RECENT CASES

Carriers—

INTERSTATE COMMERCE ACT—TOLERANCE SUSTAINED AS REASONABLE REGULATION

The Interstate Commerce Commission approved railroad tariffs for shipments of shell eggs which imposed a "tolerance," a fixed percentage of the shipment which is assumed to be damaged because of the perishable nature of the article; this percentage is deducted from all claims for loss filed with the carrier. As an alternative, the schedules permitted the shipper to utilize federal or state inspection to determine the exact amount of damage which was present before delivery to the carrier, and to substitute this sum, plus one per cent for further unavoidable damage in transit, for the tolerance.[1] Various shippers and the Department of Agriculture sued to annul the ICC order, alleging that it limited carrier liability in violation of the Interstate Commerce Act.[2] The court held the imposition of a general tolerance was a reasonable regulation merely fixing the amount of damage which the carrier did not cause. *Utah Poultry & Farmers Cooperative v. United States,* 119 F. Supp. 846 (D. Utah 1954).

Section 20(11) of the Interstate Commerce Act provides that a common carrier shall be liable ". . . for the full actual loss, damage or injury to such property caused by it . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading or in any tariff filed with the Interstate Commerce Commission. . . ." Damage present on delivery to the carrier[3] or loss caused during transit by the inherent nature of the goods has been deducted in claims against the railroad[4] despite the carrier's strict common law liability. In several cases where the carrier was found to have been negligent, the courts permitted a deduction for unavoidable damage, but the amount was determined by the evidence

1. Special Regulations, Eggs, 284 I.C.C. 377 (1952). The schedules provide for a three per cent tolerance on eggs packed at the rail point of origin and five per cent on those processed at other points.

2. 24 STAT. 386 (1887), as amended, 49 U.S.C. § 20(11) (1952).

3. H. P. Richards & Sons v. Director General of Railroads, 160 La. 1019, 107 So. 891 (1926); *accord,* Delphi Frosted Foods Corp. v. Illinois Cent. Ry., 188 F.2d 343 (6th Cir. 1951).

4. Austin v. Seaboard Air Line R.R., 188 F.2d 239 (5th Cir. 1951); Shapiro v. Pennsylvania R.R., 83 F.2d 581 (D.C. Cir. 1936); Singer v. Ameican Express Co., 203 Mo. App. 158, 219 S.W. 662 (1920), *cert. denied,* 254 U.S. 632 (1920); MILLER, LAW OF FREIGHT LOSS & DAMAGE CLAIMS 138 (1953). *But cf.* Akerly v. Railway Express Agency, 96 N.H. 396, 77 A.2d 856 (1951) (freezing of eggs was held not to be inherent in their nature).

in the individual case and was not a fixed sum to be utilized in all cases dealing with that article.[5] Weight tolerances, based partly on inaccurate weighing rather than any real loss and partly on natural shrinkage of the article, have been authorized by the ICC,[6] but under such a tolerance a New Jersey court held that, once the shipper has shown loss, the carrier must establish that it did not cause the loss.[7] The Supreme Court, in *Chicago, M. & St. Paul Ry. v. McCaull-Dinsmore Co.*,[8] interpreted § 20(11) to invalidate a condition in the bill of lading that the carrier's liability shall be based on "the value of the property at the place and time of shipment." The Court reasoned that, since the value of the property rose during transportation, the shipper was prevented from recovering "full actual loss." Although certain types of eggs, constituting a small portion of the market, have been subject to a damage tolerance for a number of years,[9] neither its legality, nor that of the general tolerance applicable to all eggs, had been challenged in the courts before the instant case.

Since the tolerance is only an average, its application to shipments which contained less than the stated percentages of damage before transit and which were destroyed by the carrier's negligence can violate the requirement of § 20(11) that payment shall be for full actual loss.[10] The majority relied upon the Commission's determination that these were reasonable regulations, citing various rate cases as precedent for upholding the Commission's findings.[11] However, these broad discretionary powers with respect to rates have not been granted to the Commission in the section dealing with limitation of liability.[12] This authority cannot be implied, since § 20(11) provides that any limitation of liability, though part of a tariff filed with the ICC, shall be unlawful. Moreover, the omission seems intentional because one of the provisos of § 20(11) does grant the Commission such authority in another context.[13] When the Supreme Court

5. Meltzer v. Pennsylvania R.R., 29 F. Supp. 840 (E.D. Pa. 1939); 38 F. Supp. 391 (E.D. Pa. 1941); Bronstein v. Baltimore & O. R.R., 29 F. Supp. 837 (E.D. Pa. 1939).

6. Weight Tolerance Rule, 192 I.C.C. 71 (1933).

7. Joseph Toker Co. v. Lehigh Valley R.R., 12 N.J. 608, 97 A.2d 598 (1953). "Neither the carrier nor the Commission could lawfully provide that liability to the shipper for loss of coal in transit shall not accrue until the loss exceeds 1½% of the coal shipped." *Id.* at 615, 97 A.2d at 602. See Thompson v. James G. McCarrick Co., 205 F.2d 897 (5th Cir. 1953) on the carrier's burden as to the cause of the shortage; *cf.* Claims for Loss and Damage of Grain, 56 I.C.C. 347, 352 (1920).

8. 253 U.S. 97 (1920).

9. National Poultry, Butter & Eggs Ass'n v. New York Cent. R.R., 52 I.C.C. 47 (1919).

10. Instant case at 867 (dissenting opinion).

11. Instant case at 861, 862.

12. Compare the grants of authority to the Commission in establishing rates, routes and fares in 54 STAT. 911, 49 U.S.C. § 15 (Supp. 1953) with the absence of such power in 49 U.S.C. § 20(11) (1952).

13. The Act provides that notwithstanding the provisions charging the carrier with liability for full actual loss, the ICC may make reasonable orders authorizing the carrier to establish rates based on the declared value of the property, which would be the amount recoverable in the event of loss. 49 U.S.C. § 20(11) (1952).

interpreted § 20(11) in the *McCaull-Dinsmore* case, it did not feel bound by the Commission's determination of reasonableness, although the condition in the bill of lading would not prevent recovery of full actual loss if the value of the property did not rise during transportation.[14]

The background of the Interstate Commerce Act shows clearly that § 20(11) was incorporated to protect the shipper.[15] The court rejected increased rates as an alternative solution to the railroad's substantial problem of large damage claims for eggs,[16] but the practical effect of the tolerance is to increase the shipper's cost of transportation. If the courts were to take judicial notice that the ICC tolerance represents damage which the carrier did not cause,[17] the shipper would be unable to challenge its application in his case. Even if the shipper were permitted to show that he shipped with less than tolerance damage, as in a New Jersey case,[18] he would have to establish that an actual loss occurred during transportation. This may be a difficult burden since not all damage is discoverable on inspection and since handling in the repacking and candling operations increases the amount of damage present before rail transportation. When this procedure is contrasted with the usual practice of speedy claim settlements based on the tolerance, the shipper will probably accept the latter although he believes he shipped with less damage. On the other hand, without a tolerance the railroads would continue to pay claims which include damage they did not cause. This may warrant an amendment allowing the Commission to provide tolerances when reasonably justified,[19] but the present scope of § 20(11) precludes judicial modifications.

Corporations—

"SALE" INTERPRETED UNDER SECURITIES EXCHANGE ACT § 16(b)

Pursuant to a plan to gain control of the Tide Water Associated Oil Company, the Mission Corporation purchased a large percentage of Tide Water common stock over a period of years. In two exchanges within

14. 253 U.S. 97 (1920). See text following note 7 *supra.*

15. 51 CONG. REC. 9621 (1914); Reider v. Thompson, 339 U.S. 113, 119 (1949); Chicago, M. & St. Paul Ry. v. McCaull-Dinsmore Co., 260 Fed. 835, 837 (8th Cir. 1919), *aff'd,* 253 U.S. 97 (1920); 20 MICH. L. REV. 765, 770 (1922).

16. Claims for damage to shell eggs increased from about $110,000 in 1941 to $2,338,462 in 1947. Instant case at 850.

17. In Cardwell v. Union Pac. R.R., 90 Kan. 707, 136 Pac. 244 (1913) the court took judicial notice of the natural shrinkage of grain and automatically subtracted the allowance fixed by state statute and even permitted the jury to increase this amount. *But cf.* Smith v. Louisville & N. R.R., 202 Iowa 292, 209 N.W. 465 (1926).

18. Joeph Toker Co. v. Lehigh Valley R.R., 12 N.J. 608, 97 A.2d 598 (1953).

19. See, *e.g.,* the Federal Food, Drug & Cosmetic Act: "A food shall be deemed to be misbranded . . . (e) If in package form unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary." 52 STAT. 1047 (1938), as amended, 21 U.S.C. § 343 (Supp. 1952).

twenty-five months, Mission transferred its Tide Water stock to a subsidiary holding company established for that purpose and received in return two shares of the subsidiary's stock for each share of Tide Water stock.[1] Both transactions were approved by the SEC under the Investment Company Act of 1940.[2] Between these exchanges, Mission declared dividends with part of the stock received from the subsidiary, whereupon that stock was publicly traded for the first time.[3] The subsidiary's sole asset consists of the Tide Water stock except for an insignificant amount of cash; its only outstanding stock has been issued to the parent corporation in these exchanges. A stockholder's derivative action, on behalf of the Tide Water Company, was instituted under the Securities Exchange Act of 1934, § 16(b),[4] to recover profits realized by Mission through the purchase and sale of Tide Water stock within a six month period.[5] The court held that the first exchange of stock was merely a transfer between corporation pockets and not a "sale," but that the second exchange did constitute a "sale" and the profit realized by Mission is recoverable by Tide Water. *Blau v. Mission Corp.*, 212 F.2d 77 (2d Cir.), *cert. denied*, 347 U.S. 1016 (1954).

Section 16(b) of the Securities Exchange Act provides that any profit realized by an officer, director or principal stockholder of a corporation through purchase and sale or sale and purchase of the corporation's securities within a six month period shall be recoverable by the corporation.[6] The crucial issue in the instant case was whether or not the two exchanges were "sales" by Mission. For purposes of the entire Act, Congress has defined "sale" as "any contract to sell or otherwise dispose of."[7] The only two cases under § 16(b) that faced the issue of "sale" decided that a gift of securities does not fall within the definition.[8] An analogy might be drawn from *Parke & Tilford, Inc. v. Schulte*[9] which

1. The amount of Tide Water stock involved in these two exchanges comprised approximately 38.5% of its outstanding stock.

2. 15 U.S.C. § 80a-17(a), 17(b) (1952). The SEC consideration did not imply approval under § 16(b) of the Securities Exchange Act, 15 U.S.C. § 78p(b) (1952), which is administered by the courts. See text at note 19 *infra*.

3. The two dividends included approximately 40.4% of the subsidiary's outstanding stock at that time.

4. 15 U.S.C. § 78p(b) (1952).

5. Less than 17.5% of Mission Corporation's total purchases of Tide Water stock occurred within six months of either exchange.

6. 15 U.S.C. § 78p(b) (1952). The defendant corporation in the instant case is held to come within the provisions of this section through ownership of more than 10% of any class of any equity security of Tide Water. In order to reach such a decision it was necessary to consider Mission's indirect interest in Tide Water through its relationship with the subsidiary. The district court held that if the insider status of the defendant depended upon its relation to the subsidiary, the exchange of stock with the subsidiary was not a "sale." Blau v. Mission Corp., 113 F. Supp. 153 (S.D.N.Y. 1953).

7. 15 U.S.C. § 78c(a)(14) (1952). See Note, *The Scope of "Purchase and Sale" under Section 16(b) of the Exchange Act*, 59 YALE L.J. 510 (1950).

8. Shaw v. Dreyfus, 172 F.2d 140 (2d Cir.), *cert. denied*, 337 U.S. 907 (1949); Truncale v. Blumberg, 80 F. Supp. 387 (S.D.N.Y. 1948).

9. 160 F.2d 984 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947).

held that the receipt of common stock through exercise of the convertible feature of preferred stock was a "purchase." The court's language is broad enough to include any conversion of securities. However, comment on the decision has criticized the scope of the language while approving the holding on the basis of the imminent compulsory redemption of the convertible stock at a price considerably below the value of the stock received.[10] The instant case contains no similar factor to interfere with the normal tendency of such closely related securities to fluctuate together in value.

The present court's decision expresses the fear that the stocks of Tide Water and the subsidiary may change in value simultaneously, but in opposite directions. While such a situation is possible and would afford an opportunity for abuse of inside information, it seems less likely to result from normal economic factors than from manipulative practices which are made unlawful by other provisions of the Act.[11] It is more probable that a change in value of the Tide Water stock will be reflected proportionately in the holding company stock so long as its sole asset continues to be Tide Water stock.[12] With these two stocks fluctuating together, the defendant, presumably not intending to abuse inside information,[13] has developed a technique which might be used to evade statutory liability. A hypothetical speculator, with inside information of an impending rise of Tide Water stock, for example, could purchase Tide Water stock and exchange it for subsidiary stock, as the defendant did here, and then sell the subsidiary stock immediately after the expected rise.[14] No § 16(b) liability could be found by matching the transactions at the ends of such a cycle inasmuch as the statute clearly applies to trading with an

10. Note, 59 YALE L.J. 510, 526 (1950); 42 ILL. L. REV. 658 (1947). But see 59 HARV. L. REV. 998 (1946).

11. See 15 U.S.C. §§ 78i, 78j (1952).

12. The SEC has exercised its rule making power under § 16(b) to exempt from liability transactions in which stockholders of a non-diversified holding company redeem their stock for that of the operating company. Rule X-16B-5, 17 CODE FED. REGS. § 240.16b-5 (Cum. Supp. 1953). While this rule is inapplicable to the present case because it is limited to officers and directors and concerns only redemption transactions, it involves a comparable relationship of stocks which the SEC describes as "substantially and in practical effect equivalents." 17 SEC ANN. REP. 57 (1951). This is borne out by the market fluctuations of the two stocks in the instant case. From 1949 through 1951 the average price of the subsidiary stock (computed as an average of annual high and low quotations) increased 7⅛. During the same period, the average price of Tide Water stock rose 15 9/16, or 7 25/32 per share of the subsidiary stock on the 2:1 ratio. A semi-monthly check of New York Times stock quotations from March 1949 through March 1950 shows the same close relationship during the short-run.

13. The court notes the purpose of Mission Corporation to gain control of the Tide Water Associated Oil Company. Instant case at 79. However, this fact is not relevant to the issue of liability, for the statute is specifically stated to be applicable regardless of actual or intended abuse of inside information. 15 U.S.C. § 78p(b) (1952).

14. The same effect can be obtained by a purchase of holding company stock, an exchange and then sale of Tide Water stock. However, should the market values be on a down-swing, there would be no need for an exchange since the first transaction would be a sale followed by a purchase of the other security at its lowest point.

equity security of a single corporation.[15] The only way to prevent this evasion is to hold the middle exchange transaction to be a sale of one stock and purchase of the other. There are, however, practical difficulties which would impair the use of such an evasive technique. It is unlikely that an insider would create the necessary corporate relationship for such a purpose alone.[16] Much less complex stratagems, such as staying outside the six months limit, are available to the intentional evader. A further obstacle is the possible requirement of approval of the exchange by the SEC under the Investment Company Act of 1940.[17] Although the utility of such a plan is dubious, the court's decision has eliminated the profit motive when the holding company stock has an established market value.[18]

Despite this analysis supporting the holding of the instant case, there was no intimation that the defendant either abused or intended to abuse inside information. The series of transactions occurred over a period of years with ample notice and opportunity for other Tide Water stockholders to protect their interests. A case of this type raises a question of the manner in which the section is administered. The federal courts, rather than the SEC, have the responsibility of enforcement.[19] A stockholder derivative action can be brought by any owner of an equity security of the corporation even though he purchased the security after the complained of transaction.[20] Whether the plaintiff is the corporation or one of its shareholders, the money recovered inures to the corporation, but the courts have awarded liberal attorney's fees in the derivative actions to provide a more tangible incentive to outside stockholders.[21] The combination of the simplicity of acquiring standing to sue and the reward of ample fees if successful may be an undesirable temptation to some to instigate actions under § 16(b) which do not fall within the purposes of the statute.[22]

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15. The statute refers to trading "of any equity security of such issuer," (*i.e.* corporation). 15 U.S.C. § 78p(b) (1952). It is questionable whether the statute could be applied to transactions involving two types of securities of one corporation. Cook and Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 624-25 (1953); Rubin and Feldman, *Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders*, 95 U. OF PA. L. REV. 468, 486-87 (1947). *Cf.* Smolowe v. Delendo Corp., 136 F.2d 231, 237 n.13 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943). But the language of the statute makes it clearly inapplicable to transactions with stocks of two different corporations.

16. Other factors may make it practical to establish such a new corporation, as in the instant case, or the necessary relationship may already be in existence.

17. This requirement will not involve SEC consideration in terms of § 16(b) liability, but it will nonetheless bring the entire transaction to the attention of the SEC, delay completing the cycle, and may result in some undesired publicity of the plan.

18. There is still a possibility of using this plan before the holding company stock is traded since the court did not find liability in that situation.

19. 15 U.S.C. § 78p(b) (1952); American Distilling Co. v. Brown, 295 N.Y. 36, 64 N.E.2d 347 (1945). See letter from Myer Feldman, Esq., Special Counsel, SEC, dated Sept. 1, 1954, on file in Biddle Law Library, University of Pennsylvania Law School.

20. Benisch v. Cameron, 81 F. Supp. 882 (S.D.N.Y. 1948).

21. This policy was adopted in the first case under § 16(b): Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

22. See Magida on behalf of Vulcan Detinning Co. v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1951), where an effort to disclose the motive for the action and plaintiff's relationship with his attorney was thwarted. And see Magida v. Continental Can Co., 12 F.R.D. 400 (S.D.N.Y. 1952).

Maritime Law—
SURVIVAL OF ACTION UNDER JONES ACT AGAINST ESTATE OF DECEASED TORTFEASOR

A seaman perished when the private yacht on which he was employed foundered on the high seas. His administrator sued the representatives of the estates of the owners, who had been residents of Florida, in a joint action on the law side [1] of the federal district court in Florida under the Jones Act [2] and the Florida Survival Statute.[3] The district judge dismissed the action because of plaintiff's admitted failure to file notice of his claim within the time required by the Florida Probate Act.[4] The circuit court reversed, holding that the Jones Act does not provide for the survivability of a cause of action against the estate of a deceased tortfeasor, but the right of action granted by the Jones Act survived by operation of the Florida Survival Statute, and that the applicable statute of limitation was that of the Jones Act rather than the Florida probate provision. *Roth v. Cox*, 210 F.2d 76 (5th Cir.), *cert. granted*, 347 U.S. 1009 (1954).

An action under the Jones Act was held to survive the death of a tortfeasor in *Nordquist v. United States Trust Co. of New York* [5] on the theory that, since the Federal Employer's Liability Act,[6] which was incorporated in the Jones Act, provided for the survival of actions against receivers or others charged with the duty of the management of a common carrier,[7] failure to imply a survivorship provision in the Jones Act would conflict with this expressed policy of giving a plaintiff a remedy where the tortfeasor no longer exists. The instant court rejected this position [8] specifically and permitted the action to survive by operation of the state survival statute as a "common law remedy" within the meaning of the saving clause of the Federal Judiciary Act.[9] The "common law remedy" refers only to the use of the state court as a forum for the enforcement of maritime rights and to the use of common law forms of action,[10] and all of the previously reported decisions had so used the clause.[11] The appro-

1. To be distinguished from the admiralty side of the federal court. State courts may also entertain maritime cases. See text at note 10 *infra*.
2. 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952).
3. FLA. STAT. ANN. § 45.11 (Supp. 1953).
4. FLA. STAT. ANN. § 733.16 (Supp. 1953).
5. 188 F.2d 776 (2d Cir. 1951) (A. Hand, J., joined by L. Hand and Clark, JJ.); see 30 TEXAS L. REV. 510 (1952).
6. 53 STAT. 1404 (1939), 45 U.S.C. § 51 (1952).
7. *Id.* § 57.
8. Instant case at 78, 79.
9. 28 U.S.C. § 1333 (1952). This section changed the phraseology but not the intent of the ninth section of the Judiciary Act of 1789 whereby the district courts of the United States were given exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," as made clear by the reviser's note.
10. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918). See 47 COL. L. REV. 1364 (1947).
11. See, *e.g.*, C. J. Hendry Co. v. Moore, 318 U.S. 133 (1926); Panama R.R. v. Vasquez, 271 U.S. 557 (1926); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924); Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1899); Schoonmaker v. Gilmore, 102 U.S. 118 (1880); Steamboat Co. v. Chase, 16 Wall. 522 (U.S. 1872).

priateness of invoking the saving clause in the instant case is therefore questionable since this case does not turn on the form of the action or the forum. However, all three forums for the litigation of maritime rights have enforced state wrongful death and survival statutes in maritime tort actions not based on the Jones Act,[12] whether the tort was committed within the territorial limits of the state[13] or, as in this case, on the high seas,[14] either on the basis of federal adoption of state law[15] or the power of a state to create rights and liabilities in a local situation.[16] Whatever the basis for invoking state law, the particular question raised by the instant case is whether a state survival statute is enforceable in a suit under the Jones Act or whether it[17] is excluded by that Act. *Lindgren v. United States* held the Jones Act paramount to and exclusive of the operation of a state wrongful death statute, which is difficult to distinguish from a survival statute. It may be argued, however, that *Lindgren* is distinguishable from the instant case. Since the Jones Act mentions explicitly actions on behalf of a deceased plaintiff, all state statutes in conflict with its provisions must fall; but the Jones Act does not mention specifically actions against a deceased defendant, so perhaps state survival statutes remain enforceable in suits under it. Before this conclusion is accepted, the interest of the Federal Government in the uniformity of maritime law[18] must be weighed against its interest in protecting seamen and their families.[19] In maritime tort actions not brought under the Jones Act, the Supreme Court has held that enforcement of a state

12. Just v. Chambers, 312 U.S. 383 (1941); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); The Hamilton, 207 U.S. 398 (1907); The Harrisburg, 119 U.S. 199 (1886); Sherlock v. Alling, 93 U.S. 99 (1876); Steamboat Co. v. Chase, 16 Wall. 552 (U.S. 1872); Continental Casualty Co. v. The Benny Skou, 200 F.2d 246 (4th Cir. 1952); Rose v. United States, 73 F. Supp. 759 (E.D.N.Y. 1947); The City of Norwalk, 55 Fed. 98 (S.D.N.Y. 1893).

13. The Harrisburg, 119 U.S. 199 (1886).

14. The Hamilton, 207 U.S. 398 (1907).

15. Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Workman v. Mayor of New York, 179 U.S. 552 (1900); The Harrisburg, 119 U.S. 199 (1886); Rose v. United States, 73 F. Supp. 759 (E.D.N.Y. 1947).

16. Standard Dredging Corp. v. Murphy, 319 U.S. 306 (1943); Just v. Chambers, 312 U.S. 383 (1941); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); The Hamilton, 207 U.S. 398 (1907); Sherlock v. Alling, 93 U.S. 99 (1876); The Lottawanna, 21 Wall. 558 (U.S. 1874); Continental Casualty Co. v. The Benny Skou, 200 F.2d 246 (4th Cir. 1952); The City of Norwalk, 55 Fed. 98 (S.D.N.Y. 1893); *cf.* Minnesota Rate Cases, 230 U.S. 352 (1913); Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 298 (U.S. 1851).

17. 281 U.S. 38 (1930). The deceased seaman had no kin dependent upon him so as to come within the terms of the F.E.L.A.

18. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Union Fish Co. v. Erickson, 248 U.S. 308 (1919); Southern Pac. Co. v. Jensen, 244 U.S. 215 (1917); Workman v. Mayor of New York, 179 U.S. 552 (1900); Frame v. City of New York, 34 F. Supp. 194 (S.D.N.Y. 1940); *cf.* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Second Employers' Liability Cases (Mondou v. New York, N.H. & H.R.R.), 223 U.S. 1 (1912); The Lottawanna, 21 Wall. 558 (U.S. 1874). *But see* Atlee v. Packet Co., 21 Wall. 389, 396 (U.S. 1874).

19. See Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949); Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724 (1943).

wrongful death or survival statute does not abrogate the federal policy of uniformity.[20] There seems no reason for reversing this doctrine, and the interest of protecting the rights of seamen should prevail.

Assuming that the state survival statute may be applied in a maritime case under the Jones Act, would the controlling limitation on the time within which to bring the action be the eight months' period of the Florida Probate Act or the three years allowed in the Jones Act? The Supreme Court has held consistently in actions not under the Jones Act that when the state wrongful death statute gave the plaintiff the right to sue, the state limitation controlled,[21] and these cases should govern a survival action. On the other hand, perhaps those cases are distinguishable because they involved laches,[22] not a federal statute with an explicit limitation. Trying to decide this question on the basis of which act provides the "right" and which act provides the "remedy" can be unrewarding,[23] since both have been held to be "substantive rights." [24] Evaluating the practical considerations, application of the state period would achieve uniformity of limitation on all suits against decedent's estates within a particular state and encourage orderly and expeditious settlement.[25] The federal period of limitation would promote the more important objectives of national uniformity of limitation on all suits brought under the Jones Act and the protection of seamen from the possibility of being foreclosed from suit in the happen-stance of injury and hospitalization in a foreign port.[26]

Both this court and the *Nordquist* court[27] found justifications to permit an action under the Act to survive. The *Nordquist* solution seems preferable in that it avoids the problems involved in enforcing state laws in maritime cases,[28] and protects seamen and their families since recovery need not depend on whether or not a state has a survival statute.[29]

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20. See note 11 *supra.* See 29 CALIF. L. REV. 519 (1941).

21. Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); The Harrisburg, 119 U.S. 199 (1886); Continental Casualty Co. v. The Benny Skou, 200 F.2d 246 (4th Cir. 1952); Rose v. United States, 73 F. Supp. 759 (E.D.N.Y. 1947).

22. Rose v.. United States, 73 F. Supp. 759 (E.D.N.Y. 1947). Implicit in cases cited note 21 *supra.*

23. *Compare* Guaranty Trust Co. v. York, 326 U.S. 99 (1945), *with* Holmberg v. Armbrecht, 327 U.S. 392 (1946).

24. *Compare* Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949), *with* Just v. Chambers, 312 U.S. 383 (1941).

25. Brooks v. Federal Land Bank of Columbia, 106 Fla. 412, 143 So. 749 (1932).

26. For support of this conclusion see Engel v. Davenport, 271 U.S. 33 (1926).

27. See note 5 *supra.*

28. 47 COL. L. REV. 1364 (1947).

29. See Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal,* 16 TULANE L. REV. 386 (1942).

Selective Service—

DEPARTMENT OF JUSTICE FINDING ON CREDIBILITY DETERMINATIVE OF CONSCIENTIOUS OBJECTOR CLASSIFICATION

Defendant was classified I-A by his local draft board, despite his claim that he was a Jehovah's Witness.[1] His record showed that one of his parents was a Jehovah's Witness, one a Lutheran; that they were separated and he spent part of his time with each; that in 1946 he had listed his religious preference as Lutheran; that he had joined Jehovah's Witnesses three months before he registered for the draft in 1948. A hearing was held by the Department of Justice,[2] and on its recommendation the district appeal board granted defendant a conscientious objector classification, but he appealed to the national board for the additional exemption of minister.[3] The national board reclassified him I-A, and he was convicted in the district court for refusing to submit to induction.[4] On appeal the circuit court reversed, holding that the national board, acting solely on a paper record which did not contradict defendant's evidence, could not override on "suspicion and speculation" the judgment of the Department of Justice as to the credibility of the defendant. *United States v. Hagaman,* 213 F.2d 86 (3d Cir. 1954).[5]

The Supreme Court, in *Dickinson v. United States,*[6] held that a registrant whose evidence placed him prima facie within a claimed ministerial exemption, could not be given a different classification by his local board based solely on failure to believe his testimony. The stated test, not further defined,[7] was that a board needed "some affirmative evidence" to support its classification, but subsequent cases have interpreted *Dickinson* as requiring boards to build a record.[8] The instant case adds to this burden.

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1. The professed creed of Jehovah's Witnesses can sustain a claim of conscientious objection. United States v. Hartman, 209 F.2d 366 (2d Cir. 1954); Taffs v. United States, 208 F.2d 329 (8th Cir. 1953), *cert. denied,* 347 U.S. 928 (1954).

2. 62 STAT. 612 (1948), as amended, 65 STAT. 86 (1951), 50 U.S.C. § 456(j) (1952).

3. Conscientious objectors opposed to both combatant and non-combatant service are required to perform civilian work, for a prescribed period, which contributes to the maintenance of the national health, safety or interest. *Ibid.*

4. "[A]ny person who . . . evades or refuses registration or service in the armed forces . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ." 62 STAT. 622 (1948), 50 U.S.C. § 462(a) (1952).

5. The court also held that if the registrant is sincere in his belief, Jehovah's Witnesses are entitled to the exemption of conscientious objector. Instant case at 89.

6. 346 U.S. 389 (1953).

7. "The task of courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding. . . ." 346 U.S. at 396.

8. Jewell v. United States, 208 F.2d 770 (6th Cir. 1953); Pine v. United States, 212 F.2d 93 (4th Cir. 1954). This was the view which the dissenting Justices held of the majority's position. Dickinson v. United States, 346 U.S. 389, 397 (1953).

To build a record now, local boards apparently must locate witnesses who know a registrant and who will express their personal disbelief in his sincerity,[9] for it would be difficult to find extrinsic facts which would present more valid support for the opinion of the local board than those in *Hagaman.* Whether a registrant qualifies for a ministerial exemption is largely a question of fact and the *Dickinson* rule of affirmative evidence to support a board's refusal to classify IV-E is valid. But where the crucial issue is a registrant's sincerity and veracity, and outside evidence supports the inference that he is not sincere, the *Hagaman* requirement invalidates a local board's judgment as to credibility. This distinction explains an apparent contradiction between the two cases—that demeanor evidence[10] was insufficient to support the finding of the local board in *Dickinson,* but was made the controlling factor in sustaining the Department of Justice in *Hagaman.*[11]

The basic problem presented by *Hagaman* is why the Department of Justice finding on credibility should have been accepted as final by the court and that of the local board ignored with no discussion at all. This seems inconsistent with the Universal Military Training and Service Act, which provides that "[t]he appeal board shall . . . give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. . . ." [12] In *United States v. Nugent,*[13] the Supreme Court held that a fair hearing before the Department of Justice entitled a registrant to only a fair resume of any adverse evidence gathered by the FBI, on the theory that neither the Department's hearing nor investigation is the determinative factor in the classification of a registrant, that they are only auxiliary procedures.[14] Yet not only do appeal boards follow the Department's recommendation in most cases,[15] but at least one court had discarded the auxiliary rationale and held that the district appeal board's

9. After classification the registrant can appear in person before the local board if he so requests and the board in its discretion can permit any person to appear on behalf of the registrant. 32 CODE FED. REGS. §§ 1624.1-24.3 (Cum. Supp. 1954).

10. See NLRB v. Dinion Coil Co., 201 F.2d 484, 487-90 (2d Cir. 1952) (a discussion of demeanor evidence).

11. ". . . [S]uch rejection of testimony would have reflected the antithesis of the normal and proper unwillingness of a reviewing agency, which has not heard a witness, to reverse a judgment as to his credibility." Instant case at 90.

12. See note 2 *supra.*

13. 346 U.S. 1 (1953).

14. The auxiliary status of the Department of Justice hearings has also been questioned by a group of cases which sustain a registrant's right to see the full FBI report at his trial for failure to submit to induction, on the ground that he is entitled to prove whether or not he received a "fair resume." This seems inconsistent with the narrow view of the hearing taken in United States v. Nugent, 346 U.S. 1 (1953). *See* United States v. Evans, 115 F. Supp. 340 (D. Conn. 1953); United States v. Stasevic, 117 F. Supp. 371 (S.D.N.Y. 1953); United States v. Fisher, Crim. No. 6283, D.N.H., March 16, 1954; United States v. Stull, Crim. No. 5634, E.D. Va., Nov. 6, 1953.

15. Down to June 30, 1944, 11,313 cases were referred to the Department of Justice and recommendations were rendered in 8,447 of these. Available statistics on 8,126 cases show that boards of appeal followed such recommendations in 16 out of 17 cases (94.2%). SIBLEY AND JACOB, CONSCRIPTION OF CONSCIENCE 75-76 (1952).

ruling is arbitrary if the board refuses to follow the report without giving the reasons therefor.[16] The importance of the Department of Justice hearing to the registrant, and the finality accorded its decisions by the appeal boards and courts, in spite of the statute, can be justified on the pragmatic ground that a more accurate classification will result.[17] First, prejudice against conscientious objectors, which often may bias local boards, is less likely to influence hearing officers. Also the investigation by the FBI is far more detailed and complete than any a local board could make, thus making the hearings more thorough. In addition, the hearings are conducted on a more formal level and the registrant is entitled to the services of a lawyer.

The close supervision which courts now give conscientious objector claims probably stems from the limited peacetime draft. One danger of circumvention of local boards, as in *Hagaman,* is that the law formulated during limited conscription may prove unworkable in the event of total mobilization, and result in a burden upon the courts and the Department of Justice. However, the actual number of conscientious objector claims does not seem to support this view.[18] The tendency of local boards to shift the burden of classification to the Department of Justice was existent before the courts ever entered the field.[19] The argument that the present procedure gives conscientious objectors more favorable treatment than other registrants is met by the point that the basic decision to recognize a man's conscience has been made, and to carry out this difficult task, special procedures are needed. If Congress reconsiders the problem posed by *Hagaman* and *Nugent* and attempts to bring the Act and its practical interpretation into harmony,[20] it should clarify the scope and status of the Department of Justice hearing. If this is to be the determinative hearing, as seems desirable, the registrant should be allowed to see the full FBI report, not just a summary, and there should be a limited scope of review by appeal boards and courts.

Later figures, down to June 30, 1946, indicate that boards of appeal followed the recommendations of the Department of Justice as to category I-A-O and IV-E in 79.5% of the cases recommended. SELECTIVE SERVICE SPECIAL MONOGRAPH No. 11, CONSCIENTIOUS OBJECTION 147 (Vol. 1 1950).

16. United States v. Lynch, 115 F. Supp. 735 (S.D. Cal. 1953). See Pine v. United States, 212 F.2d 93 (4th Cir. 1954).

17. "Great weight must be given to the F. B. I. investigation, as there is no reason to assume that its report is anything but factual and entirely unbiased and unprejudiced." United States v. Lynch, 115 F. Supp. 735, 738 (S.D. Cal. 1953).

18. For the years 1948 through August, 1954, the Department of Justice has made recommendations to the appeal boards in 5897 cases. Letter from T. Oscar Smith, Esq., Special Assistant to the Attorney General, dated September 28, 1954, on file in Biddle Law Library, University of Pennsylvania Law School.

19. SIBLEY AND JACOB, CONSCRIPTION OF CONSCIENCE 60 (1952). Lending support to this theory is the fact that out of 8,126 cases the local boards denied objector's claims in 6,228 instances (76.4%) while the Department recommended denial in only 2,997 instances (36.7%) and the board of appeals denied the claims in 3,222 instances (39.4%). *Id.* at 75-76.

20. But see Russell, *Development of Conscientious Objector Recognition in the United States,* 20 GEO. WASH. L. REV. 409, 446 (1952), where the author states that the present legislation as to conscientious objectors appears to be closest to a fair and equitable solution.