

COMMENT

THE BETTER PART OF VALOUR—APPLICABILITY OF THE JONES ACT TO THE FLAGS OF CONVENIENCE FLEET

I. FLAGS OF CONVENIENCE—A BACKDROP

In the late 1930's, the United States was faced with a serious problem created by the outbreak of war in Europe. Clearly she wanted to avoid involvement, and to this end, she passed a series of neutrality acts.¹ However, passage of these acts left a large and active United States merchant fleet unable to continue its profitable trade with the allied powers. As a result, it became common for American merchants, with tacit government approval, to register their vessels in neutral Panama. Flying the Panamanian ensign, they were then able to trade freely with the allies. The quest for neutral flags was understandably intensified with America's entry into the war in 1941.²

The political need for this subterfuge ended with the war, but the practice did not stop. Rather, it has grown markedly.³ The shipowners discovered that by maintaining their fleets under foreign registry, they could escape stringent United States tax, labor, and safety regulations. So economical is the device that it has been estimated that a shipowner can save as much as \$100,000 a month per tanker by avoiding American labor law alone.⁴

Panama, Liberia and Honduras⁵ in particular, because of their relative lack of such regulations, have been doing a brisk business in ship registration for 25 years. Although by no means traditional maritime powers, they nonetheless have secured the bulk of the world shipping fleet.

A typical fact pattern is as follows: A vessel is owned and registered in Liberia by a Liberian corporation.⁶ The Liberian

1. Note, *Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts*, 60 COLUM. L. REV. 711 n.1 (1960).

2. *Id.*

3. *Id.*

4. *Id.* at 715 n.39 notes that general operating costs for the flags of convenience fleet are about half those of American flag vessels. The wages are only a quarter of American wages.

5. Known as the Panlibhon countries.

6. Generally, local law requires that ships registered in a nation must be owned by citizens of the nation. The "dummy" Liberian corporation satisfies that requirement.

corporation, with only a nominal office in Liberia, is wholly owned by a Panamanian corporation, having only a nominal office in Panama.⁷ The Panamanian corporation is wholly owned by a Delaware corporation with its principal place of business in New York. The vessel is involved in shipping in and out of United States ports, and has never been to Liberia.

The problem facing the courts as to the "flags of convenience"⁸ fleet is this: to what extent can the fleet be held subject to United States law? The answer has never been clear. The purpose of this comment will be to examine the extent to which American courts have, may, and should apply the Jones Act⁹ to these ships.¹⁰

II. *Groves v. Universe Tankships, Inc.*

For two reasons, the recent case of *Groves v. Universe Tankships, Inc.*¹¹ is an excellent one around which to center this examination. First, it is the latest treatment of the issue. Second, it represents the furthest the United States courts have gone in applying the Jones Act to foreign registered vessels.

Groves involves a corporate pattern similar to that of the above example. Defendant Universe was a Liberian corporation with nominal offices there. It was wholly owned by Oceanic Tankships, Inc., a Panamanian corporation with nominal offices in Panama. Oceanic's stock was almost entirely owned by an American citizen, W.K. Ludwig. Ludwig was also the majority stockholder, president, and a director of National Bulk Carriers, Inc., a Delaware corporation with its principal place of business

7. Apparently, the only reason for the interjection of the Panamanian corporation is an attempt to further cloud the beneficial ownership, which is American.

8. This is what American courts generally call it. The shipowners, claiming that this is the only way they can compete in international commerce, use the phrase "flags of necessity," while Great Britain more bitterly calls it "the runaway fleet."

9. 46 U.S.C. § 688 (1965). The Jones Act was passed to afford "seamen" greater protection against injury occurring in the course of employment. Its most notable provisions provide for a trial by jury as a matter of right (lacking in non-statutory maritime law) and abolish the fellow-servant, contributory negligence, and assumption of risk defenses.

10. This problem also arises in the areas of tax law and labor law. See generally Baker, *Flags of Refuge for the Shipping Industry—Federal Income Tax Considerations*, 13 TAX L. REV. 137 (1958); Comment, *Flags of Convenience and NLRB Jurisdiction*, 60 Nw. U.L. REV. (1965).

11. Civil no. 64-2005 (S.D.N.Y., filed Jan. 23, 1970).

in New York. Universe was entirely controlled and operated by Ludwig through National Bulk, and the two corporations shared the same offices and officers.

Decedent seaman was a British subject, and a resident of the British West Indies. He joined the vessel in Trinidad, signing Liberian articles which provided for the application of Liberian law to any claims for injury or death.¹² The ship flew a Liberian flag but had never been in a Liberian port.¹³ While in Japanese waters, he died as a result of the alleged negligence of Universe. Plaintiff, administratrix of decedent's estate, brought suit for wrongful death.

Defendant moved to dismiss¹⁴ the complaint for failure to state a claim upon which relief could be granted. In denying the motion, the federal district court noted that the intricate incorporation scheme was only "a facade to avoid the consequences of American ownership."¹⁵ Although the only nexus between the cause of action and the United States was that the vessel was beneficially owned and controlled by a United States citizen, the court held that this alone was sufficient to allow application of the Jones Act.

III. *Groves* IN THE CONTEXT OF 14 YEARS OF DECISIONAL LAW

The holding in *Groves*, that American ownership and control is sufficient in itself to justify application of the Jones Act, is the latest chapter in a fourteen year history of equivocal and inconsistent rulings on that issue. The conflicting decisions result from the broad general tests set out in two leading cases, *Lauritzen v. Larsen*,¹⁶ and *Bartholomew v. Universe Tankships, Inc.*¹⁷ Neither of these cases was concerned specifically with the narrow issue of *Groves* and its predecessors. Rather, they addressed themselves to the general problem of how to decide whether the Jones Act applies to a vessel flying a foreign flag.

12. Liberia has adopted the non-statutory general maritime law of the United States as its own. *Voyiatzis v. National Shipping & Trading Corp.*, 199 F. Supp. 920 (S.D.N.Y. 1961). The reason that plaintiff wants the Jones Act applied is that it, unlike general maritime law, provides for a cause of action for wrongful death.

13. The court speculated that it is unlikely that she ever will be.

14. Pursuant to F.R. Civ. P. 12 (b).

15. Civil no. 64-2005 (S.D.N.Y.) at 13.

16. 345 U.S. 571 (1953).

17. 263 F.2d 437 (2d Cir. 1959).

Lauritzen laid the foundation for the entire field. On its facts, it concerned a Danish seaman aboard a Danish owned and registered vessel, who had signed Danish articles providing for application of Danish law. He signed the articles while temporarily in New York, and was injured in Havana, Cuba. The court listed seven factors¹⁸ which must be considered in determining jurisdiction: (1) The place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured; (4) the allegiance of the defendant shipowner;¹⁹ (5) the place of the contract; (6) the accessibility of a foreign forum; and (7) the law of the forum.²⁰ Of the seven, the law of the flag, and the allegiances of the injured seaman and the shipowner were considered most important.²¹ Applicability of the Jones Act was to be determined by weighing the factors against each other, and against the "national interest served by the assertion of authority."²² Applying the factors to the case, the *Lauritzen* court readily determined that the Jones Act could not apply.

Following *Lauritzen*, is what has been described as an "avalanche" of cases.²³ On examining them, one would think that a mathematician had perfected and applied all the permutations and combinations of facts possible under the seven factors. Of this array between 1953 (*Lauritzen*) and 1959 (*Bartholomew*), there are only four cases which bear directly on the issue of mere ownership.

*Argyros v. Polar Compania de Navegacion, Ltda.*²⁴ in 1956, and *Mproumeriotis v. Seacrest Shipping Co.*²⁵ in 1957, held the

18. Called "the seven immortal pillars of *Lauritzen*" by the 5th circuit in *Hellenic Lines Ltd. v. Rhoditis*, 412 F.2d 919, 922 (5th Cir. 1969).

19. *Id.* *Hellenic* provides an interesting twist to this particular factor. Note that the injured seaman's allegiance or domicile is important, but when considering the shipowner, *Lauritzen* is concerned only with his allegiance. *Hellenic* concerned a vessel owned by a Greek citizen who was a permanent resident of the United States. Apparently rejecting *Lauritzen's* limitation, the court ruled that defendant's permanent American residence was a sufficient contact to apply the Jones Act. *But see* 44 TUL. L. REV. 347 (1970) which curiously lauds *Hellenic* for its rejection of *Bartholomew* and return to *Lauritzen's* analysis.

20. 345 U.S. at 583-91.

21. Separately discussing each factor, the court weighed them and virtually discounted all but these three.

22. 345 U.S. at 582.

23. 44 TUL. L. REV. 347 (1970).

24. 146 F. Supp. 624 (S.D.N.Y. 1956).

25. 149 F. Supp. 265 (S.D.N.Y. 1957).

Jones Act inapplicable. But the precedent was not followed. In 1958, in *Rodriguez v. Polar Shipping, Ltd.*,²⁶ a contrary result was reached in the same district. The plaintiff in *Rodriguez* alleged that an American citizen had both beneficial ownership and control over the ship. The court noted *Argyros* and *Mproumeriotis* but "distinguished" them on the grounds that the pleadings in those cases indicated only ownership, not control. Holding that the Jones Act applied, the court concluded that, balanced upon *Lauritzen's* scales, ownership and control by United States citizens was a sufficient contact.²⁷ As a later court points out, however, this distinction between ownership and control is, as a practical matter in world shipping, one without a difference.²⁸ It is a reasonable conclusion therefore, that Justice Cashin's distinction in *Rodriguez* was born of diplomacy to his brethren on the *Argyros* and *Mproumeriotis* courts. In reality, his position was that the decisions were incorrect, and that bare ownership (connoting control) by United States' interests is enough to support Jones Act jurisdiction.

Rodriguez was followed the same year in *Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A.*²⁹ But here, instead of distinguishing *Argyros* and *Mproumeriotis* tactfully, Judge Kaufman directly rejected them. He also took note of Justice Cashin's ownership/control distinction, and while approving of the result in *Rodriguez*, he expressly declined to pass on the validity of the distinction. Even so, when he presented the facts of his case, he quietly characterized the American owner's interest in the vessel as "ownership and control."

In 1959 the second of the two leading cases in the area, *Bartholomew v. Universe Tankships, Inc.*³⁰ was decided. As in *Lauritzen*, the facts of the case are not helpful as to the specific

26. 169 F. Supp. 79 (S.D.N.Y. 1958).

27. As authority, the court cited *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S.D.N.Y. 1953). *Zielinski's* facts provided the court two American contacts with which to work. First, the vessel was beneficially owned and controlled by United States citizens. Second, the injured seaman was a United States domiciliary. *Rodriguez* interprets *Zielinski's* language as holding that American control was the paramount factor. The domicile of the seaman was seen as immaterial to the decision. A careful reading of *Zielinski*, however, does not support this conclusion.

28. *Moutzouris v. National Shipping & Trading Co.*, 194 F. Supp. 468 (S.D.N.Y. 1961).

29. 168 F. Supp. 236 (S.D.N.Y. 1958).

30. 263 F.2d 437 (2d Cir. 1959).

issue of bare ownership. In contrast to *Lauritzen* however, the American contacts in *Bartholomew* were notable for their overwhelming substantiality. The case involved an American beneficial owner, and an assault in United States waters upon an American domicilliary who had signed a declaration of intention to naturalize.

In *Bartholomew*, the second circuit took the opportunity to reevaluate the test for Jones Act jurisdiction established by *Lauritzen*. Finding the balancing of contacts test difficult to apply absent a specific guide as to the relative weights of the contacts, the court announced a new, unilateral test. Without looking to the foreign interests involved, Judge Medina directed that courts should only determine whether the American contacts are "substantial," that is "something between minimal and preponderant" ³¹

Even though the contacts in *Bartholomew* were virtually preponderant, it by no means limited its test to such facts.³² "Indeed," Judge Medina noted, "cases such as *Mproumeriotis v. Seacrest Shipping Co.* . . . and *Argyros v. Polar Compania de Navegacion* . . . holding American ownership alone insufficient to warrant application of the Jones Act must be considered of doubtful validity."³³ While *Bartholomew* may not have been binding appellate court precedent, it is reasonable to assume that it would have provided direction to the lower courts. When this case was read in conjunction with *Bobolakis* and *Rodriguez*, it seemed clear that the trend now was to hold that way. But once again, the logical result did not follow. In the eleven years between *Bartholomew* and *Groves*, there have been only two cases in which the courts have decided the substantiality of mere American ownership.³⁴ Both were district court cases, and both ignored the admonition in *Bartholomew* by holding ownership alone insufficient.³⁵ Thus, in applying the *Groves* facts to either

31. *Id.* at 440.

32. *Id.* at 440-41.

33. *Id.* at 443 n.4.

34. *Moutzouris v. National Shipping & Trading Co.*, 194 F. Supp. 468 (S.D.N.Y. 1961); *Mpampouris v. S.S. Auromar*, 203 F. Supp. 944 (D. Md. 1962).

35. Both also distinguished away all opposition on the grounds that the opposing cases involved facts in addition to bare American ownership. *Zielinski* also involved a plaintiff who was a United States domiciliary. In *Bobolakis*, the contract was signed in the United States. *Bartholomew* involved virtually preponderant contacts. And *Rodriguez*,

Lauritzen's "balancing the contacts" test, or *Bartholomew's* "substantial contacts" test, Judge Bryan's judicial guidance can only be summed up as one eleven year old court of appeals dictum, and six conflicting and sometimes illogical³⁶ district court cases.

IV. LOGIC, PRUDENCE, AND THE BETTER PART OF VALOUR

The basis for Judge Bryan's decision in *Groves* seems to be merely a moral conclusion that American shipowners should not escape American justice so easily.³⁷ His conclusion is supported only by a selective review of the cases which support him. The others are ignored. *Bartholomew* is cited for the proposition that the Jones Act has been regularly applied to American owned vessels flying flags of convenience. He also relies on the comment in *Bartholomew* as to the doubtful validity of cases holding bare American ownership insufficient. He summarily concludes:

[T]he substantial contacts with the United States through American ownership, control and operation from the United States provide the 'heavy counterweight' necessary to overcome the law of the flag, which in this case is purely a flag of convenience in the barest sense.³⁸

Rather than take this summary approach to what Judge Bryan admits is a "recurrent and troublesome" problem, the better approach in *Groves* would have been to do some original reasoning and, acknowledging the major problems, to have arrived at a solution that is legally, logically, and politically prudent. The following are examples of problems which needed to be considered in this case.

A. *Did Congress Intend for the Jones Act to Apply in Bare Ownership Cases?*

The Jones Act extends its benefits and protections to "any seaman."³⁹ A literal application of this, however, would be

so the two cases argue, alleged control in addition to ownership. It is only here, in *Rodriguez*, that their argument fails. After distinguishing it from the "mere ownership" cases on the ground that it also involved control, both cases rejected the *Rodriguez* distinction between control and ownership. The sheer illogic of this inconsistency has evidently been missed by the courts.

36. See text accompanying note 34 *supra*.

37. Civil no. 64-2005 (S.D.N.Y.) at 16.

38. *Id.* at 15.

39. 46 U.S.C. § 688 (1965).

preposterous. Yet Congress did not clarify the limits of the Acts coverage. It is clearly a remedial statute,⁴⁰ and was intended to be liberally construed.⁴¹ However, as Chief Justice Marshall said, "An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."⁴² This leads to an inquiry of what the relevant law of nations is. Justice Jackson, in *Lauritzen*, points to "the most venerable and universal rule of maritime law. The law of the flag prevails unless some heavy counterweight appears."⁴³ *Lauritzen's* discussion of the seven factors is precisely designed to provide a definition of that "heavy counterweight."

Since the Jones Act is a remedial measure,⁴⁴ its intent is to provide a remedy for injured seamen, not to penalize negligent shipowners. In the *Groves* case, it is the shipowner who is the United States contact, not the seaman. The deceased was a British subject, injured in Japanese waters. Plaintiff too was a British subject with no American contacts. The United States has no duty or interest in protecting either of them. So logically, if the Jones Act is intended to provide a remedy for injuries to American seamen, and there are no American interests served by protecting this seaman, then there are no American interests to be served in applying the Jones Act to this case. On the other hand, Liberia does have legitimate interests to be served in asserting authority over the case. She realizes a substantial part of her revenue from registering ships. The Geneva Convention on the High Seas,⁴⁵ art. V (1) provides as to vessel registration, "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag." So, to retain its right under international law to register such ships, Liberia must assert its authority over such claims as this. The courts will no doubt note that Liberian law, like United States non-statutory general maritime law, provides no remedy for wrongful death actions. This, however, is no reason for

40. *Cox v. Roth*, 348 U.S. 207 (1955).

41. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

42. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

43. 345 U.S. at 580.

44. *Cox v. Roth*, 348 U.S. 207 (1955).

45. Geneva Convention on the High Seas, art. V, opened for signature April 28, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

American courts to substitute American legislative judgment for Liberian legislative judgment. The temptation may be strong for courts to apply the law of the nation providing the best remedy for a plaintive plaintiff. But even a cursory reading of *Lauritzen* and *Bartholomew* shows that this is not to be used as a consideration. A direct application of *Lauritzen* indicates that Liberia has by far the greater interest. Therefore, the law of the flag should govern. The Jones Act cannot apply.

B. Even if Jurisdiction Was Possible, Would it be Prudent to Exercise It?

There are many cases in the field of international law where the proper question is not how far can American authority reach, but rather, how far should it be extended? When meeting in the international arena, nations, theoretically, deal with each other as equals. Where the de facto power of one nation can infringe on the pride or financial resources of another, diplomacy, in the interests of international peace and harmony, may require that nation to restrain the use of its power.

For example when, as in *Lauritzen*, the case concerns a traditional maritime nation like Denmark, with a well developed system of maritime law, caution is indicated. Indiscriminate substitution of United States maritime law for Danish law, in cases where Denmark has a national interest, can easily become an affront to their national pride. In such cases, except where "the peace or dignity of the [United States] or the tranquility of the port is threatened,"⁴⁶ diplomatic discretion would demand deference to the foreign law.

When dealing with traditionally non-maritime nations, such as Panama, Liberia, and Honduras, whose interest in such cases is basically financial, caution is still required. These nations understandably can become indignant at American incursions into their revenue raising activities. For example, Panama, in response to American authority exerted over Panamanian flag ships,⁴⁷ has threatened to subject United States flag vessels in Panamanian

46. *Lauritzen v. Larsen*, 345 U.S. at 585, 586.

47. These threats arose in the context of American courts extending N.L.R.B. jurisdiction over Panamanian flag vessels while they were in American ports. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the Supreme Court held N.L.R.B. jurisdiction could not reach foreign flag vessels. The possibility of "international discord" was cited as a major consideration.

ports to equally inconvenient domestic rules concerning the internal matters of ships,⁴⁸ or to assert Panamanian sovereignty over waters to twelve miles out, including waters near the canal zone.⁴⁹ As *Lauritzen* points out, while international law probably cannot achieve perfect uniformity, it must be “mindful of the necessity for mutual forbearance if retaliations are to be avoided. . . .”⁵⁰

V. CONCLUSION

This comment has examined seven district court cases⁵¹ faced with the specific issue of whether bare American beneficial ownership of a foreign flag vessel will justify application of the Jones Act. The decisions are conflicting and to a large extent do not reflect the sophisticated reasoning required by the *Lauritzen* and *Bartholomew* tests. A close examination of the problem and the cases dealing with it leads to the following conclusion. An amalgamation of the *Lauritzen* and *Bartholomew* tests would provide the most complete and relevant approach to the issue. This approach would begin by determining if the case presents “substantial” American contacts. If it does, these contacts and the interests of the United States which would be served by exercising its authority should be balanced against foreign contacts, and the interests to be served by the exercise of foreign authority. If the United States’ interests are greater, then to the degree that it is internationally prudent, the Jones Act should apply.

Applying this test to the facts in *Groves v. Universe Tankships, Inc.*⁵² the following conclusions are reached: (1) it is doubtful that the case presents “substantial” United States contacts; (2) even if it did, the interests of Liberia in adjudicating the claim are clearly greater than those of the United States; and (3) considering the possibility of reprisals not only from Liberia, but also from supporting African block nations and sympathetic Panlibhon countries, the better part of valor would indicate discreet abstention from jurisdiction.

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48. N.Y. Times, March 27, 1961 at 44.

49. N.Y. Times, Sept. 1, 1961 at 45.

50. 345 U.S. at 582.

51. All but one (*Mpampouris*) are from the same district: the Southern District of New York.

52. Civil no. 64-2005 (S.D.N.Y., filed Jan. 23, 1970).