
BETWEEN:

BUNGE NORTH AMERICAN GRAIN CORPORATION AND FIRE ASSOCIATION OF PHILADELPHIA (PLAINTIFFS) ..... } APPELLANTS;

1932
Dec. 20.
1933
Feb. 7.

AND

STEAMER "SKARP" AND OWNERS (DEFENDANTS) ..... } RESPONDENTS.

Shipping—Contract of carriage—Law applicable thereto—Intention of Parties

The contract of carriage in question herein was made in the United States of America, both plaintiffs were United States corporations and the contract contained a clause valid and necessary according to such law, but not necessary under the Canadian or English law. Moreover, the insurance certificates issued by one of the plaintiffs contained an express reference to the Harter Act, a law of the United States which the plaintiffs now contend should not be applied.

Held, (affirming the judgment of the Local Judge in Admiralty for the Quebec Admiralty District) that, in the above circumstances, inasmuch as the intention of the parties is to govern, it must be presumed that the parties to the contract intended to be governed by the law of the United States (the Harter Act), and that such law applied.

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2. That the best criterion of what law is to be applied is to be found in the intention of the parties, and where such intention is not expressed it is to be gathered from the terms of the contract itself and from the surrounding circumstances.

3. That where a bill of lading contains special clauses, not necessary or valid under other laws, but necessary and valid under the laws of the country where the contract was made, the parties are presumed to have contracted subject to the law which gives effect to such clauses.

APPEAL by the plaintiffs herein from the decision of the Local Judge in Admiralty for the Quebec Admiralty District (1).

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Errol Languedoc, K.C., for plaintiffs.

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

The facts of this case and questions of law raised by the pleadings are stated in the reasons for judgment hereafter printed and also in the report of this case in (1932) Ex. C.R. at p. 213.

THE PRESIDENT, now (February 7, 1933), delivered the following judgment:

This is an appeal from the decision of Demers L.J.A., Quebec Admiralty District, in an action for the recovery of damages in respect of alleged damage to a cargo of grain shipped from Buffalo, N.Y., to Montreal, in August, 1928, on the respondent ship *Skarp*, of Norwegian registry. The judgment appealed from is reported in 1932 Ex. C.R. at page 213, and as all the facts are there to be found, I need not restate them.

The chief question for decision is whether it is the statute law of the United States, known as the Harter Act, or the Canadian Carriage of Goods by Sea Act, or the law of the flag of the ship *Skarp*, that applied to the contract for the carriage of the cargo of grain from Buffalo to Montreal. The learned trial judge found that it was the Harter Act that here applied.

Prima facie, the law of the country where the contract is made will govern it and decide what law was contemplated by the parties as applicable. The best criterion of

(1) (1932) Ex. C.R. 213.

what law is to be applied is to be found in the intention of the parties. If that intention is not expressed it is to be gathered from the terms of the contract itself and from all the surrounding circumstances. Where the bill of lading is exclusively a form of contract used in one country, it is strong indication that the parties intended the law of that country to apply. The authorities are also to the effect that if a bill of lading contains special clauses not necessary or valid under other laws, but necessary and valid under the laws of the country where the contract is made, the parties are presumed to have contracted subject to the law which gives effect to such clauses. *Lloyd* v. *Guibert* (1); *James Richardson & Sons Ltd.* v. *SS. Burlington* (2); *The Adriatic* (3); Leake on Contracts, 7th Ed., p. 140; *The Industrie* (4); *The Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Co.* (5); *The Missouri Steamship Co.* (6). And there are numerous other authorities to the same effect. In *Lloyd* v. *Guibert* (*supra*) the law of the flag prevailed, but the intention of the parties was admitted to be the crucial test.

The bill of lading in this case does not incorporate in any way the Harter Act, and it was not necessary that it should, but it is rather obvious from all the surrounding circumstances that it was intended by the parties that the contract was subject to the terms of the Harter Act. In the first place the contract of carriage was made in the United States. Both of the appellants are United States Corporations, one was the owner of the cargo, the other was the insurer of the cargo, and each is presumed to know its own law. The bill of lading contains a clause which is valid and necessary in the United States, but not necessary under Canadian or English law, or, so far as I know, by the law of the flag of the ship in question, and that is what is known as the Jason clause and which relates to General Average. The insurance certificates issued by the plaintiff, Fire Insurance Association of Philadelphia, contain an express reference to the Harter Act. These facts indubitably

(1) (1865) L.R. 1 Q.B. 115, at p. 123.
(2) (1929) Ex. C.R. 186; (1931) S.C.R. 76.
(3) (1931) P. 241; (L.R.).
(4) (1894) P. 58.
(5) (1883) 10 Q.B.D. 521, at pp. 528, 529 and 540.
(6) (1889) 58 L.J. Ch. 721.

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point to the conclusion that it was intended by the parties that it was the United States law that was to apply to the contract of carriage. Any other conclusion would not appear to be supported by the facts. There is nothing that suggests that it was intended that the law of the flag was to apply.

I think the owners of the ship in question exercised due diligence in making the ship in all respects " seaworthy and properly manned and equipped and supplied "; and the learned trial judge so held, and he found that the standing was due " to some fault or error of the pilot." It is not necessary I think to discuss at length this phase of the case. The reasons assigned by the learned trial judge, in his reasons for judgment, for his conclusion on this point, are I think amply sustained by the facts. The defendants are therefore, in my opinion, subject to the exemptions from liability contained in the provisions of the Harter Act.

The appeal is therefore dismissed with costs to the respondents.

Judgment accordingly.