1930
*May 2.
*June 10.

JAMES RICHARDSON & SONS LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE STEAMER "BURLINGTON" (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Bill of lading—Law of United States—International law—Art. 8 C.C.

The appellant company contracted with the respondent ship for the carriage of a cargo of wheat from Buffalo to Montreal. The bills of lading were signed in the United States of America, both the shipper and the shipowner being American subjects. The respondent alleged that the bill of lading was issued subject to the *Harter Act* passed by the Congress of the United States in 1893, although no special reference was made to the exemptions mentioned in that Act, while the appellant alleged that that Act did not apply as it was not referred to or made part of the contract.

Held that the obligations of the parties under the contract were governed by the laws of the United States, the law of the flag in this case being the same as the *lex loci contractus*. *Lloyd* v. *Guibert* (L.R. 1 Q.B. 115) foll.

Per Anglin C.J.C. and Lamont, Smith and Cannon JJ.—The intention of the parties, unless it is clearly shown that they intended to apply the law of Canada, must be taken as accepting, to all intents and purposes, the law of the United States, to which they were both subject as American citizens when they contracted for the carriage of an American cargo, in an American ship, from an American port, especially since the loading, transhipment at Buffalo and most of the navigation was to take place in American territory. If a contract of carriage were to be governed by the law of the country of destination because the last act of the contract, the delivery, is to be performed there, then the contract of carriage would have to be governed by the laws of different countries when goods shipped together would have several destinations in such countries, which case is inconceivable.

Held, also, that the act of the oiler in removing by mistake the cover or bonnet of the sea-cock instead of the plates on the air-pump, thus causing damage to the cargo by water, was a fault in the "management" of the ship.

Per Duff J.—The rule governing the case is that enunciated by Willes J. in *Lloyd* v. *Guibert* cited above that, where the contract of affreightment does not provide otherwise, the law applicable is the law of the flag.

Judgment of the Exchequer Court of Canada ([1929] Ex. C.R. 196) aff.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Demers J. (1), dismissing with costs the appellant's action as consignee of

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

(1) [1929] Ex. C.R. 196.

certain cargo of grain against the respondent ship for loss and damage to the cargo whilst on the ship.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

A. R. Holden K.C. for the appellant.

E. M. McDougall K.C. and *C. R. McKenzie* for the respondent.

The judgment of the majority of the Court (Anglin C.J.C. and Lamont, Smith and Cannon JJ.) was delivered by

CANNON J.—The appellant, in opening the case, declared that he accepted the facts as summarized in respondent's factum as follows:

A cargo of grain belonging to the appellant was shipped from Chicago, in the state of Illinois, U.S.A., under a through bill of lading dated August 1, 1927, destined for Montreal, P.Q., for transhipment at the port of Buffalo, N.Y., where it was loaded on the respondent ship on August 8, 1927, and consigned to the appellant at the port of Montreal, where the said ship arrived safely on the 11th day of August, 1927.

Shortly after the arrival of the said ship the chief engineer, in connection with the management thereof, instructed one of the oilers, named Montroy, to pump up the boilers, close the sea-cock valve off and to take certain covers off the air-pump.

The said Montroy by mistake removed the cover or bonnet off the sea-cock instead of the plates off the air-pump thus causing a sudden inrush of water into the engine room which could not be checked. In order to prevent the ship sinking at her berth in deep water, she was beached but with a bad list to port, submerging her hatches and bringing about the resultant damage to the appellant's cargo.

The *Harter Act,* which the trial judge has applied to this case, was passed by the Congress of the United States of America on the 13th February, 1893; the respondent was found to be entitled to the exemption set forth in section 3 thereof, which enacts that if the owner of any vessel transporting merchandise *to* or *from* any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the *management* of the said vessel.

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The first and main question to be determined is whether or not the so called *Harter Act* governs this case.

The bills of lading were signed in the United States of America, both the shipper and the shipowner being American subjects. No special reference was made to the exemptions of the *Harter Act.* It was agreed however that the consignee or owner of the cargo would not be exempt from liability for contribution in general average, even if the owner of the ship had exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, or if the said owners were exempt for damage resulting from faults or neglect of the master, pilot or crew in the navigation or management of the ship. The wording of this clause is evidently inspired by the above section 3 of the *Harter Act.*

Scrutton, on charterparties and bills of lading, 12th edition, says at page 19:

> The general rule of English law is that a contract is to be construed according to the law by which the parties intend to be bound. If that intention is not expressed in the contract, the court must ascertain what is their implied intention. In the absence of other indications, in ordinary contracts, the implication will be that the parties intended to be bound by the *lex loci contractus.*
>
> In regard to charterparties and bills of lading the general rule as to contracts applies; they will be governed by the law by which the parties intend to be bound, and if that is not expressed, it must be ascertained as a matter of implication. But in the absence of other indications, as regards charterparties and bills of lading, the primary implication will be that the parties intended to be bound by the law of the ship's flag, and not, as in other contracts, by the *lex loci contractus.*

In this case, it is to be noted that the ss. *Burlington* is an American ship and that the law of the flag is the same as the *lex loci contractus. Lloyd* v. *Guibert et al* (1), laid down the rule that,

> where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect to sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

The Cour de cassation in France, on December 5, 1910, *re American Trading Company* v. *Quebec Steamship Company,* held *inter alia:*

> Entre personnes de nationalités différentes, la loi du lieu où le contrat est intervenu est, en principe, celle à laquelle il faut s'attacher.
>
> Mais les parties peuvent, par une manifestation de volonté expresse ou tacite, adopter une autre loi, à laquelle leur contrat sera soumis.

(1) (1865) L.R. 1 Q.B. 115.

These principles, recognized in England and France, are also embodied in article 8 of the Civil Code of the province of Quebec:

> Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention expressed or presumed.

In this instance, the intention of the parties, unless it is clearly shown that they intended to apply the law of Canada, must, in my opinion, be taken as accepting, to all intents and purposes, the law of the United States, to which they were both subject as American citizens when they contracted for the carriage of an American cargo, in an American ship, from an American port. An important feature is that the loading, transhipment at Buffalo, and most of the navigation was to take place in American territory.

If a contract of carriage were to be governed by the law of the country of destination because the last act of the contract, the delivery, is to be performed there, what would happen if goods were shipped together having several destinations to different countries? It is inconceivable that the contract of carriage must be governed by the laws of the several destinations. There must and can be only one law governing the carriage and clothing the contract once and for all with all the privileges, obligations and immunities belonging to that law.

I accept what was said in the case of *The Peninsular & Oriental Company* v. *Shand* (1), by Lord Justice Turner at p. 290:

> The general rule is, that the law of the country where a contract is made governs as to nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure,* and a foreign court interpretating or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations.

(1) 3 Moore P.C.N.S. 272.

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I note with interest what His Lordship adds at page 292:

It is a satisfaction to their Lordships to find that in the year 1864 the Cour de Cassation in France pronounced a judgment to the same effect in a case under precisely the same circumstances, which arose between the appellants and a French officer who was returning with his baggage from Hong Kong in one of their ships, the *Alma,* and who lost his baggage in the wreck of that vessel in the Red Sea. The same question arose as here on the effect to be given to the stipulation in the ticket; two inferior courts, those of Marseilles and Aix, decided it in favour of the plaintiff on the provisions of the French law; the Supreme Court reversed these decisions, and held that the contract having been made at Hong Kong, an English possession, and with an English company, was to receive its interpretation and effect according to English law.

I therefore agree with the learned trial judge that the obligation of the parties are governed by the laws of the United States.

There remain then, in this case, two questions of fact:

1. Have the owners of the *Burlington* exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied?

2. Does the damage complained of by plaintiff result from faults or errors in navigation or in the management of the vessel?

The trial judge dealt with the first question of fact as follows:

The defence has established that their vessel was duly classified as a first-class vessel to transport goods on the lakes, and that she had also been duly inspected by the proper inspectors, and it is proved that the owners had made the repairs asked for.

To this evidence, which made a prima facie case in favour of the *Burlington,* the plaintiff objects, that the vessel was not seaworthy, specially because the bulkheads between the machinery and cargo were not water-tight to the spar deck.

It is proved and it appears in exhibit D-13, that the bulkheads are required by the laws of the United States only on vessels carrying passengers, and it is also provided by these rules that the rules of the American Bureau of Shipping respecting the construction of hulls, boilers and machinery, and the certificate of classification referring thereto, shall be accepted as tendered by the inspectors of this service.

There has been some controversy as to the rules of the American Bureau of Shipping, and it is doubtful if the old rules of the Great Lakes Register do apply, but even taking those rules, I see that the approval of a ship could be given, though not built in every respect according to the rules and tables of the register, article 4, section 1, p. 19.

It is true that section 44 states that all water-tight bulkheads should extend to the upper deck, but it is added, in conformity with rule 4

already quoted, that when the construction is such that special arrangements are desired, plans for same must be submitted to the committee.

This shows that the committee can approve of a boat where the bulkhead is not water-tight to the spar-deck.

In this case, the bulkhead was water-tight up to the main deck which was seventeen feet six inches (17′ 6″) above the keel and inasmuch as the ship's draught was thirteen feet eleven inches (13′ 11″), the *Burlington* had a freeboard of three feet seven inches (3′ 7″) above the waterline.

It would then have been necessary to load down the *Burlington* three feet seven inches (3′ 7″) deeper before the water would have reached the top of the main deck, which could not have been done because the canal draught is only fourteen feet (14′).

There is no question that the removing of the boards of the spar deck could not, under the circumstances, have any effect on the seaworthiness of the ship.

The second objection made by the plaintiff is that the *Burlington* was not seaworthy because there were no extension control rods of the sluice valves.

It is proved that no such extension rod exists on any lake vessel. The only witness who has said the contrary is unable to name a single lake boat which has such extension rods, and even the witness Drake, for the plaintiff, says he never saw the requirement for one.

The third complaint was that the *Burlington* was not seaworthy because the boiler pan or flooring on which the boiler fitting rests was corroded.

This is contradicted and the same witness Drake, who pretends that the boiler pan was in a corroded condition, adds: "but not seriously to effect it," and in my opinion this disposes of that objection.

In short, the defendant has proved diligence, and more than that, it is proved that the *Burlington* was fit for the transportation of that cargo to Montreal.

I do not see any reason to decide, and the appellant's factum and argument do not show, that the trial judge had erred in reaching these findings of fact. The *Burlington* was fit to, and did, transport the cargo of grain to Montreal.

The learned trial judge states that he felt inclined to have grave doubts on the second question, to wit: does the damage or loss complained of result from faults or errors in navigation or in the management of the vessel?

Lord Justice Scrutton, in his book already quoted, said:

Much discussion has taken place * * * on the words "navigation" and "management" in section 3 of the *Harter Act*. This passage in the *Harter Act* has since been copied in the New Zealand Act of 1922, the Canadian Act of 1910, and in the *Carriage of Goods by Sea Act*, 1924. The authorities are not in a very satisfactory condition, but in view of the vagueness of the words to be construed this is hardly surprising. It seems that the exceptions in the contract of affreightment, unless otherwise worded, limit the shipowner's liability during the whole time in

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which he is in possession of the goods as carrier (*Norman* v. *Binnington* (1), *The Carron Park* (2); *per* Wright J., in *De Clermont* v. *General Steam Navigation Co.* (3)). Accordingly an exception of negligence "during the voyage" was held by Sir J. Hannen to cover negligence during loading, and to apply to the whole time during which the vessel was engaged in performing the contract contained in the charter, and an exception of "damage in navigating the ship, or otherwise," was *held* to cover damage done during loading (*Norman* v. *Binnington* (1)). Cf. *The Glenochil* (4) in which an exception "faults in management" was held to cover putting water into the ballast tanks while the cargo was being discharged, without ascertaining that the pipes were in order. See also *Blackburn* v. *Liverpool Co.* (5); and *The Rodney* (6). So also in club policies of insurance. In *Good* v. *London Mutual Association* (7). In *The Warkworth* (8), leaving a sea-cock and bilge-cock open, whereby the water entered the hold, was held "improper navigation" within the policy; Willes J., defining the phrase as "something improperly done with the ship or part of the ship in the course of the voyage." In *Carmichael's Case* (*Carmichael* v. *Liverpool S.S. Association* (9)), a cargo of wheat was damaged through improper caulking of a cargo-port by the shipowner's servants before the voyage commenced: and it was held by the Court of Appeal that this was "improper navigation" within the policy. In *Canada Shipping Co.* v. *British Shipowners' Association* (10), a cargo of wheat was damaged by being stowed in a dirty hold, and this was held by the Court of Appeal not to be improper navigation. In *The Southgate* (11), where water entered through a valve improperly left open while the vessel was moored with cargo in her before starting, Barnes J., seems to have thought that the accident was one of "navigation," while he decided that it was clearly an "accident of the sea and other waters"; and in *The Glenochil* (4), where the engineer, while the cargo was being discharged, pumped water into the ballast tank to secure stability, without inspecting the pipes, and the water through a broken pipe damaged the cargo, the Divisional Court held that this was in the "management," even if it was not in the "navigation" of the vessel. Both in *The Rodney* (6), where the boatswain in trying to get water out of the forecastle by freeing a pipe with a rod broke the pipe so that the water got in the cargo; and in the *Rowson* v. *Atlantic Transport Co.* (12), where meat was damaged by the negligent working of refrigerating machinery, the casualty was held to be a "fault in the management."

Lord Scrutton, since the 12th edition of his work, has rendered in the Court of Appeal, on the 25th November, 1927, a very interesting judgment *re Grosse Millerd, Ltd. & Another* v. *Canadian Government Merchant Marine, Ltd.* (13), in which he sheds more light on the question:

It is difficult to reconcile the decisions of the United States courts with themselves or with the English decisions; and the *Harter Act* itself

(1) (1890) 25 Q.B.D. at p. 478.
(2) (1890) 15 P.D. 203.
(3) (1891) 7 T.L.R. at p. 188.
(4) (1896) P. 10.
(5) (1902) 1 K.B. 290.
(6) (1900) P. 112.
(7) (1871) L.R. 6 C.P. 563.
(8) (1884) 9 P.D. 20, 145.
(9) (1887) 19 Q.B.D. 242.
(10) (1889) 23 Q.B.D. 342.
(11) (1893) P. 329.
(12) (1903) 2 K.B. 666.
(13) (1927) 29 Lloyd's L.L. Rep. 190.

differs widely from the English Act. This arises partly from the fact that the United States courts treated all negligence clauses in contracts of affreightment as contrary to public policy, and the *Harter Act* was therefore an allowance of clauses contrary to public policy, and as such to be restricted, while the English courts allowed freedom of contract, and limited provisions which restricted that freedom. From this point of view sects. 1 and 2 of the *Harter Act* were treated as the fundamental purpose of the Act, and as Holmes J., said in the *Germanic* (1), remove matters which would otherwise be within the exceptions of sect. 3 from its operation. The English Act on the other hand, expressly makes the obligations of arts. II and III subject to the immunities and exceptions of art. IV. In the *Germanic* (1), a combined operation of loading coal for ship's use and discharging cargo was conducted so negligently that the ship lost her trim and capsized. This was held not "management of the ship." I should have thought it clearly was such management, just as provision of ballast would be. The United States courts have held management of the ship not to include: Insufficient covering of the hatches (*The Jeanie* (2)); failure to open hatches to ventilate cargo (the *Jean Bart* (3)); failure to close hatches during rough weather, which had been opened to ventilate cargo (*Andean Trading Company* v. *Pacific Steam Navigation Company* (4)); negligent management of refrigerating machinery (the *Samland* (5)). I, says His Lordship, should have decided all these cases differently. They have held management of the ship to include: failure to pump water out of bilges, causing damages to cargo (the *Merida* (6) and other cases); *mismanagement of seacocks whereby cargo is damaged* (*American Sugar Refining Company* v. *Rickinson* (7)); failure to cover ventilators or sounding pipes or to close port holes (the *Hudson* (8)); the *Newport News* (9); the *Carisbrook* (10); the *Silvia* (11).

The House of Lords, on November 16, 1928 (12), reversed this decision on the facts of the case (negligence in dealing with tarpaulins covering cargo hatches during repairs), but Lord Chancellor Hailsham said at page 93:

> My Lord, in my judgment, the principle laid down in the *Glenochil* (13) and accepted by the Supreme Court of the United States in cases arising under the American *Harter Act,* and affirmed and applied by the Court of Appeal in the *Hourani* case under the present English Statute is the correct one to apply.

The question might arise whether or not we should, in this case, apply the American decisions in interpreting the word "management," as used in the *Harter Act,* in preference to English cases; but I believe, with the trial judge, and from the above synopsis of American judgments, that

(1) (1905) 196 U.S. 589, at p. 597.
(2) (1916) 236 Fed. 463.
(3) (1911) 197 Fed. 1002.
(4) (1920) 263 Fed. 559.
(5) (1925) 7 Fed. 2nd Ser. 155.
(6) (1901) 107 Fed. 146.
(7) (1903) 124 Fed. 188.
(8) (1909) 172 Fed. 1005.
(9) (1912) 199 Fed. 968.
(10) (1917) 247 Fed. 583.
(11) (1898) 171 U.S. 462.
(12) (1928) 32 Lloyd's L.L. Rep. 91.
(13) [1896] P. 10.

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the jurisprudence applicable to the facts of the present case is well settled in favour of the defendant and that, in the United States, the act of the oiler Montroy, in removing the cover or bonnet of the sea-cock, would be considered as a fault in the "management" of the ship during the voyage, as the cargo had not yet been delivered.

On the whole, I think that the appeal should be dismissed with costs.

DUFF J.—The facts as summarized in the respondent's factum are accepted by the appellants. They are in these words:

A cargo of grain belonging to the appellant was shipped from Chicago in the state of Illinois, U.S.A., under a through bill of lading dated August 1, 1927, destined for Montreal, P.Q., for transhipment at the port of Buffalo, N.Y., where it was loaded on the respondent ship on August 8, 1927, and consigned to the appellant at the port of Montreal, where the said ship arrived safely on the 11th day of August, 1927.

Shortly after the arrival of the said ship the chief engineer, in connection with the management thereof, instructed one of the oilers, named Montroy, to pump up the boilers, close the sea-cock valve off and to take certain covers off the air-pump.

The said Montroy by mistake removed the cover or bonnet off the sea-cock instead of the plates on the air-pump thus causing a sudden inrush of water into the engine room which could not be checked. In order to prevent the ship sinking at her berth in deep water, she was beached but with a bad list to port, submerging her hatches and bringing about the resultant damage to the appellant's cargo.

The rule as to the law applicable was laid down in the famous judgment of Mr. Justice Willes, speaking for the Court of Exchequer Chamber in *Lloyd* v. *Guibert* (1), in these words:

Where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

This law, as far as I know, has never been questioned in any relevant sense, and it is to be observed that the Court of Appeal had no power to over-rule a decision of the Court of Exchequer Chamber. Furthermore, these observations of Chitty J. are to the purpose, quoted from the *Missouri* case (2). He declared that the principle of *Lloyd* v. *Guibert* (1), that is to say, the principle on which the case proceeded (the law of the flag)

(1) (1865) L.R. 1 Q.B. 115. (2) (1889) 42 Ch. D. 321.

is not confined to the particular facts of that case, but is applicable and ought to be applied not merely to questions of construction, and the rights incidental to and arising out of the contract of affreightment, but to questions as to the validity of the stipulations in the contract itself * * *. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, that of the flag; and so to hold is to adopt a simple natural and consistent rule.

I am not myself, treating the subject as a pure question of fact, able to reach the conclusion that the negligence charged against the *Burlington* could be held to be a fault in navigation as distinguished from a fault in management. It seems to me that the principle laid down by the House of Lords in the *Glenochil* (1) and accepted by the Supreme Court of the United States is the sound principle. Sir Frances Jeune says:

It seems to me clear that management goes beyond navigation and far enough to take in this class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel itself.

With this the House of Lords (2), agree.

I know it is easy to criticise by analysis the distinction between the primary object and the indirect effect of acts done in order to accomplish that object, but though there may be cases in which the distinction is fine and difficult, as a rule there is not much difficulty in applying such a principle. It seems to me what was done in this case was an act directly affecting the ship and the cargo, and only indirectly the sailing of the ship, and was therefore an act of management. I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Meredith, Holden, Heward & Holden.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

(1) [1896] P. 10.

(2) (1928) 32 Lloyd's Reports 94.