

for the following three sorts of migratory birds:

1. Migratory birds considered as game birds.
2. Migratory birds considered as non-game birds.
3. Migratory insectivorous birds.

The prosecution alleges that the bird which was found in the possession of the defendant was a "tern" and the witness heard to this effect stated that it concerned a "swallow". If we compared the English text with the French text of the said Convention, we could see that the word "tern" is translated in both cases by the word "sterne" and it would be included in the species of migratory birds considered as non-game birds, while the word "hirondelle" in the same French text is translated by the word "swallow" and falls in the classification of birds known as migratory insectivorous birds. Surely the law did not mean to cover the same case by two different provisions.

In summing it up it can be seen that the bird concerned was not a bird which was alleged to be in the charge. On the contrary, it concerns a different classification of birds, and though the restrictions may be the same in both cases, the defendant could not invoke a plea of something formerly found guilty or not guilty.

In the opinion of this Court the defendant has furnished a lawful excuse as provided by the Act and he has rebutted the presumption.

In view of all the above-mentioned reasons the charge is dismissed.

An appeal, entered against this dismissal by the appropriate Federal Government department, was heard by Hon. Wilfrid Lazure, Judge of the Superior Court, Montreal, on Jan. 23, 1947, the same counsel appearing with the addition of H. Matheson as special counsel appointed for the prosecution. Dr. O. H. Hewitt of the Wild Life Protection Branch, National Parks Bureau, Department of Mines and Resources, was called to explain to the Court the shortage of such non-migratory game in Canada as the tern and the necessity for upholding the laws enacted for their protection.

After hearing the evidence from both sides, the Court said it would render its decision at a later date and requested the lawyers for both sides to submit written factums with regard to whether it would be considered an offence to import migratory non-game birds from countries other than those enumerated in the Act.

The text of Mr. Justice Lazure's decision which upheld the appeal is given here, and a comparison of it with the judgment of the Court below provides an interesting study:

The charge in this case was dismissed on Oct. 22, 1946, by Mr. Justice Tellier, and the plaintiff makes an appeal against this judgment before this Court in conformity with section 749 and the following ones of the Criminal Code.

The accused has been charged with having had, on May 22, 1946, in his possession, without valid excuse, a migratory non-game bird, namely, a tern, the whole contrary to section 6 of The Migratory Birds Convention Act (Chap. 130 of the R.S.C., as amended in chapters 16, 23 and 24 Geo. V, 1933).

According to the evidence the accused imported from France, in 1946, 156 birds identified as being pigeons; it is presumed that he later on sold the birds to various merchants of Montreal and finally the last one was seized at his place of business by the R.C.M.P. At the time of the seizure, the accused made a written declaration in which he admits having imported the birds from France, having sold 155 and having kept the last one at his place of business; all those birds were evidently dead and stuffed when he received them and they were to be used as ornaments for ladies' hats.

Section 6 of the Act concerning migratory birds reads as follows:

"No person, without lawful excuse, the proof whereof shall lie on such person, shall buy, sell or have in his possession any migratory game bird, migratory insectivorous bird or migratory non-game bird, or the nest or egg of any such bird or any part of any such bird, nest or egg during the time when the capturing, killing or tak-