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review itself, when granted, could and should recognize and take into account the discretion allowed the trial judge. Under the present rule, granting review invariably means granting reversal.

Conclusion

Under the common law system, review of a motion for a new trial was not based on the distinction between error in law and error in fact, but on the elementary concept of what was just to all concerned. It is unfortunate that the federal courts did not adopt this informal practice. Although the old English system cannot be established under the present federal practice, the power of review of the issue of excessive damages should be returned to the appellate court so that multiple protection can be guaranteed litigants.

The trend is toward liberalization. How far will it extend? There are two roads open. Either the appellate courts will broaden review so that all rulings on new trials will be reviewed, with reversal ordered where judicial abuse of discretion is evident, or the hesitancy concerning review of errors in fact will be forgotten and direct examination of the jury verdict for abuse will be made. The latter course would eliminate the circular approach that is commonly employed. Although the traditional objections have been destroyed, in all probability the trend toward more liberal review will follow the slow course of judicial change.

STIPULATIONS OUSTING ADMIRALTY COURTS OF JURISDICTION

Introduction

Recently the Supreme Court granted certiorari to review a decision of the Fifth Circuit Court of Appeals concerning the extent to which effect can be given to stipulations in ocean bills of lading not to resort to the courts of this country.[1] The Court ultimately declined to pass on this point when its resolution became unnecessary for an adequate determination of the rights of the parties.[2] The opinion dismissing the writ, however, suggests that given sufficient opportunity the Court will review the problem; one which has produced a disparity of decision not only among the courts of appeals but even within particular circuits.

The Conflict of Decisions

The clearest expression of the views of the Second Circuit is found in *William H. Muller & Co. v. Swedish Am. Line, Ltd.*[3] There, a New York

1. The Monrosa v. Carbon Black Export, Inc., 358 U.S. 809 (1958).

2. The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959). Inasmuch as the Supreme Court was in agreement with the circuit court to the effect that the suit in rem against the vessel was not prohibited by the jurisdictional stipulation, the question of whether or not the suit against the owner of the vessel should be retained was only of academic interest.

3. 224 F.2d 806 (2d Cir.), cert. denied, 350 U.S. 903 (1955).

corporation, consignee of certain goods shipped aboard a foreign vessel from Sweden to Philadelphia, filed a libel in the Southern District of New York against the Swedish owners of the ship. One term of the bill of lading under which the shipment was forwarded provided that any claim against the carrier was to be decided by the Swedish courts. Affirming the lower court in dismissing the libel, the court of appeals stated that stipulations relegating parties to foreign forums are valid unless unreasonable. Furthermore, once the respondent shows the existence of the agreement, the libelant bears the burden of proving that it is unreasonable.[4] Although, in *Swift & Co. v. Compania Colombiana Del Caribe*,[5] the Supreme Court of the United States held that a citizen could not, on forum non conveniens principles, be relegated to a foreign tribunal unless assured of adequate security and jurisdiction over the other party, the *Muller* court affirmed dismissal of the suit before it without providing for these safeguards. The court's action was consistent with its prior holding in *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*,[6] that *Swift* does not apply to cases where the parties have voluntarily agreed to submit to another forum.

The Second Circuit thus has recognized that a distinction must be drawn between a motion to dismiss on the grounds of forum non conveniens and a plea for the same relief on the basis of a contractual stipulation.[7] In the

4. In Transcontinental Commodities, Inc. v. Italnavi Societa Di Navigazione Per Azioni-Genova, 1959 Am. Mar. Cas. 939 (S.D.N.Y. 1959), the libelant opposed a motion to dismiss on the ground that the bill of lading in question did not bind it and, therefore, the motion would not lie. The court denied the motion on the ground that such a plea raised an issue which could not be decided on motion papers.

5. 399 U.S. 684 (1950). "Application of forum non conveniens principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners." Id. at 697.

6. 187 F.2d 990 (2d Cir. 1951).

7. In Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., supra note 6, Judge Clark, in a concurring opinion, indicates quite clearly that there is a distinction to be drawn. "I prefer to place my concurrence upon the validity, under the circumstances here disclosed, of the contract requiring all claims to be settled in Norway. The apparently wider discretion granted in the opinion to the district judge to pass upon the appropriateness of the forum may, perhaps, raise more extensive questions which we need not now face." Id. at 990-91. However, district courts within the Second Circuit have failed to recognize the distinction. See Nieto v. The S.S. Tinnum, 170 F. Supp. 295 (S.D.N.Y. 1958); Murillo, Ltd. v. The Bio Bio, 127 F. Supp. 13 (S.D.N.Y.), aff'd, 227 F.2d 519 (2d Cir. 1955); St. Paul Fire & Marine Ins. Co. v. Republica De Venezuela, 105 F. Supp. 272 (S.D.N.Y. 1952). In The Tricolor, 1 F. Supp. 934 (S.D.N.Y.), aff'd, 65 F.2d 392 (2d Cir. 1932), the lower court declined jurisdiction on the basis of forum non conveniens. A jurisdictional clause relegating the parties to a foreign forum was considered by the court as one of the elements determinative of the forum non conveniens issue. Other lower court decisions have recognized the distinction which exists between the two motions. Transcontinental Commodities, Inc. v. Italnavi Societa Di Navigazione Per Azioni-Genova, 1959 Am. Mar. Cas. 939 (S.D.N.Y. 1959); Export Ins. Co. v. Skinner, 115 F. Supp. 154 (S.D.N.Y. 1953). By confusing the two concepts, the courts have also injected into the problems surrounding jurisdictional stipulations the irreconcilable decisions concerned with forum non conveniens. Compare Guevara v. M.V. Rio Jachal, 1956 Am. Mar. Cas. 1301 (S.D.N.Y. 1956), with

former case, a court will not dismiss unless the respondent can show "that he will be unfairly prejudiced, unless it be removed to some other jurisdiction."[8] When there is an agreement to litigate in a foreign forum, the libelant must introduce sufficient proof that the stipulation is unreasonable if jurisdiction is to be retained. The same factors, such as availability of witnesses[9] or the ability of the foreign forum to adjudicate the matter fairly,[10] will determine whether the stipulation is "unreasonable" or, on a forum non conveniens motion, whether the respondent will be "unfairly prejudiced." Lacking a stipulation, however, the respondent must show a balance strongly in his favor, since a libelant's choice of forum is "rarely" to be disturbed.[11] Given the same facts, but adding an agreement to submit all claims to a foreign tribunal, the action will be dismissed unless the libelant can convince the court that certain factors weigh heavily in its favor. The situation is analogous to the approach of New York courts in actions between nonresidents. In commercial cases New York courts will retain jurisdiction unless convinced by the defendant that he will be prejudiced.[12] In tort, the action will be dismissed unless the court is persuaded to do otherwise by factors weighing heavily in favor of the plaintiff's choice of forum.[13]

In contrast to the approach taken by the Court of Appeals for the Second Circuit, the Fifth Circuit has stated that any consideration of a foreign forum stipulation "starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."[14] The Fifth Circuit distinguished *Muller* on factual grounds, but in reality there was a basically different approach to the problem. This is borne out by the statement of the court that the respondents "pitch their argument to a considerable extent upon

Nestle's Products (Malaya), Ltd. v. Osaka Shosen Kaisha, 1959 Am. Mar. Cas. 1590 (S.D.N.Y. 1959). In the former case, jurisdiction was declined on the basis of a suit between two foreign parties based on a claim for damages sustained outside waters of the United States. In the latter, the court blandly announced that the whole controversy appears to have no connection with the United States, and then went on to retain jurisdiction.

8. The Western Farmer, 210 F.2d 754, 756 (2d Cir. 1954). Although this was a collision case, there is no logical reason why the same principle should not be applied to a cargo claim arising out of different circumstances. See Nestle's Products (Malaya), Ltd. v. Osaka Shosen Kaisha, 1959 Am. Mar. Cas. 1590 (S.D.N.Y. 1959).

9. Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 423 (1932); The Western Farmer, 210 F.2d 754 (2d Cir. 1954).

10. Nieto v. The S.S. Tinnum, 170 F. Supp. 295 (S.D.N.Y. 1958).

11. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

12. De Flammercourt v. Ascer, 3 N.Y.S.2d 461 (Sup. Ct. 1938).

13. Reep v. Butcher, 27 N.Y.S.2d 330 (Sup. Ct. 1941).

14. Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958), cert. denied, 359 U.S. 180 (1959). The opinion is somewhat confusing inasmuch as the court was aware of William H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806 (2d Cir.), cert. denied, 350 U.S. 903 (1955), and yet stated that the principle enunciated is universally accepted. See also The Alabama, 1952 Am. Mar. Cas. 1766 (S.D.N.Y. 1952), where the district court upheld the specific enforcement of an agreement to litigate in a foreign forum.

the doctrine of forum non conveniens, recognizing that . . . [the jurisdictional stipulation] alone did not provide a firm basis upon which to stand."[15] Both circuits agree that a forum non conveniens defense will not succeed until the respondent can show that he will be highly prejudiced unless the case is dismissed.[16] The Fifth Circuit, by acknowledging that the defense of forum non conveniens provides a sounder basis for dismissing an action rather than a motion for the same relief on the ground of a jurisdictional agreement, clearly indicated that such stipulations will be accorded little, if any, weight. Contrast this with the position of the parties in the Second Circuit where, if the libelant cannot demonstrate the unreasonableness of the stipulation, the respondent need merely show the existence of the agreement to gain a dismissal.

In *Aetna Ins. Co. v. The Satrustegui*,[17] a district court in the First Circuit accepted the *Muller* case and carried it to a logical conclusion. There, the subrogee of the consignee brought suit in the district where the goods had been discharged. The court dismissed the action since the libelant was unable to demonstrate the unreasonableness of the stipulation particularly in view of the necessity of obtaining proof from Spain as to the actual condition of the goods when shipped. The fact that it was also necessary to obtain evidence at the port of discharge and that the consignee was actively engaged in business there, was considered of little import. A district court[18] in the Third Circuit, citing and professing to accept *Muller*, nevertheless found the issue essentially the same as forum non conveniens, and concluded that jurisdiction must be retained unless the respondent could show that he was unreasonably prejudiced thereby.

Not only is there disparity between the circuits, but within the Second Circuit itself, which handles a large percentage of the admiralty matters before federal courts, there are conflicts. In *Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst*,[19] the District Court for the Southern District of New York refused to dismiss an action between two foreign corporations despite a jurisdictional clause in the towage contract. *Muller* was distinguished on the ground that it did not require dismissal where the libelant would be

15. 254 F.2d at 301.

16. Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463 (5th Cir. 1956), cert. denied, 353 U.S. 938 (1957). It is interesting to note that the Fifth Circuit reversed the lower court because it had proceeded on the wrong principle when it took the approach that jurisdiction would be retained over foreign parties as regards a collision on the high seas only when good cause was shown for so doing. The correct forum non conveniens principle is that jurisdiction will be retained unless the respondent can convince the court that there is a strong balance of convenience in his favor dictating dismissal. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

17. 171 F. Supp. 33 (D.P.R. 1959).

18. Sociedade Brasileira De Intercambio Comercial E Industrial, Ltd. v. S.S. Punta Del Este, 135 F. Supp. 394 (D.N.J. 1955). There is an obvious departure from the principles set forth in William H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806 (2d Cir.), cert. denied, 350 U.S. 903 (1955), in that the New Jersey court requires the respondent to prove prejudice under the doctrine of forum non conveniens which the Second Circuit has recognized as an altogether different problem.

19. 154 F. Supp. 886 (S.D.N.Y. 1957).

deprived of his remedy if relegated to a foreign forum whose laws might bar recovery. This very point had been discussed by the Second Circuit in *The Western Farmer*,[20] and it had dismissed lightly any contention that a variance in remedy should influence a decision on a motion to dismiss. Commenting on this aspect of the problem, a district court[21] in the Fifth Circuit noted that it would be unreasonable to hold that American law on a particular subject embodied the "quintessence of justice." Even were it assumed that our own admiralty law should be applied in a given situation, jurisdiction cannot be retained on this basis since it must also be assumed that a foreign court will give effect to it.[22]

Carriage of Goods by Sea Act

The libelant in the *Muller* case raised an objection to the jurisdictional stipulation on the ground that it lessened the liability of the carrier otherwise than as provided in Section 1303(8) of the Carriage of Goods by Sea Act[23] and was, therefore, violative of that Act. The argument was made that the convenience to the carrier and additional cost to the libelant-consignee involved by litigation in Sweden, in effect minimized the liability of the carrier. The court rejected this contention, holding that "such possible expense, which is only incidental to the process of litigation, is [not] enough to bring this jurisdictional agreement within the ban of § 1303(8)."[24]

Although rejected by the *Muller* court, and properly so under the circumstances of the case, the contention that jurisdictional clauses may at times be violative of the Carriage of Goods by Sea Act is well taken. This statute, which by its terms is applicable to all contracts "for the carriage of goods by sea to or from ports of the United States, in foreign trade,"[25] prohibits carriers from contracting away their liability beyond certain specified limits and declares void any clauses in a contract of carriage purporting to do so.[26] It would seem, therefore, that if a jurisdictional stipulation relegates parties to a forum whose law would relieve the carrier from liability in contravention of the Carriage of Goods by Sea Act, such agreement should be void. Had the *Muller* court found, for example, that the Swedish courts do not apply the same measure of damages as American maritime courts, there would have been a serious question as to whether or not the carrier's liability had been lessened in violation of the Act, and a different decision might have issued.

It is not uncommon for bills of lading to state that various statutes, which conflict at least in part, are applicable to the same contract of carriage. If an action involving a shipment within the purview of the Carriage of Goods by Sea Act were dismissed in a United States court on the ground of a jurisdictional

20. 210 F.2d 754 (2d Cir. 1954).

21. Anglo-American Grain Co. v. The S/T Mina D'Amico, 169 F. Supp. 908 (E.D. Va. 1959).

22. Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413 (1932).

23. 49 Stat. 1208 (1936), 46 U.S.C. § 1303(8) (1952).

24. 244 F.2d at 807.

25. 49 Stat. 1207 (1936), 46 U.S.C. § 1300 (1952).

26. 49 Stat. 1208 (1936), 46 U.S.C. § 1303(8) (1952).

clause, and the parties were relegated to a forum whose law was also applicable to the contract by the terms of the bill of lading, it is hardly reasonable to expect that the foreign court would apply our statute since, if the situation were reversed, our own courts would be bound to apply the Carriage of Goods by Sea Act.[27] In such a case it is submitted that a United States court is prohibited from enforcing a stipulation relegating the parties to the foreign tribunal.

CONCLUSION

Excepting those rare occasions when an admiralty court may find itself statutorily bound to retain jurisdiction, it appears that the principles set forth in the *Muller* decision form a sound basis for dealing with the contractual stipulations relegating the parties to a foreign forum. The laws of other maritime nations recognize the validity of such agreements and will enforce them.[28] In so doing they have realistically appraised the value of these stipulations and the rights of parties to establish beforehand their liabilities and rights under a given contract and also the legitimate interest of foreign nations in matters which effect their maritime fleets.

Recently, in *Romero v. International Terminal Operating Co.*,[29] the Supreme Court, dealing with a choice of law problem in connection with a foreign seaman's claim, stated that in the absence of congressional direction those principles must be applied which "are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community."[30] In this case the Court declined to give the alien seaman the benefit of a United States statute governing the rights of seamen, holding that the applicable law was that of the flag of the foreign vessel involved. The parties had by contract fixed the law by which compensation was to be determined and it was held that to apply our own law in derogation of this agreement would be to impose an "onerous" and "unduly speculative burden" on the shipowner whose liability under such a decision would shift from one standard to another as a vessel passed the boundaries of territorial waters.

The preferring of one forum over another may effect liability to the same extent as the choice of one law rather than another. In the *Chemical Carrier's* case the court based its decision to retain jurisdiction primarily on the lack of a remedy to the libelant if he were relegated to the foreign forum. Should not

27. The English Carriage of Goods by Sea Act, 1924, 14 & 15 Geo. 5, c. 22, art. IV, § 5, states that the carrier's liability shall not, unless otherwise stipulated, exceed £100 (approximately $280). The United States Carriage of Goods by Sea Act has the same provision except that the sum is $500. 49 Stat. 1210 (1936), 46 U.S.C. § 1304(5) (1952). If the parties were relegated to a forum which would apply the English Act in a case where a package was damaged in excess of the above amounts, the carrier's liability would be lessened within the intendment of the Act.

28. Nieto v. The S.S. Tinnum, 170 F. Supp. 295 (S.D.N.Y. 1958); The Alabama, 1952 Am. Mar. Cas. 1766 (S.D.N.Y. 1952).

29. 358 U.S. 354 (1959).

30. Id. at 382-83.