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Case Digest

Journal Staff

Case Digest

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

This initial digest includes cases reported from January through September, 1971. Henceforth, the Winter issue will include cases reported from April through September, and the Spring issue will contain cases reported from October through March. 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.

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1. ACT OF STATE

HICKENLOOPER AMENDMENT NOT AN EXPANSION OF "BERNSTEIN EXCEPTION"

Plaintiff, a Cuban bank, brought suit in federal district court to recover the excess realized on the sale of collateral securing a renegotiated loan made by defendant, a United States bank. After the renegotiation, the Cuban Government nationalized defendant's Cuban banks. In retaliation, defendant sold the collateral and retained the proceeds. The district court ruled that *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), was restricted severely by the Hickenlooper Amendment and that the Amendment was applicable to the instant case. The Second Circuit reversed, holding that the Amendment was not applicable in this case. While the case was on appeal to the Supreme Court, the Legal Adviser to the Department of State wrote a letter to the Court explaining that the act of state doctrine need not be applied in this case. Consequently, the Supreme Court granted certiorari, vacated the decision of the Second Circuit, and remanded the case for further consideration. On remand, defendant contended that the Second Circuit should change its prior decision since the executive branch's submission of a "Bernstein letter" had eliminated the rationale for applying the act of state doctrine. The Second Circuit adhered to its prior decision, holding that the exception to the act of state doctrine created by the *Bernstein* case should be limited to its own facts, and, therefore, that the State Department's letter did not remove the restraint on the application of the doctrine. *Banco Nacional de Cuba v. First National City Bank*, 442 F.2d 530 (2d Cir. 1971).

2. ADMIRALTY

SECTION 301 OF LABOR MANAGEMENT RELATIONS ACT NOT A BAR TO SEAMAN'S APPEAL TO FEDERAL COURTS

In lieu of seeking relief through the grievance procedure of a collective bargaining agreement with his employer, plaintiff seaman brought this suit in federal district court for wages under 46 U.S.C. § 596 (1970), claiming federal jurisdiction under 28 U.S.C. § 1333 (1970), which grants exclusive admiralty jurisdiction to the district courts. The Supreme Court held that § 301 of the Labor Management Relations Act does not preclude a seaman's suit for wages under 46 U.S.C. § 596 (1970). The Court reasoned that § 596 implies a right to appeal to the federal courts, the traditional guardians of seamen's rights. Furthermore, the Court noted that the

legislative history of the Labor Management Relations Act did not suggest that it was intended to supplant principles of admiralty. *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971).[1]

SHIP NOT RENDERED "UNSEAWORTHY" DUE TO PERSONAL NEGLIGENCE

Petitioner, a longshoreman, was injured while loading cargo aboard respondent's ship. The undisputed facts showed that the injury was caused by the winch operator's negligence. The Supreme Court affirmed a summary judgment for respondent, holding that petitioner could not maintain a claim that the ship was unseaworthy when it was undisputed that an individual's negligence caused the injury. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971).[2]

FOREIGN CORPORATION SUBJECT TO SANCTIONS UNDER RULE 37 OF FEDERAL RULES OF CIVIL PROCEDURE

Three Greek seamen brough suit for personal injuries, wages, maintenance and repatriation under the Jones Act, 46 U.S.C. § 688 (1970), the general maritime law of the United States, and Liberian law. The alleged events giving rise to the seamen's claims occurred in foreign waters aboard the Caledonia. This vessel was owned by a Panamanian corporation but operated by an English corporation with an agent in the United States. The seamen claimed that the ship was in fact owned, operated and controlled by American interests. The Panamanian corporation in its answers to interrogatories stated that its ownership was evidenced by bearer stock. Neither the English corporation nor its American agent replied to the interrogatories. The district court granted the shipowner's motion to refuse jurisdiction over the action. On appeal, the court ruled that the judgment of the district court should be vacated and the action remanded for completion of the discovery on the issue of jurisdiction. To aid in disclosure of all pertinent facts, the court stated that sanctions under rule 37 of the Federal Rules of Civil Procedure should be applied. The court stated further that if justice required, the district court should enter a default judgment on the issue of liability. *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971).

1. *See* Significant Developments, 51 B.U.L. REV. 157 (1971).

2. For an in-depth comment on this case, see George, *Ship's Liability to Longshoremen Based on Unseaworthiness–Sieracki Through Usner*, 3 J. MARITIME L. 45 (1971). *See also* Comment, 50 ORE. L. REV. 197 (1971); Current Developments, 43 U. COLO. L. REV. 137 (1971).

TIME LIMITATIONS IN FEDERAL RULES OF CIVIL PROCEDURE CONTROL THOSE IN CARRIAGE OF GOODS BY SEA ACT

Steel pipe was shipped aboard the S.S. Egle under defendant's bill of lading. Plaintiff filed suit in federal district court within one year from the date of delivery and alleged that the cargo had been damaged. Approximately eighteen months later, defendant filed a third party complaint against the stevedore company that had handled the pipe during the unloading. The third party defendant moved for summary judgment, claiming that the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1303(6) (1970), established a limitation of one year. This limitation would bar the action by defendant against the third party since the claim against the third party was filed more than one year after the date of the cargo loss. The instant court noted that the COGSA limitation conflicted with the impleading provisions of rule 14 of the Federal Rules of Civil Procedure. After examining the history of rule 14, the court found that the one year limitation in COGSA was not controlling and that rules 14(a) and 14(b) should apply with equal force in all federal court cases. Consequently, the court held that a third party complaint might be filed by leave of court at any time in an action under COGSA. *Marubeni-Iida (America), Inc. v. Toko Kaiun Kabushiki Kaisha*, 327 F. Supp. 519 (S.D. Tex. 1971).

FAILURE TO PAY WAGES TO FOREIGN SEAMAN IN AMERICAN PORT MAY CONFER JURISDICTION OVER FOREIGN SHIPOWNER

Plaintiff, a merchant seaman of Greek nationality, was injured aboard his ship when it was outside the port of Aruba, Dutch West Indies. The Panamanian-owned ship then proceeded to Portsmouth, Virginia, where plaintiff was taken to a hospital. The ship's cargo was unloaded, and the ship departed the day after plaintiff was taken ashore. Plaintiff was repatriated to Greece within a month following his hospitalization. Plaintiff brought suit in federal district court to recover damages for personal injury, wages and maintenance from the vessel and her owner. The district court quashed service of process obtained pursuant to a Virginia statute authorizing service upon the State Corporation Commission as statutory agent for foreign corporations doing business in Virginia. On appeal, the instant court vacated the judgment and remanded the case, stating that plaintiff's claim that he had not been paid full wages due and owing when he was removed from the ship might offer a basis for in personam jurisdiction. The court concluded that the jurisdiction of the lower court would depend

upon whether the plaintiff had in fact asserted a good faith claim for unpaid wages. *Elefteriou v. Tanker Archontissa*, 443 F.2d 185 (4th Cir. 1971).

STATE DIRECT ACTION STATUTE EXTENDS TO VESSEL IN INTERNATIONAL WATERS AT TIME OF INJURY

Plaintiff, a resident of Louisiana, was injured while working aboard his employer's vessel in international waters. The employee sued both the employer and the employer's insurer. The claim against the insurance carrier was based on a Louisiana direct action statute. The insurer moved for summary judgment, alleging that the Louisiana statute could not be applied in a maritime suit in which a Louisiana based vessel was in international waters at the time of the injury. The court held that the federal interest in maintaining a uniform maritime law did not preclude application of the state's direct action procedure. The court reasoned that no greater lack of uniformity would result and that the state clearly had an interest in allowing a direct action when both the tortfeasor and the insurer did business within the state. *Sassoni v. Savoie*, 327 F. Supp. 474 (E.D. La. 1971).

SOVEREIGN IMMUNITY WAIVED WHEN STATE ACTS AS STEVEDORE

Plaintiff, a seaman employed aboard a tugboat, boarded a barge that the tug was to tow from Mobile to New Orleans. Plaintiff fell through a hatch negligently left open by the Alabama State Docks Department during earlier unloading operations. The instant court found that when the state acted as a stevedore, it entered into a federally regulated sphere in which federal law was controlling. Consequently, the court held that by engaging in such activities, the state impliedly waived its claim of sovereign immunity. *Rivet v. East Point Marine Corp.*, 325 F. Supp. 1265 (S.D. Ala. 1971).

DAMAGES FOR EMOTIONAL DISTRESS OF SURVIVING SPOUSE AND CHILDREN, OR PARENTS, ARE AWARDABLE UNDER GENERAL FEDERAL MARITIME LAW

A detailed comment on this case is found at page 245 *supra*. *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (E.D. La. 1971).

MARINE INSURANCE COVERAGE SUSPENDED BY UNSEAWORTHINESS RESULTING FROM INADEQUATE CREW

Plaintiff, a shrimp boat owner, instituted an action against his marine insurance carrier to recover compensation for damages sustained when the boat was grounded on the Texas coast. The federal district court awarded compensation to plaintiff. On appeal, the insurer claimed that plaintiff breached his warranty of seaworthiness by manning his vessel with only two men instead of the three men normally required for shrimping operations. Consequently, the insurer claimed that it should not be required to indemnify plaintiff. The court found for the insurer, reasoning that an inadequate crew produced an unseaworthy condition and that, consequently, coverage under the marine policy was suspended. *Aguirre v. Citizens Casualty Co. of New York*, 441 F.2d 141 (5th Cir. 1971).

ADMIRALTY EXTENSION ACT INAPPLICABLE TO INJURIES SUSTAINED ON DRYDOCKED BARGE

Defendant's damaged barge was delivered to a repair facility, taken out of the water, and work was begun on the damaged vessel. The barge, whose stern was approximately sixty-five feet inland, was boarded by plaintiff, a repairman. Plaintiff, momentarily blinded by an intense onshore light located in the repair yard, was injured when he tripped and fell into the barge's hold. After having recovered in an action under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 (1970), plaintiff initiated this action against defendant barge company. The barge company subsequently impleaded the repair facility, and claimed that it was the latter's negligence and breach of duty of workmanlike performance that proximately caused the injury. The district court held for plaintiff. On appeal, the court vacated and remanded the case, finding the Admiralty Extension Act to be inapplicable. The court reasoned that no part of the barge extended over navigable water. Additionally, the court held that the navigable waters test was inapplicable to the breach of warranty of seaworthiness since the damages were sustained aboard a vessel that was not on navigable water. Furthermore, the court found that no warranty of seaworthiness was made under the status test because the repairs could not have been performed in the ordinary course of shipping. *Delome v. Union Barge Line Co.*, 444 F.2d 225 (5th Cir. 1971).

SHIPOWNER'S DUTY TO FURNISH SAFE WORKING PLACE NOT EXTENDED BEYOND SHIP

Decedent seaman's ship was anchored approximately one and one-half miles off Manila Bay, the Philippines, when shore leave was granted to crew members. The ship had no launch service, and the only means for traversing the distance from ship to shore was by outrigger canoe. While returning to the ship, the seaman's canoe capsized and the seaman drowned. The decedent's widow brought a wrongful death action, and alleged that defendant was negligent in not providing safe ship-to-shore transportation. The court concluded that no collective bargaining agreement expressly required the shipowners to provide suitable transportation to and from shore. The court turned next to the question of whether the defendant was negligent under the Jones Act. The court, following a prior ruling of the Ninth Circuit, denied recovery. It reasoned that the shipowner's duty to provide a safe place to work did not extend beyond the ship. *Miles v. States Marine Lines, Inc.*, 325 F. Supp. 1370 (E.D. Tex. 1971).

FREIGHT CONTAINERS CONVERTIBLE INTO ROLLING TRAILERS NOT CONSIDERED ORIGINAL CONTAINERS

Plaintiff, an importer whose principal warehouse was located in Detroit, received garments manufactured in Puerto Rico and shipped by an independently owned common carrier to the United States. The garments were packed in heavy-duty cases that were then packed into large metal vans capable of being fitted with wheels and pulled by tractor-trailer cabs to their final destination. The city of Detroit claimed that the vans were the original packages, as enunciated in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), and that when the heavy-duty cases were unloaded at plaintiff's warehouse, the property lost its essential character as an imported good. As a result, the State Tax Commission allowed the city to assess the goods. Plaintiff appealed. The court reversed and held that the convertible vans were merely a technological innovation in shipping and that since the heavy-duty cases remained the original packages, the property was not so broken up as to lose the constitutional immunity from property taxation. *Michigan State Tax Comm'n v. Garment Corp. of America*, 32 Mich. App. 715, 189 N.W.2d 72 (Mich. Ct. App. 1971).

MOORED FLOATING DRYDOCK NOT VESSEL WHILE IN USE AS DRYDOCK

Plaintiff, a machinist employed by defendant, was injured while removing cargo from a ship undergoing repairs on a floating dry dock

in defendant's marine repair facility. Plaintiff had received all the payments to which he was entitled under the Longshoremen's and Harbor Worker's Compensation Act 33 U.S.C. § 901 (1970), when he brought this action against the shipowner. Plaintiff claimed that the ship and the floating dry dock were in fact "vessels," and that, consequently, the owner had breached a warranty of seaworthiness. This court, in reversing the decision for plaintiff, applied earlier decisions of the Fifth Circuit which held, as a matter of law, that a floating drydock is not a vessel when moored and in use as a dry dock. The court reasoned that since the vessel being repaired could not have remained afloat if placed in the water, it was clearly out of navigation and no warranty of seaworthiness could exist. *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971).

OUTER CONTINENTAL SHELF LANDS ACT APPLICABLE TO STATIONARY OFFSHORE DRILLING RIGS

Decedent was employed by defendant corporation on defendant's stationary gas well platform located thirty miles off the Louisiana coast. The decedent disappeared from the platform and was never found. Decedent's widow, after receiving benefits under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 (1970), filed a wrongful death action in district court, and alleged negligence on the part of the defendant and unseaworthiness of the defendant's platform. In affirming the dismissal of the action, the court found that the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1970), required that federal law be applied to the exclusion of general maritime law in matters relating to artificial island drilling rigs on the seabed of the continental shelf. Consequently, the court held that under the Outer Continental Shelf Lands Act, compensation for the injuries sustained in the present case could be recovered only under the Longshoremen's Act. *Bertrand v. Forest Corp.*, 441 F.2d 809 (5th Cir. 1971).

3. ALIENS

DECLARED INTENT TO BECOME CITIZEN SUFFICIENT FOR ADMISSION OF RESIDENT ALIEN TO BAR MEMBERSHIP

Petitioner, a citizen of the Republic of China and resident alien of the United States, sought admission to the practice of law in the state of Washington. Petitioner filed a sworn declaration of intent to

become a citizen of the United States; he would become eligible in January, 1972. Pending hearing of this matter, petitioner was permitted to take the July, 1970, bar examination, which he passed. Nevertheless, he was denied admission to the bar by the Board of Governors of the State Bar Association solely on the basis of a requirement that applicants be United States citizens. Petitioner appealed to the Supreme Court of Washington, alleging that the citizenship restrictions were in violation of the equal protection clause of the Constitution, that bar admission requirements were in conflict with federal immigration statutes, and that the state bar requirements were in conflict with the Civil Rights Act of 1870. Following the decision by the Board of Governors on petitioner's application, the Admission to Practice Rules were amended in order to open bar membership to otherwise qualified resident aliens who had declared their intent and who were proceeding with due diligence to become United States citizens. As a result, the only question in the instant case was whether these amendments were ineffective because of state statutes that required United States citizenship for admission to practice. The court held that the statutes posed no bar to the amended Admission to Practice Rules. It reasoned that the statutes were repealed by implication by the State Bar Act of 1933, which established an integrated bar. The court concluded that the recent amendments were effective and that petitioner should be admitted to the bar. *In re Chi-Dooh Li*, 79 Wash. 2d 561, 488 P.2d 259 (1971).

ALIEN'S EXEMPTION FROM MILITARY SERVICE NOT PERMANENT BAR TO CITIZENSHIP

Petitioner, a native of Denmark, agreed to relinquish his right to become an American citizen in exchange for exemption from military service, pursuant to § 4(a) of the Selective Service Act of 1948. After repeal of that section, the Selective Service attempted to draft petitioner but found him to be physically unfit. Petitioner then decided to apply for American citizenship. The district court denied his petition on the ground that he was barred permanently from acquiring citizenship because he had been exempted from conscription. The Ninth Circuit affirmed. The Supreme Court, however, reversed. While § 315 of the Immigration and Nationality Act of 1952 provides that any alien who has applied for exemption from military service on the ground of alienage and ". . . is or was relieved . . . from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States," the Court was persuaded by the Second Circuit's decision in *United States v. Hoellger*, 273 F.2d

760 (2d Cir. 1960) and held that an alien who was first relieved from service but later inducted was not barred from citizenship. The Court reasoned that an alien was barred only during the period that the Government exempted him from military service. *Astrup v. Immigration and Naturalization Service*, 402 U.S. 509 (1971).

INTERVENING RESIDENCE PREVENTS STATUS AS ALIEN FLEEING COMMUNIST COUNTRY

Petitioner fled from mainland China to Hong Kong and maintained his residence and business there for six years. Petitioner later traveled to the United States and overstayed his visitor's permit. Deportation proceedings were commenced. Petitioner, in seeking an immigrant visa, claimed a preference under the Immigration and Nationality Act § 203, 8 U.S.C. § 1153(a)(7) (1970), *formerly* ch. 477, § 203, 66 Stat. 178 (1952), on the grounds that he was an alien fleeing persecution by a Communist country. The Supreme Court held that the visa was properly denied by the Immigration and Naturalization Service. The Court reasoned that in order to qualify under § 203(a)(7), an alien's presence in the United States must be a direct consequence of his flight from persecution and that there can be no intervening residence in a third country. *Rosenburg v. Yee Chien Woo*, 402 U.S. 49 (1971).

DEPORTEE CANNOT RE-ENTER U.S. ALTHOUGH EARLIER DEPORTATION ORDER ILLEGAL

Defendant, an Italian citizen, was convicted in 1934 for possession of narcotics. He was deported in 1956, but was discovered in the United States in May, 1970. Defendant was charged with violating the Immigration and Nationality Act, 8 U.S.C. § 1326 (1970), which makes it unlawful for a deported alien to return to the United States. Defendant argued that the deportation order was illegal and that deportation 22 years after the narcotics offense violated the statute of limitations. The court held that even if the earlier deportation order was illegal, the deportee had no right to re-enter the United States as long as the deportation order was in existence. Additionally, the court relied on *Arriaga-Ramirez v. United States*, 325 F.2d 857 (10th Cir. 1963), and held that a deportation order could not be collaterally attacked in a criminal prosecution conducted under 8 U.S.C. § 1326 (1970). *United States v. Bruno*, 328 F. Supp. 815 (W.D. Mo. 1971).

STATUTES CONDITIONING WELFARE BENEFITS UPON CITIZENSHIP OR RESIDENCY HELD UNCONSTITUTIONAL

In claimant's action to recover welfare benefits, the Supreme Court confronted the issue of whether the equal protection clause of the fourteenth amendment prevents a state from conditioning welfare benefits either upon the beneficiary's possession of United States citizenship or, if the beneficiary is an alien, upon his having resided in the United States for a specified number of years. The Court noted that state statutes distinguishing citizens from non-citizens have been upheld on the basis of a state's special interest in favoring its own citizens over aliens in the distribution of welfare benefits and in maintaining its financial integrity. *Cf. Truax v. Raich*, 239 U.S. 33 (1915). Following the precedent of *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), the Court concluded that the state's interest in the instant case did not justify limiting welfare eligibility. Consequently, the Court held that the state statutes violated the equal protection clause and that the claimant was entitled to recover. *Graham v. Richardson*, 403 U.S. 363 (1971).

ALIEN RECEIVING LIMITED EDUCATIONAL CREDITS DENIED VISA PREFERENCE AS A PROFESSIONAL

The Immigration and Naturalization Service denied appellant, an alien immigrant, a visa preference classification as a professional. Appellant had received 12 hours of undergraduate credit in accounting in the Phillippines, as well as an additional 26 hours of accounting in the United States from an unaccredited institution. In affirming the denial of appellant's visa in the instant case, the court found that there were sufficient facts upon which the Director could determine that the appellant was not, and had not, been a member of the accounting profession. Consequently, appellant was not entitled to a preference visa under § 203(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(3) (1970). *Reyes v. Carter*, 441 F.2d 734 (9th Cir. 1971).

RETURN FROM BRIEF TRIP OUTSIDE U.S. NOT AN "ENTRY" FOR DEPORTATION PURPOSES

Following petitioner's conviction for forgery, the United States sought deportation under § 241(a)(4) of the Immigration and

Nationality Act, 8 U.S.C. § 1251(a)(4). Under that section, an alien must have been convicted of a crime committed within five years after entry into this country. Relying on *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the court held that return from a brief trip to Mexico did not constitute entry for the purposes of § 241(a)(4). *Yanez-Jaquez v. Immigration and Naturalization Service*, 440 F.2d 701 (5th Cir. 1971).

STATE STATUTE CONTROLLING TIME LIMITATION FOR CLAIMING INHERITANCE BY NON-RESIDENT ALIENS NOT AN INFRINGEMENT ON FEDERAL FOREIGN RELATIONS POWER.

Claimants, citizen-residents of the U.S.S.R., appeared and demanded their inheritance claim more than five years after date of alleged intestate's death. The trial court found the claimants had not proved sufficiently their relationship to the intestate. The court of appeals reversed and remanded on grounds of judicial error. On remand, claimants contended both that the California limitations statute was tolled and that it was unconstitutional. The trial court found for the claimants, but the California Court of Appeals reversed. The court in the instant case affirmed, holding that where a state statute provides that a non-resident alien must appear and demand his interest in an estate within five years from the date of death, although all other persons are allowed five years from the decree of distribution, such statute does not violate claimants' right to equal protection and due process. Furthermore, the court held that the statute is not an unconstitutional infringement on the federal government's exclusive and plenary power to conduct foreign relations. *In re Estate of Horman*, 5 Cal. 3d 62, 485 P.2d 785, 95 Cal. Rptr. 433 (1971).

4. ANTITRUST

ACT OF STATE DOCTRINE BARS ANTITRUST CLAIM ARISING FROM ACTS OF A FOREIGN SOVEREIGN ALLEGEDLY INDUCED BY DEFENDANT

A detailed comment on this case is found at page 251 *supra*. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Calif. 1971).

FOREIGN CORPORATION ELIGIBLE TO RECOVER UNDER ROBINSON-PATMAN ACT

The court allowed a Guatemalan corporation to recover the price of coffee shipments, damages for breach of contract, and treble damages for the defendant's violations of § 2(c) of the Robinson-Patman Act. *El Salto S.A. v. PSG Co.*, 444 F.2d 477 (9th Cir. 1971).

5. CITIZENSHIP

FIVE YEAR STATUTORY RESIDENCE REQUIREMENT AS A CONDITION SUBSEQUENT TO RETENTION OF CITIZENSHIP BY PERSONS BORN ABROAD NOT VIOLATIVE OF FIFTH AMENDMENT DUE PROCESS

A detailed comment on this case is found at page 258 *supra*. *Rogers v. Bellei*, 401 U.S. 815 (1971).

6. CRIMINAL LAW

SEIZURE OF MARIJUANA JUSTIFIED DURING SEARCH FOR ILLEGALLY IMPORTED ALIENS

Defendants appealed from a conviction for unlawful transportation of marijuana, alleging that the seizure of the contraband was improper. The court held that an Immigration and Naturalization officer was entitled to stop defendants' automobile three miles from the Mexican-American border and search it in order to determine whether the vehicle contained aliens unlawfully present in the United States in violation of the Immigration and Nationality Act, § 287(a)(3), 8 U.S.C. § 1357(a)(3) (1970). Since the marijuana was discovered during the otherwise valid search for illegal aliens, the court concluded that the officer was not obliged to disregard what he had seen and that the resulting seizure of the contraband was proper. *United States v. Marin*, 444 F.2d 86 (9th Cir. 1971).

SEARCH SEVERAL MILES FROM BORDER JUSTIFIED AS BORDER SEARCH

Defendant appealed from a conviction for smuggling marijuana into the United States on the ground that there was no probable cause for

the search. Appellant had crossed the Mexican-American border in an automobile at high speed where there was no port of entry. He was seen by a border patrol, chased and ultimately caught and searched several miles inside the border. The court held that the ensuing search was a border search and, therefore, that probable cause was not necessary. *United States v. Nunez-Martinez*, 443 F.2d 403 (9th Cir. 1971).

SECOND SEARCH SIXTY MILES FROM BORDER IMPOSES NO UNDUE ELASTICITY ON "BORDER"

Defendants appealed from a conviction under the Narcotic Drugs Import and Export Act for conspiracy to receive, conceal and facilitate transportation of heroin on the ground that the search of their vehicle 60 miles from the Mexican border was an invalid border search. The uncontroverted facts indicated that two of the four co-defendants had crossed the Mexican-American border, where a routine search was made of their automobile. Thereafter, they were joined by two other co-defendants, and the group proceeded to Marfa, Texas. Notwithstanding the fact that a routine search was made of defendants' automobile at the border, the sheriff at Marfa, Texas, was notified to stop and conduct a second search of the vehicle. The subsequent search revealed nine grams of heroin. The court held that the second search constituted a valid border search. It reasoned that since there was only one available road between the border and the place of the search, the second search imposed no "unreasonable elasticity" on the border. *United States v. Reagor*, 441 F.2d 252 (5th Cir. 1971).

RECAPTURE OF GOODS STOLEN FROM CUSTOMS CUSTODY NOT BORDER SEARCH

A harbor policeman stopped defendant as he was leaving a wharf that had been the scene of waterfront thefts. Acting upon information received from an informant, customs agents searched the trunk of defendant's automobile and found a number of stolen radios. Defendant was charged with violating 18 U.S.C. § 549 (1970), for removing goods from customs custody. The court, however, granted defendant's motion to supress evidence of the stolen radios because the customs agents refused to reveal the identity or establish the credibility of the informant. The court reasoned there was no

probable cause for the search and, therefore, that the confiscated items were the "poisonous fruit" of an illegal arrest. Additionally, the court found that the subsequent seizure of the radios could not be justified as a border search since defendant had crossed no border. Furthermore, the court held that the fact that the alleged theft was from customs custody was insufficient to distinguish it from ordinary theft. *United States v. Davis*, 328 F. Supp. 350 (E.D. La. 1971).

7. FAMILY LAW

Mexican Concubinage Gives Rise to Texas Common Law Marriage

In a workman's compensation action, the alleged common law wife of the deceased appealed from a summary judgment awarding death benefits to the mother of the deceased. Plaintiff offered evidence of a "concubinage" relationship recognized by Mexican law under which she and deceased lived together as husband and wife. Although the relationship could be terminated by either party without the other's consent and without legal action, the court held that such a relationship could become a common law marriage if the couple subsequently moved to Texas and agreed to such marriage. The court concluded that plaintiff's allegation that such an agreement was made in Texas raised an issue of fact precluding summary judgment in favor of the deceased's mother. *Gonzales v. Gonzales*, 466 S.W.2d 839 (Tex. Civ. App. 1971).

Wife Does Not Acquire Husband's British Domicile When Both Spend Majority of Time Elsewhere

A British subject appealed from a Florida state court determination that his wife retained her Florida domicile after their marriage, where the wife stayed only briefly in England and the husband never provided a marital home there. On appeal, the instant court acknowledged the common law rule that a wife acquires the husband's domicile upon marriage. Nevertheless, it held that although the rule created a presumption, the trial court was justified in deciding that the wife had retained her Florida domicile because she continued to maintain her Florida home and spent more time with her husband in Florida than in England. *Ashmore v. Ashmore*, 251 So. 2d 15 (Fla. Dist. Ct. App. 1971).

8. FOREIGN ASSETS CONTROL REGULATIONS

POWER OF ATTORNEY IS INSUFFICIENT INTEREST TO PREVENT BLOCKAGE OF ASSETS UNDER FOREIGN ASSETS CONTROL REGULATIONS

Pursuant to the Foreign Assets Control Regulations, appellant, a Hong Kong resident, sought to avoid blockage in New York of assets of his father's estate that belonged to heirs residing in Shanghai. Foreign Assets Control Regulations, 31 C.F.R. § 500.101 (1971)—the regulations issued by the Secretary of Treasury pursuant to § 5 of the Trading With the Enemy Act and Executive Order 9193—prohibit transactions involving property of designated foreign nationals unless licensed by the Secretary. Appellant argued that the Secretary of Treasury should issue a transfer license, or alternatively, that the transfer of the estate assets to appellant was exempt from the licensing requirement. Since he had received a power of attorney in 1950 over the New York assets prior to the "freezing date," appellant contended that he held an interest in the property as an "unblocked national" by virtue of his Hong Kong residency and that a subsequent transfer of the heirs' interest to him was exempt from the licensing requirement. The New York Surrogate's Court ruled that the 1950 power of attorney vested in the appellant the beneficial use of the entire New York estate. The district court, however, held that the power of attorney did not transfer the Shanghai heirs' interest to appellant. The instant court affirmed, and held that since there was no transfer of interest to appellant, the assets of the Shanghai heirs were subject to the Foreign Assets Control Regulations. Furthermore, the court held that § 500.523 of the regulations, which limits transactions to the administration of the estate, could not be used to insulate the surrogate court's decision from subsequent examination by federal courts. Moreover, the Secretary's policy of denying requests for release of blocked assets was reasonable and consistent with the policy behind the Act. That policy, according to the court, was not only to prevent the flow of hard currency to blocked countries and their nationals, but also to preserve those assets in order to settle American claims against those governments and their citizens. *Cheng Yih-Chun v. Federal Reserve Bank of New York*, 442 F.2d 460 (2d Cir. 1971).

9. IMPORT-EXPORT

OBSCENE MATERIAL IMPORTED FOR PRIVATE USE SUBJECT TO LAWFUL SEIZURE

Customs agents, pursuant to the Tariff Act § 305, 19 U.S.C. § 1305 (1970), *formerly* ch. 497, § 305, 46 Stat. 688 (1930), which

prohibits the importation of obscene material, seized allegedly obscene photographs from defendant as he was entering the United States. The United States District Attorney subsequently brought a forfeiture proceeding in federal district court. Defendant denied that the photographs were obscene, counterclaimed and alleged that § 1305(a) was unconstitutional. A three-judge court held § 1305(a) unconstitutional on the ground that it failed to meet the procedural requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965). Furthermore, the court, relying on *Stanley v. Georgia*, 394 U.S. 557 (1969), held that the section was overly broad since it contained a prohibition against the possession of obscene material for private use. The Supreme Court reversed and remanded. Noting that forfeiture proceedings were initiated within thirteen days of the seizure, the Court held that the statutory requirements and the constitutional standard set by *Freedman* were met. Additionally, the Court distinguished *Stanley* by holding that the immunity of a private user in his home does not extend to allow him to import obscene material from abroad. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).[3]

10. INDUSTRIAL PROPERTY

Foreign Markets Closed to Corporation Infringing Patent

Plaintiff brought a patent infringement action under 35 U.S.C. § 271 (A) (1970) against defendant corporation for the unauthorized marketing abroad of a shrimp de-veining machine. In a companion case, the Fifth Circuit held that plaintiff's patents were valid and that they had been infringed by defendant. *Laitram Corp. v. Deepsouth Packing Co.*, 443 F.2d 928 (5th Cir. 1971). The court in the instant case held that if all essential parts were produced in the United States, defendant could not sell its machine in foreign markets even though the minor step of final assembly in the foreign country was contemplated. The court rejected the reasoning of other circuit courts which have held that since the patent is on the finished product, and not on the parts, the patent laws are not violated until the machine is complete. *See Hewitt-Robins, Inc. v. Link-Belt Co.*, 371 F.2d 225 (7th Cir. 1966); *Gold Metal Process Co. v. United Engineering & Foundry Co.*, 235 F.2d 224 (3d Cir. 1956); *Radio Corp. of America v. Andrea*, 79 F.2d 626 (2d Cir. 1935). Rather, the instant court reasoned that

3. *See* Commentary, 23 Ala. L. Rev. 135 (1970).

the word "makes" under § 271 of the statute should not be given an artificial or technical construction, but should mean the substantial manufacture of the component parts of the machine. This interpretation, according to the court, respects the purpose of the rule adopted by the other circuits in that it does not diminish the public right to use elements of the patented machine. *Laitram Corp. v. Deepsouth Packing Co.*, 443 F.2d 936 (5th Cir. 1971).

11. INSURANCE

CUBAN MONETARY LAW CONTROLS INSURANCE POLICIES TO DENY BENEFITS TO U.S. CITIZENS

Plaintiffs, beneficiaries under two life insurance policies, and the insured were American citizens residing in Cuba when the insurance policies were issued. Shortly after Castro assumed power, they fled Cuba and returned to the United States. The insured died in New York in 1961 and the plaintiffs demanded that the policy proceeds be paid in New York in United States currency. The defendant insurance company refused to pay in dollars, but declared that it would pay in pesos in Cuba on the grounds that Cuban law governed the policies and required that they be payable only in pesos. The federal district court held that Cuban law governed the performance of these policies and that defendant was required to discharge its obligation only in pesos. On appeal, the Second Circuit affirmed, and reasoned that New York public policy was not offended by giving extraterritorial effect to Cuban law since that was the place where the policies were issued. *Johansen v. Confederation Life Ass'n*, 447 F.2d 175 (2d Cir. 1971).

12. JURISDICTION

FEDERAL COURT HAS JURISDICTION OVER OWNERS OF FOREIGN REALTY WHERE U.S. CONTACTS SUFFICIENT

Appellant, a real estate broker, contracted in Florida for the sale of realty located in the Bahama Islands with six of its seven co-owners. All of these six co-owners were residents of Florida. The seventh co-owner, a resident of the Bahamas, refused to sign. Appellee, who had succeeded to the interest in the property of one of the Florida co-owners, brought the present action in an attempt to invalidate the contract. In granting summary judgment for appellee, the Florida district court declared the contract invalid as a matter of law since it had not been signed by one of the co-owners. On appeal, appellant

challenged the jurisdiction of the lower court, averring that it lacked jurisdiction because the property was located in a foreign country. This court affirmed and held that the district court had jurisdiction over the six co-owners of the foreign property who signed the contract since they were all residents of the United States and had all personally appeared before the court. Additionally, it reasoned that the contract had been signed in Florida. Furthermore, it stated that appellant had used her position as a licensed real estate broker in Florida to formulate the agreement and, therefore, owed fiduciary obligations to the Floridians by virtue of her license. Consequently, the court held that there were sufficient Florida contacts to justify the exercise of jurisdiction by the district court. *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971).

JURISDICTION OF MILITARY COURT PROPER WHERE IT PROVIDES SOLE PROTECTION FOR U.S. CITIZEN

Following a conviction by a military court for assault with intent to commit rape, appellant, a U.S. serviceman stationed in Germany, filed a writ of habeas corpus in federal district court. Appellant, relying on *O'Callahan v. Parker*, 395 U.S. 258 (1969), asserted that the military court was without jurisdiction to try him for a non-military offense committed off-post while on leave. The district court distinguished *O'Callahan* on the ground that O'Callahan's crime was committed in a jurisdiction operating under the Constitution and law of the United States, but that appellant committed his crime in a jurisdiction that was beyond the reach of a United States civil court. Since the only constitutional protection available in the present case was offered by a military court, the court reasoned that its jurisdiction properly was invoked. *Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971).

PRESENCE OF PRODUCT WITHIN STATE SUFFICIENT TO CONFER JURISDICTION OVER FOREIGN MANUFACTURER

Plaintiff's action was brought in a Louisiana state court against a Swedish manufacturer for the death of a workman resulting from defects in the crane on which he was working. The defendant-manufacturer did not sell cranes, conduct other business or maintain offices or agents in the United States. Defendant's cranes entered this country through an independent intermediary that had the exclusive right to buy them for export to the United States. Although the defendant corporation alleged that it had no knowledge of what

happened to the cranes after the sale to the intermediary in Sweden, the instant court nevertheless found jurisdiction under the Louisiana long-arm statute. The court reasoned that the presence of a substantial number of cranes located within the state was sufficient to confer jurisdiction over the foreign manufacturer. *Boykin v. Lindenkranar*, 252 So. 2d 467 (La. Ct. App. 1971).

13. REFUGEE PROTOCOL

U.N. REFUGEE PROTOCOL APPLICABLE TO PANAMA CANAL ZONE

In a habeas corpus proceeding to test the propriety of petitioner's extradition to Panama, the Canal Zone District Court denied relief and refused to consider the applicability of the 1967 U.N. Protocol Relating to the Status of Refugees, Oct. 15, 1968, [1967] 19 U.S.T. 6223, T.I.A.S. No. 6577, since Panama was not a party. While the instant action was on appeal to the Fifth Circuit, three unrelated cases arose subsequent to the district court's decision wherein the State Department informed the Republic of Panama that the United States intended to hold Panama to the terms of the U.N. Protocol. In effect, the position taken by the United States would deny extradition to Panama when it could be demonstrated that a fugitive's life or freedom would be threatened because of his political views. The opinion of the circuit court emphasized the political overtones of Panama's allegation that petitioner obtained improper mortgage financing through his position as a minister in the government that the provisional government of the demanding state had replaced. Because of the prior statements of the State Department and the assertion in the United States Government's brief that the Refugee Protocol was applicable to the Canal Zone, the court of appeals remanded the proceedings for further findings regarding the petitioner's status as a political refugee. *Nicosia v. Wall*, 442 F.2d 1005 (5th Cir. 1971).

14. SOVEREIGN IMMUNITY

EXECUTIVE SUGGESTION BINDING ON COURTS DESPITE CONTRACTUAL WAIVER OF IMMUNITY

A detailed comment on this case is found at page 264, *supra*. *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 40 U.S.L.W. 3264 (U.S. Nov. 19, 1971).