GARTLAND STEAMSHIP COMPANY AND ALBERT P. LaBLANC (*Defendants*) APPELLANTS;

1959 *Mar. 9, 10, 11, 12, 13, 16

1960 Jan. 26

AND

HER MAJESTY THE QUEEN (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Ship colliding with Crown owned bascule bridge—Bridge failing to rise due to mechanical defect—Whether excessive speed—Whether warning—Conflicting evidence—Whether agony of collision—Negligence of bridge operator and ship Master—Whether contributory negligence—Recovery on basis of Ontario Negligence Act—Whether liability restricted by ss. 649 and 651 of the Canada Shipping Act, 1934 (Can.), c. 44.

A ship owned by the defendant company collided with and destroyed the north span of a Crown owned bascule bridge, which crossed the Burlington Channel, when the bridge failed to rise due to a mechanical failure. The action for damages instituted by the Crown was maintained by the trial judge who held that the accident was solely due to the negligence of the ship in failing to keep a proper look-out and in proceeding at an excessive speed. The damages awarded included the value of the bridge, the cost of erecting a temporary replacement and loss of use of this highway bridge and channel facilities. However, the damages were limited pursuant to the provisions of the *Canada Shipping Act*. The ship appealed to this Court and the Crown cross-appealed as to the limited liability under the Act.

Held (Locke and Martland JJ. dissenting): The appeal should be allowed in part.

Per Curiam: The cross-appeal should be dismissed. The trial judge was right in permitting the amount of recovery to be limited in accordance with ss. 649 and 651 of the *Canada Shipping Act*.

*PRESENT: Taschereau, Cartwright, Locke, Martland and Judson JJ.

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Per Taschereau, Cartwright and Judson JJ.: The bridge operator and the Master of the ship were both negligent; the former for failing to give timely and adequate warning that the bridge could not be raised, and the latter for failing to stop short of the bridge. The degrees of fault should be apportionned two-thirds to the bridge operator and one-third to the ship.

This was not a case for the application of the rule in *Bywell Castle* (1879), 4 P.D. 219, dealing with the agony of collision.

As this was a common law action for damages within s. 29(d) of the *Exchequer Court Act*, the Crown, as plaintiff—there being no counterclaim—was entitled to judgment for one-third of its loss under the *Ontario Negligence Act*. There was no recovery at common law by reasons of the contributory negligence, and the *Canada Shipping Act*, incorporating the contributory negligence provisions of the *Maritime Conventions Act*, 1911, had no application to a collision between a ship and a structure on land. *T.T.C. v. The King*, [1949] S.C.R. 510, applied.

The damages awarded by the trial judge for loss of use of the channel and the bridge facilities should be disallowed. There was no monetary loss to the Crown with respect to this item which was really public inconvenience rather than loss of use. *The Greta Holme*, [1897] A.C. 596; *The Mediana*, [1900] A.C. 113; *The Marpessa*, [1907] A.C. 241; *Admiralty Commissioners v. S.S. Chekiang*, [1926] A.C. 637, distinguished.

Per Locke and Martland JJ., *dissenting:* The trial judge's findings of fact, based on his appreciation of the credibility of the witnesses, that the accident was caused by the sole negligence of the ship and that there was no contributory negligence on the part of the bridge operator, should not be disturbed. His assessment of the damages, including the award for loss of use of the bridge facilities, should also not be disturbed. The Crown was deprived of its right to use these facilities in which very large sums of public moneys had been invested, and was entitled to recover for such deprivation although the operation of the bridge was a source of continuous expense and not of profit. *The Greta Holme, supra,* and *Admiralty Commissioners v. S.S. Chekiang, supra,* applied.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada maintaining an action by the Crown for damages arising from the collision of a ship with a Crown owned bascule bridge. Appeal allowed in part, Locke and Martland JJ. dissenting.

F. O. Gerity and *G. R. Mackay,* for the defendant, appellant, Gartland Steamship Co.

P. B. C. Pepper, for the defendant, appellant, Albert P. LaBlanc.

C. F. H. Carson, Q.C., J. B. S. Southey and *P. M. Troop,* for the plaintiff, respondent.

The judgment of Taschereau, Cartwright and Judson JJ. was delivered by

JUDSON J.:—This accident happened early in the afternoon on April 29, 1952, in the Burlington Channel, which is the approach to the Port of Hamilton, when the S.S. *W. E. Fitzgerald* collided with and totally destroyed the north span of the highway bridge which crosses the channel. The weather was clear and the wind light. The channel runs east and west and the *Fitzgerald* was travelling from the lake into the harbour, that is, from east to west. The channel is protected by two piers on the Lake Ontario side. The total distance from the outer end of these piers to the highway bridge is 1,679 feet. A ship approaching the Port of Hamilton from Lake Ontario and passing through this channel has to pass two bridges, first a railway bridge and then the highway bridge. The railway bridge pivots on a concrete abutment, which is in the centre of the channel, and the Lake Ontario end of this abutment is 444 feet from the highway bridge. A ship approaching from Lake Ontario would normally expect to pass these bridges on the north side. No question arises about the railway bridge. It was opened in plenty of time for the ship to pass. The north span of the highway bridge never did open because of a mechanical failure. At some stage of the ship's progress down the channel the south span did open.

The theory of this accident, put forward by the Crown as plaintiff in the action and accepted in full by the learned trial judge, is, first, that this ship entered the channel at an excessive speed and was unable to stop before coming into collision with the north span of the highway bridge; second, that the ship came down the centre of the channel until its bow was about one ship's length from the easterly end of the concrete abutment which supports the railway bridge and at that point changed course so as to pass to the north of the abutment; and third, that the ship struck the north span notwithstanding the fact that from the time the ship entered the channel there was a steady red light on the north span conveying a warning that this span would not or could not be raised to permit the passage, and that, on the other hand, the south span was opened in plenty of time to permit the passage. In my opinion, this theory is a serious

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over-simplification of the explanation for the accident and is based upon a rejection of evidence that should not have been rejected.

The learned trial judge found that when the ship entered the channel between the piers, its speed was greatly in excess of 5 miles per hour and probably at least 7 miles per hour. This conclusion is based upon the evidence of three steamship captains, each of long experience in navigating these waters, who would have reduced to half speed not later than Burlington buoy, which is well out in the lake, and to slow speed not later than half way in and to dead slow at the outer end of the piers if the bridge had not started to rise. The trial judge also found that it was not in accordance with good seamanship to enter the channel at even 5 miles per hour when neither span of the bridge had commenced to open, unless prompt steps were taken to reduce speed further and, if necessary, to stop before reaching the bridge.

As to the signal lights on the bridge, the finding was that when the *Fitzgerald* was not more than a ship's length in the channel, the south span began to rise and that immediately before this the flashing red light on the north span had been changed to a steady red light. The flashing red light is a signal that preparations are being made to raise the span. The steady red light conveys a warning of danger that the span will not be raised. The evidence of the bridge-tender, Hockridge, is the basis for this second finding of fact. When he failed in his efforts to raise the north span, because of some still unexplained mechanical failure, he says that he pressed the button to change the flashing red light on that span to a steady red light and then turned his attention to the south span, pressing the button to change the light on this span from a steady red to a flashing red. He himself could not see the lights. At this time, he says, the ship was just entering the channel and the south span immediately began to rise and was at its full height within a minute.

Another witness, Charles Coleman, was on the bridge with Hockridge. He saw the *Fitzgerald* coming in and he says that the south span started to rise when the ship was about its own length in the channel. He saw no change of

course which would indicate an attempt to get into the south channel and no slackening of speed until the anchors were dropped. He has nothing to say about the lights on the bridge.

On this evidence and the conclusion that follows from it, there was no excuse for the ship in colliding with the north span, with weather conditions as they were and with a distance of 1,235 feet from the outer end of the pier on the Lake Ontario side to the easterly end of the abutment on which the railway bridge pivots, and with a further distance of 444 feet from this point to the north span.

The decisive questions are whether there ever was any change of light from flashing red to steady red and what was the position of the ship when the south span began to rise. On these questions the evidence of one Rowarth, the bridge-tender on the railway bridge, directly contradicts the evidence of Hockridge. He says that there was still a flashing red light on the north span when the bow of the ship passed the centre of the railway bridge. The ship was then about 200 feet from the highway bridge. He also says that when it was at the position marked "R.1" on Exhibit K, which is very close, about one-third of the ship's length, to the Lake Ontario end of the abutment on which his bridge pivots, he looked around and saw that the south span was just starting up or had just started up. It is at once obvious that this evidence describes a very different kind of accident from the one described by Hockridge. Rowarth had been employed as bridge-tender on this railway bridge for a period of twenty-eight years and had been the senior man in charge since 1946. We know his precise point of observation. He was in his cabin in the centre of his bridge and he had the best point of observation of any eye witness. He watched the *Fitzgerald* come in. The light on the north span of the highway bridge was flashing red after he had opened his railway bridge. The ship was then half way between the buoy and the pier and coming in slowly, in his opinion, judging from the bow wave. His next observation was when the *Fitzgerald* was well in the channel with her bow in line with the centre of the pier on which the railway bridge pivots. At this time his observation was that there was a flashing light on the north span, but that the span had not

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gone up. His next observation was that the ship was heading into the north channel. At this point he says he was wondering why the bridges were not going up. Neither span had moved and at this time the light on the north span was still flashing red and the light on the south span was a steady red. The bow of the ship then rubbed against his pier. There was still a flashing red light on the north span and the south span was then going up. He heard the noise of the anchor chain just before the boat rubbed on his pier. When the bow of the ship was opposite his cabin it was coming very slowly and his estimate is that the south span was by that time completely up but the flashing red light on the north span was still on. This was the last signal he saw on the north span because the ship in passing obscured his vision.

The learned trial judge rejected this evidence in its entirety. He described the evidence as very vague and containing to some extent contradictory estimates. He did not suggest that he was an untruthful witness but came to the conclusion that his recollection had become blurred by lapse of time to such an extent that his "very indefinite estimates were not to be relied on". From the written record I cannot find any indication of this vagueness or indefiniteness in estimates. This witness is clear on two points on which he was not shaken in any way. The first is that there never was a steady red light on the north span and the second is that the south span did not begin to rise until the ship was no more than a third of a length from the centre abutment. How can evidence of this kind be rejected? There was no better evidence anywhere. There was no better point of observation. If he was an honest witness, and there is no suggestion that he was not, he could not be mistaken on either point and his evidence strongly supports the evidence of the master and all the members of the crew who gave evidence on these two points.

Another independent witness, Mrs. Van Cleaf, gave evidence for the defence. She is the wife of the lighthouse keeper. She observed the *Fitzgerald* round the buoy out in the lake and heard it whistle for the bridge as it came in. She saw the ship as it entered the channel between the piers and describes its speed at that point as slow. She also heard

the ship give another blast at the entrance to the channel and wondered what was wrong. She left her house and went on the pier. When she got outside, the ship, she says, was about 90 feet from the railway bridge abutment and the south span was just beginning to go up. She heard the anchor drop at this point. She made no observation of the lights on the span.

The evidence of this witness was rejected on the ground of bias and certain other discrepancies, which to me are of no significance in determining where the ship was when the south span began to rise. Her estimate of 90 feet from the railway bridge abutment may be wrong. The railway bridgemaster says it was about one-third of a ship's length. But her evidence on this point is entirely consistent with that of the railway bridgemaster, and that of the ship's master and crew that the south span did not begin to rise until the ship was close to the railway bridge abutment. The bias assigned for the rejection of this evidence is to me very unconvincing and I do not think that the evidence should have been rejected on this ground without testing it by comparison with that of an admittedly truthful witness, who was held to be mistaken. One was said to be biased and the other mistaken but they both testified to the same essential fact of the proximity of the ship to the bridge when the south span began to rise.

There was only one witness, apart from Hockridge, who testified that the light on the north span was steady red, one W. R. Love who was an employee of the Department of Public Works, engaged in keeping a tally of the loads of fill being delivered to a work site behind the north pier. He says that he was stationed at a point marked "L" on Exhibit 14, which is about half way between the end of the pier and the highway bridge. There is some evidence that he was considerably closer to the bridge. I say this because he was within speaking distance of a man called Williams and there is evidence that the work site where he was was actually closer to the bridge than he estimated. He did not pay any attention to the approach of the *Fitzgerald*. He was working on his tallies. His attention was first drawn to the ship by the fact that its propellor was running in reverse. There is evidence that the propellor did run in reverse at one point

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after the captain had tried to enter the south channel and had failed because he was too close. I will deal with this attempt later. He also heard the noise of the anchor immediately after his first observation. His evidence therefore begins at the point where the propellor was going astern and the ship was letting go the anchor. This witness does say that the light on the north span was a steady red at this point. One immediately wonders how this witness, beginning his observations at this point, could possibly say "in comparison to any other boat I had seen going through I would say it was quite faster than any other ship I had seen going through". How could he possibly justify a statement of this kind with the observation that he made and how could the learned trial judge prefer this evidence to that of the C.N.R. bridgemaster with all his experience with shipping through this canal and his ability to judge and analyse a dangerous situation? There is no comparison between the respective testimonial abilities of Rowarth and Love based upon experience in observation, a precise identification of the point of observation, and knowledge of the movements of the ship.

In my opinion, there was error in rejecting the evidence of Rowarth and Mrs. Van Cleaf for the reasons given by the learned trial judge. The evidence as to the lights on the bridge and the position of the ship seems to me to be overwhelmingly in favour of the defence and I think that in a case where the trial is completed in February 1955 and a reserved judgment delivered in January 1958, the initial advantage of the trial judge who heard and saw the witnesses has largely disappeared.

I also think that there was error in the judgment of the learned trial judge when he held that the ship made no attempt to get into the south channel. The master did describe such an attempt when he was in the position marked "R. 1", described by Rowarth as about one-third or one-half a ship's length from the centre pier. The south span, the master says, was then opening and in an attempt to enter the south channel he turned hard left on the wheel and went full speed ahead. When he found that he was unable to get in, he reversed his engines and dropped his anchor. This attempt, he says, is what caused him to rub

on the centre pier when entering the north channel. Now, Rowarth says that the bow did rub on the centre pier when entering the north channel. Could Rowarth be mistaken in a physical fact such as this? Rowarth's evidence strongly confirms that of the master on this point. If the learned judge's finding is accepted that there was no attempt to get into the south channel, the inference is that this master not only sailed his ship into a closed span showing a red light when there was an alternative open course, but sailed it in such a way that his bow rubbed on the centre pier for no reason whatever. To me this is a glaring improbability and I cannot draw an inference of such incredible negligence from this evidence.

On the other hand, I think that the bridgemaster, Hockridge, was guilty of very serious negligence in failing to sound five short blasts of the bridge whistle to indicate his inability to raise the north span. His explanation is that there was plenty of time for the ship to get into the south channel and there might be some possible excuse for this neglect if the ship were actually in the position in which he says it was when he began to raise the south span. I have already indicated that my conclusion is that the ship was much nearer to danger when the south span did begin to rise. But quite apart from this, I cannot conceive of any more dangerous situation than failure of this span to work. When the ship was approaching and the bridgemaster knew that the north channel was the one which the ship would normally take, why not stop the ship at once by giving the danger signal? The man on the bridge alone knew that there had been a dangerous mechanical failure on the north span and he had no knowledge, at this time, that he could raise the south span. This is not an accident of a routine character. If it is true that the north span would not work and the south span was still untested, there was a situation of extraordinary emergency, a situation which in my opinion was very flippantly disregarded by the bridgemaster even if one accepts his evidence in full.

The Burlington Channel regulations read:

> 3. (1) The Master of every vessel approaching the bridges of the Burlington Channel and desiring passage through shall sound three long blasts of a whistle or horn to indicate to the bridgemaster that the bridges be opened.

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(2) If for any reason the bridgemaster is not able to immediately open the bridges he shall signal the approaching vessel by five short blasts of the bridge whistle.

(3) No liability shall be incurred by the Crown in the event of failure of the bridgemaster or staff to signal the approaching vessel when unable to open the bridge immediately.

4. (1) A vessel shall not attempt to pass the Burlington Channel bridges until both bridges are in a fully open position on the side of the Channel on which the vessel is approaching and the bridges are showing green lights.

(2) Every vessel when approaching a bridge which is not in a fully open position shall be kept at such speed and under such control that the vessel may at any time be stopped well clear of the bridge.

The interpretation put upon regulation 3(2) by the learned trial judge that there was no obligation to sound the warning blasts unless there was inability to open both spans seems to me to be a very narrow one. This ship expected to pass through the north channel, the normal and expected course of passage for a ship entering from the lake. The bridgemaster knew this and yet he deliberately made no attempt to give the warning signal that this passage would not be available. Reading regulations 3 and 4 together, I cannot regard them as supporting the position taken by the bridgemaster that he was under no obligation to sound the danger blast unless both his spans failed to work, for regulation 4, when speaking of both bridges being open on the same side, must be referring to the railway bridge and the highway bridge. Quite apart from any regulation and what it may mean, in this extraordinary emergency and with a whistle available it seems nonsense to me for the bridgemaster to say that no warning was necessary, even if the ship was where the bridgemaster says it was. I think that this ship was lured into a dangerous position by the failure to warn and by the continuing invitation in the form of the flashing red light that the north span would be raised.

The Crown is the plaintiff in this action, seeking to recover damages for the destroyed north span. There is no counterclaim by the ship owner for there was little or no damage to the ship. The Crown must prove negligence against the master and its claim is met not only by a denial of negligence but also by a plea of contributory negligence on the part of the Crown's servant, the bridgemaster. In my opinion

this plea of contributory negligence is established. The bridgemaster should have given the warning blasts when the ship was entering the channel, for, according to his own story, he had the time and opportunity to do this and he alone knew of the mechanical failure. I am also of the opinion that he never did change the flashing signal to the steady red signal and that he allowed the ship to advance too far in the face of his invitation before he made any attempt to raise either span.

I am not satisfied that the learned trial judge's finding as to the speed of the ship is the correct one. He finds that the ship entered the channel at a speed between five and seven miles per hour. His theory of the accident was that this was too high a speed to permit the ship to stop short of the bridge. This theory is based on the inference drawn from the evidence that the ship sailed straight up to the bridge. I am satisfied that this is not the correct inference to draw from the evidence and that the ship did make an effort to get into the south channel and that it did rub the centre pier. In spite of all this, the ship was virtually stopped when it nosed into the bridge. It was not a heavy impact. The expert evidence introduced by the Crown, if it is to be accepted, demonstrates that the ship even at 7 miles per hour when entering the channel could have stopped short of the bridge. It also demonstrates that if the captain executed the manoeuvres that he said he did in his attempt to get into the south channel and then to extricate himself, his ship would rub its bow on the centre pier and would have sufficient momentum to reach and collide with the north span. This expert evidence, to me, is strongly corroborative of the account of the accident given by the defence. Nevertheless, the obligation imposed on the ship by regulation 4 is clear. It must not attempt to pass "until both bridges are in a fully open position on the side of the Channel on which the vessel is approaching and the bridges are showing green lights." This must mean, in this case, the railway bridge and the north span. "Both bridges on the side of the Channel on which the vessel is approaching" cannot refer to the north and south spans of the highway bridge. Further, the ship must be under such control that it "may at any time be stopped well clear of the bridge."

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The appellant submits that it should be relieved from liability under the *Bywell Castle*[1] rule or, in the alternative, that this is a case of contribution. The *Bywell Castle* rule is appealed to on the ground that the master of the ship was put in a dilemma by the errors and omissions of the bridgemaster by delay at his work and in failing to warn of the danger by blast and lighting and that the attempt to get into the south channel at the last moment was made under real apprehension of danger and was, in the circumstances, a reasonable course of conduct. The master says that it was this attempt that gave his ship the momentum that carried it into the bridge and that if this dilemma had not arisen he would have been able to stop. While I am satisfied, for the reasons I have given, that the attempt to get into the south channel was actually made and that a situation did arise which involved a choice between two unpleasant and unsatisfactory alternatives, I do not think that this is a case for the application of the *Bywell Castle* rule. At some point in his progress through the channel the master should have decided that he had to do something to stop short of the bridge rather than go ahead on the invitation of the flashing red light in the expectation that the north span would be raised. In my opinion he postponed that decision too late. This is the negligence that I would find against him. I think the master should have done in the first place what he did in the second. Instead of going hard to the left and giving the order for full speed, he should have dropped his anchor and reversed his engines. He was too close to the abutment of the railway bridge to do what he did. The case, in my opinion, is one for apportionment of fault.

I would apportion the fault two-thirds to the bridgemaster and one-third to the ship. The next question is whether the plaintiff can recover anything in these circumstances. Apart from statute this action would be dismissed. With a plea of contributory negligence established as in this case, the plaintiff fails because he does not prove that the

[1] (1879), 4 P.D. 219, 41 L.T. 747.

defendant caused the damage: *T.T.C. v. The King*[1]. The *Canada Shipping Act,* incorporating the *Maritime Conventions Act* 1911, has no application to a collision between a ship and a structure on land. The choice is between no recovery at all and a recovery under the Ontario *Negligence Act.* This is a common law action for damages within s. 29(*d*) of the *Exchequer Court Act,* R.S.C. 1952, c. 98, and in my opinion the Crown, as plaintiff, is entitled to the advantage of the Ontario Act: *T.T.C. v. The King, supra.* It should have judgment for one-third of its loss.

The learned trial judge's assessment of the damages amounts to $367,823.49. This includes $215,073.52 for the value of the destroyed span, $30,000 for removal of the wreckage and $60,280.18 for a new temporary fixed span. In addition, assessments were made for numerous smaller items of damage. I would not interfere with any of these assessments although I have serious doubt whether more allowance should not have been made for obsolescence in the computation of the value of the destroyed span. But, in addition, the learned trial judge allowed $30,000 for loss of use of the channel and the facilities as they existed before the accident. I would disallow this item in full. There is no evidence that any ship has been unable to get through the channel because of this accident. The south channel was always open. The north channel is closed to shipping until the temporary span is replaced by a moveable span. This has not yet been done and I am not unaware of the fact that a new high-level bridge has been built with the intention of carrying most of the highway traffic which formerly travelled over the damaged bridge.

To me this item of damage for which the Crown seeks compensation is better described as public inconvenience rather than loss of use. For a short time, until the so-called temporary span was put in, pedestrian and vehicular traffic suffered inconvenience but the Crown suffered no monetary loss. The same may be said of loss of use of the north channel. If it had been thought wise to replace the span, the work would have taken one year. There was, therefore, a theoretical loss of use of the north channel for shipping during this period. But the loss of use is again really public

[1] [1949] S.C.R. 510, 515, 3 D.L.R. 161, 63 C.R.T.C. 289.

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inconvenience and not monetary loss to the Crown. I do not think that *The Greta Holme*[1], *The Mediana*[2], *The Marpessa*[3] and *Admiralty Commissioners v. S. S. Chekiang*[4], where damages were awarded for loss of use of dredgers, a lightship and, in the last case, a warship, can have any application to the facts of this case. The Crown has been fully compensated for all its loss without this item.

I would therefore reduce the learned trial judge's assessment from $367,823.49 by this item of $30,000, making the total amount of damage proved $337,823.49. Of this the Crown is entitled to judgment for one-third or $112,607.83. In accordance with these reasons, I would vary the judgment under appeal and direct that judgment be entered for $112,607.83 and costs of the trial and other proceedings prior to appeal. The appellant should have the costs of the appeal.

The formal judgment of the learned trial judge provided that the plaintiff recover from the defendants $367,823.49 but that the defendant Gartland Steamship Company was entitled to limit its liability to an amount not exceeding $184,383.50. The respondent cross-appealed against that part of the judgment which declared the defendant entitled so to limit its liability. For the reasons given by my brother Locke, I would dismiss the cross-appeal with costs.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Exchequer Court delivered by Cameron J. by which damages were awarded against the present appellants in respect of an accident which occurred on April 29, 1952 when the ship "W. E. Fitzgerald", owned by the appellant company and in charge of the appellant LaBlanc as master, came into collision with and damaged the northerly span of a bascule bridge, the property of the Crown, which traversed the Burlington Ship Canal near Hamilton.

The Burlington Ship Canal is an artificial waterway constructed by the Crown upon its own property for the purpose of providing the means of access for shipping from

[1] [1897] A.C. 596.
[2] [1900] A.C. 113.
[3] [1907] A.C. 241.
[4] [1926] A.C. 637.

Lake Ontario to and from the harbour of Hamilton. The width of the channel between the boundary walls is 298 ft., the total length is 2,720 ft. and it was dredged to a depth of 26 ft. In the centre of the channel there is a pier 503 ft. in length, the eastern extremity of which is 1,235 ft. west of the eastern extremity of the channel. This pier divides the main channel into two channels of approximately 130 ft. in width and provides support for the pivot of a Canadian National Railway bridge and the off shore edges of the two span bascule bridge which at the time of the accident afforded the means of crossing the channel to vehicles and pedestrians travelling upon the Queen Elizabeth highway. The pivot of the railway bridge is approximately 190 ft. west of the eastern end of the centre pier and 1,425 ft. from the eastern extremity of the channel. The bascule bridge is about 240 ft. west of the pivot of the railway bridge close to the western extremity of the pier. A bascule bridge is a draw bridge balanced by a counterpoise which rises or falls as the bridge is lowered or raised, and the counterpoises for the spans of this bridge were on the north and south shores of the channel. When the span was raised to permit the passage of a vessel, the floor was elevated to an almost vertical position. Each span was equipped with lights of the nature described in the Notice to Mariners of March 7, 1951, hereinafter quoted.

At a distance of about a mile from the easterly end of the channel, there is a buoy referred to as the Burlington Traffic Buoy.

The bridge is maintained and operated by the Department of Public Works of Canada. By P.C. 2294 of May 9, 1949, regulations were made under the provisions of the *Navigable Waters Protection Act*, R.S.C. 1927, c. 140, defining in certain respects the manner in which shipping should be operated when approaching and passing through the channel. These, so far as they are relevant, were as follows:

1. The maximum speed for vessels navigating the Burlington Channel shall be as follows:
   (*a*) for vessels not exceeding an over-all length of 260 feet—8 miles per hour;
   (*b*) for all other vessels—a minimum speed consistent with the safety of the vessel and the bridges.

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3. (1) The Master of every vessel approaching the bridges of the Burlington Channel and desiring passage through shall sound three long blasts of a whistle or horn to indicate to the bridge-master that the bridges be opened.

(2) If for any reason the bridgemaster is not able to immediately open the bridges he shall signal the approaching vessel by five short blasts of the bridge whistle.

(3) No liability shall be incurred by the Crown in the event of failure of the bridgemaster or staff to signal the approaching vessel when unable to open the bridge immediately.

4. (1) A vessel shall not attempt to pass the Burlington Channel bridges until both bridges are in a fully open position on the side of the Channel on which the vessel is approaching and the bridges are showing green lights.

(2) Every vessel when approaching a bridge which is not in a fully open position shall be kept at such speed and under such control that the vessel may at any time be stopped well clear of the bridge.

6. Any person violating any of these Regulations shall be liable, upon summary conviction, to a penalty not exceeding fifty dollars and costs, or to imprisonment for a term not exceeding ten days, or to both fine and imprisonment.

A further regulation was made and notice of it given to mariners dated March 7, 1951, which read:

> Additional signal lights have been installed on the highway bridge in Burlington Channel, at the top centre of each of the two bascule spans. These are in addition to the navigation lights at the centre floor level of each span, which shows steady Red or no signal when the span is closed and steady Green when it is open to passage of a vessel.
>
> Vessels requiring passage shall be governed by the following signals located on this bridge.
>
> Steady Red or no signals indicate that the bridge is not ready. A flashing Red signal on top of either span indicates that that span is being made ready for passage of a vessel. A vessel requiring passage shall then alter course if necessary and prepare to pass on the same side of the Centre Pier as that on which the flashing signal is given.
>
> After either span is completely raised, discontinuation of the flashing Red signal and a steady Green signal from the floor of the span, together indicate that that span is ready for passage of a vessel.
>
> *Note:* Navigation lights on the Canadian National Railway bridge, on the lakeward side of the highway bridge, remain as heretofore.

The case for the Crown, as pleaded, was that the impact of the ship with the span and the resulting damage was caused by the negligence of the defendant LaBlanc in the navigation or operation of the ship, in the course of his

employment as a servant of the appellant company. Particulars of the negligence pleaded were that he had caused the ship to approach, or failed to prevent it from approaching the north span, at an excessive rate of speed: that he had failed to keep or cause to be kept a proper look-out: that he had attempted to pass the bridge with the ship before the span was in an open position and showing green lights, contrary to subs. (1) of s. 4 of the Burlington Channel Navigation Regulations, and failed to keep the said ship at such a speed and under such control when approaching the north span to enable it to be stopped well clear of the bridge, contrary to subs. (2) of s. 4 of the said Regulations.

The defendants filed separate defences, each of which, in so far as the issue of liability was concerned, denied the allegations of negligence and of excessive speed, alleged that the control apparatus and machinery were not in good operating order and condition, that the accident occurred by reason of the negligence of the bridge tender in failing to give sufficient warning of the failure of the bridge machinery and its control system, in failing to manipulate the light signals so as to indicate that the bridge would not or could not open, and to sound an alarm signal to give warning to the ship of his inability to open the north span.

On the day in question the *Fitzgerald* was bound from Toronto to the Port of Hamilton, part laden with a cargo of sand. The ship is 428 ft. in length and of 52 ft. beam. According to the log, it arrived at the Burlington Buoy at about 1.18 p.m. and it is common ground that at that time the lights on the north span were flashing red, indicating, as required by the Regulations, that that span was being made ready for the passage of the vessel. Captain LaBlanc said that the ship had sounded three long blasts, as required by the Regulations, when it was about half way between the buoy and the entrance of the channel, and, apart from this, it was shown by the evidence that the bridge tender Hockridge had seen the vessel before it reached the buoy and intended to cause the north span to be opened to permit its passage. It is also common ground that, due to some failure either in the electrical power or in the mechanism with which the span was equipped, it failed to operate when

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Hockridge attempted to open the span. While the most diligent inquiries were made after the event to determine the cause of this failure, it was not ascertained. The ship, after rounding the buoy, proceeded into the main channel and, at some point the determination of which is a matter of controversy, the southern span was raised to permit the passage of the vessel. The captain, however, had directed it into the north half of the channel and, despite going hard astern and dropping two of the ship's anchors, was unable to stop it before it struck the north span. The force of the blow was sufficient to wreck the span and as an operating unit it became a total loss.

The facts relating to the movements of the ship after rounding the buoy are reviewed with such clarity and in such detail in the reasons for judgment of the learned trial judge that it is sufficient to summarize them.

Hockridge, the bridge tender who was in charge at the time, had long experience in the operation of the mechanism which raised the spans of the bridge. Earlier on the day in question the north span had been opened to permit the passage of a vessel. Hockridge said that he saw the *Fitzgerald* well out in the lake about half an hour before the collision and, when it was at the buoy, he started to take the preliminary steps necessary for the opening of the north span and put on the flashing red light on that span, to indicate that he was preparing to raise it. When the vessel was 4 or 5 lengths from the eastern end of the channel, he followed the procedure necessary to clear the bridge of traffic and to prevent further traffic on the highway but when he operated the controls to raise the north span it did not move. After making three attempts, the bridge failing to rise, he reset the lights on the north span, changing the flashing red light back to a steady red light, and pressed the button which changed the steady red light showing on the east side of the south span to a flashing red light, to indicate to the ship that he was preparing that span to be raised. He said that he then looked to see where the ship was, it being in plain view from the place where the controls were situated, and that it was just then entering the east end of the channel or, as he estimated, its bow had just entered the channel. He then moved the throttle for the

south span which began immediately to rise and within a minute, according to him, it was raised to its full height. As the entrance to the channel was some 1,235 ft. to the east of the centre pier, if Hockridge's evidence was true, the bow of the ship at that time was at least 1,000 ft. to the east of the easterly extremity of the centre pier and, as the weather was clear, the change in the lights and the movement upward of the south span were in plain view from the ship.

According to LaBlanc, however, the light on the north span which was flashing red when the ship rounded the buoy continued to do so right up to the time the vessel struck the bridge. He said that his attention was drawn to the fact that the south span was being lifted by Erickson, the man at the wheel, when the bow of his ship was only some 200 ft. distant from the centre pier. Thereupon he claimed that he first attempted to change the course of his ship to the south channel but, realizing that that was impossible, he directed it to starboard and, while the two bow anchors were dropped and the propellers were put hard astern, it was found impossible to halt the vessel before it collided with the bridge.

There was also a wide divergence between the evidence tendered by the Crown, as to the speed of the ship as it approached the entrance to the channel and at which it proceeded thereafter, and that given by the ship's captain and other members of the crew. According to LaBlanc, the speed of the ship approximated 12 miles per hour as it rounded the buoy and this was maintained until it was half way to the entrance of the channel, at which time it would be a half mile distant, when it was reduced to half speed. He said that the speed as it entered the channel was from $4\frac{1}{2}$ to 5 miles per hour and that this speed was reduced to slow immediately after the entrance had been made. He estimated the speed of the vessel at the time it was one length east of the centre abutment as being between 3 and 4 miles an hour.

LaBlanc's evidence as to the speed at the time the ship reached the entrance of the channel was corroborated by Van Deuren, the second mate. As opposed to this evidence, Captain Alexander Wilson, the Commodore of the Canada

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Steamship Lines Fleet having more than forty years' experience on the Great Lakes, when called for the plaintiff said that, in his opinion, the *Fitzgerald* should have changed to half speed at the Burlington Buoy and to slow half way in from the buoy to the entrance and that if this had been done its speed would have been from 3 to 4 miles per hour, which he considered a proper speed, when entering the channel. Based upon his experience, he said that the ship proceeding at full speed from the buoy to a point half distant from the entrance would have been going easily 7 miles per hour at the entrance.

S. T. Mathews, a naval architect with the National Research Council, had made a series of tests with a small scale model at the request of the Crown. His qualifications and the nature of the tests made with this model 1/25th the size of the *Fitzgerald* in a tank 120 ft. in length which reproduced the material physical features of the channel, are described in the reasons for judgment of Cameron J. Accepting the figures furnished by the captain as to the number of revolutions per minute of the propeller at full speed, half speed and slow, Mathews said that, assuming the ship was at full speed half way from the buoy to the channel entrance, the speed when entering would be 7 miles per hour if its maximum speed was 21.1 miles per hour when loaded as she was at the time. Mathews had computed the maximum speed of the vessel from the entries made in the ship's log of the voyage from Toronto and found her maximum speed to have been 12.35 miles per hour. However, accepting the lesser figure, his tests, which were accepted as being accurate by the learned trial judge, showed that, assuming a speed of 7 miles per hour at the entrance and that the ship was handled thereafter in the manner stated by LaBlanc, the speed, when one ship's length distant from the centre pier, would have been 5.59 miles per hour.

It was made clear in the evidence of Captain Wilson and the two other experienced captains called to give evidence for the Crown that, in their opinion, such a speed at the entrance was excessive unless the bridge was up at the time the ship entered the channel, and Captain Scarrow, called

to give evidence for the defence, admitted that at a speed between 6 and 7 miles per hour at the entrance the ship would have no chance of stopping before hitting the bridge.

Upon the issue as to the speed of the vessel, the learned trial judge, after reviewing the evidence, found as a fact that the speed at the time the ship entered the channel was greatly in excess of 5 miles per hour and was probably at least 7 miles per hour, and that when LaBlanc made the first attempt to stop the ship it was travelling at a speed in excess of 5 miles per hour.

It will be remembered that, according to LaBlanc, the light on the north span which was flashing red continued to do so up to the time of the impact. A witness, W. R. Love, called for the Crown, was working at the time for the Department of Public Works at a point on the north side of the channel some 800 ft. west of the entrance. When his attention was first called to the ship, he said that it had proceeded about 350 ft. into the channel and when the bow was directly opposite to him he saw the starboard anchor drop. Love said that at that time there was a fixed red light on the north span and the south span was then up, or pretty close to its maximum height. At that point the bow of the vessel would be some 850 ft. from the north span.

Charles Coleman, a bridge man employed by the Crown who was on duty at the north end of the bridge, said that when the south span started to rise the ship was about its own length in the channel, or possibly a little more.

Mrs. Donna Cochran, whose husband was employed by the Crown as a radio operator and who lived in a house close to the channel, said that as the south span was raised the light on it was flashing red.

The evidence of LaBlanc was supported in part by the evidence of Van Deusen, the second mate, who said that the light was flashing on the north span almost up to the time the ship struck it, that he did not see the south span commence to rise, that he got the captain's order to drop the anchor when the bow was about 100 ft. easterly of the east end of the centre pier, and that he had first observed a change in the south span after both anchors were down. A questionnaire had been submitted to this witness long prior to the trial, in which he had said that he had noticed

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the south span start to rise when the bow was passing the centre axis of the railway bridge and that it had been raised about 10 ft. when he saw it at that point. The learned trial judge said that he did not believe this witness.

Erickson, the seaman who was at the wheel, said, contradicting the evidence of LaBlanc, that the ship had been reduced to half speed at the Burlington buoy. He did not observe the south span lifting until the bow was one ship's length from the centre pier.

Lawrence Korth, a watchman, who was stationed on the forecastle deck, said that the red light on the north span continued to flash up to the time when the ship was only a few feet distant from the bridge.

Mrs. Amy Uan Cleaf, the wife of the lighthouse keeper who lived on the south side of the channel between the railway and highway bridges, gave evidence for the defence and said that the ship was only 90 ft. east of the east end of the centre pier when the south span commenced to rise. After reviewing the evidence of this witness and saying that it was impossible to escape the conclusion which he had formed at the trial, both from her demeanour and from her evidence, that she had a distinct bias against the bridge master and the bridge operators, the learned trial judge said in terms that he attached no weight whatever to her evidence.

P. T. Roworth, the senior bridge tender of the railway bridge called for the defence, said that when the ship was steering into the north channel about half a ship's length from the east end of the centre pier he saw a flashing red light on the north span and a solid red light on the south span. At that time he said that neither span had started to rise but, on cross-examination, contradicted this, saying that when the ship was at that point the south span was being opened, the north end of it being some 8 to 10 ft. in the air. Again, having said that at that time the light on the south span was solid red, when cross-examined he said that the light on that span had been solid red when he looked at it at a time when the ship was still in the lake and that he did not think that he had looked at it again thereafter. A further statement made by him on cross-examination was that the ship had blown a second blast from her whistle when she was near the outer end of the piers of the channel but later,

on re-examination, he said that the vessel was then approximately half way between the outer piers and the railway bridge. As to this witness the learned trial judge, after pointing out that he had admitted on cross-examination that he had not looked at the south span at any time after the ship entered the channel, said:

> In view of the very vague and to some extent contradictory estimates of this witness, I find it difficult to attach much weight thereto. I do not suggest that he was an untruthful witness, but I am satisfied that his recollection of the events had become blurred by lapse of time to such an extent that his very indefinite estimates are not to be relied on.

Some support for the evidence of LaBlanc as to the time when the south span opened might have been found in an entry in the ship's log made by him on the date of the accident which read:

> Struck north draw (1.29) of bridge wrecking same shoving it off its buttment into river. light on north draw flashing to signal using that side. when Entering R R bridge the South Draw opened but too late to change. So we backed full. and let go both anchors there was no signal to signify we woulden get North Draw.

As to this the learned trial judge found upon the evidence that the entry as to the point at which the south span commenced to rise was false and said that he was quite satisfied that there was in fact no attempt made to get into the south draw.

Upon this conflicting evidence the learned trial judge found as a fact that the south span commenced to rise when the *Fitzgerald* was not more than one ship's length in the channel and that immediately prior thereto the flashing red light on the north span had been changed to a steady red light, that the look-out on the ship was entirely inadequate and that this failure to keep a proper look-out in the circumstances was gross negligence which brought about the collision with the bridge. He found further that another factor which caused the disaster was the excessive speed of the vessel at the entrance to the channel, and later when the master, in view of that speed, failed to reduce it in time and to keep his vessel under such control that he could stop before reaching the bridge. The learned judge, as these findings show, accepted the evidence given by Hockridge, Love and Coleman, and that of Mathews as to the speed of the ship and the distances within which she could be

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stopped, in preference to that of the appellant LaBlanc, Mrs. Van Cleaf, Korth, Van Deusen and Roworth, where their evidence conflicted with that of the witnesses for the Crown which are mentioned.

In estimating the credibility of these witnesses whose evidence conflicted on these material points, the learned and greatly experienced trial judge had the advantage, which we have not, of observing these witnesses as they gave their evidence, and with this aid coming to a conclusion as to their veracity. In order to reverse his findings upon this aspect of the matter it would be necessary, in my opinion, for us to conclude that the learned judge was so clearly wrong as to indicate that he had not taken proper advantage of having seen and heard the witnesses. Far from coming to any such conclusion in the present case, I have, after examining all of the evidence in this lengthy record with great care, come to the same conclusion as the learned trial judge. I would not disturb these findings of fact.

As to the issue that there was contributory negligence on the part of the bridge tender, the respondent's case is based upon the fact that, admittedly, Hockridge did not signal to the approaching vessel that he was not able to immediately open the north span by having sounded five short blasts of the bridge whistle.

The wording of the regulation of June 27, 1949, dealing with this aspect of the matter is:

> 3. (2) If for any reason the bridge master is not able to immediately open the bridges he shall signal the approaching vessel by five short blasts of the bridge whistle.

Dealing with this contention the learned trial judge pointed out that the regulation requires the warning to be given only if the bridge master is not able to open both bridges, a situation which did not arise in the present case. In the present matter the change in the lights was made at a time when there was ample opportunity for the ship to be directed into the south channel and the learned judge found that the bridge master did the reasonable and prudent thing in the circumstances by immediately opening the south span when he found the north span could not be used. Being of this opinion, the learned trial judge found no negligence on the part of the bridge operator contributing

to the accident, a conclusion with which I am in complete agreement. Hockridge was entitled to assume that a proper look-out would be maintained on the ship and that she would approach at a speed that would be reasonable and in accordance with the regulation. The principle referred to by Lord Atkinson in *Toronto Railway Company v. King*[1], is not restricted in its application to traffic in the streets.

In the statement of defence of each of the appellants it was alleged that the bridge constituted an obstruction of the public right of navigation of a navigable channel and the provisions of s. 4 of the *Navigable Waters Protection Act*, R.S.C. 1952, c. 193, are pleaded. The statute applicable at the time of the accident was c. 140, R.S.C. 1927. The language of s. 4 is, however, identical.

What legal consequences would result if the appellant company had an enforceable right to use this channel, constructed by the Crown on its own property, if the exercise of that right was obstructed, due to a negligent act of the said appellants, is not explained either in the appellant's factum or in the argument addressed to us. It may be said also that the appellant company had no such right. Counsel for the appellant expressly disclaimed any contention that the bridge constituted a nuisance which might render applicable the decision of the Judicial Committee in *Steamship Eurana v. Burrard Inlet Tunnel and Bridge Company*[2].

It is to be remembered that the Burlington Channel was constructed by the predecessors of Her Majesty upon the property of the Crown and shipping is permitted to use it gratuitously to obtain entry to Hamilton Harbour and it is, of course, not suggested that any obligation rested upon the Crown, either to construct the work or to permit its gratuitous use.

Section 4 of the Act reads:

> No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

[1] [1908] A.C. 260 at 269, 7 C.R.C. 408.
[2] [1931] A.C. 300, 1 D.L.R. 785, 38 C.R.C. 263.

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Section 3 provides that, except as the provisions of the part which contain s. 4 relate to the rebuilding or repairing of any lawful work, nothing in the part applies to any work constructed under the authority of any Act of the Parliament of Canada. Dealing with this defence, Cameron J. held that, as it was shown that the channel and the south span were originally constructed about 1923 and that in or about 1931 the channel was widened and the north span constructed with funds voted by Parliament for these purposes, when, under an appropriation Act Parliament appropriates funds for the construction of specific works, such works are constructed under the authority of an Act of Canada. It might further be pointed out that the provision referred to in the *Navigable Waters Protection Act* is not by its terms made applicable to Her Majesty and, therefore, does not bind the Crown: s. 16, *The Interpretation Act*, R.S.C. 1927, c. 1.

The judgment appealed from determined the value of the north span which was wrecked by the collision and rendered valueless, except for some salvage, as being $215,073.52. The learned trial judge decided that the proper principle applicable in deciding its value was replacement cost less depreciation from the time it was constructed. The figure above mentioned was determined in this manner. The contract for the north span had been let by the Crown in 1930 and the construction carried out in 1931. Evidence was given by L. E. Rowebottom, Chief Prices Inspector of the Labour and Prices Division of the Dominion Bureau of Statistics, to the effect that the price index for material, wages and all other matters entering into the cost of construction of such a bridge in 1952 was 230.2 on the basis of 100 for the year 1930. In arriving at this figure, the witness made use of certain official publications of the Bureau of Statistics and, while these were not put in evidence by the Crown as they might have been under the provisions of s. 24 or s. 25 of the *Canada Evidence Act*, R.S.C. 1952, c. 307, counsel for the appellant LaBlanc cross-examined Rowebottom at length upon their contents, having previously asked for their production. The learned trial judge ruled that the documents should be admitted as exhibits and this was done. I respectfully agree that, in the circumstances

disclosed by the record, these documents were properly put in evidence and were admissible as proof of their contents and that the objection based upon their admission and their use by the witness fails.

When the north span was wrecked it was decided on behalf of the Crown that, since it would take at least a year to have a bascule span fabricated and built as a replacement, a temporary fixed bridge should be constructed to enable traffic upon the highway to cross the channel. In respect of the construction of this bridge and the approaches thereto the judgment allowed damages for its cost which amounted to $60,280.18. This figure as to the cost of constructing the bridge and the necessary approaches is not questioned but the appellants contend that, if liable, they should not be required to pay the replacement cost of the required span, as well as the cost of a bridge to replace it.

A further claim by the Crown, which was allowed, was for the loss of use of the bridge for three and one half months and the northerly channel of the canal for one year, and these items may conveniently be considered together.

It should be said that there is no evidence to suggest that, when the channel was constructed through the property of the Crown for the convenience of shipping, any legal obligation rested upon the Crown to provide a means of passage across this waterway, either for vehicles or pedestrians. There is no evidence as to the volume of such traffic at the time the channel was first constructed, but it is common ground that at the time of the accident there was a great volume of motor traffic upon the highway which connected with the bridge, which was the main road between Toronto and Niagara Falls and Buffalo, and a considerable volume of pedestrian traffic. The effect of the destruction of the north span was to disrupt this traffic for a period of three and one half months while the temporary span was being constructed. The Department of Public Works undertook this work promptly and also arranged a substituted means of passage for pedestrians across the Canadian National Railway bridge, for the cost of which a claim for damages was made.

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There was no revenue derived by the Crown, either from vessels using the channel or traffic crossing the bridge, and it is, accordingly, contended by the appellants that no monetary loss having been suffered the claim for loss of use fails.

The learned trial judge allowed the claim for the temporary bridge, adopting the principle that if a chattel is injured an amount paid for the hire of another while it is being repaired is recoverable as damages in tort. While the north span was destroyed, the bridge as an entirety suffered damage which resulted in the south span being rendered useless for the carriage of traffic during the time taken to construct the temporary bridge. The bridge had been constructed for the purpose of rendering services of great value to the general public and, as it was intended on behalf of the Crown to continue such services as rapidly as possible, I agree that the cost of the construction of the temporary bridge was recoverable.

The claim for loss of use of the north span and of the northerly channel of the ship canal presents further difficulties. As a consequence of the negligence of the master, the Crown was deprived of the use of the north span at least for the period of three and one half months taken to construct the temporary bridge and was deprived at least for one year of the use of the north channel of the canal, thus lessening the value of the channel as a whole and throwing an added burden of work upon the bridge across the south channel.

It is undoubted that no legal obligation rested upon the Crown to provide a means of access for shipping from Lake Ontario to and from the Harbour of Hamilton and that no profit resulted to the Crown from its operation. On the contrary, it was a source of continuous expense.

That the Crown had incurred a very large expense in constructing the channel and the bridges is undoubted and, to the extent indicated, it was deprived of its right to the use of these facilities for the periods mentioned. The learned trial judge considered that the loss was recoverable upon the principle adopted by the House of Lords in *The Greta Holme*[1], where a body of trustees who were charged with the duty of maintaining the harbour works and waterway of the River Mersey in the interests of the public recovered

[1] [1897] A.C. 596.

damages for loss occasioned to a dredge owned by the trustees and engaged in operations on the river. These operations were, of course, a source of expense and not of profit, but it was held by the House of Lords that damages were recoverable for the loss of use of the dredge while it was being repaired. The principle so stated has been followed in other decisions of the House of Lords which are referred to by the learned judge. Of these, perhaps the one which more closely touches the present matter is *Admiralty Commissioners v. S.S. Chekiang*[1]. In that case the claim was for damages caused in a collision to H.M.S. *Cairo,* a light cruiser, the operation of which was a matter of public expense rather than of profit. In the House of Lords Lord Phillimore said in part (p. 650):

> public bodies who are owners of ships employed in local public service may, when their vessels have been injured by collision, recover, among other sums, damages for their detention while under repair, although no gain which could be measured in money accrues to such bodies by the use of their ships or is lost by reason of their being put out of action.

As authority he referred to *The Greta Holme, The Mediana*[2] and *The Marpessa*[3].

The claim advanced on behalf of the Crown under this head was for $73,076.04, being for the deprivation of the use of the two bridges for a period of three and one half months amounting to $21,004.22 and for the loss of use of the north channel, estimated at 90 per cent. of its full use, since it could be used for vessels to tie up, and for the cost of providing the north span for eight and one half months. The basis upon which damages are to be assessed in such circumstances is not, in my opinion, entirely clear and the opinions expressed by the law Lords upon the subject have not always been in agreement. Clearly, one of the elements to be taken into account is that the Crown was deprived of its right to use these properties in which very large sums of public moneys had been invested for these extensive periods since no benefit accrued from the use of these moneys during these periods. In *The Greta Holme,* Lord Halsbury said that a public body had to pay money like other people for the conduct of its operations and if it is

[1] [1926] A.C. 637.
[2] [1900] A.C. 113.
[3] [1907] A.C. 241.

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deprived of the use of part of its machinery, which deprivation delays or impairs the progress of its work, it was entitled to obtain damages in the same way as other people. Referring to the difficulty of assessing the damages, Lord Herschell said that as the trustees were deprived of the use of the dredger they had sacrified the interest on the money spent on its purchase and that a sum equivalent to that should at least be allowed.

Cameron J. was asked by both parties to consider the matter as a jury might do and, taking into account the whole of the evidence, he reached the conclusion that an award of $30,000 would be fair and reasonable. In my opinion, this finding should not be disturbed.

By way of defence the appellants pleaded that the bridge machinery and its control and signal system were in an unsafe and improper condition and that there had been a failure to properly inspect and maintain in good order and condition such machinery and the said system. The evidence dealing with this aspect of the matter was considered at length in the reasons delivered at the trial and I agree with the finding made that the defence failed to prove that there was any inadequacy or negligence in the maintenance of the bridge and its equipment.

The appellants dispute their liability for the wages of the regular bridge staff from April 30, 1952, until August 15, 1952, and for the cost of the relocation of the ferry berth which was previously located in the south channel. Upon the evidence I agree with the conclusion of the learned trial judge that these claims should be allowed for the reasons stated by him.

The judgment at the trial held that the appellant company was entitled to restrict its liability in the manner provided by ss. 649 and 651 of the *Canada Shipping Act*, 1934, c. 44. The respondent has cross-appealed against this finding on the ground that, as that statute does not specifically provide that those sections shall apply to Her Majesty, the sections do not apply. The learned trial judge rejected this contention and the judgment as against the company was restricted to $38.92 for each ton of the ship's tonnage. This

reduced the damages found to have been sustained and awarded against the appellant LaBlanc of $367,823.49 to $184,383.50.

The Canada Shipping Act was enacted by Parliament in reliance upon the powers vested in it by head 10 of s. 91 of the *British North America Act*. It is not questioned that the sections referred to were within the powers of Parliament and restricted the liability of the owners of vessels for loss or damage occasioned by reason of the improper navigation of a ship owned by them where the event occasioning the loss occurs without their actual fault or privity. This was made applicable to the owners of all ships, except those belonging to His Majesty. This exception was provided by s. 712.

The purpose of s. 16 of the *Interpretation Act* to which I have referred above is, in my opinion, to prevent the infringement of prerogative rights of the Crown other than by express enactment in which the Sovereign is named. Section 712 of the *Canada Shipping Act* was held in the case of *Nesbit Shipping Co. Ltd. v. The Queen*[1], to effectively prevent the exercise of the Royal prerogative. The effect of the sections of the *Canada Shipping Act,* however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law. I am accordingly of the opinion that the learned trial judge was right in permitting the amount of recovery to be restricted in the manner above indicated.

[1] [1955] 3 All E.R. 161, 4 D.L.R. 1, 73 C.R.T.C. 32.

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The respondent further asked to vary the judgment at the trial by awarding interest upon the damages from the date of the accident. No such claim was made in the information and the matter was accordingly not considered in the judgment delivered at the trial. This is a substantive claim which, if intended to be asserted, should have been pleaded.

I would dismiss both the appeal and the cross-appeal with costs.

Appeal allowed in part and cross-appeal dismissed with costs, LOCKE *and* MARTLAND JJ. *dissenting.*

Solicitors for the defendants, appellants: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the plaintiff, respondent: W. R. Jackett, Ottawa.