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WORKMEN'S COMPENSATION FOR MARITIME EMPLOYEES: OBSCURITY IN THE TWILIGHT ZONE

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THE case of *Southern Pac. Co. v. Jensen* [1] was a landmark in the interpretation of the constitutional grant of federal judicial power over "all Cases of admiralty and maritime Jurisdiction." [2] During the nineteenth century the emphasis was on delineating the boundary between state and federal spheres of judicial competence over maritime matters. The Supreme Court developed many of the principles of a general maritime law and demanded its uniform application within the federal system of admiralty courts. As late as 1893, however, state courts were not required to apply federal maritime law to common-law proceedings involving maritime subjects; [3] each jurisdiction developed, somewhat incidentally, its own system of substantive law. The *Jensen* decision represented a decisive departure from that approach, in the direction of establishing a general maritime law for both state and federal courts on the theory that substantive law should not be determined by the choice of forum.[4]

The question in *Jensen* was whether the widow of a longshoreman who forgot to duck as he backed his truck into a hatchway in the side of a docked ship could recover under the New York Workmen's Compensation Law.[5] The Supreme Court, reversing the New York courts, held that she could not. State legislation that "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony

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[1] 244 U.S. 205 (1917).

[2] U.S. CONST. art. III.

[3] Belden v. Chase, 150 U.S. 674 (1893).

[4] *Compare ibid. with* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (applicability of maritime rule of comparative negligence to proceedings at common law). See Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 254 (1950).

[5] N.Y. Sess. Laws 1914, c. 316.

of that law in its international and interstate relations" [6] runs counter to the constitutional grant of jurisdiction to the federal courts, the majority found, and cannot be enforced even in state tribunals.

It is clear from the opinion that the Court was primarily concerned with the development of a general maritime law. But in the ensuing years the judiciary's interest shifted towards according the injured worker and his family adequate means of availing themselves of the compensatory relief that is provided by federal and state governments. The Supreme Court's attempts to reconcile that purpose with its earlier concern for a general maritime law, and the consequences these attempts have had in the area of workmen's compensation, are the subject of this article.

I. What the Supreme Court Decided

In decisions subsequent to *Jensen* the Supreme Court began to set apart some areas of maritime employment as being of merely local concern where the application of state workmen's compensation laws would not work material prejudice to the characteristic features of a general maritime law.[7] There grew up a sizable body of law defining the boundary between national and local activities.[8] In 1927, after two attempts to permit the application of state compensation laws to maritime employment — both declared unconstitutional [9] — Congress passed the Longshoremen's and Harbor Workers' Compensation Act, extending compensatory relief to workers injured in maritime employment on the navigable waters of the United States wherever "recovery for the disability or death through workmen's compensation proceedings may not

[6] 244 U.S. at 216.

[7] *E.g.*, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[8] For a defense of this body of jurisprudence, see Dickinson & Andrews, *A Decade of Admiralty in the Supreme Court of the United States*, 36 Calif. L. Rev. 169, 179 (1948). For a competent judicial application of it in its heyday, see Motor Boat Sales, Inc. v. Parker, 116 F.2d 789 (4th Cir.), *rev'd*, 314 U.S. 244 (1941). For citations of cases that go to make it up, see Davis v. Department of Labor, 317 U.S. 249, 253 n.2 (1942).

[9] 40 Stat. 395 (1917) added to the section of the Judicial Code giving the district courts jurisdiction of admiralty causes, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it," 36 Stat. 1091 (1911), the words "and to claimants the rights and remedies under the workmen's compensation law of any state." This was stricken down in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). A further congressional attempt to amend this clause so as to leave state remedies intact was stricken down in Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924).

validly be provided by State law." [10] By so limiting federal relief, Congress seemed to have adopted the distinctions between national and local matters that had been developed since the *Jensen* decision. Consequently these distinctions were carried over into cases considering whether the injured worker should seek compensation under the state law or under the Longshoremen's Act. The result was that in each case an examination of the facts was required to determine whether the case fell into one category or the other, and the worker was granted or denied compensation depending on which remedy he chose to pursue.[11]

The first attempt to get the Supreme Court to reconsider the entire area of workmen's compensation for maritime employees in the light of contemporary constitutional doctrines came in *Parker v. Motor Boat Sales, Inc.*[12] The Fourth Circuit had reversed an award of compensation under the Longshoremen's Act, holding, for reasons not satisfactory to the Supreme Court, that the demonstration of a motor boat to a prospective purchaser was a matter of only local concern. Counsel for the employer therefore offered the Court a more basic contention, arguing that the language of the Longshoremen's Act barred its application in any case for which state law could validly provide, that the only reason state law could not be applied in the instant case was *Jensen*, and that *Jensen* was bad law and should be overruled. Then state law *could* be validly applied, and the Longshoremen's Act would be excluded by its own terms. The Court, however, unanimously rejected this opportunity to abandon *Jensen*. Whatever its status as constitutional law, the Court held, *Jensen* was conclusive of the meaning of the word "validly" as used by Congress in making the applicability of the Longshoremen's Act turn on whether state law could validly provide relief.

Such, then, was the state of the law when one Davis met his death by drowning in the Snohomish River. At the time of the accident he had been standing on a barge checking steel as it was put on board in the process of dismantling a bridge. His widow

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[10] 44 STAT. 1426 (1927), 33 U.S.C. § 903(a) (1952). A provision of the same section limiting recovery to injuries sustained on navigable waters seems to be responsive to State Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922), which held that a state could afford compensation to longshoremen injured on land.

[11] Allen, *The "Twilight Zone" Between the Jurisdictions of State and Federal Compensation Acts*, 16 INS. COUNSEL J. 202, 203 (1949).

[12] 314 U.S. 244 (1941).

sought relief under the Washington state compensation act,[13] but was turned down by the state board on the ground that Davis' employment — loading a vessel — was exclusively subject to federal jurisdiction. The state courts sustained the administrative decision against the contention that dismantling a bridge was a matter of merely local concern.[14] The Supreme Court reversed.

The Court declared that the line between activities properly covered by the state act and those reserved to federal administration under the Longshoremen's Act was so "undefined and undefinable" that presumptive weight ought to attach to an assumption of jurisdiction by either state or federal authorities.[15] The opinion sets forth persuasive policy reasons for the result the Court reached. Both Congress and the state legislature intended to provide the worker and his family with a speedy and certain remedy for industrial injuries. But under the existing law an employee might have to go through several appellate courts before finding whether the remedy he chose in good faith was the right one. And if, after all this litigation, the employee lost, he might find that the remedy he should have pursued was barred by the statute of limitations. At the same time, an employer might find that the insurance he had bought under the law he supposed to be applicable to his employees did not cover him, since his employees were compelled to make their claims under the other law.

On what conceptual basis could these difficulties be avoided? The Court retained the *Jensen* criterion of interference with the harmony and uniformity of the maritime law as determinative of whether state or federal law applied, but characterized the determination as factual. On this premise an award of federal compensation could be sustained on the familiar doctrine of administrative finality without precluding the subsequent application of state law to similar situations. In the instant case, however, where the applicability of state law was in question, the Court drew its presumptions from a different source. The state law, the Court noted, purported to cover this situation, and there had been no "conflicting process of administration" [16] under the federal act.

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[13] WASH. REV. STAT. ANN. § 7673 (1932).

[14] Davis v. Department of Labor, 12 Wash. 2d 349, 121 P.2d 365 (1942).

[15] Davis v. Department of Labor, 317 U.S. 249, 255 (1942). "There is . . . clearly a twilight zone in which the employees must have their rights determined case by case . . . ." *Id.* at 256.

[16] *Id.* at 258.

Accordingly, the state law had to be applied unless it was unconstitutional. But the law should not be held unconstitutional in an equivocal fact situation. Thus the applicability of the state law was to be upheld.

The difficulty with this approach is that by the time the case reached the Supreme Court the "factual" question had already been resolved, by the state administrative agency, against state compensation. Thus application of the doctrine of administrative finality would seem to have required affirmance of that administrative decision. There must therefore have been another step in the reasoning leading to the decision.

Arguably, what the Supreme Court was doing in reversing *Davis* was advising the state courts and agency that the question before them was to be treated as one of fact, even though it had previously been regarded as one of law. The Texas Supreme Court in *Emmons v. Pacific Indemnity Co.*[17] seems to have read *Davis* in this way. Emmons, injured while doing metal work on a barge, was denied compensation by the state board on grounds of exclusive federal jurisdiction, and in the trial de novo provided by local practice the judge took the case from the jury on the same ground. The state supreme court, relying heavily on the Court's statement that the question of interference with the harmony and uniformity of the maritime law was factual, outlined at some length the pre-*Davis* criteria for exclusive federal jurisdiction, and held that it could not be said *as a matter of law* that those criteria were met in the *Emmons* case. Apparently, then, the jury should have determined whether they obtained.[18]

Reading *Davis* as requiring state agencies to treat certain questions as questions of fact, not of law, raises two troublesome considerations. First, a state court may be reluctant to have its control over its own administrative bodies governed by the Supreme Court's characterization of the questions before them. Second, while the basic question has been called factual by the Supreme Court, its contours have been filled out by a long series

[17] 146 Tex. 496, 208 S.W.2d 884 (1948).

[18] For a somewhat different, but equally conservative, approach to *Davis* during this period, see HOROVITZ, WORKMEN'S COMPENSATION 31 (1944).

In Green v. Simpson & Brown Constr. Co., 24 N.J. Super. 422, 94 A.2d 693 (County Ct. 1953), the court held that evidence of death in connection with work on a barge being used in bridge building made out a prima facie showing that the case was within state jurisdiction as "maritime but local," so that dismissal by the agency at the close of plaintiff's evidence was improper.

of judicial decisions, all of which purported to be dealing with questions of law, and none of which was overruled in *Davis*. These difficulties came up in two almost simultaneous cases from opposite coasts of the country, which were to put an entirely different complexion on *Davis*.

In the latter half of 1945, two shipyard workers, Moores in East Boston, and Baskin in San Francisco, were injured under circumstances indistinguishable from those held to be of exclusively federal cognizance in the important pre-*Davis* case of *John Baizley Iron Works v. Span*.[19] State compensation was awarded to Moores in Massachusetts, but denied to Baskin in California. The California appellate court took the more conservative view; *Davis*, it held, had no application where the earlier precedents were unequivocal; consequently Baskin's case was not within the "twilight zone." [20] This approach represents the customary mode of appellate review of factual determinations: where a question of fact has an obvious answer, the trier of fact will be allowed to find no other. And whether or not the answer is "obvious" is a question of law to be decided on the basis of precedents.

The Massachusetts court went on an entirely different tack.[21] The court pointed out that it must draw its own conclusions from the subsidiary facts found by the compensation commission,[22] thus impliedly rejecting as a guide to its review of administrative determinations the Supreme Court's characterization of the *Jensen* criterion as factual. Nevertheless, the court affirmed the award of compensation. It noted that, unless federal law was controlling, the state statute would apply to the facts of the case, and that while, on the basis of earlier decisions, the case was within the area of exclusive federal jurisdiction, the policy considerations underlying *Davis* seemed to be equally applicable here, and it could be predicted with some certainty that the Supreme Court would affirm an award of compensation. Hence the court found no federal obstacle to the application of the state statute, reading *Davis* as setting up a zone of "overlap" [23] in which state and fed-

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[19] 281 U.S. 222 (1930).

[20] Baskin v. Industrial Accident Comm'n, 89 Cal. App. 2d 632, 201 P.2d 549 (1949).

[21] Moores's Case, 323 Mass. 162, 80 N.E.2d 478 (1948).

[22] *Id.* at 164, 80 N.E.2d at 479.

[23] *Id.* at 166, 80 N.E.2d at 480.

eral authority were concurrently exercisable in order to avoid the hardship of compelling the injured workman to proceed anew after a false start. The court seemed to recognize that the Longshoremen's Act was so worded as to require mutual exclusiveness, but found no clear way out of the dilemma:

> 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 . . . .[24]

When the two cases reached the Supreme Court, the Massachusetts decision was affirmed per curiam, with a citation to *Davis*,[25] and the California decision was vacated and remanded for reconsideration in light of the affirmance of *Moores*.[26] On remand, the California court sent the case back to the commission with directions to take jurisdiction.[27]

The Supreme Court, by affirming *Moores*, did not necessarily adopt the reasoning of the Massachusetts court; it may have applied the same presumptions it set up in *Davis*. But, while it is possible that the Court still purports to adhere to the statutory standard of mutual exclusiveness, the state courts would seem to be abandoning it. As long as the Supreme Court goes on affirming state court decisions, there is no obstacle to their doing so. Thus, while it seems clear that in many situations the courts will affirm an award of compensation under either state or federal law, it is not at all clear whether the two are in theory still mutually exclusive. The resulting uncertainty bears on a number of problems in the enforcement of compensation acts, as will be discussed in the following section.[28]

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[24] *Id.* at 167, 80 N.E.2d at 481. The court was referring to Justice Frankfurter's statement in *Davis*: "Theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act . . . or under a state statute." 317 U.S. at 259 (concurring opinion).

[25] Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

[26] Baskin v. Industrial Accident Comm'n, 338 U.S. 854 (1949).

[27] Baskin v. Industrial Accident Comm'n, 97 Cal. App. 2d 257, 217 P.2d 733 (1950).

[28] 2 LARSON, WORKMEN'S COMPENSATION §§ 89.20–.25 (1952) divides the foregoing history into five phases: "I: unqualified federal pre-eminence" from *Jensen* to Grant-Smith Porter Ship Co. v. Rohde, 257 U.S. 469 (1922), "II: the 'maritime-but-local' test" from *Rohde* to the enactment of the Longshoremen's Act, "III:

II. What the Supreme Court Did Not Decide

A. Administrative Finality in the Twilight Zone

It would seem that the person left most in the dark by the references to administrative finality in *Davis* is the administrator: he is not told whether he is free to turn down a twilight zone case in favor of the other jurisdiction, or, if he is, what standards he should employ in making his decision. Unless the principle of mutual exclusiveness has been abandoned even on the theoretical level, he must preface any award of compensation with some sort of determination that the law he is administering obtains to the exclusion of the other.

There is no record of an appeal from a decision of a federal deputy commissioner's decision turning down a twilight zone case in favor of state jurisdiction; perhaps on such an appeal the courts would follow the social policy articulated in *Davis* by abandoning the administrative finality rationale. But, assuming that the commissioner would be sustained in his denial of jurisdiction, what should be his guiding considerations? The Longshoremen's Act provides that the claim is presumed to come within its provisions unless there is "substantial evidence to the contrary." [29] But the Supreme Court said in *Davis* that the state act should be presumed to apply in the absence of a "conflicting process of administration." [30] Substantial evidence that there had been no such process would seem, then, to be sufficient to overcome the presumption that the federal act applied. By this reasoning, the deputy commission-

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the Longshoremen's Act" until *Davis*, "IV: the 'twilight zone' rule" from *Davis* to *Moores*, and "V: concurrent jurisdiction?" The anticipated difficulty of defining the boundaries of the twilight zone or zone of overlap, see Dickinson & Andrews, *supra* note 8, seems not to have materialized. Indeed, in view of Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953), it appears that any case doubtful enough to be litigated is doubtful enough to be included within the twilight zone. If there is any limit on this process, it may be found in Justice Black's statement in his opinion in *Davis* that the twilight zone "includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act." 317 U.S. at 256. Those persons left out under this criterion, however, will probably be engaged in employments such as stevedoring in which the federal remedy is well recognized. Thus, they will be unlikely to seek the state remedy through inadvertence, and it is very rarely to their financial advantage to do so, since in most cases the Longshoremen's Act will pay more generous benefits than the state act.

[29] 44 Stat. 1436 (1927), 33 U.S.C. § 920(a) (1952).

[30] See pp. 640–41 *supra*.

er would never be justified in bringing the "conflicting process" into being.

Since it is not clear what the Court meant by the absence of "conflicting process," the deputy commissioner might reasonably conclude that it was only referring to the fact that in *Davis* the state tribunal had been the first approached. If so, the filing of a claim before him would by itself constitute a conflicting process and eliminate the presumption in favor of the state law. The commissioner might reach the same result by interpreting *Davis* to mean that the presumption in favor of the state law obtained only before a tribunal of the state.[31]

Would the presumption that the federal act applied be overcome by evidence that the operation of state law in the case would not interfere with the harmony and uniformity of maritime law? Since *Davis* characterizes this question as factual, it ought to follow that the federal deputy commissioner must hear evidence on it and make a finding. But all the decisions on the question antedate *Davis*. They deal with the issue as one of law, and the Supreme Court evidently has abandoned that approach. Thus, having no standards for making his decision, the commissioner could hardly be blamed if he went through the motions of making a finding without any serious consideration of the evidence, or, as is more likely, ignored the whole problem and proceeded to the award.

Even if Davis is read to mean that state and federal law are no longer mutually exclusive in this area, the same "factual" question may arise in considering the applicability of the Longshoremen's Act on its own terms, which limit it to situations for which state law cannot "validly" provide. If the zone of "overlap" was created simply by mitigating the effect of *Jensen* as a restriction on state activity here, there would remain intact the holding in *Motor Boat* that *Jensen* defines the scope of the Longshoremen's Act. In other words, even though the state is now free to act in ways that were hitherto supposed to interfere improperly with the general

[31] The *Davis* opinion bears this out somewhat by quoting the following language from Alaska Packers' Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935), a case involving the application of the extraterritorial provisions of the California workmen's compensation law to an injury in Alaska: *"Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted." 317 U.S. at 258. Thus it has been suggested that the Court has returned to the principle that state courts are not bound by the substantive principles of admiralty law. Note, 2 STAN. L. REV. 536 (1950). Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), would seem, however, to have laid this view to rest.

maritime law, the federal act is still limited by its own terms to situations in which the Court had previously found that state activity would work such interference. Here again the federal deputy commissioner will have to deal with the problem of whether a finding of fact is necessary.

On the other hand, it might be argued that the Supreme Court has abandoned any attempt to give effect to the statutory limitation in the Longshoremen's Act. Such a departure could be justified on the ground that the statutory language was intended to insure benefits to certain workers, was responsive to a climate of judicial decision that no longer existed, and may be abandoned to the extent necessary to give effect to the underlying policy of the act.[32] If this was the effect of *Davis*, of course no finding as to the applicability of the federal statutory provision would be necessary to an assumption of federal jurisdiction.

The state tribunals, in administering their workmen's compensation laws, are faced with rather different questions. While the question of interference with the harmony and uniformity of the maritime law may still be formally relevant, the state courts, in reviewing determinations of the question by their own administrative agencies, are not bound to regard it as a question of fact. This was at least implied by the Massachusetts court in *Moores's Case*.[33] But if the question is one of law, it is for the state court to determine on the basis of the applicable decisions of the Supreme Court. In other words, it would seem to be incumbent on state tribunals to follow the mandate of their own legislatures, unless some principle of federal law would lead the Supreme Court to reverse. In the few cases that have been decided, the state courts appear to have compelled their agencies to take jurisdiction wherever prior decisions indicated that the Supreme Court would allow them to do so.[34]

In some states, however, the compensation law is expressly inapplicable to maritime employment for which a rule of liability is provided by federal law.[35] In such states the courts might ex-

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[32] See Note, *Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 HARV. L. REV. 1181 (1951).

[33] See pp. 642–43 *supra*.

[34] Baskin v. Industrial Accident Comm'n, 97 Cal. App. 2d 257, 217 P.2d 733 (1950); Hammond v. Albany Garage Co., 267 App. Div. 647, 47 N.Y.S.2d 897 (3d Dep't 1944).

[35] *E.g.*, MISS. CODE ANN. § 6998–03 (1942); MO. REV. STAT. § 287.110–1 (1949).

clude their compensation laws from the entire twilight zone on the ground that a federal remedy was available. The alternatives would be to adopt some set of presumptions like those set up in *Davis*, or some standard of interpretation like that in *Motor Boat*, or both, or to hold that the legislature in enacting such a provision meant only to embody the federal constitutional limitation, forbidding no more than would be forbidden from time to time by the Supreme Court.

B. Exclusive Remedies Provisions in the Twilight Zone

Part of the scheme of every compensation act, including the Longshoremen's Act, is a provision counterbalancing the burden of liability without fault by immunizing a complying employer against common-law liability to his employees for compensable injuries.[36] The federal act and most state acts further provide that where the employer has failed to comply with the security provisions of the act by purchasing approved insurance, or by obtaining a self-insurer's permit, an injured employee may bring a court action against him under rules of liability considerably broader than the common law.[37] Provisions of this sort are the most effective device for enforcing the security requirements of the acts; it would seem that a jurisdiction should be able to apply such a provision in any case in which it could grant compensation, even though another jurisdiction likewise competent to afford compensation had attempted to insulate the employer against common-law liability.[38] Thus, if the state and federal jurisdictions

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There was such a provision in the Washington act involved in *Davis*. WASH. REV. STAT. ANN. § 7693a (1932).

[36] *E.g.*, 44 STAT. 1426 (1927), 33 U.S.C. § 905 (1952); N.Y. WORKMEN'S COMPENSATION LAW § 11; WASH. REV. STAT. ANN. §§ 7673, 7679 (1932). It appears that provisions of this sort are meant to abolish only the common-law right of action, and will not be read as precluding an award of compensation under the laws of another jurisdiction. See Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).

[37] *E.g.*, 44 STAT. 1426 (1927), 33 U.S.C. § 905 (1952); N.Y. WORKMEN'S COMPENSATION LAW § 11. WASH. REV. STAT. ANN. § 7676 (1932) formerly provided a similar right of action in case of default in compulsory contributions to the state insurance fund, but this was repealed, Wash. Laws 1947, c. 247, § 4d.

[38] There seems to be no case on this, but if the policy of one jurisdiction is not opposed to an award of compensation by the other, it should not be opposed to the maintenance of an action whose purpose is to compel the purchase of compensation insurance. In other contexts, the forum has been held competent to enforce its own compensation laws despite the attempt of another jurisdiction to make the remedy provided by its own law exclusive. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939). Of course, if there were a true

"overlap," an employer presumably has to insure under both acts in order to escape common-law liability.

But what are the employer's liabilities and the employee's remedies as long as the theoretically mutual exclusiveness of state and federal relief is preserved in this area? In the more likely case, where it is federal insurance that the employer has failed to provide,[39] the court deciding whether a twilight zone employee can maintain a common-law action is faced with the same problem as is the federal deputy commissioner resolving the "factual" question established in *Davis*. But here the burden of proof on the question whether federal or state law applies is on the plaintiff, rather than on the defendant; the resolution of that question is therefore all the more imperative for the employee. Yet if *Davis* gave the commissioner unreviewable discretion to decide the question because of his expertise or his policy-making function, the court would seem to be incompetent to resolve it. And even if it could be resolved by the court, it would have to be submitted under appropriate instructions to the jury. The spectacle of twelve citizens deciding whether state activity will interfere with the harmony and uniformity of maritime law is not likely to commend itself to the judiciary. If it is state insurance the employer has failed to provide, the problem is simpler. The state court could

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policy conflict, the state could not, even in its own courts, allow its own law to prevail over the federal law, as it could over that of another state. See Testa v. Katt, 330 U.S. 386 (1947). In any event, the state law would afford no protection to an employer who failed to buy federal insurance.

[39] Since the worker must always be afloat when injured if he is to recover federal compensation, it is hard to imagine an employer with no possible liability under a state compensation law. Thus, if he insures at all, he will insure under the state law. Insurance companies afford federal insurance automatically in classifications with significant maritime exposure, with a single rate for the combined federal and state coverages. Thus, the chief possibilities of failure to insure are in the case of an employer whose work is not of a type usually performed afloat. Other possibilities are assigned risks under some state plan, who are often not given federal insurance, or employers in states where compensation insurance is a monopoly of a state fund which is not authorized by state law to afford insurance under the Longshoremen's Act. Other problems similar to the questions presented by the uninsured employer are those involving the scope in the twilight zone of a provision like MASS. GEN. LAWS c. 152, § 25 (1932), requiring a compensation carrier to pay the full amount of any judgment against its insured for damages on account of a compensable injury, and those involving the different state and federal interpretations of the effect of a provision barring common-law liability on contribution among joint tortfeasors or on "liability over." See 64 HARV. L. REV. 492 (1951); Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953), and cases cited therein, *id.* at 566–67, 75 S.E.2d at 773–74.

probably take the position that, since the Supreme Court would affirm an award of compensation, the state act would apply *in toto*.[40]

C. *Res Judicata in the Twilight Zone*

The question whether an award by one jurisdiction bars a subsequent award by the other may depend on how *Davis* is interpreted. The problem can be sketched out quickly. If the jurisdictions are mutually exclusive, and it is a question of fact which act applies, litigation of the factual issue in one jurisdiction should bar a relitigation in the other, on the familiar principles of res judicata.[41] This has been the rule on cases involving the question whether an injured person was subject to a state compensation law or the Federal Employers' Liability Act.[42] Cases both before and after *Davis* suggest situations where the rule should be applied to the Longshoremen's Act.[43] If the jurisdictions are held to be concurrent, a state award ought not to bar relief under the Longshoremen's Act, although the amount recoverable will be reduced to the extent that prior relief has been obtained.[44] Nor should a federal award preclude recovery under the state act, although if controlling weight is given to the reference in *Davis* to a "conflicting process of administration," a federal award would seem to constitute such a process and bar subsequent state awards.

Two cases decided since *Davis* deserve mention. In *Dunleavy v. Tietjen & Lang Dry Docks*[45] a New Jersey court held that

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[40] See note 34 *supra*.

[41] See 2 LARSON, WORKMEN'S COMPENSATION §§ 89.51–.52 (1952).

[42] 35 STAT. 65 (1908), 45 U.S.C. § 51 (1952); Chicago, R.I. & Pac. Ry. v. Schendel, 270 U.S. 611 (1926); Landreth v. Wabash R.R., 153 F.2d 98 (7th Cir.), *cert. denied*, 328 U.S. 855 (1946). In each of these cases the state compensation proceeding was initiated by the employer and contested by the claimant.

[43] United States Fidelity & Guaranty Co. v. Lawson, 15 F. Supp. 116 (S.D. Ga. 1936); Massachusetts Bonding & Ins. Co. v. Lawson, 149 F.2d 853 (5th Cir. 1945).

[44] It may be argued that a state award merges with and bars the federal. *Cf.* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). *But see* Industrial Comm'n v. McCartin, 330 U.S. 622 (1947); 66 HARV. L. REV. 524 (1953). Cases hold that acceptance of state compensation constitutes an accord and satisfaction of a federal cause of action. *E.g.*, Owens v. Hammond Lumber Co., 8 F. Supp. 392 (N.D. Cal. 1934). *Contra*, Gahagan Constr. Corp. v. Armoa, 165 F.2d 301 (1st Cir. 1948). All these cases arose in Jones Act litigation, and would not be applicable here, in view of 44 STAT. 1427, 1434 (1927), as amended, 33 U.S.C. §§ 908(i), 915(b) (1952), invalidating settlements made without the approval of the deputy commissioner.

[45] 17 N.J. Super. 76, 85 A.2d 343 (County Ct. 1951), *aff'd on opinion below*, 20

state and federal relief were mutually exclusive, but that jurisdiction "vested" in the body first approached. This view seems without adequate support in the decisions or comments,[46] though if it operated only in favor of the federal jurisdiction there would be some ground for it in the doctrine of supremacy of federal law.

The other case is *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*,[47] in which the Fourth Circuit passed on an award made under the federal act after an award under the state act; the court held that the case fell within the purview of the federal statute and outside the permissible scope of state laws. The court said that since awards had been made under both laws it would make its decision without regard to any presumption — as if *Davis* had not been decided. This is odd doctrine, but seems to have been followed.[48]

D. The Twilight Zone in Areas Not Subject to the Longshoremen's Act

Certain areas of maritime employment are not covered by the Longshoremen's Act. In these areas, unless state compensation is available, the injured workman must proceed under the general maritime law, or its statutory modification, the Jones Act.[49] If state compensation is to be excluded, it must be on account of some constitutional restriction on modifying the general maritime law — the *Jensen* doctrine — or because the Jones Act has pre-empted

N.J. Super. 486, 90 A.2d 84 (App. Div.), *cert. denied*, 10 N.J. 343, 91 A.2d 448 (1952).

[46] Though it is perhaps implicit in 66 HARV. L. REV. 524 (1953).

[47] 192 F.2d 968 (4th Cir. 1951).

[48] See Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952).

[49] 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952). The act incorporates by reference federal laws dealing with injuries to railroad employees — a system that eliminates many defenses available to the employer at common law, but retains fault as a basis of liability. The Jones Act applies to "seamen," a term which has been held to include longshoremen. International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926). Under the general maritime law, a seaman has a remedy against a shipowner for "unseaworthiness"; this was held available to longshoremen in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). The general maritime law also affords a crew member maintenance and cure for injuries sustained while in the service of the ship. This right includes such medical services as may help ameliorate the condition of the injured man, and living expenses while treatment is being undergone. For a general discussion of these remedies, see Howe, *Rights of Maritime Workers*, 5 NACCA L.J. 146; 6 *id.* at 131 (1950). Their chief omission is that they make no provision for the family of a worker killed without fault on anyone's part. The Longshoremen's Act, of course, supersedes all these remedies as between a subject employee and his employer.

the field. Although the concept of a general maritime law may still have considerable vitality in other contexts, the Supreme Court has made it clear that *Jensen* will not be extended to invalidate state regulation of aspects of the employment relationship other than workmen's compensation.[50] Within the compensation field *Jensen* probably retains no force except as enshrined in the Longshoremen's Act by the *Motor Boat* case. The Jones Act, on the other hand, incorporating by reference the federal laws dealing with injuries to railroad employees, would seem, like them, to exclude state activity,[51] although one circuit has held the contrary.[52]

The most important exclusion from the Longshoremen's Act is that of masters and members of the crews of vessels.[53] It appears that these workers were excluded by Congress at the behest of their representatives, who considered their remedies under the general maritime law, as supplemented by the Jones Act, superior to any practicable compensation benefits.[54] These remedies are available, it is now settled, even if the master or crew member is injured on land.[55] They appear to be exclusive of state compensation on land as well as of federal compensation on the water.[56]

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[50] In Standard Dredging Corp. v. Murphy, 319 U.S. 306 (1943), it was held that a state could levy an unemployment insurance tax on maritime employments. "Indeed," said the Court, "the *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws. *Parker* v. *Motor Boat Sales* . . . ." *Id.* at 309.

[51] The doctrine of New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917), that a state cannot afford compensation to railroad employees subject to the Federal Employers' Liability Act, was recently reaffirmed by implication in South Buffalo Ry. v. Ahern, 344 U.S. 367 (1953). Presumably, therefore, it rests on a firmer foundation than *Jensen*. Thus, while recent cases denying applicability of state laws to Jones Act situations have relied heavily on *Jensen*, Alaska Industrial Board v. Alaska Packers Ass'n, 186 F.2d 1015 (9th Cir. 1951); Occidental Indemnity Co. v. Industrial Accident Comm'n, 24 Cal. 2d 310, 149 P.2d 841 (1944), their result would probably survive an overruling of that decision.

[52] Maryland Cas. Co. v. Toups, 172 F.2d 542 (5th Cir. 1949). This was a compensation proceeding brought by the family of a crew member who had drowned without anyone's fault; here neither the Jones Act nor the general maritime law afforded a remedy. The court rejected the pre-emption argument on the basis of some sort of pre-*Davis* local concern learning. This would seem to be an instance of a hard case making bad law.

[53] 44 STAT. 1426 (1927), 33 U.S.C. § 903 (1952).

[54] See Norton v. Warner Co., 321 U.S. 565, 570 (1944).

[55] O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943) (Jones Act); Aguilar v. Standard Oil Co., 318 U.S. 724 (1943) (maintenance and cure).

[56] Occidental Indemnity Co. v. Industrial Accident Comm'n, 24 Cal. 2d 310, 149 P.2d 841 (1944); Rudolph v. Industrial Marine Serv., 187 Tenn. 119, 213 S.W.2d 30 (1948); Note, 29 B.U.L. REV. 116 (1949).

The question whether a given person is a master or member of the crew is of course the same whether the compensation alternative is state or federal.[57] Despite the difficulty of the question [58] the courts have refused to set up a twilight zone in which alternative remedies are available to a person whose status as a master or crew member is equivocal.[59] The advocates of such a twilight zone may find some support in a Fifth Circuit holding that state compensation may be paid to a crew member where this would not prejudice the proper harmony and uniformity of the maritime law; [60] the First Circuit seems to have rejected any such doctrine.[61] There is little authority for importing a presumption of administrative finality, on which the establishment of a twilight zone theory on the order of *Davis* depends, into the question whether a person is a master or member of the crew.[62] The Supreme Court expressly rejected the contention that an administrative finding under the Longshoremen's Act must be accorded finality against a claim of crew membership.[63] It would seem that any presumption of validity attached to a state statute or administrative decision would fare no better.

Another important exception in the Longshoremen's Act is that, being limited to injuries sustained on the navigable waters of the

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[57] It appears to be, at least in part, by virtue of a congressional intent implicit in the Longshoremen's Act that the remedies of crew members are unavailable to other maritime employees injured on land. Swanson v. Marra Bros., 328 U.S. 1 (1946). Thus, the scope of these remedies on land must be coextensive with the exception in the Longshoremen's Act, as it is on sea.

[58] See Note, 8 NACCA L.J. 149, 153–55 (1951).

[59] *Ibid.* The arguments against setting up such a twilight zone are rather similar to those stated on pp. 650–51. See 2 LARSON, WORKMEN'S COMPENSATION § 90.41 (1952). The author also seems persuaded by the analogy to the exclusiveness of the acts dealing with railroad employees. 2 *id.* § 90.42.

[60] Maryland Cas. Co. v. Toups, 172 F.2d 542 (5th Cir. 1949). See note 52 *supra.*

[61] Gahagan Constr. Corp. v. Armao, 165 F.2d 301 (1st Cir. 1948). Some of the cases cited in note 56 *supra* seem to bear obliquely on the same point.

[62] In the *Toups* case, *supra* note 60, the court treated as a question of law what the Supreme Court in *Davis* called a question of fact. Gahagan Constr. Corp. v. Armao, *supra* note 61, paid a modicum of attention to a jury finding of crew membership, but no more. South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940) relied in part on an administrative finding under the Longshoremen's Act that claimant was not a master or crew member, but Norton v. Warner Co., 321 U.S. 565 (1944) seems to have limited this doctrine severely. In Daffin v. Pape, 170 F.2d 622 (5th Cir. 1948), the majority held that *Norton* left no room for finality except where the incidents of the employment were themselves in dispute.

[63] Norton v. Warner Co., *supra* note 62. The maritime unions appeared as amici curiae in this case, and stressed the importance to them of the exception in the Longshoremen's Act.

United States, it does not apply to accidents on the high seas or in foreign ports.[64] The remedy of a longshoreman injured on board ship in the Canal Zone has been held to be under the Jones Act.[65] If such a longshoreman were a resident of California hired in California for work in Panama, the California act would purport to cover him,[66] but would be barred by the Jones Act just as if the employee were a seaman injured in California.

Let us see how this works. Suppose a California contractor sends a crew of men to dismantle a bridge over the Panama Canal. A man is injured checking steel being loaded aboard a barge. Unless federal law provides otherwise, California affords compensation and excludes all other remedies. The employee's argument in proceedings under the Jones Act is that, since both the Longshoremen's Act and the Jones Act cover maritime employment, any employment subject to the Longshoremen's Act when it is conducted on the navigable waters of the United States is subject to the Jones Act when conducted on foreign navigable waters. The employer may contend, first, that the Jones Act does not cover all maritime employment, but only that traditionally undertaken by the ship's crew,[67] and second, that in the instant proceeding the employment would not have been within the scope of the Longshoremen's Act if conducted on the navigable waters of the United States. It is true that, thanks to *Davis*, an administrative award of federal compensation for injuries sustained under similar circumstances at home would be upheld. But absent both the administrative finding and the statutory presumption of jurisdiction under the Longshoremen's Act, the result should not be the same. At least, the employer will contend, he should be allowed to intro-

[64] 44 STAT. 1426 (1927), 33 U.S.C. § 903 (1952).

[65] Panama Agencies Co. v. Franco, 111 F.2d 263 (5th Cir. 1940).

[66] CAL. LABOR CODE § 5305 (1953). Most other compensation laws, by statute or decision, operate in the same way. See RESTATEMENT, CONFLICT OF LAWS § 398 (1934).

[67] International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926) held that shipside longshoremen were "seamen" within the meaning of the Jones Act because their work was traditionally done by the ship's crew. The case has not undergone further development because the enactment of the Longshoremen's Act has made it academic in most contexts, and has made less urgent the policy considerations behind it. Swanson v. Marra Bros., 328 U.S. 1 (1946) held that the purpose of limiting the Longshoremen's Act to injuries on the navigable waters was to allow state compensation to operate elsewhere. Claimant had combined *Haverty* with O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943) (Jones Act applies to crew members injured on land), to contend that the remedy of a longshoreman injured on land was under the Jones Act.

duce evidence that an award of state compensation would not interfere with the harmony or uniformity of the maritime law.

If, instead of a Jones Act suit, a state compensation proceeding is brought, it may be argued in favor of state jurisdiction that this is a twilight zone case. But there are cogent reasons for not applying the twilight zone doctrine where the alternative to a state award is the Jones Act instead of the Longshoremen's Act. It is one thing to make a choice between two summary remedies and quite another to make a choice between a summary remedy and a full court trial. Moreover, it is arguable that the liability without fault basis of workmen's compensation is economically feasible only because it insulates the employer against high jury awards in negligence cases, and that it would be too severe a strain to expose the employer to the alternatives of state compensation and the Jones Act. Furthermore, the reasons for the Supreme Court's refusal to uphold an award under the Longshoremen's Act on the basis of administrative finality where the alternative is a suit for damages under the Jones Act apply with equal force here.[68] Probably, therefore, state jurisdiction would not be upheld on a twilight zone theory.

But the employee need not rest his claim on the twilight zone doctrine. He can contend that the Jones Act is inapplicable to his case, presenting the same arguments his employer would make defending against proceedings brought under the Jones Act. With the Jones Act out of the way, there would remain no further obstacle to a state compensation award except the *Jensen* doctrine. And it seems unlikely that the Court would invoke that doctrine today, absent the complicating federal legislative structure presented by the Longshoremen's Act.[69]

III. Conclusion

By the time the *Motor Boat* case arose, it was fairly clear that *Jensen* and the cases following it were, as to some workers, frustrating the legislative policy of affording a summary remedy for

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[68] See notes 62 and 63 *supra.*

[69] "Since 1917, Congress and the states have sought to restore order out of the confusion which resulted from the *Jensen* decision." Davis v. Department of Labor, 317 U.S. 249, 255 (1942). This certainly indicates a dislike of *Jensen.* Furthermore, *Jensen* is being more and more confined to cases in which the complicating legislative structure exists. See Sorenson v. City of New York, 202 F.2d 857 (2d Cir. 1953), and cases cited therein.

industrial injuries under the various compensation laws. To be sure, the distinctions made in the cases could be applied with some facility — if not with complete unanimity — by the courts. But such distinctions are litigious; even if we accept the optimistic view that the multiplication of case law will eventually clarify all of them, the process is at best a long one.[70] It may well be said that such distinctions have no place in an area in which there is a strong policy in favor of affording a summary remedy. One might have expected the Supreme Court to attempt to formulate a new line of distinction more easy to apply. That it did not do so is perhaps the result of a belief that no distinction drawn on a case-by-case basis can avoid being litigious, and that the use of a single case to state arbitrarily a mechanical criterion of general applicability would be beyond the legitimate bounds of judicial power.

It is more difficult to see why the Court did not take the opportunity presented in the *Motor Boat* case to make Congress redraw the line. The elimination of the general maritime law as an inhibition on state regulation of the employment relationship would have resulted in the complete debilitation of the Longshoremen's Act, since state law could "validly" be applied in the whole field. Had the Court adopted this view, steps could have been taken to have the act amended to state a nonlitigious criterion. But since at that time some maritime states afforded higher benefits than the Longshoremen's Act, others lower, the result might instead have been a political controversy of a sort that the Court would be reluctant to touch off. It seems probable that the *Motor Boat* decision was motivated by some such consideration, for the canon of statutory construction ostensibly relied on by the Court has little to recommend it, as Mr. Justice Douglas pointed out a year later when a majority of the Court used it to frustrate a desirable tax reform.[71]

The *Davis* solution, then, has some practical justifications. The relevant considerations are stated in the opinion: the existing law was objectionable because of the uncertainty of the remedy; but too radical a departure would also have caused trouble by

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[70] See HOLMES, THE COMMON LAW 127 (1881). Justice Black, from his prefatory remarks in *Davis*, would seem to doubt if even long-run certainty could be achieved. 317 U.S. at 253.

[71] Helvering v. Griffiths, 318 U.S. 371, 404 (1943). Note that Justice Black, the author of the *Motor Boat* opinion, joined in the dissent.

upsetting the large area in which there were satisfactory statutory and administrative adjustments of long duration. The objections to the opinion are on a conceptual level; after stating the relevant social considerations, the Court goes on to construct a conceptual underpinning which not only is specious, but also creates great practical difficulties if an attempt is made to apply it in other contexts. Should the Court have found it necessary to erect such a structure? Granted the obvious desirability of affording a summary remedy to the injured worker and his family, there are still judicial considerations that also have a legitimate claim to be called social values and should not be abandoned altogether. The creation of a zone of "overlap" ought to have been reconciled with the express terms of the federal and state statutes, which provide for mutual exclusiveness, and with the doctrine of preemption by federal legislative action. There may be important reasons for not respecting either of them in this case, but we would like to have had those reasons articulated by the Court so that we could develop a body of authority on the limits of these principles, rather than be left with an uneasy feeling that they are being eroded by forces we do not understand.

The uniformity of the general maritime law has much to recommend it in a number of situations. The states are inappropriate governmental units for dealing with many of the problems that arise in maritime commerce. The exclusion of the states from substantive legislation in the whole field depends on *Jensen*. Yet the Court's sweeping criticism of *Jensen* has left in some doubt such questions as whether a maritime contract is still immune to objections based on the local statute of frauds.[72] Several commentators have suggested that *Jensen* has been abandoned sub silentio both as a principle of constitutional law and as adopted by the Longshoremen's Act.[73] All the Court need have done was to abandon the view that the harmony and uniformity of the maritime law were prejudiced by state interference with the employment relations of local longshoremen and harbor workers; the maritime law generally could have been left with such stability as it derived from *Jensen*.

The characterization by the Court of the question of state interference with the general maritime law as one of fact suggests

[72] See Union Fish Co. v. Erickson, 248 U.S. 308 (1919).

[73] *E.g.*, Howe, *Rights of Maritime Workers*, 5 NACCA L.J. 146, 152 (1950); Allen, *supra* note 11, at 207–08.

that other complex questions of constitutional policy might also be so characterized. *Davis* could be used to support the proposition that the question whether a state tax would impose an undue burden on interstate commerce, or whether an industry over which a state labor board claimed jurisdiction is one affecting interstate commerce, is factual, and that state action should be presumed constitutional.[74] While those propositions are tenable, it is unlikely that they derive much support from *Davis*. The basic issue in each of those situations is not the "factuality" of the question involved, but the extent to which the federal policy admits of intervention by the state. But the policy behind the Court's reference to the presumption of constitutionality in *Davis* was that of affording an adequate remedy to workmen, not that of granting full scope to state legislation.

The same is true of the Court's reference to the principle of administrative finality as a justification for its decision. The Court was not furthering a policy of giving scope to the determination of the administrator, but a policy of affording compensation. That policy would be frustrated if the administrator were to take the finality language seriously and deny compensation in some of the twilight zone cases that came before him.[75]

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[74] *Cf.* Dennis v. United States, 341 U.S. 494, 587 (1951) (dissenting opinion of Douglas, J.) (jury, not judge, should decide whether clear and present danger presented by the defendants' conspiracy).

[75] *Compare* O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), *with* Norton v. Warner Co., 321 U.S. 565 (1944).