THE
UNIVERSITY OF CHICAGO LAW REVIEW
VOLUME 10 APRIL 1943 NUMBER 3

NOTES AND RECENT CASES

WORKMEN'S COMPENSATION FOR MARITIME EMPLOYEES: THE JENSEN DOCTRINE RE-EXAMINED

The question of when a state may and when it may not grant relief under a compensation act to maritime employees has precipitated a set of such tenuous distinctions that the recent re-examination by the Supreme Court of the settled criterion[1] has surprised no observers. On the contrary, that test was expected by many to suffer more radically than it did, in view of its anomalous history.

In Article III, Section 2, of the Constitution, it is said that the judicial power of the United States shall extend "to all Cases of admiralty and maritime Jurisdiction. . . . ."[2] It was early settled that this jurisdiction was not exclusive, the states possessing concurrently the power to entertain maritime cases wherever the common law afforded an adequate remedy.[3]

[1] Davis v. Dept. of Labor and Industries of Wash., 63 S. Ct. 225 (1942).

[2] For the significance of the presence of both "admiralty" and "maritime," see the elaborate opinion of Mr. Justice Story in De Lovio v. Boit, Fed. Cas. No. 3,776 (C.C. Mass. 1815).

[3] The United States Supreme Court has consistently approved the exercise of maritime jurisdiction by state courts under the clause in which the first Congress gave to the federal district courts "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. . . . ." (italics inserted) Judicial Act of 1789, c. 20, § 9, 1 Stat. 76, 28 U.S.C.A. § 41(3) (1927), 28 U.S.C.A. § 371 (1928); see cases cited infra note 7.

While it was assumed that the framers intended the general maritime law,[4] as applied in the colonies, to be applied in the federal courts,[5] the state courts, until the case of *Southern Pacific Co. v. Jensen*,[6] were left to apply whatever substantive rules they pleased.[7] In that decision, however, a bare majority of the Court, speaking through Mr. Justice McReynolds,[8] ignored this tradition and reinterpreted Article III, Section 2, to prescribe a nationwide uniformity on maritime questions attainable only by the application of the general maritime law in all courts, state and federal.[9]

Hence, an injured maritime employee was accustomed to look only to that general law for compensation privileges, regardless of the court in which he sued; and a state workmen's compensation act, insofar as it purported to apply to him, was considered unconstitutional.[10] Only Congress could alter the maritime law,[11] and even that body was required to effect only changes which would operate uniformly throughout the country. Thus, it could not provide for maritime workmen's compensation merely by permitting injured employees to recover under their respective state acts.[12] It could, however, take advantage of

[4] The origins of this body of law and its developments are discussed in Robinson, Admiralty 1–13, 30–31 (1939); Wright, Uniformity in the Maritime Law of the United States, 73 U. of Pa. L. Rev. 123, 223 (1925); Hughes, Admiralty 1–15 (1901).

[5] The Lottawanna, 21 Wall. 558 (1874). That this was the intention of the framers has been questioned, however; for example, Mr. Justice Pitney, dissenting in Southern Pacific Co. v. Jensen, 244 U.S. 205, 227 (1917), wrote: "That the language of § 2 of Article III of the Constitution speaks only of establishing jurisdiction, and does not prescribe the mode in which or the substantive law by which the exercise of that jurisdiction is to be governed seems to me to be entirely plain. . . . ." Similarly, Holmes, J., dissenting in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 166–70 (1920).

[6] 244 U.S. 205 (1917).

[7] Knapp Stout & Co. v. McCaffery, 177 U.S. 638, 646 (1899); The Harrisburg, 119 U.S. 199 214 (1886); Sherlock v. Alling, 93 U.S. 99, 104 (1876); Atlee v. Packet Co., 21 Wall. 389, 395–96 (1874); Steamboat Co. v. Chase, 16 Wall. 522, 533, 534 (1872); Cooley v. Board of Wardens, 12 How. 299 (1851); New Jersey Steam Navigation Co. v. Merchants Bank of Boston, 6 How. 343, 390–92 (1848).

[8] Cf. dissents of Holmes, J., at 218, and Pitney, J., at 223.

[9] Any other interpretation would contravene "the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states," said the Court, at 215, quoting from The Lottawanna, 21 Wall. 558, 575 (1874), a case which, however, dealt only with the law to be applied in the admiralty courts.

[10] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[11] This power is held to be impliedly vested in Congress by Article III, Section 2, of the Constitution. Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42–52 (1934); United States v. Flores, 289 U.S. 137, 148–49 (1933); Crowell v. Benson, 285 U.S. 22, 39 (1932) and cases cited in the latter case, at 39 n. 2.

[12] Act of October 6, 1917, 40 Stat. 395, 28 U.S.C.A. § 41 (3) (1927), § 371 (1928); declared unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). Congress later re-enacted this statute, but excluded ships' crews from its scope 42 Stat. 634 (1922), 28 U.S.C.A. § 41(3) (1927), § 371 (1928); but this amendment was held an insufficient answer to the former objections. Washington v. Dawson & Co., 264 U.S. 219 (1924).

an exception which the Court had made to the *Jensen* doctrine, namely, that states might regulate maritime matters which were of purely "local" concern.[13] This Congress did in the Federal Longshoremen's and Harbor Workers' Act of 1927,[14] thus carrying out its desire to leave in state hands as much control of workmen's compensation as the Court would permit.[15] Under the Act federal compensation was provided for longshoremen and harbor workers only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."[16] And the Court has said that it may "validly be provided" only if the work is "local" in character.[17]

[13] This exception was implied by the Jensen opinion itself, where it was said, at 216, that no state legislation can be upheld if it "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." Hence, when state legislation could be applied to maritime situations without such prejudice or interference, the Court has readily sanctioned such application. Sultan Ry. & Timber Co. v. Dept. of Labor and Industries of Wash., 277 U.S. 135 (1928) (assembling and disassembling log booms); Alaska Packers Ass'n v. Industrial Accident Commission, 276 U.S. 467 (1928) (cannery fisherman injured pushing boat into water); Smith & Son v. Taylor, 276 U.S. 179 (1928) (unloading a vessel while standing on dock); Rosengrant v. Harvard, 273 U.S. 664 (1927), affirming per curiam, Ex parte Rosengrant, 203 Ala. 202, 104 So. 409 (1925) (lumber inspector standing on floating barge, checking lumber as it was unloaded). These cases all involved the application of state workmen's compensation acts. Where the work was considered nonlocal, the act was of, course, inapplicable. Parker v. Motor Boat Sales, 314 U.S. 244 (1941) (testing motor boats); Baizley Iron Works v. Span, 281 U.S. 222 (1930) (painting angle irons in the engine room of a ship lying in navigable waters); Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) (longshoreman working aboard ship); Spencer Kellog & Sons v. Hicks, 285 U.S. 502 (1932) (workman employed by manufacturer who maintained launch to transport workmen from New York to the New Jersey plant, the launch sinking while claimant was aboard); Employers' Liability Assurance Corp. v. Cook, 281 U.S. 233 (1930) (unloading cargo while aboard ship); Nogueira v. N.Y., N.H., & Hartford Ry. Co., 281 U.S. 128 (1930) (loading cars on car float); London Guarantee & Accident Co. v. Industrial Accident Commission of Calif., 279 U.S. 109 (1929) (navigating vessel which carried fishing patrons five or ten miles to fishing places); Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928) (unloading cargo while aboard vessel); Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925) (repairing completed vessel); Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171 (1924) (repairing plates of steamship resting in floating dock); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923) (repairing completed vessel); Peters v. Veasey, 251 U.S. 121 (1919) (unloading cargo while aboard ship); Clyde Steamship Co. v. Walker, 244 U.S. 255 (1917) (unloading cargo while aboard ship); cf. Messel v. Foundation Co., 274 U.S. 427 (1927) (repairing completed vessel). In distinguishing the two classes of cases, the Court has used various descriptive phrases. For example, work is not deemed "local" if it is "directly related to navigation." For an early analysis of the distinctions, see Will Admiralty Face the Facts? 73 U. of Pa. L. Rev. 190 (1925).

[14] 44 Stat. 1424 (1927), 33 U.S.C.A. § 901 (Supp. 1942); constitutionality upheld, Crowell v. Benson, 285 U.S. 22 (1931).

[15] Congress felt that, although seamen might well be subjected to a different set of rules, longshoremen, being land workers, should be governed by the same law under which other citizens in the community worked. 62 Cong. Rec. 7754 (1922) (remarks of Rep. Volstead). Congress would have preferred that state law govern even those workers engaged in "nonlocal" activities, but the Court had already said that such employment was related to navigation so closely that it could be subjected only to the general maritime law. See cases in note 14 supra.

[16] 44 Stat. 1426 (1927), 33 U.S.C.A. 903(a) (Supp. 1942).

[17] See recent cases cited note 14 supra.

The distinction between "local" and "nonlocal" work has entailed numerous practical difficulties, discussed below. These, together with the scholarly doubts which have been cast upon the *Jensen* decision,[18] brought a renewed demand for its overruling two years ago, when the case of *Parker v. Motor Boat Sales*[19] arose. The employment in that case was held by the Court to be clearly nonlocal and hence, by the *Jensen* doctrine, not subject to state compensation. *But even if the Jensen doctrine were discarded,* continued the Court, nonlocal employment would still lie outside of state jurisdiction. For did not Congress admittedly pass the Longshoremen's Act with reference to the *Jensen* line of decisions? Therefore all cases where recovery could not "validly be provided under state law" meant cases where it could not be provided under those decisions. Where Congress has legislated the states certainly cannot, even though they might otherwise be able to; hence, even though the Court may no longer feel that the Constitution imposes the *Jensen* limitation upon the states, Congress itself is said to have imposed it.

The legislative background strongly refutes this reasoning, however, and indicates that Congress, had it foreseen an overruling of the *Jensen* doctrine, would have been the first to sanction a statutory construction which would accord with it. In fact, it would seem that no more remote intent could be attributed to that body than the perpetuation of the *Jensen* criterion.[20]

Having made the attribution, however, the Court declared that an overruling of the *Jensen* case would be irrelevant unless Congress repealed the Longshoremen's Act. Congress, on the other hand, was not likely to attack a structure so painfully erected, so long as the *Jensen* doctrine remained on the books. All that remains, apparently, is for litigants and courts to continue hobbling under a doctrine which no one seems to want.

Mr. Chief Justice Stone urged its reconsideration as late as last December in the case of *Davis v. Department of Labor and Industries*.[21] But his was a dissenting voice, the majority being content merely to simplify its application. The wife of a deceased construction worker, in that case, had sued for benefits under the Washington Workmen's Compensation Act,[22] her husband having drowned

[18] Palfrey, The Common Law Courts and the Law of the Sea, 36 Harv. L. Rev. 777 (1923); Dodd, The New Doctrine of the Supremacy of Admiralty over the Common Law, 21 Col. L. Rev. 647 (1921); Cunningham, Is Every County Court in the United States a Court of Admiralty? 53 Am. L. Rev. 749 (1919); Cunningham, The Tables Turned—Lord Coke Demolished! 55 Am. L. Rev. 685 (1921); but see Wright, Uniformity in the Maritime Law of the United States, 73 U. of Pa. L. Rev. 123, 223 (1925).

[19] 314 U.S. 244 (1941).

[20] See, e.g., remarks of Representatives O'Connor and LaGuardia: "Twice has Congress, by amending the judiciary Code, attempted to give the states jurisdiction over the subject matter, only to be met with the decisions of our United States Court that this . . . . could not be delegated to the states. . . . . In order to meet that situation, it is necessary to pass a Federal law" (86 Cong. Rec. 5412–14 [1927]).

[21] 63 S. Ct. 225, at 231 (1942).

[22] Wash. Rev. Stat. Ann. (Remington, 1932) § 7673.

while assisting in the dismantling of a bridge.[23] The state compensation board had decided that the employment was nonlocal and fell under the federal act and that the injury therefore was not compensable under the Washington act. The state supreme court had affirmed this stand.[24] On appeal to the United States Supreme Court, the decision was reversed on a novel theory.

Pointing out that most employment is clearly "local" or "nonlocal," the majority recognized, nevertheless, that some maritime occupations, such as that involved here, contain aspects which have never been dealt with in any decision and can be defined only with difficulty. When one whose employment falls within this "twilight zone" comes before the Court, then, the decision, they said, must be reached not on precedents but on the facts. Since precedents, they continued, do not help the Court decide such a case, certainly they do not enable the employee to anticipate that decision. He can only conjecture on the direction which the line will take and choose his statute accordingly. If he is wrong, he must begin his case over. And by then the statute of limitations may have precluded even this recourse.[25]

To avoid these results, the Court decided to create a strong presumption in favor of whichever statute the employee filed his claim under. Whether this presumption was to be conclusive or not was left undecided. On the contrary, the Court purported to lean on other presumptions as well, for its holding in favor of the state act. The irrelevancy of these other presumptions, however, sheds doubt on their importance. For example, the traditional presumption in favor of the constitutionality of state legislation is entirely inappropriate, since the constitutionality of the Washington statute was not even in issue.[26] Likewise, it is doubtful if the Court actually attached as much significance as it said it did to the absence of federal administrative findings in favor of the federal act. Such findings were necessarily absent since the claim was filed under the state act, and the effect would seem largely offset by the fact that both the state compensation board and the state supreme court favored the federal act.[27] Further, it is impossible to take the Court seriously when it professes apprehen-

[23] The building or dismantling of a bridge has been held to be local work, The Rock Island Bridge, 6 Wall. 213 (1867); but this holding did not settle the instant case, because the deceased, at the time of his death, was loading the dismantled portions onto a barge. It was argued by respondent that this loading was merely incidental to the work of dismantling, but see Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928).

[24] 12 Wash (2d) 349, 121 P. (2d) 365 (1942).

[25] See, Ayers v. Parker, 15 F. Supp. 447 (Md. 1936).

[26] The Washington Workmen's Compensation Act does not attempt to cover maritime employees except those "for whom no right or obligation exists under the maritime laws." Wash. Rev. Stat. Ann. (Remington, 1932) § 7693a. Hence, it is incapable of application beyond the constitutional limits.

[27] Notice, too, that despite its purported anxiety to give full effect to the state act, the Court ignores the provision which says, "In all court proceedings under or pursuant to this act the decision of the department shall be prima facie correct and the burden of proof shall be upon the party attacking the same." Wash. Rev. Stat. Ann. (Remington, 1932) § 7697.

sion lest a judgement in favor of the federal act render the employer subject to criminal penalties for violating that act, merely because the record did not show that he had insured as required. The record could not be expected to show a fact so irrelevant under the Court's previous criterion. As a matter of fact, in respondent's petition for rehearing,[28] proof was promptly offered that he had so insured.

For these reasons, it is likely that only one important presumption was established in the *Davis* case, namely, one favoring the employee's own choice of statutes. Henceforth, then, instead of distinguishing merely between "local" and "nonlocal" work, the Court must at times distinguish between cases which present new-type situations and those which constitute only variations on preceding cases. This will occur as often as an employee attempts to recover under a statute other than the one to which he would be subjected without the presumption established in the *Davis* case.[29] For example, if an employee claiming under a state act is engaged in work which the Court decides is local, it is unnecessary for the Court to explain whether it reached its decision on precedent or on the particular facts of the case. If, however, that same employee claims under the federal act, the decision will turn on whether or not the case is within the "twilight zone," recovery being denied if it is not, and given if it is.

The Court has not lightened its own burden; it has merely set up a new criterion. Employees, on the other hand, will experience a positive diminution of uncertainty. As for employers, it may be contended that this decision forces them to insure under two statutes instead of one wherever the work is of uncertain character. Actually, however, employers with such work took a substantial risk, even prior to the *Davis* case, if they did not insure under both statutes. Their risk then has only been increased, not created, by this case.

THE APPLICATION OF THE RULE IN SHELLEY'S CASE

In the case from which it takes its name, the rule in Shelley's Case is stated by Lord Coke to apply, "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase."[1]

[28] Respondent's petition for rehearing, p. 6.

[29] Regardless of which statute he thinks would govern under the old "local-nonlocal" rule, an employee will tend to sue under whichever statute offers greater compensation so long as he thinks his case differs sufficiently from any prior case to take him out of that rule and give him instead the benefits of the Davis presumption.

[1] 1 Co. Rep. 93b, 104a (1581). For an authoritative discussion of Shelley's Case itself, see Challis, Real Property, 154–62 (3d ed. 1911). A modern and more limited expression of the rule can be found in the Rest., Property § 312 (1940). In England, the rule has been abrogated by statute, Law of Property Act (1925) 15 Geo. V, c. 20, § 131. Some 34 American jurisdictions have also wholly or partially abrogated the rule by statute. Rest., Property § 313 (1940).