At Sea with the United States Supreme Court

Herbert R. Baer

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I must go down to the seas again, to the lonely
sea and the sky,
And all I ask, oh august Court, is a case to
steer me by.†

The sight of a star was all that Masefield's mariner needed to guide him safely on his way. Perhaps it was the North Star for which he scanned the heavens. But, having found it, the mariner knew he could rely on its position being unchanged, its directions firm and true. The legal mariner who plows the seas of admiralty law also searches for a star to guide him as he plots his course. Through the fog of conflicting decisions of lower federal courts he hopes to catch now and then a glimpse of a guiding star by way of a Supreme Court decision which will safely lead him on his way.

But the admiralty lawyer is not blessed with the good fortune of the mariner at sea. All too frequently, when the stars of Supreme Court decisions appear, the lawyer finds the heavenly pattern completely changed and in utter confusion. That which was formerly north has become south; that which was a fixed star has become a comet dashing about the legal galaxy so that it is impossible even to plot a future course. The stars themselves seem to be in trouble. Instead of shining brightly they glimmer waveringly, split into majority and minority portions and do naught but confuse.

It is one of the paradoxes of our judicial system that admiralty, the oldest body of law administered by our courts, is the least understood by both lawyers and judges. It is not without significance that in the short interval since January 1953 four Justices dissented from the majority in eleven admiralty cases, and in still more such cases dissenting opinions were filed by a lesser number of Justices who were severely critical of the law as declared by the Court. Conceivably this disagreement among the Justices may be attributed to any one of several causes. Possibly it is the lack of precedent in a given situation; maybe certain of the Justices just do not fully comprehend the law of admiralty; or, as is true in so many other fields, perhaps a Justice, well knowing the legal rules applicable, chooses to depart therefrom to establish a prin-

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† With all due apologies to John Masefield.

ciple which to him seems socially more desirable than that declared by established decisional and statutory law.

The purpose of this Article is to discuss significant decisions rendered by the Supreme Court in the past few years which are of vital interest to the admiralty personal injury lawyer.[1] Where there is disagreement, we shall not attempt to say which of the possibilities set forth above was the cause for the division. As to that the reader shall be free to draw his own conclusion. However, it is hoped that a discussion of the cases with emphasis on the rationale of both majority and dissenting opinions will enable the admiralty practitioner to recognize where he may advise with some degree of assurance and where, by virtue of the extent and nature of the disagreement among the Justices or the departure from previously accepted admiralty principles, a decision may conservatively be accepted as merely the law of the moment.

RIGHTS OF THE ILL OR INJURED SEAMAN*

MAINTENANCE AND CURE

From very ancient times a seaman who had fallen ill or had been injured while in the service of the ship was entitled to maintenance and

[1] The bulk of the litigation before the Supreme Court of concern to the admiralty lawyer has been in the personal injury field. Because of limitations of space this paper is restricted to cases involving personal injury or death. Discussion of the Court's decisions in other admiralty areas such as marine insurance, collision, cargo claims, etc., is more appropriately the subject of a separate paper.

* To locate a particular subject matter dealt with in this Article the reader will find the following helpful.

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cure. The medieval sea codes, such as the Laws of Oleron,[2] specifically proclaimed this right which has been honored throughout the centuries. Yet, to this very day, the United States Supreme Court has generally been unable to agree as to whether or not the right existed in the case before it and, even when there has been agreement on the existence of the right, the Court has divided 5 to 4 as to when the right terminates.

The particular instances that have caused the Court trouble are the cases in which the injury or illness is contracted by the seaman while on shore leave. The ancient sea codes were obscure on this point. Thus, while the Laws of Oleron provided for maintenance and cure for the seaman who was taken ill or injured "in the service of the ship" and specifically relieved the master from liability if the injuries were incurred while the seaman was on shore without leave, the code was silent as to liability for injuries incurred by the seaman while on shore with leave.[3]

It was not until 1943 that the Supreme Court first passed upon the question of the seaman's right to maintenance and cure for injuries sustained while on shore leave. In *Aguilar v. Standard Oil Co.*[4] the claims of two seamen who had been on shore leave were before the Court. One was injured when after leaving the ship and proceeding on the pier in darkness he fell into an open ditch at a railroad siding. The other was returning from shore leave and while walking on a roadway on premises he had to traverse in order to reach the ship was struck and injured by a motor vehicle.

Justice Rutledge spoke for the Court and held that both of the seamen were entitled to maintenance and cure. Seamen, he found, were "in the service of the ship" while on shore leave.

> Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. . . . In short, shore leave is an elemental necessity . . . . [I]t is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings.[5]

Although this language of Justice Rutledge was sufficiently broad to extend maintenance and cure coverage to disabilities sustained while in the actual enjoyment of shore leave, he confined the holding of the Court to the precise instances where the seaman was either going from or returning to the ship. Thus after stating that coverage would exist

[2] The Laws of Oleron, arts. VI, VII, reprinted in 30 Fed. Cas. 1174-75 (1897).
[3] *Ibid.*
[4] 318 U.S. 724 (1943). The case is treated in Comment, 38 ILL. L. REV. 193 (1943). For an interesting collection of cases on this subject see Pollitt, *Shore Leave and the Doctrine of Maintenance and Cure,* 34 CORNELL L.Q. 603 (1949).
[5] *Id.* at 733-34.

had the injuries been sustained on the vessel while leaving or boarding it he said,

> We can see no significant difference, therefore, between imposing the liability for injuries received in boarding or quitting the ship and enforcing it for injuries incurred on the dock or other premises which must be traversed in going from the vessel to the public streets or returning to it from them. That much, at least, is within the liability. How far it extends beyond that point we need not now determine.[6]

While the Court in *Aguilar* found a right to maintenance and cure existed in the shore leave cases when the seaman was either departing from or returning to the vessel, it also declared that under certain conditions there would be no such right. We are told that the seaman is not entitled to maintenance and cure if he has been guilty of "some wilful misbehavior or deliberate act of indiscretion."[7] Elaborating on this phrase the Court said,

> The traditional instances are venereal disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore.[8]

Again, the Court said the shipowner's obligation to pay maintenance and cure is so broad that "negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility."[9] The fault of the seaman would not bar him "unless gross."[10]

It was, of course, with such words and phrases as "deliberate acts of indiscretion," "culpable misconduct," and "gross" that difficulty in the form of differences of opinion as to the character of the conduct was bound to arise. In 1951 this difficulty was presented in *Warren v. United States*.[11]

The *Warren* case presented two major questions on which the Court sharply divided. The first was whether the coverage allowed in *Aguilar* to the seamen leaving or returning to the vessel was to be extended to the seaman who suffered his injuries while in the course of enjoying relaxation at the place he sought entertainment. The other was whether the seaman had been guilty of conduct which would bar his recovery.

Warren, a messman on a ship owned by the United States, was on shore leave in Naples. After engaging in sightseeing, he and a few of his shipmates drank a bottle of wine together and spent some time in a dance

[6] *Id.* at 737.
[7] *Id.* at 731.
[8] *Ibid.*
[9] *Ibid.*
[10] *Id.* at 734.
[11] 340 U.S. 523 (1951), 50 MICH. L. REV. 435 (1952).

hall. A room adjoining the dance hall overlooked the ocean. French doors opened onto an unprotected ledge which extended a few feet from the building. Warren stepped to within six inches of the edge and, as he leaned over to look, he grasped an iron rod which seemed to be attached to the building. The rod came off. Warren lost his balance, fell and broke his leg.

The trial court allowed recovery.[12] The Court of Appeals denied it.[13] A majority of the Supreme Court speaking through Justice Douglas agreed with the trial court.

As to the question of whether the remedy of maintenance and cure should be extended to injuries and illnesses incurred while the seaman is enjoying his shore leave or restricted to those instances where the seaman is leaving or returning to the vessel, the majority of the Court had no difficulty. Justice Douglas quoted at length the language of Justice Rutledge in *Aguilar* which we set out above. That reasoning of Justice Rutledge, the Court found, is just as applicable to "injuries received during the period of relaxation while on shore as it is to those received while reaching it."[14] Thus it became established that an injury received by a seaman while on shore leave is an injury "in the service of the ship."[15] If any leeway was to be given in either direction, the Court declared, " '[T]he considerations which brought the liability [for maintenance and cure] into being dictate it should be in the sailor's behalf.' "[16]

It was on this point that Justices Jackson and Clark dissented. They declared the injuries did not arise in the service of the ship. *Aguilar* applied only to the seaman who was leaving or returning to the vessel over a route of access of which he had no choice. "But the choice of places of refreshment and varieties of entertainment are the sailor's own."[17] Unless we are to consider the seaman's employment gives him a policy of accident insurance while he is on leave, these dissenters find no support for the Court's decision.

The second question upon which the Court divided was whether or not Warren had been guilty of "wilful misbehavior," "culpable misconduct," or "gross" fault which would bar him from recovery. Justice Douglas, for the majority, found that while Warren had been negligent, he had not been guilty of wilful misbehavior or gross negligence. He found no "deliberate act of indiscretion" or "vicious conduct" which would have prevented recovery.[18] Intoxication was no barrier because

[12] The Anna Howard Shaw, 75 F. Supp. 210 (S.D.N.Y. 1947).
[13] Warren v. United States, 179 F.2d 917 (2d Cir. 1949).
[14] 340 U.S. at 530.
[15] *Id.* at 529.
[16] *Id.* at 530, quoting Aguilar v. Standard Oil Co., 318 U.S. 724, 735 (1943).
[17] *Id.* at 531.
[18] *Id.* at 528.

the trial judge had found Warren was not intoxicated.[19] Accordingly, recovery was allowed.

Justice Frankfurter dissented on the ground that Warren, in leaning over the ledge and grasping the bar, was not only negligent but was guilty of such a "deliberate act of indiscretion"[20] as to bar him from recovery. In so holding he agreed with the Court of Appeals.

While it may now be accepted law that the seaman is covered for maintenance and cure while on shore leave, the *Warren* case illustrates only too well the uncertainty of a recovery if denial is predicated on the character of the seaman's conduct at the time of the injury or illness. The trial judge had expressly concluded that Warren had not acted "in reckless disregard of safety" or been guilty of "gross negligence" and allowed recovery.[21] A unanimous Court of Appeals for the Second Circuit disagreed with the trial court and denied recovery because they found Warren had not used a minimal degree of care for his own safety.[22] A majority of the Supreme Court agree with the trial judge and find no conduct which would bar a recovery, and a dissenting justice finds that Warren should be denied recovery because he was guilty of a deliberate act of indiscretion.

It would appear, therefore, that the seaman who is charged by the shipowner with such conduct as would bar a recovery must go before three "juries" before he will ultimately know his fate. The first "jury," the District judge; the second, the Court of Appeals; and the third, the Supreme Court, where only the optimist will look for an unanimous verdict!

Duration of Seaman's Right to Maintenance and Cure

The cause of action for maintenance and cure includes three specific items of recovery: (1) maintenance, which is a living allowance; (2) cure, which covers nursing and medical expenses, and (3) wages. The Court has had no difficulty in recognizing these components of the cause of action. It has had considerable trouble, however, in determining for how long the seaman is to be entitled to maintenance and cure and payment of wages.

It is possible for a seaman to contract an incurable disease. It is also possible that an accident may produce such injuries that at some point treatment will not effect any further cure in the sense of betterment of the seaman's condition, although it might alleviate the pain and suffering which the seaman may have to endure for the balance of his life. Is the shipowner's obligation for maintenance and cure to end when the maxi-

[19] *Id.* at 528.
[20] *Id.* at 533.
[21] 75 F. Supp. 210, 216 (S.D.N.Y. 1947).
[22] 179 F.2d 919, 922 (2d Cir. 1949).

mum cure has been effected and the disability is recognized as permanent? Or should this obligation continue as long as medical care is needed to relieve the seaman from the effects of his permanent condition?

Further, the seaman's disability may have arisen because his service to the ship exposed him to the disease or injury. Or it may have arisen merely during his employment but with no causal relation thereto. Is a different yardstick as to the period for which maintenance and cure is recoverable to be applied in these two cases? At what point does the seaman's right to wages terminate? It is these basic problems which the Court considered in *Farrell v. United States*,[23] a 5-to-4 decision.

Farrell had overstayed shore leave and on February 5, 1944 was returning to his vessel when he fell over a guard chain into a drydock and was seriously injured. He received hospital treatment until June 30, 1944 when he was discharged as completely disabled. He was totally blind and suffering from post traumatic convulsions which probably would become more frequent and were without possibility of further cure. He would in the future require medical care to ease attacks of headaches and epileptic convulsions. Farrell contended he was entitled to maintenance and cure as long as he would be disabled which, in his case, was for life. The government as owner of the merchant vessel on which Farrell served contended its obligation for maintenance and cure terminated when the maximum cure had been effected.

Both lower courts sustained the position of the government.[24] On certiorari, the Supreme Court majority, headed by Justice Jackson, upheld the lower courts and denied Farrell further maintenance and cure beyond the date when he had been discharged as permanently disabled. Justice Douglas, speaking for the four dissenters, was of the opinion that a seaman is entitled to maintenance and cure even after the condition has become permanent if the situation is such that he will require future medical care and will be without means of maintenance.

In reaching the majority decision, Justice Jackson noted that under some of the medieval sea codes a seaman who was injured while fighting to defend the ship from sea rovers or pirates was entitled to maintenance for life.[25] But this principle he finds is not applicable here since Farrell was in no sense injured while defending the ship from her enemies. In fact he was lost on shore and, far from defending his ship, he was unable to find her.

[23] 336 U.S. 511 (1949), 23 So. CAL. L. REV. 81 (1949).
[24] Farrell v. United States, 167 F.2d 781 (2d Cir. 1948).
[25] 336 U.S. at 513. Justice Jackson quotes from 1 PETERS, ADMIRALTY DECISIONS app. at xv (1807) as follows: "If in defending himself, or fighting against an enemy or corsairs, a mariner is maimed, or disabled to serve on board a ship for the rest of his life, besides the charge of his cure, he shall be maintaned as long as he lives at the cost of the ship and cargo. Vide the *Hanseatic* law, art. 35."

While it is true that Farrell was not defending his ship when he was injured, it is equally true, in the light of the *Aguilar* and *Warren* cases just discussed, that his injury, suffered while on shore leave, was incurred in the service of the ship. There was a causal relation between the employment and the injury.

Counsel for Farrell contended that in *Calmar S.S. Corp. v. Taylor*[26] the Court had intimated that maintenance and cure might extend for a further time in those cases where the disability arose out of the employment as against those in which it had no relation thereto. In the *Taylor* case a seaman contracted Buerger's disease during his employment. The employment was in no sense a causal factor. At the seaman's request the trial court allowed a lump sum recovery based upon the seaman's life expectancy. This was predicated on the court's finding that the disease would continue for the rest of the seaman's life. The Court of Appeals affirmed the award. It found that treatment during the balance of the seaman's life would be necessary to allay the ravages of this progressive disease.[27] The Supreme Court reversed. Justice Stone, speaking for the Court, declared that in this type of case, where the disability has no causal relation to the employment, maintenance and cure should not be allowed for life but only for such time "after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment."[28] Then again emphasizing the lack of causal relation to the employment Justice Stone said, "Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service."[29]

The question of whether a seaman is to be entitled to a longer period of maintenance and cure if his disability arose out of his service to the ship was accordingly left open in the *Taylor* case. Now, when faced with the problem in *Farrell,* the majority hold that no distinction is to be made.[30] The seaman's right of recovery is measured by the same yardstick irrespective of whether his disability arises out of his service to the ship or from other causes. Farrell was entitled "to the usual measure of maintenance and cure."[31]

But what is the "usual measure"? On this question the court divides sharply. The majority finds the seaman's right to maintenance and cure ends when he has been "so far cured as possible."[32] When the condi-

[26] 303 U.S. 525 (1938), 24 VA. L. REV. 920 (1938).
[27] Calmar S.S. Corp. v. Taylor, 92 F.2d 84 (3d Cir. 1937).
[28] 303 U.S. at 530.
[29] *Ibid.*
[30] Referring to the distinction implied in the *Taylor* case, Justice Jackson said, "We think no such distinction exists . . . ." 336 U.S. at 515.
[31] 336 U.S. at 517.
[32] *Id.* at 518.

tion has become permanent, when no further cure can be effected, the obligation of the ship owner as to maintenance and cure terminates. Accordingly, the judgment denying further maintenance and cure is affirmed.

Justice Douglas, for the dissent, takes the humanitarian approach. Maintenance and cure is an inducement for seamen to enter the service. They face the perils of the ocean and those "who employ them must be solicitous of their welfare."[33] "Maintenance and cure," says the Justice, "[is] . . . part of the cost of the business. It is nonetheless a legitimate cost though the expense continues beyond the time when a maximum cure has been effected."[34] It is significant that, in declaring maintenance and cure should continue as long as medical aid is needed even though a maximum cure has been effected, Justice Douglas directs his conclusion to those cases where the seaman has been disabled as a result of his service to the ship. He recognizes that in *Taylor* a different result was reached when the disability did not arise out of the employment.

WAGES

The next issue on which the Court divided was the question of the period for which Farrell was entitled to recover wages. The conflict of opinion arises out of the difference in the customs relating to the hiring of seamen for coastwise shipping and shipping to a foreign port. The practice in connection with coastwise shipping is to hire the seaman for a specific term irrespective of the number of voyages that may be made. In connection with overseas voyages the practice is to hire the seaman for the specific voyage.[35] The Court is agreed that in cases of coastwise shipping the injured seaman is entitled to wages until the end of the hire term. But the Court is unable to agree as to the interpretation to be placed on Farrell's contract of hire.

For reasons for wartime security the articles which Farrell signed on December 16, 1943 did not describe the route but bound him to a voyage on the *S.S. James E. Haviland* "from the Port of Philadelphia, to A point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct, or as may be ordered or directed by the United States Government or any department, commission or agency thereof . . . and back to a final port of discharge in the United States for a term of time not exceeding 12 (Twelve) calendar months."[36]

[33] *Id.* at 524.
[34] *Ibid.*
[35] *Id.* at 520.
[36] *Id.* at 520.

The majority of the Court were of the opinion that Farrell was not bound to serve for a period of twelve months but only for the voyage "on which the ship was engaged when he signed on and that, when it terminated at a port of discharge in the United States, he could not have been required to reimbark for a second voyage."[37] Accordingly, the Court sustained the two lower courts which had found that Farrell's right to wages terminated on the completion of the *Haviland*'s voyage at New York on March 28, 1944.

The four dissenters were of the opinion that the same rule should apply in this case as would have been applied in a coastwise case where the articles provided for a hire period of twelve months. Justice Douglas could find no basis for a distinction since Farrell, under his articles, could have been required to serve on a voyage that would have continued for twelve months. Farrell had, as the dissent sees it, committed himself to an obligation to serve for a period which might be twelve months. "The obligations to pay wages should be coterminous with that responsibility."[38] Therefore, under the dissenters' view, Farrell should recover wages to December 16, 1944 instead of to March 28, 1944.

In view of the fact that a switch in the vote of a single one of the majority justices would completely reverse the rule of law both as to the duration of the right to maintenance and cure as well as the period for which wages are recoverable, the admiralty bar can hardly rely on *Farrell* as settling either one of these matters. The case appears to be one that we must look at as "the law of the moment" which may or may not be cemented by subsequent decisions of the Court.

Unseaworthiness and the Jones Act

The right to maintenance and cure, which we have just discussed, exists irrespective of the presence or lack of fault on the part of the shipowner or his servants. The recovery allowed by this right does not in any real sense compensate the disabled seaman for the injuries he has sustained. However, if the disability is caused by the unseaworthiness[39] of the vessel or her appliances the seaman is entitled to recover both against the vessel and her owners, in addition to maintenance and cure, an amount which will compensate him for his disability. This recovery is subject to diminution if the seaman's own negligence contributed to his injury or illness. But, until the passage of the Jones Act[40] in 1920, unless unseaworthiness brought about the disability, the seaman was not

[37] *Id.* at 520-21.
[38] *Id.* at 521.
[39] Some recent pronouncements by the Court as to what constitutes unseaworthiness will be discussed later in this article.
[40] 41 Stat. 1007 (1929), 46 U.S.C. § 688 (1958).

entitled to more than maintenance and cure even though the responsible cause was the negligence of the master or a member of the crew.[41]

By the Jones Act the seaman is given, in general, the same rights against his employer based upon negligence that the Federal Employers' Liability Act[42] gives to the railroad employee. These include trial by jury and the comforting doctrine of comparative negligence. Although the statute has been on the books for almost forty years, some basic problems of interpretation have only recently been dealt with by the Supreme Court.

The Jones Act states that the seaman injured in the course of his employment may "at his election" maintain an action for damages in accordance with its provisions. Since the seaman already had the right to sue for maintenance and cure and the further right to sue for indemnity in the event unseaworthiness was the cause of his injuries, the question arose as to what the term "at his election" meant. Four possibilities were presented:

1. The Jones Act gave the seaman an added remedy of which he could avail himself as he chose without forfeiting any of his existing rights;
2. Electing to sue under the Jones Act forfeited all claim to maintenance and cure as a separate remedy but his right to sue for unseaworthiness continued;
3. Electing to sue under the Jones Act forfeited all right to sue for unseaworthiness as a separate remedy but his right to sue for maintenance and cure continued; and
4. Electing to sue under the Jones Act forfeited all rights to sue both for maintenance and cure and unseaworthiness.

As early as 1928 the Supreme Court held in *Pacific S.S. Co. v. Peterson*[43] that "the right under the new rule [Jones Act] to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages."[44] Thus, on the sole issue before it, the Court then ruled that the right to maintenance and cure, as well as the right afforded by the Jones Act, constituted two "consistent and cumulative"[45] remedies.

However, Justice Sanford, speaking for the Court, did not content himself with deciding the issue before him. He went further and by way of dictum declared,

> And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right

[41] For the leading authority spelling out the rights of the seaman against the vessel and her owners prior to the Jones Act see The Osceola, 189 U.S. 158 (1903).
[42] 35 Stat. 65-66 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).
[43] 278 U.S. 130 (1928).
[44] *Id.* at 136-37.
[45] *Id.* at 138.

> under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness . . . .[46]

The theory which required a seaman to elect between unseaworthiness or his remedy under the Jones Act created several problems. When did the election have to be made? How was the plaintiff's attorney to know for certain whether his case should be based on unseaworthiness or on negligence under the Jones Act? Lawyers and judges of lower courts struggled with these problems and reached a variety of results.

It was not until 1958 that the Supreme Court again considered the election question in *McAllister v. Magnolia Petroleum Co.*[47] McAllister, a seaman, had fallen on board ship on October 19, 1950. On August 27, 1953 he instituted a suit against his employer in a Texas state court and claimed recovery on three grounds: (1) maintenance and cure, (2) damages under the Jones Act and (3) indemnity under the maritime law of unseaworthiness. The trial judge ruled that none of the claims were barred by the passage of time and submitted all three to the jury. By their verdict the jury found no negligence on the part of the employer and also found no unseaworthiness. The trial judge then entered a judgment in favor of the plaintiff for 6,258 dollars as maintenance and cure. The case went up to the United States Supreme Court on a question of the statute of limitations which we will consider later. However, at this time, it is important to note that, without referring to the *Peterson* case by name, the Supreme Court considered the matter of election by way of a footnote and said,

> Recent authorities have effectively disposed of suggestions in earlier cases that an injured seaman can be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness.[48]

And so the words "at his election" are now construed by the Court in line with the first possibility set out above, namely, that they really mean "in addition to" and result in merely adding another remedy to those which the seaman already had prior to the Jones Act. However, a word of caution is in order. While the Court now permits the seaman

[46] *Id.* at 139. It is interesting to compare this language with the statement by Justice Van Devanter four years earlier in Panama R.R. v. Johnson, 264 U.S. 375 (1924), where in referring to the Jones Act he said, "[I]t brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules." 264 U.S. at 388.

[47] 357 U.S. 221 (1958), 37 N.C.L. REV. 163 (1959).

[48] *Id.* at 222 n.2. The Court cited cases from the Second, Third, and Ninth Circuits and with a "cf." the non-Jones Act case of Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), and the able work of Professors Gilmore and Black on *The Law of Admiralty.*

to sue both under the Jones Act and for unseaworthiness, it imposes an obligation on him to combine both actions in a single proceeding. After having recognized, by way of a footnote, that the remedies under the Jones Act and for unseaworthiness are cumulative, the Court in the body of the *McAllister* opinion says,

> But if the seaman is to sue for both unseaworthiness and Jones Act negligence he must do so in a single proceeding.[49]

This conclusion, the Court states, necessarily follows from the rule laid down by it some thirty years earlier in *Baltimore S.S. Co. v. Phillips*[50] to the effect that a judgment in a seaman's libel for unseaworthiness is "a complete 'bar' to his subsequent action for the same injuries under the Jones Act."[51]

And thus, after an interval of thirty years, the "election" bugaboo so clearly stated by the dictum of Justice Sanford is laid to rest and seamen's counsel may under the current position of the Supreme Court safely proceed to prosecute personal injury claims under both Jones Act rules and unseaworthiness principles. All they need be careful to do is to see that they combine their prayers for relief under the two remedies in the same action.

Time Limitations on Seaman's Right of Action

While the *McAllister* case is noteworthy because of its determination of the election problem, the particular issue before the Court was whether or not a state court could apply its two-year statute of limitations to bar an unseaworthiness action which was joined with an action for negligence under the Jones Act, which has a three-year period of limitations.

As previously stated, the trial judge ruled that none of the three grounds alleged for recovery were barred by the passage of time. Both the seaman and the shipowner appealed the judgment of the trial court to the Texas Court of Civil Appeals. The seaman did not appeal the judgment on the Jones Act count but did appeal the judgment on the unseaworthiness count, contending that the trial court had committed error in admitting evidence as to that count and in its charge to the jury. The shipowner sought to upset the judgment for maintenance and cure.

The Texas Court of Civil Appeals affirmed the judgment as to maintenance and cure.[52] It did not consider the ground urged by the seaman as reason for reversing the judgment on the unseaworthiness count

[49] 357 U.S. at 224-25.
[50] 274 U.S. 316 (1927).
[51] 357 U.S. at 225.
[52] McAllister v. Magnolia Petroleum Co., 290 S.W.2d 313 (Tex. Civ. App. 1946).

because it found action on that count was barred by virtue of the Texas two-year statute of limitations relating to personal injuries. It therefore affirmed the judgment for the defendant on the unseaworthiness count. The seaman then brought the case to the United States Supreme Court on certiorari.

That Court divided 6 to 3. The majority reversed the Texas Court of Civil Appeals. It held that because the unseaworthiness count was joined with a Jones Act count the state court could not apply a shorter period of limitation to the unseaworthiness count than the three years permitted under the Jones Act. The dissent saw no reason to apply a different period of limitation to the unseaworthiness count in a case where it was joined with a Jones Act count than would be applied had unseaworthiness been the sole basis for recovery.

There is no federal statute of limitations as to actions for unseaworthiness and the rule of laches applies in admiralty to such maritime causes of action. While in determining whether or not the plaintiff is guilty of laches the admiralty courts will look to the state statutes of limitations as a guide, circumstances may influence the court to allow a longer period than the state statute prescribes.[53]

Chief Justice Warren, speaking for the majority in *McAllister,* said the Court would not decide the "broad question of whether a state court is free to apply its own statutes of limitation to an admiralty right of action for which no special limitation is prescribed, or whether it is bound to determine the timeliness of such actions by the admiralty doctrine of laches."[54] What the Court did decide was simply that, when an unseaworthiness claim is joined with a Jones Act claim, a court will not be permitted to apply a shorter period of limitations to the unseaworthiness claim than the three years permitted by the Jones Act. While the particular lower court involved was a state court, the Chief Justice said the Supreme Court thought the same rule would apply whether the action was "at law or in admiralty, in the state or the federal courts."[55]

The Chief Justice further declared that since a seaman wishing to prosecute both his Jones Act and unseaworthiness claims has to join them in the same action, an application of a two-year limitation period to the unseaworthiness claim "effectively diminishes the time within

[53] See Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956), where the Court at page 533 said, "It is well settled, however, that laches as a defense to an admiralty suit is not to be measured by strict application of [state] statutes of limitations; instead, the rule is that 'the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of the case.'" For a detailed discussion of *Czaplicki* see text at note 220 *infra.*

[54] 357 U.S. at 224.

[55] *Ibid.*

which the seaman must commence his action under the Jones Act."[56] This reasoning is a bit hard to follow. Assuming, for the sake of argument, that there was a two-year federal statute of limitations on unseaworthiness claims and the present three-year statute on Jones Act claims, no one could reasonably say that the unseaworthiness limitation period effectively diminished the Jones Act period. The most such a situation would accomplish would be to require the seaman to sue within the shorter period of limitations *if he wished to prosecute both claims.* But, if he wished to proceed solely on the basis of the Jones Act he would always have the benefit of the three-year limitation.

Justice Brennan wrote a concurring opinion. He noted that it had been the generally accepted practice for both state and federal courts to apply the state statute of limitations in those cases based on federally created rights for which no time limitations had been provided. However, this is not a hard and fast rule and Justice Brennan feels the courts may depart from the specific time limit fixed by state statutes when the circumstances of the case so warrant. Since the federally created limitation of the Jones Act is three years, Justice Brennan concludes that the seaman's action for damages based on unseaworthiness should also be accorded a three year limitation. This, he says, is especially true because he finds the Jones Act and unseaworthiness remedies "are but two aspects of a single cause of action."[57]

Justice Whittaker wrote the dissenting opinion. He was joined by Justices Frankfurter and Harlan. He points out the difference in the Jones Act and unseaworthiness causes of action. In one negligence is required; in the other there is liability without fault. He interprets the majority opinion to mean that if the seaman had sued on the basis of unseaworthiness alone the state two-year period of limitation would have been applied. Joinder of the two causes of action for which there are in effect different periods of limitation does not, in his opinion, warrant increasing the time limitation of the one to conform with the other.

Whether one considers the reasoning of the majority or that of the dissent the sounder, it seems quite clear that a uniform period of limitation within which a seaman may prosecute such claims as he may have against the shipowner by reason of personal injuries is desirable. Congressional action would be the simplest procedure but, in the absence thereof, the courts, pursuant to the thinking of Justice Brennan, might well declare that, irrespective of the time fixed by a state statute of limitations, a seaman will not be guilty of laches in prosecuting his claim based on unseaworthiness if he brings such action alone or in conjunc-

[56] 357 U.S. at 226.
[57] 357 U.S. at 229.

tion with a Jones Act claim within three years. This would not only achieve a uniformity as between the two types of actions but would also create a national uniformity which is lacking whenever the statutes of limitations of the different states, which vary considerably, are looked to as a yardstick.

VIOLATION OF NAVIGATION STATUTE AS BASIS FOR RECOVERY UNDER THE JONES ACT ABSENT NEGLIGENCE

In 1958 the Supreme Court rendered another of its 5-to-4 decisions in the admiralty field when it decided *Kerman v. American Dredging Co.*[58] The action was an exoneration and limitation proceeding and involved the death of a seaman who had lost his life in a fire on his employer's tug which at the time was towing a scow on the Schuykill River in Philadelphia. The accident occurred at night and under the Coast Guard regulations applicable the scow was to carry a white navigation light not less than eight feet above the surface of the water. The purpose of this regulation was to prevent collisions. The regulation was not complied with by the shipowner who, instead of carrying a light not less than eight feet above the surface, carried an open lantern on the barge three feet above the water.

No collision occurred as a result of this violation but fumes arising from waste petroleum products floating on the surface of the water became ignited and the scow and tug were enveloped in the flames which caused decedent's death. The trial judge found[59] that the river area in question had not been deemed dangerous and that there was no negligence in carrying an open flame lantern on the barge three feet above the water. He concluded that since the danger which was encountered in the instant case was not of the sort that the Coast Guard navigation regulation was designed to guard against, and since there was no negligence in having a light three feet above the surface, there could be no recovery under the Jones Act by the decedent's widow. The Court of Appeals affirmed.[60]

The majority of the Supreme Court reversed. It held that recovery could be had under the Jones Act for the death which resulted from the violation of the statutory duty concerning lights even though there was no negligence in having the lantern three feet above the water and even though the character of the risk involved was not that which the statute was designed to guard against. In reaching this conclusion, the Court relied on decisions under the Federal Employers' Liability Act in which

[58] 355 U. S. 426 (1958), 46 CALIF. L. REV. 847 (1958).
[59] Matter of American Dredging Co., 141 F. Supp. 582 (E.D. Pa. 1956).
[60] Matter of American Dredging Co., 235 F.2d 618 (3d Cir. 1956).

the Court had held that recovery could be had for injuries resulting from the violation of the Safety Appliance Acts or the Boiler Inspection Act without regard to whether the injuries which flowed from the breach were the type the statutes sought to prevent. Those principles developed under FELA were to be incorporated in construing the Jones Act, which grants to seamen the rights given railroad employees under FELA.

The four dissenters, headed by Justice Harlan, shared the position of the two lower courts. Their basic disagreement with the majority is that they see no justification for applying the principles developed around the violation of the Safety Appliance and Boiler Inspection Acts to *any* statute whatever. The dissent points out that previous decisions of the Court had found that by the Safety Appliance and Boiler Inspection Acts Congress had intended to impose an absolute liability without regard to negligence. No such intent is found in connection with the navigation regulations of the Coast Guard.

The case presents the interesting question as to what position the majority would have taken if, *in addition* to the lantern which was three feet above the surface, the barge had been properly equipped with a light no less than eight feet above the surface. In such a case the same fire and loss would have occurred, there would have been no negligence in having the three foot light, there would have been no violation of a statute on which to hang liability, and it would appear, unless some new doctrine were announced, that there would be no recovery.

CHARACTER OF PERSONNEL AS UNSEAWORTHINESS

The liability without fault which is predicated on unseaworthiness generally arises from the fact of injury due to the "unseaworthiness" of the vessel or its equipment. Unseaworthiness exists when the vessel is not reasonably fitted for the voyage in question or when the ship's gear or equipment is inadequate for the purpose for which it is ordinarily used.[61] Will a vessel in cases involving injury to seamen be deemed unseaworthy because of the unfitness of certain of its personnel as contrasted with the unfitness of the vessel itself or its gear? This question was first passed upon by the Supreme Court in 1955 when it decided *Boudoin v. Lykes Bros. S.S. Co.*[62]

Boudoin, the plaintiff seaman, was asleep in his bed when Gonzales, a deck maintenance man, came into Boudoin's room and took a bottle of brandy from under Boudoin's bed. When this action aroused Boudoin, Gonzales struck him with the bottle, inflicting serious injuries. It

[61] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944), 92 U. PA. L. REV. 459 (1944).

[62] 348 U.S. 336 (1955), 33 TEX. L. REV. 1081 (1955).

appeared that Gonzales, prior to the assault, had been attending a drinking party and had personally consumed almost a fifth. He was unquestionably drunk when he made the attack on the plaintiff and after the attack returned to plaintiff's room with a large knife which he proposed to use on his victim.

Boudoin based his action against the ship owner both on negligence and unseaworthiness. The District judge, trying the case without a jury, found that the shipowner had breached its warranty of seaworthiness and that its officers were negligent.[63] The Court of Appeals reversed, finding no negligence and rejecting the concept of unseaworthiness as applicable to cases involving an assault by one seaman on another.[64] The Supreme Court unanimously reversed the Court of Appeals. Eight members of the Court allowed recovery on the theory of unseaworthiness and thus found it unnecessary to consider the matter of negligence, while one Justice would have allowed recovery on the basis of negligence. In finding that the presence of Gonzales rendered the vessel unseaworthy the Court said it saw no reason to differentiate between the gear of the vessel on the one hand and its personnel on the other. The Court reasoned as follows:

> A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect. The problem, as with many aspects of the law, is one of degree[65].

As to the yardstick to be applied, the Court gives the answer in the following language:

> Was the assault within the usual and customary standards of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature? If it is the former, it is one of the risks of the sea that every crew takes. If the seaman has a savage and vicious nature, then the ship becomes a perilous place.[66]

Having laid down the above standard under which the seaman must assume the risk of a certain degree of assaulting, the Court concluded that Gonzales had "crossed the line"[67] and that his disposition was so savage as to render the vessel unseaworthy.

The *Boudoin* case opens the door of the Courts to every seaman who has been injured as a result of an assault by one of the ship's personnel irrespective of the knowledge or lack of knowledge on the part of the shipowner as to the assaulting characteristics of the offender. Recovery

[63] Boudoin v. Lykes Bros. SS. Co., 112 F. Supp. 177 (E.D. La. 1953).
[64] Lykes Bros. SS. Co. v. Boudoin, 211 F.2d 618 (5th Cir. 1954).
[65] 348 U.S. at 339-40.
[66] 348 U.S. at 340.
[67] *Ibid.*

on the theory of unseaworthiness will, in each instance, depend upon the characteristics of the assaulting seaman. If the Court should find that the offending seaman was "not equal in disposition to the ordinary men of that calling"[68] recovery by the assaulted seaman will be allowed irrespective of the existence of negligence on the part of the shipowner.

Undoubtedly the standard established by the Court will be difficult to apply. The *Boudoin* case does not mean that every time a seaman is assaulted by his drunken shipmate he will recover against the shipowner. Thus the Supreme Court in quoting from one of the few Court of Appeals decisions[69] on this question said:

> All men are to some degree irascible; every workman is apt to be angry when a fellow complains of his work to their common superior; and some will harbor their resentment and provoke a quarrel over it even after the lapse of several hours. Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the "disposition" of "the ordinary men in the calling."[70]

The lesson to the victim of the assault is clear. If he would recover for his injuries on the theory of unseaworthiness his case will be strengthened by proof that his assailant was a man of more than usual irascibility, a man who had a propensity to vicious conduct, and preferably a man who chose an instrumentality more dangerous than the human fist.

RIGHTS OF A SEAMAN'S GUEST INJURED ON BOARD SHIP

It is the custom of various shipowners to permit friends of seamen to visit them on board during the period the vessel is in port. It was not, however, until 1959 that the Supreme Court was called upon to determine the rights of such a guest who suffers injuries by reason of a negligently maintained condition of the ship. Is the guest entitled to the benefits of the non-fault liability established by the maritime doctrine of unseaworthiness? Is there to be a difference in the responsibility of the shipowner depending on whether the guest is to be classified

[68] *Ibid.*

[69] The quoted language is taken from Jones v. Lykes Bros. S.S. Co., 204 F.2d 815 (2d Cir. 1953). In that case the plaintiff had complained about the work of a fellow seaman. The seaman so criticized later assaulted and beat up the plaintiff with his fists causing a serious hip injury. Judge Learned Hand denied recovery which had been sought on the theory of unseaworthiness predicated on the character of the assaulter. Judge Hand distinguished the *Jones* case from Keen v. Overseas Tankship Corp., 194 F.2d 515 (2nd Cir. 1952), which he had decided the previous year. In the *Keen* case Judge Hand had ruled that a recovery might be had on the theory of unseaworthiness when it appeared that a ship's cook, who had vicious proclivities, assaulted the plaintiff seaman with a meat cleaver.

[70] 348 U.S. at 339.

as an invitee or licensee? And, when the accident occurs on navigable waters within state territory, is the state rule of contributory negligence as a complete bar to apply, or is the guest to be covered by the comparative negligence doctrine of admiralty?

These questions were presented and decided in *Kermarec v. Compagnie Generale Transatlantique.*[71] The case is significant, not only because it is one of first impression in the Supreme Court, but also because it is one of the few admiralty decisions in recent years in which all Justices concurred in the one opinion of the Court. Although the District Court had been affirmed by a divided Court of Appeals,[72] the Supreme Court was unanimous in reversing both lower courts.

The *S.S. Oregon* was berthed at a New York City pier. Kermarec had been given permission[73] to board the vessel for the purpose of making a social call on one of its crewmen. As Kermarec was leaving the ship he fell and was injured on one of the ship's stairways due to the dangerous manner in which a canvas runner had been tacked to the stairway. Kermarec brought suit against the shipowner in a federal court in New York basing jurisdiction on diversity of citizenship. He sought recovery both on the maritime doctrine of unseaworthiness and on alleged negligence of the shipowner.

The trial judge ruled that the action was governed by the state law of New York. He found that the doctrine of liability without fault based on unseaworthiness was not a part of the common law of New York and therefore eliminated unseaworthiness as a basis for recovery. He instructed the jury that Kermarec was a gratuitous licensee and that, in line with the law of New York, he could only recover if he showed that the shipowner had actual knowledge of the defective condition and failed to warn Kermarec. He also charged that if the jury found Kermarec guilty of contributory negligence, however slight, he could not recover. A jury verdict was returned for the plaintiff. On motion of the defendant, the trial court set aside the verdict and dismissed the action on the ground of a total lack of proof that the shipowner had actual knowledge of the defective condition. The Court of Apeals affirmed the dismissal.

[71] 358 U.S. 625 (1959), 75 L.Q. REV. 289 (1959).

[72] Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175 (2d Cir. 1957).

[73] It appeared that a pass had been obtained by a crewman authorizing Kermarec's visit. This pass contained exculpatory language pursuant to which the holder of the pass agreed the shipowner should not be liable in the event the visitor was injured by the shipowner's negligence or otherwise. The evidence showed that Kermarec never saw the pass and the jury verdict implicitly found that he had not been informed of its contents. Accordingly, the Supreme Court deemed it unnecessary to consider what effect the attempted disclaimer would have had if Kermarec had been aware of it. See 358 U.S. at 626 n.1.

In reversing the lower courts and directing that the jury verdict be reinstated with judgment for the plaintiff the Supreme Court made the following rulings:

(1) The trial judge had been right in denying recovery on the theory of unseaworthiness, not because such doctrine was no part of the common law of New York, but because Kermarec "was not a member of the ship's company, nor of that broadened class of workmen [*i.e.*, stevedores] to whom the admiralty law has latterly extended the absolute right to a seaworthy ship."[74]

(2) Since the injury occurred in navigable waters, maritime law and not state law would be applied. Hence, a charge that contributory negligence would operate as a complete bar instead of merely reducing recovery in line with the comparative theory of maritime law was erroneous. However, since the jury had found for the plaintiff even in the face of the contributory negligence charge, there was no damage done by this erroneous instruction.[75]

(3) The trial court had applied the common law of New York as to invitees and licensees and then, having classed the plaintiff as a licensee, found no liability. The Court of Appeals adopted the same licensee-invitee theory of law and affirmed without making it clear whether it was applying New York law or whether it deemed the licensee-invitee doctrine to be a part of maritime law. The principal issue, said the Supreme Court, is "whether admiralty recognizes the same distinction between an invitee and a licensee as does the common law."[76]

It is with the last quoted issue that the Court's opinion deals at length. The Court finds that prior to this case it had never determined whether a different or lower standard of care is to be accorded a ship's visitor who, under common law nomenclature, would be termed a licensee rather than an invitee. Then the Court declares that the distinctions between licensees and invitees were the result of a culture deeply rooted in the land, "a culture which traced many of its standards to a heritage of feudalism."[77] It notes that throughout the years the law courts have struggled with these common law distinctions and in an effort to do justice in our modern society have "found it necessary to formulate increasingly subtle verbal refinements."[78] Those courts have, "unevenly and with hesitation," been moving from the conceptual distinctions of

[74] 358 U.S. at 629. See discussion re *Seas Shipping Co. v. Sieracki* in text accompanying note 164 *infra*.
[75] 358 U.S. at 629.
[76] *Id.* at 630.
[77] *Ibid.*
[78] *Ibid.*

licensee and invitee to recognizing a single duty on landowners and occupiers of "reasonable care in all the circumstances."[79]

In the light of this common law background of the licensee-invitee concept and the gradual departure therefrom by the law courts, the Supreme Court concludes that "for the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality."[80] Accordingly, the Court declines to make the licensee-invitee concept a part of the maritime law and instead states,

> We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.[81]

Here then, is a decision of the Court of material aid to admiralty counsel. By a unanimous tribunal we are informed that licensee-invitee distinctions have no place in admiralty and that the obligation of the shipowner to all visitors on board is one of reasonable care under the circumstances.

RELEASES GIVEN BY SEAMEN—HOW GOOD ARE THEY?

In the days of the sailing vessel and well into the nineteenth century, the great bulk of seamen were drawn from illiterate, improvident and reckless people who inhabited the waterfronts. They were generally ignorant of their rights; they were not represented by unions; and they were easily imposed upon by unconscionable shipowners. Such men needed the protection of the admiralty courts. Hence we find Justice Story in 1823 during the course of his opinion in *Harden v. Gordon*[82] saying:

> Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. They are considered as placed under the dominion and

[79] *Id.* at 631.
[80] *Ibid.*
[81] *Id.* at 632.
[82] 11 Fed. Cas. 480 (No. 6047) (C.C. Me. 1823).

> influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage.[83]

And again, in 1836, Justice Story declared in *Brown v. Lull*:[84]

> Seamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is, that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty.[85]

Over one hundred years later, the Supreme Court in *Garrett v. Moore-McCormick Co.*[86] cited the above language of Justice Story in the *Harden* case as requiring that special treatment be given releases obtained by shipowners from their seamen. In *Garrett* a seaman brought suit under the Jones Act in a Pennsylvania state court. The shipowner pleaded a release and the seaman claimed fraud in its acquisition. The release was upheld by the state court[87] which found the seaman had not sustained the burden, which the court deemed to be his, of establishing the shipowner's fraud. The United States Supreme Court reversed. It held that in this maritime cause of action the burden was on the shipowner to establish that the release was "executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."[88] The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release were said to be relevant in appraising his understanding.

The fact that the American seaman, because of our school system, is as well educated as the average worker; the fact that he is organized into

[83] *Id.* at 485.
[84] 4 Fed. Cas. 407 (No. 2018) (C.C. Mass. 1836).
[85] *Id.* at 409.
[86] 317 U.S. 239 (1942), 91 U. PA. L. REV. 667 (1943).
[87] Garrett v. Moore-McCormick Co., 344 Pa. 69, 23 A.2d 503 (1942).
[88] *Id.* at 248.

powerful unions and that a union delegate is on board each ship to represent him against the master; and the fact that instead of being paid eighteen dollars a month as was the plaintiff in 1836 in *Brown v. Lull*, he may now earn anywhere from 300 dollars to more than 500 dollars a month has not altered the maritime rule of law.[89] The seaman is still the ward and favorite of the court of admiralty. The burden of sustaining the seaman's release is still on the shipowner.

However, even though we know where the burden is, we find it impossible to predict, in a given case, whether or not that burden has been sustained by the shipowner. This is most acutely illustrated in the recent case of *Thompson v. Coastal Oil Co.*[90] On January 12, 1950 Thompson, a ship's cook, had found Medina, a crew messman, engaged in a homosexual act on board ship. He promptly told the chief steward and the union delegate what he had seen. The union delegate called a meeting of all concerned. Medina denied the charge, left the meeting and went to the galley where he obtained a meat cleaver. He then lay in wait for Thompson and at the opportune moment lowered the cleaver three times on Thompson's head.

Thompson received medical and hospital treatment. On April 28, 1950 he was discharged from Stapleton Hospital with a medical notation that he had made a good recovery and would be fit for duty on May 29th. On May 18, 1950 Thompson was examined by Dr. Farr, a physician engaged by the defendant. Dr. Farr reported that Thompson had a ten per cent disability and would be able to return to work in three months.

During his hospitalization Thompson had been deluged with offers of legal services. He declined all of these solicitations and decided to use his own judgment. Accordingly, shortly after his discharge from Stapleton Hospital he interviewed one Barron who was the shipowner's agent in charge of settling claims. As of the time of this interview, there had been no decision of the Supreme Court, or of a lower federal court, which imposed absolute liability on the shipowner on the theory of unseaworthiness when a seaman had been assaulted by another seaman of vicious propensities and the shipowner had no reason to know of the dangerous character of the assaulter. The Supreme Court decision in *Boudoin*[91] was not handed down until five years later and the Court of Appeals decision in *Keen v. Overseas Tankship Corp.*[92] (another

[89] For a forceful article in which the author urges that it is now high time to stop treating the seaman, who in fact sometimes is a college graduate, as though he were an imbecile, see Wood, *"Old Father Antic the Law": The Favorites of the Courts of Admiralty*, 41 A.B.A.J. 924 (1955).

[90] 352 U.S. 862 (1956).

[91] 348 U.S. 336 (1955). This case is dealt with in the text accompanying note 62 *supra*.

[92] 194 F.2d 515 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952); see the brief discussion of this case in note 69 *supra*.

case of an assault with a meat cleaver and the first decision in point) was rendered two years after Thompson's conference with Barron.

Barron was of the opinion that in order for Thompson to recover he would have to establish knowledge on the part of the shipowner of Medina's vicious propensities. He advised Thompson of this opinion and told him he thought he had a weak case. In so doing, Barron acted in good faith. Thompson then settled his case, executing a release to the shipowner on the payment of 4,000 dollars.

Subsequent events proved that both the medical opinion of Dr. Farr and the legal opinion of Barron were erroneous. Thompson did not regain his health as expected and after the settlement had to be hospitalized again. At the time of the trial he was still suffering from his injuries and receiving out-patient treatment. Although he had been able to do some work of a lower calibre since the settlement, it was clear at the trial that his injuries had proven to be more serious than they were estimated to be at the time of the release. The decision in the *Keen* case, rendered before the trial of Thompson's case, established the error of Barron's opinion on the law. In the light of these circumstances, what effect was to be given the release?

The district court judge, trying the case without a jury, was of the opinion that the settlement was not "fairly arrived at"[93] because representatives of the shipowner had, although innocently, made misrepresentations of both fact and law. He accordingly entered a judgment in favor of Thompson against the shipowner for an additional 16,000 dollars. The Court of Appeals[94] held that the district court erred in striking down the release. It found that no coercion had been exercised nor any unfair advantage taken of Thompson. It accordingly reversed the district court judgment. On an application for a rehearing before the Court of Appeals en banc, that court divided.[95] The majority denied the rehearing. Two dissenting judges were of the opinion the rehearing should be granted on the ground that the release was invalid because of Barron's erroneous representation of the law as subsequently established by the *Keen* case.

Certiorari was granted.[96] However when the case was argued in January 1956, only eight Justices sat. They were evenly divided 4 to 4. Accordingly, the Court rendered a brief one-sentence per curiam decision affirming the judgment of the Court of Appeals.[97] None of the Justices wrote an opinion expressing their views. Application for

[93] Thompson v. Coastal Oil Co., 119 F. Supp. 838, 845 (D.N.J. 1954).
[94] Thompson v. Coastal Oil Co., 221 F.2d 559 (3d Cir. 1955).
[95] *Id.* at 562.
[96] Thompson v. Coastal Oil Co., 350 U.S. 817 (1955).
[97] Thompson v. Coastal Oil Co., 350 U.S. 956 (1956).

reargument was made and allowed.[98] At the reargument in October 1956 all nine Justices sat. This time they divided 5 to 4.[99] The preponderance was against the shipowner, however, and in another brief per curiam opinion the Court reversed the judgment of the Court of Appeals and ordered the judgment of the district court to be reinstated. Again, no Justice wrote an opinion expressing his views, although the report shows that Justice Harlan, who concurred in the reversal, would have preferred to remand the case to the Court of Appeals for the purpose of having that court determine if the district judge was correct in holding the vessel unseaworthy. The four dissenters were Justices Reed, Frankfurter, Burton and Minton.

And so if in the future someone asks, "How good is a seaman's release?", the answer might well be in the form of a summary of the action of the courts in the *Thompson* case:

(1) District Court judgment—release invalid.
(2) Court of Appeals judgment—release valid.
(3) First Supreme Court judgment—release valid (4-to-4 affirmance).
(4) Second Supreme Court judgment—release invalid (5-to-4 reversal).

Further comment as to the degree of reliance that may be placed on a seaman's release would seem superfluous.

RIGHTS OF FOREIGN SEAMEN

May a foreign seaman who is employed on a foreign vessel sue in the United States courts for damages either under the Jones Act or under the general maritime law of maintenance and cure and unseaworthiness? Is it material that the injury occurred in American waters or that the contract of hire was made in the United States? How controlling is the fact that the foreign seaman has an adequate remedy under the law of the flag of the foreign vessel? Two recent Supreme Court cases have highlighted these questions.

The first case is *Lauritzen v. Larsen*,[100] decided in 1953, and the second is *Romero v. International Terminal Operating Co.*,[101] decided in 1959. In *Lauritzen* only one Justice dissented but in *Romero* the dissenters numbered four!

Larsen was a Danish seaman who, while temporarily in New York, signed ship's articles written in Danish by which he joined the crew

[98] Thompson v. Coastal Oil Co., 350 U.S. 985 (1956).
[99] Thompson v. Coastal Oil Co., 352 U.S. 862 (1956).
[100] 345 U.S. 571 (1953), 102 U. PA. L. REV. 237 (1953). Justice Black was the sole dissenter.
[101] 358 U.S. 354 (1959), 73 HARV. L. REV. 138 (1959).

of the Danish owned and registered vessel the *Randa.* The articles provided that a crew member's rights were to be governed by Danish law and by the employer's contract with the Danish Seamen's Union of which Larsen was a member. Larsen was injured while the *Randa* was in Cuban waters. He brought suit against his employer on the law side of a federal district court in New York claiming damages under the Jones Act. He did not make any claim under maritime law for unseaworthiness or maintenance and cure. The sole issue, therefore, was the right of this foreign seaman to sue under the Jones Act.

Larsen's employer contended that Danish law was applicable and that Larsen had received all he was entitled to under that law. In addition the employer questioned the power of the court to grant the plaintiff relief. The District Court entertained the case and entered judgment for Larsen on the jury verdict of 4,267.50 dollars. The Court of Appeals affirmed.[102] The Supreme Court reversed.

The Jones Act provides that "any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . ."[103] There is no provision confining the act's coverage to American seamen nor is there anything said about the non-applicability of the act if the injury occurs on a foreign vessel or outside the territorial jurisdiction of the United States. As Justice Jackson said, when speaking for the court in the *Larsen case,* "[A] hand on a Chinese junk, never outside Chinese waters would not be beyond its literal wording."[104]

But however broad may be the wording of the act, Justice Jackson points out that by long established usage statutes dealing with maritime matters "have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[105] International commerce, he tells us, requires that there be mutual forbearance. Imposition of United States' law in maritime matters should only be sanctioned if there were sufficient contacts with the United States to make it preferable to apply its law rather than to leave the suitor to his remedies under foreign law.

Justice Jackson then proceeds to consider seven factors which are to be considered in determining whether or not the United States courts should give relief. They are in the order given:

1. Place of the wrongful act,
2. Law of the flag,
3. Allegiance or domicile of the injured,

[102] Larsen v. Lauritzen, 196 F.2d 220 (2d Cir. 1952).
[103] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).
[104] 345 U.S. at 577.
[105] *Ibid.*

4. Allegiance of the defendant shipowner,
5. Place of contract,
6. Inacessibility of foreign forum, and
7. The law of the forum.

As to the *first,* the place of the wrongful act, this, Justice Jackson says, would take us to Cuban law if we adopt a territorial theory or to the law of Denmark if we adopt the law of the flag of the vessel on which the injury occurred. Without determining whether it should be Cuban or Danish law by reason of the location of the tort, it is clear that the locality test "affords no support for the application of American law."[106]

In regard to the *second,* the law of the flag, Justice Jackson finds that the settled American doctrine is to give greatest weight to the law of the flag as to all matters of discipline and all things done on board which affect only the vessel or those belonging to her and do not involve the peace or dignity of the country or port where the ship then happens to be. Consideration of the second factor, says Justice Jackson, weighs heavily in favor of Danish and against American law.

The *third* and *fourth* factors, allegiance or domicile of the injured seaman and of the shipowner, pointed to the application of the Danish law. Not only were both of these parties Danish but the vessel itself was of Danish nationality as evidenced by its papers and flag.

The place of the contract was the *fifth* factor strongly relied on by the seaman. The contract of hiring was made in New York and in the law of conflicts the place of the making of the contract frequently controls the rights and obligations of the parties. But Justice Jackson points out that the Jones Act concerns itself with torts. The practical effect of making the place of the contract control the tort liability of the vessel would be "to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen."[107] However, even if contract law were to be considered, Justice Jackson notes that the contract itself provided Danish law was to apply. He finds no public policy which, under the circumstances of this case, would bar the parties from contracting in view of the law they intended. Thus the place of the contract does not operate to rule out Danish law.

The *sixth* factor discussed is the inaccessibility of the foreign forum. Whatever might be the circumstances in other cases, in this one it appeared that the seaman was under no obligation to go to Denmark to enforce his rights but could do so in New York by presenting his claim through the Danish consulate. In addition the record showed the

[106] *Id.* at 584.
[107] *Id.* at 588.

seaman had been offered free transportation to Denmark by the shipowner.

The *seventh* and final factor considered was the law of the forum. It was urged that because the shipowner was "doing business" in the state of New York it should be subject to American law. The theory of the plaintiff was that as long as the American court would have jurisdiction over the defendant it should take cognizance of a claim predicated on a foreign transaction. But Justice Jackson declared that contacts which are enough to give a local state jurisdiction over a foreign corporation are not necessarily sufficient to bring extra-territorial maritime torts under our law. "Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable."[108]

And so Larsen was denied recovery under the Jones Act. What would have been his rights had he sued to recover under the maritime doctrines of unseaworthiness and maintenance and cure was not in issue and was not decided. Neither are we told just which of the seven factors, if found to be favorable to the application of American statute law, would be sufficient to compel its application. Under the circumstances of *Larsen,* the place of contracting was not sufficient.

In the second Supreme Court decision involving the rights of an injured foreign seaman, *Romero v. International Terminal Operating Co.,*[109] a far more complicated situation was presented. Romero, a Spaniard, while in Spain signed on as a member of the crew of the *S. S. Guadalupe* for one round trip of the vessel which was owned and operated by Compania Transatlantica. The vessel was of Spanish registry and flew the Spanish flag. At the end of his initial voyage Romero continued on as a crew member. Under Spanish law this automatically continued in force the terms of his original hiring. During one of his subsequent trips on the *Guadalupe,* Romero was injured by a cable while on board the vessel when she was berthed at a Hoboken, New Jersey pier.

Romero filed suit on the law side of a United States District Court in New York. His amended complaint claimed damages against four defendants. They were his employer and owner of the vessel, Compania Transatlantica (a Spanish corporation); Garcia & Diaz, Inc. (a New York corporation), which acted as husbanding agent for Transatlantica's vessels while in the port of New York; International Terminal Operating Co. (a Delaware corporation), which was the stevedore concern en-

[108] *Id.* at 591.
[109] 358 U.S. 354 (1959).

gaged to load cargo on the vessel; and Quin Lumber Co. (a New York corporation), which was engaged in carpentry work in preparation for the receipt of cargo.

Recovery against Compania Transatlantica and Garcia & Diaz, Inc. was sought both under the Jones Act and under the general maritime law of the United States for unseaworthiness of the vessel and maintenance and cure. Recovery against International Terminal Operating Co. and Quin Lumber Co. was sought on the basis of a maritime tort. Both these latter corporations were doing work on the vessel at the time of the injury. Romero, while apparently given the opportunity at a pretrial hearing, had declined to amend his complaint against all the defendants so as to proceed by a libel in admiralty under general maritime jurisdiction. Had he done so, he would not, of course, have had the benefit of a jury which he would enjoy were he permitted to proceed on the law side of the court.

In this situation the District Court[110] dismissed the complaint as against all defendants for the following reasons:

(1) The complaint against Transatlantica based on the Jones Act was dismissed because that act was found to give no cause of action to an alien seaman under the circumstances of the case. The claims against Transatlantica under the general maritime law were dismissed because of lack of diversity of citizenship.

(2) The complaint against Garcia & Diaz, Inc. based on the Jones Act was dismissed because Garcia was not Romero's employer nor did it have control of the operation of the vessel.

(3) The other claims against Garcia as well as the claims against International and Quin were dismissed because of a lack of complete diversity of citizenship since Romero and Transatlantica were both of Spain.

The dismissal by the District Court was affirmed by the Court of Appeals.[111] On certiorari the case was twice argued before the Supreme Court. Finally, a majority of five affirmed in part and reversed in part, while the four dissenters for different reasons voiced in three opinions agreed in part with the majority, disagreed in part with it, and were not in complete accord among themselves.

Justice Frankfurter delivered the opinion of the Court. Much of the Court's opinion is concerned with a new interpretation which

[110] Romero v. International Terminal Operating Co., 142 F. Supp. 570 (S.D. N.Y. 1956).

[111] Romero v. International Terminal Operating Co., 244 F.2d 409 (2d Cir. 1957).

Romero urged should be given to 28 U.S.C. section 1331.[112] In brief, Romero's counsel contended that diversity of citizenship was not essential for the law side of the federal court to entertain Romero's claims based on maritime law. His argument was that a claim under the general maritime law, which could be prosecuted both on the admiralty side of the federal courts and on the law side if the necessary diversity of citizenship existed, could also be tried on the law side with the benefit of a jury even though there was no diversity. This, he alleged, was so because a claim based on maritime law as applied by our courts was a claim which arose under the Constitution and laws of the United States.

With that argument the majority did not agree. However, the Court did find that the District Court had jurisdiction under the Jones Act to determine whether or not Romero had stated a cause of action under that act. It then held that the same considerations which were enumerated in *Lauritzen v. Larsen*[113] precluded the District Court from giving relief under that act. The mere fact that the injury occurred in American waters was not sufficient to warrant application of the Jones Act where the contract of hiring had been made in Spain and the seaman and his employer as well as the vessel were of Spanish nationality.

Although the majority denied that a maritime claim gave rise to a "federal question" which could be tried on the law side of the federal court absent diversity of citizenship, it found that by reason of the jurisdiction the District Court had under the Jones Act it could consider Romero's claims under general maritime law by using the theory of "pendent jurisdiction." Thus the Court says:

> We perceive no barrier to the exercise of "pendent jurisdiction" in the very limited circumstances before us. Here we merely decide that a district judge has jurisdiction to determine whether a cause of action has been stated if that jurisdiction has been invoked by a complaint at law rather than by a libel in admirality, as long as the complaint also properly alleges a claim under the Jones Act. We are not called upon to decide whether the District Court may submit to the jury the "pendent" claims under the general maritime law in the event that a cause of action be found to exist.[114]

[112] At the time of the commencement of Romero's suit § 1331 read: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." Public Law 85-554, approved July 25, 1958, increased the requisite jurisdictional amount to $10,000. Section 1331 is derived from § 1 of the Judiciary Act of 1875, 18 Stat. 470, which was the first permanent statute vesting original "arising under" jurisdiction in the federal courts.

[113] 345 U.S. 571 (1953), discussed at note 100 *supra.*

[114] 358 U.S. at 381.

Having found a pendent jurisdiction over Romero's claims against his employer based on unseaworthiness and maintenance and cure, the Court proceeds to consider whether or not American maritime law should be applied or whether Romero should be left to his remedies under foreign law. It concludes that the same considerations which precluded relief against the foreign employer under the Jones Act also preclude relief against him under the general maritime law of the United States. It accordingly affirms the dismissal of all of Romero's claims against his employer. *Lauritzen v. Larsen,* we are told, was intended as a guide for courts not only in Jones Act cases but also in the application of maritime law generally.

It will be recalled that the District Court dismissed the complaint as to Garcia, International and Quin because of the lack of complete diversity existing since Romero and Transatlantica were both of Spain. This action of the District Court is now reversed by the Court because the Jones Act is held to be an independent ground for jurisdiction as to Transatlantica. Since there is this independent ground for jurisdiction of the non-diverse defendant and since the other three defendants are all diverse from the plaintiff the Court holds that "the rule of *Strawbridge v. Curtiss* does not require dismissal of the claims against the diverse respondents."[115] The majority also finds that, although Garcia can not be held liable as an employer and therefore the claims of unseaworthiness and maintenance and cure were properly dismissed, the District Court has not considered whether Romero was asserting a claim in negligence against Garcia. For that reason the case as to Garcia is remanded for further proceedings along with the claims against International and Quin.

Justice Brennan wrote the major dissenting opinion in which he was joined in part by Chief Justice Warren and Justices Black and Douglas. Briefly stated, Justice Brennan's position is that Romero's claims, although of a maritime nature, arise under the Constitution and laws of the United States and accordingly are properly brought under 28 U.S.C. section 1331 on the law side of a federal court irrespective of diversity of citizenship. Section 1331 was originally passed in 1875 and it was not until 1950 in a dictum by Judge Magruder[116] that it was

[115] *Ibid.* In Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), Chief Justice Marshall established the principle that when jurisdiction in a federal court is predicated on diversity of citizenship each plaintiff must possess the requisite of diversity of citizenship when compared with each defendant. A collective diversity is required as between all plaintiffs and all defendants when there is a plurality of either plaintiffs or defendants or both.

[116] Jansson v. Swedish Am. Line, 185 F.2d 212, 217-18 (1st Cir. 1950), where Judge Magruder, wholly by way of dictum, said: "If the 'Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law', and if, when a cause of action cognizable in admiralty is sued

interpreted as including in its scope maritime claims based on the law as determined by decisions of our federal courts. This delay in time, in Justice Brennan's opinion, should not deter the Court now, when the question is fairly presented, from giving the proper scope to that section. A seaman's right to recover for unseaworthiness and for maintenance and cure is deeply rooted in federal case law. Consequently all such maritime causes, says Justice Brennan, arise under the laws of the United States and are properly within the scope of the federal question clause, section 1331.

Having concluded that the federal law court had jurisdiction not only of Romero's claims which were based on the Jones Act but also over those founded on general maritime law as well, Justice Brennan agrees with the majority that the federal court should not give relief under American law, but, for the reasons stated by the majority, should leave Romero to his remedy under foreign law. Justice Brennan also agrees with the action of the majority in setting aside the dismissal as to defendants Garcia, International and Quin.

The net results of Justice Brennan's dissenting opinion is that, while he disagrees with the majority as to whether section 1331 includes maritime claims, he agrees with the end result of the majority which denied Romero any relief against his employer and which reversed the dismissals as to the other three defendants.

Justice Black had dissented in *Lauritzen v. Larsen.* He now dissents from both the majority opinion and that portion of the dissenting opinion of Justice Brennan which bars Romero from recovering against his employer in American courts. Justice Black says the Jones Act gives a remedy to "any seaman." That term, Justice Black thought, ought to have covered Larsen, who had been employed in the United States but was injured in Cuba; and that term should, as he sees it, also cover Romero, who, while employed in Spain, was injured in this country.

Justice Douglas does not think that *Lauritzen v. Larsen* applies to Romero's situation and is of the opinion that the District Court should take jurisdiction over Romero's claims against his employer.

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on at common law, either in a state court or on the law side of a federal district court, the court must apply the general maritime law rather than the law of the state of the forum, and if the judgment of a state court in such a case is reviewable by the United States Supreme Court because a federal question is necessarily involved, then it would plainly follow, we think, that a civil action for damages filed on the law side of a federal district court, to enforce a claim cognizable in admiralty, may be maintained in the district court pursuant to 28 U.S.C.A. § 1331 as a case arising 'under the Constitution, laws or treaties of the United States'—assuming, of course, that the requisite jurisdictional amount is present, and that the venue requirements of 28 U.S.C.A. § 1391 are met. This would be so whether or not diversity of citizenship also existed, for such diversity, if present, would only be a cumulative or additional basis of jurisdiction under 28 U.S.C.A. § 1332."

Summing up the *Romero* case we see that seven Justices agreed that the District Court should refrain from giving relief to the foreign seaman against his foreign employer. Two were of the opinion he should be given relief in our courts. All nine Justices agreed that the foreign seaman's claims against the three other defendants could be pursued on the law side of the federal court. All Justices agreed that diversity would give jurisdiction. Four dissenters were of the opinion that diversity is not a requisite to a federal court's taking jurisdiction of maritime claims on the law side if those claims are the type that common law courts can properly handle.

What does this diversity of opinion in *Romero* indicate? Simply this: If one of the majority should join the four dissenters and hold that maritime claims present a federal question as contemplated by the terms of section 1331, we will have a situation where jury trials can be had on the law side of the federal court irrespective of diversity in all maritime causes for which there is a common law remedy. Except for those instances where the common law does not grant a remedy—as, for example, the libel in rem—the bulk of maritime litigation would proceed on the law side where the plaintiff could have the benefit of a jury.

That such a result may be disappointing to admiralty defense counsel who prefer a judge to a jury is readily understandable. However, it must be conceded that there is little logic in a system of law which affords a seaman suing on a maritime cause of action a federal jury trial if there happens to be diversity of citizenship but which denies him a jury in the same federal court if there is no diversity.

RIGHTS OF INJURED LAND-BASED WORKERS

We have considered the rights of those persons who in daily parlance are known as seamen or members of a crew and who, in their service to the ship, voyage with her and incur the risks of maritime navigation. We will now consider the rights of those workers who live on the land and perform services for the vessel when she is in port. Most frequently such persons will be longshoremen, but they may be any type of worker from the carpenter and ship fitter to the extremely specialized expert who works with hazardous chemicals and must wear a gas mask when on duty.

In dealing with the rights of seamen we were chiefly concerned with the obligations of the employer shipowner and the ship herself. The injured land-based worker may be employed by the owner of the vessel, or he may be employed by a third party. If he is employed by a third party, he may have claims against his own employer as well as the

shipowner and the ship. His injury may have been wholly accidental or the result of negligence of one or more of the parties involved. It may have been incurred on the dock or on the vessel and it may have resulted from unseaworthiness of the vessel without any negligence on the part of the shipowner.

In the course of the years, both Congress and the Supreme Court have attempted to fix the land-based worker's rights. However, it is in this area, when the vessel is in port, that the Supreme Court has been most "at sea." Its several 5-to-4 decisions in this field have left admiralty counsel at best uncertain, if not confused.[117]

Rights of the Injured Land-Based Worker Against His Employer

We shall first consider the rights of the injured land-based employee against his employer and shall then discuss his rights against the shipowner in personam as well as his in rem rights against the vessel.

With the promulgation of state Workmen's Compensation Acts in the early part of the twentieth century, the land-based worker who suffered an injury arising out of and in the course of his employment *while on land* was afforded a remedy against his employer. It was only when such employee suffered the injury while on a ship or other object lying in navigable waters or in such waters themselves that the Supreme Court found itself in difficulty. By its first 5-to-4 decision in this area the Supreme Court held in *Southern Pacific Co. v. Jensen*[118] that a stevedore injured on board the vessel could not recover compensation against his employer under the state Workmen's Compensation Act. His rights were held to be created by the maritime law and were enforceable in admiralty or in the common law courts under the "savings clause."[119] The maritime law was to have national uniformity and this would be disturbed if local state Workmen's Compensation Acts were permitted to cover maritime injuries.

Subsequent efforts by Congress to eliminate the *Jensen* rule by amending section nine of the Judiciary Act so as to preserve to claimants not only their common law remedies but also their rights and remedies

[117] Perhaps it was with some of the cases in this area in mind that Justice Frankfurter on April 10, 1959, when speaking on the occasion celebrating Judge Learned Hand's fifty years on the bench, said, "[C]an it really have been easy for him all these years to interpret the mysteries and the Mumbo Jumbo of the nine Delphic oracles, and, at pain of a spanking, find clarity in darkness?" N.Y. Times, April 11, 1959, § 1, p. 12, col. 4.

[118] 244 U.S. 205 (1917).

[119] Section 9 of the Judiciary Act of 1789 gave District Courts exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction saving to suitors in all cases "the right of a common-law remedy where the common law is competent to give it."

under state Workmen's Compensation Acts[120] proved unsuccessful. In both *Knickerbocker Ice Co. v. Stewart*[121] (another 5-to-4 decision) and *State v. W. C. Dawson & Co.*[122] the Supreme Court declared such amendments unconstitutional as an unwarranted delegation to the states of the powers of Congress in the field of maritime law. Further, the Court repeated its earlier declaration that the harmony and uniformity sought for maritime law as conceived by the Constitution would be defeated if state Workmen's Compensation Acts were to apply to injuries suffered by employees engaged in maritime work. In the *W. C. Dawson & Co.* case the court indicated that Congress could, within its power to alter maritime law, enact a general employers' liability law.

Congress took the Court's suggestion and in 1927 enacted the Longshoremen's and Harbor Workers' Compensation Act.[123] This act was modeled after the New York Workmen's Compensation statute. It does not apply to a master or member of the crew of a vessel nor to persons engaged by the master to load or unload or repair a small vessel of under eighteen tons net. The act covers injuries occurring on navigable waters of the United States and on any drydock. It specifically was made applicable to injuries only if recovery for the disability or death resulting could not be validly provided by state law.

The explanation for the presence of this last clause lies in decisions of the Supreme Court that followed *Jensen.* If, after *Jensen,* the Supreme Court had restricted the application of state Workmen's Compensation Acts to injuries occuring on land and had applied the federal concept of maritime law to all injuries occurring in or on navigable waters, the confusion which followed *Jensen* under the so-called "maritime but local" doctrine would probably not have arisen. But such an easy solution was not adopted by the Court. A brief statement of three cases decided after *Jensen* and before the enactment of the Longshoremen's and Harbor Workers' Act will illustrate the process by which the Supreme Court propelled itself, and with it future litigants, into a dismal legal morass.

The first of these cases was *Western Fuel Co. v. Garcia,*[124] decided in 1921. Souza, a stevedore, was killed while working in the hold of a vessel which had been chartered to his employer. His widow, after failing to get relief in the state courts under the state Workmen's Compensation Act filed a suit in admiralty against the employer in which

[120] 40 Stat. 395 (1917); 42 Stat. 634 (1922).
[121] 253 U.S. 149 (1920).
[122] 264 U.S. 219 (1924).
[123] 44 U.S.C. 1424, 1426-27, 1429, 1431-32, 1434-46 (1927), as amended, 33 U.S.C. §§ 901-50 (1958).
[124] 257 U.S. 233 (1921).

she alleged that the death of Souza was due to the employer's negligence. She based her right of recovery on the state wrongful death statute, but unfortunately her action had been instituted beyond the one-year limitation provided by state law. The Supreme Court restated the generally recognized law that no action for wrongful death can be brought under the general maritime law, but then stated that an action for wrongful death brought under a state statute could be brought in admiralty if within the time prescribed by state law. Such an action, the court said, "is maritime and local in character and . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law."[125] Since the action was barred by the one-year limitation of the state law, the widow failed to recover.

The second case was *Grant Smith-Porter Ship Co. v. Rhode,*[126] decided in 1922. Rhode was employed as a carpenter on a vessel which was nearing completion and lying in navigable waters of the state of Oregon. Both parties had accepted the Oregon Workmen's Compensation Law. Rhode brought suit in admiralty against his employer alleging his injuries were due to the employer's negligence. Basing its argument in part on the somewhat dubious doctrine of maritime law that a contract to build a vessel is not a maritime contract, the Court held that the matter of Rhode's injury was one of local concern to be governed by state law even though it occurred on navigable waters.

The third case was *Millers Indem. Underwriters v. Braud,*[127] decided in 1926, in which the Supreme Court held that a diver who was suffocated while removing an obstruction to navigation in navigable waters was covered by the state Workmen's Compensation Act because the matter, while of a maritime nature, was of merely local concern.

With the adoption of the Longshoremen's and Harbor Workers' Act the "maritime but local" doctrine continued to flourish. The claimant who was injured on navigable waters now found he could not be assured in advance as to whether he was to recover under the state Workmen's Compensation Act or under the federal Longshoremen's and Harbor Workers' Act. The specific tasks of loading and unloading vessels were recognized as non-local and, consequently, covered by the Longshoremen's and Harbor Workers' Act. But a vast variety of other activities had to be catalogued as the cases arose. In 1932 Justice Holmes made the following statement:

> The application of the State Workmen's Compensation Acts has been sustained where the work of the employee has been deemed

[125] *Id.* at 242.
[126] 257 U.S. 469 (1922).
[127] 270 U.S. 59 (1926).

to have no direct relation to navigation or commerce and the operation of the local law "would work no material prejudice to the essential features of the general maritime law."[128]

However, the decisions of the court belie the apparent simplicity of the yardstick set up in the quoted language. We have already seen that the diver who was killed in an attempt to remove impediments to navigation was held covered by the state acts. And the uncertainty in the application of the rule was highlighted in 1941 by *Parker v. Motor Boat Sales, Inc.*[129] There a land-based janitor was assigned to help another employee place an outboard motor on a boat for the purpose of testing. Although he had theretofore done all his work on land, he was instructed on this occasion to go along in the boat and look out for hidden objects. He was drowned when the boat capsized. His work would appear to have fallen in the category of "maritime but local" at the time of the accident. However, instead of pursuing her remedy under state law, the widow filed for relief under the Longshoremen's and Harbor Workers' Act. The District Court sustained an award made by the deputy commissioner. The Court of Appeals promptly reversed.[130] On certiorari the Supreme Court in turn reversed the Court of Appeals and reinstated the award.[131]

Out of confusion came illogic when in the following year the Supreme Court decided *Davis v. Department of Labor and Industries.*[132] Davis was a structural steel worker who was assisting in the dismantling of an abandoned bridge and the loading of a barge which carried away the steel portions as removed. His employer had made contributions to the Workmen's Compensation Fund of the State of Washington. At the time of the fatal accident Davis was working on the barge examining steel and directing where it should be loaded. He fell or was knocked from the barge into the navigable waters of the stream and drowned. The Supreme Court of Washington denied his widow recovery under the state Workmen's Compensation Law on the theory that the loading of the barge was work of a maritime nature covered by the federal law

[128] Crowell v. Benson, 285 U.S. 22, 39-40 n.3 (1932), quoting from Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).

[129] 314 U.S. 244 (1941).

[130] Motor Boat Sales, Inc. v. Parker, 116 F.2d 789 (4th Cir. 1941).

[131] Judge Dobie, one of our most able federal judges, had written a detailed opinion for the Court of Appeals in which he reached the conclusion that Congress had never intended to cover this landlubber janitor by the Longshoremen's and Harbor Workers' Act. His widow's remedy, the judge found, must be under state law. But, it was now Judge Dobie's turn to be "spanked." The Supreme Court finds that the federal statute afforded the exclusive remedy for the widow.

Obviously, the problem of the widow's attorney to determine accurately the final outcome in this judicial seesaw action required something more than the law in the law books. He needed the aid of an infallible gypsy palmist!

[132] 317 U.S. 249 (1942), discussed in Note, 53 YALE L.J. 348 (1944).

and not the state compensation act.[133] On certiorari the United States Supreme Court reversed. The opinion by Justice Black, speaking for the Court, was indeed unique.

Very briefly stated, the Court recognized that under existing case law "the most competent counsel may be unable to predict" whether in a given case the worker was covered by the state Workmen's Compensation Act or the federal Longshoremen's and Harbor Workers' Act.[134] It conceded that in the instant case there were decisions that would support recovery under either statute. It found that persons like Davis occupied a "shadowy area"[135] which it later referred to as a "twilight zone."[136] Justice Black noted that the federal authorities had not been called upon to give relief under the Longshoremen's and Harbor Workers' Act. He was not satisfied that application of the state Workmen's Compensation Act would be unconstitutional and in the absence of a conflict between the state and federal authorities he preferred to rely on the presumption of the constitutionality of the state act as applied to Davis. Accordingly, the decision of the Supreme Court of Oregon denying recovery under the state law was reversed.

In his concurring opinion, Justice Frankfurter stated that "theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act . . . or under a state statute."[137] However, until Congress acted he deemed it best that marginal cases be determined in this way. Chief Justice Stone was the sole dissenter. He, like Justice Frankfurter, said the majority's opinion permitted recovery under either state or federal law. That such was the essence of the majority opinion was confirmed by later cases. No longer was the claimant, in a doubtful case, to lose his right of recovery because he had chosen to proceed under the state Workmen's Compensation Act instead of the Longshoremen's and Harbor Workers' Act. All that he needed to be sure of was that his case was sufficiently doubtful so that it would qualify as a "twilight zone" situation. The Supreme Court has given the term broad scope and in fact has relied on it where it would seem entirely unnecessary.

In 1948 the Supreme Court of Massachusetts decided *Moores's Case,*[138] affirming an award of compensation under the state act given a claimant who, while assisting a crane operator, was injured by falling on a ship which was in a floating drydock for repairs. The Massachu-

[133] Davis v. Department of Labor & Industries, 12 Wash. 2d 349, 121 P.2d 365 (1942).
[134] 317 U.S. at 255.
[135] *Id.* at 253.
[136] *Id.* at 256.
[137] *Id.* at 259.
[138] 323 Mass. 162, 80 N.E.2d 478 (1948).

setts court stated it would not attempt to reconcile previous authorities. In the light of the *Davis* decision, it declared, it would be futile to reason logically. The language of Chief Justice Qua is worth quoting:

> Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about "illogic," and to regard the *Davis* case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other.[139]

On appeal from the state court, the United States Supreme Court in a per curiam opinion affirmed Chief Justice Qua's decision by the single sentence, "The judgment is affirmed,"[140] citing *Davis*.

The following year, 1949, the Supreme Court had another occasion to utilize its "twilight zone" doctrine. In *Baskin v. Industrial Acc. Comm'n*[141] the California state court had dismissed a petition for workmen's compensation benefits sought by a materialman employed by the Kaiser Shipyard. At the time of the injury he had been sent on board a vessel docked in San Francisco bay with instructions to move certain planks from one hold to another so that they could be reached by the crane's boom. While engaged in moving the planks on the ship he slipped and fell. The state court held that the *Davis* "twilight zone" doctrine did not apply because here it was clear the injury was maritime. The work was being done both on the vessel and in connection with repairs to the vessel. Hitherto such work had been deemed maritime. On certiorari, the Supreme Court reversed in another per curiam opinion.[142] The Court noted that its decision in *Bethlehem Steel Co. v. Moores* had not been available to the California court. It then vacated the state court judgment with instructions that that court reconsider the case in the light of the *Moores* and *Davis* cases. Thereupon, the California court said its duty was clear and reversed its former ruling on the authority of the *Moores* case. Its reversal was duly affirmed by the United States Supreme Court.[143]

The extent to which the Court has absorbed the "twilight zone" philosophy is well illustrated by *Avondale Marine Ways, Inc. v. Hender-*

[139] *Id.* at 167, 80 N.E.2d at 481.
[140] Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).
[141] 89 Cal. App. 2d 632, 201 P.2d 549 (1949).
[142] Baskin v. Industrial Acc. Comm'n, 338 U.S. 854 (1949).
[143] Kaiser Co. v. Baskin, 340 U.S. 886 (1950).

son,[144] decided in 1953. The deceased was killed while working on a barge which had been drawn out of the water and which was on a marine railway drydock. Inasmuch as section three of the Longshoremen's and Harbor Workers' Act expressly covers injuries or death occurring on any drydock, relief was sought by the petitioner under that act. An award made in favor of the dependents of the deceased was upheld by the District Court and Court of Appeals, both of which deemed the federal statute applicable.[145] On certiorari eight Justices sat. The per curiam opinion was restricted to a one sentence affirmance. Significantly, however, the Court cited as authority for affirming the *Davis, Baskin* and *Moores* cases. Both Justices Douglas and Burton concurred in the affirmance. Justice Douglas declared, however, that this was no "twilight zone" case since the injury occurred on a drydock. Justice Burton abstained from making any reference to the "twilight zone" doctrine but said this was a case properly brought under the Longshoremen's and Harbor Workers' Act because the fatal injury had occurred on a drydock.

It will have been observed that the "twilight zone" doctrine arose and was applied in situations where the doubtful question was whether the injured employee was covered by a state Workmen's Compensation Act or by the federal Longshoremen's and Harbor Workers' Act. Under the doctrine recovery could be had under either the state or federal statute. Choice was left to the claimant. Is the "twilight zone" doctrine to apply when the doubtful issue is whether the employee is covered by one or another federal statute?

In 1953 the Supreme Court had before it the case of *Pennsylvania R.R. v. O'Rourke*.[146] O'Rourke was a railroad brakeman employed by the Pennsylvania Railroad. At the time of his injury O'Rourke was working on railroad cars that were on a car float. While climbing on one of the cars to release a handbrake he fell and was injured. The barge at that time was on navigable waters and the cars were being removed from the barge to land. O'Rourke sought recovery under the Federal Employers' Liability Act, which covers injuries to railroad employees engaged in interstate commerce. The railroad moved to dismiss on the ground that O'Rourke at the time was covered by the Longshoremen's and Harbor Workers' Act. The District Court dismissed.[147] The Court of Appeals reversed on the theory that the Federal Employers' Liability Act covered railroad employees while engaged in railroad work even though on navigable waters.[148] On certiorari the Supreme Court

[144] 346 U.S. 366 (1953).
[145] Avondale Marine Ways v. Henderson, 201 F.2d 437 (5th Cir. 1953).
[146] 344 U.S. 334 (1953), 52 MICH. L. REV. 445 (1954).
[147] O'Rourke v. Pennsylvania R.R. Co., 99 F. Supp. 506, (E.D.N.Y. 1951).
[148] O'Rourke v. Pennsylvania R.R. Co., 194 F.2d 612 (2d Cir. 1952).

divided 5 to 4. The majority held that the District Court's dismissal was correct because, as they saw it, the Longshoremen's and Harbor Workers' Act covered O'Rourke exclusively. His employer was engaged in a maritime activity of transporting cars and O'Rourke was injured while on navigable waters. Nothing more was required. To the five of the majority it mattered not that O'Rourke's particular activity was that of a railroad brakeman.

The four dissenters were of the opinion that O'Rourke's employment was not maritime. He was performing an ordinary railroad brakeman's chore in the course of removing the cars from the barge. He should, as the dissent saw it, be considered in law what he was in real life, a railroad brakeman engaged in interstate commerce and covered by the Federal Employers' Liability Act.

It is interesting to note that the court, while referring to the *Davis* case, makes no mention of the "twilight zone" theory. It will be recalled that the doctrine of the "twilight zone" was to afford the claimant relief in whichever tribunal he petitioned for recovery if his case fell in such a shadowy area that competent counsel could not safely advise whether relief should be sought under the state or federal statute. Here, in *O'Rourke,* we must concede the most shadowy of shadowy areas exists when five of the Justices say the statute applicable is the Longshoremen's and Harbor Workers' Act and four of them say it is the Federal Employers' Liability Act. Why not let the philosophy of *Davis* apply here? The majority by way of footnote makes this brief comment:

> The *Davis* case avoided uncertainty in areas where state and federal statutes might overlap. In the present case we have two federal statutes and a line marking their coverage can be drawn.[149]

One might well question whether the line is more easily drawn between the application of the two federal statutes than it is between the application of a state and a federal statute. Obviously, the 5-to-4 division of the Justices indicates that the drawing of the line in *O'Rourke* could have been no more difficult had the case involved a choice between a state and a federal statute!

There is, however, another distinguishing feature in *O'Rourke* which was not commented on by any of the Justices. In *Davis,* irrespective of whether we applied the state compensation act or the federal Longshoremen's and Harbor Workers' Act, the choice was between two compensation statutes, whereas, in *O'Rourke* the choice was between a compensation statute and a proceeding at law in which a jury trial was available. The liability of the employer under two compensation statutes would not be substantially different. In fact, it will be recalled, the

[149] 344 U.S. at 341 n.8.

federal Longshoremen's and Harbor Workers' Act was patterned after the New York State Workmen's Compensation statute. But application of the "twilight zone" theory as between the two federal acts involved in *O'Rourke* could very well result in a substantially greater recovery against the employer under the jury-protected Federal Employers' Liability Act than would be available under the non-jury compensation provisions of the Longshoremen's and Harbor Workers' Act.

Whether the "twilight zone" option is to be accorded an employee when in one tribunal he has a jury trial while in another he is covered by a compensation statute was not determined by the Supreme Court until 1959, when it decided *Hahn v. Ross Island Sand & Gravel Co.*[150]

Hahn was injured while working on a barge located on navigable waters of the state of Oregon. At the time of his injury he was assisting in the transferring of equipment from one barge to another. His employer had complied with the provisions of the Longshoremen's and Harbor Workers' Act securing payments to injured employees who might be covered by that statute. The employer had also exercised an election permitted him by Oregon law not to be covered by the state Workmen's Compensation Act. By virtue of this election an employee could sue his employer in an action at law under the Oregon Employers' Liability Act for an injury negligently inflicted and in such case would have the right to jury trial. Hahn instituted such a negligence action against his employer in the state court. The Oregon Supreme Court affirmed a ruling of the trial court which denied him recovery under the state law on the theory that his sole remedy was under the federal Longshoremen's and Harbor Workers' Act.[151] This appeared to the court to be clear both on the facts and the case law applicable.

Nevertheless, the state court proceeded to review the development of the law since the *Jensen* case; considered in detail the *Davis, Baskin* and *Moores* cases; noted that the Supreme Court had not applied the "twilight zone" theory in the *O'Rourke* case; and came to the conclusion that the "twilight zone" option was not to be afforded to an employee when under one election he would recover under a compensation statute while under another he would have an action at law before a jury. The United States Supreme Court granted certiorari.[152]

In that Court, the state of Oregon, through its attorney general, filed a brief as amicus curiae and in its brief and on oral argument urged that the decision of its own state Supreme Court be reversed. Only seven justices sat on the case.[153] The Court divided 5 to 2. The ma-

[150] 358 U.S. 272 (1959), 45 CORNELL L.Q. 148 (1959).
[151] Hahn v. Ross Island Sand & Gravel Co., 214 Ore. 1, 320 P.2d 668 (1958).
[152] Hahn v. Ross Island Sand & Gravel Co., 356 U.S. 972 (1958).
[153] The Chief Justice and Justice Frankfurter took no part.

jority wrote a one page per curiam decision in which they declared that, "It seems plain enough that petitioner's injury occurred in the 'twilight zone' . . . ."[154] Consequently, the Court said the employee could have proceeded under the applicable Oregon Workmen's Compensation Act, but, since the employer had elected not to be covered by that act, the employee could proceed under state law in an action for negligence. Then the Court continued:

> Of course, the employee could not do this if the case were not within the "twilight zone," for then the Longshoremen's Act would provide the exclusive remedy. Since this case is within the "twilight zone" it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery.[155]

Justices Stewart and Harlan dissented. They recognized that the case was one of first impression. Up to this date no employee had been given an election between a compensation remedy and a common law jury trial. They do not concede that Hahn's case is within the "twilight zone" but declare that even if it is Hahn should not be permitted to "spurn federal compensation and submit his claim to a state court jury."[156] The concluding statement of the dissent is significant:

> In the interest of a clear legislative purpose to provide the certainty and security of workmen's compensation, the "illogic" of a twilight zone was permitted. Such illogic should not be utilized to frustrate that very purpose.[157]

It will be recalled that in *O'Rourke* the Supreme Court majority held that a railroad brakeman while doing his work as a brakeman on a car float located on navigable waters was covered by the Longshoremen's and Harbor Workers' Act. He was not permitted to sue at law under the Federal Employers' Liability Act. He had no benefit of the "twilight zone" doctrine. Now, in what on its facts is surely a clearer case for holding the worker to be covered by the Longshoremen's Act, he is permitted by the majority under the protection of the "twilight zone" doctrine to sue his employer at law under a *state* Employers' Liability Act. In the light of this last development one may well question the degree of reliance to be placed on the 5-to-4 *O'Rourke* decision. Interestingly enough, neither the majority nor the dissent even mentioned *O'Rourke* in their opinions in *Hahn*![158]

[154] 358 U.S. at 273.
[155] *Ibid.*
[156] *Id.* at 275.
[157] *Ibid.*
[158] A rehearing in *Hahn* was denied in 359 U.S. 921 (1959).

If, as was done in *Hahn,* an employee, in what the court deems to be a "twilight zone" situation, may decline compensation under a federal compensation statute and proceed to recover damages determined by a state jury in an action at law under a state employers' liability act, it is difficult to see why, when the uncertainty involves two federal laws, the employee could not also decline compensation under the federal compensation statute and proceed to recover damages to be determined by a federal jury in an action at law under the Federal Employers' Liability Act.

Rights of Injured Land-Based Workers Against Shipowner and Ship

An unbroken line of federal cases has held that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due to the shipowner's negligence.[159] But, by means of an interesting evolution of case law, the liability of the shipowner to certain kinds of land-based workers who perform services on the ship has been extended to include a liability without fault, a liability on the part of the shipowner even though he has not been negligent. This absolute liability is predicated on the unseaworthiness of the vessel on which the injury took place. It exists even though the worker involved did not go and would not have gone to sea and risked the hazards of a sea voyage. It is with this extended liability of the shipowner that the Supreme Court has had considerable difficulty, and it behooves us to observe the process by which a shipowner's liability, originally based on negligence alone, became a liability without fault as well.

We have seen that in *Jensen*[160] a stevedore who received injuries while on board the vessel was denied workmen's compensation benefits provided by state law and was restricted to his rights under maritime law. As of that time, 1917, there was no federal compensation statute covering this type of work. We have also seen that until the passage of the Jones Act in 1920,[161] unless unseaworthiness brought about his disability, a seaman was not entitled to more than maintenance and cure even though the responsible cause of his injury was the negligence of the master or a member of the crew.

In 1926, one year before the passage of the Longshoremen's and Harbor Workers' Act, the Supreme Court decided *International Stevedoring Co. v. Haverty,*[162] holding that a stevedore injured on board ship

[159] See cases collected in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 413-14 n.6 (1953).
[160] Discussed in text accompanying note 118 *supra.*
[161] Discussed in text accompanying note 40 *supra.*
[162] 272 U.S. 50 (1926).

by reason of the negligence of one of his fellow servants was entitled to recover against his employer under the Jones Act. While the Jones Act purported to cover "seamen," Justices Holmes, for an unanimous Court, held that the term "seamen" should be construed to include stevedores. Such a construction was rationalized on the theory that "the work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew."[163] The need to convert a stevedore into a seaman so that he could recover against his employer under the Jones Act was eliminated the following year with the enactment of the Longshoremen's and Harbor Workers' Act. As to the employer, the stevedore's sole remedy for injuries occurring on board ship was under the latter statute. However, although the need for calling a stevedore a seaman now no longer existed, subsequent events proved that this convenient twisting of the meaning of words designed to enable a stevedore to recover against his negligent employer was to result disastrously for the shipowner.

It was twenty years after *Haverty* that the Supreme Court in 1946 decided *Seas Shipping Co. v. Sieracki.*[164] By that decision it extended to the land-based stevedore the peculiar rights given by maritime law to seamen to recover against the shipowner, without the need of proving negligence, for injuries caused by the unseaworthiness of the vessel.

Sieracki was an employee of a stevedoring concern and was injured while working on board a ship because of the breaking of a shackle which supported a boom. He sued the shipowner and two other parties whose negligence he alleged caused his injury. The District Court[165] found that the condition of the shackle rendered the vessel unseaworthy; that there was no negligence on the part of the shipowner; that the two third-party defendants were negligent; and that recovery should be had only against those third parties. The Court of Appeals[166] accepted the findings of unseaworthiness and negligence made by the District Court but concluded that Sieracki could recover against the shipowner on the ground of unseaworthiness irrespective of the latter's lack of fault. Five Justices of the Supreme Court approved the position taken by the Court of Appeals and affirmed Sieracki's recovery.

Justice Rutledge spoke for the majority and declared the seaman's right to recover for unseaworthiness was not founded on contract. Rather, this remedy was designed to reimburse the seaman who suffered loss by reason of hazards which he was in no position to ward off. The financial burden could better be borne by the shipowner who in turn

[163] *Id.* at 52.
[164] 328 U.S. 85 (1946), 34 CALIF. L. REV. 601 (1946).
[165] Sieracki v. Seas Shipping Co., 57 F. Supp. 724 (E.D. Pa. 1944).
[166] Sieracki v. Seas Shipping Co., 149 F.2d 98 (3rd Cir. 1945).

could distribute the loss to the shipping community which receives the service. This liability without fault of the shipowner extends, said Justice Rutledge, "to all within the range of its humanitarian policy."[167] Is a stevedore employed by a third party within this range? To the majority, the answer is clearly in the affirmative. Historically the work of loading and unloading a vessel was done until recent times by the ship's crew. "For these purposes he [the stevedore] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."[168]

The majority surely must have known that the real risks of unseaworthiness incurred by the seaman while the vessel is on the high seas are not faced by the land-based stevedore whose work is performed during the period the vessel is safely docked in port. Further, the majority was aware that Sieracki had the statutory remedy of compensation available to him under the Longshoremen's and Harbor Workers' Act and also had the protection of the judgment against the two negligent third parties responsible for the defective shackle. Unlike *Haverty,* this case presented no need whatsoever, even from the humanitarian aspect, to create a liability without fault on the part of the shipowner to protect Sieracki. Yet, having once called a stevedore a seaman, it was easy for the five to afford this land-based "seaman" a seaman's remedy for unseaworthiness!

Three Justices dissented.[169] They ably pointed out that it was because the seaman shared the fate of shipwreck, capture, et cetera of the vessel on the high seas that an absolute liability for unseaworthiness was imposed on the shipowner. The seaman is exposed to all perils of the sea with little opportunity to discover factors of unseaworthiness or "to prove who is responsible"[170] for them. Stevedores are by no means in the same category. "[T]hey do not go to sea; they are not subject to the rigid discipline of the sea; they are not prevented by law or ship's discipline from leaving the vessel on which they may be employed . . . ."[171] The dissent finally observed that the majority decision affords the maritime worker who is not a member of the crew more rights than the crew member who truly incurs the risk of a sea voyage. This is so because the land-based stevedore can now not only get the benefits a seaman could get under the unseaworthiness doctrine but he can also have the benefits of the Longshoremen's and Harbor Workers' Act which a crew member does not have.[172]

[167] 328 U.S. at 95.
[168] *Id.* at 99.
[169] Justice Jackson took no part in the decision.
[170] 328 U.S. at 104.
[171] *Id.* at 105.
[172] *Id.* at 107.

Since Sieracki, the right of the stevedore employed by a stevedoring company to recover against the shipowner on the basis of unseaworthiness has continued to be recognized by the Supreme Court. The problem presented by subsequent cases has been to determine just what other types of land-based workers are to be given the stevedore's protective word mantle of "seaman." In 1953 the Supreme Court decided *Pope & Talbot, Inc. v. Hawn,*[173] holding that a carpenter employed by a ship refitting concern doing repair work on grain-loading equipment of a vessel was entitled to recover against the shipowner on the basis of the absolute liability of unseaworthiness, as well as on the ground of negligence, for injuries he received when he slipped and fell through an uncovered hatch. The carpenter's need for protection in repairing loading equipment was found to be no more, nor less, than that of a stevedore using it. And, although *Sieracki* had only lately been decided, Justice Black speaking for the majority as to Hawn's rights said, "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law."[174]

Justice Frankfurter wrote the sole concurring opinion. He questions the statement made by the majority and just quoted. He states that the majority fails to cite a single case, or student of admiralty, in support of its decision giving Hawn both a right based on negligence and one on unseaworthiness. He points out that it was not until the passage of the Jones Act, in 1920, that seamen were given the right to sue for negligence. He concedes that by *Sieracki* the Court, in 1946, gave longshoremen the right to sue a shipowner based on unseaworthiness, but observes that never, until its decision in *Hawn,* had the Court held longshoremen had the right to sue in negligence as well as for unseaworthiness. In fact he states that *Sieracki* raises doubts as to whether a longshoreman, who is now given a cause of action for unseaworthiness, can sue the shipowner in negligence.[175] In any event, since a recovery can be supported on the unseaworthiness doctrine of *Sieracki,* Frankfurter would affirm on that basis alone.

Justice Jackson wrote the opinion for the three dissenters He dis-

[173] 346 U.S. 406 (1953), 68 HARV. L. REV. 160 (1954). Negligence of plaintiff carpenter's employer contributed to the injury but contribution against the employer was denied the shipowner. For a brief discussion of the action of the Supreme Court denying contribution as between joint tortfeasors but recognizing a shipowner's right of indemnity in certain cases against the land-based employer whose negligence contributed to or caused the injury to the harbor worker see note 185 *infra.*

[174] 346 U.S. at 409.

[175] "Did *Sieracki,* in holding that longshoremen laboring like seamen of old in the 'service of the Ship' were entitled to recover for unseaworthiness, leave them also with the negligence cause of action which *The Osceola* denied to seamen?" 346 U.S. at 417.

approves of *Sieracki* and particularly disapproves of extending *Sieracki* to cover a carpenter who is engaged in repairing the vessel or its equipment. The following statement by Justice Jackson is noteworthy:

> It does not seem to me that one who hires a contracting firm to put his ship in seaworthy condition guarantees that it is in seaworthy condition before the work starts. If everything were shipshape, he would not need the services of the repairmen.
>
> I think that the expansion of the warranty of seaworthiness from a seaman to a repairman is illogical, contrary to any decisional law and not consistent with the scheme of Congress to maintain a sharp distinction between the seafaring man and the harbor worker.[176]

Justice Jackson then compares the lot of the seaman, who ties his fate to the ship, who may be placed in irons for disobeying an order, who suffers all the inconveniences and hazards of a sea voyage, with the lot of the land-based carpenter who lives at home, takes no risks of the sea and suffers no greater hazards than he would were he doing repair work on shore. *Sieracki* was a novel holding and, however logical its doctrine might be when applied to stevedores, there is no logic in applying it to a repairman.[177]

In *Sieracki* the defective shackle which brought about the injury was a part of the ship's equipment. Would the shipowner be liable to an injured stevedore on the basis of unseaworthiness if the defective equipment did not belong to the shipowner but had been brought on

[176] 346 U.S. at 423. If the *Sieracki* doctrine is to be applied to repairmen, Justice Jackson's views expressed in the first quoted paragraph would seem sound when the unseaworthy condition causing the injury is the very one the claimant has been engaged to rectify. If, however, as appears to be the case in *Hawn,* the unseaworthy condition was not the subject of repair by the claimant, then one may question his conclusion. As will appear later herein in the discussion of *West v. United States,* discussed in text at note 212 *infra,* when the entire vessel is being reconditioned for service the Court has refused to apply the *Sieracki* doctrine to repairmen.

It is conceivable, of course, that a vessel in service may need repair to two or more items. For example, a vessel on arriving in port may find that both a porthole and loading equipment are unseaworthy. *X* company is engaged to repair the porthole and *Y* company the loading equipment. An employee of *X* company while engaged in repairing the porthole is injured by the unseaworthy condition of the loading equipment then being repaired or under contract to be repaired by *Y* company. Is the employee of *X* to have the benefit of the *Sieracki* doctrine? Some aid may be obtained from the statement of the Court in the *West* case quoted in text at note 215 *infra.*

The difficulties presented would of course be entirely eliminated if the Court would adopt the view expressed in the second paragraph of the quotation of Justice Jackson in the above text and not extend the *Sieracki* unseaworthiness doctrine to the land-based repairman, but leave him with the same remedy of negligence which he would have against the owner of premises were he making repairs on shore. Irrespective of negligence, the repairman, whether he is injured while working on shore or on the vessel, will have a compensation remedy against his employer.

[177] 346 U.S. at 423.

board by the stevedoring company? That question was presented in 1954 by *Alaska S.S. Co. v. Petterson.*[178]

A snatch block which did not belong to the shipowner and which was presumed to have been brought on board by the stevedoring company broke when put to proper use and Petterson, a stevedore, was injured. He sued the shipowner in admiralty claiming he had suffered his injuries by reason of the unseaworthiness of the snatch block. The District Court dismissed the libel, holding that *Sieracki* was not to be extended to cover equipment brought on board by the stevedoring company. The Court of Appeals[179] reversed and remanded the case for the fixing of damages. That court deemed it immaterial that the control of the vessel at the time of the injury had been turned over to the stevedoring company by the shipowner and that the block was not a part of the ship's equipment.

On certiorari the Supreme Court affirmed the Court of Appeals in a one sentence per curiam decision, citing *Sieracki* and *Hawn.* Three Justices dissented. Justice Burton, speaking for the dissent, opposed the extension of *Sieracki* to cases where the defective equipment is brought on board by the stevedoring company. The *Sieracki* decision, he says, assumed that "the stevedores, like their predecessors [crewmen], used the ship's equipment."[180] But the historical analogy between stevedores and seamen, Justice Burton continues, disappears in the instant case. "The modern stevedores, who supply substantial loading equipment, are a far cry from the traditional wards of . . . admiralty . . . ."[181]

While usually the land-based worker who is injured on board ship due to the negligence of the shipowner or the unseaworthiness of the vessel sues the shipowner in personam, he is free, in line with admiralty practice to bring a libel against the ship in rem. This remedy was pursued by a stevedore in *Crumady v. The Joachim Hendrik Fisser,*[182] decided by the Supreme Court in 1959. Crumady was injured when struck by a boom or its tackle while he was engaged as a stevedore in transferring cargo on a ship. The District Court[183] found that the vessel's loading equipment was unseaworthy and that the negligence of the stevedoring company brought the unseaworthy condition of the loading equipment into play. It accordingly gave Crumady a judgment against the vessel and, because it found the stevedoring company's negligence activated the unseaworthy condition, it directed the stevedoring

[178] 347 U.S. 396 (1954), 53 MICH. L. REV. 126 (1954).
[179] Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953).
[180] 347 U.S. at 400.
[181] *Ibid.*
[182] 358 U.S. 423 (1959).
[183] Crumady v. The Joachim Hendrik Fisser, 142 F. Supp. 389 (D.N.J. 1956).

company to indemnify the ship for the amount she was called upon to pay Crumady. The Court of Appeals[184] reversed. It found that there was no unseaworthiness and that the sole cause of the accident was the negligence of the stevedoring company.

On certiorari the Supreme Court majority reversed the Court of Appeals and ordered the judgment of the District Court reinstated. It was of the opinion that the District Court's finding of unseaworthiness was not clearly erroneous and therefore should not have been reversed by the Court of Appeals. Justice Harlan spoke for the three dissenters. He is in accord with the finding of no unseaworthiness by the Court of Appeals and is of the oninion that there was no adequate basis in the record for the District Court to find unseaworthiness. However, since his views were not accepted on that score, he concludes that he must dissent from the majority's allowance of indemnity by the shipowner against the stevedoring company. This he does because, as he construes the Court's earlier case law on the subject of shipowner's indemnity, such right does not exist if the shipowner himself brought about the unseaworthy condition which contributed to the injury.[185]

[184] Crumady v. The Joachim Hendrik Fisser, 249 F.2d 818 (3d Cir. 1957).

[185] The matter of the shipowner's right to indemnity against a stevedoring or other land-based ship's service company has recently been the subject of considerable litigation before the Supreme Court. Space does not permit a discussion of the problem in detail in this paper. Suffice it to say that in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), a shipowner was denied the right of contribution against the land-based employer of the injured harbor worker when it appeared that the negligence of both the shipowner and employer contributed to the injury. Although the jury found the negligence of the shipowner was only twenty-five per cent responsible and that of the injured's employer seventy-five per cent, the shipowner was saddled with the payment of the entire judgment. The injured employee had brought suit only against the shipowner. The Longshoremen's and Harbor Workers' Act barred a negligence action against his employer. The rule of the *Halcyon* case was followed in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), discussed in text accompanying note 173 *supra,* where the Supreme Court affirmed a Court of Appeals judgment which denied contribution in behalf of the shipowner against a ship refitting company whose negligence contributed to the injury of a land-based carpenter working on the vessel.

The unfortunate position of the shipowner who thus had to bear the entire burden was substantially alleviated in 1956 when the Supreme Court in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), held, by a 5-to-4 decision, that a shipowner could recover indemnity against a negligent stevedoring company whose negligence had caused the injury. This recovery is predicated on an implied warranty of the stevedoring company to perform its services in a workmanlike, proper and safe manner.

In *Ryan* the liability of the shipowner to the injured was based on the negligence of the shipowner in failing to discover improper workmanship (faulty stowage) of the stevedoring company and on the unseaworthy condition of the vessel created by such improper workmanship. In Weyerhauser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958), the Court further recognized the shipowner's right to indemnity "absent conduct on its part to preclude recovery." This quoted language would seem to indicate that in certain cases the right of indemnity may not exist.

It is against the background of these cases that the majority in *Crumady* allowed

ACTIONS FOR WRONGFUL DEATH

In the absence of statute, there is no action for wrongful death known to maritime law.[186] In 1920 such an action was given to representatives of seamen by the Jones Act.[187] In the same year, Congress enacted the Death on the High Seas Act,[188] which gives such an action to the personal representative of a deceased whenever death was caused by wrongful act or default occurring on the high seas beyond a marine league from the shore of any state. No federal statute provides for a wrongful death action in the case of any person who does not qualify as a seaman under the Jones Act when the death is caused by injury suffered on a vessel within the territorial limits of a state.[189]

In this situation, the Supreme Court, prior to the passage of the Death on the High Seas Act, held that actions for wrongful death could be brought, either at common law or in admiralty, under state wrongful death acts when the act causing the death took place on waters of the state[190] or even in certain instances on the high seas.[191] State law was permitted to supplement the maritime law in this area where Congress had not acted. But, with the passage of the Death on the High Seas Act, the state wrongful death acts were inoperative as to deaths caused on the high seas beyond a marine league from the shore of any state. Except as so restricted the state wrongful death acts were still operative.

Two recent 5-to-4 decisions, *The Tungus v. Skovgaard*[192] and *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*,[193] involve actions for the wrongful death of a land-based worker occasioned by injury suffered when on board ship.[194] In view of the state of the law just discussed and because the death in both cases was brought about by an injury suffered on a vessel while docked at a New Jersey port, the claimants, who alleged negligence and unseaworthiness, predicated recovery on the New Jersey Wrongful Death Act. The Supreme Court majority held

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the shipowner indemnity against a stevedoring company which by its own negligence brought into play an unseaworthy condition of the vessel, a condition which was created by the shipowner but made operative by the negligence of the stevedoring company.

[186] The Harrisburg, 119 U.S. 199 (1886); see generally Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395 (1926).

[187] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

[188] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1958).

[189] Of course compensation for death may be recovered against the decedent's employer in an appropriate case under either state Workmen's Compensation Acts or the Longshoremen's and Harbor Workers' Act previously considered herein.

[190] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[191] The Hamilton, 207 U.S. 398 (1907).

[192] 358 U.S. 588 (1959), 37 N.C.L. REV. 479 (1959).

[193] 358 U.S. 613 (1959), 37 N.C.L. REV. 479 (1959).

[194] After the completion of this article the Supreme Court rendered two more decisions on the subject of wrongful death in navigable waters of a state. See reference to these cases and the accompanying chart showing the realignment of the Justices in note 210 *infra*.

that the claimant in *The Tungus* could proceed both on negligence and unseaworthiness theories but that in *Halecki* the claimant could only rely on negligence.

Skovgaard had been employed by an independent contractor to assist in repairing a pump on the *Tungus* which was used in unloading a cargo of coconut oil. After arriving on board, he slipped on some oil and fell to his death. His administratrix instituted a suit in admiralty against the vessel and her owners and alleged that death was occasioned by the unseaworthiness of the vessel and the negligent failure of the respondents to provide the decedent with a reasonably safe place to work.

The District Court dismissed[195] the libel, holding that a wrongful death action for unseaworthiness would not lie and that there was no duty to furnish the deceased a safe place to work. The Court of Appeals[196] divided 4 to 3. The majority reversed and remanded the case. They held that the New Jersey Wrongful Death Act embraces a claim for unseaworthiness and that there was a duty owing to the deceased to exercise reasonable care for his safety. The three dissenting judges of the Court of Appeals found that New Jersey did not recognize a cause of action for unseaworthiness. Liability under the state wrongful death act, as they saw it, was predicated on negligence or intentional wrong. Further, the dissenting judges found that under New Jersey law there was no liability to Skovgaard for negligence under the conditions prevailing at the time he boarded the vessel. It is of further interest to note that neither the majority nor the dissent was able to find a single New Jersey case or statute that gave a cause of action for unseaworthiness absent fault on the part of the shipowner. To the majority of the judges having an unseaworthy vessel was a "wrongful act, neglect or default" within the meaning of this quoted language of the New Jersey Wrongful Death Act. To the dissenters existence of an unseaworthy vessel alone with no fault on the part of the shipowner was not a "wrongful act, neglect or default."

On certiorari the majority of five in the Supreme Court adopted the position of the majority of four in the Court of Appeals. The four dissenters in the Supreme Court, however, do not follow the views expressed by the three dissenters in the Court of Appeals. They, in fact, agree with the action of the Court of Appeals in reversing the District Court's dismissal. But they dissent from the theory applied by the Court of Appeals majority and the Supreme Court majority which held that New Jersey law created the right to recover both on the ground of unseaworthiness and negligence.

[195] Skovgaard v. The Tungus, 141 F. Supp. 653 (D.N.J. 1956).
[196] Skovgaard v. The Tungus. 252 F.2d 14 (3d Cir. 1957).

All the Supreme Court Justices agree that a duty of seaworthiness was owed to Skovgaard. He was entitled to the same protection that was accorded Sieracki and Hawn. All the Justices also agree that a duty of care was due Skovgaard. The disagreement between the Justices is that the five find the duties to furnish a seaworthy vessel and to use due care were created by the New Jersey law for which recovery may be had under the New Jersey Wrongful Death Act, while the four Justices say the duties to have the vessel seaworthy and to use due care were created by the federal maritime law. The New Jersey Wrongful Death Act, according to the dissenters, comes into play merely as supplying a remedy for the violation of the duties owed Skovgaard under maritime law. That remedy is available in this instance because the maritime law, itself, gives no remedy for wrongful death when the cause of death occurs within the territorial limits of a state.

Because of the lack of New Jersey law on the subject the case presents difficulties that were not solved by the Supreme Court's decision. For example, if the trial court on an issue of contributory negligence should find that Skovgaard by his own negligence contributed to his death, would the action of the plaintiff be completely barred under the common law rule applied in negligence cases in New Jersey or should the recovery merely be reduced in accordance with the comparative negligence rule of admiralty? The majority concedes that there is no way of knowing whether the New Jersey court would apply the same legal standards in this type of case as it would if Skovgaard had been killed on a New Jersey dock. But the majority does not suggest that decision be delayed until a dispositive ruling on the subject can be obtained from the New Jersey state courts. In fact, Justice Frankfurter in his concurring opinion says he abstains from stating his strong conviction expressed in other cases that lower federal courts should, where the state law is not known, withhold decision until an authoritative ruling is made by the state court.[197]

If it should eventually be determined that under New Jersey law contributory negligence of the decedent will bar recovery, then we would have a situation in which if Skovgaard had lived and sued for his injury he would, under the maritime law applicable, not be barred by his contributory negligence; but if he should die, his representative's action under the state wrongful death act would be barred. The lower federal courts are in conflict as to whether the state rule of contributory negligence operating as a bar is to be applied when action is brought in admiralty to recover under a state wrongful death statute.[198]

[197] 358 U.S. at 597.

[198] For a collection of cases on this subject see Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction,* 35 YALE L.J. 395, 398 (1926), and Note,

Justice Brennan, writing for the dissent in *The Tungus,* says that the majority has failed to grasp the distinction between duties and remedies. The extent of the duties owed to Skovgaard while on board the vessel are, as he sees it, governed by maritime law. With that position even the majority would have no quarrel if Skovgaard had survived his injury and brought an action either in admiralty or in a common law court. But, continues Justice Brennan,

> Today the Court announces the strange principle that the substantive rules of law governing human conduct in regard to maritime torts vary in their origin depending on whether the conduct gives rise to a fatal or a nonfatal injury.[199]

It may well be that in *The Tungus* the end result would be no different if the trial court either found no contributory negligence on the part of Skovgaard or found that New Jersey courts when applying their state's wrongful death act to deaths caused in their territorial waters would incorporate the comparative negligence rule of the admiralty courts. If, however, the trial court found that Skovgaard was guilty of contributory negligence and that under New Jersey law such negligence bars recovery by the administratrix, recovery would be denied under the majority view of the Supreme Court, whereas it would be allowed under the minority view.

There is contained in the New Jersey Wrongful Death Act language common to many such statutes. Thus the act gives a cause of action "when the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury . . . ."[200] Conceivably, a New Jersey court when it passed on the subject could say that, although the contributory negligence of Skovgaard would bar his administratrix had the injury occurred on land, it would not bar her when the injury occurred on board ship. This result could be achieved by reasoning that since, if death had not ensued, Skovgaard's contributory negligence would not have barred his action, it follows that his administratrix has an action under the Wrongful Death Act because of the above quoted language of the statute despite the presence of contributory negligence. If such should be the eventual pronouncement of the New Jersey law, both the majority and the dissent would allow recovery, albeit, they might disagree as to whether it was state law or maritime law that created the obligation.

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38 HARV. L. REV. 672 (1925), criticising The Devona, 1 F.2d 482 (D. Me. 1924), which applied the comparative negligence rule of admiralty in an action in admiralty based on the Maine Wrongful Death Act.

[199] 358 U.S. at 611.

[200] N.J. STAT. ANN. § 2A:31-1 (1952).

The decision of the Court of Appeals for the Third Circuit in *Tungus* was handed down on December 23, 1957. On January 10, 1958, and with the benefit of the *Tungus* decision before it, the Court of Appeals for the Second Circuit rendered its decision in *Halecki v. United N.Y. & N.J. Sandy Hook Pilots Ass'n.*[201] The *Tungus* case was a suit in admiralty against both the vessel and its owners brought in a federal district court sitting in New Jersey. The *Halecki* case was an action at law brought only against the owners of the vessel in a federal district court in New York. As previously stated, the death in both cases occurred in New Jersey.

In *Halecki* a pilot boat was moored at Jersey City and was undergoing its annual overhaul and repairs. An electrical contracting concern had been engaged to dismantle and overhaul the boat's generators. Halecki, an employee of the electrical concern, was assigned to do the work. In the course of the process it was necessary that the generators be sprayed with carbon tetrachloride. This chemical is very toxic to human beings and because of its nature the spraying was done on a Saturday when no one else was on board. Halecki used a gas mask for his own safety. In addition certain ventilating equipment of the vessel and portable blowers brought on board were used to remove the fumes. Nevertheless, Halecki became ill and died two weeks later of carbon tetrachloride poisoning.

In her action, Halecki's administratrix alleged that the death was caused by reason of the inadequacy of the ventilating system of the vessel even when supplemented with equipment brought on board by the deceased. She predicated recovery both on unseaworthiness and negligence. The trial court left both issues to the jury and further instructed them that the contributory negligence of the deceased, if any, would not bar a recovery but would merely go in limitation of damages. The jury returned a verdict for the plaintiff on which judgment was entered. Because of the nature of the verdict, it was impossible to tell whether the jury based its award on unseaworthiness, or negligence, or both.

The Court of Appeals affirmed the judgment by a divided court. On the negligence count, the court held that Halecki was a business guest and that a duty of care was owned to him by the shipowners. Under the facts in issue the court found a jury question on that point was presented. As to the unseaworthiness count, the court cited the Court of Appeals decision in *Tungus* as authority for holding that the New Jersey Wrongful Death Act encompassed a cause of action for unseaworthiness as well as one for negligence. It then declared that

[201] 251 F.2d 709 (2d Cir. 1958).

pursuant to the doctrine of *Sieracki*,[202] *Hawn*[203] and *Petterson*[204] a duty of seaworthiness was owing to Halecki and recovery could be predicated on that ground as well as negligence.

This left to the Court of Appeals the propriety of the trial court's charge that the contributory negligence of the deceased would not bar recovery. It will be recalled that the Court of Appeals in *Tungus* did not pass upon the effect of contributory negligence. It was not necessary that it do so because the action had been dismissed by the trial court and hence no instruction as to the effect of contributory negligence was before it. Accordingly, the Court of Appeals in *Tungus* returned the case to the trial judge, leaving for him to determine what effect was to be given to contributory negligence.

Now in *Halecki* the Court of Appeals for the Second Circuit had to pass upon the accuracy of the trial court's charge as to contributory negligence. It, of course, found no New Jersey authority on the question. It was not helped by *Tungus*. But it concluded it would be most irrational to permit Halecki, had he lived, to recover despite his contributory negligence and to deny recovery to his administratrix if he died. And so the Court of Appeals, recognizing that it did not know what the New Jersey law on the subject is, said,

> [W]e must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.[205]

On certiorari the principal issue in dispute is whether Halecki was the kind of worker who is entitled to the protection of the unseaworthiness doctrine that was accorded to Sieracki, Hawn and Petterson. The majority find he was not and reverse the Court of Appeals on the unseaworthiness count. They note that not only was Halecki no seaman, but he was also doing a specialized kind of work which in no way was traditionally done by crew members.[206] In fact it could not

[202] Discussed in text accompanying note 164 *supra*.
[203] Discussed in text accompanying note 173 *supra*.
[204] Discussed in text accompanying note 178 *supra*.
[205] 251 F.2d at 713. Judge Lumbard dissented in the Court of Appeals. He felt that Halecki was not the type of person to whom a duty of seaworthiness was owed. He was obviously opposed to the doctrine of *Sieracki* but stated that, even if that doctrine be accepted as to stevedores and some persons doing work formerly done by seamen, Halecki not only was not a seaman in the true sense but he was not doing the kind of work that any seaman had ever done. In fact the crew was excluded from the vessel while Halecki was at work. Judge Lumbard also believed the majority was wrong in holding that the New Jersey courts would abandon their common law concept that contributory negligence is a bar in this type of case. He accordingly would have sent the case back to be tried solely on the negligence issue with a charge that contributory negligence would bar recovery.
[206] 358 U.S. at 618. The majority, in effect, adopt the view of dissenting Court of Appeals Judge Lumbard set out in the preceding footnote insofar as the question of unseaworthiness is concerned.

be done at sea and had to be done when all crew members were excluded from the vessel. Halecki might recover if there was negligence, but to impose an absolute liability without fault in his case on the unseaworthiness doctrine would be to distort the law of *Sieracki* "beyond recognition."[207]

Since it is impossible to know whether the jury verdict was predicated on unseaworthiness or negligence the case is sent back for a retrial on the negligence count. As to whether contributory negligence would bar recovery, the Supreme Court majority states that it accepts "in this case"[208] the Court of Appeals' determination of the effect New Jersey law would accord to the decedent's contributory negligence.

It will be recalled that the vessel on which Halecki was working was not ready for a voyage but was at a dock for the purpose of being repaired and overhauled. The United States had filed a brief as amicus curiae which raised the question whether a shipowner can ever be liable for the unseaworthiness of a vessel to a shore-based worker who performs labor on the ship while it is laid up for its annual overhaul and repairs. Since the majority rules out recovery based on unseaworthiness it finds no need to pass upon the question raised by the United States.[209]

Justice Brennan wrote the opinion for the four dissenters in *Halecki.* He, of course, differs from the majority on the issue of whether state or federal martime law created the obligation and reaffirms the position he took on that score in *Tungus.*[210] The major portion of the dissent,

[207] 358 U.S. at 618.

[208] *Id.* at 615.

[209] 358 U.S. at 618 n.7. On December 7, 1959 the Court did decide this matter in West v. United States, 361 U.S. 118 (1959), which is discussed later in this text.

[210] Since the completion of this article the Supreme Court has rendered two more decisions involving actions for wrongful death of land-based workers who were drowned in navigable waters of a state. The first is Hess v. United States, 361 U.S. 314 (1960), in which the Court divided 6 to 3, and the second is Goett v. Union Carbide Corp., 361 U.S. 340 (1960), a 5-to-4 decision.

In *Hess,* the issue was whether the rule of *Tungus,* applying the substantive law of the state, would be followed in a case where the state law of Oregon imposed a higher duty of care on the defendant than that imposed by maritime law. The majority held *Tungus* was to be applied. The dissent said *Tungus* could not be applied if the state law imposed a higher duty of care than the maritime law.

In *Goett,* the majority sent the case back for further determination of the state law of West Virginia. The minority thought such remand was uncalled for and conflicting opinions were written by the dissenters as to the meaning of *Tungus.*

Tungus has been materially weakened as an authority by reason of the peculiar realignment of the Justices in the *Hess* and *Goett* cases as will be seen below:

Tungus

Majority	*Dissent*
Stewart (opinion)	Brennan (opinion)
Frankfurter	Chief Justice
Clark	Black
Harlan	Douglas
Whittaker	

however, is an attack on the holding of the majority that Halecki was not the kind of worker who was entitled to the unseaworthiness doctrine applied in *Sieracki, Hawn* and *Petterson.* To the dissenters it is immaterial that Halecki was engaged in a highly specialized type of work which under modern practice is contracted out by the shipowner. *Sieracki* is said to have established a humanitarian doctrine that was not predicated on the degree of specialization in the work involved. To say that the more specialized the work, the less the doctrine of unseaworthiness is to apply appears to the dissent to be an inversion of the *Sieracki* principle.

While one may question this conclusion of the dissent, one cannot doubt the correctness of its prophecy, namely, that lower courts will have difficulty in determining just how specialized the character of the work must be to take it out of the protection of *Sieracki, Hawn* and *Petterson* and to place it in the unprotected area of *Halecki.* "And so," concludes the dissent, "confusion is left to breed further litigation in an already heavily litigated area of the law."[211]

Hess

Majority		*Dissent*
Stewart (opinion)		Harlan (opinion)
Clark		Frankfurter
Chief Justice		Whittaker (memorandum)
Black	Join solely under	
Douglas	compulsion of *Tungus.*	
Brennan		

Goett

Majority (per curiam)	*Dissent*
Chief Justice	Harlan (opinion)
Black	Frankfurter
Douglas	Whittaker (opinion)
Clark	Stewart (opinion)
Brennan	

In a footnote at the end of the majority opinion in *Goett,* the following caveat appears: "THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join this opinion, but solely under compulsion of the Court's ruling in *The Tungus v. Skovgaard,* 358 U.S. 588. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that state law is the measure of recovery when it helps the defendant, as in *The Tungus,* and is not the measure of recovery when it militates against the defendant, as in *Hess v. United States,* ante, p. 314. However, they note their continued disagreement with the ruling in *The Tungus,* and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers. See the various separate opinions in this case and in *Hess v. United States, supra.*" 361 U.S. at 344 n.5.

It looks very much as if *Tungus* will be overruled. But then, who would be so foolhardy as to predict? Certainly, not this writer!

[211] 358 U.S. at 624. It will be recalled that both Sieracki and Petterson were stevedores and Hawn was a carpenter. All three were doing work that in earlier times had been done by crew members. That certainly was not the character of Halecki's work. If the theory announced in *Haverty* (discussed in text accompanying note 162 *supra*) and relied upon in *Sieracki* (discussed in text accompanying note 164 *supra*) to the effect that the injured worker should have the benefit of the unseaworthiness doctrine because he was doing a seaman's work is controlling, the majority would seem to be on sounder ground.

DOES THE SIERACKI DOCTRINE OF UNSEAWORTHINESS APPLY TO A VESSEL BEING OVERHAULED AND REPAIRED?

On December 7, 1959, the Supreme Court performed the unusual in the admiralty field and rendered a unanimous decision in *West v. United States*.[212] It there answered the question raised by the United States as amicus curiae in *Halecki* as to whether a harbor-worker could have the benefit of the unseaworthiness doctrine when he was injured on board a vessel laid up for overhaul and repairs.

West was an employee of Atlantic Port Contractors, Inc., which had been engaged to reactivate the *S.S. Mary Austin*, a merchant vessel owned by the United States which had been deactivated and placed in the "Moth Ball Fleet." Under the specifications of its contract Atlantic Port Contractors was to clean and repair waterlines and replace all defective and missing plugs. While West was working in the engine room a loosely fitted plug blew out when a co-worker turned on water. The plug struck and injured West. He filed suit in admiralty against the United States under the Public Vessels Act[213] and sought recovery on the grounds of both unseaworthiness and negligence. The District Court and the Court of Appeals denied recovery.[214] The Supreme Court affirmed the denial.

Justice Clark, speaking for the Court, said the *Sieracki* doctrine did not apply in a case of this sort where the vessel was undergoing extensive repairs, was not in navigation, and was in the control of the contractors performing the repairs. Instead of holding the vessel out as seaworthy, the United States, by the very nature of the contract involved, recognized that the vessel was unseaworthy.

The question of whether the harbor-worker is to have the benefit of the unseaworthiness doctrine, we are told, is not determined by the nature of the work he might be performing at the time but by "the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done . . . ."[215] Conceivably the doctrine of unseaworthiness might be applied in the case of a vessel which has just completed a voyage and is being repaired in preparation for another.[216]

[212] 361 U.S. 118 (1959).

[213] 43 Stat. 1112-13 (1925), as amended, 46 U.S.C. §§ 781-90 (1958). This statute authorizes an action in personam against the United States for damages caused by one of its public vessels.

[214] West v. United States, 143 F. Supp. 473 (E.D. Pa. 1956). The Court of Appeals first remanded the case to the District Court for further findings of fact in West v. United States, 246 F.2d 443 (3d Cir. 1957), and then, upon those findings, affirmed the trial court's judgment in West v. United States, 256 F.2d 671 (3d Cir. 1958).

[215] 361 U.S. at 122. Compare the fact situation in *Hawn* and the language of dissenting Justice Jackson in that case quoted in text accompanying note 176 *supra*.

[216] See the language of the Court of Appeals in West v. United States, 256 F.2d 671, 673 (3d Cir. 1958); see also the discussion in note 176 *supra*.

That does not have to be determined by the Court in this case. It is sufficient here that the vessel had not been in navigation for some time prior to the repair work and was being overhauled and repaired in order that she might again be placed in navigation.

As to the count based on negligence, the Court finds there was no duty to afford West a reasonably safe place to work in the light of the fact situation. The United States at the time was exercising no control over the vessel nor did it have supervisory power over the way the repairs were being done. There was no hidden defect. The plugs themselves were the subject of repair by the contractor. Their testing was the job of the contractor and not that of the shipowner. Negligence in this connection on the part of employees of the contractor could not be charged to the shipowner.

EFFECT OF ACCEPTANCE OF WORKMEN'S COMPENSATION BENEFITS BY INJURED HARBOR WORKER ON HIS THIRD-PARTY ACTION

The Longshoremen's and Harbor Workers' Act gives the injured worker an election to sue a third party who is liable for his injuries for damages instead of taking compensation from his employer under the act. Mere acceptance of compensation without an award does not constitute an election, but section 33(b) of the act provides that:

> Acceptance of such compensation *under an award in a compensation order filed by the deputy commissioner* shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.[217]

Following an assignment by virtue of the above quoted language, the employer may either institute proceedings against the third party or compromise with such party either with or without instituting suit. After appropriate deductions for expenses and compensation paid or payable by the employer are made, the excess of any such recovery goes to the injured worker. If the employer is insured and the insurance carrier has assumed payment of compensation the insurer is subrogated to the rights of the employer.

Prior to the recognition of the shipowner's right to seek indemnity against the land-based contractor whose employee had recovered in a

[217] 44 Stat. 1440 (1927), as amended, 33 U.S.C. § 933 (1958). The italicized words were placed in the statute by an amendment in 1938. 52 Stat. 1168. Consequently, the acceptance of compensation without an award in a compensation order filed by a deputy commissioner does not today operate as an assignment to the employer of the injured employee's cause of action against a third-party tortfeasor, a conclusion which courts had reached under the former wording of the act. For recognition of this change see American Stevedores, Inc. v. Porello, 330 U.S. 446, 454 (1947).

third-party action against the shipowner,[218] an employer frequently paid compensation to the employee without a formal award, thus leaving the employee free to sue the shipowner either on the ground of unseaworthiness or negligence. Negligence of the employer would not bar the employee's third-party action, and as long as the shipowner had no recourse against the employer the latter had nothing to fear. But, with the establishment of the shipowner's right to recover from the negligent employer the amount it had been called upon to pay the employee, it was to the employer's interest that the control of a third party action be in him and not in his employee.

Therefore, as was pointed out by Justice Black in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*,[219] employers today will tend to refuse to pay compensation voluntarily but will insist on a deputy commissioner's award which will result in the employee's cause of action against the third party being assigned to them. The employer will then have little incentive to prosecute the third-party action since any amount the shipowner is held obligated to pay may be recouped by the shipowner in its indemnity action against the employer. It is unreasonable to expect that an employer would thus establish a liability against himself for the ultimate benefit of the employee. Such liability would in most cases well exceed his obligation to pay compensation under the Longshoremen's and Harbor Workers' Act.

It is equally evident that the employee will be materially prejudiced if, after he has accepted compensation under an award, his employer chooses not to prosecute the third-party action. Accordingly, if the employee's interest in having a third-party action prosecuted is not to be prejudiced by his accepting compensation under an award, some means must be found either to enable him to bring the third-party action himself or to hold the employer responsible as a defaulting fiduciary for not properly prosecuting the assigned action against the third party.

No doubt, when Congress enacted the automatic assignment provision of the employee's third-party claim to the employer, it was assumed that both employer and employee would have an interest in having the claim prosecuted. Without the recently judicially created indemnity right of the third party against the employer, both employer and employee would have a vital interest in obtaining a recovery. When, for any reason, it appears that the interests of the employer and employee do conflict as to the advisability of bringing a third-party action

[218] See the discussion of this shipowner's right to indemnity in note 185 *supra*.

[219] 350 U.S. 124, 144-45 (1956). Justice Black minces no words in this connection. He quite properly concludes that "human nature and habits being what they are, employers will not be eager to finance suits against themselves." 350 U.S. at 145. See the discussion of the shipowner's right to indemnity in note 185 *supra*.

and the employer does not bring such suit, the employee, despite the terms of the statute, should be free to do so. That such will be the position taken by the Supreme Court is strongly indicated in the comparable situation presented by *Czaplicki v. S.S. Hoegh Silvercloud,*[220] decided in 1956.

Czaplicki was a longshoreman employed by the Northern Dock Company, which was insured for purposes of the Longshoremen's and Harbor Workers' Act by the Travelers Insurance Company. In 1945, while working on the *S.S. Hoegh Silvercloud,* Czaplicki was injured when steps constructed by the Hamilton Marine Contracting Company collapsed. For liability arising out of such a condition Hamilton was also insured by Travelers.

Within three weeks after the accident Czaplicki elected to take compensation under the Longshoremen's and Harbor Workers' Act and the following day a formal award was entered by a deputy commissioner and payments of compensation made by Travelers. Travelers now was subrogated to the right of the employer to sue the third party Hamilton by virtue of the automatic assignment and subrogation provisions of the Longshoremen's and Harbor Workers' Act heretofore discussed. But Travelers did not sue Hamilton for the obvious reason that any judgment against Hamilton would have to be paid by Travelers under its liability policy with Hamilton.

In 1952, seven years after the accident, Czaplicki brought a libel in admiralty against the vessel, its owners and operators, and Hamilton Marine Contracting Company. The District Court dismissed as to all defendants on the ground that by accepting compensation under an award Czaplicki no longer was the proper party to bring suit. The Court of Appeals[221] affirmed the dismissal on the sole ground that by his delay Czaplicki was guilty of laches and could not recover against any of the alleged tortfeasors. The Court of Appeals refrained from deciding what rights Czaplicki would have in view of the position Travelers held if he had not been guilty of laches.

On certiorari the Supreme Court reversed. The majority of the Court held that the automatic assignment provision of the Longshoremen's and Harbor Workers' Act contemplates a situation where the interests of employee and employer do not conflict. Here there is a conflict of interests. An action by Travelers against Hamilton would, in effect, be an action against itself. Czaplicki is the only person who has an interest in suing Hamilton. Therefore, the majority concludes,

[220] 351 U.S. 525 (1956), 66 YALE L.J. 581 (1957).
[221] Czaplicki v. S.S. Hoegh Silvercloud, 223 F.2d 189 (2d Cir. 1955).

> In this circumstance, we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally.[222]

The majority expressly declined to hold that the assignment provision of the statute placed the assignee in the position of a fiduciary. Instead the majority said,

> [A]ll we hold is that, given the conflict of interests and *inaction by the assignee,* the employee should not be relegated to any right he may have against the assignee, but can maintain the third-party action himself.[223]

The writer has supplied the italics above because the insertion of the italicized phrase, itself, raises questions now unanswered. What are the employee's rights if the employer or insurer assignee does take action? Under the statute the assignee has the right to compromise, with or without suit. Would the assignee with conflicting interests have the right to compromise? Would the employee be bound by such a compromise? In fact, would the assignee have the right to bring the third-party suit when on its face it is clear he could hardly be expected to prosecute such action with vigor? If such suit were brought by the assignee, could the employee insist on having his own counsel take part in the trial and would settlement have to be approved by the employee?

Perhaps the Court did not intend to imply that, before the employee can sue the third party, there must be not only conflicting interests but also inaction on the part of the assignee employer or insurer. Perhaps the Court meant the conflict of interests is itself enough and the italicized phrase is not intended to establish a prerequisite but is merely a recognition of the fact situation in the instant case. The answer lies in future decisions of the Court.

It will be recalled that the Court of Appeals had upheld the dismissal of Czaplicki's action on the ground of laches. The Supreme Court majority holds, in line with well established precedent, that the mere fact that the state statute of limitations has expired does not necessarily mean that the libellant will be barred by laches in admiralty. The District Court had never passed on the question of laches and Czaplicki had had no opportunity to introduce evidence to justify the delay. Accordingly, since the question of laches is deemed primarily a question addressed to the discretion of the trial court, the case is remanded to the District Court where Czaplicki will be free to sue all parties designated by him and will be given an opportunity to explain his delay. In so far as Travelers is concerned, the Court states that it, if subject to the trial

[222] 351 U.S. at 531.
[223] *Id.* at 532. (Emphasis added).

court's jurisdiction, should be made a party upon proper service of process.

While Justice Frankfurter concurs in reversing the dismissal, he proceeds on a different theory. He thinks the action should be brought against Travelers on the theory of fiduciary responsibility. He does not subscribe to the view that because of the conflict of interests the employee may bring the third-party action as if there had been no assignment. Instead he quotes from an earlier Court of Appeals decision to support his view that Czaplicki's remedy is against Travelers as a fiduciary.[224] He states that he would "direct reconstruction of this proceeding so that it should be against Travelers, while the vessel would be retained as a party."[225]

THE JURY'S POWER TO CONVERT HARBOR WORKERS INTO JONES ACT SEAMEN

The Jones Act gave seamen a remedy against their employers for negligence. The Longshoremen's and Harbor Workers' Act gave the employees covered by that statute a compensation remedy against their employers irrespective of negligence. As previously stated herein, the latter statute expressly excluded from its coverage a master or members of a crew of any vessel. Crew members were still to be treated as the seamen they were, and their recovery was to remain under the Jones Act. Subsequent jury verdicts have established that the financial interest of crew members are better served by the generous awards of jurors than they would be under the lesser recoveries allowed by a compensation type of statute.

In the light of this factual situation, it is not surprising that we find persons who are not members of the crew, who are not seamen in any ordinary sense of the word, seeking to recover as seamen before a jury rather than proceeding under either the federal or state compensation acts. Nor in the light of the declared "humanitarian" policy of certain members of the Supreme Court is it particularly surprising to find that a person who has no characteristics of a seaman is classified as such by a sympathetic jury with the approval of the Court.

[224] *Id.* at 535. The case relied upon by Justice Frankfurter is United States Fid. & Guar. Co. v. United States, 152 F.2d 46 (2d Cir. 1945). His quotation from the case is as follows: "So far as concerns the tortfeasor's liability to the employee beyond the amount of workmen's compensation, no agreement between the tortfeasor and the employer can prejudice the employee, because, although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest."

[225] 351 U.S. at 535.

We shall now examine the Supreme Court's decisions rendered in this area since 1951 and observe the emergence of the 1951 dissenters as the present day majority and the accompanying conversion of the land-based laborer, pile driver or oil well driller into a seaman![226]

In 1951 the Court decided *Desper v. Starved Rock Ferry Co.*[227] Desper had first been employed by the ferry company in 1947. His task was to ready sight-seeing boats, which had been laid up for the winter, for summer use. Desper obtained an operator's license and operated the boats during the summer of 1947 and when the season closed helped take the boats out of the water and block them up for the winter. His first employment with the ferry company terminated in December 1947. In March 1948 he was reemployed. There was evidence that he had been hired for the season and was to resume his operator's duties. However, at the time of his fatal accident, Desper was still working in cleaning, painting and otherwise readying for navigation the boats which were still on land. The ferry company maintained a workshop on a moored barge. Desper was on the barge painting life preservers for use on the boats when he was killed by an explosion.

Desper's administratrix sued under the Jones Act. The trial judge submitted the case to a jury which returned a verdict for the plaintiff. Judgment on the verdict was entered by the District Court but was reversed by the Court of Appeals.[228] The latter court found that Desper was not a seaman within the meaning of the Jones Act and the jury's saying that he was did not make him so. The Supreme Court affirmed the Court of Appeals and stated that although Desper had once been a seaman, and might become one again, he was not a seaman at the time of the accident. Justice Jackson for the Court said, "It is our conclusion that while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act."[229] The Court left open the question as to whether the state workmen's compensation act or the Longshoremen's and Harbor Workers' Act was applicable. Justices Black and Douglas dissented, stating they would affirm the judgment of the District Court.[230]

[226] This act of conversion is not without historical precedent, for the reader will recall that before the enactment of the Longshoremen's and Harbor Workers' Act the Supreme Court in *Haverty* (discussed in text accompanying note 162 *supra*) classified the stevedore as a seaman so that he might recover under the Jones Act, there then being no other basis for recovery against the employer for an injury received on board ship by reason of the negligence of the stevedore's fellow workers. With the adoption of the Longshoremen's and Harbor Workers' Act the injured stevedore's remedy against his employer under the Jones Act came to an end.

[227] 342 U.S. 187 (1951).

[228] Desper v. Starved Rock Ferry Co., 188 F.2d 177 (7th Cir. 1951).

[229] 342 U.S. at 191.

[230] *Id.* at 192.

The next case in this area is *Gianfala v. Texas Co.*,[231] decided in 1955. Martin was an employee of Texas Company and a member of an oil drilling crew. He was working on a barge which was part of the drilling equipment. In accordance with the practice, the barge during the drilling process was sunk to the bottom by flooding and held in position by piling. It had no navigation lights and, in fact, would be moved from one location to another only about twelve times a year. Martin worked six days a week and was off six days. He lived on shore and was paid overtime if called upon to do extra work. His duties as a member of the drilling crew included turning on and off a steam valve which forced the water out of the barge so it would float when it was to be moved from location. At the time of the accident he was assisting in unloading drilling pipe onto the barge. His supervisor, who was in charge of the drilling crew and was the only witness who testified in the case, said that Martin was not a seaman, signed no Seamen's Articles, could quit whenever he wanted to, and had nothing to do with the navigation of the barge even when it was shifted from one location to another.

Martin's administratrix brought suit under the Jones Act. The defendant moved for a directed verdict on the ground Martin was not a seaman. The trial judge denied the motion. There was a jury verdict for the plaintiff and judgment was entered for 34,000 dollars after the plaintiff had remitted 6,000 dollars of the verdict.

The Court of Appeals[232] reversed. It held that when the facts were undisputed and were subject to only one inference the jury was not free to determine whether the deceased was a seaman. That was a question of law for the Court. In concluding the Court of Appeals said:

> When the accident, on which this suit is based, took place, the vessel was not in navigation, nor was Martin aboard it in the aid of navigation. On the contrary he was aboard it, *not as a member of a ship's crew* but as *a member of a drilling crew.* He was then and there doing work which is done strictly and only by oil field workers, handling the tubing to be used in completing the well and he was certainly not a "seaman in being."
>
> If this decision below, and the contention of appellees, that a member of an oil-field drilling crew is a seaman and a member of a crew of a vessel, *merely because the jury said he was,* is sustained, it can only be because the ordinary principles governing the function of court and jury, in a trial in the federal court, have been departed from, indeed abandoned.[233]

[231] 350 U.S. 879 (1955).
[232] Texas Co. v. Gianfala, 222 F.2d 382 (5th Cir. 1955).
[233] *Id.* at 387. The emphasis is the Court's.

The Supreme Court granted certiorari and in the same breath quickly disposed of the case without more ado than the following words: "The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to reinstate its judgment."[234] The Court did not venture to distinguish the *Desper* case.

The next case is sequence is *Senko v. LaCrosse Dredging Corp.*[235] Senko was a laborer employed by the defendant dredging company. He did not belong to a seamen's union but was a member of a common laborers' union. He lived at home and drove to work each day. His duties consisted in carrying supplies from the shore to a dredge and back. He cleaned the dredge and its lanterns. These lanterns were not navigation lights, for the dredge carried none except when being towed. From time to time he measured the amount of silt removed by the dredge. Senko worked an eight hour shift and was paid extra for overtime. He was subject to supervision by a labor foreman who worked on shore. No officer of a vessel was his superior. At the time of his injury he was on land and was placing a lantern he had brought from the dredge into a shed on the bank. Senko had never travelled on the dredge; in fact, he had never seen it moved. He brought suit under the Jones Act in the city court of Granite City, Illinois. The jury rendered a verdict in his favor, finding he was a member of a crew of a vessel. Judgment for Senko was entered on their verdict. The state district appellate court reversed on the ground that there was insufficient evidence from which the jury could find Senko was a seaman within the meaning of the Jones Act.[236] The Supreme Court of Illinois denied a petition for appeal.

On certiorari the Supreme Court by a vote of six to three reversed. The majority cited *Gianfala* and held the jury's determination of Senko's status was conclusive even though the appellate court might disagree. The majority stressed that Senko's duties were to aid in maintaining the dredge and that if the dredge were put in transit there was evidence that Senko would have a significant navigational function. The majority failed to note that Senko never travelled on the dredge.

The dissenters were Justices Harlan, Frankfurter and Burton. Answering the majority, Justice Harlan said:

> There is nothing in the record to indicate that petitioner was responsible for the seaworthiness of the dredge, or that he ever performed or was qualified to perform any duties of that type. True, he cleaned lights, but these were not "navigation" lights,

[234] 350 U.S. 879 (1955).

[235] 352 U.S. 370 (1957), *rehearing denied,* 353 U.S. 931 (1957), 55 MICH. L. REV. 1011 (1957).

[236] Senko v. LaCrosse Dredging Corp., 7 Ill. App. 2d 307, 129 N.E.2d 454 (1955).

> as the dredge did not carry the latter except when under tow. In effect he cleaned lanterns and placed them when the construction work continued at night. Again, he took "soundings," but in spite of the maritime flavor of the phrase, the facts permit no salty inference, since the soundings were taken not in aid of navigation (the dredge being completely stationary at such times), but only to measure the amount of silt pumped from the canal. All this means is that Senko occasionally measured the work-progress on an earth-removal project, a task about as nautical as measuring the depth of a natural swimming pool under construction in marshy ground.
>
> . . . . He was simply a handy-man and assistant for a crew of men operating an earth-removing machine which happened to be afloat and which, occasionally and always in Senko's absence, was pushed from place to place.
>
> The fact that it was a jury that found Senko to be "a member of a crew" does not relieve us of the responsibility for seeing to it that what is in effect a jurisdictional requirement of the Jones Act is obeyed.[237]

The next case is *Grimes v. Raymond Concrete Pile Co.*,[238] decided in 1958. Grimes was employed by the defendant pile company which was erecting a Texas Tower[239] 110 miles east of Cape Cod pursuant to a contract with the United States government. Grimes was a member of the Pile Drivers Union and was employed to assist in the erection of the tower. The tower had to be towed out to location and during that time Grimes lived on the tower with other workmen and kept it in proper condition for installation at its permanent site. After the tower had been anchored and while temporary piling was being driven down, Grimes performed only piledriving work. On the date of his injuries, which was six days after the tower had been anchored, he was being transported by a navy life ring to the tower from a nearby barge that was used to transport materials.

Grimes brought suit under the Jones Act in a federal district court. The trial court granted defendant's motion for a directed verdict on the grounds that the Defense Base Act,[240] which incorporates the provisions of the Longshoremen's and Harbor Workers' Act, applied to Grimes and that no recovery could be had under the Jones Act even if Grimes were to be classified as a seaman.

The Court of Appeals affirmed.[241] The majority of that court held that the Defense Base Act would not bar a recovery under the Jones Act if Grimes had been a seaman, but that Grimes was, in fact, not a seaman

[237] 352 U.S. at 376-78. The dissenters of course cited the *Desper* case.

[238] 356 U.S. 252 (1958).

[239] These towers are used as radar stations and form a part of the nation's defenses.

[240] 55 Stat. 622-23 (1941), as amended, 42 U.S.C. §§ 1651-54 (1958).

[241] Grimes v. Raymond Concrete Pile Co., 245 F.2d 437 (1st Cir. 1957).

and hence the directed verdict and judgment for the defendant should stand.

On certiorari, the Supreme Court agreed with the Court of Appeals that the Defense Base Act did not bar an action under the Jones Act. The majority of the Court disagreed, however, with the holding of the Court of Appeals that Grimes could not properly be classified as a seaman by the jury. They accordingly reversed and remanded the case to the trial court where the jury would be free to find that Grimes, the pile driver, was really Grimes, the seaman!

Justices Harlan and Whittaker dissented on the ground that Grimes could not be held to be a seaman entitled to the benefits of the Jones Act. In concluding his dissent Justice Harlan said:

> If the "standing" requirements of the Jones Act are still to be regarded as having any real content, I can find no room for debate that this individual is not a seaman, unless a "seaman" is to mean nothing more than a person injured while working at sea. We should give effect to the law as Congress has written it.[242]

The last case in the sequence at this writing is *Butler v. Whiteman*.[243] Butler was a day laborer who had been employed by the defendant to do odd jobs around the defendant's wharf. A barge was moored to the

[242] 356 U.S. at 255.

[243] 356 U.S. 271 (1958). In the recent case of Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129 (1959), the issue was not whether the injured was a seaman under the Jones Act but whether he suffered his injuries in the course of his employment as a seaman. The claimant was a mate on the respondent's barge which on the day prior to his injury had been taken to respondent's repair yard for repairs. The respondent maintained a raft in the waters adjacent to the repair yard. The morning after the barge had been moored for repairs the respondent ordered the claimant to lay some flooring on the raft. As the claimant started to go to the raft a catwalk gave way and injured him. The trial court gave judgment for the claimant under the Jones Act following a jury verdict. The Court of Appeals reversed, Braen v. Pfeifer Oil Co., 263 F.2d 147 (2d Cir. 1959), on the ground that claimant's injuries were not incurred in the course of his employment as a seaman and that his recovery instead of being under the Jones Act was under the Longshoremen's and Harbor Workers' Act.

The Supreme Court was unanimous in reversing the Court of Appeals. However it split 6 to 3 on the question of whether the District Court judgment should be reinstated. The majority held it should. The three dissenters were of the opinion that a jury question was presented as to whether at the time of his injury the claimant was already engaged in performance of his raft assignment or was merely enroute to that assignment. If the former, the dissent was of the opinion there could be no recovery under the Jones Act since the claimant then would not be in the service of his ship. But, if the latter, the dissent thought there could be recovery under the Jones Act. Interestingly enough, the dissent also was of the opinion that since the claimant was a member of a crew of a vessel he could not recover under the Longshoremen's and Harbor Workers' Act but would be covered by state law.

Since it was shown that the raft, from time to time, was used to facilitate painting the respondent's vessels it would appear that in servicing the raft the claimant was as much "in the service of the ship" as were the claimants in the shore leave cases who were getting personal relaxation. The references to these cases by the majority seems in order. See text accompanying notes 4 and 11 *supra*.

wharf and a tug which had been out of navigation for several months and was inoperable was lashed to the barge. On the date in question Butler was drowned, apparently falling off either the barge or tug. Earlier in the day he had been cleaning the tug's boiler for the purpose of rehabilitating the tug for navigation and in preparation for Coast Guard inspection.

Suit was brought under the Jones Act by Butler's widow in a federal district court. The trial judge granted defendant's motion for a directed verdict on the ground that Butler was not covered by the Jones Act. The Court of Appeals affirmed.[244] It found that the undisputed evidence showed the tug was not in navigation and had neither captain nor crew at the time of the accident. It held there was no evidence of negligence on the part of defendant and that Butler was not a seaman under the Jones Act.

On certiorari, the Supreme Court reversed. In an unsigned opinion it sent the case back to the trial court with instructions that the jury should be permitted to determine (1) whether or not the tug was in navigation, (2) whether or not Butler was a seaman and member of the crew of the tug within the meaning of the Jones Act and (3) whether or not the defendant's negligence played a part in bringing about Butler's death.

Justices Harlan and Whittaker dissented. They rely on the *Desper* case and on what they deem to be the meaning of the Jones Act. Justice Harlan said,

> In my opinion it taxes imagination to the breaking point to consider this unfortunate individual to have been a seaman at the time of the accident within the meaning of the Jones Act, and I think that if a jury were so to find, its verdict would have to be set aside.[245]

It is clear from the last four cases, *Gianfala, Senko, Grimes* and *Butler,* that *Desper* has to all intents and purposes been overruled although the Court has never expressly said it was so doing. It is also clear that today the pile driver, the oil well driller, or the common ordinary day laborer doing odd jobs about a wharf, but never going to sea, is a seaman if the jury[246] in its wisdom so declares. But it is im-

[244] Harris v. Whiteman, 243 F.2d 563 (5th Cir. 1957).

[245] 356 U.S. at 272.

[246] As in other areas of law, the Supreme Court has reversed lower courts in admiralty cases when those courts deemed there was inadequate evidence of negligence or causal relation to support a jury finding for the claimant. See the 5-to-4 decision in Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956), reversing 222 F.2d 540 (2d Cir. 1955). A directed verdict for the defendant in a Jones Act case by the trial court was upheld by the Court of Appeals. The deceased had disappeared after reporting for work on defendant's tugs. Several weeks later his body was found in the water near an adjacent pier. The Supreme Court held

portant to bear in mind that such persons are now being permitted to be characterized as seaman at a time when to be so designated means a *greater* financial recovery for the injury or death in question than could be had if the jury were compelled to recognize them for what in real life they actually are. One may well doubt whether the present majority of the Court would permit a jury to attach the appellation of seamen to persons of the type in question if to do so meant the claimant would receive a *lesser* recovery.

CONCLUSION

Occasionally we have found the Supreme Court unanimous, or substantially so, in its decisions of the admiralty cases herein discussed. But in the far greater number of those cases the division of the Court emphasizes the lack of a reasonable degree of certainty in our present law of the sea. Nevertheless, a study of the cases indicates both the basis and direction of admiralty law under the guidance of today's Court.

One cannot fail to sense that the motivating force behind the decisions of the Court is a liberalism which often results in the alleviation of the needs of the individual. This is done at the expense of the many, for obviously the shipowner passes on the cost to those who use the shipping services.

Surely, in this day and age of social security of every kind, the goal of the Court is in line with current political and social theory. Within the "gray" areas we might well applaud this humanitarian action. However, when we find the Court disregarding congressional mandates, redefining the established functions of court and jury, and classifying as seamen persons who obviously are not such merely because as a "seaman" the claimant may recover more dollars than he would be entitled to in his true capacity, one may well feel that our Court has sailed too far off course.

The pot of gold at the end of the rainbow is not the star on which our Supreme Court mariners should fix their sights!

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there was enough evidence from which the jury could infer that the defendant had not furnished deceased with a safe place to work and that as a result the deceased had fallen into the waters and drowned.

In the recent case of Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107 (1959), *reversing* 256 F.2d 156 (5th Cir. 1958), the plaintiff in a Jones Act case recovered a jury verdict on which judgment was entered in the District Court. Plaintiff contended that as the result of an accident he incurred on board ship a pre-existing condition of tuberculosis was activated or aggravated. The Court of Appeals reversed on the ground that there was insufficient medical evidence from which the jury could find a causal relation between the accident and the aggravated condition of tuberculosis. The Supreme Court reviewed the evidence and found there was adequate medical proof to support the jury verdict for the claimant.

As has been his practice, Justice Frankfurter dissented in each of these cases on the ground that a writ of certiorari should not be granted to review evidence and to discuss specific facts.