LLOYD'S LIST
LAW REPORTS

Editor:
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CASES CITED.*

* Excluding cases cited in United States v. Atlantic Mutual Insurance Company and Others, p. 520.

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STATUTES CONSIDERED.

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[1952] VOL. 1] FRIDAY, APRIL 4, 1952. [PART 1

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Nov. 12, 13, 14, 15, 19, 20, 1951.

CANADA STEAMSHIP LINES, LTD. v. THE KING.

Before Lord PORTER, Lord NORMAND, Lord MORTON OF HENRYTON, Lord ASQUITH OF BISHOPSTONE and Lord COHEN.

Contract—Lease—Exemption from liability clause—Indemnity clause—Negligence of lessor's servants causing fire on demised premises—Destruction of property belonging to lessees and to third parties—Liability of lessor—Right of lessor to indemnity—Construction of lease—*Faute lourde*.

Lease entered into between plaintiffs and Crown whereby there was demised to plaintiffs for a term of years a parcel of land situated on the western side of St. Gabriel Basin of Lachine Canal, Montreal, together with the right to occupy and use freight shed—Terms of lease:

> 7. That the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.
>
> 17. That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

Obligation upon Crown to "maintain the said shed"—Use of oxy-acetylene apparatus by servants of Crown to effect repairs to shed doors—Cotton waste set alight by sparks, fire spreading and destroying shed and contents—Claim brought by plaintiffs and other goods-owners (third parties) against Crown alleging *faute lourde* (gross negligence) of servants of Crown—Denial of negligence, with further plea that claim was in any event barred by terms of Clause 7—Alleged right of Crown under Clause 17 to be indemnified by plaintiffs in respect of third-party claims—Judgment entered by learned trial Judge in favour of plaintiffs on both claim and third-party issue—Appeal by Crown—Decision of Sup. Ct. of Canada that plaintiffs' claim was barred by Clause 7 of lease and that Crown was entitled to indemnity under Clause 17—Appeal by plaintiffs—Principles to be applied in construing clauses stipulating immunity from liability—Civil Code of Lower Canada, Arts. 1013-1021, 1612 (3), 1614, 1617, 1618, 1641, 1660—Canadian Exchequer Court Act, 1927.

———*Held*, by P.C., that, construing the wording of the lease in general and Clause 7 in particular, the Crown had failed to establish that it was intended to exempt it from liability in respect of the gross negligence of its servants; and, construing Clause 17, that (a) it was doubtful whether its words could be applied to a negligent act done in the course of carrying out the lessor's obligations under the lease; (b) even if Clause 17 embraced damage based on a negligent act, its wording was also wide enough to embrace damage arising from some ground other than negligence, and therefore, its meaning being far from clear, the Crown had failed to establish a right to indemnity in respect of the gross negligence of its

servants—Appeal by plaintiffs allowed—Order of learned trial Judge restored.

————Alderslade v. Hendon Laundry, Ltd., [1945] 1 K.B. 189, applied.

The following cases were referred to:

Alderslade v. Hendon Laundry, Ltd., [1945] 1 K.B. 189;

Glengoil Steamship Company and Gray v. Pilkington and Others, (1897) 28 S.C.R. 146.

This was an appeal, brought by special leave, by Canada Steamship Lines, Ltd., from six judgments of the Supreme Court of Canada, reversing in part a like number of judgments of the Exchequer Court of Canada (Angers, J.) which had maintained petitions of right against the Crown for damages arising out of a fire which, on May 5, 1944, destroyed a freight shed (described as the Ottawa Street Shed) occupied by the appellants under lease from the Crown on a wharf belonging to the Crown in the St. Gabriel Basin of the inner harbour of Montreal.

In the first of such cases, the appellants claimed from the Crown $40,713.72 as the value of the property of the appellants destroyed in the fire. In the remaining five cases, the suppliants were owners of other property destroyed by the fire, viz., cargo in the hands of the appellants awaiting shipment, goods stored in the shed by special arrangement with the appellants, and motor vehicles and other property lawfully in or about the shed at the time of the fire. The suppliants in these five cases and the amounts respectively claimed by them from the Crown were as follows:—

H. J. Heinz Company of Canada, Ltd.	38,430.88	dols.
Canada and Dominion Sugar Company, Ltd. ...	108,310.83	,,
W. H. Taylor, Ltd. ...	3,670.25	,,
Raymond Copping	1,662.37	,,
Cunningham & Wells, Ltd.	15,159.83	,,
	167,234.16	,,

In each of the six cases, which were tried together before the Exchequer Court of Canada, the trial Judge maintained the suppliants' petition of right against the Crown, and condemned the latter to pay the damages claimed, the amount of which was admitted. In the five cases other than that in which the appellants were suppliants the trial Judge also dismissed third-party proceedings instituted by the Crown seeking indemnity from the appellants.

The Crown then entered a consolidated appeal to the Supreme Court of Canada, which, while upholding the judgment of the trial Judge in favour of the suppliants other than the appellants, reversed his decision so far as they related to the appellants' own claim and to the third-party proceedings for indemnity brought by the Crown against the appellants in respect of the claims of the other suppliants.

The appellants were a steamship company engaged (*inter alia*) in the transport of cargo from Montreal to various ports on the Great Lakes. In order to secure facilities for the loading, discharging and delivery of cargo at Montreal in the conduct of its business, the appellants leased from the Crown space on one of the latter's wharves in the St. Gabriel Basin of the inner harbour of Montreal, together with a large freight shed erected thereon. The relevant clauses of the lease, which was dated Nov. 18, 1940, were as follows:

1. That the lessee will pay all rental herein reserved at the time and in the manner in these presents set forth, without any abatement or deduction whatever.

5. That the lessor, his servants or agents, shall, at all times and for all purposes, have full and free access to any and every part of the said land, the said shed and the said platform.

6. That the said land shall be used for purposes in connection with the lessee's business, only, and for no other purpose or purposes whatever.

7. That the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

8. That the lessor will, at all times during the currency of this lease, at his

own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

9. That the lessee shall, in addition to the payment of the yearly rental hereunder, at its own sole cost and expense, insure, concurrently with the execution of this lease or as soon thereafter as possible, and thereafter keep insured during the currency of this lease with an insurance company or companies satisfactory to the Minister of Transport the said shed against fire and other casualty in the sum of forty-eight thousand dollars ($48,000.000). . . .

10. That the lessee shall, before constructing or erecting the said platform, the said canopy or other structures, including alterations to the said shed, on the said land, submit to the general superintendent plans or drawings showing the location and design and nature of construction of the said platform, the said canopy or such structures, and obtain his approval of such plans or drawings, and shall construct or erect the said platform, the said canopy or such structures on the location and in accordance with the designs as shown on the plans and drawings approved by the general superintendent, and thereafter maintain the said platform, the said canopy or such structures in accordance with the designs respecting the same, and shall carry on the work of such construction and maintenance of the said platform, the said canopy and such structures at its own cost and expense and under the control and direction of the general superintendent and to his entire satisfaction.

12. That it is distinctly understood and agreed that this lease is granted subject to the condition that the said platform and the said canopy shall forthwith, upon termination of this lease in any manner, except as provided for in Clause 18 hereof, be and become vested in title in the lessor without any payment of compensation to the lessee in respect of the said platform and the said canopy.

16. That the parcel or tract of land, thirty (30) feet in width, situated between St. Gabriel Basin No. 2 and the said land may be used by the lessee in common with the public generally, it being understood and agreed, however, that the lessee shall, in the discretion of the superintending engineer and in accordance with his direction, have preference in the use thereof.

17. That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

Some five or six days prior to the fire in question the appellants' shed foreman had made complaint in general terms to the Superintendent of the Lachine Canal, under whose jurisdiction the shed in question fell, regarding the condition of the doors of the shed, a number of which required repairs. On May 5, 1944, the day of the fire, servants of the Crown, without further reference to the appellants, were effecting repairs to such doors, the work undertaken by them and the manner of its being carried out being entirely without reference to the appellants or their employees. The shed in question was completely full of a great variety of merchandise awaiting shipment, in addition to which it contained other goods stored by third parties by special arrangement with the appellants and a large quantity of cargo-handling, office and other equipment belonging to the appellants. There were also a number of trucks and motor vehicles on the wharf delivering or about to deliver further goods for transport.

The shed in question was constructed of corrugated iron on a steel frame and the shipping doors were hung on hinges bolted to the uprights of such frame. These uprights were in the form of steel "H-beams," the flanges of which were ¼ to ⅜ in. thick. The Crown's employees, having almost completed their work on the afternoon of the day in question, had removed and straightened the upper hinge of one of the shipping doors which had to be replaced. These hinges had originally been affixed to the "H-beam" with ⅝-in. bolts. When they came to replace the hinge in question they found that they had no ⅝-in. bolts with them, the smallest size being ½ in. in diameter. Instead of securing a bolt of the proper size they elected to enlarge

the ⅝-in. hole in the "H-beam" so that it would take the ½-in. bolt. Inside the door immediately opposite and approximately 3 ft. distant from the "H-beam" in question were piled a number of bales of cotton waste. Having decided to enlarge the holes as aforesaid, the Crown's employees, instead of using an electric or hand drill or reamer for the purpose, an operation which would have taken about a minute and could have been carried out with perfect safety, elected to make use of an oxy-acetylene cutting torch which they happened to have at hand. The operation of enlarging the hole involved using the torch for a matter of three or four minutes. Sparks escaped into the shed and bales of cotton waste caught fire. The flames spread rapidly to the other contents of the shed and consumed the whole.

The learned trial Judge found as a fact that the fire and resulting damages were caused by the gross negligence (*faute lourde*) of the Crown's servants while acting within the scope of their duties or employment.

The Crown's case was based primarily upon a denial of negligence. In addition, so far as the appellants' claim was concerned, the Crown pleaded that the claim was in any event barred by the provisions of Clause 7 of the lease. In the third-party proceedings the Crown relied upon Clause 17 of the lease as giving rise to a right of indemnity from the appellants.

The learned trial Judge, Angers, J., basing himself on the law of Quebec, found that no clause would extend to relieve the Crown of liability for damages resulting from the gross negligence (*faute lourde*) of its servants. He accordingly refused to adopt Clause 7 as a bar to the appellants' action or to hold that Clause 17 gave the Crown a right to indemnity in the other five cases. In the result, he condemned the Crown to pay to the appellants and to the other five suppliants the damages respectively claimed by them, and he dismissed the third-party proceedings brought by the Crown against the appellants.

The Supreme Court of Canada (Rinfret, C.J., Rand, Kellock, Estey, Locke, Cartwright and Fauteux, JJ.) by a majority of six to one (Locke, J., dissenting) reversed the trial Judge in the appellants' own case and unanimously reversed the trial Judge in the cases of the other five suppliants in so far as the third-party proceedings were concerned. The Supreme Court concurred in the finding of the trial Judge as to the negligence of the Crown's servants but refused to hold that such negligence amounted to *faute lourde*. Construing Clauses 7 and 17, they held that such clauses barred the action brought by Canada Steamship Lines, Ltd., and entitled the Crown to indemnity in the other actions.

Canada Steamship Lines, Ltd., now appealed.

The further facts and arguments are sufficiently set out in their Lordships' judgment.

Mr. Geoffrey Cross, K.C., Mr. Hazen Hansard, K.C. (Canadian Bar) and Mr. R. O. Wilberforce (instructed by Messrs. Lawrence Jones & Co.) appeared for the appellants; Mr. A. J. Campbell, K.C., and Mr. D. W. Mundell, K.C. (both Canadian Bar) and Mr. Frank Gahan (instructed by Messrs. Charles Russell & Co.) represented the Crown.

Judgment was reserved.

Monday, Jan. 21, 1952.

JUDGMENT.

Lord MORTON OF HENRYTON: It will be convenient to refer to the appellant company as "the company" and to the respondent as "the Crown."

This is an appeal by special leave from six judgments of the Supreme Court of Canada dated June 23, 1950, reversing in part a like number of judgments of the Exchequer Court of Canada (Angers, J.), which had maintained petitions of right against the Crown for damages arising out of a disastrous fire.

In the first of these six cases the company was suppliant, claiming from the Crown 40,713.72 dols. as the value of the property of the company destroyed in the fire. In the remaining five cases the suppliants were owners of other property destroyed by the fire. The suppliants in these five cases and