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Civil Procedure—Death on the High Seas Act Held to Confer Concurrent Jurisdiction

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corporation may be held to be amenable to service lies in the case of acts violating state statutes which are punishable by criminal sanction or may be enjoined.[37]

In the present case the Court of Appeals held that the petitioner-corporation was amenable to service of a subpoena on two grounds. First, there was evidence of at least solicitation within the state by the petitioner, which taken together with evidence of other business conduct possibly brought out in the inquiry, may have established that petitioner was in fact doing business within the state, which would have made the petitioner subject to service. Secondly, the corporation may have been violating the Alcoholic Beverage Control Law, a misdemeanor, which activity could have been enjoined under Section 63 of the Executive Law, so that petitioner's possible violation of a state statute rendered it amenable to service.

The Court seems to place emphasis on the second ground in concluding that the petitioner was amenable to service, for the Court states:

> Be that as it may, though, even if the petitioner's contacts within this State were deemed to be less than necessary to justify the maintenance of a civil suit, it is our view that it still would be amenable to the subpoena. . . .[38]

Thus the Court seems to be more concerned with upholding the power of the Attorney General to enjoin commission of illegal acts by bringing foreign corporations within the jurisdiction of the courts than with any abrogation of the civil rule (which requires more than mere solicitation of business within the state) by which a corporation is made subject to service. It seems fair to say that the present case provides no authority for service of process on foreign corporations for purposes of a civil suit, especially where it cannot be found that the foreign corporation is doing business within New York State under the currently applied solicitation—plus formula.

D. P. S.

DEATH ON THE HIGH SEAS ACT HELD TO CONFER CONCURRENT JURISDICTION

An interesting sequel to *Kilberg v. Northeast Airlines, Inc.*[39] is presented in *Ledet v. United Aircraft Corporation*,[40] also decided this term. In this case, the wrongful death occurred on the high seas. The Federal Death on the High Seas Act, enacted in 1920, provides that in the event of a wrongful death occurring at sea beyond the territorial limits of any state or territory 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. . . ."[41]

37. Cf. Travelers Health Ass'n v. Commonwealth of Virginia, 339 U.S. 643 (1950); United States v. Morton Salt Co., 338 U.S. 632 (1950).

38. Supra note 27 at 198, 219 N.Y.S.2d at 6.

39. 9 N.Y.2d 34, 211 N.Y.S.2d 133 (1961), noted p. 96 infra.

40. 10 N.Y.2d 258, 219 N.Y.S.2d 245 (1961). This decision was received too close to printing time to permit more thorough analysis. A more extensive discussion is planned for the next issue.

41. 46 U.S.C. § 761 (1958).

The New York courts have assumed, with relatively little discussion, that this section creates a cause of action enforceable in the state courts as well.[42] This construction is grounded in part upon the clause in the Judiciary Act of 1789 which, in granting exclusive maritime and admiralty jurisdiction to the federal courts, saves to suitors "in all cases the right of a common law remedy, where the common law is competent to give it."[43] As the result of the Supreme Court's statement that this clause refers to remedies,[44] there has developed the practice of concurrent jurisdiction for enforcement of substantive rights created by such federal acts as the Federal Employers' Liability Act[45] and the Jones Act.[46] Litigation in the federal courts in recent years, however, affords good authority to the contrary in the case of the Death on the High Seas Act, *i.e.*, that the Act does not authorize a suit other than in admiralty.[47] These decisions are not clear authority for exclusive federal jurisdiction, however, inasmuch as they only decide that when an action is brought in a federal court it must be in admiralty, the civil side having no jurisdiction.[48]

In *Ledet v. United Aircraft Corporation*, the Court of Appeals, in a per curiam opinion, affirmed the construction which the Act has received in the New York courts. The Court's treatment of the crucial provisions of the Act, those relating to jurisdiction, does not convince but rather sheds even greater doubt on the validity of New York's construction of the Act. Relying upon Supreme Court holdings that the Act supersedes substantive rights derived from state statutes,[49] the Court reasoned that the provisions allowing suit in admiralty must, therefore, be procedural in nature, in which case the procedural law of the forum applies.

In a strong dissent,[50] Chief Judge Desmond argued that the clause in question was jurisdictional; that in authorizing such suits the Act required that they be brought in admiralty, in which case the jurisdiction of the federal courts is exclusive. The "saving to suitors" clause affords no basis for jurisdiction, inasmuch as, apart from the Death on the High Seas Act, neither maritime law nor common law recognizes such an action. Thus, there is no "other remedy" available. Insofar as the New York decisions are contrary to the federal decisions, he would overrule them. *Bd.*

42. E.g., Wyman v. Pan Amer. Airways, 181 Misc. 863, 43 N.Y.S.2d 420 (Sup. Ct. 1943), aff'd, 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dep't 1944), aff'd, 293 N.Y. 878, 59 N.E.2d 785 (1944); Elliott v. Steinfeldt, 254 App. Div. 739, 4 N.Y.S.2d 9 (2d Dep't 1938).

43. 28 U.S.C. § 1333.

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

45. 45 U.S.C. § 51 (1958).

46. 46 U.S.C. § 688 (1958).

47. E.g., National Airlines v. Stiles, 268 F.2d 400 (5th Cir. 1959), cert. denied, 361 U.S. 885 (1959); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), cert. denied, 355 U.S. 907 (1957); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955), cert. denied, 352 U.S. 802 (1956).

48. See, e.g., Noel v. Linea Aeropostal Venezolana, supra note 47.

49. Lindgren v. United States, 281 U.S. 38 (1930); Knickerbocker Ice Co. v. Stewart, supra note 44.

50. Supra note 40 at 262, 219 N.Y.S.2d at 247.