Supreme Court of Canada

The Queen *v*. The Sailing Ship "Troop" Company (1899) 29 SCR 662

Date: 1899-10-03

Her Majesty The Queen (Plaintiff)

Appellant

And

The Sailing Ship "Troop" Company (Defendant)

Respondent

1899: May 2, 3; 1899: Oct. 3.

Present:—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Certiorari—Merchants' Shipping Act, 1854—Distressed seaman—Recovery of expenses—"Owner for time being"—Proof of ownership and payment.

An appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute a rule *nisi* for a certiorari to bring up proceedings before a police magistrate under The Merchants' Shipping Act with a view to having the judgment thereon quashed.

Sec. 213 of The Merchants' Shipping Act, 1854, makes the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being."

*Held,* affirming the judgment of the Supreme Court of New Brunswick, that the latter words mean the owner at the time of action brought.

*Held* further, that a certificate of the Assistant Secretary of the Board of Trade that such expenses were incurred and paid is sufficient proof of payment under the Act though the above section does not provide for a mode of proof by certificate.

Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under The Merchants' Shipping Act of 1854 proof of ownership of a ship may be made according to the mode provided in The Merchants' Shipping Act, 1894, by which the former Act is repealed.

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Under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the Registrar General of Shipping at London is sufficient proof of ownership.

*Quœre.*—Where the Merchants' Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will certiorari lie to remove the proceedings into a Superior Court?

Appeal from a decision of the Supreme Court of New Brunswick making absolute a rule *nisi* for certiorari to remove the proceedings before the Police Magistrate of St. John with a view to having the order made therein quashed.

The action was brought by the Imperial Board of Trade to recover the amount paid for hospital fees and board at Hong Kong on account of a seaman on board a ship of the defendant who was injured and left at Hong Kong, and also the expenses of carrying the seaman to London.

The questions raised on the appeal were:

1. Did an appeal lie when the order of the magistrate was neither quashed nor affirmed on certiorari?

2. Defendant having become owner of said ship after the expenses were incurred was it an "owner for the time being" under sec. 213 of The Merchants' Shipping Act, 1854?

3. Was the payment of said expenses by the Board of Trade properly proved by a certificate of the assistant secretary?

4. Was the ownership of the vessel proved by a copy of the registry certified by the Registrar General at London?

5. Did certiorari lie to remove the proceedings before the magistrate whose order is made final by the Act?

The certificates in evidence are set out in the judgment of the court.

The Supreme Court of New Brunswick held that the ownership of the vessel was not proved and gave

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judgment for defendant on that ground. The Crown appealed.

*Newcombe Q.C.* (Deputy Minister of Justice) for the Crown. The Merchants' Shipping Act of 1894 is the governing enactment in this case and the 64th and 695th sections are complete statutory authority for proof of ownership of the vessel in the manner here adopted. The position is not the less clear if we are to rely upon the previous legislation under which the Supreme Court of New Brunswick dealt with the question. The court did not refer to section 15 of the Merchants' Shipping Act Amendment Act, 1855,[[1]](#footnote-1) which provides, (sec. 1,) that that Act shall be taken to be part of the Merchants' Shipping Act, 1854,[[2]](#footnote-2) and shall be construed accordingly. The copy or transcript certified by the Registrar General might therefore have been properly admitted under the combined effect of sections 107 of the Act of 1854 and section 15 of the Act of 1855. If necessary, also, sections 14 and 11 of the law of Evidence Amendment Act, 1851,[[3]](#footnote-3) may be called in aid. If not admissible upon other grounds, then the copy or transcript kept by the Registrar General is a document to which section 14 applies and it has the same effect as the original under section 64 of the Merchants' Shipping Act of 1894[[4]](#footnote-4). See also the Canada Evidence Act, 1893, secs. 13 and 14[[5]](#footnote-5).

As to the certificate of the Assistant Secretary of the Board of Trade as to the payment of expenses, sec. 208, ss. 1 and 3 of the Merchants' Shipping Act, 1894, in effect provide that if the expenses referred to in the section are paid by any British consular officer or "other person on behalf of the Crown" then in any proceeding for

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recovery a certificate signed by the consular officer or "other person" shall be sufficient proof that the expenses were duly paid by that officer or "other person." The words "other person" are very wide' and seem intended to provide for various possible stages. The Board of Trade is the government department which ultimately bears the expenses on behalf of the Crown, and obviously the Board is the body, or its proper officer is the person to certify the fact. Sections 695 and 719 of the Merchants' Shipping Act, 1894, (sec. 7 of the Act of 1854) come in aid of section 208 (3) if required. The shipping master at Hong Kong could not certify the whole expenditure, but only that which he himself incurred and paid. Necessarily there have been other expenses paid by the Board of Trade which were not incurred at Hong Kong so that the Board is the only body, or its officer is the only person who can certify the full amount. The Legislature cannot have intended that a British consular officer or shipping master in a colonial port should always prepay the conveyance and subsistence money under ss. 228-9, of the Merchants' Shipping Act, 1854. That is too narrow a construction, and one which is not required by the wording of those sections, or sections 207-8 of the Act of 1894 in which they are reproduced. The certificate of the Board of Trade which had first inquired into and satisfied itself of the propriety of the expenditure is really the best evidence and, in this case, the only certificate which the statute contemplates.

As to the point that the action could not be maintained against the company inasmuch as it had acquired ownership after the expenses were incurred, section 208 of the Merchants' Shipping Act, 1894, charges the expenses upon the ship to be recovered from the owner for the time being as a debt to the

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Crown. This obviously refers to the owner at the time proceedings are taken, the only construction consistent with the expenses being constituted a charge upon the ship. The wording of the section seems quite inappropriate to the proposition that the owner for the time being means the owner at the time when the expenses are incurred. *Arrow Shipping Co.* v. *Tyne Improvement Commissioners[[6]](#footnote-6)*.

The judgment of the police court having been made final by statute could not be reviewed upon certiorari except for want of jurisdiction or on the ground of fraud. The writ was allowed upon the ground that the evidence was insufficient, but the court has no jurisdiction to review the judgment upon certiorari on any such ground. Tidd's Practice (9 ed) 400; Paley on Convictions, (7 ed.) 373, *et seq.; Queen* v. *Bolton[[7]](#footnote-7)*; *Cave* v. *Mountain[[8]](#footnote-8)*; *Colonial Bank of Australasia* v. *Willan[[9]](#footnote-9)*; *Fox* v. *Veale[[10]](#footnote-10)*; *Kemp* v. *Balne[[11]](#footnote-11)*. We refer also to *Hespeler* v. *Shaw[[12]](#footnote-12)*; *In re Trepanier[[13]](#footnote-13)*; *The Queen* v. *Ambrose and Winslow[[14]](#footnote-14)*; *The Queen* v. *Coulson[[15]](#footnote-15)*; *The Queen* v. *Scott[[16]](#footnote-16)*; and *Royal Insurance Co.* v. *Duffus[[17]](#footnote-17)*.

*A. L. Palmer Q.C.* for the respondent. The extracts or copies of transcripts, etc., were not certified in accordance with the 107th and 229th sections of the Merchants' Shipping Act of 1854. The copy or extract of transcript is not a certificate of registry or an examined copy thereof, or a copy thereof purporting to be certified under the hands of the registrar, or person having charge of the original; the same is, and professes to be, a copy of a transcript or copy, which has been

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transmitted by the Registrar, or other persons having charge of the same, at Liverpool, to the Registrar General of Shipping and Seamen at London. The statute under consideration, and the Evidence Act of New Brunswick[[18]](#footnote-18), make provision for the reception in evidence of a copy certified by the official having charge of the original, but there is no provision for a certificate such as the one given. The other certificate of Cosmo Monthouse or documents produced before the police magistrate are not a certificate within the meaning of the 229th section of the Act; that section requires the certificate of the consular officer, or other person on behalf of Her Majesty, who makes the payment. It would be a manifest injustice and an absurdity to allow an officer in the office in London, to issue certificates with reference to payments made by consular officers, and the other persons named in the Act at the various ports and places throughout the world where ships of Her Majesty's subjects trade. The Act contemplates that the owner of the ship, when called upon to repay expenses, should have the certificate of the consular officer or other person who has actually made the disbursement on account of the alleged distressed seamen, at the place and at the time when he was so in distress, and not a mere statement from some official of the Board of Trade in London that the Board of Trade had paid the money to some person, without any certificate from such person that the money had been properly expended.

It appears that the alleged expenses were all incur red long before the respondent was incorporated or became owner of the ship, and even if the papers produced are sufficient, judgment could only be entered against the former owners. The 229th section of the Merchants' Shipping Act are clearly words of

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limitation; first, because that is their ordinary and grammatical meaning; secondly, because any other interpretation of them will cast a liability in the nature of contract upon a person who at the time of the arising of the liability under the contract was nonexistent. It would be absurd to hold that a company incorporated in 1892, under an Act of the legislature of New Brunswick, is liable for acts and happenings in Hong Kong and London in 1891. All liability under the Merchants' Shipping Act is based upon actual or supposed contract or agreement between existing parties.

The judgment is declared to be final as to matters of fact, but this declaration cannot affect matters of law which go to the jurisdiction; Paley, p. 424. The defect in the convicting court here is that it had not power to inquire into the matter before it. The case of *Hespeler* v. *Shaw[[19]](#footnote-19)* carries out this same principle, and certiorari is the correct and only remedy in the case. The stricter and narrower rules of evidence laid down in the Act of 1854 are saved by the Act of 1894 and they apply here. See the Interpretation Act of 1889 as to the effect of repeals and sec. 745 of the Merchants' Shipping Act, 1894. Consequently the certificates, transcripts or copies produced cannot make evidence, nor could there be jurisdiction in the police magistrate; see sec 188 of the Merchants' Shipping Act, 1854.

KING J.—This is an appeal from a judgment of the Supreme Court of New Brunswick making absolute a rule *nisi* for a certiorari to remove, (with a view of quashing,) a judgment rendered in the Police Court of the City of St. John, for the Queen, in the

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sum of $58.65, and all proceedings upon which such judgment is based.

The action was brought by the Imperial Board of Trade in the name of Her Majesty to recover hospital fees and board at Hong Kong, and expenses of conveyance to London of Carl Silstrom, a seaman on board the ship *Troop,* who had sustained injuries in the service of the vessel, and who was discharged and left behind by the master in the year 1891.

Section 213 of the Merchants Shipping Act, 1854, enacts that:

If any seaman \* \* \* belonging to any British ship is discharged or left behind at any place out of the United Kingdom without full compliance on the part of the master with all the provisions in that behalf in this Act contained, and becomes distressed and is relieved under the provisions of this Act \* \* " the wages (if any) due to such seaman \* \* \* and all expenses incurred for his subsistence, necessary clothing, conveyance home, burial, etc., shall be a charge upon the ship whether British or foreign, to which he so belonged as aforesaid, and the Board of Trade may in the name of Her Majesty (besides suing for any penalties which may have been incurred), sue for and recover the said wages and expenses with costs either from the master of such ship as aforesaid, or from the person who is the owner thereof for the time being or, in the case of such engagement as aforesaid for service in a foreign ship, from such master or owner, or from the person by whom such engagement was so [Illegible text] as aforesaid; and such sums shall be recoverable either in the same manner as other debts due to Her Majesty, or in the same manner and by the same form and process in which wages due to the seaman would be recoverable by him; and in any proceedings for that purpose production of the account (if any) to be furnished as hereinbefore is provided in such cases, together with proof of payment by the Board of Trade or by the Paymaster General of the charges incurred on account of any such seaman, \* \* shall be sufficient evidence that he was relieved, conveyed home, for buried (as the case may be), at Her Majesty's expense.

Section 229 provides that:

If any such expenses in respect of the illness, injury or hurt of any seaman or apprentice as are to be borne by the owner are paid by any consular officer or other person on behalf of Her Majesty \* \*

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such expenses shall be repaid to such officer or other person by the master of the ship, and if not so repaid the amount thereof with costs shall be a charge upon the ship and be recoverable from the master or owner of the ship for the time being as a debt due to Her Majesty, and shall be recoverable either by ordinary process of law or in the manner in which seamen are hereby enabled to recover wages; and in any proceeding for the recovery thereof the production of a certificate of the facts signed by such officer or other person, together with such vouchers (if any), as the case requires, shall be sufficient proof that the said expenses were duly paid by such consular officer or other person as aforesaid.

The provisions of the statute as to the recovery of seamen's wages are, so far as material, as follows: Section 188:

Any seaman may \* \* sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seamen \* \* has been discharged, or at which any person upon whom the claim is made is or resides \* \* for any amount of wages due to such seaman \* \* not exceeding £50 over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable, and every order made by such justices \* \* in the matter shall be final.

By sec. 519 it is declared that

Any stipendiary magistrate shall have full power to do alone whatever two justices of the peace are by this Act authorized to do.

The defendant company, a corporation incorporated by the laws of New Brunswick, has its principal place of business at Rothesay, in New Brunswick, a place near to the City of St. John, N.B., and Robert J. Ritchie,. Esq., who exercised the functions of the Police Court in the proceedings in question, was a stipendary magistrate in the City of St. John, and in these proceedings was acting as such.

The evidence adduced to prove the ownership of the *Troop* by the defendant company was a document certified by the Registrar General of Shipping, in London, England. It embraced (first), a transcript of register for transmission to the Registrar General of

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Shipping and Seamen. (Secondly), a copy of transactions subsequent to registry showing the vesting of the entire ownership in the defendant company in March, 1892, with a statement of ownership and encumbrances after such registration by which it appeared that the defendant company were the sole owners down to the date of the following certificate:

I hereby certify that the foregoing particulars of the registry and present ownership and interest of the *Troop,* official number 87977 have been truly extracted from the records in my charge.

(Sgd.) J. CLARK HALL.

*Registrar General.*

General Register and Record Office of

Shipping and Seamen, Customs House,

London, E., 24th January, 1897.

Then, in proof of payment, there was the following certificate of an assistant secretary of the Board of Trade.

It is hereby certified that the Board of Trade have paid on behalf of Her Majesty the sum of *£*12ls 9d, being the amount of expenses incurred in the months of August, September, October and November, 1891, by the harbour master at Hong Kong, and the superintendent of the Mercantile Marine Office at Victoria docks, London, in the relief according to the provisions of the Merchants' Shipping Act of 1854, of Carl Silstrom, formerly of the ship *Troop,* distressed British seaman. And it is further certified that the documents hereunto annexed and marked B. C. and D. are the original signed receipts which include the payments making up the said sum of «£12 Is 9d. And it is further certified that this certificate is issued by the Board of Trade under the provisions of the Merchants' Shipping Act of 1854.

(Sgd.) COSMO MONTHOUSE,

*L.S.*

An Assistant Secretary of the Board of Trade,

London. Dated this 22nd of May, 1895.

The documents referred to in the certificate were put in evidence.

In the Supreme Court of New Brunswick, (as before the Police-Magistrate,) it was maintained by the defendants that these certificates were insufficient,

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and it was also contended that persons who became owners of the vessel after the transaction were not "owners for the time being" within the meaning of the Act. As to this last point the New Brunswick Supreme Court held that these words mean the owners at the time of action brought. This seems clearly so. The words import a fluctuating body of persons. They are not the determinate owners who made default but the owners for the time being, the words "for the time being" denoting not a time fixed by the transaction in question but one that is variable according to the happening of another event. Then, inasmuch as the debt is made a charge upon the vessel following and binding her even on change of ownership, and even when she has ceased to be a British and becomes a foreign ship, the evident intention is to make the personal liability co-extensive with this.

The Supreme Court of New Brunswick also held that there was sufficient proof of payment by the Board of Trade.

Upon the remaining objection, however, they were with the defendant company, and held that the certificate of ownership was defective upon the ground that the Registrar General not being the person having charge of the original register (the vessel being registered at Liverpool) it was not competent for him to give a certificate sufficient under the Act; and upon this ground the rule was made absolute.

In the argument of the appeal Mr. Palmer, for the respondents, contended that an appeal does not lie in a case of certiorari except from a judgment ordering the quashing (or otherwise) of the judgment or order of the inferior court.

By force of the Act of 1891 (read in conjunction with the principal Act R. S. C. ch. 135), an appeal lies

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from the judgment in any case of proceedings for or upon a writ of *habeas corpus,* certiorari or prohibition not arising out of a criminal charge.

A judgment in a case of proceedings for a writ of certiorari in proceedings such as these seems, therefore, in explicit terms to be within the Act.

The practice in certiorari in the Supreme Court of New Brunswick is similar to that expressed in the following passage from Paley on Convictions, p. 434:

If a rule *nisi* only be granted in the first instance yet the argument on such rule generally decides the case and if it be made absolute after argument, the conviction is quashed almost as a matter of course when it is afterwards brought up on the certiorari.

Next, as to the grounds of appeal. It is argued for the appellant that in a case where by statute the judgment of the inferior court is declared to be final, the effect is, not indeed to take away the right of certiorari, but to limit it to cases of the want, excess or defect of jurisdiction, or of fraud.

It is settled, in cases where no restraint is imposed by the legislature upon review by certiorari, that an adjudication by a tribunal having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. It has been also settled that even where the right is taken away by statute it is to be deemed as still existent in cases of want or excess of jurisdiction or fraud. In the case of *Colonial Bank of Australasia* v. *Willan[[20]](#footnote-20)* there is a discussion of the various conditions which may be said to determine the jurisdiction of tribunals of limited jurisdiction. A marked distinction exists between the merits of the case and points

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collateral to the merits upon which the limit to jurisdiction depends. In the former, it is conceived that, where by statute the adjudication is final, no mere error of the tribunal whether as to law or fact involved in such determination, can suffice to make the adjudication open to review upon certiorari.

Treating the matter otherwise, however, and without formally deciding it, it would appear that there was a sufficiency of evidence to warrant the conclusions of the police magistrate.

First, as to the evidence of ownership, sec. 15 of the Merchants' Shipping Amendment Act, 1855, declares that the copy or transcript of the register of any British ship which is kept by the Chief Registrar of Shipping at the Customs House in London or by the Registrar General of Seamen under the direction of Her Majesty's Commissioners of Customs, or of the Board of Trade, shall have the same effect to all intents and purposes as the original register of which the same is a copy or transcript. What, therefore, the custodian of the original register might certify under sec. 107 of the Act of 1854, the registrar general may certify under the same section, by force of sec 15 of the Act of 1855.

By the Merchant Shipping Act, 1894, the prior Acts alluded to were repealed, and by one provision of the new Act, the returns transmitted by the local registrars to the registrar general are declared to constitute the register of British ships, and by sec. 64 it is enacted that a copy or transcript of the register of British ships kept by the registrar general

shall be admissible in evidence in manner provided by this Act and have the same effect to all intents as the original register of which it is a copy or transcript.

By sec. 695 it is provided that a copy of any such document as is by the Act declared to be admissible in evidence, or an extract therefrom, shall be admissible

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in evidence, if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was entrusted. By the expression "original document," is manifestly meant the document previously referred to as that which by the Act is made admissible in evidence, and the expression is used as in contradistinction to the copy or extract of which it is the original. Naturally the person capable of certifying to a copy of or extract from a particular document would be the person having custody of such document, and not a person having custody of an original of such "original document."

Mr. Palmer met this argument by referring to the clause of the Interpretation Act of 1889, by which it is enacted that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, and argued that the remedy would be affected if a new statutory mode of proof were admitted. If the new provision related to matters the proof of which was provided for in the provisions of the repealed Act establishing the remedy, the effect might perhaps be as contended for, but independent and general provisions as to proof contained in the later Act would seem to be *primâ facie* applicable to all cases where such proof has to be made.

Next, as to the evidence of payment; the difficulty arises from the fact that section 213 of the Act of 1854 which empowers the Board of Trade to sue for and recover the expenses in the name of Her Majesty, and which declares the effect of proof of payment by the Board of Trade, does not provide for a mode of such proof by certificate. The form of the certificate rather leads to the conclusion that the Board of Trade was advised that such a certificate could be given under section 7 of the Act of 1854. The Supreme Court of

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New Brunswick, however, find a warrant for it under section 229, by treating the Board of Trade as a person making the payment on behalf of Her Majesty. In this case the vouchers show that the account for the hospital fees, (the largest item in the claim,) was made in terms against the Board of Trade. I do not think it is any straining of the statute to read it as the Supreme Court of New Brunswick have done, for manifestly the Board of Trade is the real paymaster by whosesoever hands the money may have passed.

A question was raised as to the jurisdiction of the Police Court. But the facts and references already stated show that the Stipendiary Magistrate of St. John had jurisdiction to entertain a claim for wages against the defendant company, and indeed the question was not raised in the court below.

The appeal, therefore, should be allowed. The proper order below was to discharge the rule *nisi* for a certiorari.

Appeal allowed with costs.

Solicitor for the appellant: E. L. Newcombe.

Solicitor for the respondent: C. A. Palmer.

1. 18 & 19 V. c. 91 (Imp.) [↑](#footnote-ref-1)
2. 17 & 18 V. c. 104 (Imp.) [↑](#footnote-ref-2)
3. 14 & 15 V. c. 99 (Imp.) [↑](#footnote-ref-3)
4. 57 & 58 V. c. 60 (Imp.) [↑](#footnote-ref-4)
5. 56 V. c. 31 (D.) [↑](#footnote-ref-5)
6. [1894] A. C. 508. [↑](#footnote-ref-6)
7. 1 Q. B. 66. [↑](#footnote-ref-7)
8. 1 Man. & G. 257. [↑](#footnote-ref-8)
9. L. R. 5 P. C. 417. [↑](#footnote-ref-9)
10. 8 M. & W. 126. [↑](#footnote-ref-10)
11. 1 Dowl. & L. 885. [↑](#footnote-ref-11)
12. 16 U. C. Q. B. 104. [↑](#footnote-ref-12)
13. 12 Can. 6. C. R. 111. [↑](#footnote-ref-13)
14. 16 O. R. 251. [↑](#footnote-ref-14)
15. 24 O. R. 246. [↑](#footnote-ref-15)
16. 10 Ont. P. R. 517. [↑](#footnote-ref-16)
17. 18 Can. S. C. R. 711. [↑](#footnote-ref-17)
18. C. S. N. B. ch. 46, s. 15. [↑](#footnote-ref-18)
19. 16 U. C. Q. B. 104. [↑](#footnote-ref-19)
20. L. R. 5 P. C. 417. [↑](#footnote-ref-20)