Vanderbilt Journal of Transnational Law

Volume 7
Issue 3 *Summer 1974*

Article 10

1974

Case Digest

Journal Staff

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.

This digest includes cases reported mainly from December 1973 through March 1974. The cases are grouped into 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 aspects of transnational law.

TABLE OF CONTENTS

1. ACT OF STATE

ACT OF STATE DOCTRINE APPLIES TO INFORMAL ACTIONS OF FOREIGN GOVERNMENTS IF THE GOVERNMENTAL AGENT ACTS WITHIN THE SCOPE OF HIS AUTHORITY

In 1960, the government of Cuba nationalized five Cuban cigar companies, which had active accounts with American importers and set up an agency that continued business with the importers until 1962. The importers made several payments for shipments, received before the nationalization, to the agency through New York collecting banks under the established practice. Plaintiffs, former owners of the cigar companies, sued the importers to recover these payments. The agency intervened to recover payments due from the importers for postnationalization shipments. The importers then counterclaimed under a quasi-contract theory for return of the payments for prenationalization shipments paid erroneously to the agency. The agency claimed that the owner's accounts receivable were included in the property nationalized in 1960 and that the nationalization was an act of state, which is not subject to review by an American court. The importers maintained that their payments in good faith to the New York collecting banks satisfied their liability to the owners, or, alternatively, that they should be able to setoff these payments to the agency against the agency's claim. The court found that since the accounts receivable of the cigar companies had their situs in the United States, the nationalization decree was ineffective as to them. Thus the importers were liable to the plaintiffs, despite the prior payments made to the agency. The court then held that the Cuban government's refusal to return the importers' prenationalization payments was an act of state. The proper test to determine whether an act of state exists is whether the agent acted within the scope of his authority, not whether the action was a formal governmental decree. Then, relying on *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), the court allowed each importer's counterclaim, limited to the amount of the agency's claims against the importers. *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973).

2. ADMIRALTY

SIGNIFICANT-RELATIONSHIP-TO-MARITIME-ACTIVITY TEST USED TO DETERMINE ADMIRALTY TORT JURISDICTION

Smoke emitted from a shore-based paper mill obstructed navigation and caused a ship to collide with a railroad bridge. Plaintiff, bareboat charterer of the ship, instituted an exoneration and limitation of liability proceeding and filed a third-party complaint against the owner of the paper mill, charging that the smoke emitted by the paper mill interfered unreasonably with the vessel's use of the waterway and constituted a nuisance and an obstruction to navigation. The owner of the vessel filed a cross-claim against the mill alleging violation of the Georgia Air Quality Control Act and federal regulations pertaining to navigation and signals, and alleging that such violations were the proximate cause of the collision. The paper mill owner's motion to dismiss for lack of admiralty jurisdiction was sustained by the District Court. The Court of Appeals for the Fifth Circuit reversed, finding a substantial connection between the tort and maritime activities. The fact that the source of the obstruction had a nonmaritime origin was not controlling since the obstruction resulted in injury to a vessel then underway on navigable waters. The court stated that if locality of the tort were the only maritime connection, admiralty jurisdiction would be lacking. Relying on the "virtually identical" test of "the relationship of the wrong to traditional maritime activity," of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and a "substantial connection with maritime activities or interests," of *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121 (5th Cir. 1972), the court further clarified the requirements for the developing substantial maritime connection test for admiralty tort jurisdiction. *In re Motor Ship Pacific Carrier*, 489 F.2d 152 (5th Cir. 1974).

DAMAGES FOR LOSS OF NAVIGATION RIGHTS FOR PRIVATE PLEASURE BOATS ARE NOT RECOVERABLE UNDER EITHER FEDERAL MARITIME LAW OR CALIFORNIA LAW WHEN NAVIGATION IS IMPAIRED BY OFF-SHORE OIL SPILL

The plaintiffs, private pleasure boat owners, sought recovery for damages to their boats caused by an oil spill from an off-shore well and for loss of navigation rights while the Santa Barbara Channel was closed during the subsequent cleanup operations. Plaintiff

contended that under the Outer Continental Shelf Lands Act, 43 U.S.C. § 130 *et seq.*, as construed by *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), California law should apply. Defendant urged the application of federal maritime law, which would deny recovery to the plaintiffs. The District Court permitted recovery for physical damage to the vessel but not for the loss of navigation rights. While affirming the lower court's decision, the Court of Appeals for the Ninth Circuit dismissed the plaintiff's contention citing various cases when maritime law has been applied under the Outer Continental Shelf Lands Act when conflicts with state law arise. Noting the restrictions on admiralty jurisdiction stated in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), the court held that the wrong in this case bears a "significant relationship to traditional maritime activity" and thus satisfies the test set out in that case. The court further rejected the plaintiff's contention that *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), permitted the application of state law by distinguishing the ship-to-shore pollution, which was the nexus of that case, from the shore-to-ship pollution under consideration here. Finally, the court concluded that even if state law were applicable, plaintiff would not be able to recover because the obstruction of the channel was a public nuisance and the plaintiff had not suffered damages different in kind from the public as a whole, so as to allow recovery under applicable California nuisance law. This decision restrictively denies the application of state law to incidents arising out of operations conducted on fixed off-shore drilling platforms. *Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9th Cir. 1973).

DAMAGES AWARDABLE FOR WRONGFUL DEATH OF NON-SEAMEN ON STATE TERRITORIAL WATERS ARE GOVERNED BY GENERAL MARITIME LAW

In their wrongful death actions, claimants sought damages for the fatalities of their wives and children in a barge accident on state territorial waters. Claimants contended that the language in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), recommending guidance by state wrongful death statutes, implied that actions involving the deaths of non-seamen within state waters should be governed by local law and not by maritime law, which relies on unseaworthiness theories to compensate employees. The barge line argued that since the state statutes conflict with federal

law, damage awards should be governed by the Death on the High Seas Act (DOHSA). Relying on *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970), the District Court held that, under the doctrine of uniformity, general maritime law and DOHSA govern the measure of damages. The court found that in such actions, reference may be made to state statutory provisions only when the uniformity doctrine is not impinged upon by a local rule contrary to federal law. *In re Complaint of American Commercial Lines, Inc.*, 366 F. Supp. 134 (E.D. Ky. 1973).

PACKAGING FOR PROTECTION, WHETHER COMPLETE OR PARTIAL, SHOULD BE CONSIDERED AS MAKING THE ITEM A PACKAGE UNDER COGSA

Consignee and owner brought an action against the vessel, its owner and operator, a loading stevedore and a marine carpentry firm for damages during shipment to five circuit breakers mounted on steel bases, which were unwrapped and fully visible except for wooden crating covering instrument panels. The defendant contended that its liability, if any, was limited by the Carriage of Goods by Sea Act (COGSA) to 500 dollars per circuit breaker. The plaintiff moved to strike these defenses on the ground that the circuit breakers were not "packages" within the Act since the steel base was a permanent part of the circuit breaker. Relying on *Aluminios Poznelo Ltd. v. S.S. Navigator*, 407 F.2d 152 (2d Cir. 1968), the court held that the goods were "packages" on two grounds: (1) the Bill of Lading described the goods as packages and (2) some packaging in preparation for transportation had been made to facilitate handling. The court clarified the latter point by stating that packaging, to the extent that it protects cargo, also facilitates its handling and that packaging for protection, whether complete or partial, should be considered as constituing a package within § 4(5) of COGSA. This decision is a further development of what constitutes a "package" under COGSA. *Companhia Hidro Electrica v. S/S Loide Honduras*, 368 F. Supp. 289 (S.D.N.Y. 1974).

A MARITIME LIEN CREATED UNDER UNITED STATES LAW IS ENFORCEABLE IN CANADA AND TAKES PRIORITY OVER A MORTGAGE ON THE SHIP

Appellant shipyard performed necessary repairs on the defendant ship in New York, thus creating a valid maritime lien under United States law. Upon default of a mortgage held by the respon-

dent, the ship was ordered to proceed to Vancouver, Canada, where she was arrested and purchased by respondent mortgagee, who paid the proceeds into court. In a subsequent action in Canada to settle the priorities among the ship's creditors, appellant intervened and claimed the priority status that Canadian law affords a maritime lienholder over a ship's mortgagee. The appellant argued that although Canadian law does not give the supplier of necessary repairs a maritime lien, the court should apply United States law, which does grant the supplier of necessaries a maritime lien—a right in rem unaffected by movement of the ship from port to port. The lower court reasoned that since Canadian law, which governs the availability of remedies, does not provide precedence for the supplier of necessary repairs, appellant's claim was subordinate to the mortgage. On appeal, the Supreme Court of Canada reversed, holding that a Canadian court will give the holder of a valid maritime lien created under foreign law the same priority to which the holder of a valid Canadian maritime lien is entitled. The court first referred to *The Ship Strandhill v. Walter W. Hodder Co.*, [1926] Can. Exch. 226, *aff'd*, [1926] Can. S. Ct. 680, in which a Canadian court decided that maritime liens acquired under foreign law will be recognized and may be enforced by a tribunal having the requisite admiralty jurisdiction. The court then concluded that a valid foreign maritime lien should be given the same precedence as a Canadian maritime lien even though it was created under foreign law in circumstances insufficient to create a lien in Canada. Therefore, a valid maritime lien created under foreign law will take precedence in Canada over a ship mortgage. *Todd Shipyards Corp. v. Altema Compania Maritina, S.A.* [1973] S.C.R. ____.

3. ALIEN'S RIGHTS

Regulations Excluding Resident Aliens from Employment in Federal Competitive Civil Service Violate Due Process Clause of Fifth Amendment

The United States Civil Service regulations excluded all resident aliens from employment in the federal competitive civil service, regardless of the nature of the job. The government argued there was a compelling governmental interest counterbalancing the discriminatory classification. In determining that the regulations violated the fifth amendment Due Process Clause, the Court of Appeals for the Ninth Circuit relied on the Supreme Court decision

in *Sugarman v. Dougall*, 413 U.S. 643 (1973), which held a New York statute barring aliens from civil service jobs to be in contravention of the Equal Protection Clause of the fourteenth amendment. Though not strictly controlling, a coextensive equal protection principle implicit in the concept of fifth amendment Due Process provides a similar basis for this holding. Relying on this principle, and extending the Supreme Court finding in *Graham v. Richardson*, 403 U.S. 365 (1971), that aliens constitute a suspect classification in a welfare context, the court held that the prohibitive regulations were too broad. The flat prohibition against federal employment of aliens for all jobs fails to meet the compelling interest test and, in excluding aliens from all civil service jobs, the regulations sweeps too broadly to satisfy due process. This decision may have a profound effect on civil service employment practices. *Wong v. Hampton*, 333 F. Supp. 527 (9th Cir. 1974).

4. AVIATION

MENTAL DISTRESS ATTACHES TO AN AIR CARRIER'S STRICT LIABILITY FOR BODILY INJURY UNDER THE WARSAW CONVENTION

Defendant's airliner made an unscheduled and lengthy landing in the Jordanian desert after being hijacked by members of the Popular Front for the Liberation of Palestine. Plaintiffs, a married couple who were passengers on the plane, brought suit for bodily injuries and mental anguish while on the "detour." Plaintiffs contended that the airline was strictly liable for any bodily injury occurring during the flight and that mental distress could be attached to the bodily injury claim as a parasitic tort. Another court, in *Husserl v. Swiss Air Transport*, 351 F. Supp. 702 (S.D.N.Y. 1972), had ruled that the Montreal Agreement of 1966, as it modified the Warsaw Convention, art. 17, 49 Stat. 3005 (1929), made airlines strictly liable for bodily injuries resulting from a hijacking, but the court denied recovery to a plaintiff who had pleaded mental distress alone. Relying on the *Husserl* decision, the instant court translated (from French) article 17 to read that the carrier is liable "for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger . . . ." Next, the court held that "mental anguish directly resulting from a bodily injury is damage sustained in the event of a bodily injury." Therefore, the plaintiffs could recover for any emotional anxiety suffered as a consequence of the hijacking.

Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D. New Mex. 1973).

5. IMMIGRATION AND NATURALIZATION

CONGRESS MAY GRANT CITIZENSHIP TO FOREIGN-BORN CHILDREN OF CITIZEN FATHERS, WHILE DENYING SAME TO OFFSPRING OF CITIZEN MOTHERS

Petitioner, son of an American citizen mother, appealed a deportation order of the Immigration and Naturalization Service. The Service had denied his claim of American citizenship, relying on section 1993 of the Revised Statutes of 1874, effective at the time of petitioner's birth, which granted citizenship to foreign-born children of American citizen fathers, but failed to accord a similar privilege to foreign-born children whose mothers were American citizens. Petitioner argued that the statutory distinction between the citizen status of offspring of citizen fathers and the citizen status of similarly situated offspring of citizen mothers constituted an invidious discrimination forbidden by the Constitution. Petitioner relied on *Rogers v. Bellei*, 401 U.S. 815 (1971), contending that congressional standards are subject to a test of being "unreasonable, arbitrary, or unlawful." Relying on *Hein v. United States Immigration and Naturalization Service*, 456 F.2d 1239 (5th Cir. 1972), the Court of Appeals for the Fifth Circuit rejected petitioner's contention, and held that the legislative preference accorded to offspring of American citizen fathers does not constitute invidious discrimination. The court distinguished *Bellei* on the ground that the test established therein applies only to the power to subject previously granted citizenship to a condition subsequent, rather than a condition precedent to the initial attainment of citizenship. Petitioner also contended that his deportation order was invalid because he was not represented by an attorney at his hearing before the Special Inquiry Officer. The court rejected this claim, reasoning that the operative facts of the case were undisputed and that appointment of an attorney was unnecessary. The significance of this decision is limited to cases involving similar petitioners born before December 24, 1952. *See* 8 U.S.C. § 1401(a)(7). *Villanueva-Jurado v. Immigration and Naturalization Service*, 482 F.2d 886 (5th Cir. 1973).

CONCEALED INTENTION TO STAY PERMANENTLY IN UNITED STATES DOES

NOT CONSTITUTE FRAUD FOR PURPOSES OF INVOKING THE EXCLUSION PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT

Plaintiff, a Belgian citizen and mother of a child of United States citizenship, refused to leave the United States after her six month visitor's visa expired and an order was entered by the Immigration and Naturalization Service that she be deported. On appeal to the Tenth Circuit Court of Appeals, plaintiff contended that she originally obtained her visa as the result of fraud and misrepresentation, by concealing her intent not to leave at the end of six months. The plaintiff further contended that the Immigration and Nationality Act, 8 U.S.C. § 1251(f) (which excludes from deportation an alien, otherwise admissible at the time of entry, who is the parent of an United States citizen, and has sought or procured a visa or entry into the United States by fraud or misrepresentation) precluded her deportation. Relying on two earlier Ninth and Seventh Circuit decisions, *Lourdes Cabuco-Flores v. Immigration and Naturalization Service*, 477 F.2d 108 (9th Cir. 1973) and *Milande v. Immigration and Naturalization Service*, 484 F.2d 774 (7th Cir. 1973), the court ruled that 8 U.S.C. § 1251(f) operates as a waiver of a deportation charge, if, and only if, the deportation charge "results directly from the misrepresentation." Since the deportation order here did not depend directly or indirectly upon the asserted misrepresentation in obtaining the visa, the court concluded the order must be affirmed. *Preux v. Immigration and Naturalization Service*, 484 F.2d 396 (10th Cir. 1973).

ALIEN RESIDENT OF UNITED STATES MAY BE NATURALIZED UNDER § 329(A) OF IMMIGRATION AND NATIONALITY ACT EVEN THOUGH NOT MEETING STRICT MILITARY SERVICE REQUIREMENTS OF THE ACT

The alien petitioner, a resident of the United States for 21 years under an erroneously issued certificate of citizenship who had been on active duty in the Army from 1958 to 1960 and in the reserves from 1960 to 1964, petitioned for naturalization under section 329(a) of the Immigration and Nationality Act, 8 U.S.C. § 1440. Section 329(a) provides that any nonresident alien serving on active duty in the United States armed forces between June 25, 1950, and July 1, 1955, or from February 28, 1961, to the termination date of the Vietnam hostilities as set by the President may be naturalized under this section. Though not falling within the strict military service requirements of this section, the petitioner claimed eligibility on two theories: (1) he was on active duty in

Korea, which was an area of actual hostility, and the dates of the Korean War are set out in section 329(a), and (2) the period of his duty in the reserves was also within the time requirements of section 329(a). The District Court for New Jersey held for the alien on both of his theories, reasoning that the inclusion of the dates of the Korean War in the section would indicate that persons serving in this area be benefited also. In addition, the court noted that the alien's reserve service, which followed two years of active duty, evidenced his willingness to serve the United States and should be counted in determining eligibility under the act. The court distinguished the recent Supreme Court decision in *United States Immigration & Naturalization Service v. Hibi*, 414 U.S. 5 (1973) on the basis of Hibi's inability to meet the requirement of United States residence, whereas the present petitioner had been a resident for 21 years. This decision uses a more liberal standard than the one used by the Supreme Court and may reflect a more lenient trend in naturalization decisions in the lower federal courts. *Petition for Naturalization of Yui-Nam Donn*, 42 U.S.L.W. 2293 (N.J.D.C. 1973).

6. JURISDICTION

Foreign Corporation Subject to State Long Arm Jurisdiction When all Claims were Occasioned by the Same Cause of Action

Plaintiff, a citizen of the State of Michigan, brought a suit in United States District Court seeking damages for personal injuries suffered while operating a machine manufactured by defendant Metalmeccanica, an Italian corporation, and imported into the United States by two Canadian firms. Plaintiff's action was based on the broad Michigan long arm statute for tort claims, and alleged three theories for recovery: (1) negligence; (2) breach of implied warranty; and (3) breach of express warranty. Metalmeccanica moved to dismiss the action contending that, due to insufficient contacts with Michigan, no in personam jurisdiction could be exercised pursuant to Rule 4(d)(7) of the Federal Rules of Civil Procedure. The court determined that the defendant had insufficient contacts within Michigan to constitute carrying on general business within the state and that Michigan's long arm statute did not provide a basis for jurisdiction over the breach of express warranty claim alone. It then held that jurisdiction could be exercised over all three claims since the negligence and breach of implied war-

ranty claims specifically fell within the provisions of the statute and since all three claims were occasioned by the same transaction. The court reasoned that when claims are sufficiently related to come within the ancillary jurisdiction concept, it should compel the defendant to respond to all claims, thus providing a reasonable forum for economical and expeditious disposition of the claims. *Behlke v. Metalmeccanica Plast, S.P.A.*, 365 F. Supp. 272 (E.D. Mich. 1973).

SECURITIES EXCHANGE ACT OF 1934, SECTION 10(B)(5) APPLIES TO FOREIGN SECURITIES TRANSFER BETWEEN FOREIGN CORPORATIONS HAVING SIGNIFICANT IMPACT ON AMERICAN SECURITIES MARKETS

Defendant, a United States corporation, and plaintiff, its European subsidiary, signed a memorandum of understanding whereby key employees of defendant would form a Dutch corporation and purchase the subsidiary from defendant and that *inter alia* the United States corporation would receive all retained earnings of the subsidiary prior to a fixed date. Defendant sued plaintiff in Europe over the amount of retained earnings and attempted to reacquire the subsidiary. In the United States, the subsidiary sued the United States corporate defendant on various counts of breaches of trust, breaches of contract, unfair trade practices, and fraud and misrepresentation in the sale of securities in violation of the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1970). Defendant moved to dismiss the counts arising under the Act for want of subject matter jurisdiction and to dismiss or stay the remaining counts pending final adjudication of the Netherlands litigation. Defendant contended that the Act does not apply to a transfer of ownership of securities of a foreign corporation to a foreign purchaser that took place outside the United States. The District Court for the Eastern District of Pennsylvania denied defendant's motions. The court first stated that although other litigation might establish defendant's right to reacquire plaintiff, it would not establish whether such reacquisition would foreclose plaintiff's suit. The court also concluded that it has subject matter jurisdiction under § 10(b)(5) in light of evidence of significant impact on the United States securities market since defendant was United States owned and its stock was registered on the American Stock Exchange, one of plaintiff's major stockholders was a United States citizen, and the sale and alleged fraud occurred in the United States. The court would not rule whether § 10(b)(5) pro-

tects only a United States investor nor did it reach the issue of misrepresentation. *Selas of America (Nederland) v. Selas Corporation of America*, 365 F. Supp. 1382 (E.D. Pa. 1973).

7. SOVEREIGN IMMUNITY

ADMINISTRATIVE PROCEDURE ACT HELD NOT TO APPLY TO STATE DEPARTMENT DECISION TO RECOGNIZE AND ALLOW CLAIM OF FOREIGN SOVEREIGN IMMUNITY

During the violence surrounding the military overthrow of the Allende government in Chile, the Cuba *M/V Playa Larga* abruptly left Valparaiso harbor, without completely unloading its cargo of raw sugar and without removing four unloading cranes owned by a Chilian corporation. A second Cuban vessel, the *M/V Marble Island*, also carrying sugar, changed course before reaching Chile. The Chilian consignee of the sugar aboard both vessels instituted a breach of contract suit in the Panama Canal Zone District Court against the Cuban corporation that owned the vessels. The jurisdiction of the court was based on a writ of attachment against a vessel that was present in the Canal Zone and owned by the Cuban corporation. The State Department suggested that sovereign immunity barred the suit, and plaintiffs requested both a statement of reasons for the decision and an opportunity to appeal. The State Department denied both requests. The court then granted the defendant's motion to dismiss the suit, but deferred the entry of the order pending appeal. Plaintiffs, on appeal, argued that the State Department decision to allow a claim of foreign sovereign immunity was "final agency action" within the meaning of the Administrative Procedure Act and was, therefore, subject to judicial review. Acknowledging that the question presented was one of first impression, the court held that the APA does not apply to a State Department decision to recognize and allow a claim of foreign sovereign immunity. The court reasoned that the separation of powers requires the judicial branch to assume that the State Department has taken into account all pertinent considerations in arriving at its decision, and that the disclosure of the reasons behind the decision might itself defeat the legitimate foreign policy objectives of the executive branch. *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).