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NOTES AND COMMENTS

Admiralty—Maritime Jurisdiction—End of “Twilight Zone”

Section 3(a) of the Longshoremen’s and Harbor Workers’ Compensation Act¹ provides:

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring on the navigable waters of the United States . . . and if recovery for the disability or death through workmen’s compensation proceedings may not validly be provided by State law.

In *Calbeck v. Travelers Ins. Co.*² two welders were injured, one fatally, while performing construction work on unfinished vessels launched and floating in navigable waters. The injured welder and the personal representative of the deceased welder claimed benefits under the Longshoremen’s and Harbor Workers’ Compensation Act. The awards were allowed by the Deputy Commissioner and affirmed in the district courts.³ The court of appeals reversed both judgments,⁴ holding that since compensation for the workers could validly be provided by state law, the language of the Longshoremen’s Act precluded recovery under that statute. The two cases were heard together on certiorari, and the United States Supreme Court reversed, two justices dissenting.⁵ The majority found that Congress had enacted the act in order to provide compensation for all injuries suffered by employees on navigable waters, regardless of whether the injury was compensable under a state workmen’s compensation law.

The history behind this decision points out the difficult area upon which the instant decision purports to shed light. Before 1917, it was held by both state⁶ and federal⁷ courts that the compensation

¹ 44 Stat. §§ 1424, 1426-27, 1429, 1431-32, 1434-46 (1927), as amended, 33 U.S.C. §§ 901-50 (1958).

² 370 U.S. 114 (1962).

³ These cases are apparently unreported.

⁴ *Travelers Ins. Co. v. Calbeck*, 293 F.2d 52 (5th Cir. 1961); *Avondale Shipyards, Inc. v. Donovan*, 293 F.2d 51 (5th Cir. 1961).

⁵ Justice Stewart and Justice Harlan. Justice Frankfurter did not participate in the decision.

⁶ *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372 (1915);

laws of the various states were applicable to all land-based workers, regardless of the fact that the injury itself might have occurred on navigable waters. In 1917, however, the Supreme Court in *Southern Pac. Co. v. Jensen*⁸ decided that state compensation acts could not validly be applied to stevedores unloading vessels on navigable waters. The application of the state acts to such injuries, said the Court, would destroy the uniformity of the general maritime law, and the state acts to that extent were declared invalid. The immediate result of the *Jensen* decision was that stevedores were deprived of any sort of compensation if they had the misfortune of being injured while on the ship, rather than on the dock where their injuries would be covered by the state compensation statutes.⁹ Two subsequent federal acts¹⁰ purporting to apply the compensation laws of the various states to workers injured on navigable waters were struck down as unconstitutional delegations of authority to the states.¹¹ Meanwhile, the Supreme Court, mindful of the harsh effects of *Jensen*, began to restrict that decision somewhat in holding that certain types of activities were of a maritime nature, but of local concern, and that as to them, state workmen's compensation statutes could constitutionally be applied.¹² The leading case in this area

Lindstrom v. Mutual S.S. Co., 132 Minn. 328, 156 N.W. 669 (1916). See generally Annot., 25 A.L.R. 1029 (1923).

⁷ *Riegel v. Higgins*, 241 Fed. 718 (N.D. Cal. 1917); *Berton v. Tietjen & Lang Dry Dock Co.*, 219 Fed. 763 (D.N.J. 1915). See generally Annot., 25 A.L.R. 1029 (1923).

⁸ 244 U.S. 205 (1917).

⁹ The House Judiciary Committee on what later became the Longshoremen's Act was treated to a humorous example of this undesirable result in the statement of an attorney for the International Longshoremen's Association: "A man was coming down a ladder from the deck of the ship to the dock. And he was a pretty fat man; and the boat was out about 2 feet from the dock. And the rope that was holding the ladder broke . . . he fell with his weight between the ship and the dock. His buttocks struck the dock and his belly struck the ship. Now, he has a sprained shoulder; assuming that the sprain took place on the way from the deck down to the dock, the compensation commission of New York awarded him compensation for injury to the buttocks, but not for injury to the shoulder." *Hearings before the House Judiciary Committee on H.R. 9498*, 69th Cong., 1st Sess. 33 (1926).

¹⁰ Act of October 6, 1917, ch. 97, 40 Stat. 395; Act of June 10, 1922, ch. 216, 42 Stat. 634.

¹¹ *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

¹² The "local concern" doctrine was first mentioned in *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), where, although the action was held barred by the applicable statute of limitations, the Court stated: "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied to admiralty courts, when following the common law,

was *Grant-Smith-Porter Co. v. Rohde*,¹³ which held that a worker performing construction work on an unfinished vessel floating on navigable waters was engaged in an activity purely local in scope, and that the application of the Oregon Workmen's Compensation Act to his injuries would work no prejudice to the uniformity of the general maritime law.

Although *Rohde* and like decisions¹⁴ mitigated the damage wrought by *Jensen* as to certain classes of workers, the stevedore injured on the ship he was unloading was still without a remedy. This result adversely affected a very substantial number of persons,¹⁵ and there was an appeal from employers and employees alike for effective relief. Congress, after seeing their two previous attempts at solving the problem rendered impotent by the Court, took notice of the constitutional problem involved, and the new attempt was built around a piece of judicial admonishment in *Washington v. W. C. Dawson & Co.*¹⁶ to the effect that uniform federal legislation should be enacted in order to cover those injuries rendered non-compensable by the Court.¹⁷ An examination of the various com-

will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law. . . ." 257 U.S. at 242.

¹³ 257 U.S. 469 (1922). In deciding the case, the Court relied heavily on the dictum set out only a month earlier in *Western Fuel Co. v. Garcia*, *supra* note 12.

¹⁴ See *Alaska Packers' Ass'n v. Industrial Acc. Comm'n*, 276 U.S. 467 (1928) (fisherman injured while pushing boat off shore into navigable waters); *Millers' Indem. Underwriters v. Braud*, 270 U.S. 59 (1926) (diver sawing off timbers on abandoned launching ways); *Sunny Point Packing Co. v. Faigh*, 63 F.2d 921 (9th Cir. 1933) (watchman stationed on floating fish trap fastened to shore).

¹⁵ Testimony before the House Judiciary Committee on the proposed Longshoremen's Act indicated that there were approximately 250,000 persons who would be affected by the act. *Hearings before the House Committee on the Judiciary on H.R. 9498*, 69th Cong., 1st Sess. 19 (1926).

¹⁶ 264 U.S. 219 (1924).

¹⁷ "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity. . . ." 264 U.S. at 227. The original draft of the Longshoremen's Act was carefully worded in order to be in accordance with this dictum. See, e.g., *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 3170*, 69th Cong., 1st Sess. 20 (1926), where the following exchange is recorded: "Mr. Chamberlain. . . . And in this last decision [referring to the *Dawson* case], being pressed on that point, the court says that compensation is possible under the admiralty power of Congress. So the bill is based on that theory of the

mittee and subcommittee hearings on the proposed bill shows that the purpose of Congress was to provide compensation only for those who were left without a remedy by the decisions of the Supreme Court, and that as to the others, the states could supply an adequate remedy.¹⁸ The dissent in the principal case quotes the Senate Committee Report: "If longshoremen could avail themselves of the benefits of the State compensation laws, there would be no occasion for this legislation"¹⁹ One motivating factor giving rise to this general attitude may well have been the differences in the rate scales of the Longshoremen's Act and the compensation acts of the states.²⁰ In certain states, the rates were somewhat lower than those under the federal act.²¹ Therefore, the *locus* of the injury might have made a substantial difference in the compensation payable for a given injury. This result was patently undesirable, containing a vast potential for perjured claims, and for policy reasons, it would seem that situations where one worker could be covered by two acts should have been kept at a minimum.

At any rate, the bill as it was first introduced appeared to reflect a desire to leave within state jurisdiction exclusively those marginal cases which the Court had decided were within the "local concern" concept. It read in part: "This act shall apply to any employment performed on a place within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation and commerce"²²

It was immediately recognized that the latter clause, if left in

court. Senator Overman. This bill is based on that decision. Mr. Chamberlain. It is based on that suggestion. And really there would be no way possible to take care of the situation otherwise that I know of."

¹⁸ See *Hearings before the Subcommittee of the Senate Committee on the Judiciary on S. 3170*, 69th Cong., 1st Sess. 19 (1926), where an attorney representing the Longshoremen's Union indicated widespread agreement among all parties concerned that State law should handle the situation. "But it [the bill] is designed to give a remedy where the State compensation law does not protect a man or his family" *Id.* at 25. Discussion before the House Committee contains language of similar import. See *Hearings before the House Committee on the Judiciary on H.R. 9498*, 69th Cong., 1st Sess. 39 (1926).

¹⁹ S. REP. No. 973, 69th Cong., 1st Sess. 16 (1926).

²⁰ See *Hearings before the House Judiciary Committee on H.R. 9498*, 69th Cong., 1st Sess. 51 (1926), where the reported discussion reflects an uneasiness concerning this part of the bill on the part of a large employers' association.

²¹ *Id.* at 51-52.

²² *Id.* at 2; *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 3170*, 69th Cong., 1st Sess. 2 (1926).

its then existing state, would foster much litigation.²³ The litigation would, of course, have been avoided entirely by the simple deletion of the offending clause. The House Committee in redrafting the bill did in fact omit the clause.²⁴ But at some point in the proceedings, the House Committee changed its collective mind, deciding instead to accept the revision made by the Senate Committee.²⁵ That draft, accepted by both Committees and later by Congress, read substantially as it does today, *i.e.*, that compensation was payable under the act only if state law could not provide a remedy.²⁶

The majority in *Calbeck* found that the latter change gave rise to a "reasonable inference" that Congress meant to avoid the potential litigation inherent in the "local concern" exception;²⁷ that their true purpose was to "provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law,"²⁸ and that the final wording was accepted, and later passed, in its present form only because of a "parliamentary obstacle"²⁹ to its further revision. The very fact that Congress, when faced with an obvious solution to the dilemma of impending litigation, chose instead to use language just as pregnant with potential lawsuits does not appear to support the majority's opinion that one of the primary purposes of Congress was to avoid litigation. On the contrary, it suggests that Congress was unwilling to extend federal jurisdiction any further than necessity demanded, albeit at the expense of some legal uncertainty. The dissent offers a more logical reason for the change in language. Conceivably, the Court might choose to extend state jurisdiction beyond the bounds of "local concern"; if so, the final wording of the act would be broad enough to cover these changes, making the federal law inapplicable in such cases.³⁰

After the passage of the Longshoremen's Act in 1927, the clause excluding from federal coverage those injuries compensable under

²³ See, *e.g.*, *Hearings before the House Committee on the Judiciary on H.R. 9498*, 69th Cong., 1st Sess. 77 (1926).

²⁴ H.R. Rep. No. 1767, 69th Cong., 2d Sess. 2 (1927).

²⁵ There is apparently no record of the deliberations leading to the House Committee's change in the language of the act.

²⁶ S. Rep. No. 973, 69th Cong., 1st Sess. 2 (1926).

²⁷ 370 U.S. at 123.

²⁸ *Id.* at 117.

²⁹ *Id.* at 124.

³⁰ *Id.* at 135 n.4.

state law produced, as expected, rather heavy litigation.³¹ The "maritime but local" concept continued to lend an air of uncertainty as to what relief a particular worker was entitled, and in which court. Each case was decided on its own separate facts, and it became apparent that if an injured employee made a wrong guess as to the jurisdiction of his case, he might be denied recovery under either the state or the federal act, due to the relatively short statutes of limitations common to most workmen's compensation acts.³² This was clearly not the intent of Congress.³³ Accordingly, in *Davis v. Department of Labor & Indus.*,³⁴ the Supreme Court held that where the facts of a particular case were such that counsel could not accurately predict, in the light of existing case law, the proper forum in which to bring action, there would be a presumption that his choice was correct, and in effect recovery would be allowable in either court. The Court termed the doubtful area the "twilight zone."³⁵

After announcing the "twilight zone" doctrine, the Court proceeded to apply it in subsequent cases where, before the existence of the doctrine, there would have been no question as to jurisdiction.³⁶

When the principal case came before the court of appeals,³⁷ the issue was whether the injury came within a "twilight zone" rendered overly elastic by those decisions. Apparently, neither party seriously contended that the federal act was applicable to *all* injuries suffered on navigable waters. Judge Brown of the Fifth Circuit was of the opinion that the "twilight zone" could not apply, because under the *Rohde* case an injury suffered by an employee engaged in

³¹ See, e.g., *New Amsterdam Cas. Co. v. McManigal*, 87 F.2d 332 (2d Cir. 1937); *United States Cas. Co. v. Taylor*, 64 F.2d 521 (4th Cir.), *cert. denied*, 290 U.S. 639 (1933); *Puget Sound Nav. Co. v. Marshall*, 31 F. Supp. 903 (W.D. Wash. 1940).

³² See, e.g., *Ayers v. Parker*, 15 F. Supp. 447 (D. Md. 1936).

³³ "Such a result defeats the purpose of the federal act, which seeks to give 'to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation' . . ." *Davis v. Department of Labor & Indus.*, 317 U.S. 249, 254 (1942).

³⁴ 317 U.S. 249 (1942).

³⁵ *Id.* at 256.

³⁶ See *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Baskin v. Industrial Acc. Comm'n*, 338 U.S. 854 (1949); *Bethlehem Steel Co. v. Moores*, 335 U.S. 874, *affirming per curiam Moores v. Bethlehem Steel Co.*, 323 Mass. 162, 80 N.E.2d 478 (1948). See generally Baer, *ADMIRALTY LAW OF THE SUPREME COURT* 75-83 (1963).

³⁷ *Travelers Ins. Co. v. Calbeck*, 293 F.2d 52 (5th Cir. 1961).

construction of an unfinished vessel afloat on navigable waters was clearly compensable under the Louisiana Workmen's Compensation Act, and thus the claimants could not recover under the Longshoremen's and Harbor Workers' Act.³⁸

The majority of the Supreme Court, in reversing the apparently logical decision of Judge Brown, found that all injuries suffered by employees on navigable waters were within the act, despite the language of section 3(a).³⁹ The dissent notes that if the instant decision be taken at face value, then the problem which gave rise to the "twilight zone" never existed;⁴⁰ certainly, there is now no longer a need for it. By the judicial deletion of an entire phrase of the act, the Court has eliminated the uncertainty which marked the "maritime but local" area, and there is little doubt that this is a desirable result.⁴¹ The method by which that result is reached, however, seems to set an alarming precedent. The Court as late as 1959 had recognized the existence of the "twilight zone" and the terms of the act which it emasculated in *Calbeck*;⁴² even some of the cases cited by the majority as being "entirely consistent" with their conclusion contain much language suggesting just the opposite result.⁴³

In view of the result reached in the principal case, the Court's next step may well be to hold injuries on navigable waters not compensable under state acts under any circumstances. Such a decision would, of course, do violence to a large body of case law,⁴⁴ but would be consistent with the basis of the *Jensen* case, *i.e.*, uniformity of the general maritime law, and, when considered with *Calbeck*, would also point out a clear procedural path where before lay uncertainty: if the injury is sustained on navigable waters, recovery

³⁸ *Id.* at 59.

³⁹ 370 U.S. at 117.

⁴⁰ *Id.* at 137.

⁴¹ Justice Stewart, speaking for the dissent in the principal case, writes: "While the result reached today may be a desirable one, it is simply not what the law provides." *Id.* at 132.

⁴² *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959).

⁴³ "Congress having expressly kept out of the area in which 'recovery . . . may . . . validly be provided by State law . . .'" *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 247 (1941); "Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery . . . may not validly be provided by state law.'" *Davis v. Department of Labor & Indus.*, 317 U.S. 249, 252-53 (1942).

⁴⁴ *E.g.*, *Grant-Smith-Porter Co. v. Rohde*, 257 U.S. 469 (1922); *United States Cas. Co. v. Taylor*, 64 F.2d 521 (4th Cir.), *cert. denied*, 290 U.S. 639 (1933).

will be under the Longshoremen's and Harbor Workers' Act; and if the injury is sustained on land, the state workmen's compensation proceedings will provide the remedy.

STEPHEN C. COWPER

Early Statutory and Common Law of Divorce in North Carolina

American courts and legislatures have for a century and a half looked with disfavor on the dissolution of marriage.¹ In so doing they have created a fifty-headed hydra of an internecine complexity unparalleled in the law. Here we shall investigate the birth and early childhood of that great serpent in North Carolina.

At the outset it is well to agree on just what is meant by the term "divorce." Historically, it has been used to describe four distinct remedies affecting the marital status: (1) divorce *a mensa et thoro*, (2) divorce *a vinculo matrimonii* by legislative act, (3) divorce *a vinculo matrimonii* by judicial decree, and (4) annulment. At common law the term "divorce" properly comprehended only the divorce *a mensa et thoro*, commonly known as legal separation or divorce from bed and board, although annulment was often incorrectly termed "absolute divorce."² In its modern sense, as a dissolution of a valid existing marriage, "divorce" means a divorce *a vinculo matrimonii* by judicial decree³ or legislative act.⁴ The latter has become obsolete.

¹ "We reconcile ourselves to what is inevitable. Experience finds pain more tolerable than it was expected to be; and habit makes even fetters light. Exertion, when known to be useless, is unassayed; though the struggle might be violent, if by possibility it could be successful. A married couple thus retrained may become, if not devoted in their affections, at least discreet partners, striving together for the common good, and steady friends, ready to perform all offices of kindness required by the other—instead of the dissentient heads of a distracted family, driven by inflamed passions to a degree of madness not to be satisfied with less than an entire separation, though it bring disgrace on themselves and their offspring, and deprive the latter of the greatest earthly advantage, the nurture and admonitions of a parent." *Scroggins v. Scroggins*, 14 N.C. 535, 542 (1832). Compare the views of South Carolina and Georgia: "The policy of this State has ever been against divorces. It is one of her boasts that no divorce has ever been granted in South Carolina." *Hair v. Hair*, 31 S.C. Eq. 163, 174 (1858). "[I]n South Carolina... to her unfading honor, a divorce has not been granted since the Revolution..." *Head v. Head*, 2 Ga. 191, 196 (1847).

² This convenient dichotomy caused some confusion. See, *e.g.*, *Crump v. Morgan*, 38 N.C. 91 (1843).

³ Absolute divorce by judicial decree was unknown in England until the Matrimonial Causes Act of 1857, 20 & 21 Vict. ch. 85. There were a few instances of such decrees during the early years of the Reformation, but it