DOCUMENT NO. 135

MARITIME LAW ASSOCIATION OF THE UNITED STATES

ANNUAL MEETING, MAY 20, 1927.

APPENDIX VII.

Report of Committee on Admiralty Rule 56.

IN THE MATTER

OF

ADMIRALTY RULE 56.

The undersigned committee were appointed pursuant to a resolution of the Association passed at the January meeting, reading:

> "RESOLVED that the President be empowered to appoint a committee of five to consider whether a broader right of interpleader is desirable, and, if so, how the result could be accomplished."

The committee have investigated the authorities and considered the question in conference among themselves and also individually in conference with other members of the Association and of the admiralty bar, as a result of all of which your committee now reports that the right of so-called interpleader now afforded under Admiralty Rule 56 appears to be unduly limited, and the same ought, if possible, to be broadened; also that this result would probably best be accomplished through efforts to secure permission of the courts to receive the views of this Association (in the event this report is adopted) as *amicus curiae* in cases where the question may properly be raised.

Your committee considers that Admiralty Rule 56 is already as broad and inclusive in its language as it could probably be made, and that its apparent intent is to permit the settlement in one admiralty suit of all claims which may exist with respect to the subject matter of the suit, whether involved in the original

libel or not. The present Rule 56 is broader in its application so far as the language goes than was the former Rule 59, which it has superseded. In the Southern District of New York there was formerly a Rule 15 (before the present Supreme Court Rule 56 was promulgated) which was of substantially the same scope as Supreme Court Rule 56, which rule of said District Court has also been superseded, probably because thought unnecessary.

The question therefore does not appear to be as to the language of the Rule but as to the effectiveness of the language or implications of the language, in view of what have been supposed to be restrictions upon the admiralty jurisdiction.

The earlier decisions of the courts, notably *The Hudson,* 15 Fed. 162, and *Evans* v. *New York & Porto Rico S. S. Co.,* 163 Fed. 405, indicated the purpose to enforce the principle now stated in the 56th Rule to the extent of impleading in an admiralty suit parties whose rights could not have been the subject matter of an original admiralty suit because not of a maritime nature. The theory of these decisions was avoidance of circuity of action and avoidance in the public interest of excessive litigation, which, notwithstanding the non-maritime character of various claims which might be involved, was thought possible because such claims in the situation which had developed were incidental to other matters which were maritime, and therefore which by the interrelation of circumstances and of rights were thereby drawn into the vortex of the litigation.

Another honored illustration of this principle is found in the limitation of liability cases, where claims which could not conceivably be the subject matter of an original admiralty suit are adjudicated by the admiralty courts in view of the equitable principles which are said to attach to such a proceeding and produce a concourse of claimants, so that the rights of a shipowner and all other parties (whether claiming at law, in equity or in admiralty) will be properly determined *inter sese.* The Supreme Court of the United States has upheld this procedure in various cases, and the same is not based on any special provision of the Constitution other than the grant of admiralty jurisdiction—supplemented as to details of practice, but of course not enlarged as to power, by the Limited Liability Act of 1851.

Latterly, however, some courts, including the United States District Court for the Southern District of New York and the

Circuit Court of Appeals for the Second Circuit, have held in substance that Rule 56 does not permit impleading a third party unless such party could have been proceeded against directly by original libel, either because one of two parties severally liable, or (as some of the cases suggest) because jointly liable with another.

See

The Goyaz, 281 Fed. 259;
Fido v. *Lloyd Braziliero,* 283 Fed. 62;
Luckenbach S. S. Co. v. *Gano Moore Co.,* 1923 A. M. C. 1229, 298 Fed. 343; also, *Luckenbach S. S. Co.* v. *Central Argentine Co.,* 1924 A. M. C. 841, 298 Fed. 344;
The Southern Cross, 1926 A. M. C. 415, 10 Fed. (2nd) 699.

Nevertheless there is strong evidence that this Circuit is tending away from the restrictive view just mentioned. In *Alert; Soderberg* v. *Atlantic Ltg. Co. and Cunard S. S. Co.,* decided by the Circuit Court of Appeals for the Second Circuit May 2, 1927 (1927 A. M. C. 907), the petition impleading the Cunard Line claimed that it was responsible for damage for which the Lighterage Company was being sued because it (Cunard Line) had employed the stevedores. The District Court had upheld this contention. The Circuit Court of Appeals reversed the decree on the merits but held nevertheless that the Cunard Line was properly impleaded under Rule 56. Judge Learned Hand distinguished the earlier decisions of the Court in *Fido* v. *Lloyd Braziliero,* 283 Fed. 62, and *The Southern Cross,* 1926 A. M. C. 415. Judge Hand's language is so significant that in view of the decision not yet being reported we quote therefrom as follows:

> "The case cited [Fido v. Lloyd Braziliero] did not itself decide that a party impleaded under the Fifty-sixth Rule must be jointly liable with the respondent or claimant. It turned upon the fact that the controversy there sought to be introduced into the original suit was not within the jurisdiction of the admiralty. We thought, and still think that a procedural rule cannot extend the constitutional powers of Federal courts, and that the con-

> troversy added must at least fall within some part of the substantive jurisdiction granted by the Constitution. It is not necessary here to determine whether the District Court could introduce such a controversy, though it was not of admiralty jurisdiction, if it was within some one of the other grants of jurisdiction. All we need say is that if it be within the jurisdiction of the admiralty, it need not be upon a joint liability of the respondent or claimant and the party impleaded. Indeed, a contrary ruling would be in the very teeth of the rule itself, which allows the claimant or respondent to implead a vessel or person 'who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter.' This at least covers any such liability which is cognizable in the admiralty. We hold, therefore, that the Cunard Steamship Company was properly impleaded in the case at bar" (1927 A. M. C., at 909).

The language just quoted appears to justify the hope which was expressed by Judge A. N. Hand in *Mar Mediterraneo,* 1927 A. M. C. 502, where he felt compelled to deny a motion made by Kerr Steamship Company to file a petition against the Hamburg American Line to raise for determination the question whether the latter had properly performed its agreement to act as loading agent of the vessel with respect to carriage of goods on which Kerr Steamship Company had been sued by Lamborn & Company; but where he nevertheless said:

> "It may be that the Court of Appeals might see its way to a return to the doctrine of the earlier cases, for the inconvenience is manifest of requiring the Kerr Company to start a new action upon its claim against the Hamburg Company instead of settling it here, but I seem to be precluded from granting the relief sought."

The language of the *Soderberg* case suggests that the law as it was expressed by Judge Learned Hand in *The Lysefjord,* 263 Fed. 623 (Dist. Ct.), is now good law in this Circuit. In that case there were successive petitions, that is to say, the respondent B impleaded C, who in turn impleaded D, and D was permitted in that suit to file a cross libel against C. The benefits of this procedure are manifest from the opinion. Successive petitions were also involved in *Gans* v. *Wilhelmsen,* 275 Fed.

254, although no issue as to the practice was taken either in the District Court or the Circuit Court of Appeals.

The Circuit Court of Appeals for the Ninth Circuit also allows impleading, notwithstanding that the impleaded party could not have been proceeded against by the libellant and had no joint liability with the respondent. See *The Ecuador; Bethlehem Shipbuilding Corp.* v. *Gutradt Co.*, 1926 A. M. C. 342, 10 Fed. (2nd) 769, where Gutradt Company filed a libel against Pacific Mail Steamship Company for damage to cargo under contract of affreightment, and the latter impleaded the Shipbuilding Corporation on the ground that the damage had resulted from failure of the Shipbuilding Corporation to repair certain clapper valves according to its contract with the Pacific Mail Company. This decision is comparable with one rendered by the Circuit Court of Appeals for the Second Circuit in *The Northland—The Sachem; Loma Fruit Co.* v. *International Nav. Co. and Atchison, Topeka & Santa Fe R. R. Co.*, 1924 A. M. C. 664, 11 Fed. (2nd) 124 (affirmed on the opinion of the District Judge), wherein the steamship company, which was sued for damage to apples shipped from California to Liverpool via Boston, caused by non-refrigeration of the apples, impleaded the Atchison Railroad on the ground that it had improperly issued in California through bills of lading providing for refrigeration. Exceptions to the petition had been overruled by Judge Mayer in the District Court. This decision of Judge Mayer was concurred in by Judge Ward, who tried the cases. The Circuit Court of Appeals did not express any view, but merely affirmed on Judge Ward's opinion the decree which held the Atchison Railroad liable.

One portion of Judge Learned Hand's opinion in the *Soderberg* case calls for special consideration:

> "We thought, and still think, that a procedural rule cannot extend the constitutional powers of Federal courts, and that the controversy added must at least fall within some part of the substantive jurisdiction granted by the Constitution. It is not necessary here to determine whether the District Court could introduce such a controversy, though it was not of admiralty jurisdiction, if it was within some one of the other grants of jurisdiction."

This language may have a significance not at first apparent, in view of the fact that the same judge wrote the opinion of the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Pressprich & Son Co.* v. *Elwell & Co.*, 250 Fed. 939, wherein it was decided that a penalty suit under the Harter Act (brought in admiralty), of which the District Court was held to have no admiralty jurisdiction, could be dealt with as if the suit had been properly brought at law. In the light of this there is more than a strong hint in the sentence from Judge Learned Hand's opinion in the *Soderberg* case last above quoted. It is hardly too much to hope that Rule 56 will now be given the fullest possible effect according to its plain language, irrespective of whether the new angle of the entire controversy brought into the suit by petition be (as an independent matter) within the admiralty jurisdiction or not. Whether there should be any restriction by reason of a non-maritime matter (impleaded) involving less than $3,000 or being between citizens of the same state is still perhaps an open question. But Rule 56 itself does not suggest any such restriction, and it is apparent that such a restriction would prevent impleading in many otherwise proper cases. If the admiralty court is to implead at all to settle controversies not maritime, it would seem that such impleading power should not be affected by jurisdictional restrictions which apply in terms only to common law and equity.

This result would be consonant with the convenience and interest of litigants and the public, and that it would be approved by the Supreme Court of the United States is foreshadowed by the recent decision of that Court in *The Bolikow*, 1927 A. M. C. 402, which is a good illustration of the proposition that jurisdiction once assumed should be maintained to end the litigation. That case involved the question whether, after limitation of liability under the Act of 1851 was denied to the shipowner because of his privity, the limited liability proceeding should be dismissed and the several claimants remitted to their actions at law. This point was raised by the Hartford Accident & Indemnity Company, which had filed in Court the bond to secure to the claimants the value of the barge and her pending freight. Mr. Chief Justice Taft wrote the opinion, and held that notwithstanding denial of limitation (thus producing a situation where the shipowner would no longer have a right to file a petition), the proceeding should continue and all parties be held in concourse so

that all controversies arising out of the disaster could be terminated. He speaks of the Supreme Court having by its rules and decisions

> "given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. Dowdell v. United States District Court, 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy and is applicable to proceedings in rem against the ship as well as to proceedings in personam against the owner" (406-407).

The admiralty court in a limited liability proceeding exercises powers of courts of equity and courts of law without any special warrant given by the Constitution. Since the admiralty jurisdiction is not varied by statute, it can hardly be said that the court's power in a limitation proceeding comes from the Act of 1851. That statute only provided for a certain procedure, the details of which were worked out by the Supreme Court Rules in that respect. The other Supreme Court Rules have, by statute of at least equal dignity, the same power of direction over the proceedings in the lower Federal courts. In view of Rule 56 there appears to be no restriction whatever on the right and power of the District Courts sitting in admiralty to entertain impleading petitions, irrespective of the "new" controversy not being of a maritime nature or not having any apparent relation to the subject matter of the libel, and perhaps irrespective of the amount involved or citizenship of the parties.

Although it is stated in a footnote to *Armour* v. *Fort Morgan S. S. Co.*, 270 U. S. at 259, 1926 A. M. C. at 331, that application of Rule 56 is limited by certain considerations of jurisdiction, it does not appear that the point now before the Association was in issue in that case.

Indeed, in view of the positive language of Rule 56, which provides that in any suit the claimant or respondent

> "shall be entitled to bring in any other vessel or person * * * who may be partly or wholly liable either to the libellant or to such claimant or respondent * * * growing out of the same matter. This shall be done by petition * * *"

it may well be that the District Court has a positive duty to entertain any petition which falls within the language of Rule 56, without interpreting the same away, and that performance of such duty if disregarded could be enforced by mandamus. If less than $3,000 is involved, or if the impleaded party is a citizen of the same state with the libellant or respondent (in a matter only legal or equitable, if independent), that should not defeat the impleading power, because the "new" controversy is only incidental to the settlement of the principal maritime controversy alleged in the libel—just as the many common law claims in any limited liability proceeding are incidental to the whole proceeding.

The objection most frequently heard to impleading where the "new" controversy is of a common law nature is that the impleaded party is thereby deprived of trial by jury. Perhaps it is fair to say that in most of such cases such party, if put to his choice, would unhesitatingly accept the decision of the admiralty judge in preference to the verdict of a jury. In such instances the contention is made only for the purpose of avoiding trial at all, then. Jury trial can be readily waived, as the Circuit Court of Appeals held it was in the *Elwell* case, 250 Fed. 939, 942. In those few cases where the impleaded party does not wish to waive jury trial it is not seen why the District Judge may not take a jury to pass on any question of fact. Judge Neterer said in *Sutton* v. *Pacific S. S. Co.* (W. D. Wash.), 1925 A. M. C. 64, 3 Fed. (2nd) 72, 74:

> "There is no inhibition against the privilege to submit an issue of fact to a jury"

although he pointed out that jury trial as a matter of right in admiralty under R. S. 566 only extends to cases arising on the Great Lakes. The Supreme Court held in *Liberty Oil Co.* v. *Condon,* 260 U. S. 235, 243-244, that in an equitable action

(converted into such by interpleader filed in an action at law) jury trial of certain issues was preserved.

Another minor objection occasionally heard is that impleading of additional parties respondent may impede the termination of the litigation as between the original libellant and respondent. Although such comment is not to be overlooked, nevertheless it is the general convenience and benefit of all litigants and the public that should have the greater consideration. Further, the District Court might grant severance of the trial in a case where delay in proceeding threatened serious prejudice to the libellant. This decision is supported by *The Alert,* 61 Fed. 113.

Inasmuch as by far the greater number of questions under the 56th Rule have arisen in the Second and the Ninth Circuits, the practice in which is observed rather generally by the other Circuits, your committee has not attempted to make a general survey of the decisions in all the Circuits.

Respectfully submitted,

ROSCOE H. HUPPER
WHARTON POOR
ALBERT T. GOULD
GEORGE P. WHIP
WILLIAM J. CONLEN.

Dated, May 20, 1927.