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Notes

ADMIRALTY — THE “TWILIGHT ZONE” — LONGSHOREMEN’S ACT AND LOUISIANA COMPENSATION ACT AS CONCURRENT REMEDIES

A longshoreman, injured in the hold of a vessel moored in navigable waters, sought workmen’s compensation under the Louisiana act. The Louisiana district court dismissed his suit on the ground that his exclusive remedy was the federal Longshoremen’s and Harbor Workers’ Compensation Act.¹ The court of appeal *held*, reversed and remanded. A longshoreman injured on navigable water can seek workmen’s compensation under either the Longshoremen’s and Harbor Workers’ Compensation Act or the Louisiana Workmen’s Compensation Act. *Richard v. Lake Charles Stevedores*, 95 So.2d 830 (La. App. 1957), *cert. denied*, 78 Sup. Ct. 535 (U.S. 1958).

This century has seen a prolonged legal battle in the courts over the constitutionality of state workmen’s compensation laws as they apply to longshoremen² and other harbor workers.³ The fight began in 1917⁴ with the case of *Southern Pacific v. Jensen*,⁵ in which a five-man majority of the United States Supreme Court held that a state workmen’s compensation law was unconstitutional insofar as it applied to a longshoreman injured on a gangway between the ship and the dock.⁶ The rationale of the

1. 44 STAT. 1424 (1927), 33 U.S.C. §§ 901-950 (1952).

2. It should be noted at the outset that at the present time longshoremen are not considered “seamen” within the meaning of the Jones Act, although this has not always been the case. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 282 (1957).

3. The battle might be regarded as essentially a *jurisdictional* clash between the state authorities charged with administration of the state compensation acts, and the federal courts, vested with original and exclusive jurisdiction by Congress, 28 U.S.C. § 1333 (1948). However, it seems better to view the problem as a conflict between state substantive law and the substantive maritime law applied by the federal courts. See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 43 (1957).

For an interesting historical account of this area, see *id.* at 333 *et seq.* A concise analysis of the cases can be found in 2 LARSON, *THE LAW OF WORKMEN’S COMPENSATION* 408 *et seq.* (1952).

4. Four years earlier in *The Fred E. Sander*, 208 Fed. 724 (W.D. Wash. 1913), a federal district court held that a longshoreman injured on board ship had suffered a maritime tort, to which the state workmen’s compensation act could not validly apply. It is interesting to speculate as to what effect this long, closely-reasoned opinion may have had on the majority in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

5. 244 U.S. 205 (1917).

6. The alignment of the Court should be compared to that found in *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917). That case, decided just before *Jensen*, was one of a group of leading cases in which the Court first considered the constitutionality *per se* of state workmen’s compensation laws. In the *Washington* case four Justices dissented from the holding that the Washington

majority was this: the injury had occurred over navigable water; it was thus a "maritime tort"⁷ and within the original and exclusive admiralty jurisdiction of the federal courts under Article III, Section 2, of the Constitution; this constitutional grant of admiralty jurisdiction to the federal courts implied that a nationally uniform system of substantive admiralty law was necessary;⁸ to allow the various state compensation acts to apply to "maritime torts" would wreck the necessary "uniformity" of maritime law.⁹ Later the Supreme Court modified the *Jensen* rule by holding that although a tort occurred over navigable water and thus was "maritime," a state workmen's compensation law could validly apply if the employment of the injured person had been so local in nature that it had no direct relation to navigation and commerce.¹⁰ Allowing the state act to cover situations which were "maritime but local," reasoned the court, would not seriously prejudice the need for "uniformity," hallowed five years earlier in the *Jensen* case.¹¹ The result created a problem for the harbor worker injured over navigable water.¹² He could

workmen's compensation law was constitutional. These four formed most of the majority in the *Jensen* case. Four of the Justices who had held for constitutionality in the *Washington* case, including Holmes and Brandeis, became the dissenters in the *Jensen* decision.

7. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217 (1917). The rule that a tort is maritime if it occurs over navigable water had been announced earlier in *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914). This "locality test" is still the one used to determine whether a tort is within the admiralty jurisdiction. *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); *Vancouver Steamship Co. v. Rice*, 288 U.S. 445 (1933).

8. The Constitution merely extends the *judicial* power of the federal courts to admiralty cases. U.S. CONST. art. III, § 2. However, the Supreme Court had previously declared that Article III, Section 2, implied that Congress had the power to enact substantive admiralty law. *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527 (1889). Further, the federal courts had traditionally applied (and modified) the general maritime law as gleaned from European authorities. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 42 (1957).

9. "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917).

Justice Holmes, dissenting, called the majority's fear of lack of "uniformity" in the general maritime law a "spectre." *Id.* at 223.

10. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

11. "[N]either [plaintiff's] general employment, nor his activities at the time had any direct relation to navigation or commerce Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations." *Id.* at 476. This "maritime but local" exception to *Jensen* had been worked out earlier in another context. *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921) (wrongful death action brought in admiralty court under state wrongful death statute).

12. "It must be remembered that under the *Jensen* hypothesis, basic conditions

not get an award under the state compensation act unless his occupation fit within the "maritime but local" exception to *Jensen* and there was no way to determine this with certainty except by fighting up through the appellate hierarchy.¹³ If it were finally decided that his situation was within the exclusive ambit of the general maritime law applied by the federal courts,¹⁴ he was without a right to workmen's compensation of any sort, since the general maritime law provided none.¹⁵ In 1927 Congress sought to provide workmen's compensation in such a case by enacting the Longshoremen's and Harbor Workers' Compensation Act.¹⁶ By providing that it covered workers¹⁷ hurt over navigable water *only* if the state compensation acts "may not validly apply,"¹⁸

are factual: Does the state law interfere with the proper harmony and uniformity of maritime law? Yet, employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." *Davis v. Department of Labor and Indus. of the State of Washington*, 317 U.S. 249 (1942). See also *Merchants' & Miners' Transportation Co. v. Norton*, 32 F.2d 513, 516 (E.D. Pa. 1929).

13. See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 347 (1957).

14. *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925) (repairman on completed ship in navigable water); *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924) (longshoreman on ship in navigable water); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1923) (repairman on completed ship in navigable water); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (bargeman fell overboard, drowned); *Peters v. Veasey*, 251 U.S. 121 (1919) (award of Louisiana workmen's compensation to longshoreman hurt on vessel in navigable water reversed); *Clyde S.S. Co. v. Walker*, 244 U.S. 255 (1917) (longshoreman on ship in navigable water); *Lee v. W. & A. Fletcher Co.*, 4 F.2d 3 (3d Cir. 1925) (repairman on completed vessel in navigable water); *Jordan v. Frederick Leyland & Co.*, 7 F.2d 386 (E.D. La. 1925) (unloading vessel on navigable water); *The Fred E. Sander*, 208 Fed. 724 (W.D. Wash. 1913) (longshoreman on vessel in navigable water); *March v. Vulcan Iron Works*, 102 N.J.L. 337, 132 Atl. 89 (1926) (decendent killed in floating drydock). Cf. *Doey v. Clarence P. Howland Co.*, 244 N.Y. 30, 120 N.E. 53 (1918) (repairman on completed ship in navigable waters); *Dorman's Case*, 236 Mass. 583, 129 N.E. 352 (1921) (mate on harbor steamer).

15. Section 9 of the Judiciary Act of 1789, 1 STAT. 76, gave the federal courts original jurisdiction over maritime cases, but included a "saving clause," which reserved to "suitors, in all cases, the right to a common law remedy, where the common law is competent to give it." The majority in the *Jensen* case had stated that state workmen's compensation laws were not "common law remedies" within the meaning of the "saving clause." In order to circumvent this holding, Congress twice expanded the "saving clause" to specifically include state workmen's compensation laws, but the Supreme Court struck down both attempts as unconstitutional delegations of federal power. *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

16. 44 STAT. 1424 (1927), 33 U.S.C. §§ 901-950 (1952). It had been settled that Congress had the power to enact substantive admiralty law. *Panama R.R. v. Johnson*, 264 U.S. 375 (1924).

17. The act does not apply to the master and crew of a vessel. Longshoremen's and Harbor Workers' Compensation Act § 3(a)(1), 44 STAT. 1424 (1927), 33 U.S.C. § 903(a)(1) (1952).

18. "Compensation shall be payable under this Act in respect of disability or

Congress seemingly excluded from coverage those workers whom the federal courts had placed under the state acts through the "maritime but local" doctrine.¹⁹ For the next fifteen years the courts continued to use the "maritime but local" formula to classify new waterfront situations either under the state acts on the one hand,²⁰ or the Longshoremen's Act on the other.²¹

In 1941 the Supreme Court handed down a decision which did not seem to fit this pattern.²² An award to a widow made under the Longshoremen's Act was allowed to stand, even though the deceased had been killed while demonstrating an outboard motor, a task which certainly seemed "local" within the "maritime but

death of an employee, but only if the disability or death results from an injury occurring upon navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Longshoremen's and Harbor Workers' Compensation Act, § 3(a), 44 STAT. 1424 (1927), 33 U.S.C. § 903(a) (1952).

19. See GILMORE & BLACK, THE LAW OF ADMIRALTY 339 (1957).

20. Sultan Ry. & Timber Co. v. Department of Labor & Indus. of the State of Washington, 277 U.S. 135 (1928) (unloading sawlogs for use in mill); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 276 U.S. 467 (1928) (cannery workman pushing boat into water); Rosengrant v. Havard, 273 U.S. 664 (1926) (tallyman for lumber company shot while over navigable water); Millers' Indem. Underwriters v. Braud, 270 U.S. 59 (1926) (diver sawing off timbers from abandoned set of marine ways); Alaska Packers Ass'n v. Marshall, 95 F.2d 279 (9th Cir. 1938) (loading fish into a schooner for packing company); New Amsterdam Cas. Co. v. McManigal, 87 F.2d 332 (2d Cir. 1937) (building lighthouse over navigable water); Jeffers v. Foundation Co., 85 F.2d 24 (2d Cir. 1936) (diver inside cofferdam filled with water); Sunny Point Packing Co. v. Faigh, 63 F.2d 921 (9th Cir. 1933) (watchman on floating fishtrap); United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir. 1933), *cert. denied*, 290 U.S. 639 (1933) (workman on launched ship only 96% completed); United Dredging Co. v. Lindberg, 18 F.2d 453 (5th Cir. 1927), *cert. denied*, 274 U.S. 759 (1926) (decendent fell behind dredge digging canal across land); Massman Constr. Co. v. Bassett, 1940 A.M.C. 310 (E.D. Mo. 1940) (inside dry cofferdam); Hawkins v. Raynor, 261 App. Div. 1011, 25 N.Y.S.2d 876 (1941) (garage worker drowned protecting employer's boat during storm); William Hebert's Case, 283 Mass. 348, 186 N.E. 554 (1933) (sweeper on garbage scow); *accord*: P. J. Carlin Constr. Co. v. Heaney, 299 U.S. 41 (1936) (ferryboat operator).

If it were decided that a workman fell within the "maritime but local" doctrine and thus state compensation could validly apply to him, he was denied compensation under the Longshoremen's Act *even though the state had no compensation act*. United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir. 1933).

During this period other situations were classed under the state acts, not because they were "maritime but local," but because they were not maritime at all, since they did not occur over navigable water. For example, an injury to a longshoreman on land was not a maritime tort. Colonna's Shipyard v. Lowe, 22 F.2d 843 (E.D. Va. 1927); Smalls v. Atlantic Coast Shipping Co., 261 Fed. 928 (E.D. Va. 1919). Neither was an injury to a longshoreman on a dock, since the dock was considered an extension of the land. T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928) (longshoreman struck on dock, from which he fell into navigable water and drowned); State Industrial Comm'n of New York v. Nordenholt Corp., 259 U.S. 263 (1922); Netherlands American Steam Nav. Co. v. Gallagher, 282 Fed. 171 (2d Cir. 1922); Swayne & Hoyt v. Barsch, 226 Fed. 581 (9th Cir. 1915). *Of* Seifort v. Keansburg Steamboat Co., 20 F. Supp. 542 (S.D.N.Y. 1937) (watchman hurt on dock not within coverage of Jones Act).

local" rule and thus presumptively within the exclusive coverage of the state act.²³ Language in the decision indicated that perhaps the court had given up the "maritime but local" exception entirely and returned to the unqualified preemption of the *Jensen* case.²⁴ However, the following year the Court revealed what had been behind the decision by creating the now-famous "twilight zone," an area of situations wherein the injured worker could recover under *either* the federal or state act.²⁵ What comprised the "twilight zone" was by no means clear, but apparently the Court meant to include within it at least all the possible waterfront situations which had not already been before the courts and thereby become classified either under the Longshoremen's Act or the state acts.²⁶ The "twilight zone" was indeed "theoretic

21. *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935) (longshoreman knocked from ship onto dock; compare with *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928)); *Vancouver S.S. Co. v. Rice*, 288 U.S. 445 (1933) (longshoreman on ship in navigable water); *Spencer Kellogg & Sons, Inc. v. Hicks*, 285 U.S. 502 (1932) (workers drowned while being ferried to work); *Employers' Liab. Assur. Corp. v. Cook*, 281 U.S. 233 (1930) (auto company employee hurt unloading parts from ship in navigable water); *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930) (repairing completed ship in navigable water); *Nogueira v. New York, New Haven & Hartford R.R.*, 281 U.S. 128 (1930) (railroad employee on car float in navigable water); *London Guarantee & Acc. Co. v. Industrial Acc. Comm'n of California*, 279 U.S. 109 (1929) (decendent drowned swimming to reach boat in storm); *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142 (1928) (unloading ship in navigable water); *Union Oil Co. v. Pillsbury*, 63 F.2d 925 (9th Cir. 1933) (watchman on floating drydock); *T. J. Moss Tie Co. v. Tanner*, 44 F.2d 928 (5th Cir. 1930) (stencilling railroad ties on barge in navigable water); *Puget Sound Nav. Co. v. Marshall*, 31 F. Supp. 903 (W.D. Wash. 1940) (watchman on ferry); *Lake Washington Shipyards v. Brueggeman*, 56 F.2d 655 (W.D. Wash. 1931) (worker remodelling ship in navigable water); *Great Lakes Dredge & Dock Co. v. Brown*, 47 F.2d 265 (N.D. Ill. 1930); *Merchants' & Miners' Transp. Co. v. Norton*, 32 F.2d 513 (E.D. Pa. 1929) (repairman on completed ship in navigable water); *LaCasse v. Great Lakes Eng'r Works*, 242 Mich. 454, 219 N.W. 730 (1928) (repairing completed ship in navigable water).

22. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

23. *Ibid.* For earlier cases classifying situations as "maritime but local," see note 20 *supra*.

24. To the argument that the situation in the case was within the "maritime but local" doctrine, the Supreme Court, through Justice Black, replied that "the decision of this Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, however, severs a link in this chain of reasoning. For under the holding of that case, even in the absence of any Congressional action, federal jurisdiction is exclusive and state action forbidden in an area which, although of shadowy limits, doubtless embraces the case before us." *Id.* at 247. "While the proviso of § 3 (a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide." *Id.* at 249.

25. *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249 (1942). The federal commissioner's "conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error." *Id.* at 256. However, if the state has taken jurisdiction, the Court will rely "heavily on the presumption of constitutionality in favor of the state statute." *Id.* at 257.

26. "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which

illogic"²⁷ in that it caused the federal and state acts to overlap in doubtful cases, even though the federal act by its own terms cannot apply where state acts may validly apply.²⁸ However, the next two Supreme Court cases on the subject apparently made the "twilight zone" even broader.²⁹ There the employees had been injured while repairing completed vessels on navigable water.³⁰ Even though this situation had often been litigated and was invariably classed as outside the scope of the state compensation acts,³¹ the workmen chose to sue under state acts.³² In both cases the Supreme Court upheld the workman's choice.³³

particular facts and circumstances are vital elements." *Id.* at 256. See Comment, 33 WASH. L. REV. 312, 322 (1958).

27. In his concurring opinion in the *Davis* case Justice Frankfurter referred to the "twilight zone" as "theoretic illogic." *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249, 259 (1942).

28. Longshoremen's and Harbor Workers' Compensation Act § 3(a), 44 STAT. 1424 (1927), 33 U.S.C. § 903 (a) (1952).

Dissenting, Chief Justice Stone had contended that the majority's attempt to remove the difficulties in the area "by construing state workmen's compensation acts and the Longshoremen's and Harbor Workers' Act so that their coverages overlap, can hardly be deemed to be within judicial competence." *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249, 260 (1942).

29. Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948); *Baskin v. Industrial Acc. Comm'n*, 338 U.S. 854 (1949).

30. See cases cited note 29 *supra*.

31. *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930) ("Repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce as has been often pointed out by this Court." *Id.* at 232); *Messel v. Foundation Co.*, 274 U.S. 427 (1927); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1923); *Merchants' & Miners' Transportation Co. v. Norton*, 32 F.2d 513 (E.D. Pa. 1929); *Lee v. W. & A. Fletcher Co.*, 4 F.2d 3 (3d Cir. 1925); *Lake Washington Shipyards v. Brueggeman*, 56 F.2d 655 (W.D. Wash. 1931); *LaCasse v. Great Lakes Eng'r Works*, 242 Mich. 454, 219 N.W. 730 (1928); *March v. Vulcan Iron Works*, 102 N.J.L. 337, 132 Atl. 89 (1926); *Doey v. Clarence P. Howland Co.*, 224 N.Y. 30, 120 N.E. 53 (1918). *Accord*, *Union Oil Co. v. Pillsbury*, 63 F.2d 925 (9th Cir. 1933).

32. *Baskin v. Industrial Acc. Comm'n*, 89 Cal. App.2d 632, 201 P.2d 549 (1949); *Moores' Case*, 323 Mass. 162, 80 N.E.2d 478 (1948).

33. *Bethlehem Steel Co. v. Moores*, 335 U.S. 874 (1948) (per curiam memorandum decision, containing simply a citation to *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249 (1942)); *Baskin v. Industrial Acc. Comm'n*, 338 U.S. 854 (1949) (refusal of state court to award compensation reversed, and remanded with suggestion that the lower court consider *Moores Case*, 323 Mass. 162, 80 N.E.2d 478 (1948)). The treatment originally accorded the *Moores* case by the Supreme Judicial Court of Massachusetts is interesting. Well aware of the pre-twilight zone precedents classifying the situation as maritime, the Massachusetts court nevertheless refused to follow them, stating:

"Although apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the *Jensen* case, the most important question has now become the fixing of the boundaries of the new 'twilight zone,' and for this the case gives us no rule or test other than the indefinable and subjective test of doubt Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to treat the *Davis* case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all

The decision in the present case hinged on the court's analysis of these last two cases. In those cases the employees, who would have been clearly within the coverage of the Longshoremen's Act under the pre-"twilight zone" decisions,³⁴ were allowed compensation under the state acts.³⁵ The court in the present decision reasoned that the "twilight zone" had been extended by the Supreme Court to include *all* waterfront injuries.³⁶ Thus, although the plaintiff in the instant case, a longshoreman hurt on navigable water, would formerly have been placed under the federal act,³⁷ he had brought his suit under the state act, and so his choice should be upheld.³⁸

According to the Court's analysis of the Supreme Court cases, the Longshoremen's Act and the state acts are now concurrent remedies.³⁹ Although the Court's conclusion has been expressly

waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of previous decisions might disclose an apparent weight of authority one way or the other." *Moores' Case*, 323 Mass. 162, 167, 80 N.E.2d 478, 480 (1948).

34. See note 31 *supra*.

35. *Bethlehem Steel Co. v. Moores*, 335 U.S. 874 (1948); *Baskin v. Industrial Acc. Comm'n*, 338 U.S. 854 (1949).

36. *Richard v. Lake Charles Stevedores*, 95 So.2d 830, 831 (La. App. 1957). The court referred extensively to the analysis in 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* 408 *et seq.* (1952).

37. *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); *Vancouver S.S. Co. v. Rice*, 288 U.S. 445 (1933); *Spencer Kellog & Sons, Inc. v. Hicks*, 285 U.S. 502 (1932); *Employers' Liab. Assur. Corp. v. Cook*, 281 U.S. 233 (1930); *Nogueira v. New York, New Haven & Hartford R.R.*, 281 U.S. 128 (1930); *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142 (1928); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). *Accord*, *T. J. Moss Tie Co. v. Tanner*, 44 F.2d 928 (5th Cir. 1930) (employee stencilling railroad from barge on navigable water).

38. *Richard v. Lake Charles Stevedores*, 95 So.2d 830 (La. App. 1957).

39. The court referred to the present state of the law as amounting to a "concurrent jurisdiction exercised by both State and federal tribunals, each jurisdiction deciding for itself whether it shall apply its own law, such determination being relatively final." *Id.* at 831.

However, there may be a difference in the "finality" of a state authority's decision on whether to take jurisdiction of a case and that of the federal commissioner. The Supreme Court has indicated that it will accord nearly absolute finality to the findings of the federal commissioner regarding jurisdiction. *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953); *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249 (1942). The Commissioner will probably be upheld whether he accepts jurisdiction over a case or refuses to do so. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 353 (1957). On the other hand, the *Davis* and *Baskin* cases clearly show that a state authority's refusal to take jurisdiction over a case can be reversed by the federal court. *Ibid.*

However, it would appear that once a state authority has taken jurisdiction of a case, it will not be reversed by the Supreme Court, since the state compensation act would be presumed constitutional under the doctrine of the *Davis* case. Comment, 33 WASH. L. REV. 312, 323 (1958); GILMORE & BLACK, *THE LAW OF ADMIRALTY* 354 (1957) (inferentially). *Contra*, 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* 418-19 (1952), wherein it is argued that the problem in this area is still one of federal preemption, and a federal court can always decide that a state authority has invalidly taken jurisdiction over a case.

A related question is whether there can be awards under both the federal and

disapproved by the Federal Court of Appeals for the Fifth Circuit,⁴⁰ it appears to the writer to be correct. In every case since 1941, including the 1959 decision of *Hahn v. Ross Island Sand & Gravel Co.*,⁴¹ the Supreme Court has refused to upset a harbor worker's choice.⁴² Admittedly, there is "theoretic illogic" in saying the federal act is concurrent with the state acts, when the federal act expressly states that it cannot apply where state acts may validly apply.⁴³ However, the practical result simplifies the problem for the injured harbor worker.⁴⁴ If the Longshore-

state acts. It would appear that an employee can get a supplemental award under the Longshoremen's Act after he has received an award under a state act. *Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409 (9th Cir. 1952); *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F.2d 968 (4th Cir. 1951); 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* 418 (1952); GILMORE & BLACK, *THE LAW OF ADMIRALTY* 354 (1957). Larson contends that federal supremacy in this area precludes a state's making an award once an award has been made by the federal commissioner. 2 LARSON, *loc. cit. supra*. However, it would appear that any such federal "supremacy" disappeared with the advent of the "twilight zone," and therefore a state may validly make a supplemental award to one already made under the Longshoremen's Act. GILMORE, & BLACK, *loc. cit. supra*.

40. *Flowers v. Travelers Ins. Co.*, 258 F.2d 220, 226 (5th Cir. 1958) (Longshoremen's Act held exclusive remedy for ship repairman injured over navigable water). In a thorough and well-documented opinion the court concluded that the "twilight zone" was meant by the Supreme Court to include only those situations which had not previously been classified either under the federal or the state acts. Since a ship repairman had often been classified under the Longshoremen's Act, the court concluded that he did not fall within the "twilight zone." However, the court admitted that even under a theory of concurrent remedies its decision would have been the same, since the worker had in fact chosen the federal act. *Id.* at 224.

41. 79 S.Ct. 266 (U.S. 1959) ("twilight zone" doctrine interpreted as giving "an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the state in which the injury occurred." *Id.* at 267). There the plaintiff was injured on a gravel barge in navigable water. His employer was covered under the Longshoremen's Act but had elected not to come under the Oregon compensation statute, which provided that an employer's failure to participate would subject him to a negligence suit, against which he could interpose no traditional common law defenses. The Supreme Court held that the employee could sue under this provision, since his occupation was within the "twilight zone." Of course, the employee's occupation had apparently never been classified under either the state or federal act, and thus would appear to be within the "twilight zone" as originally delineated in *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249 (1942). Thus the Supreme Court's holding that the worker was entitled to pursue the remedy he had chosen does not precisely support the doctrine of concurrent remedies as framed in the instant case.

42. *Baskin v. Industrial Acc. Comm'n*, 338 U.S. 854 (1949); *Bethlehem Steel Co. v. Moores*, 335 U.S. 874 (1948); *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249 (1942); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

43. Longshoremen's and Harbor Workers' Compensation Act § 3(a), 44 STAT. 1424 (1927), 33 U.S.C. § 903(a) (1952).

44. However, the result may well be to complicate matters for the employer, since he has no way of knowing in advance which act an injured employee will choose. See *Flowers v. Travelers Ins. Co.*, 258 F.2d 220, 226 (5th Cir. 1958), where the court suggests that concurrency of the acts will result in an employer being liable to civil and criminal penalties under both during the time the employee is deciding which to choose. Perhaps the only way an employer can adequately protect himself is to suffer the additional expense of securing coverage under both

men's Act is concurrent with the state compensation act, he need not pursue a costly appeal merely to find out which act applies to him, but can simply choose between the two without fear of having made the wrong choice.⁴⁵

C. Jerre Lloyd

CRIMINAL LAW — CONSTITUTIONALITY OF STATUTE PROHIBITING POSSESSION OF HYPODERMIC NEEDLE WITHOUT CRIMINAL INTENT

Defendant was convicted under a Louisiana statute¹ making it a crime to possess a hypodermic needle. The statute, with certain exceptions,² imposed criminal liability for mere possession with no consideration given to the intended use of the needle. In the original trial³ the state introduced evidence of the presence of a barbiturate in the box where the needle was found. Defendant offered evidence to prove that he had never used the needle for the administration of narcotics. The state's objection of irrelevancy to this offer was sustained in the district court on the grounds that the defendant was being prosecuted for possession alone, and intent was therefore irrelevant. On appeal, the case was remanded by the Supreme Court on the grounds that evidence tending to show an illegal intent and evidence tending toward disproving this intent are both relevant in all criminal prosecutions.⁴ On retrial, the defendant was again convicted, with the evidentiary matter apparently never again becoming an issue. On appeal of the second conviction, the de-

the Longshoremen's Act and the applicable state act. See *Hahn v. Ross Island Sand & Gravel Co.*, 79 S.Ct. 266 (U.S. 1959) (employer subjected to negligence suit resulting from failure to participate in state compensation plan even though employer was covered under the Longshoremen's Act).

45. A comparison of the benefits under the Louisiana Workmen's Compensation Act with those under the Longshoremen's Act can be found in MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* 606-12 (1951). For a short discussion of the possibility of obtaining awards under both the Louisiana act and the federal act, see note 39 *supra*.

1. LA. R.S. 40:962(B) (1950): "It is unlawful for any person, except a dealer in surgical instruments, apothecary, dentist, veterinarian or nurse, attendant or intern of a hospital, sanatorium or institution in which persons are treated for disability or disease, at any time to have or possess a hypodermic syringe or needle unless such possession be authorized by the prescription or certificate of a physician issued within the period of one year prior thereto. Provided that this sub-section shall not be held to apply to syringes or needles for the treatment of fowl or livestock." The term "physician" is defined to mean a person authorized to practice medicine in the State of Louisiana.

2. *Ibid.*

3. *State v. Birdsell*, 232 La. 725, 95 So.2d 290 (1957).

4. See note 16 *infra*.