THE CONFLICT OF LAWS PROBLEM BETWEEN THE LONGSHOREMEN'S ACT AND STATE WORKMEN'S COMPENSATION ACTS

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The Longshoremen's and Harbor Workers' Compensation Act[1] is, in form, an ordinary workmen's compensation act, modelled on the New York act.[2] There are perhaps hundreds of thousands of workers as to whom, at some time or another, a question might arise whether they fall under state compensation acts or under the Longshoremen's Act: stevedores, repairmen, painters, construction workers, guards, and dozens of other categories of workers, who live on shore but who work on and off vessels or installations in navigable waters. The conflicts question has proved to be a unique one. It was not approached like the state-versus-state question, for here, instead of competition between equal jurisdictions both subject to the full faith and credit provision, the courts saw a preeminent federal maritime power on one side. But neither could it be solved by a simple enforcement of this preeminent federal power, as "seamen's" cases under the Jones Act[3] might be, because the Longshoremen's Act is by its terms confined to an area narrower than that of full maritime power in two respects: It applies only to injuries that occur upon the navigable waters of the United States, and it purports to be applicable only when state acts could not validly apply. The first of these two terms, as the ensuing discussion will show, has assumed a dominant and decisive position; the second has by judicial decision become a dead letter.

In order to understand the present state of the law on this subject, and predict its probable course in the future, one must trace the development of the state-maritime division of jurisdiction from a point some years before the Longshoremen's Act was passed. Six phases can be

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1. 33 U.S.C. § 901 *et. seq.* (1970).
2. N.Y. WORKMEN'S COMP. LAW (McKinney 1965).
3. Merchant Mariue Act, § 33, ch. 250, 41 Stat. 1007 (1920).

detected in the unfolding of this story, each representing a dramatic change in state-maritime relations.

PHASE I: UNQUALIFIED FEDERAL MARITIME PREEMINENCE

The *Jensen*[4] case, in 1917, held that New York's workmen's compensation act could not constitutionally be applied to a stevedore injured on board ship while engaged in unloading cargo at a New York pier. Both the locus of the injury, being on navigable waters, and the nature of the employment were maritime. It followed, said the Supreme Court, that application of individual state acts to such injuries would prejudice the uniformity of the maritime law. The doctrine that the maritime law's uniformity must be preserved at all costs was itself brought to full flower by this same decision, although earlier cases contained some adumbration of it.[5]

So strong and uncompromising was the Supreme Court's devotion to this principle of uniformity that it actually struck down two attempts by Congress to undo the effect of the *Jensen* decision by express legislation preserving to claimants "the rights and remedies under the Workmen's Compensation Law of any state" in maritime situations.[6]

In this phase, then, the law was relatively clear—perhaps clearer than it has ever been since, but the clarity was obtained at the price of denying no-fault compensation of thousands of workers in very hazardous "amphibious" occupations, since longshoremen, not being "seamen," did not even have the traditional seamen's no-fault remedy of maintainance and cure.[7]

PHASE II: THE "MARITIME-BUT-LOCAL" TEST

Five years after the *Jensen* case, in 1922, the *Rohde*[8] case applied to workmen's compensation a doctrine worked out earlier in death statute

4. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

5. *See, e.g.*, The Lottawanna, 88 U.S. (21 Wall.) 558 (1874).

6. Act of October 6, 1917, ch. 97, 40 Stat. 395, in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

The second attempt differed from the first in that it excepted masters and members of crews. Act of June 10, 1922, ch. 216, 42 Stat. 634, in Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

7. At this time, the concept of "seaman" was limited to the typical mariner—one who was trained to reef and maneuver a vessel. Beddoo v. Smoot Sand & Gravel Corp., 128 F.2d 608 (D.C. Cir. 1942).

8. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922).

cases:[9] The uniformity of maritime law is not prejudiced by the application of state statutes to maritime employment that is local in character. The work was deemed local if it had no direct relation to navigation or commerce. One of the best-established distinctions under this test was that between construction work on an uncompleted vessel by a carpenter, painter, plumber or other artisan, and maintenance or repair work on a vessel already completed. The former was not deemed to affect commerce, and fell within local acts;[10] the latter bore a direct relation to the facilitation of commerce, and was therefore beyond the reach of the states when the injury occurred over navigable waters.[11] Loading and unloading ships was definely related to commerce, even when the particular workman's participation in this function was intermittent or infrequent.[12] But such activities as the following were held to be of local concern: removal of a submerged obstruction by a diver;[13] building a pier from a floating raft;[14] building a marina in a navigable lake;[15] checking lumber on a barge;[16] pushing a fishing boat into the water;[17] delivering a small boat;[18] making up logging booms in navi-

9. *See, e.g.*, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

10. *Federal*: John Balzley 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).

Michigan: La Casse v. Great Lakes Eng'r Works, 242 Mich. 454, 219 N.W. 730 (1928) (contains thorough analysis of Supreme Court cases on point).

New York: Seeler v. Otis Elevator Co., 281 App. Div. 140, 120 N.Y.S.2d 325 (1952) (elevator company employee, injured while installing elevator aboard ship one day after commissioning but prior to final completion of construction, held within New York act).

Texas: Travelers Ins. Co. v. Gonzalez, 351 S.W.2d 374 (Tex. Civ. App. 1961) (claimant was injured while working as a painter and sandblaster on a new and incomplete drilling barge, docked on navigable waters. The court affirmed state compensation jurisdiction with the comment that there was no other evidence, such as the nature of the contract under which the barge work was being done, to indicate maritime service or employment).

11. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922).

12. Employers' Liab. Assur. Corp. v. Cook, 281 U.S. 233 (1930).

13. Miller's Indem. Underwriters v. Braud, 270 U.S. 59 (1926).

14. State Indus. Bd. v. Terry & Tench Co., 273 U.S. 639 (1926).

15. Garrisey v. Westshore Marina Associates, 2 Wash. App. 718, 469 P.2d 590 (1970) (claimant injured while working on a marina being constructed in a navigable lake sought and received compensation benefits, and then sought to recover damages against the employer for negligence and for unseaworthiness of the barge on which he was working. Held, work being done was of local concern, so that plaintiff's election of compensation benefits was binding).

16. Rosengrant v. Harvard, 273 U.S. 664 (1927).

17. Alaska Packers Ass'n v. Industrial Acc. Comm'n, 276 U.S. 467 (1928).

See also Cordova Fish & Cold Storage Co. v. Estes, 370 P.2d 180 (Alaska 1962) (a crab fisherman was injured at the end of the day while moving some crab pots on the deck of the boat, which was tied to the dock. The pots, the boat, a helper, and the bait were supplied by the cannery, although at times the fisherman dug his own bait when the supply was not available. The court held that his duties were sufficiently adjacent to the

gable water;[19] working as a sweeper on a garbage scow;[20] and the servicing of a refrigerator in a ship's galley by a local refrigerator company.[21]

All this, while it constricted the area within the ban of the *Jensen* case, still left all stevedores and a large proportion of the other amphibious workers outside the range of any no-fault compensation protection.

PHASE III: THE LONGSHOREMEN'S ACT

In 1927, the Longshoremen's and Harbor Workers' Compensation Act was passed with the object of covering those waterfront workers whom the best efforts of Congress and the state courts had failed to bring within state protection. Its limits of applicability were defined in terms related to maritime power, on the one hand, and state power, on the other, as worked out by case law in Phases I and II. That is, the Longshoremen's Act did not, in any event, extend to an injury unless it occurred upon navigable waters of the United States; and, even if this condition was satisfied, it applied only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."[22]

As to the requirement of occurrence of injury on navigable waters, this meant that the general maritime character of claimant's employment was ineffective to bring him under the act if the injury occurred on land; and it was of no consequence that the great bulk of his work was on the water, or that his landward excursions were brief, temporary and intermittent.[23] Of course, since the sea is so close to the land, hair-splitting decisions were occasionally necessary in assigning the locus of injury to the one or the other. The *Taylor*[24] and *Minnie*[25] cases provide the classical illustration of this process. In *Taylor*, the

business of the cannery to apply the twilight-zone theory on a maritime-but-local concept, since the crab pots were placed in "inland waters" less than a mile from shore. State compensation award affirmed).

18. Szumski v. Dale Boat Yards, Inc., 48 N.J. 401, 226 A.2d 11 (1967) (decedent suffered a fatal heart attack while at sea in a small boat he was delivering, although 90% of his time was spent on land. Held, New Jersey had jurisdiction to apply its compensation act).

19. Sultan Ry. & Timber Co. v. Dep't of Labor & Indus., 277 U.S. 135 (1928).

20. *In re* Herbert's Case, 283 Mass. 348, 186 N.E. 554 (1933).

21. Hammond v. Albany Garage Co., 267 App. Div. 647, 47 N.Y.S.2d 897 (1944).

22. 33 U.S.C. § 903 (1970).

23. Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928).

24. T. Smith & Son Inc. v. Taylor, 276 U.S. 179 (1928). See the fuller discussion of this type of question, including more recent cases, at text accompanying notes 59-60 *infra*.

25. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935).

injury occurred when a longshoreman, standing on a dock, was knocked into navigable water by a crane operated from a vessel. Compensation under a state act was upheld because the impact occurred upon the land, and it was the impact that caused the injury and gave rise to the workman's rights. In *Minnie,* the positions were exactly reversed: The workman was on the deck of a vessel when a crane, operated from the land, struck him and knocked him onto the land. Again the place where the initial blow fell was held to control, and the state compensation act was held inapplicable.

As to the second condition of applicability—the absence of state power to cover the injury—the decisions for the first 15 years under the Longshoremen's Act followed the standards laid down during Phase II, amassing an elaborate body of law classifying endless combinations and permutations of land and maritime employment foctors.[26] Toward the end of Phase III there was a case typical of those which kept the courts busy and the litigants uncertain, *Parker v. Motor Boat Sales.*[27] A small store selling boats and maritime equipment had a janitor and handyman whose work was almost entirely on land. On this occasion, however, he was sent to help carry an outboard motor to the river to be tested. Without authorization he went along on the test run and was drowned when the boat capsized. The deputy commissioner awarded compensation under the Longshoremen's Act; the district court affirmed; the circuit court of appeals reversed;[28] and the Supreme Court restored the original award. The Court stressed that the maritime character of decedent's employment was not to be determined by the habitual performance of duties on land, but by the character of the activity in which he was engaged at the moment of injury.

This decision by the highest court appeared to scrap the "local" exception to maritime employment, for the relation to navigation and commerce of a casual and unauthorized ride in a tiny outboard motor boat might seem to approach the vanishing-point. It was not until the following year that the Supreme Court revealed what this case was leading up to.

PHASE IV: "TWILIGHT ZONE" RULE

In 1942, the Supreme Court in the *Davis* case[29] adopted what came to be known as the "twilight zone" rule. The case involved a structural

26. *See* notes 10-21 *supra.*
27. Parker v. Motor Boal Sales, Inc., 314 U.S. 244 (1941).
28. Motor Boat Sales, Inc. v. Parker, 116 F.2d 789 (4th Cir. 1941).
29. Davis v. Dep't of Labor & Indus., 317 U.S. 249 (1942).

steel worker who was engaged in dismantling a bridge across a navigable river. At the time of his death, he was working in a barge upon which the dismantled steel had been placed. He was cutting some of the steel into smaller pieces, after which it was to be carried a few hundred feet down the river for storage. While so occupied, he fell into the river and was drowned. Compensation under the state act was denied by the supervisor, the state department of labor and industries, the state superior court and the state supreme court.[30] However, on certiorari the United States Supreme Court reversed and held that the state act could be applied.

The revolutionary feature of the decision was that no attempt was made to reach this result by an extension of the existing "local concern" doctrine or by any other adaptation of principles worked out during Phases I, II and III. Two new grounds stood out in the opinion, one legal, the other utilitarian. The legal ground was that, when a compensation case falling within the "twilight zone" of uncertainty comes before a tribunal—whether a state workmen's compensation commission or a federal deputy commissioner applying the Longshoremen's Act—there is a presumption of coverage which should prevail in the absence of a convincing reason rebutting it. The Longshoremen's Act contains an express presumption of jurisdiction, while the states have the benefit of the overall presumption of the constitutionality of the application of their statutes. Therefore, given a borderline case, and given a presumption of coverage, it followed that all borderline cases were to be resolved in favor of coverage by the first act under which application was made by the claimant.

The utilitarian ground was that the court evidently felt it time to call a halt to the time-consuming and expensive process of fighting each close case through the appellate hierarchy; it therefore removed the incentive by ruling out reversals if jurisdiction was assumed anywhere within the doubtful area. The effectiveness of this move to reduce litigation was, however, subject to question, for, while it removed the necessity for pencilling a fine line between state and longshoremen's acts, it left the eventual task of drawing two lines—one on each side of the shaded area of the twilight zone. It was generally assumed that these two lines bounding the twilight zone could at least be traced by connecting the dots made by individual Supreme Court decisions on familiar categories of employment, and that the new doctrine would apply only when fact combinations appeared that did

30. 12 Wash. 2d 349, 121 P.2d 365 (1942).

not arrange themselves clearly on one side or the other of the twilight zone as marked out by these numerous and well-established precedents. If they did so fall outside the twilight zone, it was apparently also assumed that, if they fell clearly on the traditional federal side, federal coverage would be exclusive because of the preeminence of maritime power, and, similarly, if they fell clearly on the state side under the maritime-but-local cases, state jurisdiction would be exclusive because of the express provision in the Longshoremen's Act abdicating jurisdiction when state acts could validly apply.

But once more the Supreme Court had a surprise in store for the profession.

PHASE V: CONCURRENT JURISDICTION

The first sign of a possible break in this pattern involved the federal side. Of all the categories of borderline employment, the one which had been most authoritatively, repeatedly and decisively placed on the federal side was repair work on a previously-completed vessel, as distingnished from construction work on an uncompleted vessel.[31] Such an employment was involved in *Moores's Case*,[32] in which the workman was injured while helping to move repair materials on board a vessel under repair in a dry dock. The Supreme Judicial Court of Massachusetts, confronted with not only three United States Supreme Court cases but also one of its own[33] which classified this employment as federal, interpreted the *Davis* case as virtually effacing all the old landmarks. Its construction of the case is embodied in the following remarkable paragraph:

> [A]lthough 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 . . . . 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 intoler-

31. *See* notes 10-11 *supra*.

32. 323 Mass. 162, 80 N.E.2d 478, *aff'd sub nom.* Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

33. O'Hara's Case, 248 Mass. 31, 142 N.E. 844 (1924).

> able 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 way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other.[34]

If this was not what the Supreme Court meant, it had an opportunity to say so, for the case was taken there on certiorari. But the Massachusetts decision was affirmed in a *per curiam* memorandum decision.[35]

At this point it might have been possible to conjecture that the Supreme Court did not intend the implications inherent in its memorandum opinion. But this conjecture became less supportable when, in the *Baskin*[36] case, the rule in *Moores* was in effect carried a step further. Baskin was a shipyard worker who worked mostly on shore. He was injured on board a vessel while assisting in its repair by moving planks from one hold to another. The California commission and courts denied compensation.[37] The Supreme Court of the United States reversed, again in a memorandum opinion, suggesting merely that the California courts take a look at the *Moores* case. The *Baskin* case is, if anything, more striking than the *Moores* case, since in *Moores* the Court merely declined to upset an award granted by the state court, while in *Baskin* it in effect told the state court to make an award which had been denied. An award was duly made to Baskin, and the case once more found its way to the United States Supreme Court, this time on the theory that the employee had elected to come under the Longshoremen's Act by accepting some payments made thereunder, although without an award. This defense was rejected by the Court in another *per curiam* memorandum opinion,[38] citing the previous *Baskin* case, the *Moores* case and the *Davis* case.

At this point, for both chronological and analytical reasons, the still-cloudy and controversial story of possible concurrent state jurisdiction in traditionally federal areas will be interrupted to permit introduction of the next[39] major Supreme Court decision, the *Calbeck*

34. 323 Mass. 162, 167, 80 N.E.2d 478, 480 (1948).

35. Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

36. Baskin v. Industrial Acc. Comm'n, 338 U.S. 854 (1949).

37. Baskin v. Industrial Acc. Comm'n, 89 Cal. App. 2d 632, 201 P.2d 549 (1949).

38. Kaiser Co. v. Baskin, 340 U.S. 886 (1950).

39. Between *Baskin* and *Calbeck* there was another *per curiam* Supreme Court opinion which, although it contained some theoretical implications on the twilight-zone doctrine

case,[40] which, while controversial, is clear in its assertion of full concurrent federal jurisdiction in traditionally state areas of maritime injury. Two welders were injured while working on the construction of new vessels floating on navigable waters. One welder at times had worked on the repair of completed vessels; the other welder had only worked on new vessels. Thus, just as *Moores* and *Baskin* had involved one of the best-established categories of federal jurisdiction, repair of completed vessels, so *Calbeck* involved one of the best-established categories of maritime-but-local state jurisdiction, construction of new vessels.[41] Nevertheless, the Supreme Court concluded "that Congress invoked its constitutional power so as 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." To put the matter in blunt terms, the Court by judicial construction deleted from the Longshoremen's Act the second condition of coverage, "and if recovery . . . through workmen's compensation proceedings may not validly be provided by State law," as the dissent quite accurately pointed out.[42]

Since the direct holding of the case is so definite and well-settled, there is little reason to rehearse or debate in detail the merits of the Court's rationale—as it bears on the specific issue decided. But the opinion will repay some scrutiny as possibly throwing light on the still-unsettled issue: Do the states similarly now have concurrent jurisdiction in traditionally federal categories of maritime employment, notably

that evoked contemporary comment, had limited direct applicability. The case was Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959), holding that, when a case fell within the twilight zone, the fact that the employer was covered by the Longshoremen's Act did not prevent a common-law suit against him as a non-electing employer under the state act. The point is discussed in the text accompanying notes 119-120 *infra*.

40. Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962).

41. *See* text accompanying note 11 *supra*.

42. Justices Stewart and Harlan, dissenting, argued:

> I think the statute still means what it says, and what it has always been thought to mean—namely, that there can be no recovery under the [Longshoremen's] Act in cases where the State may constitutionally confer a workmen's compensation remedy. While the result reached today may be a desirable one, it is simply not what the law provides . . . .
>
> In order to avoid the harsh results . . . [of this "jurisdictional dilemma"] the Court in *Davis v. Department of Labor*, 317 U.S. 249, developed the theory of the twilight zone . . . . It was noted that both the Federal Act and the state compensation statute "show clearly that neither was intended to encroach on the field occupied by the other." . . .
>
> Whatever else may be said of the *Davis* decision, it thus clearly rested on a construction of the statute precisely opposite to that adopted by the Court today. Indeed, if today's decision is correct, then there was no reason for the "twilight zone" doctrine worked out with such travail in *Davis*. For the Court now holds that the problem which led to the *Davis* decision never really existed.

370 U.S. at 132, 136, 137.

ship repair and stevedoring? Leaving aside the Court's review of legislative history and of earlier cases, one can boil its rationale down to two practical considerations: The decision was necessary both to eliminate possible gaps in compensation protection of maritime workers and to eliminate intolerable uncertainty, delay, litigation, burdensomeness, and changeability in the process of deciding jurisdiction on a case-by-case basis. This two-part justification of the result is seen in the following passage, following the Court's review of the act's legislative history:

> In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy.[43]

As to the first ground, the possibility of *lacunae* in coverage resulted from the curious choice by the drafters of the Longshoremen's Act of the word "may" in the clause limiting the act's reach. One need only postulate a set of facts in which, under established maritime-but-local decisions, a state "may" constitutionally provide compensation coverage, but simply has not done so. We now confront a situation in which certain workers, who are clearly within federal constitutional maritime power if Congress chose to exercise it, are in danger of being left altogether unprotected by either state or federal workmen's compensation. Congress, the Court concluded, could not in the light of the legislative history have intended such a result. Therefore an interpretation must be adopted that would avoid it.

One such possible interpretation, considered and rejected, was that when Congress said "may be" it really meant "is." This, however, involved not just one difficulty but two. The first was that it necessitated changing the plain language of the statute, since "may be" does not mean "is," and consequently the Court, in principle, would have been just as guilty of tampering with Congressional language as it was when it in effect read the whole clause out. But even if the Court had construed the act to mean that federal jurisdiction was defeated only when compensation protection was in fact provided by the particular state law, it faced the second difficulty that:

> [S]uch a reading would make federal coverage in the 'local concern' area depend on whether or not a state legislature had taken certain action—an intention plainly not to be imputed to a

43. *Id.* at 124.

> Congress whose recent efforts to leave the matter entirely to the States had twice been struck down as unconstitutional delegations of congressional power.[44]

The second ground of the *Calbeck* decision, that of avoiding uncertainty and litigation, places *Calbeck* in the direct line of succession of the twilight zone cases, since it was this same ground that led to the twilight zone rule in *Davis*. The Court begins by stressing the element of vagueness: "[T]he contours of the 'local concern' concept were and have remained necessarily vague and uncertain."[45] It adds the factor of litigiousness: "There never has been any method of staking them out except litigation in particular cases."[46] Then changeability: "Such a purpose would require, rather, that federal coverage expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters."[47] And finally administrative burdensomeness:

> But that would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies; and that each and every award of federal compensation would be a constitutionally premised denial of state competence in a like situation. We cannot conclude that Congress imposed such a burden on the administration of compensation by thus perpetuating the confusion generated by *Jensen*.[48]

The Court then reviews its previous decisions, notably *Parker* and *Davis*, and points out that "they are entirely consistent with our conclusion."[49]

PHASE VI: NAVIGABLE WATERS TEST AS DOMINANT

If *Calbeck* seemed to be a bold move in the direction of enlarged federal coverage, there was to appear a case seven years later that with equal forthrightness restricted the limits of the Longshoremen's Act in relation to state jurisdiction. That case was *Nacirema Operating Co.*

44. *Id.* at 125.
45. *Id.* at 124.
46. *Id.* at 125.
47. *Id.* at 126.
48. *Id.*
49. The final issue, stemming from the prior acceptance of state benefits by one claimant, is dealt with in the text accompanying notes 108-10 *infra*.

v. Johnson.[50] It held that the Longshoremen's Act never applies unless the injury occurred upon navigable waters.

It is a little difficult to understand why this decision should have caused any particular surprise, considering the unambiguous language of the statute.[51] Probably the reason was that the "twilight zone" habit of thought had become imperceptibly transferred to the navigable waters requirement. Actually, the entire twilight zone development, from *Parker* through *Davis* to *Calbeck,* was concerned, not with the navigable waters boundary line, but with the absence-of-state-power boundary line. In all the twilight-zone cases, the fact of occurrence of the injury on navigable waters was not in dispute. There was nothing in the jurisprudence of the Supreme Court that could be cited as a holding or even a dictum that the act applied beyond navigable waters. The best that the dissenting justices could come up with was a rather loose fragment of a sentence buried in a quotation from a Fifth Circuit case used by the Court in *Calbeck,*[52] and a statement by a federal district judge picked up by Judge Sobeloff in the decision below.[53] Three other

50. 396 U.S. 212 (1969). Justices Douglas, Black and Brennan dissented.

51. "Compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . ." 33 U.S.C. § 903(a) (1970).

52. The dissent stated that "we" (*i.e.,* the Supreme Court) had said in *Calbeck,* 370 U.S. at 130: ". . . 'Congress intended the compensation act to have a coverage co-extensive with the limits of its authority . . . .'" This, however, is followed by ". . . *quoting* from De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481, 483." (Emphasis added). In other words, the Supreme Court was not itself the author of the quotation—the Circuit Court was. Moreover, if the entire quoted sentence is read, which the dissent chops off without indicating that the sentence quoted was not complete, it is clear that the statement is addressed only to the issue of federal power in relation to the second limitation, "if recovery . . . may not validly be provided by state law." 370 U.S. at 130. At both the beginning and end of the complete quotation the phrase "on navigable waters" appears (see 370 U.S. at 129, 131), indicating that there was never any consideration of the possible issue of extending federal coverage beyond this point. Throughout the *Calbeck* opinion, the Court repeatedly and scrupulously limits its statements to injuries upon navigable waters. The phrase occurs on almost every page of the opinion; *see, e.g.,* 370 U.S. at 115, 116, 117, 119, 120, 124, 125, 126, 129 and 131. It is invariably included at those points where the Court sums up its exact holding; *e.g.*: "We conclude that Congress used the phrase 'if recovery . . . may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters." 370 U.S. at 126.

53. The passage from Judge Sobeloff's opinion most on point is this:

> Again, in the words of Judge Palmieri [in Michigan Mutual Liab. Co. v. Arrien, 233 F. Supp. 496, 500, aff'd 344 F.2d 640], it thus appears that "upon navigable waters" is to be equated with "admiralty jurisdiction."

398 F.2d at 905.

circuits were cited by the Supreme Court as having held *contra* the Fourth Circuit's holding here under review.[54]

The principal argument of the respondents was that the act should be so construed that coverage follows not the situs of the injury but the status of the longshoreman as a person engaged in performing a maritime contract. But, as the Court points out, the distinction between locality of injury and locality of contract as a determinant of jurisdiction is a familiar one. In the early history of workmen's compensation acts, much of the story concerns the choice between tort or contract theories as the basis for jurisdiction.[55] If Congress had intended to adopt the contract approach, there would have been no mystery about how to do it, since many states had already done so, and since for other purposes the concept of admiralty contract jurisdiction, extending over all contracts relating "to the navigation, business or commerce of the sea" wherever made or executed, was well known.[56] But the language chosen is unambiguously that of place of injury, and, if there were any doubt, the legislative history traced by the Court fully confirms this conclusion.

The Court readily concedes that there is much to be said for a uniform treatment of longshoremen injured while loading or unloading a ship. There has always been something incongruous about the picture of a stevedore walking in and out of a federal and state act dozens of times a day whenever he crosses a gangplank. But to change this is a matter for Congress, which originally made this choice for reasons that admittedly are not as cogent today as they were in 1927; that is, the locality approach was more suited to the original objective of filling the gaps left by state coverage than would have been the contract approach, whose objective would necessarily have been a sweeping takeover of entire categories of employment. The Court goes on to show, however, that extending the outer boundaries of the act to the periphery of maritime jurisdiction rather than of navigable

54. *See* 396 U.S. at 214 n.4:

Nicholson v. Calbeck, 385 F.2d 221 (C.A. 5th Cir. 1967), cert. denied, 389 U.S. 1051 (1968); Houser v. O'Leary, 383 F.2d 730 (C.A. 9th Cir. 1967), cert. denied, 390 U.S. 954 (1968); Travelers Insurance Co. v. Shea, 382 F.2d 344 (C.A. 5th Cir. 1967), cert. denied *sub nom.* McCullough v. Travelers Insurance Co., 389 U.S. 1050 (1968); Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640 (C.A. 2d Cir.), cert. denied, 382 U.S. 835 (1965).

55. *See* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 87.20, 87.30 (1952).

56. De Lovio v. Boit, 7 F. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Story, J.).

waters would by no means automatically ensure uniformity and certainty:

> And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion which previously existed on the seaward side.[57]

It only remained for the Court to dispose of the argument that the scope of the act was broadened by the Extension of Admiralty Jurisdiction Act[58]—a not very arduous task. There are half-a-dozen obvious reasons why this 1948 legislation, in connection with which the Longshoremen's Act was never mentioned, has no relevance to the matter in hand, several of which the Court patiently enumerates. The most self-evident is that the Extension Act is plainly, both by its wording and its legislative history, aimed at the specific problem of extending maritime jurisdiction to allow suits in rem or in personam for damage to person or property in cases of ship-caused injury on a pier or on land.

MEANING OF "INJURIES UPON NAVIGABLE WATERS"

Up to this point, the story of the Supreme Court's development of the doctrines controlling longshoremen's conflicts has been told in mainly chronological order, without lingering too long at various points to examine the controversies that may have been left along the way. The reason for this method of exposition is that these unresolved issues can be intelligently discussed only against the full backdrop of Supreme Court jurisprudence touching all aspects of the relation of the Longshoremen's Act to state acts. It is unquestionably true that the *Calbeck* and *Johnson* cases swept large areas clean of uncertainty by providing two straightforward doctrines: first, that the Longshoremen's Act *always* covers *all* injuries occurring upon navigable waters, and second, that it *never* covers injuries *not* occurring upon navigable waters. Obviously this pair of rules now throws a heavy burden upon the concept of "occurring upon navigable waters," and accordingly the contro-

57. 396 U.S. at 223.

58. 46 U.S.C. § 740 (1970). The pertinent passage is:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

versies surrounding the application of that test will be examined first. It must next be noted that, although the *Calbeck-Johnson* axis is in principle sharp and clear as to what the Longshoremen's Act does and does not cover, there is as yet no corresponding sharp and clear decision on what, as a result of all these developments, the state acts do or do not cover on the seaward side of the *Jensen* line. That question, which must necessarily ask to what extent there is a twilight zone affecting, or concurrent state jurisdiction over, maritime injuries, will be treated next. Then, to the extent that some concurrent jurisdiction may exist, there follows the problem of possible successive and supplementary awards whether in the form of state awards followed by federal or federal awards followed by state.

The most common problem requiring a determination of the exact place of injury is that in which the original impact or act causing injury, and the place where the injury or death is consummated, are divided between navigable waters and shore. A pair of typical early cases, *Taylor* and *Minnie*,[59] have already been mentioned, in the first of which a man standing on a dock was knocked into the water, and in the second of which a man standing on a ship was knocked onto land. These two cases, both decided by the Supreme Court, held that the point of initial impact controlled, as the act which caused the injury and created the longshoreman's rights.

The present rule, however, appears to be one aimed not so much at attaining conceptual symmetry as one designed to ensure maximum preservation of the rights of the worker and his family. Thus, if the issue is that of affirmative rights under the Longshoremen's Act, compensation would undoubtedly now be upheld if either the place of impact or the place of culmination was on navigable waters. The *Minnie* case[60] would cover the former. The latter is the fact situation in *Marine Stevedoring Corp. v. Oosting*,[61] in which compensation under

59. *See* notes 21-22 *supra*.

60. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935). *See also* Mach v. Pennsylvania R.R., 198 F. Supp. 469 (W.D. Pa. 1958). *Cf.* Tarabocchia v. John W. McGrath Corp., 270 F. Supp. 605 (S.D.N.Y. 1966) (claimant's injury sustained in a fall from a removable skid on a pier to the apron below held not to occur on navigable waters).

61. 238 F. Supp. 78 (E.D. Va. 1965), *aff'd*, 398 F.2d 900 (4th Cir. 1968).

See also The Interlake S.S. Co. v. Nielsen, 338 F.2d 879 (6th Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), and O'Keeffe v. Atlantic Stevedoring Co., 354 F.2d 48 (5th Cir. 1965) (longshoreman was caught up from the dock by a ship-based cargo loading rig and hoisted into the air by one leg. He fell and suffered a fractured temporal bone, but death was caused by drowning in the "slip." The court held that the accident had occurred on navigable waters and therefore the widow's remedy would be a Longshoremen's Act award).

the Longshoremen's Act was awarded by the federal district court and affirmed by the Fourth Circuit in the case of a longshoreman who was drowned after being knocked off a pier. It is significant that this case, although grouped with the cases in the Fourth Circuit that went to the Supreme Court under the name of *Nacirema Operating Co. v. Johnson,* and indeed although it gave its name to the decision below, was not itself taken to the Supreme Court.

When the issue stems from the assumption of jurisdiction by a state, in view of the tone of Supreme Court cases since *Davis,* it is difficult to believe that a state would be denied the right to award compensation if either the initial impact[62] or the culmination were on land. Similarly, if the effect of a finding of injury on navigable waters is to defeat an action for damages rather than to confer affirmative benefits, the question may be resolved in favor of the plaintiff in the type of case in which the impact is on land and the longshoreman is plunged into navigable waters.[63]

One of the alternative grounds relied upon by Judge Sobeloff in the *Johnson* group of cases[64] was that the piers on which the accidents occurred were quite large, so that small vessels and barges could pass beneath them; accordingly, he reasoned that these cases could be analogized to instances in which compensation had been awarded for injuries resulting from plane accidents above navigable waters.[65] The Supreme Court firmly rejected this idea saying: "Piers, like bridges, are not transformed from land structures into floating structures by the mere fact that vessels may pass beneath them."[66]

62. When the original impact was on land, T. Smith & Son Inc. v. Taylor, 276 U.S. 179 (1928), presumably still stands, upholding the claim under state law.

63. Stott v. Thompson, 294 Ill. App. 450, 14 N.E.2d 246, *cert. denied,* 205 U.S. 639 (1938). *See also* Murphy v. Boston & Maine R.R., 319 Mass. 413, 65 N.E.2d 923 (1946); *cf.* Baldwin v. Linde-Griffith Constr. Co., 115 N.J.L. 608, 181 A. 35 (Ct. Err. & App. 1935). See discussion of the general question of the relation between compensation coverage and availability of common law actions at text accompanying notes 119-20 *infra.*

64. Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968).

65. Judge Sobeloff cited D'Aleman v. Pan American World Airways, 259 F.2d 493 (2d Cir. 1958), which held that the phrase "on the high seas" in the Death on the High Seas Act, U.S.C. §§ 761-67 (1970), included a cause of action arising in a plane flying above the ocean.

See also Nalco Chemical Corp. v. Shea, 419 F.2d 572 (5th Cir. 1969) (decedent, a pilot-salesman, spent most of his time traveling to offshore oil platforms by float plane or boat and often spent as long as a week at a time at the employer's offshore installations. He was killed while delivering chemicals to a platform by plane. Employer was held to be subject to the Longshoremen's Act because decedent's work came under this classification).

66. 396 U.S. at 215 n.6. The Court cites its own decision in Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 360, 366 (1969). The Fifth Circuit had rejected a similar contention several years earlier in Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967) (that a small

The analogy is somewhat far-fetched, in view of the fact that, in the case of the pier, one begins with a structure connected permanently to the land and festooned with a long and venerable line of Supreme Court cases holding that they are extensions of the land, while in the airplane cases one begins with no connection except thin air. Piers, docks, wharves and all similar structures permanently attached to the land have always been treated as part of the land,[67] as distinguished from gangplanks,[68] skids,[69] and comparable structures[70] that provide only temporary connection between land and vessels. The pier need not be directly connected to land; it has been held sufficient if a permanent pier was attached to the outboard edge of a warehouse which itself was partially on land.[71]

Although the constitutional maritime power of the United States includes not only the navigable waters of the United States but also the high seas as well, it seems clear from the choice of statutory language that Congress intended to confine the Longshoremen's Act to the territorial navigable waters of the United States. This intent is suggested by the fact that, when Congress wanted to cover injuries sustained in oil drilling operations beyond territorial waters, it felt it necessary to pass a separate act, the Outer Continental Shelf Lands Act,[72] applying the provisions of the Longshoremen's Act to such injuries.

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craft no larger than a canoe could navigate under the pier was held not to make the location of the injury "upon navigable waters"—denial of compensation affirmed).

67. Swanson v. Marra Bros., 328 U.S. 1 (1946); Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935); T. Smith & Son Inc. v. Taylor, 276 U.S. 179 (1928); State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922); Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316 (1908); The Plymouth, 70 U.S. (3 Wall.) 20 (1866); Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967); Johnston v. Marshall, 128 F.2d 13 (9th Cir.), *cert. denied*, 317 U.S. 629 (1942); Stansbury v. Atlantic & Gulf Stevedores, Inc., 159 So. 2d 728 (La. App. 1964).

68. The Admiral Peoples, 295 U.S. 649 (1935); Beasley v. O'Hearne, 250 F. Supp. 49 (S.D.W. Va. 1966) (decedent worked at a coal crusher and tipple on the banks of the Ohio River. The coal was loaded on barges moored to pilings off-shore, and access to the barges was by way of a ladder. While working, decedent fell off a barge, ladder or a catwalk connecting the piling with the shore and drowned. The court held that such work involved maritime employment, and that the death occurred on navigable waters, regardless of which of the above alternatives was actually true); West v. Erie R.R., 163 F. Supp. 879 (S.D.N.Y. 1958); Caldaro v. Baltimore & O.R.R., 166 F. Supp. 833 (E.D.N.Y. 1956).

69. Michigan Mut. Liab. Co. v. Arrien, 344 F.2d 640 (2d Cir. 1965) (claimant was injured while working on a temporary skid between the ship and the wharf—held that the accident occurred upon navigable waters and was within the Longshoremen's Act).

70. Byrd v. New York Cent. Sys., 6 N.J. Super. 568, 70 A.2d 97 (Hudson County Ct., L. Div. 1949).

71. Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967), discussed in note 66 *supra*.

72. 43 U.S.C. § 1333(c) (1970). The relevant portion of the Act is as follows:

The general body of cases defining and identifying "navigable waters" is, of course, directly usable to determine Longshoremen's Act jurisdiction. In spite of the wealth of precedent, an occasional question can still arise about whether particular waters are navigable. For example, in *Morrison-Knudsen Co. v. O'Leary*,[73] during the construction of a dam across a navigable river, four construction workers had been drowned while attempting to close off the temporary diversion tunnel. The court rejected the employer's contention that, since only one-twentieth of the river stream was passing through the tunnel, the workers were not on navigable waters within the Longshoremen's and Harbor Workers' Compensation Act.

The full wording of the navigable-waters section of the Longshoremen's Act is: ". . . upon the navigable waters of the United States (including any dry dock)."[74] The inclusion of the word "dry dock" as designating a specific area of coverage presents the courts with a straight question of definition of a statutory term, free of any of the usual overtones of policy, philosophy, or constitutional principle. There are, according to the Bureau of Yards and Docks of the Navy Department, three principal types of facilities used for dry docking.[75] The first,

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With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Act under this section—
(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
(2) the term "employer" means an employer any of whose employees are employed in such operations; and
(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

It has been held that, under this langnage, there is no room for twilight zone between state acts and the Shelf Lands Act: Crooks v. American Mut. Liab. Ins. Co., 175 So. 2d 875 (La. App. 1965) (under 43 U.S.C.A. § 1333, subsections (b) and (c), an employee injured while employed in drilling operations 30 miles off shore can recover only under the Longshoremen's Act); Goodart v. Maryland Cas. Co., 139 So. 2d 567 (La. App. 1962) (a general mechanic was injured while being transported from a crewboat to the platform of an oil rig situated in the Gulf of Mexico. The court held that extension of the Longshoremen's Act under the Outer Continental Shelf Lands Act established exclusive jurisdiction under the federal act and preempted an award under the Louisiana act. The locale of the injury controlled even though the land-based mechanic was not employed as the typical maritime worker, longshoreman, or harborworker); Touchet v. Travelers Indem. Co., 221 F. Supp. 376 (W.D. La. 1963) (oil field worker injured while working on off-shore drilling platform exclusively under federal, not state, act).

73. 288 F.2d 542 (9th Cir. 1961) (court, affirming, stressed that all the activities of the worker were directly concerned with a maritime purpose).

74. 33 U.S.C. § 903(a) (1970).

75. *See* O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571, 573 (9th Cir. 1965).

whose inclusion within the term is obvious, is a floating dry dock. This is the type that may be partially submerged to allow entrance of a vessel, after which water is pumped out of the ballast tanks until the dock is clear of water. The second type, which also seems to cause no controversy,[76] is a graving dock, which is a permanently fixed basin into which a ship is floated, after which the water is pumped out, exposing the underwater portion of the hull. The third type, which has led to some difference of opinion, is a "marine railway." This is a permanently fixed track that extends from below the water line, where a ship floats on a cradle which is then pulled out of the water on the tracks, to a point above, and sometimes a considerable distance from, the water line. Marine railways have usually been classed as dry docks when being used for repair purposes,[77] even, in one instance, at a distance of 400 feet from the water line.[78] Moreover, once the apparatus has been classed as a covered dry dock, it includes the land area under and around it from which work on the vessel must be performed. Thus, in *Holland v. Harrison Bros. Dry Dock and Repair Yard Inc.*,[79] an employee engaged in cleaning sand off a barge which was on a marine railway was injured when he was standing next to barge with both feet on dry land. The court reasoned that since a marine railway had been held to be within the Longshoremen's Act coverage, "[any] meaningful definition of marine railway should include the land immediately adjacent to the tracks *that is beneath a ship drawn up on the railway and that must be used in the course of repairing any ship on the railway.*"[80]

However, if a marine railway is used for construction of new vessels rather than repair of finished vessels, there is authority for denying such a railway the status of "dry dock." The reason is not so much derived from the old maritime-but-local distinction between repair and

76. *See* Gretna Mach. & Iron Works, Inc. v. Neumau, 316 F. Supp. 147 (E.D. La. 1970) discussed in note 81 *infra.*

77. Avondale Marine Ways, Inc. v. Hendersou, 201 F.2d 437 (5th Cir.), *aff'd per curiam,* 346 U.S. 366 (1953) (dissent argued that a marine railway differs from a dry dock. Citing *Parker* and *Davis,* the dissent further coutended that Congress made clear its purpose to permit state compensation protection whenever possible).

Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952) (marine railway, on which a tugboat was being repaired, which extended into the water, was treated as a "dry dock"); Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369 (5th Cir. 1962); Maryland Cas. Co. v. Lawson, 101 F.2d 732 (5th Cir. 1939); Continental Cas. Co. v. Lawson, 64 F.2d 802 (5th Cir. 1933). *But see* Norton v. Vesta Coal Co., 63 F.2d 165 (3d Cir. 1933).

78. Avondale Marine Ways, Inc. v. Henderson, 201 F.2d 437 (5th Cir.), *aff'd per curiam,* 346 U.S. 366 (1953).

79. 306 F.2d 369 (5th Cir. 1962).

80. *Id.* at 372 (emphasis in original).

construction, since it is clear enough that if a regular dry dock was used for new construction this would not destroy its obvious character as a dry dock.[81] Rather the reason is that a marine railway used for new construction is classified in the trade as a "building way," not as a species of dry dock. The court that carefully identified the three kinds of dry dock listed at the outset of this subsection is the court that also concluded that this kind of building-way marine railway did not fall into any of the three categories described.[82] There is *contra* authority, however.[83]

The Fifth Circuit, which produced the two most inclusive decisions,[84] embracing marine railways within the term "dry dock" subsequently drew the line at extending the concept to a conveyor belt system that extended from land onto navigable waters, but that was permanently fixed to the shore and anchored to the bottom of the waterway. An accident to a claimant working on this system was held not to have occurred upon navigable waters.[85]

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81. Gretna Mach. & Iron Works, Inc. v. Neuman, 316 F. Supp. 147 (E.D. La. 1970) (claimant was injured in a graving dry dock which was used almost exclusively for new construction rather than repair. This distinction was held not to take the site of the injury out of the meaning of the term "dry dock" in the Longshoremen's Act); Kelso Marine, Inc. v. Hollis, 316 F. Supp. 1271 (S.D. Tex. 1970) (claimant was injured while working on a barge which was being constructed. The barge was resting on a synchrolift dry dock, which lifts vessels vertically rather than on horizontally inclined tracks. Injury held to be within the jurisdiction of the Longshoremen's Act). *See also* Hansen v. Perth Amboy Dry Dock Co., 48 N.J. 389, 226 A.2d 4 (1967) (benefits under the Longsboremen's Act paid for in injury to claimant while he was painting a new ship in dry dock).

Even if it is the dry dock itself that is under construction, the injury is covered. In Travelers Ins. Co. v. Branham, 136 F.2d 873 (4th Cir. 1943), the dry dock was only 5% completed at the time the decedent was killed by a fall from a barge inside the dry dock. Later, when the same dry dock was 62% completed, it was again the scene of an accident. By this time the water had been pumped out of the area where decedent was working, but the court held that the decedent was constructively in navigable waters, and permitted recovery under the Longshoremen's Act. Travelers Ins. Co. v. McManigal, 139 F.2d 949 (4th Cir. 1944).

82. O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571 (9th Cir. 1965) (claimant was injured while working on a ship that was still on the building way. Held, a building way is not a dry dock, and the claimant was covered only by the local compensation act). *Accord,* American Mut. Liab. Ins. Co. v. Neuman, 318 F. Supp. 398 (S.D. Ala. 1969).

83. Port Houston Ironworks, Inc. v. Calbeck, 227 F. Supp. 966 (S.D. Tex. 1964) (award under Longshoremen's Act affirmed for claimant injured while working on building ways).

84. Avondale Marine Ways, Inc. v. Henderson, 201 F.2d 437 (5th Cir.), *aff'd per curiam,* 346 U.S. 366 (1953); Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369 (5th Cir. 1962).

85. Labit v. Carey Salt Co., 421 F.2d 1333 (5th Cir. 1970).

A "TWILIGHT ZONE" FOR THE "NAVIGABLE WATERS" TEST?

It was stressed earlier that the twilight zone approach was not designed to deal with close cases involving the navigable-waters line of demarcation, but to deal with the flood of close cases applying the maritime-but-local doctrine. However, now that under *Calbeck* the maritime-but-local and absence-of-state power tests have no further effect on assumption of federal jurisdiction, and with the navigable-waters test becoming decisive as to federal coverage, it would not be surprising to encounter attempts to soften the hard edges of the navigable-waters line by employing something like the twilight zone approach in close cases.

To identify the precise problem, one must postulate a fact situation in which the decision on coverage of the state act or the federal act turns exclusively on the navigable-waters test. For example, suppose that the question is whether a state act applies to a waterfront worker who (we will assume for the sake of argnment) cannot be reached by the state on any amount of stretching of the maritime-but-local concept. There remains, however, the fact that a state can always cover an injury occurring on land, rather than on navigable waters. The most direct way, then, to get state coverage would be to establish that the injury itself lies on the landward side of the *Jensen* line.

In order to try this out on an actual case, let us suppose that *Holland* arose in the form of a claim for state compensation.[86] The activity there involved was repair, not new construction, and consequently the traditional maritime-but-local rule would not help the claimant. But there he was, with his feet firmly planted on the soil of the state—how can anyone say that the state cannot take jurisdiction? Unquestionably a state award of compensation would be upheld on these facts, although the employee was engaged in maritime employment.[87] The actual *Holland* case involved a claim under the Longshoremen's Act, which was allowed because the marine railway on which the work was being done was considered to be a "dry dock." It is of unusual interest that this is one of the first cases (perhaps the only case) in which the twilight zone doctrine has been applied to the navigable-waters test. The court invoked *Moores's Case*[88] as recognizing a twilight

86. Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369 (5th Cir. 1962).

87. *See* State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).

88. 323 Mass. 162, 80 N.E.2d 478, *aff'd sub nom.* Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

zone that intended "to include within a wide circle of doubt all water-front cases involving aspects pertaining both to the land and to the sea where reasonable argument can be made either way."

Another class of cases in which a twilight zone or concurrent jurisdiction approach should be applied to a decision turning exclusively on the navigable waters test would be the *Minnie-Taylor*[89] category. These cases involve an initial impact which occurred upon land and a culmination of the injury which occurred upon navigable waters, or vice versa. If a man comes crashing down onto the solid ground of a state—no matter where his downward journey began or how maritime his employment was—that state, under modern modes of thought, should have the right to say that the resulting injury or death was within the state's jurisdiction. If the federal government wants to assert jurisdiction also, on the theory that the initial impact took place on navigable waters, there is no harm done, so long as no attempt is made to assert that this jurisdiction is exclusive once asserted.

It is no answer to say that the federal government could, if it wished, constitutionally assume exclusive jurisdiction over maritime contracts, since it is clear under *Johnson* that this is not in fact what Congress has done. It has chosen instead a statutory boundary line ("occurring on navigable waters") well short of the outer limits of its constitutional power. Consequently, in any litigation over that boundary line the state may assert jurisdiction in close cases without fear that any over-stepping on its part necessarily raises a constitutional issue, as the Court in *Calbeck* made clear about the other boundary line of "local concern."[90]

Unlike the *Calbeck* opinion, the *Johnson* opinion throws little light on the question whether there might be a twilight zone on the boundary traced by the navigable-waters test. The facts before it displayed an unmistakable case of land-based injury, and there was no occasion to speculate about what might be done in close and doubt-

89. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935), T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928).

90. The Court in *Calbeck* rejected the argument that federal coverage was bounded by the "local concern" doctrine:

> But that would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies; and that each and every award of federal compensation would equally be a constitutionally premised denial of state competence in a like situation.

370 U.S. at 126.

ful cases. It may be mentioned, for what it is worth, that the first headnote in the official report reads:

> 1. The Longshoremen's Act . . . does not provide compensation to workmen injured on a pier permanently affixed to land and hence *clearly* within the jurisdiction of the State.[91]

If the opinion itself contained these exact words, it might be argued that *Johnson's* flat abdication of landward coverage applies only to cases in which state coverage is clear. But in any event, this seems a reasonable and practical interpretation of the decision, since otherwise unclear cases falling in the shadowland along the waterline might go uncompensated by either federal or state systems.

It is also significant that in connection with its last argnment the dissent adduces the second of the two situations utilized above as examples of the need for recoguizing a twilight zone—that of the impact-culmination dichotomy:

> In addition to the cases being reviewed here, the Court of Appeals affirmed a judgment in favor of the widow of a longshoreman (238 F. Supp. 78), who, while working on the pier, was struck by a cable and knocked into the water where he died. It is incongruous to us that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happend.[92]

The incongruity would be lessened somewhat by a recognition that the principal case's forthright decision was possible because the facts on land situs were clear, in that both the initial impact and the culmination were on land, and by a corresponding recoguition that in unclear categories, such as that cited by the dissent, a twilight area of concurrent jurisdiction must be accepted.

CONCURRENT STATE JURISDICTION IN TRADITIONAL FEDERAL MARITIME AREAS?

Earlier in this article, the story of the development of the twilight zone and concurrent jurisdiction doctrines as applied to the maritime-but-local distinction was suspended to fit the *Johnson* case into the unfolding pattern. It is now necessary, with all the background in place, to confront the most troublesome remaining question: How broad is

91. 396 U.S. at 212 (emphasis added).

92. *Id.* at 225.

the possible jurisdiction of state acts over maritime injuries that are now also clearly covered by the Longshoremen's Act under *Calbeck*?

Conceptually, there are three possible answers. At one end of the spectrum, it could be said that, by operation of the twilight-zone principle, the states have in effect concurrent jurisdiction over all maritime injuries also covered by the Longshoremen's Act, including those incurred in the course of activities, such as ship repair and longshoring, that previously had been definitely assigned to the Longshoremen's Act under the maritime-but-local line of cases. At the other extreme, it could be argued that, since *Calbeck*, there is now no need for any state coverage of maritime injuries, and accordingly, Longshoremen's Act coverage of such injuries should become exclusive, including those previously within the maritime-but-local exception. In between is the view that concurrent state jurisdiction should exist in areas where, under past maritime-but-local decisions, the state jurisdiction either has been clearly recognized or at least has not been ruled out, but should stop short of employments that have been judicially placed on the federal side, like longshoring and ship repair.

The actual contest is between the first and third of these choices. The first answer could itself perhaps be subdivided. The most far-reaching statement would be an affirmative assertion that states have full concurrent jurisdiction. A less ambitious formulation would put it this way: States have concurrent jurisdiction over maritime injuries in employments without regard to whether these employments prior to *Davis* had been placed within the federal or state province. So phrased, the proposition can be supported by an impressive line of decisions.[93]

93. *Federal*: Davis v. Department of Labor & Indus., 317 U.S. 249 (1942); Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948); and Baskin v. Industrial Acc. Comm'n, 338 U.S. 854 (1949); T. Smith & Son, Inc. v. Williams, 275 F.2d 397 (5th Cir. 1960) (employee initiated a compensation suit in the Louisiana state courts. The employer brought an action in the federal district court to enjoin the state proceeding. On appeal the circuit court affirmed the denial of an injunction on the grounds that in the "twilight zone" the employees have a right to have a case-by-case determination of whether their claims arose out of maritime activities exclusively under the Longshoremen's Act or out of activities sufficiently local to apply state compensation. The injunction was denied even though the particular activity, loading of a vessel, as federal courts have determined, rests exclusively within the federal statute). *Cf.* Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958); Noah v. Liberty Mut. Ins. Co., 267 F.2d 218 (5th Cir. 1959); Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960). *See also* dictum in Michigan Mut. Liab. Co. v. Arrien, 344 F.2d 640 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965) (claimant, a longshoreman, was working on a skid which protruded from a wharf over navigable waters, when he was hit by cargo that fell from a broken pallet. The principal issue had to do with the navigable waters test, but the court, in sustaining an award under the Longshoremen's Act, went on to add: "We do not question that the skid on which Parisi was injured was

There is also, however, substantial authority for the third answer—that state acts cannot extend to employments, such as loading and unloading ships and repairing completed vessels, that have been definitely assigned to federal jurisdiction by judicial decision.[94]

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sufficiently connected with the land to sustain an award under the State Compensation Act." *Id.* at 645. The claimant had in fact previously recovered under the state act).

Louisiana: Richard v. Lake Charles Stevedores, Inc., 95 So. 2d 830 (La. App. 1957), *cert. denied*, 355 U.S. 952 (1958) (a longshoreman was injured while working in the hold of a ship lying in navigable waters. It was held to be error to dismiss the claim on the ground that the Longshoremen's Act was the exclusive remedy); Sullivan v. Travelers Ins. Co., 95 So. 2d 834 (La. App. 1957). These cases were in effect overruled in Ellis v. Travelers Ins. Co., 123 So. 2d 780 (La. App. 1960), *aff'd*, 241 La. 433, 129 So. 2d 729 (1961). *Cf.* Narcisse v. American Sugar Ref. Co., 128 So. 2d 689 (La. App. 1961); Mackey v. Standard Stevedoring Co., 131 So. 2d 123 (La. App. 1961); Robinson v. Lykes Bros. S.S. Co., 170 So. 2d 243 (La. App. 1964).

Massachusetts: Moores's Case, 323 Mass. 462, 80 N.E.2d 478 (1948), *aff'd sub nom.* Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948). *See* text accompanying note 32 *supra.*

New Jersey: De Graw v. Todd Shipyards Co., 134 N.J.L. 315, 47 A.2d 338 (Ct. Err. & App.), *cert. denied*, 329 U.S. 759 (1946) (a pipefitter injured while working on a completed ship lying in navigable waters); Allisot v. Federal Shipbldg. & Drydock Co., 4 N.J. 445, 73 A.2d 153 (1950) (painting a completed vessel); Kelly v. R.T.C. Shipbldg. Corp., 87 N.J. Super. 313, 209 A.2d 340 (Super. Ct., App. Div. 1965) (claimant was injured while working on a boat in dry dock. The vessel was undergoing extensive repairs, including a change from steam to diesel power. The court distinguished this from Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958), [discussed in note 94 *infra*] by holding that these extensive repairs were "tantamount to conversion," and claimant could avail himself of either the state compensation act or the Longshoremen's and Harbor Workers' Act). *See also* Szumski v. Dale Boat Yards, Inc., 48 N.J. 401, 226 A.2d 11 (1967), *rev'g* 90 N.J. Super. 86 (Super. Ct., App. Div.), 216 A.2d 256 (1966) (decedent, a boatyard worker, suffered a fatal heart attack while at sea on a small boat he was ferrying to another yard, although 90% of his time was spent on land. *Held*, New Jersey had jurisdiction to apply its compensation act. The court below had held that the sole remedy was under the Longshoremen's Act, although the event took place on the high seas). *Cf.* Gaddies v. Trenton Marine Terminal, Inc., 86 N.J. Super. 125, 206 A.2d 180 (Super. Ct., App. Div. 1965); Green v. Simpson & Brown Constr. Co., 24 N.J. Super. 422 (Essex County Ct., L. Div.), *rev'd*, 26 N.J. Super. 306, 97 A.2d 704 (Super. Ct., App. Div. 1953).

New York: Simis v. Curran, 31 App. Div. 2d 697, 295 N.Y.S.2d 817 (1968) (claimant was standing on a barge assisting in driving piles for the extension of a pier. Claimant's work held not so directly related to navigation or commerce as to exclude him from coverage under the New York Workmen's Compensation Law; the claim was allowed as a "twilight zone case"); Comm'r of Taxation & Fin. v. Oceanic Serv. Corp., 276 App. Div. 725, 97 N.Y.S.2d 401 (1950) (ship's guard apparently fell from a ship moored in the North River). *See also* Eldredge v. Weidler, 274 App. Div. 138, 81 N.Y.S.2d 58 (1948) (housing construction worker drowned while rowing out to secure a small pleasure craft against an approaching storm).

Rhode Island: Behrle v. London Guarantee & Acc. Co., 76 R.I. 106, 68 A.2d 63 (1949), *cert. denied*, 339 U.S. 928 (1950) (involving repairs on a completed vessel).

Texas: Indemnity Ins. Co. of North America v. Marshall, 308 S.W.2d 174 (Tex. Civ. App. 1957) (pipefitter injured while working on a completed vessel lying in a floating dry dock). *Cf.* Warner v. Travelers Ins. Co., 332 S.W.2d 789 (Tex. Civ. App. 1960).

94. *Federal*: Flowers v. Travelers Ins. Co., 258 F.2d 220 (5th Cir. 1958) (welder in-

Since this area of law has been dominated—indeed created—from the beginning by the Supreme Court, by far the most important inquiry is what that court has revealed as to its actual or probable position

jured while making repairs on an ocean-going tanker in a floating dry dock held to be within the exclusive coverage of the Longshoremen's Act. There is no twilight zone for injuries sustained on navigable waters while employee is engaged in essential repairs to an existing vessel); Noah v. Liberty Mut. Ins. Co., 267 F.2d 218 (5th Cir. 1959) (in the original hearing of the case, 265 F.2d 547 (1959), the court held that a longshoreman drowned while unloading a vessel was in the twilight zone. Accordingly, the decedent's dependents could elect to seek an award under either the Longshoremen's Act or the Louisiana act. On rehearing, the court reversed itself, two judges dissenting, and held the federal act to be the exclusive remedy). *See also* Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960) (it was not clear whether the decedent had fallen from a river bank or a barge. The court said that if he fell from the barge, the Longshoremen's Act would be his exclusive remedy; if from the bank, the state act would be his exclusive remedy).

Louisiana: Ellis v. Travelers Ins. Co., 123 So. 2d 780 (La. App. 1960), *aff'd*, 241 La. 433, 129 So. 2d 729 (1961) (employee injured aboard a vessel engaged in interstate commerce. His duties were wholly maritime in nature, and his employer was engaged in fulfilling maritime contracts. The court held that the employee's exclusive remedy was under the Longshoremen's Act); Narcisse v. American Sugar Ref. Co., 128 So. 2d 689 (La. App. 1961) (claimant's usual duties consisted of unloading barges that were used to transport products on navigable waters. He also worked at times inside the plant. He was injured while performing his usual duties. The court held that his recovery was limited to the provisions of the Longshoremen's Act within the theory of the "twilight zone"); Mackey v. Standard Stevedoring Co., 131 So. 2d 123 (La. App. 1961) (stevedore injured in the hold of a ship afloat on the Mississippi River and engaged in interstate commerce. *Held*, exclusive recovery under the Longshoremen's Act). *See also* Robinson v. Lykes Bros. S.S. Co., 170 So. 2d 243 (La. App. 1964).

New Jersey: Gaddies v. Trenton Marine Terminal, Inc., 86 N.J. Super. 125, 206 A.2d 180 (Super. Ct., App. Div. 1965) (claimant worked on docks and in warehouses and occasionally worked on board ships tied up at the docks. He was injured on board a ship while helping to unload. Held to be exclusively under the Longshoremen's Act). The court, admitting that the "twilight zone" doctrine had been applied to workmen performing alterations or repairs on completed ships, as in Allisot v. Federal Shipbldg. & Drydock Co., 4 N.J. 445, 73 A.2d 153 (1950) and in Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 (Hudson County Ct., L. Div. 1951), *aff'd*, 20 N.J. Super. 486, 90 A.2d 84 (Super. Ct., App. Div. 1952), argued that these cases were distinguishable because they did not involve loading and unloading of ships. But this misses the principle involved: categories previously held federal are either outside the twilight zone or they are not. Both ship repair and ship loading had equally been held federal. Once that line has been broken by a holding that a ship repair case can be treated as a "twilight zone" case, there is no further ground for distinguishing an unloading case. This being so, *Gaddies* appears to be discredited by the subsequent New Jersey Supreme Court case of Hansen v. Perth Amboy Dry Dock Co., 48 N.J. 389, 226 A.2d 4 (1967) (upholding a state award following federal benefits, and stressing that the distinction between working in new ships and old ships no longer makes seuse). That court does mention *Gaddies* without disapproving it, but in principle it is difficult to see how *Gaddies* can survive in view of the overall approach and tone of *Hansen*.

Green v. Simpson & Brown Constr. Co., 24 N.J. Super. 422, 94 A.2d 693 (Essex County Ct., L. Div.), *rev'd* on other grounds, 26 N.J. Super. 306, 97 A.2d 704 (Super. Ct., App. Div. 1953) (claimant was to remain aboard ship to act as caretaker but was found drowned.

on this controversy. It is true that the Court has never formally addressed itself to this exact question, as it has to the questions in *Calbeck* and *Johnson*. What can be said with confidence is that everything it has said, or, more exactly, everything it has done or omitted to do, places it on the side of the first answer—that of not limiting state jurisdiction by pre-*Davis* tests. By the same token, nothing it has said or done since *Davis* has lent any support to the view that it would accept the third answer—that is, strike down state awards for injuries during ship-loading or repair. It has already been pointed out that in *Moores* the court upheld a state award for injury in the course of a ship-repair activity. For present purposes, two features of this case must be stressed. One is that the state decision was explicitly based on a sweeping theory that left the states unbound "even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other."[95] The second point to note is that the Court did not content itself with denying certiorari—it affirmed. True, the affirmance was *per curiam*, but, unlike the noncommittal effect of a denial of certiorari, such an affirmance signifies unmistakable approval of the result. Moreover, the *per curiam* device also indicates that the court could not have had any serious disagreement with the rationale announced below, since if it had it would presumably have said so, lest its *per curiam* affirmance be misunderstood.

Then, the following year, the Supreme Court went even further in *Baskin*, another ship repair case, and not only in effect told California to make an award it had denied, but also cited it to *Moores*, and in a subsequent appeal again invoked *Moores* as well as *Davis*.[96] It is difficult to see how anything could be plainer than the Court's message that it will not strike down state awards within previously-federal waterfront categories, nor will it allow state courts to do so on some mistaken theory that the Supreme Court had told them they must.

Every subsequent action of the Court has been consistent with this interpretation. Perhaps the most far-reaching statement on the

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The court said that if his death occurred while he was on land or if on the vessel if it was in local activity there would be jurisdiction in the state courts).

Texas: Warner v. Travelers Ins. Co., 332 S.W.2d 789 (Tex. Civ. App. 1960) (claimant spent one-third of his time on dry land and two-thirds working on ships in navigable waters. At the time of his accident he was caulking rivets on the hull of an ocean-going vessel lying in navigable waters. *Held*, the twilight zone does not extend to such purely maritime work, and the exclusive remedy was the federal Longshoremen's Act).

95. *See* full quotation at text accompanying note 34 *supra*.

96. *See* text accompanying notes 36-38 *supra*.

scope of concurrent state jurisdiction is to be found in *Richard v. Lake Charles Stevedores, Inc.*,[97] where the activity was the other classical category of federal jurisdiction—longshoring. Certiorari was denied. Certiorari was also denied in *Behrle v. London Guarantee & Accident Co., Ltd.*,[98] another ship-repair case.

What, to counterbalance this, can be adduced in the way of Supreme Court actions indicating the opposite view? No attempt has been made to carry any of the decisions adopting the competing view to the Court, and consequently we do not even have whatever hint might be drawn from the granting or denying of certiorari. But, more significantly, when we face the decisive question of what the Court has in fact done to interfere with application of state laws on grounds related to the local-concern doctrine, we discover that *the Court has not forbidden a state to apply its compensation law to a waterfront injury on these grounds in over 40 years*—not just since *Davis*, but since only a few years after the Longshoremen's Act was passed.[99]

Such agonizing as has been done over this problem in the last couple of generations has been done, not by the Supreme Court, but by several state courts, and, within the federal system, chiefly by the Fifth Circuit. Louisiana, New Jersey and Texas have produced decisions facing both ways.[100] So has the Fifth Circuit[101]—indeed, it once achieved this feat within a single case.[102] The Fifth Circuit had always been unhappy with the twilight-zone approach, and it is of some interest that it was this circuit that supplied the decision[103] that was reversed by the Supreme Court in *Calbeck*. Here the Fifth Circuit was dealing with, in a sense, the same question, *i.e.*, whether both federal and state acts could apply to a situation that had been authoritatively assigned to the federal or state category by earlier cases. In this instance the activity was construction work on a new vessel, and the Fifth Circuit held that this activity had been so clearly categorized that it did not fall within the twilight zone, and consequently the Longshoremen's Act could not apply. Of course, by reversing this ruling, the Supreme

97. 95 So. 2d 830 (La. App. 1957), *cert. denied*, 355 U.S. 952 (1958).

98. 76 R.I. 106, 68 A.2d 63 (1949), *cert. denied*, 339 U.S. 928 (1950). Certiorari was also denied in the pre-*Moores* case of De Graw v. Todd Shipyards Co., 134 N.J.L. 315, 47 A.2d 338 (Ct. Err. & App.), *cert. denied*, 329 U.S. 759 (1946).

99. *See* notes 10-21 *supra*.

100. *See* notes 93-94 *supra*.

101. *See* notes 93-94 *supra*, under the heading *Federal*.

102. *See* Noah v. Liberty Mut. Ins. Co., 267 F.2d 218 (5th Cir. 1959).

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

Court did not necessarily imply that a symmetrical result must follow as to cases traditionally falling on the state side of the line, since there were arguments, such as the legislative history of the Longshoremen's Act, that would not apply in the same way to the issue of affirmative state competence. But a strong case can be made for the proposition that the dominant rationale of all the Court cases from *Davis* through *Moores* and *Baskin* to *Calbeck* is one that also applies to the present issue of state jurisdiction. That rationale can be bluntly stated: The Court simply does not want to be bothered with hair-splitting and archaic distinctions between activities of local concern and activities prejudicing the uniformity of maritime law, especially when what is at stake is no longer some compensation versus no compensation, but merely the possible differential between two compensation acts. It must be recalled that the main body of law that is still invoked in these cases was built up before the Longshoremen's Act was passed, at a time when the effect of holding an activity to be non-local was to deprive the injured worker of all protection. It is not surprising that, although a few such cases reached the Supreme Court after passage of the Act in 1927, they dropped off almost completely after 1930.

In the discussion of *Calbeck* earlier, it was mentioned that there were two main grounds for the decision. The first, ensuring coverage of workers in navigable waters, is not relevant here. But the second is—avoiding the necessity of handling coverage questions on a case-by-case basis, with all the administrative burdensomeness and endless uncertainty that this entails. By immediately invoking *Davis,* a case involving not affirmative federal coverage but affirmative state coverage, in support of this ground and stating that it was "entirely consistent with our conclusion" in *Calbeck,* the Court goes a long way toward creating the impression that the rationale of *Calbeck* cuts in both directions. Since the quantum of doubt or certainty is about the same in the earlier decisions categorizing activities as state or federal—*i.e.*, new ship construction as state, and ship repair and longshoring as federal—no real distinction can be drawn on the ground that the federal categories are somehow less uncertain than the state. If there is enough doubt in any of them to come within the *Davis-Moores-Calbeck* rationale, there is enough in all.

To all this must be added, if one is attempting to predict what the Court would say today in dealing directly with the issue of concurrent state jurisdiction, the fact that the Court's entire attitude

towards conflicts has been transformed during this same period from one based on conceptualism to one based on legitimate interests.[104] In the case of state-versus-state conflicts, the focal point of constitutional conceptualism was the full faith and credit clause; in the present conflicts problem, it was the uniformity of maritime law. *Bradford Electric Light Co. v. Clapper*[105] was the high point of the former, after which it was "downhill all the way" for conceptualism. It was decided in 1932, at about the point at which the last of the Supreme Court decisions striking down state awards under the maritime uniformity concept began to disappear from sight. Nor is it a coincidence that *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[106] which for all practical purposes buried *Bradford,* came out only three years before *Davis,* which similarly buried the conceptual maritime-but-local approach. All this reflects a shift away from the perhaps intellectually-titillating game of drawing medieval distinctions based on abstract concepts, and toward the serious business of getting social insurance benefits paid with a minimum of administrative fuss and litigation. After all, the Supreme Court, with its fantastically overloaded docket, has better ways to spend its time than in tracing ghostly definitional boundaries between, say, the "repair" of a ship and its "reconversion," and too much self-respect and sense of humor to tell us with a straight face that awarding state workmen's compensation in the former case would shatter the uniformity of maritime law, while a similar award in the latter case would not.

SUCCESSIVE AND SUPPLEMENTARY AWARDS

The inevitable comparison that springs to mind while viewing these swiftly-moving developments is this: Will the final state-versus-longshoremen's rule turn out to be similar to the state-versus-state rule as culminating in the *McCartin* case?[107] Its constitutional basis, of course, can never be identical; but some significant points of resemblance in ultimate result can be detected. First, each jurisdiction decides for itself whether it shall apply its own law, and in the vast bulk of cases its determination proves to be final. Second, Supreme Court cases which formerly were thought to set an overriding body of rules controlling

104. *See* LARSON, *supra* note 55, at § 86.

105. 286 U.S. 145 (1932).

106. 306 U.S. 493 (1939).

107. Industrial Comm'n v. McCartin, 330 U.S. 622 (1947) (upheld a supplementary award in Wisconsin, after an approved full settlement and payment of compensation under Illinois law, as not violative of the full faith and credit clause). *See* LARSON, *supra* note 55, at § 85.20.

indistinguishable fact situations are no longer treated as controlling—just as in the state conflicts story the Court abandoned its attempt to create a single conflicts rule binding on the states. Third, there is a resemblance between the connection that must exist between a state and a maritime employment to come within the "twilight zone," and the connection that must exist between a state and an employment to give it a "more-than-casual interest" under the state conflicts rule. The former is sometimes phrased as "local concern"; the latter is "local interest." The general idea seems to be the same: a recoguition of the right of the local community to confer the kind of protection it thinks wise on persons or employments in which it has a legitimate interest. This interest is just as real and just as "local" whether a local plumber is putting the final touches on an uncompleted vessel or repairing an old vessel.

A. State Award Followed by Federal

The ultimate question suggested by the parallel between the developments in the state-versus-state conflicts and state-longshoremen's conflicts doctrines is whether the full implications of concurrent jurisdiction are to be followed out, in the form of successive and supplementary awards as under the *McCartin* case, always, of course, with credit against the second award for benefits under the first so as to avoid double recovery.

When the sequence takes the form of state benefits followed by federal, there is strong authority, beginning with *Calbeck* itself, for the conclusion that acceptance of state benefits does not constitute a binding election barring award of federal benefits.[108] One of the welders

108. Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952) (claimant was injured on a marine railway. He filed a compensation claim under the state act of Washington, and payments were made to him under that act. While still receiving compensation he made claim under the Longshoremen's Act, and was awarded compensation. The employer's petition to enjoin enforcement was denied by the district court, and the denial was affirmed. This case indicates that the twilight zone doctrine does not mean that the jurisdiction first making the award will be the only one upheld. It takes the view, rather, that the federal court should decide the dispute when both state and Longshoremen's Act payments are being made, and seems to interpret *Davis* to mean that, in determining this dispute, the decision of the deputy commissioner that the case is under Longshoremen's Act should be upheld except in case of manifest error); Gulf Oil Corp. v. O'Keeffe, 242 F. Supp. 881 (E.D.S.C. 1965) (decedent fell from a barge and drowned in navigable waters. His widow accepted an award under the South Carolina Workmen's Compensation Law. The court held that this did not constitute a binding election, and thus claimant could recover under the Longshoremen's Act); Michigan Mut. Liab. Co. v. Arrien, 233 F. Supp. 496 (S.D.N.Y. 1964) (discussed in note 93 *supra*). *Cf.* Windrem v. Bethlehem Steel Corp., 293 F. Supp. 1

involved in *Calbeck*[109] had received medical and compensation benefits under the Louisiana act and had accepted checks which stated the payments were made under the state act. The Court held "that acceptance of the payments does not constitute an election of the remedy under state law precluding recovery under the Longshoremen's Act. Nothing in the statute requires a contrary result."[110]

When the issue turns on election, whether benefits were accepted with or without a formal award is not important, as long as there is knowledge that the payments were made under the state act; there have been federal awards following receipt of state benefits pursuant to awards[111] as well as those paid voluntarily, as in *Calbeck*.

When an actual state award has been made, there may arise, in addition to election, the argument that the state award establishes that the state act may validly apply, and that therefore the Longshoremen's Act by its terms is inapplicable. In *Shea v. Texas Employers' Insurance Association*,[112] claimant had been injured while working on board a vessel under construction but afloat upon navigable waters. A claim was filed and litigated under the Texas Workmen's Compensation Act, and claimant was awarded benefits. Several days after receiving this award, claimant filed suit under the Longshoremen's Act. Subsequent

(D.N.J. 1968) (claimant injured in a "twilight zone" accident received federal compensation benefits, and then sought, litigated and received payments pursuant to the New Jersey Workmen's Compensation Act. Claimant's litigation of state claim held to constitute a binding election and to bar further benefits under the Longshoremen's Act); and *cf.* as to the Defense Base Act, which incorporates the remedies of the Longshoremen's Act, Flying Tiger Lines, Inc. v. Landy, 370 F.2d 46 (9th Cir. 1966) (decedent was a pilot for a firm ferrying military personnel for the U.S. Air Force. This was held to bring him under the Defense Base Act. A prior claim for death benefits had been made under the California Workmen's Compensation Act, and benefits had been awarded. This was held not to preclude an award under the Defense Base Act, since the question of jurisdiction had not been raised and fully litigated during the initial claim, thus making res judicata inapplicable. Furthermore, there is no "twilight zone" rule in this area, so the claimants could not be held to have elected between two possible remedies, since the Defense Base Act was exclusive).

109. This point arose in the companion case of Avondale Shipyards, Inc. v. Donovan, 293 F.2d 51 (5th Cir. 1961).

110. 370 U.S. at 131. The Court adds:

> And we agree that the circumstances do not support a finding of a binding election to look solely to the state law for recovery. *Massachusetts Bonding & Insurance Co.* v. *Lawson*, 149 F.2d 853; *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F.2d 968; *Western Boat Building Co.* v. *O'Leary*, 198 F.2d 409.

111. *See* Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952); Michigan Mut. Liab. Co. v. Arrien, 233 F. Supp. 469 (S.D.N.Y. 1964); and Gulf Oil Corp. v. O'Keeffe, 242 F. Supp. 881 (E.D.S.C. 1965); *but cf.* Windrem v. Bethlehem Steel Corp., 293 F. Supp. 1 (D.N.J. 1968).

112. 383 F.2d 16 (5th Cir. 1967).

to the state award, and prior to the award of benefits under the Longshoremen's Act, the Supreme Court in *Calbeck* reversed the prior law, and held that an employee injured while working on an uncompleted vessel afloat on navigable waters was entitled to benefits under the Longshoremen's Act. Since at the time claimant litigated his state claim there was apparently no other choice open to him, he could not, said the court, be held to have made an election of remedies. However, since the Longshoremen's Act is, by its own terms, only applicable where a state act cannot be validly applied, and since the Texas litigation had determined that a state act *could* apply, the court concluded that claimant could not recover additional benefits under the Longshoremen's Act.

If the Fifth Circuit had studied the reversal of its own decision in *Calbeck* with a little more care, especially the dissent, it could not have reached this conclusion. The test whether state law may validly be applied was in effect obliterated by *Calbeck*. The dissent says so in blunt language:

> "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings may . . . *validly be provided by State law*' ". . . . Today the Court simply removes these 'terms' from the Act.[113]

The dissent then goes on to advance precisely the argument later relied on by the Fifth Circuit in *Shea*:

> In one of the cases before us the claimant has actually been paid benefits under the Louisiana Compensation Act. In the other a claim under the Texas Act is pending and would clearly be allowed. . . . These cases, therefore, were not by any stretch of the imagination within the twilight zone. The Federal Act is thus by its terms inapplicable.[114]

But, since those terms have just been said to have been removed from the Act, the argument falls.

A second flaw in the *Shea* reasoning is the assumption that, even if the "terms" remained in the Act, the federal courts would be bound by a state finding on the point. But the issue at stake is the constitutional limit of state power under the federal constitution—an issue on which the state court's decision is certainly not binding on the federal

113. 370 U.S. at 137 (emphasis in original).
114. *Id.* at 138.

courts, as the Supreme Court's decisions make abundantly clear. In fact, to allow the states to make a binding decision on when their acts are "validly" applicable could be attacked as an unconstitutional delegation of the function of fixing the boundaries of federal maritime power as applied in the Longshoremen's Act.

B. Federal Award Followed by State

Prior to *Davis*, if the federal award came first, followed by a state award, there would have been difficulty sustaining the second award. The reason would have been that the first award would necessarily have involved a federal determination that the state act could not validly apply—a determination that would be binding on the state courts as being based on the federal constitution and as asserting federal supremacy in the maritime area. But after *Davis*, this would not necessarily follow in the twilight zone, and after *Calbeck* it would not follow at all, since the absence-of-state-power test became irrelevant. With this test out of the way, then, there appears to be no obstacle to a subsequent and supplementary state award. In *Hansen v. Perth Amboy Dry Dock Co.*,[115] claimant was injured while painting a new ship in dry dock. Benefits were paid under the Longshoremen's and Harbor Workers' Compensation Act, and claim was then made under the New Jersey act. Claimant worked several weeks a year on shore, and a substantial part of his work was on new vessels. His contract was based in New Jersey and not transitory, and his employer had substantial physical assets on land in New Jersey. The court held that the employment relation was sufficiently local so as to give New Jersey a valid interest in applying its compensation act, and benefits were awarded under the New Jersey act.

Although the language of "localism" is used, note that the operative factor has become the modern conflicts concept of "valid interest." In an earlier decision, New Jersey had reached a different result in a ship-repair case.[116] But, although *Hansen* involved new ship construction, the court makes it clear that this ancient new-ship-versus-old-ship

115. 48 N.J. 389, 226 A.2d 4 (1967).

116. Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 (Hudson County Ct., L. Div. 1951), *aff'd*, 20 N.J. Super. 486, 90 A.2d 84 (Super. Ct., App. Div. 1952) (claimant injured while doing repair work on a vessel filed a state claim, discontinued it, then filed under the federal act, and had received payments during his disability. Thereafter he again filed a state claim. *Held*, since proceedings had gone forward and payments made under the Longshoremen's Act, the federal court had exclusive and final jurisdiction of his claim).

dichotomy is not the controlling consideration in the era of "valid state interest." Surely all the same elements of valid state interest could easily have been found if Hansen had been painting an old ship instead of a new one. Moreover, all the elements of legitimate state interest that have been recognized since *Alaska Packers*[117] could be invoked here, such as the interest in caring for an injured man within the jurisdiction, the interest in having his local medical bills paid, the interest in not having him become a charge on the state, and so on. Postulate, for the sake of argument, that in some particular the state statute might grant significantly more protection than the Longshoremen's Act, such as higher maximum benefits in New Jersey or New York, or more complete rehabilitation rights in Rhode Island. It could be urged that these states have a valid interest in having this degree of protection afforded workers injured along their waterfront.

A fortiori, if the prior federal action has taken the form of a denial of benefits on procedural grounds, the effect should not be to foreclose a later state award in a case in which the state would not have hesitated to make an award if the claim had originally been brought under state law.[118]

CONCURRENT JURISDICTION AND COMMON-LAW SUITS

If a case falls within the twilight-zone or concurrent-jurisdiction category, and if the employer has failed to elect compensation coverage under the state act, the employee may maintain against the employer the kind of common-law suit provided by the state act as a penalty for such non-election even if the employee could have recovered compensation under the Longshoremen's Act. In the Supreme Court decision establishing this proposition,[119] the claimant had been injured

117. Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935).

118. Bryce v. Todd Shipyard, 17 App. Div. 2d 666, 229 N.Y.S.2d 993 (1962) (claimant applied for compensation for loss of hearing under the Longshoremen's Act in 1950. The claim was rejected for failure to file in time and properly to notify the employer of the injury. He continued working until 1958 when, after retirement, he claimed compensation for the same amount of hearing loss under the New York compensation act. The court held that the claimant's employment duties came within the "twilight zone" and, therefore, the dismissal of the Longshoreman's claim on procedural grounds was not res judicata on the issue of injury, nor did it establish jurisdictional preeminence by the federal statute. Benefits under the New York act affirmed).

119. Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959). *Cf.* the earlier *contra* case of Chappell v. C.D. Johnson Lumber Corp., 112 F. Supp. 625 (D. Ore. 1953) (holding that if the employee was not covered by state compensation it made no difference whether at the time of the injury he was in an exclusive federal area or within the twi-

while engaged in loading activities connected with dredging operations on a barge on navigable waters in Oregon. The employer was covered by the Longshoremen's Act, but, as the Oregon Act permits, he had elected not to be covered by the Oregon compensation statute. The consequence of this election was that the employer was subject to a tort action without benefit of common-law defenses. The employee could have brought a claim under the Longshoremen's Act, but he chose to proceed under the state act, and accordingly sued the employer in tort. The Oregon Supreme Court dismissed the suit on the ground that loading a vessel on navigable waters fell exclusively within the Longshoremen's Act. But even if the state statute could have applied under the twilight-zone doctrine, the state court indicated that it would not have accepted plaintiff's contention that this would require the acceptance of the state act *in toto,* including the privilege of suing a non-electing employer at common law. The Supreme Court reversed, holding that the facts fell within the twilight-zone area, and that neither the Constitution nor the Longshoremen's Act contained anything that would bar the prosecution of any remedy claimant had been given under state law.

Once the case is categorized as falling within the twilight zone—which should cause no shock after *Moores* and *Baskin*—the rest of the decision seems to follow inevitably. Part of the affirmative remedy granted by Oregon is a common-law suit against non-electing employers—and not just an ordinary common-law suit, but one with the valuable additional feature, conferred as part of the same compensation statute, of freedom from the common-law defenses. The state court argued that the purpose of the twilight-zone doctrine was to permit a choice between compensation acts, rather than between a compensation act on one hand and a common-law action on the other. This is a gratuitous conclusion with nothing to support it in either law or policy. The concept of a common-law action without benefit of common-law defenses is itself an invention and creation of the compensation statute. Its purpose is directly tied to that of the compensation act, since it is the principal incentive to drive employers into election of compensation coverage. The alternative to the final holding would have been

light zone. An employee of a lumber yard company was injured while working on a barge on a navigable stream. State compensation was not available because the employer had elected not to come within the Oregon act. Common-law suit was held barred because his remedy was under the Longshoremen's Act. Citing the *Jensen* case, the court held that the rights of the parties were clearly within the admiralty jurisdiction and outside the reach of the state compensation laws).

federal interference to impede the operation of this incentive. Assume, *arguendo*, that the state benefits in a case of this kind were markedly higher than the federal. This would mean that employers could evade their statutory obligation to pay the higher state benefits by providing the lower federal benefits—and in the process also evade the state penalty provided for non-election.

Another way to put the matter is that the twilight-zone doctrine was designed to increase the claimant's rights, not to restrict them. This is in the spirit of the earlier holding that, in the extremely close navigable-waters situs problem presented when the original impact is on land and the subsequent injury takes the form of a fall into navigable waters, the plaintiff will be given the benefit of the doubt and a finding of injury on navigable waters will not be made for the purpose of defeating an action for damages under state law. There is also a similarity in spirit—although accompanied by obvious differences in statutory background—between *Hahn* and a 1968 decision[120] holding that, in a case in which both Oregon and Idaho could take jurisdiction (indeed claim had been made in Idaho and some benefits had been paid), a common-law suit could be brought against the non-electing employer in Oregon for an injury received in Idaho, because of the significant contacts of Oregon with the episode. Note that in both cases there was simultaneous coverage by two different compensation acts, and that the locus of injury was within the physical jurisdiction of the other act. Perhaps the most interesting similarity lies in the readiness of the court to conclude that, once the Oregon act was applicable at all, the common-law suit it authorized against a non-electing employer followed as a matter of course.

MERITS OF PRESENT POSITION

The complexity of the story that has unfolded since *Jensen* is the result of the fact that at different times, and sometimes at the same time, there has been stirred into the mixture a variety of different objectives and motives: conceptual constitutional soundness; avoidance of administrative burden and appellate litigation; some bias in favor of state coverage where possible; some inclination to give the claimant the benefit of the doubt; and, most recently, a search for precision of identification of federal or state areas of coverage. If symmetry were the ouly value that mattered, one final step would appear sorely tempt-

120. Davis v. Morrison-Knudsen Co., 289 F. Supp. 835 (D. Ore. 1968).

ing. This would be to abolish all state jurisdiction over injuries on navigable waters.

Three of the four parts of the pattern to achieve maximum simplicity and minimum overlap are already in place. State acts, of course, can and usually do cover *all* injuries on land or on extensions of land such as piers. The Longshoremen's Act, under *Johnson*, does *not* cover *any* injuries on land or extensions of land. The Longshoremen's Act under *Calbeck does* cover *all* injuries on navigable waters. The missing fourth piece would, of course, be: State acts do *not* cover *any* injuries on navigable waters, not even those considered "of local concern."

Such a move would undoubtedly require legislation, since to achieve it judicially it would entail overruling a half-century's accumulation of cases, and since, for reasons to be noted presently, such a drastic judicial move—although not completely unheard of—would not have behind it the weight of policy pressures that is necessary for such a sharp break with precedent. And, although the notorious legislative inertia in this field makes the chances of legislative change remote, the posing of the possibility helps set the framework for a brief overall appraisal of the merits of the existing set of rules.

A good argument can be made that if we had the whole job to do over again in proper historical sequence, this might well be the pattern that would emerge. That is, if the Longshoremen's Act had been passed immediately after *Jensen*, there would have been no need to apply and develop the maritime-but-local exception in this context, and no need to write the absence-of-state-power requirement into the act; in short, the act's coverage could have been made clearly exclusive as to all injuries on navigable waters, and we would have been spared the whole tortured story.

But we cannot escape history, and we do not begin with a clean slate. In particular, we would begin now with a somewhat different set of values and objectives. Of these, the most cogent would be the recognition of the right of a state having a legitimate interest in an injury to apply its compensation remedies to that injury—even at the expense of accepting duplicate or multiple jurisdiction and consequent successive and supplementary awards. What disadvantage must be weighed against the advantage of allowing states this privilege, even *vis-à-vis* the federal Longshoremen's Act? So far as the employer is concerned, the worst that can happen to him is no more noxious than the worst that can happen under the *McCartin* rule: He ends by giving

the employee the benefit of the act that happens to be more favorable to him. The assumption of the necessary insurance coverage is neither inconvenient nor unduly onerous.[121]

As to the virtues of predictability and precision, if full concurrent state coverage is the rule, as the present analysis concludes, rather than coverage still partly curtailed by remnants of the local-concern doctrine, then there is no particular advantage either way: One hundred percent concurrent state coverage is just as exact and definite as zero state coverage. What is lost by not putting the fourth piece—abolition of state coverage of maritime injuries—into place is not precision but aesthetics. And for some years aesthetics has been near the bottom of the hierarchy of values affecting the judicial process.

Moreover, it is somewhat misleading to suggest that perfect precision would result from a sharp division of coverage based on situs of injury. It has already been shown that this test, seemingly so physically self-evident, has encountered such troublesome borderline cases that a twilight-zone doctrine might still be necessary on the navigable waters front.

In addition, the drawing of too-bright lines between areas of coverage unavoidably increases the risk of leaving some combination of facts uncovered. In other words, overlapping of jurisdictions does give the comfortable feeling that it is almost impossible for any situation to slip between the edges.

A criticism frequently made of results produced by the choice of situs of injury as the determinant of coverage in the Longshoremen's Act is that workmen walk in and out of the act dozens of times a day—whenever they cross a gangplank. If full concurrent state coverage is accepted, this criticism cannot be made of the state acts. The worker will not walk out of the state act as he crosses the gangplank to the ship, and, since some of the major maritime states have more attractive benefits than those of the Longshoremen's Act, this should conduce to tranquility of mind on the part of longshoremen and harbor workers.

Finally, as for the appeal to history, supporters of concurrent state coverage could go back one phase earlier and suggest that the real

121. For a nominal additional premium, the employer can obtain a "Longshoremen's Endorsement" on his insurance. In state-fund jurisdictions, an estimate can be made of the relative amount of time spent on land and on water, and contributions adjusted accordingly. Puget Sound Bridge & Dredging Co. v. Dep't of Labor & Indus., 185 Wash. 349, 54 P.2d 1003 (1936).

source of all the trouble was the artificiality of the *Jensen* doctrine itself. If amphibious workers had simply remained under their respective state acts, just like their neighbors who work exclusively on shore, no one would have dreamed of suggesting that the result would be unfair to employer or employee, or inconsistent with the spirit and objectives of compensation legislation. If, then, approximately the same result comes about as a consequence of the *Davis, Moores, Baskin* and *Calbeck* cases, while it may occasion concern to constitutional law purists, there is no cause for consternation in compensation circles.