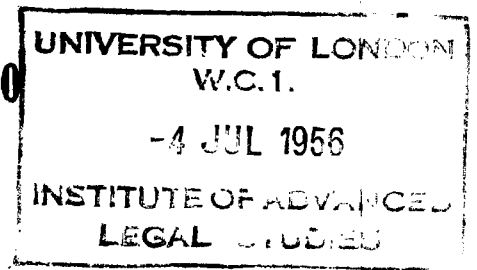


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43590



Appeal No. 30 of 1954.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

BETWEEN—

NISBET SHIPPING COMPANY LIMITED
(Suppliant) *Appellants*

— AND —

THE QUEEN *Respondent.*

10 CASE ON BEHALF OF THE APPELLANTS.

RECORD.

1. This is an appeal from a decision of the Supreme Court of Canada (The Honourable the Chief Justice of Canada, the Honourable Mr. Justice Kerwin, the Honourable Mr. Justice Rand, the Honourable Mr. Justice Kellock, the Honourable Mr. Justice Estey, the Honourable Mr. Justice Locke and the Honourable Mr. Justice Cartwright), dated 28th April, 1953, affirming the decision of the Exchequer Court of Canada (The Honourable the President), dated 20th July, 1951, who decided that the Respondent was alone to blame for a collision between the Respondent's vessel H.M.C.S. "Orkney" and the Appellants' vessel "Blairnevis", which collision occurred on the 13th February, 1945, in the Irish Sea, but also held that the Respondent was not entitled to limit his liability under the provisions of the Canada Shipping Act, 1934. The Supreme Court, in its said judgment, while affirming the decision of the Honourable the President, in favour of the Appellants as to liability for the collision, reversed his finding as to the Respondent's right to limit liability by adding to the judgment of the Honourable the President a declaration that the Crown is entitled to avail itself under the conditions prescribed in Section 649 of the Canada Shipping Act, R.S.C. 1934, limiting liability.
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2. The main general issue in this Appeal is whether the Crown is entitled to avail itself of the benefits of a Statute when the latter is not, by virtue of the provision of an express section of that same Statute,
- 30

applicable to the Crown except where specifically provided, and no such special provision is in fact made.

3. The main specific issue in this Appeal is whether the Crown is entitled to the benefit of the provisions of Section 649(1) of the Canada Shipping Act, 1934, having regard to the effect of Section 712 of that Act, and to the fact that no special provision had been made at the material time to make Section 649(1) applicable to the Crown.

p. 6, l. 11. 4. This specific contention was put in issue on behalf of the present Respondent in his Defence in the Exchequer Court of Canada in that it was there contended that "at all events, if His Majesty the King is liable in the premises, which is denied, he has the right to limit his liability to the extent to which under Article 649 of the Canada Shipping Act a private owner would, under similar circumstances, be liable", and the present Appellants in their Reply specifically denied the said assertion contained in paragraph 19 of the Defence that the Respondent was entitled to limit his liability as aforesaid and denied the application of the Canada Shipping Act, 1934, in the premises. 10

p. 7, l. 6. 5. In his judgment the Honourable the President specifically dealt with the question of limitation of the Respondent's liability raised as aforesaid, and after referring to the relevant provisions of Section 649(1) of the Canada Shipping Act, 1934, cited Section 712 of the same Act and stated that in his opinion the application for the limitation of liability should not be granted. He pointed out that as a matter of law the liability of shipowners for damage done by their ship to another ship was unlimited except as modified by Statute, and founded this statement on the judgment of Dr. Lushington in the case of the "Wild Ranger" (1863) Lush. 564, s.c. 7 L.T.N.S. 725. He further found that the present Respondent had failed to show that his claim fell within a modifying statute (in the present case the relevant provisions of the Canada Shipping Act, 1934), and that therefore the general rule did not apply to him. He (Thorson, P.) did not accept the present Respondent's contention that as Section 712 of the Canada Shipping Act, 1934, did not apply to His Majesty as the owner of ships, His Majesty could limit his liability, and he held that the meaning of Section 712 could not be restricted in this manner, citing a passage from the judgment of Kerwin J. in *The King v. Saint John Tug Boat Company Limited* (1946) S.C.R.466 (at page 468) in support of the view that Section 712 of the Canada Shipping Act, 1934 prevented the applicability of Section 640 of the same Act to His Majesty. A transcript of the judgment will be found in the Record of Proceedings at pages 7 to 22. 20

p. 21, l. 12. 6. From this judgment the present Respondent appealed to the Supreme Court of Canada. 30

p. 21, l. 17. 7. The Judges of the Supreme Court gave four separate judgments. All the seven Judges affirmed the Honourable the President's aforementioned judgment on the question of liability for the aforesaid collision and the present Respondent was held alone to blame. No appeal has been made from this part of the judgment of the Supreme Court.

p. 21, l. 45. 8. The Judges of the Supreme Court gave four separate judgments. All the seven Judges affirmed the Honourable the President's aforementioned judgment on the question of liability for the aforesaid collision and the present Respondent was held alone to blame. No appeal has been made from this part of the judgment of the Supreme Court.

p. 22, l. 9. 9. The Judges of the Supreme Court gave four separate judgments. All the seven Judges affirmed the Honourable the President's aforementioned judgment on the question of liability for the aforesaid collision and the present Respondent was held alone to blame. No appeal has been made from this part of the judgment of the Supreme Court.

p. 23. 10. The Judges of the Supreme Court gave four separate judgments. All the seven Judges affirmed the Honourable the President's aforementioned judgment on the question of liability for the aforesaid collision and the present Respondent was held alone to blame. No appeal has been made from this part of the judgment of the Supreme Court.

p. 42, l. 3. 11. The Judges of the Supreme Court gave four separate judgments. All the seven Judges affirmed the Honourable the President's aforementioned judgment on the question of liability for the aforesaid collision and the present Respondent was held alone to blame. No appeal has been made from this part of the judgment of the Supreme Court.

8. On the point of the Crown's right to limitation of liability three of the judgments in the Supreme Court reversed the finding of the Honourable the President, whereas the remaining judgment recommended that the present Respondent's appeal be dismissed also on the point of the right to limit the Crown's liability.

9. Mr. Justice Rand (with whom the Honourable the Chief Justice concurred) found that until the question of other claimants was clarified the limitation issue could not be adjudicated by the Supreme Court. On the point of the Crown's claim to limitation of liability he relied on a passage in Chitty's Prerogatives, at page 382, that the Sovereign (as cited by Mr. Justice Rand) "may avail himself of the provisions of any Act of Parliament", and he (Mr. Justice Rand) stated that where liability had thus been established on the part of the Crown on the same footing as that of the subject, thereby giving a right to damages, this "basic rule" of the prerogative could appropriately be applied for the purpose of statutory limitation of those damages.

10. This judgment does not refer to Section 712 of the Canada Shipping Act, 1934, which states: "This Act shall not, except where specially provided, apply to ships belonging to His Majesty". The Act defines ships belonging to His Majesty (definition 96) as 'all ships of war and other unregistered vessels held by or on behalf of His Majesty in right of any part of His Majesty's dominions'. The judgment in no way deals with the appropriate and relevant portion of the judgment of the Honourable the President concerning the Crown's right to limit liability. Mr. Justice Rand dealt almost exclusively with the subsidiary and purely technical contention argued before the Exchequer Court as to whether limitation of liability can be determined in the course of the actual proceedings brought to establish the liability sought to be limited, and it is submitted that this judgment by the generality of its brief reference to the main specific issue in the present appeal, provided no substantial reason for reversing the judgment of the Honourable the President on this point. It is further submitted that the cited passage in Chitty's Prerogatives, which reads as follows: "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", and which should be read in conjunction with the further passage from the same book (page 383): "But Acts of Parliament which would divest or abridge the King of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to, or bind the King, unless there be express words to that effect", never was and is not now strictly accurate and in its generality cannot be applied to instances of specific and positive statutory restrictions of the Crown's rights and liabilities, nor to instances where specifically and statutorily prescribed procedures prescribe a means of making certain statutory provisions applicable to the Crown.

p. 28, l. 29.

p. 28, l. 35.

p. 28, l. 34.

p. 32, l. 10.

11. Mr. Justice Kerwin (with whom Mr. Justice Estey concurred) in his judgment dealt with Section 712 of the Canada Shipping Act, 1934, aforesaid. He stated that in his opinion this section had no reference to a claim for limitation under Section 649, which could only be put forward by an owner. He distinguished his own judgment in *The King v. St. John Tug Boat Co. Ltd.* (1946) S.C.R.466, which had been cited with approval by the Honourable the President, as he (Mr. Justice Kerwin) had there been dealing with Section 640 of the Canada Shipping Act, 1934. This judgment thereafter also does not deal any further with the specific issue decided in the Exchequer Court nor with the main specific issue in the present appeal, and confines itself to the procedure required to determine the formal proceedings to limit liability. It is submitted that the distinction sought to be drawn concerning the interpretation of the passage referred to in Mr. Justice Kerwin's judgment in *The King v. Saint John Tug Boat Co. Ltd.* (*supra*) is not well founded and that the effect of Section 712 of the Canada Shipping Act, 1934, is the same in respect of Section 649 thereof as it is in respect of Section 640 or any other comparable section of the same Act. It is further submitted that this judgment does not provide any reason of substance for reversing the judgment of the Honourable the President as to his finding concerning the Crown's inability to limit liability in the circumstances of this collision. 10

p. 36, ll. 11 & 12.

12. The judgment of Mr. Justice Kellock (with whom Mr. Justice Cartwright concurred) deals at some length with the main specific issue of this appeal. This judgment culminates in the conclusion that Section 712 of the Canada Shipping Act, 1934, is irrelevant and that Section 19 (c) of the Exchequer Court Act (R.S.C.1927, c. 34) as amended in 1938, determines the applicability of Section 649 of the Canada Shipping Act, 1934, to the Crown. Section 19 (c) of the Exchequer Court Act is in the following terms:— 20

“The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:— 30

“(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.”

p. 33, l. 12.

p. 33, l. 23.

p. 33, l. 35.

The judgment sets out excerpts from the dissenting judgment of Strong, C.J., in the *“City of Quebec” v. The Queen* (24 S.C.R.420) and from the majority judgment of Gwynne, J. in the same case, as well as from the judgment of Burbridge, J., in *Filion v. The Queen* (4 Ex. C.R.134), from which he draws the conclusion that in determining the liability of the Crown in any action brought under Section 19 (c) of the Exchequer Court Act, if the Petitioner can make out a cause of action on the basis of the law applicable as between subjects, he thereby makes out a cause of action against the Crown and becomes entitled to the same relief as he would be entitled to in the former case. The law thereafter 40

applicable, in the opinion of Mr. Justice Kellock, is that ordinarily prevailing between subject and subject, and Section 712 of the Canada Shipping Act, 1934, can be disregarded, the Crown being entitled to rely on Section 649 as the direct result of negligence on the part of its servants within the meaning of the King's Regulations and Admiralty Instructions. It is submitted that this conclusion is misconceived. This finding is largely based on certain parts of the judgments in *Gauthier v. The King* (56 S.C.R.176), and in particular on the following passage from Mr. Justice Anglin's judgment (on p. 180) that "it was

10 "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". This judgment, however, continues:
 "But since Section 19 merely recognises 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
 20 "subject, but the general law relating to the subject-matter applicable
 "to the Crown in right of the Dominion which governs." It is sub-
 mitted that where there is a special provision in a statute, as by virtue
 of Section 712 of the Canada Shipping Act, 1934, aforesaid, the general
 jurisdiction conferred upon the Exchequer Court in respect of the
 Crown's liabilities is specifically excluded, and in any event such
 general jurisdiction could not conceivably have extended to a specific
 statutory right, such as a shipowner's limitation of his liability in certain
 instances, conferred by a Section in the very Act which is a *priori*
 inapplicable to the Crown.

30 13. It is further submitted that Mr. Justice Kellock's considerations
 of some of the passages from the judgments in the cases cited by him are
 irrelevant to the matter in issue, in that they relate to the solely juris-
 dictional effects of Section 19 (c) of the Exchequer Court Act, and are not
 concerned with the Crown's position with regard to the specific
 statutory provision conferring upon shipowners the right to limit
 liability by virtue of Section 649 of the Canada Shipping Act, 1934.

40 14. It is further submitted that as Section 712 of the Canada
 Shipping Act, 1934, expressly excluded the Crown, while providing for a
 specific procedure to make this provision applicable to the Crown (which
 had not been done on behalf of the Crown at the time in question),
 Section 649 did not become applicable to the Crown in the manner stated
 by Mr. Justice Kellock.

15. Notwithstanding the majority judgments in the Supreme Court,
 it was deemed necessary to make specific provision concerning the
 applicability of Section 649 of the Canada Shipping Act to the Crown, in
 that on the 14th May, 1953, the Crown Liability Act, 1953, received the

p. 35, l. 35.

p. 34, l. 17.

Royal Assent, whereby the Crown specifically submitted to the relevant provisions of the Canada Shipping Act, 1934, it being enacted by Section 3 (4):—

“Sections 647 and 649 to 655 of the Canada Shipping Act, 1934, apply for the purpose of limiting the liability of the Crown in respect of Crown ships; and where, for the purposes of any proceedings under this Act, it is necessary to ascertain the tonnage of a ship that has no register tonnage within the meaning of the Canada Shipping Act, 1934, the tonnage of the ship shall be ascertained in accordance with Section 92 of that Act.”

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p. 37, l. 29
l. 40.

16. In his dissenting judgment Mr. Justice Locke set out Sections 649 (1) and 712 of the Canada Shipping Act, 1934, and then dealt with some of the decided cases hereinbefore mentioned. His judgment traces back the history of Section 712 of the Canada Shipping Act and parallel legislative development in England, which culminated in the Crown Proceedings Act, 1947. At the date of this judgment, 28th April, 1953, there was no such legislation in Canada.

p. 40, l. 28.

17. Mr. Justice Locke doubts the accuracy of the passage from Chitty's Prerogatives cited by Mr. Justice Rand, and adopts the reasoning of Scrutton, C.J. in *Cayzer v. The Board of Trade* [1927] 1 K.B.269, and Lords Dunedin and Atkinson in *Attorney-General v. de Keyser's Royal Hotel* [1920] A.C.508. It is submitted that Mr. Justice Locke was correct in his reasons for upholding the judgment of the Honourable the President on all points. It is further submitted that Mr. Justice Locke was correct in stating in support of his reasons that there was no authority binding upon the Court of any instance where His Majesty had been held entitled to the benefit of the provisions of a statute which, by its terms, declared it to be inapplicable to the Crown.

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18. It is submitted that the judgments of the Honourable the President and Mr. Justice Locke were correct and that the reasons given by Mr. Justice Locke in support of his dissenting judgment were also correct.

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19. It is further submitted that Section 712 of the Canada Shipping Act, 1934, is conclusively relevant to the applicability of Section 649 of the same Act, and that as no such special provisions in compliance with Section 712 had at the material time been made in respect of the statutory rights accorded to shipowners by Section 649 (1), the Crown is not entitled to limit liability.

20. It is further submitted that it is not possible for the Crown to rely on a prerogative right which has been specifically subjected to statutory definition or exclusion, and that if the Crown is to be made liable to any duty or become possessed of any right under a statute from the provisions of which it has been specifically excluded, this can only be done (if specific provision has been made for this purpose) by providing in the precise manner prescribed in any such statute for the purpose of thus making all or some of its provisions applicable to the

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Crown, as was in fact subsequently done by the Crown Liability Act, 1953, in this instance.

21. It is further submitted that in respect of any statutory provision superimposed upon a prerogative right such pre-existing prerogative right becomes extinguished or curtailed by the words of the statute, and that same prerogative right cannot thereafter be relied on by the Crown in circumvention of such specific statutory provision.

22. Transcripts of the said judgments of the Supreme Court will be found on pages 24 to 41 of the Record of Proceedings.

p. 24.
p. 29.
p. 33.
p. 36.

10 23. The Appellants being aggrieved by the addition by the Supreme Court to the judgment of the Honourable the President of a declaration that the Crown was entitled to avail itself under the conditions prescribed in Section 649 of the Canada Shipping Act, 1934, limiting liability, sought and obtained special leave to appeal to Her Majesty in Council. A copy of the Order in Council granting such leave to appeal will be found on pages 42 to 44 of the Record of Proceedings and is dated 13th April, 1954.

p. 42.

20 24. Wherefore the Appellants hereby pray that the said addition by the Supreme Court to the judgment of the Honourable the President may be set aside and that in lieu thereof the said judgment of the Honourable the President be restored in its original form, judgment being entered for the Appellants with costs for the following among other

REASONS.

1. BECAUSE Section 649 of the Canada Shipping Act, 1934, was not applicable to the Crown at the material time.
2. BECAUSE no special provision as required had been made in accordance with Section 712 of the Canada Shipping Act to make Section 649 applicable to the Crown.
- 30 3. BECAUSE unless specific provision had thus been made to make Section 649 applicable to the Crown, the statutory right to limit liability was not applicable to the Crown at the material time.
4. BECAUSE the shipowner's right to limit liability is only applicable as the result of specific statutory provisions and Section 712 of the Canada Shipping Act by expressly providing that the statute containing the said provision should not apply to the Crown unless specially provided otherwise, acted in bar of the Crown's general prerogative.
- 40 5. BECAUSE the Crown cannot make use of rights conferred on its subjects by statute if such rights are restricted by statute as regards their applicability to the Crown.
6. BECAUSE a specific statutory provision supersedes the Crown's prerogative in respect of the specific subject-matter in respect of that statutory provision.

7. BECAUSE it is apparent from Section 3 (4) of the Crown Liability Act, 1958, that the Crown realised that Section 712 of the Canada Shipping Act required specific legislation by the Parliament of Canada to confer upon the Crown the right to limit its liability under the provisions of the Canada Shipping Act, so as to place the Crown in substantially the same position as a private person as regards liability for torts committed by servants.
8. BECAUSE the majority of the Judges of the Supreme Court (The Honourable the Chief Justice and Rand, Kerwin and Estey, J.J.) did not adequately consider the problem of the applicability of Section 649 to the Crown, which issue was before the Court as the result of the judgment of Thorson, P. 10
9. BECAUSE Kellock, J. and Cartwright, J. wrongly found that Section 712 of the Canada Shipping Act, 1934, was irrelevant, and subsequently came to the erroneous conclusion that the Crown's right to limit liability was inherent in the jurisdiction of the Exchequer Court by virtue of the Exchequer Court Act, Section 19 (c).
10. BECAUSE Section 19 (c) of the Exchequer Court Act 20 merely provides the appropriate jurisdiction for the Exchequer Court but does not enable the Crown nor the subject to limit liability, which right is provided by Section 649 of the Canada Shipping Act, 1934, and is therefore subject to the provisions of Section 712 thereof.
11. BECAUSE only Mr. Justice Locke correctly applied Section 712 with regard to the applicability of Section 649 to the Crown and correctly stated the effect of specific legislation in respect of the Royal Prerogative.
12. BECAUSE the subject is entitled to rely on the statutory 30 definition of the Crown's rights.
13. BECAUSE the Crown as a party to an Act of Parliament is bound by its provisions, and cannot rely on prerogative rights thereby curtailed or otherwise affected.
14. BECAUSE the Court can neither apply nor extend the Royal Prerogative in contravention of express statutory provision.
15. BECAUSE the judgment of the Honourable the President was right and should be restored in its original form.

Appeal No. 30 of 1954.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN:—

**THE NISBET SHIPPING COMPANY
LIMITED**
(Suppliant) *Appellants*

— AND —

THE QUEEN

Respondent.

CASE
ON BEHALF OF THE APPELLANTS.

WALTONS & CO.,
101, Leadenhall Street,
London, E.C.3.