

WARNER QUINLAN ASPHALT COM- } CLAIMANT;
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1923
 June 28.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Requisition—War Measures Act 1914, 5 Geo. V, c. 2—Compensation—Rights of charterer, without demise—Interpretation.

Held, that at common law a time charterer, without demise, had no right of action against the Crown for the damages he may have suffered from the deprivation of his contractual rights under the charter, arising from the requisition of the vessel; the right of action against the Crown being in the owner and not in the charterer.

2. That the true intent, meaning and spirit of section 7 of the War Measures Act, 1914, is to maintain and preserve to the subject any rights possessed by him at common law and which he previously had, notwithstanding the said Act; and that the said section does not confer upon him any new rights to compensation in addition to those which he otherwise enjoyed.

REFERENCE by the Minister of Justice for Canada, under provisions of section 7 of the War Measures Act, 1914, of a claim for compensation for damages arising from the requisition of the steamship *G. R. Crowe*.

April 17, 1923.

Case now heard before the Honourable Mr. Justice Audette at Ottawa.

The Hon. N. A. Belcourt, K.C. and *J. Genest* for claimant.

E. L. Newcombe, K.C. and *J. P. Bill* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. this 28th June, 1923, delivered judgment.

This is a reference, made to this Court by the Minister of Justice for Canada, under the provisions of section 7 of The War Measures Act, 1914, (5 Geo. V, ch. 2) of a claim by a charterer for the sum of \$1,269,074.48 as compensation for alleged damages arising from the requisition by the Crown, during the war, of the chartered steamship *G. R. Crowe*.

The trial of the case was proceeded with, upon admissions and documentary evidence, to determine the question of liability of the Crown,—the question of the assessment of damages being postponed pending the final determination of the issue as to liability.

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The reference which is framed in a language that safeguards the immunity of the Crown from liability at every point, reads as follows, viz:—

Alleging that there is no jurisdiction in the Exchequer Court of Canada to adjudicate under section seven of The War Measures Act, 1914, upon the claim hereinafter mentioned and that the Warner Quinlan Asphalt Company which has preferred the said claim has no right or title to any compensation, and reserving the right to plead and maintain the absence of any authority on my part to refer or on the part of the Court to adjudicate upon the said claim and also to plead and maintain that the said company is not entitled to any compensation, I hereby at the request of the said company refer to the Exchequer Court of Canada under the powers, if any, conferred by said section seven the annexed claim of the said company for compensation alleged to be due by reason of the alleged appropriation by His Majesty of the steamship *G. R. Crowe*.

Dated at Ottawa, this 15th day of February, 1921.

(Sgd.) CHAS. DOHERTY,
 Minister of Justice.

To the Registrar
 of the Exchequer Court of Canada,
 Ottawa.

The requisition in question was made in 1917 in the usual manner, under the authority of the Governor in Council pursuant to the powers conferred by the War Measures Act, 1914. The requisition appears to be similar to the one I had occasion to consider in the case of *Gaston Williams et al v. The King* (1).

The claim of the charterer is based upon the charter-party filed as exhibit No. 2.

This is a time charter, without demise. The hire was for 5 years from 1916 to 1921, with option to renew for a similar period. The owners of the vessel were settled with by the Crown by the payment of \$157,007.52, as set out in the admission filed as exhibit No. 10. A complete release (exhibit No. 8) was duly executed by the owners and the vessel placed back by them into the hands of the charterer in 1919. The Crown never had any dealings, either directly or indirectly, with the charterers. Under the decision of the American Supreme Court in *re United States v. Russel* (2) the requisition of a vessel, in its relation to the owners, does not amount to appropriation, but is only a taking of the use of the vessel from the owners; and in the present case, the latter received satisfactory compensation.

(1) [1922] 21 Ex. C.R. 370.

(2) [1871] 13 Wall. (80 U.S.)
 623.

The charterer has no title in the vessel as he derives all his rights from the owner alone.

At common law, a time charterer, without demise, has no right of action against the Crown for any damages arising from the requisition of the vessel, he may have suffered from the deprivation of his contractual rights under his charter. The right of action as against the Crown is in the owner and not in the charterer; but the latter may have a right of action against the owner. The possession of the vessel always remained in the owner and never passed to the charterer. *Dominion Coal Co. v. Maskinongé SS. Co.* (1); 26 Hals. 86.

The contractual rights of the charterer are no more interfered with by the requisition made under the statute than would be the rights of a third person resulting from the breach of any freighting contract with the owner of a vessel.

All the charterer acquired, under his charter, is the right to have the use of the vessel for certain purposes, to have his goods conveyed by this particular vessel with certain limitations hereinafter mentioned, and, as subsidiary thereto, to have the use of the vessel and the services of the owner's master and crew. The ownership and also the possession of the vessel remained in the original owners, through the master, officers, and crew, who continued to be his servants. Scrutton, *On Charterparties*, 9th ed. p. 4.

In the case of *Elliott Steam Tug Co. v. The Shipping Controller* (2), Warrington, L.J., at p. 135, says:

As charterers they had no property in the ship nor had they the possession thereof and they could not at common law have maintained an action against the officers of the Crown who took possession of the ship. And further on Scrutton L.J., who dissented on some points, says, at p. 139:

The question now is as to the rights of the charterers against the Government.

At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for the purposes of making profits or gains without possession of or property in the chattel.

(1) [1922] 38 T.L.R. 591, at p. 594; [1922] 2 K.B. 132.

(2) [1922] 1 K.B. 127.

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Citing on this point the judgment of Mr. Justice Blackburn in *Cattle v. Stockton Waterworks Co.* (1),

where a contractor making a tunnel on K's land claimed against a wrongdoer to K's land, whose wrong made his contract less profitable, and was held not entitled to recover. (2)

. . . . At p. 141:

The charterer then has no common law right against a person who deprives him of the opportunity of earning profits by his contractual rights, by taking away the ship in respect of which he had a contract.

In the case of *Federated Coal & Shipping Co. v. The King* (3), Bailhache, J., at p. 46, said, speaking of a charterer:

They were not in possession of her. Their charter party was not by demise. They had not even a lien upon her. They merely had a contractual right to order her master to perform voyages with her for their benefit and profit. The use or abuse by a third party of the chattel over which such rights exist and the consequent injury to these rights give rise to no claim at law by the persons possessing those rights.

See also *London-American Maritime Trading Co. v. Rio de Janeiro Tramway, etc.* (4).

Now, as already said, the claimant has only contractual rights flowing from a charterparty with the all important clause providing that certain perils should be excepted; and these perils included "arrest and restraint of Princes, Rulers and People." The effect of the clause being that if and to the extent to which the perils mentioned interfered with the fulfilment of their obligations, the parties are exempted from liability for non-performance. *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Company, Ltd.* (5).

The charterer thereby contracted himself out of any right to recover for any loss he might suffer resulting from the requisition of the vessel by the Crown, because, obviously the requisition itself is nothing but the exercise of the "arrest and restraint of Princes, etc." . . . If the charterer was not granted the use of the vessel during the period she was taken under the arrest and restraint of Princes, he cannot recover. The owners did not

agree to give the use of the vessel absolutely and unconditionally; but only unless prevented, amongst other things, by the restraint of princes

(1) [1875] L.R. 10 Q.B. 453.

(3) [1922] 2 K.B. 42.

(2) [1922] 1 K.B. at p. 139.

(4) [1917] 86 L.J. K.B. 1470.

(5) [1916] 2 A.C. 397, at p. 409.

Modern Transport Co., Ltd. v. Duneric Steamship Co. (1);
 See also: *Russian Bank for Foreign Trade v. Excess Insurance Co.* (2); *Arthur P. Friend et al v. United States* (3).

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The requisition was not made as against the charterer, nor was he notified of it. It was not necessary, as he only possessed rights when the vessel was not under requisition, one of the limitations provided by the charterparty itself.

Having discussed the rights of the charterer under the common law, consideration must now be given to the question as to whether or not the claimant can recover under section 7 of The War Measures Act, 1914.

In the construction of statutes, the principle is recognized that an intent to alter the common law beyond the evident purpose of the Act is not to be presumed, and it has been expressly laid down that statutes are not presumed to make any alteration in the common law beyond what the enactment explicitly declares, either in express terms or by unmistakable implication. In all general matters beyond, the law remains undisturbed. It is not to be assumed that the legislature would overthrow fundamental principles, infringe rights, or depart from, or alter the general principles of law, without expressing itself with irresistible clearness.

Maxwell, *Interpretation of Statutes*, 6th ed. 149 and 235; Craies, *Statute Law*, 2nd ed. 126 and 188; Endlich, *Interpretation of Statutes*, 95, 153 and 173.

Section 7 of the War Measures Act, 1914, reads as follows:

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.

In the present case the Crown did not appropriate in the sense of expropriating and acquiring the ownership of the vessel in question; but it appropriated the use of the property, i.e., the "use of" the vessel and accounted to the owners thereof for the same.

(1) [1917] 1 K.B. 370 at 377. (2) [1918] 2 K.B. 123, at p. 126.
 (3) [1921] 56 Court of Claims R. 423.

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Moreover, the section proceeds to state that in such case, i.e., where the Crown has appropriated the use of such property "and compensation is to be made therefor," etc., the case shall be referred for adjustment. But the Act does not say that in such cases compensation shall be paid therefor. The Act must be construed to include only cases where compensation was provided for by common law or statute at the time the Act was passed. There is also a total absence of any provision respecting the contractual rights of a charterer.

In other words the true intent, meaning and spirit of the section—relied upon at bar—is to maintain and preserve to the subject any right possessed by him at common law, and which he previously had, notwithstanding the Act. The section does not confer upon him any new right to compensation in addition to those which he theretofore had and enjoyed at common law. It recognized liabilities *in esse*—already existing—but does not create any new ones.

The Act did not alter the law, but merely maintained it as it stood at the time of the passing of the statute, in respect of all matters therein referred to.

Counsel for the claimant further argued at bar that if no remedy were available to him under the War Measures Act, the court had jurisdiction to entertain his claim under section 38 and subsections (a), (b) and (d) of section 20 of the Exchequer Court Act. A sufficient answer to this contention is that the reference is expressly made under the provisions of The War Measures Act, and the jurisdiction of the Court to hear and determine this case arises upon the reference.

Under the decision of the case of *Piggott v. The King* (1) it would seem that the present specific statutory claim referred to the court under special provisions would not come within the ambit of subsections (a) and (b) of section 20. Nor would it seem to come within the scope of subsection (d) where the common law would have to be applied, and the same may be said of a case arising under the provisions of section 38 of the Act. It would further seem that this tribunal cannot, in regard to a case submitted under the

special provisions of one statute, find its jurisdiction to consider the same under the provisions of another statute, especially where either a fiat or a proper reference by the head of the department in connection with the administration of which the claim arises would seem to be required as a condition precedent to give the court the necessary jurisdiction. See *Gauthier v. The King* (1); *Brooke v. The King* (2).

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There were other questions of minor importance raised at the trial which in the view I have taken of the case, need not be passed upon.

Therefore, there will be judgment, declaring and adjudging that the claimant is not entitled to any portion of the relief sought and the action is dismissed.

Judgment accordingly.

(1) [1917] 56 S.C.R. 176.

(2) [1921] 90 L.J. K.B. 521.