

26, 1935

~~G.C.L. 6. 16~~

UNIVERSITY OF LONDON
W.C.1.
No. 30 of 1954. -4 JUL 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

43591

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

BETWEEN
NISBET SHIPPING COMPANY LIMITED . . . Appellants
AND
THE QUEEN Respondent.

Case for the Respondent.

RECORD.

10 1. This is an appeal by special leave from the judgment of the
Supreme Court of Canada pronounced on the 28th April, 1953, affirming, pp. 41-42.
subject to a variation, the judgment of the Exchequer Court of Canada pp. 22-23.
pronounced on the 20th July, 1951, adjudging that the Appellant is entitled
to recover damages from the Respondent for the loss of the " Blairnevis " p. 42, ll. 6-8.
in such amount as will be found by the Registrar on enquiry. The judg-
ment of the Supreme Court of Canada provided for a variation in the
judgment at trial by adding thereto a declaration that the Crown is entitled
to avail itself of section 649 of the Canada Shipping Act.

20 2. There are no facts in dispute on this appeal, and the question
for determination is whether the Crown is entitled to claim limitation of
liability for damages under subsection (1) of section 649 of the Canada
Shipping Act, Statutes of Canada 1934, Chapter 44.

3. The relevant provisions of that Act are as follows :—

" 649.—(1) The owners of a ship, whether registered in Canada
or not, shall not, in cases where all or any of the following events
occur without their actual fault or privity that is to say—

- (i) where any loss of life or personal injury is caused to any
person being carried in such ship ;
- (ii) where any damage or loss is caused to any goods,
merchandise, or other things whatsoever, on board the
ship ;

30

- (iii) where any loss of life or personal injury is by reason of the improper navigation of the ship, caused to any person carried in any other vessel ;
- (iv) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel ;

be liable to damages in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding 10 seventy-two dollars and ninety-seven cents for each ton of their ship's tonnage ; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage."

4. Other statutory provisions which require consideration are—

(i) paragraph (c) of section 19 of the Exchequer Court Act, Chapter 34 of the Revised Statutes of Canada, 1927, as amended by Chapter 28 of the Statutes of 1938, as follows :— 20

“ 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters :—

* * * * *

(c) every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

* * * * *

(ii) Section 8 of the Petition of Right Act Revised Statutes of Canada, 1927, Chapter 158 as follows :—

“ 8. The statement of defence or demurrer may raise, 30 besides any legal or equitable defences in fact or in law available under this Act, any legal or equitable defences which would have been available if the proceedings had been a suit or action in a competent court between subject and subject ; and any grounds of defence which would be sufficient on behalf of His Majesty may be alleged on behalf of any such person as aforesaid.”

(iii) Section 712 of the Canada Shipping Act as follows :—

“ 712. This Act shall not, except where specially provided, apply to ships belonging to His Majesty.”

(iv) Sections 15 and 16 of the Interpretation Act as follows :— 40

“ 15. Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing that Parliament deems to be for

the public good, or to prevent or punish the doing of any thing, that it deems contrary to the public good ; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

10 16. No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby."

5. On the 19th October, 1946, the Appellant filed in the Exchequer Court of Canada a Petition of Right alleging that the steamship "Blairnevis" was struck and damaged by H.M.C.S. "Orkney" in the Irish Sea during the night of February 12th to 13th, 1945, and claiming damages in the amount of \$357,600.00. pp. 1-3. p. 3, ll. 29-32.

20 6. In the Statement of Defence dated the 7th January, 1947, the Attorney-General of Canada denied liability for the collision, and, in the alternative, alleged that if His late Majesty the King were liable he had the right to limit his liability under section 649 of the Canada Shipping Act. pp. 4-6. p. 6, ll. 11-16.

7. The Petition of Right came on for trial before the Honourable Mr. Justice Thorson, President of the Exchequer Court, in the City of Montreal, on the 13th and 14th June, 1949, and, on the 20th July, 1951, he delivered Judgment adjudging that the Appellant was entitled to recover damages from the Respondent for the loss of the "Blairnevis" in such amount as will be found by the Registrar on enquiry to be held by him. pp. 22-23.

30 8. In his Reasons for Judgment, the learned President found that the loss of the "Blairnevis" was the result of the negligence of the officers of the "Orkney," and that the Crown was liable under paragraph (c) of section 19 of the Exchequer Court Act. The learned President also held that, because of section 712 of the Canada Shipping Act, section 649 did not apply to the Crown so as to enable it to limit liability under that section. He considered that he found support for this view in a statement of the Honourable Mr. Justice Kerwin in *The King v. Saint John Tug Boat Co. Ltd.* (1946) S.C.R. 466 at page 468. pp. 7-22. p. 19, ll. 30-33. p. 21, l. 39- p. 22, l. 16.

9. By Notice of Appeal dated the 2nd October, 1951, an appeal was taken from the Judgment of the Exchequer Court of Canada to the Supreme Court of Canada. Argument on this appeal took place on the 2nd and 3rd February, 1953. p. 23. p. 41, l. 34.

40 10. On the 28th April, 1953, Judgment was delivered by the Supreme Court of Canada, providing that the Judgment of the Exchequer Court of Canada was affirmed and the appeal dismissed subject to a variation in the Judgment at trial by adding thereto a declaration that the Crown is entitled to avail itself under the conditions prescribed in section 649 of the pp. 41-42. p. 42, ll. 6-8.

p. 42, ll. 9-11. Canada Shipping Act, limiting liability. The Judgment of the Supreme Court of Canada further provided that the Crown be at liberty to take such steps toward the determination of the question of limitation as it may deem advisable.

pp. 24-29.
p. 25.

11. The Honourable Mr. Justice Rand, with whom the Chief Justice of Canada concurred, concluded that, by force of the Canada Shipping Act alone, section 649 had no application to the Crown, but being part of the general law from which the vicarious liability of a master arises, it was within the contemplation of section 19 (c) of the Exchequer Court Act. He reasoned that, in the Canada Shipping Act, Parliament had enacted its own laws of negligence, and that the liability, in all its aspects, of the owner in the case of private persons, for the negligence of servants, was adopted by section 19 (c). He also held that the rule of the prerogative that the Sovereign may avail himself of the provisions of any Act of Parliament (Chitty's Prerogatives p. 382) applied to a statutory limitation of damages. 10

p. 28, ll. 33-39.

pp. 29-33.
p. 32, ll. 3-16.

12. The Honourable Mr. Justice Kerwin, with whom the Honourable Mr. Justice Estey concurred, decided that section 712, referring to ships belonging to the Crown, had no application to a claim for limitation of liability under section 649, which can only be put forward by an owner. Referring to the suggestion that he had expressed a larger view of the operation of section 712 in *The King v. Saint John Tug Boat Co. Ltd.* (1946) S.C.R. 466, he pointed out that, in that case, he was considering section 640 of the Act which deals with the fault of two or more vessels causing damage or loss to one or more of them, their cargoes or freight, or any property on board. 20

pp. 33-36.

p. 35, ll. 35-39.

13. The Honourable Mr. Justice Kellock, with whom the Honourable Mr. Justice Cartwright concurred, reviewed the decisions of the Supreme Court of Canada in the *City of Quebec v. The Queen* (1894) 24 S.C.R. 420 ; *Filion v. The Queen* (1894) 24 S.C.R. 482 ; *Gauthier v. The King* (1918) 56 S.C.R. 176 ; *Armstrong v. The King* (1908) 40 S.C.R. 229 ; and *The King v. Desrosiers* (1908) 41 S.C.R. 71. He concluded, on the basis of these decisions, that, in determining the liability of the Crown in any case under section 19 (c) of the Exchequer Court Act if the Petitioner can make out a cause of action on the basis of the law applicable as between subjects, he thereby makes out a cause of action against the Crown and is entitled to the same relief as he would be entitled to in the former case. He went on to decide that it is necessary, in order to determine the extent of the liability of a subject, to resort to section 649 of the Canada Shipping Act. He disagreed that resort could not be had to that section because of the presence of section 712, since resort to the Canada Shipping Act is not for the purpose of determining what that statute has to say with respect to the Crown, but to determine what it has to say with respect to the liability of a subject to which question section 712 is irrelevant. It is section 19 (c) of the Exchequer Court Act which applies the answer to the question to the Crown. 30

p. 35, l. 40-
p. 36, l. 13.

pp. 36-41.
p. 39 ll. 4-14.

14. The Honourable Mr. Justice Locke, dissenting on this point, was of opinion that decisions cited by the Honourable Mr. Justice Kellock,

in so far as they are applicable to the construction of section 19 (c), are authority only for the proposition that the same events which, upon the application of the maxim *respondet superior*, impose liability upon a subject, apply in determining the liability of the Crown in that capacity. He considered that that question is entirely distinct from the question whether liability so imposed upon the Crown may be limited in its extent by a statute which, in his view, was, by its terms, declared to be inapplicable to the Crown. He also decided that, while it is the "owners of the ship" who are entitled to the benefit of limitation of liability under section 649 and section 712 says that the Act shall not apply to ships, section 712 should be construed to exclude the limitation of liability of the Crown as an owner. He considered that section 15 of the Interpretation Act requires such a construction of section 712. He also concluded that there was no binding authority holding that the Crown is entitled to the benefit of a statute which, by its terms, is declared to be inapplicable to the Crown.

p. 40, ll. 12-21.

p. 41, ll. 9-12.

15. The Respondent submits that the Judgment of the Supreme Court of Canada was right and should be affirmed for the following amongst other

20

REASONS

- (1) BECAUSE section 712 of the Canada Shipping Act renders inapplicable only those provisions of the said Act that apply to ships as such ; for example, provisions authorising the detention, seizure and forfeiture of ships.
- (2) BECAUSE section 649 of the Canada Shipping Act extends a right to a limitation of liability to all owners of ships without excepting Her Majesty from the benefit thereof.
- 30 (3) BECAUSE the Sovereign " may avail himself of the provisions of any Act of Parliament," including Section 649.
- (4) BECAUSE the liability of Her Majesty under paragraph (c) of section 19 of the Exchequer Court Act is to be determined on the basis of the law applicable as between subjects, including section 649 of the Canada Shipping Act.
- 40 (5) BECAUSE section 8 of the Petition of Right Act makes available to the Crown defences open to the subject, including section 649 of the Canada Shipping Act.
- (6) BECAUSE section 712 of the Canada Shipping Act does not expressly or by implication establish, in respect of Her Majesty, a principle different from that established by section 19 (c) of the Exchequer Court Act and section 8 of the Petition of Right Act.

- (7) BECAUSE section 19 (e) of the Exchequer Court Act and section 8 of the Petition of Right Act, if repugnant to section 712 of the Canada Shipping Act on a true construction thereof, override section 712.
- (8) BECAUSE section 712 of the Canada Shipping Act is a remedial provision, the object of which is to relieve Her Majesty.
- (9) BECAUSE of the Reasons given by the six Judges of the Supreme Court who were in the Respondent's favour on the point at issue in this appeal. 10

F. P. VARCOE.

FRANK GAHAN.

In the Privy Council.

ON APPEAL

from the Supreme Court of Canada.

BETWEEN

NISBET SHIPPING COMPANY

LIMITED . . . Appellants

AND

THE QUEEN . . . Respondent.

Case for the Respondent.

CHARLES RUSSELL & CO.,

37 Norfolk Street,

Strand, W.C.2,

Solicitors for the Respondent.