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Case Digest

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CASE DIGEST

The purpose of this *Case Digest* is to identify and summarize for the reader recent cases that have less significance than those that merit an in-depth analysis. Included in the digest are cases that apply established legal principles without necessarily introducing new ones.

The cases are grouped in topical categories, and references are given for further research. It is hoped that attorneys, judges, teachers, and students will find that this digest facilitates research in problems involving current aspects of transnational law.

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1. ADMIRALTY

PAYMENT OF WAGES TO DISCHARGED SEAMAN IS NOT LIMITED TO DIRECT CASH PAYMENT IF OTHER METHODS ARE MORE APPROPRIATE

Respondent seaman was discharged for misconduct by petitioner while in South Vietnam. Since South Vietnamese currency regulations precluded the use of American dollars in the purchase of air transportation to the United States, petitioner arranged with government officials to secure the ticket directly. Petitioner then presented respondent with the plane ticket and a voucher for salary due, minus the cost of the ticket. Respondent later sought to have the court find that petitioner had wrongfully refused to make timely payment of wages. Reasoning that respondent received a benefit not available through payment in cash, the court held that petitioner's purchase and respondent's receipt of the airline ticket constituted a partial payment of wages to which respondent consented and approved. *Significance*—Payment of a seaman's wages is not limited to a direct payment in cash, if circumstances make another method of payment more appropriate. *American Foreign Steamship Co. v. Matise*, 95 S.Ct. 410 (1976).

RULES FOR THE TRANSFER OF AN ADMIRALTY SUIT TO ANOTHER FORUM ARE THE SAME FOR *In Rem* AS FOR *In Personam* ACTIONS

The *S.S. Azalea City*, a vessel owned by the defendant but operating under the control of a compulsory pilot, was alleged to have negligently dropped her anchor and dragged it across plaintiff's pipeline. Plaintiff attached the vessel, contending that though the defendant could not be held personally liable for the fault of the compulsory pilot, the ship remained liable in rem. Defendant then moved for a transfer to Puerto Rico, the situs, for the convenience of the witnesses and parties. The court found that a change in forum would be in the interests of justice and allowed the transfer. The court reasoned that since the in rem action was originally designed to provide convenient forums, its technical distinction from an in personam action should not bar a transfer where the interests of justice would be served. Additionally, the court determined that, as the controlling substantive law would be unaffected by a change of venue, the plaintiff would not be prejudiced by transfer. *Significance*—This holding points out that the considerations and rules involved in transferring an in rem admiralty action should be substantially the same as those in an in personam admiralty action, in which the substantive law of the transferor court will be controlling. *Construction Aggregates Corp. v. S.S. Azalea City*, 399 F. Supp. 662 (D.N.J. 1975).

LONGSHOREMEN INJURED ON EMPLOYER'S VESSEL HAVE A NEGLIGENCE ACTION AGAINST THAT EMPLOYER FOR NON-STEVEDORE CAUSED INJURIES

Plaintiff, injured on a barge that defendant-steel company had borrowed for temporary use, asserted that he was a seaman entitled to a Jones Act remedy or, alternatively, that defendant employed him as a longshoreman and was liable in damages for negligently causing his injuries. The Court of Appeals affirmed the District Court's determination that plaintiff was not a seaman, but reversed and remanded the lower court's determination that plaintiff could bring no negligence action against the defendant. The appellate court held that an employer, who is liable to a non-crew member employee for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), and who is a *pro haec vice* owner of a vessel upon which the employee is injured, is liable to that employee for damages for negligence, unless his injury resulted from the negligence of persons engaged in longshoring activities. The court reasoned that the legislative history of the

1972 Amendments to the LHWCA and the Supreme Court ruling in *Reed v. The Yaka*, 373 U.S. 410 (1963), holding that a non-crew member employee who is injured on a vessel owned *pro haec vice* by his employer may sue that employer for damages, compelled such a decision. *Significance*—Although the 1972 Amendments to the LHWCA could be construed as denying an employee any negligence action against his LHWCA employer, the construction placed on the Amendments by this court preserve some of the employer's pre-Amendment open-ended liability. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975).

LACK OF SUBJECT MATTER JURISDICTION AND AVAILABILITY OF AN ALTERNATIVE FORUM DENIES FOREIGN SEAMAN ACCESS TO FEDERAL COURTS

Plaintiff-seaman injured aboard defendant vessel in Baltimore Harbor brought an action for damages in the U.S. District Court. The allegiance of both parties and the *Konkar's* base of operations and registry were in Greece, and witnesses, proof, and applicable law were all located in Greece. The court dismissed the action, reasoning that although the defendant was amenable to service of process through its managing agent in New York, an alternative forum was readily available. *Significance*—Jurisdiction alleged under the Jones and General Maritime Acts may be denied if the allegiance of the parties and the ship's base of operations are both foreign and an alternative forum exists. *Koupertoris v. Konkar Intrepid Corp.*, 402 F. Supp. 951 (S.D.N.Y. 1975).

LONGSHOREMAN'S EMPLOYER IS NOT A NECESSARY OR INDISPENSABLE PARTY TO LONGSHOREMAN'S ACTION AGAINST SHIPOWNER FOR NEGLIGENCE

Plaintiff, an injured longshoreman, sought to recover against defendant shipowner for negligence and unseaworthiness. The district court granted defendant's motion to join plaintiff's employer as a necessary and indispensable party to the action. The complaint against the employer was subsequently dismissed. The issue before the court was whether plaintiff's employer was a necessary or indispensable party under Rule 19 of the Federal Rules of Civil Procedure. Defendant sought to have the court apply the rationale of *Federal Marine Terminals v. Burnside*, 394 U.S. 404, 89 S. Ct. 1144 (1969), which held that an employer had a direct claim against the shipowner for recovery of compensation pay-

ments made to a longshoreman and must be made a party to the action. The court held that a longshoreman's employer was neither a necessary nor indispensable party to such an action. *Significance*—Only where compensation payments exceed plaintiff's recovery does the employer become a necessary or indispensable party in a longshoreman's suit against a shipowner. *Landon v. Lief Hough & Co., Inc.*, 521 F.2d 756 (2d Cir. 1975).

WRONGFUL DEATH REMEDY UNDER DECISIONAL MARITIME LAW INCLUDES ASSESSMENT FOR LOSS OF SOCIETY

Defendant, held liable for loss-of-society damages in a wrongful death action, challenged on petition for rehearing the lower court's award of loss-of-society damages under DOHSA. Defendant contended that DOHSA, as the exclusive remedy for death on the high seas, creates only a cause of action for wrongful death and allows no recovery for loss of society. Though loss of society is not a pecuniary loss, the court reasoned that the decisions in *Moragne* and *Gaudet* have abrogated the pecuniary loss standard of DOHSA, and therefore loss-of-society damages are now recoverable in wrongful death actions on the high seas. Additionally, the court noted that the policy of uniformity in available remedies requires the awarding of non-pecuniary loss damages in wrongful death actions on the high seas. *Significance*—Loss-of-society damages can now be awarded in actions for death on navigable waters. *Law v. Sea Drilling Co.*, 523 F.2d 793 (5th Cir. 1975).

LONGSHOREMAN'S ALLEGATION THAT SHIPOWNER FAILED TO PROVIDE A SAFE PLACE TO WORK STATES A LEGALLY SUFFICIENT CLAIM

Plaintiffs, longshoremen, sought recovery for injuries sustained while discharging cargo from defendant's vessel charging that they had failed to furnish plaintiffs with a safe place to work. Defendants moved to strike allegations arguing that the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) limit a shipowner's liability to compensation for injuries negligently caused and that plaintiff's allegations failed to state a claim for which relief could be granted since they relied upon the strict liability imposed for a breach of warranty of seaworthiness. The court agreed that the Amendments limited a shipowner's liability to compensation for injuries caused by his negligence but denied the motion to strike. The court reasoned that it was conceivable that the alleged failure to furnish a safe place to work was a negligent failure to do so and that since there

were potential fact situations under which the plaintiffs might recover, the allegations could not be stricken or dismissed. *Significance*—This decision recognizes that under the 1972 Amendments a shipowner is no longer strictly liable to a longshoreman for breach of warranty of seaworthiness but also recognizes and applies the rule that allegations in a complaint are to be liberally construed. *Solsvik v. Mareman Compania Naviera S.A.*, 399 F. Supp. 712 (W. D. Wash. 1975).

2. ALIEN'S RIGHTS

Conviction Under a Foreign Law with No Knowledge Requirement Does Not Preclude Aliens From Permanent United States Residency

Defendant, Immigration and Naturalization Service (INS), contended that the plaintiff should have been denied permanent United States residency because his previous marijuana possession conviction in England violated the Immigration and Nationality Act. Plaintiff alleged that he was not excludable because he was not convicted of "illicit possession" as was required by the Act. The court held that plaintiff's conviction would not render him excludable, reasoning that the words "illicit possession" were unambiguous and were compelling evidence of a knowledge requirement. In so holding the court noted that the Board of Immigration Appeals had held that Congress did not intend to exclude aliens who unknowingly possessed prohibited substances, and that neither law enforcement nor the Act would be undermined by allowing such aliens to remain in this country. *Significance*—An alien is not to be classified as excludable for a prior foreign drug conviction under a statute which makes guilty knowledge irrelevant. *Lennon v. Immigration and Naturalization Service*, 44 U.S.L.W. 2169 (2nd Cir. 1975).

Alien Charged with Being Deportable as Overstay Visitor Not Entitled to Invoke Statutory Waiver of Deportation Provision of Section 241 (f)

In 1970, defendant, a nonimmigrant visitor for pleasure, fraudulently obtained permanent resident alien status which was subsequently rescinded by plaintiff Immigration and Naturalization Service. The plaintiff charged defendant as being deportable pursuant to § 241(a)(2) of the Immigration and Nationality Act (the Act) because he had remained in the United States for a longer period than permitted after admission as a nonimmigrant. Defen-

dant countered that, since he was the parent of two citizens, he was not deportable under the statutory waiver of deportation provision of § 241(f) and argued that his 1970 adjustment of status constituted an entry into the United States, and that since the entry was fraudulently procured, the waiver provision of § 241(f) applied and prevented his deportation. The court held that an adjustment of alien status did not constitute an "entry" for purposes of applying the statutory waiver provision of § 241(f), and that § 241(f) did not apply where deportation was sought against an alien who remained in the United States beyond the period of his authorized stay. Additionally, the court noted that § 241(f) was applicable only to aliens who were, due to their acts of fraud or misrepresentation, "excludable at the time of entry." *Significance*—Waiver provision § 241(f) does not extend to situations where "entry" is solely predictated upon an adjustment of alien status. *Pereira-Barreira v. United States Department of Justice, Immigration and Naturalization Service*, 523 F.2d 503 (2nd Cir. 1975).

PREVIOUSLY ADMITTED ALIENS CAN INVOKE ESTOPPEL IN DEPORTATION CASES ONLY WHEN THE GOVERNMENT'S ACTIONS CONSTITUTED "AFFIRMATIVE MISCONDUCT"

Plaintiff aliens held visas which were valid only when aliens were "accompanying or following to join" spouses or parents entitled to preference. Defendant Immigration and Naturalization Service officials allowed plaintiffs to enter without their preferred spouses and without fully informing plaintiffs or inquiring as to fulfillment of the visa's requirements. Plaintiffs sought to estop the Government from asserting that excludability at entry is a basis for deportation, asserting that they were misled into believing their entry was lawful. The court held that estoppel can be invoked only in those immigration cases where the Government's actions amounted to "affirmative misconduct," and the mere failure to inform or inquire did not constitute "affirmative misconduct." *Significance*—This holding establishes the "affirmative misconduct" standard as a prerequisite to invoking estoppel in deportation cases where an alien was previously admitted. *Santiago v. Immigration and Naturalization Service*, 44 U.S.L.W. 2241 (9th Cir. 1975).

DENIAL OF APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION BECAUSE OF AVAILABILITY OF AMERICAN APPLICANTS MUST BE BASED ON CREDIBLE, RELIABLE INFORMATION

Plaintiff's employer applied for an alien employment certificate for plaintiff to work as a radiologic technologist. Employer had requested referrals for the position from a state employment agency, but no referrals had qualified. The Secretary of Labor denied plaintiff's application because agency data indicated an availability of qualified Americans. Plaintiff contended that the Secretary's reliance on agency data, when he knew the agency had failed to produce a qualified person, constituted an abuse of discretion. The court held that the Secretary should have investigated further, and granted the certificate. It ruled that data must be credible and reliable if it is to be the sole basis used in determining the availability of qualified American applicants; as the data used had previously been inaccurate, plaintiff's certification had been wrongfully denied. *Significance*—The Secretary is now less likely to summarily withhold an alien employment certificate since he must investigate beyond inadequate agency data in determining availability of qualified Americans. *Seo v. U.S. Department of Labor*, 523 F.2d 10 (9th Cir. 1975).

3. ANTITRUST

FOREIGN GOVERNMENTS MAY NOT SUE AS *Parens Patriae* IN ANTITRUST DAMAGE SUITS

Plaintiff, the Republic of Vietnam and others, brought suit as *parens patriae* on behalf of their individual and corporate citizens alleging that defendant drug manufacturers had conspired to fix drug prices. *Parens patriae* suits may be brought only where individuals are unable to sue in their own behalf or where damages to the state's quasi-sovereign interests are imminent. Plaintiffs urged that practical difficulties facing foreign nationals would prevent them from filing suit individually and that a class action would not be financially feasible given the strict notice requirements. The court held that foreign governments may not sue as *parens patriae* in antitrust damage suits, since injuries to the general economy resulting from losses to individual citizens do not represent damages to the quasi-sovereign interest. The court also stated that since the individuals represented by plaintiffs had standing before it, a *parens patriae* action could not be brought even where strict class action notice requirements otherwise precluded suit.

Significance—A *parens patriae* suit cannot be used to circumvent the strict notice requirements of a class action. *Pfizer, Inc. v. Lord*, 522 F.2d 617 (8th Cir. 1975).

4. AVIATION

NO PRIVATE REMEDY FOR ALLEGEDLY INFERIOR GROUND ACCOMMODATIONS MAY BE IMPLIED FROM FEDERAL AVIATION ACT

Plaintiffs were members of a European tour sponsored by defendant airline. Plaintiffs charged that their "first class" accommodations were inferior to tourist accommodations provided to other members of the tour at lesser cost, and that other services supplied were different than those warranted in the literature. Since there is no provision for private enforcement, plaintiffs sought to imply a private cause of action from two sections of the Federal Aviation Act, § 1374(b) which prohibits discrimination by any regulated air carrier, and § 1381 which gives the CAB the power to investigate and enjoin unfair or deceptive practices. The court held that a private remedy could not be implied from either section of the Act. Although the Courts have implied a private cause of action from § 1374(b) for certain acts by airlines, the court determined that the purpose of the section is to insure free access to air facilities, and that the implication of a private remedy would be improper in this case. The court also noted that no private cause of action had ever been implied from § 1381, since the purpose of the section is antitrust regulation in the public interest. *Significance*—This holding indicates that there will be a private remedy under the Federal Aviation Act only in cases involving racial discrimination and other restrictions on free access to airline facilities. *Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975).

5. CHOICE OF LAW

PARAGUAYAN SPECIFIC CODES ARE TO BE CONSULTED BEFORE GENERAL CODES IN DETERMINATION OF APPLICABLE LAW

Defendant manufacturer's airplane crashed on takeoff, killing and injuring several Paraguayan officials and causing damage to Paraguayan aircraft. Suit was brought to determine whether the Paraguayan General Codes or Specific Codes were applicable. The court held that Paraguayan law required that the Specific Codes be consulted first, and that the Aeronautic Code is a Specific Code intended to cover completely any liability arising from aircraft operation, including the claims of the plaintiffs in this case. The

court reasoned that the demonstration flight for non-paying passengers was encompassed by the Aeronautic Code because it was "transportation carried out by private parties on a basis of friendship or courtesy," and because the airplane was considered to be in flight at the point power was applied for takeoff. *Significance*—Paraguayan codified law consists of General and Specific Codes, and though both might have a bearing on the issues of a case, the Specific Codes should be considered first for their applicability. *Lineas Aereas Paraguayas v. Fairchild Hiller Corp.*, 400 F. Supp. 116 (D. Md. 1975).

6. EUROPEAN ECONOMIC COMMUNITY

REBUTTABLE PRESUMPTION SET BY NATIONAL STANDARD IS PERMISSIBLE IN THE EUROPEAN ECONOMIC COMMUNITY

French defendants were charged in the Court of Justice of the European Communities with willful over-alcoholization of wine. Article 8 of the French *Code du Vin* (Decree of December 1, 1936) raised a presumption of over-alcoholization for wines exceeding a certain alcohol/dry extract ratio. The Court of Justice was requested to determine whether Community regulations authorize the retention at national level of the provisions of the French *Code du Vin* which lay down the presumption of over-alcoholization. The Court of Justice upheld the provisions of the *Code du Vin*, allowing such a presumption so long as the presumption could be refuted and was not applied in a discriminatory manner. *Significance*—This preliminary ruling allows supervision of the wine industry in the European Community at the national level. Joined Cases 89/74, 18 and 19/75 Cour d'Appel, Bordeaus (Preliminary ruling) 30.975.

Wines imported from Italy by French wine-marketing companies were found to have an alcohol/dry extract ratio above the limit set by Article 8 of the French *Code du Vin* (Decree of December 1, 1936). The Court of Justice was requested by the Cour d'Appel, Aix en Provence, to state whether table wines subject to EEC regulation must satisfy national practices and rules (including the legal presumption of over-alcoholization of Article 8 of the French *Code du Vin*) as well as Community regulations. The Court of Justice upheld the presumption of the French *Code du Vin*, though it also found that a Member State may not require more than the Community regulations concerning use of the term "table wine" and circulation of wines within the Member States. *Significance*—This case clarifies the extent of national control possible in excess of

EEC regulations. Joined Cases 10 to 14/75 Cour d'Appel, Aix en Provence (Preliminary ruling) 30.9.75.

7. JURISDICTION

CONTACTS BETWEEN ALABAMA AND AGENCY OF A FOREIGN GOVERNMENT INSUFFICIENT TO ESTABLISH In Personam JURISDICTION UNDER ALABAMA'S LONG-ARM STATUTE

The Ministry of Industry, Commerce and Tourism of the Republic of Bolivia was named as an additional defendant in a counterclaim by the original defendant, ADM Milling Company, a Minnesota corporation. ADM's counterclaim sought damages against defendant for wrongful rejection of a cargo of wheat flour and for failure to legalize certain commercial and consular invoices which would have allowed ADM to receive payment for the flour under its letters of credit as provided for in the original sales contract. The flour was to have been shipped from Mobile, Alabama. The defendant rejected the cargo of flour because it was infected with weevils. Defendant moved to dismiss ADM's counterclaim, asserting sovereign immunity and lack of personal jurisdiction. The court granted the motion to dismiss, holding that the negligible contacts between defendant and the forum state, Alabama, did not provide adequate bases for the exercise of the court's jurisdiction under the Alabama long-arm statute. The court noted that the defendant was not an inhabitant of the state and had no office or place of business anywhere in the United States. Additionally, the contract was not made in Alabama, contained no provisions implying an intention on the part of either party to subject itself to the laws of Alabama, and expressly stipulated that the letters of credit were to be presented at a New York bank for payment. *Significance*—Partial in-state performance of a contract made outside the state does not constitute an adequate basis for the assertion of in personam jurisdiction under a state long-arm statute where one contracting party has otherwise negligible contacts with the state. *T.J. Stevenson & Co., Inc. v. 81,193 Bags of Wheat Flour*, 399 F. Supp. 936 (S.D. Ala. 1975).