1924
*Mar. 19, 20, 21.
*April 22.

WARNER QUINLAN ASPHALT COMPANY (CLAIMANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Charter party—Demise—War Measures Act, 5 Geo. V, c. 2 (D)—Appropriation by Crown of ship—Compensation—Indirect injury.

Though some provisions of a charter party and expressions used therein may indicate an intention to demise the ship to the charterers if other provisions and the purview of the whole document shew a contrary intention the shipowners do not lose possession.

By section 7 of the War Measures Act "Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act * * * and compensation is to be made therefor and has not been agreed upon the claim shall be referred by the Minister of Justice to the Exchequer Court or to a Superior or County Court of the province within which the claim arises or to a judge of any such court."

Held, affirming the judgment of the Exchequer Court ([1923] Ex. C.R. 195) that the charterer of a ship which is not demised, is not entitled to compensation under this section for loss of his rights and profits under the charter party.

Per Mignault J. Section 7 of the War Measures Act does not create a liability but only provides a mode of ascertaining the amount of compensation when the right to receive it is admitted.

Held, per Idington J., that the court or judge to which a claim is referred is *curia designata* whose decision is final.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the appellants' claim.

In 1916 the appellant company chartered the SS. *G. R. Crowe* from the owners for a period of five years and used it in their business for a few months when it was requisitioned by the Dominion Government for the use of the British Admiralty. In 1919 the ship was returned to the owners who received compensation from the respondent. The appellant claimed to be entitled to compensation also and its claim was referred to the Exchequer Court under the provisions of section 7 of the War Measures Act, 1914.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Mignault and Malouin JJ.

(1) [1923] Ex. C.R. 195.

The two questions raised on this appeal was, as stated in the head-note, first, was there a demise of the ship, and secondly, if not could the charterers claim compensation? The first depends on the terms of the charter party, the material provisions of which will be found in the judgment of Mr. Justice Duff and need not be stated here. The second is a question of the law of shipping.

Belcourt K.C. for the appellant. The provisions of the charter party clearly indicate a demise of the ship which was under the absolute control of the charterers and the captain and crew subject to their orders only. See *Baumwoll* v. *Furness* (1), Scrutton on charter parties (9 ed.), pages 4 and 5.

The master was manifestly the servant of the charterers. *Admiralty Commissioners* v. *Page* (2).

The appellant was deprived of the use of the ship from the date of the requisition by the Crown and is entitled to recompense therefor and for the higher prices paid to replace it. *Gaston Williams* v. *The King* (3).

Newcombe K.C. and *J. Philip Bill* for the respondent. The Government of Canada is under no responsibility for compensation in respect to the *G. R. Crowe* which was requisitioned on behalf and for the use of the British Admiralty which caused it to be employed all the time until its restoration to the owners. Moreover, compensation is not to be made as a matter of course in every case but has to be agreed upon.

This claim is not within the meaning of section 7 of the War Measures Act and the Exchequer Court had no jurisdiction.

The charter party does not effect a demise of the ship and the charterer has no claim for loss of contractual rights. See *Omoa & Cleland Iron Co.* v. *Huntley* (4).

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff I would dismiss this appeal with costs.

IDINGTON J.—This is an appeal from the judgment of Mr. Justice Audette of the Exchequer Court upon a reference to that court under section 7 of the War Measures Act, 1914.

(1) [1893] A.C. 8.
(2) 87 L.J.K.B. 1000.
(3) 21 Ex. C.R. 370.
(4) 2 C.P.D. 464.

1924

WARNER QUINLAN ASPHALT CO. v. THE KING.

Idington J.

I am inclined to hold that the peculiar order of reference in question does not permit of any right to appeal from said judgment to this court.

Certainly the rights of appeal given by the Exchequer Court Act do not apply hereto.

The reference does not profess to be made under the Exchequer Court Act and, therefore, its ordinary jurisdiction cannot be relied upon.

The words with which said section 7 of the War Measures Act, 1914, end, are

> the claim shall be referred by the Minister of Justice to the Exchequer Court or to a superior or county court of the province within which the claim arises or to a judge of any such court.

Could it for a moment be contended that if the reference had been made to any of the judges of the said courts that an appeal would lie, by either party, from his disposition of the claim? I submit not.

And I cannot think that any more extensive rights, in way of appeal, were conferred upon either party in the event of the Exchequer Court being selected.

The said section simply enumerated a number of possible authorities from whom a *curia designata* might be selected to finally dispose of the question of right to any damages and, if any, determine the measure thereof.

The cases of *Gosnell* v. *Minister of Mines* and *Wigle* v. *The Corporation of the Township of Gosfield* (1), seem to me to dispose of the question of jurisdiction.

But fortunately after hearing a very elaborate argument on the merits of this case and considering same, I have come to the conclusion for the reasons assigned by the learned trial judge, with which I quite agree, that his judgment is right and is well supported by many other decisions than those he relies upon cited to us herein and hence that this appeal should be dismissed with costs.

DUFF J.—This is an appeal from a judgment of the Exchequer Court in which that court purported to exercise the jurisdiction given by section 7 of the War Measures Act. The Minister of Justice in the reference reserved the right to deny the existence of any legal right or title to compensation and to assert the absence of jurisdiction in

(1) 2 Cam. S. C. Prac., pages 21 and 23.

the Exchequer Court to take cognizance of the claim and his own authority to refer the claim for adjudication.

In this court Mr. Newcombe advanced the further contention that section 7 of the War Measures Act contemplates a determination by the court to which the claim is referred that is to be final and non-appealable.

The questions raised by these exceptions are questions of some little difficulty, and as I have come to a clear opinion upon the merits of the claim advanced by the appellant I do not propose to consider them. The points of controversy divide themselves into two. The first of these is the question whether by the charter party of the 16th of May, 1916, the appellants acquired possession of the tank steamer *G. R. Crowe.*

The question whether a charter party operates as a demise of the ship is one which is to be determined by the construction of the terms of the charter party. As a rule and for the purposes of this case the question may be put in the terms in which it is stated by Mr. Carver, p. 173 of his book on "Carriage by Sea":

> On each charter party the question is who, on the whole instrument taken together, was intended to have the possession of and to work the vessel? Whose servants were those in charge of her to be? Where they are the shipowner's, then generally he acts as a carrier of goods for the charterer; while if they are to be servants of the charterer, the shipowner generally ceases to be a carrier and the contract is really one of hiring.

The distinction, so far as pertinent, between a charter which effects a demise and one that does not is very lucidly stated in the judgment of Cockburn C.J., speaking on behalf of the Court of Queen's Bench in *Sandeman* v. *Scurr* (1), in these words:—

> In the first case (that in which a demise is created) the charterer becomes for the time the owner of the vessel; the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second (that in which no demise is created) notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners and through the master and the crew, who continue to be their servants, the possession of the ship also.

In *Baumwoll Manufactur* v. *Furness* (2), Lord Herschell, at pp. 14 and 18, uses language of much the same purport. Where there is no demise, he says, the master and crew remain truly the servants of the owner, and where

(1) L.R. 2 Q.B. 86 at p. 96.

(2) [1893] A.C. 8.

1924

WARNER QUINLAN ASPHALT CO. v. THE KING.

Duff J.

there is a demise, or where there is the equivalent of a demise, the vessel is put altogether out of the power and control of the then owners, power and control over her being vested in the charterers, so that during the period of the hiring she must be regarded as the vessel of the charterers and not the vessel of the owners. In *Manchester Trust* v. *Furness* (1), the test laid down by Lord Herschell was adopted and applied by the Court of Appeal; and in the course of his judgment Lindley L.J., uses the following language at p. 546:—

> Although there is a great difficulty in reconciling all the earlier cases about demises of ships and so on, the test in each case is that which was applied by the House of Lords in the case of *Baumwoll Manufactur* v. *Furness* (2)—Whose servant is the master?

Mr. Belcourt mainly relies upon three paragraphs in the charter: The first paragraph, in which the owner "agrees to let," and the charterer "agrees to hire," for a period commencing from the date of "the delivery of the steamer," and it is provided that the steamer "is to be delivered by the owner" at Montreal on the date mentioned; paragraph 8, which provides that the captain, although appointed by the owner, shall be under the orders and direction of the charterers as respects employment agency or other arrangements; as well as par. 20, which explicitly gives the charterer the option of "subletting" the steamer. If these phrases in the first and twentieth paragraphs were the only significant phrases of the charter, they would, no doubt, lend a great deal of force to the argument. The authorities shew, however, that the use of such words is far from decisive. Such phrases as "let" and "deliver," it is pointed out, in Scrutton and Mackinnon on Charter Parties, at p. 5 (Note U), are due to the "influence of the older system of demise." Such words must yield to the intention of the parties to be gathered from the instrument as a whole. *Omao* v. *Huntley* (4); *Manchester Trust* v. *Furness* (1); *Weir* v. *Union S.S. Co.* (6). It is to be noticed that by clause 8, upon which Mr. Belcourt relies, the control of navigation is retained by the owners, a circumstance noted in the last case mentioned, as indicating that responsibility

(1) [1895] 2 Q.B. 539.
(2) [1893] A.C. 8.
(3) 2 C.P.D. 464.
(4) [1900] A.C. 525.

for the safe navigation of the vessel was still to rest upon the owners. It is to be noticed, too, that by clause 2, the owners are to provide and pay the wages of the captain, officers, engineers, firemen and crew; and by clause 10, if the charterers are dissatisfied with the conduct of the captain, officers or engineers, the owners engage to investigate any complaint, and if necessary make a change in the appointments. The appointment, that is to say, of the captain, officers and engineers, remains with the owners, together with the power of dismissal. There are, moreover, provisions of the charter party which would appear to be quite unnecessary if the charterers were to be in possession of the vessel through the captain and crew as their agents. By section 7, for example, the owners undertake that the captain shall prosecute his voyages with the utmost despatch, and render all possible assistance with the ship's crew and boats; and by article 9, the captain is to attend daily, if required by the officers of the charterers and their agents, to sign bills of lading, and the charterers agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or other documents. The significance of such terms is adverted to in the judgment of Denman J., in *Omoa* v. *Huntley* (1). The learned judge observes, referring to similar provisions, that

> these provisions are quite inconsistent with the contention of the defendant that the navigation of the vessel was to be committed to the control of the plaintiffs; for if the master and crew had been their servants, these stipulations would have been useless.

And lastly, there is the language of article 13, in which the master and mariner are explicitly designated as "servants of the shipowners." These provisions all point to the conclusion that the instrument envisages the relation of the master and the crew to the owners as that of servant and master, while the rights of the charterers in respect to the conduct of the master and crew are treated as contractual rights arising from contractual stipulations with the owners.

The appellants therefore acquired under the charter contractual rights entitling them to have the ship employed

(1) 2 C.P.D. 464, at p. 467.

1924

WARNER QUINLAN ASPHALT CO. v. THE KING.

Duff J.

for their benefit and according to their directions during the currency of the charter, but no possession of the ship and no interest in the ship as a thing.

The second question is whether, such being the character of the charter party, the appellants are entitled to compensation. Section 7 of the War Measures Act is in these words:—

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court or to a Superior or County Court of the province within which the claim arises, or to a judge of any such court.

Assuming this section gives a right of compensation, it is a right of compensation where property or the use of property has been appropriated, and the compensation to be made is compensation for such appropriation. The effect of the requisition was undoubtedly to appropriate the use of the ship for the period during which the requisition was operative, with the consequence, assuming there was no suspension of the contractual rights aforesaid resulting from that exercise of sovereign authority, of depriving the appellants of the advantage of having the contractual obligations undertaken by the owners specifically executed. The question is: In such circumstances is the possessor of such rights entitled to compensation under section 7? I think Mr. Newcombe's contention is well founded, that such a case does not fall within the scope of that section. True, the section does not specify the conditions under which the right of compensation arises or the persons or classes of persons to whom it is given. Obviously, however, the enactment cannot be supposed to contemplate reparation in respect of pecuniary loss of every description which anybody may suffer in consequence of the fact that property or the use of it is appropriated for public purposes and thereby withdrawn from the power of its owner or possessor, who may in consequence be disabled from applying it in the fulfilment of contracts and other obligations arising out of his business or other private relations. I think the reasoning by which the courts have been constrained to hold that a wrongdoer, whose wrongful act

causes damage to a chattel, is not answerable to everybody who indirectly may have suffered loss in consequence of that injury, is apposite.

It is worth while, perhaps, to refer to the authorities in some detail. There is the well-known judgment of Lord Blackburn (then Blackburn J.), in *Cattle* v. *Stockton* (1), in which the eminent judge had to deal with a claim by a contractor who had a contract for constructing certain works which had been delayed by an inundation in respect of which the defendants would be responsible to the owner of the land on the principle of *Fletcher* v. *Rylands* (2). Blackburn J., having pointed out the consequences of admitting the validity of such claims, proceeded:—

> In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so we should establish an authority for saying that, in such a case as that of *Fletcher* v. *Rylands* (3) the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect Perhaps it may be so. But, as was pointed out by Coleridge J. in *Lumley* v. *Gye* (3), courts of justice should not allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself of redressing only the proximate and direct consequences of wrongful acts. In this we quite agree. No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited.

Then there is the passage in the judgment of Lord Penzance in *Simpson* v. *Thomson* (4), beginning at p. 289:—

> The principle involved seems to me to be this—that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damages done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.

(1) L.R. 10 Q.B. 453.
(2) L.R. 1 Ex. 265; 3 H.L. 330.
(3) 2 E. & B. 216 at p. 252; 22 L.J. Q.B. 463 at p. 479.
(4) 3 App. Cas. 279.

1924

WARNER QUINLAN ASPHALT CO. v. THE KING.

Duff J.

This, I say, is the principle involved in the respondents' contention. If it be a sound one, it would seem to follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction.

But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

The reasoning of these passages was applied by Lord Sumner (then Hamilton J.), in *Remorquage* v. *Bennetts* (1), in which he held that the owner of a tug was not entitled to sue a wrongdoer who had sunk his tow, although thereby he lost the benefit of his contract of towage; and the principle was acted upon by Scrutton L.J., in *Elliott* v. *The Shipping Controller* (2), where he held that a charterer, under a charter not creating a demise of the ship, would have had no right of action at common law against a person depriving him of the opportunity of earning profits through the exercise of his contractual rights by taking away the ship which was the subject of the charter. The judgment of the majority, who held that the plaintiff under the statutory provisions governing the case was entitled to compensation, is not in conflict with this view. In *McColl* v. *Canadian Pacific Ry. Co.* (3), the same principle was followed in the construction of section 385 of the Railway Act, 9-10 Geo. V, c. 68, which imposes upon railway companies acting contrary to orders of the Railway Board,

liability to any person injured * * * for the full amount of the damages sustained thereby.

The phrase " person injured " was there held, on the same reasoning, not to include persons who are injured in their pecuniary interests only by reason of being deprived of

(1) [1911] 1 K.B. 243. (2) [1922] 1 K.B. 127, at pages 139, 140.
(3) [1923] A.C. 126 at pages 130, 131.

advantages which they might reasonably have expected to enjoy if the person directly injured had not thereby been disabled from performing his contractual obligations or carrying out his business or professional engagements or making provision in the usual way for his family.

The appeal should be dismissed with costs.

MIGNAULT J.—I have had the advantage of fully considering the carefully prepared reasons for judgment of my brother Duff and I entirely concur therein.

That the charter party relied on by the appellant was not a demise of the ship is made clear by the provisions whereby it was agreed that the owners should pay the wages of the captain, officers, engineers, firemen and crew, and that if the charterers were dissatisfied with the conduct of the captain, officers, or engineers, the owners would investigate the complaint, and if necessary make a change in the appointments. This shews that during the charter party, the captain, officers and crew were to be the servants of the shipowner and not of the charterer. They were appointed by the former and could not be dismissed by the latter. The right of the charterer was a mere contractual one, and notwithstanding the use of the terms "let" and "hire" as applied to the ship, the whole instrument indicates that the agreement of the shipowner was to navigate his ship for the benefit of the charterer, and for the carriage of his goods. The owner therefore retained the possession of the ship during the life of the charter party.

If the special provisions of the War Measures Act, 1914, sections 6 and 7 of which were relied on by Mr. Belcourt, give to the owner of property a right of action for compensation against the Crown for the appropriation of such property or of the use thereof—a point which it is unnecessary to determine in this case—they certainly do not give an action to a person, not the owner, who may suffer damage merely by reason of a contract which he has made with the owner. Section 7 deals with the case where compensation is to be made but the amount has not been agreed upon. It does not create the right to compensation but provides a mode whereby the amount, where the right to compensation is admitted, may be determined. Otherwise,

1924

WARNER QUINLAN ASPHALT Co. v. THE KING.

Mignault J.

the imperative provision, requiring the Minister of Justice to refer the claim to the Exchequer Court or to a Superior or County Court, would not be easily comprehensible. Such a requirement, on the contrary, is quite conceivable where the Crown admits that the claimant is entitled to compensation but disputes the amount of his claim.

These are really the two vital questions in the case, and as to both I find myself unable to accept Mr. Belcourt's contentions.

The appeal should be dismissed with costs.

MALOUIN J.—I concur with Mr. Justice Duff and would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Belcourt, Leduc & Genest.*
Solicitor for the respondent: *E. L. Newcombe.*