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PRESENT STATUS OF COMPENSATION ACTS IN ADMIRALTY

The decision of the United States Supreme Court in *Southern Pacific Company v. Jensen*,[1] denying to state compensation acts any validity as to cases coming within the jurisdiction of admiralty, has already been commented on in these pages.[2] Relying on this decision, state courts have been compelled to refuse awards to injured maritime employees[3]—"innocent victims of the old feud between federal and state control."[4] This was the situation as regards eight New York

[1] (1917) 244 U. S. 205; 37 Sup. Ct. 524, Ann. Cas. 1917 E, 900.

[2] (1917) 27 YALE LAW JOURNAL, 255.

[3] See *Tallac Company v. Pillsbury* (1917, Cal.) 168 Pac. 17; *Neff v. Industrial Commission of Wis.* (1917, Wis.) 164 N. W. 845. *Cf. Lanigan v. Aetna Life Ins. Co.* (1917) 57 N. Y. L. J. 1035.

[4] 12 NEW REPUBLIC, 283 (Oct. 13, 1917).

cases considered at one time by the Appellate Division, in all of which compensation was denied, and in all but one of which awards made by the Industrial Commission were set aside. *Sullivan v. Hudson Nav. Co.* (1918, App. Div.) 169 N. Y. Supp. 645. The majority held that awards made prior to the *Jensen* decision, either with the assent of the insurers, or without the question of jurisdiction having been raised, might now be reopened and set aside. They also held that the decision included within its scope not only carpenters engaged as repair men and injured while so engaged on board a ship anchored in navigable waters, but also dockworkers who were not working upon navigable waters but were employed under maritime contracts.

The view of the majority that admiralty jurisdiction extends to maritime contracts performed on land is undoubtedly correct.[5] And their view upon the other branch of the case that lack of jurisdiction of the subject matter is never waived and may be asserted at any time is likewise unanswerable.[6] Though the dissenting judges denied that admiralty jurisdiction extended to dockworkers, they did not contest the rule as to jurisdiction, but held that it applied only when lack of jurisdiction appeared from the record. In only two of the cases did they consider that the record disclosed such a situation, and they thought that the other cases should not be reopened to allow proof along those lines. That this position is technical they admit, but say that it is fair "to offset technicality against technicality in the interest of justice." But their position seems unjustifiable. While we may sympathize with their regret at the *Jensen* decision, yet it is the law of the land, and specious means should not be resorted to in order to prevent the insurers from taking advantage of it. That the insurers may have collected premiums upon the basis of agreements to pay such compensation claims is a claim properly to be made only by the employers in seeking refund of premiums paid, and even in such case

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[5] See Mr. Justice Pitney's statement in *Southern Pacific Company v. Jensen, supra,* at p. 252: "The civil jurisdiction in admiralty in cases *ex contractu* is dependent upon the subject matter; in cases *ex delicto* it is dependent upon locality."

[6] 15 C. J. 809; *McClaughry v. Deming* (1902) 186 U. S. 49, 66, 22 Sup. Ct. 786, 46 L. Ed. 1049. The case of *Valley S. S. Co. v. Wattawa* (1917) 244 U. S. 202, 37 Sup. Ct. 523, cited in 27 YALE LAW JOURNAL, 255, n. 1, where the court refused to consider the jurisdictional question decided in *Southern Pacific Company v. Jensen, supra,* on the ground that the point was not raised in the trial court, is not really *contra,* because, whether right or wrong, it went off on questions of state and federal appellate procedure. The case was one, however, where an employee had obtained a judgment in a common law action against his employer for an injury on shipboard under the Ohio elective compensation act, denying to an employer who, as in this case, refused to submit to the compensation features of the act, the defenses based on the fellow-servant rule, assumption of risk, or contributory negligence. As hereinafter developed, it is not clear that the rule of the *Jensen* case applied.

there may not have been an unjust enrichment where the insurance agreement is the usual one to pay only compensation claims legally due.[7]

The majority judges properly cite the *Jensen* decision as sustaining the validity of the saving clause of the Act of 1789, which saved to suitors from the grant of admiralty jurisdiction to the Federal courts "in all cases the right of a common law remedy where the common law is competent to give it."[8] Likewise, they correctly view the Federal decision as holding that it is the form of the remedy rather than the basis of liability created by compensation acts which renders such acts unconstitutional as applied to admiralty, and their conclusion seems correct that if the New York Compensation Act had provided a common law remedy for its enforcement, it might have been upheld in maritime cases.[9] The Court does not, however, refer to the recent amendment by which Congress added to the saving clause the words "and to claimants the rights and remedies under the workmen's compensation laws of any state."[10]

This Amendment, which was popularly supposed to nullify the *Jensen* decision,[11] has caused considerable disagreement among commentators.[12] In the case of *Veasey v. Peters* (1917, La.; rehearing,

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[7] *Cf. Matter of The Iron Steamboat Co.* (1917) 58 N. Y. L. J. 17.

[8] 1 U. S. St. at L. 76, 77, chap. 20, sec. 9; U. S. Comp. Stat. 1916, secs. 991 (1), 1233. But in (1917) 6 CAL. L. REV. 72, n. 18, it was considered that references in the *Jensen* case to the saving clause were mere *dicta*. *Cf.* 27 YALE LAW JOURNAL, 261, n. 21.

[9] "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." *Southern Pacific Co. v. Jensen, supra,* at p. 218. That recovery under state statutes has been allowed in both state and admiralty courts for maritime cases of death by wrongful act, for which there was no basis of recovery at common law, see 27 YALE LAW JOURNAL, 258, nn. 11, 12.

[10] 40 Stat. at Large, 385 (Oct. 6, 1917).

[11] See 12 NEW REPUBLIC 283 (Oct. 13, 1917), felicitating Congress on so effectually aiding shipping at a time when the need thereof is vital.

[12] Its constitutionality is considered beyond question in (1917) 17 COLUMBIA L. REV. 705, 707, and in (1918) 3 SOUTH. L. QUART. 76, but its constitutionality is questioned and its effectiveness doubted in (1917) 6 CAL. L. REV. 72, n. 18, and (1918) 31 HARV. L. REV. 488. In 17 COLUMBIA L. REV. 707 it is suggested that the New York Compensation Act will probably be held invalid as to maritime cases as imposing a double liability upon the employer, for which *Cunningham v. Northwestern Imp. Co.* (1911) 44 Mont. 180, 119 Pac. 554 is cited, and a federal compensation law is suggested as a remedy. Yet it is difficult to see how the situation in respect to double liability differs from that in any other case where admiralty jurisdiction is concurrent with state jurisdiction; the tribunal which first acquires jurisdiction retains it and two recoveries are not allowed. If the amendment is valid, claimants would naturally appeal to the state tribunal for their compensation remedy. In 3 SOUTH. L. QUART. 76, a federal compensation law is urged as necessary to cover the case of injuries upon the high seas. This

1918) 77 So. 948, it was relied upon to uphold an award, previously disallowed on the authority of the *Jensen* case, in the case of an injury occurring before its passage. This case, which concerns a stevedore injured in the unloading of a vessel, involves a curious misreading of authorities.[13] Upon the second hearing of the case, the court distinguishes the *Jensen* case on the ground that it was a proceeding *in rem* to hold the ship responsible, which is palpably an error. And it distinguishes *Atlantic Transport Company v. Imbrovek,*[14] upon which it had previously relied for its decision that admiralty had jurisdiction, on the ground that there the stevedore was engaged in loading the vessel, while in the case at bar (as in the *Jensen* case) he was unloading. The court then gives the amendment as a further ground for its decision, stating that because of its remedial character there is nothing to prevent a retroactive effect being given it. This seems erroneous, for the court does not distinguish the case where there is merely a change of remedy from the case where the giving of a certain remedy really creates a new basis of liability.[15] In view of the *Jensen* case, Congress by the amendment attempts to create a new basis of liability and the amendment therefore cannot be retroactive.

The court does not discuss the constitutionality of the amendment. As already suggested,[16] it seems to the writer that the amendment leads to a dilemma. If Congress can legislate to save to suitors in maritime cases their common law remedies,—and the saving clause of the Act of 1789 has always been considered valid and was so considered in the *Jensen* case,—why can it not legislate to save to such suitors their statutory compensation remedies? Yet the *Jensen* case holds that such remedies interfere with the grant of admiralty jurisdiction in the United States Constitution, an authority superior to Congress. There will be some question about any view of the case. To hold the amendment invalid while the saving clause itself has been upheld would be to ascribe some strange virtue to a common law remedy, a narrowness of view implying a recurrence to former times when forms of action were absolutely rigid.[17] To hold the amend-

seems a valid argument if the tort theory of compensation acts is to prevail. If the contract theory is to be adopted, and such acts given extra-territorial effect, this argument would fail, and as indicated in (1917) 27 YALE LAW JOURNAL, 259, local state acts seem otherwise preferable. For discussions of the extra-territorial operation of compensation acts, see (1917) 27 YALE LAW JOURNAL, 113, and (1918) 27 YALE LAW JOURNAL, 707.

[13] See criticism in (1918) 16 MICH. L. REV. 562.

[14] (1914) 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

[15] *Jacobus v. Colgate* (1916) 217 N. Y. 235, 111 N. E. 837.

[16] (1917) 27 YALE LAW JOURNAL, 261, n. 21.

[17] That state courts may apply equitable remedies to cases where the jurisdiction of admiralty is concurrent, see *Reynolds v. Nielson* (1903) 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000 (suit for partition of vessel); *Soper v.*

ment constitutional, the course desirable from a practical point of view, is to overrule, in part, the *Jensen* decision, to consider that it turned entirely upon the wording of the statute, and to decide that Congress may authoritatively interpret the meaning of the grant of admiralty jurisdiction in the Constitution.

But is there not a way out through the clear intimation of the Supreme Court that it is the form of remedy which is objectionable? Why not, therefore, provide a common law remedy, capable of enforcement by the ordinary process of the court, for the compensation liability?[18] And under elective compensation acts, such as those of Connecticut and Ohio, or at least under extensions of the idea contained in such acts, why is it not possible to subject such maritime employers as refuse to submit voluntarily to the ordinary compensation procedure to suit in common law actions with the defenses based on the fellow servant rule, assumption of risk and contributory negligence not available?[19] Such actions are enforced by common law remedies and the ordinary processes of the courts, and do not involve any greater change of liability from the common law than do the actions created by the death damage statutes. This would not be unfair discrimination against such employers. At most it would be simply taking from them an unfair discrimination in their favor.

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Manning (1888) 147 Mass. 126, 16 N. E. 752; *Knapp S. & Co. v. McCaffrey* (1899) 177 U. S. 638, 20 Sup. Ct. 824.

[18] It would seem that *Veasey v. Peters, supra,* might have been decided in accordance with this view, and in favor of the employee, on the original hearing, for the Louisiana Act provides that it shall be enforced through an ordinary action at law, though the court is not to be bound by common law rules of evidence or technical rules of procedure. Louisiana Acts of 1914, No. 20, sec. 18. If Louisiana can be considered to have any "common law" remedies, this would appear to be one. But the court, in its original opinion, considers the *Jensen* case as referring, not to the change of remedy created by compensation acts, but to the change of liability. In *Bjolstad v. Pacific Coast S. S. Co.* (1917, N. D. Cal.) 244 Fed. 634, a compensation act was enforced negatively in an admiralty court. Here suit had been brought by libel in admiralty for damages for the death of the defendant's employee, the action being grounded upon the New Jersey death damage statute. The court held that the New Jersey Compensation Act applied, that under that act no recovery could be had for alien dependents, and that in this case, the dependents being aliens, judgment must be for the defendant. In *Southern Surety Co. v. Stubbs* (1917, Tex. Civ. App.) 199 S. W. 343, it was held that the fact that admiralty had jurisdiction was no bar, under the *Jensen* case, to a suit at common law against an insurer for compensation.

[19] See note 6, *supra.*