In the Privy Council.

No. 30 of 1954.

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN

NISBET SHIPPING COMPANY LIMITED ... ... *Appellants*

AND

THE QUEEN ... ... *Respondent.*

RECORD OF PROCEEDINGS

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LIST OF DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL.

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A.	Letter from Geo. Nisbet & Co.	24th February, 1945
B.	Letter from Secretary to Flag Officer-in-Charge... ...	27th February, 1945
C.	Advices from Liverpool and Glasgow Salvage Association to " The Salvage Association "	15th February, 1945
D.	Letter from Liverpool and Glasgow Salvage Association to " The Salvage Association "	15th February, 1945
F.	Excerpt from Scrap Log—S.s. " Blairnevis "	——
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BN–7.	Log Book—H.M.C.S. " Orkney "	——
BN–8.	Survey of damage to H.M.C.S. " Orkney " by Ship's Staff	——

LIST OF DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT PRINTED.

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Agreement as to the Contents of the Case	30th May, 1952
Evidence of Victor Browne, Lieutenant-Commander, R.C.N. ...	16th April, 1948
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In the Privy Council.

No. 30 of 1954.

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN

NISBET SHIPPING COMPANY LIMITED ... ... *Appellants*

AND

THE QUEEN ... ... *Respondent.*

RECORD OF PROCEEDINGS

In the Exchequer Court of Canada.

No. 1. Petition of Right. 19th September 1946.

No. 1.

Petition of Right.

IN THE EXCHEQUER COURT OF CANADA.

Between

NISBET SHIPPING COMPANY LIMITED ... ... *Suppliant*

and

HIS MAJESTY THE KING ... ... *Respondent.*

TO THE KING'S MOST EXCELLENT MAJESTY:

THE HUMBLE PETITION OF:

10 NISBET SHIPPING CO. LTD., a body politic and Corporate, duly incorporated and having its head office and principal place of business at 95 Bothwell Street, Glasgow, Scotland.

Filed on the 19th day of October, 1946.

SHEWETH as follows:—

1.—THAT on the 13th of February, 1945, and at all material times herein, the Suppliant was the owner of the Steamship "Blairnevis" of 4,155 tons gross and 2,521 tons net, Official Number 161,901, and registered in the Port of Glasgow, Scotland.

In the Exchequer Court of Canada.

No. 1. Petition of Right. 19th September 1946—*continued.*

2.—THAT the " Blairnevis " sailed from Melilla in Spanish Morocco on the 1st of February, 1945, with a cargo of iron ore bound for Workington, England.

3.—THAT the " Blairnevis " joined a Naval convoy at Gibraltar and sailed from that port on the 4th of February. She remained in convoy till 23.45 hours on the 12th of February, and having arrived at a position in the Irish Sea approximately 53° 29 minutes N. Latitude, 4° 48 minutes West Longitude, on instructions from the Commodore of the convoy proceeded independently to Workington.

4.—ON the night of February 12 to 13, 1945, while in convoy and from the time she left the convoy till the time of the collision hereinafter described, the " Blairnevis " carried dimmed side and stern navigation lights.

5.—THAT on the night of February 12th to 13th the weather was overcast but the atmosphere was clear and although it was dark the visibility was good.

6.—THAT the " Blairnevis " proceeded on her course without incident till about 01.34 hours on the 13th, when the lookout on the port side reported an unlighted vessel approaching at great speed on the port side on a course approximately at right angles to that of the Blairnevis.

7.—THAT her Second Officer on watch having confirmed the report and in order to diminish the effect of the immediately impending collision ordered the Wheelsman to put the wheel hard-a-starboard but all to no avail.

8.—THAT shortly after this order was given and complied with the approaching vessel, which turned out to be H.M.C.S. " Orkney " struck the " Blairnevis " heavily on the port bow, causing the " Blairnevis " serious and extensive damage.

9.—THAT the " Blairnevis " immediately started to make water in her number one hold and an attempt was made to prevent the incursion of this water by placing collision mats over the damaged portion of the hull. The pumps of the " Blairnevis " could not cope with the increasing water in the hold which could not be controlled and the " Blairnevis " slowly sank by the head, her foredeck being awash by 12.10 hours of the 13th, following which she was beached with the aid of two tugs, stern first on Zebra Bank at 16.45 hours February 13, 1945.

10.—THE H.M.C.S. " Orkney " is a Naval steam-propelled frigate owned and controlled by His Majesty the King, the Respondent herein, in the Right of Canada and at all material times was manned by officers and men of the Royal Canadian Navy.

11.—THAT the said loss and damage were caused by and resulted solely from the negligence of the officers and servants of the Crown on board H.M.C.S. " Orkney " while acting within the scope of their duties or employment.

12.—THAT the said officers and servants of the Crown negligently failed to keep a proper lookout.

13.—THAT they negligently failed to keep H.M.C.S. " Orkney " under proper or any control.

14.—THAT they negligently failed to keep H.M.C.S. " Orkney " clear of the " Blairnevis."

15.—THAT they negligently caused or allowed H.M.C.S. " Orkney " to collide with the " Blairnevis."

16.—THAT they sailed and navigated the H.M.C.S. " Orkney " without navigation lights.

17.—THAT they did not handle her engines properly.

18.—THAT they navigated her at an improper speed under the existing circumstances.

19.—THAT they failed to take in due time or at all proper steps to avoid the collision.

20.—THAT they failed to ease, stop or reverse her engines in due time or at all.

21.—THAT they failed to exercise the precautions required by the ordinary practice of seamen or by the special circumstances of the case.

22.—THAT if they had exercised reasonable care and prudence and had navigated H.M.C.S. " Orkney " in a proper and seamanlike manner and with due regard to the existing circumstances no collision would have occurred.

23.—THAT they contravened Articles 2, 19, 22, 23 and 29 of the International Rules of the Road and/or the equivalent regulations applicable to British Naval vessels.

24.—THAT as a result of the collision the " Blairnevis " became a total loss and the Suppliant suffered damages in the amount of $357,600.

Your Suppliant therefore humbly prays as follows :—

(a) That the Crown be condemned to pay and satisfy to the Suppliant, Nisbet Shipping Co. Ltd., the sum of $357,600 with interest from the date of the collision and costs.

(b) That a reference be ordered and that an account be taken of such damage with the assistance of merchants.

(c) Such further and other relief as to this Honourable Court shall seem meet.

Dated at Montreal, the 19th day of September, 1946.

(Sgd.) C. RUSSELL McKENZIE,
of Counsel for the Suppliant,
360 St. James West,
Montreal, P.Q.

In the Exchequer Court of Canada.

No. 2. Defence. 7th January 1947.

No. 2.

Defence.

The Attorney-General of Canada, on behalf of His Majesty the King, in answer to the Suppliant's Petition of Right herein, says as follows :—

1.—That at the time of the collision between the S.s. " Blairnevis " and H.M.C.S. " Orkney," H.M.C.S. " Orkney " was part of the 25th Escort Group which was arriving to relieve the 5th Escort Group supporting a convoy of merchant vessels which was proceeding to Mersey, which convoy the S.s. " Blairnevis " had left shortly before to proceed to Workington. H.M.C.S. " Orkney " was, therefore, engaged at the time in warlike operations to protect and safeguard gratuitously merchant vessels against enemy action and, under those circumstances, any damage which may have been caused by H.M.C.S. " Orkney," even if due to the fault and negligence of those in charge of her navigation, does not give rise to any recourse against His Majesty the King by way of Petition of Right as contemplated by the Exchequer Court.

Under Reserve and Without Prejudice to What is Hereinabove Stated, and Subsidiary Thereto, The Attorney-General of Canada, on Behalf of His Majesty The King Further Says as Follows :—

2.—That he does not admit the contents of paragraphs 1, 2 and 3 of the Suppliant's Petition ;

3.—That he denies the contents of paragraph 4 of the Suppliant's Petition and states that the S.s. " Blairnevis " was not carrying any navigation lights ;

4.—That he denies the contents of paragraph 5 of the Suppliant's Petition and states that it was at the time raining and the visibility was poor ;

5.—That he denies the contents of paragraph 6 of Suppliant's Petition and states that the lookout on the port side did not report any vessel prior to the collision, and that if he did so this was at the time of the collision ;

6.—That he denies the contents of paragraph 7 of Suppliant's Petition and states that the course of the S.s. " Blairnevis " was not altered prior to the collision ;

7.—That he denies the contents of paragraph 8 of the Suppliant's Petition as drawn ;

8.—That he does not admit the contents of paragraph 9 of the Suppliant's Petition ;

9.—THAT he admits the contents of paragraph 10 of the Suppliant's Petition ;

10.—THAT he denies the contents of paragraph 11 of the Suppliant's Petition ;

11.—THAT he denies the contents of paragraph 12 of the Suppliant's Petition and states that besides the officers on the bridge there were two lookouts keeping a sharp lookout ;

12.—THAT he denies the contents of paragraphs 13, 14 and 15 of the Suppliant's Petition ;

13.—THAT he denies the contents of paragraph 16 of the Suppliant's Petition and states that the dim navigation lights of H.M.C.S. " Orkney " were on ;

14.—THAT he denies the contents of paragraphs 17, 18 and 19 of the Suppliant's Petition ;

15.—THAT he denies the contents of paragraph 20 of the Suppliant's Petition and states that the engines of H.M.C.S. Orkney were reversed some time prior to the collision ;

16.—THAT he denies the contents of paragraphs 21, 22, 23 and 24 of the Suppliant's Petition ;

17.—THAT the said collision and the loss and damage suffered therefrom were caused solely by the fault and negligence of those in charge of the navigation of the " Blairnevis " in that—

(a) They allowed the " Blairnevis " to proceed after leaving the convoy, and when the visibility was poor, without exhibiting any navigation lights when they knew that a new escort group was proceeding towards the convoy ;

(b) They allowed the " Blairnevis " to proceed at an improper rate of speed under the existing circumstances ;

(c) They failed to keep a proper lookout and, as a matter of fact, the lights of H.M.C.S. " Orkney " and H.M.C.S. " Orkney " were not seen by those on board the " Blairnevis " until the time of the collision ;

(d) They failed to take any steps whatsoever to try to avoid the collision. As a matter of fact, the only order that was given was to put the helm " hard a'starboard " at the time of the collision and when same was unavoidable ;

In the Exchequer Court of Canada.

No. 2. Defence. 7th January 1947— *continued.*

(e) They violated Articles 2, 16, 27, 28 and 29 of the Internationa Rules of the Road ;

(f) They failed to exercise reasonable care and prudence, and if they had navigated the " Blairnevis " in a proper and seamanlike manner and with due regard to the existing circumstances the collision would not have occurred.

18.—THAT if the " Blairnevis " became a total loss it was due to the fault and negligence of the Suppliant and of those in charge of her in not asking for salvage assistance. Had this been done extra pumps could have been got on board in time to save the vessel.

19.—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, i.e. $38.92 for each ton of the ship's tonnage calculated in conformity with Section 654 of the Canada Shipping Act.

THE ATTORNEY-GENERAL OF CANADA, ON BEHALF OF HIS MAJESTY THE KING, THEREFORE ASKS AS FOLLOWS :—

(a) THAT THE PETITION of Right of the Suppliant be dismissed with costs ;

(b) For a declaration that if His Majesty the King is liable in the premises he has 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 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 ;

(c) For such further and other relief as to this Honourable Court shall seem meet.

Dated at Montreal, P.Q., this Seventh day of January, 1947.

(Sgd.) LUCIEN BEAUREGARD,
Solicitor for the Attorney-General of Canada.

No. 3.

Reply.

In the Exchequer Court of Canada.

No. 3. Reply. 27th April 1948.

1.—The Suppliant has no knowledge of the alleged " Warlike operations " of the H.M.C.S. " Orkney " and in any event declares the same irrelevant and immaterial in the circumstances of the present case, and furthermore specifically denies the Respondent's allegation contained in paragraph 1 of the Statement of Defence that " any damages which may " have been caused by H.M.C.S. ' Orkney ' even if due to the fault and " negligence of those in charge of her navigation does not give rise to any " recourse against His Majesty the King."

2.—The Suppliant specifically denies the allegation of paragraph 19 of the defence that the Respondent " 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 denies the application of the Act in the premises.

3.—Otherwise the Suppliant joins issue upon the allegations of the Statement of Defence save in so far as the same consist of admissions of the allegations of the Statement of Claim.

Dated at Ottawa, Ontario, this 27th day of April, 1948.

(Sgd.) C. RUSSELL McKENZIE,
Of Counsel for Suppliant.

No. 4.

Reasons for Judgment of Thorson, P.

No. 4. Reasons for Judgment of Thorson, P. 20th July 1951.

THORSON, P.

The Suppliant, a Scottish Corporation having its head office and chief place of business at Glasgow, Scotland, claims damages for the loss of its steamship " Blairnevis " in the Irish Sea on February 13, 1945, through a collision between it and a Canadian warship, H.M.C.S. " Orkney," a steam frigate forming part of His Majesty's Canadian Naval forces on active service and manned by officers and men of the Royal Canadian Navy.

The claim is brought under Section 19 (c) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended, which 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."

In the Exchequer Court of Canada.

No. 4. Reasons for Judgment of Thorson, P. 20th July 1951— *continued.*

In a claim under this section the onus of proof that all the conditions of liability required by it have been met rests on the suppliant. It must bring its claim within the four corners of the section for apart from it the Crown is under no liability.

As to one condition of liability there is no dispute. The Orkney was owned by His Majesty in right of Canada and manned by members of the naval forces of Canada. They must, therefore, under Section 50A of the Exchequer Court Act as enacted in 1943, Statutes of Canada 1943, chap. 25, be deemed to have been servants of the Crown, and it is clear that at the time of the collision they were acting within the scope of their duties or employment. The disrupted issues of fact are whether there was negligence on the part of any officer of the " Orkney " and, if so, whether or to what extent the loss of the " Blairnevis " resulted therefrom.

The " Blairnevis " had sailed from Melilla in Spanish Morocco on February 1, 1945, with a cargo of iron ore bound for Workington, England, joined a naval convoy at Gibraltar and sailed from there in convoy on February 4, 1945, continued in this convoy until February 12, 1945, when she reached a position in the Irish Sea off certain islands known as the Skerries. There the convoy had been broken up into two portions, one going east to the Mersey and the other north-west to the Clyde and the " Blairnevis " had been instructed by the commodore of the convoy to detach herself from it and proceed independently to Workington. While she was doing so she was struck on her port bow at about 1.34 a.m. on February 13, 1945, by H.M.C.S. " Orkney." The " Orkney " was one of four Canadian frigates, designed as anti-submarine vessels, making up the 25th Escort Group based at Londonderry in Northern Ireland. With two other frigates of the group she had left Moville near Londonderry at 10 a.m. on February 12, 1945, under the command of Acting Commander Victor Browne of the Royal Canadian Volunteer Reserve, who was also the senior officer of the group, with instructions to relieve the escort that was with the Mersey portion of the convoy and take over escort duty for the balance of its voyage. It was while the " Orkney " and the other two frigates were on their way to take over this duty that the " Orkney " struck the " Blairnevis." The collision occurred at 1.34 a.m. on February 13, 1945, and the position of the vessels was established at latitude 53 degrees 38 minutes North and longitude 4 degrees, 38 minutes West, about 57 miles west of Liverpool.

The Respondent's main defence in point of law was that at the time of the collision H.M.C.S. " Orkney " was engaged in warlike operations to protect merchant vessels against enemy submarine action and that consequently the Respondent could not be held responsible for loss caused by her even if it resulted from negligence on the part of those charged with her navigation. It can be accepted that the " Orkney " was engaged in warlike operations. With her sister ships of the 25th Escort Group she was on her way to take over escort duty for the Mersey portion of the convoy that had come from Gibraltar and relieve the escort that had accompanied it. The threat of danger to merchant vessels from enemy submarine action in the

area made such duty necessary. The Irish Sea was a theatre of war. If, therefore, the Respondent's contentions were well founded in law that would be the end of the Suppliant's case but I am satisfied that the law does not go that far. Counsel for the Respondent could not, of course, find any English decision directly in point, for prior to the Crown Proceedings Act, 1947, no claim lay against the Crown in the United Kingdom for the negligence of its officers or servants, but he relied strongly on the decision of the Full Court of the High Court of Australia in *Shaw Savill and Albion Co., Ltd.* v. *The Commonwealth* (1940) 66 C.L.R. 344. In Australia, Section 56 of the Judiciary Act, 1903—1940, provides that any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court. The legislation is thus similar in principle to Section 19 (c) of the Exchequer Court Act, although broader in extent in that the claim in tort is not confined to a claim for negligence. In the case relied upon the Plaintiff, a United Kingdom company, sued the Commonwealth for damages suffered by it as the result of a collision between its motor vessel and an Australian warship and certain questions of law came before the Court on demurrers and motion. The Full Court unanimously held that an action for negligence brought against the Crown for acts done in the course of active naval or military operations against the enemy must fail, four of the judges taking the view that while the forces of the Crown are engaged in actual operations against the enemy they owe no duty of care to avoid loss or damage to private individuals and the other that such acts are not justifiable *durante bello.* But the Court also held that this immunity from action does not attach to activities of the Crown's combatant forces in time of war other than actual operations against the enemy. The governing reasons for the decision were clearly expressed by Dixon, J., with whom Rich, A.C.J., and McTiernan, J., agreed. After pointing out that the liability of the Commonwealth must be vicarious and depends on the existence of a duty of care in some individual, as is also true of the liability of the Crown under Section 19 (c) of the Exchequer Court Act, he said, at page 361 :

> " Outside a theatre of war, a want of care for the safety of merchant " ships exposes a naval officer navigating a King's ship to the same " civil liability as if he were in the merchant service. But, although " for acts or omissions amounting to civil wrongs an officer of the " Crown can derive no protection from the fact that he was acting " in the King's service or even under express command, it is recog- " nised that, where what is alleged against him is failure to fulfil " an obligation of care, the character in which he acted, together, no " doubt, with the nature of the duties he was in the course of perform- " ing, may determine the extent of the duty of care : Cp. Halsbury's " Laws of England, 2nd ed., vol. 23, p. 666. It could hardly be " maintained that during an actual engagement with the enemy or a " pursuit of any of his ships the navigating officer of a King's ship of " war was under a common-law duty of care to avoid harm to such

" non-combatant ships as might appear in the theatre of operations. " It cannot be enough to say that the conflict or pursuit is a circum- " stance affecting the reasonableness of the officer's conduct as a " discharge of the duty of care, though the duty itself persists. To " adopt such a view would mean that whether the combat be by the " sea, land or air our men go into action accompanied by the law of " civil negligence, warning them to be mindful of the person and prop- " erty of civilians. It would mean that the Courts could be called " upon to say whether the soldier on the field of battle or the sailor " fighting on his ship might reasonably have been more careful to avoid " causing civil loss or damage. No one can imagine a court undertaking " the trial of such an issue, either during or after a war. To concede " that any civil liability can rest upon a member of the armed forces for " supposedly negligent acts or omissions in the courts of an actual " engagement with the enemy is opposed alike to reason and to policy. " But the principle cannot be limited to the presence of the enemy or " to occasions when contact with the enemy has been established. " Warfare perhaps never did admit of such a distinction, but now it " would be quite absurd. The development, of the speed of ships and " the range of guns were enough to show it to be an impracticable " refinement, but it has been put out of question by the bomber, the " submarine and the floating mine. The principle must extend to all " active operations against the enemy. It must cover attack and " resistance, advance and retreat, pursuit and avoidance, reconnais- " sance and engagement. But 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 proceed- " ing 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. Thus the commander of His Majesty's torpedo-boat " destroyer " Hydra " was held liable for a collision of his ship with a " merchant ship in the English Channel on the night of the " 11th of February, 1917, because he failed to perceive that the other " ship, which showed him a light, was approaching on a crossing course. " The hearing was *in camera* and obviously the " Hydra " was on " active service and war conditions obtained *H.M.S. Hydra* (1918) P. 78.

" It may not be easy under conditions of modern warfare to say " in a given case upon which side of the line it falls. But, when, in an " action of negligence against the Crown or a member of the armed " forces of the Crown, it is made to appear to the Court that the matters " complained of formed part of, or an incident in, active naval or " military operations against the enemy, then in my opinion the action " must fail on the ground that, while in the course of actually operating " against the enemy, the forces of the Crown are under no duty or care " to avoid causing loss or damage to private individuals.

" There is no authority dealing with civil liability for negligence " on the part of the King's forces when in action, but the law has " always recognised that rights of property and of person must give " way to the necessities of the defence of the realm. A good statement " will be found by Sir Erle Richards, Law Quarterly Review, vol. 18, " at p. 135. To justify interference with person or property, it must, " according to some, be shown that the measures were reasonably " considered necessary to meet an appearance of imminent danger. " But this seems a strict test : See Pollock on Torts, 14th ed. (1939), " p. 132, note t, and p. 134 ; Law Quarterly Review, vol. 18, at " pp. 138–141 and 158, and cp. *R.* v. *Allen* (1921) 2 I.R. 241.

" The uniform tendency of the law has been to concede to the " armed forces complete legal freedom of action in the field, that is to " say in the course of active operations against the enemy, so that the " application of private law by the ordinary courts may end where the " active use of arms begins. Consistently with this tendency the civil " negligence cannot attach to active naval operations against the " enemy."

In my judgment, the principles thus laid down are applicable in the present case. It follows that since the operations in which H.M.C.S. " Orkney " was engaged, although warlike operations, were not actual operations against the enemy, the officers charged with her navigation were not freed from the duty of care for the safety of merchant vessels. That a collision between one of His Majesty's warships and a merchant vessel in time of war may be attributed to the negligence of the commander of the warship is illustrated by a case such as *H.M.S.* " *Hydra* " (1918) P. 78, although it must be conceded that in that case it was not shown that at the time of the collision the warship was engaged in warlike operations. This fact may have prompted Counsel for the Respondent to contend that immunity from the duty of care for merchant vessels extended to the officers of a Canadian warship engaged in warlike operations even although they were not actual operations against the enemy. He suggested that the decision of the House of Lords in *Yorkshire Dale Steamship Company Ltd.* v. *The Minister of War Transport* (1942) 73 Lloyd's List L.R.1. supports this proposition but, as I read the reasons for judgment in that case, it has no applicability here. There the issue was whether the claimant's motor vessel had been stranded as a consequence of warlike operations and consequently entitled to war risk insurance. It does not touch the question whether persons engaged in warlike operations are free from the duty of care to which they would otherwise be subject.

The next defence put forward was a denial of the Court's jurisdiction to entertain the claim. Counsel for the Suppliant urged that the officers charged with the navigation of the " Orkney " had been guilty of negligence in that they had failed to comply with the " Regulations for Preventing " Collisions and for Distress Signals," generally known as the International Rules of the Road, as established by Order in Council P.C. 259, dated 9th February, 1897, as amended, particularly Article 19 which reads as follows :

In the Exchequer Court of Canada.

No. 4. Reasons for Judgment of Thorson, P. 20th July 1951— *continued.*

" When two steam 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."

Exception to this contention was taken on behalf of the Respondent. It was objected that the Regulations do not bind the Crown, that the collision between the vessels occurred on the high seas and no provincial law of negligence can be applied to it, that Section 19 (c) of the Exchequer Court Act must be construed restrictively as covering only claims where a provincial law of negligence can be applied and that a claim based on negligence outside of Canada is not within its ambit.

I am unable to agree with these objections. It may be conceded that the Regulations do not bind the Crown but it is established that while they do not as such apply to His Majesty's ships they constitute a code recognised by all maritime nations as well adapted for preventing collisions at sea and embody principles of good seamanship that ought to be applied everywhere : *vide The F. J. Wolfe* (1945) P. 61 and (1946) P. 91. In the Court of Appeal, Scott, L.J. regarded the Regulations as the embodiment of principles of seamanship and said, at page 95 :

" Those rules represent the considered views of almost generations " of seamen of many nations,"

and later, on the same page, expressed these views :

" since the abolition in 1911 of the statutory presumption of fault " where there had been a breach of a regulation, it makes, generally " speaking, very little practical difference whether one says that the " rules for prevention of collisions are directly operative ' as such,' " or merely ' as a guide for seamanship ' . . . but the principles of " seamanship ought, in my view, always to be borne in mind, whether " one calls them ' rules ' or ' principles.' Their bearing on maritime " duty and fault under the one aspect or the other is normally just " the same. Every skilled and experienced navigator has the " regulations—the crossing rule at any rate—deeply ingrained in his " mind, and reacts to it just as a natural stimulus from the brain " acts on muscles. It is automatic."

But it is immaterial whether the Regulations were applicable as such or as an embodiment of principles of seamanship that the officers in charge of the navigation of His Majesty's ships ought to apply, for H.M.C.S. " Orkney " was bound by the King's Regulations and Admiralty Instructions by reason of Section 45 of the Naval Service Act, R.S.C. 1927, Chap. 139, which provided :

" 45. The Naval Discipline Act 1856 and the Acts in amendment " therefor 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 in force at the time of the collision were thus by an Act of the Parliament of Canada made applicable to His Majesty's Canadian warships wherever they were operating. Chapter XVI of these Regulations and Instructions contain regulations identical in wording with the Collision Regulations referred to with the result that the situation is similar to that which was pointed out by Sir Gorell Barnes, J. in *H.M.S.* " *Sans Pareil* " (1900) P. 267, at 272. If the facts brought the case within the words of Article 19 it was the duty of the " Orkney " and the officers in charge of her navigation to keep out of the way of the " Blairnevis." It set the standard for the duty of care to be followed : *vide* also " *The Queen Mary* " (1949) 82 Lloyd's L. Rep. 303.

This disposes of the contention of lack of jurisdiction on the ground that because the collision happened on the high seas there was no provincial law of negligence that could be applied. While it has been established by the Supreme Court of Canada in *The King* v. *Armstrong* (1908) 40 Can. S.C.R. 229, at 248 and *Gauthier* v. *The King* (1918) 56 Can. S.C.R. 176, at 180 that the law of negligence to be applied in a claim under 19 (c) of the Exchequer Court Act is that of the province in which the alleged negligence occurred as it was in force at the time, when liability for negligence of that sort was first imposed upon the Crown, and these decisions have been followed and applied in this Court in *Tremblay* v. *The King* (1944) Ex. C.R.1. and *Zakrzewski* v. *The King* (1944) Ex. C.R. 163, it is not to be assumed that these decisions are an exhaustive statement of the applicable law. The appropriate provincial law was held to be applicable on the assumption that Parliament had this law in mind when it imposed the liability on the Crown since it had not specified what law was applicable. But these decisions can have no bearing in a case where Parliament has itself seen fit to establish the standard of care by which the conduct of its officers or servants is to be measured as it did in the present case when it made His Majesty's ships subject to the King's Regulations and Admiralty Instructions.In such case Parliament has itself enacted, within its competence, the law of negligence to be applied.

Nor can it be agreed, although the question is not free from difficulty, that Section 19 (c) must be restricted to claims based on negligence occurring within Canada. Although, as Maxwell on Interpretation of Statutes, 9th Edition, points out, at page 148, the legislation of a country is primarily territorial, it is also true, as the same author states, at page 151, that an intention that a statute shall have extra-territorial operation may be readily collected from the nature of the enactment. There would have been substance in the Respondent's contention when liability for the negligence of its officers or servants was first imposed upon the Crown by Section 16 (c) of the Exchequer Court Act, as enacted in 1887, Statutes of Canada, 1887, Chap. 16, when this Court was given exclusive and original jurisdiction to hear and determine :

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

The liability for negligence was then a narrow one. In order to bring his claim within the statute a suppliant had to prove that his injury had occurred actually " on " a public work. If it happened " off " the public work itself he had no remedy even if the negligence which caused it had arisen " on " a public work. This was definitely settled by the Supreme Court of Canada in *Paul* v. *The King* (1905) 38 Can. S.C.R. 126, which was followed in a long line of cases. Under this state of the law there could be no claim based on negligence occurring outside of Canada for it was only when there was injury and negligence on a public work that the responsibility of the Crown was engaged. There was thus a territorial limitation of liability. This was not wholly removed by the amendment of Section 16 (c) of the Exchequer Court Act in 1917, Statutes of Canada, 1917, chap. 23, which had then become Section 20. This repealed the previous enactment and substituted the following :

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

Under the section as thus amended it was no longer necessary for a suppliant to prove either that his injury had happened actually " on " a public work or that the negligence which caused it had arisen " on " a public work. It did not matter where the injury happened or where the negligence arose so long as the suppliant could prove that his injury resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment, if such duties or employment were " upon any public work." In *The King* v. *Schrobounst* (1925) S.C.R. 458, these words were held to be descriptive of the kind of duties or employment rather than their physical locality. It was not necessary for a suppliant to prove that the duties or employment were actually " on " a public work so long as he could show that they were related to or connected with a public work. But while there was thus a substantial enlargement of the Crown's liability there was still room for argument that since Parliament imposed liability only where there was negligence by an officer or servant of the Crown while acting within the scope of his duties or employment upon any public work it could not have intended the imposition of liability where the negligence occurred outside of Canada, since there would be no duties or employment upon a public work outside of Canada. Then came the amendment of the Exchequer Court Act in 1938, Statutes of Canada, 1938, chap. 28, by which Section 19 (c) in its present form was enacted. This struck out the limitation of liability implied in the words " upon any public work." With the elimination of this limitation of liability the argument that there

was a locational restriction of liability lost its potency. If officers or servants of the Crown are guilty of any negligence outside of Canada while acting within the scope of their duties or employment and injury results therefrom I see no reason for assuming that Parliament did not intend that the responsibility of the Crown should be engaged. There is nothing in the section itself that warrants its restriction to claims based on negligence occurring within Canada. Moreover, when Parliament by the Naval Service Act made the King's Regulations and Admiralty Instructions applicable to His Majesty's Canadian ships it clearly intended that they should be applicable wherever such ships were operating. I am also of the view that Section 50A of the Exchequer Court Act, to which reference has been made, has some bearing on the question. It provided as follows:

> " 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."

Certainly it was intended that the deemed relation of master and servant should exist in the case of a member of His Majesty's Canadian forces wherever such member was serving and there is nothing to suggest that it was intended that there should be any territorial restriction of the liability for his negligence. I have, therefore, reached the conclusion, although not without some doubt, that the suppliant's claim is not outside the ambit of Section 19 (c) of the Exchequer Court Act by reason of the fact that the alleged negligence of the officers in charge of the navigation of H.M.C.S. " Orkney " occurred outside of Canada.

The disputed issue of fact may now be considered, the first being whether the officers charged with the navigation of the " Orkney " were guilty of negligence. The evidence establishes that the " Orkney " was coming slightly south of south-east on a course of 140 degrees and that the " Blairnevis " was going slightly north-east on a course of 26 degrees. The two vessels were thus on crossing courses involving risk of collision within the meaning of Article 19 of the Regulations and the " Orkney " had the " Blairnevis " on her starboard side. The latter was the stand-on ship and the former the give-way one. It was the duty of the " Orkney " to keep out of the way of the " Blairnevis " and her failure to do so without justification implies negligence on the part of the officers charged with her navigation. These were Commander Browne, the officer commanding the " Orkney," and Lieutenant Page, the officer of the watch on duty before and at the time of the collision. In my view, the evidence points to the conclusion that the failure of the " Orkney " to keep out of the way of the " Blairnevis " was due to fault on the part of these officers either severally or jointly. Indeed, Counsel for the Respondent did not even attempt to defend their conduct.

It cannot be said that the " Blairnevis " appeared suddenly in front

of the " Orkney " making it impossible for the latter to avoid the collision. Commander Browne had been advised what to expect. He had been told that a convoy of ships was coming up from the south and that it would break up at the Skerries, one portion proceeding easterly to the Mersey and the other northerly to the Clyde. He ought, therefore, to have anticipated that there might be ships coming up on his starboard side and have seen that a proper lookout was kept for them. Moreover, as early as 1.10 a.m. while he was in the chart house observing the plan position indicator he had the report of the "Orkney's" radar indicating contact with the convoy, she was to meet bearing on her starboard side and also the presence of an independent ship, which must have been the " Blairnevis," also on her starboard side. This latter fact appears from the following answers of Commander Browne on his examination for discovery as an officer of the Crown :

" *Q.* Wherever she was, she must have been picked up by radar " somewhere off your starboard bow ?—*A.* Yes.

" *Q.* And she must have been picked up a long time before the " collision ?—*A.* That is correct.

" *Q.* That is quite so ?—*A.* Yes.

" *Q.* And, Commander, we are not speaking now of two or three " minutes. We are speaking of quite a period of time, as much perhaps " as twenty minutes : that is correct also ?—*A.* Yes."

There is also his report of the collision, dated February 20, 1945, in which it is stated that the " Blairnevis " was first seen at 1.30 a.m. and that she was then on a bearing of 210 degrees and approximately 7½ cables, 1,500 yards, away. While there was some dispute as to visibility Commander Browne put it at 1,500 yards. The other evidence is that lights could be seen much farther away. The second officer of the " Blairnevis " said that the visibility was good to pick up lights but not objects and that when coming along past the Skerries he could see the Skerries light over 10 miles away and Captain McKinnon said that he saw the stack lights on Anglesey 15 miles away. The " Blairnevis " was sailing under dimmed lights, a red light on her port side and a green one on her starboard side, and without a masthead light. Commander Browne was in the chart room looking at the plan position indicator when he was told by the officer of the watch that there was a ship at 210 degrees on his starboard side and concluded that it was sufficiently far off the beam that he did not need to worry about it, but then he was advised very shortly afterwards that the ship was now 30 degrees and he then realised that that was very dangerous and came on the bridge. It was also stated that the first light of the " Blairnevis " that was seen was her red port navigation light. This was the sighting of the officer of the watch but Commander Browne said that he first saw it not more than a minute before the collision or not more than two minutes. It should also be remembered that prior to the collision the " Orkney " was sailing without any lights. Commander Browne said that he had switched on the lights at 1.30 a.m., which was 4 minutes before the collision, but on this point I prefer the evidence of the witnesses for the suppliant who were

on the " Blairnevis " that when they first saw the " Orkney " she was unlighted and that her lights went on just a few seconds before the collision. The fact that the " Orkney " was sailing without lights made it all the more necessary to keep a sharp lookout for such vessels as the " Blairnevis " whose presence in the vicinity had been indicated or should have been anticipated. It was much easier for the " Orkney " to see the " Blairnevis " sailing with her dimmed navigation red light, which was visible at least a mile away, than for the " Blairnevis " to pick up the " Orkney " sailing without any lights. On the evidence I have no difficulty in finding that there was failure on the part of the responsible officer of the " Orkney " to keep a proper lookout for the movement of the " Blairnevis " on her starboard side from the time of her first reported presence at 1.10 a.m. according to the radar and her first sighting by the officer of the watch at 1.30 a.m. according to Commander Browne's evidence. This failure must primarily be laid at the door of Lieutenant Page, the officer of the watch, who was temporarily in charge of the ship. If he had kept the lookout which he could and should have done the " Blairnevis " would have been seen sooner than she was and there would have been no difficulty in keeping the " Orkney " out of her way as Article 19 of the Regulations required. His failure to keep a proper lookout was negligence on his part from which the collision was a resulting consequence.

But, although the failure of the officer of the watch to keep a proper lookout was the prime cause of the collision, and this is sufficient to establish the suppliant's claim, I have also come to the conclusion that Commander Browne was not wholly free from fault. He did not act as promptly and appropriately as the situation demanded. He ought to have appreciated sooner than he did the risk of collision with the vessel on his starboard side which the radar had reported and the officer of the watch had sighted and should have taken charge sooner. If he had gone to the bridge sooner than he did the collision could have been averted. There is some question as to when he did come to the bridge after he realised the imminence of danger and what he did. He said that he did not appreciate the proximity of the ship until one of his officers told him that she was very close. He said that he first saw the red light of the " Blairnevis " not more than a minute or not more than two minutes before the collision and that he gave the order for half speed astern as soon as the presence of the ship was reported to him and the order full speed astern as soon as he appreciated how close she was. There is an important discrepancy between the oral evidence and the entries in the deck log and the engineer's log. The deck log shows that both engines were put half astern at 1.32½ a.m. and full astern at 1.33¼ a.m. and that the collision occurred at 1.34 a.m. But the engineer's log records the half astern order at 1.34 a.m. with the notation that the impact was felt, and the full astern order at 1.34½ a.m., which was half a minute after the collision. The " Orkney " was easily manoeuverable. Commander Browne said that he could bring her to a stop even at her top speed of over 14 knots in a minute or a minute and a half during which she would go 300 yards. He also said that at 1.30 a.m. he had switched on her lights and reduced her speed to 8 knots which would enable her to be brought to a stop in even

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a shorter time and distance. Commander Browne suggested that there had been delay on the part of the engineer in putting his orders into effect. If that is so then the engineer was negligent but I am of the view that Commander Browne cannot place the delay in stopping the engines and putting them full speed astern on the engineer. He was himself responsible. If he had acted more promptly he would have had time in which to bring the " Orkney " to stop and so avert the collision. Moreover, there is substance in the submission that he failed to take the helm action, either hard aport or hard astarboard, that he ought to have taken. On the evidence, I have come to the conclusion that his failure to act as promptly and as appropriately as he ought to have done must be regarded as negligence on his part.

While Counsel for the Suppliant admitted that on the facts the case against the " Orkney's " officers was a strong one he submitted that there was contributory negligence on the part of those on board the " Blairnevis " and that the Suppliant's petition should, therefore, be dismissed. The submission would, in my judgment, be a sound one if such contributory negligence could be established, notwithstanding the division of damages in *Saint John Tug Boat Company Limited* v. *The King* (1945) Ex.C.R. 214 and (1946) S.C.R. 466, but as I view the evidence it does not warrant a finding of contributory negligence.

The first ground of contributory negligence assigned was that there had been failure on the " Blairnevis " to keep a proper lookout. It was submitted that it was imperative to keep a sharp lookout because the " Blairnevis " was sailing without a masthead light, that there should have been a lookout on the forecastle head instead of on the port wing of the bridge since there were gun nests in front of it, that if there had been a lookout on the forecastle the " Orkney " might have been seen sooner and steps taken to prevent the collision. It was also urged that the important duty of lookout ought not to have been entrusted to a young man of 18 years. There is nothing in the evidence to support a finding of failure to keep a proper lookout. The presence of the gun nests in front of the port wing of the bridge would not obstruct the view from it of a vessel on the course taken by the " Orkney " and there is no foundation for the assumption that the " Orkney " would have been seen sooner if there had been a lookout on the forecastle instead of on the port wing of the bridge. Furthermore, it would have taken longer for a message to get back to the bridge from the forecastle than from the port wing. I also find that the young man who was posted on the port wing of the bridge saw the " Orkney " as soon as it could be seen and gave the alarm immediately. There was a proper lookout on the " Blairnevis."

It was next urged that the " Blairnevis " had failed to take sufficiently prompt evasive action to prevent the collision. Reference was made to Article 21 of the Regulations and the note thereto reading as follows :—

> Article 21. Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed.
>
> Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the

action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

It was submitted that since the " Orkney " was sailing without lights she could not be seen by lookouts on the " Blairnevis " until she was quite near, that consequently the situation was the same as if the " Blairnevis " had been sailing in thick weather—that is to say, when visibility is restricted by fog—and that as soon as the second officer of the " Blairnevis " saw the " Orkney " on his port side and that a collision was imminent he ought to have taken immediate action and reversed his engines to swing his bow to starboard and that he had failed to do so. The answer to this charge is that it was the duty of the " Blairnevis " as the stand-on ship to keep her course and speed and that the master of the " Blairnevis " took helm action hard astarboard just as soon as he saw that the " Orkney " was not going to keep out of the way.

The third count of contributory negligence charged to the " Blairnevis " was that as soon as the presence of a vessel on her port side was reported her masthead light should have been switched on in order to indicate her course to the " Orkney." This would have made no difference for Commander Browne admitted that he had seen the red light of the " Blairnevis " and knew the direction in which she was proceeding.

Finally, it was argued that when the second mate gave the order for hard astarboard a signal of one blast should have been given as required by Article 28 of the Regulations. The answer to that is that even if there was a failure to give this signal such failure did not contribute to the collision : *vide The " Dotterel "* (1947) 80 Ll.L. rep. 272.

My conclusion is that there was no contributory negligence on the part of those on board the " Blairnevis." When they first picked up the " Orkney " out of the dark on the port side of the " Blairnevis " and saw that she was not going to keep out of the way there was nothing that they could do to avert the collision. The fault was solely that of the officers charged with the navigation of the " Orkney." I, therefore, find that the Suppliant has brought its claim within the ambit of Section 19 (c) of the Exchequer Court Act and is entitled to damages.

It was agreed between Counsel that if the Suppliant should be found entitled to damages there should be a reference to the Registrar for an enquiry as to quantum. It was submitted for the Respondent that the responsibility of the Crown should be restricted to the damages resulting from the collision and should not extend to the loss of the ship on the ground that it resulted from the negligence of the master and officers of the " Blairnevis " in not applying for tug assistance to get her to Liverpool sooner than they did. It was also suggested that the determination of this issue should be left to the Registrar as part of his enquiry. I have come to the conclusion that the Court ought to determine it as a matter of law so that the Registrar could proceed with his assessment of the damages on the basis so determined. I also find myself unable to accept the submission that the Crown ought not to be held responsible for the loss of the " Blairnevis." The facts are against it. The collision tore a hole

in her port bow in her No. 1 hold. The pumps were started immediately and Captain McKinnon informed the " Orkney " that he was proceeding slow to Liverpool and requested her to accompany. The " Blairnevis " was found to be making water in the No. 1 Hold and her engines were stopped. A collision mat was prepared and fixed over the hole and she went slow ahead but the mat was carried away and she stopped again. Captain McKinnon then, through the " Orkney," requested a salvage tug. The collision mat was re-rigged and the ship went slow ahead. She was still making water in the No. 1 hold, the pumps were not able to keep up and Captain McKinnon again enquired about the tug. At 7.00 a.m. he informed the " Orkney " that a salvage tug was urgently required and asked her to come within hail. The " Orkney " did so and offered the use of her pumps but they were useless because of a difference in voltage. The second collision mat was put on and the " Blairnevis " tried to proceed slowly. At 11.20 a.m. the tug " Crosby " came alongside and put her pumps to work but the " Blairnevis " was making water fast and sinking slowly by the head. At 12.10 a.m. her foredeck was awash and at 12.12 her engines stopped and her No. 1 hold was full of water. At 12.40 a.m. the salvage tug " Watchful " came alongside and commenced pumping water from the No. 1 hold but could not lower it. There was a strong breeze blowing and in the heavy swell seas were breaking continuously over the deck. At 13.00 p.m. the pumping operations ceased, the pumps were disconnected and preparations were made to beach the ship. The crew was taken off and she was taken in tow by two tugs and towed stern first towards the Zebra Bank. At 16.45 a.m. she went aground and at 17.00 a.m. she was reboarded by her master, officers and a few members of the crew. The " Watchful " was standing by hoping to refloat her at high tide and beach her so that the hole in her side would be accessible at low water. At high tide the " Blairnevis " was again taken in tow by four tugs and beached, but the heavy seas and the condition of the ship made it impossible to continue salvage operations on that tide. Finally, the master received instructions from the Salvage Master on the " Watchful " to be prepared to abandon ship. It seemed doubtful whether the tugs could get alongside to take off the crew and the New Brighton lifeboat was called out but this proved unnecessary . for at 3.30 a.m. on February 14, one of the tugs succeeded in coming alongside and taking off the crew. At high water the vessel was boarded by a salvage crew and found to be almost completely broken in half. Subsequently, the Liverpool and Glasgow Salvage Association and the Mersey Dock and Harbour Board concluded that the salvage of the " Blairnevis " was impracticable and notice was given by the Board that she had become an obstruction that had to be removed. It was impossible to hold a survey on her. The owners had no alternative other than to submit to the decision of the Board and could do nothing to minimise their loss. It was urged that if the assistance of a tug had been requested earlier the " Blairnevis " might have been saved. That may possibly be so, but there is nothing to suggest that the master and officers were negligent in not requesting aid sooner. Captain

McKinnon did not think that his ship was as badly damaged as it turned out to be. He asked for aid as soon as his collision mat went away and thought that an earlier call for assistance would not have made any difference. Nor should any fault be attributed to him for not sending his request for aid by wireless. It was not for him to break radio silence and bring possible danger from submarines to escort and other vessels. I am satisfied that the master and officers of the "Blairnevis" did everything that was reasonable to save their ship and no responsibility for her loss should be attributed to them. Her loss must be regarded as the result of the negligence of the officers of the " Orkney " and I so find. It is on that basis that the Registrar should assess the Suppliant's damages.

There remains only the contention that the Respondent has the right to limit his liability to $38.92 for each ton of the " Orkney's " tonnage and a decree of limitation of liability accordingly is sought. The right is claimed under Section 649 (1) of the Canada Shipping Act, 1934, Statutes of Canada, 1934, chap. 44, which provides as follows :

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

" (i) where any loss of life or personal injury is caused to any person " being carried in such ship :

" (ii) where any damage or loss is caused to any goods, merchandise, " or other things whatsoever, on board the ship ;

" (iii) where any loss of life or personal injury is, by reason of the " improper navigation of the ship, caused to any person carried " in any other vessel ;

" (iv) where any loss or damage is, by reason of the improper " navigation of the ship, caused to any other vessel, or to any " goods, merchandise, or other things whatsoever on board " any other vessel ;

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

In my opinion, the application for limitation of liability should not be granted. Section 712 of the Canada Shipping Act, 1934, provides :

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

It should be noted that as a matter of law the liability of ship owners for damage done by their ship to another ship is unlimited, except in so far as that law has been modified by statute : vide Dr. Lushington in the *Wild*

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No. 4. Reasons for Judgment of Thorson, P. 20th July 1951— *continued.*

Ranger (1863) Lush, 564, s.c. 7 L.T.N.S. 725. The applicant for limitation of liability must, therefore, show that his claim falls within a modifying statute and that the general rule does not apply to him. This the Respondent cannot do. Counsel for the Respondent sought to escape from Section 712 by contending that, while it stated that the Act, except where specially provided did not apply to His Majesty's ships, it did not state that the Act did not apply to His Majesty as the owner of the ships and that consequently he could take advantage of the limitation of liability conferred by Section 649. I am unable to accept this restriction on the meaning of Section 712. I find support for a larger view of it, namely, that it means that the Act, except when specially provided, does not apply to His Majesty, in the statement of Kerwin, J., in *The King* v. *Saint John Tug Boat Co., Ltd.* (1946) S.C.R. 466 at 468 that by Section 712 Section 649 of the Act does not apply to His Majesty. I am similarly of the view that Section 649 of the Act does not apply to His Majesty and that he is not entitled to any limitation of liability under it.

This disposes of the contention but, even apart from this ground, there is also the fact that there is no evidence before me of tonnage on which a limitation of liability could be based.

The result is that there will be judgment that the Suppliant is entitled to damages for the loss of the " Blairnevis " in such amount as will be found by the Registrar on the enquiry to be held by him. The Suppliant is also entitled to costs.

No. 5. Formal Judgment. 20th July 1951.

No. 5.

Formal Judgment.

IN THE EXCHEQUER COURT OF CANADA.

Friday, the 20th day of July, A.D. 1951.

Present :

The Honourable the PRESIDENT.

Between

NISBET SHIPPING COMPANY, LIMITED ... ... *Suppliant*

and

HIS MAJESTY THE KING ... ... *Respondent.*

This action having come on for trial before this Court at the Old Court House in the City of Montreal, on the 13th and 14th days of June, A.D. 1949, in the presence of Counsel for the Suppliant and for the Respondent, UPON HEARING READ the pleadings herein and UPON HEARING and examining

the evidence adduced and what was alleged by Counsel aforesaid, THIS COURT WAS PLEASED to direct that written argument be submitted by Counsel aforesaid and that the said action should stand over for Judgment and the same coming on this day for Judgment,

In the Exchequer Court of Canada.

No. 5. Formal Judgment. 20th July 1951— *continued.*

THIS COURT DOTH ORDER AND ADJUDGE that the Suppliant is entitled to recover damages from the Respondent for the loss of the " Blairnevis " in such amount as will be found by the Registrar on the enquiry to be held by him.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Suppliant is entitled to recover from the Respondent his costs of this action to be taxed.

By the Court,

H. R. L. HENRY,
Registrar.

No. 6.

Notice of Appeal.

In the Supreme Court of Canada.

No. 6. Notice of Appeal. 2nd October 1951.

IN THE SUPREME COURT OF CANADA.

Between

HIS MAJESTY THE KING ... ... (*Respondent*) *Appellant*

and

NISBET SHIPPING COMPANY LIMITED ... ... (*Suppliant*) *Respondent.*

TAKE NOTICE that the Appellant herein is dissatisfied with the judgment given by the Exchequer Court of Canada in this case on July 20, 1951, and intends to appeal and does hereby appeal against the said judgment to the Supreme Court of Canada.

Ottawa, this 2nd day of October, A.D. 1951.

F. P. VARCOE,
Deputy Attorney General of Canada.

To : The Registrar, Supreme Court of Canada,

and

To : The Registrar, Exchequer Court of Canada,

and

To : C. Russell McKenzie, Esq., K.C., Counsel for Respondent, 360 St. James Street West, Montreal, P.Q.

In the Supreme Court of Canada.

No. 7.

Reasons for Judgment.

No. 7. Reasons for Judgment.

(a) Rand, J. (concurred in by the Chief Justice)

(a) RAND, J. (concurred in by the Chief Justice).

This litigation arises out of a collision between H.M.C.S. " Orkney " and the ship " Blairnevis " on the morning of February 13th, 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 application of Section 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 Section 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 Section 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 Section 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 cap. 25 of the Dominion Statutes, enacting Section 50 A of the Exchequer Court Act, the members of the naval, military or air services of His Majesty were declared as from June 24th, 1938, to be deemed servants of the Crown for the purposes of Section 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 be 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 Section 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) cap. 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 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 recognised paramount source: *The Scotia*, 14 Wall (U.S.) 170.

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 sea, certainly, they create the duties on the part of those in charge of Canadian naval ships out of which their liability for negligence must arise: Vaughan-Williams, L.J. in *H.M.S. Sans Pareil* (1900) P. 267, at p. 285.

The scope of that liability at common and maritime law has been modified by statute. The Canada Shipping Act in Sections 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 Sections 649 to 655 inclusive, provision is made for the limitation of the damages issuing from that liability. It was argued that, because of Section 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 Section 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).

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(a) Rand, J. (concurred in by the Chief Justice)—*continued.*

The President of the Exchequer Court, 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, of 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 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* (1918) P. 78 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* (1919) P. 362, 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 judgment 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* (1940) 66 C.L.R. 344, 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 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 that liability ceases is attempted. The substance of the opinions is stated in these words of Dixon, J. :—

(a) Rand, J. (concurred in by the Chief Justice)— *continued.*

" 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 look-out, 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 Section 649 of the Canada Shipping Act :—

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(a) Rand, J. (concurred in by the Chief Justice)—*continued.*

" 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

* * * *

" (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 Section 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 rateably 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*, 45 L.J.C.L. 783, where the claim was for damage to a tow by stranding : *Beauchamp* v. *Turrell* (1952), 1 Ll.L.R. p. 266, 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*, 12 Ex. C.R. 325. 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*, 35 L.T.R. 36. The purpose of Section 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 recognised 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 appear 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

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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 Section 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.

(a) Rand, J. (concurred in by the Chief Justice)—*continued.*

(b) KERWIN, J. (concurred in by Estey, J.).

(b) Kerwin, J. (concurred in by Estey, 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 found that negligence on the part of the 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 Section 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 Section 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 Section 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 Section 50A : " a member of the naval,

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(*b*) Kerwin, J. (concurred in by Estey, J.)— *continued.*

" 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 Lushington's Admiralty Reports, 539, 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," Section 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 Section 19 (c) the conclusion is reached that the Exchequer Court has jurisdiction in the present proceedings.

It has always been held that Section 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 Section 19 (c) " upon any public work " were omitted in 1938 and it was by Section 1 of chapter 25 of the Statutes of 1943–44 that Section 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, chapter 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, chapter 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 Section 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 Instruc- " tions, 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 Section 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.* (1940) S.C.R. 153, 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, Sections 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, Saville and Albion Co., Limited* v. *The Commonwealth* (1940) 66 C.L.R. 344. That was a decision of the High Court of Australia on a demurrer, where, of course, the allegations in the statement 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

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(*b*) Kerwin, J. (concurred in by Estey, J.)— *continued.*

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 Section 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 Section 712 of the Act prevents this result. That section provides :—

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

In my opinion this section has no reference to a claim for limitation for liability under Section 649, which can only be put forward by an owner. The President considered that in *The King* v. *St. John Tug Boat Co. Ltd.* (1946) S.C.R. 466, I had expressed a larger view of the operation of Section 712 but, there, I was considering Section 640 of the Act which deals with the fault of two or more vessels causing damage or loss to one or more of them, their cargoes or freight, or any property on board.

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.* (1935) S.C.R. 617. 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 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 Section 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 Section 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 Section 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 other points, there should be no costs in this Court.

(c) KELLOCK, J. (concurred in by Cartwright, J.).

(c) Kellock, J. (concurred in by Cartwright, 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 Section 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*, 24 S.C.R., 420, Strong, C.J., with whom Fournier, J. concurred, in considering the provisions of Section 16 (d) of the Exchequer Court Act (now Section 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 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 Section 16 (now Section 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*, 4 Ex. C.R. 134, 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, 24 S.C.R., 482, 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

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(c) Kellock, J. (concurred in by Cartwright, J.) —*continued.*

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*, 56 S.C.R. 176, the law was again affirmed in the same sense. The matter there in issue was governed by Section 19 of the 1906 statute (R.S.C., c. 140) to which Section 18 of the present statute corresponds. Section 20 of the 1906 statute corresponds to Section 19 of the present statute.

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

" I agree also with Mr. Justice Anglin that Section 19 of the " ' Exchequer Court Act ' merely recognises 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."

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. *Des-Rosiers* (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 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 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* (1907) 11 Ex. C.R., 119, the statement of the law in the same sense was expressly approved on appeal to this court by at least three of the members of the Court, Davies, Maclennan and Duff, JJ., 40 S.C.R., while again in *The King* v. *Desrosiers*, 41 S.C.R. 71, 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. *The 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 Section 19 (c) of the Exchequer Court Act, if the Petitioner can make out a cause of action on the basis of the law applicable as between subjects, he thereby makes out a cause of action against the Crown and is entitled to the same relief as he would be entitled to in the former case.

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

In the Supreme Court of Canada.

No. 7. Reasons for Judgment.

(c) Kellock, J. (concurred in by Cartwright, J.) —*continued.*

applicable by Section 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 Section 649 provides the answer.

It is contended on the basis of the presence of Section 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 obvious that Section 712 is quite irrelevant. When this inquiry is thus answered, it is Section 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.

(d) Locke, J. (*d*) LOCKE, J. :—

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 13th, 1945. The jurisdiction invoked is that vested in the Court by Section 18 of the Exchequer Court Act and the cause of action is based upon Section 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 Section 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 Section 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 Section 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*, 1951, 2 T.L.R. 895, Willmer, J., expressed the view that a breach of these regulations was breach of the duty owed by His Majesty's ships to other mariners. I do not share this view but it is unnecessary

for the disposition of the present case to decide the matter. I respectfully agree with the learned President of the Exchequer Court that the fact that the International Rules of the Road, as established by Order-in-Council P.C.259 dated February 9th, 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 Section 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."

The Respondent contends that any such claim on behalf of the Crown is excluded by Section 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

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No. 7. Reasons for Judgment.

(d) Locke, J. —*continued.*

liability in conformity with the provisions of Sections 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 Section 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 Section 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 Section 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* (1894) 24 S.C.R. 420. The claim of the Appellant in that case was considered by a majority of the Court to be based upon subsection (c) of Section 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 subsection (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*, 13 A.C. 192 :—

> " 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."

Gwynne, J., who disagreed with the Chief Justice as to the proper disposition to be made of the appeal, referred to subsection (c) of Section 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* (1895) 25 S.C.R. 482 at 485, 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 subsection (c) not only created a liability but gave jurisdiction to the Court.

In *Gauthier* v. *The King* (1918) 56 S.C.R. 176, where the claim was in contract, Anglin, J. (as he then was), in discussing liabilities imposed by Section 20 of the Exchequer Court Act (the former Section 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 subsection (c) of Section 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.) Section 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 Section 921 of the Canada Shipping Act (cap. 113, R.S.C. 1906) and re-enacted as Section 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.

Section 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 Section 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 Section 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 Section 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, Section 712 was enacted in the precise terms of Section 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

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No. 7. Reasons for Judgment.

(*d*) Locke, J. —*continued.*

reason that when the Crown Proceedings Act, 1947 (cap. 44), which for the first time imposed liability upon the Crown in respect of torts committed by its servants or agents, was enacted, Section 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."

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 Section 649 (1), Section 712 says that the Act shall not, except where specially provided, apply to *ships* belonging to His Majesty. In my opinion, Section 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 Section 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 Section 15 of the Interpretation Act.

The contention that the Crown may take advantage of Section 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 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*, 1927, 1 K.B. 269 at 294. 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*, 1920 A.C. 508 at 526, 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 Section 712 provides that any provision of the Act may be made applicable to the Crown and the provision of Section 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 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."

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No. 7. Reasons for Judgment.

(*d*) Locke, J. —*continued.*

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.

No. 8.

Formal Judgment.

No. 8. Formal Judgment. 28th April 1953.

IN THE SUPREME COURT OF CANADA.

Tuesday, the 28th day of April, A.D. 1953.

Present :

The Right 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.
The Honourable Mr. Justice CARTWRIGHT.

Between

HER MAJESTY THE QUEEN ... ... *Appellant*

and

NISBET SHIPPING COMPANY LIMITED ... ... *Respondent.*

The Appeal of the above named Appellant from the judgment of the Honourable the President of the Exchequer Court of Canada pronounced in the above cause on the 20th day of July in the year of Our Lord one thousand nine hundred and fifty-one, having come on to be heard before this Court on the 2nd and 3rd days of February in the year of Our Lord One thousand nine hundred and fifty-three, in the presence of Counsel as well for the Appellant as for the Respondent, whereupon and upon hearing

In the Supreme Court of Canada.

No. 8. Formal Judgment. 28th April 1953— *continued.*

what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment and the same coming on this day for judgment, THIS COURT DID ORDER AND ADJUDGE that the said judgment of the Exchequer Court of Canada should be and the same was affirmed and that the said Appeal should and the same was dismissed subject to a variation in the judgment at trial by adding thereto a declaration that the Crown is entitled to avail itself under the conditions prescribed in Section 649 of the Canada Shipping Act, R.S.C. 1934, limiting liability.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the Crown will be at liberty to take such steps toward the determination of the question of limitation as it may deem advisable.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that there be no costs in this Court of this Appeal.

(Sgd.) PAUL LEDUC,
Registrar.

No. 9.

Order in Council granting special leave to Appeal.

In the Privy Council

No. 9. Order in Council granting special leave to Appeal. 13th April 1954.

IN THE PRIVY COUNCIL.

AT THE COURT OF SAINT JAMES.

The 13th day of April, 1954.

Present

HER MAJESTY QUEEN ELIZABETH THE QUEEN MOTHER

HER ROYAL HIGHNESS THE PRINCESS MARGARET.

LORD PRESIDENT.	MR. SECRETARY LYTTELTON.
MARQUESS OF READING.	MAJOR LLOYD GEORGE.
EARL DE LA WARR.	MR. PEAKE.

WHEREAS Her Majesty, in pursuance of the Regency Acts, 1937 to 1953, was pleased, by Letters Patent dated the 20th day of November, 1953, to delegate to Her Majesty Queen Elizabeth The Queen Mother, Her Royal Highness The Princess Margaret, His Royal Highness The Duke of Gloucester, Her Royal Highness The Princess Royal and The Earl of Harewood, or any two or more of them, as Counsellors of State, full power and authority during the period of Her Majesty's absence from the United Kingdom to summon and hold on Her Majesty's behalf Her Privy Council and to signify thereat Her Majesty's approval of anything for which Her Majesty's approval in Council is required :

In the Privy Council

No. 9. Order in Council granting special leave to Appeal. 13th April 1954—*continued.*

AND WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 29th day of March, 1954, in the words following, viz. :—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of The Nisbet Shipping Company Limited in the matter of an Appeal from the Supreme Court of Canada between the Petitioners Appellants and Your Majesty Respondent setting forth (amongst other matters) : that the Petitioners are a Company duly constituted and incorporated under the laws of Scotland, carrying on business at Glasgow : that on the 13th February 1945 the Petitioners' steamship "Blairnevis" collided with H.M.C.S. "Orkney" a frigate of the Royal Canadian Navy in the Irish Sea and the "Blairnevis" sustained such severe damage that she eventually became a total loss : that on the 19th October, 1946, the Petitioners filed a Petition of Right in the Exchequer Court of Canada setting out their claims arising out of the collision and loss and a Statement of Defence was filed on the 17th January 1947 by the Attorney General of Canada on behalf of the Crown : that by Judgment of the Exchequer Court of Canada dated the 20th July 1951 H.M.C.S. "Orkney" was found solely to blame for the collision and the Petitioners were held to be entitled to recover their damages from the present Respondent as assessed by the Registrar and their costs of the action and it was decided that the request by the Attorney General of Canada to be permitted to limit liability on behalf of the Crown should not be granted in accordance with the general provision of Section 712 of the Canada Shipping Act ; that the Deputy-Attorney General of Canada appealed on behalf of the Crown to the Supreme Court of Canada and by unanimous Judgments dated the 28th April 1953 the Appeal was dismissed as to liability and H.M.C.S. "Orkney" was held solely to blame for the collision and loss : that a majority of the Court held that the Crown was entitled to claim the right to limit liability in accordance with the provisions of Section 649 of the Canada Shipping Act provided that proof could be adduced that the damage and loss caused had occurred without actual fault or privity on the part of the Crown and that there should be no order as to costs in the Supreme Court of Canada whereas by his dissenting Judgment Locke, J. concurred with the Exchequer Court and held that he would dismiss the Appeal with costs on the ground that Section 712 of the Canada Shipping Act 1934 having made that Act inapplicable to the Crown there was no authority before the Court which showed that the Crown was entitled to the benefits of the provisions of that Act : that it is submitted that the majority of the Judges of the Supreme Court were wrong in holding that the Crown was entitled to the right of limiting liability in respect of its Canadian ships by virtue of Section 649 of the Canada Shipping Act in the absence of special provisions made in accordance with Section 712 of the said Act : And humbly praying

In the Privy Council

No. 9. Order in Council granting special leave to Appeal. 13th April 1954—*continued.*

Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the Supreme Court of Canada dated the 28th April 1953 and for such further or other Order as to Your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 28th day of April 1953 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

NOW, THEREFORE, Her Majesty Queen Elizabeth The Queen Mother and Her Royal Highness The Princess Margaret being authorized thereto by the said Letters Patent, have taken the said Report into consideration and do hereby, by and with the advice of Her Majesty's Privy Council, on Her Majesty's behalf approve thereof and order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

In the Privy Council.

No. 30 of 1954.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

NISBET SHIPPING COMPANY LIMITED ... ... *Appellants*

AND

THE QUEEN ... ... *Respondent.*

RECORD OF PROCEEDINGS

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