MARWELL EQUIPMENT LIMITED AND BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED (*Plaintiffs*) ..... APPELLANTS;

1960

*May 2, 3, 4
Nov. 21

AND

VANCOUVER TUG BOAT COMPANY LIMITED, OWNERS OF THE TUG *LA DENE* AND THE BARGE *V.T. 5* (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Shipping—Collision—Removal of wreck by owner—Liability of defendants —Limitation of liability—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 657, 659—Navigable Waters Protection Act, R.S.C. 1952, c. 193, ss. 13, 14, 15, 16.

The respondent company and a master in its employ were held to be liable in an action for damages arising from a collision in the Fraser River of a scow owned by the company, when in tow by a tug also owned by the company, with a barge owned by the appellant M. The trial judge found that the collision was caused solely by the negligence of the master of the tug, but found that the company was entitled to limit its liability under ss. 657 and 659 of the *Canada Shipping Act*, as well for the damage caused by the sinking as for the cost incurred by the appellants in removing the wreck at the direction of the river authorities. The appellants appealed to this Court.

Held (Locke and Cartwright JJ. *dissenting*): The appeal should be allowed in part.

*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

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Per Curiam: The findings of the trial judge that the sinking was caused by the improper navigation of the tug and scow and that this occurred without the actual fault or privity of the respondent should not be disturbed. Accordingly the respondent is not deprived of its right to limit its liability under s. 657 of the *Canada Shipping Act* in relation to the claim for the loss of the dredge.

Per Martland, Judson and Ritchie JJ.: The words "in respect of loss or damage" in s. 657 of the Act are not used to define the wrongful act of the shipowner whose vessel causes damage, but are used to define that kind of damage in relation to which, the wrongful act having occurred, he may limit his liability. *Burger v. Indemnity Mutual Marine Assurance Company Limited,* [1900] 2 Q.B. 348, applied.

Section 659 only affords protection to a shipowner in respect of a claim for loss or damage caused to property or rights of any kind by reason of improper navigation or management of the ship. This is not to be read as applying to any kind of damage resulting from the infringement of another's rights. The section limits liability for the infringement of rights in respect of a particular kind of loss or damage, i.e., loss or damage caused to property or to rights. The "rights" referred to must be rights which may be subject to loss or damage.

The claim with respect to the expense incurred in removing the wreck is not one for damage to property. Neither is it a claim for loss or damage to the appellant's rights. Nor was there any claim in damages for damage to the property or rights of the Crown, as distinct from those of the appellants, which could make s. 659 applicable.

The Crown's claim, in respect of the obstruction to navigation caused by the sinking of the dredge, was for the enforcement of the statutory duties imposed and of its statutory rights created by the *Navigable Waters Protection Act* and not a claim for damages for damage to its own property or rights.

Therefore s. 659 does not enable the respondent to limit its liability in respect of the claim for the cost of removing the wreck. *The Urka,* [1953] 1 Lloyd's Rep. 478; *The Millie,* [1940] P. 1; *The Stonedale No. 1,* [1955] 2 All E.R. 689, applied.

Per Locke J., *dissenting*: The sinking of the dredge occurred through the negligence of the respondent, and there was imposed upon the owners the statutory obligation to remove the wreck. This was a direct result of the negligent act and was damage "in respect of" the damage to the dredge within the meaning of s. 657 of the Act and to the "rights" of the appellants within the meaning of s. 659. *The Stondale No. 1, supra; The Millie, supra,* distinguished; *The Urka, supra,* not followed.

Per Cartwright J., *dissenting*: If damages flow sufficiently directly from a wrongful act to be recoverable in an action in tort based on that act it is not possible to say that they are not damages "in respect of" that wrongful act. If they were not in respect of such act they would not be recoverable.

The expense incurred in removing the wreck forms part of the damages for which the respondent is liable, and the respondent is entitled to limit its liability accordingly.

APPEAL from a judgment of Sidney Smith D.J.A.[1] Appeal allowed in part, Locke and Cartwright JJ. dissenting.

D. McK. Brown and *R. M. Hayman,* for the plaintiffs, appellants.

J. I. Bird and *F. O. Gerity,* for the defendants, respondents.

LOCKE J. (*dissenting*):—This is an appeal by the plaintiffs in the action from the judgment of the Deputy Judge in Admiralty at Vancouver[1] by which the respondent company and G. M. L. Harwood, the master of the tug *La Dene,* were held to be liable for damages arising from the collision between the scow *V.T. 5,* when in tow by the said tug, and the dredge *Townsend* owned by the appellant, Marwell Equipment Ltd. in the Fraser River on the evening of March 14, 1957. The learned judge found that the collision was caused solely by the negligence of Harwood, the master of the tug, but found that the respondent company was entitled to limit its liability to both of the appellants under the provisions of ss. 657 and 659 of the *Canada Shipping Act,* as well for the damage caused by the sinking as for the cost incurred by the appellants for removing the dredge and other equipment from the bed of the river at the direction of the river authorities.

The defendant Harwood did not appeal and the finding that he was guilty of negligence in the navigation of the *La Dene,* which either caused or contributed to the collision, is not disputed. The issues to be determined are as to the respondent company's right to limit its liability under the sections of the *Shipping Act* referred to.

The Marwell Company was the owner of the dredge which was at the time in question under a charter by demise to the British Columbia Bridge and Dredging Co. Ltd. The dredge was not self-propelled and it was necessary to employ tugs to place her in position. Under a contract with the British Columbia Highway Toll and Bridge authority, the last named company (to be referred to as the Dredging Company) was preparing certain test holes in the bed of the Fraser River in connection with the intended construction of the Deas Island tunnel, which has since been completed, under the south arm of the Fraser River. The dredge

[1] [1960] Ex. C.R. 120, 32 W.W.R. 523.

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had been moved to the Ladner Ferry slip on March 9th and on March 12th was moved into a position located approximately 1,200 feet from the Deas Island shore on the south and something more than 600 feet from the Lulu Island shore on the north. Between the position of the dredge, as thus located, and the shore of the Deas Island there was a pipeline carried on pontoons designed to carry the sand and other material removed from the bed of the river by the dredge to be deposited on the island to the south. The south arm of the Fraser is navigable by deep sea vessels and there is a great deal of traffic both ways in that portion of the river between the sea and the Port of New Westminster and places to the east which passed the site of these operations. The requisite permission had been granted to the appellants for the carrying on of the work and the stationing of the dredge and the pipeline in the river and no question arises as to this.

The respondent company carries on extensive operations upon the west coast and in the Fraser River, operating a fleet of tugs employed, *inter alia,* by logging and lumber companies in towing scows and rafts of logs. Captain Harwood was a qualified master of long experience and had been employed by the respondent company for many years. He was not apparently assigned to any particular vessel, being employed on any of the tugs operated by his employer to which he might be directed. He had been on a holiday for the two weeks preceding the date in question but was recalled on the morning of that day and instructed to assume command of the tug *La Dene* at Marpole on the north arm of the river and to carry out a tow to Bellingham. He took charge of the tug at about 2.00 p.m. At about 4 o'clock that afternoon Captain Edward Y. Taylor, the senior despatcher of the respondent company, learned that the scows which were to be towed to Bellingham would not be ready and, having communicated with another company, arranged with them to tow the scows *V.T. 5* and the *I.T. 41* from a place near New Westminster to Duncan Bay. Taylor spoke to Harwood at some time between 4.30 and 5.00 o'clock communicating to him the changed instructions, and thereafter the latter proceeded with the *La Dene* to the place where these latter scows were loaded, at or near the easterly extremity of Lulu Island, arriving there at about 6 o'clock.

In taking the tugs in tow deep sea gear was used, the *V.T. 5* being about 300 feet behind the tug and the *I.T. 41* to the rear of it. The master estimated the total length of the tug and the tow as being close to 800 feet. The *La Dene* started on its voyage at 8.15 p.m. According to Harwood, the visibility was first rate and objects could have been seen at 8 or 9 miles. It is common ground that at some time during the afternoon of March 13 the respondent company received a written notice from the District Marine agent of the Department of Transport at Victoria dated March 11, 1957, entitled "Notice to Shipping" which stated that the hydraulic dredge *Townsend* would be operating in the main channel of the Fraser for approximately two weeks, anchored on the centre line of the Deas Island tunnel project approximately 1,000 feet from the Canada Rice Mills and approximately 600 feet north of the Deas Island dyke, and that a floating pipeline would extend from the dredge to Deas Island. Mariners were warned to pass to the north of the dredge and to exercise the necessary caution while these operations were in progress. On the evening of March 14 when Harwood left with his tow he was unaware of these facts, Taylor, whose duty it was to inform him having failed to do so.

There was a strong ebb tide at the time and with the river current together ran at the rate of approximately 3 to 4 knots. The speed of the tug with the tow was approximately 4 knots through the water, giving her speed over the ground of some 7½ knots. The dredge *Townsend* 115 feet in length and 36 feet in breadth was anchored headed upstream and carried two red lights suspended at a height between the two forward masts of the scow, two 1,500 watt floodlights at the front of the dredge, two deck lights and two 1,500 watt floodlights at the stern. On the pontoons carrying the pipeline there were 25 watt bulbs every 50 feet, these being some 22 in number, between the dredge and the shore. These lights were carried some 7 to 8 feet above the water.

The position of the dredge was in the Gravesend Reach of the river and the *La Dene,* moving downstream toward the sea, entered the reach at a place about 2 miles from the location of the dredge. While, according to Captain Harwood, he saw these lights, other than the red lights above mentioned, he thought they were the lights of the Ladner

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Ferry landing which was situate roughly 800 feet in a southerly direction from the dredge and which, it was shown, were of a substantially different nature, and he did not realize that the dredge and pipeline were in the position stated until he was about 400 feet distant from them. It was then clearly too late to avoid a collision between one of the scows and the dredge.

Captain Leonard Griffiths was the owner of the tug *Jarl* which was acting as tender for the *Townsend*. He saw the *La Dene* and the tow approaching when the latter was about 1½ mile distant and realized that the course it was following would take it to the south of the dredge, that is, between that vessel and the Deas Island shore. Griffiths, whose evidence was accepted by the learned trial judge, first called the *La Dene* on the radio but got no response and started upstream to warn that vessel, making several attempts on the way to communicate with it on the radio without getting any answer. In addition, Griffiths directed that the front side deck lights of his tug be flashed repeatedly in an endeavour to attract attention, and tried to do so by using the search light but this was of no avail. He passed the *La Dene* as he went upstream to a distance of some 50 to 75 feet and thereafter attempted to assist the extrication of that vessel from its position by pushing the second of the scows to the north. These efforts proved unavailing and the first of the scows hit the dredge on the starboard side causing her to sink. Captain Harwood said that he did not see the *Jarl* or the signals made by her described by Griffiths and the radio on the *La Dene* was not turned on.

Upon these facts the learned trial judge held that Harwood should have recognized that there was an obstruction in the channel on first entering the Gravesend Reach and found that he was negligent in failing to keep a proper lookout and in failing to appreciate the significance of the lights that were exhibited when he saw them, and that his failure was the sole cause of the collision.

Captain Harwood had said in his evidence that had he known of the presence of the dredge and the pipeline in the river he would not have attempted to take the *La Dene* and its tow down the river at all, and there was evidence by other masters to the same effect. There was, however, more

than 625 feet of navigable channel through which the tug and tow could have been safely directed to the north of the position of the dredge, and the finding at the trial that the sole cause of the accident was the negligence of the master shows that the learned trial judge considered that this was the case and that had the master steered a course closer to the north shore the collision would have been averted.

The finding that the negligence of Harwood at least contributed to the occurrence is not questioned by the parties to this appeal: the appellant, however, contends that the respondent has not satisfied the onus resting upon it of proving that the loss of the dredge and the consequent damage occurred without its actual fault or privity and that, accordingly, the limitation of liability permitted by s. 657 of the *Canada Shipping Act* is not available to it. Upon this aspect of the matter the learned trial judge held that if there was fault on the part of the respondent in failing to have communicated to Captain Harwood the fact of the presence of the barge and pipeline in the river, of which it had received notice on March 13, the negligence was that of a paid employee only and was without its "actual fault or privity" within the meaning of that expression in s. 657.

Section 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29, so far as it is relevant, reads:

> The owners of a ship, whether registered in Canada or not, are not in cases where all or any of the following events occur without their actual fault or privity, that is to say,
>
> * * *
>
> (*d*) where any loss or damages is by reason of the improper navigation of the ship caused to any other vessel . . .
>
> liable to damages . . . in respect of loss or damage to vessels . . . to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

The history of the statutory provisions permitting the owners of vessels to limit their liability in this manner is to be found in Mayers' Admiralty Law, commencing at p. 161. In England the matter was dealt with in a statute passed in 1773 and later appeared as s. 503 of the *Merchant Shipping Act 1854* and as s. 502 of the Act of 1894. In an *Act Respecting the Navigation of Canadian Waters,* passed as c. 58 of the Statutes of Canada of 1858, s. 12 provided for the limitation, and this was repeated in a slightly varied form in c. 29 of the Statutes of 1880, R.S.C. 1886, c. 79 and

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R.S.C. 1906, c. 113. Each of these Canadian statutes contained the expression "actual fault or privity" adopted from the earlier English statutes.

I do not find any assistance in determining the meaning to be assigned to the expression where the ship owner is a limited company prior to the decision of the Court of Appeal and of the House of Lords in *Lennard Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[1] When that case came before the Court of Appeal[2] Buckley L.J. said in part (p. 432):

> The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents.

and Hamilton L.J. said in part (pp. 436-7):

> Actual fault negatives that liability which arises solely under the rule of "respondeat superior." . . .
>
> In the case of a company, the "owners" within the meaning of the section must be the person or persons with whom the chief management of the company's business resides.

The facts in that case were that the appellant company was managed by another limited company and J. M. Lennard who was a director of both companies was registered in the ship's register and designated as the person to whom the management of the vessel was entrusted. It had been found that Lennard knew or had the means of knowing of the defective condition of the ship's boilers which rendered her unseaworthy, but gave no instructions to the captain or the engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in that condition. It had been held at the trial that the owners had failed to discharge the onus which lay upon them of proving that the loss happened without their actual fault or privity. After referring to the language of s. 502 of the *Merchant Shipping Act 1894*, Viscount Haldane L.C. said in part (p. 713):

> Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. . . . It has not been contended at the Bar, and it could not

[1] [1915] A.C. 705. [2] [1914] 1 K.B. 419.

have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior,* but somebody for whom the company is liable because his action is the very action of the company itself.

The language employed by Buckley L.J., by Hamilton L.J. and by the Lord Chancellor which has been above quoted was approved and adopted in the judgment of the Judicial Committee in *Robin Hood Mills Ltd. v. Paterson Steamships Ltd.*[1]

At the relevant time J. C. F. Stewart, who had been in the employ of the respondent in various capacities for many years including that of general manager, was the vice-president of the company and in charge of its general administration. Rod Lindsay, the general manager of the company, was absent on a holiday in March of 1957 and Stewart was discharging his duties as well as his own. He was a director and, in answer to a question put to him in cross-examination, agreed that he was discharging the functions of a managing director at the time. Stewart said that he saw the notice to shipping referred to on the afternoon of March 13. It was proven that a second copy was given to Taylor, the senior despatcher, and Stewart said that it was the latter's duty to broadcast such notices so that the information would be in the possession of the respondent's vessels, all of which were fitted with telephonic equipment. The practice in the respondent's office was to have four such broadcasts daily, one of which would be made at 4 o'clock in the afternoon. According to Stewart, at about 3.30 in the afternoon of the 14th he went to the despatcher's office and asked Taylor if he had seen the notice. For some reason, objection was made to his giving evidence as to what then took place between him and the senior despatcher, which was clearly admissible on this issue, but he was permitted to say that as a result of what Taylor said to him he was satisfied that the notice was going to be put out over the air. He did not learn that this had not been done until after the accident later that day. Taylor, who was a qualified master who had been employed by the company as a

[1] [1937] 3 D.L.R. 1 at 6, 46 C.R.C. 293.

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despatcher for some nine years, said that he had seen the notice to shipping on the morning of March 14. He confirmed the evidence of Stewart that the latter had come to his office just before the 4 o'clock broadcast and had mentioned this particular notice and that he, Taylor, had told him that he had forgot to broadcast it on the earlier broadcast but would do so at 4 o'clock. It was apparently after the 4 o'clock broadcast that he spoke to Harwood on the telephone, the latter being then at Marpole, and he admittedly did not then communicate to him the contents of the notice. Taylor said that he did not think he had talked to the *La Dene* at the time of the 4 o'clock broadcast. It is not questioned that the information contained in the notice should have been communicated to the masters of the company's vessels operating on the Fraser River and, as Taylor did not know whether Harwood had heard the 4 o'clock broadcast clearly, he should have informed him.

While it was the duty of the despatchers to communicate the contents of such notices to those in charge of the respondent's ships Stewart was unable to explain why he had spoken to Taylor on the afternoon in question regarding this particular notice. The learned trial judge, however, accepted his evidence and that of Taylor that this had occurred. He found as a fact that Taylor and the other despatchers were reliable, competent and certificated men and had performed their duties for several years; that Stewart had spoken to Taylor at about 3.30 p.m. taking the copy of the notice with him, and asked Taylor if he had seen it and had then been told that he had not informed the tugs but would do so on the next broadcast which was to take place in about half an hour and that:

> With the assurance received from Capt. Taylor that he would inform all the tugs, Mr. Stewart left the Despatch Office and had no knowledge that the information had not in fact been conveyed until after the accident.

After referring to the decision in the *Asiatic Petroleum Company* and *Paterson Steamships* cases above mentioned, the judgment reads in part:

> I think it is conceded here that the *alter ego* of this Company consisted of Mr. Arthur Lindsay, the President, or Mr. James Stewart, the Vice President and General Manager. Mr. Lindsay may be dismissed from consideration . . .

It seems to me that just as Mr. Stevenson was the pertinent "heart" in the *City of Alberni* case (1947 Ex. Ct. Rep. 83), so I think is Mr. Stewart in the same position here . . .

The fault lay with Capt. Taylor, the senior Despatcher of the Company, and a man of very considerable experience both ashore and afloat. But he has no interest in the Company. He is not a shareholder; he is an employee, albeit an important one.

In view of the principles I have referred to above, it seems impossible for me to say that the Company must be held in "fault and privity" to his neglect and thereby barred from the indulgence provided by the relevant sections of the Canada Shipping Act.

The evidence appears to me to support the finding that the "directing mind and will" of the respondent company was at the time in question that of Stewart. I have read with care his evidence and the exhaustive cross-examination to which he was subjected. It appears to me to be strange that Stewart should on the afternoon in question have particularly mentioned the notice to shipping in question to the senior despatcher when it was that official's duty to communicate the information to the masters of the various tugs which might be operating on the Fraser River. However this may be, the learned and greatly experienced trial judge who heard Stewart and Taylor give their evidence believed them and I can find nothing in the record to justify us in interfering with his finding as to their credibility. This being so, whether or not the failure to advise Captain Harwood of the fact that the dredge was operating on the river was a contributory cause to the collision, the respondent is not, in my opinion, deprived of its right to limit its liability under s. 657 of the *Canada Shipping Act*.

It is said for the appellants that the respondent's system was defective in that proper logs were not maintained upon the tugs and that, as the evidence shows, Captain Harwood paid scant attention to radio broadcasts which he appeared to regard as something in the nature of a nuisance. The tug was well equipped with means of maintaining close telephonic communication with the headquarters of the company in Vancouver and was equipped with radar which, if used as the tug entered the Gravesend Reach, would have disclosed the presence of the obstruction in the river, and it seems apparent from the evidence that, at least so far as Captain Harwood is concerned, the regulations of the

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company in this regard had not been enforced. However, none of these matters contributed to the event in my opinion in view of the findings of fact that have been made.

I have read the judgment of the House of Lords in *"The Norman"* which is now available[1], where neglect was found on the part of the owners of the trawler in that Hellyer, put forward by the owners as the *alter ego* whose actual fault or privity would for the purpose of the action be deemed to be theirs, had been negligent in failing to communicate by wireless to the trawler information as to a rock, the presence of which was not indicated upon the available charts and the existence of which had been discovered after the vessel had sailed. The decision does not, however, assist the appellant in the present case where it was Taylor's duty, and Stewart did give express instructions, that the masters should be informed of the presence of the obstruction. It is unnecessary to discuss further the facts of "The Norman" case which bear no similarity to those in the present matter, other than the fact that the rock, as the dredge, was a danger to navigation.

A further question to be determined is as to the right of the respondent to limit its liability under the provisions of the *Canada Shipping Act* for the costs incurred by the appellant in removing the wreck of the dredge from the river following the demand made upon it by the New Westminster Harbour Commissioners.

Section 13 of the *Navigable Waters Protection Act,* R.S.C. 1952, c. 193, provides, *inter alia,* that where the navigation of any navigable water over which the Parliament of Canada has jurisdiction is obstructed by the sinking or grounding of any vessel, the owner of such vessel shall forthwith begin the removal thereof and prosecute such work diligently to completion. Under the terms of s. 16 as amended, if an owner has failed to remove such a wreck and the Minister has caused the same to be removed and where the cost thereof has been defrayed out of public money of Canada, the amount of such cost constitutes a debt recoverable by Her Majesty in right of Canada from the owner.

Following the sinking of the "Townsend" the New Westminster Harbour Commissioners, having jurisdiction in the matter, by a notice dated March 21, 1959, addressed to both

[1] [1960] 1 Lloyd's Rep. 1.

appellants, ordered them forthwith to remove the dredge *Townsend* which, it was said, was causing an obstruction to navigation in the Fraser River near Deas Island, on pain that if they did not remove the same, they would be held responsible for the resulting expense.

The appellants removed the wreck from the river and incurred expense in respect of which they claim to recover the amount of $108,039.06. The respondent claimed to be entitled to limit its liability and has been held entitled to do so by the judgment at the trial.

Section 659 of the *Canada Shipping Act* reads:

> The limitation of the liability of the owners of any ship set by s. 657 in respect of loss of or damage to vessels, goods, merchandise or other things shall extend and apply to all cases where without their actual fault or privity any loss or damage is caused to property or rights of any kind whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship.

This section is in the same language as that of an amendment made to the *Merchant Shipping Act,* 1894 (Imp.), in the year 1900.

The appellants' contention is expressed in their factum in these terms:

> The appellants submitted in the Court below, and submit in this Court that the claim for removal of the wreck constitutes a claim for damages arising out of a tort committed by respondent. Appellants' obligation arose out of the *Navigable Waters Protection Act,* c. 140, ss. 14 and 16. Appellants submit that the claim is not one for damage to rights in any case because appellants have no right to have their vessel positioned in the bottom of the river. On the contrary they have an obligation both at common law and by statute not to position their dredger in the bottom of the river.

In dealing with the question the learned trial judge distinguished the claim from that asserted in *The Stonedale*[1] upon the ground that in that case the claim was there advanced by the Manchester Ship Canal Company, a harbour authority entitled under the *Manchester Ship Canal Act,* 1936, to recover the cost of removing a wreck from the harbour. Such claim was not for damages for negligence, but was to recover upon the statutory obligation imposed by the Act.

[1] [1955] 2 All E.R. 689, [1956] A.C. 1.

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In the judgment delivered by Viscount Simonds in *The Stonedale* this is most clearly pointed out and he referred with approval to the judgment of Langton J. in *The Millie*[1], where the claim was of the same nature and where it had been held that the limitation permitted under the *Merchant Shipping Act,* 1894 (Imp.), as amended, was inapplicable.

On the argument before us we were referred to the decision in *The Urka*[2], to which the attention of the learned trial judge had not apparently been directed. That case was decided by Lord Sorn in the Court of Session. In a collision in Stornoway Harbour between *The Urka* and a coal hulk known as *The Portugal,* the hulk was sunk, due to faulty navigation on the part of the vessel, which was admitted. The owner's claim for the value of the hulk and the right to limit the liability in respect of that claim was admitted. A further claim was for the cost of removing the wreck of *The Portugal* on the demand of the Stornoway Harbour Commissioners, and it was held that in respect to this claim s. 503 of the *Merchant Shipping Act,* 1894 (Imp.), did not apply. Lord Sorn was of the opinion that the claim was not in respect of "loss of damage to property or rights", saying that when the owners of *The Portugal* incurred this expenditure they were neither rescuing their property nor vindicating their rights. The learned judge said that this was the identical question decided in *The Millie.*

I am unable with respect to agree with this judgment or with the reasoning upon which it proceeds. After saying that the identical question had been decided by Langton J. in *The Millie* it is said that while in that case there was a direct liability of the owner and the liability in the case of *The Portugal* was indirect the learned judge was of the opinion that this made no difference. This would appear to overlook the fact that as pointed out by the learned trial judge in the present matter and by Viscount Simonds in *The Stonedale* the only claim to which the sections of the *Merchants Shipping Act* permitting limitation of liability apply are those for damages for negligence and the claim of the Ship Canal Company was not such a claim.

[1] [1940] P. 1, 109 L.J.P. 17. [2] [1953] 1 Lloyd's Rep. 478.

In my opinion the claim for the cost of removing the wreck falls within the terms of ss. 657 and 659. By reason of the sinking of *The Townsend* through the negligence of the respondent the dredge was lost and there was imposed upon the owners the statutory obligation to remove the wreck. This was a direct result of the negligent act and was in my opinion damage "in respect of" the damage to the dredge within the meaning of s. 657 and to the "rights" of the appellants within the meaning of s. 659. I can see no basis for a contention that to impose a legal liability upon a third person by a negligent act is not an infringement of his rights.

I would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—For the reasons given by my brother Locke I agree with his conclusion that we cannot disturb the findings of the learned trial judge that the sinking of the dredge *Townsend* was caused by the improper navigation of the tug *La Dene* and its tow the scow *V.T. 5* and that this occurred without the actual fault or privity of the respondent, the owner of the tug and scow.

The claim of the appellant, Marwell Equipment Limited, hereinafter referred to as Marwell, is set out in the statement of claim as follows:

14. The Plaintiff Marwell Equipment Limited has suffered damages in the amount of $682,041.70, particulars of which are:—

(*a*) Loss of dredge "Townsend"	$ 550,000.00
(*b*) Pipeline and pontoon damage	7,767.30
(*c*) Loss of equipment on dredge "Townsend" at time of sinking	28,239.06
(*d*) Loss of spare parts and materials on "Townsend" at time of sinking	7,048.48
(*e*) Loss of sandsucker including cost of removal	10,105.83
(*f*) Loss of rentals from "Townsend" for period March 15th, 1957 to November 1st, 1957	30,000.00
(*g*) Premium overtime expended during construction of Dredge "W. G. Mackenzie" to replace "Townsend" for the purpose of meeting Deas Island committment.	48,881.03

15. The Plaintiff Marwell Equipment Limited has also suffered the loss of $108,039.06, being the expense incurred in removal of the wreck of the dredge "Townsend" from the channel of the Fraser River, including cost of salvaging scrap, less the amount recovered through sale of this scrap.

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On the basis of the findings set out in the first paragraph of these reasons the appellant does not appear to question the right of the respondent to limit its liability in respect of any of the items claimed which may be allowed by the registrar in assessing the damages other than the item of $108,039.06 the expense incurred by the appellant in removing the wrecked dredge from the river.

While the learned trial judge left it to the registrar to assess the damages, it is implicit in his reasons and was not questioned before us that the damages which Marwell is entitled to recover from the respondent include the expenses of removing the wreck. In my opinion this is clearly the right view. In *The Stonedale No. 1*[1], Singleton L.J. says at page 176:

> If those responsible for the management of a ship are guilty of faulty navigation (or negligence) which causes damage to others, the measure of damages is governed by the ordinary rule, i.e., they are recoverable if they are the natural and probable results of the wrongful act.

It appears to me that it is a natural and probable result of sinking a dredge in that part of the Fraser River in which the *Townsend* sank that her owners will be put to the expense of removing the wreck. Indeed the whole argument before us proceeded on the basis that Marwell can recover this item from the respondent; if it were otherwise the question of the respondent's right to limit its liability in regard to the item would, of course, not arise at all.

In my opinion the learned trial judge was right in rejecting the argument that the case at bar is governed by *The Stonedale No. 1*[2] or by *The Millie*[3]. The cardinal difference between those cases and the case at bar is that neither of the former was and the latter is an action for damages.

The expense of removing the dredge with which we are concerned is merely one item among those making up the sum total of damages for which, when the reference is completed, the appellant will have judgment against the respondent. The *ratio decidendi* of *The Stonedale No. 1* and

[1] [1954] 2 All E.R. 170.

[2] [1953] 1 W.L.R. 1241, affirmed [1954] 2 All E.R. 170, affirmed [1955] 2 All E.R. 689.

[3] [1940] P. 1, 109 L.J.P. 17.

The Millie, that the amounts there in question were recoverable not as damages but as a statutory debt, has no application in the circumstances of the case before us.

In *The Stonedale No. 1* Viscount Simonds after referring to the anomalies which exist in this branch of the law said at page 693:

> But, having said so much about anomalies, I think it right to repeat that I found my opinion that the appellants have no right of limitation on the plain words of the statutes.

It appears to me that the solution of the question before us depends on the true meaning of s. 657(1) of the *Canada Shipping Act* which reads as follows:

> 657 (1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,
>
> (*a*) where any loss of life or personal injury is caused to any person being carried in such ship;
>
> (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board the ship;
>
> (*c*) 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; and
>
> (*d*) 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;
>
> 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 vessels, 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 some judgments the draftsmanship of the corresponding provision of the English Act has been subjected to criticism but on a careful analysis the purpose and meaning of the sub-section appear to me to be reasonably plain.

The primary purpose is to provide that in certain specified cases the liability of the owners of a ship to damages for which they would be liable under the principle *respondeat superior* is to be limited to amounts ascertained by reference to the tonnage of their ship. All the cases are conditioned upon the wrongful act giving rise to the right of action for damages having occurred without the fault or privity of the owners.

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The specified cases are those in which all or any of the events set out in clauses (*a*), (*b*), (*c*) and (*d*) occur. Once it appears that one or more of these events has occurred without the actual fault or privity of the owners their *right* to limit their liability is established but the *amount* to which it is limited will depend upon the clause or clauses under which the event (or events) giving rise to the liability for damages falls.

The primary purpose of the clauses introduced by the words "in respect of" in the two places in which they occur in the subsection is to assign the appropriate amount of limitation having regard to the event (or events) which has given rise to liability; whatever may be the aggregate amount of damages recoverable at common law it is reduced to the aggregate amount set by the sub-section.

In the case at bar the appropriate clause is (*d*) and the limitation is $38.92 for each ton of the combined tonnage of the tug and scow.

What then is limited in the case at bar is the aggregate amount of the respondent's liability to damages in respect of loss or damage to the dredge. The appellant's cause of action is for damages for the wrong done it by the respondent in damaging and thereby sinking its dredge by reason of improper navigation. The reason that it is entitled to have the cost of removing the wreck added to its other items of damage is that it is a part of the damages caused to it by the respondent's tortious act. The phrase "in respect of" as used in the sub-section appears to me to be at least as comprehensive as the phrases "resulting from", "caused by" or "in consequence of". I observe that the meanings given to the phrase "in respect of" in the Shorter Oxford English Dictionary, 3rd edition (1947) are:—"with reference to", "as relates to" "as regards".

It appears to me that all damages which Marwell is entitled to recover from the respondent for having sunk and damaged its dredge, since to be recoverable at all they must in contemplation of the law have been caused by that single wrongful act, are necessarily damages in respect of that act. I cannot follow the argument that an item of damage awarded as being caused by a wrongful act is not awarded in respect of that wrongful act.

I could understand (although I would not agree with) the argument that, since at common law the owners of a vessel sunk without any fault on their part were not bound to remove the wreck, the expense to which they were put in removing it for which, in the case at bar, they are liable only by virtue of the provisions of the *Navigable Waters Protection Act*, R.S.C. 1952, c. 193, was not a loss caused by the wrongful sinking; but if this argument were accepted the result would be that Marwell could not recover this item of expense from the respondent and no question of limitation of liability would arise in regard to it.

In construing an ordinary English phrase such as "in respect of" in one statute only limited assistance can be derived from cases construing it in other statutes or documents.

In *Tatam v. Reeve*[1], a Divisional Court composed of Bruce and Wright JJ. held that the words "in respect of any contract" were more comprehensive than the words "under any contract".

In *Lord Glanely v. Wightman*[2], Viscount Buckmaster at page 629 and Lord Tomlin at page 632 appear to treat the phrase "in respect of the occupation of lands" as the equivalent of "arising from the occupation of lands"; at page 637 Lord Wright holds that before an operation carried on on the land in question can be taxed as not being "in respect of the land" it must be shewn that the taxpayer "is there conducting some 'separate and distinct operation unconnected with the occupation of the land' ".

On the other hand, in *Burger v. Indemnity Mutual Assurance Company*[3], the Court of Appeal held that the words in a marine insurance policy agreeing to indemnify the assured against liability "in respect of injury to such other ship or vessel itself" were not equivalent to the words "in consequence of injury to such other ship or vessel" and did not cover a sum which the owners of the vessel sunk through the insured's negligence had been obliged to pay for the removal of the wreck and for which they had recovered judgment against the insured; but that decision appears to me to have turned upon the special wording of the policy and

[1] [1893] 1 Q.B. 44, 67 L.T. 683.
[2] [1933] A.C. 618, 102 L.J.K.B. 456.
[3] [1900] 2 Q.B. 348, 69 L.J.Q.B. 838.

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particularly on the view that if the words quoted were construed as "in consequence of injury to such other ship or vessel" it would render otiose some of the terms of the contract which followed. However, I have gained little help from these cases in which the phrase "in respect of" has been used in other contexts and I rest my judgment on what appears to me to be the meaning of s. 657(1).

For the reasons given by my brother Locke, I agree with his conclusion that we ought not to follow the decision in *The Urka*[1].

I have not found it necessary to refer to the terms of s. 659 of the *Canada Shipping Act*, as in my opinion, the respondent's right to limit its liability is found in the words of s. 657(1); certainly there is nothing in s. 659 to cut down this right of the respondent.

In my opinion if damages flow sufficiently directly from a wrongful act to be recoverable in an action in tort based on that act it is not possible to say that they are not damages "in respect of" that wrongful act. If they were not in respect of such act they would not be recoverable. I can see no more reason for denying the right of the respondent to limit its liability in regard to the item of $108,039.06 than in regard, for example, to items (*f*) and (*g*) claimed in paragraph 14 of the statement of claim, set out above.

In my view the item of expense with which we are concerned forms part of the damages for which the respondent is liable to the appellant in respect of the damage negligently done by the respondent's tug and scow to the appellant's dredge and the respondent is entitled to limit its liability accordingly.

I would dispose of the appeal as proposed by my brother Locke.

The judgment of Martland and Judson JJ. was delivered by

MARTLAND J.:—I agree with the conclusions of my brother Locke with regard to the respondent's right to limit its liability in relation to the appellants' claim for the loss of the dredger *Townsend*. With respect, however, I have reached a different conclusion concerning the appellants'

[1] [1953] 1 Lloyd's Rep. 478.

claim to recover the expenses which they incurred in connection with the removal of the wreck. In my opinion the limitation provisions of the *Canada Shipping Act*, R.S.C. 1952, c. 29, are not applicable to that claim.

Section 13 of the *Navigable Waters Protection Act*, R.S.C. 1952, c. 193, imposed upon the owner of the dredger the statutory duty to remove it. That section provides as follows:

13. (1) Where the navigation of any navigable water over which the Parliament of Canada has jurisdiction is obstructed, impeded or rendered more difficult or dangerous by the wreck, sinking, lying ashore or grounding of any vessel or part thereof or other thing, the owner, master or person in charge of such vessel or other thing, by which any such obstruction or obstacle is caused, shall forthwith give notice of the existence thereof to the Minister or to the collector of customs and excise at the nearest or most convenient port, and shall place and, as long as such obstruction or obstacle continues, maintain, by day, a sufficient signal, and, by night, a sufficient light to indicate the position thereof.

(2) The Minister may cause such signal and light to be placed and maintained, if the owner, master or person in charge of such vessel or other thing by which the obstruction or obstacle is caused fails or neglects so to do.

(3) The owner of such vessel or thing shall forthwith begin the removal thereof, and shall prosecute such removal diligently to completion; but nothing herein shall be deemed to limit the powers of the Minister under this Act. R.S., c. 140, s. 14.

Sections 14 and 15 go on to provide:

14. The Minister may, if, in his opinion,

(*a*) the navigation of any such navigable water is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking, partially sinking, or lying ashore or grounding of any vessel, or of any part thereof, or of any other thing,

(*b*) by reason of the situation of any wreck or any vessel, or any part thereof, or of any other thing so lying, sunk, partially sunk, ashore or grounded, the navigation of any such navigable water is likely to be obstructed, impeded or rendered more difficult or dangerous, or

(*c*) any vessel or part thereof, wreck or other thing cast ashore, stranded or left upon any property belonging to Her Majesty in right of Canada, is an obstacle or obstruction to such use of the said property as may be required for the public purposes of Canada,

cause such wreck, vessel or part thereof or other thing, if the same continues for more than twenty-four hours, to be removed or destroyed in such manner and by such means as he thinks fit. R.S., c. 140, s. 15.

15. (1) The Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction

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or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

(2) The Minister shall pay over any surplus of such proceeds or portion thereof to the owner of the vessel, cargo or thing sold, or to such other persons as are entitled to the same respectively. R.S., c. 140, s. 16.

The appellants performed the duty imposed upon them by s. 13. Had they not done so, the Minister of Transport could have caused the removal of the dredger, pursuant to s. 14, and the Crown could have recovered, as a debt, the cost of removal from the owner or from the respondent by virtue of s. 16 of the Act, the material portions of which provide as follows:

16. (1) Whenever, under the provisions of this Part, the Minister has caused

(*b*) to be removed or destroyed any wreck, vessel or part thereof, or any other thing by reason whereof the navigation of any such navigable waters was or was likely to become obstructed, impeded or rendered more difficult or dangerous,

and the cost of maintaining such signal or light or of removing or destroying such vessel or part thereof, wreck or other thing has been defrayed out of the public moneys of Canada, and the net proceeds of the sale under this Part of such vessel or its cargo, or the thing that caused or formed part of such obstruction are not sufficient to make good the cost so defrayed out of the public moneys of Canada, the amount by which such net proceeds falls short of the costs so defrayed as aforesaid, or the whole amount of such cost, if there is nothing that can be sold as aforesaid, is recoverable with costs by the Crown.

(i) from the owner of such vessel or other thing, or from the managing owner or from the master or person in charge thereof at the time such obstruction or obstacle was occasioned, or

(ii) from any person through whose act or fault, or through the act or fault of whose servants such obstruction or obstacle was occasioned or continued.

Had the Minister taken this course and claimed the cost of removal from the respondent, it would seem clear that, applying the reasoning of the House of Lords in *The Stonedale No. 1*[1], the respondent would not have been entitled to limit its liability under s. 659 of the *Canada Shipping Act*. The relevant portions of s. 657 and s. 659 of that Act are as follows:

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

[1] [1955] 2 All E.R. 689.

(*d*) 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;

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 vessels, 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.

659. The limitation of the liability of the owners of any ship set by section 657 in respect of loss of or damage to vessels, goods, merchandise, or other things shall extend and apply to all cases where, without their actual fault or privity, any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship.

The question in this issue is as to whether the respondent is in a better position in relation to the claim by the appellants than it would have been had the claim been made by the Crown for expense of the removal of the dredger by the Minister of Transport.

The learned trial judge held that the limitation provisions of the *Canada Shipping Act* did apply. His reasoning on this point is as follows[1]:

It seems clear that the Marwell Company only did what it was bound to do, and undoubtedly it has a claim against the defendants. The question is, however, whether the limitation clause applies to the defendant company. The nature of the claim for reimbursement of cost of recovering a wreck has been considered in several English cases, and it has been held that since the limitation section only limits liability for damages, and the right of the authorities who have incurred expense to collect from the owner, does not sound in damages, but is based on a statutory debt, the limitation section is no defence to the claim. *The "Stondale" No. 1,* (1954) P. 338: (1955) 2 All E.R. 689.

Here, however, the claim is not by the harbour authorities, but by the owner. And there is nothing in the *Navigable Waters Protection Act* that gives the owner a new right to sue the wrong-doer, so that suit cannot be based on statutory debt. Equally there is no contractual relation, so it seems that any claim against the defendants must be based in tort; c.f. the reasoning of Willmer, J. (the trial Judge), (1953) 1. W.L.R. 1241) as opposed to that of the Court of Appeal in *The "Stondale" No. 1* (*supra*). I therefore see no escape from the conclusion that the Marwell Company can claim its outlays from the wrongdoers as part of its damages consequent on the negligence that caused the sinking; and that involves the limitation section in the *Canada Shipping Act* applying for the benefit of the defendant Company.

[1] (1960), 32 W.W.R. 523 at 525.

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I agree that if the Minister of Transport had caused the dredger to be removed, the recovery of this expense, pursuant to s. 16 of the *Navigable Waters Protection Act,* either from the owner or from the respondent, would have been the recovery of a statutory debt and there could have been no limitation of liability in respect of such a claim. The appellants' claim against the respondent in this case is for indemnity for the expense of performing the statutory duty imposed upon them in consequence of the fault of the respondent's servants. I do not agree that this leads to the conclusion that the limitation provisions of the *Canada Shipping Act* become applicable. The respondent is only entitled to the protection afforded by them if the appellants' claim is of the kind defined in them. As Viscount Simonds said in his judgment in *The Stonedale No. 1,* at page 691, with reference to *The Merchant Shipping (Liability of Shipowners and Others) Act, 1900,* s. 1 of which is the same as our s. 659 of the *Canada Shipping Act*:

> That Act, by Part 8, dealt with the subject of the liability of shipowners, and I pause to observe that the right of a shipowner to limit his liability forms no part of our common law but is entirely the creature of statute and must be found within its four corners.

The position in this case is that, because of the negligence of the respondent's servant, the appellants, without any negligence on their own part, have been made liable for the performance of a statutory duty imposed upon them by the *Navigable Waters Protection Act.* They have been required to spend money for the removal of the sunken dredge. At common law, there being no negligence on their part, that duty would not have arisen (*Dee Conservancy Board v. McConnell*[1]). Had they failed to fulfil that statutory duty the appellants, as also the respondent, could have been made liable to the Crown under that Act for the expense of the removal of the dredge by the Crown as a statutory debt. That liability could not have been limited either by the appellants or by the respondent under the provisions of the *Canada Shipping Act.*

Section 657 of that Act permits limitation of liability where, by reason of improper navigation of a ship, loss or damage is caused to another vessel, but only "in respect of loss or damage" to that vessel. In my opinion the words just

[1] [1928] 2 K.B. 159, 97 L.J.K.B. 487.

quoted are not used to define the wrongful act of the shipowner whose vessel causes damage. They are used to define that kind of damage in relation to which, the wrongful act having occurred, he may limit his liability. This he can only do in the case of a collision between vessels (apart from claims for loss of life or personal injury) where the damages are for loss of or damage to the other vessel or the goods, merchandise or other things on board it or on board his own vessel. This is not a claim for that kind of damage. The language used in the section to define those kinds of damage in respect of which liability may be limited is not broad enough to describe the statutory obligation to raise the dredger which arose as a result of the respondent's tort.

I find support for my view of the limited meaning of the words "in respect of loss or damage to vessels" in s. 657 in the judgment of the Court of Appeal in *Burger v. Indemnity Mutual Marine Assurance Company, Limited*[1]. In that case, which involved the interpretation of a policy of marine insurance, the issue was as to whether the insurer's covenant, in the event of a collision by the insured ship with another ship, to pay "in respect of injury to such other ship or vessel itself" would include the amount which the assured had to pay for the removal of a tug which had sunk after collision with the insured vessel. The tug owners had had to pay the cost of removal to the river commissioners, who had removed it and then asserted their statutory power to recover the expense. The tug owners, in turn, had obtained a judgment against the assured. The Court unanimously held that the policy did not cover that expense. Dealing with the words of the policy quoted above, Vaughan Williams L.J., at p. 351, said:

> The question in this case depends on the meaning of the words "sums . . . in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel." It seems to me that those words, which enumerate the subject-matters against which the underwriters undertake by the collision clause to indemnify the assured, taken as they stand, are clear enough, and need no explanation. I think that prima facie it is impossible to say that a sum of money which the assured has been compelled to pay in respect of the expenses of clearing the tideway of the Tees is a sum paid "in respect of injury to such other ship or vessel."

[1] [1900] 2 Q.B. 348, 69 L.J.Q.B. 838.

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Section 659 only affords protection to a shipowner in respect of a claim for loss or damage caused to property or rights of any kind by reason of improper navigation or management of the ship. I do not read this as applying to any kind of damage resulting from the infringement of another's rights. The section does not so state. It limits liability for the infringement of rights in respect of a particular kind of loss or damage, i.e., loss or damage caused to property, or to rights. The "rights" referred to in this section must be rights which may be subject to loss or damage.

The claim with which we are concerned here is not one for damage to property. That was the subject-matter of the claim for the loss of the dredger itself to which s. 657 applied. Is it a claim for loss or damage to the appellants' rights? I do not think that it is. As previously stated, the substance of the matter is that as a consequence of the improper navigation of the respondent's tug a statutory liability was imposed upon the appellants by s. 13(3) of the *Navigable Waters Protection Act*. The only rights created under that Act were granted to the Crown and not to the appellants. I agree with the words of Lord Sorn in *The Urka*[1], where he says:

> In order to come within the words of the section, the pursuers' liability for this claim must be held to be a liability in respect of "loss or damage to property or rights," etc. First of all, then, can it be said that the liability is in respect of any loss or damage to property or rights of the defenders, the owners of the *Portugal*, who present the claim? Obviously not. The *Portugal* was their property, but its loss is covered by their other claim, and this claim is not in respect of any loss or damage to property of theirs. Nor can it be said to be in respect of any loss or damage to any right of theirs. When they incurred this expenditure they were neither rescuing their property nor vindicating their rights.

Was there then, as the result of the improper navigation of the tug, any claim in damages for damage to the property or rights of the Crown, as distinct from those of the appellants, which could make s. 659 applicable? Again I do not think that there was. It was on this phase of the issue that Lord Sorn in *The Urka* said that the matter had been determined by Langton J. in *The Millie*[2]. The judgment of Langton J. in that case has been confirmed by the House of Lords in *The Stonedale No. 1, supra.* In both cases it was held that the claim of the Manchester Ship Canal Company

[1] [1953] 1 Lloyd's Rep. 478 at 480.
[2] [1940] P. 1, 109 L.J.P. 17.

in respect of interference with navigation in the canal by reason of the sinking of a vessel was a claim for statutory debt and not covered by the limitation provisions of s. 1 of the *Merchant Shipping (Liability of Shipowners and Others) Act, 1900,* which, as already noted, is the same as s. 659 of the *Canada Shipping Act.* In the present instance, as evidenced by the letter dated March 21, 1957, from The New Westminster Harbour Commissioners to the appellants, the Crown's claim, in respect of the obstruction to navigation caused by the shinking of the dredge, was for the enforcement of the statutory duties imposed and of its statutory rights created by the *Navigable Waters Protection Act* and not a claim for damages for damage to its own property or rights.

In my view, therefore, s. 659 of the *Canada Shipping Act* does not enable the respondent to limit its liability in respect of this part of the appellants' claim.

In my opinion, the appeal on this point should be allowed and the appeal in respect of the question of limitation of liability regarding the damage to the dredger itself should be dismissed. I think that the appellants should be entitled to their costs in this Court and in the Court below.

RITCHIE J.:—I agree with the conclusions of Mr. Justice Locke with respect to the respondent's right to limit its liability in relation to the appellants' claim for loss of the dredge *Townsend,* but I share the view expressed by Mr. Justice Martland that the appellants' claim for the costs and expenses of removing the wreck is not one to which the limitation provisions contained in s. 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29, are applicable.

I would dispose of this appeal as proposed by my brother Martland.

Appeal allowed in part with costs, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Russell & Dumoulin, Vancouver.

Solicitors for the defendants, respondents: Campney, Owen & Murphy, Vancouver.