Calendar No. 181.

66TH CONGRESS, 1st Session. } SENATE. { REPORT No. 216.

ACTIONS FOR DEATH ON THE HIGH SEAS AND OTHER NAVIGABLE WATERS.

SEPTEMBER 23, 1919.—Ordered to be printed.

Mr. KELLOGG, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany S. 2085.]

The Committee on the Judiciary, to whom was referred the bill (S. 2085) relating to the maintenance of actions for death on the high seas and other navigable waters, having considered the same, report favorably thereon with certain amendments, and as so amended recommends that the bill do pass.

The bill (S. 2085) has been previously indorsed and its passage urged by both the American Bar Association and the Maritime Law Association. Practically an identical bill passed the House during the Sixty-third Congress, but failed of consideration by the Senate; and substantially the same bill was favorably reported during the Sixty-fourth Congress by both the Senate and House Committees on the Judiciary. When this legislation was under consideration during the first session of the Sixty-fourth Congress, Mr. Fitz-Henry Smith, jr., on behalf of the committee of the Maritime Law Association, submitted the following communication:

I am writing you this hurried letter, and under a separate inclosure am sending you a copy of Case and Comment for July last containing Judge Harrington Putnam's paper on "Remedy for death at sea."

Replying briefly to the inquiry as to the right of Congress in the premises, I may say that the jurisdiction of the admiralty courts of the United States extends over the high seas and all navigable waters. This jurisdiction was conferred upon the United States courts by the Constitution and is exclusive in respect of all maritime causes of action. By the judiciary act original jurisdiction was given to the district courts, but "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," a provision which has been retained in the existing judicial code, so called. Thus, a common-law right of action may be maintained in our courts for a transitory cause, such as a tort, even though committed on the high seas.

The admiralty or maritime law is of great antiquity, and as it has come down to us had its origin in the rules and practices of mariners. Says Judge Bradley in the *Lottawanna*, 21 Wall. 558:

"Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have."

In other words, although the maritime law of the nations of to-day had a common origin, there is no such thing as a code of maritime law practised by all nations except as adopted by the laws and usages of the various nations. And the maritime law of the United States is the law adopted in this country and modified by acts of Congress. Compare Story, J., in the *Barque Chusan*, 2 Story 455–462, where he says:

"The Constitution of the United States has declared that the judicial power of the National Government shall extend 'to all cases of admiralty and maritime jurisdiction'; and it is not competent for the States, by any local legislation, to enlarge, or limit, or narrow it. In the exercise of this admiralty and maritime jurisdiction the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof, by the general principles of the maritime law."

Thus Congress has modified the maritime law in a number of cases affecting both domestic and foreign vessels, notable examples of which may be cited as the Harter Act and the act of June 23, 1910, relating to the enforcement of liens on vessels for maritime necessaries.

The maritime law of a country so far as the high seas are concerned may be described as the law of the forum for that part of the globe governing all vessels when brought before its courts—in the absence of treaty stipulations. Thus we have treaties with some countries governing disputes between the master of a foreign ship and the seamen of the ship whereby our courts will not take jurisdiction unless requested by the consul or upon some other contingency. But our courts now take jurisdiction of injuries on a foreign ship and of collisions between foreign ships even when they take place on the high seas. All that we seek to do in the bill relating to loss of life is to provide a law of the forum for American courts in that particular and a law of the flag for American vessels, just as a law now exists for injuries that are not fatal.

Our courts are not bound to exercise jurisdiction over a controversy involving foreign vessels, and do not always do so. As to when they should is laid down by Bradley, J., in the *Scotland*, 105 U. S., 24. Says the learned judge:

"Each nation, however, may declare what it will accept, and, by its courts, enforce as the law of the sea when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction or seeking justice in its courts can complain of the determination of their rights by that law unless they can propound some other law by which they ought to be judged; and this they can not do except where both parties belong to the same foreign nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty."

It may be pointed out that the above case dealt with the act of Congress limiting the liability of vessel owners, and that the collision took place on the high seas.

The above is a meager and imperfect exposition of the law as I find it, but I trust that it may prove serviceable to you, and if I can be of further assistance I shall be pleased to help you out to the best of my ability.

We are all very anxious to have the bill go through in its present simple form, which avoids conflict with State statutes and yet remedies a crying defect in the maritime law as administered in this country, namely, that there is no right of action for death under that law, notwithstanding that by statute in every State such a right is given for death within the territorial jurisdiction of the State. May we hope for your kind assistance?

Respectfully, yours,

FITZ-HENRY SMITH, JR.

The following letter was also at that time received from the Hon. Harrington Putnam, of the Supreme Court of the State of New York:

The general purpose of the measure is to give a uniform right of action in the United States admiralty courts for death by negligent acts occurring on the high seas, or on navigable waters of the United States, including the Great Lakes. The common law of England and in this country had no right of action for death, the reason for this omission being commonly stated that such a right was personal, which did not survive the death of the one injured. This was remedied by Lord Campbell's act, and following it our States have passed statutes conferring certain remedies for death. Congress also has changed the common law in this respect for the District of Columbia.

On the Continent of Europe a recovery may be had for death, whether the negligent act was on land or on water. Generally the right is admitted in favor of those whose maintenance or support is cut off by such removal of the one under a duty of support

But the maritime law of England and the United States follows the common law, and hitherto we have had no remedial legislation passed for our maritime courts. In England it has been held that Lord Campbell's act does not cover a death on the high seas so as to give a right of action in rem; that is, against the vessel at fault, although a recovery has been allowed in personam against the vessel owner.

In this country a series of decisions by the Supreme Court of the United States has held that there is no recovery for death at sea, in the absence of a statute conferring such a remedy. (The *Harrisburg*, 119 U. S., 199; The *Alaska*, 130 U. S., 201.)

The French law allows such recovery. Hence in a proceeding to limit liability by the French steamship company owning the passenger steamship *La Bourgogne* (210 U. S., 95), our court enforced the right to recover for death at sea, applying the law of France.

In another limited liability proceeding arising from a collision more than 3 miles from land between steamships both owned by Delaware corporations the death statute of Delaware was applied. (The *Hamilton*, 207 U. S., 398.) These State statutes, however, are far from uniform. In some States the recovery is limited to the conscious suffering before death—a matter difficult of proof in case of drowning at sea. (The *Robert Graham Dunn*, 70 F. R., 271.) Other States only give the remedy against those who are common carriers, which would not apply to vessels chartered or engaged for a single owner. In a few States the remedy for damages must follow, or be concurrent with, a criminal prosecution, so that the offender must have been first indicted. Furthermore, corporations owning seagoing vessels are not confined to the States upon the seaboard. For reasons of taxation, or other supposed advantages, shipping corporations may be organized in a remote inland State, and if the vessels are negligently managed at sea the death remedy must be sought in the statutes of such State. If a collision be supposed between vessels of different States, having diverse systems of relief for death, obviously great difficulties would arise, especially in fixing damages.

Although the constitutional grant of all cases of admiralty and maritime jurisdiction, with the power to regulate commerce, was intended to secure uniformity throughout the country, the Supreme Court has suffered this anomalous condition to grow up on the permissive theory that until Congress acts a State can legislate at least to the extend of binding corporations which it has created, so that these statutes may extend to torts committed more than 3 miles from land.

Such State statutes, diverse in their terms and conflicting in remedies, are but a poor makeshift for the uniform, simple legislation which Congress alone can enact.

The present bill is designed to remedy this situation by giving a right of action for death, to be enforced in the courts of admiralty, both in rem and in personam. The right is made exclusive for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States. The measure has engaged the attention of the Maritime Law Association of the United States for more than 10 years, and in its present form has the approval of the American Bar Association. It is believed to be plain, simple, and in accord with the general policy of our more recent State and Federal legislation.

Referring to the separate sections, it may be said:

Section 1 gives a right of action in the admiralty courts for death from negligent acts occurring upon the high seas, the Great Lakes, and other navigable waters, the language being similar to the language of Lord Campbell's Act.

Section 2 provides that the damages to be recovered shall be a fair and just compensation to the persons injured by the death of the deceased, to be determined and apportioned by the court, inasmuch as in admiralty proceedings there are no jurors.

Section 3 fixes a one-year statute of limitation within which suit must be brought, and since it may not always be possible to get jurisdiction of the vessel or owner during that period, a proviso is added to allow additional time in case the one-year period does not afford reasonable opportunity to serve process.

Section 4 deals with the case where a person has brought suit in an admiralty court to recover for a personal injury but dies from the effects of the injury before the suit is concluded. The section permits the action to be continued by the personal representative of the deceased for the recovery of damages for his death as provided for by the act.

Section 5 states the admiralty rule in respect to the effect of contributory negligence, namely, that it shall not bar recovery, as at common law, but go to the reduction of damages. (See the *Max Morris*, 137 U. S., 1.) This is also the doctrine of the Federal employers' liability act. (Laws of 1908, ch. 140, sec. 3.)

Section 6 reserves to shipowners the right of limitation of liability, as established by the laws of the United States, present or future.

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 can not properly legislate for the high seas.

And section 8 reserves to suitors their rights under State statutes in the courts of the States and in the common-law courts of the United States with the proviso that there shall be but a single recovery for the injury.

The measure is primarily a bill for the admiralty courts; not to interfere with the jurisdiction of the States.

The fact that the several States have followed Lord Campbell's Act, in so far as actions in the courts of common law are concerned, shows that public opinion in this country favors recovery for death. The *Titanic* disaster is still fresh in mind.

There is no reason why the admiralty law of the United States should longer depend on the statute laws of the States and lag behind the general law of Europe. Congress can now bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea.

I am not aware of any objection to the bill.

Mr. George W. Whitelock, on behalf of the committee of the American Bar Association, wrote:

Having seen Hon. James A. O'Gorman, I learn that the Senate committee recognizes the expediency of establishing a right of action for death in so far as Americans and their ships are concerned, but that there is a possible objection to the Lodge bill because it may be deemed to create a substantive right of recovery against foreigners and their vessels for torts at sea outside of the 3-mile limit.

The urgency of Federal legislation is strikingly reinforced by the *Middlesex*, decided at Boston on June 13, 1916. There a collision at sea occurred between American ships, registered at ports of States whose laws allow recovery for death, but Federal Judge Morton was nevertheless forced to dismiss the libels for the death of certain of the crew because no act of Congress afforded a remedy.

The power of Congress to legislate as to foreigners and their vessels is unquestioned. "Each nation may declare what it will accept, and by its courts enforce, as the law of the sea, when parties choose to resort to its forum for redress." (The *Scotland*, 105 U. S., 24.) And the act of 1851 for limitation of liability (Rev. Stats., 4282–4289), the Harter Act of 1893 to regulate navigation and carriage of goods at sea (27 Stat., 445), and the act of June 23, 1910, concerning liens on vessels for maritime necessaries, are all instances of exercise by Congress of such power over foreigners and their ships.

Every country of western Europe is believed to recognize the right of recovery for death (see my article in 22 Harvard Law Review, 403, and citations therein of foreign law), and assuredly there is no hardship in giving in American courts the very same right of recovery to which a foreign defendant and his ship would be liable under the law of the vessel's home port. But it is a tragic anomaly to relegate our own citizens (dependent relatives) to foreign courts to recover for death by negligence at sea when suit may be brought here for the very same tort if death does not ensue.

The Supreme Court has recognized death claims in cases of proceedings to limit liability, where the owner, foreigner or American, has voluntarily surrendered the remains of his property to an American court, and in which the owner is then subject to American law. (The *Hamilton*, 207 U. S., 398; *La Bourgogne*, 210 U. S., 95; the *Titanic*, 233 U. S., 718.) But the right to affirmative action in the admiralty against ship or owner has never been sustained by the Supreme Court, and Judge Morton's dismissal of the meritorious libels against the *Middlesex* was in strict conformity with the existing law of the forum— a law which is a disgrace to a civilized people.

The American Bar Association and the Maritime Law Association have for many years advocated legislation by Congress in the premises, and it may be recalled that in April last every member of the executive committee of the former association, including its president, ex-Senator Elihu Root, united in a letter to the Senate Judiciary Committee asking that the Lodge bill be favorably reported. I am not aware of any opposition to the measure from the outside, and I hope sincerely that it may receive prompt and favorable action so that my committee may report progress at the ensuing meeting of the American Bar Association.

From a review of authorities, it is not believed that the Congress has the power to create a substantive right of action to recover damages against foreigners and their vessels for wrongful death on the high seas. The committee concludes that this bill (S. 2085) is particularly designed to provide a law of the forum for American courts in this connection, and a law of the flag for American vessels. But it is clear from the authorities that an action will lie in the United States courts where the statute of the foreign country where the

vessel belongs grants a right of action for death by negligence. But as the Supreme Court has held that the limited liability statute of the United States applies to foreign ships seeking such limitation of liability in our courts, the committee recommends that the bill be amended by the insertion of a new section, to be numbered section 4, to read as follows:

SEC. 4. Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or fault, 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.

The committee also recommends that the bill be further amended by changing section numbers as follows: Change present section 4 to 5, section 5 to 6, section 6 to 7, section 7 to 8.

Pursuant to the recommendations of the Secretary of War, it is recommended that the following words and punctuation be eliminated from lines 5 and 6, on page 1: "on any navigable waters of the Panama Canal Zone," and that the words "or to any navigable waters in the Panama Canal Zone" be added at the end of line 11, on page 3.

The Secretary's letter follows:

WAR DEPARTMENT,
Washington, June 24, 1919.

HON. KNUTE NELSON,
Chairman Committee on the Judiciary,
United States Senate.

SIR: My attention has been invited to the bill (S. 2085) relating to the maintenance of actions for death on the high seas and other navigable waters, introduced in the Senate June 17 by Mr. Nelson and referred to your committee. As at present drawn the bill applies specifically to the navigable waters of the Panama Canal Zone.

During the Sixty-fourth Congress a similar bill was introduced in the House of Representatives, and upon the same being brought to the attention of the governor of the Panama Canal a report thereon was received, from which the following is quoted for your information:

"This bill, upon its receipt in this office, was forwarded to the special attorney for the Panama Canal, who has advised that, in his opinion, the bill should not be made applicable to the Canal Zone. 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. In addition, the employers' liability act of Congress is now applicable to the Canal Zone, and some suits have been instituted against the Panama Railroad for injuries and deaths occurring upon the company's ships while lying in the navigable waters of the Canal Zone. The proposed bill is much broader than the employers' liability act, inasmuch as the former is not limited to injuries to employees.

"The opinion of the special attorney with reference to this bill is concurred in by this office, and it is accordingly suggested that reference to the Canal Zone be eliminated from the bill, as, in my judgment, its application to the Panama Canal would result in creating confusion in the substantive law of the Canal Zone."

The same conditions which existed at the time the previous bill was under consideration, so far as the Panama Canal Zone is concerned, obtain at the present time, and in view of the governor's report, quoted above, it would seem advisable that the pending bill should be so amended that its provisions will not extend to the navigable waters of the Canal Zone, and it is respectfully suggested that this be done by striking out in line 6, section 1, the words "the Panama Canal Zone," and by adding to line 11, page 3, after the word "State" the words "or of the Panama Canal Zone."

I shall be pleased to be advised as to your views in this matter, and if there is any point upon which you desire more information I will be glad to furnish the same upon being informed of your wishes.

Very respectfully,

NEWTON D. BAKER,
Secretary of War.