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THE WATER-CARRIAGE OF GOODS ACT.

(9-10 *Edward VII. chap.* 61. *Canada.*)

I. Introductory.

The Parliament of Canada, at its last session, enacted The Water-Carriage of Goods Act, which will have an important influence on the future relations of shipowners and shippers, in respect to goods shipped from Canadian ports. It came into force on the first of September, 1910.

The Act effects a serious change in the law, in prohibiting and declaring void certain clauses in bills of lading, in respect of shipments affected by the Act, whereby the shipowner seeks to relieve himself from liability for the negligence of himself and those for whom he is responsible. It further defines and limits the respective rights and responsibilities of both parties to the contract, in a manner not hitherto attempted in Canada.

This legislation is based on the Act of Congress of the United States, commonly known as the "Harter Act," enacted in 1893, and on a somewhat similar Act of the Parliament of the Commonwealth of Australia, enacted in 1904. In fact, the Canadian bill, which matured into the present Act, was originally drafted upon the lines of the Australian legislation, but was modified in Committee, for the alleged purpose of placing Canadian shippers in a similar position to that of their United States competitors, under the Harter Act.

Legislation of a like character has, also, been enacted in New Zealand.

Previous Canadian legislation in respect to liability of carriers by water is contained in Part XVII. of The Canada Shipping Act.[1] This part applies to goods of any kind and deals with the responsibility of the carrier therefor. It is not stated whether it extends to contracts for the carriage of goods from Canadian to foreign ports as well as to Canadian registered vessels and Canadian coasting trade, or not; but it was probably intended that this part should have general application to all contracts of carriage by water made in Canada, and it would

1. R.S.C., c. 113, ss. 961 to 996 inc.

have that effect, inasmuch as they apparently are not repugnant to the provisions of any Imperial statute.[2]

Part XVII. of The Canada Shipping Act is not referred to in The Water-Carriage of Goods Act, either by a repealing clause or otherwise. Consequently The Canada Shipping Act is affected by the recent Act, only in so far as it is inconsistent with and repugnant to any of the provisions of the latter. In other words, The Canada Shipping Act must be read with The Water-Carriage of Goods Act, to the extent that one may be consistent with the other. In the event of inconsistency, the new Act must govern.[3]

II. Application and Scope of the New Act.

1. *As to goods.*—Section 2 provides:—

2. In this Act, unless the context otherwise requires:—

(*a*) "goods" includes goods, wares, merchandise, and articles of any kind whatsoever, but does not include live animals;

(*b*) "ship" includes every description of vessel used in navigation not propelled by oars;

(*c*) "port" means a place where ships may discharge or load cargo.

This section is not found in the Harter Act. It appears from it that the Act applies to all goods and articles of any kind, except live animals. The Canada Shipping Act applies to "goods, wares or merchandise and articles of any kind whatsoever," without exception. The Harter Act applies to live animals, except section 1, excluding the contracts limiting liability for negligence, and section 4, imposing a duty to issue a bill of lading in accordance with the Act.

2. *As to ships.*—Section 3 provides:—

3. This Act applies to ships carrying goods from any port in Canada to any other port in Canada, or from any port in Canada to any port outside of Canada, and to goods carried by such ships, or received to be carried by such ships.

2. Colonial Laws Validity Act, 28-29 Vict. (Imp.), c. 63, ss. 2 and 3.
3. Maxwell, Statutes, p. 233.

The declaration in this section that the Act applies also to the carriage of goods "from any port in Canada to any port outside of Canada" is not found in The Canada Shipping Act provisions, but the section does not go so far as section 1 of the Harter Act, which applies that Act as well to all ships carrying goods *to* the United States from any foreign port. The broad application of the Harter Act in this respect has resulted in practically every line, transporting goods between American and foreign ports, incorporating the Harter Act in their respective bills of lading.

A discussion occurred, while the bill was before the Committee of the Senate, as to whether the new Act would apply to the carriage of goods, which originated in the United States, on a through bill of lading executed there and shipped from a Canadian port. It was considered that it would so apply. Section 3, applying the Act, as it does, to ships carrying goods from any port in Canada would appear to be broad enough to cover the point, particularly in view of the definition of the term "port" in section 2 (c). The Harter Act would not apply to such a shipment, though originating in the United States, inasmuch as it would not be the "transportation of merchandise or property from and between ports of the United States and foreign ports."[4] There would, therefore, be no conflict of law in this respect.

3. *In general.*—It has been held that the Harter Act does not apply as between charterer and shipowner;[5] nor to the relations of one ship to another, particularly in respect to collisions;[6] nor to passengers and their baggage.[7] It is possible that this jurisprudence would be followed by our own and the English courts.

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4. Harter Act, s. 1.

5. *Golcar SS. Co.* v. *Tweedie Co.* (1906) 146 Fed. Rep. 563.

6. *The North Star* (1882) 106 U.S. 17; *The Manitoba* (1895) 122 U.S. 97.

7. *The Rosendale* (1898) 88 Fed. 324; *The Kensington* (1899) 94 Fed. Rep. 885; also (1902) 183 U.S. 263; *La Bourgogne* (1906) 144 Fed. Rep. 781 (C.C.A.).

4. *Constitutionality.*—It was argued before the Committee of the Senate that the Act might be ultra vires of the Dominion Parliament, in so far as it applied to the carriage of goods from a Canadian to a foreign port, upon the ground that section 91, paragraph 15, of the British North America Act, in authorizing Parliament to legislate respecting "Navigation and Shipping," did not permit it to legislate respecting the carriage of goods beyond the limits of Canada. The question was not seriously considered by the Senate Committee. It was considered that Parliament had jurisdiction.

The Merchant Shipping Act of England is, of course, in force in Canada, and applies to British ships trading therewith. That Act deals with the "Liability of Shipowners" in sections 502 to 509 inclusive, and these sections, unless the context otherwise requires, extend to the whole of His Majesty's dominions.[8] They would not apply, however, to Canadian registered vessels, if repealed by a Canadian Act.[9]

Section 2 of the Colonial Laws Validity Act, 1865,[10] provides that, "Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."[11]

The Parliament of Canada has power, under the British North America Act, to legislate respecting "Trade and Commerce" and "Navigation and Shipping." Although the power to legislate respecting trade and commerce is limited, it may fairly be said to extend to all matters of trade and commerce, in

8. Id., s. 509.
9. Section 735.
10. 28-29 Vict. Imp., c. 63.
11. Cr. Code, s. 589, as to offences in Canada against Imperial statutes.

connection with any of the matters specifically referred to Parliament, such as navigation and shipping.[12]

From the above, therefore, it may be contended that the Parliament of Canada has jurisdiction in respect to a contract for the carriage of goods by sea from a Canadian port to a port without Canada, in so far as (respecting British ships) its enactments are not repugnant to the provisions of The Merchants Shipping Act, or any other Act of the Imperial Parliament.

From careful reading of sections 502 to 509 inclusive of The Merchants Shipping Act, it will not appear that there is anything in the new Act repugnant to these sections. The effect of section 502 will have further consideration in conjunction with section 7 of the new Act.

5. *Recognition of the Act by courts without Canada.*—Upon the principle that a contract is governed by the law of the place where it is made, provided the intention of the parties thereto to the contrary does not appear, and particularly if the provisions of such law are incorporated in the contract, the English courts would, in suits taken in England, apply the provisions of the Act to bills of lading issued under the Act.[13]

Upon these principles the exceptions and limitations of the Harter Act have been applied by the English courts.[14] There is no reason to doubt that this jurisprudence would be followed in respect to the Canadian Act.

Section 4 will be considered with sections 6 and 7.

6. *Section 5 considered.*—This section enacts that:—

> **5.** Every bill of lading, or similar document of title to goods, relating to the carriage of goods from any place in Canada to any place outside of Canada shall contain a clause to the effect that the shipment is subject to all the terms and provisions of, and all the exemptions from liability contained

12. *Parson's Case* (1881) 7 App. Cas. 796, 51 L.J.C. 11; *Tennant* v. *Union Bank of Canada*, L.R. (1894) A.C. 31.

13. Carver, Carriage by Sea, s. 201 et seq.

14. *McFadden* v. *Blue Star Line*, 74 L.J.K.B. 423; (1905) 1 K.B. 697; *The Glenochil* (1895) 65 L.J., p. 1 (1896) Prob. 10; *The Rodney* (1900) P. 112, 69 L.J., p. 29.

in, this Act; and any stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

This section is not to be found in the Harter Act; but it has become the almost universal custom to incorporate the Harter Act in bills of lading for the carriage of goods to and from the United States.

Section 5 only requires that a clause to the effect that "the shipment is subject to all the terms and provisions of and all the exceptions from liability contained in this Act" should be inserted in the bill for the carriage of goods to any place outside of Canada and will, therefore, not apply to Canadian coasting trade. The purpose of incorporating the Act into the contract is, no doubt, to cause foreign courts to apply its provisions.

The second part of section 5, declaring void a stipulation or agreement "to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada, in respect of a bill of lading or document," is possibly prompted by the clause found in many bills of lading, particularly English bills, giving exclusive jurisdiction to courts without Canada, in respect to any dispute between the interested parties, and, at times, stipulating that all such disputes be determined by British or some foreign law. Our courts have dealt with such clauses, and, apparently, with approval.[15]

On the other hand, the United States courts have refused to recognize such clauses, on the ground that such stipulations are contrary to public policy.[17]

Our section 5 will probably leave to be determined the question as to whether "British law" or "the law of England" or the foreign law invoked, as the case may be, if applied as re-

15. *Rendell* v. *Black Diamond SS. Co.*, Q.R. 10 S.C. 257; *Michalson* v. *Hamburg-American Packet Co.*, Q.R. 25 S.C. 34; *Canada Sugar Refining Co., Limited* v. *Furness-Withy Co., Limited*, Q.R. 27 S.C. 502; *Ramsay* v. *Hamburg-American Packet Co.*, Q.R. 17 S.C. 232.

17. *The Silvia* (1808) 171 U.S. 462; *The Chattahoochee* (1899) 173 U.S. 540; *The Etona* (1894) 64 Fed. 880.

quired by the bill of lading, would oust or lessen the jurisdiction of the Canadian courts, in view of the fact that they might, nevertheless, retain jurisdiction respecting the matters at issue, subject to the obligation to apply the English or foreign law.

It is possible that our courts would hold in the affirmative, and would refuse to recognize such a clause, on the grounds of public policy, following the decisions in United States.

The jurisdiction of English or foreign courts is, of course, unaffected.

Before the Senate Committee it was argued that the bill, as originally drafted, would permit of the shipowner being sued at some point of original shipment remote from the actual port of loading, where presumably the Canadian domicile of the shipowner would be; and it was pointed out that the words "at the port of loading," as used in this section, would preclude such a possibility. This is open to doubt, inasmuch as the section does not, in terms, exclude the jurisdiction, otherwise existing, of any such court, any more than it excludes the jurisdiction of any court abroad.

III. Contracting Out of Negligence Prohibited.

Section 4 of the Act reads as follows:—

4. Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby:—

(*a*) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship; or,

(*b*) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided; or,

(*c*) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened or avoided;

such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with other provisions of this Act.

1. *Scope of sec.* 4.—The provisions contained in the above section are practically the same as those in secs. 1 and 2 of the Harter Act, with these differences:—

In respect of paragraph (*a*): The Harter Act reads, after the word "care," "or proper delivery of any and all lawful merchandise or property committted to its or their charge." There is substantially no difference in meaning. Our Act follows the Australian Act.

In respect of paragraph (*b*): After the words "and supply the ship," the Harter Act reads, "and make said vessel seaworthy and capable of performing her intended voyage."

The provision as to *keeping* the ship seaworthy, and as to making and *keeping* her "hold, refrigerating and cooled chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation," are taken from the Australian Act.

It has, however, been held under the Harter Act, even in the absence of special reference to that Act, that the shipowner was responsible for the break-down of the refrigerator, notwithstanding the bill of lading exception "against such break-down, even though arising from defect existing at or previous to the commencement of the voyage."[18]

In respect of paragraph (*c*): The Harter Act does not contain the word "preserve," which is also taken from the Australian Act.

Section 4 contains the most important provision of the new Act, in that it makes a radical change in the law heretofore existing in Canada, as laid down by the Supreme Court of

18. *The Southwark* (1903) 191 U.S. 1.

Canada, in the case of *Glengoil SS. Company & Pilkington*,[19] as follows: "A condition in the bill of lading providing that the shipowner shall not be liable for negligence on the part of the master or mariners, or their own servants or agents, is not contrary to public policy, nor prohibited by law in the Province of Quebec." This judgment further held that art. 1676 of the Civil Code of the Province of Quebec only applied to notices by carriers and not to bills of lading, as the contract between the parties. It would, also, appear from the judgment, that in England and presumably the other provinces of Canada, and in France, Italy, Germany and Belgium, the law, prior to that time, had been to the same effect.[20]

Previous decisions in the Province of Quebec had determined that no person could contract out of the consequences of his own negligence,[21] but *Glengoil & Pilkington* has been followed by the Quebec courts.[22]

Since the Supreme Court decision in *Glengoil & Pilkington*, jurisprudence in France has declared to be void clauses exempting from liability for negligence.[23] This latter jurisprudence is more in accord with the Convention of Berne [24] and the French statute,[25] both of which prohibit or limit exemption of liability for negligence.[26]

Section 4, in declaring certain exceptions void, does not, in terms, impose upon the shipowner and others the obligation to use the care and due diligence, which he cannot relieve himself from.

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19. (1898) 28 S.C.R. 146.

20. Id., p. 158.

21. *Rendell* v. *Black Diamond Steamship Co.*, Q.R. 10 S.C. 257.

22. *Dean* v. *Furness*, Q.R. 9 Q.B. 81; *Canada Sugar Refining Co.* v. *Furness-Withy Co., Limited*, Q.R. 27 S.C. 502.

23. (1901) S.P. 1, 401 and note; (1901) D.P. 1, 152; (1903) D.P. 1, 17 and 19 and note.

24. 1st October, 1890.

25. 20 mars 1902.

26. (1903) D.P. 1, 19; Journal Officiel, p. 1408.

The common law, however, imposes this obligation, and The Canada Shipping Act gives it statutory form.[27] Carriers would be subject to one or the other.

2. *Insurance.*—A clause frequently met with in bills of lading is to this effect: "The shipowner is not to be liable for any damage to any goods, which is capable of being covered by insurance."

The courts have shewn a decided disposition not to give effect to this clause, if there was any way to avoid doing so. It would undoubtedly be void under sec. 4.

IV. EXEMPTIONS OF LIABILITY IN FAVOUR OF THE SHIPOWNER.

This is dealt with in section 6.

> **6.** If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

1. *"Due diligence."*—The above section is the first part of sec. 3 of the Harter Act, with the most important addition of the words "or from latent defect."

This section is a modification of the common law rule and, in broad general terms, with section 7, covers the exceptions usually included in the bill of lading, except that as to negligence. Almost every one of the expressions contained in these two sections has received judicial interpretation.

"Due diligence" denotes, in the first place, all absence of negligence. Moreover, it "requires a carefulness of inspection or repair proportionate to the danger."[28]

"It seems to be equivalent to reasonable diligence, having regard to the circumstances known, or fairly to be expected,

27. Section 963.

28. *The Edward L. Morrison* (1894) 153 U.S. 199.

and to the nature of the voyage, and the cargo to be carried. It will suffice to satisfy the condition if such diligence has been exercised down to the sailing from the loading port.[29] But the fitness of the ship at that time must be considered with reference to the cargo,[31] and to the intended course of the voyage; and the burden is upon the shipowner to establish that there has been diligence to make her fit.[32] The actual exercise of such diligence by the owner or his agents is a condition precedent to his claiming the protection of the statute, and he cannot rely on the prima facie presumption of law that his ship is seaworthy.[33]

It is not enough to satisfy the condition that the shipowner has been personally diligent, as by employing competent men to do the work. The condition requires that diligence to make her fit shall, in fact, have been exercised, by the shipowner himself, or by those whom he employs for the purpose.[34] The shipowner is responsible for any shortcomings of his agents or subordinates in making the steamer seaworthy at the commencement of the voyage for the transportation of the particular cargo.[35]

2. *"To make the ships seaworthy and properly manned, equipped and supplied."*—The English and United States law is that the obligation of the owner, as to seaworthiness, is satisfied, if the ship be seaworthy before the inception of the voyage and until it has actually commenced.[36] Even the Australian

29. *The Guadaloupe* (1899) 92 Fed. Rep. 670; *The Cygnet* (1904) 126 Fed. Rep. 742.

31. *The Southwark* (1903) 191 U.S. 1; *The Alvena* (1896) 74 Fed. Rep. 252, 79 Fed. Rep. 973.

32. *The Southwark* (1903) 191 U.S. 1.

33. *The Wildcroft* (1905) 201 U.S. 378. Cf. *The Ninfa* (1907) 156 Fed. Rep. 512.

34. *Dobell* v. *Steamship Rossmore Co.*, 64 L.J.Q.B. 777, (1895) 2 Q.B. 408; *The Flamborough* (1895) 69 Fed. Rep. 470; *The Mary L. Peters* (1897) 68 Fed. Rep. 919, 79 Fed. Rep. 998; *The Colima* (1897) 82 Fed. Rep. 665; *International Nav. Co.* v. *Farr* (1901) 181 U.S. 218.

35. *The Frey* (1899) 92 Fed. Rep. 667, at p. 669; *Putnam* v. *Manitoba* (1900) 104 Fed. Rep. 145; Carver, p. 149.

36. Carver, sec. 17 et seq.; *The Silvia* (1898) 171 U.S. 462; *The Germanic* (1903) 124 Fed. 1; *The Caledonia* (1895) 157 U.S. 124.

Act goes no further, as the warranty it implies is, as to seaworthiness "at the beginning of the voyage."[37]

Section 6 of the new Act would appear to follow the law elsewhere in this respect; but its fourth section prohibits any limitation of negligence to "make and *keep* the ship seaworthy." The word "keep" was first used in this connection in the Australian Act, but its effect was there nullified by the phrase in a subsequent section "at the beginning of the voyage."

The courts may at some time be called upon to determine whether sec. 4 must be read with and affects sec. 6 in this respect, so as to impose on the shipowner the necessity of using due diligence to keep his ship seaworthy after the commencement of the voyage. It is, however, unlikely that serious question can arise in this respect, in view of the other terms of the Act, as it is difficult to conceive of a ship becoming unseaworthy from any other cause than from failure to exercise due diligence before the commencement of the voyage, or each stage of the voyage, and for this failure the shipowner would be responsible, or from faults or errors in navigation, or in the management of the ship, or latent defect, from the results of which he is exempt.

The test of seaworthiness commonly applied by both the English and American courts is whether the vessel is reasonably fit in design, structure, condition and equipment to carry the goods, which she undertakes to transport, and to encounter the ordinary perils of the voyage. The ship must also have a competent master and a competent and sufficient crew.[38]

There is such a mass of jurisprudence on this subject that it is only possible to give a few examples. In *The Rossmore*,[39] an English case under the Harter Act, a cargo port had been carelessly closed by the ship's carpenter before the vessel sailed. During the voyage, part of the cargo was damaged by sea-water entering through this port, which could not be reached and

37. Section 8.
38. Carver, sec. 18; *The Silvia* (1898) 171 U.S. 462.
39. (1895) 2 Q.B. 408.

closed on account of freight being stowed against it. It was held that the ship was unseaworthy at the time of sailing.[40]

Due diligence to make the ship seaworthy imposes an obligation on the shipowner to exercise due diligence as to the condition and working of the refrigerating machinery, prior to the commencement of the voyage.[41]

It is of interest to note that the act of sending or taking unseaworthy ships to sea is a crime under Cr. Code secs. 288 and 289.

3. "*Faults or errors in navigation or in the management of the ship.*"—"It has been repeatedly held that the word 'management' does not include acts of preparing the ship for a voyage. Thus, omission in the ship's equipment, negligence or mistake in the stowage, or so loading her that she will get out of safe trim on the voyage, are not faults in 'management.' Even if such defaults could be described as faults or errors in management, they would, if they occurred at the commencement of the voyage, negative the condition of due diligence in making the ship fit, and so would exclude its exemption. Where the act negligently done or omitted has been one which was or ought to have been done during the course of the voyage, and had reference to the safety of the ship, whether regarded as a navigating vessel or as a cargo carrier, it has generally been a fault in navigation or management."[42]

The remarks of Sir F. Jeune, in *The Glenochil*,[43] in comparing secs. 1 and 3 of the Harter Act (our secs. 4 and 6) are of sufficient interest to quotation:—

"The bill of lading in this case incorporates, by words added to it, what is known as the Harter Act—'the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th of

40. Also *International Navigation Co. v. Farr* (1901) 181 U.S. 218.

41. *The Southwark* (1903) 191 U.S. 1; *The Maori King* (1895) 22 R. 550.

42. Carver, sec. 103 (*e*), cases cited and examples given.

43. (1895) 65 P. 1.

February, 1893.' The question is whether the exemptions in that Act apply to the present case so as to give rise to an exemption from what the learned judge has found, and rightly found, to be negligence. . . . It is not at first sight, I think, very easy to understand the meaning of the Harter Act and to reconcile clause 1 and clause 3. . . . No doubt the object of clause 1 is in terms to prevent conditions being inserted in the bill of lading which would exempt from liability in respect of want of proper care of the cargo. It is obvious, of course, that those words cannot be taken in their largest sense, because in a certain sense any mismanagement of the ship, in navigation or otherwise, is want of care as regards the cargo, secondarily, though not primarily. But it is clear what was intended by the words of section 3—words which exempt from liability for damage or loss resulting from faults and errors of navigation or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think—first, that it prevents exemptions in the case of direct want of care in respect of the cargo; and, secondly, the exemption meant is, though in a certain sense there may be want of care in respect of the cargo, primarily a fault arising in the navigation or in the management of the vessel, and not of the cargo. Now, then, is this a fault in the management of the vessel within the meaning of the bill of lading? It is not necessary to deal with it as a question of navigation. It is sufficient to deal with it as a question of management. It is said, however, that the two things are one and the same, and that management and navigation mean the same thing because the management is only in the navigation, and no doubt upon that a most formidable argument arises. . . . It seems to me almost clear that management goes somewhat beyond—perhaps not much beyond—navigation, and takes in this very class of things, which do not affect the sailing or movement of the vessel, but do affect the vessel herself . . . and I adhere to what I said then, that stowage is an altogether different matter from the management of the vessel, because it is connected with the cargo alone, and the management of the vessel is something else. It may be that the illustration I gave in that case was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo, and want of care of vessel indirectly affecting cargo. Then the other argument which was pressed upon us was that the terms 'management' and 'navigation'

under the provisions of the Harter Act (1) apply only to the period of navigation itself; and that is said to end when the vessel comes into dock. . . . I do not say whether navigation in the strict sense of the term is limited to the period that the vessel is sailing—that is to say, in motion—but I confess I see no reason whatever for limiting the word 'management' to the period of the vessel being actually at sea."

4. "*Latent defect.*"—Under the Harter Act it has been held, in effect, that a latent defect is one which could not have been discovered by inspection.[44]

Under the law of England a warranty of seaworthiness, at the beginning of the voyage, is implied;[45] and stipulations excluding this warranty are strictly construed.[46]

In fact, the Australian Act, sec. 8, expressly provides that, "In every bill of lading with respect to goods, a warranty shall be implied that the ship be, at the beginning of the voyage, seaworthy in all respects and properly manned, equipped and supplied."

It has been held in England that, even under the Harter Act, an express stipulation excluding warranty of seaworthiness was essential to relieve the shipowner from liability for latent defects, such warranty being otherwise always presumed;[47] and this might, also, be inferred from decisions of the United States Supreme Court.[48]

It has, however, also been held in the United States that "the main purposes of the Act were to relieve the shipowners from liability for latent defects, not discoverable by the utmost care and diligence."[49]

It would, therefore, appear that this statutory exemption from the results of "latent defects" is a gain for the shipowner.

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44. *The Manitoba*, 104 Fed. Rep. 151; *The Phœnicia*, 90 Fed. Rep. 118; *The Carib Prince*, 170 U.S. 655.

45. Carver, sec. 17, seq.

46. Carver, sec. 79, seq.

47. *McFadden* v. *Blue Star Line* 74 L.J.K.B. 423; (1905) 1 K.B. 697 and 707.

48. *The Caledonia* (1895) 157 U.S. 124; *The Carib Prince* (1898) 170 U.S. 655.

49. *The Irrawaddy* (1898) 171 U.S. 187, 192.

5. *"Fire, dangers of the sea, etc."*—These exceptions are dealt with in the following section:—

> **7.** The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or 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, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees.

This section forms the latter part of sec. 3 of the Harter Act, and the exemptions contained in sec. 7 are, in the Harter Act, made conditional upon the exercise of due diligence, as expressed in the first part of the section, which forms our sec. 6.

According to the terms of sec. 7, it would appear that the shi wner is exempted from liability for the result of the events mentioned, down to the word "strikes," whether or not, in respect to those to which human negligence could contribute, such as fire, for example, they have resulted from his fault or privity; and it would appear from the debate before the Senate Committee that the intention was to exonerate the shipowner from loss by fire, even when his negligence or that of his servants contributed to it. The courts will, no doubt, be called upon to determine in how far the section has this desired effect.

In this connection the following facts are of interest:—

The former Canadian Act respecting the Liability of Carriers by Water,[50] exempted shipowners from liability from fire and dangers of navigation or other causes of loss therein mentioned, "happening without their actual fault or privity." The revisers of the statutes of 1906 drafted sec. 964 of The Shipping Act,[51] to represent the above, in the following manner:—

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50. R.S.C. of 1886, c. 82, s. 2, par. 4.

51. R.S.C., c. 113, ss. 961 to 966.

"964. Carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens:—

(*a*) without their actual fault or privity, or without the fault or neglect of their agents, servants or employees; or,

(*b*) by reason of fire or the dangers of navigation; or,

(*c*) from any defect in or from the nature of the goods themselves; or,

(*d*) from armed robbery or other irresistible force. R.S., c. 82, s. 2."

It might be contended that the result of the revision was to exempt the shipowner from loss by fire, even though it resulted from his actual fault or privity, in view of the apparent deliberate transposition of the parts of the old law.

The old Canadian statute was in accord with The Merchants Shipping Act, sec. 502, which, of course, is still operative. By that section, the shipowner is only discharged from loss by fire, etc., "happening without his actual fault or privity." Therefore, in respect to sec. 7 of the new Act, and, more particularly, in regard to British ships, while we have the new Act in terms exempting shipowners from liability for fire, without exception as to its happening as a result of his actual fault or privity, we find the governing Imperial Act limiting the exemption from liability in that respect. The probability is that sec. 7, in respect to British ships, would be construed in accordance with the terms of The Merchants Shipping Act.

The question may be a little more difficult of solution in respect to the owners of Canadian registered and foreign ships.

In respect to them there would appear to be, for our courts, a bald and unconditional exemption from liability for all the causes mentioned. However, sec. 4 and the last clause of sec. 7 would probably bring about the adoption, under the new Act, of the principle laid down in both England and the United States, under the somewhat more formal legislation in those countries, that the shipowner will not be allowed to rely upon exceptions, when his own negligence or the negligence of his servants has brought the excepted cause of loss into operation, unless, of

course, in the case of the Harter or the Canadian Act, the negligence of the servants consist of faults or errors in navigation or relate to the management of the ship.[52]

Presumably the exceptions of fire, dangers of the sea, acts of God, or public enemies, inherent defect, etc., in the thing carried, will be read as similar exceptions in bills of lading have been read, and it is therefore unnecessary to deal with them.

The words "or other reasonable deviation or from strikes, or from loss arising without their actual fault or privity, or without the fault or neglect of their agents, servants or employees" are not found in the Harter Act.

The phrase "or other reasonable deviation" was probably suggested by some United States jurisprudence under the Harter Act, somewhat strictly interpreting the exemption from loss from deviation in rendering the service mentioned.[53]

The term "strikes" would probably not include lockouts, but it is not of moment whether it would or not, inasmuch as if the lockout was not due to the actual fault or privity of the shipowners, their agents, servants or employees, the shipowner would not be responsible under sec. 7, and if the lockout was due to such fault or privity, liability could not be stipulated against.

The clause "and for loss arising without their actual fault or privity, or without the fault or neglect of their agents, servants or employees" is an absolutely general clause, which, coupled with the prohibition to contract out of negligence, should bring about the adoption of what is known as a clean bill of lading.

6. *Declaration of value.*—*Sec.* 8.—This section reads:—

8. The ship, the owner, charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars per package, unless a higher value is stated in the bill of lading or other

52. Carver, secs. 8, 17; *The Caledonia* (1895) U.S. 124.

53. *Re Mayer; The Emily* (1896) 74 Fed. Rep. 881; *The Chinese Prince* (1894) 61 Fed. 697; *The Florence* (1895) 65 Fed. 248.

shipping document, nor for any loss or damage whatever if the nature or value of such goods has been falsely stated by the shipper, unless such false statement has been made by inadvertence or error. The declaration by the shipper as to the nature and value of the goods shall not be considered as binding or conclusive on the ship, her owner, charterer, master or agent.

This section is not found in the Harter Act, it supersedes sec. 965 of The Canada Shipping Act, but must be read in conjunction with sec. 502, par. 2(ii), of The Merchants Shipping Act. The latter reads as follows:—

"502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely,—

* * * * * *

(ii) (*s*) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared (*t*) by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof."

The last sentence of section 8, as to the declaration of the owner of a British ship from liability in respect of the valuable articles mentioned, under the circumstances stated, he would not be liable for even the sum of $100 per package, in respect to them under sec. 8.

The last sentence of section 8, as to the declaration of the shipper not being binding on the ship, does not go quite as far as it might, in order to complete the intention. For instance, the terms "quantity, weight, marks, etc.," might have been added.

V. Obligation to Issue Bill of Lading.—Sec. 9.

This section is as follows:—

9. Every owner, charterer, master or agent of any ship carrying goods, shall on demand issue to the shipper of such goods a bill of lading shewing, among other things, the marks

necessary for identification as furnished in writing by the shipper, the number of packages or pieces, or the quantity or the weight, as the case may be, and the apparent order and condition of the goods as delivered to or received by such owner, charterer, master or agent; and such bill of lading shall be primâ facie evidence of the receipt of the goods as therein described.

This is substantially the same as the Harter Act, the words "or pieces" were added to satisfy the lumber trade.

VI. Delivery in Case of Wood Goods.—Sec. 10.

This is provided for by the following section:—

10. In case of wood goods, notwithstanding anything in the charter party, bill of lading, or other shipping document, the owner, charterer, master, or agent of the ship, or the ship itself, shall only be bound to deliver to the consignee, the pieces received from the shipper, and shall not be held responsible for deficiency in measurement; and any words inserted in any charter party, bill of lading or other shipping document for the purpose of making the owner, charterer, master or agent of the shop, or the ship itself, liable for deficiency in measurement in such case shall be illegal, null and void and of no effect.

This section was inserted at the request of the steamship owners, ostensibly for the purpose of avoiding complications resulting from difficulty in tallying lumber by measure and by marks.

VII. Notice of Arrival of Ship.—Sec. 11.

This is provided for as follows:—

11. When a ship arrives at a port where goods carried by the ship are to be delivered, the owner, charterer, master or agent of the ship shall forthwith give such notice as is customary at the port, to the consignees of goods to be delivered there, that the ship has arrived.

This section is not found in the Harter Act. It creates no new obligation, inasmuch as the notice required is such as is

customary at the port of discharge, which custom probably has hitherto been complied with.

VIII. OFFENCES.—SEC. 12.

This section reads as follows:—

12. Every one who, being the owner, charterer, master or agent of a ship,—

(*a*) inserts in any bill of lading or similar document of title to goods any clause, covenant or agreement declared by this Act to be illegal; or makes, signs, or executes any bill of lading or similar document of title to goods containing any clause, covenant or agreement declared by this Act to be illegal;

without incorporating verbatim, in conspicuous type, in the same bill of lading or similar document of title to goods, section 4 of this Act; or,

(*b*) refuses to issue to a shipper of goods a bill of lading as provided by this Act; or,

(*c*) refuses or neglects to give the notice of arrival of the ship required by this Act;

is liable to a fine not exceeding one thousand dollars, with cost of prosecution; and the ship may be libelled therefor in any Admiralty District in Canada within which the ship is found.

2. Such proportion of any penalty imposed under this section as the court deems proper, together with full costs, shall be paid to the person injured, and the balance shall belong to His Majesty for the public uses of Canada.

Paragraphs (*a*) and (*c*) are not found in the Harter Act, which also imposes a penalty of $2000. The penalty clause otherwise is practically the same.

A question might arise as to how far a prosecution would lie in Canada, under paragraph (*c*), for an offence which must, in its nature, occur without Canada, in respect to all carriage, other than the Canadian coasting trade.

There has apparently been only one prosecution for penalties under the Harter Act, and that was unsuccessful.[54]

54. *U.S.* v. *Cobb* (1906) 163 Fed. 791.

IX. Dangerous Goods.—Secs. 13, 14.

These sections are as follows:—

13. Every one who knowingly ships goods of an inflammable or explosive nature, or of a dangerous nature, without before shipping the goods making full disclosure in writing of their nature to, and obtaining the permission in writing of, the agent, master or person in charge of the ship, is liable to a fine of one thousand dollars.

14. Goods of an inflammable or explosive nature, or of a dangerous nature, shipped without such permission from the agent, master or person in charge of the ship, may, at any time before delivery, be destroyed or rendered innocuous, by the master or person in charge of the ship, without compensation to the owner, shipper or consignee of the goods; and the person so shipping the goods shall be liable for all damages directly or indirectly arising out of such shipment.

These sections are not found in the Harter Act, but they really add nothing new of importance to the common law.

The remaining sections are:—

15. This Act shall not apply to any bill of lading or similar document of title to goods made pursuant to a contract entered into before this Act comes into force.

16. This Act shall come into force on the first day of September, one thousand nine hundred and ten.

X. Onus of Proof.

It has recently been settled in the United States that the onus of proof is upon the vessel owner to show that the damage was from one of the causes from which the vessel is exempted under the Harter Act.[55] The reason given for this view is practically the same as that given for requiring express clauses in bills of lading, namely, that both the bill and the Act must be strictly construed, because the cargo owner is not on the some footing

55. *Jahn* v. *Folmina* (1909) 212 U.S. 354, 29 Sup. Ct. 363.

with the vessel owner to inspect or learn of the vessel's condition or the causes of damage. He must either accept the terms offered by the carrier or not ship the goods.

In England and Canada the general rule of evidence would appear to be similar, but with some modifications.[56]

Query.—How far would a clause be upheld, which stipulated that the onus of proof would, in all cases, be upon the plaintiff, seeking a condemnation against the shipowner, under a bill of lading? Would such a clause be contrary to public policy, or not?

I have not been able to find any jurisprudence to the effect that it would be contrary to public policy; but, on the contrary, I find that the French courts, when they have refused to exonerate the shipowner under a clause contracting out of his negligence and that of his servants, have held that the clause had, at least, the effect of shifting the onus of proof on to the cargo owner.[57]

XI. Priority of Lien.

There seems to be only one case so far decided in the United States, under the Harter Act, wherein priority of lien, as between the vessel owner and the cargo owner, has been considered. It was there held that the cargo owner had the prior lien, upon the ground that the negligence of the officers of the vessel contributed to cause the loss and that both they and the shipowner were prevented, thereby, from recovering with or before the cargo owner.[58] In other words, although the shipowner might not be responsible for the fault of the officers in the management of the ship, so as to make him liable for the loss of the goods; he, nevertheless, was responsible for the acts of his servants to the extent of giving to the cargo owner a prior lien upon

56. Carver, sec. 78; *Dominion Express Company* v. *Rutenberg*, Q.R. 18 K.B. 50.

57. Sirey, C.N. 1784, No. 10; Sirey Rec. (1901) 1, 401, note; Dalloz, P. Tables, 1897-1907, Vo. Commissionaire de Transport, Nos. 68 and 69.

58. *In re Lakeland Trans. Co.* (1900) 103 Fed. 328, affirmed, 111 Fed. 601.

a fund insufficient to meet the claims of both. Presumably, therefore, in the absence of fault or privity on his part, and of negligence on the part of his servants, he would rank equally with the cargo owner.

XIII. Effect on General Average Contribution.

1. *Shipowner* v. *Cargo owner.*—It has been settled by the Supreme Court of the United States in *The Irrawaddy* that, while the Harter Act declared the vessel owner not to be responsible for the negligence of his servants in the navigation or management of the vessel, he could not recover from the cargo owner any contribution in general average for his own losses, caused by negligence of his servants, as stated.[59] In other words, while the Act so relieved the vessel owner from liability, it gave him no affirmative relief against the cargo for the results of such negligence, because, "had Congress intended to grant the further privilege now contended for, it would have expressed such intention in unmistakable terms."

In England, different views on the subject prevail, and the decision in *The Irrawaddy* has not been followed.

In England, as is pointed out in Carver,[60] the fault which takes away the right to contribution must be one which gives the right of action to the person, who might otherwise be liable to contribute, either as being a tort, or as a breach of contract: so that if unseaworthiness or negligent navigation are, by contract of carriage, not to be counted as faults against the shipowner, his right to contribution cannot be lost, on the ground that unseaworthiness or bad navigation made the sacrifice necessary. The view adopted by the English courts is that the default or wrongful act, which is to bar a person from claiming contribution, "must be something which is wrongful in the eyes of the law, that is to say, something which constitutes an actionable act."[61]

59. *The Irrawaddy* (1898) 171 U.S. 187, 192.
60. Section 373(*b*).
61. *Kennedy, L.J.*, in *Greenshields, Cowie & Co.* (1908) 1 K.B., p. 51.

The Carron Park is the leading English case.[62] In that case Sir J. Hannen said: "The claim for contribution as general average cannot be maintained, where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered it." Lord Justice Vaughan Williams, however, apparently held a contrary view, namely, that the exceptions in the contract of carriage do not affect liability to contribute in general average.[63] But a majority of the Court of Appeals, in that case, confirmed the principle laid down in *The Carron Park*.

Will the Canadian courts hold that, although the shipowner, under the new Act, is not responsible for the faults of his servants in the navigation and management of the ship, the negligence of his servants, nevertheless, defeats his recourse in general average against the cargo owner, following the United States jurisprudence; or will they hold that, as the shipowner is not responsible under the contract for such negligence, it is therefore non-existant for him, and cannot affect his recourse in general average, following the English jurisprudence?

In the United States, a motive for the *Irrawaddy* decision was that the Harter Act involved a change of law and could not be extended beyond its express terms. If the Canadian law, prior to the new Act, be held to have been the English law, it is possible the English rule will be followed.

2. *Cargo owner* v. *Shipowner*.—In two cases in the United States, subsequent to the decision of the Supreme Court in *The Irrawaddy*, the right of the cargo owner to sue the shipowner for general average contribution was considered.

In *The Strathdon*,[64] it was held, in effect, that the cargo owners possessed such recourse, but that the vessel owner could

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62 *The Carron Park* (1890) 59 L.J. Adm. 74; 15 P.D. 203.

63. See his dissenting judgment in *Milburn* v. *Jamaica* (1900) 2 Q.B. 540, pp. 548-553.

64. *The Strathdon* (1899) 101 Fed. 600.

set up against it, by way of compensation or off-set, the damage caused to the ship, when that damage was caused in a manner for which the shipowner was not responsible under the Act. The court was of opinion that the cargo owner should not be allowed to recover from the shipowner in general average, under the circumstances, without such off-set, because, by changing the form of action in this respect, he could recover for losses for which the vessel owner was not responsible under the Act. The court said: "When the cargo owner seeks to recover in general average, in such case the shipowner is also entitled to contribution as though innocent of fault; otherwise the cargo owner would recover by selecting his form of procedure for losses for which the shipowner was not responsible."

In *The Jason*,[65] the court held that the cargo owners were entitled to recover, but that the amount paid to the salvors by the vessel owner must be taken into consideration. The court allowed the cargo owners to recover in general average because this was a right existing since the earliest maritime usages had been established, and was, in no way, connected with the rights under the bill of lading, and hence not affected by the Harter Act.

These two cases agree in allowing the vessel owner to set up his loss, occasioned by the negligence of his servants, without his privity or knowledge, against claims for average contribution; but they raise and disagree as to the question whether or not the cargo owner can recover in general average for his losses from a shipowner, who has himself suffered no damage.

Under our law, the liability of the shipowner to the cargo owner in general average would hardly be questioned.

The new Canadian Act specifically states that the shipowner shall not be liable, or held responsible, for loss in the instances and under the conditions stated. Would an action, therefore, in general average, by the cargo owner against the shipowner, be maintained, either in Canada or in England, under circu

65. *The Jason* (1908), 162 Fed. 56.

stances in which the Act, as part of the bill, or otherwise, provided that the shipowner should not be held liable for loss or damage; and, if maintained, would the shipowner be entitled to off-set his loss against it?

The English courts recognize the bill of lading exceptions to the extent of making negligence, for which the shipowner is not responsible thereunder, "as foreign to him as to the person who has suffered by it." They further give full weight to a contract to enable the shipowner to recover in general average, notwithstanding that the loss may have been brought about by the negligence of himself or his servants, provided it is excepted. It might consequently be consistent for the English courts likewise to declare that the stipulations exempting the shipowner from liability for loss, included, by implication, exemption from general average contribution.

But, while the general average contribution may be affected by contract, it is a matter of maritime law, and not a matter of contract; and an exception, exempting the shipowner from contribution in general average, except, perhaps, in respect to the jettison of deck loads of cattle, would be unusual, as depriving the shipowner of an ancient and well understood right.[66]

It is possible, therefore, that the ordinary stipulations in a bill of lading, exempting from loss without express mention of general average, would be held by the English courts not to include the latter by implication, upon the ground that the exemption from contribution in general average by the shipowner, must be clearly expressed.[67]

It is further possible, therefore, that the English courts and our Canadian courts would apply the same principles to the new Canadian Act and hold "that loss and damage" does not include contribution to general average; and that, where the new Act exempts the shipowner from liability for loss and damage, he is not thereby excused from general average contribution.

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66. Stephens, Bills of Lading, p. 17.

67. *Schmidt & Royal Mail Steamship Co.* (1876) 45 L.J.Q.B. 646; *Crooke* v. *Allan* (1879) 5 Q.B.D. 38, 40.

It is further possible that English and Canadian courts would refuse to follow the above United States decisions, but the questions involved are not without difficulty and their solution will be awaited with interest.

The factor which might affect this question is that, in the United States, the innocent cargo owner may, in the event of collision, in which both ships are at fault, recover his full loss from either ship, the ship condemned recovering its proportion from the other.[68] Hence, should a cargo owner's recourse against the contracting ship be defeated by the latter's off-set, as permitted under the United States rule, the United States courts may have taken into consideration the fact that the cargo owner should nevertheless possess his recourse for the full amount against the owner of the other ship at fault, for its share.

On the other hand, the English rule is that, when both ships are at fault, the cargo owner can recover from the stranger ship or those responsible for her management, only one-half of the damage caused to the goods.[69]

If, therefore, the United States rule be applied in Canada, in respect to the shipowner's off-set against the cargo owner's claim for general average contribution and the English rule be applied to the effect that a cargo owner can only recover one-half his loss from the stranger ship, the cargo owner, under a Canadian bill of lading, would be in the position of having his recourse against the contract shipowner defeated by the off-set of the latter and his recourse against the stranger ship limited to only one-half of his claim.

XIII. Summary.

1. *Application and scope of Act*—The Act applies to all articles capable of carriage except live stock, and to all ships carrying goods from a Canadian port. The Merchant Shipping Act must be applied to British ships, not registered in Canada,

68. *The North Star* (1882) 106 U.S. 17; *The Manitoba* (1895) 122 U.S. 97.

69. Carver, sec. 704.

in respect of liability for loss of damage to goods, when it conflicts with the new Act. The conflict is slight.

It is probable that the Act would be held to be intra vires of the Canadian Parliament, and that it would be recognized by courts without Canada, as forming part of the contract of carriage. The foreign law would possibly be applied only in so far as it was consistent with the terms of the Act.

2. *Contracting out of negligence.*—Contracting out of negligence is no longer lawful in Canada, in respect to the water-carriage of goods, and to do so involves a penalty.

3. *Exemptions of liability in favour of the shipowner.*—The Act materially improves the position of the shipowner in giving statutory approval of exemptions of liability, which it has heretofore been necessary to ensure by elaborate bill of lading clauses. The more important among these statutory exemptions are as to "faults or errors in navigation or in the management of the ship, or from latent defect," and generally as to all "loss arising without their (shipowners) actual fault or privity or without the fault or neglect of their agents, servants or employees."

Probably, but not with certainty, the shipowner will not be allowed to rely upon the exemptions contained in section 7, notwithstanding its absolute terms, where his own negligence or the negligence of his servants has brought the excepted cause of loss (*e.g.*, fire) into operation, unless the negligence of the servants consist of faults or errors in navigation or relate to the management of the ship.

4. *Onus of proof.*—The onus of proof would, by law, be upon the ship to prove that the loss fell within one of the exemptions in its favour; but a clause whereby the onus was placed on the cargo owner would, apparently, be valid. This, however, remains to be settled.

5. *Priority of lien.*—It has yet to be settled whether the cargo owner would have a prior lien over the shipowner on a fund

insufficient for both, when the loss has resulted from the negligence of the shipowner's servants, for which he is not responsible under the Act.

6. *General average.*—Several questions arise as to the respective rights and obligations of shipowner and cargo owner of a more or less complicated character, which also await decision.

7. *Conclusion.*—On the whole, it would appear that the new legislation will be beneficial to Canadian trade; and, while opposed and severely criticized by shipowners, it may prove ultimately of benefit to them.

I have endeavoured, in the foregoing memorandum, to limit its matter to new questions, which may arise under the new Act; and, in doing so, I have sought to make it of some service to shipowners, shippers, and possibly to the legal profession.

PEERS DAVIDSON,
(Of the Bar of the Province of Quebec).

Montreal.

The *Law Times* (Eng.) copies in full the article which appeared in our issue of May 2nd, discussing *Mercier* v. *Campbell* which turned upon the construction of the Statute of Frauds (see ante p. 273). After setting forth the facts and summarizing the arguments our contemporary speaks as follows:

"The decision is one which seems to be in accordance with one already on the Canadian Law Reports (*Canadian Bank of Commerce* v. *Perran*, 31 O.W.R. 116), and it seems to mark a departure from a long line of American cases. It would appear as though some confusion has arisen in these latter cases through a lack of distinction between the words 'void' and 'voidable,' but the American decisions seem somewhat variable. The case brought to our notice in the *Canada Law Journal* seems to have abundant support in English decisions, but we rather gather that it marks a departure from the accepted law obtaining in Canada. It would seem as though the Canadian decisions

had been influenced by the current, albeit a variable current, of American opinion. We should be glad to see any doubts as to the validity of such alternative agreements solved on similar lines in the case of all English-speaking communities, for the Statute of Frauds is one of those measures which seems essential to their well-being in all matters coming within its scope."

Such fees as the following would make the professional mouth water in this country. Mr. Samuel Untermeyer, a leader of the Bar in New York, recently received a fee of $775,000 as compensation for three or four years' work in bringing about a merger of the Utah Copper Company and the Boston Consolidated Mining Company. The directors and stockholders of both companies unanimously voted that the above sum was not too much to pay and it was upheld by the judges on an attempt to tax it. Our contemporary (*Case and Comment*) says: "In view of the fact that the merger will probably involve a capitalization of $100,000,000 the fee is really modest. It amounts to less than one per cent. Lawyers in accident cases against corporations on the contingent fee basis usually ask fifty per cent. of the damages recovered."

On a former page (ante, p. 43) we referred to the disparaging judicial remarks which had been used in reference to the case of *Mykel* v. *Doyle*, 45 U.C.R. 65, which decided that the ten years' limitation does not apply to actions to recover easements, and suggested that in an appellate court that case might possibly receive its quietus by being "overruled"; but this contingency has not happened, instead of its obsequies having been performed it has been formally and fully resuscitated by the Court of Appeal and is now indubitable law in Ontario as far as that court can make it so. See *Ihde* v. *Starr*, 21 O.L.R. 407, where it was followed, and declared by Garrow, J., to have been too long followed to be questioned in any court in Ontario.

REVIEW OF CURRENT ENGLISH CASES.

POWER OF APPOINTMENT—TESTAMENTARY POWER—COVENANT BY DONOR OF POWER WITH OBJECT OF POWER NOT TO EXERCISE APPOINTMENT SO THAT THE COVENANTEE WILL GET LESS THAN SPECIFIED SUM—APPOINTMENT CONTRARY TO COVENANT.

In re Evered, Molineux v. *Evered* (1910) 2 Ch. 147, which deals with a point in the law of powers, may be briefly noticed. The donee of a power of appointment by will, covenanted with an object of the power not to exercise the power so that he would get less than a specified sum. The donee of the power died, leaving a will appointing the fund in question so that the covenantee would get less than the sum specified in the covenant; and it was held by the Court of Appeal that though the covenant could not be treated as an appointment, because that would be permitting a testamentary power to be executed by deed, yet that effect might be given to the covenant by treating it as a contract to leave the fund unappointed so far as might be necessary to give effect to the covenant; and that the appointment made by the will was therefore nugatory to the extent necessary to give the covenantee the specified sum as in default of appointment.

POWER OF APPOINTMENT—POWER OF REVOCATION—APPOINTMENT OF PART OF TRUST ESTATE—SUBSEQUENT APPOINTMENT OF TRUST ESTATE IN GENERAL TERMS—IMPLIED REVOCATION—ABSENCE OF WORDS OF INHERITANCE IN APPOINTMENT.

In re Thursby, Grant v. *Littledale* (1910) 2 Ch. 181. This is another decision on the law of powers. In this case by marriage settlement a husband and wife had a joint power to appoint the trust funds and securities comprised in the settlement, amongst their children and issue; and the settlement contained a power to invest the trust funds in the purchase of real estate. A part of the funds was accordingly invested in the purchase of real estate, which the husband and wife appointed upon trust on the death of the survivor of them for their eldest son, his heirs and assigns, subject, however, to a power of revocation and re-appointment. Subsequently and without reference to this appointment they executed an appointment in exercise of

the power given by the will and of every other power enabling them to do so, of the whole of the trust moneys, stocks, funds and securities comprised in the settlement, in favour of their children in equal shares; and the question submitted to the court was whether or not the second appointment had the effect of revoking the first. Warrington, J., thought that it had, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Farwell, L.JJ.), overruled his decision, and held that it did not, inter alia, because there was no reference in the second appointment to the power of revocation contained in the first, nor any express intention manifested to exercise it; that the general words used in the second appointment did not include the lands in which part of the trust fund had been invested; but if they had, Farwell, L.J., expresses the opinion that the appointees would only have taken life estates for want of words of inheritance.

CONTEMPT—ENFORCING INJUNCTION ORDER AGAINST CORPORATION —BREACH OF INJUNCTION AND UNDERTAKING—"WILFUL DISOBEDIENCE"—SEQUESTRATION—COSTS.

In *Stancomb* v. *Trowbridge* (1910) 2 Ch. 190, the defendants, a municipal council, had been enjoined from sending sewage into a stream and had given an undertaking to cleanse it, and had violated the injunction and failed to perform their undertaking. On a motion for a sequestration the defendants sought to excuse their breach of the injunction on the ground that it had not been wilful disobedience, but was due to the negligence of their servants. Warrington, J., held that the defendants were liable for the acts of their servants and their negligence or dereliction of duty afforded no excuse. He, therefore, granted a sequestration, but directed it to lie in the office for six months and not to issue then if in the meantime the defendants effectually complied with their undertaking to the satisfaction of certain named parties. The defendants were ordered to pay the plaintiffs' costs as between solicitor and client.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court—K.B.]. [August 2.

WILSON *v.* HICKS.

Life insurance—Assignment of policy—Gift—Intention—Beneficiary.

Appeal from the judgment of Britton, J., in favour of plaintiff, who held an endowment insurance policy for $5000. In December, 1896, he assigned the policy to the defendant describing her as his "fiancee." The consideration stated was "one dollar and other value consideration." Neither the policy nor the assignment were under seal. The plaintiff did not inform the defendant of the assignment until February, 1897. In April, 1897, the plaintiff wrote the defendant stating that the assignment was enclosed, but it was not sent to her, but to the insurance company, who made a memorandum of it, and notified the defendant. In January, 1909, the plaintiff asked the defendant to re-assign the policy, which she refused to do. Subsequently, by an instrument under seal, plaintiff assumed to revoke the assignment, directing that all moneys under the policy should be paid to himself. The plaintiff had kept the premiums paid. The action was for a declaration that the plaintiff was entitled to the policy and the moneys thereunder, and that the assignment had been effectually revoked.

Held, 1. That as the assignment was absolute upon its face, and the plaintiff had paid the premium from time to time, (thus re-affirming the gift) there was sufficient evidence that the gift was complete, and that the defendant was the owner of the policy. It was evidently intended as a gift inter vivos; also that delivery was not necessary, but even if it were there was a constructive delivery by the formal acts of registry in the insurance office, and the notification to the defendant; and oral evidence of an intention to revoke was not admissible.

2. It could not be said under R.S.O. 1897, c. 253, s. 151, sub-s. 3, as amended by 1 Edw. VII. c. 21, s. 2, sub-s. 4-5, that the donor had the right to change the beneficiary and that the

legal effect of the assignment to her was merely for the purpose of designating the defendant as the beneficiary.

3. There is nothing in the Act which restricts or interferes with the right of any person to assign a policy in any other mode allowed by law. In this case the [illegible]as not merely the designation of a beneficiary but a transf[illegible]f absolute legal title.

Appeal allowed with costs.

J. M. Best, for plaintiff. *Proudfoot*, K.C., for defendant.

Falconbridge, C.J.K.B.]. [August 31.

BROWN *v.* VALLEAU.

Contract — Money advanced — Acknowledgment — Promise to "work off" debt.

Action by the Canadian representative of commission merchants in Liverpool, Glasgow and London, to recover $4,963.25, a balance alleged to be due by the defendant, a dealer in apples at Toronto, on account of advances made by the plaintiff for the purchase of apples. The defendant signed an acknowledgment admitting a balance at his debit of $4,153.25. The acknowledgment did not state that the debt was not to be paid by the defendant, but only that it was to be discharged by the defendant working for the houses represented by the plaintiff. The defendant promised "to work with the company next season and until the above debt is worked off."

Held that that did not amount to a discharge; and in any event the onus would lie on the defendant to shew that he was always ready and willing to "work off" the debt, but that he was prevented by some act or default of the plaintiff or of his principals; and that onus he had not met. As to the remainder of the plaintiff's claim, the defendant should have the benefit of the doubt. Judgment for the plaintiff for $4,153.25, with interest from the 7th April, 1908, and costs. Counterclaim dismissed with costs.

G. Drewry, for plaintiff. *F. E. Hodgins*, K.C., and *W. H. Hodges*, for defendant.

In *Ford* v. *Canadian Express Co.* on p. 545, 23rd line, the word "not" was omitted after the word "had."

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] IN RE ARTHUR W. WHITE. [August 18.

Collection Act, R.S. 1900, *c.* 182, *ss.* 2, 27, 29—*Order for payment by instalments—Fraudulent disposition of property—Committal for—Costs on—Co-debtors—Contribution as between—Costs incurred after judgment.*

On application under the Liberty of the Subject Act, R.S. 1900, c. 181, for the discharge from imprisonment of Arthur W. White, who had been committed to gaol by a commissioner, on proceedings under the Collection Act, R.S. 1900, c. 182, for fraudulent disposition of his property, the ground mainly relied on was that the order for committal, in addition to adjudging that the debtor had been guilty of fraudulent disposition of his property, ordered his imprisonment for the period of three months unless the amount of the debt was sooner paid and costs, including commissioner's and constable's fees upon the examination of his co-debtor as well as his own. There were two defendants, White and Green, and both were summoned to appear for examination at the same time. An order for payment by instalments was made against Green, but White obtained an adjournment of his examination for one week, after which evidence was heard and the order complained of was made.

Held, 1. The order for payment by instalments which the commissioner is authorized to make under s. 29, clearly, by virtue of s. 2, includes costs incurred subsequent to the judgment, no matter whether caused by the action of one defendant or both. When incurred, such costs become part of the judgment debt and enforceable as such.

2. Costs paid by one debtor under such circumstances would be the subject of indemnity or contribution as between himself and the other defendants.

3. There does not seem to be any provision, express or implied, to authorize the commissioner to split the amount due on the judgment and to award committal until the part affected by the fraud is discharged. Neither is there anything in ss. 27 and 29 to authorize dropping any costs which formed part of the judgment or the amount due upon it.

Robertson, K.C., and *Sangster*, in support of application. *Morse*, contra.

Longley, J]. FERGUSON *v.* CHAPELLE. [Aug. 31.

Costs and taxation—Taxable and non-taxable items.

In an action by plaintiff against defendant claiming damages for trespass committed upon plaintiff's land by entereing thereon and cutting trees there was judgment in favour of plaintiff with costs. On taxation of costs before a Master of the court plaintiff sought to recover as part of his costs a sum of money paid to a number of men for going over the land in question and counting the stumps of trees cut and the Master having refused to tax this amount there was an appeal. By order 63 of the Jud. Act, rule 21, costs are to be taxed "according to the schedule of costs now in force."

Held, that the words of o. 63, r. 23, s. (7), "just and reasonable charges and expenses—properly incurred in procuring evidence and the attendance of witnesses" could not be given an interpretation to include the item claimed, and that the judgment of the Master must be affirmed.

Held, nevertheless, that under the words "maps, plans, surveys" plaintiff was entitled to tax for the services of men employed to assist the surveyor in making a survey of the land, such survey being necessary and having been rendered more difficult by reason of the action of defendant in destroying trees and obliterating blazed lines.

Robertson, K.C., in support of appeal. *Meagher*, contra.

Longley, J.] [Aug. 31.

THE KING *v.* HECTOR MCDONALD.

Customs Act, s. 216—Conviction for offence—Defect in warrant —Discharge of prisoner ordered under certiora.

Defendant was arrested under a warrant charging him with having been unlawfully on board a vessel liable to forfeiture for a violation of the Customs Act, having taken on board a quantity of liquors at St. Pierre and landed it secretly at an island in the county of Cape Breton. Defendant pleaded guilty and was convicted and fined, and in default of payment of the fine imposed was sentenced to imprisonment for the period of two months. The section of the Customs Act under which the penalty as imposed (216) contains the words "if he has been knowingly concerned in any of such acts."

Held, that these words constituted an essential condition precedent to the completion of an offence and that their omission from the warrant under which the prisoner was arrested and convicted constituted a defect which rendered the warrant insufficient and that defendant was entitled to his discharge under certiorari proceedings.

Carroll, in support of application. *Mellish*, K.C., and *D. A. Cameron*, contra.

Meagher, J.] [September 13.

CROSBY *v.* YARMOUTH ELECTRIC CO.

Practice—Notice of trial—Where sittings held alternately at two places in a county—O. 20, r. 3.

Application to set aside plaintiff's notice of trial on the ground that it was not given in conformity with O. 20, r. 3, which provides that the statement of claim must in all cases shew the proposed place of trial. It appeared that the sittings of the Supreme Court in the County of Yarmouth are held alternately at Yarmouth and Tusket and that in this case the place of trial named in the statement of claim was Yarmouth, but that plaintiff being unable to bring his case on for trial at Yarmouth gave notice of trial for the next sittings of the court to be held at Tusket.

Held, that on the correct construction of the order plaintiff had the right to have his case tried at any place in the county in which the place of trial named in the statement of claim was situated. Application dismissed with costs.

Covert, K.C., in support of application. *Robertson*, K.C., contra.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [Sept. 16.

PATERSON TIMBER CO. *v.* CANADIAN PACIFIC TIMBER CO.

Contract—Assignability—Contract made with firm, subsequently turned into incorporated company—Assignment of contract by firm to incorporated company—Rights of contracting company and assignee—Novation—Breach—Damages.

By contract between defendants and plaintiff firm carrying on business under the name of the "P. Timber Company," plain-

tiff firm agreed to sell and defendants agreed to purchase the entire output for one year of certain lumber camps operated by the plaintiff firm. The contract was expressed to be binding upon the parties, their executors, administrators and successors respectively. Logs were to be paid for in cash on delivery. Shortly after the contract was entered into, the plaintiff firm caused a company to be incorporated under the name "The P. Timber Company, Limited," to which the company the firm assigned all its assets, including the timber limits on which the logs were to be cut, and including also the contract in question. The incorporated company agreed to perform all the contracts of the firm. The company continued to deliver logs under the contract for some months, until the defendants claiming that a breach of the contract had been made, notified the firm that further deliveries of logs would not be accepted. It was not clearly proved that the fact of the plaintiff firm having turned its business over to the company was ever clearly brought to the attention of the defendants, although the defendants in correspondence and in their minute book used the name of the incorporated company, and referred to the contract as being made with the incorporated company.

Held, 1. IRVING, J.A., dissenting. The alleged breach was assented to by the defendants' manager, and therefore the defendants were not entitled to repudiate the contract.

2. IRVING, J.A., dissenting. The contract was not of such a personal nature that it could not be assigned, or at any rate it did not require to be performed by the plaintiff firm personally, but could be performed by the company, and therefore the plaintiffs were entitled to recover damages for the wrongful repudiation of the contract by the defendants. *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1903) A.C. 414; *British Wagon Co.* v. *Lea* (1880) 5 Q.B.D. 149, referred to.

3. The facts did not establish a novation.

4. In estimating the damages to which the plaintiffs were entitled the amount of two booms sold to other parties with the consent of the defendants were not to be deducted from the amount of logs which the defendants were obliged to accept, but the damages were to be estimated without any reference to the fact of these booms being sold to other parties.

Sir C. H. Tupper, K.C., and *Griffin*, for appellants. *Craig* and *Hay*, for respondents.