St. John's Law Review

Volume 34, December 1959, Number 1 Article 8

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St. John's Law Review

NOTES

ENFORCEMENT AND EFFECT OF THE JURISDICTION CLAUSE IN ADMIRALTY

In 1930, in commenting upon provisions in a bill of lading which purported to confine all litigation to a French court, Judge Learned Hand said: "The respondent does not pretend that, so construed, these would be valid, and it is of course well settled that they would not." [1]

In 1949, the same judge, in a case involving a similar provision, wrote in a concurring opinion: "In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all. . . . What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist." [2]

The two statements dramatically portray the development of legal thought in the area of jurisdiction clauses—thought which culminated in the enforcement of such a clause in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*[3] An agreement which resulted in ousting a court of competent jurisdiction and of limiting a plaintiff to a specific court in which to seek his remedy had been traditionally held invalid as against public policy,[4] at least where the agreement was made prior to the accrual of the cause of action.[5] Such clauses, in addition to being found in bills of lading, are commonly found in railroad employment contracts,[6] in insurance contracts,[7] and in a variety of other types of agreements,[8] and have almost invariably

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[1] Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942 (2d Cir. 1930).

[2] Krenger v. Pennsylvania R.R., 174 F.2d 556, 561 (2d Cir. 1949) (concurring opinion).

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

[4] *E.g.,* Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508 (6th Cir. 1897); Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916).

[5] Where the agreement is made subsequent to the accrual of the cause of action, the greater number of courts view the agreement enforceable. Gitler v. Russian Co., 124 App. Div. 273, 108 N.Y. Supp. 793 (1st Dep't 1908); Detwiler v. Lowden, 198 Minn. 185, 269 N.W. 367 (1936).

[6] *E.g.,* Krenger v. Pennsylvania R.R., *supra* note 2.

[7] *E.g.,* Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, *supra* note 4; Slocum v. Western Assur. Co., 42 Fed. 235 (S.D.N.Y. 1890).

[8] *E.g.,* Otero v. Banco De Sonora, 26 Ariz. 356, 225 Pac. 1112 (1924) (sale

been held unenforceable.[9] As is indicated by the decision in the *Muller* case, the trend now is to look much more favorably upon them.[10] Abstractly, there is much to be said in favor of this legal trend. Where two parties in an equal bargaining position agree that any dispute shall be decided according to the law of a particular jurisdiction and by a particular forum, there is no apparent reason for not holding them to that bargain. It is somewhat disturbing, however, that the breakthrough has occurred in admiralty, an area in which enforcement of the agreement results, not merely in sending the claimant to another state or another district, but in relegating him to the tribunal of another country to seek his remedy and in which equality of bargaining power is largely illusory.[11]

The Harter Act[12] and the Carriage of Goods by Sea Act[13] which largely supersedes it[14] represent, in effect, legislative recognition of the lack of bargaining power in this area. Prompted by the widespread use of bill of lading clauses which virtually absolved the carrier of any responsibility for loss,[15] the purpose of the acts is to define carrier liability.[16] A degree of freedom of contract remains, but only in the direction of increasing the liability of the carrier, never of lessening it.[17] Because of this bill of lading legislation, and because of the continued existence of the unequal bargaining power which prompted it, it is felt that the jurisdiction clause presents problems peculiar to admiralty.[18] The attempt here is to analyze these problems.

The Extent of Enforcement

In *Muller,* the consignee of a shipment from Gothenburg, Sweden, to Philadelphia filed libel in admiralty against the shipping

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of goods); Field v. Eastern Bldg. & Loan Ass'n, 117 Iowa 185, 90 N.W. 717 (1902) (stock certificates); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 109 S.E. 362 (1921) (automobile sales contract).

[9] *But see,* Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903).

[10] The Court of Appeals of the Second Circuit has been the only appellate court to enforce such an agreement. There are some indications that its determination is not looked upon with universal approval. See Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958), *cert. granted,* 358 U.S. 809 (1958), *cert. dismissed,* 359 U.S. 999 (1959). But no case to date has directly repudiated the *Muller* decision.

[11] GILMORE & BLACK, ADMIRALTY 165 (1957).

[12] 27 Stat. 445-46 (1893), 46 U.S.C. §§ 190-96 (1952).

[13] 49 Stat. 1207-13 (1936), 46 U.S.C. §§ 1300-15 (1952).

[14] For a discussion of the extent to which the Carriage of Goods by Sea Act superseded the Harter Act, see Note, 27 VA. L. REV. 1078 (1941).

[15] See KNAUTH, OCEAN BILLS OF LADING 115-31 (4th ed. 1953) for a detailed account of the commercial, judicial and legislative history behind the statutes.

[16] See GILMORE & BLACK, *op. cit. supra* note 11, at 122-27.

[17] *Id.* at 125.

[18] For a general discussion of the jurisdiction clause, see Note, 10 LA. L. REV. 293 (1950).

line to recover for loss of cargo. The bill of lading contained a clause which stipulated that any claim should be decided according to the law of Sweden and in Swedish courts. The Court of Appeals for the Second Circuit in affirming the decision of the District Court, held that, while the agreement itself cannot oust a court of jurisdiction otherwise obtaining, it can be enforced when, in the discretion of the court, it "is not unreasonable in the setting of the particular case. . . ." [19]

The determination that a clause is not unreasonable is apparently based on a judgment by the court that there is a relation between the subject matter of the case and the jurisdiction named in the agreement. The availability of evidence in the named jurisdiction appears to be largely determinative of the relation. It is important to note, however, that a determination that the clause is reasonable does not necessarily involve a determination that the forum selected by the plaintiff is not equally reasonable. Thus, in *Muller,* the plaintiff's proof required the testimony of expert witnesses as to the value of the lost cargo and these witnesses were available only in New York. Yet the court, noting that the ship was of Swedish ownership and construction and that the members of the crew resided in Sweden, held the agreement not unreasonable. Similarly, in *Aetna Insurance Co. v. The Satrustegui,*[20] the claim involved damage to cargo in a shipment from Spain to Puerto Rico, the damage allegedly being caused by contact with water and other foreign substances. The court, in enforcing an agreement granting exclusive jurisdiction to the courts of Spain, noted that evidence of the condition of the goods when shipped would be available only there; the fact that evidence of its condition when received might well be available only in Puerto Rico was not considered. It would appear, therefore, that a showing by the plaintiff that the home forum is equally appropriate carries little weight in determining the issue. If there are grounds for granting jurisdiction to the forum named in the clause, the agreement cannot be said to be unreasonable and the courts will enforce it.

Doctrine of Forum Non Conveniens

Since it is not the agreement itself which ousts the court of jurisdiction, but rather the court which, in the exercise of its discretion, declines to exercise its jurisdiction in order to give effect to the agreement, the question arises whether there is any real distinction between the "clause cases" and those applying the doctrine of forum non conveniens. The latter doctrine deals "with the discretionary power of a court to decline to exercise a possessed jurisdiction

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[19] Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 808 (2d Cir.), *cert. denied,* 350 U.S. 903 (1955).

[20] 171 F. Supp. 33 (D.P.R. 1959).

whenever it appears that the cause before it may be more appropriately tried elsewhere." [21] In truth, there is a close relation between that doctrine and the theory on which jurisdiction clauses are enforced. It would be a mistake, however, to infer that because of the forum non conveniens doctrine, the existence of the clause is unimportant. At least two distinctions can be noted when such a clause is present:

Firstly, the courts seem never to have applied the forum non conveniens doctrine where to do so would result in denying an American citizen, suing in his own right, access to the federal courts,[22] although there is no decision expressly denying them the power to do so.[23] The jurisdiction clause gives the effect of the doctrine, while permitting the court to by-pass the question of whether, in the absence of a contractual stipulation, it could deny access to the American citizen.[24]

Secondly, the conditions for application of the forum non conveniens doctrine seem much more demanding than those which will justify the enforcement of a jurisdiction clause. The theory of forum non conveniens is that the court can decline jurisdiction where exceptional circumstances make it inappropriate to exercise it.[25] The "clause cases," on the other hand, do not require a showing that the home forum is inappropriate, but simply a showing that the foreign tribunal is not unreasonable. Under the former doctrine, "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." [26] Under the "clause cases," the advantage of the plaintiff seems only a minor factor; a showing by the defendant of a substantial relation between the jurisdiction named and the subject

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[21] Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

[22] The Suadades, 67 F. Supp. 820 (E.D. Pa. 1946). See Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 925 (1947).

[23] The question was specifically left open in Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 697 (1950); see *The Supreme Court, 1949 Term*, 64 HARV. L. REV. 155-56 (1950). Some state courts, notably those of New York, have categorically held that the courts have no power to deny access to a resident. Gregonis v. Philadelphia & R. Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923). There is also dictum to the effect that a jurisdiction agreement would not give the court that power. Schwartz v. Zim Israel Nav. Co., 15 Misc. 2d 576, 577, 181 N.Y.S.2d 283, 285 (Sup. Ct. 1958). Because of this disparity of treatment of residents and non-residents, it has been unsuccessfully argued that the doctrine might deny the latter "the priveleges and immunities of Citizens in the several states." U.S. CONST. art. IV, § 2. See Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[24] 65 HARV. L. REV. 184-85 (1951).

[25] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947); Kloeckner Reederei Und Kohlenhandel, G.M.B.H. v. A/S Hakedal, 210 F.2d 754, 756 (2d Cir.), *dismissed per stipulation*, 348 U.S. 801 (1954).

[26] Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 524 (1947).

matter of the case would make the clause reasonable and therefore enforceable.[27]

The Carriage of Goods by Sea Act

The Carriage of Goods by Sea Act provides that *"Every bill of lading* or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, *shall have effect subject to the provisions of this chapter."* [28] The Act, an implementation of the Hague Rules on international shipping,[29] contains several provisions limiting the exceptions which the carrier can make to its common law liability. The Act, unlike statutes of most other countries adopting the Rules,[30] provides that bills of lading in shipments *to* the United States, as well as those from the United States, shall be subject to its provisions.[31] Manifestly, the purpose of this was to prevent the abuse of the carrier's bargaining power, not only when the shipment originated here, but in any case where the shipment touched the United States, and to prevent a carrier from availing himself of less stringent regulations which might prevail in any other country which might have an interest in the shipment, regardless of whether it be the country of origin or of destination.[32]

The court in *Muller* held that, since the Act said nothing about jurisdictional clauses explicitly, it did not invalidate them.[33] But, by declining jurisdiction, the court gave effect to a provision for Swedish law and courts, thereby negating any effect which the Act

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[27] *Compare* Aetna Insurance Co. v. The Satrustegui, 171 F. Supp. 33 (D.P.R. 1959), *with* Koster v. (American) Lumbermens Mutual Casualty Co., *supra* note 26.

[28] 49 Stat. 1207 (1936), 46 U.S.C. § 1300 (1952). See also 49 Stat. 1212 (1936), 46 U.S.C. § 1312 (1952). (Emphasis added.)

[29] GILMORE & BLACK, ADMIRALTY 123-24 (1957). The Hague Rules were adopted by representatives of the shipping world and of the maritime nations, first as a set of clauses intended for voluntary incorporation in bills of lading by reference and then as a Convention to which the adherence of maritime nations was invited. *Id.* at 123.

[30] For a listing of the countries having Hague Rules legislation and a conspectus of that legislation, see KNAUTH, OCEAN BILLS OF LADING 453-95 (4th ed. 1953).

[31] 49 Stat. 1207, 1212 (1936), 46 U.S.C. §§ 1300, 1312 (1952). Only the United States, the Philippines, and Belgium have such a provision. KNAUTH, *op. cit. supra* note 30, at 162. It is interesting to note that after the adoption of this provision, Belgian courts held jurisdiction clauses to be invalid as opposed to the new public policy, despite the general statement of the Belgian Civil Code that parties have a wide freedom to agree what law shall govern their contract, and what court shall be resorted to in the event of dispute. *Ibid.*

[32] The jurisdiction clause is treated as a method of evasion of the Act in KNAUTH, *op. cit. supra* note 30, at 161-62.

[33] Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806. 807 (2d Cir. 1955).

might have had upon other provisions of the bill and, it would seem, seriously weakening the force of the legislative declaration that *every bill* of lading evidencing shipment *to or from* the United States is subject to the provisions of the Act.[34] The Act makes no exception based upon reasonableness or availability of evidence, nor is its applicability made subject to defeat by contractual agreement.

The inconsistency of enforcing a jurisdiction clause in the face of such a legislative declaration becomes even more apparent in the light of the later case of *Sociedade Brasileira De Intercambio Comercial E Industrial, Ltda. v. S.S. Punta Del Este.*[35] In that case, involving a shipment from New Orleans to Santos, Brazil, the court refused to give effect to a stipulation for Uruguayan law and courts, distinguishing the *Muller* case in that the bill of lading before it contained a "clause paramount," [36] stating that the Carriage of Goods by Sea Act would be applicable. But it would seem that the distinction is more apparent than real. Surely Congress could not have intended that the applicability of the statute was to be conditioned on the parties' assent to it.[37] Where a statute is designed to protect against abuse of bargaining power, to imply that it becomes less applicable because the parties fail to mention it in the contract would be to completely negate its force.

In this respect, the case of *Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S.*,[38] cited by the court in *Muller,* differs materially. The shipment under consideration there was a shipment from Peru to Belgium. Not being "to or from ports of the United States," the Carriage of Goods by Sea Act was not applicable. In fact, the vessel being Norwegian-owned and operated, the contract in no respect touched the United States, and the case is distinguishable from the ordinary forum non conveniens cases only in that the plaintiff was an American citizen.[39]

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[34] For a discussion of this point, see GILMORE & BLACK, ADMIRALTY 125, n.23 (1957).

[35] 135 F. Supp. 394 (D.N.J. 1955).

[36] The Carriage of Goods by Sea Act requires that such a clause, reciting that the bill is to be governed by the provisions of the Act, be inserted in all *outbound* bills of lading. 49 Stat. 1212 (1936), 46 U.S.C. § 1312 (1952). The reason for this is that the country of destination will apply its own law if the Act is not mentioned. GILMORE & BLACK, *op. cit. supra* note 34, at 164-65. It was understood that the Act would be read into the bill, regardless of the absence of the clause, if the carrier were successfully subjected to suit in the United States. *Id.* at 165.

[37] This is obvious from a reading of the Act. It is provided that a carrier shall be free to surrender any or all of his rights or immunities under the Act, or to increase his responsibilities and liabilities as provided therein. 49 Stat. 1211 (1936), 46 U.S.C. § 1305 (1952). Any lessening of liability, on the other hand, is null and void. 49 Stat. 1208 (1936), 46 U.S.C. § 1303(8) (1952).

[38] 187 F.2d 990 (2d Cir. 1951).

[39] In the district court, the case was decided on forum non conveniens grounds. The plaintiff being treated as assignee of the Belgian buyer, the

Jurisdiction Clause as Lessening of Liability

The Carriage of Goods by Sea Act, as already mentioned, was designed to prevent the carrier from contracting away his liability. Any lessening of liability otherwise than as provided by the Act is declared to be null and void and of no effect.[40] The court in *Muller* denied the contention that the increased expense incurred by the plaintiff in litigating in Sweden would amount to a decrease in the carrier's liability.[41] It is submitted, however, that while the expense to the plaintiff in litigating in a foreign tribunal is not *in itself* a lessening of the carrier's liability, it does provide him with a *means* by which he can lessen his liability substantially. Suppose, for example, a shipper has damages in the sum of one thousand dollars. It can readily be seen that the expense of transporting expert witnesses to the foreign jurisdiction, or even of taking depositions from such witnesses for use in the litigation, might well preclude an action on the claim, however valid. The aggregate liability of the carrier is thus lessened by the total value of the claims so eliminated.[42]

Related to this would be the effect which the enforcement of the jurisdiction clause would have in aiding the carrier to arrive at a favorable settlement. At the point where the settlement offered equals the probable judgment award less the expense of litigation, the claimant, of course, would be well advised to accept the settlement offer. Where the action must be brought in a foreign tribunal, this settlement point is reached at a much lower figure than might otherwise be possible, first, because the amount of damages awarded is likely to be considerably less than American courts might render,[43] and secondly, because the expense of the foreign litigation is certain to be greater than the expense of prosecuting the same action in this country.

As can readily be seen, the jurisdiction clause is a considerable boon to the foreign carrier. It seems relevant to make some inquiry

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case was regarded as one between foreigners. Cerro De Pasco Copper Corp. v. Knut Knutsen O.A.S., 94 F. Supp. 60 (S.D.N.Y. 1950).

[40] 49 Stat. 1208 (1936), 46 U.S.C. § 1303(8) (1952).

[41] Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 807 (2d Cir. 1955).

[42] A jurisdiction agreement made after accrual of the cause of action was held to be an exemption from liability within the prohibition of section 5 of the Federal Employers' Liability Act, 35 Stat. 66 (1908), 45 U.S.C. § 55 (1952). Boyd v. Grand Trunk W.R.R., 338 U.S. 263 (1949) (per curiam). See also, Petersen v. Ogden Union Ry. & Depot Co., 110 Utah 573, 175 P.2d 744 (1946). It would seem that if a jurisdiction clause can be regarded as an *exemption* from liability when it limits a cause of action to a particular court in the United States, it should, with much greater reason, be considered a *lessening* of liability when it limits jurisdiction to a foreign tribunal.

[43] Additionally, in cases where the value of the shipment is undeclared, the value of the damage award is likely to be affected by fluctuating exchange rates. See KNAUTH, OCEAN BILLS OF LADING 283-88 (4th ed. 1953).

into its possible effect on the American carrier. Incorporated in the United States and with its principal place of business in this country, it is unlikely that a court would consider a provision for foreign law and foreign courts to be reasonable if made by such a carrier. He is thus unaided by the possibility of enforcement of a jurisdiction clause, but he is not unaffected by the judicial policy of holding such clauses enforceable. The damages which he pays are the damages assessed by American courts and he is unable to point to the expense of foreign litigation to induce a claimant to agree on a settlement. As a result, his costs of settling claims are likely to be greater than those of the foreign carrier with a similar loss record, which will possibly be reflected in other costs, such as that of insurance. Moreover it might necessitate an increase in prices, in government subsidies,[44] or in both and further weaken his already poor competitive position in the maritime world.[45]

Summary and Conclusion

Whatever may be said of holding a man to an agreement freely made, that argument is of little force in regard to provisions of admiralty bills of lading. Equality of bargaining power in this area is a fiction as evidenced by the fact that bills of lading are drawn up by the carriers. The entire legislative history of the area bespeaks the necessity of protecting the shipper from an abuse by the carrier of its bargaining position. In the light of this inequality, there is little justification for refusing an American the protection of United States laws and of denying him access to United States courts.[46]

On the other hand, there are several reasons for refusing to enforce the jurisdiction clause. When a bill of lading evidences a contract for the carriage of goods to or from ports of the United States, to permit it to be interpreted according to foreign law is a negation of congressional efforts to protect the cargo owner.[47] If it be admitted that the United States statutes are applicable, it would seem

[44] For a summary of the extent of Federal subsidization of shipping, see Morse, *A Review of the Assistance provided to the American Merchant Marine Under Statutes of the United States and their Administration by the Federal Maritime Board and the Maritime Administration, U.S. Department of Commerce,* 18 FED. B.J. 355 (1958).

[45] For a review of the difficulties already facing the American Merchant Marine, see Magnuson, *Maritime Legislative Problems Facing the 86th Congress,* 18 FED. B.J. 350 (1958).

[46] What was said in regard to a jurisdiction agreement between a railroad and an employee seems equally applicable here: "(1) they are contracts of a kind at which courts have always looked askance; (2) they concern a matter as to which—in some respects at any rate—Congress has shown that it considered the employee to bargain at a disadvantage; (3) that disadvantage is in this instance especially marked and is without any corresponding benefit." Krenger v. Pennsylvania R.R., 174 F.2d 556, 561 (2d Cir. 1949) (concurring opinion).

[47] While as a general rule, a stipulation of the parties as to the law governing a contract will be followed by the courts, apparently this has never been the case with shipping contracts. Note, 62 HARV. L. REV. 647, 654 (1949).

seldom to be reasonable to consider a foreign court as a more appropriate court to apply it.[48] In addition, while not expressly denying the liability imposed by statute, the jurisdiction clause, if enforced, may have the same effect as a denial, by preventing actions on claims arising out of the liability.[49]

In view of these considerations, it is submitted that the enforcement of such clauses is, under normal circumstances, an unwise exercise of judicial discretion. The solution to the problem presented by the current trend towards enforcing them, would appear to lie either in legislative action in the form of an amendment to the Carriage of Goods by Sea Act which would expressly invalidate them,[50] or in review by the Supreme Court, when presented with the proper opportunity, of the extent of the discretionary power of the courts to decline jurisdiction in such cases.[51] In the meantime, the protection of the American cargo owner must depend upon the cautious application by the courts of their newly declared discretionary power. It is suggested that before a court permit application of foreign law, a minimum requirement should be that the country named adhere to the Hague Rules on international shipping. To require less would be to invite a return of the abuses which prevailed prior to the formulation of the Rules, and which still prevails in countries which recognize no limitations on the carrier's power to contract away his liability.

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[48] A principal element affecting the application of the forum non conveniens doctrine is that to reach a decision the court must determine difficult questions under the law of another jurisdiction. Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908, 924 (1947).

[49] It might be said that the size of the claim is one factor which should be considered by the court in exercising its jurisdiction, since it is the small claim which is most likely to be excluded by the jurisdiction clause. The fact, however, that a court in its discretion might elect to hear his complaint would offer very little solace to the claimant who must engage an attorney and prepare to prosecute the action with the uncertainty that the court will exercise jurisdiction. Should he elect to sue and the court declines jurisdiction, he has then suffered not only the loss resulting from the carrier's negligence, but also the expense of futilely attempting to collect damages for that loss.

[50] The Carriage of Goods Act of Australia currently contains such a provision. A similar provision was also contained in the Canadian Act of 1910, but it was not carried over in subsequent legislation. It is still felt, however, that Canadian courts will not look with favor upon clauses ousting their jurisdiction. KNAUTH, OCEAN BILLS OF LADING 238 (4th ed. 1953).

[51] The question was almost passed on in March, 1959. The Fifth Circuit refused to extend the *Muller* decision to an *in rem* proceeding where the jurisdiction clause, by its terms, did not apply to such a proceeding. Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958). The Supreme Court at first granted certiorari. The S.S. Monrosa v. Carbon Black Export, Inc., 358 U.S. 809 (1958). The writ, however, was dismissed as improvidently granted, the majority holding: "We do not believe that this case affords us an appropriate instance to pass upon the extent to which effect can be given to such stipulations in ocean bills of lading not to resort to the courts of this country." The S.S. Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 182 (1959) (four judges dissenting).