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FLOWERS AND NOAH: NEW DEVELOPMENTS IN CONFLICTING REMEDIES AFFORDED AMPHIBIOUS EMPLOYEES

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Two recent decisions of the United States Court of Appeals for the Fifth Circuit[1] appear to have shed new and sorely needed light on an area of the maritime law which, unfortunately and perhaps needlessly, has been subject to confusion for over four decades. This perplexing problem is the choice of the proper workmen's compensation act, federal or state, to apply to claims against employers by amphibious workers or their dependents for injuries or death sustained on navigable waters. The numerous decisions of the Supreme Court of the United States pertaining to this issue have not left the selection of the applicable statute as simple as might appear from the now firmly entrenched philosophy supporting such compensation statutes.[2]

Noah v. Liberty Mutual Insurance Co.[3] presented an appeal from a judgment dismissing a mother's claim against an employer's compensation insurer under the Louisiana workmen's compensation act for the death of her longshoreman[4] son, who was drowned when he fell from a barge while engaged in the loading of cargo onto a vessel lying in the Mississippi River.[5] The district court had found the

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[1]Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958); Noah v. Liberty Mut. Ins. Co., *infra* note 3.

[2]See 1 LARSON, WORKMEN'S COMPENSATION §2.20 (1952); Note, 9 U. FLA. L. REV. 311 (1956).

[3]265 F.2d 547, *overruled on rehearing en banc*, 267 F.2d 218 (5th Cir. 1959).

[4]Despite some incorrect transposition of terminology by the authorities, a longshoreman is actually the laborer engaged in loading or unloading cargo, whereas a stevedore is the person in authority over or in charge of the longshoremen laborers. Corporate employers of longshoremen often are termed "_____ Stevedoring Co." See NORRIS, MARITIME PERSONAL INJURIES 5 (1959).

[5]162 F. Supp. 723 (E.D. La. 1958). This case was presented in the district court by virtue of removal from the Civil District Court for the Parish of Orleans, there being diversity of citizenship between the plaintiff and the defendant compensation insurer, 28 U.S.C. §1441 (1958). (Transcript of Record on Appeal, pp. 1-10.) Such removal would no longer be permissible, 28 U.S.C. §1445 (c) (1958).

exclusive remedy against the stevedore employer to lie under the federal Longshoremen's and Harbor Workers' Compensation Act.[6]

A sharply divided court, Judge Wisdom dissenting,[7] initially concluded that the Supreme Court's new pronouncements in *Hahn v. Ross Island Sand & Gravel Co.*,[8] viewed in the light of other cases elaborating upon the twilight zone theory of concurrent federal and state jurisdiction, had in effect retreated from the often berated[9] teachings of *Southern Pacific Co. v. Jensen*.[10] Hence the claim in question could be asserted under a state workmen's compensation statute in spite of the fact that the similar death of a longshoreman presented in *Jensen* gave rise to the classic denial of state jurisdiction and the fact that, but for the enactment of the federal compensation act, longshoremen would be treated as seamen.[11] Upon rehearing en banc, the court receded from this view, sustained the trial court, and, speaking through Judge Wisdom, held that *Hahn* had not overruled *Jensen* by implication and that the federal Longshoremen's and Harbor Workers' Compensation Act provided an exclusive remedy to Noah's dependent against his employer.[12] The original majority, Chief Judge Hutcheson and Judge Cameron, dissented. Certiorari apparently was not sought.

It may now be seriously suggested that, pending further decisions of the Supreme Court of the United States, claims arising from injuries[13] *on navigable waters*[14] to longshoremen loading or unloading

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It is also a matter of interest that apparently a state compensation claim in Louisiana may be initiated in a court, unlike the procedure in Florida, wherein the proceeding is commenced before a deputy industrial commissioner. FLA. STAT. c. 440 (1959).

6 44 STAT. 1424 (1927), 33 U.S.C. §§901-48 (1958), herein sometimes called the Harbor Workers' Act.

7 265 F.2d at 550.

8 358 U.S. 272 (1959).

9 ". . . a much criticized and somewhat impaired, but not overruled, decision which held federal power exclusive and state compensation laws forbidden in an area of 'shadowy limits.'" Helvering v. Griffiths, 318 U.S. 371, 399 (1943). See also United States v. Southeastern Underwriters Ass'n, 322 U.S. 533, 584, 589 (1944) (dissenting opinion); Standard Dredging Corp. v. Murphy, 319 U.S. 306, 309 (1943).

10 244 U.S. 205 (1917).

11 Uravic v. F. Jarka Co., 282 U.S. 234 (1931); International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926).

12 267 F.2d 218 (5th Cir. 1959).

13 The Longshoremen's and Harbor Workers' Compensation Act extends coverage to death or disability from personal injury, 44 STAT. 1426 (1927), 33 U.S.C. §903 (a) (1958), "injury" including certain occupational diseases, 44 STAT. 1425

vessels are ordinarily exclusively within the federal Longshoremen's and Harbor Workers' Compensation Act, at least as far as the federal courts in the Fifth Circuit are concerned.[15]

It seems plausible to assume that longshoremen comprise a substantial segment of maritime employees, emphasizing the practical significance of *Noah*. Marine workers engaged in furthering the repair of existing vessels also constitute a sizable group of amphibious workers potentially confronted with selection of the proper jurisdiction for assertion of a claim against an employer.

Shortly prior to *Noah*, the Court of Appeals for the Fifth Circuit decided *Flowers v. Travelers Insurance Co.*[16] A claim had been asserted in the district court for injuries sustained by a welder while engaged in the repair of a vessel lying in a floating dry dock in the harbor of Galveston, in the navigable waters of the United States.[17] In a typically piercing opinion[18] Judge Brown, for a unanimous bench,[19] rejected the employee's claim, not unlike that to be later ad-

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(1927), 33 U.S.C. §902 (2) (1958). Herein reference will ordinarily be made simply to "injury."

[14]This qualification is of prime importance because, as will be observed herein, shoreside injuries are invariably encompassed by state workmen's compensation acts. Occurrence of a tort on navigable waters is a prerequisite of admiralty jurisdiction in a personal injury claim. See NORRIS, *op. cit. supra* note 4, at 418. "Briefly, the admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject-matter of the suit is confined to one state." GILMORE and BLACK, ADMIRALTY 28 (1957). See, however, 62 STAT. 496 (1948), 46 U.S.C. §740 (1958), extending admiralty jurisdiction to injuries caused by vessels when done or consummated on land. The federal Longshoremen's and Harbor Workers' Compensation Act extends coverage only to injuries occurring upon the navigable waters of the United States, including any dry dock. 44 STAT. 1426 (1927), 33 U.S.C. §903 (a) (1958). The term *dry dock* includes a marine railway. Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953).

[15]See note 110 *infra*.

[16]258 F.2d 220 (5th Cir. 1958). It is also noteworthy that this case was decided before *Hahn* and did not consider any effects of that decision on the prevailing law.

[17]Case No. 2149, S.D. Tex., Galveston Div. Like *Noah*, the case was removed after initial filing in a state court. (Transcript of record on Appeal, pp. 3-21.)

[18]*Cf.* the "judicial conflicts bus ride" in United Services Automobile Ass'n v. Russom, 241 F.2d 296 (5th Cir. 1957).

[19]Tuttle, Jones, and Brown, JJ., none of whom sat in the original hearing on *Noah*. No doubt this fact, in conjunction with the apparent inconsistency of

vanced in *Noah,* that the decision of the Supreme Court in *Davis v. Department of Labor*[20] and the subsequent "unilluminating per curiams"[21] in *Bethelem Steel Co. v. Moores*[22] and *Baskin v. Industrial Accident Comm'n*[23] brought the case within the so-called twilight zone,[24] wherein an option of selection by the employee would operate to support his choice of the Texas workmen's compensation act. Conflicting decisions of state courts in Louisiana[25] and Texas[26] supporting the claimant's position were disregarded as "fundamentally erroneous"[27] in an area in which the federal courts are supreme. In holding that the sole remedy for Flowers against his employer lay under the federal statute the court commented:[28]

> "The outlines of a case of an injury received on navigable waters while engaged in essential repairs to an existing vessel have long been clear and distinct. As to them, there was no twilight. . . . The District Judge was right in holding that the Texas act could not apply and that this was a case for the exclusive application of the Federal Act."

Although always an action of debatable significance,[29] it is well to note that certiorari was denied by the Supreme Court.[30]

These decisions appear to require federal courts in the Fifth Circuit to restrict claims against employers by longshoremen engaged in loading or unloading vessels and by repairmen engaged in repairs

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Flowers and the first *Noah* opinions, contributed to the fact that all seven members of the court sat in the rehearing on *Noah*.

[20]317 U.S. 249 (1942).

[21]258 F.2d at 222.

[22]335 U.S. 874 (1948).

[23]338 U.S. 854 (1949).

[24]See Davis v. Department of Labor, 317 U.S. 249, 256 (1942).

[25]Richard v. Lake Charles Stevedores, Inc., 95 So.2d 830 (La. App. 1957); Sullivan v. Travelers Ins. Co., 95 So.2d 834 (La. App. 1957).

[26]Indemnity Ins. Co. v. Marshall, 308 S.W.2d 174 (Tex. Civ. App. 1957); Emmons v. Pacific Indemnity Co., 146 Tex. 496, 208 S.W.2d 884 (1948).

[27]258 F.2d at 227.

[28]*Id.* at 228.

[29]See Brown v. Allen, 344 U.S. 443, 488 (1953). For a view often expressed by counsel and laymen see the excerpt from the employee's brief in *Flowers*, 258 F.2d at 228, n.22. For a rare judicial expression of the same tenor see Kraft Foods Co. v. Commodity Credit Corp., 266 F.2d 254, 263 (7th Cir. 1959).

[30]359 U.S. 920 (1959). Mr. Justice Douglas is noted as being of the opinion that certiorari should be granted.

to existing vessels[31] almost invariably to the federal statute in situations in which such workers are injured on navigable waters. As noted, the groups involved obviously represent a large portion of those employees likely to become confronted with the choice in issue, and if for no other reason the decisions are important.

Although these decisions doubtless appear to reach results both logical and, to many, unstriking, an examination of the historical development of this conflict of state and federal remedies for maritime workers through the decisions of the Supreme Court of the United States reflects the uncertainty that has existed and indicates the need at the time *Noah* and *Flowers* were decided for a more definitive statement of the rights of amphibious workers in such situations.

Of what practical importance is a selection between state and federal compensation statutes, beyond the obvious frustration, expense, and delay resulting from an erroneous choice? It is, of course, beyond the purview of this article to analyze all of the statutory provisions; it is suggested that in given instances variations between a state statute and the federal statute will afford differences in the identity and requisite dependence of relatives of deceased employees competent to maintain claims, the quantum of compensation and medical benefits payable, and applicable statutes of limitation. Moreover, variations in substantive rules of compensation law are important, for example, the law applicable to establishment of an injury as one arising out of and in the course of employment, and therefore compensable.[32]

Before proceeding with this discussion, it is well to note that the scope of this commentary does not encompass the rights of seamen, but presupposes that the employees discussed are not seamen — or, more properly, are not masters or members of the crew of a vessel[33] —

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[31]It is of importance to note this qualification, for, as will be seen, a contract for the building of a ship is non-maritime, and work on an uncompleted ship may likewise be non-maritime. See discussion under *The Local Concern Doctrine infra.*

[32]See, *e.g.*, 44 STAT. 1425 (1927), 33 U.S.C. §902(2) (1958); FLA. STAT. §440.09(1) (1959).

[33]Compensation is not payable under the Harbor Workers' Act to a master or member of a crew of any vessel. 44 STAT. 1426 (1927), 33 U.S.C. §903(a)(1) (1958). The effect of the enactment of the Harbor Workers' Act was to remove longshoremen from coverage under the Jones Act, 41 STAT. 1007 (1920), 46 U.S.C. §688 (1958), a remedy for a seaman. South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). Hence it seems logical for the limited purpose of remedies

and thus are not within the ambit of the Merchant Marine Act of 1920, commonly known as the Jones Act[34] or the other liberal remedies afforded to seamen against their employers under the general maritime law. Rather it represents an effort to review the overlapping or mutual exclusion, as the case may be, of various remedies afforded non-seamen maritime or amphibious employees against employers under state or federal workmen's compensation statutes. The determination of whether an employee may be a seaman is in itself a complex problem; indeed, in some employment situations, dredge workers, for example, a particular accident or injury may involve the making of two decisions: (1) whether the injured employee is a seaman or a member of the crew of a vessel – usually a fact question;[35] (2) whether the circumstances of the particular injury give rise to a claim under the state or the federal compensation act. Only the second problem will be here considered.[36] The state and federal compensation acts will often be termed simply "state act" and "federal act."

THE UNIFORMITY CONCEPT: JENSEN AND ITS OFFSPRING

All authorities trace the origin of the problem to *Southern Pacific Co. v. Jensen,*[37] a case closely in point with *Noah.* Although the chronology of the case law has perhaps grown too familiar to bear exhaustive repetition,[38] it still presents an interesting account of

against employers to consider "seaman" and "member of a crew" as virtually synonymous. See 1 NORRIS, SEAMEN 13-14 (1951).

[34]41 STAT. 1007 (1920), 46 U.S.C. §688 (1958).

[35]See South Chicago Coal & Dock Co. v. Bassett, *supra* note 33. A recent decision shedding considerable light on the problem of determining what employees are seamen is Offshore Co. v. Robinson, 266 F.2d 769 (5th Cir. 1959). See also 1 NORRIS, SEAMEN §§1-19 (1951). For an indication of an even broader umbrella of coverage for seamen under the Jones Act see Braen v. Pfeifer Oil Transportation Co., 28 U.S.L. WEEK 4044 (U.S. Dec. 14, 1959).

[36]For varying results in dredging cases, see Radcliff Gravel Co. v. Henderson, 138 F.2d 549 (5th Cir. 1943) (Harbor Workers' Act applicable); Kibadeaux v. Standard Dredging Co., 81 F.2d 670 (5th Cir. 1936) (Jones Act applicable); United Dredging Co. v. Lindberg, 18 F.2d 453 (5th Cir. 1927) (state act applicable). See also Comment, 32 TULANE L. REV. 292 (1958).

[37]244 U.S. 205 (1917). "Even *Southern Pacific Co. v. Jensen,* which fathered the 'uniformity' concept . . . ." The Tungus v. Skovgaard, 358 U.S. 588, 594 (1959).

[38]For text treatments see 1 BENEDICT, ADMIRALTY §§27-31 (6th ed. 1940); GILMORE and BLACK §§6-45-52; HANNA, FEDERAL REMEDIES FOR EMPLOYEE INJURIES 4-8 (1955); 2 LARSON, WORKMEN'S COMPENSATION §89 (1952); NORRIS, MARITIME PERSONAL INJURIES §§132-37 (1959); ROBINSON, ADMIRALTY §§13-15 (1939). For law review treatments see Gisevius and Leppert, *Modern Maritime Workers,* 9

progressive judicial treatment of a modern industrial dilemma, the study of which is doubtless necessary in order to perceive the full significance of *Flowers* and *Noah*.

Even prior to *Jensen*, longshoremen's claims against employers had concerned the Supreme Court. In 1890 the Court held in effect that longshoremen's claims against vessels for injuries occurring on navigable waters were properly within admiralty jurisdiction.[39] Then in 1914, in *Atlantic Transport Co. v. Imbrovek*,[40] with no compensation act involved, the Court held that admiralty jurisdiction extended to a claim by a longshoreman against his stevedore employer for an injury sustained on navigable waters as the result of negligent failure to provide a safe place to work.

In *Jensen* the Supreme Court, divided five to four on an employer's appeal, reversed a judgment of the Court of Appeals of New York[41] which had affirmed application of the New York workmen's compensation statute to the claim of Jensen's widow, arising from his death while working as a longshoreman unloading a vessel docked

LOYOLA L. REV. 1, 18-26 (1957-58); Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 HARV. L. REV. 637 (1955); Comment, 67 YALE L. J. 1205 (1958). See also Bedell, *What You Should Know About Maritime Torts*, 38 FLA. B. J. 480, 488 (1956); Bradley, *An Introduction to Admiralty and Maritime Law*, 27 INS. COUNSEL J. 51, 58-61 (1960); Creede, *Injuries to Amphibious Employees: Is Jurisdiction Under the State Compensation Act or Federal Maritime Law?*, 22 INS. COUNSEL J. 42 (1955).

[39]The Max Morris, 137 U.S. 1 (1890).

[40]234 U.S. 52 (1914). This opinion is also important in that it planted a seed that ripened into full flower 32 years later in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). In *Imbrovek* the Court remarked: "Formerly the work [loading and unloading of cargo] was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'" 234 U.S. at 62. Upon this basis the Court in *Sieracki* extended to longshoremen in actions against vessels and their owners the right to rely upon the warranty of a vessel's seaworthiness traditionally granted to seamen. Such actions may ultimately result in indemnification of the shipowner by the stevedore employer through third party actions, FED. R. CIV. P. 14, GEN. ADMIRALTY R. 56, thereby in effect circumventing the limited liability feature of the Harbor Workers' Act, 33 U.S.C. §905 (1958). See Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); NORRIS, MARITIME PERSONAL INJURIES §§49-61 (1959).

For an able critique of the premise that loading and unloading was work traditionally done by the crew, see Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L. Q. 381 (1954).

[41]215 N.Y. 514, 109 N.E. 600 (1915).

in the New York harbor. Speaking through Mr. Justice McReynolds, who was destined to write many of the later decisions focusing on the same problem,[42] the Court found that the application of the New York statute as a basis for an award to the widow worked material prejudice to the characteristic features of the general maritime law, which was said to require uniformity under the constitutional delegation of admiralty jurisdiction to the federal courts. A classic dissent by Holmes questioned this conclusion,[43] and a foremost modern authority has cogently pointed out the numerous applications of state law to matters maritime with the blessing of the high tribunal.[44] Moreover, Judge Wisdom, the ultimate voice of the court in *Noah*, in accepting *Jensen* expressed his doubt as to the validity of its conclusions.[45]

While little is to be gained by further figurative flaying of this decision, its reasoning does appear questionable in the light of the facts then before the Court. The claim, of course, was one arising from a death. The general maritime law, like the common law,[46] makes no provision for recovery for death.[47] Within four years after

[42]*E.g.*, Employers' Liability Assurance Corp. v. Cook, 281 U.S. 233 (1930); John Baizley Iron Works v. Span, 281 U.S. 222 (1930); Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928); Alaska Packers Ass'n v. Industrial Accident Comm'n, 276 U.S. 467 (1928); Millers' Indemnity Underwriters v. Braud, 270 U.S. 59 (1926); Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925); Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171 (1924); Washington v. W. C. Dawson & Co., 264 U. S. 219 (1924); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923); State Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922); Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Peters v. Veasey, 251 U.S. 121 (1919); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

[43]244 U.S. at 216. "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ." *Id.* at 222.

[44]GILMORE and BLACK, ADMIRALTY §6-45 (1957).

[45]265 F.2d 547, 551. *But see* GILMORE and BLACK 43-44: "[I]t is impossible not to concede that the *major* premise they [*Jensen* and related cases] state is a sound one. If there is any sense at all in making maritime law a federal subject, then there must be some limit set to the power of the states to interfere in the field of its working." For an example of the difficulties in application of state law in maritime matters, see Wilburn Boat Co. v. Firemen's Fund Insurance Co., 348 U.S. 310 (1955).

[46]*E.g.*, Nolan v. Moore, 81 Fla. 594, 88 So. 601 (1921).

[47]*E.g.*, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); The Harrisburg, 119 U.S. 199 (1886). However, recent divided decisions of the Court, *e.g.*, The Tungus v. Skovgaard, 358 U.S. 588 (1959), may foreshadow far reaching innovations in connection with remedies for death in admiralty.

the *Jensen* case the Supreme Court in *Western Fuel Co. v. Garcia*,[48] again through Mr. Justice McReynolds, held that in view of this lack of provision in the general maritime law, a state wrongful death statute might be utilized as a vehicle for admiralty to entertain a libel in personam against a stevedore employer for the death of a longshoreman on navigable waters within a state, a prior claim under the state compensation act having been dismissed under authority of *Jensen*.

It is difficult to accept the premise that the utilization of a state wrongful death statute in one instance, and the utilization of a statute allowing recovery for death within the framework of a state workmen's compensation act in another, should be so remarkably different as to reconcile *Western Fuel* and *Jensen*. Perhaps the prejudice of *Jensen* might be found in the fact that liability without fault is a

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[48]257 U.S. 233 (1921). For an indication that application of state law in the case of death in the state's navigable waters may validly include application of a standard of care higher than that imposed by the general maritime law, see Hess v. United States, 28 U.S.L. WEEK 4058 (U.S. Jan. 18, 1960). The Jones Act precludes enforcement of state death acts against employers of seamen. Lindgren v. United States, 281 U.S. 38 (1930). This would seem to rule out any efforts to advance claims under a state death act against employers for the death of a seaman allegedly resulting from breach of a warranty of seaworthiness, as has been done in non-seaman cases under some state death acts, *e.g.*, The Tungus v. Skovgaard, 358 U.S. 588 (1959). The Florida act, FLA. STAT. §768.01 (1959), has been interpreted as not encompassing a death claim based on unseaworthiness, Graham v. A. Lusi, Ltd., 206 F.2d 223 (5th Cir. 1953); but the *Graham* case does not appear to have considered the amendment to the statute by Fla. Laws 1953, c. 28280, §1. See 5 U. FLA. L. REV. 344 (1952). However, Chief Judge Whitehurst of the Southern District of Florida, without discussion of the amendment, has recently reaffirmed the rule of *Graham* in a case of a seaman's death subsequent to the amendment and has moreover held the state death act inapplicable to a claim for the death of a seaman, asserted in that instance against the vessel in rem. de Hyman v. The Montego, No. 549 Adm-T, S.D. Fla., Tampa Div., Dec. 23, 1959. The exclusive liability provisions of state and federal compensation acts rule out application of state death acts against employers covered by those statutes, *e.g.*, 44 STAT. 1426 (1927), 33 U.S.C. §905 (1958), although it is not inconceivable that rejection of a compensation act in advance of injury and death, as in Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959), might furnish an area for the application of such statutes. The federal Death on the High Seas Act, 41 STAT. 537 (1920), 46 U.S.C. §§761-68 (1958), does cover any death occurring on the high seas beyond a marine league from the shore of any state, but does not prevail over a state compensation act. King v. Pan American World Airways, 270 F.2d 355 (9th Cir. 1959), petition for certiorari pending, 28 U.S.L. WEEK 3237 (1960). Hence the rule of *Western Fuel* should not now be of great importance in employee-employer actions.

feature of the workmen's compensation act. If this be so, assuredly this feature has not troubled later courts, because liability without fault has become a keynote of personal injury and death remedies in other maritime situations presented to the Supreme Court.[49] The latter point is perhaps also debatable, since maintenance and cure, a species of responsibility without fault, has long been known to the admiralty law.[50] However, some basis for this belief may be found in *Chelentis v. Luckenbach S.S. Co.*,[51] in which the Court, citing *Jensen*, did in effect hold that common law standards of liability do not extend to admiralty, indicating that no state has the power to abolish well-recognized maritime rules concerning measure of recovery and substitute rules of the common law.

In any event, regardless of the validity of its conclusion or the explanation for its holding, adherence to *Jensen* in cases of longshoremen injured on navigable waters was shortly found in *Peters v. Veasey*.[52] Indeed, though often assailed and destined to be limited by the local concern and twilight zone doctrines, the holding of *Jensen* has actually never been overruled. With particular reference to *Noah*, the Supreme Court, as will be seen, does not appear to have retreated from the *Jensen* holding in a longshoreman case.

THE FEDERAL COMPENSATION ACT

Amphibious workers confronted with the *Jensen* holding found themselves lacking the ready remedy for industrial injuries accorded shoreside workers, who were not required to demonstrate fault of the employers, as were amphibious workers proceeding under *Imbrovek*. Apparently desirous of solving this quandary by extending to state workmen's compensation statutes the area of operation denied by *Jensen*, the Congress twice amended the "saving to suitors" clause of the Judiciary Act[53] to provide the states an avenue to pursue in

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[49]*E.g.*, the warranty of seaworthiness by the owner of a vessel. See NORRIS, MARITIME INJURIES §30 (1959). A humorous commentary on this subject is found in the remarks by the Honorable Bailey Aldrich, United States District Judge for the District of Massachusetts, on "The Training of an Admiralty Judge" given at the fall dinner meeting of The Maritime Law Association of the United States, New York, Nov. 14, 1958; see Document No. 423 of the Association at 4377, 4378.

[50]See The Osceola, 189 U.S. 158 (1903).

[51]247 U.S. 372 (1918).

[52]251 U.S. 121 (1919).

[53]1 STAT. 76-77 (1789), now 28 U.S.C. §1333 (1958).

utilizing their workmen's compensation statutes in such situations.[54] The semantic exercises of the Congress and the Court are history, and it is a sufficient epitaph to say that in both instances congressional efforts were appropriately eulogized as they were laid to rest as victims of the uniformity doctrine.[55] In *Washington v. W. C. Dawson & Co.* a thinly veiled hint was made to the Congress that a federal statute might be the answer.[56]

This bit of judicial advice was eventually heeded with the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927.[57] This statute, patterned on the New York act,[58] provides federal workmen's compensation benefits in all instances of claims against employers[59] for injury or death when they occur on navigable waters or on a dry dock, and when state workmen's compensation proceedings might not validly provide recovery.[60] A master and the members of a crew of a vessel are excluded,[61] the latter employees, of course, possessing rights under the Jones Act[62] and rights otherwise granted seamen under the general maritime law.[63] Also excluded are persons engaged by the master to load or unload or repair any small

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[54]40 STAT. 395 (1917); 42 STAT. 634 (1922).

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

[56]264 U.S. 219, 227 (1924).

[57]44 STAT. 1424 (1927), 33 U.S.C. §§901-50 (1958).

[58]See 2 LARSON, WORKMEN'S COMPENSATION §89.10 (1952).

[59]"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 44 STAT. 1425 (1927), 33 U.S.C. §902(4) (1958).

[60]44 STAT. 1426 (1927), 33 U.S.C. §903(a) (1958). It is to be noted that Congress did not follow the simplest choice of placing *all* injuries on navigable waters under the federal compensation act, but only those constitutionally beyond the reach of the state. See GILMORE and BLACK 346.

[61]44 STAT. 1426 (1927), 33 U.S.C. §903(a)(1) (1958). This exclusion was at the specific urging of seamen's groups. See GILMORE and BLACK 338 and cases cited. For a suggestion, perhaps not designed to be received with favor by shipowners or P & I underwriters, that seamen be afforded rights under the Harbor Workers' Act and still retain rights to bring tort actions against employers, see Gardner, *Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen*, 71 HARV. L. REV. 438 (1958).

[62]41 STAT. 1007 (1920), 46 U.S.C. §688 (1958).

[63]See Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); The Osceola, 189 U.S. 158 (1903). See, however, Lovitt, *Things Are Seldom What They Seem: The Jolly Little Wards of the Admiralty*, 46 A.B.A.J. 171 (1960), a humorous criticism of the liberal treatment afforded seamen's claims.

vessel under eighteen tons net.[64] The Supreme Court has held that in enacting this statute Congress adopted the *Jensen* line of demarcation between state and federal compensation acts;[65] that is to say, the provision of the federal act limiting its coverage to situations in which a state act could not validly apply in effect adopted *Jensen* as a measure for the valid application of a state act. In theory, two mutually exclusive areas of operations should have devolved, as separate if not as distant as great Birnam wood and high Dunsinane hill;[66] indeed, such a result should have inhered from *Jensen* even without the enactment of the Harbor Workers' Act. It will be observed that it did not.

In examination of the factors leading to the passage of the Harbor Workers' Act, it is well to note *International Stevedoring Co. v. Haverty*,[67] which came before the Court after the congressional efforts to eradicate the *Jensen* rule had been ruled invalid. At this time, before the passage of the Harbor Workers' Act, *Jensen* and its progeny precluded amphibious employees not saved by the local concern doctrine, which will shortly be examined, from proceeding under state workmen's compensation acts for injuries on navigable waters. Rather they were relegated to claims against their employers under the admiralty law in accordance with *Imbrovek*. Longshoreman Haverty's claim arose from the negligence of a fellow servant, for which the employer was not responsible under the general maritime law.[68] However, the Jones Act abrogating the fellow servant rule as to seamen had been passed in 1920.[69] Thus unless longshoremen were within the ambit of the Jones Act their rights against their employers were sorely impeded by the fellow servant rule. In *Haverty* the Court, speaking through Mr. Justice Holmes, noting as it did in *Imbrovek* that the work of a stevedore was maritime service formerly rendered by the crew, concluded that Congress must have intended longshoremen, although not seamen for most purposes, to be considered as seamen within the coverage of the Jones Act.

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[64]44 STAT. 1426 (1927), 33 U.S.C. §903 (a) (1) (1958).

[65]Parker v. Motor Boat Sales, Inc., 312 U.S. 244 (1941).

[66]SHAKESPEARE, MACBETH, Act IV, Scene 1.

[67]272 U.S. 50 (1926).

[68]See The Osceola, 189 U.S. 158 (1903).

[69]The Jones Act adopted for seamen by reference the rights and remedies of railway employees under the Federal Employers' Liability Act, 35 STAT. 65 (1908), 45 U.S.C. §§51-60 (1958), which abolished the fellow servant defense. See GILMORE and BLACK §6-54; NORRIS, MARITIME INJURIES §21 (1959).

The effects of this decision, of course, were short lived because of the passage the next year of the federal Longshoremen's and Harbor Workers' Compensation Act. Today longshoremen and other employees encompassed within the Harbor Workers' Act have no rights against their employers under the Jones Act or the general maritime law.[70] This is true not only for injuries sustained on navigable waters but also for shoreside injuries,[71] despite the fact that the Jones Act may extend to injuries of seamen on land.[72] Further, only true seamen may assert the ancient right to maintenance and cure.[73] However, longshoremen and others performing work traditionally that of the crew have been entitled, at least since 1946, to hold a vessel owner to the warranty of the vessel's seaworthiness extended to seamen.[74] The holding in *Seas Shipping Co. v. Sieracki*[75] extending this remedy to longshoremen was based on the premise of *Imbrovek* and *Haverty* that longshoremen perform traditional work of the crew.

THE LOCAL CONCERN DOCTRINE

During the unsuccessful congressional efforts to return to the states the right to utilize workmen's compensation statutes for injuries on navigable waters, the "local concern" doctrine, a judicial effort in the same direction, saw the light of day in *Grant Smith-Porter Ship Co. v. Rohde.*[76] It was held that a carpenter injured on a *ship under construction* in navigable waters in Oregon could not maintain a libel in admiralty against his employer because of the exclusive provision of the state workmen's compensation law; the thesis of the Court was that the contract for shipbuilding and the contract of the employment were non-maritime[77] and basically matters of local concern. Thus *Jensen's* area of exclusion of state statutes

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[70]See NORRIS, MARITIME INJURIES §21 (1959).

[71]Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946).

[72]O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943).

[73]See GILMORE and BLACK §6-7.

[74]United Pilots Ass'n v. Halecki, 358 U.S. 613 (1959); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). For a listing of those workers performing traditional crew's work see NORRIS, MARITIME INJURIES §48A (1959). *But see* West v. United States, 28 U.S.L. WEEK 4091 (U.S. Dec. 7, 1959).

[75]328 U.S. 85 (1946).

[76]257 U.S. 469 (1922).

[77]See The People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393 (1857).

did not extend to such essentially local or non-maritime employment. Only a case by case study can fully demonstrate the workers classified as local. A good example is found in *Millers' Indemnity Underwriters v. Braud,*[78] in which the local concern doctrine was determined to be applicable to a diver drowned while suspended from a barge to saw timbers. This doctrine was followed in several decisions,[79] but of course the need to find a basis upon which to escape *Jensen* and to afford compensation benefits for injuries on navigable waters was theoretically gone with the enactment of the Harbor Workers' Act. In any event, the doctrine does not seem to have been applied by the Court to repairmen on existing vessels or to longshoremen. Indeed, despite the growth of the local concern doctrine, support of *Jensen* continued in the non-application of state statutes to repairmen working on existing vessels.[80] It is moreover well to remember that *Rohde* involved work on a ship under construction and not a completed ship under repair, as did *Flowers.*

Even during the heyday of the local concern doctrine the Court continued to adhere to the view that longshoremen's claims for injuries on navigable waters could not be asserted under state statutes.[81] This thesis was further echoed in *Nogueira v. New York, N.H. & H. R.R.,*[82] in which it was held that a freight handler injured on a railroad car float was relegated to the Longshoremen's and Harbor Workers' Act and could not sue under the Federal Employers' Liability Act,[83] the usual remedy of railroad employees. The Court, in declaring that the general scheme of the Longshoremen's and Harbor Workers' Act was to provide compensation to employees engaged in

[78]270 U.S. 59 (1926).

[79]Sultan Ry. & Timber Co. v. Department of Labor, 277 U.S. 135 (1928), *affirming* 141 Wash. 172, 251 Pac. 130 (1926) (logging operations); Alaska Packers Ass'n v. Industrial Accident Comm'n, 276 U.S. 467 (1928), *affirming* 200 Cal. 579, 253 Pac. 926 (1927) (cannery worker pushing boat into water); Rosengrant v. Havard, 273 U.S. 664 (1927), *affirming* 213 Ala. 202, 104 So. 409 (1925) (lumber checker); State Industrial Bd. v. Terry & Tinch Co., 273 U.S. 639 (1926), *reversing* 240 N.Y. 292, 148 N.E. 527 (1925) (claimant engaged in pier construction).

[80]John Baizley Iron Works v. Span, 281 U.S. 222 (1930); Messel v. Foundation Co., 274 U.S. 427 (1927); Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925); Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171 (1924); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923).

[81]Uravic v. F. Jarka Co., 282 U.S. 234 (1931); Employers' Liability Assurance Corp. v. Cook, 281 U.S. 233 (1930); Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928).

[82]281 U.S. 128 (1930).

[83]35 STAT. 65 (1908), 45 U.S.C. §§51-60 (1958).

maritime employment, stated: "But seamen, including longshoremen engaged in loading or unloading, if injured on a vessel in navigable waters, could not constitutionally have the benefits of a state workmen's compensation act, even if an act of Congress so provided."[84]

As late as 1935 it was held that the claim of a longshoreman struck by a hoist while unloading a ship and knocked from the ship to the dock properly came under the federal act and could not be asserted under the state statute.[85] An interesting sidelight is the fact that seven years earlier the Court found the state act applicable to the death of a longshoreman who drowned after being knocked from a wharf into the Mississippi River by a cargo sling.[86]

THE TWILIGHT ZONE

In the early 1940's it was thus clear that while some injuries occurring on navigable waters, including those resulting from construction work on uncompleted vessels, were within state acts by virtue of the local concern doctrine, injuries occurring in navigable waters or in a dry dock to longshoremen and to workers repairing existing vessels were almost invariably within the federal statute. In *Parker v. Motor Boat Sales, Inc.*[87] the Court, however, speaking through Mr. Justice Black, who was to become the blazer of as broad a path in this field as Mr. Justice McReynolds, held in effect that federal jurisdiction validly extended to a compensation claim for a janitor who ordinarily worked on land but was killed while riding in a boat. The Court indicated that the fact that his work was habitually done on land was irrelevant. This opinion might well have started a reconsideration of the local concern rule, because the facts at hand clearly fell within that rule. However, the case was shortly to be followed by a new means of giving effect to state acts, again without overruling *Jensen*.

The doctrine of the "twilight zone"[88] was enunciated in 1942

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[84]281 U.S. at 135.

[85]Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935).

[86]T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928). See also State Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922), holding state compensation act to apply to death of longshoreman on a dock.

[87]314 U.S. 244 (1941).

[88]This expression of course refers, at least to date, to an area of alleged concurrent action between the state and federal compensation acts, and not to any

in *Davis v. Department of Labor*,[89] in which the Court held that a claim for the death of a worker handling steel on a barge during the dismantling of a bridge was validly asserted under the state statute. For the first time enunciating the "theoretic illogic"[90] of the twilight zone, Mr. Justice Black stated:[91]

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.
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> "Faced with this factual problem we must give great — indeed, presumptive — weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There we are aided by the provision of the federal act, 33 U. S. C. A. §920, which provides that in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. . . .
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> ". . . . We find here a state statute which purports to cover these persons, and which indeed does cover them if doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute."

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similar area between compensation acts and the Jones Act. See GILMORE and BLACK 356.

[89]317 U.S. 249 (1942).

[90]See *id.* at 259 (concurring opinion).

[91]*Id.* at 256.

Davis presented an entirely new approach to the problem; in fact, the Court has since indicated that it introduced a concept of an area of overlapping jurisdiction.[92] The Court of Appeals for the Fifth Circuit has described the *Davis* doctrine as " 'the first come first served' rule."[93]

While the "twilight zone" might have solved some problems from a practical standpoint, it doubtless also created the one of locating not one but two lines of demarcation and thus the twilight zone between. The difficulties incident to the twilight zone were exemplified in the perplexing actions taken by the Supreme Court in *Bethlehem Steel Co. v. Moores*[94] and *Baskin v. Industrial Accident Comm'n.*[95] In *Moores* the Supreme Judicial Court of Massachusetts, in affirming the allowance of state workmen's compensation benefits to a rigger injured on a vessel being repaired in a floating dry dock,[96] offered this often quoted analysis of the twilight zone:[97]

> "It would seem, therefore, that although apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the Jensen case, the most important question has now become the fixing of the boundaries of the new 'twilight zone,' and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. Mr. Justice Frankfurter says that 'Theoretic illogic is inevitable so long as the employee . . . is permitted to recover' at his choice under either act. 317 U.S. at page 259, 63 S.Ct. at page 230. 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 regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either

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[92]Hahn v. Ross Island Sand and Gravel Co., 358 U.S. 272 (1959).
[93]De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481, 483 (5th Cir. 1944).
[94]335 U.S. 874 (1948).
[95]338 U.S. 854 (1949).
[96]Moores's Case, 323 Mass. 162, 80 N.E.2d 478 (1948).
[97]*Id.* at 167, 80 N.E.2d at 480.

> way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future."

The Supreme Court affirmed per curiam,[98] citing the *Davis* case. This action, of course, was a clear step away from the earlier views of repairmen claims, and one strongly relied on by the employee in *Flowers*.

Prior to the Supreme Court's action in *Moores*, an intermediate appellate court in California in *Baskin* held that a materialman injured on a ship being repaired in navigable waters was not within the state act, *Davis* notwithstanding.[99] This seems in line with earlier decisions of the Court. The Supreme Court reversed per curiam for reconsideration in the light of *Moores* and *Davis*.[100] On further review the California court held that the Supreme Court must have considered the case to be within the twilight zone.[101] This ruling was subsequently summarily affirmed by the Supreme Court,[102] a still further departure from earlier doctrine relating to claims of repairmen.

Thus the combined effect of these none too enlightening decisions was to convey the impression that the twilight zone was exceedingly broad and encompassed repairmen claims, leading other courts to depart further from *Jensen* and its successors to find longshoremen within the twilight zone.[103] This problem was compounded by perplexing denials of certiorari.[104]

New Light in the Twilight Zone

Although the Court has not yet clarified these problems of the twilight zone jurisdiction, nevertheless in *Pennsylvania R.R. v.*

[98]335 U.S. 874 (1948).

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

[100]338 U.S. 854 (1949).

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

[102]Kaiser Co. v. Baskin, 340 U.S. 886 (1950).

[103]Cases cited note 25 *supra*.

[104]Sullivan v. Travelers Ins. Co., 95 So.2d 834 (La. App. 1957); Richard v.

O'Rourke,[105] a case relied on by Judge Brown in *Flowers,* it reaffirmed its position that the Harbor Workers' Act and the Jones Act together cover all maritime employees beyond constitutional reach of the state. There, as in *Nogueira,* considering the issue as to whether the Harbor Workers' Act or the Federal Employers' Liability Act applied to the claim of a freight brakeman injured on a moored car float, the Court indicated that in any event state jurisdiction could not validly apply. Concerning the Harbor Workers' Act the Court stated:[106]

> "Section 902 (4) requires the employer to pay compensation if he has 'any' employees so engaged. If, then, the accident occurs on navigable waters, the act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.' "

Certainly a literal reading of *O'Rourke* supports the conclusion that despite the earlier twilight zone rationale, longshoremen injured on navigable waters are exclusively subjects of federal jurisdiction. Judge Brown's adoption of this concept for repairmen claims seems equally logical, albeit not supported by the facts in *O'Rourke* and indeed contrary to *Baskin* and *Moores.*

Of great significance for the future are these words in *Flowers,* reviewing *O'Rourke:*[107]

> "It added the further and entirely new concept that where coverage of §903 (a) is applicable, the exclusive liability of §905 does not depend on the nature or character of the work being done by the injured employee so long as (1) that injury occurs on navigable waters and (2) the employer is such a person '*any* of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any drydock),' §902 (4). Flowers' rights under the Act for an injury admittedly received on navi-

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Lake Charles Stevedores, Inc., 95 So.2d 830 (La. App. 1957), *cert. denied,* 355 U.S. 952 (1958).

[105]344 U.S. 334 (1953).

[106]*Id.* at 341.

[107]258 F.2d 220, 224 (5th Cir. 1958).

gable waters while engaged in the performance of his duties depended, not upon his own status (even though it was purely maritime in nature), but rather upon the fact that his employer, Todd Shipyards Corporation, had *'any* . . . employees' engaged in maritime employment."

This "any employee" test, however, suggested by *O'Rourke* and approved and expanded in *Flowers,* furnishes a clue that a liberal construction of the federal statute will be given by the Court of Appeals for the Fifth Circuit. On the other hand, this concept, though doubtless a workable theory, may prove unnecessarily broad. For example, would the court extend the federal act to a secretarial employee of a shipyard injured while on board a vessel under repair merely to summon an executive to a telephone?

In 1959 came *Hahn v. Ross Island Sand & Gravel Co.,*[108] the latest milestone on this long trail through the rulings of the Supreme Court, which gave rise to the original majority view in *Noah.* It held in effect that an oiler on a dredge, with a claim within the twilight zone, in pursuing a state remedy could pursue a common law action against his employer where this was permitted under the provisions of the state workmen's compensation act when the employer had rejected the state act. Of course this result would not follow if the action were not one originally falling within the twilight zone. While this may have been overlooked by the original majority in *Noah,* it would appear that the ultimate majority has correctly limited *Hahn* to the facts there involved.

It is submitted that the original construction of *Hahn* in the *Noah* case was not well taken. *Hahn* did not deal with a longshoreman but with a worker within the twilight zone; it allowed him to exercise his remedy under the Oregon workmen's compensation statute, which, because of the employer's rejection of the act, consisted of a common law action. This was too tenuous a basis to rely upon in extending the twilight zone to longshoremen. Indeed, if longshoremen are in the twilight zone, it is suggested that the zone exists no more; all will be darkness or light according to the eye of the beholder, and a virtually complete overlapping system of federal and state compensation statutes will have come into being. As long as *Jensen,* with its head bloody but unbowed, remains law this may not constitutionally or logically be done.

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[108]358 U.S. 272 (1959).

SUMMARY

In *Flowers* the Court of Appeals for the Fifth Circuit, relying on *O'Rourke*, has rejected the argument that the twilight zone encompasses repairmen engaged in repairs to existing vessels; and in *Noah* this court has likewise denied that the twilight zone, as allegedly revitalized by *Hahn* and extended by state courts, includes claims for injuries on navigable waters by longshoremen engaged in loading or unloading vessels.[109] These results are salutary and bring some certainty into an area already the subject of needless confusion resulting from the unenlightening holdings in *Baskin* and *Moores*, as weighed in the light of earlier decisions of the Supreme Court, and from certain state decisions on longshoremen claims. There can be no question, of course, that there are myriad other types of amphibious employees whose status is still subject to dispute under the twilight zone theory, which by no means has been abrogated by *Flowers* and *Noah*. Moreover, state courts, pending definitive action by the Supreme Court of the United States, remain unfettered by *Flowers* and *Noah* and free to find other answers in the judicial maze commenced by *Jensen*.[110]

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[109]Any doubt of the intended import of *Flowers* and *Noah* was laid to rest by this dictum of the Fifth Circuit (Jones, Brown, and Wisdom, JJ.) in Atlantic & Gulf Stevedores, Inc. v. Donovan, No. 18039, Jan. 18, 1960: "[T]his Court has now firmly ruled that maritime injuries to one engaged in the classic occupation of a longshoreman loading or unloading a vessel, and one engaged in repair of an existing vessel are within the exclusive jurisdiction of the federal Act, not that of a state . . . ." Timely petition for rehearing en banc was filed and remained to be ruled upon at the time this article was submitted to the printer.

[110]An exposition of the situation now prevailing in Louisiana, where in spite of *Flowers* and *Noah* state courts continue to follow Richard v. Lake Charles Stevedores, Inc., 95 So.2d 830 (La. App. 1957), in accepting jurisdiction of longshoremen claims asserted under the state act, is found in T. Smith & Son, Inc. v. Williams, No. 17959, Feb. 17, 1960, wherein the Fifth Circuit (Tuttle, Brown, and Wisdom, JJ.) held that a federal district court was precluded by the anti-injunction statute, 28 U.S.C. §2283 (1958), from enjoining compensation proceedings instituted by a longshoreman in a state court under the state act following a determination by the federal deputy compensation commissioner that the case was properly under the federal act. The court commented, "Flowers and Noah are not the last word on the subject, only the latest word. The twilight zone cases are close enough, the Supreme Court is divided enough, and there is uncertainty enough as to the choice of controlling policies in federal-state conflicts over compensation for waterfront workers, to justify resolution of the issue through the state court route. That is the view of Louisiana courts. Right or wrong, it is entitled to deference by federal courts." The time allowed for filing petition for

Abolition of the twilight zone, even by complete and radical action, would be justified. However, only a re-examination of *Jensen* by the Supreme Court, or a congressional extension of the federal compensation act to encompass all injuries on navigable waters, could accomplish that result. Meanwhile, any certainty is welcome, and if any workers logically and constitutionally should be said to be almost invariably within the federal statute, it is suggested that *Noah* and *Flowers* have correctly identified them.

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rehearing had not expired when this article was written. Note, however, that the Fifth Circuit has held in Atlantic & Gulf Stevedores, Inc. v. Donovan, *supra* note 109, that a federal district court may compel a federal deputy compensation commissioner to conduct a hearing to determine whether the Harbor Workers' Act encompasses a particular claim of an employee even in the absence of a formal claim. The practical effects of these latest cases in providing assistance in solving the problem now prevailing in Louisiana should be closely observed. Meanwhile it is to be hoped that no such conflict among the courts develops in Florida, and that more certainty will be injected into the question by the Supreme Court or Congress.