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THE ADOPTION OF A UNIFORM BILL OF LADING BY INTERNATIONAL CONFERENCE.

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The subject of the adoption of a uniform bill of lading in the foreign commerce of the United States will become the subject of legislation in the next Congress.

A bill was directed to be reported favorably by the Committee on Commerce of the House of Representatives containing certain essential features which concern the great shipping interest connected with the trade of the United States. Its effect must be serious to other interests than those of the owners of shipping.

Its provisions substantially are that no bill of lading shall be issued for ocean commerce which contains any exception of liability of the owner for negligence of their servants in navigation under the terms "care in transport" and authorizes the collectors of the port to refuse clearance to vessels when they are satisfied that bills of lading have been issued which are not in conformity with the provisions of the Act, or when the master or vessel's

agents refuse to issue bills of lading unless containing such exceptions.

The state of the law in the Federal courts in respect to this is still undefined. The rule of the Federal courts which refuses to enforce an agreement for such an exemption for negligence to carriers by land was extended also to carriers by water in the case of Liverpool & London & Globe Insurance Company *v.* Phœnix Insurance Company.[1]

That case, however, did not decide the question which was attempted to be raised—*i.e.*, That such contracts when made by owners of foreign vessels in the United States for shipment to foreign ports were, in case of a conflict of law, to be enforced according to the law of the vessel's nation or that of the country of the destination of the vessel where the voyage terminates.

In that case known as "The Montana" the contracts were for shipments from New York to England by an English vessel, but on the face of the contract itself it did not appear that the shippers had notice that the shipments were to be made by other than American vessels, and the rule of law was stated to be that the contract was presumably made under the law of the place (*i.e.*, of the United States), in the absence of any evidence to show that the parties contracted with reference to any other law. It was admitted that parties to a contract substantially to be performed elsewhere might frame their contract with reference to the foreign law, and that when such intention is manifest the foreign law will control the contract. It was only decided in that case as it was presented; that there was no evidence to show that the shippers had entered into a contract otherwise than as an American one, and it was therefore held to be subject solely to the rule of the American law as applied in the Federal courts, which refuses to recognize the validity of the exception from negligence in navigation which was found to have caused the loss.

The same question precisely came before the English Court of Appeals, which withheld the delivery of its judg-

[1] 129 U.S., 397.

ment until the case had been passed upon by the Supreme Court of the United States. That Court came to a precisely different result; holding that when the terms of such a contract of shipment to a foreign country contained stipulations which were valid according to the law of the place of destination and were otherwise under that of the place of contract or shipment, the parties were presumed to have contracted in reference to the law of the place of ultimate destination and not to that of the place of contract. This was the case *in re* Missouri.[1]

It is to be observed that in neither of these cases did the courts regard the fact that the shipments were made by a foreign vessel as one materially affecting the result.

The Supreme Court considered it a question not before the Court and reserved any opinion as to what their judgment would have been if the shipper had known that the contract was for transportation by an English vessel. The English Court of Appeals while adverting to the fact of the shipment being made by an English vessel does not seem to have considered that circumstance to be one which materially affected their judgment.

The attempt of text-book writers[2] to treat the law of the nation of a carrying vessel as that which presumably controls contracts of transportation by vessel, where a conflict of law arises, received very little countenance in these cases.[3] Such a rule has been very properly applied in cases of marine disaster, where exceptional duties to the owners of the cargo, arising out of the law of agency created by necessity, are thrown upon the master; but there seems to be very little ground for applying it to contracts made by the owners themselves. Such contracts made at foreign ports are usually entered into by agents, who practically represent the owners themselves. The

[1] 42 Ch. Div., 320.

[2] Carver on Carriage by Sea, S. 200. Machlachlan Merch. Shipping, p. 161 (2 ed.).

[3] Although supported by the words of WILLES, J., in his opinion delivered in Lloyd *v.* Guibert, L. R. 1, Q. B. 115.

powers and duties of such agents are defined by the ordinary law of agency; their contracts are construed in case of the conflict of laws in the same manner as if the owner was present and acting in person.

While in the case of maritime disaster, when the master becomes the agent *ex necessitate* of the owners of the cargo to preserve their interests, the only rule of conduct which the master of the vessel can safely follow in relation to the cargo, is that directed by the law of the vessel's nation, which he is presumed to know,[1] no reason appears to exist for the application to contracts for carriage by sea made by the owners themselves or their resident agent in foreign countries of any rule other than the usual one as to the enforcement of all contracts in case of a conflict of laws.

As it appears that the rules of all the maritime nations, whose vessels are the principal carriers in the foreign trade of the United States, permit such exemption for negligence in navigation, provided the vessel is seaworthy for the purposes of the voyage, which state of seaworthiness includes the furnishing of a competent master and crew; it is not probable that if the validity of such contracts is supported when made by owners of foreign ships that the same claim of exemption from liability will be refused by American courts in contracts made by owners of American vessels; otherwise such American vessels would be employed at a disadvantage in competition with foreign-owned vessels in the trade of the United States and elsewhere, as the party suffering loss will follow and enforce his claim against the vessel in her home port where the law is most favorable for the shipper.

Since the bills of lading which were the subject of the case of "The Montana" were issued, a form of bill of lading for the Atlantic foreign trade of the United States has been adopted and put into effect. It is known as "The Produce Exchange Bill of Lading," and it contains

[1] The Gaetano and Maria, 7 Prob. Div., 137. Lloyd *v.* Guibert *ante*. The Woodland, 14; Blatch, 499.

a similar exemption from "liability for loss occasioned by the negligence of the master and mariner and other servants of the shipowner in navigation, provided such damage is not caused by the fault of the shipowners or the ship's husband or manager." This bill of lading was prepared by a committee representing the steamship lines trading out of New York and of the Produce Exchange of New York. It was in effect at the time when that cause was argued, although adopted after the bills of lading in the case of the Montana were issued, but the attention of the Court was not called to it. It was completed after much consultation and deliberation. Each of the clauses was carefully considered before final adoption. It received also the formal approval of the Produce Exchange at Chicago. This form of contract is adopted in the through bill of lading, issued by the Trunk Lines for shipments from interior points in the United States to Europe, in that part relating to the ocean transport.[1]

Previously to the adoption of this bill of lading the contracts of carriers by sea were such as each chose to adopt for itself. They had grown to be long and cumbersome documents and contained many clauses which were objectionable to the shippers, and they were drawn in reference to the laws of different nations and the customs of different ports. The Society for the Codification of the Law of Nations has taken up the subject, and in 1887, at a meeting of the association in London, adopted a resolution as follows:

"That the principle of the common form of bill of lading should be this: That the shipowner, whether by steam or sailing ship, should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage, such as the stowage and right delivery of the cargo and other matters of this kind; but, on the other hand, the shipowner should be exempt from liability for everything which comes under the head of 'accidents of navigation,' even though the loss from these may be in-

[1] Report of The American Bar Association for 1889, p. 339.

directly attributable to some fault or neglect of the crew."

The form, finally adopted by the committee referred to, has the merit of simplicity and precision of language in the various clauses.

The Produce Exchange Bill of Lading is in accord with that recommended; it is believed to have successfully stood the scrutiny of the trade for upward of eight years. In adopting this bill of lading both sides were represented by competent persons, and it was conceded that the rule of the maritime nations allowing exemption for negligence in navigation, was one which should be conceded the owners of vessels who could not control or remove their agents after a voyage is commenced. In this respect the shipowner is unlike the carrier by land. Navigation is necessarily conducted by the owner's agents in his absence. It is to be remembered, also, that questions as to the liability of sea carriers are almost always between the latter and the under writers of cargo, who, through the different boards of surveyors, know the grade of the vessels whose cargoes they insure. Whatever may be the protection which the owner of cargo can obtain from the liability of the ship owner, he, nevertheless, habitually insures; he looks for immediate indemnity for any loss which may be consequent on the peril of the sea to his insurers who are liable, directly to him, for a loss by sea damage, although such loss was incurred by reason of the fault of the shipowner's servants. The claims on the ship owners will, almost universally, be found to be those by the underwriters of cargo, arising out of substitution to that of the shipper on the payment of the insured loss by the insurers, who, of late years, attempt to obtain indemnity from the ship owner for a part of the risk—which they are paid to assume. And the real question as to losses arising from negligence in navigation by the shipowner's servants is, whether they are such as should be borne by the underwriters or by the shipowner.

The rule which forbids the common carrier by land in the United States to contract for exemption from liability for the negligence of his servants, is put on the ground of

public policy. Public policy would seem to be a very unstable ground for the courts to stand upon. "It is a very unruly horse, and when you once get astride of it, you never know where it will carry you."[1]

Like the rule of "sound decretion," it is one, which the late Mr. Justice GRIER aptly said, was more fit for the Hall of the Cadi than for the judgment-seat of the Court.[2]

The circumstances under which the Produce Exchange Bill of Lading for sea transportation was adopted, would seem to exclude any such ruling as that it is a document which the courts will refuse to enforce for reasons of public policy. No body of men could be found more competent to form a judgment as to the good policy of allowing such exemption to carriers than that which gave its assent to this form of bill of lading, which casts the burden of all losses by sea peril, in case of a seaworthy vessel, furnished with a competent crew, upon the insurers of the cargo on board of the vessel. Considerations of the highest policy would require the courts to sustain and support the validity of this exception. A shipowner, whether a common carrier or otherwise, is a volunteer in the sense that he can retire from the business, or any particular trade, at his will. A corporation of shipowners, unlike that owning a railroad, holds no duty to the public, except as long as it may be to its interest to serve the same. The shipowner, therefore, must be indemnified against any increased risks by an increase in rates of freight; and every rule of contract, which increases the liability of the shipowner, eventually works to the disadvantage of the exporter from the United States, wherever he comes in competition with exporters of other countries. The bill introduced into Congress makes this risk of navigation one which the shipowners cannot escape by contract, and a liability which he must assume even in relief of the insurers of the shipper. It is impossible that this insistence on an extreme liability, from which, in other trades, the

[1] Burroughs in Richardson *v.* Mellish, 2 Bing., 242-9, etc.

[2] The Conestoga, 2 Wall. Jr., 124.

vessels are exempt, will not affect the employment of vessels in the export trade of the United States. Vessel owners necessarily would give preference to charter parties for the employment of their vessels in those trades where their liability would be less than that of the United States. It is impossible to believe that the large and intelligent class of shipowners, represented as they now are by protective associations which carefully scan their contracts by charter party, will not discrimate in favor of the employment of their vessels in other trades, than in that of the United States. So that it would work to the disadvantage of the shippers of produce from this country, and in favor of their competitors in trade in the exportation of grains and provisions from Australia, India and the Black Sea.

In the report of the Committee of the House of Representatives a stricture was made in emphatic terms on clauses in the bills of lading which had reference to the foreign law. The through bill of lading was drawn so as to be adapted to shipments by vessels of different nationalities after arrival at the port of shipment in the United States. The English shipowners contended that the contract would be governed as to British vessels by what is termed as the law of the flag. The owners of the lines of steamers to the continent of Europe and of the few American vessels in the foreign trade thought that it would be governed by the law of the port of destination. The two clauses were drawn with reference to this difference of view. It must have been a misconception of the subject which led to the remark that such contract was humiliating to an American citizen. That men may contract in this or any other country according to the law prevailing in the place of performance cannot be discussed. A country or court which should refuse to countenance such contracts in a proper case would make commercial intercourse so difficult as to restrict it to the narrowest limits, and one of the most enlightened branches of the law—namely, that of the Conflict of Laws, which is the private international law of

the world—would cease to be a part of the commercial law of the United States.[1]

A mistaken opinion is expressed in the report of the Committee in favor of the bill, when it says that the carrying trade of the United States is a monoply in the hands of certain corporations of shipowners. The most superficial examination will show that the carrying trade of the world is principally done by that class of vessels designated as tramps, which do not trade from any one country or port. The vessels whose names are most familiar to the public derive their principal business from their passenger trade. The carrying capacity of the swift steamers is small, and is only an adjunct to their other business. The real carriers are the tramps, which are bound to no line, and have no connection with any particular ports. They seek business wherever its conditions are most profitable. It is the competition for the trade of the United States by these vessels, which keeps down the rates of freight. Business relations, other than the carrying of freight, may compel the owners of the principal steam lines to continue their business, notwithstanding the increased burden which this Act of Congress would put upon them in their freighting business. The ordinary freighting vessel would seek employment in the ports of those countries where the conditions of the contract of carriage are least onerous.

The result, therefore, of such legislation is adverse to the American farmer and planter wherever he comes in competition with foreign producers for the trade of the world.

The power given to the collectors of the port to deny clearance to vessels wherever in the opinion of such collectors the bills of lading issued are not in conformity with the provisions of the Act, reposes a power in those officials

[1] A most emphatic statement of the duty of courts to enforce the foreign law, not of comity but of right, will be found in the opinion of Judge CHRISTIANCY, in Thompson *v.* Waters, 25 Mich., 214; see also Wharton's "Conflict of Laws," Sec. 1.

which the owners of no other class of property would voluntarily subject themselves to.

It would entail a very heavy responsibility on these officers and their bondsmen, and it is a power over others so great and so capable of abuse as cannot safely be trusted to officials of any grade.

Contracts of carriage by sea cannot be made entirely uniform for every trade. There must always be certain variations in the contracts of affreightment of vessels whose destination is to different countries, and a different form of contract will be found to exist for shipment of ores, fruits, oil, grain and cotton. In the various clauses which must be introduced in charter parties of vessels having reference to the trade in which they are employed, it would not be difficult to find clauses, the terms of which might be considered inconsistent with provisions of the Act. The terms of the bill of lading must conform with the contract of the charter parties. Such contracts are made months ahead of the arrival of the vessels in this country and while they are in distant seas. By far the largest part of the trade of the United States to Europe is conducted under such charter parties, which to a certain extent are speculative in their character. By such charter parties so effected the charterer or hirer of the whole capacity of the vessel contracts with the shipper, and the master can sign no bill of lading except in conformity with those charters which uniformly contain this exception of liability.[1] Difficulties must result from the attempt to attach to the trade of this country the provisions of an Act which applies solely to this country, accompanied by a provision so stringent as that which allows a collector of a port to detain a loaded vessel and possibly break up a voyage for want of compliance with the terms of this Act. Trade is said to be like the sensitive plant, "touch it and it shrinks, press it and it dies." Even difficult port regulations militate against the trade of the port which impose them. What injury to the

[1] Gracie *v.* Palmer, 8 Wheat, 605; Rodomachi *v.* Milburn, 17, 2 B. Div., p. 316.

trade of the United States may not be anticipated from the objections of shipowners to subjecting their vessel property to the control of a collector of a port, who has the right to construe the contract of a vessel's bill of lading and to enforce his views by denying a clearance to the vessel whenever in his opinion the bill of lading is not consistent with the provisions of this Act? Delay in the clearance of the vessel may defeat contracts of sale based upon monthly shipments, and the liability which the shipowner will incur may be extreme.

For these reasons it appears inadvisable that such restraint on the power of contract in the foreign carrying trade of the United States should be imposed by legislation without a general concurrence on the part of other nations; and it seems only reasonable that the interpretation and enforcement of such contracts should be left to the courts alone until some general agreement shall be arrived at by international conference leading to the adoption of a uniform limit of liability of vessel owners in contracts of carriage by sea.

The subject is as important as that of the rules of the road which led to the conference at Washington of representatives of all maritime nations, where uniformity in sailing rules was adopted. The liability of carriers for the sea risk should be uniform in all trades using the pathway of the sea. Restriction of the freedom of contract or imposition of liability upon carriers in the trade of one single nation will inevitably be detrimental in its results to the interest of that nation.

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