NOTES

ADMIRALTY AND WORKMEN'S COMPENSATION: "MARITIME BUT LOCAL" DOCTRINE REJECTED AS LIMITATION ON FEDERAL JURISDICTION UNDER THE LONGSHOREMEN'S ACT

SECTION 3 (a) of the Longshoremen's and Harbor Workers' Compensation Act explicitly states that benefits may be paid only if an injury (1) occurs on navigable waters, and (2) "may not validly be" compensable under a state workmen's compensation statute.[1] In the recent case of *Calbeck v. Travelers Ins. Co.*,[2] the Supreme Court apparently jettisoned the second limitation in holding that the Longshoremen's Act provides "compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also [be] . . . within the constitutional reach of a state workmen's compensation law."[3]

In *Calbeck*, two employees, both welders, were injured while working on uncompleted vessels which had been launched into navigable rivers. In both cases, awards by Deputy Commissioners under the Longshoremen's Act were sustained by federal district courts; but the Court of Appeals for the Fifth Circuit reversed on the ground that since injuries sustained on launched but uncompleted vessels are clearly compensable under state acts, the second limitation of section 3 (a) removed jurisdiction from the Deputy Commissioners to hear the claims.[4] The Supreme Court in a six to two decision reversed and sustained the awards.

The federal-state conflict over workmen's compensation for injured harbor workers stems from the 1917 case of *Southern Pac. Co. v. Jensen*[5] in which the Supreme Court declared that state compensation statutes could not constitutionally apply to maritime

[1] 44 Stat. 1426 (1927), 33 U.S.C. § 903 (a) (1958).
[2] 370 U.S. 114 (1962).
[3] *Id.* at 117.
[4] Avondale Shipyards, Inc. v. Donovan, 293 F.2d 51 (5th Cir. 1961); Travelers Ins. Co. v. Calbeck, 293 F.2d 52 (5th Cir. 1961). Since both cases involved the same questions of fact and law, they were consolidated in the petition for certiorari. See Travelers Ins. Co. v. Calbeck, 368 U.S. 946 (1961).
[5] 244 U.S. 205 (1917).

workers injured on navigable waters since this would materially prejudice the uniformity of the general maritime law.[6] Subsequently, in order to mitigate the harshness of leaving thousands of harbor workers without a compensation remedy on the mere fortuity of their being injured on navigable waters instead of on land or a dock, the Court fostered the development of the "maritime but local" doctrine.[7] This concept allowed recovery under state acts for some injuries received on navigable waters on the ground that, although occurring within the admiralty jurisdiction, state compensation would not disrupt maritime uniformity since the employee's activity at the time of injury had no direct relation to navigation or commerce.

In the meantime, Congress twice enacted statutes designed to allow state acts to apply to all injuries on navigable waters. Both were struck down by the Supreme Court as unconstitutional delegations of legislative power which would make the maritime law subject to discordant state laws.[8] Finally, in 1927 Congress passed the Longshoremen's Act[9] whose purpose was to provide a federal

[6] U.S. CONST. art. III, § 2 extends the judicial power of the United States to "all cases of admiralty and maritime Jurisdiction." The Court also interpreted U.S. CONST. art. I, § 8 cl. 18, as giving Congress paramount power to determine the substantive maritime law. Southern Pac. Co. v. Jensen, *supra* note 5 at 214-16. See generally, D. Currie, *Federalism And The Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158; Morrison, *Workmen's Compensation and the Maritime Law,* 38 YALE L.J. 472 (1929); Wright, *Uniformity in the Maritime Law of the United States* (pts. 1, 2), 73 U. PA. L. REV. 123, 223 (1925).

The *Jensen* doctrine does not extend to land or extensions of land, such as docks. State Industrial Comm'n v. Nordenbolt Corp., 259 U.S. 263 (1922).

[7] See, *e.g.,* Millers' Indem. Underwriters v. Braud, 270 U.S. 59 (1926); *Ex parte* Rosengrant, 213 Ala. 202, 104 So. 409 (1925), *aff'd per curiam,* 273 U.S. 664 (1926); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922). The classic statement of the "maritime but local" doctrine is found in Sultan Ry. & Timber Co. v. Department of Labor, 277 U.S. 135 (1928). See generally, 2 LARSON, WORKMEN'S COMPENSATION § 89.22 (1961) [hereinafter cited as LARSON].

However, even with the "maritime but local" exception to the *Jensen* doctrine, the vast majority of harbor workers, in particular longshoremen and repairmen, could not recover under the state statutes if injured on navigable waters. Their only remedy was an admiralty tort action. See, *e.g.,* Employers' Liab. Assur. Corp. v. Cook, 281 U.S. 233 (1930) (longshoremen); John Baizley Iron Works v. Span, 281 U.S. 222 (1930) (repairmen).

[8] Act of Oct. 6, 1917, ch. 97, § 1, 40 Stat. 395, held unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Act of June 10, 1922, ch. 216, § 1, 42 Stat. 634, held unconstitutional in State of Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924). Both acts amended the Judiciary Act of 1789 allowing state compensation statutes to apply concurrently with admiralty tort actions for injuries on navigable waters. The second amendment differed from the first only in excluding seamen.

[9] 44 Stat. 1424 (1927), as amended, 33 U.S.C. § 901-50 (1958) (constitutionality upheld in Crowell v. Bensen, 285 U.S. 22 (1932)).

compensation remedy for all employees under its coverage.

The second limitation of section 3 (a) was from the outset interpreted to exclude "maritime but local" cases from the jurisdiction of the Longshoremen's Act.[10] Since courts failed to delineate with any consistency the limits of state jurisdiction under this doctrine, however, litigation proved necessary in many borderline cases to determine whether the state or federal government had jurisdiction over the injury. Moreover, unless the injured employee simultaneously filed claims under both the Longshoremen's Act and the applicable state act, he took the risk of having his claim barred by a statute of limitations if his first choice proved wrong.[11] To alleviate this awkwardness in obtaining compensation relief, the Supreme Court in 1942 formulated the "twilight zone" doctrine.[12] The effect of this doctrine was to allow a claimant his choice between the federal or the applicable state act when the factual situation presented reasonable doubt as to the proper jurisdiction.

The Supreme Court did not, however, apply the "twilight zone" concept to the instant case, but rather based its decision on the entirely new ground that the coverage of the Longshoremen's Act extends to *all* injuries received on navigable waters, despite the possible concurrent application of a state workmen's compensation act.[13] Thus, the Court rejected the prior interpretation that the second limitation of section 3 (a) precluded federal jurisdiction over

[10] See, *e.g.*, Union Oil Co. v. Pillsbury, 63 F.2d 925 (9th Cir. 1933); Dewey Fish Co. v. Department of Labor, 181 Wash. 95, 41 P.2d 1099 (1935). See GILMORE & BLACK, ADMIRALTY § 6-49 (1957); 2 LARSON § 89.22 n. 71, § 89.23 (b); Comment, 57 YALE L.J. 243, 267 (1947).

[11] See, *e.g.*, Dawson v. Jahncke Drydock, Inc., 33 F. Supp. 668 (E.D. La. 1940); Ayers v. Parker, 15 F. Supp. 447 (D. Md. 1936).

[12] See Davis v. Department of Labor, 317 U.S. 249 (1942) (employee drowned when he fell off barge while helping to dismantle an abandoned drawbridge). See generally, Baer, *At Sea With The United States Supreme Court*, 38 N.C.L. REV. 307, 344-51 (1960); Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 HARV. L. REV. 637 (1955); Comment, 67 YALE L.J. 1205-23 (1958); Note, 53 YALE L.J. 348 (1944).

[13] 370 U.S. at 117, 126-27. *But cf.* Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369 (5th Cir. 1962), which was decided a few weeks after *Calbeck*. There a laborer cleaning a barge on a marine railroad was injured while attempting to move a heavy hose lying partially under the barge. At the time of his injury, he was standing on the ground adjacent to the marine railroad. Interpreting *Calbeck* as a "twilight zone" case, the Fifth Circuit upheld an award under the Longshoremen's Act on the ground that this case also fell within the "twilight zone." While the result in *Holland* may be justifiable on the basis that the injury occurred within the area of federal coverage, the Court in *Calbeck* clearly seemed to dispose of the "twilight zone" concept in the determination of federal jurisdiction.

"maritime but local" cases[14] and upheld the federal awards even though the claimants clearly could have obtained state compensation under the "maritime but local" doctrine.[15] Relying heavily on legislative history, the Supreme Court concluded that Congress intended the Longshoremen's Act to provide a reliable remedy for all harbor workers injured on navigable waters and this objective would be impossible unless the Act applied to the "maritime but local" cases. Several factors were utilized by the Court to support its conclusion. Time-consuming litigation to determine the necessarily vague contours of the "maritime but local" doctrine will be eliminated. Secondly, the possible failure of a state to enact a compensation statute to cover injuries under the "maritime but local" doctrine will not prevent a harbor worker injured on navigable waters from having any compensation remedy.[16] Finally, the Court pointed out that the Longshoremen's Act was desigued to eliminate the administrative burden caused by the constant litigation of the constitutional issue of maritime uniformity required by *Jensen* whenever the application of the "maritime but local" concept was at issue.

The legislative history of the Longshoremen's Act, however, does not appear to support the Court's conclusion.[17] The statutory language of the second limitation of section 3 (a) is unambiguous, and it seems clear that Congress, as in its two earlier unsuccessful attempts, intended to give the states as much jurisdiction as possible, leaving the federal act to cover only those situations where the

[14] See cases cited notes 7 and 10 *supra.*

[15] State compensation bas been consistently allowed where an injury has occurred on launched but uncompleted vessels. *E.g.,* Travelers Ins. Co. v. Gonzalez, 351 S.W.2d 374 (Tex. Civ. App. 1961); United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir.), *cert. denied,* 290 U.S. 639 (1933); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922).

[16] This argument seems moot now, however, as all states have compensation statutes and the federal courts never had much difficulty in overcoming the theoretical vacuum posed by the Court. *Compare* United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir.), *cert. denied,* 290 U.S. 639 (1933) (no federal award even though state had no compensation statute) *with* Travelers Ins. Co. v. Branham, 136 F.2d 873 (4th Cir. 1943) (same court indicated it no longer followed the *Taylor* case). *But see* Rodes, *supra* note 12 at 646-47.

[17] The meaning of the second limitation of § 3 (a) in its various forms received only minor attention in the extensive hearings and floor debates on the Longshoremen's Act. See *Hearings Before the Senate Judiciary Committee on S. 3170,* 69th Cong., 1st Sess. 56-57, 92, 95-96 (1926); *Hearings Before the House Judiciary Committee on H.R. 9498,* 69th Cong., 1st Sess. 77 (1926). The original wording of the second limitation of § 3 (a) was that the act would not apply to "employment of local concern and of no direct relation to navigation and commerce...." *Senate Hearings, supra* at 1.

Supreme Court had previously denied state competence.[18] It is submitted, however, that although the Court's interpretation of the statutory language is questionable, the extension of the Longshoremen's Act's jurisdiction in *Calbeck* was forecast by past decisions and can be supported by important practical and theoretical considerations.

Previous cases have indicated that "maritime but local" injuries might qualify for benefits under the Longshoremen's Act.[19] Furthermore, by formulation of the "twilight zone" concept twenty years prior to the *Calbeck* case, the Court clearly had implied a rejection of the prior interpretation that the second limitation of section 3 (a) demanded mutually exclusive jurisdiction between the federal and state acts in "maritime but local" cases.[20]

[18] See, *e.g., Hearings Before the House Committee on H.R. 9498,* 69th Cong., 1st Sess. 39-45 (1926); S. REP. No. 973, 69th Cong., 1st Sess. 16 (1926). See also text accompanying note 8 *supra.*

[19] See Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953), in which the Court extended the coverage of the act to include injured employees working on non-maritime, as well as maritime, activities on navigable waters so long as the employer had *any* employees engaged in maritime employment. Yet the determination that the employee was engaged in a non-maritime activity on navigable waters was the condition precedent to state recovery under the "maritime but local" doctrine both before and after the passage of the Longshoremen's Act. See cases cited in notes 7 and 10 *supra.* Since almost every waterfront employer has some employees engaged in maritime employment, the *O'Rourke* case in effect brought the great majority of the "maritime but local" cases within the coverage of the Federal act. See Dixie Sand & Gravel Corp. v. Holland, 255 F.2d 304 (1958), *aff'd on rehearing,* 269 F.2d 495 (6th Cir. 1959). *But see* Warner v. Travelers Ins. Co., 332 S.W.2d 789 (Tex. Civ. App. 1960); Indemnity Ins. Co. of North America v. Marshall, 308 S.W.2d 174, 179 (Tex. Civ. App. 1957); Baer, *supra* note 15, at 347-50. See also the leading case of Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), discussed in 2 LARSON § 89.23 (b).

[20] See Davis v. Department of Labor, 317 U.S. 249, 260 (1942) (dissent). While the second limitation of § 3 (a) excludes from the coverage of the act those cases where a state remedy may "validly be provided by state law," § 5 of the act states that liability "shall be exclusive and in place of all other liability of such employer to his employee . . . at law or in admiralty...." 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958). If § 5 is interpreted literally, it would seem to preclude the possibility of the employer's liability under both the Longshoremen's Act and the applicable state act for the same injury, seemingly allowed in a "twilight zone" case. Section 5 is, however, similar to the mutually exclusive provisions of state compensation acts, and since Industrial Comm'n v. McCartin, 330 U.S. 622 (1947), a supplementary award in a second state has been allowed on the rationale that these provisions are exclusive of common law liability, but not of supplementary compensation benefits in a second forum. Double recovery is prevented by deducting the amount of the original award from the second. See generally, 2 LARSON §§ 85.00-86.50; Wellon, *Workmen's Compensation, Conflict of Laws and the Constitution* (pts. 1-2), 55 W. VA. L. REV. 131, 233 (1953). By analogy the *McCartin* rule could be applied to the alternative recovery permitted by the "twilight zone," but the Supreme Court has never said that the same principle applies. Courts have had difficulty in reconciling the conflict between the alternative recovery permitted in a "twilight zone" case with the mutual

Application of the "twilight zone" doctrine by the courts, however, yielded only confusion. Many courts employed the concept to expand state jurisdiction beyond the limits of the "maritime but local" doctrine,[21] while a few courts recognized the federal and state acts as concurrently operative in every instance.[22] Other courts, however, restricted the application of the "twilight zone" option and continued to adhere to the doctrine that the federal and state acts were mutually exclusive.[23] In the meantime, the Supreme Court in a series of per curiam decisions merely affirmed the expansion of state jurisdiction without explanation of its limits.[24] Hence, the vagueness and constitutional implications of the "maritime but local" concept were compounded and thus continued to be the major cause of administrative confusion in the federal-state conflict over compensation for harbor workers.[25] Perpetuation of this confusion by literal application of section 3 (a) in the instant case would have been unjustifiable.

In seeking to dispel this confusion, the Court in *Calbeck* explicitly recognized that the jurisdiction of the Longshoremen's Act

exclusiveness of § 5 of the act. See, *e.g.*, Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952), 66 HARV. L. REV. 524 (1953); Comment, 67 YALE L.J. 1205, 1215-23 (1958). See also note 31 *infra*.

[21] See, *e.g.*, Allisot v. Federal Shipbuilding & Drydock Co., 4 N.J. 445, 73 A.2d 153 (1950) (repair injury); Commissioner of Taxation & Fin. v. Oceanic Serv. Corp., 276 App. Div. 725, 97 N.Y.S.2d 401 (1950) (watchman); Moores's Case, 323 Mass. 162, 80 N.E.2d 478, *aff'd per curiam sub nom.* Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

[22] See Richard v. Lake Charles Stevedores, Inc., 95 So. 2d 830 (La. App. 1957), *cert. denied*, 355 U.S. 952 (1958) (longshoreman injured in hold of ship allowed to recover under Louisiana Act); Indemnity Ins. Co. of North America v. Marshall, 308 S.W.2d 174 (Tex. Civ. App. 1957) (followed the *Lake Charles* case in allowing state jurisdiction over a repair injury).

[23] See, *e.g.*, Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958), *cert. denied*, 359 U.S. 920 (1959); Warner v. Travelers Ins. Co., 332 S.W.2d 789 (Tex. Civ. App. 1960).

[24] See, *e.g.*, Bethlehem Steel Co. v. Moores, 335 U.S. 874, *affirming per curiam*, Moores's Case, 323 Mass. 162, 80 N.E.2d 478 (1948) (repair injury); Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366, *affirming per curiam*, 201 F.2d 437 (5th Cir. 1953) (injury on marine railroad some 400 feet from the water); Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959), *reversing per curiam*, 214 Ore. 1, 320 P.2d 668 (1958). The picture was further confused by the uncertainty as to the meaning of the *Jensen* doctrine and the Court's statements that it was severely restricted by Davis v. Department of Labor, *supra* note 12. See Standard Dredging Corp. v. Murphy, 319 U.S. 306, 309 (1943) (dictum); Kossick v. United Fruit Co., 365 U.S. 731, 743 (1961) (Frankfurter, J., dissenting); see also 2 LARSON § 89.25-.40; D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 202-19; Note, 72 HARV. L. REV. 1363 (1959); Comment, 50 NW. U.L. REV. 677 (1955); Comment, 2 STAN. L. REV. 536 (1950).

[25] See Baer, *supra* note 12 at 450.

and state acts are concurrent for injuries on navigable waters except in those cases where the *Jensen* doctrine of maritime uniformity made questionable the availability of a state remedy.[26] In practice, since the Court did not overrule any of its earlier decisions allowing the expansion of state jurisdiction, the net result most probably will be that only longshoremen injured on navigable waters while loading and unloading cargo will not be able to seek state benefits under the "twilight zone" doctrine.[27]

At the same time, the Court's rather conspicuous failure to undermine the pre-existing tendency of the "twilight zone" cases to extend state jurisdiction does not seem to impair the maritime uniformity sought by *Jensen*. Since state acts differ only in detail from the Longshoremen's Act, the result under either will be the same in most cases.[28] Furthermore, in almost every instance, the benefits under the federal act are more generous than those under the state acts.[29] Thus, as a practical matter, the injured claimant will probably accept the uniform federal remedy even though he could theoretically get recovery under the applicable state act.

Finally, the extension of federal jurisdiction in the *Calbeck* decision will greatly simplify the administration of the Longshoremen's Act. In order to recover, an injured employee will need to show only that the injury occurred on navigable waters and that the employer qualifies under section 904 (2).[30] Confusion about the

[26] 370 U.S. at 126.

[27] In its narrowest context the denial of state benefits to longshoremen injured on navigable waters is all that the *Jensen* case prohibited. See Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, 337 (1953) (dictum); Noah v. Liberty Mut. Ins. Co., 267 F.2d 218, *overruling on rehearing en banc*, 265 F.2d 547 (5th Cir. 1959).

[28] For the provisions of the state acts, see 1 LARSON § 56.10 and 2 LARSON 509-23 (App. A); see also Allen, *That "Twilight Zone" Between the Jurisdictions of State and Federal Compensation Acts*, 16 INS. COUNSEL J. 202, 207 (1949). *But see*, Note, 36 TULANE L. REV. 134, 137, n. 16.

[29] In terms of the maximum weekly benefits and the total maximum compensation, as of October 1961, only Alaska, Arizona and Hawaii provide overall higher benefits than the Longshoremen's Act. Some states, however, may possibly be more generous in a particular category. Thus Oregon, although providing lower weekly benefits, has no maximum total for temporary total disability, whereas the maximum total for this category under the Longshoremen's Act is $24,000. See U.S. DEP'T OF LABOR BULL. No. 161, 10-38 (1961 Supp.). See also 2 LARSON at 524-58 (App. B). The difference can be very great. Thus in *Calbeck*, the awards under the Longshoremen's Act were in one case 6.6 times higher ($83,000 to $12,600 for death benefits—Texas law) than the maximum possible under the applicable state act, and in the other case, 9.6 times higher ($134,784 to $14,000 for total permanent disability—Louisiana law). Brief for Petitioners, pp. 6, 10.

[30] 44 Stat. 1424 (1927), 33 U.S.C. § 902 (4) (1958), defines a qualifying employer as

applicability of the act will be dispelled for the first time, and accordingly, nearly all injured harbor workers will be assured of expeditious receipt of benefits under the self-executing features of the Longshoremen's Act[31] without the uncertainty, delay, and expense of litigation. Although the qualifying employer will still have to carry insurance to meet the contingency of state compensation awards in "twilight zone" cases, double insurance on this area has long been necessary and is a simple, inexpensive process.[32] Thus, the employer is no worse off than previously.

To accomplish these results, the Supreme Court in *Calbeck* indulged in flagrant judicial legislation. Criticism should be tempered, however, with knowledge that the Court began to rewrite the second proviso of section 3 (a) twenty years ago and with recognition of the practical benefits inuring to the injured harbor workers.

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one "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)."

[31] Under § 14 of the act the employer, or his insurer, must begin making compensation payments within 14 days after knowledge of the injury. The injured employee thus receives automatic voluntary payments and very few formal hearings involving disputed claims are ever held. See Flowers v. Travelers Ins. Co., 258 F.2d 220, 225 (5th Cir. 1958). While *Calbeck* decided that the mere acceptance of voluntary benefits under similar direct payment provisions of state acts does not preclude supplementary recovery under the Longshoremen's Act, the Court did not deal with the troublesome question of whether acceptance of payments under the act bars supplemental state recovery in a "twilight zone" case. See, *e.g.*, 2 LARSON, § 89.30-.52; Rodes, *supra* note 13, at 647-50. See also discussion in note 20 *supra*. Perhaps an equitable solution would be to allow the claimant to recover supplemental benefits in either situation unless (1) there has been a formal award under either the Longshoremen's Act or the applicable state act, or (2) the injured employee has received voluntary payments under one act for a sustained period of time without filing a claim for supplementary benefits. *Cf.* Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369, 377 (5th Cir. 1962); Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794, *modified*, 279 F.2d 75 (5th Cir. 1960); T. Smith & Son, Inc. v. Williams, 275 F.2d 397 (5th Cir. 1960); Jones v. Baton Rouge Marine Contractors, 127 So. 2d 58 (La. App. 1961); Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 (Hudson Co. Ct. 1951), *aff'd on opinion below*, 20 N.J. Super. 486, 90 A.2d 84 (App. Div. 1952), *cert. denied*, 10 N.J. 343, 91 A.2d 448 (1952) (injured employee received voluntary payments under the Longshoremen's Act for six years before filing a state claim).

[32] Forty-four states allow self-insurance; and there is a standard workmen's compensation policy used throughout the country which can be endorsed to cover, on a pro rata basis, maritime operations under the Longshoremen's Act. See Gardner, *Remedies For Personal Injuries To Seamen, Railroadmen, And Longshoremen*, 71 HARV. L. REV. 438, 450 n.34 (1958); Note, 50 CALIF. L. REV. 342, 347 (1962).