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Rethinking the Meaning of the Phrase "Surviving Widow" in the Jones Act: Has the Time Come for Admiralty Courts to Fashion a Federal Law of Domestic Relations?

ROBERT M. JARVIS*

INTRODUCTION

Section 33 of the Merchant Marine Act of 1920, popularly known as the Jones Act, provides that if a seaman is killed in the course of his employment, his personal representative may bring an action for damages for the benefit of a specified class of beneficiaries headed by the decedent's surviving widow.

The foregoing proposition seems straightforward, until one discovers that the Jones Act does not define the phrase "surviving widow." Nor is the term defined in the Federal Employers' Liability Act, which the Jones Act explicitly incorporates. As a consequence, federal courts sitting in admiralty are often called upon to

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2. There has been considerable controversy concerning who qualifies as a seaman under the Jones Act. For an article which reviews the subject see Hoffman, Recent Decisions Determining Seaman Status Under the Jones Act, 6 MAR. LAW. 173 (1981). Effective December 29, 1982, the Act was amended to preclude certain aliens from coverage under the statute. The 1982 amendment does not bar all alien seamen from recovery; only those aliens who work in the offshore oil and gas exploration and production industry in areas outside and other than the United States outer continental shelf are excluded. For an excellent article on foreign seamen and the Jones Act in general, see Gliatta, Keeping Up With the Jones Act: The Effect of United States Based Stock Ownership on the Applicability of the Jones Act to Foreign Seamen, 15 N.Y.U. J. INT'L L. & POL. 141 (1982).
3. It should be noted that a Jones Act suit can only be maintained by the deceased seaman's personal representative. An attempt by anyone, other than the personal representative, to bring the suit will result in an invalid suit. See, e.g., Civil v. Waterman S.S. Corp., 217 F.2d 94 (2d Cir. 1954).
determine whether a particular claimant is a surviving widow entitled to collect damages under the Jones Act.

Such cases present several difficult choice of law questions. Initially, there is the question whether the court should look to federal or state law in defining the meaning of the phrase "surviving widow." If the court chooses federal law, the inquiry then becomes the relatively simple one of who is considered a surviving widow under federal law.

Alternatively, if the court decides that state law controls the question, the focus then turns to which state should have its law applied. In our increasingly mobile society, it is not unusual to find that several states can at least claim to have a connection to the seaman and his wife. Such a connection can be based on the couple's domicile or residence in that state, or the ownership of property in the state. A host of other factors are also available to support a state's contention of a significant relationship. Since the consequence of choosing to apply the law of State A over that of States B and C can dramatically affect the outcome of a particular case, the question of which state had the greatest contact with the couple is often of paramount importance.

Federal courts have typically decided these cases by choosing state, rather than federal law to provide the meaning of the term surviving widow. The rationale for the choice is the perceived need to defer to the states on issues involving questions of family law, a position which has been approved by the United States Supreme Court.

In choosing which state's law is to apply, the courts have followed a "grouping of contacts" test. Under this approach, the court locates the state which had the greatest number of contacts with the seaman and his widow. Usually this method leads to

5. States will often claim a connection with a particular person for tax purposes. When the potential tax liability is very large, fascinating struggles emerge between the states. In the famous Dorrance litigation, which is reported at In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932), cert. denied, 288 U.S. 617 (1933); In re Dorrance's Estate, 115 N.J.Eq. 268, 170 A. 601 (Prerog.Ct.1934), aff'd, Dorrance v. Thayer-Martin, 13 N.J.Misc. 168, 176 A. 902 (Sup.Ct.1935), aff'd, 116 N.J.L. 362, 184 A. 743, cert. denied, 298 U.S. 678 (1936), the courts of both Pennsylvania and New Jersey found that the decedent was domiciled in their state at the time of death. As a result, both states taxed the estate, forcing the estate to pay $28 million in taxes. More recently, the Howard Hughes estate has raised similar questions, with the states of California, Texas and Florida each claiming to be the proper beneficiary of the estate taxes. The United States Supreme Court was forced to step into the controversy and agreed to exercise its original jurisdiction. Cory v. White, 457 U.S. 85 (1982); California v. Texas, 457 U.S. 164 (1982).

6. See infra notes 88-125 and accompanying text.

7. See infra notes 63-71 and accompanying text.

choosing the state in which the family home was maintained. On some occasions, however, another state may be deemed to have had a greater nexus with the couple, especially where there is no common household.

Once the state having the greatest link is identified, the issue to be decided is whether the claimant is a surviving widow entitled to collect damages for the decedent’s death. Where the couple went through a valid marriage ceremony, and no claim of divorce or desertion is raised, the claimant will be deemed a surviving widow entitled to enforce her claim under the Jones Act.

Problems begin to surface, however, if the couple did not go through a valid ceremony. In some cases, it will be found that the couple did go through a marriage ceremony, but the ceremony was defective because of a prior marriage still in existence at the time of the second marriage, or because some other statutory directive was not met. In other cases, it will be discovered that the couple did not go through a marriage ceremony at all.

When a valid marriage ceremony is absent, counsel for the widow will attempt to prove the existence of a recognizable marital relationship by resorting to quasi-marital aids. It will be suggested that the decedent and the claimant were involved in a common law marriage, or that the claimant was the putative spouse9 of the decedent.

Resort to such quasi-marital relationships will often be rebuffed by the federal courts. Adhering rigidly to state law, the federal judge will refuse to find the quasi-marital relationships sufficient unless they would confer legal widowhood under the prevailing state law. In most cases, however, the state law will have been amended to abolish recognition of such relationships. Where this is the case, the widow has always been denied Jones Act compensation, even if it is proved that she lived with the decedent and was dependent upon his earnings for some or all of her livelihood. The decision of federal trial and appellate courts to unwaveringly follow state law in determining whether a claimant who did not go through a valid marriage ceremony may collect damages under the Jones Act has resulted in four discernible problems in the administration of American admiralty law.

First, it has made it difficult to state with assurance what the likely outcome of any particular case will be. This is especially true if the couple had contacts with two states, one that would recognize the claimant as a surviving Jones Act widow, and one that would not recognize her as a surviving Jones Act widow. Such could be

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9. See infra note 105 for the meaning of the term “putative spouse.” Although no Jones Act case appears to have used it, there is also the term “de facto marriage.” These marriages are defective because of a failure to follow a statutory prescription.
the case, for example, if the couple had a home in Washington, D.C., which traditionally has recognized common law marriages, but the decedent worked as a seaman out of a port in Virginia, which does not recognize common law marriages. Because of the uncertainty of the result that a court would reach, and the understandable desire of the decedent's employer to avoid paying Jones Act damages if the court applies the law of Virginia rather than the law of the District of Columbia, much needless litigation occurs to determine which law the court will choose.12

The second problem is forum shopping. This problem is a direct outgrowth of the first. Because the outcome of a case can vary from state to state, the personal representative often seeks to bring his action in a state having a favorable marital statute. The defendant, on the other hand, attempts to thwart such a suit by beating the personal representative in the proverbial race to the courthouse. To win the race the defendant brings his own action in a state which favors him. For example, the defendant, usually a shipowner or a subrogated insurer, will in many cases have a right to exoneration by instituting a “limitation of liability” suit.13 By bringing this suit

10. The District of Columbia courts, while acknowledging that common law marriages have been abolished in neighboring states, continue to recognize such marriages. See, e.g., Johnson v. Young, 372 A.2d 992 (D.C. 1977). Johnson was recently relied on in Gordon v. Railroad Retirement Bd., 696 F.2d 131 (D.C. Cir. 1983) to reverse a decision of the Retirement Board denying benefits to the insured's second wife.


12. If the court does bar recovery by the "widow," the Jones Act then directs that recovery is to be had by the seaman's children. If there are no children recovery then goes to the seaman's parents. If the seaman's parents have predeceased the seaman, damages are to be paid to the seaman's dependent next of kin. Thus, it is in the defendant's interest to have the damages descend to the lowest rung of the ladder. While the seaman's wife, children and parents do not have to prove actual dependency on the seaman's wages, the next of kin do have to prove such dependency in order to be able to collect. In many cases, no such dependent kin will be found, or, if they are found, they will have received only meager support from the seaman. Thus the size of their damages, relative to the damages which would have been collected by the seaman's wife, children or parents, will be small.

13. For an example of a Jones Act suit considered within a limitation of liability petition brought by the shipowner, see In re Industrial Transp. Corp., 344 F. Supp. 1311 (E.D.N.Y. 1972). See also infra note 130 for further discussion.

Under the Limitation of Liability Act, now codified at 46 U.S.C. §§ 181-96 (1982), a vessel owner may limit his liability to the value of the vessel after the occurrence of the casualty giving rise to the limitation proceedings. The purpose of the Act is to protect the shipowner from the financial ruin which would occur by having to pay off large claims following a marine disaster. The concept of limitation developed in the Mediterranean Codes in the 16th and 17th centuries and was transmitted into English law in the 18th century. The principle was at first rejected by American courts. The New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston, 47 U.S. 343 (1848). Shortly thereafter, however, Congress passed the Limitation of Liability Act in 1851. The pur-
and including a prayer to be excused from any Jones Act liability, the defendant effectively frustrates the action of the personal representative. Even when the defendant’s plan is capsized by the court severing the Jones Act cause of action, or refusing to grant the requested limitation, it is usually late in the proceedings and the personal representative has expended a great deal of time and expense in opposing the defendant’s suit. The result is that the personal representative will often settle on terms much more favorable to the defendant than if the personal representative had won the race to the courthouse.

A third problem, related to federal courts applying state statutes dealing with domestic matters, is that the federal judge must delve into areas of law with which he is likely to be completely unfamiliar. Although it is believed that our generalist judiciary is able to master any area of law with which it may be confronted, the amount of valuable and all too limited judicial resources which must be expended in order to acquire the necessary mastery must be questioned. Given that state courts have recently been working overtime to invent new causes of action such as “palimony,” this

pose of the Act is to protect the commercial interests of the United States while inducing investment in shipping. The Limitation Act has generated colorful case law. In Norwich Co. v. Wright, 80 U.S. 104 (1871), for example, the United States Supreme Court found the statute so poorly drafted that the next year they took the extraordinary step of issuing its own rules on limitation. Even this, however, did not help. Subsequent appeals in the Norwich case were still being presented to the Court as late as 1886. The City of Norwich v. Norwich & N.Y. Transp. Co., 118 U.S. 468 (1886). Limitation proceedings have invariably followed all modern sea disasters. The doomed S.S. Titanic, for example, spawned limited litigation which reached the Supreme Court in Oceanic Steam Navigation Co. v. Mellor, 233 U.S. 718 (1913). The case presented interesting choice of law questions, and the Court held that all vessel owners, whether foreign or domestic, who filed a limitation proceeding in a United States court, had the right to have their claims decided pursuant to American law. When the M/V Torrey Canyon sank in March, 1967, fouling the beaches of England and France with thirty-five million gallons of oil, a limitation suit was brought in the United States. Since one lifeboat, having a salved value of $50 had been saved from the vessel, the federal court permitted the ship owner to establish a $50 limitation fund. For a further discussion of the Torrey Canyon case, see Jarvis, Richardson v. Foremost Insurance Company: A New Opportunity for Industry to End State Regulation of Coastal Oil Pollution?, 19 Gonz. L. Rev. 265, 278 n.88 (1984) [hereinafter cited as Jarvis].


15. In Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the California Supreme Court held that an unmarried person could recover from a person with whom she had cohabitated in accordance with any written contract between them unless the agreement rested on an unlawful meretricious consideration. The court further held that even where there was no such written contract, a party could still recover if the court could find an implied contract. Even if no contract, whether express or implied, could be found, the court held that the doctrine of quantum meruit could be used, along with other equitable remedies, in order to recognize the interests of the plaintiff. Although the plaintiff in Marvin, Michelle Triola, eventually was denied recovery on all three grounds, the case has spawned a vast amount of litigation. These
waste of judicial resources is likely to grow ever larger.

The final problem caused by the present deference to state law is that it too often results in the denial of benefits to a class which ought to be compensated. By denying benefits to those claimants who cannot present the requisite documentation, the federal courts particularly fail in their historical role as guardian to the seaman. Although it has long been said that seamen are the wards of the admiralty courts, it is difficult to believe that the courts are being effective and proper guardians when they fail to take care of the ward’s loved ones.

In light of the foregoing, this Article has two purposes. First, it will detail the reasons why the courts have interpreted the Jones Act in the way they have. Second, it will suggest a potential solution to the problems caused by this interpretation.

I. The History of the Jones Act

A. Passage of the Jones Act

In 1915 Congress passed an omnibus statute known as the Sea-

Marvin-inspired cases have received varying responses from the courts around the country. The Illinois Supreme Court, for example, refused to follow the Marvin precedent. Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). The New York Court of Appeals, however, followed the Marvin case to the extent that express contracts between former lovers would be recognized, even if the contract was oral. Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980).

16. Seamen have long been thought to require special protection from the admiralty. Whether such perceived need stemmed from the lack of education of most mariners, or the rigors of shipboard life, or the need to have an able-bodied merchant marine to carry on trade and commerce, is an open question. The likely answer is that all three factors probably played a part in the development of a wardlike relationship between courts and seamen. For a general statement of the relationship, see Harris v. Pennsylvania R.R. Co., 50 F.2d 866 (4th Cir. 1931). For an application of the principle in a Jones Act setting, see also Jacob v. City of New York, 119 F.2d 800 (2d Cir. 1941), rev’d, 315 U.S. 752 (1942), in which both Judge Learned Hand and his cousin, Judge Augustus Hand, participated. Of course, courts have sometimes leaned too far in the direction of the seaman. In Warren v. United States, 340 U.S. 523 (1951), a majority of the United States Supreme Court held that a sailor was entitled to recover support from his employer for injuries sustained when he became drunk while on shore leave and fell off a balcony. The Court explained that “if leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor’s behalf.” Id. at 530. State courts have been similarly sympathetic. See Kois- tinen v. American Export Lines, Inc., 194 Misc. 942, 83 N.Y.S.2d 297 (N.Y. Civ. Ct. 1948), which applied the guardian-ward relationship to a seaman who injured himself while making a hasty retreat from a brothel. In England, seamen also received special treatment. Thus it was said in D. MacLachlan, The Law of Merchant Shipping 156 (7th ed. 1932):

We come now to consider the contracts, rights and duties of seamen. This meritorious class of His Majesty’s subjects, so essential to the power and prosperity of this country, long have been favoured objects with the British Parliament; and still in every later enactment alike their merits and their need continue to be acknowledged, by the accumulation of guards and protection in addition to those with which they were already surrounded.
man’s Welfare Act. The Act regulated a number of subjects of importance to the working conditions of seamen, including wages, treatment aboard ship, desertion and the availability of life-saving equipment. The twentieth and last section of the Act provided that a seaman could sue his employer for injuries he sustained due to the negligence of any member of the crew, including the master, in the management or navigation of the vessel.

Congress’ purpose in enacting section 20 was to overturn the third proposition of a case known as The Osceola. In that case the United States Supreme Court held, inter alia, that a seaman could not sue to recover for the negligence of another member of the crew because all members of the crew were fellow-servants. Conse-

17. Known as the LaFollette Act after its chief backer, the bill was passed as Pub. L. No. 63-302, 38 Stat. 1164 (1915).
18. Section 20 of the Act reads as follows: “That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority.” Pub. L. No. 63-302 § 20, 38 Stat. 1164, 1183 (1915).
20. In The Osceola, a crew member had libeled the ship in rem to recover for injuries received in carrying out an order of the master. As presented, the case was one of the few to have ever raised a question of pure operational negligence. Since counsel for the crewman conceded that the ship was seaworthy in all respects, the seaman’s injury was caused solely by his proper execution of an improvidently given order. The district court found for the seaman, and the circuit court certified the case to the Supreme Court. Justice Brown, writing for the Court, came to four conclusions regarding the rights of a seaman injured while working aboard a vessel: 1) an injured seaman was entitled to maintenance and cure for at least as long as the voyage continued; 2) the owners and the vessel were liable for all injuries due to unseaworthiness; 3) all members of the crew, with the possible exception of the captain, were fellow-servants; 4) a seaman could not recover for the negligence of the master or the crew. Id. at 176. The first of these propositions might need explanation for shore based lawyers. Maintenance and cure is a traditional remedy which is provided to fallen seamen by their ships. Under it, the seaman receives wages to the end of the voyage and care until the maximum cure obtainable for the injury has been reached. Maintenance and cure can be withheld, however, if the seaman’s injury was due to the seaman’s gross negligence or was caused by a pre-existing condition which the seaman intentionally concealed at the time that he signed onto the voyage. Otherwise, the shipowner is under an absolute duty to provide maintenance and cure.

Although cure can run into thousands of dollars for a prolonged illness requiring hospitalization, the shipowner rarely pays for such costs because most seamen check into Sailor’s Hospitals or Homes run by the United States. The service is reviewed at G. Gilmore & C. Black, THE LAW OF ADMIRALTY § 6-11, at 301-02 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]. As for maintenance, the traditional rule was that a seaman was entitled to no more than $8 a day. Vaughan v. Atkinson, 369 U.S. 527 (1962). Recently, however some courts have begun to approve maintenance payments at the rate of $20 a day. Austin v. Otis Eng’g Corp., 641 F.2d 197 (5th Cir. 1981). Other courts, however, continue to award $8 a day. Gajewski v. United States, 540 F. Supp. 381 (S.D.N.Y. 1982). As to why the figure of $8 became the standard measure of maintenance, see Incandela v. American Dredging Co., 659 F.2d 11 (2d Cir. 1981).

sequently, the negligence of any one of them was imputed to all of them, and the action was barred.

Section 20 was put to judicial scrutiny shortly after its enactment in *Chelentis v. Luckenbach S.S. Co.* The United States Supreme Court affirmed the trial and appellate courts and held that despite the passage of section 20, a seaman could still sue for injuries suffered due to the negligence of a crew member. The Court explained that the fellow-servant rule was not a bar to such an action. The bar to recovery was the recognition that the only right under maritime law for a seaman’s injury sustained through negligence was the traditional one of “maintenance and cure.” Thus, it was irrelevant that Congress had abolished the fellow-servant rule, because that rule had never stood in the way of a recovery for negligence.

It has, of course, been pointed out that the Court could easily have interpreted section 20 to mean what Congress evidently had intended: that seaman were now free to sue for negligence regardless of the previous imputed negligence bar. Yet such was not the

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22. 243 F. 536 (2d Cir. 1917), aff’d, 247 U.S. 372 (1918).

23. See supra note 20 for the meaning of maintenance and cure. The reader would be left with an incomplete picture without a few words about the context in which the *Chelentis* case arose. In the early part of the 20th century the United States Supreme Court was busily developing an expansive interpretation of the federal admiralty jurisdiction, which substantially cut back on what maritime matters could permissibly be decided under state regulation. Just why the Court should have been concerned with this question in the early days of the 1900’s is discussed in detail in Jarvis, supra note 13, at 281 n.108. The opening salvo of the Court’s attack on state maritime regulation came in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), in which a bitterly divided Court ruled that a New York workmen’s compensation statute impermissibly conflicted with a parallel federal statute. When in the next year *Chelentis* reached the Supreme Court, it provided a perfect vehicle for the Court to continue striking down state regulation. The *Chelentis* case was brought in a state court, and the opinion of the Supreme Court was penned by Justice McReynolds, who had written the *Jensen* decision. *Jensen* became firmly moored two years later when the Court relied on it in *Knickerman Ice Co. v. Stewart*, 253 U.S. 149 (1920). In that case the Court rebuffed a congressional attempt to allow claimants to bring admiralty claims by relying on the workmen’s compensation laws of their home states. This subsequently led to the passage of the Longshoremen's and Harbor Workers’ Compensation Act in 1927. As amended, the Act is now found at 33 U.S.C. §§ 901-50 (1982). Thus, it can be seen that the *Chelentis* outcome was in many ways predestined.

24. GILMORE & BLACK, supra note 20, § 6-20, at 326. Professors Gilmore and
case,\textsuperscript{25} and Congress was forced to go back to work on the problem.

Two years after the 	extit{Chelents} decision Congress was back with its answer. This answer emerged in section 33 of the Merchant Marine Act of 1920.\textsuperscript{26} Like the 1915 Seaman's Welfare Act, the Merchant Marine Act of 1920 was an omnibus bill. Among other things, it established the United States Shipping Board, placed into operation a comprehensive Ship Mortgage Act, and made important amendments to the Federal Maritime Lien Act of 1910.\textsuperscript{27}

Section 33 of the 1920 Act, like section 20 of the 1915 Act, had nothing to do with the statute in which it was contained. Although the purpose of section 33 was to amend section 20, it caused little debate or discussion as it made its way through the various committees and onto the floors of the House and Senate of the Congress. Indeed, a review of the legislative history of the Merchant Marine

Black believe that the Court was simply attempting to "goad Congress" into writing a clear piece of legislation. Some lower courts, of course, clearly understood Congress' intention despite the inartful drafting. The Second Circuit Court of Appeals, for example, explained that Section 20 of the Act "was intended to enlarge the existing rights of seamen by providing that, in suits to recover damages for injuries, 'seamen' having command should not be held to be 'fellow-serants with those under their authority.'" 

Ger
dradin v. United Fruit Co., 60 F.2d 927, 928-29 (2d Cir.), cert. denied, 287 U.S. 642 (1932). The most likely reason the Court chose to not find the congressional purpose was, therefore, probably not due to a desire for clear drafting. Rather, as explained in supra note 23, the Court did not divine Congress' purpose, because to have done so would have side tracked its efforts to expand the federal admiralty courts' jurisdiction at the expense of state courts.

25. See supra note 20 for the other holdings of the Court. What should be remembered about the Court's decision, but often isn't, was that it meant to address the three questions which had been certified to it by the circuit court. Those questions were:

1) was the ship liable to a crew member due to an improvident order of the Master? [The Court said no];
2) are masters and their crews fellow-servants? [Yes];
3) was the vessel or its owners liable to the seaman on the facts presented? [No].

Much of the confusion attributed to the Court's opinion is understandable once it is remembered that the Court was seeking to answer the questions posed to it.


27. The Act established the Shipping Board because there was a surplus of American tonnage following the end of World War I. The purpose of the Board was to provide policy decision making and implementation in regards to the American merchant marine.

The Ship Mortgage Act, now codified at 46 U.S.C. §§ 911-84 (1982), was designed to encourage private investment in shipping by providing credit through the government of the United States. As Professors Gilmore & Black point out, however, the Act basically failed to increase private investment in shipping following the end of World War I. Gilmore & Black, supra note 20, § 9-48, at 691.

The Federal Maritime Lien Act is now codified at 46 U.S.C. §§ 971-75 (1982). It provided a uniform law on the subject after a bewilderingly number of complex state lien acts had succeeded in scuttling, figuratively, if not literally, untold number of ships with concepts such as the "home port" doctrine. For an excellent article written shortly before the passage of the Federal Act, see Smith, 

Act contains surprisingly little on section 33. It is regrettable that the section received so little comment. As will be discussed, section 33 has the unmistakable look of having been put together late one night by an uncaring draftsman. The problems now under discussion are a direct product of this poor drafting.

B. The Language of the Jones Act

Section 33 of the Jones Act states 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 cases 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.

From the foregoing passage it can be seen that the Jones Act is an odd piece of drafting. Since its enactment it has spawned a great deal of confusion. Professors Gilmore and Black, for example, have reminded their readers that at one time the editors of the “United States Code Annotated prefaced the statute with a seventy-page essay entitled Commentary on Maritime Workers, supplemented by a diagrammatic ‘Chart to Illustrate the Jurisdiction of the Courts.’” This was deleted in 1958 when it was realized that mastering the quagmire of case law spawned by the inartful drafting of the Jones Act was impossible.

For present purposes, however, the difficulty of the Jones Act is readily mastered. The Act does not say who is entitled to collect damages if a seaman, injured through the course of his employment, dies as a result of such injury. Indeed, the statute does not even say what causes of personal injury may give rise to compensation. All this, and more, is left to be worked out by resorting to the laws relating to the injury and death of railway workers.

29. See infra notes 40 and 41 and accompanying text.
31. GILMORE & BLACK, supra note 20, § 6-20, at 327.
32. Id.
II. THE FEDERAL EMPLOYERS' LIABILITY ACT

A. Language of the Federal Employers' Liability Act

The references in the Jones Act to the laws regulating the injury and death of railway workers refer to sections 51-60 of Title 45 of the United States Code, which is commonly known as the Federal Employers' Liability Act (FELA). Under FELA any employee of an interstate rail carrier may recover damages from the carrier for injury or death which results in whole or in part from the negligence of the carrier's officers, employees or agents, or from the insufficiency or defectiveness of the carrier's cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment, if such defectiveness or insufficiency was the result of negligence.

Although the contributory negligence of the employee cannot bar recovery, it can be used to reduce the size of the employee's award. FELA contains a broad section which effectively abolishes the defense of "assumption of risk" in all but the most extreme

34. 45 U.S.C. § 51 (1982) reads as follows:
   Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
   Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.
35. Section 3 of FELA, codified at 45 U.S.C. § 53 provides:
   In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.
cases, and any attempt by the carrier to exempt itself from FELA liability, whether by “contract, rule, regulation or device” is deemed void. Actions are to be commenced within three years from the date the cause of action first arises, and federal and state courts have concurrent jurisdiction. An important proviso states that any action which is begun in state court cannot be removed to federal court.

B. Problems Caused by the Incorporation of FELA into the Jones Act

The Jones Act states that all provisions of all laws relating to the personal injuries and deaths of railway workers are to be applied to seamen’s actions arising under the Jones Act. At one time it was thought that this proscription was to be taken literally, but in an early case the United States Supreme Court made it clear that the application of FELA to Jones Act cases should be done without undue literalness. Professors Gilmore and Black have described the resulting rela-

36. As amended in 1939, section 4 of FELA is codified at 45 U.S.C. § 54 and states that:

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

37. The rule is section 5 of FELA, codified at 45 U.S.C. § 55 (1982), which reads:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury of death for which said action was brought.


39. See Gilmore & Black, supra note 20, § 6-26, at 352 n.158 and § 6-28, at 357-58; the no removal provision was originally included in section 56. In 1948, the provision was dropped from section 56 but a companion provision was retained in the Judicial Code, codified as 28 U.S.C. § 1445 (1982). See also Pate v. Standard Dredging Corp., 193 F.2d 498 (5th Cir. 1952) cited by the authors.

40. Cox v. Roth, 348 U.S. 207 (1955). The Cox decision was decided in the same year the Court decided Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 348 U.S. 310 (1955). Although Wilburn is discussed, see infra note 100 and accompanying text, Cox can be put into perspective by saying a few words here about Wilburn. In Wilburn the Court decided that admiralty law should be flexible. At times it should create its own rules, while at other times it should look to the law prevailing on land. As it was worked out by the lower courts this desire, to keep flexibility in the admiralty law, can be seen as the rationale for the Cox opinion.
tionship between FELA and the Jones Act in light of this "rule of reason" by saying that:

This proposition unavoidably shrouds the relationship between the two statutes in a sort of floating ambiguity, which becomes peculiarly intense whenever FELA is amended. There is no reason to believe that amendments to FELA do not carry over to the Jones Act (although the Supreme Court has never so held), but, even if there is carry-over, it must be decided anew in each case whether the particular amendment can "reasonably" apply to the Jones Act.41

Besides this statutory confusion and the obvious fact that FELA was drafted to address the unique problems of the railroad industry, for present purposes the main problem is the designation of beneficiaries under FELA. Under section 51 of FELA, the personal representative of the deceased railroad worker brings a suit, in the first instance, for the benefit of the surviving widow. FELA does not, however, state who is to be a surviving widow under the Act.42

C. Interpreting the Meaning of the Phrase "Surviving Widow" in FELA

Shortly after FELA was enacted in 1908, the United States Supreme Court was called on to decide who were the surviving next of kin entitled to sue under the Act. In Seaboard Air Line Railway v. Kenney,43 the defendant urged the Court to disregard the law of North Carolina, the controlling state law, if state law was applicable, and to apply federal common law to interpret the meaning of the words "next of kin" as used in the Act.44 The Court rejected

41. See Gilmore & Black, supra note 20, § 6-26, at 352 (footnote omitted). For a case where the Jones Act was saved from constitutional infirmity by the "rule of reason," see also Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924).
42. 45 U.S.C. § 51. See supra note 34.
43. 240 U.S. 489 (1916).
44. Id. at 492. The facts of the case are somewhat difficult to follow. The personal representative brought a suit under FELA for the benefit of three claimants: Sills, Joe and Nettie Hardy. The decedent was the illegitimate child of the mother of Sills, Joe and Nettie. The mother of the decedent had pre-deceased the decedent. Since the decedent was unmarried at the time of his death, the FELA beneficiary ladder went as follows: first, to the decedent's wife (there was none); then to the decedent's children (there were none); then to the decedent's parent's (his mother was dead and his father was presumably unknown since the decedent was an illegitimate child); then to the decedent's next of kin, if they were actually dependent. Thus, the personal representative had to prove that Sills, Joe and Nettie were the next of kin of the decedent and they had been actually dependent on the decedent prior to the decedent's death. At one time, of course, half-siblings were not considered next of kin, because of the stigma which society attached to illegitimate children. Indeed, at early common law illegitimate children had few, if any rights. Today, however, these distinctions based on birth have been found to be constitutionally infirm. Trimble v. Gordon, 430 U.S. 762 (1977); Gomez v. Perez, 409 U.S. 555 (1973). In Seaboard, the Court agreed with the lower court and disposed of the half-sibling issue by finding that "[i]t is very clear that in
defendant's position, and decided that state law should be used to answer the question of who was a next of kin capable of taking under the Act. The Court explained that:

[P]lainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. . . . The argument that such result [applying federal common law] must have been intended since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the States, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others. 45

In deciding to look to state, rather than federal law in order to determine who was a next of kin under FELA, the Supreme Court followed a long tradition of federal courts choosing to defer to state legislatures and state courts on issues involving domestic relations.

If counsel for the defendant was familiar with this long line of cases he would have had no reason to be surprised by the Court's decision. Because of this long tradition, the outcome of Jones Act cases involving claimants who did not go through valid ceremonial marriages, as detailed by state statute, has often been a foregone conclusion. It may therefore be useful to reflect somewhat further on the division between federal and state courts on matters of admiralty and domestic relations. It is also useful to compare the American practice with that of England, since, as the Seaboard Line case acknowledges, our jurisprudential system is inextricably interwoven with that of England.

III. HISTORICAL PERSPECTIVE

A. American Practice Relating to Deciding Cases Involving Admiralty and Family Law

Since the earliest of times admiralty and family law matters have been separated into two distinct legal worlds in America. As a rule, admiralty cases are heard by federal courts, while family cases are heard by state courts. Initially, this dichotomy did not exist. When North America was under the control of the British, for example,

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45. 240 U.S. at 493-94.
the common law courts handled admiralty matters along with a wide variety of other causes.46 When, towards the end of the seventeenth century the British became concerned with the administration of the American colonies (mostly over the issue of enforcing the acts of trade), they set up a system of specialized vice-admiralty courts tribunals.47 The purpose of these new courts was to establish tighter control of colonial government and effectively regulate colonial commerce.48 Although these tribunals never achieved the sort of control sought by the British,49 they do appear to have carried on a fair amount of maritime work. At the same time, however, many admiralty matters were brought before courts in which locally appointed judges were sitting.50

This confused state of affairs lasted for approximately seventy-five years, until the revolution broke out. At that time each state took complete charge of all of the admiralty matters occurring in the territory under the jurisdiction of the revolutionary state government.51 In most instances the states turned to their own courts to handle the cases. One admiralty matter received special legislation. At the urging of the national government, many states passed laws regulating the subject of prizes.52 The Continental Congress envisioned that a right of appeal would exist from the state courts dealing with prizes and captures of enemy vessels to the Congress.

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47. Id. at 69-70.
48. Id. at 71.
49. Id. at 74.
50. Id. at 96.
51. Id. An illuminating book collecting cases from the New York Admiralty Court during the period 1715 to 1788 (and thus reported during the period of both the vice-admiralty court and the state admiralty court) is C.HOUGH, REPORT OF CASES IN THE VICI ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK (1925). Originally printed by the Yale University Press, it provides a window on the sort of work done by admiralty courts during the 18th century. Although the book is now out of print, it is still available in some libraries and through private collections. For an interesting comparison based on the experiences of the early admiralty courts in Rhode Island, see Wiener, Notes on the Rhode Island Admiralty, 46 HARV. L. REV. 44 (1932).
52. The term "prize" in an admiralty sense refers to a vessel which, because of its enemy nature or unneutral conduct in wartime, is captured at sea and subsequently considered the property of the country that seized her. R. DE KERCHOVE, INTERNATIONAL MARITIME DICTIONARY 607 (2d ed. 1961) [hereinafter cited as DE KERCHOVE].

According to a recent commentator, American courts have had little prize litigation since the time of the Spanish American War, although a prize law still appears in the national laws at 10 U.S.C. §§ 7651-81 (1982). J. LUCAS, CASES AND MATERIALS ON ADMIRALTY 137 (2d ed. 1978). For a somewhat recent discussion of prize law, see BROWN, WORLD WAR PRIZE LAW APPLIED IN A LIMITED WAR SITUATION: EGYPTIAN RESTRICTIONS ON NEUTRAL SHIPPING WITH ISRAEL, 50 MINN. L. REV. 849 (1966).
This system, however, never worked as intended. The states were jealous of their powers, and few appeals were taken to the Congress.\footnote{53}

The Confederation’s dismal experience with the state maritime courts fostered a widespread conviction that under any new plan of government the admiralty jurisdiction ought to rest entirely with the national government. Although there was substantial conflict in the Convention and the First Congress as to the necessity or desirability of establishing a system of inferior federal courts,\footnote{54} once it was determined that such courts ought to be established the admiralty jurisdiction was ceded to them as a matter of course.\footnote{55} Indeed, some members of the First Congress, such as Samuel Livermore of New Hampshire, argued that the federal courts should only hear admiralty cases, leaving all other causes of actions to be entertained by the state courts.\footnote{56} The end result was article III, section 2 of the Constitution, which provides that “cases of admiralty and maritime jurisdiction” are to be heard by the federal courts.\footnote{57} As has been noted by one commentator, the grant of ad-

\footnote{53. ROBERTSON, supra note 46, at 1-2.}
\footnote{54. Id.}
\footnote{55. Writing in The Federalist Alexander Hamilton said of the decision to vest the federal courts with responsibility for maritime matters that: It seems scarcely to admit of controversy, that the Judiciary authority of the Union ought to extend to all those cases which originate on the high seas, and are of admiralty or maritime jurisdiction. The admiralty jurisdiction will demand little animadversion. The most bigoted idolizers of State authority, have not thus far shown a disposition to deny the National Judiciary the cognizance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important of them are, by the present Confederation, submitted to Federal Jurisdiction.}
\footnote{56. ROBERTSON, supra note 46, at 2 n.1.}
\footnote{57. U.S. CONST. art. III, § 2. Interestingly enough, article III does not define what is a case of admiralty or maritime jurisdiction. In the days of wooden ships and sails this was probably not necessary since a ship, after all, was a ship. Today, however, the matter has been complicated by the invention of seaplanes, hover-crafts, pleasure boats and off-shore oil rigs. All of these have provoked countless cases, as well as law review articles, as claimants attempt to bring their claims within the ambit of admiralty’s federal jurisdiction. In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), the United States Supreme Court attempted to bring some order to the situation by holding that claims arising from airplane accidents occurring on navigable waters would be cognizable in admiralty only when the wrong which was the gravamen of the suit bore a significant relationship to “traditional” maritime activity. This requirement, however, was recently capsized by the Court. In Richardson v. Foremost Ins. Co., 457 U.S. 668 (1982), the Court was faced with a collision which involved two pleasure boats. The district court had dismissed the suit, which had been brought under the federal admiralty jurisdiction, because it found that the wrong complained of bore no relationship to traditional maritime concerns. This was an entirely understandable position for the lower court to take, since traditionally admiralty had been equated with commercial shipping, as noted in the Executive Jet case. The Fifth Circuit Court of Appeals re-}

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The statutory exclusivity of the admiralty jurisdiction did not endure very long. Concurrent maritime jurisdiction in common law

versed the decision, however, and a bitterly divided Supreme Court affirmed. Justice Marshall, writing for the majority, explained that although the maritime activity involved in Richardson was noncommercial in nature, still the need to subject all ship operators to a uniform set of liability rules required that the case be heard in a federal court sitting in admiralty.

Claimants barred access to the federal courts by the Executive Jet decision have, after Richardson, been welcomed at the doors of the federal courthouse. See, e.g., Oliver v. Hardesty, 745 F.2d 317 (4th Cir. 1984). Although the full ramifications of Richardson are still unclear, this much seems to be certain. A claimant wishing to assert an admiralty claim is entitled to have a federal court hear that claim under the court's admiralty jurisdiction whenever the claimant is able to demonstrate either: 1) that the wrong which gives rise to the suit is of a kind traditionally heard by admiralty courts; or, 2) that the wrong requires a uniform solution in order to insure that maritime activity is not disrupted.

58. ROBERTSON, supra note 46, at 1. From this specific recognition of admiralty arose the practice of admiralty being treated differently from other fields of law. Perhaps this is uniformed by the fact that until 1966, admiralty enjoyed its own set of procedural rules. Even after the incorporation of admiralty into the Federal Rules of Civil Procedure, a supplemental set of rules relating to admiralty continues in force. For further information on the unification of the admiralty with the Federal Rules, see Crutcher, Imaginary Chair Removed from the United States Courthouse: Or What Have They Done to Admiralty?, 5 WILLAMETTE L.J. 367 (1969) and Note, Admiralty Practice After Unification: Barnacles on the Procedural Hull, 81 YALE L. J. 1154 (1972).

Another area where admiralty practice has differed from the rest of the law is in the application of the constitutional requirement of notice before seizing the property of another. In a series of cases in the 1970's, the Supreme Court increased the requirements of notice prior to seizure and the procedures to be followed after seizure. These efforts culminated in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). Admiralty courts, however, have not felt themselves governed by these procedures because of the unique mobility of ships relative to other chattels. See, e.g., Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacci S.A. de Navegacion, 732 F.2d 1543 (11th Cir. 1984); Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982); Merchants Nat'l Bank v. Dredge General G. L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), cert. denied, 456 U.S. 966 (1982).

Admiralty has historically been recognized as a specialty apart from the rest of the law. See, e.g., interpretations of Canon 46 of the American Bar Association's Canons of Professional Ethics in H. DRINKER, LEGAL ETHICS 243 (1953). The new MODEL RULES OF PROFESSIONAL CONDUCT drafted by the ABA explicitly recognize admiralty as a specialty. Rule 7.4(b) entitled Communication of Fields of Practice, states that a lawyer shall not state or imply that he is a specialist except: "A lawyer engaged in admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty,' or a substantially similar designation," MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4(b) (1981).

In explaining why such specialization is allowed with respect to admiralty the Rules refer to EC 2-14 of the 1969 ABA CODE OF PROFESSIONAL RESPONSIBILITY, which explained that the holding out of oneself as a specialist when engaged in admiralty "historically has been permitted." It is interesting that the new Model Rules allow the use of the term "Proctor in Admiralty." Prior to the unification of the Admiralty Rules with the Federal Rules of Civil Procedure in 1966, admiralty lawyers were actually called proctors; suits were called libels; plaintiffs were libellants and defendants were respondents. For the Model Rules, drafted in the 1980's, to continue to use the term Proctor in Admiralty shows that, at least in the minds of other lawyers, admiralty lawyers are practicing in a different ocean.
Courts was established in 1879 when the first Judiciary Act provided that the district courts would have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 59

It has been said, only half in jest, that the "savings to suitors," clause (as it became known) "has been the ultimate source of most of the Federalism problems that have arisen in admiralty." 60

Because of this clause, a claimant is free to walk into the courthouse on either side of the street, except in those rare instances where the only remedy available arises under admiralty law. 61

In practice, however, almost all maritime claimants have preferred to walk into the federal courthouse. 62 Thus, despite the fact that doors of both the state and federal courthouse were open to admiralty suitors, little admiralty traffic came to the state courthouse.

If admiralty was generally confined to the federal courthouse because of the preference of litigants, the confinement of family law to the state courts was the result of a decision by the federal judiciary to close their doors to family law litigants.

The decision to close the federal courthouse came in a case known as Barber v. Barber. 63 In dictum, the United States Supreme Court stated that: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board." 64

Half a century later the Court was again called to speak on the question in two divorce cases which were on appeal from territorial courts. In Simms v. Simms, 65 the Arizona territorial

59. 1 Stat. 77 (1879). The clause is now codified at 28 U.S.C. § 1333 (1982), which provides that the federal courts have jurisdiction of: "(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

60. Roberton, supra note 46, at 18-19. Roberton also contains an excellent review of the drafting of the clause. Id. at 22-27.

61. Proceedings directly against the vessel, as opposed to her owners, can only be brought in the federal courts, since the common law does not know the in rem action. For an interesting state case in which the Supreme Court approved of an in rem proceeding going forth in state court, see Hendry Co. v. Moore, 318 U.S. 133 (1943). In that case the forfeiture of a net was upheld as a violation of the state gaming laws, a traditional concern of the common law.

62. The usual reasons given are: the greater expertise of federal judges; the simplified practice procedures of the federal courts; the speedier resolution of disputes relative to state courts; and the increased ease of enforcing federal judgments throughout the country and in foreign nations.

63. 62 U.S. 582 (1858).

64. Id. at 584.

65. 175 U.S. 162 (1899).
court had granted a decree of divorce with alimony. The Supreme Court quoted Barber and stated that:

> It may therefore be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State and not to the laws of the United States.66

Similar language was used in the Court’s disposition of De La Rama v. De La Rama.67 The case involved an appeal from the Supreme Court of the Philippines which had reversed a lower court’s decree granting the wife a divorce, division of property and allowance for support. The Court wrote:

> It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as incident of a divorce or separation, both by reason of the fact that the husband and wife cannot usually be citizens of different States so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value.68

> It is important to note, however, that in both Simms and De La Rama, the Court went on to hold that Barber did not apply. Both cases arose from territorial courts. The Court held that where there existed no state courts, the federal courts could hear family matters. The Barber rationale was held not to be a bar because the government of the United States has complete power to regulate the affairs of the territories.69 Other Supreme Court cases have held, however,

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66. Id. at 167.
67. 201 U.S. 303 (1906).
68. Id. at 307.
69. The problem of how much power a territorial court could exercise, and on what subjects it was free to exercise that power, is a continuing one. In dictum in Glidden Co. v. Zdanok, 370 U.S. 550 (1962), the Supreme Court juxtaposed the powers of territorial courts with regards to family and admiralty matters and concluded that the territorial courts were free to rule on both. In support of its conclusion the Court cited the Barber case for the power of the territorial courts to hear family matters and American Ins. Co. v. Canter, 26 U.S. 511 (1828) to show that territorial courts could hear admiralty matters. 370 U.S. at 544, 545 n.14. Canter involved a salvage claim decided by the Florida superior courts, which had been formed by the Congress before Florida was a state. Salvage has always been considered a matter within the admiralty jurisdiction. (Mason v. The Blaireau, 6 U.S. 240 (1804)). It was claimed that as a result of salvage being within the admiralty jurisdiction, it had to be heard by an article III judge who had been appointed for life. The Florida judges were appointed for terms of four years. When the case reached the Supreme Court, Chief Justice Marshall held that the Florida territorial courts could hear admiralty claims because Congress was free,
that in the normal situation a litigant would be barred from bringing a divorce action in federal court. Nevertheless, some federal appellate courts have recently begun to question whether the domestic relations exception to the federal judiciary's subject matter jurisdiction is correct.

B. English Practice Relating to Deciding Cases Involving Admiralty and Family Law

Doctors' Commons is situate in Great Knight-Rider-street, to the south of St. Paul's Cathedral. It is the college of civilians, where the civil law is studied and practised, and derives its name from the civilians commoning together as in other colleges. Here are kept the courts which have cognizance of injuries of an ecclesiastical, military, and maritime nature.

The foregoing description of Doctors' Commons, penned shortly after the beginning of the nineteenth century, explains in a single paragraph the historical relationship between admiralty and family law in England. For it was in Doctors' Commons that the civilians, lawyers versed in both the civil and canon law, passed on maritime matters as well as family matters. That an institution would have made bedfellows out of family and admiralty law may seen remark-

where no state government existed, to create article I legislative courts to hear all claims that might come before it. 26 U.S. at 546.

70. See, e.g., Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930). The whole subject of the domestic relations exception to federal jurisdiction is neatly presented in C. Wright, The Law of Federal Courts § 25 (4th ed. 1984) [hereinafter cited as Wright]. Wright points out that although Popovici is often cited for the proposition that federal courts have no power to hear domestic law issues, the facts of the case are so unique that it is questionable to cite the case for that proposition. The Popovici decision actually turned on the fact that the husband was a foreign consul who denied that a state court could try him because consular matters are made the constitutional prerogative of the federal courts.

71. Phillips, Nizer, Benjamin, Krim, Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir. 1973); Solomon v. Solomon, 516 F.2d 1018 (3rd Cir. 1973). Although neither of those cases held against the Supreme Court's position, both questioned the holding in opinions which explore in detail the whole basis of the Barber decision.


73. Doctors' Commons was immortalized for all time in Charles Dickens' David Copperfield. In Chapter 23 David has asked Steerforth what a proctor is. Steerforth replies that:

I can tell you best what he is, by telling you what Doctors' Commons is. It's a little out-of-the-way place, where they administer what is called ecclesiastical law, and play all kinds of tricks with obsolete old monsters of Acts of Parliament, which three-fourths of the world know nothing about, and the other fourth suppose to have been dug up, in a fossil state, in the days of the Edwards. It's a place that has an ancient monopoly in suits about people's wills and people's marriages, and disputes among ships and boats.

Dickens' description of the Doctors' Commons being a "little out-of-the-way" place is wrong; however, the mistake is surely due to artistic license rather than ignorance be-
able, especially in this day and age of intense specialization and separation. It is really quite comprehensible, however, once a few facts fill in the historical picture.

To begin with, it should be remembered that the admiralty law coming down from the Rhodians, is basically civil in nature. Although its civil nature has now been diluted with the introduction of numerous statutes and centuries of Anglo-American jurisprudence, much of its civil law flavor can still be discerned, especially in such areas as salvage. Thus, it became necessary in England to have admiralty matters placed in the hands of lawyers competent in the civil law.

Due to the strict requirements of the age, very few lawyers in England were trained in the civil law. This was due, in part, to a decision to keep the numbers of civil law trained lawyers artificially low. Primarily, however, the small number of civil lawyers was

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cause Dickens himself had been a free-lance reporter in Doctors' Commons for five years. Wiswall, supra note 72, at 81 explained:

Architecturally, Doctors' Commons was evidently quite splendid. The "Great Quadrangle" (of which there is a drawing in the London Museum) was entered through an archway from Knightrider Street, and opposite was another archway leading into a second quadrangle and garden. The buildings included the dwellings and chambers of the advocates and the offices of the proctors. . . . the Common Hall, and an informal dining room, over which was a "spacious and well-stocked" library.

74. Gilmore & Black, supra note 20, § 1-3, at 8.

75. The Rhodians compiled a comprehensive maritime code several hundred years before the coming of Christ. The code contained a section on salvage and, like salvage law today, rewarded persons who salved property in danger while on the water. 3A. Benedict on Admiralty § 5, at 1-6-1-8 (Norris rev. ed. 7th ed. 1983). It must be pointed out, however, that a number of commentators have criticized the notion that the Rhodians created such a code. See Benedict, The Historical Position of the Rhodian Law, 18 Yale L.J. 223 (1909).

76. It is ironic that a feeling that there were too many lawyers existed in 16th and 17th century England, and that a conscious need was felt to erect barriers preventing admission to the bar. State bars in late 20th century America have also been deluged by lawyers, and in response many bar associations have attempted to keep out potential lawyers by having the state supreme courts require that potential admits meet stringent residency requirements. While these requirements are often urged as necessary to insure that lawyers from foreign jurisdictions will be versed in local law, the real reason is less laudatory. In striking down New York's residency requirements, the court of appeals wrote that: "durational residency requirements constitute protectionist trade barriers for the economic protection of local interests [and] have given rise to numerous calls to nationalize admission to the Bar." Matter of Gordon, 48 N.Y.2d 266, 272 n.10, 397 N.E.2d 1309, 1313 n.10, 422 N.Y.S.2d 641 n.10 (1979). The subject of residency requirements has attracted attention at the highest levels of government, and has proved to be a contentious thorn in United States-Japanese trade relations. See Haberman, Japan Resisting U.S. Lawyers, The N.Y. Times, Dec. 29, 1984, at 28, col. 3. When the issue reached the United States Supreme Court, that Court in line with state supreme court decisions, struck down residency requirements in a 8 to 1 decision. Supreme Court of New Hampshire v. Piper, Civ. No. 83-1466 (U.S. Mar. 4, 1985); see also Greenhouse, Vermont Lawyer Wins in Residency Rule Case, N.Y. Times, Mar. 5, 1985, at B5, col. 1. For interesting recent commentaries, written before the Supreme Court's decision in the Piper case, see Greenhouse, Competition and Lawyers, The N.Y. Times,
due to the vissicitudes of English history. Following his split with the Roman Catholic Church, King Henry VIII established the Anglican Church of England. As part of his effort to suppress Roman theology, the King forbade the medieval canon lawyers from continuing their practice of canon law, and abolished the canon law faculties at Cambridge and Oxford Universities.\textsuperscript{77}

Unable to now practice canon law, the former canonists turned to the practice of civil law, itself a close cousin of canon law. These civilians, as they became known, established a common college for themselves at Cambridge. By 1511 their College had been formally founded, and was known for the next two centuries by such titles as the College of Civilians and the College of Advocates. In 1768, the College received a Royal Charter under the official name of the College of Doctors of Law, exercent in the Ecclesiastical and Admiralty Courts. Long before this Charter was granted, however, the body became informally known as Doctors’ Commons, due to the physical premises of the College.

In order for a candidate to be admitted to the College, he had to first receive a doctorate in civil law from either Oxford or Cambridge; a degree from another university would not gain him admission. The candidate then sought admission as an Advocate of the Arches and Fellowship of the College. Admission as an Advocate of the Arches was discretionary with the Archbishop of Canterbury and an unfavorable decision by the Archbishop could not be appealed. Fellowship was granted upon the favorable vote of a majority of the current Fellows.\textsuperscript{78}

A lawyer admitted to Doctors’ Commons was knowledgeable in both civil and canon law. At Cambridge the doctorates of civil and canon law were conferred together following a course of study that took ten years to complete. The successful candidate received the degree of LL.D. At Oxford the candidate went through a similar period of study, although the degree conferred was the D.C.L.

Since family law matters were governed by church mores, the civilians were able to put their training in the fields of civil and canon law to immediate use. Sir John Nicoll, for example, heard virtually all of the admiralty and probate matters in England while serving from 1833 to 1838 as Judge of the Admiralty. He also heard both original and appellate ecclesiastical causes.\textsuperscript{79}

Doctors’ Commons retained a prominent position until the mid-

\textsuperscript{77} Wiswall, \textit{supra} note 72, at 37-40.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 79.
dle part of the nineteenth century, when a severe scandal sent the institution into a speedy decline.\textsuperscript{80} Within a decade a Royal Judicature Commission, headed by Sir Robert Phillimore,\textsuperscript{81} suggested that further changes in the administration of the admiralty court were in order. Although the Commission recommended far ranging changes,\textsuperscript{82} it recognized that advantages could be gained by joining together the civil law courts. Thus, its report stated that “as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court.”\textsuperscript{83}

Four years after the release of the Royal Commission’s report, the Judicature Act of 1873, which established a Supreme Court of Judicature, was enacted by the Parliament.\textsuperscript{84} The Act created a High Court of Justice as well as a Court of Appeal. Within the High Court of Justice five separate divisions were established: Queen’s Bench, Common Pleas, Exchequer, Chancery, and Probate, Divorce and Admiralty. The Probate, Divorce and Admiralty division was often referred to as P.D.A. or, more simply, the Admiralty Division, although some commentators, of an obviously more humorous persuasion, would often call the P.D.A. the Division of Wills, Wives and Wrecks.\textsuperscript{85}

The structure of the 1873 Act lasted for nearly one hundred years. In 1970, however, the admiralty jurisdiction of the High Court was transferred to the Admiralty Court as part of the Queen's Bench Division; the Probate and Divorce parts of the P.D.A. were joined to form a new division known as the Family Law Division.\textsuperscript{86}

\textsuperscript{80} The scandal, which came to light in November, 1853, involved the embezzlement of 75,000 pounds from the coffers of the Admiralty Registry by Henry B. Swabey while he was serving as the Admiralty Registrar. The affair shocked the Doctors’ Commons and by 1859 Serjeants, Barristers, Attorneys and Solicitors were admitted to the practice of admiralty by the High Court of Admiralty Act of 1859. WISWALL, supra note 72, ch. 3.

\textsuperscript{81} Sir Phillimore had more than a passing acquaintance with admiralty matters. His father had been an Admiralty Advocate, a position which the younger Phillimore reached in 1855. He had in the same year been appointed as Judge of the Admiralty Court of the Cinque Ports, and, following the death of the great Admiralty Judge Dr. Lushingdon, became Admiralty Judge and Dean of Arches. For Sir Phillimore’s background and contributions to the development of English admiralty law see WISWALL, supra note 72, at 96-97 and 112-15.

\textsuperscript{82} WISWALL, supra note 72, at 101.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 102. For those unfamiliar with the nautical meaning of the word “wreck,” it means a sunken vessel.

\textsuperscript{86} The reorganization came with the passage of the Administration of Justice Act 1970. Under section 2(1) of that Act, an Admiralty Court was constituted within the Queen's Bench Division to take “Admiralty business.” The term “Admiralty business” was defined in the Supreme Court Act 1981, s. 62 to involve the exercise of the High
Interestingly, this development occurred within a short time of the publication of a lengthy federal district court opinion which questioned the *Barber* rule of the United States Supreme Court. While American courts were attempting to join family law to their admiralty dockets, English courts were heading in the opposite direction.

IV. COURT DECISIONS INVOLVING THE QUESTION OF WHO COULD BE A JONES ACT SURVIVING WIDOW

As the discussion in Part III of this Article illustrated, the decision to have American federal judges concentrate on admiralty matters while their state brethren decided family law cases was not the result of a carefully thought out system; it was not designed to achieve advantages such as division of workload or creation of specialized tribunals who, through constantly hearing one type of case, would develop an expertise in handling a particular matter. Rather, the decision was a product of historical accident, just as the decision in England to combine the two specialties was likewise the result of a historical accident. Nevertheless, in the United States the influence that this accident exerted on federal courts was clearly illustrated when it came time to decide questions of who could be a surviving widow under the Jones Act.

The earliest decision on the question appears to have come from the Fifth Circuit in *Beebe v. Moormack Gulf Lines, Inc.* In that case an oiler named Harrison Knighton was killed through the negligence of his ship's owners. He was survived by a wife and child and his mother in Arkansas, and by Marian Beebe, with whom he had gone through a marriage ceremony some weeks before his death. At the time of his accidental death he was living in New Orleans with Marian, who did not know of his previous marriage.

Marian Beebe claimed to be the surviving widow of Harrison and sought to recover under the Jones Act. The court held that she could not recover because of the prior, undissolved marriage. In so holding, the court wrote:

> We feel sure than Congress did not contemplate the possibility of a man leaving two lawful wives, or holding an employer to compensate two women claiming to be such. No doubt, as is here

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Court's Admiralty jurisdiction. See 2 CARVER'S, CARRIAGE BY SEA 1417 (R. Colinaux ed. 13th ed. 1982).


88. 59 F.2d 319 (5th Cir. 1932).

89. An oiler is an unlicensed member of the engine room staff who oils and greases bearings and moving parts of the engines and supplies the proper grade of oil and grease. DE KERCHOVE, supra note 52, at 547 and 337.
contended, marriage with consequent wifehood is a matter of state law, as the other relationships mentioned in this statute have been held to be. . . . If there were such conflict in the marriage laws of Arkansas and Louisiana, the two loci contractus here involved, as to seem to result in this seaman having left two wives, a difficult question might be presented, but the law of Louisiana is that the undisolved prior marriage rendered the ceremony in Louisiana with Marian Beebe null. 90

The next case to touch the question was Lawson v. United States. 91 The case involved a statute known as the Death on the High Seas Act (DOHSA), 92 which is a sister act to the Jones Act. 93 DOHSA confers upon the personal representative of the decedent a right to recover damages for the benefit of the decedent's wife. Like the Jones Act, DOHSA does not define who is a wife. In Lawson, the Second Circuit Court of Appeals reversed the district court which had allowed a putative spouse 94 to recover. In explaining its reversal, the court wrote:

But the common meaning of "wife" is legal wife; and a bigamous marriage does not make the defrauded and innocent woman a "wife" in common parlance. The problem, of course, is to determine what meaning the legislators intended (or may be assumed to have intended) to ascribe to the word "wife." And we see nothing to suggest that they used the word in other than its normal meaning, or intended that a man could have two or more wives all recovering at once under this statute. 95

Shortly after Lawson was decided, the Eastern District Court of

90. 59 F.2d at 319-20 (citation omitted).
91. 192 F.2d 479 (2d Cir. 1951).
92. The Death on the High Seas Act (DOHSA) is codified at 46 U.S.C. §§ 761-68 (1982). It was passed by Congress on March 30, 1920, to provide a recovery for deaths "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State." A marine league is 6,075 yards long. DE KERCHOVE, supra note 52, at 444. A third act which should be mentioned is the Longshoremen's and Harbor Workers' Compensation Act, discussed supra note 23. Because it does not deal with so-called "blue water" seamen, the problems of defining the meaning of the word wife in the Act are not discussed in this Article. Once again, however, federal admiralty courts have consistently looked to state law to supply the definition. For a comprehensive discussion see Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306 (5th Cir. 1979).
93. DOHSA is not identical to the Jones Act. DOHSA does not contain a survival provision. More importantly, the possible beneficiaries under DOHSA are different from those under the Jones Act. Section 761 of DOHSA provides that the personal representative may recover benefits for the decedent's wife, husband, parent, child or dependent relative. Thus, all dependent beneficiaries can share in a DOHSA award. The Jones Act establishes three successive classes of beneficiaries: 1) spouse and children; 2) parents; 3) dependent next of kin. See supra notes 12 and 44. In addition, the existence of a prior class bars recovery on behalf of all members of any subsequent class. GILMORE & BLACK, supra note 20, § 6-30, at 361. GILMORE & BLACK also explains the often tortured relationship between DOHSA and the Jones Act. Id. at § 6-31.
94. The term "putative spouse" is defined infra note 105.
95. 192 F.2d at 480-81 (footnote omitted).
Pennsylvania was faced with a similar case under DOHSA. In Tetterton v. Arctic Tankers, Inc., the court ruled that the administratrix could not recover benefits because she had never consummated a valid common law marriage with the decedent. Although the administratrix had lived with decedent for five years and eventually obtained an annulment of the first marriage, the law of New York, the administratrix’s domicile, did not recognize common law marriages. The couple had lived together at one point in Florida, which did recognize common law marriages, but the court refused to look to this alternative jurisdiction in order to permit recovery for the administratrix.

It was against this background that the Fourth Circuit decided the leading case of Bell v. Tug Shrike. In Tug Shrike the decedent met his death when the Tug Shrike capsized in the Chesapeake Bay. Mary Bell brought suit under the Jones Act to recover as a surviving widow.

The decedent had been married three times during his life. He first married in 1940, and that marriage ended in divorce in June, 1951. One week later he entered into his second marriage. He and his wife were separated in 1954, however, and a divorce decree was issued on September 18, 1957. He married the claimant on December 13, 1956, and died on September 12, 1959.

The issue in the case then was whether the decedent’s third marriage in December, 1956, ever became legal, since at the time he was married to his second wife. All of the parties agreed that the law of Virginia would control if state law was applied. In addition, it was further agreed that Virginia law did not recognize common law marriages. As a result, the claimant argued that the federal courts should fashion a rule of domestic relations rather than employing the state rule. Both the trial and appellate courts rejected the claimant’s contention, applied Virginia law, and denied Jones Act surviving widow status to Mary Bell.

The Fourth Circuit’s opinion began by recognizing that there was

97. The term “common law marriage” is defined infra note 104.
98. The claimant moved to Florida in 1943 and began living with the decedent. Sometime prior to 1948 the couple moved to New York. New York had abolished common law marriages by statute in 1933. In 1948, the claimant received an annulment of her first marriage. Although the court was unwilling to allow the decree to be relate back, the court was not completely unsympathetic to the claimant’s plight. The court did attempt to find another jurisdiction with which the couple had contacts which allowed common law marriages. The court wrote that such a jurisdiction could not be found because: “[T]here is no proof that Maria and Tetterton were domiciled at any time in any state which permits common-law marriages. Virginia, where she and Tetterton visited his relatives, does not.” 116 F. Supp. at 432.
no admiralty law defining the phrase "surviving widow." In such circumstances, the court said, the correct approach would be to decide whether it would be better to fashion an admiralty rule or adopt an existing rule from a non-maritime context. Finding it wiser to adopt rather than create, the court wrote that:

Appellant maintains that admiralty has a choice of law and that, if the application of state law would undermine a federal right, the court should look to that law which will best effectuate admiralty principles and achieve the national uniformity that is desirable in this area. She urges that these fundamental principles would be better satisfied by accepting her as a common-law wife instead of depriving her of that status by resort to the domestic relations laws of Virginia. . . . Emphatically we must decline to accept the appellant's contention that by applying the law of Virginia to interpret the term "surviving widow" in the Jones Act, a federal right is being defeated by the state. There can be no federal right unless the claimant can qualify as a beneficiary under the statute. Under the circumstances this can only be achieved through a lawful marriage as that term is interpreted in the only available domestic relations law—the law of the domicile.

The question appeared again seven years later in McPherson v. S/S South African Pioneer. Since the case was heard by the same trial judge who had decided Tug Shrike, the result was a foregone conclusion. The case is interesting, however, for in it counsel for

100. The question whether, in situations where there were no admiralty precedents available, federal courts were to fashion a precedent or look to land based cases had been argued in Wilburn Boat Co. v. Fireman's Ins. Co., 348 U.S. 310 (1955). See also supra note 40. The question in Wilburn was whether an insurer could assert as a complete defense to a claim made on a houseboat which had been lost, that its insured had failed to live up to the warranties contained in the insurance policy. The lower courts held that such a defense was valid, and dismissed the suit. The Supreme Court reversed, arguing that there was no settled view on the question. The Court then held that because the question did not require a uniform answer, the federal courts should apply the applicable state insurance law to decide if the defense was valid.

Wilburn is a remarkable opinion for several reasons. First, the issue had been decided eighty years before in Insurance Co. v. Thwing, 80 U.S. 672 (1871). Thus, there was really no reason for the Court to decide the case. Either unaware of or unimpressed by the Thwing decision, however, the Wilburn Court decided its case without reference to and in a way directly oposite to Thwing. The second reason why the Wilburn case is remarkable is that it has spawned a healthy amount of litigation because of the uncertainties it caused. GILMORE & BLACK, supra note 20, § 2-8, at 71. Finally, Wilburn has been taken as the rallying call for all those who favor increased state regulation over maritime matters, in contrast to the call for uniformity found in the Southern Pacific Co. v. Jensen, 244 U.S. 305 (1917) see supra note 23. The recent decision of the Court in Richardson v. Foremost Ins. Co., 457 U.S. 668 (1982) see supra note 57, must, however, be taken as a rebuff to the vitality of Wilburn.

101. 332 F.2d at 331-32, 336-37. The Fourth Circuit's opinion relies heavily on Wilburn. Id. at 332.


103. Walter E. Hoffman. Judge Hoffman was sitting as Chief Judge of the Eastern District when he heard both cases. Those interested in the career of Judge Hoffman, who has now assumed Senior Judge status, are directed to 588 F. Supp. LXXXIV-XCI
the claimant argued that his client should be found to be a Jones Act surviving widow either because she had a common law marriage with the decedent, under the laws of South Carolina, or because she was a "putative spouse." The court rejected the former because the couple had never lived together in South Carolina and because the legal impediment to the common law marriage was not removed until after the decedent's death. But as to the latter, the court held that the claimant could not be a putative spouse because she knew at the time of her marriage to the decedent that he was not free to marry her. Although the court did not say what its decision would have been had it found that the claimant was truly ignorant of the legal impediment, its decision certainly leaves open the possibility that a putative spouse who is innocently unaware of a legal impediment could be a Jones Act surviving widow.

After McPherson came Hamilton v. Canal Barge Company. The court denied recovery to a seaman's fiancee by asserting that: "[N]either DOHSA, the Jones Act, nor state death actions recognize as a beneficiary anyone other than a relative." The issue was

(1984), which recounts his career on the occasion of his acceptance of the Edward J. Devitt Distinguished Service to Justice Award.

104. Exactly what constitutes a "common law marriage" is hard to say, because the term has been used loosely by legislatures. It sometimes means a relationship having all of the incidents of a ceremonial marriage. At other times, however, it is merely a descriptive term for a meretricious relationship. See W. WADLINGTON & M. PAULSEN, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 130 (3d ed. 1978).

105. Under the UNIFORM MARRIAGE AND DIVORCE ACT § 209 (1973), which was approved by the ABA House of Delegates in 1974, a putative spouse is defined to be:

Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited (Section 207) or declared invalid (Section 208). If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

It is important to remember that the term "putative spouse" is a descriptive one, and confers no rights of its own force. It only provides entitlements if a statute adopts a legal definition of a putative marriage, as has, for example, been done in California and Louisiana. CAL. CIV. CODE §§ 4452, 4455 (West 1983); LA. CIV. CODE ANN. art. 117, 118 (West 1952).

107. Id. at 46.
109. 395 F. Supp. at 987. The court further stated:
next heard in the same district which had heard the *Tug Shrike* and *South African Pioneer* suits. In *Ford v. The American Original Corporation*, an action was brought under the Jones Act by a woman who had lived with the decedent, a seaman, for some years prior to his death which occurred while he was performing repair work on a vessel. Although clearly not married to the decedent, the claimant had received some support from the decedent. Relying on both *Tug Shrike* and *South African Pioneer*, the court held that the claimant was not a surviving widow because here there was not even a hint of a marriage, and because Virginia, the domicile state, did not recognize common law marriages.

In 1981 the Fourth Circuit found itself faced with a case which was "truly one of first impression." *Byrd v. Byrd* involved a suit by a wife against a husband for injuries sustained as a result of the husband's negligence in maintaining his pleasure boat in a seaworthy state. The question posed by the case was whether the wife's admiralty claim was barred by the doctrine of interspousal immunity.

Virginia was the situs of the accident and, at the relevant time,

Death is a rupture in the social fabric. It causes loss to many, fiancés and neighbors, to friends, to organizations to which the decedent belonged, to charities he may have supported, and in individual cases to many others who may have loved the deceased and been seriously affected by his death. But statutes granting a right to recover for the loss occasioned by death have always been limited to relatives, and, as we have seen, in some instances only to those who were also dependents.

No one can doubt that Ms. Dunn was injured by Mr. Hamilton's death, or that the entire course of her life has been altered. But she was not a relative; hence she may not be awarded money damages for the grievous hurt she has suffered.

Nor can damages be awarded her on the basis that the defendants caused her fiancée to breach his promise of marriage. No attempt need be made to ascertain whether state law or federal law should determine the liability for an interference with such a relationship by breach of a duty imposed by the maritime law. Louisiana does not recognize any action for interference with contractual relations, . . . and the maritime law does not recognize an action for negligent interference with a contractual relationship.

*Id.* (citations omitted).

110. The Eastern District of Virginia, Norfolk Division. See *supra* notes 99-107 and accompanying text.


113. Of course, such suits are rarely, if ever, accurately described by saying that the wife is suing the husband or that the husband is suing the wife. As seems well known, what is usually going on is that the injured spouse is bringing an action so as to reach into the pockets of the other spouse's insurance company. Indeed, in *Newton v. Weber*, 119 Misc. 240, 196 N.Y.S. 113 (1922), the court explicitly stated that no wife would want to sue her husband for a negligent tort except as a raid on an insurance company. Be that as it may, the last decade has seen a rapid decline in the number of states which prevent one spouse from suing the other.
Virginia law recognized interspousal immunity as a complete defense. The defendant-husband raised the defense, and the federal trial judge dismissed the case. On appeal to the Fourth Circuit, the plaintiff-wife argued that to apply Virginia law of interspousal immunity would be to defeat an otherwise meritorious maritime cause of action. The circuit court agreed, and reversed the lower court's decision. The concerns for uniformity of federal admiralty law and for maintaining meritorious maritime causes of action motivated the court's decision to apply federal common law rather than state law. In finding for the plaintiff, the court wrote:

Clearly, reference to state law in deciding maritime tort suits between a husband and wife will not lead to uniform decisions. Additionally, it is the standards of maritime law which measures rights and liabilities arising from conduct occurring on vessels on the navigable waters. . . . Therefore, application of a state's law on interspousal immunity, if that state does not permit suits between spouses arising out of negligent torts, . . . would operate to defeat a substantial admiralty right of recovery.

The court distinguished its holding in Byrd from that in Tug Shrike by writing that Tug Shrike:

[D]oes not mandate the application of state law in the instant case. There, this Court was faced with the question of whether a woman, "married" to a seaman in an invalid ceremony, qualified as a "surviving widow" for purposes of receiving benefits after the seaman's death under the Jones Act. The Court determined that there was no federal definition of "widow" either in the statute at issue or generally. In addition, the Court cited a number of cases involving other federal statutes where availability of some benefit turned on the familial status of the person claiming the benefit and noted that courts, including the Supreme Court, had repeatedly looked to state law to determine whether the claimant possessed the necessary status. The Court therefore held that it should apply state law rather than fashion a federal law of domestic relations . . . .

With clarity which is visited only upon appellate judges, the Fourth Circuit found a distinction between the instant case and Tug

114. According to the court's opinion, Virginia abolished the ban on interspousal tort suits during the pendency of the suit. As the court realized, this would have presented the interesting question, had the court chosen to apply Virginia law, as to the controlling law, i.e., would the old or the new law govern the case? The court found it unnecessary to reach the question. 657 F.2d at 617 n.5.


116. 657 F.2d at 618 (footnote omitted).

117. Id. at 619 (footnotes omitted).
Shrike.\textsuperscript{118}

Next came \textit{Weyer v. ABC Charters, Inc.}\textsuperscript{119} The case was brought under DOHSA by a divorced dependent widow of a seaman and provided the court with a clear opportunity to fashion an admiralty law of domestic relations. The offer was soundly rejected:

Plaintiff Shaw, citing the "humanitarian policy of the maritime law" applied in \textit{Sealnd Services, Inc. v. Gaudet}, argues that to restrict recovery for wrongful death to spouses, children and dependent relatives would unjustly exclude a large number of beneficiaries who are truly dependent upon the decedent and who suffer a pecuniary loss. In so suggesting, plaintiff invites the court to fashion a federal common law of beneficiaries apart from the authorities above cited. This invitation must be declined.\textsuperscript{120}

The most recent case to take up the issue comes from a trial court in the Fifth Circuit. In \textit{Tidewater Marine Towing v. Curran-Houston, Inc.},\textsuperscript{121} the Eastern District of Louisiana reaffirmed the rule that a common law spouse does not have a cause of action for death arising under the Jones Act.\textsuperscript{122} The case involved the death of

\begin{itemize}
  \item \textsuperscript{118} \textit{Id.} at 619-20. It is submitted that the distinction is unsatisfactory at best and nonexistent at worst. In both cases there was no admiralty precedent to guide the court. The court was, therefore, free to either apply a state law or fashion a federal common law approach. How the court came out on the issue would decide whether the plaintiff was able to recover compensation through a federal piece of legislation. Discussions of whether the remedy or the right came first seem extremely metaphysical, especially once one considers how outcome determinative the approach is.
  \item \textsuperscript{119} 558 F. Supp. 364 (W.D. Wash. 1983).
  \item \textsuperscript{120} \textit{Id.} at 366-67 (citation omitted). The court further stated:
    \begin{quote}
    The question of who is entitled to recover as a beneficiary for wrongful death under the general maritime law was recently considered in \textit{Glod v. American President Lines, Ltd.}, 547 F. Supp. 183 (N.D. Cal. 1982). In \textit{Glod} the court determined whether a decedent's nondependent siblings were entitled to maintain an action for wrongful death under the general maritime law. \textit{Id.} at 185. In an excellent opinion, Judge Weigel summarized the remedy for wrongful death and concluded that DOHSA provided an appropriate guide in determining the proper beneficiaries in a general maritime wrongful death action. \textit{Id.} at 186. Since DOHSA did not allow a decedent's nondependent siblings to recover, Judge Weigel found the decedent's nondependent relatives were not eligible to maintain an action for wrongful death. \textit{Id.}
    
    The \textit{Glod} rationale is most persuasive when applied to the analogous issues herein. Using DOHSA as the appropriate guide, the Court concludes that dependent divorced wives are not entitled to recover for wrongful death under the general maritime law. Hence, Mrs. Shaw cannot maintain her action for wrongful death. Accordingly, Penn Yan's motion for summary judgment of dismissal is granted.
    
    \item \textsuperscript{121} 1984 AM. MAR. CAS. at 2760 (E.D. La. 1983). The case does not appear to have been officially reported.
  \item \textsuperscript{122} The court found that the Jones Act employer of the decedent was not negligent, and that the only defendant who was still involved in the litigation was the Dow Chemical Company against whom the claimant had brought a negligence action under the general maritime law. Such suits have been permitted since the Supreme Court decided \textit{Moragne v. States Marine Line, Inc.}, 398 U.S. 375 (1970). Prior to the \textit{Moragne} decision, such suits were barred because of an unfortunate precedent known as \textit{The Harris-}
\end{quote}

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Daniel Dupre, who was burned to death while working aboard a ship which struck the Dow Pipeline in Louisiana.123

The court first found that under the laws of those states which recognize common law marriages, the claimant would have been considered a common law wife.124 The court then found, however, that Louisiana, where the accident occurred, did not recognize common law marriages. Based on this, the court ruled against the claimant. In explaining its decision, the court wrote:

The testimony in regard to the relationship between Dupre and Vicknair demonstrated a close relationship. In fact, Dupre listed Vicknair as his beneficiary on a life insurance policy he obtained through Tidewater. The parties held themselves out to the community as man and wife and were treated by the community as such. That the parents or brother of Daniel Dupre knew that the couple was not technically married does not detract from the status the couple attained in the community.

This Court is not ready to abandon the goal of uniformity which Moragne dictated we seek, but nevertheless finds that the common-law spouse should not have a cause of action for death under the general maritime law. Those arguing in favor of such a cause of action point out that in today's society, it is not unusual for couples to cohabit without the benefit of marriage. No sociological study is required to confirm that our mores today

burg, 119 U.S. 199 (1886) which held that no cause of action for wrongful death was provided by the general maritime law. The reasoning of The Harrisburg was based on Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1878), which held that the common law did not provide a recovery for wrongful death. The harshness of The Harrisburg holding was gradually cut away. First, the Court held in The Hamilton, 207 U.S. 398 (1907) that a recovery for wrongful death was available in admiralty cases by applying a state wrongful death statute. Next, Congress enacted the Death on the High Seas Act, the Jones Act and the Longshoremen's and Harbor Workers' Compensation Act. All three acts provided for recovery based on injury, and the Jones Act and Death on the High Seas Act also provided for recovery based on wrongful death. Thus, a unanimous Court in Moragne could find no reason to allow The Harrisburg to continue to sail. For a useful and up-to-date guide to the foregoing, see J. HOOD & B. HARDY, HANDBOOK OF SEAMEN'S DAMAGES FOR DEATH AND INJURY (1983).

Returning now to Tidewater, the only party left to be sued for negligence was the Dow Chemical Company. Although plaintiff asserted a Moragne-type claim against Dow, the court found that the outcome would have been no different if the plaintiff had been able to assert a Jones Act claim. 1984 AM. MAR. CAS. at 2764 n.7. Thus, the case, which cites all of the Jones Act cases discussed in this Article, can be said to be the latest chapter on the issue of who may qualify as a surviving widow under the Jones Act.

123. The nature of the Dow pipeline is explained by the Court at 1984 AM. MAR. CAS. at 2760-61. The pipeline was used to carry high pressure gas. When the tug on which the decedent was working ruptured the pipeline, the immediate result was a large explosion and fire which engulfed the tug.

124. The court found that the prerequisites to a common law marriage in those states which still recognize such marriages are: (1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and, (3) holding out to the public as man and wife. The court found that the claimant satisfied each of these requirements. 1984 AM. MAR. CAS. at 2765.
are not those of yesteryear—indeed couples do often cohabit without benefit of marriage. However, as often as not, in today's society unmarried couples live together without attempting to hold themselves out as husband and wife in the community. Thus, to accept the argument that one who cohabits with another should be granted a recovery for death of their roommate under the general maritime law as being responsive to the needs of society, because the survivor indeed suffers loss, both pecuniary and otherwise, is to open the flood gates of litigation to all of those who live together, whether or not their union meets the definition of a common law marriage. Should all who cohabit have a cause of action? Where would it end? Why wouldn't a "best friend" who hasn't cohabited with the deceased but who also suffers loss as a result of the death likewise have a cause of action? Why not an uncle, an aunt, or next-door neighbor?

I do not think a court can conclude in most cases whether or not the decision to not marry is a mere inadvertence or perceived lack of significance of the marriage contract, or is, on the other hand, a calculated, well thought out decision based on the fact that one or both of the individuals find it a disadvantage to be formally married . . . . Indeed, in the case at bar, this Court cannot tell whether Debra Vicknair and Daniel Dupre, though having the capacity to marry and holding themselves out to the public to be man and wife, consciously avoided contracting a legal marriage, or whether they thought a ceremony was merely an unnecessary formality.125

V. THE PROBLEMS OF THE CURRENT APPROACH IN DETERMINING WHO IS A JONES ACT SURVIVING WIDOW

As the foregoing review of cases illustrate, no court has yet held a common law or putative spouse to be entitled to collect under the Jones Act as a surviving widow. The objections voiced by the cases can be isolated into the following propositions:

1) A belief that state law must be looked to determine who is a surviving widow;
2) A fear that defendants would be subject to a multitude of claims;
3) Concern that enlarging the scope of the entitlement would bring about a vast increase in litigation;
4) An adherence to stare decisis, under which only the Supreme Court could change the rule announced in Seaboard Air Line v. Kenney.

When these concerns are carefully analyzed, they simply do not stand up.

Consider the first one, which is the belief that state law is the only

125. 1984 AM. MAR. CAS. at 2765-66.
source of domestic relations law. As has been pointed out, the fact that family law has been left for state courts is a product of accident. In England, admiralty matters and family matters were, until quite recently, heard by the same court. In recent years, American federal trial and appellate courts have increasingly questioned the correctness of the rule which disclaims a federal right to hear divorce matters. Thus, while at one time state law may have been the only source of domestic relations law, such cannot be said to be true today. Of course, even the Supreme Court has held that in cases arising from territorial courts the United States could act upon family law matters.

The second fear is that defendants would be subject to a multitude of claims. This need not be a problem. If the court finds that there are two or more claimants who are entitled to receive Jones Act damages, there is no reason why the defendant must pay two recoveries. Rather, the court can order the payment of a single lump sum, and then divide the damages by apportioning them between the claimants. Although flexibility would have to be allowed in determing the apportionment, the likely apportionment scheme would look to factors such as how long each claimant had lived with the decedent, how dependent each claimant was on the decedent either at the time of death or during the period spent with the claimant, and what other sources of support existed to provide for each claimant.

The third concern is that the floodgates of litigation will be opened. This is simply not true. The death of a seaman normally results in one lawsuit wherein all of the potential beneficiaries appear and raise all of their claims. By enlarging the scope of the phrase “surviving widow,” such cases will have one, or at most two, additional parties to already existing litigation. All other lawsuits would be barred by res judicata. Defendants and courts need not worry about additional lawsuits being brought.

On a related point, there is the legitimate question of where the line should be drawn. In the Tidewater case, Judge McNamara worried that aunts, uncles and next-door neighbors would come forward. This fear is unfounded. The Jones Act provides a list of beneficiaries who may recover: widows and husbands, then children, then parents and finally next of kin actually dependent on the decedent. Thus, even under an enlarged definition of the term “surviving widow,” an uncle or an aunt would be barred unless the distribution came down to dependent next of kin and the uncle or

126. Id.
127. See supra notes 12 and 43.
aunt qualified as such kin. By the same reasoning the next-door neighbor would also be eliminated.

The final concern as is expressed in the case law, is that any change should come from the United States Supreme Court, which began the ball rolling by looking to state law in the Seaboard case. The need to wait for the Supreme Court to act is misplaced. In the first place, it may be years, if ever, before a case presents the Court with an opportunity to reverse itself. Second, lower courts have already shown themselves willing and able to act without Supreme Court initiative in other matters relating to the application of the Jones Act. Third, an earlier error in judgment should not be allowed to continue to exist while it is hoped that the Supreme Court will eventually take action. The better course, and certainly the more humanitarian course, is to begin to correct the mistake immediately.

**VI. A PROPOSED SOLUTION**

As has been shown in the foregoing section of this Article, all of the concerns usually expressed about widening the class of beneficiaries entitled to damages under the Jones Act are fallacious. It is

128. See *supra* notes 43-45 and accompanying text.

129. As is well known, the denial of a certiorari petition is the norm, rather than the exception, and no view is expressed by the Supreme Court by a decision to deny certiorari. Thus, even if a case with proper facts was to be offered, there would be no assurance that it would receive the four votes necessary to be heard. During the period 1958 to 1968 approximately 13% of the cases (excluding cases involving indigent persons who are almost always prisoners seeking reviews of their sentences) tendered to the Supreme Court were accepted by the Court. In the 1971 Term, however, only 8.9% of the cases seeking certiorari received it. In the 1980 Term the figure was 10.6%. The whole matter is discussed at length in Wright, *supra* note 70, § 108, at 756.

130. *In re* Industrial Transp. Corp., 344 F. Supp. 1311 (E.D.N.Y. 1972) involved a limitation petition proceeding brought by the owners of the M/V MICHAEL B. The vessel had caught fire and exploded at dock, killing a seaman. The mother of children said to be offspring of the deceased seaman sought to intervene the action so as to collect Jones Act benefits for the children.

Since the Jones Act does not define who are children entitled to collect its benefits, a question arose whether the children in the present case were children for the purpose of the Jones Act. The court, following the ruling of *Tug Shrike*, held that it had no choice but to look to state law. Under New York state family law, illegitimate children could only be acknowledged as having been children of the alleged father if an order of filiation had been entered during the lifetime of the father. In the case at bar, no such order had been entered. The court thereupon reached out and decided to apply the New York State Workmen's Compensation law, under which mere acknowledgment by the father would suffice to settle the question of the child's parentage. The court stated that this result was in accord with the beneficial purposes of the Congress in enacting legislation such as the Jones Act and the Death on the High Seas Act for the protection of seamen and their families.

The decision represents laudable creativity, since none of the four sets of attorneys in the case had suggested that the court look to the Workmen's Compensation law. It is to be expected that such creativity would also be applied in cases requiring the court to determine whether a wifely relationship existed between the decedent and the claimant.
therefore recommended that the phrase "surviving widow" in the Jones Act be enlarged to include all those persons who either were the wife of the decedent at the time of the decedent's death, or who were engaged in a relationship which could be characterized as wifely in nature. What would constitute such a relationship would be left to be worked out by the courts. In administering the enlarged definition, the Courts first duty would be to interpret the definition liberally with a healthy respect for the unique role that admiralty courts have played as guardians of seamen and their dependents. If the following factors were present, however, they would weigh heavily in favor of a conclusion that the claimant was engaged in a wifely relationship:

1) the establishment and maintenance of a common household between the decedent and claimant;
2) the claimant bearing children which were the offspring of the decedent;
3) decedent providing financial support for the claimant;
4) claimant providing financial support for the decedent;
5) the decedent and the claimant holding out to the community that they were man and wife;
6) proof of acts by the decedent showing a degree of affection normally reserved for a member of one's immediate family, including naming the claimant as a beneficiary under a life insurance policy, putting the claimant through college or graduate school, paying the claimant's extraordinary medical bills following a serious injury or accident, etc.

In administering this enlarged definition of a surviving widow, courts would be free to set their own guidelines limiting recoveries. The following suggested factors should be weighed for the smooth administration of these cases:

1) a defendant found guilty of negligence and thus liable under the Jones Act would not have his liability increased simply because more than one claimant had been found entitled to collect damages under the Act. The court would first set the damages as if only one claimant had been certified;
2) where two or more claimants have been certified as having been engaged in a wifely relationship with the decedent, any benefits to be collected from the defendant would be shared by the claimants;
3) factors to be considered in apportioning benefits among entitled claimants would include, but not be limited to:
   a) the number of children each claimant was responsible

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131. What is envisioned is that the courts would provide a common sense meaning to the term "wifely relationship." Such an approach was expressly approved by the United States Supreme Court in deciding which provisions of the Federal Employers' Liability Act should be carried over to the maritime field. See supra note 40.
for, whether or not such children were the children of the
decedent;
b) the amount of financial need each claimant could
demonstrate, along with the amount of other sources of
income;
c) the length of time each claimant had spent in a wifely
relationship with the decedent;
d) the amount of support provided by the decedent to the
claimant;
e) any other factors which might establish how the dece-
dent would have divided the damages among the claimants.

CONCLUSION

The Jones Act was passed by Congress sixty-five years ago in
order to provide seamen and their families with protection against
the rigors and dangers of shipboard life. Since the days when the
Jones Act became law, however, American society has changed dra-
matically. Today it is common to find that seamen, like others, are
entering into relationships without the aid of a formal marriage cer-
emony. These relationships are no less important than those rela-
tionships which do have the benefit of a formal marriage license.

If the Jones Act is to fulfill its benedictive purposes of protecting
seamen and their families, and if the courts are to live up to their
historical role as guardians of seamen, the interpretation of the
phrase “surviving widow” must be expanded to include those wo-
men who have had a “wifely relationship” with the deceased sea-
man.132 Such an enlarged definition should come about by the
courts departing from their traditional adherence to state family

132. One interesting question which has not arisen to date, but which conceivably
could be pressed under the enlarged definition of surviving widow suggested here, is
whether a homosexual lover could recover for the death of a gay seaman. As will be
recalled, FELA provides that the personal representative may bring an action for the
employee’s wife or husband. See supra note 34. Should a gay lover be deemed a wife or
husband able to claim under the Jones Act? The subject of homosexual marriages has
caused considerable controversy over the years. Courts have routinely denied the abil-
ity of homosexual partners to “marry” one another. See, e.g., Singer v. Hara, 11 Wash.
App. 247, 522 P.2d 1187 (1974) for the classic rationales against such marriages.
Courts have also refused to allow homosexual partners to use marital substitutes such as
adoption to formalize their union. See In re Robert Paul P., 63 N.Y.2d 233, 481
N.Y.S.2d 654 (1984). Some commentators, however, have argued that same-sex mar-
rriages are valid. See Note, The Legality of Homosexual Marriage, 83 YALE L.J. 573
(1973). Under the proposal contained in this Article, courts would be free to recognize
such marriages, although they would not have to. It is suggested, however, that the
tests laid out in this Article should be applied in a sex-blind manner. Not only would
such an application further the admiralty courts historical role of guardian, see supra
note 16, but it would also take cognizance of the reality that seamen, just like others in
our society, do engage in homosexual relationships. For cases involving homosexual
seamen, see Thompson v. Coastal Oil Co., 221 F.2d 559 (3d Cir. 1955), rev’d per
law definitions. In place of state law, federal courts should develop a federal law of domestic relations along the lines suggested in this Article. With the prospect that more and more seamen

133. Congress has left many gaps in the admiralty statutes that it has passed, beginning with the grant of admiralty jurisdiction contained in article III. See supra note 57. These gaps have traditionally been filled in by the admiralty courts. One of the rare cases where the Supreme Court refused to allow lower federal courts to work out the admiralty law was Haledon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). The Court refused to give a right of contribution among joint tortfeasors, stating that it was up to the Congress to take that step. The result of this ill-starred decision has been that the issue has remained unsettled. As the reader has by now no doubt already guessed, Congress never did say whether it favored or opposed contribution. See Gilmore & Black, supra note 20, § 6-55, at 442 n.363. For an update on the Haledon case, see Villareal, Haledon to Ryan to Weyerhouser to Cooper—Where Do We Go From Here? 6 J. MAR. L. & COM. 593 (1975).

134. It should be pointed out that the two most important admiralty courts in the nation—after the Supreme Court—have not yet ruled on the issue of who can be a surviving widow under the Jones Act. Both the Second Circuit, which includes the Port of New York, and the Ninth Circuit, whose jurisdiction extends to the Ports of Los Angeles and San Francisco, have yet to rule on the issue.

135. It must be noted that the Supreme Court in other contexts has declared that a federal law of domestic relations should not be created. See, e.g., Desylva v. Ballentine, 351 U.S. 570 (1956), where the Court held that whether an illegitimate child could succeed to the renewal rights of his deceased father under the federal Copyright Act, 17 U.S.C. §§ 203, 301 (1982) was to be determined under state, not federal law. Whether this case is still good law following the Court’s recent decisions on illegitimacy is open to question. See supra note 44. The issue has also come up in deciding who is a spouse entitled to Social Security benefits under 42 U.S.C. § 416(h)(1)(A) (1982). Once again, state law has been looked to. It is suggested that two responses could be given to these precedents. The better approach, and the easier to administer, would be to say that there is a federal law of domestic relations whenever a federal right, question, or jurisdiction is present. The narrower approach would be to make an explicit distinction for admiralty, based on the long practice of providing seamen with special protection and the equally long practice of treating admiralty as apart from other fields of law. See supra notes 16 and 58, respectively.

136. In the Tug Shrike case the Fourth Circuit specifically refused to take the step of expanding the definition of the term surviving widow. In particular, it wrote that: Whether it would be sounder social policy to relax the statutory requirement of widowhood by treating the survivor of a bigamous marriage as a widow entitled to recovery is a fairly debatable question. But should such a change in policy be made on judicial initiative? It is one thing for admiralty to fill in the lacunae left by congressional silence; it would be quite another to rewrite the statute. It seems to us that an admiralty court would overstep proper limits if it should attain the result by giving a forced and artificial definition to the well-established term “widow.” 332 F.2d at 336.

Several rebuttals should be made to the above statement. First, the disastrous results which follow the decision by admiralty courts to await congressional action on an area of specific concern are well known. See supra note 133. In any event, it has been twenty years since the Tug Shrike case was decided and Congress has neither explicitly approved or disapproved of the result reached in that case, despite the fact that Congress did amend the Jones Act in 1982. See supra note 2. Although some might argue that Congress’ failure to comment on the issue is proof of its contentment with the decision, it is poor practice to infer acceptance from legislative silence.

The second rebuttal is that, although the term widowhood may have had an established meaning in 1964 that excluded women who did not have a valid ceremonial marriage, the changes in our society have made it desirable, if not necessary, to rethink what
will enter into relationships without the benefit of a marriage license,\textsuperscript{137} the creation of a federal law of domestic relations is imperative if justice is to be fully served.

\textsuperscript{137} Seamen, of course are just as likely as any other occupational group to enter into these alternative relationships. Indeed, if popular literature is to be believed, they may be more likely to do so. Consider the following verses:

\begin{quote}
In every mess, I find a friend,
In every port a wife.
\end{quote}

\textit{Charles Dibdin, Jack in His Element.}

\begin{quote}
They'll tell thee sailors, when away,
In every port a mistress find.
\end{quote}

\textit{John Gay, Sweet Williams' Farewell.}

\begin{quote}
A seafaring man may have a sweetheart in every port; but he should steer clear of a wife as he would avoid a quicksand.
\end{quote}

\textit{Smollett, The Adventures of Sir Launcelot Greaves, Ch. 21.}

The truth of the foregoing statements appears to have been borne out. \textit{See, e.g.,} Petition of Benitez, 113 F. Supp. 105, 106-07 (S.D.N.Y. 1953). Although a seaman's life has changed dramatically since Richard Henry Dana wrote his classic tale \textit{Two Years Before the Mast} in the 19th century, the modern seaman still occupies a position that a few other occupations do. Consider that a seaman may be away from home for as long as three months at a time, twice a year. In light of such a work schedule, he may be less likely to follow conventional styles of relationships than his shore-bound counterpart, who returns home every day. Thus, who should be considered a widow is a question needing even more urgent consideration for the seaman than for society in general.