1929
June 25.

QUEBEC ADMIRALTY DISTRICT

JAMES RICHARDSON AND SONS LIMITED ..... } PLAINTIFF;

v.

THE STEAMER *BURLINGTON*..... DEFENDANT.

Shipping—Bill of lading—Law of United States—International Law.

The plaintiff contracted with the defendant ship for the carriage of a cargo of wheat from Buffalo to Montreal. The plaintiff was an American, the ship was an American ship, and the contract was made in the United States. The defendant alleged that the contract or bill of

(1) (1902) A.C. 422, at 427.

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lading was issued subject to an Act of Congress of the United States known as the Harter Act, the terms and conditions of which applied to and formed part of such contract, while the plaintiff alleged that as this Act was not referred to or made part of the contract it did not apply.

Held,—That, under the circumstances, the obligations of the parties under this contract were governed by the laws of the United States.

2. That under the laws of the United States the Harter Act did not need to be referred to in the bill of lading to become binding on the parties and that the said Act is to be applied in this case.

3. The bulkhead of the *B.* was watertight up to the main deck, which was 17½ feet above the keel.

Held,—That, as the *B's* draught was 13 feet 11 inches and had a freeboard of 3 feet 7 inches above water line, she was seaworthy for the voyage in question.

ACTION by consignees of certain cargo of grain against the defendant ship for loss and damage to the cargo whilst on the ship.

The action was tried by the Honourable Mr. Justice Demers at Montreal.

A. R. Holden, K.C., for plaintiff.

Errol M. McDougall, K.C., and *C. Russell McKenzie* for the defendant.

The facts are stated in the reasons for judgment.

DEMERS L.J.A., now (June 25, 1929), delivered judgment.

This is a claim of $100,000 loss of and damage to a cargo of grain which the defendant steamer *Burlington* had undertaken to transport from Buffalo to Montreal, in the month of August, 1927, which cargo belonged to the consignee, the plaintiff in this cause.

The loss and damage are not denied.

The plea is—

That shortly after arrival of the said ship, the Chief Engineer 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;

That the said Montroy by mistake removed the cover or bonnet off the seacock thus admitting water into the said defendant ship;

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That the water so admitted into the said defendant ship caused the ship to list and placed her in grave danger of stranding;

That shortly thereafter on the said date the said defendant ship was beached at the Guard Pier at the Port of Montreal with a severe list to port;

That at the commencement of the said voyage and prior thereto and during all stages thereof, the defendant ship, the said SS. *Burlington,* was, in all respects, seaworthy and properly manned, equipped and supplied;

That the owners of the said SS. *Burlington* at the commencement of the said voyage and prior thereto and during all stages thereof from Buffalo to Montreal exercised due diligence to make the said vessel, in all respects, seaworthy and properly manned, equipped and supplied;

That any contract of carriage or affreightment and any Bill of Lading if issued to the plaintiffs or owners of the said cargo, covering the carriage of the said cargo from Buffalo to Montreal, was issued subject to an Act of Congress of the United States of America approved on the 13th day of February, 1893, and entitled "An Act relating to navigation of vessels, Bills of Lading—" and commonly known as the "Harter Act," the terms and conditions of which Harter Act apply to and form part of any such contract of carriage or affreightment, or Bill of Lading;

That the said mentioned Act of Congress enacted as Section 3 thereof as follows:

> Section 3. That if the owner of any vessel transporting merchandise or property 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 or owners, 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;* nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

That the casualty, loss or damage alleged in the Plaintiff's Statement of Claim was caused and attributable to a fault or error in navigation or in the management of the SS. *Burlington.*

The decision in this case involves questions of law and questions of facts to which the lawyers of both parties have given the best consideration.

The first question to decide is a question of International Law: is this case governed by the laws of the place where the contract was made, or is it governed by the laws of the complete performance of the contract?

The solution of this question depends upon the intention of the parties.

The general principle is that the interpretation of the contract and the extent of the obligation of the parties are generally governed by the law of the place where the contract was made.

In the contract of affreightment, the rule is to follow the law of the flag—Dicey's, 4th Edition, p. 644—and this is considered an application of the general rule.

In the contract for the carriage of goods, it is the law of the place where the contract is made and in certain cases, the law of the flag—*ibidem,* p. 649. It is only when there are special circumstances to show a different intention, that the law of the performance can be admitted.

In this case, the contract was made in the United States; the shipper was an American, and the ship is also American.

Under the circumstances, the Court arrives at the conclusion that the obligations of the parties under this contract are governed by the laws of the United States.

In its Memorandum, the plaintiff says that the Harter Act of the United States, having not been referred to or made part of the contract in question, is therefore not applicable.

It is very seldom that a contract covers every eventuality. The parties are presumed to rely on the laws of their country. A shipper and the owner of the ship are presumed to know the laws of their trade. When by these laws there is a limitation to the responsibility of the ship owner, it is implied in contracts—*ibidem,* p. 645.

Moreover, there is no doubt that, by the laws of the United States, the Harter Act does not need to be referred to in the Bill of Lading.

It has been contended by Mr. Longley, an expert witness for the plaintiff, that the Harter Act had no effect outside of the United States. He admits, p. 90:

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I know of no decision than the Irawaddy case, 171 U.S.R., p. 197 and 193, which has more clearly expressed the point made than this.

I do not find anything in that report to justify this view. The Harter Act is filed and its terms do not admit of such an interpretation, on the contrary. (See on this point 36 Cyc. p. 282.)

It has also been stated by the same witness that, though the Federal Courts have decided that Section 3 of the Harter Act applied to private carriers, he is of opinion, if that question is presented to the Supreme Court, there is a very fair chance it will be held that Section 3 of the Harter Act does not apply to a private carrier.

It is admitted that all the Federal Courts and all the Judges of this Court have agreed and had agreed at the time of the contract, that Section 3 should be applied equally to the private and common carriers.

These Courts, it is true, have been unanimous as to Sections 1 and 2, to distinguish between the two kinds of carriers, as they have been in not admitting any distinction as to Section 3.

At the moment of the contract there was jurisprudence which is presumed to be known to the contracting parties, and that jurisprudence should be followed by this Court, otherwise nothing would be sure.

The Court is of opinion that Section 3 of the Harter Act Applies in this case. (Carver, Carriage by Sea, 7th ed., p. 163, note 's'.)

There remains, then, in this case two questions of fact:—

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

Second, is the damage or loss resulting from faults or errors in navigation or in the management of the said vessel?

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 watertight to the spar deck.

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It is proved and it appears in Exhibit D-13, p. 86, 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 watertight 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 watertight to the spar deck.

In this case, the bulkhead was watertight 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 would 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.

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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 enough to affect 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.

As to the second question, to wit, is the damage or loss resulting from faults or errors in navigation or in the management of the said vessel, though I might feel inclined to have great doubts on that question if there had been no jurisprudence, the Court considers that this point is also well settled in favour of the defendant, and that the fault was a fault in the management of the ship.

Judgment will go accordingly in favour of the defendant, and the action will be dismissed with costs.

Judgment accordingly.

Solicitors for plaintiff: *Meredith, Holden, Heward & Holden.*

Solicitors for defendant: *Brown, Montgomery & McMichael.*