the city schools, affiliated with the regiment.

Undoubtedly a campaign for recruits to the regiment was authorized and encouraged, and an area of discretion in means was assumed to be in the Officer Commanding; but its scope could not extend to the violation of express regulations by which he was bound. There were such regulations that dealt with the use of equipment, and they took their character from the underlying separateness of army action from civilian action, a separateness amounting to the creation, in some respects and to some degree, of a relation analogous to a military imperium. Basically, army action of any sort is confined to army personnel and equipment: civilians are excluded; but this has necessarily given way, under the impact of modern developments, to a widening scale of interrelation between the army and civilians, either as private individuals or as public; and what is to be decided is whether the steps taken were within or beyond the range of what could reasonably be said to have been authorized for recruiting purposes.

Relevant rules are to be found in a compilation of "Regulations governing Military Operated Vehicles, 1947," published in December of that year but effective at the time of the accident. For instance, there is s. 22 which, in part, reads:—

> Military transport vehicles may be used to transport service personnel to sports fields, playgrounds and recreational centres, subject to the following conditions:—
>
> * * *
>
> (*d*) Under no circumstances will civilians or persons other than service personnel be transported.

S. 25(*a*) provides:—

> Civilians will not be transported in military vehicles except under the following circumstances:—
>
> * * *
>
> (*d*) Where adequate educational, shopping or entertainment facilities do not exist for dependents of officers and other ranks at units outside urban areas and public transportation is not available from unit boundaries, the Officer Commanding a Command may authorize the use of Service transport not required for other duties. Transport authorized shall carry dependents only between the unit and the nearest public transportation, or the nearest facilities, whichever is the closer.

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Paragraphs (*a*), (*b*) and (*c*) deal with civilians employed in the Department of National Defence, civilian contractors or their employees engaged on work for the Department, and civilian official visitors, lecturers, members of committees acting for or in association with the Department, etc.

Ss. 27 and 28 provide:—

> Members of the Royal Canadian Cadet Corps may be permitted to ride in military transport vehicles when required to do so in connection with a duly authorized parade or authorized training activity.
>
> * * *
>
> As the transportation of cadets in a military vehicle at any other time is not authorized, should the cadet be injured or killed while being transported other than on a parade or in the course of training as set out above, sections 73 to 80 inclusive of the Regulations for the Cadet Services of Canada, 1942, would not apply to provide compensation and medical treatment as set out therein. The liability of the Department in such a case would be merely that of the owner of a vehicle to a gratuitous passenger.

Now the team did not make the trip as cadets nor as substitutes for cadets, nor was it in any sense a cadet or service activity such as is contemplated either by the *Militia Act* or the regulations. The trip was an act of an extra-service nature, of which the most that can be said is that it was promoted by the Commanding Officer for the indirect purpose mentioned. That being so, the act was either within or beyond the scope of the officer's authority: there is no room for the suggestion of carrying out an authorized act in a forbidden manner.

The trip would necessarily involve the expenses of the conveyance: could they be incurred, say, by hiring a bus on behalf of the Government? There is nothing before us either express or by implication of any sort or description to warrant the conclusion that they could be, nor that, in the face of these regulations, the lorry could be used for such a purpose. Voluntary recruitment has for generations been the object of local inducement and encouragement; but, so far as they have not been private, they have always been by way of military displays or advertisements in which the authorities preserved an exclusively military action. If the Commanding Officer could send a private baseball team over 50 miles in a military lorry as a military proceeding, I see no limit to the kind of activity, whether of

sports, dancing, music, dramatics, or any other mode of arousing the interest and enthusiasm of young people, that could be resorted to in a similar manner. Such an extension of governmental action must find its authority in something more specific than the informal approval by general officers of stimulation to local enlistment.

Cameron J. found against the Crown on the ground that since the corporal was bound to execute the orders of the Commanding Officer, the act of driving was within the course of his employment. He founded himself on the case of *Irwin* v. *Waterloo Taxicab Company Limited* (1). There a taxi driver carried out the instruction of the General Manager of the business in driving him to see private friends, not on the business of the company. The driver had no reason to believe that the trip was not properly authorized, and it was made in a manner indistinguishable from the ordinary course of his work. But it was agreed that the driver was under a duty to obey the direction and to make the trip, and the Court of Appeal held the company liable for his negligence during the course of it.

The decision raises the question whether, if the General Manager himself had taken over the wheel and had driven the automobile on the same errand, the company would have been liable: if not, how the General Manager could raise the liability of the company through an order to the driver I find it difficult to see. In this I assume that the General Manager's authority extended so far as to enable him, if on an occasion he saw fit, and in the course of his employer's business, to drive the car himself. Moreover, there does not appear to have been any prohibition against the General Manager being a passenger, subject of course to the payment of the regular fare.

The fact that the servant there was bound to obey the order given him distinguishes the case from this. Here, the only order the corporal was bound in law to obey was a lawful order. It may be that, in his own interest, he was quite justified in obeying it and he would incur no discipline or responsibility for so doing; and it is clear that the special character of military relations necessitates such

(1) [1912] 3 K.B. 588.

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a justification except where the order is patently illegal. But that does not make the act done the act of the Crown. If Col. Reid himself had driven the lorry, he would not, in my opinion, have bound the Crown even though he could have done so in the course of admittedly military purposes. If that is sound, how he could engage the Crown's responsibility by ordering a subordinate to do the same act I am quite unable to appreciate.

I would therefore allow the appeal and dismiss the action with costs throughout if they are demanded.

KELLOCK J.:—Negligence on the part of the driver of the military vehicle here in question being no longer in question, the determination of this appeal depends solely on whether or not that negligence occurred while the driver was "acting within the scope of his duties or employment" within the meaning of s. 19(*c*) of the *Exchequer Court Act*. Mr. Jackett relies upon the regulations to which he referred in support of his contention that the vehicle could not, at the relevant time, be considered as having been engaged upon any business of the Crown. The evidence of Colonel Simmons, called on behalf of the Crown, furnishes, however, an additional standpoint from which this appeal must be considered.

According to this witness, during the period when the event here in question took place, both the Reserve and Active forces of the Canadian Army were in the "throes" of recruiting; "the war had finished in 1945 and we were stepping up the Reserve Forces and Permanent Forces."

With respect to the regulations as to the use of military vehicles, the witness said: "Certain things are taken for granted, that we could use a vehicle for recruiting." In particular he testified:

Q. I believe you told my friend on cross-examination that there was nothing within your knowledge in these regulations to prohibit the use of a military-operated vehicle for recruiting? Is that what you said?

A. Yes.

Q. Well, not authorizing the use of one of these vehicles for recruiting purposes, would a Commanding Officer still be subject to the limitations of the use of that vehicle imposed by these Regulations?

A. Not necessarily. If it is agreed or authorized that the—there is nothing in these Regulations which says a vehicle cannot be used for a purpose, and if it is agreed that it is a recruiting purpose, the vehicle can be used, and it would be quite all right, naturally.

With respect to the regulations themselves, the Crown relies in the first place upon Order 4558 of June 7, 1944, and particularly upon para. 3, which limits the use of army vehicles to "official purposes." The interpretation of this order is not unaffected by paras. 1 and 2 from which it appears that the order arose out of the then existing shortage of gasoline "in order to achieve economy." In my opinion, the use of a vehicle for recruiting purposes, particularly in the light of the evidence of Colonel Simmons, would be a use for an "official" purpose, and the commanding officer, to whom was committed the duty of recruiting his regiment up to its establishment, would of necessity have to judge as to what use would or would not be proper for such purpose, in the absence of some express provision with which any proposed use would be in conflict.

Colonel Reid considered that in what he directed he was carrying out his instructions with respect to increasing the strength of the regiment under his command. In the methods adopted by him to that end, he necessarily had a considerable discretion. If, therefore, there could be found a direct prohibition as to the use of transport vehicles in connection with recruiting, the question would arise as to whether disobedience would limit the "sphere of the employment" or merely amount to "a direction not to do certain things, or to do them in a certain way within the sphere of the employment;" *Plumb* v. *Cobden* (1), per Lord Dunedin at 67. If it were necessary to decide that question, I should say that the sphere of employment was not affected by the disobedience, if any, of Colonel Reid, and that, therefore, the particular regulations to which we were referred, notably with respect to the use of military vehicles for the transport of "service personnel for recreational purposes," the transport of "civilians employed by the Army," "prospective recruits" and cadets, do not assist the appellant.

If there were doubt as to whether or not this should be considered to be the right result, there would still be, in my opinion, a further question, namely, as to the duty of the driver of the vehicle when the order from Colonel Reid was given to him.

(1) [1914] A.C. 62 at 67.

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Kellock J.

In *Keighly* v. *Bell* (1), Willes J. expressed himself thus:

> I believe that the better opinion is, that an officer or soldier, acting under the orders of a superior—not being necessarily or manifestly illegal—would be justified by his orders.

It is obvious that the object with which an order is given can determine its lawfulness. An officer going on military duty orders a soldier to fetch his horse. This would be a valid order. If, however, the officer wanted his horse to go hunting or to take an ordinary ride for pleasure, this would take the order out of the category of "lawful" commands.

The authors of the *Manual of Military Law*, 1929 edition, p. 18, express the view that

> So long as the orders of the superior are not obviously and decidedly in opposition to the law of the land, the duty of the soldier is to obey and (if he thinks fit) to make a formal complaint afterwards.

A similar view prevails in the United States. In Davis on "The Military Law of the United States," a former Judge Advocate General, in speaking of "lawful" orders of a superior officer, says at p. 381:

> If a question arises with respect to their legality, and the order is not on its face clearly and obviously in contravention of law, it is the duty of the inferior to resolve such doubt in favour of obedience, relying for justification on the form of the order so received and obeyed.

In my opinion, the law is sufficiently stated for the purposes of the case in hand by Willes J. above. Even in time of peace, military discipline could not otherwise be maintained.

If Colonel Reid in good faith, as he did, considered in giving the order here in question that he was carrying out his duty as commanding officer of the regiment in connection with the current effort to bring it up to strength, it is impossible to say that the Corporal who received the order to drive the vehicle should have considered he had received an unlawful order.

With respect to s. 117 of the *Militia Act*, R.S.C. 1927, c. 132, it may be that illegality in fact would constitute a defence to any proceeding under that section, but I do not think that that section establishes the proposition that illegality in fact is sufficient to establish that a soldier, in carrying out a command of a superior officer, is not acting

(1) (1866) 4 F. & F. 763 at 790; 176 E.R. 781 at 793.

within the scope of his duties or employment within the meaning of the *Exchequer Court Act*, if the order is not "necessarily or manifestly" illegal.

I would dismiss the appeal with costs.

ESTEY J.:—The suppliants Bradshaw and Spence, respectively owner and driver of a taxicab, were awarded damages against Her Majesty in the Exchequer Court for injuries suffered when the taxicab collided with an Army truck upon a highway between Charlottetown and Souris, Prince Edward Island, about 1:30 on the morning of July 24, 1947.

The learned trial judge found that Corporal Ryan's negligent driving of the Army truck was the sole cause of the collision and no appeal is taken therefrom.

The Army truck was, at all times material hereto, in possession of the 17th Prince Edward Island Reconnaissance (RECCE) Regiment, a reserve unit of the Canadian Army then under the command of Lieutenant Colonel Reid. Corporal Ryan was a member thereof. As such, for the purpose of determining the liability of Her Majesty in this action, both Lieutenant Colonel Reid and Corporal Ryan are deemed to be servants of the Crown (*Exchequer Court Act*, S. of C. 1923, c. 25 s. 50A). The essential issue is, therefore, whether Corporal Ryan, at the time the injuries were suffered, was acting within the scope of his employment within the meaning of s. 19(*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34).

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> * * *
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Lieutenant Colonel Reid, with the intention of promoting recruiting, arranged for a ball game between the Regiment-sponsored RECCE junior team of Charlottetown and a local Souris team to be played at Souris on July 23, 1947. The RECCE team, for some reason, could not make the trip and Lieutenant Colonel Reid arranged that the Knights of Columbus, another junior team that played in the same league with the RECCE team at Charlottetown, would substitute. He directed their transportation in an Army

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truck and the injuries here claimed for were suffered while the Army truck was transporting the ball team and its supporters back to Charlottetown.

As Commanding Officer, Lieutenant Colonel Reid was authorized to promote and was at all times material hereto promoting recruiting. As one witness stated, the Regiment was then in the "throes of recruiting." There were no regulations dealing with recruiting and it must follow that as Commanding Officer it was his duty to exercise his discretion in the development of a programme that he might deem applicable and effective in the area allotted to him. As Lieutenant Colonel Rogers, then second in command, deposed:

> The policy of the Regiment in regard to recruiting was we were given certain areas in Queen's and King's counties, in which we were permitted to recruit, and we were to use the means at our disposal to interest young lads into joining the Reserve Army.

As part of the recruiting programme Lieutenant Colonel Reid concluded that good will should be maintained between the Army and the civilian population and had, as a consequence, upon different occasions transported the regimental band for entertainment. As he states, they were told at all times "to co-operate with civilian people." He accordingly arranged a ball game at Souris with a view to demonstrating to the young men that the Army was interested in many activities including sport and thereby to add to their interest in the Army. In all this he was not serving any purpose of his own or any ulterior or other purpose inconsistent with his position and duty to promote recruiting. (Whatever suggestion was made to the contrary was not established by the evidence.) Even if it be admitted he was in error, the evidence justifies no other conclusion but that he believed he was promoting recruiting and acting within the scope of his authority.

A servant may, of course, while purporting to act for his master, do so in a manner that is outside the scope of his employment, but the conduct here in question is not sufficiently far removed to justify such a conclusion. The learned trial judge did not go further than to suggest "it is difficult to agree with his opinion that the game actually played by the Knights of Columbus team had anything to do" with the subsequent enlistments from Souris. That,

however, is far from saying that Lieutenant Colonel Reid was not, in arranging the game, acting within the scope of his employment in the promotion of his recruiting programme.

The learned trial judge did find that the direction to use the Army truck for the transportation of this ball team "was contrary to the regulations and that Colonel Reid had no authority to use it for such purposes," and continued:

> I do not question his good faith in the matter. At the time he was busily engaged in an effort to secure recruits for his regiment, and doubtless thought that an exhibition baseball game, between a team sponsored by the Regiment and the young men of Souris, would assist in recruiting.

With the greatest possible respect, it would appear that in the foregoing sufficient weight has not been given to the distinction between the field of actual authority and the scope of employment. Lord Esher gives expression to this distinction when he states:

> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable. *Dyer* v. *Munday* (1).

This difference is again emphasized in Story on Agency, s. 452:

> * * * he (the principal) is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. *Bright & Co.* v. *Kerr* (2).

The foregoing statement of the learned author has been repeatedly quoted, particularly in *McGowan & Co. Ltd.* v. *Dyer* (3); *Lloyd* v. *Grace, Smith & Co.* (4); *Percy* v. *Corporation of City of Glasgow* (5). See also Willes J. in *Bayley* v. *Manchester, Sheffield,* and *Lincolnshire Ry. Co.* (6).

In *W. W. Sales Limited* v. *City of Edmonton* (7), it is pointed out that the mere fact the agent's act may constitute a criminal offence does not necessarily take it outside

(1) [1895] 1 Q.B.D. 742 at 746.
(2) [1939] S.C.R. 63 at 70.
(3) (1873) L.R. 8 Q.B. 141 at 145.
(4) [1912] A.C. 716 at 737.
(5) [1922] 2 A.C. 299 at 306.
(6) (1872) L.R. 7 C.P. 415 at 419.
(7) [1942] S.C.R. 467.

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the scope of his employment. Mr. Justice Hudson, delivering the judgment of the majority of this Court, stated at 471:

> Here the servants were "not on a frolic of their own." They were in fact doing work which was intended to be of service to their master and was in fact closely connected with acts which they were specifically instructed to do.

Where it was contended that because the conduct of the servant in repossessing a bedstead constituted a criminal assault he was, therefore, acting beyond the scope of his employment, Lord Esher stated:

> The question, therefore, for the jury was whether Price was employed to get back the bedstead, and did the acts complained of for the purpose of furthering that employment, and not for private purposes of his own * * * * *Dyer* v. *Munday supra* at 746.

The same view is adopted in *Goh Choon Seng* v. *Lee Kim Soo* (1), where, although the servant committed an act of trespass, that did not take his conduct outside the scope of his employment.

Limpus v. *The General Omnibus Co.* (2), was regarded by Compton J. at 643

> as a case of improper driving and not a case in which the servant did anything altogether inconsistent with the discharge of his duty to his master and out of the course of his employment—a fact upon which, it appears to me, the case turns.

The appellant cited among other authorities *Halparin* v. *Bulling* (3), *Battistoni* v. *Thomas* (4), and *Dallas* v. *Home Oil Distributors Limited* (5). The servant in all of these cases had left his master's business and was proceeding toward the attainment of a purpose of his own. The case of *Poulton* v. *The L. & S.W. Ry. Co.* (6), was also cited. There the conduct of the servant was ultra vires the master, which raised questions not relevant hereto, as there is no question of ultra vires in the instant case.

Section 50A of the *Exchequer Court Act* creates a relationship of master and servant between Her Majesty and a member of the Army. It thereby imposes a liability upon Her Majesty equal to that of the member of the Army for damage negligently caused by the latter while acting within

(1) [1925] A.C. 550.
(2) (1863) L.T.N.S. 641.
(3) (1914) 50 Can. S.C.R. 471.
(4) [1932] S.C.R. 144.
(5) [1938] S.C.R. 244.
(6) (1867) L.R. 2 Q.B. 534.

the scope of his employment. *The King* v. *Anthony* (1). The phrase "scope of employment," because it must so largely depend upon the circumstances in each case, has generally been conceded to be incapable of precise definition. The foregoing authorities do indicate that it is wider than the field or scope of actual authority and that the purpose of the servant and the fact that he is not acting in a manner inconsistent with his employment may be factors in determining scope of employment. Further assistance may be found in a consideration of the remarks of Willes J. in *Barwick* v. *English Joint Stock Bank* (2), where he states:

> In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

Quoted with approval in *Lloyd* v. *Grace, Smith & Co. supra,* at 733. See also *Hamlyn* v. *Houston & Co.* (3).

In *Lockhart* v. *C.P.R.* (4), their Lordships of the Privy Council adopted the statement of Salmond on Torts, 9th Ed. p. 95, 10th Ed. p. 89:

> But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it * * * On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case, the servant is not acting in the course of his employment, but has gone outside of it.

It was the duty of Lieutenant Colonel Reid to direct, within the meaning of the regulations, the use of Army vehicles for military purposes, including that of recruiting. It is unnecessary to recite the regulations which were placed in evidence, as it must be conceded that a study of them leads to the conclusion that, in the promotion of his recruiting programme, Lieutenant Colonel Reid had not the authority to authorize the use of this Army truck to transport a civilian baseball team from Charlottetown to Souris.

(1) [1946] S.C.R. 569.
(2) (1867) L.R. 2 Ex. 259.
(3) [1903] 1 K.B. 81 at 85.
(4) [1942] A.C. 591.

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At the time he considered that because he was doing this in aid of recruiting that it was for an official purpose and, therefore, permissible within s. 20 of the regulations, which reads, in part:

> 20. Military transport vehicles are to be used for official purposes only. * * * *

The problem here presented is not whether Lieutenant Colonel Reid exceeded his authority, but did he act outside the scope of his employment? He was serving no other purpose or interest in all that he did but that of his master and his conduct was not so far removed from the acts he was authorized to perform as to justify a conclusion that he was not, at all times, engaged in his master's undertaking. Upon the whole of the evidence, Lieutenant Colonel Reid, whose duty it was to direct these vehicles within the meaning of the regulations, upon this occasion misconstrued them, but even then his direction was so connected with those directions he was authorized to give that within the view expressed by Salmond and adopted by the Privy Council in *Lockhart* v. *C.P.R., supra* he was, in directing the use of this truck, acting within the scope of his employment.

Lieutenant Colonel Reid followed the usual routine of his Regiment and issued a Transport Work Ticket authorizing this trip. It was given to Sergeant Ryan who was in charge of the Army trucks. Sergeant Ryan communicated with his brother, Corporal Ryan, and as a result the latter, who was qualified to drive Army vehicles, proceeded to the garage and received his instructions. The truck was serviced and made ready for the trip by Sergeant Ryan. Corporal Ryan received, in the regular way, Army pay covering this trip. Both Sergeant Ryan and Corporal Ryan would know that the Regiment was in the throes of a recruiting campaign and if they had asked any question with regard to the purpose of this trip they would have been told it was in promotion of recruiting. Throughout, all three parties were acting within the scope of their employment at the time the injury for which damages are here claimed occurred.

In my opinion the appeal should be dismissed.

LOCKE J. (dissenting):—The learned trial judge has found that the use of the Army truck to carry the Knights of Columbus baseball team to Souris and return on the day in question was contrary to regulations and that Colonel Reid had no authority to use it for such purposes, conclusions with which I respectfully agree. The general instructions given to the officer commanding the unit to endeavour to obtain recruits for his unit cannot be construed as authorizing the carrying on of such activities by means forbidden by Army orders.

There remains the question as to whether Corporal Ryan, who was driving the truck and whose negligence has been held to have caused the accident, was at the time acting "within the scope of his duties or employment" within the meaning of that expression in subsection (c) of s. 19 of the *Exchequer Court Act*, R.S.C. 1927, c. 34.

Colonel Reid was at the time the officer commanding the 17th Prince Edward Island Reconnaissance Regiment. Other than his statement that this was a Reserve unit of the Armoured Corps and the fact that it was not at the time undergoing its annual drill or training and had not been placed on active service, there is no evidence of its status. For the Crown the King's Regulations and Orders of 1939 were tendered in evidence and admitted, with the consent of counsel for the respondent, from which it must be taken that these were the general regulations and orders which applied to members of this unit at the time of the occurrence in question. By Order 1 the Reserve Militia, of which the unit apparently formed part prior to the amendments to the *Militia Act* enacted by c. 21 of the Statutes of 1947, was organized in the manner defined by Appendix 10 which declared that the organization of the Reserve Militia was authorized subject to regulations prescribed by the Governor in Council under s. 16 of the *Militia Act*. The reference to s. 16 is to the Act as it appeared as c. 41, R.S.C. 1906. In the revision of 1927 it appeared as s. 14.

By the amendment of 1947 the designation of the various military forces of Canada as Militia was altered and all the military forces of Canada other than the Royal Canadian Navy, the Royal Canadian Air Force and the Reserves thereof were named the Canadian Army, divided into the

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active force consisting of that portion that is on continuous full time military service, such other military units then existing which had been theretofore constituted and such other units as might thereafter be named and authorized by the Minister under the provisions of s. 20 of the Act as amended. The Reserve Militia mentioned in Order 1 and Appendix 10 of the 1939 King's Regulations and Orders is not mentioned by name. Upon the evidence in the present record, a unit such as the Prince Edward Island Reconnaissance Regiment was maintained and continued as a reserve unit of the Canadian Army and this was its status at the time in question.

This being so, the question as to whether Corporal Ryan was under any duty to obey the order of the commanding officer of the unit to drive the truck at that time is not free from doubt. According to Regulation No. 9 which forms part of Appendix 10 to the King's Regulations and Orders, drill and training for the members of such units is voluntary. Regulation 11 declares that the Government does not undertake to provide the Reserve Militia, except when called out on active service, with any equipment, and they are not entitled to transportation, subsistence, pay or allowances, except while on active service. The oath taken by every officer and man on joining such a unit, in addition to containing an oath of allegiance to His Majesty, includes the oath to "well and truly serve His Majesty in the Reserve Militia of Canada under the terms and conditions laid down in the law and the regulations duly made from time to time in that behalf." Corporal Ryan's regiment, as has been stated, was neither on active service nor undergoing its annual drill or training, nor had the service he was called upon to perform by the order of Colonel Reid transmitted to him by Sergeant Ryan anything to do with the annual drill or training of the unit under the provisions of the Act. It is difficult to conclude, therefore, that when, according to the regulations, attendance at drill or training was voluntary and Corporal Ryan, according to Regulation 12, was not entitled to any pay except while on active service, he was under any obligation to obey an order to drive the baseball team to Souris, if these were the regulations then in force in regard to his unit.

While the regulations thus applicable to the unit contained these provisions, s. 115 of the Act provided a penalty for:—

> Every officer and man of the Militia who, without lawful excuse, neglects or refuses to attend any parade or drill or training at the place and hour appointed therefor, or who refuses or neglects to obey any lawful order at or concerning such parade, drill or training.

This section remained unalterated by the amendment of 1947 other than by striking out the word "militia" and substituting the words "Canadian Army" which, by the defining section, included a reserve unit such as this. The question is perhaps affected by s. 69 of the *Militia Act*, as enacted by the 1947 amendment, which includes a provision that all officers and men of the Canadian Army shall be subject to "all laws, regulations and orders relating to the Canadian Army" when, inter alia, they are within any armoury or other place where arms, guns, ammunition or other military stores are kept since, while the order to take the truck from Charlottetown to Souris and return was communicated to Sergeant Ryan by Colonel Reid by telephone and he received the work order which authorized the use of the vehicle elsewhere, Corporal Ryan took delivery of the truck and received at least part of his instructions from Sergeant Ryan at an armoury. There appears thus to be a conflict between these sections of the *Militia Act* and the regulations affecting Reserve units such as this. In view of the fact that the regulations were clearly authorized by section 14 of the statute, as it was before the amendment, it may well be contended that the words "Canadian Army" in section 115, as amended, should be construed as applicable to units other than those of the Reserve Militia which were affected by the regulations contained in Appendix 10 to the King's Regulations and Orders. I find it unnecessary to come to a conclusion on the point, in view of the opinion that I have formed that in any event Corporal Ryan owed no duty to obey an order to do something prohibited by the regulations.

The truck or lorry driven by Ryan had been issued to the 28th Light Anti-Aircraft Regiment and, according to Colonel Reid, it had been "loaned" to him for the purpose of making this trip. The regulations for the employment of military vehicles at the time provided that transport

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vehicles were to be used for official purposes only and, while by Regulation 22 they might be used to transport service personnel to sports fields, play grounds and recreation centres, this was permissible only in the case of properly authorized and organized military sports and, in the case of these, the use of transport for such purposes, for distances in excess of twenty miles, was allowed only on the authority of the Quartermaster General at Army Headquarters or the general officer commanding of the command concerned, and its use for carrying civilians or persons other than service personnel was prohibited. The vehicle in question was not being used for official purposes at the time of the accident nor for the purpose of transporting service personnel to authorized or organized military sports: the distance between Souris and Charlottetown is fifty-three miles and permission to use the truck for a journey of this extent had neither been asked nor granted. If it be assumed for the purpose of argument that Corporal Ryan was obligated by the terms of his enlistment and the obligations imposed upon him by the *Militia Act* and the King's Regulations and Orders to obey an order of the commanding officer of the unit, communicated to him in an armoury, when such unit had neither been placed on active service nor was engaged in its annual drill or training under the provisions of the *Militia Act,* his only obligation was to obey a lawful order.

The oath required of Ryan on admission to the Reserve Militia under Regulation 15 of Appendix 10 of the King's Regulations and Orders was to serve under the terms and conditions laid down in the law and the regulations duly made from time to time in that behalf. The penalties authorized by the *Militia Act* for disobedience are for the failure or refusal to obey any lawful order, not any order which a superior officer may see fit to give. While, as pointed out by Hudson, J. in *Dallas* v. *Home Oil Distributors Limited* (1), the question as to whether a given act of an employee is within the scope of his employment, in the sense in which that phrase is used for the purpose of determining the employer's liability to third persons, is strictly not the same question as to whether an injury received by an employee was an injury received in the

(1) [1938] S.C.R. 244 at 252.

course of his employment for the purpose of applying the Workmen's Compensation Act, nevertheless judicial reasoning in respect of the latter class of questions may be valuable and illuminating. In *Bourton* v. *Beauchamp* (1), where a claim was made under the Workmen's Compensation Act of 1906 by reason of the death of a miner killed in doing an act prohibited by statutory regulation under the Coal Mines Act 1911, it was held that the deceased in disobeying the statutory regulation was acting outside the sphere of his employment and that, consequently, his death was not caused by an act arising out of or in the course of his employment. To the same effect is *Moore* v. *Donnelly* (2). The reasoning applied in arriving at the conclusions of the House of Lords seems to me applicable in the present matter and accordingly that in performing an act forbidden by the regulations Corporal Ryan was not "acting within the scope of his duties or employment" within the meaning of subsection (*c*) of s. 19 of the *Exchequer Court Act*. The learned trial judge considered that the decision of the Court of Appeal in *Irwin* v. *Waterloo Taxicab Co. Ltd.* (3), should be applied in the circumstances of the present case but, with respect, I am unable to agree. In that case, Bird, the driver of the taxicab had been instructed to obey orders given to him by Black, the general manager of the taxicab company, and at the time of the accident he was complying with an order which, as shown in the judgment of Buckley L.J., he was by the defendant's directions bound to obey. In the present matter, the obligation of the soldier is limited by the statute and the regulations to obedience to lawful orders. The decision in *Irwin's* case does not, therefore, seem to me in point. If it were it would be necessary, in my opinion, to decide whether the case was rightly decided, a debatable question, to my mind.

It may be said that if officers and men of the Canadian Army were entitled to question the validity of orders given to them by their superiors, it would be destructive of military discipline. This argument was advanced in *Heddon* v. *Evans* (4), where an action was brought against an officer who had sentenced a soldier to fourteen days'

(1) [1920] A.C. 1001.
(2) [1921] 1 A.C. 329.
(3) [1912] 3 K.B. 588.
(4) (1919) 35 T.L.R. 642.

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confinement to barracks for conduct which was said to be to the prejudice of good order and military discipline, the plaintiff contending that the officer imposing the punishment had exceeded his jurisdiction. McCardie J. pointed out that the compact or burden of a man who entered the Army, voluntary or not, was that he would submit to military law, not that he would submit to military illegality; that he must accept the Army Act and Rules and Regulations and Orders and all that they involved, since these "expressed his obligations and announced his military rights." Dealing with the argument that if such actions were permitted it would injuriously affect the discipline of the Army, he said that he would not think this was so since he could not think that discipline would be the less readily exerted or the less loyally accepted if it were subjected at all times to the limitations created by the military law itself. Even if the contrary were so, I think this would not affect the matter to be here decided, which is the determination of a question of law depending upon the construction to be given to the regulations and the statutes. In *Keighly* v. *Bell* (1), a military officer claimed damages from his commander for false imprisonment, malicious prosecution and libel. Willes J. in the course of the argument, in referring to the contention of the defendant that what he had done in the matter had been authorized or approved by his superiors, said in part (p. 790):—

> I hope I may never have to determine that difficult question, how far the orders of a superior officer are a justification. Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual war—at all events, as regards enemies, or foreigners—and, I should think, even with regard to English-born subjects of the Crown, *unless the orders were such as could not legally be given.* I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders.

Later, in delivering judgment, he said in part (p. 805):—

> If it were necessary to state any principle on which it would be competent to me to decide such a case, it would be that a soldier, acting honestly in the discharge of his duty—that is, acting in obedience to the orders of his commanding officers—is not liable for what he does, unless it be shown that the orders were such as were obviously illegal. He must justify any direct violation of the personal rights of another person by showing, not only that he had orders, but that the orders were such as he was bound to obey.

(1) [1866] 4 F. & F. 763; 176 E.R. 781.

The statement first above quoted appears to me on the face of it to be simply *obiter* and neither of the passages appear to me to deal directly with the question to be decided here, as to whether obedience to an unlawful order lies within the scope of the duties of a soldier.

I am further of the opinion that the matter is not affected by the fact that Corporal Ryan may not have been aware of the true extent of the duty imposed upon him by the terms of his employment, by the *Militia Act* and by the King's Regulations and Orders and may have thought that he was in duty bound to obey the order in question. To impose liability upon the Crown the conditions of the section of the *Exchequer Court Act* must be met. I am unable, with respect for contrary opinions, to understand how the scope of his duties and employment could be extended by his mistaken understanding as to what they were (*Wardle* v. *Enthoven* (1)).

I would allow this appeal and direct that the action be dismissed with costs throughout if they are demanded.

CARTWRIGHT J.:—This is an appeal from two judgments of Cameron J. whereby it was adjudged that the suppliants Spence and Bradshaw were respectively entitled to recover damages in the amounts of $10,318.85 and $750, resulting from a collision which occurred on the 24th of July, 1947 between a taxi-cab, owned by Bradshaw and operated by Spence, and an army truck, the property of the appellant, driven by Corporal H. W. Ryan.

The learned trial judge found on conflicting evidence that the sole cause of the collision was the negligence of Corporal Ryan and neither this finding nor the assessment of damages was questioned before us.

In the statement of defence in each case it is admitted that at the time of the collision "a motor vehicle, the property of His Majesty the King, as vested in the Minister of National Defence, was being driven by one Corporal Harrison W. Ryan, No. F403452, a servant of His Majesty the King in the employ of the Royal Canadian Armoured Corps (Reserve)" but it is pleaded that Corporal Ryan, at the time of the collision, was not acting within the scope of his duties or employment. The question for determination is whether or not he was so acting.

(1) [1917] 86 L.J.K.B. 309.

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The relevant facts for the purposes of this appeal may be briefly stated as follows:

At the time of the collision Corporal Ryan was a non-commissioned officer in the Canadian Army and a member of the 17th P.E.I. Reconnaissance Regiment with Headquarters at Charlottetown. This regiment did not form part of the active force and Corporal Ryan was not on full-time military service. The Commanding Officer of this regiment was Lieutenant-Colonel Reid. The vehicle in question was a 60-cwt. truck which had been issued to the 28th Light Anti-Aircraft Regiment. The Commanding Officer of that regiment had loaned the vehicle to Lieutenant-Colonel Reid and counsel for the appellant did not argue that Lieutenant-Colonel Reid did not have the lawful custody of the vehicle or that he would not have been entitled to use it for any lawfully authorized military purpose connected with the regiment under his command.

Lieutenant-Colonel Reid testified that he had received orders, which were not in writing, to do all that he could to build up the strength of his unit by securing recruits from an area which included Souris, a small town about fifty-three miles from Charlottetown, that he thought that it would tend to encourage recruiting if he arranged an "exhibition" baseball game between a team of young men at Souris and a team sponsored by his regiment and composed of members of the Queen's Square School Cadet Corps which was affiliated with his regiment and that, with this end in view, he made arrangements for such a game, intending to transport the Cadet Corps team from Charlottetown to Souris in an army truck. For reasons which do not appear the Cadet Corps team was unable to play this game. Lieutenant-Colonel Reid considered that the failure to send a team after the game had been arranged would have a bad effect on the purpose which he was seeking to accomplish, that is to encourage recruiting, and made arrangements that a team sponsored by the Knights of Columbus and which was in the same league as the Cadet Corps team should make the trip to Souris and play the game in place of the last mentioned team.

He accordingly instructed Sergeant Ryan, a member of his regiment who was at the time on full-time military service to call in Corporal Ryan and to instruct him to make the trip. A "Transport Work Ticket" authorizing the trip was made out, was signed by Lieutenant-Colonel Reid and was given by him to Sergeant Ryan. On Corporal Ryan arriving at the armoury in response to the call which he had received, Sergeant Ryan handed him the "Transport Work Ticket", which showed on its face that the trip to be taken was from Charlottetown to Souris, and ordered him to pick up the Knights of Columbus team, to drive them to Souris and, after the game and such entertainment as had been arranged for the visiting team were over, to drive the team back to Charlottetown. It was on the return trip that the collision occurred.

It was proved that Corporal Ryan was an experienced driver and that "he had standing orders", which expression was explained to mean that he had the permanent status of a duly qualified driver of army vehicles. On previous occasions when Corporal Ryan had been called upon by his Commanding Officer to drive an army vehicle he had been paid out of the public treasury and he was to be so paid for the trip in question.

These being the facts, it would seem clear that the order to make the trip was given to Corporal Ryan at a time while he was upon military duty and within an armoury and that it was his duty to obey it provided it was a lawful order. This follows from Sections 69(2) and 117 of the *Militia Act*, R.S.C. 1927, c. 132 as amended by 1947, 11 George VI, c. 21, sections 22 and 34(1). The relevant portions of these sections provide as follows:—

69(2) Officers and men of the Active Force and members of the permanent staff of the Canadian Army shall at all times be subject to all laws, regulations and orders relating to the Canadian Army *and all other officers and men of the Canadian Army shall be subject to such laws, regulations and orders.*

* * *

(*c*) at any time while upon military duty . . . . or within any armoury * * * *

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117. Every officer and man of the Canadian Army who disobeys any lawful order of his superior officer * * * shall incur a penalty * * * *

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Indeed, I did not understand counsel for the appellant to argue that if the order had been to drive the truck for some purpose authorized by the relevant regulations it would not have been Corporal Ryan's duty to carry it out.

The main argument on behalf of the appellant is that under the relevant legislation, regulations and orders, Lieutenant-Colonel Reid had no authority to make use of the truck for the purpose described, that, while Corporal Ryan was under a duty to obey the lawful orders of his superior officer, the order given to him was unlawful and that consequently in driving the truck pursuant to such order he was not acting within the scope of his duties or employment.

The learned trial judge found that Lieutenant-Colonel Reid was acting throughout in good faith and in the belief that he was entitled to use the truck as he did but that he was mistaken and that under the relevant orders he had no authority to use the truck for this purpose and committed a breach of the regulations regarding the use of military vehicles in so doing. The learned trial judge was, however, of opinion that Corporal Ryan was acting within the scope of his duties or employment, that it was his duty to drive army vehicles in accordance with the orders which he received from his superior officers, that this was what he was doing at the time of the collision and that consequently the appellant is liable for the damages resulting from his negligent driving.

Counsel for the respondents seeks to support the judgment on the grounds stated by the learned trial judge but he also argues that Lieutenant-Colonel Reid was entitled to use the truck for the purpose mentioned. He submits that the only order or regulation properly proved, and in any case the only one having relevance, was that contained in Exhibit B, Order No. 4558 said to have been issued by the Quartermaster General, and that the only provision in such order which has a bearing on the case at bar is the sentence:—"Army vehicles are to be used for official purposes only." He then argues that Lieutenant-Colonel Reid's purpose was an official one, that he had been ordered to do everything in his power to encourage recruiting, that, in view of section 138 of the *Militia Act*,

it is unimportant that he had no written orders to this effect and that the encouragement of recruiting, having been ordered, became an official purpose. He submits that as, so far as the record discloses, the regulations are silent as to how this purpose should be carried out it must be taken to be left to the reasonable discretion of the Commanding Officer concerned. In support of this view counsel made reference to the evidence of Lieutenant-Colonel Simmons, called by the appellant. This officer stated that his duties included general supervision over the operation of military vehicles in the charge of the various units in the Eastern Command, reserve force and active force, although the primary responsibility for the use of such vehicles rested with the Officer Commanding each unit. Colonel Simmons said in part:—

> You are asking a simple question, "could a vehicle be used for recruiting purposes", and I would say "yes". My answer would be "yes".

Of course, these officers could not by their evidence relieve the court of its duty to construe the relevant regulations but, as I understand it, their evidence was not tendered for this purpose but rather to show what orders were in fact received and what practice was actually followed in a matter not expressly dealt with in the regulations, i.e., the encouraging of recruiting. It is clear that if accepted, the argument that Lieutenant-Colonel Reid was authorized to use the vehicle for the purpose mentioned and was giving a lawful order to Corporal Ryan when he ordered him to drive the truck as he did, is sufficient to dispose of the appeal in favour of the respondents. I do not find it necessary to pass finally upon this argument and will only say that the question appears to me to be a doubtful and difficult one.

For the purposes of this appeal I will assume, without deciding, that the learned trial judge was right in holding that Lieutenant-Colonel Reid did not have authority to send the truck to this particular destination and for this particular purpose. The question then is whether, on this assumption, Corporal Ryan was acting within the scope of his duties or employment at the time of the collision, for it was his negligence which caused injury to the suppliants.

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The effect of the conflicting views put forward may be summarized as follows. For the appellant it is urged that the duty of Corporal Ryan was limited to driving army vehicles for such purposes as might be authorized by the relevant statutes, regulations and orders in force at the time of the accident, that since, *ex hypothesi,* driving the truck to Souris for the purposes mentioned was not authorized by such regulations his act in driving it there fell outside the scope of his duties and that the fact that he was ordered by Lieutenant-Colonel Reid to drive the truck to Souris is irrelevant as Corporal Ryan's duty did not include obedience to the orders of his Commanding Officer unless they were lawful. For the respondents it is argued that the duty of Corporal Ryan, who was admittedly on the day of the accident a servant of the Crown, was to drive army vehicles, that it was no part of his duty to decide to what places or for what purposes such vehicles should be driven but that as to this he was to obey the orders given to him by his superior officers, provided that such orders were not *ex facie* unlawful and (perhaps) provided further that the orders were not such as a reasonable man in Corporal Ryan's position should have realized were unlawful.

I have reached the conclusion that in the circumstances of this case it was Corporal Ryan's duty to obey the order which he received and that in driving the truck to and from Souris in obedience to that order he was acting within the scope of his duty. This view appears to me to be supported by the Judgment of the Court of Appeal in England in *Irwin* v. *Waterloo Taxi-cab Company, Limited* (1), relied upon and followed by the learned trial judge. In that case one Bird was employed by the defendant Taxi-cab Company to drive its taxi-cabs. He was instructed by his employer to obey the orders of the General Manager, Black, and to drive the cabs as directed by him. Black ordered Bird to drive one of the taxi-cabs on what was clearly as between Black and the Company a frolic of his own but it was found that this fact was not known to Bird and that the circumstances were not such that he ought reasonably to have known it. While so driving Bird

(1) [1912] 3 K.B. 588.

negligently struck and injured the plaintiff. It was held that the Company was liable for Bird's negligence although it is, I think, clear from the judgments that had Black himself been driving the Company would not have been liable. We were not referred to any subsequent decision in which this judgment has been doubted and with respect I agree with it.

In the case at bar I think it clear that Corporal Ryan did not know that Lieutenant-Colonel Reid had no right to give him the order which he gave nor do I think that it can be said on the evidence that as a reasonable man Corporal Ryan should have known this. I have already indicated that, even after having had the advantage of hearing a full and able argument on the question, I am doubtful as to whether or not Lieutenant-Colonel Reid was authorized to give the order in question. It was not proved that any of the regulations or orders relied upon by the appellant as prohibiting Lieutenant-Colonel Reid from giving such an order had in fact been brought to Corporal Ryan's attention or had been published in such a manner that it became his duty to be aware of their contents. I do not think that there is any presumption that he knew their contents. In this connection reference may be made to the words of Lord Atkin in *Evans* v. *Bartlam* (1).

> For my part I am not prepared to accept the view that there is in law any presumption that any one, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

It appears to me that to hold that it was not within the duty of Corporal Ryan to obey the order given to him in this case by his superior officers would tend to bring about a condition of confusion. I cannot assent to the proposition that where a non-commissioned officer or man whose duty it is to drive army vehicles receives from his Commanding Officer an order, not obviously unlawful, to drive a vehicle to a particular place and for a particular purpose he must, before obeying the order, conduct an inquiry of his own as to whether the order is lawful.

(1) [1937] A.C. 473 at 479.

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In *Hodgkinson* v. *Fernie* (1), in his charge to the jury at page 421, Cockburn C.J. said:—

> There would be an end to all subordination, military or naval, if the officer subordinate in command were to take upon himself to decide upon the merits of the order, before he obeyed it.

This charge was approved on a motion for a new trial by a court consisting of Cockburn C.J. and Creswell, Crowder and Willes JJ.

In the case at bar counsel for the appellant does not suggest that Corporal Ryan should have questioned the merits of the order he received. The suggestion is that he should have questioned its legality. But where there is nothing on the face of an order or in the surrounding circumstances to indicate that it is unlawful the effect of holding that the subordinate should question its legality before obeying it would, I think, result in no less confusion than would permitting him to decide upon its merits.

We are not called upon in this case to consider the duty of a soldier who receives an order, in fact unlawful, in such circumstances that he ought reasonably to know it is unlawful and I wish to make it clear that I do not intend to decide anything in relation to such a situation.

For the reasons given by the learned trial judge on this branch of the matter and for the reasons set out above I am of opinion that these appeals should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. R. Varcoe.*

Solicitors for the respondents: *Bell and Mathieson.*

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(1) (1867) 2 C.B.N.S. 415.