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NOTES AND COMMENTS

Admiralty—Condition of Unseaworthiness Arising After the Commencement of the Voyage.

Whether a seaman may recover compensatory damages for injuries sustained by reason of a condition of unseaworthiness arising after the commencement of the voyage is a question recently decided by the United States Supreme Court.¹ In *Mitchell v. Trawler Racer, Inc.*,² the petitioner was a crew member on the respondent's vessel, which had docked after returning from a fishing voyage and on that same day unloaded her cargo of fish spawn. As a result of the bags of spawn being handed over the side rail of the ship, the rail became covered with a slippery substance known as fish gurry. When the unloading was complete, the petitioner prepared to go ashore. He stepped onto the rail in order to reach a ladder on the pier, slipped and fell with resulting injuries.

Suit was brought on the law side of the United States District Court for the District of Massachusetts,³ plaintiff asking for compensatory damages, as well as maintenance and cure, upon alternative theories: (1) The Jones Act⁴ for negligence, and (2) the unseaworthiness of the vessel. The trial court charged that in order for the mariner to be successful on either theory, the jury must find that the respondent shipowner had actual or constructive notice of the condition of the railing on which the seaman slipped. The jury awarded maintenance and cure but found for the shipowner on both counts of compensatory damages.⁵

The petitioner appealed urging as error the district court's charge that notice of the condition of unseaworthiness was required to make the owner liable. The court of appeals, however, affirmed, holding

¹ The question was discussed and deliberately left open in *Dixon v. United States*, 219 F.2d 10 (2d Cir. 1955).

² 362 U.S. 539 (1960).

³ The suit was brought on the law side of the court on the basis of *Doucette v. Vincent*, 194 F.2d 834 (1st Cir. 1952), which interpreted the jurisdictional provisions of 28 U.S.C. § 1331 (1949) as allowing a complainant to bring his suit on the law side of the court if his cause of action arose under the general maritime law. This case was subsequently overruled by the Supreme Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). The court of appeals, however, dismissed *Trawler Racer's* objection to the jurisdiction of the lower court by reason of the "pendant" doctrine which allows action on the law side where two counts are contained in one complaint and one could have been brought on the law side of the court.

⁴ 41 Stat. 1007 (1929), 46 U.S.C. § 688 (1958).

⁵ *Mitchell v. Trawler Racer, Inc.*, 167 F. Supp. 434 (D. Mass. 1958).

that the rule of absolute liability for unseaworthiness depended upon conditions existing *at the commencement of the voyage*.⁶

The Supreme Court granted certiorari and by a 6 to 3 decision reversed both lower courts and remanded the case to the district court for a new trial on the issue of unseaworthiness. Relying upon *Seas Shipping Co. v. Sieracki*⁷ and *Alaska S.S. Co. v. Petterson*⁸ the Court held that the duty to provide a seaworthy ship is present at all times, and that it makes no difference whether the condition arises before or after the commencement of the voyage or whether the condition be permanent or temporary.⁹ The Court stated that the liability of a shipowner to provide a seaworthy ship

is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.¹⁰

The three dissenting members of the Court, led by Justice Frankfurter in an elaborate twenty-page opinion, said that the whole doctrine of unseaworthiness as it is applied to seamen is unfounded.¹¹

Apparently the doctrine of unseaworthiness was first formulated¹² in 1816 by Lord Eldon in *Douglas v. Scougall*.¹³ In that case the insurer was sought to be held for the loss of the cargo, but the court held that the owner must bear the responsibility for the unseaworthy condition of his ship which caused the loss when such condition existed at the commencement of the voyage. The first English case involving the doctrine in a personal injury situation was *Couch v. Steel*¹⁴ which held that the doctrine did not apply in such a case. In 1876, twenty-

⁶ *Mitchell v. Trawler Racer, Inc.*, 265 F.2d 426 (1st Cir. 1959). The court said that none of the cases concerned a temporary condition of unseaworthiness which had arisen without negligence during the voyage of a ship unquestionably seaworthy at the outset.

⁷ 328 U.S. 85 (1946). The Court held that a shipowner was liable to a stevedore who was injured while working on board ship by the falling of a boom which was caused by the faulty condition of a shackle.

⁸ 347 U.S. 396 (1954). The facts of this case were essentially the same as those in the *Sieracki* case *supra* note 7, and the decision rested upon the holding thereof.

⁹ 362 U.S. at 539.

¹⁰ 362 U.S. at 549, quoting from *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946).

¹¹ The majority of the Court declined to re-examine the historical basis for the doctrine. 362 U.S. at 550.

¹² "The ancient code imposed no duty upon the shipowner and master to take pains to provide a staunch ship for the benefit of the mariners." Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 387 (1954).

¹³ 4 Dow 269, 3 Eng. Rep. 1161 (1816).

¹⁴ 3 El. & B. 402, 118 Eng. Rep. 1193 (1854).

three years after *Couch v. Steel*, The Merchant Shipping Act¹⁵ was enacted by Parliament, imposing the duty of due diligence upon the shipowner to see that the vessel was seaworthy at the inception of the voyage and that the ship be maintained in a seaworthy condition during the voyage. Following this act, the House of Lords in *Hedley v. Pinkney & Sons S.S. Co.* held that the failure to use available stanchions and rails as a result of which a seaman was thrown overboard and drowned did not render the vessel unseaworthy within the meaning of the statute.¹⁶

The doctrine had a similar origin in the United States. In 1869 the Supreme Court in *The Northern Belle*¹⁷ held that the shipowner's duty to provide and maintain a seaworthy ship for the voyage was absolute and that liability for cargo damage resulting from an unseaworthy vessel must be borne by the owner of that vessel and not his insurer.

Some earlier American cases dealing with seaman's injuries imposed liability on the shipowner to the extent that there was negligence by the owner, master, or mate to provide proper equipment or to correct dangerous conditions aboard ship after reasonable notice of the existence of such conditions.¹⁸ In another line of cases the mariner was allowed recovery on the basis of "unseaworthiness," but the standard imposed by this doctrine at that time was no greater than due diligence.¹⁹

The right of seamen to recover for injuries caused by unseaworthiness was first declared in *The Osceola*²⁰ in 1903, where the Supreme Court said that the duty of a shipowner to provide a seaworthy ship for his crew is absolute.²¹ This statement was dictum, however, be-

¹⁵ The Merchant Shipping Act, 1876, 39 & 40 Vict., c. 80, provides "that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same."

¹⁶ [1894] A.C. 222 (Scot.). The House of Lords in fact held that the failure to use this equipment, while not resulting in unseaworthiness, did constitute negligence on the part of those in charge of the management of the vessel but that under the fellow servant rule no cause of action existed against the owner by reason of the master's negligence.

¹⁷ 76 U.S. (9 Wall.) 526 (1869).

¹⁸ *The Julia Fowler*, 49 Fed. 277 (S.D.N.Y. 1892); *The Frank and Willie*, 45 Fed. 494 (S.D.N.Y. 1891); *The A. Heaton*, 43 Fed. 592 (C.C.D. Mass. 1890); *Olson v. Flavel*, 34 Fed. 477 (D. Ore. 1888); *The Noddleburn*, 28 Fed. 855 (D. Ore. 1886); *The Edith Godden*, 23 Fed. 43 (S.D.N.Y. 1885); *Halverson v. Nisen*, 11 Fed. Cas. 310 (No. 5970) (D. Cal. 1876); *Brown v. The D. S. Cage*, 4 Fed. Cas. 367 (No. 2002) (C.C.E.D. Tex. 1872).

¹⁹ *The Robert C. McQuillen*, 91 Fed. 685 (D. Conn. 1899); *The Lizzie Frank*, 31 Fed. 477 (S.D. Ala. 1887).

²⁰ 189 U.S. 158 (1903).

²¹ *The Cyrus*, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789), appears to be the first American case to require the shipowner to provide a seaworthy vessel for his crew. It should be noted, however, that a breach of the obligation merely permitted the seaman to leave the ship's service without forfeiture of wages or

cause the holding was that no recovery could be had for mere operating negligence, *i.e.*, an improvident order given by the master. This dictum was not followed in a subsequent lower court decision in 1905.²² In 1922, however, the Supreme Court gave new life to the dictum of *The Osceola* by its opinion in *Carlisle Packing Co. v. Sandanger*²³ where it was stated *obiter* that a seaman may recover for injuries sustained through the unseaworthy condition of the ship. Thus dictum was compounded with dictum and so stood the law of unseaworthiness until 1944, when the Supreme Court decided *Mahnich v. Southern S.S. Co.*²⁴ In that case there is a clear holding that the owner's duty to provide a seaworthy ship does not depend upon negligence.²⁵

More recently the doctrine of unseaworthiness has been held to embrace more than mere physical defectiveness of the ship or equipment. In *Boudoin v. Lykes Bros. S.S. Co.*²⁶ a seaman was assaulted by a man of a savage and vicious nature, a man whose very presence on board ship rendered it a perilous place. The victim was allowed to recover from the shipowner on the ground that the ship was unseaworthy because of the presence of the vicious attacker.

The underlying premise in the *Boudoin* case was that the vicious seaman was of that nature from the beginning of the voyage. If it be assumed that the assailant had developed his propensity for vicious conduct *after* the voyage had begun, then the question arises under the *Mitchell* decision whether the shipowner would be liable to the victim for unseaworthiness. The holding itself in the principal case would seem to require an affirmative answer,²⁷ yet there is language in the Court's opinion to suggest that the owner would not be held liable in the freak accident situation.²⁸

being subject to prosecution for desertion. "As late as 1832, Circuit Judge Story viewed the obligation of the vessel and shipowner to a mariner injured in its service as limited to maintenance and cure, with the possible exception of the unusual case where the mariner might have received his injuries in defending the vessel against some extraordinary peril." Tetreault, *supra* note 12, at 384.

²² *The Henry B. Fiske*, 141 Fed. 188 (D. Mass. 1905).

²³ 259 U.S. 255 (1922).

²⁴ 321 U.S. 96 (1944).

²⁵ In the *Mahnich* case a seaman was injured while at sea by falling from a staging which gave way when a piece of defective rope supporting the staging broke. The Court in a 7 to 2 decision (Justices Frankfurter and Roberts dissenting) allowed the seaman to recover on the doctrine of unseaworthiness and this despite the fact that a sound rope was on board.

²⁶ 348 U.S. 336 (1955), 33 TEXAS L. REV. 1081.

²⁷ The Court held that a shipowner is liable for injuries suffered by a seaman through the unseaworthy condition which arose after the commencement of the voyage.

²⁸ "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every peril of the sea, but a vessel reasonably suitable for her intended service." 362 U.S. at 550.

While the Court's statement was perhaps intended to provide the Court some escape from holding against the shipowner in every injury case remotely connected with either the ship or its personnel, it remains open to some doubt how far the holding in *Mitchell* will be taken to impose its newly found duty of the shipowner to provide a seaworthy ship *at all times*. To use another example, a ship at sea encounters a severe storm the force of which weakens the mast, thereby rendering the ship unseaworthy. Subsequently while the ship is limping into port where she can be repaired, the mast topples, striking and injuring a seaman. If the shipowner incurs liability in such a case, it is difficult to see how his duty to provide the requisite seaworthy ship can be fulfilled while his ship is yet at sea and beyond the reach of harbor repair facilities.

The dissent in *Mitchell* took the view that the Court's decision virtually made the shipowner an insurer of the seaman, whereas the doctrine of unseaworthiness originated in both English and American courts as a means of protecting marine cargo insurance carriers from undue risks.

It is submitted that the dissenting opinion is the sounder, for it recognizes that the doctrine of unseaworthiness was called into existence for one reason—the encouragement of marine insurance. It also recognizes that the doctrine has undergone its expansion since that time through some dubious judicial precedent. And with the decision in the principal case it is seen that perhaps the last vestige of the historical doctrine of unseaworthiness has been cast off—that element which required the shipowner to make his ship safe for the impending voyage while the ship is yet in port. The shipowner is now liable without fault before,²⁹ during,³⁰ and after³¹ the voyage to a seaman (or one doing a seaman's work) injured aboard his ship.

HOWARD A. KNOX, JR.

Domestic Relations—Basis of the Award of Alimony Pendente Lite in North Carolina.

Alimony pendente lite may be awarded to any married woman upon her application to the court with notice to her husband during any proceeding for absolute divorce, divorce from bed and board, or alimony without divorce.¹ She may receive the award whether she be the plaintiff or the defendant in the principal action.² If the wife is

²⁹ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

³⁰ *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

³¹ *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

¹ N.C. GEN. STAT. § 50-15 (1950); N.C. GEN. STAT. § 50-16 (Supp. 1959).

² *Johnson v. Johnson*, 237 N.C. 383, 75 S.E.2d 109 (1953); *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918); *Webber v. Webber*, 79 N.C. 572 (1878).