Fordham Law Review

Volume 13 | Issue 1 Article 8

1944

Obiter Dicta

dividends from securities does not of itself constitute the conduct of a business. The broad rule of discretionary authority in the court to sustain or disregard a corporation created without business purpose is thoroughly adequate to sustain the decision of the court that the foreign corporation should be disregarded in determining the income tax effect of these transactions.

The holding of this case probably will not develop or protect any substantial amount of income tax revenue for the federal government in the future, howver, since the petitioner in this case pursued an involved course, the like of which would be required to develop income tax liability in the case of a non-resident alien. Upon his expatriation by taking the oath of allegiance to the King of England, in Canada,[26] and through his taking up residence outside the United States, the petitioner became subject to income tax only upon his income from sources within the United States.[27] Had he sold the stock of the domestic corporation in Canada, or elsewhere outside the United States, it is clear that no tax liability to the United States would have arisen,[28] and profiting by the object lesson of this decision, others, similarly situated to the taxpayer in the principal case, may be able to avoid such a tax result.

OBITER DICTA

"An *obiter dictum,* in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."*

WARDS OF ADMIRALTY AND LEGISLATURE

Sailor Beware!

Seamen have traditionally been the wards of the Admiralty courts. The judges in Admiralty have always protected those who go down to the sea in ships from those who would seek to take advantage of them. Protective rules of law grew up in regard to seamen, their rights and obligations, which exceeded the protection given to other callings in the common law courts. Admiralty always sought to protect seamen from their own imprudent acts. But in later years these doctrines began to lag behind the modern Workmen's Compensation laws in the amount of security and compensation afforded to seamen for personal injuries. Congress remedied this situation in 1920 by the passage of the Jones Act 41 STAT. 1007, 46 U. S. C. A. § 688 (1920) which extended the benefits of the Federal Employers' Liability Act to seamen, 35 STAT. 65, 45 U. S. C. A. § 51 *et seq.* (1908).

26. REV. STAT. § 1999, 8 U. S. C. A. § 800 (1920); 54 STAT. 1168, 8 U. S. C. A. § 301 (1940).

27. Section 212 (a) Internal Revenue Code, 53 STAT. 76, 26 U. S. C. A. § 212 (a) (1939).

28. A non-resident alien does not realize sources within the United States by the sale of personal property outside the United States. Section 119 (e) Internal Revenue Code, 53 STAT. 53, 26 U. S. C. A. § 119 (e) (1938).

*Birrel, Obiter Dicta (1885) title page.

The Mahnich Case

The Supreme Court recently expanded the doctrine of the maritime law as to the right of seamen to recover for personal injuries resulting from the use of unseaworthy appliances. The effect of the decision is to make the owner of any vessel an insurer of the good condition of each and every piece of equipment used by a seaman in the operation of the ship. *Mahnich v. Southern Steamship Co.*, — U. S. —, 64 Sup. Ct. 455 (1944). There a seaman, who was barred by the Statute of Limitations from suing under the Jones Act, sued under the general maritime law for indemnity by reason of injuries sustained by a defective appliance, and for maintenance and cure. The injuries were sustained while the seaman was engaged in painting part of the ship because the rope supporting the stage on which he was standing broke, and he was thrown to the deck. The first officer had chosen the rope in order to rig the stage. The seaman claimed the ship was unseaworthy as the rope supplied was defective. In the District Court, and in the Circuit Court of Appeals, the libel was dismissed as to the claim based on unseaworthiness, but maintenance and cure were allowed. The dismissal was based on the decision in *Plamals v. The Pinar del Rio,* 277 U. S. 151, 48 Sup. Ct. 457 (1928). But the Supreme Court refused to follow the former decision.

The Pinar del Rio

In *Plamals v. The Pinar del Rio* the same basic facts existed. The Court found that there was a sufficient supply of good rope available to make the ship seaworthy as to the seamen. The fact that there was a bad rope on board did not make the ship unseaworthy. The seaman was injured because the mate negligently picked the bad rope. This was negligence of a fellow servant, and there could be no recovery against the owner of the ship. The District Court and the Circuit Court of Appeals felt constrained to follow this decision which closely paralleled the situation in the principal case.

The majority of the Supreme Court held that under the rule established in *The Osceola,* 189 U. S. 158, 23 Sup. Ct. 483 (1903), the vessel and the owner are liable to indemnify a seaman for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. The exercise of due diligence does not relieve the owner of his obligation to furnish adequate appliances. Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 Sup. Ct. 475 (1922). Hence the Court reasons that *a fortiori,* the obligation of the owner is unaffected by the fact that the negligence of the officers contributed to the unseaworthiness. The majority felt that this doctrine was an application of the non-maritime rule that the employer's duty to furnish a safe place to work and safe appliances was non-delegable, and not qualified by the fellow servant rule. It seemed to the majority that it would be an anomaly if the fellow servant rule, which was discredited by the Jones Act as a defense in a suit for negligence, were to be resuscitated and applied in suits founded on the warranty of unseaworthiness. Why should the Court lower the standard of the owner's duty to furnish safe appliances below that of the land employer? The rope in the instant case was defective and hence the staging was unseaworthy. This violated the employer's duty, regardless of the act of the first officer in negligently choosing the rope. The fact that good rope was available does not excuse owner's failure to provide a safe rigging.

This is an unusual statement for the Supreme Court to make. In effect it is saying that since the statute is more liberal than the general maritime law, the doc-

trine of the statute will be applied to a suit under the general maritime law, even though suit under the Jones Act could not be brought within the statutory time. Here, the Statute of Limitations in the Jones Act had expired. This argument violates all canons of statutory interpretation.

The statement taken from *The Pinar del Rio* that—"The record does not support the suggestion that the *Pinar del Rio* was unseaworthy. The mate selected bad rope when good ones were available"—was relied on by the lower courts. But the Supreme Court argued that the statement could support the lower courts' decision only on the assumption either that the presence of sound rope . . . afforded an excuse for the failure to provide a safe staging, or that antecedent negligence of the mate in directing the use of the defective rope relieved the owner from liability for furnishing the appliance thereby rendered unseaworthy." The Court thought that neither assumption is tenable by reason of the decisions before and since *The Pinar del Rio*. This statement is not wholly accurate. While it may be true that nothing will excuse the owner from the performance of his duty to provide safe appliances, nevertheless it seems that where there is a negligent act of a fellow seaman which causes an injury, the owner would not be held liable under the general maritime law. Indeed it was to alleviate this unfortunate omission that Congress passed the Jones Act. But the vice of the *Mahnich* case is that, finding that the ameliorating Jones Act could not be applied, because of the Statute of Limitations, the Court proceeds to bypass *The Pinar del Rio* which denied a recovery in similar circumstances and to extend the maritime law as to seaworthiness so as to include acts of a fellow servant causing an injury to the seaman. Assuming the Jones Act does not apply, the following astounding situation follows the *Mahnich* case: If the negligent act of the fellow servant is directed against the person of the seaman, then the owner will not be liable, for under the general maritime law a seaman could not recover for the negligence of a fellow seaman. *Pacific S. S. Co. v. Peterson,* 278 U. S. 130, 49 Sup. Ct. 75 (1928). If the negligent act of the fellow servant involves an appliance which the seaman uses, then the owner is liable. This anomaly is due to the enlargement of the concept of unseaworthiness in order to save the day.

A Strong Dissent

In a sharply worded dissent, Mr. Justice Roberts condemned the failure of the majority to follow the decision in *The Pinar del Rio*. He emphasized the close parallel between *The Pinar del Rio* and the principal case. In *The Osceola,* 189 U. S. 158, 23 Sup. Ct. 483 (1903), the Court held that a shipowner was liable for injuries received by seamen in consequence of unseaworthiness of the ship because of defective appliances. Mr. Justice Roberts observed that the unseaworthiness must be the *cause* of the injuries. The mere existence of unseaworthiness is not sufficient to cause liability.

The dissent, in which Mr. Justice Frankfurter concurred, lamented the effect of changing settled doctrines merely to achieve a desirable end in any particular case. The effect will be a tendency to weaken the foundation of law; it then becomes a game of chance. See *supra* pp. 2-5.

To recover damages for injuries under the general maritime law it was necessary to show that the vessel was unseaworthy. *Chelentis v. Luckenback S. S. Co.,* 247 U. S. 372, 38 Sup. Ct. 501 (1918); *Pacific S. S. Co. v. Peterson,* 278 U. S. 130, 49 Sup. Ct. 75 (1928). The vessel must be equipped with safe and proper appliances. Failure to supply the ship with adequate appliances makes the vessel unseaworthy, and

where injury results, the owner is liable. *Cartes v. Baltimore Insular Line,* 287 U. S. 367, 53 Sup. Ct. 173 (1932). But where the seaman knows an appliance is unsafe, he assumes the risk. *The Calvert,* 51 F. (2d) 494 (C. C. A. 4th, 1931).

The Jones Act

To alleviate the rigors of the maritime law in respect to damages for injuries Congress enacted the Jones Act of 1920. By its provisions those who are seamen within the meaning of the Act are accorded the benefits of the Federal Employers' Liability Act. Thus seamen on American vessels who sign the ship's articles are within the statute. They may bring an action *in personam* against the owners (or their representatives may, where death results) for damages by reason of the injuries or death caused by the negligence of the officers, agents or employees of the ship owner. *Panama R. R. Co. v. Vasquez,* 271 U. S. 557, 46 Sup. Ct. 627 (1926). However, where a seaman uses an appliance which is known to be unsafe, the doctrine of assumption of risk is not a defense to the action. His contributory negligence merely diminishes the damages. Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 59 Sup. Ct. 262 (1939). Further Section 5 of the Federal Employers' Liability Act, 35 STAT. 45 U. S. C. A. § 55 (1906) prohibits any contract for exemption from its provisions.

A Nice Question

When the Jones Act was enacted in 1920, the Federal Employers' Liability Act provided that all actions under it must be brought within two years. The Jones Act consists of one section of the United States Code adopting in respect to seamen all the provisions of the Liability Act in respect to railroad employees. In 1939 Congress extended the Statute of Limitations of the Federal Employers' Liability Act to three years. No mention was made of the Jones Act. Mr. Justice Roberts refers to the Statute of Limitations under the Jones Act as being three years, but cites no precedent. When the point is properly presented, a nice question will arise for the determination of the Supreme Court.

The pendulum has swung back again. In former years the seaman had much more protection than his brothers on the land. With the development of the Workmen's Compensation Acts the maritime law lagged behind in the amount of protection it afforded. Then Congress passed the Jones Act to extend liberal provisions to the seamen. Now the Supreme Court has felt obliged to keep step with Congress. Seamen have become the wards of the Legislature as well as of the Admiralty Court.

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INCOME TAX TROUBLES

This Way In

The Spring rental season for vacant stores and loft buildings has been materially enhanced by the arrival of a horde of income tax "experts," renting the empty spaces and hanging out neon-lighted signs inviting in the mentally distressed taxpayer for surcease and relief in the preparation of the confusing and complex tax forms issued by the Government. The mushroom growth of these establishments is certain to raise some interesting and pertinent questions of law. Not the least of which is the question: Does the advice and the preparation of income tax forms constitute the practice of law? Certain it is that this promiscuous peddling

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of street corner advice on the intricate and involved processes of preparing income tax returns may well call for judicial or legislative action. Already a Brooklyn Congressman has asked for a legislative investigation and charged that the unregulated establishment of such tax-emporiums threatens to do harm to the persons who approach and rely on the overnight accountants who grind out for a price ($2.50 for Federal returns; $1.50 for State returns) any and all tax problems submitted to them.

Recently the question of whether the giving out of tax advice and the making of income tax returns constituted the practice of law was presented in *Lowell Bar Association v. Loeb*, — Mass. —, 52 N. E. (2d) 27 (1943).

Practice of Law?

Herein the stated Bar Association brought a petition in equity to restrain the respondents, who were not members of the bar, from giving legal advice regarding liability to pay income taxes and from the execution of income tax returns.

The offending organization was an unincorporated body having multiple branch offices in many cities throughout Massachusetts and employing one hundred employees none of whom was a member of the bar and only one an accountant. The unincorporated association advertised heavily with "little modesty and restraint" but limited its clientele to working people and the making out of "simple returns." A reassuring line in their advertising was: "We stay with your taxes"—a do-or-die pronouncement to reassure the taxpayer that his tax advisors would provide the client with the necessary legal advice in the event of any impending difficulties with the tax department of the state or nation.

Two points in the opinion deserve special mention: The court said: "Confining our decision to the case at hand, we find the respondent engaged in the business of making out income tax returns of the least difficult kind." Then follows the court's reassuring line: "The blank forms are made *simple* . . . and can be *readily* filled out by any intelligent taxpayer whose income is derived wholly or almost wholly from salary or wages who has the *patience* to study the instructions." (Italics added).

"Easy Does It"

One may well pause before continuing to the next point and ask: Was the Massachusetts Supreme Court by any chance including in the foregoing remarks the current federal income tax return which are now mystifying, befogging, befuddling and confusing taxpayer, certified public accountant, tax lawyer and even the Federal Bureau of Internal Revenue? The difficulty, if not impossibility, of deciding where documentary simplicity ends and instrumental complexity begins has been neatly phrased by Judge Pound in *People v. Title Guaranty and Trust Company*, 227 N. Y. 366, 379, 125 N. E. 666, 670 (1919): "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled and the simplest often trouble the inexperienced."

How true! How true! in relation to current Form 1040 (1944 edition).

The Massachusetts court was able to bring its support considerable authority to the effect that the courts have distinguished between simple and complex legal instruments; especially so when these instruments were in the form of legal blanks to be filled out after purchase at the corner stationery store.

Simple or Complex?

In re *Eastern Idaho Loan and Trust Company*, 49 Idaho 280, 288 Pac. 157 (1930); *Gustafson v. V. C. Taylor and Sons*, 138 Ohio St. 392, 35 N. E. (2d) 435 (1941). But a repeated holding out by layman or cor-