IRVING H. GROSSMAN and GUS SUN (SUPPLIANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING, (RESPONDENT) ..... } RESPONDENT.

1951 *Oct. 10, 11, 12, 15

1952 *Feb. 5

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Airports—Operated by Crown—Duty to make safe for aircraft—Warnings of Danger—Crown—Whether breach of duty by servant acting within scope of his employment, renders Crown liable under s. 19(c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended.

On July 19, 1948, the appellant Grossman, piloting a light aircraft approached the Saskatoon airport, operated by the Department of Transport. Preparatory to landing he had observed workmen on the concrete runways, and diverted his course to a grass runway. While taxiing to a stop he suddenly noticed some distance in front an open ditch which cut across the runway. In attempting to take-off again he was unsuccessful in avoiding the ditch with the result that his aircraft was damaged beyond repair and his passenger and fellow appellant, Sun, was injured. The ditch in question, was not, in the view of the Court, sufficiently marked by a number of posts on which red flags had been placed by one Nicholas, the airport maintenance foreman, and they had not been seen by Grossman. The appellants' action to recover damages under s. 19(c) of the *Exchequer Court Act* as amended, was dismissed in the Exchequer Court where the damages of Grossman were assessed at $7,003.90 and those of Sun at $440.

Held: (Rinfret C.J. and Locke J., dissenting) that:

1. The open ditch across the grass runway constituted an obstruction and was recognized as such by Nicholas. In failing to provide adequate warning of the danger he failed in his duty to persons such as the appellants, and this breach of duty was negligence for which the Crown under s. 19(c) of the *Exchequer Court Act* was responsible. *The King* v. *Canada Steamship Lines Ltd.* [1927] S.C.R. 69 and *The King* v. *Hochelaga Shipping & Towing Co. Ltd.* [1940] S.C.R. 153, followed.
2. No negligence could be attributed to Grossman.
3. As the total amount claimed by Sun was $440, the Court under the provisions of the *Exchequer Court Act,* had no jurisdiction to hear his appeal which should therefore be quashed.

Per (Rinfret C.J. and Locke J., dissenting). The claim was not for an act of misfeasance but of alleged non-feasance. If there was failure on the part of Nicholas to cause adequate measures to be taken to warn aviators and such failure caused or contributed to the accident, Nicholas was not personally liable and accordingly the action against the Crown should fail.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright JJ.

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The King v. *Canada Steamship Lines, supra* and *The King* v. *Hochelaga Shipping & Towing Co. Ltd., supra* distinguished. *The King* v. *Anthony* [1946] S.C.R. 569, *Adams* v. *Naylor* [1946] A.C. 543, *Lane* v. *Cotton* 12 Mod. 473, *Perkins* v. *Hughes*, Say. 41, *Mersey Docks Trustees* v. *Gibbs* (1866) L.R. 1 H.L. 93, referred to: *Donoghue* v. *Stevenson* 1932 A.C. 562, distinguished. The matter was not affected by the *Air Regulations* enacted under the Aeronautics Act, R.S.C. 1927, c. 3, which were not expressed as applying to the Crown.

APPEAL from the Exchequer Court of Canada (1) dismissing a petition of right against the Crown with costs.

J. M. Cuelenaere K.C. for the appellants. The suppliants bring their action pursuant to the provisions of the *Exchequer Court Act,* R.S.C. 1927, c. 34 and in particular under s. 19(*c*) of that Act as amended by 1938 (Can.) c. 28, and seek to recover damages suffered by them as a result of an accident as outlined in the Statement of Facts. It is admitted in the pleadings and it was found by the learned trial judge that the Saskatoon Airport was constructed by the Crown as a Public Work and is being maintained and operated as a licensed airport for the use of the public. Such maintenance and operation is under the general supervision and direction of Earl Hickson, District Inspector of Airways, and managed by Philip R. Nichols. Both are servants of the Crown. The fact that the accident took place and the nature of the injuries suffered, it is submitted, were well established.

Broadly the question to be determined is whether the loss or damage suffered by the suppliants was due to the negligence of any officer or servant of the Crown, while acting within the scope of his duty or employment, so as to make the Crown liable in damages under s. 19(*c*).

It is submitted the trial judge was right in finding as he did that the officers of the Crown in charge of the airport were negligent and that the negligence consisted in the officers' failure to give or provide adequate warning. It is submitted they were negligent in the following respects:

(1) Allowing the ditch in question to remain open after it became known that it constituted an obstruction or hazard to flying.

2. Allowing the ditch to remain without being clearly marked.

(1) [1950] Ex. C.R. 469.

The general and accepted practice at airports and the *Air Regulations* require that any obstruction existing at a landing area be marked. (s. 12, *Air Regulations.*)

3. Allowing grass and weeds to grow and debris to accumulate in the ditch, making it difficult, if not impossible, to sight the ditch from the air.

4. Having allowed land markers visible from the air to remain on the grass runways, and the word "Airport" to remain on a building adjacent to such runways; failure to mark the end of such runways or to give adequate warning of the obstruction or hazard to any person using such runways. Each of the above enumerated particulars or two or more taken together constituted negligence on the part of the officers or servants of the Crown.

The liability of the Crown under s. 19(*c*) has been discussed in numerous cases. In *Rex* v. *Anthony* (1) Rand J. sets out the nature of the negligence giving rise to liability on the part of the Crown. In the present case the acts of the officers or servants of the Crown constitute positive conduct within the scope of their duties or employment. The Crown and its officers or servants owed a duty to the suppliant as user of the airport and failed to discharge that duty in such a manner as to raise a liability on the servant for which the master (the Crown) becomes liable. *Sincenne McNaughton Line* v. *The King* (2); *Yukon Southern Air Transport* v. *The King* (3); *Howard* v. *The King* (4); *The King* v. *Hochelaga Shipping* (5). In none of the above cases was the question of invitation discussed. The liability of the Crown was based on the use of a public work by a person lawfully on the premises. The cases cited set out the principle relating to the liability of the Crown under s. 19(*c*). In the present case the airport was a public work built by and at the expense of the Dominion Government and maintained and operated by the officers and servants of the Crown for the benefit of the Crown and for the use of the public. In the light of these authorities it is submitted that the suppliants suffered injury and that the officers or servants of the Crown were negligent, and the trial judge should have held that the suppliants were

(1) [1946] S.C.R. 569.
(2) [1926] Ex. C.R. 150; [1928] S.C.R. 84.
(3) [1942] Ex. C.R. 181.
(4) [1924] Ex. C.R. 143.
(5) [1940] S.C.R. 153.

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entitled to recover. Alternatively, he erred in holding the suppliants were licensees and in not holding that they were invitees.

The Saskatoon Airport is an airport designated as such by the Minister of Transport. The *Air Regulations,* Part III s. 1, require that no area shall be used as an airport unless it has been licensed as required by the regulations. The airport is so licensed. It was constructed and is maintained and operated for the purpose of providing facilities for aerial transportation. The *Air Regulations,* Part III, s. 6, grants to the operator of any licensed airport permission to charge for its use or for any services performed, such fees as have been approved by the Ministry. The Saskatoon Airport provides hangar facilities, repair servicing, fuel and oil.

Where an airport is operated by a public authority, such public authority, either expressly or by implication, invite the public requiring such facilities to use that airport, and the position of such public authority, its officers or servants, is no different to the owner of a private commercial landing field. As to the latter see *Beck* v. *Wing Field* (1).

The liability of public authorities with respect to buildings is set out in: *Arder* v. *Winnipeg* (2); *Nickell* v. *Windsor* (3); *Edmondson* v. *Moose Jaw School District* (4); *Blair* v. *Toronto* (5).

The trial judge ought to have found the suppliants were invitees. If invitees, the common law imposes a duty to take reasonable care against endangering life or property. Charlesworth, *The Law of Negligence* at 154, quoting *Parnaby* v. *Lancaster Canal Co.* In *Imperial Airway Ltd.* v. *Flying Service Ltd.* (6) it was held that under English law the owner of a public airport is bound: (*a*) To see that the airport is safe for the use of aircraft entitled to use it, and (*b*) To give proper warning of any danger of which he knows or should know. *Peavey* v. *City of Miami* (7) quoted by the trial judge is distinguishable. There the pilot knew that the airport was then under construction, and he had a blind spot in his aircraft. In the present

(1) (1941) U.S. Av. R. 76 (E.D. Pa.)
(2) (1914) 7 W.W.R. 294.
(3) [1927] 1 D.L.R. 379.
(4) (1920) 3 W.W.R. 979.
(5) (1927) 32 O.W.N. 167.
(6) (1933) U.S. Av. R. 50.
(7) (1941) U.S. Av. R. 28.

case the danger was not reasonably foreseeable. Where the user of the premises is an invitee it is no defence to show that the danger was open and obvious, if in fact reasonable steps have not been taken to protect the person coming on the premises. Knowledge of the condition may establish contributory negligence on the part of the user, but here, there was no knowledge. Charlesworth *supra* at 157, 136 and 123. In the light of the authorities referred to and the facts of this case, the trial judge ought to have found that the Suppliants were invitees and that there was a breach of duty committed by the officers or servants of the Crown giving rise to liability on the part of the Crown. In the further alternative, even if the suppliants were licensees, the trial judge erred in holding that the ditch in question was an obvious danger and in not holding that the ditch was in the nature of a trap, and in holding that Grossman failed to take reasonable care or was guilty of negligence. The evidence discloses that Grossman acted reasonably and diligently exercising the same care as other pilots would have exercised under similar circumstances. In the alternative, if the finding of negligence on the part of the suppliant Grossman is accepted, the trial judge should have held that the damage or loss was caused by the fault of both the officers or servants of the Crown and the suppliant, and should have determined the degree in which each was at fault and directed that the suppliants were entitled to recover in proportion to the degree in which the servants of the Crown were at fault. *The Contributory Negligence Act* 1944 (Sask.) c. 23, ss. 2 and 3. The liability of the Crown under s. 19(*c*) of the *Exchequer Court Act* is not confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury. *The Contributory Negligence Act* (Sask.) applies against the Crown. *The King* v. *Laperriere* (1); *The King* v. *Murphy* (2); *Arial* v. *The King* (3); *Blair* v. *Toronto, supra.*

G. H. Yule K.C. and *David Mundell* for the respondent. No case against the Crown was made out in the petition or on the evidence. The Crown is not liable in tort except

(1) 1946 S.C.R. 415. (2) [1948] S.C.R. 357.
(3) [1946] Ex. C.R. 540.

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in so far as liability is imposed by statute. *Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2). The appellants must rely on s. 19(*c*) of the *Exchequer Court Act*, as amended by 1938 (Can.) c. 28. *The King* v. *Anthony* (3); *The King* v. *Murphy* (4). In para. 8 of the petition the appellants assert "that the said officers and servants of the Crown (the said officers' refer back to the officers and servants in para. 7 who allegedly constructed the ditch) owed a duty to the suppliants to construct and maintain an airport fit for landing and the suppliants say that it was the duty of the said officers and servants to see to it that the said ditch was properly filled in, protected and adequately marked, but failed in the performance of that duty while acting within the scope of their employment by allowing the said ditch or excavation to remain open as aforesaid and/or without adequate markings. The ditch was constructed under contract with the Department of Transport by the Tomlinson Construction Co., relevant parts of which are to be found in the case. The ditch was designed to be an open ditch and to be kept open for drainage purposes. The Crown does not owe any duty as occupier to licensees coming on property that it occupies and servants of the Crown in charge of Crown premises are not occupiers and therefore do not owe any such duty. *Adams* v. *Naylor* (5).

The trial judge erred in holding that the Crown owed any duty to the appellants and should have held that the appellants had not brought themselves within the requirements set forth in the *Anthony* and *Murphy* cases to prove personal negligence on the part of some officer or servant of the Crown; that is a breach of duty owed by an officer or servant of the Crown to the appellants. This not having been done, it is submitted that the *King* v. *Hochelaga Shipping & Towing Co.* case referred to by the trial judge at p. 198 is not in point.

If the appellants were licensees on Crown property, and if either the Crown or any officer or servant of the Crown, as occupier, owed any duty to the appellants as licensees, the only duty owed by the Crown or any such officer or

(1) (1864) 16 C.B. (N.S.) 610.
(2) (1865) 6 B. & S. 257.
(3) [1946] S.C.R. 569 at 571-72.
(4) [1948] S.C.R. 357 at 365.
(5) [1946] A.C. 543.

servant would be to warn the licensees of any concealed danger or a trap. The petition does not allege a breach of any such duty nor does the evidence disclose any which would bring on him personal responsibility to the appellants. The only person on the evidence who was personally in charge of the airport was Nicholas, who is described as "Air Port Maintenance Foreman". Could Grossman have successfully asserted personal negligence by Nicholas? It is submitted not. The trial judge erred in holding that the appellants were licensees on that part of the property of the Crown where the accident took place. A licensee is one who comes on the property by permission, express or implied, for his own purposes. It is doubtful if on the allegation in the petition the appellants are entitled to assert that they were licensees on the area where the accident took place but in any event it is submitted that they were not licensees. That area was formerly a landing field for the R.C.A.F. When the department took over and built the new runways, that area was not maintained by the Crown.

It is conceded that Grossman would have been a licensee of the Crown in landing on the hard-surfaced runways. The onus is on him to establish permission to land where he did. He must bring himself within the area of permission, the same as the invitee must bring himself within the area of invitation. There is no evidence that would establish permission to land where he did. The simple fact is that Grossman decided not to land on any of the four serviceable hard-surface runways but picked out the grassy area because he thought it looked like a good place to make a landing. His case appears to be that he has the right to dictate to the Crown where he shall land and that the Crown has no control over the situation at all. Exhibit 2, a diagram of the Saskatoon airport, shows a portion described as "Dotted area is abandoned airdrome". This is the area in which the accident took place. This exhibit, on which the Attorney General relies strongly, is an official publication obtainable from the Department of Natural Resources, Engineering Division, and can be had for the asking. Grossman had in his possession a map prepared in 1941, before the Saskatoon Airport was constructed and he never applied for any other information, maps or any other material before he decided

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to come to an airport of which he knew nothing. The permission, held out by the Department of Transport is the permission indicated by Exhibit 2, and if he had asked for a copy of this, the area of permission would have been plain. How can he be heard to say when he did not take the elementary precaution to get such a document from the department that he has the right to dictate the area of permission? If he had he would have seen detail as to the radio range and how to contact it, and would have been told where to land and to keep away from the area where he was hurt.

The appellants contend that because the grassy area on which Grossman landed was so used by other aircraft, that that would imply permission by conduct for him to land on the same area. This is not so. In order to establish such permission (1) There would have to be much more evidence than there was here to establish the circumstances regarding the use of this area by other craft. (2) If this craft was using the area by tolerance, to establish permission on the part of the Crown it would have to be shown that responsible officers knew of such use. (3) In any event Grossman would have to show that he relied on previous use as implied permission.

On the first point, there was no evidence under what circumstances or arrangements, if any, between Saskatoon Flying Club and the department this area was used by the club. It is to be assumed there must have been some contractual relationship. It is a fair assumption that other light aircraft landing on the area might have been doing so under some arrangement with the Flying Club, or without permission. The building marked "airport" is a C.P.R. building. If C.P.R. light aircraft were using the area, surely it would be with some contractual arrangement with the department and not by leave and licence or tolerance amounting thereto. On the second point, in order to establish leave and licence of the Crown, it would have to be shown that responsible officers of the department knew of such use. *Jenkins* v. *Great Western Ry.* (1); *Pianosi* v. *C.P.R.* (2). On the third point, assuming responsible officers of the department knew that light aircraft had been landing on the area for some time, Grossman,

(1) [1912] L.R.K.B.D. 525 at 533. (2) [1944] 1 D.L.R. 161 at 167.

to establish leave and licence to him, would have to show that he was aware of such licence. *Clark & Linsell*, Ed. 10, p. 653; *Lowrey* v. *Walker* (1).

In all these cases the injured party asserting leave and licence because of prior use by others, knew of the prior use and assumed that it would be in order for him to enter as the public had been doing. Here, Grossman had no such knowledge. *Coleshill* v. *Manchester Corporation* (2); *Jenkins* v. *Great Western Ry.* (3). It is submitted that the appellants would have to establish permission to land on the area. Assuming Grossman had been invited to land on the new runways and being an invitee was entitled to a higher degree of duty than a licensee, it is submitted that he would be outside the extent of the invitation if he landed where he did, or, in any event, would have to prove that the area was within the area of invitation. 23 Halsbury, 606, para. 855; *London Graving Dock Co.* v. *Horton* (4).

If Grossman used this area by leave and licence of the Crown, then the reasons of the trial judge are relied on, holding that there was no breach of duty on the part of the Crown to Grossman and his unfortunate accident was entirely due to his fundamental failure to use care for his own safety on strange territory. *Hounsell* v. *Smyth* (5); *Mersey Dock & Harbour Board* v. *Procter* (6); *Bay Front Garage Ltd.* v. *Evers* (7).

The judgment of the Chief Justice and Locke J. (dissenting) was delivered by:—

LOCKE J.:—The claim of the appellants against the Crown as pleaded is for damage sustained by an aeroplane, the property of the appellant Grossman, and personal injuries by the appellant Sun when an airplane, the property of and piloted by the former, landed at an airport near Saskatoon owned by the Crown and operated by the department. On the day in question the appellants had flown from Prince Albert to Saskatoon and they allege that when they arrived at the airport at the latter place they saw a building on which the word "airport" was legibly

(1) [1911] A.C. 10.
(2) 97 L.J.K.B.D. 229.
(3) [1912] 1 L.R. K.B.D. 525 at 534.
(4) [1951] 2 All E.R. 1.
(5) 141 E.R. 1003 at 1008.
(6) [1923] L.J.K.B. 479 at 489.
(7) [1944] S.C.R. 20.

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painted and observed landing strips and some other buildings, whereupon they proceeded to land, when the plane ran into a ditch which crossed part of the airport causing the damage and injuries complained of. Other than the fact that the word "airport" thus appeared, no invitation or permission to use the facilities of the airport is alleged.

The exact nature of the claims as pleaded is to be noted: after alleging that the ditch was not marked by clearly visible markings and was not "detectable" from the air, the appellants asserted that the ditch was made by officers and servants of the Crown "while acting within the scope of their duties of employment and in the course of establishing and constructing the said airport the said officers and servants allowed the ditch or excavation to remain open in such a manner as to provide a danger or hazard to aircraft landing at the said airport," and again:—

> the said officers and servants of the Crown owed a duty to the suppliant to construct and maintain an airport fit for landing, and the suppliants say that it was the duty of the said officers and servants to see to it that the said ditch was properly filled and protected and adequately marked, but failed in the performance of that duty while acting within the scope of their employment by allowing the said ditch or excavation to remain open as aforesaid and without adequate markings.

The appellants did not plead that there was any duty owing to them by the Crown but, showing a proper appreciation of their legal position, founded their claims on the alleged negligence of officers or servants of the Crown under subsection (*c*) of section 19 of the Exchequer Court Act.

While the claims as thus pleaded appear to be directed to the acts and defaults of the officers and servants of the Crown who, it was contended, caused the ditch to be excavated, and allege apparently a continuing duty on their part after its construction to see that it was protected and adequately marked, and are not directed to those of the officers or servants who were in charge of the airport at the time of the accident, I think, in view of the course of the trial in which inquiry was made without objection as to the identity and duties of various officers and employees of the Department of Transport at the time of the accident, that they should be considered as if a duty on the part of some or more of these persons towards the plaintiff had been pleaded and put in issue.

The action was tried before Mr. Justice Cameron and dismissed on the ground that the proximate cause of the accident was the negligence of the appellant Grossman. In arriving at this conclusion, the learned trial judge considered that the legal relationship existing between the Crown and Grossman was that of licensor and licensee and that the respective obligations of the parties were defined by cases such as *Fairman* v. *Perpetual Building Society* (1), and *Mersey Docks* v. *Procter* (2). Accordingly, on the footing that the Crown owed a duty to warn Grossman of the danger from the open ditch, only if it was not known to him or obvious if he had used reasonable care, and that he had failed to use such care, the action failed. With great respect for the opinion of the learned trial judge, I do not think the issues in the present case are to be determined on the basis that the Crown owed the appellants any such duty. The Crown owes no duty to the subject *qua* owner or occupier of property and it will be noted that no such claim is advanced in the petition of right. The matter must be decided, in my humble opinion, upon other principles.

The jurisdiction of the Exchequer Court to hear and determine claims against the Crown for 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, and the right of the subject to recover damages for loss so occasioned were established in Canada by section 16(*c*) of c. 16 of the Statutes of 1887. The history of this enactment has been traced by Duff C.J. in *The King* v. *Dubois* (3). In the form in which it now appears after the amendment made by s. 1 of c. 28 of the Statutes of 1938, it is s. 19(*c*) of the Exchequer Court Act (c. 34, R.S.C. 1927). Prior to the Act of 1887 it had been decided by this Court in *The Queen* v. *McFarlane* (4), following *Canterbury* v. *The Attorney General* (5) and *Tobin* v. *The Queen* (6), that the Crown was not liable for injuries occasioned by the negligence of its servants or officers and that the rule *respondeat superior* did not apply in respect of the wrongful or negligent acts of those

(1) [1923] A.C. 74.
(2) [1923] A.C. 253.
(3) [1935] S.C.R. 378 at 381 et seq.
(4) (1882) 7 Can. S.C.R. 216 at 234.
(5) (1843) 1 Phill 306.
(6) (1864) 16 C.B.N.S. 310.

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engaged in the public service. Of the many cases in which the effect of the section, in so far as it touches the present matter, is concerned, it is only necessary, in my opinion, to refer to three.

In *The King* v. *Canada Steamship Lines* (1), the steamship company claimed to recover for loss sustained in consequence of the collapse of a landing slip on a government wharf at Tadoussac. The pleadings alleged negligence on the part of various persons in the employ of the Department of Public Works. One Brunet, an assistant government engineer in the Quebec office of the department, whose duties required him from time to time to make inspections of Dominion government properties, had, some three days prior to the accident, landed at the wharf in company with a number of passengers from a vessel of the steamship company, and he said that the condition of the slip aroused apprehension in his mind for the safety of the passengers. On the following morning, he made what Anglin C.J. described, in delivering the judgment of the court, as a casual and perfunctory examination of the wharf, and, after requesting one Imbeau to examine the slip and make a written report, left Tadoussac. Imbeau who, it appears, was engaged as a foreman by the department, whenever government work was done at Tadoussac, but was not a regular employee, made an examination of the wharf and reported to the district engineer on July 7th that he had found the slip was in a very dangerous condition. On the same date the accident which gave rise to the claims occurred. The judgment in this Court found liability in the Crown. After saying that, had Imbeau been in the employ of the government when he inspected the slip on the 6th of July, his failure either to bar access to the slip or, if he had not authority to do so, to advise the department by telegram of the imminent danger, or at least to warn the responsible officers of the Canada Steamship Lines against making further use of the slip until it had been put in a safe condition, would have amounted to negligence which would have imposed liability upon the Crown, it was said that the evidence did not sufficiently establish that Imbeau was an officer or servant of the Crown, within the meaning

(1) [1927] S.C.R. 68.

of section 20(*c*) (now 19(*c*)) of the Exchequer Court Act. The fault of Brunet which imposed the liability was thus described:—

> The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection "comme il faut" of the slip because it might be "endommagé"—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work.

In *The King* v. *Hochelaga Shipping and Towing Company, Limited* (1), the owner of a towboat claimed damages from the Crown for injuries sustained by the vessel in striking a portion of the outer cribwork and rock ballast of a jetty projecting from the Dominion government breakwater at Port Morien, Nova Scotia. While the jetty was under construction a portion of it had been swept away by a storm and, in the result, the cribwork and ballast referred to were submerged, their presence being apparently unknown to those in charge of the towboat. At the trial in the Exchequer Court the Crown was held liable. Angers J. found liability in the Crown under section 19(*c*) in the following terms:—

> After a careful perusal of the evidence I have come to the conclusion that the accident is attributable to the negligence of officers or servants of the Crown, namely the district engineer and the assistant engineer under whose supervision the construction of the jetty and its reparation after the top part of the outer end thereof had been partially washed away were effected, acting within the scope of their duties or employment upon a public work.

On the appeal to this Court, Duff C.J. said: (p. 155)—

> I agree with the learned trial judge that the submerged cribwork which, after the superstructure of the jetty had been carried away, was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation; and that in leaving this obstruction without providing any

(1) [1940] S.C.R. 153.

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such warning the officials concerned are chargeable with negligence for which the Crown is responsible by force of section 19(c) of the Exchequer Court Act.

Crocket J., with whom Rinfret J. (as he then was) and Kerwin J. agreed, after referring to the finding of negligence made at the trial, said that he agreed that the collision: (p. 163)—

was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19(c) of the Exchequer Court Act. It was not a case of mere non-repair or non-feasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

Davis J. said in part: (p. 170)—

What is contended for by the Crown is that the Exchequer Court had no jurisdiction because there could be no duty on the Crown to remove the submerged pile of balast; consequently no duty on any officers or servants of the Crown to remove it and a fortiori no negligence on the part of officers or servants of the Crown in not removing it. But I agree with the view taken by the learned trial judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

In *The King* v. *Anthony* (1), the claim advanced against the Crown was for a loss from fire started by a tracer bullet fired through the window of a barn by a private soldier. It was shown that at the time of the occurrence this man, in company with two non-commissioned officers, was driving along a road, the men being under orders not to fire except upon the command of a superior officer. The man whose act caused the damage had, at least once before he came to Anthony's property, fired live ammunition, and the contention of the suppliant was that the failure of the non-commissioned officers to prevent him from firing was negligence of the nature referred to in section 19(c) and imposed liability. The suppliant succeeded at the trial but this judgment was reversed and the action dismissed on the appeal to this Court. Rand J., with whose judgment Rinfret C.J. and Hudson J. agreed, in dealing with the liability imposed by the subsection, said in part: (p. 571)—

I think it must be taken that what paragraph (c) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour

(1) [1946] S.C.R. 569.

of subjects: *The King* v. *Dubois* (1) at 394 and 398; *Salmo Investments Ltd.* v. *The King* (2), at 272 and 273. It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

After saying that if the liability were placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, there would be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen, Rand J. said further (p. 572):

> This raises the distinction between duties and between duty and liability. There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of *respondeat superior;* the former does not.

The majority of the Court considered that the non-commissioned officers owed no such duty towards the suppliant, as was contended for. Kerwin and Estey JJ. dissented, they both being of the opinion that one of these non-commissioned officers, one Williams, a sergeant major, owed a duty to the suppliant to prevent the men under his charge from firing and that, accordingly, the Crown was liable. In the *Canada Steamship's* case the evidence as to the scope of Brunet's duty was meagre and whether he was vested with authority to prevent the further use of the wharf for the purpose of landing passengers until it was rendered safe for use does not appear and, whether the "dereliction of duty" referred to in the passage from the judgment of Anglin C.J., above referred to, was of a duty owed to the Crown as his employer, or one which he owed to the steamship company or other persons who might utilize the wharf as a place to land, is not stated. Neither the various judgments written nor the written arguments filed by the parties in that case or in the Hochelaga case indicate that the question as to whether any officer or servant of the Crown had incurred personal liability was argued.

Some two years before this accident, extensive improvements and additions to this airport were made at the instance of the Department of Reconstruction and Supply

(1) [1935] S.C.R. 378. (2) [1940] S.C.R. 263.

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of Canada. Under a contract dated June 25, 1946, made between His Majesty, represented by the minister of that department, and Tomlinson Construction Company, Ltd., a contractor, the latter undertook, *inter alia,* the construction of two concrete landing strips, each something more than a mile in length, and the excavation of the open ditches for the purpose of draining water from these strips, this being effected by a system of buried pipes draining into the ditches. Mr. Edward F. Cook, the district airways engineer of the Department of Transport at Winnipeg, supervised the construction of these and other works necessary for the operation of an airport by the contractor. The plan of having these open ditches which were some 48 ft. in width and varied from 7 to 11 ft. in depth was no doubt that of the professional advisers of the Department and was obviously approved and adopted on behalf of the Crown by the minister. Such open ditches situate some 600 ft. from the hard-surface runways as a means of drainage were adopted at other airports constructed for the department at The Pas, Weyburn, Brandon, Portage la Prairie and Winnipeg. It is not suggested that Cook was himself responsible for the opening of these great ditches, nor charged with any duty in respect of them other than to see that the work was properly done by the contractor, nor that he had any continuing duty in regard to them afterwards. The work was not done by any officer or servant of the Crown but by an independent contractor under the terms of this contract. There was, however, at the airport an employee of the department by the name of Nicholas who was described as the airport maintenance foreman, a position which he had occupied for some time prior to 1946. In giving evidence he said that his duty was to supervise the airport and maintain it in good condition and, if it was necessary, to put up any markings to give instructions for this to be done. According to him, he had caused to be placed 18 or 20 red woolen flags approximately 2 ft. by 3 ft. in area on posts in the vicinity of the open ditches to indicate their presence. In paragraphs 7 and 8 of the petition of right which, for the reasons above indicated, I think should be taken as directed to the conduct of Nicholas, it is alleged that he owed a duty to the suppliants to properly fill in, protect

and adequately mark the ditches. There was apparently no officer of the Department of Transport, senior to Nicholas at Saskatoon, concerned with the operation of the airport, but it cannot be seriously suggested that he could have directed that the ditch, constructed under the direction of the Minister for these purposes, be filled in. I do not understand what is meant by the allegation that it was his duty to see that the ditch was properly "protected." The suppliants' claims must, therefore, be based upon the contention that Nicholas owed a duty to them and to other people who might resort with their planes to the airport to warn them of the presence of the ditch, and that the damages claimed resulted from a breach of this duty.

The question as to the liability of a servant of the Crown occupying a position such as that of Nicholas is not, I think, decided by the judgments of this Court in the *Canada Steamship* and *Hochelaga* cases, where the question of the personal liability of such officers or servants was not argued or, so far as the judgments rendered indicate, considered. Since the claims are based upon the alleged negligence of Nicholas, the appellants must establish that he owed a duty to them to warn them of the presence of the ditch. It is, of course, not sufficient that under his contract of employment with the Crown it was his duty to see that any dangers, obstacles or obstructions on the airport be marked, so as to warn aviators of their presence. Nicholas was neither the owner, occupant or operator of the airport and no liability in any such capacity can be asserted against him. The claim, therefore, is clearly not for an act of misfeasance but of alleged non-feasance.

In *Adams* v. *Naylor* (1), which was decided in the House of Lords a few weeks earlier than the decision of this Court in *Anthony's* case, a claim was advanced against an officer of the Royal Engineers for injuries sustained by children in a mine field laid by the military authorities as a measure for the defence of the country. It was the practice in England, under such circumstances when a Crown servant might be involved, for the Crown on request to supply the name, for example, of the driver of a Crown vehicle or the navigating officer of a Crown ship at the time of an accident,

(1) [1946] A.C. 543.

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and in this matter the Crown, when appealed to by the plaintiffs to furnish the name of the Crown servant who was in charge of the mine field and responsible for its maintenance, gave the name of Captain Naylor. In the Court of Appeal (1), in addition to considering the effect of the Personal Injuries (Emergency Provisions) Act 1939, which the Crown contended was an answer to the action, there was a lengthy discussion as to whether the children who had gone into the mine field without permission were trespassers and, if so, the nature of the duty owed to them as such. In the House of Lords Viscount Simon, after saying that, in his opinion, the action was barred by the provisions of the statute, pointed out that apart from that question the issues were not really issues between the plaintiffs and the Crown, the point being as to whether there was personal liability on the part of Captain Naylor. As to this he said in part (p. 550):

> The courts before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owed a duty of care to the plaintiffs and has failed in discharging that duty. Whether the plaintiffs in the present case would succeed in doing this it is superfluous to inquire, since the decision goes against them on other grounds; but it may be useful to put on record, in passing, that the success of the plaintiffs would depend on establishing the personal liability of the defendant to them, as the Crown is not in any sense a party to the action.

Lord Simonds, who stated his agreement with Viscount Simon, said in part (p. 553):

> I must confess that, had it not been for the fact that the Act under consideration afforded a defence to the action, I should myself have had great difficulty in understanding what was the duty alleged to be due from the defendant, an officer of His Majesty's army, to a member of the public in respect of acts done or omitted to be done in course of his military service.

Lord Uthwatt pointed out that the case had been treated in the Court of Appeal as if the defendant was the occupier of the land and that it was not open to the parties to the suit by agreement to have the matter dealt with on what was shown to be a false footing. The allegation made in the statement of claim as to Naylor's connection with the matter was that he was the officer of the Royal Engineers

(1) [1944] 1 K.B. 750.

"in control and responsible for the maintenance and safeguarding of the mine field", but the case pleaded had not been dealt with.

There is no statute in England corresponding to section 19(*c*) of the Exchequer Court Act imposing liability upon the Crown and apart from the issue as to the application of the Personal Injuries Act the question to be determined was the same as in the present case. Where the claim advanced against an officer or servant of an employer is for misfeasance, the issue of liability does not, of course, depend upon the existence of that relationship: it is the commission of the tortious act which gives the right of action. In *Lane* v. *Cotton* (1), the action was brought against the Postmaster General for the recovery of certain Exchequer bills which had been contained in a letter delivered to a clerk at the post office and lost. Holt C.J., who disagreed with the majority, he being of the opinion that the Postmaster General was liable, in referring to the liability of the clerk and officer of the post office appointed "to take in and deliver out" letters at the London Post Office, said in part (p. 489):

> It was objected at the bar that they have this remedy against Breese. I agree, if they could prove that he took out the bills they might sue him for it; so they might any body else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, quatenus such cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrong-doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrong-doer or refuser.

In *Perkins* v. *Hughes* (2), Lee C.J., delivering the judgment of the Court of King's Bench, said in part (p. 41):

> In the case of *Lane* v. *Cotton* (1), the following distinction, which, in our opinion, is well founded, was taken by Holt C.J. namely, that where an injury arises from the neglect of a servant, an action only lies against his master, for that a servant is not answerable, quatenus servant, for neglect: but that where an injury arises from the misfeasance of a servant, he is himself liable to an action, not quatenus servant, but as being a wrong-doer.

(1) (1701) 12 Mod. 488.
(2) (1752) Say 41.

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In *Mersey Docks Trustees* v. *Gibbs* (1), the House summoned a Court of judges consisting of Blackburn, Keating and Shee JJ. and Channell B. and Pigott B., requesting them to answer two questions necessary to be determined in the action. The judgment of this Court written by Blackburn J., after referring to the judgment in *Lane* v. *Cotton* on the question as to the liability of a public officer for the negligence of his subordinates, said in part (p. 111):

> But these cases were decided upon the ground that the government was the principal, and the defendant merely the servant. If an action were brought by the owner of goods against the manager of the goods traffic of a railway company for some injury sustained on the line, it would fail unless it could be shewn that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal, or against the immediate actors in the wrong.

and referred to Story on Agency, s. 313, as authority for the statement.

In Smith on Master and Servant, 8th Ed. 288, the learned author, after saying that as a general rule all persons concerned in the wrong are liable to be charged as principals, states:

> But for mere nonfeasance or omission of duty, a servant is not liable to answer in a civil action at the suit of third persons, but only to his own master, who, in accordance with the maxim already alluded to, "*Respondeat superior*," is liable to answer for his servant's neglect. This distinction between misfeasance and nonfeasance was thus stated by Lord Holt, in his celebrated judgment in *Lane* v. *Cotton*.

The statement of the law by Holt C.J. in *Lane* v. *Cotton* is referred to in Evans on Agency, 2nd Ed. 385, as the authority for the distinction between the liability of the employees for acts of misfeasance and of nonfeasance. In Story on Agency, 7th Ed. (1869) p. 385, the matter is dealt with as follows:

> The distinction, thus propounded, between misfeasance and nonfeasance,—between acts of direct, positive wrong and mere neglects by agents as to their personal liability therefor, may seem nice and artificial, and partakes, perhaps, not a little of the subtilty and over-refinement of the old doctrines of the common law. It seems however, to be founded upon this ground, that no authority whatsoever from a superior can furnish to any party a just defence for his own positive torts or trespasses; for no man can authorize another to do a positive wrong. But in respect to nonfeasances or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or

(1) (1866) L.R. 1 H.L. 93.

contract with each other; and no man is bound to answer for any such violations of duty or obligation, except to those to whom he has become directly bound or amenabe for his conduct. Whether the distinction be satisfactory or not, it is well established, although some niceties and difficulties occasionally occur in its practical application to particular cases.

It may be useful to illustrate each of these propositions by some cases which have been treated as clear, or which have undergone judicial decision. And, in the first place, as to the non-liability of agents for their nonfeasances and omissions of duty, except to their own principals. Thus, if the servant of a common carrier negligently loses a parcel of goods, intrusted to him, the principal, and not the servant, is responsible to the bailor or the owner. So, if an under-sheriff is guilty of a negligent breach of duty, an action lies by the injured party against the high sheriff, and not against the deputy personally, for his negligence.

In the United States courts the accuracy of the above statement of the law in *Lane* v. *Cotton* appears to have been generally (though not universally) accepted. Thus, in *Murray* v. *Usher* (1), Andrews J., delivering the judgment of the Court of Appeals of New York, said in part:

The general rule of *respondeat superior* charges the master with liability for the servant's negligence, in the master's business, causing injury to third persons. They may in general treat the acts of the servant as the acts of the master. But the agent or servant is himself liable, as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former, the servant is in general liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity, and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone; and the nonfeasance of the servant causing injury to third persons is not, in general at least, a ground for a civil action against the servant in their favour. *Lane* v. *Cotton*, 12 Mod. 488; *Perkins* v. *Smith*, 1 Wils. 328; *Bennett* v. *Bayes*, 5 Hurl. & N. 391; Smith, Mast. & Serv. 216, and cases cited.

The same view of the law is expressed in the judgment of Martin J. (2), where the portion of the judgment of Andrews J. above quoted was approved and adopted. In *Kelly* v. *Chicago & Alton Railway Co.* (3), where a yard-master in the employ of the railway company was joined as a party defendant, the plaintiff alleging that he had neglected to make an inspection of the engine which had exploded and caused injuries, Philips J., referring to the above quoted passage from Story on Agency, held that the action did not lie.

(1) (1889) 23 N.E. 565.

(2) (1894) 75 Hun. 437 at 444.

(1) (1903) 122 Fed. 286.

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In my opinion, if there was failure on the part of Nicholas to cause adequate measures to be taken to warn aviators resorting to the Saskatoon Airport in their planes of the presence of the open ditch and if such failure caused or contributed to the accident, Nicholas is not personally liable and, accordingly, the action against the Crown should fail. The appellants' case cannot be placed upon a higher plane than it would be if Nicholas had been in the employ of a private person or a corporation, and in neither event would he, in my judgment, be personally liable, though the owner, occupant or operator of the airport might be. The appellants' difficulties are increased by the fact that the employer of Nicholas owed no such duty, as is asserted, against him to the appellants, but it appears to be unnecessary to deal with this aspect of the matter. For the contrary view, it may be said that aviators resorting to government aerodromes where they are at least permitted, if not invited, to land, are entitled to assume that some officer or servant employed by the government will take such steps as are necessary to warn them of danger from obstacles upon an airport and that this imposes liability on those employees of the Crown charged by it with that duty. I do not know how far it would be suggested that this liability should extend. Presumably, the officers of the Department of Transport whose duties would include that of seeing that Nicholas properly discharged his duties of maintenance at the airport and the government inspectors, if there were such, who inspected the airport facilities from time to time and who may have observed the warning flags exhibited and failed to do anything to remedy their inadequacy, if they were inadequate, would be involved in liability. Such a contention is not supported by authority, in my opinion.

With deference to contrary opinions, I do not think the point in this matter is affected by the decision in *Donoghue* v. *Stevenson* (1). In that case a shop assistant sought to recover damages from a manufacturer of aerated waters for injuries suffered as a result of consuming part of the contents of a bottle of ginger beer which had been manufactured by the respondent and which contained the decomposed remains of a snail. There was no claim against

(1) [1932] A.C. 562.

any employee of the manufacturer and the only point decided was as to the duty which the latter owed to the ultimate consumer of his product. While Lord Atkin, in dealing generally with the law of negligence, said in part:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

this, standing alone, is insufficient as a guide since there remains to be determined who is my neighbour. I am unable to believe that either this language or anything else said by Lord Atkin or by any of the other Law Lords who gave the majority decision in that case was intended to change the law as to the personal liability of an employee towards third persons injured by some failure on his part to perform a duty imposed upon him by his contract of employment. No such question arose for decision and the matter was not discussed either in the judgments or in the argument. There has been much discussion as to the exact point decided in the judgment of the majority of the court in *Donoghue's* case. There is an interesting discussion of the subject in the 14th edition of Pollock on Torts, pp. 344-5-6. I agree with the learned author that Lord Wright's statement as to this in *Grant* v. *Australian Knitting Mills Ltd.* (1), should be accepted, where, after referring to the decision in *Donoghue's* case and saying that their Lordships, like the judges in the courts of Australia, would follow it, said in part:

> The only question here can be what that authority decides and whether this case comes within its principles * * * Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin:
>
> > "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

The decision so summarized does not touch the point in the present case.

In the course of the able argument of Mr. Cuelenaere for the appellants, he referred to the Air Regulations enacted under the provisions of the *Aeronautics Act,* c. 3, R.S.C. 1927, which, *inter alia,* prescribe certain ground markings

(1) [1936] A.C. 85 at 102.

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to be exhibited on public aerodromes open to public use. These regulations cannot, in my opinion, affect the matter, since the aerodrome in question was operated by the Crown. Section 15 of the *Interpretation Act*, c. 1, R.S.C. 1927, declares that no provision or enactment in any Act shall affect, in any manner whatsoever the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby. The *Aeronautics Act* contains no such provision and while the regulations are declared to apply to state aircraft they do not assume to deal with the manner in which aerodromes operated by the Crown are to be marked.

The appeal should be dismissed with costs.

KERWIN J.:—The appellants' claim to recover against the Crown is based upon section 19(*c*) of the Exchequer Court Act as amended, by which that Court has jurisdiction to hear and determine a claim against the Crown arising out of any death or injury to the person or to the property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. It must now be taken as settled by this Court in *Anthony* v. *The King* (1), that the Crown's officer or servant must owe a duty to the third person, the breach of which would make him liable to that third party before the Crown's responsibility could attach under the section; that is, the rule *respondeat superior* applies. Philip R. Nicholas was the airport maintenance foreman and that in doing what he did, at the Saskatoon Airport, he was acting within the scope of his duties or employment does not, I think admit of doubt, and in my view he owed a duty to Grossman not to leave the ditch across the grass runways undesignated by something observable from the air that would give an intending user of the field warning of the danger.

The Saskatoon Airport did not have tower control and it should, therefore, have been within the contemplation of Nicholas that a flier, intending to alight on a public airport, such as that at Saskatoon, would use the grasss landing strip while the cement one was being repaired. The

(1) [1946] S.C.R. 569.

decision of the House of Lords in *Bolton* v. *Stone* (1), must be taken as a decision on its own particular facts. This was a case where Miss Stone, while on a highway abutting a cricket ground, was injured by a ball hit by a player thereon. The House of Lords reversed the decision of the Court of Appeal and restored the judgment at the trial on the ground that although the possibility of the ball being hit on the highway might reasonably have been foreseen, that was not sufficient, as the risk of injury to anyone in such a place was so remote that a reasonable person would not have anticipated it. While the result to the unfortunate plaintiff was disastrous, there is nothing to indicate that the well-known rule as exemplified in *Donoghue* v. *Stevenson* (2), was departed from, viz., that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. In my opinion the present case falls within that rule.

It is said that a mere act of omission by Nicholas would not be sufficient, and reference is made to the dissenting judgment of Lord Holt in *Lane* v. *Cotton* (3), where he states: "but for a neglect in him (a servant) they can have no remedy against him; for they must consider him only as a servant and then his negligence is only chargeable on his master or principal; for a servant or deputy, quatenus such, cannot be charged for negligence but the principal only shall be charged for it." This distinction sometimes referred to as the difference between misfeasance and nonfeasance has been generally recognized both in England and in the United States although not without some exceptions in the courts of the latter. The true rule, however, is I think that which distinguishes those cases where an agent is not liable in tort to third persons who have suffered a loss because of the agent's failure to perform some duty which he owed to his principal alone, from those cases where, in addition to a duty owing to the principal, the agent owed a duty to the third party. As Viscount Simon stated in *Adams* v. *Naylor* (4), the question whether the defendant in that case was personally liable was, of course, a question for the Court on the evidence.

(1) [1951] A.C. 850.
(2) [1932] A.C. 562.
(3) (1701) 12 Mod. 473.
(4) [1946] A.C. 543.

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In view of the basis of liability according to modern concepts in actions for tort, it should be held in the present case that Nicholas in either placing the flags, or permitting them to be placed or to remain in place, committed a negligent act for which he could be held liable at the suit of Grossman. That, I think, is consonant with the judgment of this Court delivered by Chief Justice Anglin in *The King* v. *Canada Steamships Lines Ltd.* (1), where it is stated: "In taking the risk of allowing the continued use of the wharf pending such report, and in failing to give any warning to the officers of the steamship company, Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part." Leave to appeal to the Judicial Committee was refused. The view I have expressed is also consistent with the decision in *The King* v. *Hochelaga Shipping and Towing Company, Limited* (2). In the reasons of the majority, delivered by Crocket J., it is stated that the collision that had occurred "was not a case of mere nonrepair or nonfeasance but of the actual creation of a hidden menace to navigation by a department of the government through its fully authorized officers and servants in the construction of a public work."

I quite agree that in these two cases the point now under discussion was apparently not raised acutely but those decisions may, I think, be justified on the ground I have suggested.

As to what Grossman did, I am content to adopt the reasons of my brother Taschereau but I might emphasize that while the trial judge had a view of the airport, conditions had changed since the day of the occurrence, and, in any event, he had only such evidence as was given before him as to what, on the day in question, was observable from the air. My brother Taschereau has also dealt with that aspect of the matter and I agree with what he has said.

I would allow Grossman's appeal and direct judgment to be entered in his favour for $7,003.90, the amount of his damages fixed by the trial judge. Grossman is entitled to his costs of the action and appeal. As the total amounts

(1) [1927] S.C.R. 68 at 77. (2) [1940] S.C.R. 153.

claimed by Sun is $440, this Court has no jurisdiction under the provisions of the Exchequer Court Act to hear his appeal which should be quashed without costs.

TASCHEREAU J.:—The suppliants in their petition allege that on the 19th of July, 1948, they took off from the airport at the city of Prince Albert, province of Saskatchewan, to fly to the city of Saskatoon, and that on arriving at the said airport, they ran into a ditch or excavation running across the used portion of the airport. As a result, Grossman's aircraft was demolished and Sun, the passenger, suffered bodily injuries.

Grossman claimed from His Majesty the King, in the rights of the Dominion of Canada, owner of the airport, the value of the plane, plus $785 for expenses, making a total of $7,705. Sun's claim amounted to $440 for personal injury. The Exchequer Court dismissed both claims with costs, hence the present appeal.

Grossman, who is a resident of DesMoines, Iowa, U.S.A., was the owner of the craft, a Stinson Station Wagon, registered under No. N.C. 893C, with the Civil Aeronautics Administration, and on the date of the mishap, was the holder of a pilot's license, since May, 1946. He was an experienced pilot, having flown previously approximately 450 hours. On this particular occasion, he had entered Canada from the United States at Winnipeg and had stopped at Lethbridge, Calgary, Bienfait, before leaving Prince Albert to go to Saskatoon. He left Prince Albert at about 2:30 p.m. when the flying conditions were good; the wind was blowing lightly from the southeast, and as he says in his evidence, the ceiling was "ideal".

He flew at a level of 3,000 feet above the ground, and of about 4,500 to 5,000 feet above sea level. He was in possession of a map previously obtained from a Canadian Airport at Melfort, called "The Saskatoon-Prince Albert-Saskatchewan-Area", which indicated that the Saskatoon airport was a *public airport*. At a distance of approximately 15 miles from Saskatoon, Grossman started to reduce his altitude to 2,500 feet, and as he reached the airport he flew at 1,500 feet. As the airplane was equipped with a two-way radio, he tuned into tower frequency 275 K.O.L. which is the universal control frequency, but as there was no

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tower control in operation at Saskatoon, he received no answer. He had no trouble in finding the airport even from a great distance, as the visibility was very good. He was aware that new runways had been built recently, and he states that he could see them very well from the air. One runs northwest, southeast, and the other approximately east-west. They extend for a distance of over 3,000 feet, and are hard surfaced strips capable of being used by the heaviest planes. To the east of these new strips are the old R.C.A.F. runways, north of which, in the northeast corner of the airport, is a grass landing strip running north-south, and a small building on the east, owned by the Canadian Pacific Air Lines. This grass air field is used by the Saskatoon Flying Club, the Saskatchewan Air Lines, and some other light planes which frequently land at that particular place. It is to be noticed that the boundary markings used on that grass landing ground were still there at the date of the accident.

When Grossman spotted the airport, he made what is called a "pass over the field." He looked at the windsock, and made a turn and planned to land on one of the new runways, but as he saw men at work, he regained altitude and continued his flight, proceeded east and then north, when he observed a building with the word "Airport" printed in large letters on the roof, and to the west of this building, that part of the grass surface of the airport used as runways. Continuing north, he then turned towards the west and then to the south, and made his landing well down on the north-south strip, and he testifies that he gave himself more than adequate space to complete his landing before arriving at the building, where he intended to bring his plane to a stop. The evidence reveals that he made a 3-point stall landing at 55 miles per hour, and was rolling along the grass runways, when he suddenly realized that there was an obstruction in front of him. He decided to attempt a take-off, but did not succeed in lifting his craft, and his under-carriage caught the south side of a ditch and his plane crashed into the ground.

This airport was originally operated by the Royal Canadian Air Force, but after the last war, was taken over by the Department of Transport, when it was decided to build the two new hard surfaced strips, which were in use

long before the date of the accident. It was then deemed necessary to provide for adequate drainage, and a sum of approximately one million dollars was expended. A large open ditch was dug about 2,000 feet in length, 48 feet wide, and varying in depth from 7 to 11 feet, *intersecting the old gras strip at right angles,* at 2,800 feet from the north limit of the airport, but, it was found too expensive to fill it. It is in evidence that those in charge, allowed grass and weeds to grow on both sides of the ditch, making it harder to detect its location from the air; approximately 17 to 18 flags were placed on each side of the ditch to indicate an actual danger, known to those in charge of the field, but which oncoming pilots could not easily ascertain, unless sufficiently informed.

The suppliants contend that the warning was insufficient, and with this submission I agree. Philip R. Nicholas, the airport maintenance foreman, admitted in his evidence that the danger resulting from the presence of the ditch was discussed and that complaints had been received with respect thereto. As to the flags which he placed in 1946, in order to warn oncoming planes, he is "not just too sure as to how distinguishable they were". He admitted, after comparing the exhibits, which were photographs of the ditch and of the flags, that the flags and posts present at the time of the trial, were considerably more numerous than those which existed in July, 1948, the month in which the accident happened. Many witnesses were called on behalf of the appellant and of the respondent as to the visibility of these flags and of the ditch from the air. Some say that they were hardly visible, that the ditch could be mistaken for a roadway; some others, that it is possible to detect it, flying at a height of 600 to 800 feet. As to the appellant Grossman, he is very emphatic in his evidence that he did not see the flags or the ditch.

It is undisputable that a *public airport,* as this one was, must offer a standard of security, at least equal to the one required by the regulations enacted by the competent authorities. (P.C. 2129). Air Regulations provide:

12. At every land aerodrome open to public use, the boundaries of the landing area shall, by means of suitable markings, be rendered clearly visible both to aircraft in the air and to aircraft manoeuvring on the landing area. In addition, a circle marking may be placed on the landing area. *All obstructions existing on a landing area shall be clearly marked.*

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In case part of the marked landing area should become unfit for use, this part shall be delimited by clearly visible markings or flags, and may, in addition *be* indicated by one or more clearly visible crosses.

Air Regulation 13 says:—

13. (*d*) (1) When special circumstances call for a prohibition to land liable to be prolonged, *use shall be made of a red square panel*, placed horizontally, each side of which measures at least 10 feet and the diagonals of which are covered by yellow strips at least 20 inches in width, arranged in the form of an X;

(2) When the bad state of the landing area or any other reason calls for the observance of certain precautions in landing, *use may be made of a red square panel*, placed horizontally, each side of which measures at least 10 feet and one of the diagonals of which is covered by a yellow strip at least 20 inches in width;

These requirements were surely not fulfilled in the present case, and I have reached the conclusion, that the obstruction on the landing field was not sufficiently clearly indicated. These small flags were most probably visible from the ground, and could serve as a warning for a take-off, but it is common knowledge, and the preponderance of evidence so reveals, that from the air, placed as they were on perpendicular posts, their efficacy was practically nil. Leslie Deane, superintendent of maintenance and operations for the Saskatchewan Government Airways, flew the day after the accident to the Saskatoon Airport, and he testifies that he could not see the flags, nor detect the ditch. I quite agree that a pilot familiar with that airport, and consequently aware of the existence of this obstruction, could from the air realize the obviousness of the danger, but it was Grossman's first attempt to land on that field, which he could expect to find in a safe condition, unless otherwise properly and efficiently cautioned. Airfields must offer sufficient safety not merely to those who have knowledge of the actual danger they may present, but also to those who, unaware of an existing and insufficiently made known peril, use their facilities for the first time. In *Imperial Airways Limited* v. *National Flying Services*, which is an English case but reported in U.S. Aviation Reports, 1933, at page 50, an aircraft was damaged falling through the cover over a concealed stream running across the middle of an aerodrome. It was held by Lord Hewart that the proprietors of an aerodrome, are under obligation to see that the aerodrome is safe for use by such aircraft as

are entitled to use it, and that a *proper* warning of any danger of which they knew or ought to have known must be given.

It is said on behalf of the Crown that if Grossman had dragged the field or made what has been called a "dummy run", he would have seen the obstruction, and avoided the accident. After having unsuccessfully attempted to land on the hard surfaced strip, on account of men being at work, the appellant made a circuit to reach the grass landing field. If, as suggested, making a "dummy run" means flying at a low level, all across the field, to find possible obstructions, this would amount to a violation of Air Regulations 41 and 42 which read as follows:

41. If an aerodyne starting from or about to land on an aerodrome makes a circuit or partial circuit, *the turning must be made clear of the landing area and must be left-handed* (anti-clockwise), so that during such circuit the landing area shall always be on its left.

42. (*b*) Landings shall be preceded by a descent in a straight line, commenced at least 3,000 feet outside the perimeter of the landing area;

The appellant followed, I think, the recognized and proper method in landing. He made an anti-clockwise circuit of the field, and descended in a straight line towards what appeared to be a safe marked grass strip, made a successful landing and was rolling on the ground towards the hangars when the accident happened. What he did was in accordance with the regulations, and I cannot see that any negligence may be attributed to him. Mr. B. F. Burbridge, Inspector of the Department of Transport, Civil Aviation, who was called as a witness by the respondent, justifies in his evidence what Grossman has done when he attempted to land. He states that a pilot must not cross the airfield, but *must fly around the boundaries* of the airport. The only crossing allowed is to fly down the runway which is in use. He adds that it is not necessary for a pilot to make a "dummy run" over a particular runway if he has previously observed the field. This appears to be in complete harmony with the Air Regulations and the occurrences in the instant case.

It is also argued that appellant failed to obtain the necessary information as to the landing conditions of the field where he intended to land. Before leaving Prince Albert, he had with him an air navigation map supplied

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by the Department of Mines and Resources, indicating that the Saskatoon Airport was a *public airport,* which under the Air Regulations is a centre for air traffic, containing installations necessary for such traffic. He inquired as to the facilities of the airport, and from the information obtained it was reasonable for him to conclude that he would not later encounter the difficulties that he experienced with such unfortunate results. Upon approaching Saskatoon, while flying at a height of 2,500 feet, he attempted to contact the control tower but he received no answer. When there is a control tower, it is from there that the aerial traffic is governed, and all pilots are bound to comply with the instructions they receive from the operator. But when there is none, (and there are only 5 per cent of the used airports which are thus equipped) pilots must land after having taken the necessary precautions that ordinary prudent men would take under similar circumstances. There is no obligation sanctioned by law or by common practice to contact any other station called radio range or otherwise, which is not concerned with traffic, but mostly with weather conditions, particularly when there is no danger *reasonably foreseeable,* and nothing appears abnormal. It is by virtue of the regulations, the obligation of the airport itself to warn by *clearly marked signs* of any obstructions on the field, and not the duty of the pilot to inquire if any employee has been negligent, and if his life is in peril *by accepting the implied invitation to land.* (Vide International Civil Aviation Conference, 1944, sections 5 and 28). It would otherwise be tantamount to a total reversal of the respective duties and obligations imposed by law to the parties. Of course, it would be more efficient for the pilot to do so, but the law does not require such a high standard of care. Perfection in the actions or behaviour of men is not a condition *sine qua non,* to the right to claim damages. Motorists who drive on public highways, captains who bring their ships into port, are entitled to expect that the road will be in a safe condition, that there will not be any submerged object to obstruct navigation. *King* v. *Hochelaga Shipping* (1). Unless he knows of the danger, on account of its obviousness or otherwise, the driver of the automobile, or the captain of the

(1) [1940] S.C.R. 155.

ship is entitled to be warned of its existence. The right of a pilot of an aircraft, invited to land on a public airfield is identical.

The respondent further contends that even if Grossman was not negligent, the responsibility of the Crown cannot be involved. The basis of its liability could only be found in section 19(*c*) of the Exchequer Court Act, which is as follows:—

> 19. The Exchequer Court shall also have 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 the property resuting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

During a period of many years this Court has determined what is the liability of the Crown as a result of the negligence of its employees, in circumstances similar to those with which we are now dealing.

In *The King* v. *Canada Steamship Lines Limited* (1), it was held that an employee of the Crown in allowing continued use of a wharf at Tadoussac, and *in failing to give warning* to the Steamship Company of the dangerous condition of the premises, was guilty of negligence as an "officer or servant of the Crown while acting within the scope of his duties or employment", and that his neglect entailed the liability of the Crown for consequent injuries.

In *The King* v. *Hochelaga Shipping Company,* (cited *supra*) the employees of the Crown had left a submerged crib work near a government breakwater, that had broken away during a storm, with nothing to warn navigators of its presence. The Court decided that this obstruction constituted a dangerous menace to navigation, and that for not providing *the necessary warning,* the officials and servants of the Crown in charge of these works, were chargeable with negligence for which the Crown is responsible by force of section 19(*c*) of the *Exchequer Court Act.*

What this Court held in these two cases clearly indicates that the employees of the Crown failed in their duty to third parties, that their negligence, although arising only out of an omission to act, entailed *their personal liability,* and consequently the vicarious liability of the Crown. The

(1) [1927] S.C.R. 68.

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Court was not merely confronted with cases of nonfeasance of acts which should have been done by the servant, as the result of a contract between the employer and the employee, and which would not involve the personal liability of the latter to third persons, but with the failure to perform a duty owed to the victims. (Halsbury, Vol. 22, page 255).

The Crown strongly relies on the more recent decision of this Court in *The King* v. *Anthony* (1). In that case, two aspects of the vicarious liability were considered. It was held firstly, that the act of the soldier in shooting an incendiary bullet into a barn, which eventually burnt, could not be treated as an act of negligence committed while acting within the scope of his duties; it was a wilful act done for his own purpose, quite outside of the range of anything that might be called incidental to them. Secondly, it was said that the failure of the officer in charge of the group of soldiers, to prevent one of them from firing the shot, did not constitute a breach of private duty to the owner of the barn, and that the rule *Respondeat Superior* did not apply. His omission to exercise his authority was a breach of military law, for which he was accountable to his superiors, but his dereliction could not be considered as enuring to the private benefit of other persons. There were special circumstances which governed the *Anthony* case, which do not exist in the present instance. In the former, the personal liability of the officer in charge, an essential element to the application of the rule *Respondeat Superior,* was not shown to be present, but in the case at bar, we must, I think, necesarily be guided by the principles enunciated in *The King* v. *Canada Steamship Lines,* and *The King* v. *Hochelaga* (cited *supra*), which remained unaffected by what has been said in the *Anthony* case.

In these two cases, as in the present one, the negligence was the failure to warn of an existing danger that the employees of the Crown in the performance of their duty, knew or ought to have known, bringing into play section 19(*c*) of the Exchequer Court Act. I would indeed be loath to hold that an employee of the Crown, whose concern it is to maintain an airfield in proper and safe condition, and to indicate by visible marks all dangerous obstructions,

(1) [1946] S.C.R. 569.

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would not if he failed to do so, be neglectful of his duty to oncoming pilots whose welcome on Canadian soil has been sanctioned and recognized by an international agreement with foreign countries. It is from him that diligence and alertness is rightly expected. His lack of vigilance is a personal negligence, for which the "Superior" is answerable before the courts. It follows that the Crown must be held liable for the damage caused to the plane and for other losses incurred by plaintiff Grossman, to the extent of $7,003.90, as assessed by the trial judge for the purpose of the present appeal, although he dismissed the petition. The other petitioner Sun, is exactly in the same position as Grossman, but unfortunately his claim must be refused, as the amount involved is not sufficient to give jurisdiction to this Court to hear his appeal, and grant the remedy to which he would otherwise be entitled.

I would therefore allow Grossman's appeal for $7,003.90 with costs throughout, and quash Sun's appeal without costs.

KELLOCK J.:—The airport here in question was at the relevant time owned and operated by the Crown. In what appears roughly to be its centre, two concrete strips had been built to accommodate very large aircraft. These strips run approximately north-west and south-east, and east and west respectively, intersecting at their northerly limits. Older concrete strips existed on the field prior to the making of the new strips. The new strips crossed the older ones at more than one point. There was also in the north-east corner of the airport area a grass landing strip running north and south, to the east of which and toward its northerly end there was a building owned by the Canadian Pacific Airlines, which had painted on its roof the word "Airport" clearly visible from the air. This grass landing strip was marked by some boundary markings which at the same time indicated to aircraft that the area further to the east and north was unfit for landing. The grass strip was used by the majority of the smaller and lighter types of planes. The plane of the appellant was of that type.

At the time the two new concrete strips were built in 1946, a large open ditch had been dug running south-easterly from the easterly end of the east-west strip for a distance of

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approximately 2,000 feet. This ditch was about 48 feet in width at the top and varied in depth from 7 to 11 feet. It cut through the grass strip at about right-angles at a point about 2,800 feet from the north limit of the airport, and about 1,300 feet from the south limit of the strip itself, where the hangars were situate. At the time of the accident, the raw wound originally made in the earth by the excavation had become covered by a growth of weeds, affecting its visibility considerably. The only marking of the ditch consisted in a number of posts about 10 feet high on which red flags had been placed. When originally placed, the posts were brightly painted, but at the time of the accident they had become quite dull and many of the original posts appear to have disappeared, the actual number in position at the time of the accident being quite uncertain. Some of the witnesses place this number as low as six. In the year following the accident, the posts were painted "international orange and white", and solid panels or frameworks capable of swinging a full circle were substituted for the flags.

The learned trial judge finds on the whole of the evidence that, at the time of the accident, pilots knowing of the existence of the ditch could readily locate its position, but that a pilot who did not know of its existence would have difficulty in seeing either the ditch or the flags unless he first flew over the field at a height of 1,000 feet or less.

The suppliant, before coming to the airport here in question, had, on entering Canada, landed at Stevenson airfield, Winnipeg, and had also made landings at Port Arthur, Melfort, Portage and Kenora. On an earlier trip he had also landed at Lethbridge, Calgary, Bienfait and Moose Jaw.

The day of the accident was bright and clear with a light, variable wind. At the time the appellant left Prince Albert the wind was south-easterly, and he testifies that that was still the direction as indicated by the air sock at the airport when he arrived at Saskatoon. There was evidence adduced by the respondent that its direction had changed to northerly, but the wind direction is not the subject of a finding.

The learned trial judge considered that the ditch in question constituted

"an obstruction on the runway of a public airport."

In his view, failure to give adequate warning thereof to those lawfully using the facilities of the airport and exercising reasonable care, would constitute negligence for which the Crown could be liable under the provisions of s. 19(*c*) of the *Exchequer Court Act*. He then considered the question as to the nature of the duty, if any, owed to the appellant in the circumstances, holding that as the airport was admittedly one open to public use, the appellant could not be considered a trespasser. He continues,

> There is no evidence as to whether any fees were charged to the owners of airplanes which landed on the airport, or whether such services as the supplying of gas and oil or storage were supplied by the respondent or by tenants on the property.

In these circumstances, he was unable to find that the appellant was

"invited into the premises by the owner or occupier for some purpose of business or of material interest,"

and therefore came to the conclusion that the appellant was to be considered a licensee.

The evidence which the learned trial judge thought was lacking is, however, present. Exhibit 2 is a publication of the Department of Mines and Resources produced by the respondent. On the argument before us it was contended for the respondent that no part of this document had been put in evidence except the diagram of the airport. The document, in addition to the diagram, contains a good deal of information as to the airport, and includes the following:

"GROUND FACILITIES

Hangars
Available

Fuel and Oil
Available"

All of this was placed in evidence by the respondent. I do not think, therefore, that the appellant can be treated as a mere licensee. He was an invitee. This renders inapplicable the view of the learned trial judge on the question as to the nature of the duty owed by the respondent to

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the appellant, namely, that the only duty on the part of the respondent was not to allow anything in the nature of a trap to exist.

The learned judge expressly finds, however, that it was well known to those in charge of the airport that that part of it north of the ditch, on which the appellant landed, was in daily use by a large number of light planes, and that it was the duty of the airport manager to mark any obstructions, the ditch being one.

Nicholas, who was in charge of the airport for the Crown testified that it was left to him to take all proper precautions with respect to the field and its markings. In 1946 he had placed the red cloth flags on the poles. These were the only markers or warnings placed at or near the ditch, and the fact that he did place them there indicates that he was alive to the danger constituted by the ditch.

Nicholas himself said that he had observed the ditch from the air after the flags had been put up, and deposed in this connection,

> Q. And did you particulary observe whether they could be seen from the air?
>
> A. I believe when they were first placed there I could see them from the air.
>
> Q. And later on you can't say?
>
> A. Later on I am not just too sure as to how distinguishable they were.

While the learned judge found that

> the existence of the old boundary markers there and of the building marked "Airport" would indicate to a pilot that there was there a small area available for landing,

he was of opinion that the

> proper practice to follow in approaching a strange landing area and where the facilities of the control tower or radio range are not used is that of "dragging the field," or making a "dummy run" over the landing strip at such an altitude as would give full information as to existing conditions thereon.

This view of the learned trial judge is, of course, predicated upon the limited nature of the duty owed to the appellant. The duty of an occupier, however, toward an invitee is to take reasonable care that the premises are safe; *Addie* v. *Dumbreck* (1), per Lord Hailsham at 365.

(1) [1929] A.C. 358.

It is established beyond peradventure that the strip upon which the appellant landed was part of the area upon which the public flying light airplanes were invited to land and did land constantly. It is admitted also that the ditch was an obstruction and was recognized as such. The attempt made to mark it for the danger that it was, was quite insufficient. It is contended on the part of the respondent that the international air regulations are not binding upon it. Accepting that point of view, the regulations are nevertheless evidence of what measures were recognized in order to protect against obstructions, including those of the nature here in question. Part V, Section 2, deals with ground markings, Article 12 of which provides that

> At every land aerodrome open to public use, the boundaries of the *landing area* shall, by means of suitable markings, be rendered clearly visible both to aircraft in the air and to aircraft manoeuvring on the landing area . . . *All* obstructions existing on a landing area shall be clearly marked. In case part of the marked landing area should become unfit for use, this part shall be delimited by *clearly visible* markings or flags, and may, in addition, be indicated by one or more clearly visible crosses.

Article 13(*d*) provides that

> (1) When special circumstances call for a prohibition to land liable to be prolonged, use *shall* be made of a red square panel, placed horizontally, each side of which measures *at least* 10 feet and the diagonals of which are covered by yellow strips at least 20 inches in width, arranged in the form of an X;
>
> (2) When the bad state of the landing area or *any other reason* calls for the observance of certain precautions in landing, use may be made of a red square panel, placed horizontally, each side of which measures at least 10 feet and one of the diagonals of which is covered by a yellow strip at least 20 inches in width;

How far short of this standard the posts and flags placed by Nicholas and allowed to disintegrate, falls, needs no comment. After the accident, new posts were put in on each side of the ditch and painted "international" orange and white, which the evidence shows is a clearly visible colour, and then, instead of cloth flags, a full panel of plywood painted red was placed on the posts in accordance with Article 13(*d*) (2). It cannot be said, in my opinion, on the evidence, that had this standard of care been observed, the appellant would not have seen the markings.

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In connection with his finding that it was the duty of the appellant to have made a "dummy" run over the landing area in which he landed before actually landing, the learned judge relies substantially on the evidence of the witness Burbridge, Inspector of Civil Aviation, Department of Transport. When giving evidence in chief on behalf of the Crown, this witness had said:

Q. In your opinion what procedure should a pilot follow when landing on an unfamiliar airport?

A. He should first of all land on a serviceable runway. If he is not familiar with that particular airport, if he never landed there before, if he is not in touch with flying *surely* he should make a dummy run on the landing strip on which he chooses to land.

It is plain to my mind that the witness, in his use of the word "surely," is arguing rather than giving evidence as to an accepted standard of care. That that is so appears very clearly from his subsequent evidence. He continues:

Q. What do you mean by a dummy run?

A. To run over the area of the ground he intends to land on, at a low altitude.

Q. At what altitude?

A. Any safe altitude.

HIS LORDSHIP: What do you mean by that? Low enough to give him—?

A. Accurate vision.

Q. Observation of the strip?

A. Yes.

He is then referred to the experience which the appellant had in discovering Nicholas and his workmen putting asphalt on the large concrete strip on which he had proposed to land, and he gave the following evidence as to what he would have done:

Q. What do you say you would have done if confronted with the same situation?

A. Coming in I would have carried out a dummy run of the landing strip that was into the wind, finding out those vehicles and workmen on that strip I would have carried out another circuit over the same area at a low altitude. After a while on the next dummy run, if the workmen and vehicles were still on the runway I would have carried out a second dummy run, and a third dummy run, and if they were still there if in any hurry to get out I would have used the other runway, the grass one.

In cross-examination, however, he explains the above.

Q. Coming down to conditions in Saskatoon, assuming you were coming in on the hard surface runway and you saw some men there, tell us what you think the pilot should have done.

A. I have done that.

Q. And you think he should have waved or signalled to the men?

A. Yes.

Q. Now, is it true that one or two courses would be open to him: either to signal to the men, or choose an alternative landing ground?

A. That is right.

* * *

Q. Supposing there were two strips, both in the same direction and the pilot saw one strip he could land on, would it be ordinary practice for him under those circumstances not to make a dummy run, but simply just use the other runway?

A. Provided he had surveyed the other strip.

With respect to the height at which this survey should be made, he had suggested, in chief, 100 feet from the ground. In cross-examination he gave the following evidence:

Q. At what height should the dummy run be made?

A. It is up to the capabilities of the pilot and the aircraft he is flying. Each pilot has his own capabilities.

Q. Let us put it this way. In light aircraft, at what height would you say the dummy run should be made?

A. With skill a pilot can carry out a dummy run at one hundred feet, provided there was no obstruction.

Q. But a slightly less experienced pilot, he could do that higher, is that it?

A. Yes.

Q. Would you say that he could fly at six hundred feet or eight hundred feet?

A. It is up to the individual pilot.

Q. It is entirely up to the individual pilot?

A. Yes.

* * *

Q. I think the regulations require a pilot to cross the airfield, do they not?

A. No.

Q. But it is a customary practice to cross an airfield?

A. To cross an airfield?

Q. To fly across an airfield?

A. Provided he carries out a circuit, that is to say, he flies around the boundaries of the airport.

Q. Is it customary to fly across an airfield and then make a circuit to land?

A. Provided you are flying down the live runway which is in use.

Q. What I am getting at is this: If a pilot sees a runway down on an airfield when he is making the circuit and there is no obstruction on it, would it be necessary for him to make a dummy run over that particular runway?

A. No, provided he had surveyed from one end of the runway to the other, so he could observe the runway from one end to the other.

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Q. Would you make a dummy run at one hundred feet over these hard surface runways?

A. Not exactly one hundred. I would use my own discretion. You can sometimes see an airport ten miles out and would more or less figure in the air, within two miles you can more or less survey the runway. It depends on the visibility.

Q. You can see it from quite a distance?

A. Yes, according to the visibility.

Q. Would you say it is common for people to make a dummy run at a very low altitude over airports?

A. No, it is not common. The only time you would really get down low would be with bad visibility.

Q. If it is good visibility you would not get down low?

A. No, definitely. It is bad practice. You survey the runway from the altitude you think you can observe all obstructions on the ground.

This evidence speaks for itself. There is other evidence to the same effect.

Neal, flying instructor of the Des Moines Flying Service, deposed:

Q. Do you know what the expression "dragging the field" means?

A. Yes.

Q. What does it mean?

A. That means to come down to a low altitude to observe the condition of the field as to landing. It is not a common practice at a controlled airport or municipal airport.

* * *

Q. Now, can you tell me, as an experienced pilot, when you drag a field, or drag an area?

A. That, sir, comes in landing at any other field, other than an airport, where you don't know the condition previously.

Q. What would you say as to the practice of dragging an airport from the safety factor?

A. Dragging an airport from the safety factor would depend greatly on the amount of traffic going on around it. If there is not other traffic maybe it is safe, if there is, it is entirely unsafe.

With respect to the use of his radio, the appellant made the recognized call on the proper frequency as he approached the airfield, but there was no "tower" on that field and he got no reply. There was a "radio range" in operation at the field on a different frequency, and the witness Young, called by the Crown, who was in charge, said that if such a call had been made it would have been intercepted and answered by radio range, and the pilot given all information about the field. The same witness admits, however, that at the time when the appellant arrived at the field, he himself was working on the ground.

He had an assistant who was supposed to be at the instrument, but Young admitted that this man might have been absent at the time. The assistant himself was not called. I see nothing, therefore, in this evidence to contradict the evidence of the appellant, or indicating any lack of care on his part in this respect.

The appellant approached the field at a height of 2,500 feet and crossed the boundary at 1,500 feet. The visibility was good. He saw the new concrete runways and observed the wind sock which indicated that the wind was still south-easterly. He turned to the north, decreased his elevation to 600 feet, turned again to the south-east and descended to 200 feet, when he had to abandon his intention to land owing to the presence of the workmen on the strip. He climbed back to 600 feet and turned left, presumably after crossing the south limit of the field, turned north and went up along the east boundary. He saw the building marked "Airport" and "to the west of this building a grass landing strip marked available by conventional signs, wooden markers at the ends and at the cross points of the runways dissecting the landing strips." He made another left turn and then landed. As already pointed out, there was nothing in the way of adequate or recognized marking to indicate the presence of the ditch.

In my opinion, it is clear that Nicholas, who was left in charge of the field to place whatever markings on it good practice called for, failed in his duty to a person such as the appellant, and that this breach of duty was negligence for which the Crown is responsible under s. 19(*c*) of the statute.

In *Dubois* v. *The King* (1), Sir Lyman Duff said:

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

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

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Illustrations of the application of this principle in particular instances are to be found in *Hochelaga* v. *The King* (1), and *Canada Steamships* v. *The King* (2). Merely because the neglect which produces an injury is neglect of a duty owing to a master does not preclude its being also neglect of a duty owing to a third person. Surely the brakeman, whose duty it is in the course of his employment to throw a switch when he sees an on-coming train, would be liable to passengers on the train injured by his failure to do so. As stated in Halsbury, 2nd Ed., Vol. 23, p. 588, the distinction between nonfeasance and misfeasance has no application to the question of liability when the duty properly to do a particular act omitted or improperly performed has been established. It is well settled that negligence consists in a legal duty to exercise care and a failure in the exercise of the care necessary in the circumstances of any particular case. In my opinion, Nicholas owed a duty to persons in the position of the appellant who were entitled to rely on the proper discharge of that duty in the marking of the dangerous ditch; *Howard* v. *The King* (3).

I would allow the appeal with costs here and below, and direct judgment in favour of the appellant Grossman in the amount found by the learned trial judge, namely, $7,003.90.

The appeal of Sun should be quashed without costs.

ESTEY J.:—This is an appeal from a judgment of the Exchequer Court (4) dismissing the appellants' action for damages arising out of injuries suffered in the course of landing an aeroplane, piloted by the appellant Grossman, at the Saskatoon airport on July 19, 1948.

The airport at Saskatoon is owned by His Majesty in the right of the Dominion and operated through the Department of Transport. It is a public airport, within the meaning of the Air Regulations contained in P.C. 2129, dated the 11th day of May, 1948, and passed under the authority of the *Aeronautics Act* (R.S.C. 1927, c. 3). In 1946 contractors completed two large cement runways and, for purposes of drainage, an open ditch upon which Grossman's aeroplane was wrecked.

(1) [1940] S.C.R. 153.
(2) [1927] S.C.R. 68.
(3) [1924] Ex. C.R. 143.
(4) [1950] Ex. C.R. 469; [1951] 1 D.L.R. 168.

The appellant Grossman is an experienced pilot, licensed by the Civil Aeronautics Administration of the United States Department of Commerce. He owned a 1948 model Stinson Station Wagon in which he had flown into Canada, where he had landed at a few airports, and was at Prince Albert on July 19, 1948, when he and the appellant Sun left for the city of Saskatoon. Grossman had never seen the airport at Saskatoon, but had obtained a map of the Saskatoon-Prince Albert area, upon which it was noted that Saskatoon had a "public airport with beacon." In conversation with some men at the Prince Albert airport Grossman was told that at Saskatoon "there was a good airport" with "two new runways." He left Prince Albert with the intention of landing upon one of these new runways.

Grossman describes July 19, 1948, as "a beautiful day" upon which, at about 2:30 in the afternoon, he left Prince Albert. Approximately 15 miles from Saskatoon he commenced to reduce his altitude from about 3,000 to 2,500 feet above ground and, as he came to the airport, he came down to 1,500 feet. Visibility was good and he had no difficulty in locating the airport at Saskatoon.

His only effort, through his two-way radio, to communicate with those in charge at the airport failed. He, however, proceeded to effect a landing upon one of the two cement runways, but, in coming down, he observed men working thereon. He thereupon regained altitude to 600 feet and, after making "a left turn to the east, another turn north, along that east boundary of the field", he came down on the grass landing strip and, while taxiing toward the hangars, he observed, but too late, the ditch here in question and there damaged his aeroplane.

This grass area was regularly used by lighter aeroplanes, such as Grossman's, and it is not suggested that Grossman had not a right to land thereon. It is contended that had he used due care in his attempt to land he would have seen the ditch, or the warning flags, and avoided the injuries suffered.

This grass area runs from the north fence southward to near the hangars, a distance of approximately 4,000 feet. Grossman says that, though he observed the length of this distance, he saw neither the ditch nor the flags and,

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having regard to the position of the hangars, he landed farther south of the fence than the evidence discloses all others landed. He explained that he did so because he would not have so far to taxi. As a consequence, before coming to a stop, he came upon the ditch, where he suffered the damage here claimed.

This ditch was constructed as, and was intended to remain, an open ditch. It is 2,000 feet long, 48 feet wide at the top, 7 to 11 feet in depth, and crosses the grass area about 2,800 feet south of the north fence and some 1,300 feet north of the hangars.

The construction of the open ditch across the grass runway constituted not only an obstruction within the meaning of the Air Regulations, but "special circumstances" which called "for a prohibition to land liable to be prolonged" and, therefore, should have been marked by "a red square panel, placed horizontally, each side of which measures at least 10 feet and the diagonals of which are covered by yellow strips at least 20 inches in width, arranged in the form of an X;" (The Air Regulations, Part V, para. 13(*d*) (1)).

Nicholas, the airport maintenance foreman or airport manager, was and had been in charge of this airport since 1945. He occupied that position when this open ditch was constructed and recognized it as an obstruction upon the landing area. As a consequence, he caused flags to be placed upon both sides of this ditch. They were red woollen flags, approximately 24 by 36 inches, and upon wooden poles 10 to 12 feet in height, placed on both sides about 100 feet apart, but so staggered that along the ditch a flag appeared at every 50 feet. This he did to warn aeroplanes approaching the airport and vehicular traffic working thereon. It is not, however, contended that these flags, so placed, constituted a compliance with the foregoing provision, nor, indeed, would they have been sufficient to clearly mark this obstruction within the general provision of Part V, para. 12, of the Air Regulations.

Grossman's failure to persist in his effort to communicate with those in charge of the airport and his failure to make a dummy run, both of which may be desirable and even necessary in certain circumstances, were not such upon this occasion. It was a clear day, with visibility good, and

if this ditch was not apparent there was nothing to suggest any difficulty in the making of a landing. Grossman did not see the flags, as placed, but, had warnings, in compliance with the Air Regulations, surrounded this ditch, there is every reason to conclude that he, making his observations at an altitude of 600 feet, would have seen them. These provisions in the Air Regulations should be regarded as the minimum requirement necessary to provide reasonable warning to pilots as they fly over or across the airport with the intent of effecting a landing. The flags here placed as a warning constituted but a negligent attempt to comply with the regulations and was the direct cause of the damage here claimed.

It is, however, contended on behalf of the Crown that, though the negligence of its agents and servants in not providing adequate warnings was the direct cause, the Crown is not liable for the damage suffered by Grossman, notwithstanding the provisions of s. 19(*c*) of the Exchequer Court Act:

> 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 the property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employement;

This provision, in its original form enacted in 1887, effected a change in the common law under which the Crown was not liable for the damage caused by the tortious acts of its agents and servants. After the amendment of 1917, Chief Justice Duff, in *The King* v. *Dubois* (1) at 397, interpreted this section, and the subsequent amendment of 1938 does not affect the relevancy of his statement:

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

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The purpose of this public airport is to provide for the reception and despatch of aeroplanes—not only those operated by the citizens of Canada, but, having regard to the international agreements and conventions to which Canada is a party, also those operated by citizens of other countries. In these circumstances, the maintenance foreman or manager of this airport owed a duty, not only to the Crown, but to those who, as Grossman, properly utilized this airport. This distinguishes the case at bar from *The King* v. *Anthony* (1). Unlike the soldier who fired the bullet in that case, the maintenance foreman at this airport was acting within the scope of his employment. Then, unlike the superior officers in the *Anthony* case, of whom it was said their duties, as fixed by the military law relative to the supervision of their subordinates, were "not intended to enure to the private benefit of the citizen" and that such "an officer is not within the rule of *respondeat superior* for the act of one within his command," the maintenance foreman, in supervising the placing of these flags, was acting within the scope of his employment and performing a duty that, having regard to the permission granted to the public, was intended "to enure" to the benefit of those properly using the airport.

The contention that under s. 19(*c*) of the Exchequer Court Act the Crown is not liable for nonfeasance on the part of its agents and servants does not arise in this case. The conduct of the maintenance foreman or manager constituted a misfeasance, as that term has been understood and interpreted in this Court. Not only did he supervise the placing of these flags in the first place, but, as he stated, "they were replaced which was done from time to time, to our best judgment." He was maintaining and replacing them, which he negligently believed constituted a sufficient warning, in the course of the performance of his duties at this airport and, as he did so, was "acting within the scope of his duties or employment", within the meaning of s. 19(*c*) of the Exchequer Court Act.

It is often difficult to determine whether non-action is properly described as nonfeasance or, more appropriately, as an omission in the course of the discharge or execution of a duty or undertaking and, therefore, an improper performance, rather than a mere non-performance. In this

(1) [1946] S.C.R. 569.

case the maintenance foreman has negligently performed his duty to provide adequate warnings within the meaning of the regulations covering this ditch.

In *The King* v. *Hochelaga Shipping & Towing Co. Ltd.* (1), before a jetty was completed about 50 feet of the upper portion of the outward end broke away during a heavy storm, leaving the lower portion in position, but entirely submerged. The suppliant's towboat struck this submerged portion and the consequent damages were awarded against the Crown. Mr. Justice Crocket, writing the judgment of the majority of the Court, stated, at p. 163 that the collision

was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19(*c*) of the Exchequer Court Act. It was not a case of mere non-repair or nonfeasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

Chief Justice Duff, at p. 155:

* * * that the submerged cribwork which, after the superstructure of the jetty had been carried away, was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation; and that in leaving this obstruction without providing any such warning the officials concerned are chargeable with negligence for which the Crown is responsible by force of section 19(*c*) of the Exchequer Court Act.

Mr. Justice Davis, at p. 169:

While in one sense the acts complained of might be regarded as an omission, in substance the result of the acts of those in charge of the work of restoration of the jetty constituted misfeasance.

The maintenance foreman regarded this ditch as an obstruction and negligently performed his duty to place markings thereon, within the meaning of the Air Regulations, and thereby permitted this obstruction to remain without any adequate warning of its presence to those using the airport. It was a negligent performance of work undertaken by an agent or servant of the Crown and, as such, constituted misfeasance.

Though in *The King* v. *Canada Steamship Lines, Limited* (2), misfeasance and nonfeasance are not discussed, it is, however, significant to note that Chief Justice Anglin, writing the judgment of the Court, stated:

In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty

(1) [1940] S.C.R. 153. (2) [1927] S.C.R. 68.

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amounting to negligence on his part as an "officer or servant of the Crown while acting within the scope of his duties or employment upon a public work". (*The King* v. *Schrobounst*) (1), and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

Grossman's appeal should be allowed and judgment directed for $7,003.90, with costs throughout. This Court has no jurisdiction to entertain the appeal of the appellant Sun, his claim being for $440 only. It should, therefore, be quashed, but without costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Kerwin, subject to one reservation.

I do not think it necessary to decide in this appeal whether we are bound by the judgment of the majority in *The King* v. *Anthony* (2), to hold that in order to create a liability of the Crown under section 19(*c*) of the Exchequer Court Act it must invariably appear that some servant of the Crown has drawn upon himself a personal liability to the suppliant. I wish to reserve that question for future consideration if and when it may become necessary to determine it. It may then appear that this proposition of law was stated in wider terms than were necessary to the actual decision. It must be remembered that the alleged breach of duty complained of in *Anthony's* case was the failure of a non-commisioned officer in the military forces to give certain orders to men under his command in the course of manoeuvres being carried out in time of actual war, although not in the face of the enemy. It may well be that under such circumstances the tests of liability differ from those applicable to cases in which the Crown is engaged in carrying on an activity which, if operated by an individual, would be an ordinary commercial undertaking.

I would dispose of the appeals as proposed by my brother Kerwin.

Appeal of appellant Grossman, allowed with costs here and below. Appeal of appellant Sun quashed without costs, the Chief Justice and Locke J. dissenting.

Solicitors for the appellants: *Diefenbaker, Cuelenaere & Hall.*

Solicitor for the respondent: *F. P. Varcoe.*

(1) [1925] S.C.R. 458.

(2) [1946] S.C.R. 569.