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ADMIRALTY-VALIDITY OF "BORN-TO-BLAME" CLAUSE IN BILL OF LADING

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RECENT DECISIONS

ADMIRALTY—VALIDITY OF "BOTH-TO-BLAME" CLAUSE IN BILL OF LADING—Petitioner is owner of the *S. S. Nathaniel Bacon* which collided with the *Esso Belgium* damaging both ships. The cargo of the *Bacon*, owned by respondents, was also damaged. The collision was caused by the negligent navigation of employees of both ships. The bill of lading issued to respondents contained a "both-to-blame" clause requiring the cargo owners to indemnify the carrier for any cargo loss indirectly borne by the carrier. This action was brought to determine liability for the damages suffered in the collision. *Held*, on appeal, the "both-to-blame" clause is invalid because of public policy prohibiting carriers from stipulating against their own negligence, and hence the cargo loss must be borne by the carrier as well as the ship with which it collides. *United States v. Atlantic Mutual Insurance Co.*, 343 U.S. 236, 72 S.Ct. 666 (1952).

The Harter Act¹ and the Carriage of Goods by Sea Act² have relieved the carrier ship from liability to the cargo owner for damages caused by negligent navigation or management of the vessel. Thus, where only the carrier ship is at fault, cargo loss falls on the cargo owner. If, however, a collision occurs as a result of mutual fault of both ships, the cargo owner has an action against the non-carrier ship for the full amount of his damages.³ Under the rule recognized in the United States⁴ in a mutual fault case, the total collision damages—including the cargo damage paid by the non-carrier ship—are shared equally by the two colliding ships.⁵ The ship suffering the greater damages has a claim against the other ship for an amount necessary to equalize the burden. Thus, the carrier ship indirectly pays one-half the damages to her own cargo when both ships are at fault, while she is relieved entirely of liability when solely at fault. The "both-to-blame" clause inserted in bills of lading represents the carriers' attempt to correct this "anomaly"⁶ contractually by requiring that in

¹ 27 Stat. L. 445, §3 (1893), 46 U.S.C. (1946) §192.

² "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." Carriage of Goods by Sea Act, 49 Stat. L. 1207 at 1210, §4(2)(a) (1936), 46 U.S.C. (1946) §1304(2)(a). The earlier Harter Act provided for relief from liability for such negligence only where the owner had exercised due diligence to make the vessel seaworthy. The Carriage of Goods by Sea Act eliminates this condition.

³ *The Chattahoochee*, 173 U.S. 540, 19 S.Ct. 491 (1899). Prior to passage of the Harter Act the cargo owner could pursue either ship for his full damages. *The Atlas*, 93 U.S. 302 (1876).

⁴ Nations that have ratified the Collision Convention of 1910 operate under the rule that damages borne by each vessel shall be "in proportion to the degree in which each vessel was in fault." See COLINVAUX, *CARRIER'S CARRIAGE OF GOODS BY SEA* 1004 (1952).

⁵ *The North Star*, 106 U.S. 17, 1 S.Ct. 41 (1882). The passage of the Harter Act had no effect on this rule. *The Chattahoochee*, supra note 3.

⁶ "This curious anomaly, that the carrier pays more if his navigators are half at fault than if they are solely at fault, has long been a source of friction. The practical effect is that, whenever a collision is held to be the fault of both ships, the cargo underwriters

mutual fault cases the cargo owner will indemnify the carrier ship for that share of the cargo damage which would otherwise fall on the carrier through operation of the split of damages rule.⁷ Under such a provision, the cargo owner recovers his full damages from the non-carrier ship, the non-carrier ship recovers one-half this amount from the carrier ship under the split of damages rule, and the carrier ship recovers this amount from the cargo owner. The loss would thus be shared by the cargo owner and the non-carrier ship, the carrier ship being relieved of liability here just as it is by statute where solely at fault.⁸ The validity of the clause was attacked by the cargo owners in this action on the ground that public policy will not permit common carriers to stipulate for immunity from their own or their agents' negligence.⁹ The position of the shipowners was that passage of the Harter Act relieving the shipowners from liability for negligent navigation and management of the vessel was a congressional pronouncement of public policy contrary to that previously laid down by the courts, and that there could no longer be objection on these grounds to the "both-to-blame" stipulation. The Supreme Court had already accepted such an argument when in *The Jason*¹⁰ it upheld the validity of a clause providing that cargo owners should be liable to pay general average¹¹ even when

recoup half their losses (subject, of course, to limitation of liability provisions) from the shipowner's protection and indemnity underwriters." KNAUTH, OCEAN BILLS OF LADING 158 (1941).

⁷ "If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier." United States v. Atlantic Mutual Insurance Co., 343 U.S. 236 at 238, n. 5, 72 S.Ct. 666 (1952).

⁸ "In Canada, Great Britain, and in fact throughout Europe and also in Japan, Mexico, Brazil, Argentina and Uruguay, the uniform rule is that cargo recovers from 'the other ship' the proportionate part of its loss corresponding to the degree of fault of the other ship as determined by the court in the collision suit, and 'the other ship' does not add this element of loss to its other items of damages to be divided with the carrier ship. This striking difference between the law of the United States and the law of the other shipping nations has sometimes led shipowners to adopt extraordinary precautions to avoid being sued in the United States; and has also given rise to some remarkable efforts to maintain suits in the United States in order to gain the advantage of the American rule." KNAUTH, OCEAN BILLS OF LADING 158 (1941).

⁹ Prior to passage of the Harter Act, the courts held that an attempt by the carrier to relieve itself of liability for negligence of its servants or agents was an unjust and unreasonable attempt by the carrier to abandon the essential duties of its employment. Hence such clauses were held void as against public policy. *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 9 S.Ct. 469 (1889).

¹⁰ 225 U.S. 32, 32 S.Ct. 560 (1912).

¹¹ Where a whole maritime venture is, without fault, in danger, and a part of the venture is deliberately sacrificed for the salvation of the whole, the owner of the sacrificed portion is entitled to contribution from the owners of the surviving portion of the venture. *ROBINSON, ADMIRALTY* 764 (1939).

the danger necessitating the sacrifice of ship or cargo arose because of negligence in the navigation or management of the ship. The Court felt that passage of the Harter Act removed any public policy objections to such a clause.¹² This reasoning was followed by the district court in upholding the "both-to-blame" clause;¹³ however, the decision was reversed in the court of appeals¹⁴ in a ruling affirmed by the Supreme Court in the principal case on the grounds that without more specific congressional authorization carriers could not deviate from the rule prohibiting stipulations against liability for negligence. Thus, unless there is a statutory change, shipowners will continue to be free from liability when solely at fault, but subject to indirect payment of 50 per cent of the damages when partially at fault. It is submitted that Congress should act to correct this result.

Richard B. Barnett, S.Ed.

¹² 225 U.S. 32 at 55, 32 S.Ct. 560 (1912).

¹³ *United States v. The Esso Belgium*, (D.C. N.Y. 1950) 90 F. Supp. 836.

¹⁴ *United States v. Farr Sugar Corp.*, (2d Cir. 1951) 191 F. (2d) 370.