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upon each default for the appropriate remedy. The new involuntary wage assignment acts "provide a hopeful road to [the] prevention of large arrearages, that extra load on court docket, and the thankless and usually unprofitable time consuming collection task for the lawyers."[53] Public welfare laws, although being damned currently by some, are not going to be repealed by any progressive legislature; however, they should not enable an individual by merely refusing to comply with a support order to shift his burden, however temporary, upon the public. Wage assignment laws prevent dependents, because of financial necessity, from having to resort to public welfare because of inadequate means to enforce current payments, which is inherent in the time consuming and expensive procedures ordinarily available to these persons. Through procedures facilitating wage deductions of the current obligations, the legislature is placing the primary obligation of support upon the *proper* individual.

ROGER A. OLSON

CONCURRENT JURISDICTION IN MARITIME DEATH—FAITH IN A SEA FABLE?

The Federal Death on the High Seas Act[1] gives a right of action for wrongful death where the locus delicti is the high seas. In the very language of the Act authorizing this action, there seems to be a clear provision stated as to the forum in which the action must be brought. Section One of the Act provides:

> 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.[2] (Emphasis added.)

Upon reading this section, it would come as no surprise to learn that the majority of courts have understood the Act to limit the forum in which the death action can be brought to the admiralty side of the federal district courts.[3] However, the New York Court of Appeals in the recent case of

53. Berns, supra note 40 at 917.

1. 46 U.S.C. §§ 761-767 (1958).
2. 46 U.S.C. § 761 (1958).
3. National Airlines v. Stiles, 268 F.2d 400 (5th Cir. 1959), cert. denied, 361 U.S. 885 (1959); Noel v. Linea Aeropostal Venezola, 247 F.2d 677 (2d Cir. 1957), cert. denied, 355 U.S. 907 (1957); Turner v .Wilson Line of Mass., 242 F.2d 414 (1st Cir. 1957); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955), cert. denied, 352 U.S. 802 (1956); The Silverpalm, 79 F.2d 598 (9th Cir. 1935); The Vestris, 53 F.2d 847 (2d Cir. 1931); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); Iafrate v. Compagnie

Ledet v. United Aircraft Corp. held that the death action created by the Act is equally maintainable in the common law courts of the states.[4] The court handed down their decision in an inconspicuous per curiam opinion. Chief Judge Desmond, alone, was alert to dissent.

The court's frugal argumentation stresses only two factors of statutory construction in attempting to get at legislative intent upon the question of forum. Even these are abruptly handled. The court in making their first argument consults the language of the Act but only Section Seven.[5] When properly construed, the court reasons, Section Seven must be taken to preserve to the state common law courts the power to hear actions (remedial jurisdiction) brought pursuant to the Act. Next, the court proceeds upon the basis of tradition. There has been a broad and pervasive tradition according to which the state common law courts have shared with the federal admiralty courts power to hear actions grounded upon the federal maritime law. Legislative intent in the Death on the High Seas Act must be viewed against this background of concurrent jurisdiction. The court discerns and applies this tradition in these words:

> The time-honored practice of concurrent jurisdiction allowed under the Judiciary Act of 1789 and perpetuated in the Federal Employers' Liability Act . . . and the Jones Act . . . should be applied, it would seem, unless the intention of Congress is clearly to the contrary.[6]

Of these two points only the second can be considered consequential at this stage in the debate over the question of forum raised in the Death on the High Seas Act. It is the sum of the living parts found to support state remedial jurisdiction in prior cases. In rudimentary form this is the argument upon which the prevailing New York cases, which held for state remedial

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Générale Transatlantique, 106 F. Supp. 619 (S.D.N.Y. 1952); Eagan v. Donaldson Atlantic Line, 37 F. Supp. 909 (S.D.N.Y. 1941); Echavarria v. Atlantic & Carribean Steam Nav. Co., 10 F. Supp. 677 (E.D.N.Y. 1935); Birks v. United Fruit Co., 48 F.2d 656 (S.D.N.Y. 1930); Dall v. Cosulich, 1936 Am. Mar. Cas. 359 (S.D.N.Y. 1936); In re Rademaker's Estate, 166 Misc. 201, 2 N.Y.S.2d 309 (Surr. Ct. 1938).

See also Morgan v. United States, 102 F. Supp. 275 (D. Conn. 1951); Lacey v. L. W. Wiggens Airways, Inc., 95 F. Supp. 916 (D. Mass. 1951); In re Nelson, 168 Misc. 161, 5 N.Y.S.2d 398 (Surr. Ct. 1938); Gilmore & Black, The Law of Admiralty 304 (1957); Comment, 41 Cornell L. Q. 243 (1956); Annot., 66 A.L.R.2d 997 (1959).

Contra, Sierra v. Pan American World Airways, 107 F. Supp. 519 (D.P.R. 1952); Batkiewics v. Seas Shipping, Co., 53 F. Supp. 802 (S.D.N.Y. 1943); Choy v. Pan American Airways, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941); Powers v. Cunard S. S. Co., 32 F.2d 720 (S.D.N.Y. 1925); Wyman v. Pan American Airways, 1941 Am. Mar. Cas. 912 (Sup. Ct. 1941), aff'd, 262 App. Div. 995, 30 N.Y.S.2d 816 (1st Dep't 1941); Elliott v. Steinfeldt, 254 App. Div. 739, 4 N.Y.S.2d 9 (2d Dep't 1938).

See also The Saturnia, 1936 Am. Mar. Cas. 469 (S.D.N.Y. 1936); Bugden v. Trawler Cambridge, Inc., 319 Mass. 315, 65 N.E.2d 535 (1946); Robinson, Admiralty § 143 (1939); Thompson, "Jurisdiction of Death in the Air," 1944 Ins. L. J. 654 (1944).

4. 10 N.Y.2d 258, 219 N.Y.S.2d 245 (1961).

5. 46 U.S.C. § 767:
"The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."

6. Supra note 4 at 259, 219 N.Y.S.2d at 247.

jurisdiction, turned.[7] In so far as this tradition appears to be continued by the Jones Act, which grants a right of action for the wrongful death of seamen maintainable in the state courts, it has been found persuasive.[8] Moreover, this tradition as kept safe by the Judiciary Act of 1789 is thought by some cases to be mirrored in the very words of Section Seven of the Act.[9] On the other hand the language of Section Seven not vitalized by this tradition has failed to weather the assault of the modern federal cases, which advocate the mandatory admiralty forum.[10] The harborage of this tradition, then, must be considered the "last refuge" of state remedial jurisdiction under the Death on the High Seas Act. As such it deserves the bulk of attention in any present examination of the question of forum. In weighing the determinative worth of this tradition of concurrent remedial jurisdiction, it is necessary to test it as it is borne out in its parts: state remedial jurisdiction as it obtained in the historical development of maritime death actions, as it was come by in the Jones Act, and to the extent it can rely on its protector, the Judiciary Act. Afterwards, the modern federal cases and their use of the language, legislative history, and terms of the Act may be briefly inspected.

To set the discussion, it might be well to summarily mark off the commonly accepted lines of admiralty jurisdiction, both remedial and substantive. It is well established that in rem claims, which involve a direct proceeding against a vessel, can be heard only by the federal admiralty courts.[11] The ordinary in personam claim grounded upon the general maritime law can be brought in the common law courts.[12] This is accomplished by the "saving clause" of the Judiciary Act,[13] which will be discussed hereafter. In personam claims based upon the enacted federal maritime law can or cannot be brought in the common law courts depending upon the will of Congress.[14] While

7. Wyman v. Pan American Airways, 1941 Am. Mar. Cas. 912 (Sup. Ct. 1941), aff'd, 262 App. Div. 995, 30 N.Y.S.2d 420 (1st Dep't 1941); Kristansen v. Steinfeldt, 255 App. Div. 824, 9 N.Y.S.2d 790 (2d Dep't 1939), no opinion; Colbert v. Steinfeldt, 255 App. Div. 790, 7 N.Y.S.2d 56 (2d Dep't 1938), no opinion; Murphy v. Steinfeldt, 254 App. Div. 741, 4 N.Y.S.2d 10 (2d Dep't 1938), no opinion; Elliott v. Steinfeldt, 254 App. Div. 739, 4 N.Y.S.2d 9 (2d Dep't 1938), no opinion.

8. Choy v. Pan American Airways, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941) (Judge Clancey relied heavily on an analogy to the Jones Act in holding for state remedial jurisdiction).

9. Sierra v. Pan American World Airways, 107 F. Supp. 519 (D.P.R. 1952). See also Bugden v. Trawler Cambridge, Inc., 319 Mass. 315, 65 N.E.2d 535 (1946).

10. National Airlines v. Stiles, 268 F.2d 400 (5th Cir. 1959), cert. denied, 361 U.S. 885 (1959); Noel v. Linea Aeropostal Venezola, 247 F.2d 677 (2d Cir. 1957), cert. denied, 355 U.S. 907 (1957); Turner v. Wilson Line of Mass., 242 F.2d 414 (1st Cir. 1957); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954) (this case probably represents the line of demarcation for the modern federal cases, since it exhaustively examined the problem and was possibly the first to make use of the internal legislative history of the Act).

11. Pope & Talbot v. Hawn, 346 U.S. 406 (1953); The Hine v. Trevor, 71 U.S. 555 (1867); The Moses Taylor, 71 U.S. 411 (1867).

12. Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303 (1915); Leon v. Galceran, 78 U.S. 185 (1871).

13. Ibid. See also the discussion in Gilmore & Black, The Law of Admiralty 33 (1957).

14. See, e.g., Noel v. Linea Aeropostal Venezola, 247 F.2d 677 (2d Cir. 1957); Higa v.

state remedial jurisdiction is extensive, state substantive jurisdiction, the creating, as opposed to the enforcing of rights, is severely restricted. "No such legislation is valid if it contravenes the essential purpose of an act of Congress or works material prejudice to the characteristic features of the general maritime law . . . ," thus expresses the formula laid down by the United States Supreme Court in the case of *Southern Pacific Co. v. Jensen.*[15]

In an examination of the tradition of concurrent remedial jurisdiction, the extent to which that tradition is verified by the history of maritime death actions is significantly relevant. This is the particular area in which such jurisdiction is claimed by virtue of the past; we should determine if in the past state courts have exercised jurisdiction in entertaining actions for maritime wrongful death. It was stated in the leading New York case of *Elliott v. Steinfeldt* that the state courts had "long enjoyed" jurisdiction in hearing such actions.[16] Looking backwards, it will be remembered that the common law[17] and, like the common law, the general maritime law[18] did not allow recovery for wrongful death. With the passage of state death acts, the common law began to enforce such a right of action. However, no comparable federal death act was in force prior to the Death on the High Seas Act of 1920. The sole recovery allowed for maritime wrongful death in the interim was by virtue of the so-called doctrine of constructive territoriality. The doctrine might be described as the extra-territorial application of state death acts to cover deaths occurring aboard vessels upon the high seas.[19] The rationale behind this extension of state law beyond its territorial borders to regulate liability for wrongful death aboard vessels upon the high seas was generally thought to rest in the state's power to govern the resident owners of such vessels or to govern vessels registered at a port within the state. Various obstacles stood in the path of the doctrine's development. Chief among these were constitutional uncertainty over whether the states could fashion a substantive right falling within the federal province of maritime law, and doubt as to whether a state law could follow after a vessel upon the high seas, since the law that usually applied aboard ship, the law of the flag, was thought to be exclusively national law.[20]

The pioneer case of *McDonald v. Mallory* held that the New York death act could be applied to allow recovery for maritime wrongful death, where the vessel upon which the fatal act was committed was owned and

Transocean Airlines, 230 F.2d 780 (9th Cir. 1955) (holding that the Death on the High Seas Act denies remedial jurisdiction to the state courts); Ship Mortgage Act, 46 U.S.C. 951 (1920).

15. 244 U.S. 205 (1917).

16. 254 App. Div. 739, 4 N.Y.S.2d 9 (2d Dep't 1938).

17. Panama R.R. v. Rock, 266 U.S. 209 (1924); Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1877); Geoghegan v. Atlas S. S. Co., 146 N.Y. 369, 40 N.E. 507 (1895).

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

19. McDonald v. Mallory, 77 N.Y. 546 (1879).

20. Crapo v. Kelly, 83 U.S. (16 Wall) 610 (1872).

registered in the state.[21] Subsequently, the United States Supreme Court, in the case of *The Hamilton*, allowed the similar application of the New Jersey death statute where the vessel involved was owned by a New Jersey corporation.[22] The reach of the doctrine of constructive territoriality was limited, however, by its own rationale. If it is remembered that state law applied because of the state's power over its resident or corporate shipowners or over vessels registered at its ports, the short-comings of a doctrine dependant upon such variable criteria can be easily seen. Consider the possible combinations of vessels, owners, and registries all calling a different state death act into force. Although the resultant problem in conflicts of law may not have been insurmountable, the courts soon reacted by refusing to pick and choose among the various applicable state death acts, and as a result allowed no recovery at all under any of the asserted state acts.[23] With the passage of the Death on the High Seas Act, Congress declared the law and pre-empted the field of maritime wrongful death, thus ending the operation of the state statutes under the doctrine of constructive territoriality.[24] In all, only a "scattered few" cases had entertained actions for maritime wrongful death under the doctrine.[25]

The *Elliott v. Steinfeldt*[26] claim of "long enjoyed" jurisdiction in hearing maritime death actions hardly seems too substantial in view of the history of the doctrine of constructive territoriality upon which the jurisdictional claim rested. Not only was the doctrine seldom used, and at best an apparent fiction which barely overcame the obstacles of more conventional legal concepts, but it kept constantly bumping into its own short-comings. It was never an established, sound, or universal remedy for maritime wrongful death. Moreover, it died with the passage of the federal death statute. Historically, though, it was the germ of a practice by which state courts did entertain actions for maritime wrongful death.

While the light shed upon the question of forum raised under the Death on the High Seas Act by the "long enjoyed" state court practice of hearing maritime death actions brought under the doctrine of constructive territoriality is thus diminished, it is at this point still perceivable. Can it be extinguished? State courts had found remedial jurisdiction in maritime death actions because they had evolved a substantive right of action for maritime

21. 77 N.Y. 564 (1879).

22. 207 U.S. 398 (1908) (Mr. Justice Holmes seems to base the state's power to govern the death occurring aboard ship on the state's ability to regulate the corporate owner of the vessel, which corporation was registered under the laws of the state).

23. The Middlesex, 253 Fed. 142 (D. Mass. 1916).

24. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

25. The Hamilton, 207 U.S. 398 (1908); Southern Pacific Co. v. De Valle Da Costa, 190 Fed. 689 (1st Cir. 1911); International Navigation Co. v. Lindstrom, 123 Fed. 475 (2d Cir. 1903); The James McGee, 300 Fed. 93 (S.D. N.Y. 1924); Souden v. Fore River Shipbuilding Co., 223 Mass. 509, 112 N.E. 82 (1916); McDonald v. Mallory, 77 N.Y. 546 (1879).

26. 254 App. Div. 739, 4 N.Y.S.2d 9 (2d Dep't 1938).

wrongful death under the doctrine of constructive territoriality. Their remedial jurisdiction in maritime death actions was fatefully bound to that doctrine. The dependence of their remedial jurisdiction in maritime death actions upon this doctrine led that jurisdiction into frustration, decline, and ultimate death as the doctrine, itself, suffered the same ill fortunes. This "long enjoyed" remedial jurisdiction in maritime death actions based upon a state-fashioned substantive right can make no demands upon the will of Congress where Congress has ended that substantive right and replaced it by a new federal right. In the face of the new federal death statute, the state courts must do Congress' bidding.

One further comment should be made about the doctrine of constructive territoriality and the claim for state remedial jurisdiction resting upon it. The impetus behind that doctrine, which motivated the courts to stretch the sense of more conventional concepts of law, were basic considerations of justice. First, the denial of recovery for wrongful death itself is, to the constitutions of all but the uninsured defendant, a very strong legal pill. Secondly, the state courts themselves were faced with an unjust inconsistency by allowing recovery for the landsman victim but not for his seafaring neighbor. No such compelling considerations of justice can now move the state courts to assume remedial jurisdiction where an adequate federal remedy for maritime wrongful death is provided, unless it is the wickedness of denying the plaintiff an opportunity to tell his story to a sympathetic jury.

The second leg of the tradition discerned by the Court of Appeals is that it lives in such enacted federal maritime law as the Jones Act.[27] The Jones Act incorporates the material jurisdictional provisions of the Federal Employers' Liability Act,[28] which the court mentions, so that the provisions of the latter need not be separately discussed. The Jones Act provided a right of action for the wrongful death of seamen in these words:

> . . . 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 actions all statutes of the United States conferring or regulating the right of an 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 place of business is located.[29] (Emphasis added.)

Certainly, the words of the statute speaking of an action "at law with the right to trial by jury" are patent. Remedial jurisdiction has to be given some law court, the common law courts of the states or the federal civil courts,

27. 46 U.S.C. § 688 (1958).
28. 45 U.S.C. §§ 51-60 (1958).
29. 46 U.S.C. § 688 (1958).

to carry out this purpose. It cannot be accomplished by leaving the action solely to the federal admiralty courts which sit without a jury. This language was regarded as so vigorously in favor of entertaining the action at law that the United States Supreme Court admitted that a plausible argument could be made that the statute excluded the federal admiralty courts from jurisdiction, a construction which would render the statute unconstitutional.[30] However, the Supreme Court read-in admiralty jurisdiction, thus validating the statute. It was early decided that the federal civil courts could entertain actions brought under the statute,[31] and shortly thereafter the common law courts of the state were held to have the same power.[32] The troublesome language in the latter part of the quoted section which says "jurisdiction in such actions shall be under the court of the district," was heard in an idiom familiar to judges to mean not "jurisdiction" but venue.[33]

The remedial jurisdiction allowed the state courts under the Jones Act cannot be ascribed to the tradition of concurrent jurisdiction. The power of the state courts to entertain actions brought pursuant to the Jones Act is directly attributable to the intent of Congress as it is expressed in the very language of the statute. The struggle with Congressional intent in the Jones Act was a struggle with words, a struggle fought largely within the four corners of the statute. This is apparent from the pains the various cases have taken with the words of the statute.[34] Thus the tradition of concurrent jurisdiction, inasmuch as it was not a factor in interpreting the Jones Act, was not perpetuated by it. Rather, this tradition, or actually the in fact jurisdiction of the state courts, is merely the by-product of an interpretation of the statute by means of its language. Contrary to the use the Court in the *Ledet* case makes of the fact of state remedial jurisdiction under the Jones Act, the proper use of that fact would seem to be to emphasize the value of language, not tradition, in gauging Congressional intent in the Death on the High Seas Act.

Next, the legacy of concurrent jurisdiction safeguarded in the "saving clause" of the Judiciary Act of 1789 should be examined. The "saving clause" of the Judiciary Act of 1789 preserved "to suitors, in all cases, the right of a common law remedy where the common law is competent to give it."[35]

30. Lindgren v. United States, 281 U.S. 38 (1930); Knickerbocker Ice Co. v. Stewart, supra note 24.

31. Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924).

32. Panama R.R. Co. v. Vasquez, 271 U.S. 557 (1926); Engel v. Davenport, 271 U.S. 33 (1926).

33. Panama R.R. Co. v. Johnson, supra note 31 (Mr. Justice Van Devanter remarked that if "jurisdiction" meant "venue," the action had not been brought in either of the specified districts).

34. Panama R.R. Co. v. Vasquez, supra note 32; Engel v. Davenport, supra note 32; Panama R.R. Co. v. Johnson, supra note 31.

35. 35 Rev. Stat. 563, c. 8, 28 U.S.C. 41 (1941). The clause is now worded ". . . saving to suitors in all cases all other remedies to which they are otherwise entitled." Apparently, no real change in the clause's effect on state remedial jurisdiction was intended.

With *Southern Pacific Co. v. Jensen*, it became clear that the saving clause of the Judiciary Act preserved solely remedial jurisdiction, the power to hear actions, as opposed to substantive jurisdiction, the power to give rights including rights of action. Clearly, then, no state-given action for wrongful death on the high seas is preserved to "suitors" under the "saving clause."

As previously mentioned, the remedial jurisdiction allowed the state common law courts under the "saving clause" is limited solely to entertaining in personam maritime claims. It is precisely because the in rem maritime claim, founded upon a distinctive maritime lien, has no counterpart in the "common law" that the state common law courts have been denied the power to hear these claims. Wrongful death actions, as Chief Judge Desmond suggests in the *Ledet* case, are not "common law remedies" in the strict sense but statutory remedies. Thus, strictly construing the words of the "saving clause," the statutory remedy of maritime wrongful death cannot be saved to "suitors" at the bar of the common law courts of the states. However, this strict construction has more often than not given way to a more liberal acceptation of the term "common law."[36]

Mr. Justice Holmes often admonished that the common law is a creature of both statute and case law. In fact it was in *Southern Pacific Co. v. Jensen* that he pronounced: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . . It is always the law of some State. . . ."[37] If Holmes lost his argument in attempting to save substantive jurisdiction where a "common law remedy" can be had, his argument where remedial jurisdiction is at stake seems timely, if a "common law remedy" is not to be rendered meaningless. Even construed broadly, the "saving clause" is only another enactment of Congress. Implicit in what we have said about the "saving clause" and its grant of concurrent remedial jurisdiction there have been two critical assumptions. Congress is of course free to give or retain, preserve or end, remedial jurisdiction in the state courts in maritime matters, within constitutional bounds which in shorthand form means they cannot give the states in rem jurisdiction. It has also been assumed that Congress has not spoken clearly in the Death on the High Seas Act, so that there is a need to consult the oracles, over and above language, such as the tradition of concurrent jurisdiction.

Before abandoning the Court's argumentation in *Ledet*, something should be said of their first point, which drew on the language of Section Seven of the Act. Section Seven states: "The provisions of any State statute giving or regulating *rights* of action or *remedies* for death shall not be affected by

This seems to be the United States Supreme Court's understanding of the rewording in Madruga v. Superior Court of California, 346 U.S. 556 (1954).

36. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924); The Knapp, Staut & Co., Company v. McCaffrey, 177 U.S. 638 (1900).

37. Supra note 15 at 222.

this chapter." (Emphasis added.) Beginning with the words of this section, before seeking analogies, we find that they purport to save "any State statute giving or regulating rights of action" as well as "remedies." Clearly, the words themselves attempt to do what we have seen in connection with the "saving clause" is forbidden. They attempt to save state substantive jurisdiction or the state-given action for wrongful death on the high seas. The courts apparently have tried to avoid the unconstitutional implication of these words rather than strike down the statute.[38]

Yet, the Court of Appeals in the *Ledet* case, instead of simply ignoring the language of Section Seven thereby leaving its constitutional infirmities unexposed, seeks to use the language positively in support of state court remedial jurisdiction. Ingeniously, the court says that if by latter-day construction the substantive jurisdiction of the states in maritime matters is denied, then it follows that Section Seven of the Act must mean that remedial jurisdiction and not substantive jurisdiction is saved under the state death acts. Thus, the bad apples of Section Seven are colored over to become eye-appealing peaches. All of this is accomplished by analogy to the construction placed upon the "saving clause," which construction ended the efficacy of that clause as a vehicle of state substantive jurisdiction in admiralty matters. That same construction never expanded the remedial jurisdiction which the "saving clause" gave to the states in maritime matters. However, the Court of Appeals in the *Ledet* case hurried after this analogy, the latter-day construction of the "saving clause," passing over the meaning which the language of Section Seven, itself, could supply. In applying this procedural construction of the "saving clause" to Section Seven, the court transmuted the meaning of this construction.[39] Such glossy peaches are left that they are simply too eye-appealing to consume.

The legislative history of Section Seven of the Act is really the clearest proof of what Congress had attempted in that section. Section Seven in draft form simply purported to save state death actions in so far as they applied up to the one marine league limit within which the federal death statute does not apply.[40] When the bill was debated in the House of Representatives an amendment was offered by Congressman Mann to delete that language from Section Seven which limited the operation of state death acts to the one marine league limit.[41] The Congressman apparently believed that the bill would not obtain passage as long as it curtailed the operation of state death acts.[42]

38. See Lindgren v. United States, supra note 30 at 44.

39. In his dissent in the Ledet case Chief Judge Desmond makes the point that Section Seven of the Act preserves state court "remedies" only in so far as they come under a "State statute giving or regulating rights of action or remedies for death . . . ." The Chief Judge's observation serves to point out the awkwardness of construing that section as a grant of remedial jurisdiction.

40. 59 Cong. Rec. 4482-86 (1920).

41. Ibid.

42. Choy v. Pan American Airways Co., supra note 8.

Knowledge of that amendment provides us with the most plausible interpretation of Section Seven, that is, that the section was simply intended to allow state death acts to operate in those reaches not covered by the federal statute. If one is willing to shunt this interpretation of the section aside and delve into the "vicissitudes of its passage," all that is left is the reinforced unconstitutional implication of that section. The true choices of possible meaning of the section are either its very comfortable explanation as aimed at saving state death acts within the marine league limit or its condemnation as an unconstitutional attempt to preserve state substantive jurisdiction. There is no need or reality in reaching to find an ingenious third interpretation.

To this point we have seen that the tradition of concurrent jurisdiction asserted by the Court of Appeals in *Ledet v. United Aircraft Inc.* is not borne out by the history of maritime wrongful death; nor can any "cross light" be shed upon the question of forum raised in the Death on the High Seas Act by virtue of the fact of state jurisdiction under the Jones Act. Neither has the Judiciary Act of 1789 given so rich a legacy of concurrent jurisdiction to the states that it is always dependable. Certainly, if the Judiciary Act can have any value as a tool of interpretation it must be in those instances where Congressional intent is uncertain and not readily divined from more immediate sources such as the language and legislative history of the Act. In so far as there is language in Section Seven of the Act hinting at state court remedial jurisdiction, it does not furnish a sound realistic construction of the section. Perhaps the court's whole argumentation and its error is summed up by Mr. Justice Frankfurter:

> Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose. Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bounds of hints.[43]

Perhaps in some measure the *Ledet* decision can be excused on the basis of the particular New York precedent holding for state court remedial jurisdiction. *Elliot v. Steinfeld* was the first of this line of authority. It was a decision that came eighteen years after the passage of the Death on the High Seas Act. The decision was rendered in a Memorandum opinion of the Appellate Division. The case turned upon, as was mentioned, the "long enjoyed" remedial jurisdiction that the state courts supposedly had under the doctrine of constructive territoriality. Three other decisions growing out of the same aircrash involved in the *Elliott* case were heard by the same court.[44] All were decided without opinion upon the authority of the *Elliott* case. Subsequently, an independent case was similarly decided by one of the lower courts without an officially

43. Frankfurter, "Reflections on Reading Statutes," in The Supreme Court: Views from Inside 82 (Westin ed. 1961).

44. Kristen v. Steinfeldt, 255 App. Div. 834, 7 N.Y.S.2d 56 (2d Dep't 1939); Colbert v. Steinfeldt, 255 App. Div. 790, 4 N.Y.S.2d 56 (2d Dep't 1938); Murphy v. Steinfeldt, 254 App. Div. 741, 4 N.Y.S.2d 10 (2d Dep't 1938).

printed opinion[45] and was affirmed at the Appellate Division level without comment.[46] The same case eventually reached the Court of Appeals on another question, where it was affirmed.[47] This, then, represents the New York authority in favor of a permissive state forum under the Death on the High Seas Act. Prior, however, to the *Elliott* case there were a few New York cases pulling in the direction of the mandatory admiralty forum.[48] The New York Court of Appeals cannot be said to have been intractably committed to precedent favoring the permissive state forum. The most that can be said is that if the court's judgment was vacillating, unpersuaded by either position on the question, then the New York authority favoring the permissive state forum could properly conclude the issue.

The modern federal cases are rather numerous,[49] the best reasoned and most thorough of these being Judge Goodman's decision in *Wilson v. Transocean Airlines, Inc.*[50] These cases press home three tools of statutory construction, the language, terms, and legislative history of the Act.

A very careful and almost purposeful reading of Section One of the Death on the High Seas Act will uncover the courteous little word "may." It is used as follows: ". . . the personal representative of the deceased may maintain a suit for damages in the district courts of the United States, in admiralty. . . ." Proponents of the permissive state forum insist that "may" is used to indicate that plaintiffs may or may not bring the death action "in admiralty."[51] Accordingly, plaintiffs are supposedly free to sue in the state common law courts. If the word is taken in its "ordinary and usual sense," this petty equivocation disappears and there is no need for construction. The context very clearly brings out the meaning of the word since the word is used to allow a cause of action where none existed previously—"the personal representative may maintain an action." It is certainly the word employed by legislatures in creating death actions. Even the Jones Act and the New York death act use the very same word, the personal representative, "may maintain an action."[52] Neither will the word "may" bear the meaning given it by those favoring the permissive state forum. If plaintiffs may sue in any court, the mention of a specific court becomes surplusage. "May" may well be said.

45. Wyman v. Pan American Airways, supra note 7.
46. Ibid.
47. Wyman v. Pan American Airways, Inc., 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), aff'd, 293 N.Y. 878, 59 N.E.2d 785 (1944), cert. denied, 324 U.S. 882 (1945).
48. In re Rademaker's Estate, 166 Misc. 201, 2 N.Y.S.2d 309 (Surr. Ct. Kings County 1938). See also In re Nelson, 168 Misc. 161, 5 N.Y.S.2d 398 (Surr. Ct. 1938).
49. See supra note 11.
50. 121 F. Supp. 85 (N.D. Cal. 1954).
51. This was argued without avail in Noel v. Linea Aeropostal Venezola, supra note 14.
52. 46 U.S.C. § 688 (1952):
"the personal representative of the deceased may maintain an action for damages at law . . . .";
N.Y. Dec. Est. Law § 130: "the executor or administrator . . . may maintain an action to damages . . . ."

Although this argument over the term "may" is really only nice legal exercise, by deluging all ambiguity in Section One it heightens the strength of the positive expressions in that section. There is no escaping, then, from the patent meaning of "may maintain a suit for damages in the federal district courts, in admiralty." Additional language confirms this meaning. Section One says that the action is maintainable "against [first] the vessel, person or corporation." A "vessel" can be proceeded against only in the federal admiralty courts, who alone may entertain in rem claims. In Section Three of the Act there is a provision made for extending the period of limitations if "reasonable time for securing jurisdiction of the vessel . . ." is not had.

Other provisions of the Act are in accord with the view that the admiralty forum is mandatory. Section Five provides that where, after instituting an action for personal injuries in an admiralty court, the plaintiff dies, his personal representative may be substituted as a party plaintiff. Again, the Act contemplates only the admiralty plaintiff. Section Six establishes a rule of comparative negligence, a rule little know in the common law courts. Section Two and Four are not too conclusive one way or the other.[53]

When the Death on the High Seas Act was debated in bill form in the House of Representatives, the question of forum did come up.[54] In the case of *Higa v. Transocean Airlines*, the court took it as determinative that Congressman Volstead, the author of the bill, in answer to inquiries as to why the right to trial by jury had been excluded from the Act, stated that it was his understanding that this was so because the action was to be brought only in the federal admiralty courts.[55] It might be noted that while the Court of Appeals in *Ledet* mentioned nothing of the legislative history of the Act, the counsel for plaintiffs in their brief gave extensive space to a favorable treatment of the legislative history of the Act in support of state court remedial jurisdiction.[56] Possibly this helps to explain the court's neglect of this source of statutory construction.

In conclusion, the answer to the question of whether an action brought pursuant to the Death on the High Seas Act must be brought on the admiralty side of the federal district courts appears with reasonable certainty to be in the affirmative. Criticism of *Ledet v. United Aircraft Corp.* is warranted. The Court seemed to place faith in a tradition that was largely inappropriate and remote in solving the question presented. It seemed to be searching after a

53. The court in Bergeron v. KLM, 188 F. Supp. 594 (S.D.N.Y. 1960) thought that Section Four, which provides that a death action grounded upon the law of any foreign nation may be brought in admiralty, also provided for exclusive remedial jurisdiction in admiralty.

54. 59 Cong. Rec. 4483 (1920).

"Mr. Moore of Virginia. . . . The purpose of this bill, as I understand it is to give exclusive jurisdiction to the admiralty courts where accidents occur on the high seas. Mr. Volstead. That is it."

55. Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955).

56. Respondent's Brief, 7351 Cases & Points, Case 2, pp. 15-20.

tradition, or perhaps what might better be called a policy, rather than taking the more common place approach to the problem of statutory construction. Perhaps so much similarity between the Death on the High Seas Act, especially Section Seven, and the broad contours of state concurrent jurisdicton presented to the court's mind a compelling image of grand moment and handsome symmetry. Perhaps the court took repose in its vision. There is more concrete explanation of the court's decision in terms of New York precedent, the use of legislative history by plaintiffs' counsel, and the court's zealous concern over its own powers.

If the court's decision can properly be criticized, their fellow travelers must be the draftsmen of the Act and even Congress, itself. Perhaps the draftsmen should have said "We really mean it" so that the courts would disregard the apparent tradition of concurrent jurisdiction. Certainly Congress should have averted, not compounded, the confusion built into the act by the deliberately ambiguous amendment of Section Seven. Careless wording and seeming tradition produced the problem of forum in the Act. Decision makers and law makers might well heed this caveat:

> Men and not monsters warp the bounds of the sea.
> Yet may not thoughtless men still monsters be?
> Not fate but men
> Unlock the energies of the rock.[57]

DONALD P. SIMET

NAVIGATIONAL SERVITUDE: AN OLD CONCEPT WITH A NEW LIMITATION

The Federal Government, through its sovereign power of eminent domain, has the right to acquire private property for public use.[1] The Fifth Amendment requires the Government to compensate the owner of property thus appropriated.[2] Through authority given it by the commerce clause of the Constitution, the Government also has the power of navigational servitude.[3] Navigational servitude, also termed "dominant servitude"[4] or "superior navigation easement,"[5] allows the Government to control the navigability of an interstate waterway by regulating its flow.[6] This regulation contemplates the acquisition of private property. The power of navigational servitude, like that of eminent domain, is superior to private interests.[7] However, unlike

57. Howard Baker, Ode to the Sea, in Oxford Book of American Verse 1017 (1960).

1. Adirondack Railway Co. v. New York State, 176 U.S. 335, 346 (1900).
2. Id. at 347.
3. United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).
4. Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954).
5. United States v. Grand River Dam Authority, 363 U.S. 229, 231 (1960).
6. United States v. Commodore Park, 324 U.S. 386, 390 (1945).
7. United States v. Twin City Power Co., supra note 3, at 225.