JURISDICTION OF STATE AND FEDERAL COMPENSATION AGENCIES OVER INJURIES OCCURRING ON NAVIGABLE WATERS*

Until recently claims for disability or death on navigable waters of employees engaged in activities not easily recognizable as "maritime" were presented either to a state or to a federal compensation agency at a substantial risk of disallowance. For a state agency may constitutionally exercise jurisdiction over such claims only in those instances when, according to the rule of Southern Pacific Company v. Jensen, application of the state compensation act will neither interfere with the "uniformity of admiralty law" nor prejudice that law in its characteristic features. And the federal agency's statutory

*Davis v. Dep't of Labor and Industries of Wash., 317 U. S. 249 (1942).
1. Southern Pacific Co. v. Jensen, 244 U. S. 205 (1917) (holding that a state act could not apply to a stevedore injured on navigable waters). For a concise résumé of subsequent cases dealing with this question, see London Co. v. Industrial Comm., 279 U. S. 109 (1929). Since the enactment of the Federal Longshoremens' and Harbor Workers' Act, 44 Stat. 1424 (1927), 33 U. S. C. §§ 901 et seq. (1940), the application of state law has been limited also by the overriding federal statute. But the Supreme Court has interpreted the federal statute as incorporating the Jensen doctrine as its criterion of applicability. Parker v. Motor Boat Sales, 314 U. S. 244 (1941).
2. Southern Pacific Co. v. Jensen, 244 U. S. 205, 218 (1917). The constitutional basis for the requirement of uniformity, U. S. Const. Art. III, § 2, extends the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction." In The Lottawana, 21 Wall. 558 (U. S. 1874), it had previously been held that because of this provision a uniform system of admiralty law must be dominant in the federal courts. By the Jensen decision such uniformity was required for the first time in state courts.
jurisdiction is complementary, existing only "if recovery for the disability or death may not validly be provided by State law." 3 Since state law has been interpreted as non-prejudicial when applied to an activity "local" in character or one having "no direct relation to navigation and commerce," 4 and since federal law, by virtue of this delimitation, has been interpreted as always applicable to "maritime" occupations 5 because these bear a direct relation to navigation and commerce, the issue of jurisdiction 6 depends in each


6. The term "jurisdiction" is used here to connote broadly the respective classifications of situations to which a state or federal court may apply its own law. The term "jurisdiction" has also been used with reference to admiralty law to connote that classification of situations to which the substantive principles of admiralty are applicable. Thus
case upon the allocation of the employee's occupation at the time of the accident to one or the other of these vague classifications. While longshoremen have been easily assimilated to exclusive federal jurisdiction as "maritime" workers, others, whose functions are less easily relatable to navigation and "admiralty jurisdiction" attaches to all maritime contracts and to all torts occurring on navigable waters. See Martin v. West, 222 U. S. 191, 197 (1911); Leathers v. Blessing, 105 U. S. 626, 630 (1881); Waring v. Clarke, 5 How. 441, 459 (U. S. 1847); see also HUGHES, ADMIRALTY LAW (1901) c. II. The opinions of some courts would seem to indicate that the Jensen case established boundaries of "admiralty jurisdiction." But by the commonly accepted interpretation, it merely established criteria for determining when a state may apply its law to a situation which admiralty principles generally govern. The added principle is clearly deducible that state law is always applicable where the situation does not fall within "admiralty jurisdiction." From the holding in State Industrial Commission v. Nordenholt Corporation, 259 U. S. 263 (1922), the inference that state law is not inapplicable merely because it may be applied within "admiralty jurisdiction" would seem justifiable. There, a stevedore had suffered injuries on land in the course of his maritime employment. The New York Court of Appeals had decided that the state law was not applicable, since a remedy in workmen's compensation was contractual and, when applied to a maritime contract, fell within "admiralty jurisdiction." The Supreme Court reversed the New York Court of Appeals without deciding that the jurisdiction was not in admiralty, stating: "In Jensen's case rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general admiralty law." Id. at 276. From the case of Grant Smith-Porter Co. v. Rohde, 257 U. S. 469 (1922), criteria for determining more precisely when a state law is applicable within the field of "admiralty jurisdiction" have been drawn. Rhode was injured while at work as a carpenter upon a partially completed vessel lying in navigable waters within the state of Oregon. The Supreme Court, while deciding that there was jurisdiction in admiralty because the alleged tort occurred on navigable waters, went on to say that: "... in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court." Id. at 478. Thus state law is applicable once admiralty jurisdiction has been established, if the employment contract is of merely local concern and its performance has no direct effect on navigation or commerce. See Baizley Iron Works v. Span, 281 U. S. 222, 230 (1930); Employers' Liability Assur. Corp. v. Cook, 281 U. S. 233, 236 (1930); Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 144 (1928); Sultan Railway & Timber Co. v. Dep't of Labor and Industries of Wash., 277 U. S. 135, 137 (1928); Alaska Packers Ass'n v. Industrial Accident Comm., 276 U. S. 467, 469 (1928); Millers' Indemnity Underwriters' Co. v. Braud, 270 U. S. 59, 64 (1926); Grant Smith-Porter Co. v. Rohde, supra.

commerce, have suffered not only from the necessity of a case by case determination, but also from a lack of any recognizable judicial consistency in application of the classifications. Thus the activities of a diver who suffocated while removing timber from an abandoned set of ways obstructing navigable waters have been held only indirectly relatable to navigation and commerce while those of a railway employee injured when loading cars on a float lying in navigable waters have been held to have such a direct relation to navigation and commerce as to fall within the jurisdiction of the federal statute. Therefore, neither the employer making contribution nor the marginal employee making application has been able to predict with any certainty the agency ultimately responsible for compensation.


8. Millers' Indemnity Underwriters' Co. v. Braun, 270 U. S. 59 (1926). For other cases holding state law applicable to injuries on navigable waters, see Sultan Railway & Timber Co. v. Dept't of Labor and Industries of Wash., 277 U. S. 135 (1928) (employee injured while assembling and breaking up log booms); Rosengrant v. Havard, 273 U. S. 654 (1927), aff'd per curiam Ex parte Rosengrant, 203 Ala. 202, 104 So. 409 (1925) (lumber inspector injured while inspecting lumber on floating barge). While these cases were decided prior to the enactment of the Federal Longshoremen's and Harbor Workers Act, the test employed is the same as that applied subsequent to its enactment. See also Alaska Packers' Assn. v. Industrial Accident Comm., 276 U. S. 467, 469 (1928); Carlin Construction Co. v. Heaney, 299 U. S. 41 (1936), where the court, considering workmen's compensation a contractual remedy, held state law applicable because the circumstances of the case fell outside "admiralty jurisdiction." See note 6 supra.


10. When the injury occurs on land a similar problem presents itself, though the federal act does, by its own terms, not apply. 44 Stat. 1424 (1927), 33 U. S. C. § 903 (1940). Theoretically, the difficulty is even greater. Since workmen's compensation is said to be contractual, the injury would fall within "admiralty jurisdiction" if the employment were maritime, and if the employment bore a direct relation to navigation and commerce, state law would not be applicable. Because admiralty, however, affords only a tort remedy for injuries and its jurisdiction in tort is limited to navigable waters, "admiralty jurisdiction" would not attach, since the injury occurred on land. A practical perspective indicates that in such a situation the matter is always of merely local concern. See State Industrial Commission v. Nordenholt Corp., 259 U. S. 263 (1922); Morrison, Workmen's Compensation and Maritime Law (1929) 38 Yale L. J. 472, 483-91. The problem is further complicated when injury begins on the water and is consummated on
The Supreme Court intended to obviate the hazards resulting from this uncertainty by its ruling in *Davis v. Department of Labor and Industries of Washington*.11 The workman here was examining steel beams removed from an abandoned drawbridge when he fell from a barge moored alongside.12 Both the state agency and the Washington Supreme Court had rejected his widow's claim for compensation on the ground that the state could not exercise jurisdiction consistent with the requirements of the Federal Constitution.13 The Supreme Court, while recognizing that the circumstances surrounding this accident fell within the "twilight zone"14 of uncertainty created by the *Jensen* doctrine, declined to reexamine the constitutional implications of that doctrine. It held that in the absence of findings by the federal agency establishing a presumption of federal jurisdiction,15 a presumption of constitutionality attached to the state statute and that, therefore, the Constitution presented "no bar" to the state agency's entertainment of the claim.16

Chief Justice Stone, in a dissenting opinion,17 argued that the facts of this accident fell within the area of federal jurisdiction as delimited by the present Court in *Parker v. Motor Boat Sales*18 where a claim for the death of a janitor drowned while riding with a co-employee in the employer's motorboat was allowed under the federal statute on the ground that the employee was engaged in a "maritime" activity.19 The Chief Justice criticized also the system of "overlapping" presumptions created by the majority opinion as inconsistent with the "exclusive" liability established by the overriding federal statute,20 and indicated that a desirable occasion had arisen for reconsideration of the *Jensen* doctrine.21

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12. Compare The Rock Island Bridge, 6 Wall. 213 (U. S. 1867).
13. 12 Wash. (2d) 349, 121 P. (2d) 365 (1942).
15. *Id.* at 256-57. Section 20 of the federal act, 44 STAT. 1436 (1927), 33 U. S. C. § 920 (1940), provides that in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary."
16. Davis v. Dep't of Labor and Industries of Wash., 317 U. S. 249, 257 (1942). Mr. Justice Black considered the problem comparable to that of determining whether a particular state act unduly burdens interstate commerce. In these cases the Court has heavily relied upon a presumption of constitutionality in favor of state legislation. See South Carolina Highway Dep't v. Barnwell Bros., 303 U. S. 177, 188, 191 (1938); Railway Express Agency v. Virginia, 282 U. S. 440 (1931); Interstate Busses Corp. v. Blodgett, 276 U. S. 245 (1928).
18. 314 U. S. 244 (1941).
19. *Id.* at 247.
21. *Id.* at 263-64.
The majority, while ostensibly adhering to the doctrine, would seem to have abandoned all attempt to give content to the *Jensen* line of demarcation. For, as the opinion indicates, if the federal agency had first found "jurisdiction," the Court would have respected the presumption arising from that agency's findings, and the injury could, then, equally well have been placed within that realm of admiralty law where uniformity of remedy is essential. Nor may it be argued that the demarcation has been retained because the Court has by a system of presumptions shifted the responsibility of classifying facts in a particular case to the administrative agency presented with the initial determination of jurisdiction. While such a presumption may have been extended to the findings of the federal agency in the *Parker* case, in the principal case both the state compensation agency and the Washington Supreme Court had held the statute constitutionally inapplicable. Not even the provisions of the state statute, by virtue of the presumption of constitutional applicability, may be considered determinative in respect to jurisdiction. For the Washington statute was so limited by its express terms as to apply only "to those for whom no right . . . [existed] under the maritime laws." 24

Apparently, therefore, the marginal employee has the option of a recovery from either the state or federal agency irrespective of nice questions of jurisdiction provided that he can prove a *prima facie* case under the requirements of the governing statute. Thus he is relieved from the possible expense of an unsuccessful suit before one agency, with the concurrent risk of the Statute


23. The Court seemingly ignores the following section of the state act: "In all court proceedings under or pursuant to this act the decision of the department shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same." Wash. Rev. Stat. Ann. (Remington, 1932) § 7697. The state officer found: "that the work which the claimant was doing at the time of the said fatal accident . . . [did] not come under the jurisdiction of the workmen's compensation act, but . . . [was] maritime in character" and "that the alleged injury was sustained on board a vessel in navigable waters and was therefore under admiralty jurisdiction." *Davis v. Dep't of Labor and Industries of Wash.*, 317 U. S. 249, 263, n. 2 (1942).

24. Wash. Rev. Stat. Ann. (Remington, 1932) § 7693a. Another provision of the statute reads: "this act is intended to apply to all . . . inherently hazardous works and occupations, and it is its purpose to embrace all of them which are within the legislative jurisdiction of the state." Id. § 7674.

25. See note 4 supra.

26. Certainly, the federal agency could not make an overriding contrary finding of fact when the claim is with the state agency. When the claim is with the federal agency, its findings are considered conclusive. The worker's option, however, may be thwarted by a finding against jurisdiction by the agency of his choice. In this connection, Chief Justice Stone raises the following objection to the court's solution: "the . . . doctrine does not reveal . . . what the function of this Court is to be in cases where the federal and state commissioners both find against jurisdiction. . . ." *Davis v. Dep't of Labor and Industries of Wash.*, 317 U. S. 249, 262-63 (1942).
of Limitations barring a second suit before the other. But opponents of the majority's solution have argued that it only partially eliminates the problem arising from the "twilight zone" because the employer, who must qualify prior to the injury, may now be held equally liable for contribution under the state or federal statute at the choice of the claiming employee. While the possibility of such alternating liability already existed as a result of inconsistent court decisions, it is probable that the majority's decision will increase this risk. For the employee's choice may be guided in the future not by pre-existent, if vague, legal rules concerning the classification of his employment, but by economic considerations as to the maximum financial benefit obtainable for his injury. Thus jurisdiction will vary with the inconsistently varying

27. See the holding in Ayers v. Parker, 15 F. Supp. 477 (D. Md. 1936), that a failure to file a claim under the Longshoremen's and Harbor Workers' Compensation Act within one year after injury or death barred any remedy under that Act, notwithstanding the fact that the employee had mistakenly proceeded under the state compensation statute. Claimant's rights under the Act can be protected, however, by filing simultaneous claims within the one year period. See the Federal Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1432 (1927), 33 U. S. C. § 913, a-d (1940). The Washington Act has also a one year filing limitation. WASH. REV. STAT. ANN. (Remington, 1932) § 7686. Most of the state acts contain six months to one year limitation periods. See Note (1932) 78 A. L. R. 1294.


29. The employer is also liable for substantial additional payments and subject to fine and imprisonment under the provisions of the federal enactment if the federal agency does not finally assume jurisdiction. 44 STAT. 1439, 1442 (1927), 33 U. S. C. §§ 938, 932 (1940).

30. See note 26 supra.

31. State industrial commissions have had similar difficulty in determining their proper function in respect to maritime accidents. See Bureau of Labor Statistics, Bull. 377 (1933) 119. Insurance companies, too, have been concerned with the problem. See 23 PROCEEDINGS OF THE CASUALTY ACTUARIAL SOCIETY (1937) 171, 187, 213-19, 228-36.

32. The federal act, for example, provides a maximum total compensation of $7500 for almost all types of injuries and disabilities. See 44 STAT. 1424, 1434 (1927), 33 U. S. C. § 914(m) (1940). State provisions may authorize higher or lower maximum payments or may set no maximum whatsoever. Even where the maximum payment authorized is higher under the federal act, the maximum period of compensation or the amount payable per week may be lower than under the provisions of a particular state act. Similar variations may exist with respect to maximum amounts payable for death, for permanent total or permanent partial disabilities, and for temporary disabilities, or with respect to the length of periods of payment for partial disabilities, such as loss of a thumb or an arm. See Bureau of Labor Statistics, Bull. 672 (1940) 202-14.

An indication of the factors which would be considered by the employee in choosing one agency or the other is afforded by a comparison of the provisions of the Washington Workmen's Compensation Act, WASH. REV. STAT. ANN. (Remington, 1932) §§ 7673-7796, with those of the Federal Longshoremen's and Harbor Workers' Act, 44 STAT. 1424-46 (1927), 33 U. S. C. §§ 900-50 (1940). Payments made under the federal act constitute a percentage of the employee's wage. Under the Washington act, they constitute a lump sum, bear no relation to wages, and only maximum payments are made.
provisions of the state and federal acts as to maximum amounts allowable, duration of payment, and rates per week or per injury. Although some

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<th><strong>FEDERAL ACT</strong></th>
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<td>a) Maximum period of compensation</td>
<td>Widowhood or specified minority age of children.</td>
<td>Widowhood or specified minority age of children.</td>
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<td>b) Maximum payment per month</td>
<td>$55 for widow and two children, plus $5 for each additional child under 16 years.</td>
<td>Approximately $100.</td>
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<td>c) Maximum total payments</td>
<td>No maximum.</td>
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<th><strong>Permanent Total Disability</strong></th>
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| **Permanent Partial Disability** | The Washington Act provides for a lump sum payment, such as $3000 (maximum, per injury) for loss of one arm or leg so near the shoulder or hip that no artificial arm or hip can be worn, or $1050 for the loss of sight of one eye. | The federal act varies the periods of compensation with the type of injury. Leg (at hip), 248 weeks. Loss of sight of an eye, 140 weeks. The payments vary from $3 to $25 a week, and the total maximum is $7500. Total payment for leg, $1934-$2000. In addition to compensation, employee undergoing vocational rehabilitation is paid cost of maintenance, maximum $10 weekly. Total payment (compensation) for loss of sight of an eye, $1120-$3500. |
| a) Maximum period of compensation | | |
| b) Maximum payment per month | | |
| c) Maximum total payment | | |

| **Temporary Total Disability** | Whole period of disability. | Whole period of disability. |
| a) Maximum period of compensation | | |
| b) Maximum payment per month | $60 if wife and two children, plus $5 for each additional child, plus $25 for constant attendant if necessary. | Approximately $100. In addition to compensation, employee undergoing vocational rehabilitation is paid cost of maintenance, maximum $10 weekly. |
| c) Maximum total payment | No maximum. | $7500. |
employers may protect themselves against double liability by insurance policies covering both acts, the use of insurance for such a purpose is circumscribed. The federal act permits private insurance, but in six states compulsory state compensation funds eliminate the possibility of a double policy entirely. The high cost of such policies, moreover, ranging up to 65 per cent over usual compensation rates except with respect to certain classes of marginal employees subject to standard rates for double coverage, renders them an unsatisfactory substitute for certain liability under one act.

In view of this continuing problem, the Court’s reluctance to overrule the Jensen decision would seem to indicate the desirability of Congressional action; yet so long as the Jensen case stands as law, further legislation could hardly be effective to solve the problem of the marginal employee unless Congress were willing to supersede state law entirely and provide compensation

35. REV. COMP. LAWS (Hilkey, 1929) §2680; N. D. COMP. LAWS ANN. (Supp. 1925) § 396.6; OHIOGEN. CODE ANN. (Page, 1937) §§1465-69; WASH. REV. STAT. ANN. (Remington, 1932) §§7673-7674; W. VA. CODE ANN. (Michie, Sublett & Stedman, 1943) §§2511-2519; WYO. REV. STAT. ANN. (Courtright, 1931) §§124.102-124.103. While the Oregon act also provides for an exclusive fund, Ore. Comp. Laws Ann. (1940) §102.1736, it provides that the fund may insure employers subject to their liability under the Longshoremen’s and Harbor Workers’ Act, id. § 49.1841.

The Nevada and West Virginia acts are “elective” in respect to private employments, but the employer who fails to file with the act is deprived of his common law defenses in a suit brought by the employee. It is not probable, therefore, that an insurance policy covering this alternative liability could be obtained except at a very high rate. The Ohio and West Virginia acts provide for self-insurance. This permits the employer able to demonstrate financial responsibility to become directly liable to the employee, but provisions authorizing self-insurance are available only to a limited number of employers.

36. Policies which cover marginal employees engaged in stevedoring, shipwright work, ship scaling, talleying, etc., provide for coverage under both the Federal Longshoremen’s and Harbor Workers’ Compensation Act and the state compensation act. Policies covering these classes of employees under only one act are, apparently, the exception and the rate for such so-called “partial coverage” is that proportion of the total rate which the pure premium for the portion subject to coverage bears to the total pure premium for the employment involved. No combined policies are generally available, however, for marginal employees other than the classes mentioned. When double coverage is required for such employees, the rate is increased by a percentage which ranges from zero to sixty-five per cent, depending on the comparative ratio between the benefits under the state compensation act and the Federal Longshoremen’s and Harbor Workers’ Compensation Act. Communication to YALE LAW JOURNAL from National Council on Compensation Insurance, February 21, 1944.

37. See Mr. Justice Frankfurter’s concurring opinion, Davis v. Dep’t of Labor and Industries, 317 U. S. 249, 258-59 (1942).
NOTES

for all injuries occurring on navigable waters. A broad Congressional definition of "maritime" employment would be no easier to apply to hard facts than a court definition; and a Congressional attempt to define precise situations falling within the federal statute might by an undesirable specificity prevent application of the statute in cases where the state could still not constitutionally exercise jurisdiction. Federal legislation attempting to incorporate state law by reference so as to render it applicable to all employees not covered by the federal seaman's act would, so long as the Jensen doctrine remains law, fair for noncompliance with the requirements of uniformity.

On the other hand, reexamination of the Jensen decision might be difficult in the absence of some Congressional action because the federal statute has been interpreted as incorporating the Jensen boundary of demarcation. Thus, in those cases where the application of state law is in issue, a constitutional question might not arise because state law would always be validly limited by the Jensen doctrine as the statutory criterion of the limits of the clearly superior federal act. Cases arising under the federal act would involve merely a problem of statutory interpretation. But, as Chief Justice Stone suggested in his dissent, when an employer liable under the federal statute has failed to file with the federal agency, the employee is permitted the alternative of

38. This type of statute would still not solve the problem of marginal employees injured on land while working under a "maritime" contract. See note 10 supra. There is a slight possibility, also, that a federal statute including non-maritime employments might be considered unconstitutional, since workmen's compensation is said to be contractual in nature. See P. J. Carlin Construction Co. v. Heaney, 299 U. S. 41 (1936); see also note 6 supra.

39. See page 351 supra.


41. A congressional proviso saving from the jurisdiction of admiralty courts the "rights and remedies under the workmen's compensation law of any State," 40 STAT. 395 (1917), 28 U. S. C. §§41(3), 371(3) (1940), amending the savings clause of the Judiciary Act of 1789, 1 STAT. 73, 76-77 (1789), was held unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 164 (1920). While the decision rests in part on the principle of the non-delegability of legislative power, the Knickerbocker case extends the uniformity doctrine of the Jensen case in such a way as to require not merely the application of the same law by both state and federal tribunals, but also the application of a geographically uniform law. See Morrison, supra note 10, at 477-79. A similar statute attempting to maintain such uniformity where essential, by excepting from operation of the saving clause "the master or members of the crew of a vessel," was also declared invalid under the Jensen doctrine. State of Washington v. Dawson & Co., 264 U. S. 219 (1924). But suits for injuries incurred while working on navigable waters may still be brought in state courts. Messel v. Foundation Co., 274 U. S. 427 (1927).

42. Parker v. Motor Boat Sales, 314 U. S. 244, 249-50 (1941).

43. See Davis v. Dep't of Labor and Industries of Wash., 317 U. S. 249, 263 (1942).

44. Ibid.

45. Id. at 260-63.
an action either "at law or admiralty." The "action at law or admiralty" interpreted as the employee's remedy under state law would permit a reconsideration of the Jensen criterion as a problem of constitutional limitation.

If the Jensen doctrine were reconsidered, a practicable solution to the problem of the marginal employee might be obtained without the necessity of further Congressional action provided that the Supreme Court were also willing to revise its interpretation of the federal statute. Since the federal law is applicable "if recovery may not validly be provided by state law," the restrictive phrase might be interpreted to cover those employees which any particular state statute either expressly excluded or clearly failed to include. While Congress when adopting the phrase was probably contemplating the Jensen limitation, it indicated by so restricting the area of federal application that its intent was not to supersede state law but only to fill those gaps where state law could not be deemed to apply. To confine the meaning of "validly apply" to "validly as defined by the Jensen case" would seem an unwarranted restriction of Congressional intent if the Jensen case were already overruled.

If the suggested interpretation of the federal act were adopted, employers as well as employees and courts could easily determine the agency authorized to exercise jurisdiction over their interests by examining the provisions of their respective state acts. It might be argued, however, that as a result state legislatures or courts interpreting statutes like that of Washington would extend these statutes to include longshoremen, now adequately and long protected under federal law. Since no constitutional or federal statutory barrier would exist, such an extension is clearly conceivable. If the state statute were modified, however, by express legislative action, little prejudice could result to either employer or employee, since the source of liability and of recovery would be clear to both. If the extension were made by court interpretation, there would still seem to be little uncertainty once the initial case had been determined. Despite the difficulty inherent in any shift of administrative jurisdiction, it would seem that those longshoremen and stevedores who are

47. See Davis v. Dep't of Labor and Industries of Wash., 317 U. S. 249, 263 (1942).
48. For a similar reluctance on the part of the Supreme Court to reconsider a constitutional principle deemed to have been incorporated into a Congressional enactment, see Helvering v. Griffiths, 318 U. S. 371 (1943). But see Mr. Justice Douglas' dissent, id. at 404.
50. See page 353 supra.
51. See note 7 supra. It is possible also that the Davis doctrine might be applied in such a way as to achieve this result.
local residents and essentially non-migratory, might better be protected by state law. 62

SCOPE OF A HABEAS CORPUS HEARING ON INTERSTATE EXTRADITION OF CRIMINALS*

The notorious incidence of "lynch law" in certain Southern states 1 has engendered a reluctance to turn over to those states fugitives who are likely to be deprived of their constitutional right to a fair and impartial trial. Probable deprivation of such a right has occasionally resulted in a governor's refusal to honor an extradition request. 2 Although the question has rarely arisen, it is generally assumed that it would be improper under the federal extradition statute 3 for a state court to accomplish a similar result through the issuance of a writ of habeas corpus. 4 The usual statement is that in a

52. It might be argued that overruling of the Jensen case would cause state law to be applied to "seamen" and that, as a result, the employer would again be subject to a double liability because the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1940), gives seamen a right of action under the Federal Employers' Liability Act. Elimination of the Jensen doctrine would, however, remove only the barriers to application of state law within the area of "admiralty jurisdiction." See note 6 supra. Where Congressional legislation provides a remedy, it would still presumably preempt the field.

As to seamen's injuries incurred on land, see Morrison, supra note 10, at 487-91; London Guarantee & Accident Co. v. Industrial Accident Comm., 279 U. S. 109 (1929). But cf. Alaska Packers' Ass'n v. Industrial Accident Comm., 276 U. S. 467 (1928). In Occidental Indemnity Co. v. Industrial Accident Comm., 143 P. (2d) 58 (D. C. App. Cal. 1943), the Davis doctrine of dual presumptions was held inapplicable to a seaman entitled to recover under the Jones Act.


2. If a governor refuses to extradite a criminal, no court has the power under federal law to compel him to do so, even though the Supreme Court has ruled it is a ministerial, not a discretionary, gubernatorial function. Kentucky v. Dennison, 24 How. 65 (U. S. 1861). The Uniform Criminal Extradition Act makes it mandatory, under state law, for a governor to extradite a fugitive if on investigation the governor finds that the fugitive is properly charged with a crime under the laws of the demanding state and was present in the demanding state at the time the alleged crime was committed. Uniform Criminal Extradition Act §§ 2, 3, 4.


4. See Ex parte Paramore, 95 N. J. Eq. 385, 123 Atl. 246 (1924), aff'd, 96 N. J. Eq. 397, 125 Atl. 926 (1924).
habeas corpus proceeding the court may consider only whether the accused is substantially charged with a crime against the laws of the demanding state,\(^6\) whether he was there at the time the crime was committed,\(^6\) whether he is a fugitive from justice,\(^7\) and whether he is actually the individual wanted.\(^6\) In a recent case, however, a Pennsylvania court held that in a habeas corpus proceeding\(^9\) it was privileged to inquire into the treatment likely to be accorded the fugitive in the demanding state and to release a prisoner held for extradition to Georgia on the ground that the Fourteenth Amendment implied a constitutional right not to be lynched.\(^10\)

In *Commonwealth ex rel. Mattox v. County Superintendent of Prisons, Philadelphia*,\(^11\) the prisoner, a negro boy held for extradition to Georgia on warrant of the Governor of Pennsylvania,\(^12\) presented strong evidence, inadvertently corroborated by the Georgia authorities, to show that if extradited he would be in grave danger of being lynched or otherwise denied a fair trial.\(^13\) The Superior Court of Pennsylvania dismissed an appeal from an

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7. See *Ex parte Paramore*, 95 N. J. Eq. 386, 123 Atl. 246 (1924), *aff'd*, 96 N. J. Eq. 397, 125 Atl. 926 (1924). The Court may not investigate the prisoner's guilt or innocence. *Drew v. Thaw*, 235 U. S. 432 (1914). Where an accused can prove undisputedly that he is innocent, however, a few courts have released him on the ground that he is not a fugitive from justice. See *In re Kuhns*, 36 Nev. 487, 137 Pac. 83 (1913); *Ex parte LaVere*, 39 Nev. 214, 156 Pac. 446 (1916); *People ex rel. Plumley v. Higgins*, 109 Misc. 328, 178 N. Y. Supp. 728 (Sup. Ct. 1919); *Ex parte Owens*, 34 Okla. Crim. 128, 245 Pac. 68 (1926). A court may not question the motives of the executive of the demanding state.


11. Ibid.

12. The negro boy, Mattox, was charged with criminal assault upon a white man after a fight in which, the court states, the first move towards physical violence was made by the latter. The latter had also slapped Mattox's two sisters, who were with Mattox at the time, and hit Mattox with a car jack before the relator drew a knife and inflicted superficial wounds on the white man. No attempt was made to prosecute the latter. *Id.* at 178, 31 A. (2d) at 581.

13. Mattox's two sisters were held in jail for three months. Their mother, who sought to have them released, was severely beaten, and no attempt was made to arrest her assailants. Mattox's brother, who was not involved in this incident, was jailed and threatened with mob violence by the sheriff unless they found Mattox in order to "kill him." The Georgia county prosecutor objected to the Pennsylvania judge's sitting on the case
order releasing the prisoner on bail.\textsuperscript{14} In reaching this result the Court relied on dicta in one Pennsylvania case\textsuperscript{15} and one United States Supreme Court case,\textsuperscript{16} both implying that under the circumstances of the \textit{Mattox} case a court would be justified in protecting the fugitive's right under the due process clause of the Fourteenth Amendment.\textsuperscript{17} The court's inability to offer more than isolated dicta in support of its decision reflects the United States Supreme Court's traditionally strict interpretation of the federal extradition statute\textsuperscript{18} in the interest of interstate harmony\textsuperscript{19} and its tendency to limit habeas corpus proceedings to consideration of jurisdictional issues.\textsuperscript{20}

\begin{footnotes}
\item[\textsuperscript{14}] on the ground that he had once sponsored anti-lynching legislation in Congress. \textit{Id.} at 179, 31 A. (2d) at 581.
\item[\textsuperscript{15}] Commonwealth \textit{ex rel.} Mattox \textit{v.} County Superintendent of Prisons, Phila., 152 Pa. Super. 167, 31 A. (2d) 576 (1943).
\item[\textsuperscript{17}] Marbles \textit{v.} Creecy, 215 U. S. 63 (1909). "It is clear that the executive authority of a state in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by the mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the state to which it is sought to remove him nor be adequately protected, while in the custody of such state, against the action of lawless and bad men." \textit{Id.} at 69. The Pennsylvania court stated that the excerpt italicized by it implied "that if the charge . . . had been established to the satisfaction of the judge who granted the writ of habeas corpus . . . it would have been a sufficient ground for releasing the relator from custody and refusing to deliver him up to the representatives of the demanding state." 152 Pa. Super. 167, 174, 31 A. (2d) 576, 579 (1943).
\item[\textsuperscript{18}] Courts previously have ruled that danger of being lynched is not sufficient reason for not extraditing the fugitive. See \textit{Ex parte} Ray, 215 Mich. 156, 183 N. W. 774 (1921); Ople \textit{v.} Weinbrenner, 285 Mo. 365, 226 S. W. 256 (1920), \textit{cert. denied}, 256 U. S. 695 (1921); \textit{Ex parte} Paramore, 95 N. J. Eq. 386, 123 Atl. 246 (1924), aff'd, 95 N. J. Eq. 397, 125 Atl. 926 (1924). These cases may be distinguished from the \textit{Mattox} case on the ground that in all of them the court expressed doubt as to whether there was actually any danger of the prisoner's being lynched. But see People \textit{ex rel.} Whitfield \textit{v.} Enright, 117 Misc. 448, 191 N. Y. Supp. 491 (Sup. Ct. 1921). Compare Pahli \textit{v.} Pollack, 174 Misc. 981, 22 N. Y. S. (2d) 413 (Sup. Ct. 1940), with State \textit{ex rel.} Cooney \textit{v.} Hoffmeister, 336 Mo. 682, 80 S. W. (2d) 195 (1935). The operation of the Statute of Limitations in the demanding state is not to be considered in extradition proceedings. Waggoner \textit{v.} Feeney, 44 N. E. (2d) 499 (Ind. 1942). See generally (1941) 54 Harv. L. Rev. 503.
\item[\textsuperscript{19}] \textit{Rev. Stat.} § 5278 (1875), 18 U. S. C. § 662 (1934).
\item[\textsuperscript{20}] See Valentina \textit{v.} Mercer, 201 U. S. 131 (1906).
\end{footnotes}
In *Johnson v. Zerbst*, however, the Supreme Court stated that sufficient denial of due process raises a jurisdictional issue. The *Zerbst* case held that appointment of counsel for an indigent defendant was a jurisdictional requisite in a federal criminal trial. The Court has also approved the use of writs of habeas corpus by federal courts to facilitate an appeal in a criminal case and to set aside state court convictions based on trials which were flagrantly unfair and unconstitutional or on confessions extorted by third degree methods. These cases suggest a characterization of habeas corpus jurisdiction which would seem to support the *Mattox* decision.

The analogy of the *Mattox* decision to the *Zerbst* line of authority is, however, defective in at least one respect; in the former, habeas corpus was issued to prevent infringement of the fugitive's constitutional rights, whereas in the latter, habeas corpus was used to rectify infringements which had already occurred. For this reason the cases in which federal courts have enjoined state criminal trials would seem to be more nearly comparable to the *Mattox* situation. In both the federal injunction cases and the *Mattox* case the right of each state to try its own criminals according to its laws, plus the desirability of promoting harmony between sovereign jurisdictions by according them that right, was opposed by the right of every individual to due process of law. The federal courts have reconciled this conflict by saying that a state criminal trial will be enjoined only when the individual's constitutional

22. The federal courts probably have been granted the power to consider constitutional issues in a habeas corpus proceeding, but, apparently, never refer to this power, preferring the grounds of the *Zerbst* case. Rev. Stat. § 753 (1875), 28 U. S. C. § 453 (1924); Pettibone v. Nichols, 203 U. S. 192, 201 (1906); see (1939) 24 Corn. L. Q. 270.
27. See cases cited *infra* note 31. These cases generally involve a challenge of state statutes prohibiting the exercise of a civil liberty or of certain business activities on pain of criminal penalties, by suits to enjoin enforcement brought either before or after the forbidden act is committed. The advantage of the injunctive suit and, similarly, of the declaratory judgment action is the fact that the constitutional issue may be raised without the petitioner's subjecting himself to possible criminal penalties. See Borchard, *Challenging "Penal" Statutes by Declaratory Action* (1943) 52 Yale L. J. 445.
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rights are in great and immediate danger of being irreparably impaired.31 In the *Mattox* case the relator clearly showed that he was in great and immediate danger of being irreparably lynched, and the Pennsylvania court would seem, therefore, to have come within the rule of the federal injunction cases, assuming that *Mattox* had a constitutional right not to be lynched capable of being infringed.

It is far from settled, however, that such a constitutional right exists.32 Those who deny it rely on the early Supreme Court cases of *United States v. Harris*33 and *Powell v. United States*.34 In each instance a prisoner of the state was lynched before trial. The mob leaders were indicted under section 19 of the United States Criminal Code, which makes it a federal offense to conspire "... to injure ... any citizen in the ... enjoyment of any right or privilege secured to him by the Constitution ... of the United States ..." 35 Demurrers were upheld on the ground that the Fourteenth Amendment did not give Congress the power to legislate with reference to private individuals. From this the inference is drawn that there is no constitutional right not to be lynched which is judicially enforceable. It is unlikely, however, that either case would be so interpreted by the present Supreme Court, which has tended to expand rather than contract the personal guarantees of the due process clause of the Fourteenth Amendment.36

The view that there is a constitutional right not to be lynched was adopted in the circuit court case of *Ex parte Riggins*,37 in which under the identical fact situation of *United States v. Harris* and *Powell v. United States* the lynchers were convicted under section 19 of the Criminal Code. The court distinguished the *Harris* decision38 and based its opinion squarely on the due process clause. It held, in effect, that accused persons have a constitutional right


33. 106 U. S. 629 (1882).

34. 212 U. S. 564 (1909).


38. *Id.* at 415.
not to be lynched on the ground that such violence deprives them of their right to a fair trial. This theory was affirmed by a recent case in which a deputy sheriff was convicted partly for failure to protect his charges against mob violence.\textsuperscript{39} Another line of Supreme Court decisions in the last decade has also stressed that a prisoner’s right to a fair trial includes court protection against pre-trial violence. The Supreme Court has reversed convictions where defendants have been tortured before trial \textsuperscript{40} and where confessions have been extracted by mob threats.\textsuperscript{41} Therefore, it would seem that those in custody of the law have a constitutional right to be protected against lynching, whether perpetrated by state officials \textsuperscript{42} or by private individuals.

In the absence of threatened violence, however, the fact that the prisoner, if extradited and if not lynched, would probably not be given a fair trial is by itself a questionable ground on which to grant a preventive remedy, such as habeas corpus, since inequities in court procedure can always be challenged on appeal. This is the usual attitude of federal equity courts when asked to enjoin a state criminal trial. The Supreme Court has stated that the constitutionality of a state statute cannot be challenged by collateral injunction proceedings when the appellant pleads only that raising the constitutional issue on appeal from a conviction would subject him to the risk of a prison term were the statute upheld.\textsuperscript{43} Presumably, therefore, a court cannot release a prisoner in a habeas corpus proceeding on the ground that he will undoubtedly be denied a fair trial. Such a preventive remedy should be granted only where a prisoner is confronted with probable and drastic personal violence.

\textbf{ADMISSIBILITY IN A FEDERAL COURT OF EVIDENCE OBTAINED UNDER A STATE IMMUNITY STATUTE*}

Legal forms embodying the conception that a man should not be forced to testify against himself have varied with the requirements of particular

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\item \textsuperscript{39} Catlette v. United States, 132 F. (2d) 902 (C. C. A. 4th, 1943). The police officer removed his badge and helped manhandle some Jehovah's Witnesses. The court ruled that removal of his badge did not exempt him from the responsibilities of his office, and he was convicted for joining in the assault and also failing to protect the Witnesses against mob violence.
\item \textsuperscript{40} Brown v. Mississippi, 297 U. S. 278 (1936); Moore v. Dempsey, 261 U. S. 86 (1923).
\item \textsuperscript{41} Ward v. Texas, 316 U. S. 547 (1942).
\item \textsuperscript{42} Section 19 of the Criminal Code can undoubtedly be used to protect an individual's constitutional rights against encroachment by state officials. United States v. Classic, 313 U. S. 299 (1941); see United States v. Cruikshank, 92 U. S. 542 (1875).
\item \textsuperscript{43} Spielman Motor Sales Co. v. Dodge, 295 U. S. 89 (1935).
\end{itemize}

places and periods. Yet the conception itself remained unimpaired until the introduction into a federal system of government of federal and state statutes compelling testimony. Purportedly, these statutes harmonize the function of the privilege against self-incrimination contained in federal and state constitutions with the object of obtaining information by substituting immunity from prosecution because of crimes divulged for the protection previously afforded a witness by his silence. Since the legislative immunity controls, however, only the jurisdiction within which testimony is compelled, the possibility remains that evidence so obtained may be used prejudicially against the witness in another jurisdiction to which the power to immunize does not

1. The privilege against self-incrimination arose at common law as a series of evidentiary rules preventing the extraction of forced testimony. The privilege included not only the right of a defendant in a criminal prosecution to refuse to give testimony, but also that of a witness in a civil prosecution to refuse to respond to questions the answers to which he claimed might incriminate him. For discussions of the historical genesis of the privilege, see 9 Holdsworth, History of English Law (1938) 192-202; 8 Wigmore, Evidence (3d ed. 1940) §2250; Pittman, The Colonial and Constitutional History of the Privilege Against Self Incrimination in America (1935) 31 Va. L. Rev. 763.

The privilege was later embodied in the Federal Constitution, U. S. Const. Amend. V., and in all but two state constitutions. The provisions of the state constitutions are assembled in 8 Wigmore, Evidence §2282, n. 3. The wording of the Federal Constitution is typical: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. Const. Amend. V. Variations in constitutional phrasing have not affected the scope of the privilege. See 8 Wigmore, Evidence §2252. In the two states where the privilege has not found constitutional sanction, Iowa and New Jersey, it has been held part of their common law. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); State v. Zdanowicz, 69 N. J. L. 619, 55 Atl. 743 (1903).

2. A complete compilation of the "immunity" statutes may be found in 8 Wigmore, Evidence 472-501.

3. The plight of the regulatory agency in its attempt to secure information has been persuasively presented in Lilienthal, The Power of Governmental Agencies to Compel Testimony (1926) 39 Harv. L. Rev. 694. See also 8 Wigmore, Evidence §2251; Corwin, The Supreme Court's Construction of the Self-Incrimination Clause (1930) 29 Mich. L. Rev. 1; Rapacz, Rules Governing the Allowance of the Privilege Against Self-Incrimination (1935) 19 Minn. L. Rev. 426; Wartels and Pollitt, A Critical Comment on the Privilege Against Self-Crimination (1929) 18 Ky. L. J. 18; Comment (1940) 49 Yale L. J. 1059.

4. See the statement in Counselman v. Hitchcock, 142 U. S. 547, 585 (1892): "... no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States."

extend. Judicial distinctions which hold this limited immunity the legal equivalent of the privilege destroyed, should not be permitted to obscure the fact that silence wherever maintained would protect a witness against prosecutions in either state or federal jurisdictions. Realization of this fact might well influence a determination of the question whether testimony compelled by a promise of legislative immunity is, or should be, admissible evidence against the testifiant in a jurisdiction not subject to the legislative fiat.

It would seem unfortunate, therefore, that the majority of the Court of Appeals for the Second Circuit in United States v. Feldman should have rested their affirmation of the competency of such evidence solely on legal analogy. The testimony introduced in this case, a federal prosecution for fraudulent use of the mails, had been obtained from the defendant by virtue of a state immunity statute in proceedings conducted by New York judgment creditors. Although the defendant argued that the introduction of prior testimony which he had been powerless to withhold would have the practical effect of violating his Federal Constitutional privilege against self-incrimination, the district court overruled the objection. The Circuit Court, in sustaining the ruling, relied in the admitted absence of authority on the point, on inferences to be drawn from the holding of United States v. Murdock and the enactment of a federal statute, subsequently repealed, which would have barred the evidence.

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5. These decisions are based on the conception that the privilege against self-incrimination is operative with respect only to the laws of the jurisdiction in which it is asserted. See Brown v. Walker, 161 U. S. 591 (1896): a witness compelled to testify under a federal statute cannot assert in a federal proceeding a privilege against self-incrimination under state law. See also United States v. Murdock, 284 U. S. 141 (1931). Similarly, a witness compelled to testify in a state proceeding, cannot assert his privilege against self-incrimination under federal law. Jack v. Kansas, 199 U. S. 372 (1905).

6. 136 F. (2d) 394 (C. C. A. 2d, 1943). But see Judge Clark's dissent, id. at 399.

7. The defendant's testimony was given in special proceedings brought by judgment creditors in New York state. The New York statute under which the evidence was compelled provides: "A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud . . . but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding, except on a charge or indictment for perjury committed in an examination under this article." N. Y. Civ. PRACTICE ACT § 789.


9. One decision had held that incriminating testimony obtained in a state prosecution might be used against a defendant on cross-examination, but in this case the defendant had waived his constitutional privilege by taking the stand to testify. Vause v. United States, 53 F. (2d) 346, 356 (C. C. A. 2d, 1931).


11. REV. STAT. § 860 (1878) reads: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or
Since the Congressional statute had prohibited the introduction into United States courts of testimony obtained from a party or witness in any prior judicial proceeding, its enactment would not necessarily imply Congressional belief that the federal privilege against self-incrimination embodied in the Fifth Amendment would not prevent the use of testimony extracted by a state immunity statute. And in any event, Congressional belief as to the scope of Constitutional provisions would seem hardly persuasive authority. Nor would the holding in United States v. Murdock seem to offer more convincing criteria of determination. Here it was held that a witness could not claim his federal privilege against self-incrimination as a protection against possible incrimination under state law. The issue whether a claim of privilege should be allowed would seem hardly comparable to the question whether the Constitutional privilege to which a defendant in a criminal prosecution is undoubtedly entitled includes also a protection against the use of incriminating testimony forced from him by state compulsion.

The Murdock decision does apparently hold, however, that the federal privilege against self-incrimination may be claimed for the purpose of protection against federal prosecution alone. The circuit court seemed to infer from this that a state privilege is similarly restricted in scope and that, therefore, the privilege against self-incrimination urged in the New York judgment creditor proceedings was not violated by use of the defendant's testimony in a subsequent federal prosecution. Considerations as to the state privilege, however, would seem to have been irrelevant except insofar as ideas of comity might have influenced a federal court to respect the protection held out by a state immunity statute. The circuit court's argument obscures entirely the question whether the defendant's Federal Constitutional privilege was violated. It may be, however, that the circuit court inferred from the rule in the Murdock case that incriminating evidence obtained under a federal immunity statute would be admissible in a subsequent state proceeding and that, therefore, testimony compelled in a state proceeding should be likewise

any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided. That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid:"

14. The circuit court also argued that the defendant had been given an immunity equivalent to that afforded by the New York immunity statute because the testimony was not used as evidence of the crime for which the defendant was indicted, but as evidence only of prior crimes on which the Statute of Limitations had run. United States v. Feldman, 136 F. (2d) 394, 398-99 (C. C. A. 2d, 1943). The New York statute, however, protected the witness not only against prosecution for crimes his testimony revealed but provided also that no "testimony so given . . . [should] be used against him upon any criminal investigation or proceeding." N. Y. Civ. Prac. Act § 789.
admissible in a subsequent federal prosecution. Even if an immunity statute had been a factor in the Murdock situation, however, it would not necessarily have followed that the evidence there obtained would be admissible in a subsequent state proceeding, since its admissibility would depend entirely on local rules of evidence. In at least one state case in which the question has arisen it has been held that to admit testimony compelled by a federal immunity statute would violate the defendant's privilege against self-incrimination guaranteed to him by the state constitution.\textsuperscript{15} Similarly, the question of admissibility in federal courts depends only on federal rules of evidence.

While the rule in \textit{United States v. Murdock} does indicate a tendency to restrict the Constitutional privilege against self-incrimination, it is questionable whether the restrictionary policy expressed would or should extend to the situation in the Feldman case. The Supreme Court may have felt that a witness' claim of the privilege to withhold testimony only possibly useable in another jurisdiction was overbalanced by the need for obtaining information which the witness alone was empowered to give. Yet the same Court might equally well have hesitated before reducing the Constitutional privilege of a defendant in a criminal prosecution to a procedural requirement preventing him from being called as a witness,\textsuperscript{16} but not prohibiting the use of his own forced testimony to secure his conviction. The Court may also have felt in the Murdock case that danger of prosecution under state law was "remote," since the factor of remoteness was emphasized in decisions on which this ruling was based.\textsuperscript{17} Such a belief would give little indication as to the Supreme

\textsuperscript{15} Clark v. State, 68 Fla. 433, 67 So. 135 (1914).
\textsuperscript{16} See 20 \textit{Stat.} 30 (1878), 28 U. S. C. 632 (1940) making a defendant charged with a federal crime a competent witness "at his own request but not otherwise." (Italics added).
\textsuperscript{17} American cases on which the Murdock ruling was based seem to create a conclusive presumption that the danger of prosecution by another jurisdiction is improbable. In \textit{Jack v. Kansas}, 199 U. S. 372 (1905), a state court denying a claim of the privilege based on possible federal prosecution relied on the fact that it did not believe there was "any real danger of a Federal prosecution or that such evidence would be availed of by the government for such a purpose." (Italics added). See also Brown v. Walker, 161 U. S. 591 (1896), where the Court considered the danger of possible prosecution in another jurisdiction an improbable one, which it was not the purpose of the Constitutional provision to obviate. The rule of the English case cited in the Murdock opinion seems to be that the privilege will be denied when only a claim of possible prosecution is made; The King of Two Sicilies v. Willcox, 1 Sim. (n.s.) 301, 61 Eng. Rep. R. 116 (1851); Queen v. Boyes, 1 B. & S. 311, 121 Eng. Rep. R. 730 (1861); \textit{cf. In re Atherton}, [1912] 2 K. B. 251; but that it may be allowed when the foreign law under which the party may be held liable is set out in the pleadings. See United States v. McRae, L. R. 4 Eq. 327, 336, L. R. 3 Ch. App. 79, 85 (1857) where the court said that the judge in the Two Sicilies Case "could not have contemplated a case where the presumed ignorance of the Judge as to foreign law is completely removed by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated. . . ."

Practical considerations might have precluded application of the English rule in the Murdock case. It would be difficult to determine the degree of probable danger necessary
Court's attitude toward a situation in which the "remote" danger had become actualized.

Other than Constitutional prohibitions, however, might preclude the use of testimony like that offered in the Feldman case. For in McNabb v. United States, the present Supreme Court recently adopted as a criterion of admissibility in federal courts the vague notion of compliance with "civilized standards of procedure and evidence" and emphasized that these "are not satisfied merely by observance of . . . minimal historic safeguards." "Civilized standards of procedure and evidence" might forbid the use of testimony against a defendant who despite a right to two distinct Constitutional privileges against self-incrimination was in fact being forced to testify against himself. It would seem, moreover, that immunity granted in one jurisdiction as a result of the limitation of the privilege of self-incrimination should be respected in another. Otherwise, the objective of immunity statutes might be impaired because to many witnesses the penalty for refusing to testify would be preferable to a subsequent criminal prosecution. Admission of such incriminating evidence might, also, facilitate collaborative action by federal and state prosecutors, whereby proceedings to uncover testimony would be commenced in one jurisdiction in order to effect indictment under the laws of the other.

to render the privilege allowable. See 8 WIGMORE, EVIDENCE, § 2258. Such a rule would also require in each case a consideration of the rules of law and policies of foreign jurisdictions, with consequent administrative burden. See 8 WIGMORE, EVIDENCE, 338-39. Professor Wigmore's objection to the English rule, however, would not be as valid when the danger is possible prosecution in another state of the United States or by the federal government in the same state instead of by a foreign nation. There would not be much difficulty in ascertaining the law since state statutes authorize state courts to take judicial notice of the laws of sister states and of federal laws and, conversely, federal courts take judicial notice of the laws of all the states. See Hanley v. Domoghue, 116 U. S. 1 (1885); Darling v. Dent, 82 Ark. 76, 100 S. W. 747 (1907); Baltimore & O. S. W. R. R. v. Berdon, 195 Ind. 265, 150 N. E. 407 (1924); The danger of prosecution by another sovereignty is much more substantial in a federal system where both the state and federal governments exercise concurrent jurisdiction over the same territory. See McGovney, Self-Criminating and Self-Disgracing Testimony Code Revision Bill (1920) 5 IOWA L. BULL. 174, 182-84.

18. 318 U. S. 332, 340 (1943).