1953

*Feb. 2, 3
*Apr. 28

HER MAJESTY THE QUEEN *(Defendant)* ..... } APPELLANT;

AND

NISBET SHIPPING COMPANY LIMITED *(Suppliant)* ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Collision at sea between foreign merchant ship and Canadian warship—Negligence in navigation—Application of s. 19(c) of the Exchequer Court Act, R.S.C. 1927, c. 34—Governing law—Whether effective in circumstances—Whether Crown entitled to limitation of damages under s. 649 of the Canada Shipping Act, 1934.

Action for damages resulting from a collision in the Irish Sea in February, 1945, between a foreign merchant ship and a Canadian warship on her way to take over escort duty for a convoy. The vessels were on crossing courses and the merchant ship was struck on her port bow. For the purpose of this case counsel for the appellant admitted that s. 19(c) of the *Exchequer Court Act* was not restricted to claims based on negligence occurring within Canada.

Held: That the warship was solely to blame for the collision and for the loss of the merchant ship.

Held: That at the time of the collision the warship was not engaged in warlike operations in a theatre of war so as to take it out of the operation of ss. 19(c) and 50A of the Exchequer Court Act.

Held (Locke J. dissenting): That notwithstanding s. 712 of the Canada Shipping Act, 1934, the Crown is entitled to limit its liability under s. 649 of that Act if it is able to show that the damage or loss occurred without its actual fault or privity.

Per Rinfret C.J. and Rand J.: The sources of law imposing regulations upon a merchant vessel and a naval ship are different; but the rules, originating in the uniform practices of navigators for centuries, have since their enactment been universally followed. They have become

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

the de facto international or maritime rules on the high seas, and the duties raised on the two vessels were therefore rules of law proceeding from a recognized paramount source.

Per Kerwin and Estey JJ.: The International Rules of the Road, as established by Canadian Order in Council P.C. 259, dated February 9, 1897, and those contained in the King's Regulations and Admiralty Instructions (as amended to November 1943) and incorporated in the Naval Service Act, R.S.C. 1927, c. 139, were the governing rules to be applied under ss. 19(*c*) and 50A of the Exchequer Court Act in the present case.

Per Locke J.: The International Rules of the Road, not being by their terms made applicable to the Crown, did not apply. The fact, however that that portion of the rules governing the conduct of vessels proceeding on crossing courses had been almost universally adopted by ships of seafaring nations and that an identical rule forms part of the King's Regulations and Admiralty Instructions affords evidence from which the inference may properly be drawn that failing to comply with it is negligent conduct. In addition there was evidence justifying the finding that there had been no proper lookout kept on the naval vessel.

Per Locke J. (dissenting in part): The Crown is not entitled to limit the amount of its liability under s. 649 of the Canada Shipping Act of 1934, since such limitation of the liability of His Majesty qua owner is excluded by s. 712 of that Act. Furthermore, the principle that the Crown may invoke the benefit of any statute, though not named in it, has no application where as here the matter has been dealt with by Parliament.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), holding, in an action brought under s. 19(*c*) of the *Exchequer Court Act*, that the respondent was entitled to recover the full amount of its damages from the appellant for the total loss of its vessel, the S.S. *Blairnevis*, when she collided on February 13, 1945, with the Canadian frigate, H.M.C.S. *Orkney*, in the Irish Sea.

F. P. Varcoe Q.C. and *A. J. MacLeod* for the appellant.

C. R. McKenzie Q.C. and *L. A. Sherwood* for the respondent.

The judgment of the Chief Justice and Rand J. was delivered by:—

RAND J.:—This litigation arises out of a collision between H.M.C.S. *Orkney* and the ship *Blairnevis* on the morning of February 13, 1945 in the Irish Sea, a few miles north of The Skerries. Besides that of negligence in the navigation of the *Orkney*, questions were raised at trial of the applica-

(1) [1951] Ex. C.R. 225.

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tion of s. 19(*c*) of the *Exchequer Court Act*, which gives a right of action against the Crown for negligence, to acts causing damage on the high seas; of the governing law and whether it could be said to be effective in the special circumstances of the collision; and whether the Crown was entitled to invoke s. 649 of the *Canada Shipping Act* in limitation of damages.

On the argument before this Court, Mr. Varcoe stated that, for the purposes of the appeal, he would not contest the application of s. 19(*c*), and we are not then concerned with that issue.

On the second point, the controlling fact is that the Crown, not liable for the tortious acts of its servant, has by statute accepted liability. The legislation by which that has been done must be taken as impliedly envisaging the law according to which the liability of both the servant and master, in any case, arises. The courts in applying s. 19(*c*) have uniformly held that within Canada that law is the law of the province in which the act takes place, and as of the time of the enactment of the statute; but as to acts on the high seas, the situation is somewhat complicated.

In 1943 by c. 25 of the Dominion Statutes, enacting s. 50A of the *Exchequer Court Act*, the members of the naval, military or air services of His Majesty were declared as from June 24, 1938 to be deemed servants of the Crown for the purposes of s. 19(*c*). To what law, then, applicable to a collision on the high seas between a Canadian naval vessel and a merchant ship registered in Scotland must we relate the accepted liability, the law creating liability of the persons actually to blame for it and vicariously of the Crown, as an employer, for whom they were acting. If Parliament itself has legislated in relation to either or both of these matters, that would seem to me necessarily to be the law to which that liability must be related.

Under the *Imperial Shipping Act of 1894*, regulations governing navigation were in 1910 promulgated by Order in Council. The Act by s. 424 provided that with the consent of foreign countries the regulations could, by Order in Council, be extended to apply to their ships when either within or beyond British jurisdiction as if they were British ships; and by the same order they were so applied, with unimportant exceptions, to all maritime European countries,

to most of the countries of North and South America, including the United States, and to a number in Asia.

These regulations affected only merchant vessels but in the same year the Admiralty issued Instructions identical with them to govern the ships of the navy. By the *Naval Service Act,* (1910) c. 139, R.S.C. 1927, these Instructions, so far as applicable, were adopted for the Canadian naval service, and they were in effect at the time of the collision. It was found by the President (1), and not challenged before us, that the particular rules governing the situation here were the same as those prescribed by the Imperial orders.

The sources of law imposing the regulation on the merchant vessel and on the naval ship here are seen to be different: but the rules, first codified in 1863 under the *Merchants' Shipping Amendment Act* of that year and assented to by the maritime nations, originating in the uniform practices of navigators for centuries, have since their enactment been universally followed. They have become the *de facto* international or maritime rules on the high seas, and it would be to disregard realities to deal with the duties raised on the two vessels otherwise than as rules of law proceeding from a recognized paramount source: *The Scotia* (2).

Their adoption by the statute for the governance of Canadian naval vessels is in fact the recognition of their international character. It was the statutory enactment by Congress in 1864 of identical rules, that was treated by the British government as the "consent" of the United States under the *Act* of 1863. The principle that the maritime or international law applicable in any country is that interpretation of it given by that country can here be accorded its full effect, and its result is simply the submission of the naval forces to that broader but identical law. The observance of the rules by Canadian vessels, not only towards other ships of Canadian registry but towards all vessels bound by them, as the law of the sea, is inherent in the language of the statute. Within the western seas, certainly, they create the duties on the part of those in

(1) [1951] Ex. C.R. 225.

(2) 14 Wall (U.S.) 170.

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charge of Canadian naval ships out of which their liability for negligence must arise: Vaughan-Williams L.J. in *H.M.S. Sans Pareil* (1).

The scope of that liability at common and maritime law has been modified by statute. The *Canada Shipping Act* in ss. 640 et seq., deals with negligence on the part of two or more vessels in collision and attributes responsibility according to the degree of fault. These provisions constitute likewise part of the general law of negligence applicable to the liability of the servant, on which, in turn, the Crown's liability is founded.

The same principle attracts finally those provisions of Dominion law which deal directly with the imputed responsibility of owners. By ss. 649 to 655 inclusive, provision is made for the limitation of the damages issuing from that liability. It was argued that, because of s. 712, these sections had no application to the Crown. By force of the statute alone, that is so, but being part of the general law from which the liability of a master arises, they are within the contemplation of s. 19(*c*). What is sought is the law governing the collision: Parliament has enacted its own laws of negligence; and the liability, in all its aspects, of the owner in the case of private persons, for the negligence of servants, so arising, is that adopted by 19(*c*).

The President of the Exchequer Court (2), after a careful examination of the facts, found the *Orkney* solely to blame for the collision and rejected the contention that the *Blairnevis* had aggravated the damages by unreasonable delay in seeking assistance. On the argument I was satisfied that the President's findings had not been successfully challenged, and further consideration has confirmed that view.

The substantial point against the applicability of the law was as follows. The *Orkney* at the time was, under Admiralty orders, moving southeasterly to take up escort duty into Liverpool of a portion of a convoy that was to divide near The Skerries, off Anglesey, the other portion proceeding north to Glasgow; the *Blairnevis* had in the meantime detached herself from the convoy and was proceeding northerly to Workington; in February, 1945, the allies were still at war with Germany and its associates; we must assume, as the facts indicate, that the hazards

(1) [1900] P. 267 at 285. (2) [1951] Ex. C.R. 225.

from submarine and air bombing were at all times, in the Irish Sea, to be anticipated; and that in this situation the civil law of negligence is not to be taken as operative.

Three authorities bear upon this proposition. There is, first, the case of *H.M.S. Hydra* (1) in which a steamship was damaged by a collision with a destroyer. The action was heard in camera and we do not know all the facts; but as the collision took place in the English Channel in February, 1917, the destroyer was undoubtedly engaged in at least equal warlike activities and in an area that was surcharged with war dangers. In the judgment as reported no reference is made to the supersession of the law of negligence, the controversy was decided solely upon the ordinary rules of seamanship, and the destroyer held alone to blame. In *H.M.S. Drake* (2), a naval vessel having been torpedoed and heading southeasterly from Rathlin Island in a damaged condition collided with a steamship. This took place in October, 1917 in Rathlin Sound, and again it is necessary to assume that the same warlike operations and war perils were present as in the previous case; but the judgments of Roche J. and of the Court of Appeal deal with the case only in relation to the rules of good seamanship. The action was, in fact, dismissed but there is no hint of any suspension of the ordinary law.

The last examination of the question arose in the High Court of Australia. In *Shaw Savill & Albion Company Limited* v. *The Commonwealth* (3), the action was brought against the Crown for negligence by a naval vessel. A special defence was pleaded to the effect that the naval vessel was proceeding on its course pursuant to Admiralty instructions during a state of war, and that at the time of the collision it was engaged in active naval operations against the enemy. In reply, the plaintiff both denied the facts and pleaded a demurrer; and it was on the latter that the case went to appeal. The court, consisting of Rich, A.C.J., Starke J., Dixon J. (now C.J.), McTiernan J. and Williams J. agreed in the general proposition that in the circumstances of actual hostile engagement the civil laws are in effect supplanted and no act of persons participating in it can give rise to liability in negligence. On the other

(1) [1918] P. 78. (2) [1919] P. 362.
(3) (1940) 66 C.L.R. 344.

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hand it was agreed that not all warlike activity can be said to be active operations against the enemy; that, as the two authorities already mentioned show, there may be activity which, though warlike, is nevertheless accompanied by the duty of care towards civilian interests, to be judged, as in all other cases, in the light of the existing conditions. No theory by which the point at which the liability ceases is attempted. The substance of the opinions is stated in these words of Dixon J.:—

> A real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances . . . It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls.

The court agreed that the question of the existence of the state of things excluding liability was one for the civil tribunals.

The facts here do not, in any conception of the principle, bring the case within those overriding operations in which by their nature the civil law is superseded, conditions in which the responsibility rather is cast upon the civilian to extricate himself as best he can both for his own interest and to avoid interference with them. Although the *Orkney* in her passage to join the convoy was under a primary duty of alertness to enemy presence of any kind, yet the movement was not what, by any reasonable interpretation, could be called actual operations against the enemy. It was a period not of encounter but anterior to possible encounter, a period of apprehension, of lookout, of watchfulness with a view to detection; but, at the same time, a period in which duties to civilian interests were, in fact, intended to be continued. In such circumstances, unless the exercise of care is, at the moment, incompatible with that paramount vigilance, I can see no ground for excusing the failure to exercise it. It has not been suggested that any feature or requirement of that duty operated to the slightest degree in the faulty navigation: it was, by the facts themselves, demonstrated that the observance of the rules would have been as indifferent to the fulfilment of the naval duty as was their disregard. In that character of action, there is

no public interest to exempt the individual from the consequences of his delinquency; and in view of the role that goods of every conceivable kind now play in war, practical considerations would be clearly against it. That was the view of the President in the court below, and I think he was right.

There remains the claim for limitation of damages, on which the President held against the Crown. The latter, by its defence, sought the benefit of s. 649 of the *Canada Shipping Act*:—

> 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
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> * * *
>
> (iii) Where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel . . .

be liable beyond an amount based on the vessel's tonnage. Mr. Mackenzie challenges the right of the Crown both to avail itself of this provision and to raise the question by the plea. He argues that the matter is controlled by s. 650 which, "where any liability is alleged to have been incurred by the owner of a British or foreign ship" permits the owner to apply to a judge of the Exchequer Court to determine the limited amount for which he is liable and to distribute that amount ratably among whoever may be claimants. The section contemplates two or more claims made or apprehended: other proceedings in the same or other courts may be stayed; provision is made for bringing in persons interested, and for the exclusion of those who do not claim within a specified time.

It seems to be settled in England that where there is only one claimant, the matter can be raised by a defence and determined in the action: *Wahlberg* v. *Young* (1), where the claim was for damage to a tow by stranding; *Beauchamp* v. *Turrell* (2), a claim by a widow of a member of a crew who had, through a defective rope, fallen into the sea and drowned. The same procedure was followed in *Waldie* v. *Fullum* (3). But it is obvious that if other claimants are apprehended, the issue cannot be conclusively adjudicated in an action limited to one alone; in that case a counterclaim directed to the plaintiff and all other claimants can be resorted to: *The Clutha* (4). The purpose of

(1) 45 L.J.C.L. 783.
(2) [1952] 1 Ll. L.R. 266.
(3) 12 Ex. C.R. 325.
(4) 35 L.T.R. 36.

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s. 650 is to determine, once for all, whether limitation is in order or not and to conclude the question against all interests. Since the vessel and her cargo were, here, a total loss, the question of other claimants should be cleared up, and it would seem to me to be improper to enter upon that question as the action now stands in this Court.

Mr. Varcoe argued his right to limitation on another ground. It is a recognized rule that the Sovereign "may avail himself of the provisions of any Act of Parliament": Chitty's Prerogatives, p. 382. Where liability, then, on the same footing as that of a subject, is established, giving a right to damages, I can think of no more appropriate enactment to which that basic rule of the prerogative could be applied than to a statutory limitation of those damages.

If it should appeal that there are no other or apprehended claims, then the preliminary condition of actual fault or privity of the Crown will be determined by a judge of the court and the tonnage at the same time ascertained. It may be that, prima facie at least, the circumstances of a collision themselves exclude the existence of fault or privity, and I do not at the moment see how, on the facts shown here, there can be any doubt upon it. If other claims appear, the matter will be dealt with according to the procedure of the Court.

I would, therefore, dismiss the appeal 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, of s. 649 of the *Canada Shipping Act*, 1934, limiting liability. The Crown will be at liberty to take such steps toward the determination of the question of limitation as it may be advised. There will be no costs in this Court.

The judgment of Kerwin and Estey, JJ. was delivered by:—

KERWIN J.:—On February 13, 1945, a collision occurred on the high seas between His Majesty's Canadian frigate *Orkney* and the respondent's ship *Blairnevis*. In its petition of right filed in the Exchequer Court of Canada, the respondent claimed from His Majesty the King damages suffered by it as a result of the loss of its ship. The President (1), found that negligence on the part of the

(1) [1951] Ex. C.R. 225.

Commander and officers of the frigate alone had caused such damages, declared that His Majesty should pay the amount thereof, and directed a reference to the Registrar to determine the proper sum. Her Majesty the Queen now appeals.

The claim of the respondent is based upon s. 19(*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34) which, as amended in 1938, reads as follows:—

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.

With this must be read s. 50A of the *Exchequer Court Act* as enacted in 1943:—

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

In the Court below it was argued that s. 19(*c*) must be restricted to claims based on negligence occurring within Canada. Such a contention was abandoned before us but in view of at least one other question that requires consideration, I deem it advisable to state that I concur in the opinion of the President. To the reasons given by him, I would add a reference to the wording in s. 50A: "a member of the naval, military or air forces of His Majesty in right of Canada", which contemplates that such a servant of the Crown may perform a negligent act within the scope of his duties or employment outside the limits of Canada. Furthermore, in *The Diana* (1), the Court was concerned with the *Admiralty Court Act,* 1861 (24 Vict. c. 10) "An Act to extend the jurisdiction and improve the practice of the High Court of Admiralty", s. 7 of which enacted:—

The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

This was held to confer jurisdiction over a cause instituted as a result of a collision between foreign vessels in foreign waters. Similarly upon a consideration of s. 19(*c*) the conclusion is reached that the Exchequer Court has jurisdiction in the present proceedings.

(1) 1 Lush. 539.

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It has always been held that s. 19(*c*) imposed liability upon the Crown as well as conferred jurisdiction upon the Exchequer Court. This, it should be noted, is the Exchequer Court proper and not on its Admiralty side. Where the events complained of arise in a province, the law that applies is the provincial law as between subject and subject as of the date of the enactment of the relevant provisions imposing such liability, unless, of course, Parliament has chosen to establish the standard of care of its own officers or servants. The question here is as to the law to be applied where a collision occurred on the high seas between one of His Majesty's Canadian warships and a private merchant ship registered in Scotland.

The words that formerly appeared at the end of s. 19(*c*) "upon any public work" were omitted in 1938 and it was by s. 1 of c. 25 of the Statutes of 1943-44 that s. 50A was enacted. From that time until the date of the collision, February 13, 1945, the applicable law remained the same. The Canadian Order in Council establishing collision regulations under the authority of the *Canada Shipping Act*, 1934, c. 44, was not promulgated until April 8, 1948, so that, if any regulations relating to collisions at sea be relevant, the proper ones would be those established by P.C. 259 of February 9, 1897 (Canada). The *Naval Service Act, 1944*, c. 23, although assented to July 24 of that year was not brought into force by proclamation until October 15, 1945. The previous *Naval Service Act* (R.S.C. 1927, c. 139) therefore applied, and subsection 1 of s. 45 thereof provided:—

> 45. The Naval Discipline Act, 1866, and the Acts in amendment thereof passed by the Parliament of the United Kingdom for the time being in force, and the King's Regulations and Admiralty Instructions, in so far as the said Acts, regulations and instructions are applicable, and except in so far as they may be inconsistent with this Act or with any regulations made under this Act, shall apply to the Naval Service and shall have the same force in law as if they formed part of this Act.

The King's Regulations and Admiralty Instructions (as amended to November, 1943) referred to in this subsection contain, in chapter 16, regulations for preventing collisions at sea. Paragraph 660 states:—

> The following regulations are to be observed in order to prevent collisions at sea and all executive officers are to make themselves thoroughly acquainted therewith.

Then follow regulations identical for present purposes with the Collision Regulations under the *Imperial Merchant Shipping Act of 1894* and with those established by Canada, P.C. 259 of February 9, 1897, including article 19:—

> When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Therefore the rule to be followed by His Majesty's Canadian naval ships on the high seas where the proper circumstances existed were set by the authority of the same Parliament which by s. 19(*c*) of the *Exchequer Court Act* imposed liability on the Crown.

The *Orkney* had the *Blairnevis* on her own starboard side. The President found that the Commander and officers of the frigate failed to obey the injunction contained in article 19 and failed to observe the standard of care demanded under the circumstances. I am satisfied on the evidence that this was the correct conclusion and Mr. Varcoe has not persuaded me that the President was in error in finding that there was no negligence on the part of those on board the *Blairnevis*. However, it was contended that even if the officers of the *Orkney* were negligent and caused damages, those damages did not include the loss of the *Blairnevis* because, it was said, that loss resulted from the negligence of the latter's Master and officers in not applying for a tug to take their ship to Liverpool sooner than they did. When such a contention is raised, all the circumstances must be investigated. They are not at all similar to those that existed in *The King* v. *Hochelega Shipping and Towing Co. Ltd.* (1), and the evidence set forth in the reasons for judgment in this case in the Court below satisfied me that there is no basis for the contention now under consideration.

It was next argued that at the time of collision the *Orkney* was engaged in warlike operations in a theatre of war and that, therefore, ss. 19(*c*) and 50A of the *Exchequer Court Act* did not apply. Reference has been made to several cases but the only one I need mention is *Shaw, Seville and Albion Co. Limited* v. *The Commonwealth* (2). That was a decision of the High Court of Australia on a demurrer where, of course, the allegations in the statement

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

(2) (1940) 66 C.L.R. 344.

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of claim were taken as being true. The judgment of Sir Owen Dixon is a carefully reasoned one and I think that he put the position correctly when he stated that the principle that civil liability did not arise for supposedly negligent acts or omissions in the course of an actual engagement with the enemy extended to all active operations against the enemy but that a real distinction existed between the latter and other activities of the combatant services in times of war. In each instance the precise circumstances must be considered and in the present case, in my view, the *Orkney* was not engaged in a warlike operation against an enemy but in something anterior and preparatory, and the point must therefore be decided against the appellant.

The final point raised by the appellant is that in any event it is entitled to a limitation of liability under s. 649 of the *Canada Shipping Act*. As the owner of the *Orkney*, the Crown would ordinarily be entitled to take advantage of this provision but it is said that s. 712 of the *Act* prevents this result. That section provides:—

> This Act shall not except where specially provided apply to ships belonging to His Majesty.

In my opinion this section has no reference to a claim for limitation for liability under s. 649, which can only be put forward by an owner. The President considered that in *The King* v. *St. John Tug Boat Co. Ltd.* (1), I had expressed a larger view of the operation of s. 712 but, there, I was considering s. 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.

The question therefore remains, what order should now be made? The respondent is justified in its contention that the onus is on the appellant to show that the damage or loss happened without its fault or privity: *Patterson Steamship Ltd.* v. *Canadian Co-Operative Wheat Producers Ltd.* (2). While in the statement of defence the appellant asked:—

> (*b*) For a declaration that if His Majesty the King is liable in the premises he had the right to limit his liability to the sum of $38.92 for each ton of H.M.C.S. *Orkney's* tonnage, the said tonnage to be determined in conformity with Sections 649 and 654

(1) [1946] S.C.R. 466. (2) [1935] S.C.R. 617.

of the Canada Shipping Act; that he is liable only for the damage resulting from the collision and not for the subsequent loss of the S.S. *Blairnevis*, and that he is not liable for interest;

and while s. 650 of the *Canada Shipping Act* provides that "The President or the Puisne Judge of the Exchequer Court may" determine the amount of the owners liability, the usual practice is that an action for limitation of liability would be brought against the present respondent and every person or persons whomsoever claiming or being entitled to claim in respect of the damage or loss alleged to have been occasioned in any way by the collision between the *Orkney* and *Blairnevis* on or about February 13, 1945. It is quite probable that little difficulty will be encountered in ascertaining the tonnage of the *Orkney* but all interested parties should have an opportunity of disputing the claim of the Crown that it is able to bring itself within s. 649 by showing that the damage or loss happened without its actual fault or privity. The judgment appealed from with its order that the respondent recover its costs of the action might well stand. The appeal to this Court should be dismissed subject to an addition to the trial judgment of a declaration that the Crown is entitled to limit its liability in accordance with s. 649 of the *Canada Shipping Act* 24-25 Geo. V. 1934. c. 44, if it is able to show that the damage or loss occurred without its actual fault or privity. The respondent has won in this Court on all issues except that of limitation of liability. In view of the expense entailed in connection with the preparation and presentation of this appeal on the other points, there should be no costs in this Court.

The judgment of Kellock and Cartwright, JJ. was delivered by:

KELLOCK J.:—I agree with my brothers Kerwin and Rand that the appeal fails on all grounds except as to the right of the appellant to limit liability under s. 649 of the *Canada Shipping Act*. With respect to the excepted point, I desire to express my own view.

In *The City of Quebec* v. *The Queen* (1), Strong, C.J., with whom Fournier J. concurred, in considering the provisions of s. 16(*d*) of the *Exchequer Court Act* (now s. 19(*d*)), said at p. 429:

Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some

(1) (1894) 24 Can. S.C.R. 420.

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pre-existing liability of the Crown, but that it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every case in which a claim was made against the Crown which, according to the existing general law, *applicable as between subject and subject,* would be cognizable by the courts.

Gwynne J., with whom King J., concurred, expressed a similar view at p. 449 with respect to paragraph (*c*) of s. 16 (now s. 19(*c*)):

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

In *Filion* v. *The Queen* (1), Burbidge J., said at p. 144:

> It was the intention of Parliament that the Crown should within the limitations prescribed in section 16 of the Exchequer Court Act be liable in any case *in which a subject* would in like circumstances be liable.

On appeal (2), Strong C.J., expressly agreed with the reasons of the trial judge, considering that the question of jurisdiction was precluded by the decision in the Quebec case. Gwynne J. is, I think, to be taken as affirming the view he had already expressed in the earlier case, while Sedgewick J. expressly concurred in that view, considering himself "bound by the judgment" in the Quebec appeal. King J. also concurred. That this is the settled jurisprudence of this court, which was never departed from, is, I think, fully established.

In *Gauthier* v. *The King* (3), the law was again affirmed in the same sense. The matter there in issue was governed by s. 19 of the 1906 statute (R.S.C., c. 140) to which s. 18 of the present statute corresponds. S. 20 of the 1906 statute corresponds to s. 19 of the present statute.

In Gauthier's case Fitzpatrick C.J., contrasted the situation with respect to the applicable law under the then ss. 19 and 20. At p. 182 he said:

> I agree also with Mr. Justice Anglin that section 19 of the "Exchequer Court Act" merely recognizes pre-existing liabilities; and cases falling within it must be decided not according to the law applicable to the subject matter as between subject and subject, but to the general law of province in which the cause of action arises applicable to the Crown in right of the Dominion.

(1) 4 Ex. C.R. 134. (2) (1894) 24 Can. S.C.R. 482.
(3) (1918) 56 Can. S.C.R. 176.

Anglin J., with whom Davies J. also agreed, said at p. 190:

There are, however, two fallacies in the appellant's contention—one the assumption that liability *ex contractu* of the Crown in right of the Dominion depends upon the "Exchequer Court Act"; the other, that a series of decisions, culminating in *The King* v. *Desrosiers*, (41 Can. S.C.R. 71) holding that a liability of the Crown imposed by clauses of section 20 of that Act is the same as would be that of a subject under like circumstances in the province in which the cause of action arises, applies to cases falling within section 19. This latter provision (originally found in section 58 of 38 Vict. ch. 11) does not create or impose new liabilities. Recognizing liabilities (*in posse*) of the Crown already existing, it confers exclusive jurisdiction in respect of them upon the Exchequer Court and regulates the remedy and relief to be administered. In regard to the matters dealt with by this section there is no ground for holding that the Crown thereby renounced whatever prerogative privileges it had theretofore enjoyed and submitted its rights and obligations to be determined and disposed of by the Court according to the law applicable in like cases between subject and subject. The reasons for which it was so held in regard to liabilities imposed by section 20, are stated by Strong C.J. in the earlier part of his dissenting judgment in *The City of Quebec* v. *The Queen* (24 Can. S.C.R. 420). See, too, *The Queen* v. *Filion* (24 Can. S.C.R. 482), *The King* v. *Armstrong* (40 Can. S.C.R. 229) and *The King* v. *Desrosiers* (41 Can. S.C.R. 71). No other law than that applicable between subject and subject was indicated in the "Exchequer Court Act" as that by which these newly created liabilities should be determined. Placing upon that section a "wide and liberal"—a "beneficial construction"—"the construction calculated to advance the rights of the subject by giving him an extended remedy,"—it was the view of the former learned Chief Justice, and is now the established jurisprudence of this Court, that it was thereby

> not intended merely to give a new remedy in respect of some pre-existing liability of the Crown but that it was intended to impose a liability and confer a jurisdiction by which the remedy for such new liability might be administered in every case in which a claim was made against the Crown, which, according to the existing general law, applicable as between subject and subject, would be cognizable by the Courts.

But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute, binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action arises, it is not that law as applicable between subject and subject, but the general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

In *Armstrong* v. *The King* (1), the statement of the law in the same sense was expressly approved on appeal to this court (2), by at least three of the members of the Court,

(1) (1907) 11 Ex. C.R. 119. (2) (1908) 40 Can. S.C.R. 229.

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Davies, Maclennan and Duff JJ., while again in *The King* v. *Desrosiers* (1), Fitzpatrick J., said at p. 76:

> All these questions were decided by this court against the appellant in the Armstrong Case (40 Can. S.C.R. 229) on the ground that the law had been settled in a long series of cases; and, on the application for leave to appeal to the Privy Council from that judgment, Lord MacNaghton said as a ground for refusing the application, referring to the decisions of this court:
>
> This seems to have been the law for eighteen years.
>
> (See report of argument in Privy Council, p. 17), (*Cf. per Girouard J. in Abbott* v. *City of St. John* (40 Can. S.C.R. 597) at p. 602).
>
> In these circumstances, we are of opinion that the judgment in the Armstrong Case is conclusively binding on this court.

Accordingly, in determining the liability of the Crown in any case under s. 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.

The question arises, therefore, as to the law applicable as between subject and subject in circumstances such as are here present. In my view the legislative subject matter with respect to navigation and shipping being exclusively a matter for the federal Parliament, the law applicable in so far as the question of negligence or no negligence on the part of those in charge of the navigation of the *Orkney* at the material time is concerned, is to be found in the King's Regulations and Admiralty Instructions made applicable by s. 45 of the *Naval Service Act*, R.S.C., 1927, c. 139. Negligence being thus established, it is then necessary, in order to determine the extent of the liability of a subject, to resort to the provisions of the *Canada Shipping Act*, which is the law applicable, and s. 649 provides the answer.

It is contended on the basis of the presence of s. 712 in the *Canada Shipping Act* that resort cannot be had to that *Act* in a case such as the present. In my view this is erroneous. The resort to that statute is not at all for the purpose of determining what that statute has to say with respect to the Crown, but as to what it has to say with respect to the liability of a subject. In that inquiry it is

(1) (1908) 41 Can. S.C.R. 71.

obvious that s. 712 is quite irrelevant. When this inquiry is thus answered, it is s. 19(*c*) of the *Exchequer Court Act* which applies that answer to the Crown.

I would therefore vary the judgment below to the extent indicated and would dismiss the appeal otherwise. In my opinion there should be no costs in this court.

LOCKE, J. (dissenting in part):—This action was commenced by a Petition of Right by the respondent company, incorporated in Great Britain, as the owner of the steamship *Blairnevis,* against the Crown as owner of H.M.C.S. *Orkney,* in respect of damages caused by a collision between these two vessels which occurred in the Irish Sea on February 13, 1945. The jurisdiction invoked is that vested in the Court by s. 18 of the *Exchequer Court Act* and the cause of action is based upon s. 19(*c*) of that *Act,* in respect of the alleged negligence of certain naval officers, while acting within the scope of their duties, who are to be deemed servants of the Crown by virtue of s. 50A.

There are three questions to be determined. The first is as to whether there was negligence on the part of the naval officers which caused the accident: the second, was there contributory negligence on the part of those in charge of the *Blairnevis*: and the third, whether, if there be liability upon the Crown, is it entitled to limit the amount of that liability under the provisions of s. 649(1) of the *Canada Shipping Act of 1934.*

I agree with the contention of counsel for the Crown that the International Rules of the Road, not being by their terms made applicable to the Crown, did not apply to H.M.C.S. *Orkney* at the time in question. While the King's Regulations and Admiralty Instructions referred to in s. 45 of the *Naval Service Act* (R.S.C. 1927, cap. 139) were not proven at the trial of this action, the matter has been contested on the footing that they were in effect at the time in question and that they are identical in their terms with the International Rules of the Road, and that this is a fact should, in my opinion, be accepted in disposing of this appeal. In *The Truculent* (1), Willmer J. expressed the view that a breach of these regulations was a breach of the duty owed by His Majesty's ships to other mariners. I do not share this view but it is unnecessary

(1) [1951] 2 T.L.R. 895.

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for the disposition of the present case to decide the matter. I respectfully agree with the learned President of the Exchequer Court (1) that the fact that the International Rules of the Road, as established by Order-in-Council P.C. 259 dated February 9, 1897, require that when two vessels are crossing so as to involve risk of collision the vessel which has the other on her starboard side shall keep out of the way of the other, that this rule has been almost universally adopted for a very long time past by ships of seafaring nations, and that an identical rule forms part of the King's Regulations and Admiralty Instructions affords evidence from which the inference may properly be drawn that the course prescribed is in accordance with good seamanship, and that failing to comply with it is negligent conduct. In addition, the failure of the naval officers to keep a proper lookout, which was found to have contributed to the accident, was a failure to take that reasonable care in the circumstances to avoid injury to the property of others, which is the duty of those at sea as well as ashore. In my opinion, the inference was properly drawn in the present matter that it was the negligent acts of the two naval officers referred to in the reasons for judgment of the learned President which were the proximate cause of the collision and the resulting damage. I am further of the opinion that the defence that at the time of the collision the *Orkney* was engaged in warlike operations to protect merchant vessels against enemy action and that the Crown cannot, therefore, be held liable for loss, fails for the reasons given by the learned President. Upon the issue of contributory negligence, I also agree with his conclusion.

The third question arises by reason of the contention that, if liable, the Crown is entitled to the benefit of the provisions of s. 649(1) of the *Canada Shipping Act of 1934*. So far as relevant to the present proceedings, that section reads:—

> 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—
>
> * * *
>
> (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 . . . to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

(1) [1951] Ex. C.R. 225.

The respondent contends that any such claim on behalf of the Crown is excluded by s. 712 of the *Act* reading:—

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

The claim to limit the liability was advanced in paragraph 19 of the Statement of Defence and, by the prayer for relief, a declaration was asked that if His Majesty was liable in the premises he had the right to limit his liability in conformity with the provisions of ss. 649 and 654 of the *Canada Shipping Act*. The right to so limit the liability, if I appreciate correctly the argument advanced by counsel for the Crown, is that as the position of the Crown in respect of claims under s. 19(*c*) is the same as if the claim was asserted against a subject *qua* employer and as a subject would be entitled to invoke the benefit of s. 649, so may the Crown. Secondly, it is said that under the principle that the Crown may invoke the benefit of any statute, though not named in it and presumably, therefore, not being bound by its provisions, it may rely upon s. 649.

In support of the first contention, we have been referred to a passage from the dissenting judgment of Strong, C.J. in *City of Quebec* v. *The King* (1). The claim of the appellant in that case was considered by a majority of the Court to be based upon ss. (*c*) of s. 16 of the *Exchequer Court Act,* which first imposed liability upon the Crown under certain circumstances in respect of the negligence of its servants, but the learned Chief Justice considered that any right of the City must depend upon ss. (*d*) which gave jurisdiction to the Court to hear and determine:—

> Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

It was in considering this subsection that Strong C.J. said (p. 429) as to its interpretation and, after referring to a passage from the judgment of the Judicial Committee in *Attorney-General of the Straits Settlement* v. *Wemyss* (2):

> Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some pre-existing liability of the Crown, but it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every case in which a claim was made against the Crown which, according to the existing general law, applicable as between subject and subject, would be cognisable by the Courts.

(1) (1894) 24 Can. S.C.R. 420. (2) 13 App. Cas. 192.

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Gwynne, J., who disagreed with the Chief Justice as to the proper disposition to be made of the appeal, referred to ss. (*c*) of s. 16, which, in his opinion, gave to the Exchequer Court "the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals."

In *The Queen* v. *Filion* (1), Sedgwick, J. quoted the passage from the judgment of Gwynne, J. in the *City of Quebec* case, from which the above quotation is taken, as authority for finding that ss. (*c*) not only created a liability but gave jurisdiction to the Court.

In *Gauthier* v. *The King* (2), where the claim was in contract, Anglin J. (as he then was), in discussing liabilities imposed by s. 20 of the *Exchequer Court Act* (the former s. 16), said that no other law than that applicable between subject and subject was indicated in the *Exchequer Court Act* as that by which these newly created liabilities should be determined and, following this, quoted from the judgment of Strong, C.J. in the *City of Quebec* case the passage above cited.

These statements, in so far as they are applicable to the construction of ss. (*c*) of s. 19 of the *Exchequer Court Act,* are, in my opinion, authority only for this, that the same events which, upon the application of the maxim *respondiat superior,* impose liability upon a subject *qua* employer, apply in determining the liability of the Crown in that capacity. That question is entirely distinct from the matter in question here, which is whether the liability so imposed upon the Crown may be limited in its extent by a statute which, by its terms, is declared to be inapplicable to the Crown. Nothing said by the learned members of this Court in the above mentioned cases or in any others to which we have been referred was directed to any such question.

In England the liability of the owners of vessels in respect of harm caused without their actual fault or privity has been restricted by various statutory enactments since 1733 (Mayers Admiralty Law, p. 161). S. 503 of the *Merchant Shipping Act of 1894* limited the damage to £8 for each ton of the ship's tonnage. That section, with changes which do not alter its meaning, was incorporated as s. 921 in

(1) (1894) 24 Can. S.C.R. 482 at 485. (2) (1918) 56 Can. S.C.R. 176.

the *Canada Shipping Act* (c. 113, R.S.C. 1906) and re-enacted as s. 903 in the revision of 1927. When the new *Canada Shipping Act* was enacted in 1934 and the previous *Act* repealed as well as the Merchant Shipping Acts of 1894 to 1898, in so far as they were part of the law of Canada, the section was enacted in its present form.

S. 4 of the *Merchant Shipping Act of 1854* provided that the *Act* should not, except as provided, apply to ships belonging to His Majesty. As section 741 the provision formed part of the *Merchant Shipping Act of 1894*. When the *Canada Shipping Act of 1906* was enacted, however, while by a number of sections (of which s. 4 was an example) particular parts of the statute were declared to be inapplicable to ships belonging to His Majesty, there was no such provision in Part XIV of which s. 921 formed a part, nor was there any such section in that part of the *Canada Shipping Act* as it appeared in the Revised Statutes of 1927 of which s. 903 formed a part. When, however, the new *Act* was passed in 1934 and the Merchant Shipping Acts of England, in so far as they formed part of the law of Canada, were repealed, s. 712 was enacted in the precise terms of s. 741 of the *Act of 1894*.

Parliament thus, discarding the manner which had been adopted in the earlier Canada Shipping Acts of exempting His Majesty's ships from the operation of defined parts of the *Act*, adopted the form of the legislation which had been in effect in England of providing generally that, except where specially provided, the *Act* should not apply to them. It is clear that, with certain exceptions provided by the terms of the statute which are irrelevant to the present consideration (such as sections 557 to 564), none of the provisions of the *Merchant Shipping Act of 1894* were ever held to apply to vessels of His Majesty's Navy. It is no doubt for this reason that when the *Crown Proceedings Act*, 1947 (c. 44), which for the first time imposed liability upon the Crown in respect of torts committed by its servants or agents, was enacted, s. 5(1) provided that:—

> The provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall, with any necessary modifications, apply for the purpose of limiting the liability of His Majesty in respect of His Majesty's ships; and any provision of the said Acts which relates to or is ancillary to or consequential on the provisions so applied shall have effect accordingly.

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There is no such legislation in Canada.

It is, however, to be noted that while it is the "owners of a ship" who are entitled to the benefit of the limitation of liability by s. 649(1), s. 712 says that the *Act* shall not, except where specially provided, apply to *ships* belonging to His Majesty. In my opinion, s. 712 should be construed as applying to or in respect of ships belonging to Her Majesty and that, accordingly, the limitation of the liability of His Majesty *qua* owner is excluded by s. 712. To construe that section otherwise would be, in my judgment, to fail to interpret the section in such manner as will best ensure the attainment of the object of the enactment, as required by s. 15 of the *Interpretation Act*.

The contention that the Crown may take advantage of s. 649(1) is apparently based upon a principle which is stated in Chitty on the Prerogatives of the Crown, p. 382, in the following terms:—

> The general rule clearly is that, though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him.

When the necessity arises and, in my opinion, it does not arise in the present case, it will be necessary to consider the entire accuracy of this statement. As to this, I refer to the comments of Scrutton, L.J. in *Cayzer* v. *Board of Trade* (1). The right to invoke the statute is asserted as an exercise of the prerogative and there is no room, in my opinion, for its exercise when the matter has been dealt with by Parliament. In *Attorney-General* v. *De Keyser's Royal Hotel* (2), Lord Dunedin said in part:—

> The prerogative is defined by a learned constitutional writer as "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

Here s. 712 provides that any provision of the *Act* may be made applicable to the Crown and the provisions of s. 649 and the following sections have not been so made applicable. Lord Atkinson said in part (p. 539):—

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach

(1) [1927] 1 K.B. 269 at 294. (2) [1920] A.C. 508 at 526.

conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do.

There is no authority binding upon us to which we have been referred or of which I am aware where His Majesty has been held entitled to the benefit of the provisions of a statute which, by its terms, declares it to be inapplicable to the Crown.

I would dismiss this appeal with costs.

Appeal dismissed without costs subject to limitation of liability under s. 649 of the Canada Shipping Act, 1934.

Solicitor for the appellant: *Lucien Beauregard.*

Solicitor for the respondent: *C. Russell McKenzie.*