BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

LEVIS FERRY LIMITED .....DEFENDANT.

1958
March 10, 11, 12, 13, 14
May 5, 6, 7 and 8

1960
Feb. 1

Shipping—Collision in St. Lawrence River—Loss of icebreaker Lady Grey—Negligence of officers of both ships—Failure of both ships to comply with International Rules of the Road—Apportionment of blame—Damages—Recovery for loss of use of ship and replacement—Recovery for loss of personal effects of officers and crew—Defence of Act of God disallowed—Limitation of liability—Regulations for Preventing Collisions at Sea (1954) Rule 29—International Rules of the Road 15, 16, 27 and 30—Finance Administration Act R.S.C. 1952, c. 116—Regulation 19—Canada Shipping Act R.S.C. 1952, c. 29, ss. 657 and 659.

The action is one to recover from the defendant, owner of the Ferry *Cité de Lévis*, damages for the loss of the icebreaker *Lady Grey*, owned by the plaintiff in the right of Canada, which sank in the St. Lawrence River following a collision between the two ships. The collision occurred in very severe winter weather during which the fog was so thick that at times there was practically no visibility.

1960

THE QUEEN
v.
LÉVIS FERRY LTD.

Plaintiff contends that the collision and damage resulting were caused by the fault and negligence of the *Cité de Lévis* and the servants of defendant on board and employed by defendant. Defendant counters that the collision was due to an Act of God or *vis major* or the negligence of the navigators of the *Lady Grey*. The Court found that the collision was not due to inevitable accident but was caused by the negligent operation of both vessels and assessed blame to the plaintiff as sixty per cent and to the defendant as forty per cent.

Held: That it was bad seamanship on the part of defendant not to have had a proper look-out at all times during the operation of the *Cité de Lévis*, and such failure was a contributing cause of the accident.

2. That breaches of Rule 15(*c*)(1) of the International Rules of the Road by both vessels caused the collision and both vessels and those in charge of them were at fault in failing to send the mandatory signals prescribed by the Rule.

3. That the plaintiff is entitled to recover from defendant the amounts paid by the Crown to the officers and members of the crew of the *Lady Grey* for the loss of their personal effects resulting from the collision.

4. That plaintiff is entitled to recover compensation for the loss of the use of the *Lady Grey* and replacement, as well as for the loss of the *Lady Grey* itself.

5. That defendant is entitled to limitation of its liability as provided for in *The Canada Shipping Act* R.S.C. 1952, c. 29, ss. 657 and 659.

ACTION for damages resulting from a collision between two ships.

The action was heard before the Honourable Mr. Justice Fournier, sitting with assessors, at Quebec.

Paul Taschereau, Q.C., Roger Cordeau and *Paul M. Ollivier* for plaintiff.

Jean Brisset, Q.C. for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

FOURNIER J. now (February 1, 1960) delivered the following judgment:

This is an action in which Her Majesty the Queen is seeking to recover from the defendant damages sustained as a result of the loss of the Icebreaker *Lady Grey* following a collision which occurred on February 1, 1955 between the Icebreaker *Lady Grey* and the Ferry *Cité de Lévis* in the St. Lawrence River abeam the City of Quebec. At the time of the collision, the plaintiff, in the right of Canada, was the owner of the icebreaker and the defendant was the owner of the ferry.

The following facts were well established before the Court.

The ship *Lady Grey,* of the port of Ottawa, Ontario, was a steel twin-screw steam icebreaker, 172 feet in length, 32.2 feet in breadth and 18.1 feet in depth, of 823.97 tons gross and 10.73 tons net register, fitted with two vertical inverted triple expansion engines of 2,300 indicated horse power. She was capable of a speed of approximately 12 knots. Built in 1906, her superstructure was rebuilt in 1943 and she was used for icebreaking and buoy tender service in the St. Lawrence River. She had a magnetic compass, but was not equipped with radar. Her navigating bridge located on top of a closed wheel-house was 90 feet abaft the stem-head or just abaft of amidship. She was painted black. At the time of the collision, her mean draft was 16 feet 6 inches and her freeboard 6 feet 8 inches. She was manned by a normal crew though a few replacements had been made on account of circumstances.

The *Cité de Lévis* is a car and passenger ferry registered in Quebec under No. O/N 161,922. She is a single screw steam vessel fitted with a right hand propeller. She was built in 1930 and is used during the winter in the ferry service between Lévis and Québec. Her dimensions are: length, 141.7 feet; beam, 50.1.5 feet; depth, 28.5 feet. Her gross tonnage is 1,259.07 tons and her net register is 467 tons. The tonnage of the space required for propelling power is 570.77 tons. She has a speed capacity of 10 knots. She has a magnetic compass, but no radar. She is manned by a crew of eleven men. Her navigating bridge is located 55 feet abaft the stem and 29 feet above the water line.

When the collision occurred the weather conditions were very severe, the temperature being from 30° to 35° below zero; the wind was light southwesterly. The cold air coming into contact with the warmer water caused a dense vapour to rise on the surface of the water. The fog was so thick that at times the visibility was practically nil. The fog or vapour were intermittent. Where there were large fields of thick ice, their density was greater. So at times the fog and vapour vanished suddenly or became thinner; in other words, they were whirling round in eddies. The waters of the St. Lawrence River at Quebec are tidal. At 12.09 a.m.

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

on February 1, 1955 the tide was at low ebb; at 7.12 a.m. it would be flood. At all relevant times, large fields of heavy ice were floating downstream on the ebb tide (west-east) and there was solid shore ice extending into the river.

According to the entry in the *Lady Grey's* log book, the collision between the vessels described *supra* occurred at 6.45 a.m. on February 1, 1955. Witnesses heard mentioned the time as between 6.35 and 6.45 a.m. I am satisfied that 6.45 a.m. as the right time is as close as could be reasonably established under the circumstances. As to the time of the sinking of the *Lady Grey,* the evidence and the entry in her log book indicate 7.30 a.m.

The plaintiff submits that the collision and the damages resulting therefrom were caused by the fault and negligence of the *Cité de Lévis* and of the servants of the defendant on board her, while in the performance of the work for which they were employed. The grounds of fault were the lack of proper look-out; too great a speed in fog; the failure to blow proper signals and to take appropriate avoiding action in time. The amount claimed for damages is $677,000.

The defendant rested its defence on the assertion that the collision was due to an Act of God or *vis major* and was inevitable, or that, if it was caused by negligence, the fault was attributable to the navigators of the *Lady Grey* in that 1) they failed to give the proper signal indicating that the progress of the icebreaker had been blocked by ice, that she was working one or both of her engines astern and falling off with the current on the ferry's bows; 2) they failed to take appropriate or any avoiding action.

The important facts relating to the movements of the vessels and the actions of those responsible for their navigation were described and explained at length at the trial by Captain Blais of the *Lady Grey* and by Captain Pouliot of the *Cité de Lévis.* I shall summarize their evidence.

[The learned Judge here reviews the evidence and continues.]

This summary of the facts of the case is far from being exhaustive, but I have heard all the evidence and read it. Now, I may state that I find it impossible to arrive at the conclusion that the collision could be described as an inevitable accident. The facts before the Court, in my

opinion, do not meet the well recognized requirements necessary to constitute such an accident. I am guided in this finding by the accepted definition of such an accident.

In Marsden's *Collisions at Sea,* 10th ed., p. 10, the author says:

> The Privy Council, adopting the language of Dr. Lushington, defined inevitable accident to be "that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill," . . .

In two cases at least Dr. Lushington defined inevitable accident as follows:

> . . . where one vessel doing a lawful act without any intention of harm, and using proper precautions, unfortunately happens to run into another vessel.
>
> To constitute an inevitable accident it is necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence.

The facts may have been sufficient to show that the collision was inevitable immediately before or at the moment of its occurrence and that everything that could be done to avoid the impact at the time of the collision had been done. But to succeed it should have been established that the collision could not have been prevented even if proper precautions had been taken earlier. This, the defendant having failed to prove, he cannot succeed in having the plaintiff's action dismissed on that ground.

When two ships have been navigated into a position in which a collision is unavoidable, the question to be determined is by whose fault did they get into such a position? As a general rule a vessel is guilty of negligence causing or contributing to a collision by being in breach of the rules of the road or the regulations for the prevention of collisions or of the duty of good seamanship; by failing to give the proper signals in dense fog or vapour; by proceeding at too great a speed under certain circumstances or with no look-out, or because precautions were not taken to avoid danger or risks of collision which could reasonably be foreseen under known circumstances.

Now I propose to deal with the first charge made by the plaintiff against the *Cité de Lévis* and the defendant's servants on board her, while in the performance of the work for which they were employed, that of having negligently

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

failed to keep a proper look-out. The evidence is to the effect that when the master of the ferry sighted the icebreaker he was on the port side and parallel with the *Cité de Lévis*. He was then in the wheelhouse with his mate, who was at the wheel. There was also a rating. He put on his lights and sent the rating to the look-out cabin. He stayed there till the *Lady Grey* had overtaken the *Cité de Lévis*. He then returned immediately to the wheelhouse and remained there. He left the look-out post because he was cold. The Captain lost sight of the icebreaker when it was about 75 feet ahead. From that time until the occurrence of the collision there was no look-out. When asked why, he said that he thought it was useless on account of the mist and dense fog. He mentioned that he had kept the window open in the wheel-house to enable him to hear the icebreaker's signals. Even so, he did not hear the 3-blast signal of the icebreaker when she proceeded backwards to open a second time a passage for the ferry. I believe this shows that there was no look-out on the ferry from the time the icebreaker started its rescue operation up to the moment of the collision.

In the *Regulations for Preventing Collisions at Sea (1954)* there is a general rule of the nature of a declaration, not to be ignored by seamen, setting forth the legal consequences of negligence.

> Rule 29. Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

I understand that in ordinary cases one hand at least should be specially stationed on the look-out by day as well as by night. The seaman acting as such must be of ordinary skill and intelligence, with proper use of sight and hearing according to circumstances. In dense fog and bad weather he must be more vigilant than in clear and fine weather. It is no excuse to say that during a dense fog a look-out is of no use or a proper look-out under those circumstances could not have avoided the collision. In the present instance, I think that at times the fog or vapour would have permitted to see the icebreaker at a distance. Witnesses stated that the fog or vapour was intermittent. The look-out, well

posted, could have heard signals, had signals been given. I have no doubt that it was bad seamanship to neglect having a proper look-out all through the vessels' difficulties.

Here are some rules, which were applied in numerous cases, describing what would constitute a proper look-out; these rules are summarized in Halsbury's *Laws of England,* 2nd ed., vol. 30, p. 802, No. 1042.

> . . . To constitute a good look-out on a ship there must be a sufficient number of persons stationed for the purpose, who must know and be able to discharge that duty. As a rule, except doubtless in the case of very small vessels, there ought to be a look-out forward besides the officer on the bridge, even on a fine day. Sometimes the proper place for the look-out is not forward, but on the bridge. . . . In deciding what is a proper look-out, one must consider the state of the night and the proximity of vessels; the greater the necessity for the look-out owing to thick weather or otherwise, the more vigilant it should be. It is no excuse for a bad look-out to urge that no vigilance could have avoided the other vessel. In some cases it has been considered that a steamship proceeding at high speed in a thronged thoroughfare, or in fog, ought to have a double look-out forward. . . . Not having any look-out has been said to be a breach of the Sea Regulations, and it is no excuse that it was immaterial because the vessel had to keep her course. . . .

In my view, the master of the ferry would have shown good seamanship had he followed some of the above rules. His failure to do so was one act of negligence which contributed to bring his vessel to the position it was found to be a few moments previous to the collision.

The second ground of fault was that the ferry was proceeding at an excessive speed in the fog. This charge does not seem to me to have been established. Under the circumstances at the time, I believe it was practically impossible to determine the rate of speed of the vessels over the land. The evidence on this point is far from being convincing. No doubt it was necessary for both vessels to proceed at full speed to make headway through the fields of heavy ice. To say that the ferry ought to have stopped her engine at a given moment does not impress me. The moment she had begun to proceed, and knowing that heavy ice was floating downstream, she had to continue full speed to meet the challenge or stop her engine and find herself in the same predicament from which she had just been extricated. I do not believe the ferry's speed was the cause of the collision. At the distance at which the icebreaker was sighted, even at slow speed I do not think she had sufficient time to

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

change her course and avoid the impact. The witnesses state that the blow when the vessels came into contact was not a heavy blow. At the time, the icebreaker was being pushed downstream by the current and the heavy ice, and she was drifting downstream when the collision occurred. As to speed, her master says that the ferry prior to the collision was proceeding at four or five knots and that the current was about two or three knots, so her speed over the ground could have been two knots, which cannot be said to be excessive speed. Even though I do not think the ferry was proceeding at an immoderate speed at the time of the collision, I am sure it would have been better seamanship to follow the rules which are set forth in Halsbury's *Laws of England* (*op. cit.*). I quote (p. 725):

> . . . Still more in a river, a fog may be so thick that it is the duty of a vessel not to get under way, and if under way to come to anchor as soon as possible. In a thick fog in a river, if there is an opportunity of coming to anchor, and an attempt to proceed involves danger to property and possibly to life, it is the duty of those who have the control of the steamer to anchor, notwithstanding the convenience and urgency of passengers. Even a ferry steamer, which proceeds in a river in such a fog, takes upon herself all the responsibility of such a course, and her owners must pay if by so doing she injures life or property. . . .

Before dealing with the charge that the ferry was not sounding proper signals, I must state that I find it most difficult to understand why the ferry when reaching clearer waters changed her course in a westerly direction without giving the signals required by the *International Rules of the Road.* I mention this because it would appear that the ferry ignored completely the *Regulations for Preventing Collisions at Sea* relating to signals.

The rules applicable to signals to be given by vessels proceeding in mist, fog or vapour are Rules 15 and 16 of the *International Rules of the Road,* which are worded as follows:

> Rule 15 (c) In fog, mist, falling snow, heavy rainstorms, or any other condition similarly restricting visibility, whether by day or night, the signals prescribed in this Rule shall be used as follows:
>
> (i) A power-driven vessel making way through the water, shall sound at intervals of not more than 2 minutes a prolonged blast.
>
> (ii) A power-driven vessel under way, but stopped and making no way through the water, shall sound at intervals of not more than 2 minutes two prolonged blasts, with an interval of about 1 second between them.

As both parties urged that both vessels were navigating in special circumstances, I shall cite Rule 27, which, it was submitted, is relevant to the facts of the case.

Rule 27. In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from the above rules necessary to avoid immediate danger.

After the icebreaker had given the 3-blast signal to indicate that it would proceed backwards to open for the second time a passage for the ferry, no other signal was given by either ship. To excuse the ferry's failure to adhere to Rule 15(*c*)(i), the defendant attempted to prove that during rescue operations by an icebreaker in the Quebec harbour a local special system of signals was in existence and that it was known to the masters of both vessels herein involved. But it was admitted that this special system of signals was neither discussed nor agreed to by the Captain of the icebreaker. When the witnesses were asked if these local regulations had been duly adopted and registered, the answers were in the negative, so it did not meet with the requirements of Section 646 of the *Canada Shipping Act*. In my opinion, to apply a special rule which interferes with Rule 15 it is compulsory that the special rule be duly made and registered. This rule reads thus:

Rule 30. Nothing in these rules shall interfere with the operation of a *special rule* duly made by local authority relative to the navigation of any harbour, river, lake, or inland water, including a reserved seaplane area.

Furthermore, I believe a well established international rule which has proven its effectiveness as Rule 15 should not be lightly disregarded, specially when the visibility at certain times and places was such that it was most difficult to ascertain the position of the vessels. In making this statement, I am mindful of the severe weather conditions and the lack of visibility. It is most difficult to establish circumstances which can justify departure from the rule. When vessels get under way under conditions as those described in this case, it is their duty to adhere to the rules of navigation, and one of these rules is to give the signals provided for by Rule 15. If it is not followed, the vessels take onto

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

themselves the consequences of their negligence. The omission of giving the fog signals prescribed by Rule 15 is a statutory fault. Vessels violating this rule have to prove that the circumstances under which they were proceeding, had they given the prescribed signals, would have endangered navigation or that a duly adopted rule for local conditions had priority over the International Rule. This was not established in the present instance.

True, the collision occurred under abnormal weather conditions, but one has to keep in mind that the *Lady Grey* was an icebreaker, with a crew trained for and experienced in icebreaking and rescuing operations, and that the *Cité de Lévis* was a ferry specially built and equipped for winter service on the St. Lawrence River, between Lévis and Québec. When the *Cité de Lévis* called for help, it was not on account of danger to property or life, but because she could not return to her wharf without the help of an icebreaker. The *Lady Grey* answered the call because it was one of the operations for which she was equipped and manned. Both vessels in the past had been in similar predicaments. So, those in charge knew or should have known that vigilance under the existing circumstances was of the utmost importance.

The *Lady Grey* had a proper look-out. On the other hand the *Cité de Lévis* departed from the rule of good seamanship, namely, to provide a look-out at the most crucial time. In my view, though the look-out on the *Lady Grey* gave her no assistance to avoid the collision, it was no excuse for those in charge of the *Cité de Lévis* to say that the presence of a look-out on her board would not have aided to prevent the collision. It seems to me that at some time, when the fog or mist had decreased in density or disappeared, it would have been possible for a good look-out, well posted, to see the icebreaker and so notify the Captain.

Two experienced nautical assessors were appointed to hear all the evidence. At the conclusion of the trial they expressed the opinion that the breach to Rule 15(*c*)(i) was the real cause of the collision and that both vessels and those in charge were at fault on this point. I am of the same mind and concur in their opinion.

I find that the two vessels proceeding under the circumstances related to the Court, as well as the persons in charge of them, had been negligent in failing to sound the mandatory signals prescribed by Rule 15(*c*)(i) of the *Regulations for Preventing Collisions at Sea* and that this was the main cause of the collision. I also believe that the fact that the *Cité de Lévis* neglected to have at all times a proper look-out was to a certain extent a contributing cause of the collision for the reasons expressed *supra*.

I do not think that the manœuvres of the *McLean* while approaching or leaving the ship which was rapidly sinking had any effect on the ultimate fate of the *Lady Grey*. I believe that before the arrival of the *McLean* she was beyond help and that everything had been done that could have been done to save her under the circumstances.

I have given my best consideration to the proportion of liability of the parties in the light of all the evidence. I find that the defendant should bear three-fifths or 60 per cent of the blame and the plaintiff two-fifths or 40 per cent of the blame for the collision and the damages resulting therefrom.

It now becomes necessary to assess the damages to which the plaintiff is entitled. The plaintiff's total claim is for $677,000. The only two items about which some agreement could not be reached are:

(*a*) loss of the *Lady Grey* ..... $350,000.
(*b*) loss of use of the *Lady Grey* and replacements .... $165,000.

These two claims will be dealt with later.

I shall now list the items of damages claimed in respect of which agreement was reached, to wit:

1. Cost of additional repairs to the *Walter E. Foster* as a result of her icebreaking services on the St. Lawrence River to replace the *Lady Grey* and to maintain her in proper condition to perform these duties.

These costs, amounting in all to $30,000, were claimed on the basis that the *Walter E. Foster* was not as well fitted as the *Lady Grey* for icebreaking services. It was agreed that $15,000 would be allowed.

1960

THE QUEEN
v.
LÉVIS FERRY LTD.

Fournier J.

2. Expenditures amounting to $20,000 and incurred in connection with the bringing of the *Walter E. Foster* from Saint John, N.B., to Quebec, to replace the *Lady Grey,* and the reconditioning and commissioning of the *Franklin* to replace the *Walter E. Foster* at Saint John, N.B.

This amount was agreed to and is to be allowed in full.

3. Loss of stores, materials, crew's personal effects and belongings.

The amount claimed was $112,000 and for "loss of stores and materials" it was agreed that the sum of $75,000 should be allowed.

4. For "loss of crew's personal effects and belongings" it was agreed that the amount paid, namely $7,708.51, as appears from exhibit P-14, would not be contested, and that, if the plaintiff is legally entitled to claim for the crew's loss of effects, then the sum should be allowed.

Counsel for the defendant submits that the payments were made by the Crown as a result of a discretionary power exercised by the Treasury Board, as evidenced by plaintiff's exhibits Nos. 20 and 21. There was no subrogation obtained by the Crown and, even though the members of the crew themselves may have had a right of action against the ferry and her owners, assuming there were negligence on the latter part, the Crown had no direct right of action as is sought to be exercised here for the amounts paid to the crew, whether the payments were voluntary or were made obligatory by statute, executive order or otherwise.

On the other hand, counsel for the Crown contends that the value of the crew's effects lost in the sinking of the *Lady Grey* was paid in discharge of its statutory obligation, whether the *Lady Grey* was reimbursed or not for the collision, and, if the *Lady Grey* was jointly liable for the collision with the *Cité de Lévis,* it discharged its obligation under common law in addition to the above mentioned statutory obligation.

In support of this submission, he referred to the *Financial Administration Act*, R.S.C. 1952, c. 116—*Ships' Crew Regulations, Canada Gazette* (Part II) December 8, 1954, which reads as follows:

19. When an employee suffers loss of any clothing or personal effects because of a marine disaster or ship wreck, he may, with the approval of the Treasury Board, be reimbursed for the actual loss suffered by him.

Under this regulation the members of the crew had a right to claim the actual loss suffered by them and to be reimbursed. In my view, if the actual loss was established, the Treasury Board had no discretionary power but was bound by the terms of the Regulations to approve the payment, which it did in the present case.

A similar provision may be found in the *Financial Administration Act—Ships' Officers Regulations*, under the heading "Compensation for loss of personal effects resulting from marine disaster", regulation 22.

As to plaintiff's right of action, I believe the Supreme Court of Canada laid down a principle in *Regent Taxi & Transport Company* and *La Congrégation des Petits Frères de Marie*[1], which should be followed in the present instance. This principle was affirmed by the Privy Council[2]. It was held (Mignault and Rinfret JJ. dissenting):

The plaintiff was within the purview of the word "another" ("autrui") as used in article 1053 C.C., and therefore entitled to maintain this action. Article 1053 C.C. confers on every person, who suffers injury directly attributable to the fault of a third person as its legal cause, the right to recover from the latter the damages sustained. The suggestion that the right of recovery under that article should be restricted to the "immediate victim" of the tort involves a departure from the golden rule of legal interpretation (Beal, Legal Interpretation, 3rd ed., p. 80) by refusing to the word "another" ("autrui") in article 1053 C.C. its ordinary meaning; and such interpretation would be highly dangerous and would result in the rejection of meritorious claims. . . .

In this case, the members and officers of the crew were entitled to claim from the Crown damages for the loss of their personal effects resulting from a marine disaster. The Crown paid in accordance with the legal provisions *supra*.

[1] [1929] S.C.R. 650. [2] [1932] A.C. 295.

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

Now the Crown submits that the loss resulted from the negligence of the defendant and its employees. The evidence establishes that the defendant and its employees, through negligence, contributed to the collision and the damages resulting therefrom. I find that the plaintiff's action on this point is well founded.

There remain two disputed claims. The first one is for the "Loss of use of the *Lady Grey* and replacements, $165,000". In the months following the sinking of the *Lady Grey* the Department of Transport reconditioned and recommissioned its vessel, the *Franklin,* which was sent from Halifax to Saint John, N.B., to replace the *Walter E. Foster,* and the latter came up to Quebec to replace the *Lady Grey* for the remaining months of the winter 1955. The costs for reconditioning and recommissioning the *Franklin,* sending her to Saint John, sending the *Walter E. Foster* to Quebec, returning the latter to Saint John and decommissioning the former are all included in paragraph 10 of the Information. This claim is for $20,000, which amount has been agreed to and is allowed.

The *Walter E. Foster* left Saint John on February 4, 1955 and returned to Saint John on July 5, 1955. Then the *Franklin* came to Quebec from Saint John to do the summer work of the *Lady Grey* and worked there until September 5, 1955. After that she was laid up and later decommissioned and sold. There is no evidence as to the price of the sale.

The plaintiff claims that the Crown is entitled to general damages even if the operation of an icebreaker is a non-profit or a non-commercial enterprise. This seems to me to be in accordance with the decisions in *Greta Holme*[1]; *Mersey Docks and Harbour Board v. Owners of the S.S. Marpessa*[2]; *Admiralty Commissioners v. S.S. Susquehanna*[3]. In these cases it was made clear that a public body, not working for mercantile gain, which is deprived of its ship by a wrongdoer, is entitled to a substantial damage, irrespective of the special use which might have been made of her during the time she was under repair.

[1] [1897] A.C. 596. [2] [1907] A.C. 241.
[3] [1926] A.C. 655.

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

In Marsden's *Collisions at Sea,* 10th ed., p. 124, dealing with the question of non-profit earning vessels, it is said:

> In *The Chekiang* and *The Susquehanna,* Lord Summer and Lord Dunedin have expounded and elaborated the principle of awarding damages thus laid down. In the former of these cases, a warship was the sufferer and the House of Lords approved an award of damages arrived at by taking the warship's original cost, less depreciation, and allowing as damages 5 per cent. interest on the sum so arrived at, though Lord Summer emphasized the artificiality necessarily involved when dealing with a warship *pur sang,* in estimating a loss in terms of money. In *The Susquehanna,* where an Admiralty oil tanker suffered damage, the House of Lords refused to allow an award of damages based on the freight-earning capacity on mercantile charter of a ship which had not been and was not likely to be put on the market to earn freight. "All the same", said Lord Summer, "the *Prestol's* services during the time of repair were lost, and accordingly the principle of *The Greta Holme* . . . may be applied with such rates of interest and depreciation as the evidence may justify. . . ."

In the present case, counsel for the defendant submitted that the only juridical basis on which damages could be awarded to the plaintiff would be one which would allow interest on its capital investment in the *Franklin* together with depreciation and profit during the period of time her disposal for sale had to be delayed because of the use she was put to.

[The learned Judge here reviews the evidence concerning loss of the use of the *Lady Grey* and replacements and the net worth of the *Lady Grey* and continues.]

The damages claimed are assessed as follows:

Repairs to the *Walter E. Foster* for ice damage	$ 15,000
Reconditioning the *Franklin* moving the *Walter E. Foster*	20,000
Material stores and crew's personal effects	75,000
Damage for loss of use and replacement	5,775
Net worth of the *Lady Grey*	200,000
total:	$ 310,775

As I have found that the defendant should bear three-fifths or 60 per cent of the blame and the plaintiff two-fifths or 40 per cent of the blame for the collision and the damages resulting therefrom, the plaintiff should be entitled to recover from the defendant 60 per cent of $310,775, or a

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

sum of $186,465. But in its defence, the defendant alleges that, if it is found fully or partly to blame for the collision, it is entitled to limit its liability under the relevant provisions of the *Canada Shipping Act* on the basis that its maximum liability, calculated at the rate of $38.92 per ton on the ship's tonnage for purposes of limitation, is equivalent to a sum of $40,390, and prays for a declaration to this effect.

So, the corporate defendant, as owner of the *Cité de Lévis,* seeks to limit its liability to $38.92 per ton of the ship's tonnage under the provisions of ss. 649 and 651 of the *Canada Shipping Act,* Statutes of Canada 1934, c. 44 (now found in ss. 657 and 659 of the Revised Statutes of Canada 1952, c. 29):

> 649. (1) The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur without their actual fault or privity that is to say . . . be 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.
>
> 651. The limitation of the liability of the owners of any ship set by section six hundred and forty-nine of this Act in respect of loss 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.

As 60 per cent of the damages in question were caused by the improper navigation or management of the vessel without the actual fault or privity of the owner, the latter would seem entitled to the benefit of those sections.

The latest decision on the question of limitation of liability which was dealt with by the Exchequer Court of Canada is the case of *The Queen v. Gartland Steamship Company* and *Albert P. LaBlanc*[1] (unreported—No. 82786 of the Exchequer Court records), in which Cameron J. held

[1] January 28, 1957 Unreported.

that as the damages were caused by the improper navigation or management of the ship and without the actual fault or privity of the owner the latter would seem entitled to the benefit of the above sections. His decision on this question was affirmed by the Supreme Court of Canada on January 26, 1960. The Court concurred in the following remarks of Honourable Mr. Justice Locke and decided accordingly. I do not think that any further comments by me on the subject would add to the solution of the debate, so I propose to quote *in extenso* his remarks at pp. 22, 23 and 24 of his notes:

The judgment at the trial held that the appellant company was entitled to restrict its liability in the manner provided by ss. 649 and 651 of the *Canada Shipping Act 1934*, c. 44. The respondent has cross-appealed against this finding on the ground that, as that statute does not specifically provide that those sections shall apply to Her Majesty, the sections do not apply. The learned trial judge rejected this contention and the judgment as against the company was restricted to $38.92 for each ton of the ship's tonnage. This reduced the damages found to have been sustained and awarded against the appellant LaBlanc of $367,823.49 to $184,383.50.

The Canada Shipping Act was enacted by Parliament in reliance upon the powers vested in it by head 10 of s. 91 of the *British North America Act*. It is not questioned that the sections referred to were within the powers of Parliament and restricted the liability of the owners of vessels for loss or damage occasioned by reason of the improper navigation of a ship owned by them where the event occasioning the loss occurs without their actual fault or privity. This was made applicable to the owners of all ships, except those belonging to His Majesty. This exception was provided by s. 712.

The purpose of s. 16 of the *Interpretation Act* to which I have referred above is, in my opinion, to prevent the infringement of prerogative rights of the Crown other than by express enactment in which the Sovereign is named. Section 712 of the *Canada Shipping Act* was held in the case of *Nesbit Shipping Co. Ltd. v. Reginam* (1955) 3 A.E.R. 161, to effectively prevent the exercise of the Royal prerogative. The effect of the sections of the *Canada Shipping Act*, however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative

1960

THE QUEEN v. LÉVIS FERRY LTD.

Fournier J.

rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law. I am accordingly of the opinion that the learned trial judge was right in permitting the amount of recovery to be restricted in the manner above indicated.

In the present case, the tonnage of a ship for purposes of limitation of liability is the aggregate of the register tonnage plus that of the space of the engine room under section 662 of the *Canada Shipping Act*. According to her certificate of registry, the register tonnage of the *Cité de Lévis* is 467 tons (exhibit P-2) and that of the space reserved for her propelling power is 570.77 tons, a total of 1,037.77 tons, which multiplied by $38.92 produces a figure of $40,390. This would be the amount to which the Crown would be entitled if the *Cité de Lévis* were to bear the full responsibility for the damages resulting from the collision. But having apportioned its responsibility to 60 per cent of the damage, the Crown is entitled to 60 per cent of $40,390, or the sum of $24,234, and interest at 4 per cent on that sum from the date of the collision, namely February 1, 1955 to the date the amount is deposited in Court after judgment.

Therefore the plaintiff is entitled to recover from the defendant the sum of $24,234 and interest as aforesaid, with costs to be taxed in the usual way.

Judgment accordingly.