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of it will be lost to taxes.²⁰ The court apparently was persuaded that the better view is to consider the instruction a matter of judicial discretion.²¹

Though the writer believes that the decision in this case is correct, certain closely related questions remain undecided in Florida. For example, should a jury be instructed as to the taxability of income derived from an award?²² Further, should the plaintiff's earnings before or after taxes be considered the basis for the computation of damages for loss of future earnings?²³ It would be better to attack this area as a whole and propose solutions that would dispose of all these related problems. Despite this shortcoming, the decision represents a beginning in a more realistic approach to a recurrent problem.

HERBERT STETTIN

ADMIRALTY—JURISDICTION UNDER THE FDHSA

The administrator of an estate filed suit in a state court, seeking recovery under the Federal Death on the High Seas Act¹ for the decedent's death which resulted from an airplane accident on the high seas. The defendant moved to dismiss on the ground that jurisdiction under the act was exclusively within the admiralty jurisdiction of the federal courts.² From a denial of this motion, the defendant appealed. *Held*, affirmed: absent a clear congressional intent to the contrary, the FDHSA does not withdraw

20. *Id.* at 275.

21. *Poirer v. Shireman*, 129 So.2d 439, 444-45 (Fla. App. 1961). The instruction was taken from the Missouri Supreme Court's sample charge in *Dempsey v. Thompson*, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952), which reads as follows: "You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to Federal or State income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make."

22. See, e.g., *Margevich v. Chicago & N.W. Ry.*, 1 Ill. App. 2d 162, 116 N.E.2d 914 (1954); *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952).

23. See *McWeeney v. New York, N.H., & Hart. R.R.*, 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); *Chicago & N.W. Ry. v. Curl*, 178 F.2d 497 (8th Cir. 1949); *Southern Pac. Co. v. Guthrie*, 180 F.2d 295 (9th Cir. 1949), *rehearing granted*, 186 F.2d 926 (9th Cir. 1950), *cert. denied*, 341 U.S. 904 (1951); *Stokes v. United States*, 144 F.2d 82 (2d Cir. 1944); *Runnels v. City of Douglas*, 124 F. Supp. 657 (D. Alaska 1954); *Floyd v. Fruit Indus., Inc.*, 144 Conn. 659, 136 A.2d 918 (1957). In addition, there are several law review articles on this point, representative of which is Daniels, *Measure of Damages in Personal Injury Cases*, 7 MIAMI L. Q. 171, 175-77 (1953).

1. 41 Stat. 537 (1920), 46 U.S.C. §§ 761-67 (1958) (hereinafter referred to as FDHSA).

2. Original jurisdiction in all civil cases of admiralty lies in the United States district courts. This jurisdiction is separate and distinct from other civil cases tried by these courts. 28 U.S.C. § 1333(1) (1958). Cases are usually tried in an admiralty court by a judge sitting without a jury. The purported generosity of jury verdicts must, in all probability, contribute to the desire on the part of plaintiffs' attorneys to obtain trial in other than an admiralty forum.

jurisdiction from courts which previously have entertained actions of this nature. Section 7 of the act,³ which states that "the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter," must be interpreted to allow for the enforcement of the substantive rights accorded by it through the procedural medium of a competent state or non-admiralty court. *Ledet v. United Aircraft Corp.*, 10 N.Y.2d 258, 176 N.E.2d 820, 219 N.Y.S.2d 245 (1961).

Prior to 1920, no common law remedy was available for a wrongful death occurring outside the territorial limits of the United States. Individual states did in some instances offer relief through their wrongful death or survival statutes,⁴ but often, because of the complexities involved in the case, a state could not find sufficient nexus to exercise jurisdiction.⁵ Suitors would thus, in many cases, be left with a valid claim and no means of enforcement. To fill this gap in the body of maritime law,⁶ and to unify the law in its application to maritime matters,⁷ Congress enacted the FDHSA.⁸

Strangely enough, the question of which court would have jurisdiction to hear suits brought under this act was raised even before the law was enacted.⁹ As originally drafted, the statute provided that the rights accorded by a state statute in wrongful death cases would not be affected "as to causes of action accruing within the territorial limits of any state."¹⁰ This provision was stricken from the original act by a last-minute amendment. From the standpoint of legislative intent, this amendment could be construed to mean one of three things: (1) Congress intended to remove jurisdiction under the act from non-admiralty courts entirely; (2) it intended non-admiralty courts to hear only those cases that arose within state territorial limits; (3) it did not withdraw jurisdiction for wrongful death in any case in which a state had previously exercised jurisdiction. The first propo-

3. 41 Stat. 538 (1920), 46 U.S.C. § 767 (1958).

4. *The Hamilton*, 207 U.S. 398 (1907); *Southern Pac. Co. v. De Valle Da Costa*, 190 Fed. 689 (1st Cir. 1911); *Souden v. Fore River Shipbuilding Co.*, 223 Mass. 509, 112 N.E. 82 (1916); *McDonald v. Mallory*, 77 N.Y. 546, 33 Am. Rep. 664 (1879).

5. For instance in *The Harrisburg*, the deceased was a resident of Delaware, the ship was registered in Pennsylvania and the death occurred off the coast of Massachusetts. *The Harrisburg*, 119 U.S. 199 (1886); See also, *The Middlesex*, 253 Fed. 142 (D. Mass. 1916).

6. 59 CONG. REC. 4482 (1920) (remarks of Rep. Volstead). "The bill . . . is intended to supply a defect which now exists under what was the common-law rule as to actions affecting injuries that might be caused through the wrongful act or neglect of persons engaged in shipping on the high seas."

7. H.R. REP. No. 674, 66th Cong., 1st Sess. 4 (1920). "Section 7 makes the Act the law of the courts of admiralty of the United States, and, so far as the high seas are concerned, makes the remedy exclusive. This is for the purpose of uniformity, as the States cannot properly legislate for the high seas."

8. See note 1 *supra*.

9. See discussion of proposed bill in 59 CONG. REC. 4482 (1920).

10. Section 7 as originally drafted, and recommended by the committee reads as follows: "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any state." H.R. REP. No. 674, 66th Cong., 1st Sess. 4 (1920). (Emphasis added.)

sition has been completely rejected.¹¹ As for the latter two, the courts have developed a definite split of authority. The majority of courts agree that Congress intended jurisdiction to remain exclusively in admiralty where the cause of action accrued *without* the territorial limits of a state.¹² For a number of years no issue was taken with this limitation, and the courts, without exception, held the sole forum in cases of death on the high seas to be a court of admiralty. The predominant *ratio decidendi* in these cases was based upon a reliance on this congressional intent, which is at best somewhat obscure.¹³ However, in recent years an increasing number of non-admiralty courts have adopted the third alternative — hearing cases under the FDHSA although the deaths occurred *outside* their territorial limits.¹⁴

In *Elliot v. Steinfeldt*,¹⁵ a New York court, in a brief memorandum opinion, stated simply that the FDHSA does not pre-empt previously exercised state jurisdiction in maritime death actions absent a "distinct manifestation" by Congress to this effect. Since *Elliot* a number of other courts have announced this same result,¹⁶ and several have set forth well-reasoned and convincing opinions. *Sierra v. Pan Am. World Airways, Inc.*¹⁷ involved the same factual situation as the instant case. Suit was commenced on the civil side of the United States District Court of Puerto Rico. The defendant moved to dismiss the complaint claiming that because it came within the purview of the FDHSA, the action was triable solely by the admiralty side of the court. The motion was denied. The court explained that the act does not specifically withdraw jurisdiction from non-admiralty courts, but merely provides another forum in which suit may be brought. The court stated emphatically that the suit could have been maintained

11. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

12. *Trihey v. Transocean Air Lines, Inc.*, 255 F.2d 824 (9th Cir. 1958); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957); *Turner v. Wilson Line*, 242 F.2d 414 (1st Cir. 1957); *Higa v. Transocean Airlines*, 124 F. Supp. 13 (D. Hawaii 1954); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954); *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677 (E.D.N.Y. 1935); *Gordon v. Reynolds*, 187 Cal. App. 2d 507, 10 Cal. Rptr. 73 (Dist. Ct. App. 1961); *In re Rade-maker's Estate*, 166 Misc. 201, 2 N.Y.S.2d 309 (Surr. Ct. 1938).

13. "At first blush it might seem that in a case like *The Hamilton* [state wrongful death statute applied to collision on the high seas prior to the FDHSA] a libel might still be founded on the [state] . . . death statute . . . [N]o doubt Section 7 read in the light of the act as a whole and its legislative history will be construed as a savings clause to maintain the efficacy of the state acts only in cases of fatal injuries received in localities not covered by the Federal Act . . ." Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 422-23 (1926).

14. *Sierra v. Pan Am. World Airways, Inc.*, 107 F. Supp. 519 (D.P.R. 1952); *Wyman v. Pan Am. Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943); *Batkiewicz v. Seas Shipping Co.*, 53 F. Supp. 802 (S.D.N.Y. 1943); *Choy v. Pan-Am. Airways Co.*, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941); *Elliott v. Steinfeldt*, 254 App. Div. 739, 4 N.Y.S.2d 9 (1938); See also, 1 BENEDICT, ADMIRALTY § 142 (6th ed. 1940); ROBINSON, ADMIRALTY § 16 (1939).

15. 254 App. Div. 739, 4 N.Y.S.2d 9 (1938).

16. See cases cited note 14 *supra*.

17. 107 F. Supp. 519 (D.P.R. 1952).

in the local courts of Puerto Rico under that territory's wrongful death statute. As the FDHSA itself did not withdraw jurisdiction from non-admiralty courts, and because section 7 of the act provides that state laws giving or regulating rights of action or remedies for death are not affected,¹⁸ the court held that jurisdiction would lie in a non-admiralty court provided the substantive rights and liabilities afforded by the act were not affected by local law.

It should be noted that before the passage of the FDHSA there were serious constitutional doubts as to the extent of state power in any segment of maritime law. This reservation was first enunciated by the Supreme Court in *Southern Pac. Co. v. Jensen*,¹⁹ in which the Court held that a state workmen's compensation law, to the extent that it conflicted with general maritime law, could not be applied in accidents arising from employment which was maritime in nature.²⁰ As previously indicated, it has been determined that a state may create a right of action in wrongful death cases,²¹ but exactly how much further it may go is not certain. Subsequent to the *Jensen* decision, Congress enacted a statute which overrode the rule of this case. Shortly thereafter, the Supreme Court held this statute unconstitutional as being a delegation of power to states in an area reserved to Congress by the Constitution.²² The only interpretation of this decision which would explain the vast number of maritime cases brought in other than admiralty courts is that it forbade only a substantive invasion of maritime law, leaving non-admiralty courts open for the enforcement of the substantive maritime law.

The position of the instant case is readily sustainable not only from a constitutional standpoint, but also from a strict and logical interpretation of the act. The statute states clearly that state laws regulating rights and remedies for death are not affected by its provisions.²³ New York entertained a death on the high seas action under its own wrongful death statute many years prior to the FDHSA,²⁴ and thus, in the words of the act, had a remedy which is not affected by its provisions. A literal reading of the act might be taken to require New York to apply its own wrongful

18. Federal Death on the High Seas Act, 41 Stat. 538 (1920), 46 U.S.C. § 767 (1958).

19. 244 U.S. 205 (1917).

20. "In view of these constitutional provisions and the [savings to suitors clause] . . . it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation . . . [W]e 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." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

21. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

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

23. Federal Death on the High Seas Act, 41 Stat. 538 (1920), 46 U.S.C. § 767 (1958).

24. *McDonald v. Mallory*, 77 N.Y. 546, 33 Am. Rep. 664 (1879).

death statute in lieu of the FDHSA. But this interpretation could only increase the probability that a New York court in hearing the case would infringe on the substantive rights accorded by the FDHSA. Why then should a New York tribunal not be allowed to sit as a procedural enforcement medium in judgment of the case under the FDHSA? The only conclusion which can be reached is that neither the available legislative history, nor a logical interpretation of the act, appear to demand an admiralty forum. Representative Mann, who propounded the amendment which struck from the act the provision that state jurisdiction would be unaffected only as to causes of action accruing within a state's territorial limits, expressed his doubts as to where jurisdiction would lie under the act;²⁵ and in fact some 250 members of the House who voted on the amendment were not present when the discussion on the floor took place.²⁶ No words in the act demand an admiralty forum. It is submitted that the question in each case should be whether the substantive rights and liabilities which accrued to the parties on the happening of the event in litigation will be enforced by recourse to the procedure of the non-admiralty court in which the suit is filed. It must be remembered that if suit is brought under the FDHSA in a non-admiralty court, one substantial difference which will be present is the possibility of resort to a jury trial. It has been argued that the complexities of an admiralty case are too great to be sifted and weighed intelligently by a jury.²⁷ Whether this or any other factor will serve to subvert the substantive rights of the FDHSA is a question that may be settled only by the Supreme Court.

JAMES H. SWEENEY, III

STATE COURTROOM DOORS CLOSED TO EVIDENCE OBTAINED BY UNREASONABLE SEARCHES AND SEIZURES

The petitioner was convicted in a state court of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of a state law.¹ The

25. "[M]y impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court." 59 CONG. REC. 4484 (1920).

26. See 59 CONG. REC. 4486 (1920).

27. Smith, *Jury Trials for Admiralty Cases?* *No!* 2 FED. B. NEWS 49 (1954).

1. OHIO REV. CODE ANN. § 2905.34 (Baldwin 1958). The statute provides in pertinent part that: "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, [or] . . . picture"