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MARITIME LAW ASSOCIATION

OF THE

UNITED STATES

April 24, 1930.

JURISDICTION AND PENAL SANCTIONS IN THE EVENT OF COLLISION ON THE HIGH SEAS.

To the Maritime Law Association of the United States:

The undersigned, constituting a majority of the three members of the Committee appointed by the President to consider the matter of criminal jurisdiction over collisions on the high seas, report as follows:

The agenda of the International Maritime Committee, for its meeting at Antwerp in August, 1930, contains the following item:

> "Jurisdiction and penal sanctions in the event of collision on the high seas."

This subject comes before the International Maritime Committee because of a resolution, dated April 19, 1929, adopted by the Mixed Maritime Committee of the International Labor Bureau, urging the necessity of determining, by means of an International Convention, "the courts having jurisdiction and the penal sanctions in the event of a collision occurring on the high seas," and stating that it is desirable that the International Maritime Committee should, at its next meeting, endeavor to settle "the terms of an international agreement which by the introduction of rules of penal law would complete the Conventions in force at present as to collision and salvage at sea." The preamble to the resolution of the International Labor Bureau's Committee refers "to the danger of several prosecutions which threaten masters of vessels and shipowners by reason of the same negligence." The

resolution seems to regard, as the outstanding difficulty in the present situation, the possibility of double jeopardy, or more than one prosecution in different countries for the same offense.

The statutes of the United States do not appear to give such criminal jurisdiction to the Courts of the United States. Section 272 of the Criminal Code (18 U. S. Code, Sec. 451) gives criminal jurisdiction to the Courts of the United States over specified offenses committed on the high seas or committed on board any vessel of the United States, but does not give such jurisdiction in respect of offenses committed on the high seas on board vessels of other nations.

The question to be considered may be stated as follows: Should there be an International Convention and, if so, what should be its terms, prescribing what countries should be at liberty to exercise criminal jurisdiction over collisions occurring on the high seas?

The whole discussion is an outcome of the decision of the Permanent Court of International Justice at The Hague in the case of the French Republic against the Turkish Republic (SS. *Lotus*) rendered on September 7, 1927, and reported in condensed form at 1928 A. M. C. 1. A collision occurred on the high seas between a French steamship and a Turkish steamship. The Turkish steamship was sunk and the lives of eight Turkish nationals were lost. The French steamer proceeded to Stamboul with the survivors, and both the French and the Turkish navigating officers were arrested, tried for negligent manslaughter, convicted and sentenced to fine and imprisonment. France protested against the proceeding, in so far as it involved the French officer, on the ground that Turkey had no jurisdiction and that such a prosecution was in violation of International Law. An agreement was reached between the two nations referring to The World Court the question whether there was any principle of International Law and, if so, what, which forbade prosecution by Turkey under the circumstances.

The Court was divided in opinion: seven judges, including the representative of Turkey, took the view that there was no principle of International Law which forbade the exercise of jurisdiction by the Turkish Court; five judges took the contrary view. Of the seven judges who constituted the majority on the main question, one, Judge John Bassett Moore, dissented from

the judgment on other grounds and therefore, while agreeing with the majority on the main question, voted with the minority. The vote was, accordingly, six to six, and the tie was determined in favor of Turkey by the casting vote of the President of the Court. For the purposes of the present question, however, the Court voted seven to five in favor of the Turkish contention.

The majority opinion was rested chiefly upon the ground that, since a wrongful act had been committed, the consequences of which took effect upon a Turkish vessel on the high seas (and, therefore, figuratively at least, upon Turkish territory), Turkey was at liberty to prosecute without violating International Law. The decision did not turn upon the nationality of the men whose lives were lost, but upon the nationality of the vessel upon which they were, and it would seem that the result would have been the same if the men on the Turkish steamer, whose lives were lost, had been of any other nationality.

The question may be stated in another form as follows: What would be a desirable international arrangement, if any, for the orderly exercise of jurisdiction in such cases?

It seems to make little difference what the Municipal Law of various countries on this subject is at the present time, and the International Law has been settled, so far as it can be settled, by the decision in the *Lotus* case.

It seems clear that, if there has been criminal negligence in navigation on the high seas, the country whose flag is flown by the vessel whose officer has been guilty of the negligent act has jurisdiction to prosecute the act. As we understand it, this proposition has not been disputed by anyone. The question is whether it is desirable that concurrent, or partially concurrent, jurisdiction should be permitted, on the part of the country whose flag is flown by the other vessel.

This is rather a practical question than a theoretical one. The objections to such concurrent jurisdiction are: (1) possibility of double jeopardy; (2) the possibility that, speaking from the standpoint of the United States, an American citizen might thereby be subject to prosecution in some country in whose courts we have less confidence than in our own. On the other hand, cases of flagrant negligence involving loss of life may easily be imagined where it would seem denial of justice if the injured country were not at liberty to prosecute. Moreover, in many

cases, there might be neglect to prosecute on the part of the country whose vessel was at fault, and that vessel with her officers might be in a trade which would not take her to her own country for a long period of time.

It is, as already stated, not a question of legal theory but a question of balancing the practical objections on one side against those on the other.

In our opinion, it is desirable that there should be a concurrent jurisdiction, subject to the following limitations:

1. Such Conventions should be made only between countries which have adopted the International Rules of the Road and the navigation of whose ships is, therefore, governed by the same law.

2. Such Conventions should provide that a judgment of conviction or acquittal in one country should bar prosecution in the other.

3. It should further be provided that, in such prosecutions, it would be a defense for the defendant to show that his navigation was in fact in accordance with the laws of the country whose flag his own ship flies. The reason for this is that there are, from time to time, variations in the International Rules as they prevail in different countries. For example, the recent London Conference recommended certain changes in the International Rules. Such changes may be made by the legislature of one country several years before the same changes are made in other countries, and, if the accused officer was, in fact, carrying the lights and obeying the rules, etc., prescribed by the law of his own country, he should not be subject to punishment.

We, therefore, report, as our conclusion, that, if the subject is of sufficient practical importance to warrant International Conventions, such conventions should be concluded only with nations whose rules of navigation are substantially the same as our own, and should be subject to the restrictions suggested above, namely: (1) that acquittal or conviction in one country should bar prosecution in another; (2) that the accused should be at liberty to show as a defense that he had complied with the laws of his own country, if they differ from those of the forum.

We do not understand that the question referred to us has any relation to jurisdiction over civil litigation in respect of collision, nor do we understand that it has any relation to collisions happening within the territorial waters of any nation.

New York, April 24, 1930.

CHAUNCEY I. CLARK,
JOHN W. GRIFFIN.

To the Maritime Law Association of the United States:

The third member of your Committee does not concur in the opinion of the majority that "there should be a concurrent jurisdiction" under the circumstances of the *Lotus* case; and the minority conclusion is that it is not desirable to commit the United States to an international agreement to that effect.

In expressing this dissenting view, it is not intended to attempt a critique of the reasoning of the majority in the *Lotus* decision. It may be suggested, however, that perhaps the statement in the present report of the majority of your Committee to the effect that "the International Law has been settled, so far as it can be settled, by the decision of the *Lotus* case" is not wholly justifiable. It may be true that the *Lotus* decision now makes a precedent for those sovereign states or nations which adhere to the statute of the International Court. It does not presently bind the United States to the principle for which it stands, and it is at least doubtful if the decision truly reflects the opinion of such a majority of the society of nations as to constitute a "consensus of opinion" necessary to render the decision a fixed rule or doctrine of international law.

If there is any surviving force in the decision rendered by the majority of the Court in the case of *The Queen* v. *Keyn* (1876-77), 2 Exchequer Division 63 (Crown Case Reserved), it may be assumed that the doctrine would not be desirable to one great maritime nation at least. Lord Finlay, in his dissenting opinion in the *Lotus* case, cited the *Keyn* (Franconia and Strathclyde collision) case as an authority on the point, and character-

ized the question raised in the English case as being "exactly the same as that which arises in the present case" (p. 54, "Collection of Judgments").

The French view is (or was) obvious as shown by the argument advanced in the *Lotus* case.

There does not seem to be a reported case from a United States Court squarely on the point; but the attitude taken by the Government under such circumstances as are exemplified in what is known as the *Cutting* case (referred to in Foreign Relations of the United States, 1887, p. 751; idem, 1888, II, pp. 1114, 1180) and in the *Anderson* case (referred to in Foreign Relations of the United States, 1879, pp. 435, 436; 1880, p. 481) indicates that the doctrine of the *Lotus* case would not be acceptable to the United States. The majority report here has already mentioned that the United States statutes are silent as to this particular jurisdiction, that is, as to offenses committed on the high seas on board vessels of other nations.

But regarding the question apart from legal theories and doctrines, and to use the words of the majority report, simply as "a question of balancing the practical objections on one side against those on the other," it seems to the minority of your Committee that the limitations proposed by the majority sufficiently show the impracticability of entering into an international convention in conformance with the *Lotus* ruling. Certainly it would be unjust to the accused to compel the submission of a question of his guilt or innocence to a foreign tribunal, whose decisions may be variously conflicting with the decisions of his own national courts, even on the same rule of the road at sea. It may fairly be said that the ordinary criminal courts of any state are not fully competent to deal with questions of negligence in navigation. Can any benefit be derived by sanctioning the submission of such a question, affecting the freedom of our nationals, to the judgment of such a foreign tribunal? Can our nationals reap any benefit by exacting from aliens their submission to the jurisdiction of our own criminal courts? The result would only engender international friction and dissatisfaction. The remedy could be better obtained by less arbitrary methods through diplomatic channels. We are not considering here any question of reparation for property damage, nor of acts or crimes committed within territorial waters or ports in disturbance of the peace.

It seems to the minority of your Committee, therefore, that if any representations are to be made on the part of the United States, they should stand firmly for its exclusive jurisdiction of the conduct of its nationals in the management of vessels of its flag on the high seas, under the circumstances of the *Lotus* case.

W. H. McGRANN.

New York, April 25, 1930.