NOTE.—Please substitute for copy of Judgment previously issued, in which the words in the third line "a little outside of territorial waters" have now been deleted.

Privy Council Appeal No. 20 *of* 1919.

Canadian Pacific Railway Company - - - *Appellants*

v.

The Steamship "Storstad" and others - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER, 1919.

Present at the Hearing:
VISCOUNT HALDANE.
LORD DUNEDIN.
LORD ATKINSON.
LORD SUMNER.

[*Delivered by* LORD SUMNER.]

This appeal arises out of the disastrous collision between the "Storstad" and the "Empress of Ireland," which occurred in the St. Lawrence on the 29th May, 1914. The "Empress of Ireland" foundered, with much loss of life; the "Storstad" proceeded to her destination—Montreal. There she was arrested, and an action *in rem* was begun at the suit of the Canadian Pacific Railway Company, owners of the "Empress of Ireland." Those who were entitled to make personal claims in respect of loss of life were in a position of some embarrassment, for the Maritime Conventions Act does not apply to Canada, and the "Storstad" was the property and the only property of a single ship company—the Aktieselskabet Maritime—incorporated and domiciled in Norway. Pending a decision as to the responsibility for the collision they held their hands.

On the 27th April, 1915, the Exchequer Court of Canada, by the judgment of Dunlop, J. sitting in Admiralty, held the "Storstad" to have been alone to blame. Against this decision

there was no appeal. The ship was sold by order of the Court for $175,000, which sum was deposited in Court, and the question of the amounts of the claims was referred to the Registry, the owners of the " Storstad " taking no further part in the inquiry.

The claimants for loss of life then intervened in the action, and on the 22nd March, 1916, an order was made in the terms and under the circumstances which are thus set out in the Report to the Court made by the Deputy District Registrar in Admiralty.

> " Whereas on the 22nd day of March, 1916, at one of the adjournments of the reference, a large number of solicitors on behalf of the plaintiff intervenants and claimants, representing majority in number and amounts claimed, agreed and consented, that the Deputy District Registrar do forthwith accept the claims of all the parties as being duly recorded and proved, that is to say, ' It is hereby admitted that the loss and damage of each of the said parties resulting from the sinking of the " Empress of Ireland " amount to the said sums ' (referring to them) ' but without prejudice to the rights of any or all the parties as to their contentions, that the claims of any of them were filed too late, or as to their pretensions that some of the claims are entitled to payment in whole or in part by priority over others, and without waiver of any other rights, except only as to the amount of the said loss and damage in each case.' "

The proved claims amounted in the aggregate to $3,069,483·94, of which $469,467.51 were for loss of life, and the residue was for loss of property. An acute conflict thus arose between the two interests, and in the result it has been held by the Admiralty Judge and by a majority of the Supreme Court of Canada (with a variation not at the moment material) that the claimants in respect of life lost have an absolute priority against so much of the sum in Court as is taken to represent £7 per ton of the " Storstad's " registered tonnage, and further rank *pari passu* with the claim of the Canadian Pacific Railway Company against the remainder of the fund. The registered tonnage of the " Storstad " was 6,028 tons gross.

No proceedings were ever taken by the owners of the " Storstad " for limitation of their liability, and the fund in Court, which was one sum and one fund and not two, was simply the proceeds of the sale with some accrued Bank interest, and had no connection with the gross registered tonnage of the ship or the amounts of £15 per ton or £8 per ton or with the law relating to Limitation of Liability. Furthermore, the order above recited only admitted the now respondents as claimants on the fund in the action *in rem*, and gave them the benefit of the finding that the " Storstad " was alone to blame, and made no admission whatever as to the character of the fund in Court or as to any prior claim to it in favour of the life claimants. Their rights must rest and were only rested in argument on the effect of the Limitation of Liability sections in the Merchant Shipping Act. Before their Lordships the appellants abandoned part of the contentions raised below, and admitted that this statute and these sections alone are material.

The following passages from the judgment of Anglin, J.

conveniently give the reasoning which prevailed with the majority of the judges of the Supreme Court :—

> "Section 503 is not merely an enactment for the shipowner's benefit limiting his liability. It contains a substantive provision for the advantage of claimants in respect of loss of life and personal injuries, upon whom it confers valuable rights of priority. A construction, which would make the existence and enforceability of these rights entirely dependent upon the shipowner's seeking and obtaining a judgment under section 504 declaratory of the limitation of his liability and fixing the amount thereof, would seem so utterly unreasonable and so contrary to what Parliament apparently intended should be the effect of the statute, that in my opinion it should not prevail. Whether the loss of life and personal injury claims are to have a limited preference over loss of property claims or are to rank *pari passu* with them on the entire fund available was not left to be determined by the action or the inaction of the shipowner, whether prompted by interest or purely spontaneous. . . . Were the Court to distribute the money now available *pro rata* amongst all the claimants, as the plaintiff contends for, the policy of section 503 of the Merchant Shipping Act would be defeated. It would be equally disregarded were the entire proceeds of the sale of the ship devoted to a fund available exclusively to satisfy demands in respect of loss of life and personal injury. The statute does not give them any such priority. It provides for the concurrent establishment of two distinct funds, in which it defines different rights."

Their Lordships are unable to accept this reasoning. Limitation of liability is the creation of statute. It is a provision in favour of the shipowner, and operates to restrict the rights of those to whom he is liable. Incidentally the sections furnish the rule by which to determine the rights of parties interested in the fund created by the operation of the sections themselves, but if the shipowner, for whatsoever reason, does not bring the sections into operation, no one else can do so, and they do not in such case have effect. This is the result of the enactment itself, for it expressly provides for procedure to limit the shipowner's liability, and sets up no principle or rule as to the rights of different classes of claimants apart from such limitation. The owners of the "Storstad" took no proceedings for limitation of their liability. If she had turned out to be of such value that the amount ultimately paid into Court equalled the aggregate amount of the proved claims, they would have been paid in full, no matter how many pounds per gross register ton that amount represented. If the tonnage of the ship had been so small that the amount in Court exceeded £15 per ton, the whole of it would, nevertheless, have been available in satisfaction of the proved claims. Nothing would have prevented the claimants as a body from enjoying their full rights, arising out of the faulty navigation of the ship and the damage caused thereby, unless the shipowners had availed themselves of the statute. As they have not done so, nothing prevents a particular class of these claimants—in this case the appellants—from enjoying the full benefit of their legal rights. It is an accident, and an unfortunate one, that there is not money enough for all, but this accident gives the respondents no more and the appellants no less right than if the fact had been otherwise. If, instead of being made intervenants in the Canadian

proceedings by consent, the respondents had found it worth their while to sue the shipowners in Norway *in personam*, they would have been entitled, if successful, to a judgment for the full amount of their claim, notwithstanding the fact that the result of the proceedings *in rem* in Canada had withdrawn a part of their opponents' assets beyond the reach of execution on their judgment.

Since the sections do not apply, no more need be said now upon their construction and operation. Their Lordships will only add, that they are unable to find any ground for assuming a policy or intention on the part of the Legislature to establish a general preference applicable to all circumstances in favour of life claimants, or to treat any sum, which may happen to be in Court in a collision action generally, as if it had been brought into Court in one particular way under the statute.

The appellants contended further that the Limitation of Liability sections had no application, because it had not been shown that the loss of the "Empress of Ireland" happened without the actual fault or privity of the owners of the "Storstad." Their Lordships refrain from discussing this point because it appears to them to be devoid of any substance. It was neither proved nor suggested that the "Storstad" was in any respect ill found. She belonged to an incorporated company and not to natural persons, and it was proved at the trial that the whole cause of the collision was the bad navigation of the officer of the watch. In such circumstances what room can there be for discussion of the actual fault or privity of the Aktieselskabet Maritime ?

In the result the appeal succeeds, and with costs ; nor is there any ground for allowing the appellants' costs to be taken out of the fund in Court as suggested by the respondents. The judgments of the Court of Exchequer and of the Supreme Court must be set aside, and the case must be remitted in order that judgment may be entered, directing a division of the fund in Court among the different claimants, appellants and respondents, *pro rata,* in proportion to the amounts of their respective proved claims. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

CANADIAN PACIFIC RAILWAY COMPANY

v.

THE STEAMSHIP "STORSTAD" AND OTHERS.

DELIVERED BY LORD SUMNER.

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