We have attempted to state the main considerations upon which the Supreme Court will base its decision, whenever and on whichever side the decision is reached. In such a region of mingled law and politics it seems impossible to do more.

*New York, February 2, 1892.*

NOTE.

Since the preceding article was put in type, the Supreme Court has handed down a decision affirming the validity of the McKinley Act in this respect among others. The opinions are not yet at hand. Chief Justice FULLER and Mr. Justice LAMAR appear to take the view maintained here, while the rest of the Court, speaking by Mr. Justice HARLAN, consider that the President is not vested by the act with any real legislative power, but is left to ascertain that a particular fact exists. Until the opinion of the Court is handed down in full, it will be difficult to say in what cases legislative discretion may hereafter be held to be delegated. —*E. B. W.*

## HIGH COURT OF JUSTICE—PROBATE DIVISION.

## THE AUGUST.

SYLLABUS.

A German vessel, loading at Singapore for London, took on board, with other cargo, a quantity of pepper shipped by British subjects, under English bills of lading in the usual form. On the voyage, heavy weather was experienced, and the vessel put into a port of distress, both the ship and portion of the cargo being damaged. The master telegraphed to this effect to the ship's agent at Singapore, and the contents of the telegram were communicated to the various shippers, but no instructions were received by the master. Thereupon the master, acting in good faith on the best advice he could obtain, and believing it to be for the benefit of the cargo-owners, sold, with other cargo, a considerable portion of the pepper, much of which might have been reshipped, and some of which was, in fact, sent on by the purchasers in other vessels to London, where it fetched substantially the price of sound pepper.

In an action for breach of contract and conversion, brought by the plaintiffs, who were the consignees of the whole, and the purchasers of part of the pepper so sold by the master:

*Held*, that the defendants, the owners of the vessel, were not liable, as the law of the flag must be looked at to determine the propriety of the sale, and by German law the conduct of the master was justifiable.

Action for non-delivery of goods.

The facts are as stated in the syllabus.

## OPINION OF THE COURT.

SIR JAMES HANNEN, President, after stating the nature of the action, proceeded: This action is brought in respect of the pepper sold at Cape Town as damaged, it being contended further for the plaintiffs that such sale was not necessary or justifiable.

The defendants pleaded that the *August* was "a German vessel, and entitled to fly the German flag, and to all the privileges of a German ship; and that the defendants and charterers of the said ship were German subjects, resident in Germany; and that the master was a German subject; and that the charter party was a German contract; and that the contracts contained in the bills of lading for the carriage of the said pepper were made and entered into subject to German law; and that by the German law . . . the sale of the said goods was lawful and right."

The question raised by this plea was first argued before me, it being agreed that the other questions arising in the case should stand over until I had determined whether the propriety or impropriety of the conduct of the captain in selling the pepper alleged to be damaged was to be determined by English or German law.

The broad distinction suggested to exist between the English and German law on the subject under consideration is, that by the English law it is not sufficient to justify the sale of the goods at a port of refuge, that the captain acted in good faith and in the exercise of the best judgment he could form, if it should be held by the tribunal before which the question may come that there was not in fact a real necessity for the sale; whereas, by the German law, the sale will be justified if the captain, after taking the best advice he can obtain, honestly comes to the conclusion that a sale is best for the interests of the persons for whom he is called upon to act in the emergency which has arisen.

This is not given as a complete statement of the German law on the subject, but merely as an indication of the nature of its difference from the English law for the purposes of the present inquiry.

The argument for the defendants is based on the principle laid down by the Court of Exchequer Chamber in Lloyd *v.* Guibert,[1] that where the contract of affreightment does not provide otherwise, as between the parties to the contract in respect of sea damages 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.

In the very learned judgment in that case, delivered by WILLES, J., on behalf of the Exchequer Chamber, he says (p. 129): "Exceptional cases, should they arise, must be dealt with upon their merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect to sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and, therefore, most convenient to those engaged in commerce."

This subject has since been very fully considered by the Court of Appeal in the case of the Gaetano and Maria.[2] In that case goods were shipped by British subjects under a charter party made in London for the carriage of goods to England in an Italian ship. The ship put into Fayal in distress, and the master entered into a bottomry bond, by which he hypothecated the cargo as well as the ship without communicating, as he might have done, with the cargo-owners, but which, by the Italian law, he was not bound to do. The question was whether the captain was bound by the English law, by which he had no authority to bind the owners of the cargo without communicating with them; or by the Italian law, under which such communication was unnecessary.

The present Master of the Rolls, in giving judgment in that case, says (p. 146): "What is the principle which ought to govern the case? The goods are put on board an Italian ship, and the person to exercise arthority is an Ital-

[1] Law Rep., 1 Q. B., 115. [2] Law Rep., 7 P. D., 137.

ian master. Is the authority of the Italian master to depend upon the law of the country of the shipper, when the law is contrary to the law of his own country? Why should it? Is the master of the ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so. If a merchant puts his goods into the power of an Italian master on board an Italian owner's ship, what is the meaning of the transaction but that he is to deal with goods on board his ship, unless he is bound to another mode? Upon principle, it seems to me that he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary."

And after reviewing the facts of the case of Lloyd *v.* Guibert,[1] and pointing out that there the contract was one of affreightment, he continues: "Still, if the contract was there held to be a foreign contract, because it was made with regard to the shipment of goods on board a foreign ship, the principle governs this case, and would authorize our saying that the authority which arises out of the contract of shipment is the authority which the law of the country of the ship would give to the master."

And COTTON, L. J., thus states the principle applicable (p. 149): "When the owner of goods puts them on board a vessel, he must authorize the owner of that vessel, and his agent, the captain, to deal with those goods according to the law of the country to which that vessel belongs." This "rule is applicable, because no one who ships goods on board a vessel can be ignorant of the flag—that is, of the country to which the ship belongs—whilst the master would be in a very difficult position if he had to inquire what was the law of the country of the goods if, as regards one portion of the cargo, he had power to deal, when the necessity arose, in one way, and as regards another portion of the cargo in another way."

This appears to me to be binding authority in the

[1] Law Rep., 1 Q. B., 115.

present case, unless a valid distinction can be drawn between the law which is to govern the right of a master to hypothecate cargo and that applicable to his right to sell it in circumstances of emergency. I can find no such distinction, and it will have been seen that the passages I have quoted from the judgments in Lloyd *v.* Guibert[1] and the Gaetano and Maria are perfectly general, and apply with equal force to the case of a master called upon in a position of difficulty to determine whether he should sell goods as to that of one having to determine whether he should pledge them.

It was urged also for the plaintiffs that a later case in the Court of Appeal, the Chartered Mercantile Bank of India *v.* Netherlands, India, etc., Co.,[2] modified the decision in the Gaetano and Maria and supported their contention. I am of opinion, however, that it has no such effect. There is no such suggestion throughout the judgments there delivered that there was any intention to vary the law as laid down in the earlier cases I have cited. There, goods were shipped under a bill of lading containing, amongst other excepted risks, "collision." In the course of the voyage the carrying ship came into collision with another vessel belonging to the same owners, both ships being to blame. It was a question in dispute whether both were Dutch. It was held that, whether they were Dutch or not, the defendants were liable in tort for the negligence of their servants on board the ship with which the carrying vessel collided. This case does not appear to me to throw any light on the one now under consideration. It was held in that case that the contract was English, even though the ship in which the goods were carried was Dutch. Assuming that the contract in the present case was English, that does not govern the question of what law is to be applied to goods carried in a German ship, a state of facts not provided for and not contemplated by the contract having arisen. Such facts existing, we must consider what

[1] Law Rep., 1 Q. B., 115. [2] 10 Law Rep., Q. B. D., 521.

law it is just to apply to these exceptional circumstances, and, for the reasons so forcibly stated in Lloyd *v.* Guibert and in the Gaetano and Maria, it appears to me that the master of the *August* could only be expected to act in conformity with the law of his flag.

Holding, therefore, as I do, that the captain, in dealing with the damaged cargo at the port of distress, was entitled to act in accordance with German law, I proceed to consider what is the German law applicable to such a case.

(*After reviewing the German law at length, the learned judge held that it absolved the master and owners of the ship from liability for the sale, and judgment was directed for the defendants.*)

## THE LAW OF THE FLAG.

The foregoing case is the latest application of that canon of construction, commonly designated as the "law of the flag," which has been adopted by the English courts in cases involving the relations arising from a contract by charter party or bill of lading, where, either owing to the diverse nationality of the parties, or other circumstances connected with the transaction, there is no conclusive presumption as to the municipal law to which recourse must be had to determine the rights of the parties.

Mr. FOOTE, in his work on Private International Law, page 408, states that the law of the flag is "to regulate the liabilities and regulations which arise among the parties to the agreement, be it of affreightment or by hypothecation, upon this principle; that the ship-owner who sends his vessel into a foreign port gives a notice by his flag, to all who enter into contracts with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all."

While the rule, thus broadly stated, has never been judicially recognized in this country, but, on the contrary, has been repudiated when it has come before the courts for consideration, there can be no doubt but that, when a case shall arise which shall call for its application within its proper limits, the courts of this country will follow it.

*The Nature of the Rule.*—Until within a comparatively recent time the prevailing doctrine was that the recognition and enforcement of a foreign municipal law were based upon the comity prevailing among nations, and even at the present time that theory is not without its adherents. (See remarks of Judge BROWN, in the Brantford City, 29 Fed. Rep., 373. to 383.)

The current theory, however, is that the force of a foreign municipal law is in no wise due to a spirit of comity, but depends upon the intention of the parties, which, when ascertained, must be enforced as a matter of right. Considered as a foreign law, it can have no extra territorial effect, and none can be conferred by comity; but, viewed as a stipulation, which the parties to a contract have impliedly incorporated into it by submission to the law of such foreign country, it occupies precisely the same position as any other provision of the contract, and the Court which refuses to enforce such foreign law, unless it involves the violation of the public policy of the country, clearly violates the duty imposed upon it. Substantively, foreign law is exactly what it has always been regarded as a matter of procedure. It is simply a fact. It stands upon the same footing as the contract itself. It must first be shown that the parties intended to be bound by a contract, and, when that is done, the provisions of that contract must determine the rights of the parties; and so, when it is proved that the parties intended to submit to a foreign law, that law must determine their rights.

The grounds upon which a foreign municipal law is enforced and that upon which a local municipal law is enforced are identical. It is the consent of the parties in both instances which entitles the Court to give force to the law. There is this distinction, however: where no questions of public policy are concerned, it is undoubtedly true that the parties owing allegiance to the same municipality may waive the provisions of the local municipal law and provide otherwise; but such waiver must be clearly expressed, or there will be conclusive presumption that by reason of their allegiance to the government the parties have consented to be bound by the terms of the law. Where there is diverse citizenship, no such presumption can arise, and the question of the intention is an open one.

Where there is no evidence of the intention, the presumption generally is that the parties intend to submit themselves to the law of the place where the contract is made: P. & O. Co. *v.* Shand, 3 Moo. P. C. (N. S.), 272; the Montana, 129 U. S., 397; Jacobs *v.* Credit Lyonnais, 12 Q. B. D., 589. Lord MANSFIELD thus stated the law in Robinson *v.* Bland, 2 W. Black, 258 (1760): "The general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered, in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of the making of the contract) had a view to a different kingdom."

But in England, at least, the tendency is, in cases of affreightment, toward a different presumption. Mr. SCRUTTON, in his work on Charter Parties, etc., p. 11, after referring to the above rule, says: "It is submitted that, in the absence of any express indication of intention as between the parties to a contract of affreightment, there is a strong presumption in favor of the law of the ship's flag."

That this presumption is not, in England, conclusive is shown by the case of the Chartered Mercantile Bank of India *v.* the Netherlands India Steam Nav. Co., 10 Q.

B. D., 521, where an English merchant shipped goods at an English port to be carried to a Dutch port, in a ship registered in Holland and carrying the Dutch flag, belonging to a company registered in Holland and also in England as an English stock company. The bill of lading was in English. It was held in the Queen's Bench and in the Court of Appeals that these facts were sufficient to overcome any presumption in favor of the law of the flag, and showed that it was the intention of the parties to be governed by the law of England. BRETT, L. J., said: "It may be true, in one sense, to say that where the ship carries the flag of a particular country, *primâ facie* the contract made by the captain of that ship is a contract made according to the laws of the country whose flag the ship carries. But that is not conclusive."

Accepting the intentions of the parties, then, as being the crucial test of the law which applies in each particular case, it becomes evident that the law of the flag of the ship is no more than an element, to be considered in conjunction with all the other facts of the transaction in ascertaining the true intention of the parties. As to its relative weight in determining this question no inflexible rule can be established. In some instances its preponderance appears to be so great as to amount almost to a conclusive presumption. In other cases it may be outweighed entirely by the other facts.

This rule has been applied in two classes of cases: first, those involving its effect upon the authority of the master; and, second, those involving the validity of contracts of affreightment.

The first may be subdivided into those applying to the authority of the ship-owner, either by way of hypothecation or affreightment; and, second, the authority of the master over the cargo.

(1) *Effect of the Law of the Flag upon the Authority of the Master.*

(*a*) To bind ship-owner by way of hypothecation or affreightment.

The exception of bottomry bonds from the general rule, that the *lex loci contractus* prevails, seemed anomalous to the writers on the conflict of laws.

MR. MACLACHLAN, in his treatise on Merchant Shipping, published in 1860, suggested that the explanation of this might be found in applying the law of the flag of the ship. "The agency that we speak of here is devolved upon him by the law of his flag. The same law that confers this authority ascertains its limits; and the flag at the mast-head is notice to all the world of the extent of such power to bind the owners or freighters by his act" (3d ed., p. 170).

He further says: "Is the foreigner who deals in his own country with this agent bound by that law (of the flag)? First, he has notice of it, and therefore if he be, there is no injustice.

"The notice of which we have spoken is to be found in the national flag that he hoists on every sea and sails under into every port. Agents under the municipal laws, even within the bounds of municipal jurisdiction, bear no such public credentials. Moreover, his command on board, the ship's papers, and all the circumstances that connect him with the vessel, isolate the vessel in the eyes of the world, and demonstrate his relation to the owners and freighters as their agent

for a specific purpose, and with power well defined under the national maritime law" (p. 170).

This rul: was followed, in 1864, in the leading case of Lloyd *v.* Guibert, 1 Q. B., 115. In that case the plaintiff was a British subject, who had chartered a vessel carrying the French flag, at St. Thomas, a Danish West India island, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option. The ship was chartered by the master in pursuance of his general author ity. The vessel belonged to French subjects, domiciled and trading in France, and the charter party in the French language described her as French. A cargo was shipped at St. Marc for Liverpool, and the vessel sailed with it; but she was compelled to put into Fayal, a Portuguese port, in distress, and, in order to repair, the master borrowed money upon bottomry upon ship, cargo and freight. On arrival at Liverpool the ship and cargo were insufficient to pay the charge, and it fell to the cargo-owner, who claimed to be indemnified by the ship-owners.

By the laws of France there was no personal liability of the ship-owners, and the case turned upon what law was applicable. It was held by the Queen's Bench, and afterward upon appeal by the Exchequer Chamber, that neither the Danish law (the law of the place of contract) nor the law of Hayti (where cargo was loaded), nor the Portuguese law (where bottomry was given), nor the law of England (as the place of performance), were intended by the parties to apply, but that all the facts showed that they intended to submit to the law of the flag. In the Queen's Bench, BLACKBURN, J., followed directly the rule laid down by Mr. MACLACHLIN, holding that the master had no greater authority to bind the ship-owner than was conferred by the law of the ship. He said:

"We think that, as far as regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master's authority is that conferred by the law of the flag; that his mandate is contained in the law of that country, with which those who deal with him must make themselves acquainted at their peril" (33 L. J. Q. B., 248).

Upon appeal, in the Exchequer Chamber, the decision was placed upon a broader ground. After an elaborate discussion, it was held that neither the English, Portuguese or Haytien laws had any application, and that the considerations in favor of the Danish law were outweighed by those in favor of the law of the flag of the ship.

The ground of the discussion in the Court of the Queen's Bench, that of the limitation of the authority of the master, was not considered in the Exchequer Chamber, the Court being of opinion that by entering into the contract of affreightment the parties intended to be governed by the law of the ship as to all questions of sea damage. Said WILLES, J.:

"The general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce."

The same question had already been before the courts of this country, and different decisions had been rendered, none of them being exactly in accord with Lloyd *v.* Guibert.

In Pope *v.* Nickerson, 3 Story, 465, exactly the same question arose. The schooner *Anawan*, owned by citizens of Massachusetts, took on board at Malaga a cargo consigned to Philadelphia. She put into Bermuda in distress, and there the master executed bottomry upon ship, cargo and freight. The question arose whether there was any personal liability of the ship-owner. By the law of Pennsylvania, such personal liability existed, but by the laws of Massachusetts and Spain it did not exist. Judge STORY held that the law of Massachusetts, being the law of the domicile of the owners, prevailed. He said:

. . "But what I wish to rely on is the fact that the master has no power to bind the owners beyond the authority given to him by the owners; and that, from the nature of the case, the extent of that authority, is the law of the country where the ship belongs and they reside, for it is there that the authority is given, and there it is to be interpreted. If, by the law of the domicile of the ship and of the owners, the authority of the master is limited to the ship and freight, and does not, in the absence of express instructions, bind the owners personally, it seems difficult to understand how resort can be had to the law of a foreign country, unknown and unsuspected (it may be) by the owners, to expand that authority to the positive creation of personal obligations on the part of the owners, and that, too, according to the law of every successive country which the ship may visit in the course of a circuitous voyage."

In Malpica *v.* McKeown, 1 La., 249, a question arose as to the liability of the ship-owner for property on board the ship belonging to a passenger which was lost. The point was made that, as the passenger and property were taken on board at a foreign port, the law of that place, and not that of the place of residence of the ship-owner, should determine his liability. PORTER, J., said, in deciding that the *lex loci contractus* prevailed:

"We are of the opinion that the law of the place of contract, and not that of the owner's residence, must be the rule by which his obligations are to be ascertained. The *lex loci contractus* governs all agreements unless expressly excluded, or the performance is to be in another country, where different regulations prevail. What we do by another we do by ourselves; and we are unable to distinguish between the responsibility created by the owner sending his agent to contract in another country and that produced by going there and contracting himself."

The same question again arose in that State, in Arayo *v.* Currel, 1 La., 528, and a similar conclusion was reached.

MARTIN, J., said: "If this question turned on the master's having exceeded his powers, we are inclined to think that, as the general rule authorized him to bind the owner to the extent contracted for, the plaintiff who contracted with him was unaffected by a limitation in a statute of another country, of which he could not be presumed to have any knowledge, and to the authority of which he was not subject."

(*b*) To control the cargo.—This question is closely allied to the last one, and the same rule applies:

"Whoever puts his goods on board of a foreign ship to be carried, authorizes the master to deal with them according to the laws of the ship's flag, unless that authority is limited by express stipulation between the parties at the time of the agreement:" Scrutton on Charter Parties and Bills of Lading, page 11.

In the Gaetano and Maria, L. R. 7 P. D., 137 (1882), a charter party was entered into in London for the charter of an Italian ship. Goods were shipped under this contract in New York. The vessel put into Fayal in distress, and while there borrowed money upon bottomry of ship, freight and cargo, without communication with owners, as required by the law of England. In a suit upon the bottomry bond the cargo-owners defended and alleged that it was invalid, as it was made without communication. It was held that the law of Italy, which did not require communication, was applicable.

BRETT, L. J., said: "What is the principle which is to govern this case? The goods are put on board an Italian ship, and the person to exercise authority is an Italian master. Is the authority of the Italian master to depend upon the law of the country of the shipper, when that law is contrary to the law of his own country? Why should it? Is the master of a ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so. If a merchant puts his goods into the power of an Italian master, on board of an Italian owner's ship, what is the meaning of the transaction but that he is to deal with the goods as an Italian master is to be taken to deal with goods on board his ship, unless he is bound to another mode? Upon principle it seems to me that he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary."

In the Bahia, Br. & L. 38, Dr. LUSHINGTON held, in a case where cargo was shipped on board a French ship, that all questions relating to transshipment were to be determined by the law of the ship.

Although the question has not yet been determined by our courts, it seems most probable that the law of the flag would be followed to its proper limit, that is, to questions concerning the right of the master to bind the ship-owner, either by hypothecation or by implied stipulations in contracts of affreightment limiting the liability of the ship-owner, and also to all questions in reference to the power of master over cargo.

It seems, too, that questions of the right of the ship-owner to recover pro rata freight are to be governed by the law of the flag: Lowndes, on General Average, p. 229. The question was raised in Nat. Board of Underwriters *v.* Melchers, 45 Fed. Rep., 543, but its decision was unnecessary under the facts of that case.

It will be observed that in the case of Pope *v.* Chickerson, Judge STORY approached very closely to the doctrine of the "law of the flag." But to have applied that law to that case would have left the case undecided. The flag was American, but by referring to that country, owing to our peculiar sys-

tem of government, there was no uniformity in the law upon this subject, and therefore some further test was necessary.

(2) *The Effect of the Law of the Flag upon the Validity of the Contract of Affreightment.*—In the Missouri Steamship Company, 42 Ch. Div., 321 (1886), this rule was widely extended. In that case a contract was made in Boston, between an American citizen and the agent in Boston of a British steamship company, for the transportation of certain cattle in the *Missouri*, a British ship. The contract contained a provision that the company should not be liable for negligence of the master or crew. Such a provision was valid by the English law, but invalid by that of the United States and Massachusetts. The cattle were lost by the negligence of the master and crew. CHITTY, J., held that the English law, as the law of the ship, showed that it was the intention of the parties to submit to the English law. He said: "I have referred somewhat fully to this judgment (Lloyd *v.* Guibert) in order to show that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable, and ought to be applied, not merely to questions of construction arising out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinctions founded on the difference of these questions were not rested on substantial grounds, and would lead to uncertainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simple, a natural and consistent rule."

Upon appeal, however, while the decision was affirmed, the Court, evidently, did not go quite so far. Lord HALSBURY, L. C., said: "Now this is a contract for the conveyance of cattle from Boston to England by sea, on board a British ship, by a British company whose domicile is in England. These circumstances, though very strong, would, perhaps, not be conclusive. But when I look at the contract itself and find that the ordinary exceptions to the bill of lading are the Queen's enemies and so on, it is absolutely impossible to resist the conclusion that the parties did contemplate being governed by the English law in their contracting relations." The effect of the use of the words, "Queen's enemies," is shown in the principal case to mean only the enemies of the ruling power, which might have been that of America or of England. The learned judge was also of the opinion that, as one of the provisions only, and not the entire contract, was void by the law of Massachusetts, where it was made, that it would be enforced by the English courts.

In the United States directly opposite conclusions have been reached.

In the Brantford City, 29 Fed., 373, decided in D. C. U. S., S. D. of N. Y., in 1886, the facts were almost identical with those in the *Missouri*. Judge BROWN held that the law of the United States should prevail. It may be doubtful whether the point was actually involved in that case, as the facts tend to show that the proximate cause of the damage was the defective

fittings of the steamship, amounting to unseaworthiness, which was not one of the exceptions of the bill of lading: Steel *v.* State Line S. S. Co., 3 App. Cases, 72; the Huaji, 16 Fed. Rep., 861; Tattersall *v.* Steamship Co., L. R., 12 Q. B. D., 297. Referring to the law of the flag, he says: "The 'law of the flag,' so called, which, it is urged, should govern this case, does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs and whose flag she bears, whether it accords with the general maritime law or not. In so far, however, as the law of the flag does not represent the general maritime law, it is but the municipal law of the ship's home."

In the Titania, 19 Fed. Rep., 101 (1883), the same judge held that in the case of a shipment from Dundee to New York, on board a British vessel, the English law should govern in respect to damages upon the high seas. He said: "The shipment being made in England, and upon an English vessel, the law of the flag should govern." In the Oranmore, 24 Fed., 922, there was an express provision that any question under the bill of lading should be determined by the English law. In the District Court of U. S., D. of Maryland, Judge MORRIS held that the English law should govern. Considering that case in connection with the decisions of the courts of this country, "it is questionable whether there was not merely an attempt to evade the decisions in reference to liability for negligence. But the question was not raised.

This question came before the Supreme Court of the United States in the Liverpool and Great Western Steam Co. *v.* Phœnix Insurance Co., 129 U. S., 397 (1889) (the Montana). There, a contract was entered into in New York by a resident of New York with the agent of a British company for carriage of certain property to Liverpool. The bill of lading contained the usual clause, exempting the company from negligence of master and crew. The property was shipped on the *Montana*, carrying the English flag, which was lost through the negligence of the master and crew.

The Court held that the law of this country, as the *lex loci contractus*, must prevail, and that the exemption clause was invalid.

Mr. Justice GRAY said: "This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

An examination of these cases demonstrates that the American courts will not, from the mere fact that goods were shipped on an English vessel, assume that the contract is an English one.

The question is not free from

doubt, and it is probable that patriotic motives had some effect in both cases.

In some respects the American rule, to prefer the *lex loci contractus*, seems to have more to support it. Take the following case:

If goods should be shipped at an English port in an American ship, under a contract made with ship's agent at that place, and incorporated into the bill of lading was the clause that the owner should not be liable for negligence of master and crew, it does not seem probable that the English courts would hold that the shipment of the goods on the American vessel would make the contract an American one. They would probably discover some facts to show that it was the intention of the parties to submit to the English law.

Upon principle, the case of the *Missouri* appears to be in conflict with other English cases.

In P. & O. *v.* Shand, 3 Moo. P. C. (N. S.), 272; 12 L. T. N. S., 808 (1865), the plaintiff paid one entire sum for his passage from England to Mauritius by a ship of the defendant company, and signed a ticket stating that he accepted the conditions printed thereon, one of which was that the company would not be responsible for loss of the luggage of the passengers. Some of the plaintiff's luggage was last seen at Suez, in the company's possession, and was not afterward to be found. In an action to recover its value, the Supreme Court of Mauritius held that the French law, which there prevailed, should govern. Upon appeal, the Privy Council reversed that Court's holding that the liability of the company was to be determined by the law of England, as the *lex loci contractus*. TURNER, L. J., said: "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation and interpretation. The parties to a contract are either the subjects to the power there ruling or, as temporary residents, owe it a temporary allegience; in either case, equally they must be understood to submit to the law there prevailing, and to agree to its action upon the contract."

In the recent case of Jacobs *v.* Credit Lyonnais, L. R. 12 Q. B. D., 589, the defendants, a London firm, contracted in London to sell to the plaintiffs, London merchants, a quantity of Algerian exports, to be shipped by a French company at an Algerian port, on board vessels to be provided by the plaintiffs in London. The contract also contained provisions in regard to shipment by steamer from Algiers, and the plaintiffs were required to approve and accept the exports as put on board in that country.

In the Court of Appeals, BOWEN, L. J., remarks: "Certain presumptions or rules in this respect have been laid down by judicial writers of different countries and accepted by the courts, based upon common sense, upon business convenience, and upon the comity of nations; but they are only presumptions or *prima-facie* rules that are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of the country where the contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties.

"Again, it may be that the contract is partly to be performed in

one place and partly in another. In such a case, the only certain guide is to be found in applying sound ideas of business, convenience and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties.

"Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by the English law, or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to the English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which, in modern times, we have to deal."

The rule suggested by Mr. Carver (Carriers, page 218), that where there is a division of carriage the parties may intend to be bound by one law as to one part and another law as to another part, does not seem to solve this question.

He puts the following case: "An agreement is made between Americans for the carriage of cotton, under a through bill of lading, from a place inland in the United States to England, say by rail to Philadelphia, and thence by steamer belonging to an English line. It may well be supposed that the law of the flag was meant to govern the contract as to the latter part of the transit, although as to the first part there would be little doubt that the American law would determine its effect."

Change the facts of this case slightly, and supply, instead of an English line of steamships, a line composed of American and English ships. How can there be any presumption of the intention that the law of the flag was intended to govern in such a case?

The shipper at the inland point does not know whether his cotton will be carried on an English or an American ship.

It certainly is not true that a stipulation in a bill of lading, that the ship-owner shall not be liable for the negligence of the master and crew, is to be void or valid by the fact that the cotton is shipped on the American or English ship, a fact of which the shipper has no knowledge whatever.

The *lex loci contractus* has better support. In a contract for carriage the agreement is made at one place for delivery in another. It is evident that the customs of the place of delivery must govern the manner of delivery. That would seem to be the only application of the law of that place. Generally, the manner of carriage is an immaterial question and does not affect the contract.

Two facts only are of importance—the delivery of the goods to the carrier, and the delivery by the carrier to the consignee. The method of carriage is, generally speaking, immaterial. If there is right delivery the law is satisfied. Why, then, should an immaterial fact determine the relations of the parties to the contract and decide whether a provision of the contract is valid or invalid?

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