1932
June 29.

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

BUNGE NORTH AMERICAN GRAIN CORPORATION, AND FIRE ASSOCIATION OF PHILADELPHIA.... } PLAINTIFFS;

AND

STEAMER "SKARP" AND OWNERS.... DEFENDANTS;

AND

THE SAID DEFENDANTS..... COUNTER CLAIMANTS.

Shipping—Contract of Carriage—Law applicable—Intention of the parties —Perils of Navigation—Jurisdiction—General Average

The *S.*, a Norwegian vessel, entered into a contract of carriage with the B.N.A.G. Co., an American company, for the transport of a cargo of grain from Buffalo to Montreal. The contract was made at Buffalo and was evidenced by a bill of lading issued at Buffalo which contained a clause (the Jason Clause relating to General Average) which was necessary only under United States law. During the voyage the ship stranded twice, and cargo was damaged and salvage expenses were incurred. The strandings occurred at places which were well known by mariners to be dangerous. The plaintiffs claimed that the contract of carriage was not subject to the Harter Act (the law of the United States) and that the Law of the Flag (Norway) governed.

Held: 1. That perils of navigation are something fortuitous or unexpected and that damages which flow from the ordinary expected incidents of the voyage are not covered by the exception "perils of navigation."

2. That the law applicable to a contract depends upon the intention of the parties, and where, as in this case, a contract was made in the United States in the form there used and which had become necessary by the jurisprudence of that country, the parties will be assumed to have submitted themselves to the law of the United States regarding the responsibilities of the parties under the contract.

3. That the shipowner had exercised due diligence to make the ship seaworthy, and that the damage resulted from faults or errors in navigation, and that under the Harter Act of the United States the defendants were exempt from liability.

4. That the Exchequer Court has no jurisdiction over claims for General Average contribution, and that the defendants' counter-claim should be dismissed.

ACTION by the plaintiffs to recover $35,000 damages to their cargo of grain while in transit from Buffalo to Montreal.

The following are extracts from the bill of lading under which the cargo was shipped:—

LAKE CARRIERS' FORM GRAIN BILL OF LADING

BUFFALO, N.Y., August 30th, 1928.

Shipped, in apparent good order and condition by Western Elevating Ass'n., Inc., as agents and forwarders, for account and risk of whom it may concern, on board the Steamer Skarp, whereof..... is Master, now in the port of Buffalo and bound for Montreal, the following property as herein described, shippers' weight (weight, quality and value unknown to the undersigned), to be delivered in like good order and condition (the dangers of navigation, fire and collision excepted), as consigned herein or to his or their assigns or assignees upon paying the freight and charges as noted below.....

.....

If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred but with the Shipowner, shall contribute in General Average, and shall pay such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

The action and counter-claim were tried before the Honourable Mr. Justice Demers, Local Judge in Admiralty for the Quebec Admiralty District.

Errol Languedoc, K.C., for the plaintiffs.

R. C. Holden, K.C., for defendants.

The facts are given above and in the reasons for judgment.

DEMERS L.J.A., now (June 29, 1932), delivered the following judgment:

This is a claim for damages by the owners of the cargo and the Underwriters of the said cargo.

Plaintiffs allege that under the contract of carriage, Defendants were bound to deliver the said cargo in good order and condition at the port of Montreal; that on the 1st of September, 1928, during the course of her said voyage while rounding the breakwater at the entrance to the north channel off Johnstown, in the province of Ontario, the said vessel swung and sheered and struck heavily against the

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stone pile with her port bow and remained fast ashore; part of the cargo was discharged and approximately fifty bushels of her cargo were lost through lightering operations; that the defendant ship then proceeded on her way past Sparrowhawk Point, where she again became completely out of control, but was finally righted and some distance lower down, on the 2nd of September, after rounding Iroquois Point, she again became completely out of hand and took a violent sheer to port; she took ground hard and stranded, the said stranding resulting in the damage to the cargo.

Defendants plead first, that under the contract of carriage, which has been produced by plaintiffs, defendants were exempt from liability for loss or damage due to the dangers of navigation; that the waters in the vicinity of the places where the casualties referred to in the plaintiffs' action are alleged to have occurred, are dangerous, and vessels have frequently had difficulty and have stranded there; that any loss or damage which may have been sustained by the plaintiffs is due to the dangers of navigation.

As a second plea, they allege that the said contract of carriage was subject to all the terms, provisions and exemptions from liability contained in the United States Statute known as the Harter Act, and paragraph 16 specially; that if the loss and damage claimed by the plaintiffs were not due to the dangers of navigation, they resulted from faults or errors in navigation, or in the management of the vessel, and under the said Harter Act, the defendants are exempt from liability therefor; that by the Bill of Lading it was also so agreed in conformity with the United States practice, that in case of due diligence by the owners, in case of fault or negligence of navigation or management of the ship or unseaworthiness of the ship whether existing at the time of shipping or at the beginning of the voyage, but not discoverable by due diligence, the owners of the cargo would not be exempted from liability for contribution in General Average.

The defendants filed a counter-claim for contribution of General Average, for a sum of $4,976.34.

Plaintiffs have answered to this plea, as to the perils of navigation, that the defendants were, or should have been, well aware of the nature and risks, whatever they might be,

of the voyage from Buffalo to Montreal, and, therefore, they deny that the loss was caused by perils of navigation.

As to the second point of the defence, plaintiffs, in answer to paragraph 16, do not deny the fact alleged therein, but, on the contrary, they "pray acte of the statement therein made that the damage was due to fault or error of navigation or management of the ship and they deny that the Harter Act has any application."

As to the counter-claim, plaintiffs specially urge that it is illegal and should be dismissed for reasons of law and practice; they also deny that it was duly proved.

It was conclusively proved that there are bad currents and eddies and that all ships sheer at the North Channel and at Iroquois Point, and also at Sparrowhawk Point, and that at the last place it is not unusual or improper to reverse the engines and let them turn right around. Many vessels have difficulty at the entrance to the North Channel and at Iroquois Point, and if they do not straighten up and recover from their sheer, "It is just too bad," to use the words of Captain Barrett.

Plaintiffs' witness Pilot Lindgren, who was examined on commission, says that he handled the *Skarp* exceptionally well, except where she took her one sheer at the entrance to the North Channel; that the *Skarp* had the usual type of extension rudder, and that the ship was in a seaworthy condition, but that the ship did not answer her rudder when she happened to take her bad sheer at the entrance to the North Channel. When a ship sheers, it is because she is not answering her helm at that particular moment.

That Pilot left immediately after the first accident, and was replaced by Pilot Murphy, who is also a witness for the plaintiffs. Pilot Murphy, who appears to have no interest whatever in the case since the *Skarp* is a boat which perhaps he will never again pilot, testifies that everything about the ship was in excellent condition; that she had ample steam, and everything else she needed and the impression to be derived from his testimony is that the stranding at Iroquois Point was due to the bad currents.

The plaintiffs' own surveyor, Mr. Crocker, surveyed the ship and cargo after the North Channel stranding and examined the steering gear and extension rudder and tried out the steering gear under steam, and he testified that

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everything was in excellent condition, and this witness for the plaintiffs testified positively that he considered the vessel seaworthy. This examination was made immediately after the first stranding.

It is proved by all witnesses that the extension rudder was the ordinary extension rudder for the vessels on the lake.

As to the evidence of what took place after the accident, I consider that it should be all disregarded, and that most of it, if not all, is illegal.

As to the First Point—Perils of Navigation:

The Court is of opinion that this plea is not founded.

Perils of navigation should be something fortuitous or unexpected. Damages which flow from the ordinary expected incidents of the voyage, for example, from merely being in water or from taking the ground in the ordinary way in a tidal harbour, are not covered by the exemption "perils of navigation."

Carver, Carriage of Goods, No. 87.

Scrutton, Charter Parties, 12th Edition, p. 260.

As to the Second Point—we have to examine:

(*a*) if the Harter Act does apply; and

(*b*) if the case falls under it.

This contract was made in Buffalo on behalf of the plaintiff company, which is an American company, with the Norwegian steamer *Skarp*.

It is contended by the plaintiffs that this contract is *ruled by the law of the flag*, and they reply principally on the case of *Lloyd* v. *Guibert* which is a different case. In that case, both parties were foreigners. It was for a voyage on the high seas. Here plaintiffs repudiate the law of their country and want to apply the law of Norway for a voyage from Buffalo to Montreal.

One must admit that it is quite unnatural. The plaintiffs and their insurer had made a contract of insurance for that cargo from Fort William to Montreal via Buffalo, in which they agreed that the insurance shall cover against all damage resulting from faults or errors in navigation or in the management of the vessels, from which vessels and

their owners . . . are relieved of responsibility by the clause in Section 3 of the so-called Harter Act.

It is pretty hard to imagine that the owners had the intention, when they made this contract in Buffalo, to be ruled by the laws of Norway.

Now, let us come to the intention of the Master of the ship. He made his contract in Buffalo in the form used in the United States, a form which has been rendered necessary by American jurisprudence.

Moreover, the clause concerning General Average in this contract presupposes the Harter Act, for if the owners of the ship were responsible for the loss of the cargo due to the negligence of the pilot, there could be no contribution. Contribution presupposes necessarily that the owners of the ship are not responsible.

See Lowndes, General Average, 6th Edition, p. 35.

It being admitted by all authorities that it is always the intention of the parties which should rule the contract, I am of the opinion that this contract is ruled by the Harter Act.

In their factum, plaintiffs contend that the loss was not caused by faults or errors of navigation, but as I have said, they have admitted this fact. Defendants, by their allegation 16, said that they did, and the plaintiffs, instead of denying the fact, on the contrary say—"we pray acte of the declaration that the loss occurred by fault and negligence in navigation."

It is useless for me to say that it is a rule of our Courts, as it is a rule in England, that a fact which is not denied is admitted. If there had been only one stranding in this case, I would have considered that it was a clear case, but the fact that there were two strandings by two different pilots is, I admit, of a nature to create doubt, but when we consider that plaintiffs' own surveyer surveyed the ship after the first stranding, and testified that everything, even the rudder, was in excellent condition, and that Pilot Murphy, who would be interested, it seems to me, to say that the accident occurred by the fault of the ship, does not say so, but, on the contrary, leaves a strong impression that it was by his own want of skill or carelessness.

The plaintiffs have drawn my attention to the fact that there is a difference between the English Act of 1924 and

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the Harter Act, Section 3; but the Bill of Lading in this case, in my opinion, goes further than the Harter Act, and it is provided therein that there is no warranty of seaworthiness, but only of diligence as to the seaworthiness, as under the English Law.

Being of the opinion that the defendants have proved that they had made due diligence to make their ship seaworthy, and that the stranding is due to some fault or error of the Pilot in these very dangerous places, I have come to the conclusion that the claim of the plaintiffs should be dismissed with costs.

As to the counter-claim, after examining the authorities of both parties, I arrive at the conclusion that the Court has no jurisdiction in the matter, and though the amount of claim for average has been proved to my satisfaction, I am of opinion that this counter-claim should be dismissed with costs, but without costs of enquete.

Mayers, pp. 2 and 3; *Lowndes*, 5th ed., p. 404.

Judgment accordingly.