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Provisions of Jones Act Applicable So as to Allow Recovery to Alien Seamen Injured in a United States Port on a Foreign Flag Vessel Owned and Controlled by United States Alien Domiciliaries.

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injustice in allowing a judgment to remain. The Federal Rules of Civil Procedure provide for relief within one year after judgment for excusable neglect. The Rule does not differentiate between extrinsic fraud and intrinsic fraud.[50] This rule has been construed liberally in order to do justice where it should be done[51] while maintaining the "delicate adjustment between the desirability of finality and prevention of injustice."[52] Texas would come closer to maintaining justice in cases of this nature by adopting this rule.

Karen J. Ruble

ADMIRALTY—CONFLICT OF LAWS—PROVISIONS OF JONES ACT APPLICABLE SO AS TO ALLOW RECOVERY TO ALIEN SEAMAN INJURED IN A UNITED STATES PORT ON A FOREIGN FLAG VESSEL OWNED AND CONTROLLED BY UNITED STATES ALIEN DOMICILIARIES. *Hellenic Lines Limited and Universal Cargo Carriers, Inc. v. Zacharias Rhoditis,* 412 F.2d 919 (5th Cir. 1969).

Zacharias Rhoditis, a Greek seaman, was injured aboard the *S. S. Hellenic Hero* while the ship was docking at the Port of New Orleans. *The Hellenic Hero,* which flew the Greek ensign and was registered in the Port of Piraeus, Greece, was owned by a Panamanian corporation that in turn was owned by a Greek corporation. However, 95 per cent of the stock of the Greek corporation was owned by two residents of the United States, and the corporation had its principal office in New York. Universal Cargo Carriers, the Panamanian corporation, was a holding company with no operational responsibilities in connection with the *Hero.* The real ownership and operational responsibilities were vested in Hellenic Lines, the corporation organized and existing under the laws of Greece. Hellenic was managed from the base in New York and was owned almost entirely by Pericles Callimanopoulos and his son. Callimanopoulos was a Greek citizen who had resided in the United States since 1945. Seeking compensation for his injuries, Rhoditis brought suit under the Jones Act; the

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50 FED. R. CIV. P., 28 U.S.C.A. 60b:
Relief from Judgment or Order
(b) Mistake; Inadvertance; Excusable Neglect; . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertences, surprise, or excusable neglect; . . .
(3) fraud (whether heretofore denominated intrinsic or extrinsic) . . .
(6) and any other reason justifying operation of judgment.

51 Laguna Royalty Co. v. Marsh, 350 F.2d 817 (5th Cir. 1965).

52 *In re* Casco Chemical Co. v. Superintendence Company, Inc., 335 F.2d 645 (5th Cir. 1964).

trial court held that it had jurisdiction over the subject matter and awarded damages in the sum of $6,000. Held—*Affirmed.* The provisions of the Jones Act are applicable so as to allow recovery by an alien seaman who is injured in a United States port while on a foreign flag vessel when such vessel is owned and controlled by a United States alien domiciliary.

The United States Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction.[1] Under the Judicial Code the district courts of the United States are given "original jurisdiction, exclusive of the courts of the states, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled."[2] Although the Constitution vests jurisdiction over admiralty cases it does not provide what substantive law should apply to such cases.[3] Federal statutes, however, have set forth substantive law that partially covers some of the more important admiralty fields. For example, in 1915, Congress passed an omnibus statute captioned "an act to promote the welfare of American seamen in the Merchant Marine of the United States; to abolish arrest and imprisonment as a penalty for desertion . . . and to promote the safety at sea."[4]

The above mentioned statute is commonly referred to as the Merchant Marine Act of 1915. The Jones Act, which is a 1920 amendment to section 20 of the Merchant Marine Act, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.[5]

Prior to the enactment of the Jones Act a seaman had no cause of action for negligence unless the cause of action could be attributed to the

1 U.S. CONST., § art. III, § 2, cl. 1.
2 28 U.S.C.A. § 1333 (1949).
3 *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, §§ 1-16 (2d ed. 1957).
4 Act of March 4, 1915, ch. 153, 38 Stat. 1164.
5 46 U.S.C.A. § 688 (1920).

unseaworthiness of the vessel; an injured seaman was limited to two remedies: an action for maintenance and cure, and for his wages, at least so long as the voyage continued and an action for indemnity for injuries received as a consequence of the unseaworthiness of the vessel.[6]

Though the remedies that evolved from the enactment of the Jones Act are quite well defined, the instances or fact situations in which its substantive provisions are to be applied are quite complex and uncertain. For example, in relation to the term "any seaman" the courts have had to define the members of such class, and determine which members out of all persons employed by shipowners throughout the world, fall into the limited class.[7] The courts upon which the jurisdiction over admiralty cases has been conferred are confronted with a problem that occurs often in admiralty cases, that is, the problem of determining what substantive law to apply.

Such a problem arose in the landmark case of *Lauritzen v. Larsen*.[8] In *Lauritzen*, the Supreme Court formulated some general rules that were intended to stabilize an unpredictable area of the law. In holding that the Jones Act did not apply so as to allow recovery to Larsen, a Danish seaman who had signed the ship's articles providing that the rights of crew members would be governed by Danish law and who was negligently injured on board a ship of the Danish flag in Havana Harbor, the Supreme Court set forth seven factors to be considered in determining whether the Jones Act is applicable:[9]

(1) The place of the wrongful act;
(2) The law of the flag;
(3) The allegiance or domicile of the injured seaman;
(4) The allegiance of the defendant shipowner;
(5) The place where the contract of employment was made;
(6) The inaccessibility of a foreign forum;
(7) The law of the forum.

The factors to be considered in determining the applicability of the Jones Act having been set forth, the next problem was one of determining the weight to be given to each factor. The "place of the injury" does not appear to be controlling. It has been held that the mere fact that an injury occurs in United States waters or in a United States port does not make the provisions of the Act applicable, nor does the fact that the injury was incurred outside United States waters preclude such coverage.[10] The Supreme Court of the United States, in the case

6 The Osceola, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903).
7 Desper v. Starved Rock Ferry Co., 342 U.S. 187, 72 S. Ct. 216, 96 L. Ed. 205 (1952); Hudgins v. Gregory, 219 F.2d 255 (4th Cir. 1955).
8 Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953).
9 *Id.*
10 Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed.

of *Romero v. International Terminal Operating Co.*,[11] provided the reasoning for according little weight to the "place of the injury":

> [T]he place of injury . . . does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals. . . . To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be . . . an onerous burden . . . disruptive of international commerce and without basis in the expressed policies of this country.[12]

Although little weight is accorded the "place of the injury", it seems well settled that the "flag of the vessel" is given the greatest weight of all the factors used in determining the substantive law to be applied.[13] This may be explained by the existence of a desire on the part of the courts "to foster the principles of international comity 'and to achieve' stability in the application of maritime law."[14] Although the law of the flag is stressed in determining the substantive law to be applied, it seems quite clear that the courts will continue to make an exception to this rule when it is shown that American shipowners are attempting to evade the provisions of the Jones Act.[15] Thus, where the flag is shown to be merely one of convenience, the Jones Act will be applied if other sufficient contacts exist.[16]

It appears that the fact that a seaman is an American citizen is to be considered an important factor in determining whether the provisions of the Jones Act apply.[17] At the same time, the fact that a seaman is an alien does not necessarily preclude application of the Act, but

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2d 368 (1959); Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); The Paula, 91 F.2d 1001 (2nd Cir. 1937), *cert. denied*, 302 U.S. 750, 58 S. Ct. 270, 82 L. Ed. 580 (1937); Pavlow v. Ocean Traders Marine Corp., 211 F. Supp. 320 (S.D.N.Y. 1962); Katelouzos v. The S.S. Othem, 184 F. Supp. 526 (E.D. Va. 1960).

11 Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959).

12 *Id.*

13 Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); Southern Cross Steamship Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960); Shahid v. A/S J. Ludwig Mowinckels Rederi, 236 F. Supp. 751 (S.D.N.Y. 1964); Prol v. Holland-America Line, 234 F. Supp. 530 (S.D.N.Y. 1964); Voyiatzis v. National Shipping & Trading Corp., 199 F. Supp. 920 (S.D.N.Y. 1961); Markakis v. Liberian S/S The Mparmpa Christos, 161 F. Supp. 487 (S.D.N.Y. 1958); Catherall v. Cunard S.S. Co., 101 F. Supp. 230 (S.D.N.Y. 1951).

14 Shahid v A/S J. Ludwig Mowinckels Rederi, 236 F. Supp. 751 (S.D.N.Y. 1964).

15 53 MICH. L. REV. 100 (1954).

16 Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); Gerradin v. United Fruit Co., 60 F.2d 927 (2nd Cir. 1932), *cert. denied*, 287 U.S. 642, 53 S. Ct. 92, 77 L. Ed. 556 (1932); Southern Cross Steamship Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960); Pavlow v. Ocean Traders Marine Corp., 211 F. Supp. 320 (S.D.N.Y. 1962); Voyiatzis v. National Shipping & Trading Corp., 199 F. Supp. 920 (S.D.N.Y. 1961); Zielinski v. Empresa Hondurena de Vapores, 113 F. Supp. 93 (S.D.N.Y. 1953).

17 Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); Uravic v. F. Jarka Co., 282 U.S. 234, 51 S. Ct. 111, 75 L. Ed. 312 (1931); Prol v. Holland-America Line, 234 F. Supp. 530 (S.D.N.Y. 1964); Pavlow v. Ocean Traders Marine Corp., 211 F. Supp.

must be weighed with the other factors or contacts present, if any.[18] Thus, "allegiance or domicile of the injured" is to be accorded substantial weight.

The "allegiance of the defendant shipowner" is to be accorded substantial weight.[19] The importance of this factor is best exemplified by reference to the Court's opinion in *Lauritzen,* wherein the Court stated:

> . . . it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them.[20]

Thus, the courts will, or should, determine ownership of the vessel and weigh such factor accordingly.

As to the last three factors set forth in the *Lauritzen* opinion, "the place where the contract of employment was made," "the inaccessibility of a foreign forum," and "the law of the forum," it suffices to say that such factors are to be accorded less weight than the factors heretofore mentioned.[21]

Since 1953, various combinations of all seven factors have been considered by the courts throughout the United States. It is fairly safe to say, however, that all of the possible combinations of the factors set forth in *Lauritzen* have yet to be considered, and, as a case presents a different combination, new law evolves. The principal case presents such a combination.

In *Hellenic Lines Limited,* the court, in considering the factors set forth in the *Lauritzen* case, pointed out that the factor said to be of cardinal importance is the law of the flag and that it must prevail unless some heavy counterweight is present.[22] Here, the court found that heavy counterweight present in the fact that the ship was, for all commercial purposes, owned and operated by a United States domicil-

320 (S.D.N.Y. 1962); Shorter v. Bermuda and West Indies S.S. Co., 57 F.2d 313 (S.D.N.Y. 1932); Mahoney v. International Elevating Co., 23 F.2d 130 (E.D.N.Y. 1927); Zarowitch v. F. Jarka Co., 21 F.2d 187 (E.D.N.Y. 1927).

18 The Paula, 91 F.2d 1001 (2d Cir. 1937), *cert. denied,* 302 U.S. 750, 58 S. Ct. 270, 82 L. Ed. 580 (1937); The Fletero v. Arias, 206 F.2d 267 (4th Cir. 1953).

19 Anastasiadis v. S.S. Little John, 346 F.2d 281 (5th Cir. 1965); Volkenburg v. Nederland-Amerik/Stoom v. Maats, 336 F.2d 480 (1st Cir. 1964); Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir. 1959); Brillis v. Chandris (U.S.A.) Inc., 215 F. Supp. 520 (S.D.N.Y. 1963).

20 Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); Southern Cross Steamship Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960).

21 Southern Cross Steamship Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960).

22 Hellenic Lines Limited v. Rhoditis, 412 F.2d 919 (5th Cir. 1969).

iary who had resided in the United States since 1945 and who maintained his principal place of business here. In support of its finding, the court pointed out that United States shipowners have been held liable in similar instances and, that, since alien domiciliaries of the United States are accorded the same rights and liabilities as United States citizens, they too should be made to comply with the provisions of the Jones Act, which are applicable to all United States shipowners.[23] The court in adopting the dissenting opinion in *Tsakonites v. Transpacific Carriers Corp.*,[24] which involved the same defendants as the instant case and same fact situation, with the exception that the injury was incurred while the ship was berthed at a pier in Brooklyn, stated:

> So, unless the same obligations that United States law imposes on shipowners who are United States citizens are imposed on resident alien shipowners, a resident alien shipowner like Callimanopoulos will be able to enjoy the considerable benefits of lawful permanent resident alien status in this country without being subject to the duties and obligations exacted of an otherwise similarly situated competitive shipowner who is an American shipowner.[25]

The court in *Hellenic Lines Limited* "pierced the corporate veil" to consider a foreign corporation as if it were an American corporation and held that the ship's flag was merely one of convenience, as had been done in so many instances involving American shipowners in similar situations.[26] In justifying such action, the court cited *Bartholomew v. Universe Tankships, Inc.*, in which the court said:

> This action is essential unless the purposes of the Jones Act are to be frustrated by American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign flag.[27]

Therefore, as the court pointed out, the same frustration of the Jones Act should be prevented when the shipowner is a resident alien; in other words, no distinction should be made between American shipowners and shipowners who are resident aliens of the United States.[28]

In contrasting *Hellenic Lines Limited,* decided in the Fifth Circuit, and the *Tsakonites* case, decided in the Second Circuit, the former is more in line with the legal authorities of the day. Perhaps the different conclusions of the two circuits may be attributed first of all, to their

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23 *Id.*

24 Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426 (2d Cir. 1966), *cert. denied,* 386 U.S. 1007, 87 S. Ct. 1348, 18 L. Ed. 2d 434 (1966).

25 *Id.*

26 Cases cited note 16 *supra.*

27 263 F.2d 437, 442 (2d Cir. 1959).

28 Hellenic Lines Limited v. Rhoditis, 412 F.2d 919 (5th Cir. 1969).

different interpretations of the *Lauritzen* case. In *Hellenic Lines Limited,* the court took the position that the *Lauritzen* opinion is authoritative only on the narrow issue actually decided, and that the seven factors set out in *Lauritzen* are neither "exclusive nor immutable."[29] For example, the court points out that it has been held that an eighth contact should be considered—the shipowner's base of operations.[30] On the other hand, the court of the Second Circuit has held that the Jones Act and general maritime law of the United States do not apply to an accident occurring in an American port causing injury to a foreign seaman on a ship owned by a foreign corporation.[31] In *Tsakonites* the principal shareholder or owner, though a foreign citizen, resided in the United States and operations of the ship were controlled from the United States. The court evidently interpreted *Lauritzen* as conclusive; especially that portion of the court's opinion which makes reference to the "law of the flag" as being the controlling factor.[32]

Secondly, it seems as though the court in *Tsakonites* failed to recognize the significance of the fact that the interests in the foreign registered ship were owned by a resident alien of the United States. From a standpoint of competition in commerce, there seems to be little doubt that the federal government has the power to regulate such competition;[33] and to say that to allow a resident alien, who enjoys the same rights as an American citizen, to circumvent such duties imposed by the Act is not detrimental or destructive to the competitive standards present among United States shipowners seems to be without foundation.

It seems that the reason for refusing application of the Jones Act in cases such as *Tsakonites* is the desire for the freedom of commerce and for the avoidance of friction and retaliation between foreign nations and the United States.[34] Whether an alien seaman can invoke the provisions of the Jones Act in such a situation must be determined by weighing the points of contact of the incident, against the national law sought to be applied.[35] In considering the above reasoning, can it be said that a foreign country had a substantial competing interest in the regulation of *The Hero*? Can it be said that by holding the owners of *The Hero,* who have resided in the United States for over

29 *Id.*

30 *Id.* Citing: Pavlow v. Ocean Traders Marine Corp., 211 F. Supp. 320 (S.D.N.Y. 1962).

31 Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426 (2d cir. 1966), *cert. denied,* 386 U.S. 1007, 87 S. Ct. 1348, 18 L. Ed. 2d 434 (1966).

32 *Id.*

33 U.S. CONST. art. I, § 8, cl. 18; Swanson v. Marra Bros., 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946).

34 102 U. PA. L. REV. 237 (1953).

35 Anastasiadis v. S.S. Little John, 346 F.2d 281 (5th Cir. 1965).