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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

BILL OF LADING COMMITTEE

REVISION OF THE HAGUE RULES

MINORITY REPORT

The undersigned members of this Association's Committee on Bills of Lading strongly dissent from the recommendations of the Majority Report on two subjects, viz.:

5. Liability in tort, the Himalaya problem,

and

7. Both-to-Blame

and urge the Association to reject those recommendations.

5. Liability in tort, the Himalaya problem.

The reasons given by the Sub-Committee of the Comité Maritime International for seeking revision of the Hague Rules so as to extend to servants and agents of the carrier and to independent contractors employed by him in the carriage of goods the exculpatory clauses of the Rules, and the limitations of amount of liability established therein, are:

> "In order to avoid the possibility of by-passing the contract and the legislation based on the convention * * *."

The reasons are specious and the reasoning baseless.

The Hague Rules themselves grant the exonerations and limitations only to "the carrier", not to his agents, servants, or independent contractors. Article 2 of the Hague Rules provides that:

> " * * * the carrier * * * shall be * * * entitled to the rights and immunities hereinafter set forth";

and Articles 1(a) defines "carrier":

> " 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper".

We know of no "legislation based on the convention" which defines carrier otherwise; and it is clear, therefore, that suits against servants and agents of the carrier, and independent contractors, do not "by-pass * * * legislation based on the convention"—those persons are not entitled to the benefits of such legislation by the terms of the legislation itself. *Krawill* v. *Herd*, 359 U. S. 297, 301-2.

The statutory exemptions and limitations, which were a departure from a common carrier's common law insurer's liability, were granted to "carriers" only to encourage shipping, a purpose only remotely served, if at all, by their extension to agents, stevedores and repairmen. It is to be noted that the direct beneficiaries of such a change are not the proponents of it. Rather, the extension is being advocated by the shipowners and their liability underwriters.

Similarly, such suits do not "by-pass the contract". At least until very recent months, bills of lading did not purport to be made for the benefit of the carrier's agents or servants, or for independent contractors; and unless they do, it cannot be argued that such persons are entitled to their benefits.

The recommendation of the majority of the Committee, in any event, goes far beyond the stated reason. It would extend the benefits of the Rules to agents, servants, and independent contractors *not only when the bill of lading contract purports to be made for their benefit, but even when it does not.*

No servant, agent or independent contractor can be held liable excepting for his own negligence. Exoneration from liability for one's own negligence or limitation of the amount of that liability, is rightly the exception, not the rule. These should be granted sparingly, and only for good reasons. The reasons advanced by the Sub-

Committee and by the majority of this Committee are not such reasons.

The recommendation of the majority of this Committee goes even beyond the recommendations of the Sub-Committee of the Comité. The latter propose to deny the benefits of the Rules to carriers, agents, etc. whose acts or omissions are done

> "with intent to cause loss or damage, or recklessly and with knowledge that loss or damage would probably result."

The majority of this Committee recommends that these provisions be stricken. Apparently it proposes to exonerate carriers, servants and independent contractors from liability even for wilful, personal, malicious damage to cargo.

The Hague Rules themselves were a compromise of conflicting interests, among which a balance was struck. The recommendation of the majority upsets that balance, without any compensatory benefit to cargo interests.

WE RECOMMEND (1) THAT THE ASSOCIATION'S DELEGATION BE INSTRUCTED TO OPPOSE THE AMENDMENT; BUT (2) THAT IF IT BE INSTRUCTED TO SUPPORT IT, THE INSTRUCTIONS REQUIRE THAT IT SUPPORT THE WHOLE AMENDMENT, INCLUDING PARAGRAPHS "(4)" AND "(7)".

7. Both-to-Blame.

At the outset, it should be noted that this whole matter concerns only the law of the United States. The Sub-Committee of the Comité says only that it:

> "* * * would regard it as a great progress towards the unification of Maritime Law if the United States would accept and adopt the same rules about collisions as the rest of the maritime world * * *".

and the majority of this Committee concedes that:

> "* * * the best way to * * * bring United States law into conformity with the law of the rest of the world * * * is to ratify the Brussels Collision Convention or to enact the provisions of that Convention as United States Law. Your

> Committee therefore would not recommend amendment of the Hague Rules on this point, if it were certain that the principles of the Brussels Collision Convention would in the near future be enacted as domestic law of the United States".

The concession makes it crystal clear that *the majority of this Committee seeks to amend the Hague Rules solely to effect a change in the law of the United States which the Congress has thus far been unwilling to make.* This we consider presumptuous and devious. It goes far beyond the Sub-Committee's cautious remarks, which merely urge the United States to act. This ground alone would, we submit, justify defeat of the majority's recommendation.

Above and beyond this, however, is the inherent inequity of the recommendation. The both-to-blame clause perpetrates a legal wrong. It requires an innocent party to compensate a guilty one for the consequences of the latter's negligence. This is wholly contrary to the concept that "admiralty does equity".

The both-to-blame clause does not, as the majority report says, require "indemnification by cargo to the ship for money recovered for a cause for which the ship and her owners are not responsible under the Hague Rules". On the contrary, it requires that indemnification for a cause not dealt with in the Hague Rules at all—the right of one joint tort-feasor to seek contribution from a fellow tort-feasor.

At the common-law, one of two joint tort-feasors had no privilege of contribution from the other. The admiralty early granted him that privilege. The both-to-blame clause now seeks to turn the privilege into a license to be negligent without penalty.

By hypothesis in a both-to-blame situation both ships are negligent. The cargo is free from fault. The both-to-blame clause seeks to transfer the consequences of negligence of the carrying ship to its innocent cargo, while freeing that negligent ship from the consequences of its own negligence. This is neither logical nor equitable.

If, as the majority euphemistically insist, the sole purpose of the proposed amendment is to free the carrying ship from contributing to reduce the damages which the non-carrying ship must pay the carrying ship's cargo, the result can be obtained simply and directly by abolishing the right of contribution between the two ships

in both-to-blame situations. This would accomplish the result without penalizing the only innocent party involved—the cargo.

WE RECOMMEND THAT THE ASSOCIATION'S DELEGATION BE INSTRUCTED TO VOTE AGAINST ANY AMENDMENT TO THE HAGUE RULES WHICH WOULD MAKE VALID THE BOTH-TO-BLAME CLAUSE.

March 11, 1963.

Respectfully submitted,

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