

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
William Howard Smith and Sons, Limited,
v. Alexander Wilson; from the Supreme
Court of Victoria, delivered 27th June 1896.*

Present :

THE LORD CHANCELLOR.

LORD HERSCHELL.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Appellant Company were the registered owners of the S.S. "Gambier," which, on the 28th August 1891, was run into and sunk by the S.S. "Easoby" within the limits of the harbour of Port Philip, in the Colony of Victoria. On the same day, the Appellants gave due notice to the Southern Insurance Company, Limited, and also to the Commercial Insurance Company, Limited, with whom the sunken vessel was insured, that they abandoned all their interests insured, and claimed payment under their policies for a total loss. Both these Companies admitted the claim, and, on the 21st September 1891, paid to the Appellants the full amount of the policies. On the 2nd November 1891, the Certificate of Registration of the "Gambier" was cancelled in consequence of her having become a wreck.

By Section 13 of the "Marine Act, 1890," which is No. 1565 of the Consolidated Victorian

Statutes of that year, it is enacted:—" If any
 " ship be sunk stranded or run on shore in any
 " port within Victoria, or having been sunk shall
 " be permitted so to remain, and the owner or
 " master shall not clear such port of any such
 " ship and of every part of the wreck thereof
 " within such time as the port officer harbour
 " master or in their absence the proper officer of
 " customs of or at such port shall by notice in
 " writing require, or shall not give security to
 " the satisfaction of such port officer harbour
 " master or officer of customs for the removal of
 " such ship and wreck within such further time
 " as the said port officer harbour master or
 " officer of customs may appoint, any two justices
 " are hereby authorised and required, upon the
 " complaint of the said port officer harbour
 " master or officer of customs, to issue their
 " warrant for the removing such ship or wreck
 " in such manner as such port officer harbour
 " master or officer of customs shall direct, and
 " for causing the same to be sold and out of the
 " money arising from such sale to defray the
 " expenses of such removal, paying the overplus
 " (if any) to the owner of such ship or if he
 " cannot be found to the Treasurer of Victoria
 " on behalf of such owner; and if the money
 " arising from such sale shall not be sufficient
 " to defray the expenses aforesaid, the excess
 " thereof beyond the proceeds of such sale shall
 " be chargeable to the owner of the ship; and
 " if not paid within twenty days after having
 " been demanded by the authority of the justices
 " aforesaid shall be recovered as hereinafter
 " mentioned."

On the 5th September 1891, the Respondent, who is port officer for the Colony of Victoria, served a notice upon the Appellants, requiring them, as owners of the "Gambier" at the date when she was sunk, to clear the port of the

vessel and every part thereof within thirty days from the date of their receiving the notice, and to give security to his satisfaction for the removal of the vessel and the wreck thereof within thirty days from the expiry of that period. The notice further intimated that, in the event of the Appellants' failure to comply with these requisitions, application would be made to the justices sitting in petty sessions for a warrant to remove the ship in such manner as the Respondent might direct, and for causing the same to be sold in terms of the above section. The Appellants did not remove the wreck, or give security; and, on the 6th October 1891, the Respondent, by a second notice, required them to find security for its removal within thirty days, with the same notification which had been previously made, in the event of their failing to do so. The Appellants did not comply with that notice. It is not disputed that, after the 28th August 1891, they did not exercise any control over the sunken vessel, or interfere in any way with the wreck.

On the 21st November 1891, a complaint and summons at the Respondent's instance was issued from the Court of Petty Sessions at Port Melbourne, requiring the Appellants to show cause why a warrant should not be issued authorising the removal and sale of the wreck in terms of the Marine Act of 1890. After hearing parties, the justices, on the 4th December 1891, granted a warrant authorising the Respondent, two months after its date, to remove the vessel and any part of the wreck thereof in such manner as he should direct, and to cause the same to be sold in terms of the statute. In virtue of that warrant, the Respondent, between September 1892 and March 1893, caused the ship to be blown up by explosives, and sold some portions of the wreck.

On the 18th August 1894, the justices, on the application of the Respondent, issued a further warrant, which bears that the ship had been removed, and that the expenses of the removal exceeded the money arising from the sale of materials; and also that the Appellants were the owners of the ship prior to her removal, and at the time of her being sunk. In these circumstances, the Respondent was authorised to make demand upon the Appellants for the sum of 3,058*l.* 4*s.* 3*d.*, being the amount of the excess.

The Appellants then obtained an order *nisi* from the Supreme Court of the Colony, requiring the Respondent to show cause why the warrant of the justices should not be set aside, on the grounds (1) that they were not the owners of the ship within the meaning of Section 13 of the Marine Act, 1890, and that, on their abandonment, the property of the ship passed by operation of law to the underwriters; (2) that the ship had not been removed in manner provided by Section 13, but had been dispersed and destroyed by explosives; (3) that items amounting to 250*l.* charged by the Respondent for lighting were not expenses of removal within the meaning of the Statute. Two other reasons were stated in the order, but were abandoned in the Court below; and, in the argument upon this Appeal, the plea, that the ship was not removed in terms of the Act, was not insisted in. On the 10th April 1895, the Court, consisting of Mr. Justice Williams, Mr. Justice Holroyd, and Mr. Justice Wood, directed that the warrant of the justices should be amended, by deducting from the amount ordered to be paid the sum of 106*l.*, being costs of lighting the wreck before its removal began; and, subject to that amendment, discharged the order *nisi* with costs.

The first and main question arising in this

appeal depends upon the construction of the 13th section of the Act which has already been quoted at length. According to the Appellants' argument, that clause makes the excess of expenditure incurred by the port officer, over receipts derived from sales by him, chargeable, not to the person who was registered owner of the ship down to the time of her sinking, but to the person who was owner of the wreck during the time occupied in its removal. The Respondent, on the other hand, argues that statutory liability attaches to the person who was owner of the vessel, during the last stage of its existence as a navigable ship; and that the port officer has no concern with anyone who may afterwards acquire right to the wreck from such owner.

Counsel for the Appellants strongly relied upon the recent decision of the House of Lords in *The "Crystal"* (1894, Ap. Ca. 508). Their Lordships are unable to regard that authority as a useful aid in interpreting the Section which it has become their duty to construe in this appeal. The subject-matter of that Section is very much akin to the subject-matter of Section 56 of the Harbours, Docks, and Piers Clauses Act, 1847, which the House of Lords had to consider in *The "Crystal."* Except to that extent, there is very little resemblance between the two clauses. The expressions requiring to be construed are not the same; and the context in which they occur is different. In the British Act of 1847, there is no mention made of a ship, or of the owner of a ship; the terms used are "wreck," and the "owner of the same." And the noble and learned Lords who gave judgment in the case of *The "Crystal"* were unable to find, in the context of Section 56, any language indicating the intention of the Legislature to

impose upon the owner of a navigable ship, who was not the owner of its wreck, a liability which did not attach to him at common law. For reasons similar, though not the same, their Lordships do not think it would be of any advantage to examine the bearing, upon this case, of the judgments of Mr. Justice Mathew and the Court of Appeal in *Barraclough v. Brown* (65 L. J., Q. B. D. 333).

The Section of the Victorian Act appears to their Lordships to be framed in terms very different from those which occur in the British Statute of 1847. The introductory and leading provisions of Section 13 cast upon the owner of any ship which is sunk, stranded, or run on shore, the duty of clearing the port in which it is sunk, stranded, or run on shore, of any such ship, and of every part of the wreck thereof. The duty attaches at once, and is made equally imperative, whether the ship continues to be a ship, and only requires to be set afloat, or becomes a total wreck, and ceases to be a ship; and, what is of greater importance to the present question, the duty is, in either case, imposed upon the owner or master of the ship. Their Lordships are of opinion, and the Appellants' Counsel hardly ventured to dispute, that, in this part of the clause, the owner or master referred to is the owner or master of the ship, at and before the time of the occurrence which led to her being sunk, stranded or run ashore. The remaining enactments of the clause are alternative. They make provision for the event of the owner or master failing to perform the statutory duty incumbent upon them, and do not come into operation if that duty be fulfilled. When the owner or his master fail to remove the ship, the port officer is entitled, on his following the procedure prescribed by the clause,

to have it removed "in such manner as he shall "direct"; and, if the wreck sold does not produce money sufficient to defray the expenses of removal, the deficit is made "chargeable to "the owner of the ship." In their Lordships' opinion, the expression "owner of the ship," as it occurs in the second part of these enactments, has the same meaning which it bears in the first. It is not unreasonable to suppose that the Legislature intended to make the person whom the Statute requires to remove the wreck, at his own cost, reimburse the statutory officer by whom it is removed, in consequence of his failure; and there is nothing, either in the language of the clause, or in the nature of its enactments, to suggest that it was meant to release the shipowner from liability because he neglected his duty.

Their Lordships are accordingly of opinion that the enactments of Section 13, taken *per se*, have been rightly construed by the Supreme Court. In that view, it becomes unnecessary to rely upon the fact that these enactments were not novel, and that the legislation which preceded them had received judicial construction in *Ramsden v. Payne* (1 V. L. R. 256), and *Payne v. Fishley* (1 A. J. R. 122). It is also unnecessary to consider the Appellants' argument to the effect that they had, at common law, ceased to be owners of the wreck, before the commencement of the Respondent's operations in September 1892.

The learned Judges of the Supreme Court were of opinion that all expenses charged by the Respondent in Exhibit M, before the 4th February 1892, should be deducted; but, seeing that in the order *nisi* the Appellants had only objected to expenses of lighting, they left the question of such further deduction to the parties.

Their Lordships agree upon that point with the learned Judges, but do not notice it farther, as they do not suppose that an officer of the Colonial Government, in the position of the Respondent, will have any difficulty in acceding to the suggestion made by the Court below.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The costs of the appeal must be borne by the Appellants.
