1917
March 17

QUEBEC ADMIRALTY DISTRICT.

CANADIAN PACIFIC RAILWAY CO.

v.

S.S. "STORSTAD" AND AETNA ASSURANCE CO. AND OTHER INTERVENANTS AND CLAIMANTS.

Admiralty—Collision—Priority of claims—Limitation of liability—Law governing.

In a collision between a Canadian coasting vessel and a British ship on the "high seas," more than 3 miles outside the Canadian coast, the maritime law of England, and not the Canadian law, applies and governs the rights of the parties. Under the Imperial Merchant Shipping Act (1898, sec. 503), claims for loss of life are given a preference over others, notwithstanding that a judgment limiting the liability had not been obtained.

MOTIONS heard by the Hon. Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, in Court at Montreal, on February 5, 1917, in an action *in rem* in connection with the report of the deputy district registrar dealing with claims for damages and the distribution of $175,000 deposited with the registrar representing the proceeds of the sale of the S.S. "Storstad." The ground upon which the motions were based appear in the reasons for judgment.

A. R. Holden, K.C., in support of plaintiff's motion to vary the report. *J. W. Cook*, K.C., and *W. F. Chipman*, K.C., in support of motions by certain claimants to vary the report. *George F. Gisborne*, K.C., *Errol Languedoc*, K.C., *A. H. Duff*, K.C., *Errol M. McDougall*, and *J. W. Weldon*, for life claimants on motions to confirm the report.

MACLENNAN, DEP. L. J. (March 17, 1917) delivered judgment.

This case comes before me on motions by the plaintiff and by certain intervenants and claimants to vary the report of the deputy registrar filed on May 31, 1916, settling

the amounts of the claims proved and the distribution to be made of the money in Court and asking to have the distribution made on the basis of a *pro rata* division to all claimants, and on motions by other claimants for the confirmation of the report and an order for payment of the sums collocated. The claims admitted by the deputy registrar amount to $3,069,483.94, of which $469,467.51 were for loss of life and the balance for loss of property, including over $2,000,000 claimed by the Can. Pac. R. Co. as the value of its ship "Empress of Ireland," which was sunk with all her cargo and over 1,000 passengers and crew as the result of a collision with the S.S. "Storstad." The money now in Court to be distributed on these claims is $175,000 (with accumulated bank interest) being the proceeds of the sale of the "Storstad" made under order of the Court while the action to determine the responsibility for the collision was pending before this Court. The "Storstad" was held responsible by a judgment rendered herein by Dunlop, J., on April 27, 1915, its counterclaim was dismissed and a reference was made to the deputy registrar to assess the damages. The deputy registrar's report was made and filed on May 31, 1916, and is the subject of the various motions now before me.

The fund being insufficient to satisfy all claims, the deputy registrar, after allowance for costs, collocated the balance *pro rata* in favour of the life claims so far as such funds were sufficient, and excluded all other claimants from participation in the collocation. This distribution is in accordance with the provisions of sec. 503 of the Merchant Shipping Act, 1894 (Imp.), under which, claimants for loss of life have an absolute privilege and priority over claimants for loss of property or goods to the extent of an amount equal to £7 per ton of the ship held to have been at fault, and a claim on a further amount of £8 per ton along with all other claimants. It is admitted that an amount equal to £7 per ton would exceed the amount now before this Court for distribution. Counsel for plaintiff and for other claimants for loss of property have submitted that the distribution should be made in acordance with the Canada Shipping Act, under which no preference or priority is given to claims for loss of life, and they further submit

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that even if the Imperial statute governs the preference or priority put forward for life, claims must fail, as no proceedings were taken by the owners of the "Storstad" to obtain a judgment limiting their liability on the ground that the loss occurred without their actual fault.

The first important question to be decided is: Is it the maritime law of England or the Canadian law which governs the rights of the parties in respect to the claims for damages and the distribution of the fund now in possession of the Court?

The Exchequer Court of Canada as a Court of Admiralty is a Court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.), over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court in England, whether exercised by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court in England

"The law which is administered in the Admiralty Court of "England is the English Maritime Law. It is not the "ordinary Municipal Law of the country, but it is the law "which the English Court of Admiralty, either by Act of "Parliament or by reiterated decisions and traditions and "principles, has adopted as the English Maritime Law: *The Gaetano and Maria.*[1]

Although the Exchequer Court in Admiralty sits in Canada it administers the maritime law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty. The collision in this case took place after the "Empress of Ireland" had discharged her pilot at Father Point, her last port of call in Canada, and had put to sea on a voyage to Liverpool. It is admitted that the wreck now lies in the River St. Lawrence, $3\frac{3}{4}$ miles from the nearest coast line, and the Judge who tried this case found that the collision took place 1,200 or 1,500 ft. east of where the wreck lies, which certainly was not any nearer the coast. This was in tidal waters to the seaward of where the inland waters of Canada

[1] 7 P.D. 137, per Brett, L.J., at 143.

end in the River St. Lawrence (R.S.C. ch. 113, sec. 72 (*g*)), at a point where the river is about 25 miles wide and on the direct route to the Atlantic. The collision having taken place more than 3 marine miles from the Canadian coast, it must be held to have occurred outside the territorial jurisdiction of the Parliament of Canada and on the high seas as that term is understood in a British Court of Admiralty.

"The expression "high seas," when used with reference "to the jurisdiction of the Court of Admiralty included all "oceans, seas, bays, channels, rivers, creeks and waters "below low-water mark, and where great ships could go, "with the exception only of such parts of such oceans, etc., "as were within the body of some country.

"A foreign or colonial port, if it was part of the high seas in "the above sense, would be as much within the jurisdiction "of the Admiralty as any other part of the high seas: *The Mecca*,[1] *The Queen v. Anderson*,[2] *The Queen v. Carr*.[3] The law applicable in England to cases of collision on the high seas is the Maritime Law of England: *The Leon*,[4] and *Chartered Mercantile Bank of India v. Netherland India Steam Navigation Co.*[5] Neither the "Empress of Ireland" nor the "Storstad" were registered in Canada and this Court obtained jurisdiction by reason of the "Storstad," after the collision, having come into the Quebec Admiralty District, when an action *in rem* was instituted and the steamer arrested at the instance of the plaintiff.

It was contended on behalf of plaintiff that the "Storstad" was found in fault by the trial Judge for failure to observe the Canadian Rules of the Road as enacted by order-in-council of February 9, 1897, and that this circumstance shewed that the Canadian law should govern. The order-in-council referred to was passed to bring into force in Canadian waters and to the notice of the owners and masters of Canadian vessels, the rules and regulations for preventing collisions at sea passed by an Imperial order-in-council on November 27, 1896, in virtue of the Merchant Shipping Act (1894). These rules are now

[1] [1895] P. 95 107, per Lindley, L.J.
[2] L.R. 1 C.C. 161.
[3] 10 Q.B.D. 76.
[4] 6 P.D. 148.
[5] 10 Q.B.D. 521, 537, 545.

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commonly known as the International Rules of the Road and cannot be changed or modified by the Canadian authorities, except for the purpose of making them conform and agree with a change or modification made by an Imperial order-in-council, while regulations for the navigation of the inland waters of Canada on the other hand may be made and modified by order-in-council without reference to Imperial action: Canada Shipping Act, sec. 913.

The trial Judge found the "Storstad" at fault in violating arts. 16, 21 and 29 of the Rules of the Road," and he further stated that "there is nothing to shew that the disaster was in any way attributable to the St. Lawrence route, and being open water, all sea rules apply." In dealing with a collision in the River St. Lawrence in the case of *Montreal Transportation Co. v. The Ship Norwalk*,[1] Dunlop, J., said:—

"It is well known that from the Victoria Bridge down we "are practically under the International Rules of the Road, "that is to say, the Canadian Government has made the "Imperial rules applicable in their entirety from the Victoria "Bridge down stream."

From this it is quite evident that the "Rules of the Road," which the trial Judge found had been violated by the "Storstad," were the Imperial or International Rules. These rules are to be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels: *The Anselm*.[2]

Counsel for plaintiff submitted that the "Storstad" must be held to have been subject to Canadian law because she was engaged in the coasting trade between Nova Scotia and the ports of Quebec and Montreal: Canada Shipping Act, R.S.C., ch. 113, secs. 952-960. Assuming the ship to have been engaged in this trade, the provisions referred to affect only the license, entries, clearances and pilotage dues of the ship and in no way affect the rules of navigation on the high seas.

The "Empress of Ireland" was a British ship and the collision having taken place on the high seas outside the

[1] 12 Can. Ex. 434, at pp. 452–3. [2] 76 L.J.P. 54 [1907] P. 151.

Canadian jurisdiction, the maritime law of England alone applies and governs the rights of the parties originally and now before the Court. The part of that law which governs the distribution of the funds now in the hands of the Court is the Merchant Shipping Act, 1894 (Imp.), sec. 503, which gives the claimants for loss of life an absolute preference over all other claimants on the first £7 on the tonnage of the "Storstad:" *The Victoria*.[1] Her tonnage, according to Lloyd's register, was 6,028 tons and her liability for loss of life would be slightly over $200,000, an amount considerably in excess of what was realised from the sale of the ship.

The counsel for plaintiff and for certain intervenants and claimants further submitted that even if the maritime law of England did apply, sec. 503 of the Merchant Shipping Act had no effect in the present case seeing that the owners of the "Storstad" had not, under sec. 504, obtained a judgment limiting their liability. Sec. 503 provides that in the absence of actual fault or privity on the part of the owner he shall not be liable to damages beyond the following amounts, namely: when there is loss of life and also loss of property a total amount not exceeding £15 for each ton of the ship's tonnage (of which the first £7 is reserved for loss of life, if any), and when there is no loss of life and only loss of property, only £8 per ton. Sec. 504 provides that where any liability is alleged to have been incurred by the owner of a British or foreign ship, as enumerated in sec. 503, and several claims are made or apprehended in respect of that liability, then the owner may apply to any competent Court and that Court may determine the amount of the owner's liability and may distribute that amount rateably amongst the several claimants and may stay any proceedings pending in any other Court in relation to the same matter and may proceed in such manner as the Court thinks just. It will be seen that sec. 504 is permissive and does not in any way change the positive terms of sec. 503, but it gives the action in limitation of liability to a defendant when his property in excess of the statutory limit is under arrest or liable to arrest within the jurisdiction where damages are sought to be recovered in respect of loss

[1] (1888), 13 P.D. 125.

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of life or property. In this case neither the plaintiff nor the claimants, for loss of life or loss of property, were in a position to compel the owners of the "Storstad" to institute an action in limitation of their liability. The latter preferred to allow their ship to be sold and the proceeds of sale—$175,000— are admittd to be less than the liability under the statute, and as the owners of the "Storstad" had no other property within the jurisdiction of this Court subject to seizure, it was unnecessary for them to institute proceedings under the permissive provisions for limitation of their liability. Sec. 503 in positive terms provides for a preference in favour of claimants for loss of life on the first £7 of the ship's tonnage, and failure on the part of the owners to institute and obtain a judgment in their favour in limitation of liability does not take way that preference. In *The Victoria*,[1] Butt, J., said:—

"The Act interferes with the claimants' right only by "putting a limitation on the amount which they can "recover from the ship owner, and there is nothing in the "Act to shew that persons who have suffered loss have their "rights otherwise altered."

Marsden's Collisions at Sea, 6th ed., p. 165:—

"Where the amount of the fund in Court is insufficient "to satisfy in full claimants in respect of loss of life and loss "of cargo, the former are entitled to the whole of that part "of the fund which represents the seven pounds per ton."

MacLachlan's Merchant Shipping, 5th ed. (1911), p. 791:—

"The Court, in the application of equitable principles, "will marshal such assets as are within its control in that "way which best meets the just claims of competing plain-"tiffs, and best protects the relative interests of separate "defendants."

The competing plaintiffs in this case, because the claimants for loss of property and loss of life are now practically plaintiffs in the same position as the original plaintiff in the action, are urging their claims against the money now under the control of the Court and, in the application of equitable principles, the claims for loss of life are entitled to a preference over claims for loss of pro-

[1] 13 P.D. 125, at 127

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perty. In dealing with the fund in Court in this way the owners are not made liable for any sum beyond the amount set forth in sec. 503. Their interests are not prejudiced and they are not concerned in the priorities existing between the respective claimants: 26 Hals' Laws of England, sec. 966.

I am therefore of opinion that the absence of any action by the owners for limitation of their liability does not prevent the Court giving effect to the preference and priority in favour of claims for life contained in sec. 503 of the Merchant Shipping Act.

I am of opinion that the law which governs this matter is the maritime law of England and the Merchant Shipping Act of 1894, and that claims arising from loss of life are absolutely privileged upon the fund in Court, and that the deputy registrar, in distributing the fund *pro rata* among the claimants for loss of life after providing for costs incurred by the different parties acted upon proper principles and that the motions on behalf of the plaintiff and the other claimants for loss of property, asking that the report of the deputy registrar should be varied and their claims collocated *pro rata* with all other claims, should be dismissed.

Since the deputy registrar made his report a number of further claims have been filed, and, on September 26, 1916, an order of the Court was made that all parties having claims against the fund, the proceeds of the sale of the "Storstad" now in the hands of the deputy district registrar, should file such claims on or before October 10, 1916, after which date no claim should be allowed to be filed.

Certain new claims have been filed with the deputy registrar under this order, and it will be necessary to remit the whole matter to the deputy registrar for further enquiry and report.

A number of motions have been made by claimants for loss of life, asking that the report of the deputy registrar be confirmed and the amounts therein collocated be paid under rules 179 and 192. These motions were probably considered necessary to support the report of the deputy registrar and to secure payment of the amounts allowed, and, in view of the fact that the report has to go back to the registrar for further enquiry and report on all claims now before the Court, these motions cannot be granted,

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but as they were all filed before the order of the Court extending the delay for the filing of further claims, I think that the parties making these motions are entitled to costs.

The costs collocated by the deputy registrar and not yet paid, as well as the Court costs on all motions to vary and confirm the report, should be paid now out of the fund in Court, and all claims filed up to October 10, 1916, are remitted to the deputy registrar for further enquiry and report on the whole matter to be filed within 2 months from the date of the present judgment.

Judgment accordingly.