

# YALE LAW JOURNAL

---

Vol. XXXI

DECEMBER, 1921

No. 2

---

## DEATH ACTIONS IN ADMIRALTY

ROBERT M. HUGHES  
Virginia Bar

[The following is the recent federal statute on the subject:

**An Act Relating to the maintenance of actions for death on the high seas and other navigable waters.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

SEC. 2. That the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

SEC. 3. That such suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

SEC. 4. That whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

SEC. 5. That if a person die as the result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section 2.

SEC. 6. That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

SEC. 7. That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

SEC. 8. That this Act shall not affect any pending suit, action, or proceeding.

Approved, March 30, 1920.

(Public Acts, No. 165-66th Congress, S. 2085)].

As the writer has been in touch with the efforts to secure this legislation from their inception, having been a member of committees both of the Maritime Law Association and of the American Bar Association, he has had exceptional advantages for knowing the lines along which this statute has been evolved. In fact, in its final form much of it was drawn by him.

Prior to 1886 there was much conflict of decision on the question whether, in the absence of any statute, there was a right of action in the admiralty for damages resulting in death. In the view of some judges, the doctrine that such a cause dies with the person was treated as limited to the common law, and the attempt was made to work out a right of action for the admiralty court from the civil law and from principles of natural justice. But in 1886 the Supreme Court decided in *The Harrisburg*<sup>1</sup> that there was no difference between the common-law and civil-law doctrines on the subject, and that there was no such right of action in the admiralty in the absence of statute.

This left open the question whether such a right of action could be created by statute. As far back as 1872, in *American S. B. Co. v. Chase*,<sup>2</sup> the power of a state to give such a right of action on the common-law side in cases arising within its own boundaries, though on navigable waters included therein, was recognized, and, in *Sherlock v. Alling*,<sup>3</sup> decided in 1876, this right was upheld as to causes of action arising on navigable waters within the boundaries of a state, though the vessels affected were engaged in interstate commerce. It was added, however, that this was true only as long as Congress forbore to act.

But the Supreme Court has never held directly and unequivocally that a state statute can give such a right enforceable in an admiralty court, though it has recognized such rights in limited liability proceedings and in at least one dictum.<sup>4</sup> On the other hand, the inferior federal courts have enforced such rights of action under state statutes, and have held that they had jurisdiction on the admiralty side, on the theory that such causes of action are torts maritime by nature when occurring on navigable waters, and therefore within the jurisdiction of

<sup>1</sup> (1886) 119 U. S. 199, 7 Sup. Ct. 140.

<sup>2</sup> (1872, U. S.) 16 Wall. 522.

<sup>3</sup> (1876) 93 U. S. 99.

<sup>4</sup> *Butler v. S. S. Co.* (1889) 130 U. S. 527, 9 Sup. Ct. 612; *The Corsair* (1892) 145 U. S. 335, 12 Sup. Ct. 949; *The Hamilton* (1907) 207 U. S. 698, 28 Sup. Ct. 133.

an admiralty court regardless of their source. This left the jurisdiction in such cases dependent on local statutes necessarily limited in their operation, so that for cases arising outside of the jurisdiction of a state there was no remedy.

In 1899 the Maritime Law Association was organized, and was composed of specialists in admiralty law and experts in average adjustment and marine insurance. One of its earliest activities was the appointment of a committee to draft and recommend to the Association a congressional statute giving a right of action in the admiralty for such cases. In 1900 Congressman Boutell of Illinois introduced a bill designed to accomplish the purpose, but it was imperfect in many particulars, and was afterwards withdrawn. From that time until November, 1903, committees of the Maritime Law Association devoted much time and thought to the preparation of a satisfactory bill. There was no difference of opinion as to the need of legislation, but there were many puzzling questions as to the waters and vessels to which such a bill should be made applicable. The main issue was, whether to make such an act apply to all navigable waters, and thus supersede state statutes within their respective boundaries, or to make it supplementary to state statutes and apply only on waters not covered by any statute. Those advocating a statute applying to all navigable waters urged the advantage of uniformity, and the endless diversity of the state statutes. Those advocating an act covering only waters not included within the range of the state statutes pointed out the unfavorable public sentiment that might be engendered by having two different statutes covering the same subject and operating in neighboring fields between which it is often difficult to locate a boundary. After much deliberation, the uniformity view prevailed, and at the November, 1903, meeting of the Association a draft of an act was agreed upon and recommended for passage. It was offered in Congress, but no action upon it could be secured.

At the November, 1908, meeting of the Association this same draft of the bill was again indorsed, and the committee directed to renew their efforts to secure its passage. It was reintroduced in the House by Mr. Parker, and in the Senate by Senator Lodge.<sup>5</sup> Hearings were had before the Senate and House committees on February 10th and March 31st, 1910, at which representatives of the Association presented their views. No action however was taken by Congress, mainly on account of press of other business.

The Titanic disaster in April, 1912, focused the attention of the public on the need of some legislation, so that at the meeting of the Association on May 3, 1912, it was decided to make renewed efforts for such legislation; and the draft of the Act was revised to meet objec-

---

<sup>5</sup> H. R. 15810, Senate Bill, 6291, 61st Congress.

tions that had been urged against it. It was offered in the House by Mr. Peters, and in the Senate by Senator Brandegee.<sup>6</sup> On the failure of that Congress to act, the bill, in substantially the same form, was introduced in the House by Mr. Peters.<sup>7</sup>

Meanwhile the American Bar Association had lent its powerful support to the measure and appointed a committee whose chairman, Mr. George Whitelock, interested himself with his accustomed energy. This bill passed the House on January 6, 1915, but unfortunately amendments were added on the floor which made it susceptible to the construction that a recovery could be had both under state and federal statutes for the same accident, and which also attached to it an amendment as to limited liability apparently affecting the then pending Titanic litigation.

Up to this point all drafts of bills had proceeded on the theory of having a uniform law for all navigable waters of the United States, whether within the boundaries of a state or not. The discussions on the bill had shown that this provoked opposition, as local practitioners were satisfied with their own local statutes, and did not want them superseded. Hence, at the May, 1915, meeting of the Maritime Law Association, it was decided to take the other course and draft a bill intended to be supplementary to the local statutes and applicable to waters which they did not reach. The result was the bill offered in the House by Governor Montague of Virginia, and in the Senate by Senator Lodge.<sup>8</sup> This bill finally passed and was approved March 30, 1920, the only material change being the addition of section 4.

This section was apparently added for the purpose of giving our courts the power to enforce such a right of action arising under a foreign law against a foreign vessel. The addition was superfluous, for it is an elementary doctrine of marine law that an admiralty claim against a ship can be enforced against her wherever she may be found.

"It has force everywhere, and follows a ship around the globe with lengthening chain into every port known to commerce which she may enter."<sup>9</sup>

In *The Bourgogne*,<sup>10</sup> our courts recognized and enforced a death claim arising under a French law against a French vessel.

A review of the Act first involves consideration of the waters on which it was intended to operate. The above account of its evolution, coupled with the language of the first and seventh sections, shows that it was specially guarded in terms, so as to leave state statutes unaffected

<sup>6</sup> H. R. 24764, Senate Bill, 6930, 62d Congress.

<sup>7</sup> H. R. 6143, 63d Congress.

<sup>8</sup> H. R. 9919, Senate Bill, 4288, 64th Congress.

<sup>9</sup> *The Sydney L. Wright* (1883, E. D. Va.) 5 Hughes, 474.

<sup>10</sup> (1908) 210 U. S. 95, 28 Sup. Ct. 664.

by it. Hence it covers only waters a marine league from the shore of a state, or waters within regions where the federal government has exclusive jurisdiction.

This principle involved the exclusion of the Great Lakes. The boundary between this country and Canada is the middle of the Lakes, so that waters on our side of that line are necessarily within the jurisdiction of some state, and waters on the other side are necessarily within the jurisdiction of Canada.

The Association draft included the waters of the Panama Canal Zone. But on February 26, 1916, the acting Secretary of War wrote to the Speaker of the House inclosing a letter from the acting Governor of the Canal which asked that the canal be exempted, saying:

"The present laws of the Canal Zone extend over the navigable waters of the zone as well as over the land. If this bill were made extensive to the navigable waters of the Panama Canal, it would result in the application of different principles of substantive law for cases arising on board of ships in the navigable waters of the zone from those applying to cases arising on land in the Canal Zone."

Accordingly the clause was added to the seventh section which excluded the waters of the Canal Zone.

If the Governor meant by the above quotation that such a right of action already existed in the Zone, he assumed what is not free from doubt.<sup>11</sup>

It is next important to consider whether the Act is a survival act or a death act. Statutes on the subject usually follow one of two theories. Some give a right of action to the injured party himself, and make that cause of action survive. The Massachusetts<sup>12</sup> and Louisiana<sup>13</sup> Acts are good examples of this class, and they are termed "survival acts."

Others give an entirely new right of action to the relatives or other parties injured by the death on account of their loss from the death, and not on account of any right of action in the deceased himself made to survive for their benefit. Lord Campbell's Act<sup>14</sup> in England and the Virginia Statute<sup>15</sup> are examples of this latter class. The Federal Employer's Liability Act,<sup>16</sup> prior to the amendment of April 5, 1910, was also an example of this latter class. By that amendment this Act was made a hybrid act giving a right of action to the deceased which was made to survive, and also a right of action to certain relatives.<sup>17</sup>

<sup>11</sup> *Lebert v. Pacific Mail S. S. Co.* (1918, C. C. A. 5th) 249 Fed. 349.

<sup>12</sup> Tiffany, *Death by Wrongful Act* (2d ed. 1913) 515, quoting Rev. Laws, 1902, ch. 171.

<sup>13</sup> Rev. Civ. Code, 1909, sec. 2315.

<sup>14</sup> (1846) 9 & 10 Vict. c. 93.

<sup>15</sup> Va. Code, 1919, ch. 236, sec. 5786.

<sup>16</sup> Act of June 11, 1906 (34 Stat. at L. 232).

<sup>17</sup> (1915) 237 U. S. 648, 35 Sup. Ct. 704.

The difference between the two classes is well explained by Mr. Justice Lurton in *Michigan Central Ry. v. Vreeland*.<sup>18</sup>

The rationale of these decisions makes the act a death act, not a survival act.

This distinction is important in passing upon cases which overlap the border line. Suppose that a party is fatally injured while on the high seas, but dies after reaching state waters. The Statute makes the place of the wrongful act the test, and would, therefore, govern if the death occurred on navigable waters, though within the marine league. Different and more difficult questions arise if the injury was on the high seas but the death occurred ashore. It is a settled doctrine that a cause of action in tort is entirely without the jurisdiction of the admiralty if it was consummate on land, though it originated on navigable waters. The grant of admiralty jurisdiction is by the Constitution. Congress can regulate admiralty matters if they are admiralty matters; but it can not make a matter marine if not so by nature, and hence can not give a remedy in admiralty for a matter which is not marine by nature. True, it may make many regulations under the commerce clause, but even that clause does not confer the right to give an admiralty remedy for a cause of action not marine by nature. As far back as 1851, in *The Genesee Chief*,<sup>19</sup> the court said:

"Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. . . . The judicial power in cases of admiralty and maritime jurisdiction has never been supposed to extend to contracts made on land and to be executed on land. But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits may be created on water under that authority, the same reason would justify the same exercise of power on land."

Under a death act the cause of action is to the survivors, and is not consummate till death. Hence, if the death was ashore, it was not within the admiralty jurisdiction, and neither the state nor Congress can make it so. Therefore, such a case would be governed by the state statute on the common-law side.

The state statute should also govern as to injuries received within the marine league, though death should occur beyond it; for the Act in terms applies only beyond the league, and remedies under state statutes are expressly reserved by the seventh section.

We must next determine the vessels to which the Act applies. Here the most puzzling problems connected with the subject are destined to arise. We will omit any discussion of its bearing upon the territories or dependencies as of comparatively lesser importance, and confine it to

<sup>18</sup> (1913) 227 U. S. 59, 33 Sup. Ct. 192.

<sup>19</sup> (1851, U. S.) 12 How. 443, 452-3.

causes of action arising upon the high seas. And we shall reserve the question of the rights of seamen against their own vessel for separate discussion.

Take the case of a collision between an American and a foreign ship, in which both ships are at fault, and on both of which deaths are the result. As to those on the American ship, the right of action is clear against their own ship. Before there was any congressional statute, it had been held that a state could follow its citizens and property upon the high seas and subject them to its laws on the subject.<sup>20</sup> Is it not equally clear that the Act gives a right of action against the American ship to the representatives of those killed on the foreign ship? The right of Congress so to legislate as to a ship under its own flag can not be questioned. The sole question, then, is one of construction.

The prototype of all these statutes is Lord Campbell's Act,<sup>21</sup> or, as the English call it, the "Fatal Accidents Act." In *Davidsson v. Hill*<sup>22</sup> a collision occurred on the high seas between an English and a Norwegian vessel, in which the Englishman was solely in fault, and one of the crew of the Norwegian ship was drowned. The discussion was, whether the English Act was intended to apply to foreigners as against an English ship-owner. Separate opinions were rendered by Sir William Kennedy and Sir Walter Phillimore, holding that the Act must have been so intended.

State courts, in the vast majority of instances, have construed their statutes in the same way.<sup>23</sup> As our Act follows Lord Campbell's Act substantially, it is practically certain that it will receive a like construction.

Now, in the case supposed, what are the rights of the Americans against the foreign ship? In the writer's opinion, their rights depend on the law of the flag of the foreign ship, under the principle of *Davidsson v. Hill, supra*. An act of Congress can hardly be held to affect the conduct of foreign ships on the high seas. In *The Sagamore*,<sup>24</sup> in which there was a collision between a British steamer and a Massachusetts ship on the high seas, resulting in the death of some of the crew on the Massachusetts ship, and in which the Britisher was at fault, it was attempted to hold the Britisher under the Massachusetts act, on the theory that, when the Massachusetts ship was struck, a tort was committed on Massachusetts soil. This contention was negatived, the court saying:<sup>25</sup>

"While the statute offers a liability of Massachusetts owners to those injured, it does not follow that it may impose a liability upon citizens of another state who are without its territorial jurisdiction. Its authority

---

<sup>20</sup> *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133.

<sup>21</sup> See note 14 *supra*.

<sup>22</sup> [1901] 2 K. B. 606.

<sup>23</sup> Tiffany, *Death by Wrongful Act* (2d ed. 1913) sec. 86.

<sup>24</sup> (1917, C. C. A. 1st) 247 Fed. 743. See also *The Hamilton, supra* note 20.

<sup>25</sup> *The Sagamore, supra*, at page 757.

over its own ships and citizens does not extend to the ships and citizens of another nation."

Congress evidently realized this, for the fourth section, while superfluous, recognized that such cases would be governed by the foreign flag.

The doctrine of *The Scotland*<sup>26</sup> is not in conflict with this view. That and similar cases merely hold that, when a foreigner voluntarily resorts to our courts to claim the benefit of the protection accorded by our law, he is subject to the terms of that law. Hence our limited liability act was applied to a foreigner who filed a petition for a limitation of liability. The additional ground was assigned that the law of limited liability is a part of the general maritime law which any maritime nation may adopt in whole or in part as it sees fit.

This reasoning can not apply to the case of a foreigner brought into our courts *in invitum*, nor can the death statutes be considered a part of the general maritime law.

How about a collision between two foreigners on the high seas, resulting in death due to negligence? Though suit were brought in one of our courts, our act could not apply, but the law of the respective flags would govern the liability of each ship. *The Bourgogne*<sup>27</sup> is an interesting application of this. There our court applied the international rules of navigation as construed by it (for collision has often been held to be *communis juris* and a part of general maritime law), but it applied the law of the ship's flag in passing upon the right to recover damages for the death.

It remains to define the rights of action growing out of the death of a seaman on navigable waters.

Where more than one ship is involved, the right of a seaman's representatives against the other ship is the same as that of any one else, so no time need be wasted on that phase of it.<sup>28</sup>

Passing then to the seaman's own ship, it will be simpler to discuss the situation prior to June 5, 1920, as applicable to American privately-owned ships. And, under this subdivision, let us first consider the situation inside the marine league, which is expressly excluded from the range of the Congressional Act.

Before any statutes on the subject, the right of a seaman against his own ship, independent of any injury growing out of unseaworthiness, was simply for maintenance and cure, and did not extend beyond his life. And this was a right not affected by any question of negligence. Hence there was no remedy within the marine league unless a state statute could and did confer it. Until 1917 it was supposed that, in the absence of congressional legislation, state statutes could create such a

<sup>26</sup> (1881) 105 U. S. 24.

<sup>27</sup> (1908) 210 U. S. 95, 28 Sup. Ct. 664.

<sup>28</sup> *The Hamilton*, *supra* note 20.



right in cases arising within their jurisdiction, and that a right so arising, being marine by nature, could be enforced in an admiralty court. But in 1917 *Southern Pacific Co. v. Jensen*<sup>29</sup> was decided. It went up on writ of error to review the action of the New York Court of Appeals sustaining an allowance under the New York Workmen's Compensation Act to the representatives of a longshoreman killed while at work on a ship on navigable waters. The Court held that such work was maritime in its nature and beyond the reach of state legislation, saying<sup>30</sup>:

"And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

A year later *Chelentis v. Luckenbach S. S. Co.*<sup>31</sup> was decided. It was a common-law suit for personal injuries received by a seaman at sea. The court held that, even in a state common-law court, the maintenance and cure doctrine of the admiralty governed the seaman's measure of recovery, that a state statute could not modify it, and that the saving of a common-law remedy by the Judiciary Act<sup>32</sup> did not enlarge the scope of such a statute.

Hence, although the right of a state to legislate in ordinary death cases was recognized, it is a necessary logical deduction from these cases that such power does not exist in the exceptional case of seamen, and that the ancient admiralty doctrine applicable to them is beyond the reach of state legislation.

Nor is this conclusion shaken by the provision in the seventh section of the Congressional Act, that "the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this Act." That is a mere saving clause, and does not give the statutes any effect that they did not have regardless of it. In *Knickerbocker Ice Co. v. Stewart*<sup>33</sup> the court passed upon the Congressional Act of October 6, 1917,<sup>34</sup> which was intended to amend the Judicial Code "so as to save to claimants the rights and remedies under the workmen's compensation laws of any state." The court said<sup>35</sup>:

"The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the Legislature of an erroneous opinion concerning the law does not alter it."

<sup>29</sup> (1917) 244 U. S. 205, 37 Sup. Ct. 524.

<sup>30</sup> *Ibid.* at p. 216, 37 Sup. Ct. at p. 529.

<sup>31</sup> (1918) 247 U. S. 372, 38 Sup. Ct. 501.

<sup>32</sup> Act of Sept. 24, 1789 (1 Stat. at L. 73, 76).

<sup>33</sup> (1920) 253 U. S. 149, 40 Sup. Ct. 438.

<sup>34</sup> Act of Oct. 6, 1917 (40 Stat. at L. 395).

<sup>35</sup> *Knickerbocker Ice Co. v. Stewart*, *supra* note 33, at p. 162, 40 Sup. Ct. at p.

It was also decided that, while Congress could modify the maritime law, it could not delegate the power to state legislatures. The case was that of a bargeman killed on navigable waters within the State of New York.

And so it follows that, as to a seaman, there was, before June 5, 1920, no right of action for a death within the marine league. This was the result of the unwillingness to pass an act applicable to all navigable waters, instead of an act applicable only beyond the marine league.

Next, as to deaths beyond the marine league in the case of seamen, the very decisions reviewed above concede the right of Congressional legislation. The act in its terms is broad enough to include seamen, and it would give a right of action in such cases.

Now as to the situation subsequent to June 5, 1920. On that day the Merchant Marine Act<sup>36</sup> took effect, the 33d section whereof provided:

"That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'Sec. 20. That 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 case 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.'

This act applies to all navigable waters. As it adopts the theory of the Federal Employer's Liability Act, the presumption is that it will follow the construction put upon that Act. And the Supreme Court has repeatedly held that that Act supersedes state statutes.<sup>37</sup>

Hence it results that, as to rights of action arising out of the death of seamen though in state waters, the above-quoted section of the Merchant Marine Act controls, and displaces state statutes.

In the writer's opinion, it also displaces the Act of March 30, 1920, now under discussion, in so far as rights of action for the death of seamen are concerned. It is a later act applicable to a special class, and to that extent modifies the earlier act of general application.

Assuming the correctness of this view, what rights does this later act confer?

The natural construction of the act is that, in suits by the seaman himself for personal injuries, he has an election to sue in the admiralty

<sup>36</sup> Act of June 5, 1920, Public Acts, No. 241-66th Cong. H. R. 9392.

<sup>37</sup> *Mich. Cent. Ry. v. Vreeland* (1913) 227 U. S. 59, 33 Sup. Ct. 192.

for the damages which he could have recovered in that forum, or to bring a common-law action for such damages as he could recover under the principles of the Employer's Liability Act. There was a reason for an election in this case, for it preserved to the seaman his rights under the maintenance and cure doctrine even in those cases where he was negligent and the ship-owner was not.

On the other hand, the last half of the section relating to death actions does not give an election; for there was no remedy in admiralty to preserve under the maintenance and cure doctrine. And we can hardly attribute to Congress an intent to preserve a concurrent remedy under the Death Statute without more specific language. If it did so intend, we have the anomaly of this section of the Merchant Marine Act applying different rules within the marine league and without it, and the further anomaly of allowing two different suits in different courts with different methods of recovery for the same tort. This is manifest by a comparison of section one of the Employer's Liability Act with the corresponding section of the death act. In the former the consort and children are the sole beneficiaries in the first instance. The parents can recover only when there are no such prior beneficiaries, and the dependent next of kin can only recover in the absence of both prior classes. But in the death statute of March 30, 1920, they are all named along together, and the recovery is apportioned according to the loss they have severally suffered.

Hence there was a good reason for refusing an election in this case, for Congress can not be supposed to have been guilty of the injustice of allowing a recovery in favor of the surviving consort or child in a common-law action under the amended section 33 of the Merchant Marine Act, and also a recovery in admiralty in favor of some dependent relative under the Death Statute of March 30, 1920. As the beneficiaries under the two statutes are different, there would be no way of enforcing an election between them. The two statutes can not be made to dove-tail in this special case, and the later, applying to the special case, must replace the other. Two bodies can not occupy the same space at the same time. And so we are driven to the conclusion that the only remedy in case of the death of a seaman on navigable waters is a common-law action in the court of the district in which the defendant employer resides, or in which his principal office is located.

So far the discussion as to the rights springing from the death of a seaman on navigable waters has had in view simply the rights of seamen or their representatives on vessels of private American owners. But there is one other class of unfortunates who deserve passing though regretful mention. They are seamen of American vessels operated for business purposes by the American Government. We must not forget the United States Shipping Board of happy memory.

Everybody knows that the Government can not be sued except by its

consent, and subject to the conditions under which that consent is given. The only act purporting to give consent as to such vessels is the Act of March 9, 1920.<sup>38</sup> Its second section gives the right to sue the United States only "in cases where if such vessel were privately owned or operated, . . . a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for." But we have already seen that the only remedy in case of a seaman's death is a common-law suit against the private owner, assimilated to the Employer's Liability Act. Hence this remedy is not within the language of the Act of March 9, 1920.

On the other hand it is clear that the above quoted 33d section of the Merchant Marine Act does not *proprio vigore* give any remedy against government-owned ships; for the Government can not be said to reside anywhere, or to have a principal office located anywhere.

And so the Shipping Board seems entitled to kill its seamen with impunity.

And, finally, as to foreign seamen. On the high seas as against their own ships, the right of action for a death is governed by the law of the ship's flag, which will be given effect, not only under the general practice of the admiralty, but under the express provisions of section 4 of our act. On the high seas, as against an American vessel colliding with their vessel and causing death, the right would be given under our death statute of March 30, 1920, under the doctrine of *Davidsson v. Hill*.<sup>39</sup> In American waters within the marine league, the right of action would be regulated by the local state statute, for the 33d section of the Merchant Marine Act can not be construed to apply to seamen on foreign ships; and therefore the state statutes remain in force.

Attention should be given to the difference between the Death Act of March 30, 1920, and most similar acts in the provision as to the limitation. The third section makes the time run from the date of the wrongful act, while it is usually made to run from the death. The fifth section allows the revival of an action for the personal injury if death as the result of such injury ensued during the pendency of such suit; and so the method adopted makes the limitation in personal injury and death suits run in the same way, and enables a badly injured person to preserve his rights by suit during his life. Besides, it is a fairer provision. The date of the wrongful act is within the equal knowledge of both parties; while the date of the death may not be. The cause of death may be obscure, and put the opposite party, after the lapse of years and consequent loss of testimony, at the mercy of hired experts. From every view-point the rule of the new act is the most equitable.

---

<sup>38</sup> Public Acts, No. 156-66th Cong. S. 3076, or see Hughes, *Admiralty* (2d ed., 1920) Appx. 506.

<sup>39</sup> [1901] 2 K. B. 606.