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THE SEAMAN AS WARD OF THE ADMIRALTY

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THE seaman has a peculiar status in American law. He is in most instances a mature individual, *sui juris*, and therefore capable of entering into his own contracts but nonetheless his contractual dealings with shipmasters and owners are as carefully watched by our admiralty courts as though he were a minor or a young heir. He is in contemplation of the maritime law a ward of the admiralty courts.[1]

The seaman's position in a legal and economic sense is unique. Singled out by the Congress of the United States as one of a class of workers requiring special consideration and treatment,[2] he has long been regarded in admiralty as improvident and incapable of protecting his rights.[3] After almost a century and a half this fundamental concept of the merchant seaman has not been materially altered by the courts.

It is paradoxical that during the Middle Ages when a large segment of the working populace lacked economic freedom as we know it today, seamen were accorded humane consideration in the form of nursing care and maintenance—with pay—when sick or injured in the service of the ship.[4] Ironically, the present era in the United States with its

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[1] He has been variously described as "ward of the admiralty," Garrett v. Moore-McCormack Co., 317 U.S. 239 at 248, 63 S.Ct. 246 (1942); Socony-Vacuum Co. v. Smith, 305 U.S. 424 at 430-431, 59 S.Ct. 262 (1939); The Arizona v. Anelich, 298 U.S. 110 at 122-123, 56 S.Ct. 707 (1936); Warner v. Goltra, 293 U.S. 155 at 162, 55 S.Ct. 46 (1934); Robertson v. Baldwin, 165 U.S. 275 at 287, 17 S.Ct. 326 (1897); "ward of the nation," The Grace Dollar, (9th Cir. 1908) 160 F. 906 at 907; "ward of the legislature," ROBINSON ON ADMIRALTY 282 (1939); cf. The James H. Shrigley, (D.C. N.Y. 1892) 50 F. 287, and as "favorites of the courts of admiralty," Metaxas v. United States, (D.C. Cal. 1946) 68 F. Supp. 667.

[2] Practically every step in his working conditions has been legislated by Congress from the time he first comes aboard the ship and signs the articles to the time when the voyage is terminated and the vessel secured, and even beyond that should he require hospitalization. Finally, in the event of death, there are statutes regulating the disposition of his personal property.

[3] Harden v. Gordon, (C.C. Me. 1823) 11 Fed. Cas. 481, No. 6,047.

[4] The Laws of Oleron, art. VII, 30 Fed. Cas. at 1174; The Laws of Wisby, art. XIX, 30 Fed. Cas. at 1191; The Laws of the Hanse Towns, arts. XXXV, XXXIX, XLV, 30 Fed. Cas. at 1199, 1200; The Marine Ordinances of Louis XIV, Title Fourth, arts. XI, XV, 30 Fed. Cas. at 1209.

full measure of independence for the working man finds the seaman still bound by rules of conduct traceable to the Middle Ages. Even his current working conditions retain the flavor of medieval days, for his place of employment is both his home and his factory. In fact, his working day, while usually limited to eight-hour stints, actually includes every hour of the twenty-four, for he can be called upon to do his duty at any time of day or night should an emergency arise while the vessel is at sea.

Has the lot of the seaman today changed to such an extent that he is no longer the reckless, profligate individual for whom the admiralty courts have had to extend its cloak of protection? Has he reached the point where, like the landsman, he is to be presumed to be fully capable of taking care of his affairs? Has the pendulum of favoring the seaman swung so far over as to make his employer almost an insurer of his health and safety? Are seamen entitled to the continued benevolent regard of the courts as "wards of the admiralty?" Is it inconsistent for present-day courts to look upon our merchant seamen in virtually the same light as in the early part of the nineteenth century? In short, has the wardship theory for merchant seamen lost its raison d'etre, and will further pursuance of this doctrine by the courts result inevitably in a legal anachronism? These are the questions most frequently asked by those in the maritime legal profession and industry as well as those who are intrigued by the fascinating aspect of a class of men deliberately and as a matter of policy favored in the law. To understand the problem it is desirable to review the rules and laws which are so strongly in favor of the seaman.

I

ANCIENT SEA CODES

The favored position at law which the present-day seaman enjoys has long, well-developed roots going back to the Middle Ages. These ancient sea codes, almost ten centuries old, set down the rules governing maritime commerce and included the regulations applicable to mariners. The sea codes have been aptly termed "the common law of the sea."[5]

[5] Many of the rules expressed in the sea codes are part of the American admiralty law of today. It is better known as the "general maritime law." It has been described in The Lottawanna, 88 U.S. 558 (1874), as "that venerable law of the sea, which has been the subject of high encomiums from the ablest jurists of all countries." Not all of these codes could be adopted by our courts. Some of the provisions, especially with respect to the

While the earliest maritime code (of which no written record remains) is said to be the Rhodian Sea-Law,[6] the code which was the precursor of the general maritime law is The Laws of Oleron.[7] This code is attributed to Eleanor, the Duchess of Guienne, and was introduced into England by Richard I upon his return from one of the Crusades.[8] The Laws of Wisby[9] and the Laws of the Hanse Towns,[10] as well as some lesser known sea codes,[11] are to a large extent freely borrowed from Oleron. The French Code—the Marine Ordinances of Louis XIV— was compiled by Colbert, the Minister to Louis XIV, and published in 1681.

Some of the provisions of these codes penalized the peccadillos, as well as the more serious offenses of mariners, by punishments "cruel and unusual." The quarreling seamen could suffer the loss of a hand;[12] striking the master resulted in the loss of a hand "in a painful

conduct of mariners, are completely repugnant to our ideas of equity, justice and methods of punishment. Therefore, the general maritime law is operative as law here only as it is accepted by the laws and usages of this country. The Lottawanna, supra. It was Justice Holmes, in The Western Maid, 257 U.S. 419 at 432, 42 S.Ct. 159 (1922), a case involving sovereign immunity, who stated with regard to the general maritime law that "there is no mystic overlaw to which even the United States must bow."

[6] ASHBURNER, THE RHODIAN SEA LAW (1909).

[7] Antedating the Laws of Oleron were a number of written laws of the following Mediterranean cities: The Tables of Amalfi (1010 A.D.), The Ordinances of Trani (1063 A.D.), The Assizes of Jerusalem (1100 A.D.).

[8] The original language of the Laws of Oleron was that of Gascony, and the code was originally intended to cover the commercial practices of that part of France. Richard I of England, who reigned from 1189 to 1199, inherited the Dukedom of Guienne from his mother, Eleanor, and introduced the code into England. Additions were made to it by King John (1199-1216), and it was promulgated anew in the fiftieth year of Henry III (1266). The Laws of Oleron received their final confirmation in the twelfth year of Edward III (1339).

[9] Wisby was a seaport city and the ancient capital of Gothland, an island in the Baltic Sea. The sea-laws and ordinances of Wisby were applied there in all causes for suits relating to maritime affairs. These ordinances were submitted to all litigants who traded in Wisby and were considered as righteous and just by the maritime nations of Europe. It has been contended by some that the laws of Wisby are more ancient than those of Oleron. This claim has been opposed by Cleriac who denies that they were promulgated prior to the year 1266.

[10] The Hanse Towns or Hanseatic League was composed of 81 cities in the area of what is presently called Germany between the Baltic and the Scheld. The Baltic was surrounded by barbaric nations whose piracies and vandalisms prevented the advancement of successful commerce and compelled the cities of Lübeck and Hamburg to unite in mutual defense. One of the means adopted by the League to insure prosperous trade and the settlement of controversies between them was the formation of a code for the regulation of their maritime activities. They appear to have been first enacted in the year 1597 and the laws were evidently founded on the laws of the neighboring city of Wisby and the Laws of Oleron.

[11] The Purple Book of Bruges, The Good Customs of the Sea, The Dantzic Ship-Laws, etc.

[12] The Laws of Wisby, art. XXIV, 30 Fed. Cas. 1191.

manner,"[13] or death;[14] and deserters were hanged[15] or branded on the face with the initial letter of the name of the town to which they belonged.[16]

But there was a brighter side, too, in the medieval codes' treatment of the seaman. Judged in the light of the treatment accorded to shore-workers during the fourteenth to eighteenth centuries, mariners did not fare too badly. Some of the code provisions indicated consideration and humaneness. Sailors were paid their wages in three equal parts. One-third was advanced upon joining the ship, one-third upon unlading the cargo in a foreign port, and the final third when the vessel ended her voyage at her home port.[17] Extra compensation was granted to mariners when they were required to do longshoremen's work.[18] A salvage reward was permitted them for recovery of cargo upon the wreck of their vessel.[19] Shore leave was granted in the discretion of the master.[20]

While the master had almost autocratic power aboard ship, the codes enjoined him to show patience and understanding toward the crew. A seaman could be discharged at any time for just cause, but if he repented he was to be taken back. Upon the master's refusal to re-hire a repentant seaman, he could follow the ship and claim full wages.[21] The master, according to The Laws of Oleron,[22] was permitted to strike the seaman one blow, after which the victim had the right to defend himself. But under the Laws of the Hanse Towns the master who struck a seaman could receive blow for blow.[23] The Consulate of the Sea[24] allowed the master to call the seaman ill names. The seaman could flee from his sight to the prow. If followed, the sailor was to flee to another part of the ship. But if the master pursued him further, the seaman had the right to defend himself.

[13] The Laws of Oleron, art. XII, 30 Fed. Cas. 1177.
[14] The Marine Ordinances of Louis XIV, art. VII, Title Third, 30 Fed. Cas. 1206.
[15] The Laws of Wisby, art. LXI, 30 Fed. Cas. 1194.
[16] The Laws of the Hanse Towns, art. XLIII, 30 Fed. Cas. 1200.
[17] The Laws of the Hanse Towns, art. XXVIII, 30 Fed. Cas. 1199.
[18] The Laws of Wisby, art. V, 30 Fed. Cas. 1190. Present day union collective bargaining agreements have similar provisions.
[19] The Laws of Oleron, art. IV, 30 Fed. Cas. 1172; The Laws of the Hanse Towns, art. XLIV, 30 Fed. Cas. 1200.
[20] The Laws of Wisby, art. XVII, 30 Fed. Cas. 1190.
[21] The Laws of Oleron, art. XIII, 30 Fed. Cas. 1177; Laws of Wisby, art. XXV, 30 Fed. Cas. 1191.
[22] Art. XII, 30 Fed. Cas. 1177.
[23] Art. XXIV, 30 Fed. Cas. 1191.
[24] Art. 16.

Undoubtedly, the most notable aspect of these sea codes was the recognition that a seaman sick or injured in the service of his vessel without misconduct on his part should receive medical and nursing care at the expense of the ship as well as the wages which he would have earned during the period of the voyage.[25] This rule, almost without change, is our present doctrine of maintenance and cure, a remedy which has been described as relatively simple and devoid of technicalities.[26] As a working man's remedy it anticipated industrial workmen's compensation by almost a thousand years.

II

EARLY ENGLISH AND AMERICAN CASES

Toward the close of the eighteenth and during the early part of the nineteenth century, the English admiralty courts began to recognize the seaman as a member of a valuable class of society. Not only was he needed to man the merchant vessels that were sailing to far parts of the globe in furtherance of England's trade and expanding colonial empire, but he was also essential to the much needed manpower which her navy required to blockade the French and to fight Napoleon's fleet when it finally sailed out for combat.[27] Concurrent with this recognition of the seaman's importance there developed a concept of the seaman as an illiterate, inexperienced, unthinking and imprudent individual who required the special protection of the court. The principal proponent of this view was Lord Stowell who sat in the High Court of Admiralty for a period of thirty years beginning in 1798. The stirring times during which he served, with the dangers and hardships of the Napoleonic Wars, the mutiny of the English navy at Spithead and at Nore,[28] the revolting cruelties practiced on the English

[25] The Laws of Oleron, art. VII, 30 Fed. Cas. 1174; The Laws of Wisby, art. XIX, 30 Fed. Cas. 1191; The Laws of the Hanse Towns, art. XLV, 30 Fed. Cas. 1200; The Marine Ordinances of Louis XIV, Title Fourth, art. XI, 30 Fed. Cas. 1209; The Ordinances of Trani, art. X, 4 BLACK BOOK OF THE ADMIRALTY, Twiss' ed., 13 (1871); The Tables of Amalfi, art. 14, 4 BLACK BOOK OF THE ADMIRALTY, Twiss' ed., 531 (1871). If maimed or disabled while defending the ship from "rovers"—pirates or other enemies—he was entitled to compensation for life. The Laws of the Hanse Towns, art. XXXV, 30 Fed. Cas. 1199.

[26] Farrell v. United States, 336 U.S. 511, 69 S.Ct. 707 (1949).

[27] England partly solved her manpower requirements by simply impressing her merchant seamen (and sometimes Americans were included) into the naval service.

[28] See ANTHONY, REVOLT AT SEA 68-95 (1937).

sailors in the name of "discipline,"[29] and the necessity of making the merchant service attractive in order to recruit and hold her mariners, must have had considerable influence in the shaping of this doctrine.

It was in 1799, only two years after the mutinies at Spithead and Nore, that Lord Stowell (then Sir William Scott) in *Robinett v. The Ship Exeter*,[30] took occasion to assert with regard to common seamen that they "from their ignorance and helpless state [are] placed in a peculiar manner under the tender protection of the Court." As to their manner of living and their conduct he went on to state that although intoxication of seamen could not be condoned, nevertheless theirs was a mode of life peculiarly exposed to severe peril and exertion "and therefore admitting in seasons of repose something of indulgence and refreshment; that indulgence and refreshment is naturally sought by such persons in grosser pleasures of that kind; . . . the proof of a single act of intemperance, committed in port, is no conclusive proof of disability for general maritime employment. Another rule would, I fear, disable many very useful men for the maritime service of their country."[31]

In business dealings between the seaman and the wealthy merchant-shipowner it became apparent to the admiralty court that the former was placed in a grossly disadvantageous position. Lord Stowell, in *The Minerva*,[32] said:

> "On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in

[29] A favorite device of some of the navy captains was to flog the last man up the hatchway or the last down from the rigging; another, was "keel-hauling," i.e., lowering a man down one side of the ship and hauling him, half drowned, up the other. LLOYD, CAPTAIN MARRYAT AND THE OLD NAVY 15 and 129 (1939). What Mr. Lloyd failed to state was that many of these seamen were terribly lacerated when pulled across the barnacle encrusted bottoms. Anthony in his REVOLT AT SEA, p. 70, relates one incident which occurred in September 1797. "Captain Pigot worked up the crew of the *Hermione* smartly on a West Indian cruise. The last man to lay below was flogged. Two topmen fell from the shrouds in the mad chase to make the deck and broke their legs. 'Throw those lubbers overboard,' ordered Pigot. Over they went and were drowned. In the older navy Pigot might have been quite safe. That night in September, 1797, the crew rose, murdered Pigot and most of his officers; times were changing."

"Flogging round the fleet" was tantamount to a death sentence. Few men survived. The prisoner would be placed in the longboat where he received fifty lashes from the boatswain's mate. The longboat would then cast off to the next ship in line. Here and alongside every vessel in the harbor the performance would be repeated. KENNEDY, NELSON'S CAPTAINS 8 (1951).

[30] 2 C. Rob. 261, 165 Eng. Rep. 309 at 310 (1799).

[31] Concern for the preservation of merchant seamen as a class from being lost to a very necessary branch of the nation's military service was expressed by Justice Story in Harden v. Gordon, (C.C. Me. 1823) 11 Fed. Cas. 480, No. 6,047. See also Attorney General Taney's opinion, 2 OP. ATTY. GEN. 468 (1831).

[32] 1 Hagg. 347, 166 Eng. Rep. 123 at 126-127 (1825).

> business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves. Everybody must see where the advantage must lie between parties standing upon such unequal ground, and accordingly these special engagements so introduced into the mariners' contract lean one way, to the disadvantage of the mariners, and to the advantage of their employers, by increasing the duties of the former, and diminishing the obligations of the latter."[33]

In American maritime law the shaping of the wardship theory was greatly influenced by the famous opinion of Justice Story in *Harden v. Gordon*.[34] This case concerned a seaman's claim for the expenses

[33] See Hume v. Moore-McCormack Lines, Inc., (2d Cir. 1941) 121 F. (2d) 336 at 341. In an interesting and informative opinion, Judge Frank noted the development during this period of the theory of laissez-faire (which found its greatest expression in Adam Smith's WEALTH OF NATIONS, published in 1776) involving a belief that if men were let alone each to follow his own selfish aims, the social welfare would be best promoted. The epitome of that belief was the freeing of the individual in all walks of life from all restraints in matters of industry and trade. But so far as seamen were concerned a different rule—a paternalistic one—became the order of the day. Judge Frank said, at 341-342, ". . . when we ask why, during the 19th century, in the high noon of laissez-faire, those employed as sailors were accorded unique treatment—why judges sitting in admiralty, and without benefit of statute, refused to accord that type of employee the full measure of that liberty which the common law had thrust, willy-nilly, upon workers engaged in other occupations—the answer seems to be this: The courts had made realistic appraisals of the inability of the individual seaman to cope effectively with his employer in bargaining, but had found from observation that the same difficulties were not encountered by the individual worker in other occupations."

[34] (C.C. Me. 1823) 11 Fed. Cas. 480, No. 6,047. Some of the illness which prevailed in Judge Story's time, such as scurvy, yellow fever, etc., have virtually disappeared so far as shipboard life is concerned. However, the hazard to the seaman's health while in countries where low moral and health standards prevail is still present. Infection by contact is not a rarity by any means. The so-called "social diseases" lead the list. Syphilis was present among Columbus' crew and also on Bligh's *Bounty* as well as countless thousands of vessels since. Of 13,299 cases of illness involving seamen on deep-sea vessels reported during 1950, a total of 1,493 were cases of venereal disease, or 11%. Marine Index Bureau, Inc., Circular Letter No. 11, Statistical Analysis No. 6, Feb. 14, 1951. The total population in the United States in 1950 was 150,697,361. Reported cases in the United States in 1950 of venereal disease were 533,715. The United States Public Health Service, Federal Security Agency, V.D. Fact Sheet, Division of Venereal Disease, December 1951, Issue No. 8. If we assume that 50,000,000 represents adult males over 18 years of age (a conservative estimate), the 533,715 cases are equivalent to approximately 1% of the United States adult male population.

That the seamen face real danger even in this day of "wonder drugs" is attested by the experience of engineer McAllister, of the *Edward B. Haines*, who was stricken with polio while his vessel was in plague-ridden Shanghai, China, in 1945. McAllister v. Cosmo-

occasioned by his sickness while in a foreign port during the course of a voyage and of certain deductions made by the shipowner from his wages. It was Justice Story, then on circuit, who first termed seamen as "the wards of the admiralty." While they are not technically incapable of entering into a valid contract he stated, "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." If in the seaman's contractual dealings with the shipowners the former has been overreached, Justice Story contended, then the judicial interpretation of the transaction was that the bargaining was unjust and unreasonable, advantage had been taken of the weaker party and therefore the bargain should be set aside as inequitable. He then summed up his view toward seamen in general in the following words which have became classic:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless and acquire habits of gross indulgence, carelessness and improvidence. . . . 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."

Lord Stowell's opinion in *The Juliana*[35] was reported only a year before *Harden v. Gordon* was decided,[36] and Stowell's philosophy as

politan Shipping Co., (2d Cir. 1948) 169 F. (2d) 4, reversed Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S.Ct. 1317 (1949).

The *New York Times* of June 29, 1952, 5:10:8, reported that while the crew of the American tanker *R. G. Stewart* were working at their task of getting the vessel ready for sailing as she lay at Maturia Bar, San Juan River, Venezuela, they were suddenly engulfed by a swarm of brownish-yellow moths or butterflies. Because of the prevailing heat the men had been working stripped to the waist. Later that morning as the vessel went out to sea the moths or butterflies disappeared, but that afternoon the entire crew broke out with severe cases of skin irritation accompanied by intense and persistent itching. Reports of similar maladies came in from other ships out of the Gulf of Paria. While the illness in this incident was not of a serious nature it illustrates the risks facing seamen compelled to go into strange ports and strange countries.

[35] 2 Dod. 504, 165 Eng. Rep. 1560 at 1562 (1822). Lord Stowell stated, "The common mariner is easy and careless, illiterate and unthinking; he has no such resources, in his own intelligence and experience in habits of business, as can enable him to take accurate measures of postponed payments, with proper estimates of profit and loss."

[36] That same year (1822) Judge Ware in The Nimrod, (D.C. Me. 1822) 18 Fed. Cas. 250 at 253, No. 10,267, expressed similar views when he stated: ". . . sailors, from the nature of their employment, acquire habits that are somewhat peculiar. Their occupation exposes them to hardships and privations, and accustoms them to dangers; and while it trains them up to habits of intrepid courage, generates also those faults of character which

illustrated therein and in his earlier opinions of treating seamen as a class apart from landsmen and who, because of the nature of the seafaring profession, required special understanding and liberal and humane treatment, met with Justice Story's praise and "cordial assent."[37]

III

CONTRACTUAL RELATIONS

Our national legislature and the courts of admiralty have given particular expression to the wardship theory in matters relating to seamen's contracts. The principal instrument is his contract of hire. From that contract flow the various rights of the seaman, such as maintenance and cure and his right to wages.

Closely allied with the seaman's contractual rights is the subject of releases executed by the seaman, purporting to release his employer from contractual or tort obligations. As the practical application of the wardship theory has received its greatest expression in this field, we shall discuss seamen's releases before taking up matters pertaining to their wages.

Admiralty courts go far beyond questions of fraud, competency, lack of consideration, etc., and hold that it is the burden of the one who sets up a seaman's release to show that it was executed freely, without deception and without coercion. The shipowner must show that the seaman was not overreached—that he signed the release with full understanding of his rights.[38] If the seaman acts alone, without benefit or guidance of counsel, the courts will inquire whether he has the intelligence to understand the situation and the risk he takes in giving up his rights. If he acts under advice, further investigation will be made to ascertain whether that advice was disinterested.[39] The obligation is placed upon the shipowner, his claim agents, doctors, and attorneys to make clear to the seaman, prior to accepting his release, the nature and seriousness of his ailment, its effect on his ability to

are apt to be associated with fearlessness of personal danger in minds somewhat rude and undisciplined by education, roughness and impetuosity of manners, and hasty and choleric tempers. We must take them as they are, and compound for their bad by their good qualities. . . . The spirit of the law is accommodated to the character of the sailor."

[37] Harden v. Gordon, (C.C. Me. 1823) 11 Fed. Cas. 480, No. 6,047.

[38] Garrett v. Moore-McCormack Co., 317 U.S. 239 at 247, 63 S.Ct. 246 (1942); Harmon v. United States, (5th Cir. 1932) 59 F. (2d) 372.

[39] Sitchon v. American Export Lines, Inc., (2d Cir. 1940) 113 F. (2d) 830; Bonici v. Standard Oil Co., (2d Cir. 1939) 103 F. (2d) 437.

work and on his earning power,[40] and to advise him of his rights under the general maritime law, the Jones Act and other laws affecting the seaman's remedies.[41] His releases will be sustained, however, when he was represented by counsel, when the release was fairly entered into and fairly safeguarded the rights of a seaman who fully understood what he was doing.[42]

In wage matters, the claims of seamen are highly favored by the courts.[43] It has been called a "sacred claim"[44] and it is protected by a lien against the vessel.[45]

There have been safeguards placed assuring payment to him after laboring on behalf of the ship. By legislation it has been declared that the payment of wages is due within twenty-four hours after the cargo or within four days after the seaman has been discharged, whichever happens first.[46] Failure to do so without sufficient cause is followed by a penalty of double wages for every day that the seaman is kept waiting.[47] Discharging a seaman on articles before he has earned a

[40] Muruaga v. United States, (2d Cir. 1949) 172 F. (2d) 318.

[41] United States v. Johnson, (9th Cir. 1947) 160 F. (2d) 789, revd. other grounds, 333 U.S. 46, 68 S.Ct. 391 (1948); Bay State Dredging & Contracting Co. v. Porter, (1st Cir. 1946) 153 F. (2d) 827.

[42] Bonici v. Standard Oil Co., (2d Cir. 1939) 103 F. (2d) 437; Sitchon v. American Export Lines, Inc., (2d Cir. 1940) 113 F. (2d) 830; Ames v. American Export Lines, (D.C. N.Y. 1941) 41 F. Supp. 931; Little v. United States, (D.C. N.Y. 1946) 1946 A.M.C. 611.

[43] The City of Norwich, (2d Cir. 1922) 279 F. 687; Myers v. United States, (D.C. N.Y. 1949) 81 F. Supp. 747. Molloy in 2 DE JURE MARITIMO ET NAVALI 211 (London, 1677), commented on the latitude of the admiralty court as follows: "The Courts at Westminster have been very favourable to mariners in order to their suing for wages, for at the Common Law they cannot joyn, but must sue all distinct and apart for their wages. Yet in the Admiralty they may all joyn, and the Courts at Westminster will not grant a prohibition."

[44] The Samuel Little, (2d Cir. 1915) 221 F. 308.

[45] The lien, incidentally, is of a high order, and outranks maritime liens based upon contribution in general average, liability for collision damage, cargo loss, personal injury, repairs, supplies, etc. The J. E. Rumbell, 148 U.S. 1, 13 S.Ct. 498 (1893). Admiralty accords the mariner a three-fold remedy against (a) the ship, (b) the owner, and (c) the master. Farrel v. McClea, 1 Dall. (1 U.S.) *392 (1788). The vessel can be sued in rem to enforce the wage claim. Sheppard v. Taylor, 5 Pet. (30 U.S.) 675 (1831).

[46] 46 U.S.C. (1946) §596.

[47] Ibid.; Collie v. Fergusson, 281 U.S. 52, 50 S.Ct. 189 (1930). It is easily understandable that the double wage penalty can mount up to a not inconsiderable sum. In Suomalainen v. Helsingfors S.S. Co., (D.C. N.Y. 1942) 1942 A.M.C. 1486, a native Finnish seaman injured on a vessel flying the flag of Finland was hospitalized at New York. His ship sailed while he was in the hospital. He was discharged from the service of the vessel without any earned wages paid to him. In the language of the court's finding, his being "cast ashore in a strange country, unable to speak its language, and seriously injured—constituted unpardonable neglect." A decree was granted in his favor of his earned wages of $1261 and to this sum was added penalty wages of $7,250.58.

The master's or owner's failure to pay off his crew "without sufficient cause" can result in penalties in rather enormous sums. "Without sufficient cause" means, in effect, a willful, unreasonable and arbitrary attitude upon the part of the master or shipowner in

month's wages when the discharge is without his fault, or consent —although he may have been paid his earned wages in full—will result in a liability of one month's extra wages being inflicted upon his employer.[48]

His contract of employment[49] is not an instrument which can be changed at will by either of the parties. The contract—commonly called the articles—is a statutory prescribed form.[50] Any variations or "riders" must be approved by a United States Shipping Commissioner.

The traditional method of collecting a judgment against a wage-earner by garnishment or attachment of his wages is of no avail where

refusing to pay earned wages to the seaman. It has been characterized by the courts as arbitrary, unwarranted, unjust, Glandzis v. Callinicos, (2d Cir. 1944) 140 F. (2d) 111; The Sonderborg, (4th Cir. 1931) 47 F. (2d) 723, and unreasonable conduct, McCrea v. United States, 294 U.S. 23 at 30, 55 S.Ct. 291 (1935). Generally, where the refusal or failure to pay wages results from an honest difference of opinion arising from a matter in dispute—a dispute about which honest men are apt to differ—the courts will be loath to declare a penalty when one of the disputants has been proved wrong. A showing of good faith upon the part of the master or owner, together with reasonable cause for failure to pay wages due, undoubtedly carries considerable influence in determining whether such refusal is not without sufficient cause. Bender v. Waterman S.S. Corp., (D.C. Pa. 1946) 69 F. Supp. 15, affd. (3d Cir. 1948) 166 F. (2d) 428; Pikna v. S.S. Telfair Stockton, (4th Cir. 1949) 174 F. (2d) 472.

[48] 46 U.S.C. (1946) §594; The Steel Trader, 275 U.S. 388, 48 S.Ct. 162 (1928). This statute was enacted to stop the practice of employing seamen for a relatively short time—sufficient to pay the charges of his boarding-house keeper or other creditors. The provision virtually guarantees him a month's wages, unless the voyage is normally completed before that time. Lucadou v. United States, (D.C. N.Y. 1951) 98 F. Supp. 946.

[49] Lord Stowell in The Minerva, 1 Hagg. 347, 166 Eng. Rep. 123 (1825), described a shipping contract as "an ancient instrument" with but two particular obligations incorporated therein. The shipowner's obligation was to describe the voyage, that of the seaman to engage for the rate of wages which he was content to accept for his services on that voyage. With these basic concepts, the agreement was further described by the jurist as "a simple and intelligible contract." Any other duties and obligations which the parties owed to each other in the course of the ship's voyage depended not upon the contract but upon the rules of the General Maritime Law. The Statute of 1729 (2 Geo. 2, c. 36) enlarged on these obligations and provided for greater detail and particulars to be set forth in the shipping contract.

[50] 46 U.S.C. (1946) §§563, 713. The official form which must be used on all foreign and intercoastal voyages and which may be used on coastwise trips, besides containing the usual description of the engagement also sets out a detailed listing of the minimum scale of subsistence. Id., §713. Further on in the form of articles is a provision for the daily issue to the crew of antiscorbutics. For failure to carry antiscorbutics aboard the vessel, the master or owner is liable to a fine of not more than $500. If the master fails or neglects to serve lime, lemon juice, sugar and vinegar in the quantities specified by the statute (Id., §666), he may be fined not more than $100 for each offense. If the offense occurred owing to the act or the fault of the owner, the master can recover the amount of the fine from the owner. (Id., §667) The statutes with regard to antiscorbutics do not have the importance once attached to them more than a half century ago. Because of the enormous advances in the science of processing foods and the use of electric refrigeration, the diet of seamen aboard vessels compares most favorably with that of landsmen. The use of grapefruit, orange and tomato juices—both canned and fresh—have for all practical purposes replaced the daily dose of lime and lemon juice.

an employed seaman is concerned. A federal statute prohibits the assignment of the seaman's wages as well as attachment, encumbrance or arrestment against it.[51]

Neither can a counterclaim or set-off lie against the seafarer's wages except in those instances specifically permitted by Congress.[52] Recently, in *Isbrandtsen Co. v. Johnson*,[53] the Supreme Court had occasion in no uncertain terms to declare that the seaman's wages were virtually inviolate and could not be whittled down by way of counterclaim or set-off except, of course, where a deduction is specifically permitted by statute. Johnson, a messman on one of the Isbrandtsen ships, stabbed a shipmate named Brandon. As a result of the assault the vessel, which was sailing in the Pacific had to deviate to one of the islands where hospital facilities were available. Thereafter Brandon was flown back to the United States. Up to the date of the assault Johnson had earned wages in the amount of $439.27. The Isbrandtsen Company refused to pay the wages to Johnson and sought to set off expenses of $1691.55 which it incurred as a result of Johnson's misconduct. In denying the shipowner that right, the Court, after reviewing the many instances where it emphasized the position of the seaman as the ward of admiralty, reiterated its previous holdings that legislation in aid of seamen is largely remedial and that it calls for a liberal reading in his favor.[54] Said Justice Burton speaking for the Court:

> "In keeping with the spirit of such legislation and the need for clear rules governing the computation of the balance due each seaman upon his discharge, it is reasonable to hold that only such deductions and set-offs for derelictions in the performance of his

[51] 46 U.S.C. (1946) §601. Wilder v. Inter-Island Navigation Co., 211 U.S. 239, 29 S.Ct. 58 (1908). The prohibition against attachment or arrest of wages is intended to apply against the seaman's creditors and not to shield him from his just obligations to his family. Therefore, the statute specifically provides that nothing contained in it is to interfere with an order by any court regarding the payment by a seaman of any part of his wages for the support and maintenance of his wife and minor children.

[52] Some examples of these are expenses incurred in hiring a substitute for a seaman who has neglected or refused without reasonable cause to join his vessel, 46 U.S.C. (1946) §701(2); quitting the vessel without leave after her arrival but before she is placed in security, id., §701(3); willful disobedience to any lawful command at sea, id., §701(4); willfully damaging vessel or willfully damaging or stealing ships' stores or cargo, id., §701(7); an act of smuggling for which a seaman is convicted and loss or damage imposed on master or owner, id., §701(8); the cost of survey made as result of an unfounded complaint, id., §663; purchases from the ship's commissary (commonly called the "slop chest") id., §670, etc.

[53] 343 U.S. 779, 72 S.Ct. 1011 (1952).

[54] Id. at 787-789. See Aguilar v. Standard Oil Co., 318 U.S. 724, 63 S.Ct. 930 (1943); Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246 (1942); Warner v. Goltra, 239 U.S. 155, 55 S.Ct. 46 (1934); Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S.Ct. 173 (1932); Wilder v. Inter-Island Navigation Co., 211 U.S. 239, 29 S.Ct. 58 (1908); Patterson v. The Bark Eudora, 190 U.S. 169, 23 S.Ct. 821 (1903).

duties shall be allowed against his wages as are recognized in the statutes. Other claims against him may be valid but their collection must be sought through other means. . . . Congress has gone so far in expressly listing such deductions and set-offs that it is a fair inference that those not listed may not be made. It thus remains for the courts to determine only what are the deductions or set-offs for derelictions of duty that are listed by Congress, rather than to determine which of the deductions or set-offs once known to the general maritime law Congress has failed to exclude. Congress, in effect, has excluded all of them except those which it has listed affirmatively."

Discharging a seaman for a single act of disobedience is not countenanced. If the recalcitrant conduct is the result of a flare-up of temper and not willfully persisted in, the admiralty courts take a tolerant and indulgent view.[55] The master is expected by the exercise of force of character and self-control to practice temperance in punishing a seaman for disobedience.

IV

LEGISLATIVE ENACTMENTS

Beginning in 1790 with the statutes passed by the first Congress of the United States,[56] the seaman has received the constant care and attention of that national legislative body—a concern unquestionably accorded to no other class of workers. Practically every working activity from the time he first signs his contract of employment to the distribution of his wages and effects upon his decease has been regulated. Over the years Congress has been unusually attentive and responsive to his wants. His need for medical care was met by the requirement of a medicine chest for shipboard use[57] and the establishment of United States Marine Hospitals for free treatment ashore;[58] the cruelties to which he was subjected by brutal captains and bucko mates resulted in effective antiflogging criminal statutes;[59] the per-

[55] Alaska Steamship Co. v. Gilbert, (9th Cir. 1916) 236 F. 715; Trent v. Gulf Pacific Lines, (D.C. Tex. 1930) 42 F. (2d) 903; Marsland v. The Yosemite, (D.C. N.Y. 1883) 18 F. 331; The Donna Lane, (D.C. Wash. 1924) 299 F. 977; The Superior, (D.C. N.Y. 1885) 22 F. 927. An angry retort by a seaman to an officer, Alaska Steamship Co. v. Gilbert, supra; failure to wear a prescribed uniform, The Idlehour, (D.C. N.Y. 1894) 63 F. 1018, and refusal of a mess boy to serve coffee to the crew at an early hour when they failed to tip him, The Royal Arrow, (D.C. Cal. 1918) 248 F. 546, are some examples of conduct considered venial and not meriting discharge from employment.

[56] Act of July 20, 1790, c. 29.

[57] 46 U.S.C. (1946) §666.

[58] Id., §1 et seq.

[59] 18 U.S.C (Supp. V, 1952) §2191; 46 U.S.C. (Supp. V, 1952) §712.

nicious activities of parasitic crimps, boarding-house keepers, shipping agents, shanghaiiers, etc., were dealt with and their shady activities forever banished;[60] unsafe conditions at sea emphasized by the *Titanic* and other nautical disasters brought forth much needed safety legislation;[61] and finally the inability of seafarers to be compensated for injuries due to their employers' negligence brought about the Jones Act.[62]

His creature comforts have not been forgotten. Federal statutes call for a minimum standard of provisions,[63] the use of antiscorbutics,[64] the maintenance of a commissary or "slop chest" aboard the ship where the seaman can purchase useful articles necessary for his employment on the vessel,[65] warm clothing and heated rooms,[66] etc.

At foreign ports his interests are protected through the activities of the United States consular officers. The relationship of the consuls to the seamen and their problems are set out.[67] A detailed procedure for the survey of a suspected unseaworthy vessel is minutely prescribed.[68] The sick or stranded seafarer has been placed under the guardianship of American consuls stationed throughout the world.[69]

The office of Shipping Commissioner in the various major seaports of this country was created by the Shipping Commissioners Act of 1872,[70] an act which made sweeping reforms in the field of seamen's activities. An elaborate mechanism was set up for the protection of the seaman in sending him to sea. Practically all of the seamen's statutes enacted in 1872 are in force today.[71]

These legislative enactments were made in a spirit of correcting evils. They are remedial in nature and the courts have consistently interpreted them liberally having that intent in view.[72] In *Aguilar v. Standard Oil Co. of New Jersey*,[73] in respect to legislation designed

[60] 18 U.S.C. (Supp. V, 1952) §§2194, 2279; 46 U.S.C. (1946) §546.
[61] The Seamen's Act of 1915, Act of March 4, 1915, c. 153, 38 Stat. L. 1185.
[62] 46 U.S.C. (1946) §688.
[63] Id., §713.
[64] Id., §666.
[65] Id., §670.
[66] Id., §669. This section does not apply to fishing or whaling vessels or to yachts.
[67] Id., §§569, 570, 571 621-624, 654-659, 678, 679, 682-685, 703; 22 U.S.C. (1946) §§1186, 1187, 1198, 1199; 31 U.S.C. (1946) §547.
[68] 46 U.S.C. (1946) §§656-659.
[69] Id., §678.
[70] Act of June 7, 1872, c. 322, 17 Stat. L. 262.
[71] A few of the sections are outmoded.
[72] Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 63 S.Ct. 930 (1943); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 72 S.Ct. 1011 (1952); Jamison v. Encarnacion, 281 U.S. 635, 50 S.Ct. 440 (1930).
[73] 318 U.S. 724 at 729, 63 S.Ct. 930 (1943).

to secure the comfort and health of seamen aboard ship, hospitalization at home, and care abroad, Justice Rutledge, speaking for the Court, stated:

> "The legislation therefore gives no ground for making inferences adverse to the seaman or restrictive of his rights. Rather it furnishes the strongest basis for regarding them broadly, when an issue concerning their scope arises, and particularly when it relates to the general character of relief the legislation was intended to secure."

Legislative interest in the affairs of seamen have followed a definite, discernible pattern for the past century and a half. Clearly the legislative purpose has been to preserve the seafaring profession and its concomitant, the merchant and naval service of the United States, by protecting the seaman against his own improvidence, correcting social evils, and by giving him rights and remedies when the courts are powerless to do so.

And so it is that the seaman today is surrounded by over one hundred statutes which are intended to protect him from the dangers of his maritime world and which make him what he is—a peculiar, sheltered legal figure.

V

ILLNESS AND INJURY

Throughout the centuries the one remedy which the seaman was reasonably certain of receiving when stricken with illness and injury during the course of his employment has been maintenance and cure.[74] Maintenance and cure[75] can be defined as a right granted by the general maritime law in consequence of the seaman's status resulting from any shipping contract between the seaman and the master or

[74] He received an indemnity for injury as a result of the vessel's unseaworthiness.

[75] By "maintenance" is meant sustenance and a berth while aboard ship and the payment in cash to the ill or injured seaman for the cost of his board and lodging while ashore actually expended by him for the liability which he incurred [Shipowners' Liability Convention of 1936, art. 3(b), 54 Stat. L. 1695]. "Cure" as used with reference to the shipowner's obligation to furnish a sick or injured seaman with maintenance and cure, means care [Calmar S.S. Corp. v. Taylor, 303 U.S. 525 at 528, 58 S.Ct. 651 (1938)]. Cure used in its original meaning means proper care of the injured seaman and not a positive cure, for, obviously, in some cases a cure may be impossible [Mullen v. FitzSimons & Connell Dredge & Dock Co., (7th Cir. 1951) 191 F. (2d) 82; Muise v. Abbott, (1st Cir. 1947) 160 F. (2d) 590; Morris v. United States, (2d Cir. 1924) 3 F. (2d) 588; The Mars, (3d Cir. 1907) 149 F. 729]. See also Farrell v. United States, 336 U.S. 511, 69 S.Ct. 707 (1949); Morrison, "'Maintenance and Cure' and Farrell v. United States," 6 MIAMI L.Q. 168 (1952); comment, 50 MICH. L. REV. 435 (1952).

the vessel which gives to the seaman, ill or injured in the service of the ship without willful misbehavior on his part, wages to the end of the voyage, and sustenance, lodging and care to the point where the maximum cure attainable has been reached.

The seaman's right to compensation arising out of his illness or injury[76] has been broadly interpreted by the courts and only his willful misbehavior can deprive him of that remedy.[77]

Negligence, whether it is characterized as active, passive, ordinary or gross, does not defeat a seaman's claim for maintenance and cure, for his conduct is not measured by a standard of due care. There must be an element of willfulness about it in order to deprive him of his traditional right. It is a simple remedy devoid of technicalities. Neither the rules of contributory negligence, comparative negligence, the fellow-servant doctrine, assumption of risk, or that of fault have any place in the liability or defense against it.

The pervasive influence of the wardship theory can be readily seen in the matter of pleadings. Unlike the common-law courts admiralty may gloss over defective pleadings in order not to deprive a seaman of his right. The appeal in *The Montezuma*[78] well illustrates the flexibility of admiralty practice. There the libelant, a seaman, brought suit in rem for personal injuries which he had sustained. His libel was dismissed in the district court on the ground that the injury occurred on land. In the circuit court of appeals for the first time he asked that he at least be allowed a recovery for maintenance and cure. His libel had not asked for maintenance and cure and neither did he urge such a recovery in the district court. The appeal came to the circuit court of appeals with no assignment of error for such failure to recover. Nevertheless, that court reversed the decree and remanded the cause to the district court so that the seaman could apply to amend his libel and then make application for maintenance and cure. In doing so, the court stated:

> "Courts of admiralty have always liberally entertained jurisdiction on the plea of a seaman for maintenance and cure, particularly where there is no fraud, and serious injury has be-

[76] While in the United States he is entitled to free treatment at United States Marine Hospitals and therefore cannot receive maintenance during his stay there. He is entitled to maintenance after his discharge from the hospital, during his convalescent period, and to the time he is again fit for duty as a seaman. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 58 S.Ct. 651 (1938). At foreign ports the shipowner is obliged to pay for the hospital or medical care of the seaman.

[77] Traditional examples of willful misbehavior are illness occasioned by a venereal disease and injuries received as a result of intoxication. Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 63 S.Ct. 930 (1943).

[78] (2d Cir. 1927) 19 F. (2d) 355.

> fallen a libelant through no fault of his own. It is based upon the necessity to prevent a failure or miscarriage of justice. . . . The relation of a seaman to his vessel creates a personal indenture, establishing rights for maintenance and cure in case of personal injury. It results in much liberality of remedy, in order that he may not be defeated of such humanitarian purposes."

The illness or injury of the seaman need not necessarily occur aboard the vessel. It is sufficient if his illness or injury occurs, is aggravated, or manifests itself while he is in the ship's service.[79] It was long ago held that there was no requirement that the sickness of the seaman should have originated during the voyage.[80] But, in time, many of the courts imported into the application of this liberal admiralty doctrine principles borrowed from common law or workmen's compensation cases. They held that where the injury occurred during his period of relaxation afloat or ashore he was barred from recovery on the theory that the illness or injury was incurred in pursuance of his private avocation and was not a logical incident of duty in the service of the ship.[81]

The Supreme Court in *Aguilar v. Standard Oil Co. of New Jersey*[82] sharply terminated this trend in the lower courts by repudiating such a rule. While the fact situation in that case concerned a seaman ashore on leave who was injured as he proceeded to the street from a pier at Philadelphia[83] where his vessel was tied up, nevertheless the question presented to the court was a much broader one, viz., should a seaman on shore leave be held within the service of the ship and hence within the protection of the maintenance and cure doctrine whether or not he was actually engaged at the time in the ship's business, or was it necessary that he actually be so engaged in order to come within the protection of the doctrine? After the Court noted that the shipowner's obligation of maintenance and cure applies to the seaman whose duties carry him ashore and that this obligation is termi-

[79] The Osceola, 189 U.S. 158 at 175, 23 S.Ct. 483 (1903); Miller v. Lykes Bros.-Ripley S.S. Co., (5th Cir. 1938) 98 F. (2d) 185.

[80] Neilson v. The Laura, (D.C. Cal. 1872) 17 Fed. Cas. 1305, No. 10,092. See also The Bouker No. 2, (2d Cir. 1917) 241 F. 831.

[81] See Meyer v. Dollar S.S. Lines, (9th Cir. 1931) 49 F. (2d) 1002 (horseplay); Smith v. American South African Line, (D.C. N.Y. 1941) 37 F. Supp. 262 (injured by motorcycle while ashore at foreign port); Wahlgren v. Standard Oil Co. of N.J., (D.C. N.Y. 1941) 42 F. Supp. 992 (injured ashore while riding on bus); Collins v. Dollar S.S. Lines, (D.C. N.Y. 1938) 23 F. Supp. 395 (injured ashore while playing baseball); The President Coolidge, (D.C. Wash. 1938) 23 F. Supp. 575 (fall from ladder while leaving ship to respond to personal telephone call).

[82] 318 U.S. 724, 63 S.Ct. 930 (1943).

[83] That the doctrine of the Aguilar case applies to illness or injuries occurring as well in foreign ports was settled in Warren v. United States, 340 U.S. 523, 71 S.Ct. 432 (1951).

nated when the seaman leaves the ship contrary to orders, it went on to hold that seamen ashore on leave are not on exclusively personal business but are in the service of the ship and that shore leave and the need for relaxation ashore are part of the mariner's employment activities. Said Justice Rutledge on this point (pp. 733-734):

> "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. . . . The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If, in those surroundings, the seaman . . . incurs injury, it is because of the voyage, the shipowner's business. That business has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment."

The exact nature of the seaman's activity at the moment of illness or injury is not the determining factor in deciding his right to an award. Only his willful misbehavior will defeat it.

It is now recognized that the shipowner owes a duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition and that for failure to discharge that duty there is liability on the part of the vessel and her owners to the seaman suffering an injury as a result.[84] The shipping articles are silent on the matter of warranting to the crew a seaworthy vessel but the absolute obligation of the owners to see that the vessel is seaworthy at the commencement of the voyage[85] and to do all in their power to keep the ship and her appurtenances in this condition[86] is inherent. Failure to furnish a seaworthy vessel is a species of liability without fault and is not limited by conceptions of negligence.[87] The doctrine has been evolved as the result of pragmatic realization that while the vessel is at sea ship's

[84] The Osceola, 189 U.S. 158 at 175, 23 S.Ct. 483 (1903).

[85] Balado v. Lykes Bros. S.S. Co., (2d Cir. 1950) 179 F. (2d) 943; The H. A. Scandrett, (2d Cir. 1937) 87 F. (2d) 708; Hamilton v. United States, (4th Cir. 1920) 268 F. 15.

[86] Burton v. Greig, (D.C. Ala. 1920) 265 F. 418, affd. (5th Cir. 1921) 271 F. 271.

[87] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872 (1946); Cookingham v. United States, (3d Cir. 1950) 184 F. (2d) 213.

discipline impels the seaman to obey orders and stand by his ship.[88] He is bound to perform the services required of him in the light of his employment. He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe. In short, he is not at liberty, like the landsman, to quit his job at will.[89]

Seaworthiness is a relative term.[90] It may be easily defined by general language, but difficulty is encountered when it is sought to fit the facts to the definition or to apply the definition to the facts.[91] For example, the lack of a handrail may make a vessel sailing on the high seas unseaworthy,[92] while the lack of such a rail in a harbor boat operating in protected waters where hawsers are used in moving her about would not constitute unseaworthiness.[93]

Like virtually all rules of law intended to protect the interests of seamen the interpretation given to seaworthiness has been broadened and liberalized. To be seaworthy, a vessel must not only be strong, staunch and fit in the hull for the voyage to be undertaken, but also she must be properly equipped. The following instances indicate the wide area which the courts encompass in holding the vessel liable: It was held that the vessel was unseaworthy where the mate was one with a reputation for brutality and given to inflicting severe and uncalled for assaults upon the seamen under his orders;[94] improper living and working conditions aboard ship proximately causing or contributing to the seaman's injury made the vessel unseaworthy as to him and so did the absence of a handle or rail in a shower bath;[95] a defective ventilating system which causally contributed to a seaman's

[88] He must obey the lawful orders of the master and of his superior officers, and for willfully disobeying the master's lawful commands he may be punished by being clapped in irons. 46 U.S.C. (1946) §701(4)(5).

[89] Lafourche Packet Co. v. Henderson, (5th Cir. 1899) 94 F. 871; The Lowlands, (D.C. S.C. 1906) 142 F. 888.

[90] Hanrahan v. Pacific Transport Co., (2d Cir. 1919) 262 F. 951; Henry Gillen's Sons Lighterage v. Fernald, (2d Cir. 1923) 294 F. 520; Zinnel v. United States, (2d Cir. 1925) 10 F. (2d) 47.

[91] Adams v. Bortz, (2d Cir. 1922) 279 F. 521.

[92] Cf. Zinnel v. United States, (2d Cir. 1925) 10 F. (2d) 47.

[93] Newport News Shipbuilding & Dry Dock Co. v. Watson, (4th Cir. 1927) 19 F. (2d) 832.

[94] The Rolph, (9th Cir. 1924) 299 F. 52 at 55. The court stated: ". . . it is but reasonable to say that a ship is not properly equipped for a voyage where the mate is a man known to be of a most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel, and uncalled for assaults upon sailors. Such a man may be ever so skilled and competent in navigation and seamanship, nevertheless, he is wholly incompetent to fill a place of authority which calls for the exercise of a sense of natural fairness to men under him."

[95] Krey v. United States, (2d Cir. 1941) 123 F. (2d) 1008.

tubercular condition;[96] and failure to provide the crew with good and sufficient provisions.[97]

In *Keen v. Overseas Tankship Corporation*,[98] the doctrine of seaworthiness was further extended so as to make the owner liable for an insane ship's cook who assaulted a fellow seaman, although his employer had no knowledge of, or reason to suspect, his condition at the time of hiring. There was nothing in his appearance to indicate such a disposition. Judge Learned Hand, writing for the court, after stating that the warranty of seaworthiness did not mean that the vessel was expected to withstand every violence of wind and weather but rather that she should be reasonably fit for the voyage, applied similar reasoning to the warranty of a seaman as being equal in disposition and seamanship to the ordinary men of his calling. Then taking the line that indemnity to an injured workman is one of the risks of doing business,[99] Judge Hand stated:

> ". . . But suppose there will be many such instances; that is no reason why an individual seaman who has suffered because his fellow is not up to his work, must bear the loss. Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the premiums, in the end it will be likely also to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships. As we have said, this has been the uniform practice when the injury has arisen from defects in material; and we have yet to learn that hull and gear are less likely to fail under stress than those who handle both."

We have seen that the seaman has received certain rights and indemnities when ill or injured while in the service of the vessel by way of maintenance and cure and for damages when injured on an unseaworthy vessel. The United States Supreme Court in *The*

[96] Boboricken v. United States, (D.C. Wash. 1947) 76 F. Supp. 70.

[97] Dixon v. The Cyrus, (D.C. Pa. 1789) 7 Fed. Cas. 755, No. 3,930. See also Stewart v. United States Shipping Board Emergency Fleet Corp., (D.C. N.Y. 1925) 7 F. (2d) 676.

[98] (2d Cir. 1952) 194 F. (2d) 515 at 518.

[99] Ultimately the cost is borne by the public. That injury to an employee is one of the costs of economic production was advanced by Justice Holmes in a concurring opinion in Arizona Employers' Liability Cases, 250 U.S. 400, 39 S.Ct. 553 (1919), when he stated (p. 433): "If a business is unsuccessful it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just."

Osceola,[100] a case which crystallized these rights, also went on to hold that all members of the crew are fellow servants and thus seamen could not recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure. Specifically, the Court held that the seaman was not allowed to recover an indemnity for the negligence of the master or of any member of the crew but was limited to maintenance and cure alone. Thus while the law was practically settled with respect to the seaman's right to recover maintenance and cure and indemnity for injuries caused as a result of the owner's failure in his duty to supply a seaworthy vessel, the mariners' gains were principally illusory. The landsmen's fellow-servant rule and the doctrine that denied him recovery of compensation for injuries resulting from the master's negligence rose up to plague him. Constant and effective lobbying in Congress (aided by the *Titanic* disaster which put the legislators in a receptive frame of mind to enact safety-at-sea laws and concomitantly to improve the safety and working conditions of the individual seaman) resulted in the passage of the La Follette Seamen's Act of 1915.[101] Section 20 of that act stated that it was intended to enlarge the existing rights of seamen by providing that in suits to recover damages for injuries "seamen" having command should not be held to be "fellow-servants with those under their authority."[102]

Thus, the fellow-servant rule as applicable to seamen was abolished. But in *Chelentis v. Luckenbach S.S. Co.*[103] the Supreme Court held that the Seamen's Act of 1915 in abolishing the fellow-servant rule had imposed no additional liability upon the shipowner beyond the existing liabilities of the general maritime law. In short, abolishing the fellow-servant rule had not changed the rule of the law maritime against holding the shipowner liable for damages for personal injuries to his employee arising out of the owner's negligence other than, of course, an unseaworthy vessel. The court, while recognizing the right of the seaman to bring his action in a state court under "the saving to suitor's clause,"[104] held that the seaman, by the abolishment of the fellow-servant rule, was given a right but lacked the remedy to enforce that right.

[100] 189 U.S. 158 at 175, 23 S.Ct. 483 (1903).

[101] Act of March 4, 1915, c. 153, 38 Stat. L. 1185.

[102] Section 20 reads as follows: "In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

[103] 247 U.S. 372, 38 S.Ct. 501 (1918).

[104] Section 9, Judiciary Act of 1789, 1 Stat. L. 76 at 77.

The effect of the *Chelentis* decision[105] was to spur the seamen, through their union representatives,[106] to greater efforts to secure for American seamen adequate relief when injured in their employment. The growth and expansion of the American Merchant Marine as a result of World War I brought with it the advocacy of making this nation a first-rate maritime power. Congress, in response to that feeling, promulgated the Merchant Marine Act of 1920.[107] To avoid the effects of the *Chelentis* decision Congress, by section 33 (the very last section of the Merchant Marine Act of 1920),[108] amended section 20 of the La Follette Seamen's Act of 1915 by giving to seamen all of the remedies for injuries afforded to railroad employees by the Federal Employers' Liability Act of 1908. Section 33 of the Merchant Marine Act of 1920 is now commonly called the Jones Act.[109]

The Jones Act permits any seaman suffering personal injury in the course of his employment the right of election to maintain an action for damages at law against his employer with the right of trial by jury. In the event of death, his personal representative may maintain an action for damages at law including the right of trial by jury.[110] The Jones Act is remedial and welfare legislation which creates new rights for the seaman for damages arising from maritime torts[111] and is intended to give protection to the seaman and to those dependent on his earnings.[112] As remedial and welfare legislation the Supreme Court has repeatedly held that it is to be liberally construed in order to accomplish its beneficent purposes.[113] As was said by Justice Stone in *The Arizona v. Anelich*,[114] "The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Its provisions, like others, of the Merchant Marine Act, of which it is a part, are

[105] Supra note 103.

[106] Foremost in the fight for the betterment of seamen's working conditions was Andrew Furuseth, President of the International Seamen's Union.

[107] Act of June 5, 1920, 41 Stat. L. 988.

[108] 46 U.S.C. (1946) §688.

[109] Named after its sponsor, Senator Wesley L. Jones of Washington.

[110] Under the general maritime law when the seaman's injury resulted in death his cause of action died with him. Justice Cardozo in Cortes v. Baltimore Insular Line, 287 U.S. 367 at 371, 53 S.Ct. 173 (1932), in commenting upon the non-existence of a right of action for an injury causing death, said: "Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land."

[111] Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S.Ct. 1317 (1949).

[112] Cortes v. Baltimore Insular Lines, 287 U.S. 367 at 375, 53 S.Ct. 173 (1932).

[113] Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 at 790, 69 S.Ct. 1317 (1949); Cortes v. Baltimore Insular Line, 287 U.S. 367 at 375, 53 S.Ct. 173 (1932); Jamison v. Encarnacion, 281 U.S. 635 at 640, 50 S.Ct. 440 (1930).

[114] 298 U.S. 110 at 123, 56 S.Ct. 707 (1936).

to be liberally construed to attain that end, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part."

One of the notable aspects of the liberal manner in which the Jones Act has been construed has been the refusal of the Supreme Court to give the word "negligence" a narrow, technical and restricted meaning.[115] It left the interpretation of negligence to the courts to construe that word liberally so as to include all the meanings given to it in the light of the peculiar hazards of the seafaring profession.[116] There are literally hundreds of acts or failures to act on the part of the seamen's employer which may give rise to liability for negligence under the Jones Act. But while the Jones Act is liberally construed in aid of its beneficent purpose, nevertheless "it does not make that negligence which was not negligence before" and it "does not make the employer responsible for acts or things which do not constitute a breach of duty."[117] Neither contributory negligence nor assumption of risk is available as a defense to an action under the Jones Act.[118]

VI

THE ARGUMENTS

Having rather briefly surveyed the legal position of the seaman as the courts and legislature have resolved it, we now come to the seaman of the present day. We can start with the premise that his economic condition has improved within the past fifteen years.[119] From this point on we can receive the arguments of the contending parties.

It has been asserted by shipowners that to regard seamen today in the light of conditions which prevailed in Justice Story's time is in

[115] Jamison v. Encarnacion, 281 U.S. 635, 50 S.Ct. 440 (1930).

[116] See Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S.Ct. 173 (1932); Jacob v. The City of New York, 315 U.S. 752, 62 S.Ct. 854 (1942); Koehler v. Presque-Isle Transportation Co., (2d Cir. 1944) 141 F. (2d) 490; Escandon v. Pan American Foreign Corp., (5th Cir. 1937) 88 F. (2d) 276.

[117] De Zon v. American President Lines, Ltd., (9th Cir. 1942) 129 F. (2d) 404 at 407, 408, affd. 318 U.S. 660, 63 S.Ct. 814 (1943). See also Ford v. United Fruit Co., (D.C. Cal. 1947) 75 F. Supp. 311, affd. (9th Cir. 1948) 171 F. (2d) 641; Chandler v. United States, (D.C. N.Y. 1949) 94 F. Supp. 581, affd. (2d Cir. 1950) 185 F. (2d) 1019.

[118] Jacob v. City of New York, 315 U.S. 752 at 755, 62 S.Ct. 854 (1942); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262 (1939).

[119] The latest wage settlement between shipowners and the Seafarers International Union fixes the wages of an able-bodied seamen at $302.32 per month. NEW YORK TIMES, December 3, 1952, p. 67:4. This is more than a fourfold increase over the base pay of an A.B. at the time of the outbreak of World War II, viz., $72.50 per month. In addition there is increased payments for overtime and vacation pay. Some of the seamen's unions provide old age pensions, maternity benefits for seamen's wives, and scholarships for the children of seamen.

effect turning the clock back a century. Their working conditions, it has been argued, are as good if not better than those of the average shore worker. They receive high pay for unskilled work and excellent board and lodging. Their food and living quarters are healthful. They are organized in several unions and on their special behalf these unions publish newspapers which instruct and inform them with respect to their legal rights on ships. The United States Coast Guard vigilantly supervises the conduct of shipowners and ships' officers and does not tolerate any improper sanitary or safety conditions or lack of discipline on vessels.

Aboard ship they usually work no more than seven and one-half hours per day. During the middle of their four-hour periods of work they have "coffee time" which lasts for fifteen minutes or more. They have radios which provide them with entertainment; they have the companionship of other seamen not on duty, and during their non-working hours they relax and enjoy themselves with men of their own social level. In fact, they have no "rush hour" to endure as is the case of most shore workers when they ride to and from their place of work in busses or subways. Seamen have more free time than shore workers because they do not have to travel to their place of work.

In spite of the *Aguilar*[120] opinion to the effect that shore leave and relaxation is a necessary part of the seaman's employment, it has been asserted that such relaxation does not serve to make the seaman more efficient. It does not benefit the ship because it is common for seamen to remain away from their ship while it is in port and they sometimes return to their quarters unfit to perform any service for the ship.

The seaman's side of the picture is wholly different and it is along these lines: When men go to sea they are taken away from home and familiar surroundings for long periods of time. They cannot enjoy the type of life which is the privilege of every land worker. It is difficult to raise and enjoy a family in normal fashion when you are at sea for several weeks or several months at a time. When your vessel comes into port at the end of the voyage it may be far from the place where your home is located. In the case of tankers the "turn-around" is of such short duration that a man hasn't much time to get ashore for a few hours of relaxation let alone travel to see his family.

When on shore leave in a strange port he has few, if any, friends to turn to for companionship. The barroom and other public houses are usually the only places to go where he can talk and enjoy human

[120] 318 U.S. 724, 63 S.Ct. 930 (1943).

society. A stranger in a strange city the seaman finds that few doors are open to him.

Shipboard life is not a "natural" one. A man is not free to do as he pleases. At the end of his eight hours of work he is still subject to call at any moment. The shore worker can leave his office, factory or shop at five o'clock and thereafter his time is his own. If he wishes to carouse it is his own affair so long as he does not disturb the peace of his town or neighbor. With the seaman it is different. He cannot drink aboard the ship and should he quarrel too loudly there is always a superior officer around with a sharp word of command. On long voyages there is often the boredom of constantly being in the company of the same men. His is a dangerous calling and the forces of nature can be thrust upon him and his ship at any moment with sometimes disastrous results.

He is subject to ship's discipline. He cannot quit his job at will. Ship's discipline carries with it the duty of a quasi-military obedience to orders, and the ever-present possibility of fines, forfeitures and confinement.

CONCLUSION

If the seaman is better educated today than he was a century ago, it is in line with the general raising of the level of education of the American people. While his living standards have undoubtedly increased, in general he is still a profligate individual with a full purse one day and "broke" on the morrow. He is in need of assistance when in difficulties simply because, unlike the landsman, he is not able to turn to his friends and neighbors for aid and guidance. The mariner who spends his life at sea is generally out of touch with life as it is lived ashore. The conditions of his employment make it such that he may be discharged from his job or find himself sick or injured in an unfamiliar or remote port—remote, that is, from the standpoint of his home or friends.

While the lot of the seaman has improved greatly within the past twenty years it is apparent in the light of the history of the seaman and the shipping industry that whatever gains he has won have either come to him through his own efforts in seeking legislation to improve his condition or through economic weapons forged by virtue of the strength of his unions. There have been virtually no advantages given to him by way of voluntary grants of his employers. With a depression in the shipping industry or other adverse economic change his advantages can be rather quickly dissipated.

The evil practices of the past, the crimping, shanghaiing, forcing men off ships at foreign ports through cruel treatment in order to sign on native replacements at low wages, the creditor enslavement, etc., were stamped out through the actions of the admiralty courts and of humane legislation. To withdraw from the seaman the salutary efforts of the courts would be to invite the return of conditions which made those evils possible.

It cannot be emphasized too often that it is the *nature* of the seaman's vocation which makes him "different" and which sets him apart from all other classes and stratas of society. To apply to seamen strict rules of law, as with the landsman, is to be blind to the peculiarities of their profession. To do so would be to drive a valuable class of men from a calling important to this nation both in times of peace and in times of war—factors very much in the minds of Lord Stowell and Justice Story.[121] And so, in spite of the changes which courts and legislatures have evoked, we must perforce return to an inescapable hypothesis—that the essential physical conditions which the seaman accepts when he goes to sea have changed but little in the past century and a half. It is for these reasons that the seaman should and will continue to receive the protection of the admiralty court as its "ward."

[121] The past World Wars have shown the enormous importance of ocean transportation in an era of global warfare.