[Vanderbilt Journal of Transnational Law](https://scholarship.law.vanderbilt.edu/vjtl)

Volume 6
Issue 2 *Spring 1973*

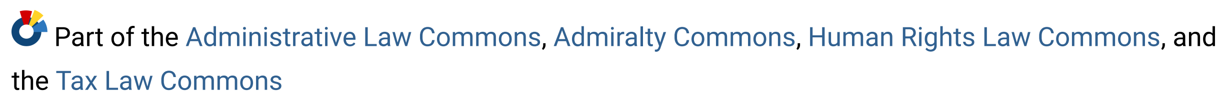
Article 12

1973

Case Digest

Journal Staff

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vjtl


Part of the Administrative Law Commons, Admiralty Commons, Human Rights Law Commons, and the Tax Law Commons

Recommended Citation

Journal Staff, Case Digest, 6 *Vanderbilt Law Review* 706 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol6/iss2/12

This Comment is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Case Digest

The purpose of the *Case Digest* is to identify and summarize for the reader those recent and interesting 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 from December 1972 through April 1973. The Fall issue will include cases reported from May through November, 1973. 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. ADMINISTRATIVE 707
2. ADMIRALTY 707
3. ALIENS 715
4. AVIATION 717
5. CITIZENSHIP 717
6. HUMAN RIGHTS 719
7. IMPORT-EXPORT 720
8. JURISDICTION 722
9. TAXATION 722

1. ADMINISTRATIVE

NON-VESSEL-OPERATING COMMON CARRIERS HAVE BURDEN OF PROOF TO JUSTIFY THE REASONABLENESS OF PROPOSED RATE INCREASE IN A FEDERAL MARITIME COMMISSION PROCEEDING

Transconex, Inc. and Consolidated Express, Inc., both non-vessel-operating common carriers by water, filed schedules of proposed rate increases to take effect respectively on April 30, and June 10, 1969. The Federal Maritime Commission (FMC) then initiated public investigation and hearings on April 28, and June 6, 1969, to determine whether the increases would be unlawful under the Shipping Act of 1916 and/or the Intercoastal Shipping Act of 1933. The FMC did not suspend the rate increases pending the hearing and Puerto Rico intervened to oppose the increases. The investigation and hearings were discontinued on the ground that Puerto Rico had failed to discharge its burden of proving that the increases were unlawful. Puerto Rico then petitioned the Court of Appeals for the District of Columbia to review this order of dismissal, contending that the burden of proof was on the non-vessel-operating common carriers in such a proceeding even though the FMC did not suspend the rates pending review of their reasonableness. The court held for Puerto Rico on the basis of congressional intent as ascertained from S. REP. No. 724, 76th Cong., 1st Sess. 2 (1939) and from the Intercoastal Shipping Act of 1933, 46 U.S.C. §§ 843-48 (1970). These sources allocate the burden of proof to the carrier proposing the rate change since the carrier is the party most likely to possess the evidence necessary to establish the reasonableness of the change. *Puerto Rico v. Federal Maritime Comm'n*, 468 F.2d 872 (D.C. Cir. 1972).

2. ADMIRALTY

COMPARATIVE NEGLIGENCE STANDARD APPLICABLE TO THE CANAL ZONE COMPANY DOES NOT SUPERSEDE THE RULE OF DIVIDED DAMAGES BETWEEN VESSELS

Plaintiff's tanker, while being piloted by a Panama Canal Company pilot, collided with a freighter owned by defendant. Plaintiff Afran sued the freighter for damages, the freighter counterclaimed against the tanker, and plaintiff then sought recovery from the Panama Canal Company for any liability to the defendant. The Court of Appeals for the Fifth Circuit found both plaintiff and defendant at fault, and therefore applied the rule of divided damages whereby damages are divided equally between the parties regardless of degree of compara-

tive fault. The Panama Canal Company petitioned for rehearing, contending that the rule of divided damages here should yield to the comparative negligence standard, which applies in direct actions against the Panama Canal Company pursuant to section 292 of the Canal Zone Code. The court held that although the negligence of the Canal Company is imputed to the tanker, the action between the tanker and the freighter is an *in rem* action. Therefore, based on *Burns Bros. v. Central R.R.*, 202 F.2d 910 (2d Cir. 1953), the rule of divided damages should apply to this *in rem* recovery. The court upheld the use of the rule of comparative negligence between the tanker and the Panama Canal Company since section 292 is a waiver of sovereign immunity. *Afran Transp. Co. v. S/S Transcolorado*, 468 F.2d 772 (5th Cir. 1972).

FAILURE TO OBEY COMMANDS OF SHIP MASTER BECAUSE OF VOLUNTARY INTOXICATION CONSTITUTES WILLFUL DISOBEDIENCE

Plaintiff, a seaman, claimed that an improper deduction from his wages by defendant, his employer, entitled him to "double penalty wages" under 46 U.S.C. § 596. Defendant asserted that plaintiff's admitted failure to stand several prescribed watches because of intoxication constituted the disobedience of orders necessary under 46 U.S.C. § 701 to justify a deduction of wages. The court analogized this case to criminal cases in which voluntary intoxication does not excuse a crime. Therefore, the court held that missing assigned watches due to voluntary intoxication was willful disobedience and that deduction of wages was proper. *Davenport v. Albatross Tanker Corp.*, 349 F. Supp. 183 (E.D. Pa. 1972).

PREJUDGMENT INTEREST FROM DATE OF JUDICIAL DEMAND IS PROPER WHEN ORIGINAL ACTION AT LAW IS CHANGED TO ADMIRALTY BY WITHDRAWAL OF JURY DEMAND

Plaintiff was injured while working on a submersible drilling barge and brought suit for personal injuries against his employer under the Jones Act for negligence, and under general maritime law for unseaworthiness. Plaintiff filed his suit as a civil action and asked for a jury trial, unavailable in admiralty actions. Three days before trial, however, plaintiff waived his request for trial by jury. The district court for the Eastern District of Louisiana entered judgment for plaintiff and awarded damages including prejudgment interest from

the date of judicial demand, a remedy available, under the Jones Act, only in admiralty actions. Defendant appealed, contending that plaintiff's suit was a civil action at law, not in admiralty. Therefore, defendant alleged, the award of prejudgment interest was improper. The Court of Appeals for the Fifth Circuit upheld plaintiff's judgment and award of interest. The court determined that the action was in admiralty, making prejudgment interest proper. Reasoning that the plaintiff's original choice of the law side for his Jones Act suit was not irrevocable, the court treated the plaintiff's withdrawal of his demand for jury trial as an election to proceed in admiralty, notwithstanding his failure to comply with Rules 9(h) and 15, Federal Rules of Civil Procedure, which require identification of a suit as an admiralty claim. *Doucet v. Wheless Drilling Co.*, 467 F.2d 336 (5th Cir. 1972).

THE PERSONAL REPRESENTATIVE ALONE HAS STANDING TO BRING A WRONGFUL DEATH ACTION IN GENERAL MARITIME LAW

Plaintiff, father of decedent, brought a wrongful death action under the Jones Act, Death on the High Seas Act (DOHSA) and general maritime law. Defendants moved for summary judgment, asserting that plaintiff lacked standing to sue because he was not the personal representative of the deceased. Conceding his lack of standing under the Jones Act and DOHSA because he was not the personal representative of the deceased, plaintiff nevertheless argued his standing to sue in general maritime law actions created by *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The Court of Appeals for the Fifth Circuit upheld the lower court order granting defendant's motion for summary judgment. The court reasoned that the advantages inherent in a uniform rule of standing for maritime death actions outweigh any persuasive reason to introduce an anomaly into maritime law, and concluded that the clear expression of congressional intent, found in the Jones Act and DOHSA, to limit standing to sue solely to the personal representative should apply equally to *Moragne* wrongful death actions. *Futch v. Midland Enterprises, Inc.*, 471 F.2d 1195 (5th Cir. 1973).

PERMITTING AN OBJECT NOT PART OF SHIP'S EQUIPMENT TO REMAIN IN PLACE WHERE IT COULD BE DISLODGED CAN MAKE VESSEL UNSEAWORTHY

Plaintiff, a longshoreman, sustained a severe eye injury when he was struck by a falling object dislodged near the top of a ladder on board

defendant's ship. The object was not a part of the ship's equipment. Plaintiff contended that the vessel was unseaworthy and thus liable because dangerous debris was permitted to accumulate in a place where it could fall and injure a workman. The district court for the Western District of Washington held that a falling object must be part of the ship's equipment before unseaworthiness can be found. On appeal, the Court of Appeals for the Ninth Circuit reversed the district court and held that the presence on board a ship of an object placed near a ladder where it could be dislodged by a workman using the ladder in a normal manner constituted an unseaworthy condition, even though the object was not part of the ship's equipment. *Griffin v. United States*, 469 F.2d 671 (9th Cir. 1972).

ORDER ON MOTION TO STAY IS NOT APPEALABLE IF UNDERLYING ACTION IS IN ADMIRALTY

In plaintiff's admiralty action seeking recovery for damage to cargo, defendant asserted as a defense a compulsory arbitration provision of the charter party. Six months after the filing of the complaint, defendant moved to stay the proceedings pending resolution of the dispute by arbitration. Holding that defendant was guilty of unreasonable delay, the district court denied the motion, and defendant appealed to the Court of Appeals for the Fourth Circuit. The court held that the denial was clearly mandated under *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935). That decision and several others held that if the underlying action is one at law, a motion to stay is in effect a motion for an injunction and its resolution is appealable under 28 U.S.C. § 1292(a)(1) (1970). If the underlying action is in admiralty or equity, however, the fictional injunction is lacking and, therefore, an order on the motion to stay is not appealable. The court noted in dicta that either Congress or the Supreme Court should act to eliminate this incongruity. *J. M. Huber & Co. v. M/V Plym*, 468 F.2d 166 (4th Cir. 1972).

STATUS OF SEAMAN REQUIRES SUBSTANTIAL WORK ABOARD VESSEL WITH SOME DEGREE OF REGULARITY AND CONTINUITY

Appellant, employed as a temporary helper on an offshore drilling platform, suffered an injury while working on the platform. Alleging

his status as a seaman, appellant brought an action against his employer and others under the Jones Act and under general maritime law. Appellant contended that his performance of certain duties, including scraping paint and painting, for several days aboard the tender that serviced the drilling platform made him a seaman of that vessel. As a member of the platform crew, appellant also ate, slept and spent his off-duty time on the tender. The sole issue before the court was whether the duties appellant performed aboard the tender classified him as a seaman. On appeal, the Court of Appeals for the Fifth Circuit sustained the district court and held that appellant was not a seaman under the requirement set forth in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). The court found appellant's evidence insufficient to demonstrate that he performed a significant portion of his work aboard the tender with some degree of regularity and continuity. *Keener v. Transworld Drilling Co.*, 468 F.2d 729 (5th Cir. 1972).

ADMIRALTY COURT WILL ASSUME JURISDICTION OF ACTION BETWEEN FOREIGN LITIGANTS UNLESS JUSTICE IS BETTER SERVED BY DENIAL

The Irish administratrix of the estate of a deceased Irish seaman filed a wrongful death libel against defendants, a vessel of Irish registry, her Irish corporate owner, and a Georgia corporation. Plaintiff alleged that the deceased drowned in the Savannah River after falling from a portable catwalk negligently maintained by the Georgia corporation, and attached to the Irish vessel in an unseaworthy manner. The Irish defendants moved to dismiss the action on the ground that the administratrix's residence in Ireland made a forum there accessible for adjudication. The court noted that under the doctrine of *The Belgenland*, 114 U.S. 355 (1885), the assumption of jurisdiction by United States admiralty courts in cases involving foreign litigants is discretionary, and should be exercised unless special circumstances and the needs of justice dictate otherwise. The court found that the Georgia situs of the injury and the presence there of local witnesses, the potential right of contribution between the defendants, and, should the evidence disclose that the deceased was contributorily negligent, the problem of apportionment of damages between the administratrix and defendants, all could be handled best in one action. The court, therefore, held that these questions should be resolved in one lawsuit in the United States and not in separate actions in different countries. *Kearney v. Savannah Foods & Indus., Inc.*, 350 F. Supp. 85 (S.D. Ga. 1972).

BALANCE IN FAVOR OF FOREIGN DEFENDANT MUST BE ESPECIALLY STRONG BEFORE AMERICAN PLAINTIFF'S CHOICE OF DOMESTIC FORUM WILL BE DISTURBED

Plaintiff, an American seller, brought an action for damages in the district court for the Southern District of New York against defendant, a French bank, for releasing shipping documents to a French corporate buyer of plaintiff's goods contrary to plaintiff's instructions. Defendant filed a third-party complaint against the French buyer for indemnification. The French buyer then moved to dismiss the defendant bank's complaint for lack of personal jurisdiction and on the ground of *forum non conveniens.* The French bank, in turn, sought dismissal of the seller's complaint on the ground of *forum non conveniens,* contingent on the dismissal of its third-party complaint. The district court dismissed both complaints on grounds of *forum non conveniens.* The Court of Appeals for the Second Circuit reversed the dismissal of seller's complaint against defendant bank. The court found that the balance must be strongly in favor of a foreign defendant and forum before an American plaintiff's choice of domestic forum will be overturned. Noting that the relevant transactions between plaintiff and defendant occurred both in the United States and in France, and that defendant maintained a New York office, the court found it to be no more trouble for defendant to try the case in New York than for plaintiff to try the case in France. The court, however, affirmed the dismissal of the bank's third-party complaint against the buyer. Since both of these parties were French corporations, all of the relevant transactions took place in France, the witnesses were in France, French law would apply and the buyer had no contacts in New York, the court concluded that the third-party action should be resolved in French courts. *Olympic Corp. v. Societe Generale,* 462 F.2d 376 (2d Cir. 1972).

COURT ORDER DECLINING JURISDICTION OVER FOREIGN PARTIES IS EFFECTIVE ONLY ON DEFENDANT'S PROOF OF AGREED SUBMISSION TO FOREIGN JURISDICTION AND COOPERATION IN OBTAINING DEPOSITIONS

Plaintiff, a Spanish seaman on a vessel owned by defendant, a German corporation, brought suit to recover damages based on claims of unseaworthiness and negligence arising from an accident in Port Newark, New Jersey aboard defendant's vessel. Defendant petitioned the court to decline jurisdiction on the ground of *forum non conveniens.* The court evaluated the factors referred to in *Lauritzen v.*

Larsen, 345 U.S. 571 (1953) that are used to resolve choice-of-law problems in maritime tort claims, and concluded that the Jones Act and the general maritime law of the United States were not applicable. Noting that plaintiff and all the witnesses now reside in Spain, that the depositions of doctors in the United States easily could be obtained and that defendant offered to submit to foreign jurisdiction and cooperate in the taking of depositions, the court refused to retain jurisdiction on the ground of *forum non conveniens*. To eliminate prejudice to plaintiff, the court made the dismissal effective only on defendant's proof of its submission to foreign jurisdiction and cooperation in the taking of depositions. *Rodriguez v. Orion Schiffahrts-Gesellschaft Reith & Co.*, 348 F. Supp. 777 (S.D.N.Y. 1972).

Charge to Jury in Maritime Personal Injury Suit Must Distinguish Operational Negligence from Unseaworthiness

Plaintiff longshoreman was injured in an unloading accident on defendant's ship when a fellow longshoreman improperly spotted the boom of the ship's crane throughout the unloading operation and caused a steel beam to slam plaintiff against the side of the ship. Plaintiff sought recovery from defendant for personal injuries on the ground that his fellow longshoreman's actions made the ship unseaworthy. The District Court for the Eastern District of Louisiana charged the jury that defendant was liable if negligent acts of the longshoreman created an unseaworthy condition aboard ship that subsequently caused injury. The court advised the jury, however, that unseaworthiness does not arise if the negligent act and injury are simultaneous. Both parties found the instruction misleading; however, the court let it stand, and the jury returned a verdict in favor of defendant. On appeal, the Court of Appeals for the Fifth Circuit found the lower court's instruction to the jury in error and vacated the judgment. The court found confusing the instruction that there can be no liability for unseaworthiness when the negligent act and the injury are simultaneous. The court reasoned that the lower court's instruction failed to explain that unseaworthiness may be found, although the negligent act and injury are simultaneous, if the act is of such character or duration as to constitute unseaworthiness. Therefore, the court ruled that the charge must instruct the jury to distinguish an isolated personal act of negligence from an individual act of such character that it becomes an unseaworthy condition of the vessel itself. *Kyzar v. Vale Do Ri Doce Navegacai, S.A.*, 464 F.2d 285 (5th Cir. 1972), *cert denied*, 41 U.S.L.W. 3448 (U.S. Feb. 20, 1973).

COSGA, HARTER ACT AND UNITED STATES SHIPPING ACT GOVERN IN CASES IN WHICH TRANSPORTATION BY WATER IS AVERRED THOUGH NOT ALLEGED IN COMPLAINT

The Commonwealth of Puerto Rico instituted a civil action in the Superior Court of Puerto Rico against defendant carriers for an alleged misdelivery of 63 trailer loads of food shipped by the United States Government. The court granted defendant's petition for removal to the federal district court on the grounds that both the bill of lading contract and plaintiff's cause of action were governed by the terms and conditions of the Carriage of Goods by Sea Act (COSGA), the Harter Act and the United States Shipping Act. Plaintiff then moved for remand to the Superior Court of Puerto Rico. Plaintiff contended that COSGA, the Harter Act and the Shipping Act did not govern because they were not invoked specifically in the complaint, and argued that the Commonwealth of Puerto Rico enjoys sovereign immunity from suit in federal court. The district court for Puerto Rico denied plaintiff's request, and held that the language of these three acts demonstrates a congressional intent that they should apply in situations such as the instant case regardless of whether they are specifically alleged in the complaint. *Crispin Co. v. Lykes Bros. S.S. Co.*, 134 F. Supp. 704 (S.D. Tex. 1955), supported the court's argument that the mere averment of transportation by water in the complaint brings into play these statutes. The court also found ample precedent permitting a federal court to take judicial cognizance of these acts. The court finally held that when the sovereign has sufficient interest in the outcome of litigation to become a plaintiff, it waives its right to plead sovereign immunity, a doctrine available only when the sovereign is being sued for damages, and which will not prevent removal to another court. *Puerto Rico v. Sea-Land Serv., Inc.*, 349 F. Supp. 964 (D. P.R. 1970).

HALF-DISTANCE RULE IS DEPENDENT ON REMOTELY FORESEEABLE POSSIBILITY OF COLLISION

Petitioner's tanker was proceeding upstream on the Oregon side of the Columbia River when it sighted visually and by radar respondent's tugboat and barge heading downstream one and one-half miles ahead. The tugboat and barge became engulfed in a fog along the Washington shore. The captain of the tugboat then misjudged the tanker's position by mistaking the direction of its fog signal and, in an avoidance maneuver, executed a left U-turn across the shipping channel. When the tugboat unexpectedly emerged from the fog, the tanker went full

astern to decrease her headway but was unable to avoid being hit by the oncoming barge. In its admiralty action, petitioner contended that respondent was negligent in navigating the tugboat. The District Court for the District of Oregon held the tugboat and barge solely at fault. On appeal, however, the Court of Appeals for the Ninth Circuit held that petitioner also was negligent in violating the "half-distance" rule, 33 U.S.C. § 192 (1970), which establishes a standard used to determine whether a maritime speed is moderate under the prevailing weather conditions. The test is whether a vessel is able to stop in one-half the distance at which a converging vessel is first sighted. The United States Supreme Court reversed, and held the tugboat solely liable for the collision because the half-distance rule did not apply in this specific case. The Court found that the reason for the half-distance rule was not present here because it was unrealistic, on the facts of the case, for petitioner to anticipate the possibility that respondent would execute its totally unorthodox maneuver and thus intersect petitioner's path. *Union Oil Co. v. Tugboat San Jacinto*, 409 U.S. 140 (1972), *rev'g* 451 F.2d 1369 (9th Cir. 1971).

3. ALIENS

ALIEN ILLEGALLY IN THE UNITED STATES IS NOT BARRED FROM WORKMEN'S COMPENSATION BENEFITS UNLESS EMPLOYMENT CONTRACT AIDS ILLEGAL ENTRY

Plaintiff illegally entered the United Staes from Mexico, found employment and subsequently brought suit against defendant to recover under the Texas Workmen's Compensation Act. Defendant contended that petitioner's illegal entry voided his work contract and, therefore, prohibited his recovery of workmen's compensation benefits. The Texas Court of Civil Appeals upheld plaintiff's right to recover compensation benefits and ruled that violation of the immigration laws does not alone prevent recovery under the state workmen's compensation act. The court found that 42 U.S.C. § 1981 and the equal protection clause of the United States Constitution protect an alien's right to enter contractual obligations and to seek judicial redress. Noting also that a contract whose performance violates the law is void, the court reasoned that since plaintiff's contract of employment did not aid his illegal entry, he could recover workmen's compensation benefits. *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972).

ALIEN WHO OVERSTAYS NONIMMIGRANT VISA IS NOT EXEMPT FROM DEPORTATION

Petitioner overstayed his nonimmigrant visitor visa in order to remain in the United States with his permanent resident children. Petitioner then appealed his deportation ruling, claiming an exemption from deportation under 8 U.S.C. § 1251(f) (1970). The court found that the clear meaning of the statute exempts from deportation only aliens who obtained entry into the United States by fraud and have permanent resident children in the United States. The court determined that since petitioner entered the United States legally, section 1251(f) did not provide an exemption from deportation. *Pirzadian v. Immigration & Naturalization Serv.*, 41 U.S.L.W. 2397 (8th Cir. Jan. 25, 1973).

ALIEN MUST INTEND TO INTERRUPT HIS RESIDENTIAL STATUS FOR HIS RETURN TO BE AN "ENTRY" ON WHICH DEPORTATION CAN BE PREDICATED

Petitioner, a Mexican national admitted to the United States in 1963 as a permanent resident, returned to Mexico in 1970 to pay a family condolence call. While in Mexico, petitioner was approached by four Mexicans who asked his aid in effecting illegal entry into the United States. Petitioner helped the four Mexicans, and on his return to the United States was convicted for aiding an illegal entry. The Immigration and Naturalization Service then ordered petitioner's deportation under 8 U.S.C. § 1251(a)(13) (1970), which provides for the deportation of an alien who, within 5 years after any "entry," has aided the illegal entry of another. The Board of Immigrations Appeals affirmed. The Supreme Court held in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), however, that an "entry" for the purpose of deportation does not include the return from a brief foreign visit made by the resident alien without any intention of abandoning his United States resident status. Relying on that decision, the Court of Appeals for the Fifth Circuit reversed the deportation order and found that petitioner's return to the United States did not constitute a deportable "entry." The court noted three factors in its decision, including the length of absence from the United States, the need to obtain special travel documents and the purpose of the visit. Finding that petitioner did not intend to interrupt his residential status, the court held that petitioner could not be deported under 8 U.S.C. § 1251(a)(13). *Vargas-Banuelos v. Immigration & Naturalization Serv.*, 466 F.2d 1371 (5th Cir. 1972).

4. AVIATION

An Airline Hijacking Is an "Accident" Giving Rise to Cause of Action Against Airline Under Article 17 of Warsaw Convention

On September 6, 1970, armed members of the Popular Front for the Liberation of Palestine hijacked defendant's aircraft, scheduled for a direct flight from Zurich, Switzerland, to New York, and forcibly diverted the plane to a desert airstrip near Amman, Jordan. Plaintiff, a passenger on defendant's aircraft, was forced to remain in Amman until the eleventh of September. Plaintiff brought an action for bodily injury and mental anguish under article 17 of the Warsaw Convention, as modified by the Montreal Agreement of 1966. The liability rules of article 17 impose air carrier liability only on proof of the occurrence of an "accident." Defendant contended that hijacking is not an accident within the meaning of article 17 of the Warsaw Convention, and moved to dismiss plaintiff's complaint for failure to state a claim on which relief could be granted. The district court for the Southern District of New York held that a hijacking constitutes an accident under the Convention and, therefore, raises the presumption of air carrier liability. Analogizing hijacking to sabotage, the court reasoned that the intent of the parties to the Montreal Agreement to render airlines liable to victims of sabotage should apply equally to hijacking, and also found that the policy of the Convention to redistribute the costs involved in air transportation supported its holding. The court reasoned that the carrier was best qualified initially to develop defensive mechanisms to avoid hijacking, and thereafter most capable of assessing and insuring against the risks associated with air transportation. *Husserl v. Swiss Air Transp. Co., Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972).

5. CITIZENSHIP

Discrimination Based on Citizenship Is Not Violative of Title VII of the Civil Rights Act of 1964

Plaintiff, a lawfully admitted resident alien of Mexican origin, was denied employment by defendant Farah Manufacturing Co. Plaintiff alleged that she was discriminated against on the basis of her national origin, a violation of title VII of the Civil Rights Act of 1964. Defendant claimed that plaintiff was not hired because she was not a United States citizen. The court agreed with defendant that since 90 per cent of its employees were of Mexican origin, plaintiff had

not been discriminated against on the basis of her national origin. Therefore, the issue before the court was whether the words "national origin" in title VII include citizenship. Even though the meaning of "national origin" is plain, the court looked to the legislative history of the Act and found that "national origin" was meant to have its plain meaning. Therefore, the court found that discrimination on the basis of citizenship is not violative of title VII of the Civil Rights Act of 1964. *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331 (5th Cir.), *petition for cert. filed*, 41 U.S.L.W. 3350 (U.S. Oct. 31, 1972) (No. 671).

THREE-YEAR CONTINUOUS RESIDENCE REQUIRED FOR NATURALIZATION IS NOT BROKEN WHEN PETITIONER RELIES ON GOVERNMENT INFORMATION AND LIVES ABROAD WHILE CITIZEN HUSBAND SERVES IN THE PEACE CORPS

Petitioner, a French national and the wife of an American citizen, filed a petition for naturalization under 8 U.S.C. § 1430(a), which requires three years continuous residence. Petitioner had lived for more than three years in Senegal while her husband worked there for the Peace Corps. Before leaving the United States, petitioner had received erroneous assurances from the Immigration and Naturalization Service that her residence in Senegal would not break her three years continuous residence. On her return to the United States, however, petitioner was denied naturalization. The district court of St. Thomas and St. John, Virgin Islands, reversed the order determining that although the statute should be strictly interpreted, recent cases have made exceptions to strict interpretation. The court reasoned that congressional intent would be satisfied in this case if petitioner were allowed naturalization since she was the wife of a citizen who worked for the United States Government. The court further held the Government estopped from denying petitioner naturalization since she had relied on incorrect information given her by the Immigration and Naturalization Service. *In re LaVoie*, 349 F. Supp. 68 (D. St. Thomas & St. John, V.I. 1972).

STATE STATUTES REQUIRING STATE EMPLOYEES TO BE UNITED STATES CITIZENS CONTRAVENE SUPREMANCY AND EQUAL PROTECTION CLAUSES ABSENT A COMPELLING STATE INTEREST IN PROTECTING STATE FISCAL INTERESTS AND RESOURCES

Plaintiff Miranda was eighteen years of age and a permanent resident alien continuously residing in Arizona for over fifteen years. Plaintiff applied for parttime employment with the Tucson School

District in a Work-Study Program sponsored by the District under the Vocational Education Act, 20 U.S.C. § 1241 *et seq.* (1970). Plaintiff satisfied all the requirements for enrollment in the federally sponsored and subsidized program, and was accepted for employment. One month later defendants terminated plaintiff's employment for the sole reason that she was a noncitizen of the United States. Plaintiff Huxtable was twenty-eight years of age and an alien having the status of a permanent resident and holding a permanent visa. The Arizona State Personnel Commission rejected plaintiff Huxtable's application for employment as a social service worker and teacher solely because of her alienage. In both instances the defendants, *inter alia* the Attorney General of Arizona and the Chairman of the Arizona State Personnel Commission, acted pursuant to article 18, § 10 of the Constitution of Arizona and section 38-201, subsection B of the Arizona Revised Statutes, which barred state employment of noncitizens. Plaintiff sought injunctive and declaratory relief, contending that these Arizona statutes contravened the United States Constitution and deprived plaintiffs of their rights and immunities under the equal protection and supremancy clauses. Defendants, citing *Truax v. Raich*, 239 U.S. 33 (1915), argued the state right to distinguish between its citizens as one class and its resident aliens as another class in the allocation of public wealth and resources under the theory of a state's "special public interest" in protecting and preserving its wealth and resources for its citizens. The district court for the District of Arizona held for the plaintiffs. The court found that any state legislative attempt to exclude permanent resident aliens from any lawful employment solely because of alienage violates the supremacy clause. Following the rationale of *Graham v. Richardson*, 403 U.S. 365 (1971), the court reasoned that the discriminatory acts were neither compelling nor substantially and rationally connected to the protection of Arizona fiscal interests or resources. *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972).

6. HUMAN RIGHTS

The European Court of Human Rights Will Order Compensation for a Violation of the Convention for the Protection of Human Rights and Fundamental Freedoms

Petitioner, an Austrian citizen, appealed to the European Court of Human Rights, claiming that his detention for more than two years during his Austrian trial violated his right to a prompt judicial proceeding, guaranteed in article 5, section 3 of the Convention for

the Protection of Human Rights and Fundamental Freedoms. The Court found for petitioner. The Austrian Federal Minister of Justice, however, refused to make pecuniary reparation for the damage allegedly caused petitioner by the Austrian Government, and instead deducted the detention time from the prison sentence imposed on petitioner at the trial. The European Commission of Human Rights, at petitioner's request, then applied to the European Court of Human Rights for "just satisfaction" on the grounds that the Austrian Government had refused to compensate and thus had violated article 50 of the Convention. The Austrian Government contended that the Court could not adjudicate petitioner's separate claims for prompt trial and for compensation, and that the availability of an internal remedy for full reparation for Austria's violation of article 5, section 3 obviated petitioner's right to compensation under article 50 of the Convention. The Court again found for petitioner, reasoning that the administration of justice would be facilitated by the consideration of a compensation claim by the same judicial body that found a violation of the Convention. Additionally, the Court rejected the Austrian Government's contention that the deduction of time spent in detention from petitioner's sentence was full reparation for the violation of article 5, section 3. The Court reasoned that the acceptance of the Government's argument would deprive article 5, section 3 of its effectiveness, especially when the person detained is found guilty. *Ringeisen Case* (European Court of Human Rights, June 22, 1972), 11 Int'l Legal Materials 1065 (1972).

7. IMPORT-EXPORT

IMPORTER OF RAW SUGAR CANNOT PROTEST ADDITIONAL CUSTOMS DUTY WHEN NO PROOF OF SUGAR'S REFINEMENT IS OFFERED WITHIN THE PRESCRIBED TIME PERIOD

Appellant, an importer, protested the assessment of an additional duty, under Tariff Schedules of the United States (TSUS) item 901.00, 19 U.S.C. § 1202, on his importation of raw sugar into the United States. Item 901.00 imposes an additional tax on imported sugars that are not to be refined or improved in quality in the United States. The Customs Court upheld this duty, and the Court of Customs and Patent Appeals affirmed. The courts found that the temporary item 901.00 tax automatically attaches to all goods, including sugars, dutiable under TSUS item 155.20. The intention of 901.00 to follow the imported item into consumption then makes the tax subject to rule 10(e)(ii) of the general interpretive rules of TSUS,

19 U.S.C. § 1202. This rule, *inter alia*, prevents imposition of the 901.00 tax on proof of the sugar's actual refinement or improvement within three years of the entry date. Since appellant did not prove refinement or improvement of the raw sugar within the prescribed time period, the courts upheld the item 901.00 duty. *Czarnikow-Rionda Co. v. United States*, 468 F.2d 211 (C.C.P.A. 1972).

DEBTS OWED OWNER OF COMPANY CONFISCATED BY CUBAN GOVERNMENT MUST BE PAID EVEN THOUGH DEBTS WERE PAID TO THE CUBAN GOVERNMENT

In 1960, the Government of Cuba confiscated the factories and principal assets of plaintiffs, the five leading Cuban manufacturers of Havana cigars. The Cuban Government designated "interventors" to assume complete control of the companies on behalf of the Government. The interventors then continued to export the cigars to defendants, United States cigar importers, under their customary brand names and trademarks registered in the United States. Defendants thereafter paid the interventors only for the cigars shipped to them before the confiscation. Plaintiff-owners brought this action, demanding payment from defendants for the value of the cigars shipped before the confiscation and asserting trademark infringement and unfair competition by defendants and interventors in their continuing cigar transactions. The interventors joined the action and claimed payment due for cigars shipped after the confiscation. Defendants admitted the interventors' right to payment, but denied any liability to the previous owners. Defendants alleged that prior payments to the interventors properly discharged their debt for all preintervention shipments. The court found that the debts in question were located in the United States because a debt follows the debtor, in this case the American importers. The court, citing *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), refused to recognize the right of the Cuban Government to receive payment for the preintervention cigar shipments, either under the Cuban decrees of confiscation (which had no effect on debts constituting property in the United States because the intervention was not consistent with the policy and law of the United States) or under subsequent Cuban currency regulations. Thus the court held that the importers must pay the previous owners, optionally by means of a setoff against the money the importers owed the interventors. The court found trademark infringements by defendants and interventors under sections 32(1)(a) and 43(a) of the Lanham Act, 15 U.S.C. § § 1114(1) and 1125(a) (1970). The court awarded no damages for trademark

infringements, however, because there was no evidence that either the owners' reputations or the trademarks themselves were tarnished. *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972).

8. JURISDICTION

CRUISE SHIP LINE'S SALES CONTROL OVER RESIDENT AGENTS AND IN-STATE BUSINESS CALLS ARE SUFFICIENT TO CONFER JURISDICTION UNDER UTAH LONG ARM STATUTE

Petitioner, a Utah corporation, appealed an order quashing service of process in an action against defendant, a nonresident cruise ship line having its principal office in Rotterdam. Petitioner contended that defendant had sufficient Utah contacts under the test derived from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to subject it to in personam jurisdiction under the Utah long arm statute. In the instant case, defendant had authorized eighteen or nineteen Utah travel agents to sell bookings under agency contracts in which defendant had substantially delineated the agents' sales procedures. Furthermore, defendant's officials had called on plaintiff and the travel agents in Utah. The Supreme Court of Utah held that these facts exhibited sufficient minimum contacts with Utah under *International Shoe* to subject the defendant cruise ship line to in personam jurisdiction under the Utah statute. *Foreign Study League v. Holland-America Line*, 27 Utah 2d 442, 497 P.2d 244, *cert. denied*, 41 U.S.L.W. 3330 (U.S. Dec. 12, 1972).

9. TAXATION

EVIDENCE SOLELY OF INTERNAL TRANSACTIONS BETWEEN COMPANIES CONTROLLED BY SAME INTEREST IS NOT SUFFICIENT TO OVERCOME ALLOCATION OF INCOME UNDER IRC SECTION 482

Lufkin Foundry and Machine Company (Lufkin), a Texas Corporation, sold machinery to Lufkin Foundry and Machine Company International (Lufkin International), and to Lufkin Overseas Corporation, S.A. (Lufkin Overseas), both wholly owned subsidiaries of Lufkin. Lufkin International received a 20 per cent discount from Lufkin for all machinery sold to Lufkin Machine Co., Ltd. (Lufkin Canada), a Canadian corporation wholly owned by Lufkin, and a 20 per cent commission on all other sales. Lufkin Canada received a 10

per cent discount from Lufkin International. Lufkin also granted Lufkin Overseas a 20 per cent discount on all its sales of Lufkin machinery. The Commissioner, exercising his power under section 482 of the Internal Revenue Code to allocate income items between controlled businesses to prevent tax evasion or to reflect income clearly, allocated to Lufkin 50 per cent of the commissions paid Lufkin International and Lufkin Overseas, and 50 per cent of the discount given Lufkin International on its sales to Lufkin Canada. Petitioner Lufkin then sued to overturn this allocation of income. The Commissioner enjoys a presumption of correctness in a section 482 allocation that may be overcome only by the presentation of evidence sufficient to establish that the discounts and commissions distributed would not have varied had an uncontrolled taxpayer dealt at arm's length with Lufkin. 26 C.F.R. § 1.482-1(6)(1) (1972). In the Tax Court, Lufkin presented evidence prepared by an independent certified public accountant of the reasonableness of the discounts and commissions. The Tax Court held this evidence sufficient to overcome the Commissioner's presumption of correctness. On appeal to the Court of Appeals for the Fifth Circuit, the sole issue was whether any quantum of evidence concerning a taxpayer's internal transactions with its subsidiaries, standing alone, is sufficient to establish arm's length dealing between them. The Commissioner argued that Lufkin must produce some probative evidence of prices charged between unrelated and uncontrolled companies in order to rebut the presumption. Lufkin contended, however, that it is possible to comply with the standard of proof for rebuttal by producing and analyzing evidence of its own marketing arrangements. The court reversed the Tax Court decision, and held that evidence of similar business activities between uncontrolled taxpayers must be offered to rebut the presumption of correctness in favor of the Commissioner. The court reasoned that, under 26 C.F.R. § 1.482-2 (1972), a court can discern whether a disparity in tax treatment exists only if it has evidence of what has occurred in arm's length situations. The court therefore remanded this case to the Tax Court to allow Lufkin to present the proper evidence. *Lufkin Foundry & Mach. Co. v. Comm'r*, 72-2 U.S. Tax Cas. 85,508 & 85,865 (5th Cir. 1972).