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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

MEMORANDUM ON BALLOT ITEMS

1. Concerning "new trial" on admiralty appeals:

Those who favor retaining this practice say that it is necessary for justice and good order because it enables the C.C.A. to correct error and adjust liabilities among (often a multiplicity of) parties without returning the cause to the District Court for new trial, which might involve further appeal and further expensive and complicated procedure. They say also that the complicated fact situations existing in many admiralty cases should remain open for consideration by the C.C.A. and not be left for final determination by the single District Judge, subject to the discretion which rests in the C.C.A. to prevent abuse and not disturb the facts on appeal unless as found by the District Judge they are clearly against the weight of evidence.

Those against retaining this practice say that it is an anachronism, and that admiralty appeals should not have a facility not existing either in common law or equity appeals; that by virtue of "new trial" causes are sometimes finally disposed of in the C.C.A. on points not thought important in the District Court and therefore not fully developed on the facts; and that the practice imposes an undue burden on counsel in preparing for and arguing appeals, as well as on the C.C.A. in considering the same.

The theory and development of "new trial" are discussed broadly in *Munson* v. *Miramar,* 167 Fed. 960. It is recognized as established doctrine by the Supreme Court. See *Watts* v. *Unione,* 248 U. S. 9, 21; *Standard Oil Co.* v. *Southern Pacific*

Co., 268 U. S. 146, 155. Interesting applications appear from *Yeaton* v. *United States,* 5 Cranch. 281; *Munson* v. *Glasgow,* 235 Fed. 64.

2. Concerning findings of fact and conclusions of law:

Admiralty counsel appear to be fairly unanimous that findings and conclusions should be done away with. They are now enforced by Supreme Court Admiralty Rule 46½, which may have resulted from failure of a District Judge to write an opinion in a case that later was reviewed by the Supreme Court. Most counsel consider that a fairly complete opinion by a competent Judge serves all reasonable purposes that can be served by formal findings and conclusions, and it is probable that many Judges share this view.

3. Concerning assignments of error:

Some counsel consider that assignments of error should be done away with on the ground that they serve no effective purpose that would not be served as well by filing with the C.C.A. a statement of the principal points to be argued, as is now done under the Civil Rules, and that technicalities are sometimes based on a contention that error has not been adequately assigned—thus inviting many and perhaps repetitious assignments. Some method of presenting the principal errors to the C.C.A. remains necessary.

4. Concerning pre-trial practice:

Pre-trial practice similar to that provided by Civil Rule 16 could doubtless be informally adopted by the District Court for admiralty cases without express provision in the rules. Some counsel consider that dignity and importance would result if a permissive rule should be adopted for admiralty by the Supreme Court, of the same nature as its Civil Rule 16. The impression exists that on occasion the pre-trial practice has been availed of by some Courts as a means of forcing settlements, which if so is beyond the legitimate purpose of this practice.

5. Concerning extending Civil Procedure Rules to Admiralty:

Admiralty Rules 31 to 32 C are already substantially the same as Civil Rules 33 to 37. Civil Rules 26 to 32 broaden the field as concerns depositions and discovery, so that the principal change involved in extending the Civil Rules to admiralty "so far as may be" concerns these two subjects.

Under these Civil Rules depositions may be taken at any time before trial and witnesses may be examined for discovery purposes without the examining party becoming bound by the witness.

Depositions *de bene esse* in admiralty are now governed by 28 U. S. C. A. 639 (R. S. 863) and commissions in admiralty to take testimony abroad by 28 U. S. C. A. 644 (R. S. 866). These two sections impose a limitation on the Supreme Court's rule-making power for admiralty—28 U. S. C. A. 637 (R. S. 862)—which presumably could be removed only by statute. That course was recommended by a committee of the Association to the May 1941 meeting, but was not adopted and the matter was referred back to the Executive Committee to be dealt with further. Item 6 on the ballot seeks your expression on this point.

Some admiralty counsel point to the enlargements already made in the Admiralty Rules (31, 32, -A, -B, 46 A) as being adequate for all reasonable purposes, and suggest that abuses might exist in examinations before trial in admiralty unless the opposing party should make permissible appropriate motions to limit the scope and manner of examination, which motions they further suggest might hamper and confuse the practice, particularly in respect of the frequent necessity of taking the depositions of admiralty witnesses promptly.

Other admiralty counsel strongly favor the proposed enlargement in the Admiralty Rules, particularly as that would concern collisions and personal injury cases. They instance that in common law cases attorneys for plaintiffs rather generally forego opposition to defendants' notices for examination before trial. See Civil Rule 30 (a), (b) and (d). As favoring examination before trial in admiralty they also mention that various personal injury cases which could have been brought in admiralty, but nevertheless brought originally at common law, have been discontinued by plaintiffs when confronted by notice of examination before trial, and then brought in admiralty, for the very reason that the respondent cannot now examine the libellant before trial.