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FLOOD TIDE: SOME IRRELEVANT
HISTORY OF THE ADMIRALTY

The shore has a dual nature, changing with the swing of the tides, belonging now to the land, now to the sea. On the ebb tide it knows the harsh extremes of the land world, being exposed to heat and cold, to wind, to rain and drying sun. On the flood tide it is a water world, returning briefly to the relative stability of the open sea.

RACHEL CARSON

The staple of maritime personal injury cases before the Supreme Court in recent years involves an injury to a longshoreman, his proceeding to recover from the shipowner under the *Sieracki* doctrine,¹ and the shipowner's third-party claim against the stevedore's employer for indemnity under the *Ryan* doctrine.² Three of these

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¹ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). In *Sieracki*, the Court extended to longshoremen "doing seamen's work" the warranty of seaworthiness applied in favor of seamen in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); see also *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

² *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan*, the Court held that when the unseaworthiness that grounded the claim against the shipowner was produced by the negligence of the stevedore, the stevedore was liable to the shipowner for the amounts he was required to lay out. The liability was predicated upon an implied warranty of workmanlike service in the contract between the parties. See also *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1954).

cases during the last two terms represent continued extensions of previous doctrines. These are but the latest chapters of a painfully long story.

I. THE CASE OF THE UNSEAWORTHY BEAN BAG

In *Gutierrez v. Waterman Steamship Corp.*,³ the libelant was a longshoreman employed in unloading a cargo of beans. The beans had been shipped in bags, some of which apparently were defective. There was no evidence that the shipowner knew that the bags were defective. The contract stevedore sent coopers on board to sew up some of the bags, but a number of others broke in the course of unloading, some on the ship and some on the pier. The libelant was working on the pier when he slipped on loose beans, fell, and sustained the injuries complained of. He brought his libel in two counts, one in negligence under the general maritime law, and one grounded on unseaworthiness. He had a decree in the district court⁴ and the shipowner appealed. The court of appeals reversed with instructions⁵ and the libelant appealed.

The unseaworthiness count presented the Supreme Court for the first time with the question whether the shipowner's absolute warranty of seaworthiness extends to a longshoreman working on the pier. This question had been answered in the affirmative in a number of lower court cases in which objects had fallen from the ship and injured shoreside longshoremen.⁶ In *Gutierrez* the Court approved the result of these cases, agreeing with Judge Learned Hand in *Strika v. Netherlands Ministry of Traffic*⁷ that breach of the warranty of seaworthiness of the ship and its tackle is a tort arising out of maritime status and relationship and is therefore a maritime tort whether committed on sea or on land. It remained to establish that in *Gutierrez* the ship or its tackle was unseaworthy.

While all the cases that had allowed recovery for injuries sustained on shore had involved some failure of the equipment of the

³ 373 U.S. 206 (1963).

⁴ *Gutierrez v. The S.S. Hastings*, 193 F. Supp. 894 (D. Puerto Rico 1961).

⁵ 301 F. 2d 415 (1st Cir. 1962).

⁶ See, e.g., *Strika v. Netherlands Ministry of Traffic*, 185 F. 2d 555 (2d Cir. 1950).

⁷ *Ibid.*

ship,⁸ or an accident that had occurred on the ship but caused injury on the pier, in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*⁹ the Court had held indirectly that recovery for a shipboard injury could be predicated upon the defective condition of steel bands used to contain a cargo of burlap, and in *Reddick v. McAllister Lighterage Line*¹⁰ the Second Circuit had held that the shipowner was liable for injury to a longshoreman when, because of a latent defect, a packing case broke when he stood on it.¹¹

In *Gutierrez*, the Court read these cases as holding that the doctrine of seaworthiness "is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be fit for the purpose for which they are to be used."¹² So cargo containers became gear *pro hac vice*, and without even a finding that the Rhodians carried off grain in earthen jars provided by the ship. Having characterized the bean bags as ship's gear, the Court had no trouble in holding them unseaworthy. As everyone knows, wrote Mr. Justice White, beans belong in their bags and a bean bag that fails to contain its beans and permits them to roll *ad libitum* on the pier is unfit and hence unseaworthy.

The opinion in the *Gutierrez* case leaves a great many unanswered questions. The first two "things about a ship," its hull and decks, cause no trouble, for they are always part of the ship itself. The stowage is either the hold where cargo is stored, in which event it, too, is part of the ship, or not properly a "thing" at all, but a

⁸ *Ibid.*; *Hagans v. Farrell Lines*, 237 F. 2d 477 (3d Cir. 1956); see also *Alaska Pacific S.S. Co. v. Egan*, 202 F. 867 (9th Cir. 1913), an action at law permitting recovery for failure of ship's equipment on shore; *Robillard v. A. L. Burbank & Co.*, 186 F. Snpp. 193 (S.D. N.Y. 1960).

⁹ 369 U.S. 355 (1962).

¹⁰ 258 F. 2d 297 (2d Cir. 1958).

¹¹ But see *Carabellese v. Naviera Aznar, S.A.*, 285 F. 2d 355 (2d Cir. 1960), where Judge Friendly ruled that it was not error to instruct the jury that unseaworthiness could not be predicated upon the top-heaviness of a crate of cargo. Despite the instruction, the jury had answered in the negative a special interrogatory on the top-heaviness of the crate, and Judge Friendly and Judge Tuttle held this to be an alternative ground for affirming a verdict for the defendant; Chief Judge Lumbard reserved judgment. The court was unanimous, however, in its approval of the instruction.

¹² 373 U.S. at 213.

condition, the manner of storing. Since the Court was explicit in its statement that the ship warrants that the cargo is properly stowed, and cited with approval the *Robillard* case¹³ holding a shipowner liable for injuries produced on shore through unseaworthy stowage, that term can no longer give trouble. Cargo containers are generally furnished by the ship insofar as the longshoreman is concerned, and the holding of the case is to the effect that their defective condition will ground an action for unseaworthiness whether the defect shows itself on sea or on land.

Machinery is sometimes ship's machinery and sometimes furnished by the contract stevedore. In *Alaska S.S. Co. v. Petterson*,¹⁴ it was held that the failure of equipment assumed to have been brought on the ship by the longshoreman's employer constituted unseaworthiness. Since the decision in *Gutierrez*, the Second Circuit, in an opinion by Judge Friendly, has held that the shipowner does not warrant the "seaworthiness" of shore equipment being readied for contact with the ship. Conceding that once the equipment became affixed to the ship it may well be that a seaman or longshoreman engaged in unloading could recover on the ground of unseaworthiness if he were injured as a result of its not being fit for its intended use, Judge Friendly suggested that "... a warranty normally relates to what has been furnished by the warrantor, not by someone else whose equipment is merely being readied for the warrantor's use."¹⁵ Even this modest limitation upon the sweep of the *Sieracki* doctrine was made over a dissent. Judge J. Joseph Smith was of the opinion that in affixing the equipment to the ship, the longshoreman was doing a "seaman's work" within the *Sieracki* doctrine. He cited *The Osceola*,¹⁶ where the injury occurred while the seaman was engaged in preparing a cargo gangway on the ship for use when the vessel should tie up at the pier. Because the majority found that the equipment was not, as yet at least, appurtenant to the ship, Judge Friendly did not have to deal with the problem of status as a seaman. He did observe that whatever seamen's historical duties in readying ship's gangways, "it takes some imagina-

¹³ *Robillard v. A. L. Burbank & Co.*, 186 F. Supp. 193 (S.D. N.Y. 1960).

¹⁴ 347 U.S. 396 (1954).

¹⁵ *Forkin v. Furness Withy & Co., Ltd.*, 323 F. 2d 638, 641 (2d Cir. 1963).

¹⁶ 189 U.S. 158 (1903).

tion to suppose that the work of putting out a gangplank from shore to ship was generally done by members of the ship's crew. . . ."¹⁷ Gangways, gangplanks, and equipment of this sort are made appurtenant to the ship in a physical sense. Since the equipment had not been so attached at the time of the accident, it could be said that no duty had arisen with respect to its condition. But one can think of a variety of situations in the halfway zone. What of a shore-based crane employed in loading a ship when its defective condition causes a bag of beans to fall on a longshoreman working on the pier? What of equipment that goes on and off the ship? If the unfitness of a fork-lift furnished by the stevedores manifests itself on the pier before it has been aboard the ship, going up the gangplank, or on the pier after being on the ship, is the shipowner liable?

Another question left to be answered is whether the cargo proper, as distinct from the cargo containers, is "a thing about a ship" under the *Gutierrez* case. There seemed to be a studied avoidance by the Court of placing cargo on the list. In his dissenting opinion Mr. Justice Harlan pointed out that the Court decided in *Morales v. City of Galveston*¹⁸ that a workman asphyxiated in the hold of a ship because of a "shot" of contaminated grain could not recover from the shipowner on the ground of unseaworthiness, the hold being seaworthy despite the absence of a ventilator system. Mr. Justice Harlan could not understand why, if the shipowner warrants the condition of the cargo, the Court, including Justices Brennan, Clark, Stewart, and White of the *Gutierrez* majority, decided the way it did in *Morales*, or why the argument that the grain itself was unseaworthy totally escaped Justices Black, Douglas, and Warren, who had dissented on the ground that a ship in the grain trade, where asphyxiation from fumigated grain occurs from time to time, is unseaworthy if it has no forced ventilation system in the hold.

There are two at least nominal differences between the *Morales* and *Gutierrez* cases. It is possible to distinguish them on Judge Friendly's point of distinction between *Gutierrez* and *Forkin*. In *Morales* the contaminated grain was not furnished by the ship; it

¹⁷ 323 F. 2d at 641.

¹⁸ 370 U.S. 165 (1962).

was, in the words of the Court, "a noxious agent from without."¹⁹ In *Gutierrez* by contrast, insofar as the longshoremen were concerned the bags were furnished by the ship. The other point of distinction is, of course, that while there is an analogy to be drawn, specious though it may be, between the bags in which beans are carried off the ship and the gear employed in unloading, no such analogy applies to cargo proper. In 1962, before *Gutierrez*, but after *Ellerman*, the district court in Oregon in the *Bell* case²⁰ held that the shipowner was not liable for injuries resulting from the breaking of a log being loaded on the ship when the log broke because of a latent defect, even though the accident occurred on board the ship. Without indicating agreement with extensions to date, Judge W. T. Beeks distinguished the *Ellerman* case by noting that in that case the band that broke "was utilized by the stevedore instead of a sling or pallet board in performing an obligation of the ship, the discharge of the cargo therefrom. The result is not different than the stevedores having supplied a defective pallet board . . . or a defective tong. . . ."²¹ Judge Beeks also mentioned the difference between loading and unloading, observing that in the cases in which liability had been imposed, the equipment had been on board long enough to be considered an integral part of the ship's gear.

Whether either of these limitations on the extent of the principle enunciated in the *Gutierrez* case ultimately will prevail is a question for the future. Certainly they are both consistent with the holding in *Gutierrez*, and with much of the language of Mr. Justice White's opinion. Whether they are compatible with the more or less unprincipled paternalism that the Court likes to refer to as its "broad humanitarian policy" is less certain. There is no reason to suppose that the longshoreman in *Forkin* was any more or less in need of full compensation after the equipment was affixed to the ship, or that the longshoreman in *Bell* was injured less by having a log fall on him, than their counterpart who slipped on the beans in *Gutierrez*.

The second count in the *Gutierrez* case was predicated upon

¹⁹ *Id.* at 171.

²⁰ *Bell v. Nihonkai Kisen, K.K.*, 204 F. Supp. 230 (D. Ore. 1962).

²¹ *Id.* at 233-34.

negligence. The district court found that the shipowner was negligent in permitting the beans to be unloaded in their defective bags "when it knew or should have known that injury was likely to result."²² As Mr. Justice Harlan pointed out, this finding begs the question, for it is not constructive knowledge that defective bagging produces injuries that grounds a finding of negligence, but constructive knowledge that the bagging is defective. Mr. Justice White's treatment of this aspect of the case is puzzling. At one point he stated that ". . . the trial court was entitled to infer that respondent should have known of the defective condition of the bagging when the beans were leaking while still in the ship, when beans spilled out of the bags throughout unloading, and when coopers were sent aboard to repair the torn bagging."²³ This indicates that the condition of the bags was so notorious that the shipowner was put on notice. But he concluded his discussion of the negligence count with the observation that the shipowner "had an absolute and nondelegable duty of care toward petitioner not to create this risk to him, which it failed to meet. When this lack of care culminated in petitioner's injury, respondent became legally liable to compensate him for the harm."²⁴ If the absolute and nondelegable duty of care is the duty to provide seaworthy equipment, including cargo containers, Mr. Justice White was merely confusing the negligence and unseaworthiness issues. On the other hand, if he was speaking of some other duty of care, where did it arise? He may have been suggesting that independently of whether the ship or its gear is unseaworthy, the shipowner has a duty to take precautions to see that whatever it releases to the longshoremen is not dangerous. This, it will be noted, would include cargo as well as containers. But if this duty is not covered under the warranty of seaworthiness, when did it become absolute and non-delegable? Further, the discussion is internally inconsistent, for if the duty is absolute, why does it depend upon the fact that the notoriety of the leaking bags constituted constructive notice?

The distinction is of some importance. In *Mitchell v. Trawler Racer*²⁵ the shipowner was held liable under the unseaworthiness doctrine when a longshoreman slipped on fish gurry left on the

²² 373 U.S. at 210.

²⁴ *Id.* at 211-12.

²³ *Id.* at 211.

²⁵ 362 U.S. 539 (1960).

railing of the ship in the course of unloading a cargo of fish, despite the fact that there was no showing that the condition had existed for a sufficient time to give the ship's officers constructive notice. Because the condition existed on the ship itself, the Court could find the ship unseaworthy. Suppose that in addition to the ship's railing, fish gurry had been slopped around the pier in the course of unloading, not a very strained supposition. It would be difficult to say that fish gurry is a cargo container or any variety of ship's equipment, proper or *pro hac vice*. It would be equally bizarre to find that it was not fit for the particular use to which it was put. If the shipowner has a duty of care that extends to the general locale of unloading, and the duty is non-delegable, presumably if the condition were notorious enough to put the ship's officers on notice, he would be liable for accidents occasioned by his failure to clean it up.²⁶ If the duty is absolute, no level of care would suffice, and the shipowner would be insurer of the safety of the pier.

II. THE HARBOR WORKERS' COMPENSATION ACT— THE LONGSHOREMAN'S MAINTENANCE AND CURE

In extending the shipowner's liability without fault to accidents arising on land, and his warranty of the ship and its equipment to cargo containers, the Court took a long step toward assuring longshoremen the benefit of jury damages²⁷ for accidents occurring during the loading and unloading of ships. It was able to do this, however, because of the third-party exception to the exclusive remedy provisions of the Harbor Workers' Compensation Act.²⁸ This act provides longshoremen with limited relief similar to state workmen's compensation remedies for accidents occurring in the course of their employment. Its provisions apply whether or not the longshoreman is on the ship or the shore, and regardless of whether he is engaged in a "seaman's work." Section 5 of the act

²⁶ In *Guiierrez*, the point was made that the shipowner had no control of the impact zone. Mr. Justice White held that the question could be put aside because control was not necessary, but wrote in passing, "We doubt that respondent had no license to go upon the pier at which it was docked and clean up the loose beans, if it had wanted to. . . ." 373 U.S. at 211.

²⁷ See *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963).

²⁸ 33 U.S.C. §§ 901-950, 44 Stat. 1424 (1927).

provides that the "liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death. . . ." ²⁹ Section 33 preserves the seaman's claim against third parties who may be liable for damages, and the *Sieracki* doctrine became important because normally the longshoreman works for a contract stevedore, and therefore is not barred by the act from suing the shipowner for his negligence or breach of duty to provide seaworthy appliances. In *Reed v. The Yaka*,³⁰ the longshoreman was employed by the bareboat charterer of the ship. He libeled the ship on the theory that the duty to provide a seaworthy vessel with seaworthy gear being non-delegable, the ship, and, through it the shipowner, were liable for the failure of the ship's gear despite the demise of the vessel, a question reserved in 1962 in *Guzman v. Pichirilo*.³¹ The Court again reserved judgment on this issue and held, over the dissent of Justices Harlan and Stewart, that the charterer-employer of the longshoreman was liable to him in an action for unseaworthiness despite the plain wording of the statute.

The opinion was written by Mr. Justice Black. He noted that over his objections the Court had held in the *Ryan* case and cases extending the *Ryan* doctrine that a shipowner who had been forced to pay damages to an employee of a contract stevedore under the *Sieracki* doctrine could recoup his losses in a third-party action against the stevedore, predicated upon an implied warranty of workmanlike service in the stevedoring contract. If this be true, Mr. Justice Black reasoned, the argument that the result of the action for unseaworthiness is to tax the stevedore with liability over and above the limits imposed by the Harbor Workers' Compensation Act is unavailing. He saw no economic difference between full liability in cases of independent contractor operations and liability when the employment relationship is direct. Congress must have been aware of the *Sieracki* case and the *Ryan* case and had not amended the act. Therefore the act must be interpreted in the light of these cases and the dominant purpose of the legislation,

²⁹ 33 U.S.C. § 905.

³⁰ 373 U.S. 410 (1963).

³¹ 369 U.S. 698 (1962).

to help longshoremen. That purpose must not be thwarted by "blind adherence to the superficial meaning of a statute."³²

In his dissenting opinion Mr. Justice Harlan, joined by Mr. Justice Stewart, pointed out that whatever the propriety of the *Sieracki* and *Ryan* cases, they did not go directly in the teeth of the plain meaning of the easily understood provisions of a statute. If "exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty . . ." meant only "superficially" that the employee could not bring an independent action against the employer based upon maritime tort principles, Mr. Justice Harlan wondered what the "true" purpose of the statute might be.

And well he might, for *The Yaka* is nothing less than naked nullification. In all probability it will cause but small ripples in maritime personal injury litigation, for very few cases seem to involve longshoremen employed directly by the shipowner. It is also true that the majority could have achieved the same result by more devious means, for it could have held the owner liable despite the charter, thus setting up a third-party relationship to take the case from under the exclusive remedy provisions of the Harbor Workers' Compensation Act, and then require the charterer to indemnify the owner under an implied warranty in the charter. The Court has demonstrated that these implied warranties can be pulled out like rabbits from a hat. It is not the result, then, but the bald arrogance of the decision that is startling, for it shows that when it runs out of periphrases the Court is ready simply to rewrite the statutes.

In *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*,³³ referred to by the Ninth Circuit (understandably enough) as *Griffith's Case*,³⁴ Griffith was a longshoreman employed by an independent contractor in unloading a ship owned by Italia when he was injured by the failure of a rope that had been provided by his employer. The rope broke because of a latent defect. Under the *Petterson* doctrine, Griffith recovered from Italia on the theory of unseaworthiness. Then Italia sued Oregon, Griffith's

³² 373 U.S. at 415.

³³ 376 U.S. 315 (1964).

³⁴ 310 F. 2d 481 (9th Cir. 1962).

employer, for a breach of the latter's warranty of workmanlike service under the *Ryan* doctrine.

Until *Griffith's Case*, the Supreme Court litigation under the *Ryan* doctrine had been confined to cases in which the stevedore employer had been negligent, the theory being that the stevedoring contract contained an implied warranty that the stevedore would perform his duties under the contract in a workmanlike way, and that a breach of this warranty that resulted in the shipowner's liability to the stevedore's employees would ground an action. *Griffith's Case* raised the question whether the shipowner would be indemnified against liability to the stevedore's employees incurred because of the absolute nature of the warranty of seaworthiness, where no fault on the part of the stevedore could be shown.

The Court split six to three. Mr. Justice White, for the majority, held that the third-party action would lie. He pointed out that the *Ryan* doctrine was designed to shift the risk to the segment of the industry best able to minimize it, and that ropes break either because of original defects or age, and that in either event, through periodic tests or accelerated retirement schedules, the stevedore could best reduce the occurrence of such accidents.

Mr. Justice Black, joined by Mr. Justice Douglas and the Chief Justice, felt that while the Harbor Workers' Compensation Act did not stand in the way of making the shipowner liable to the longshoreman, it was enacted to protect the stevedore, his employer, against liability beyond that specified in the act. He thought the *Ryan* case itself had produced an unwarranted extension of that liability, but if justifiable at all, it could be supported only on the theory of contract. To read into a service contract an absolute indemnity from liability was not only violative of the intent of the Congress in enacting the Harbor Workers' Compensation Act, but likely to cause confusion in the law of warranty in areas other than the admiralty.³⁵

These three cases have some interesting interrelationships. Though the *Gutierrez* case does not involve directly the *Ryan* doctrine, it is hard to believe that if the shipowner was negligent in permitting the unloading of the beans, the stevedore was not similarly negligent. Put together, then, *Gutierrez* and *Griffith* at the

³⁵ 376 U.S. at 326.

same time extend both the sphere of the shipowner's absolute liabilities and the stevedore's duty to reimburse him for his losses. Thus, while *The Yaka* disemboweled the Harbor Workers' Compensation Act's exclusive remedy provision in the direct employer relationship, *Gutierrez and Griffith*, though less directly contradictory of the words of the statute, accomplished much the same result in the independent contractor relationship.

That the statute, no doubt designed to provide the sum and total of a longshoreman's recovery for injuries produced without third-party negligence, is now no more than the longshoreman's maintenance and cure seems certain. All that remains to be discovered is who killed it. Mr. Justice Black attributed the death to *Ryan* and *Griffith*.³⁶ Mr. Justice Harlan accused *Yaka* and *Petterson*.³⁷

Any post-mortem of the Harbor Workers' Compensation Act must begin with the essential difference between the statutory pattern for solution of the problem of industrial accidents within the shipping industry and the Court's view of that problem. For reasons of its own, Congress has chosen not to view the entire industry as a unit for the purpose of designing such a solution. It has followed the Supreme Court's distinction between shrimps and oysters.³⁸ A seaman is a shrimp, a free-swimming fish; the longshoreman is an oyster, living in beds along the coast. Congress has cast its legislation to reflect this difference. For a quarter of a century the Supreme Court has doggedly refused to accept this distinction and has set about to bring equality of treatment to workers in the shipping industry.

The principles that underlie the *Sieracki* and *Ryan* cases were stated with candor by the late Judge Clark in *DeGioia v. United States Lines*.³⁹ The function of *Mahnich* and *Sieracki*, wrote Judge Clark, is the "allocation of losses caused by shipboard injuries to the enterprise." The function of the doctrine of indemnity announced in the *Ryan* case is the allocation "within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved."⁴⁰

³⁶ *Ibid.*

³⁷ 373 U.S. at 416.

³⁸ Compare *Toomer v. Witsell*, 334 U.S. 385 (1948), with *McCready v. Virginia*, 94 U.S. 391 (1876).

³⁹ 304 F.2d 421 (2d Cir. 1962).

⁴⁰ *Id.* at 426.

These principles are old ones in the civil law⁴¹ and have been common in our statutory law for over half a century.⁴² A sensible system for their implementation would provide for absolute liability on the part of the employer within the industry, with an action over against the person whose negligence caused the injury (when it was produced by negligence), or against the owner or person who controlled the premises, or provided the tools and equipment (when the injury was the product of unsafe working conditions). If insurance rates are fixed on the basis of individual accident experience, perhaps even the third-party action could be rejected on the theory that the contracting party will select his contractors with an eye to reducing his costs. Such a system could be provided with or without limitations on the amount of awards, with or without compulsory insurance, and with or without implementation by administrative process.

Several things make it difficult for courts to work out such a system. In the first place, the entire shipping industry is not within the admiralty and maritime jurisdiction of the federal courts. Thus a longshoreman who is working on land when the injury occurs and is not employed in the business of any particular ship has recourse only to landsmen's remedies. His redress must be at common law or its statutory modifications. This is an irrational distinction, of course, for no commanding difference between wet torts and dry torts commends itself to the intellect. In the second place, while legislative allocation of liability is *actio imperium* and not to be questioned unless it represents an excess of power, presumably judge-made law follows a course of reasoned decision. If the Congress chooses to provide a special set of tort rules for the interstate employees in the railroad industry, for instance, and not to apply them to interstate truckers,⁴³ we may think it queer, but not wrong. When a court so singles out a particular segment of the citizeury, on the other hand, we feel free to inquire, "By what mode of reasoning did they arrive at that conclusion?" And back we go to the Law of the Rhodians.

⁴¹ See, e.g., SCHUSTER, *THE PRINCIPLES OF GERMAN CIVIL LAW* 262 *et seq.* (1907).

⁴² See 1 LARSON, *WORKMEN'S COMPENSATION LAW* 32 (1952).

⁴³ See *Latzko v. National Carloading Corp.*, 192 F. 2d 905 (6th Cir. 1951).

III. BACKGROUND OF THE OSCEOLA

The present struggle over industry-wide solution of the industrial accident in commercial shipping goes back, if not to the Law of the Rhodians, at least to 1789 when "cases of admiralty and maritime jurisdiction" were defined as within "the judicial power of the United States."⁴⁴ In the case of *The Lottawana*,⁴⁵ Mr. Justice Bradley observed that the Constitution "assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood."⁴⁶ And so no effort was made to define it. But certainly this was one of the more fatuous assumptions the Founding Fathers made. In point of fact nobody understood it and few pretended to understand it.

In 1789, the jurisdiction of the English High Court of Admiralty was at a low ebb, encompassing almost nothing more than occurrences on the high seas.⁴⁷ For a number of reasons it might have

⁴⁴ U.S. CONST. art. III, § 2.

⁴⁵ 21 Wall. 558 (1875).

⁴⁶ *Id.* at 574-75.

⁴⁷ The subject was quite settled by the time of the American Revolution but seems to have left some touchy feelings. In his introduction to the 9th edition, published in 1769, Molloy stated: "In the whole Work I have nowhere meddled with the *Admiralty* or its *Jurisdiction* (unless by the by, as incidentally falling in with other Matters) knowing well, that it would have been impertinent and saucy in me to enter into the Debate of *Imperium merum*, *Imperium mixtum*, *Jurisdiction simplex*, and the like, and of the bounding out of Jurisdictions, which in effect tends to question the Government, and trip up the Power that gives Laws and Protection to us. . . ." 1 MOLLOY, *DE JURE MARITIMO* xxiv (9th ed. 1769) (hereafter MOLLOY). Earlier, broader definitions of admiralty jurisdiction had been expunged from the books. The first edition of *Croke's Reports* included the alleged agreement between the judges of law and admiralty made in the King's presence in 1575 and later repudiated by Coke. The 1742 edition leaves them out, inserting a mantissa stating "Page 296. *Resolution upon the Cases of Admiralty Jurisdiction*. *Nota*, These were not judicial resolutions, and therefore not authentic. *Vide* an ordinance 12 Aprilis, 1647, touching the same." 3 Cro. Car. xvi (1742). See 2 BROWNE, *ADMIRALTY* 79 (1840) (hereafter BROWNE), where they are set out with a note to the effect that they were left out of the later editions of Croke, "seemingly *ex industria*," but were included in *Zouch on the Admiralty Jurisdiction*. This history was known to Judge Hopkinson in Pennsylvania in 1781. See *Clinton v. Brig Hannah*, Bee 419 (1781). It was discovered by Judge Drayton in South Carolina through conflicting citations to *Croke's Reports*. *Shrewsbury v. Sloop Two Friends*, Bee 433 (1786). It seems to have become lost knowledge. Judge Peters cited *Cro. Car.* 296 as authority in *Gardner v. Ship New Jersey*, 1 Pet. Adm. 223 (1806), citing *ROLLE ABR.* 534, and apparently taking his *Cro. Car.* citation from the *Bacon Abr.* 180, 5th ed., seemingly wholly oblivious of what the citation referred to.

been predicted that the 1789 jurisdiction of the English admiralty would not be taken as the measure of the federal jurisdiction under our constitutional phrase. In England the long and sometimes acrid dispute which resulted in the line between law and admiralty was a fight between a common-law court equipped with the power of prohibition and sitting as the central organ of English law on the one side and a specialized admiralty court administering the vestigial remains of the civil law on the other. In America the legions were on the other side. The jurisdiction of the national courts varied directly with the breadth of the admiralty. There were extant several disquisitions by noted English civilians on the outrageous behavior of the Court of the King's Bench in wrecking the admiralty jurisdiction with its prohibitions,⁴⁸ and these provided a basis for the early determination that "cases of admiralty and maritime jurisdiction" meant what the English admiralty jurisdiction would have been if Coke had been a gentleman.⁴⁹

Had we adhered to the English pattern, it would have been difficult enough to divine guiding substantive principles in maritime law. The High Court of Admiralty was said to have operated generally on civilian principles,⁵⁰ though this has been denied.⁵¹ In any event the Roman sources were almost non-existent, and England never adopted either a general civil code or a maritime code.⁵² It was thought that it was guided by the ancient sea codes, particular-

⁴⁸ See *DeLovio v. Boit*, 2 Gall. 398 (C.C. Mass. 1815), where Mr. Justice Story's discourse is larded throughout with Godolphin, Prynne, Spelman, and Zouch.

⁴⁹ See COKE, *JURISDICTION OF COURTS* 136, 4th INST. (1797). Clearly Mr. Justice Story thought that Lord Coke "ratted out" on the agreement of 1575, a judgment shared by Sir Leoline Jenkins. See 2 BROWNE 77 (1840).

⁵⁰ DUNLAP, *ADMIRALTY PRACTICE* 85 (2d ed. 1850).

⁵¹ See 1 MOLLOY xxi: "Place amongst others of the Ancient *Romans* as well as the modern, yet have they not all received by Custom such a Force as may make them Laws, but remain only as they have the Authority in Shew of Reason, which binds not always alike, but varies according to Circumstances of Time, Place, State, Age, and what other Conveniences of Inconveniences meet with it. . . ."

⁵² See STORY, *MISCELLANEOUS WRITINGS* 248-49 (1835): "Yet, how narrow is the compass, within which the whole maritime law of Rome is compressed! It scarcely fills a half dozen short titles of the Pandects, and about as many in the Justinian Code, mixed up with matter properly appertaining to other subjects." Browne devotes four pages to setting out the Roman maritime law and concludes, "Sterile, then, is the naval law of Rome." 2 BROWNE 38 (1840).

ly the Laws of Oleron,⁵³ but only insofar as they were consistent with English law and custom.⁵⁴ It is said that they were guided by the continental treatises on maritime law.⁵⁵ Yet Sir James Marriott, judge of the High Court of Admiralty at the time of the American Revolution, characterized Bynkershoek, Huberous, Vatel, Hubner, Schlegel Busch, Heineccius, Grotius, and Pufendorf as "men who have written to serve a particular private personal, or otherwise some public political purpose," and went on to note:⁵⁶

It is well known that in the foreign universities that whosoever takes a degree (and degrees are mostly taken in Law) print and publish Theses which they make or are made for them. Nothing can be more ridiculous, when it is as notorious that a thesis may be bought, as well as burghers briefs and false passes, for one or a few rix-dollars, than to see such things dressed up with all the professional pedantry of learning, and the authors as theatrically antiquated as if they appeared in trunk hose, jackboots, slashed doublets, great slouched hats and feathers, ruffs or bands.

Recourse to the records of the High Court and of the Court of the Judges Delegates made available in the latter part of the nineteenth century⁵⁷ lend more than a touch of support to Sir James's skep-

⁵³ STORY, *op. cit. supra* note 52, at 39, where it is stated that the Laws of Oleron were established by Richard I, continued by John, and promulgated anew in the 50th of Henry III, and received their ultimate confirmation in the 12th of Edward III.

⁵⁴ 1 MOLLOY xxi: "Nor have those Laws, instituted at *Oleron*, obtained any other or greater Force than those of *Rhodes* or Imperial, considered only from the Reason the which are not become Laws by any particular Custom or Constitution, but only esteemed and valued by the Reasons found in them, and applied to the Case emergent."

⁵⁵ Indeed if the ancient codes were employed as a source of reason, it was inevitable that the European commentaries would be referred to, for the English texts were relatively late in coming. Molloy acknowledged debt to Petrus Pekius the Zealander, Locinius, Vinins, Garasias, Ferrand, and Cleriack.

⁵⁶ 1 Hay & Marriott xxxi-xxxii (1801). Sir James attributed much of the complication of the simple idea of justice to the fact that "German and Dutch '*magnificent*' professors as they call themselves, and who in general are only school masters, are the numerous and principal writers on the laws ecclesiastical, civil, and of nature, and of nations." He did not have much good to say of the common law either, describing the reports as "chiefly the reports of illiterate clerks who misunderstand, and which mark the low characters of the writers who perpetuate 'much bad reasoning in much bad language.'" *Id.* at xxxi-xxx.

⁵⁷ MARS. ADM. (1885); 11 SELDEN SOCIETY, SELECT PLEAS IN THE COURT OF ADMIRALTY, 1547-1602 (1897). In the Marsden collection, there is an occasional refer-

ticism. Certainly many of them are decided on English law and principle, and case to case. The High Court of Admiralty was not a court of record, however, and its first published opinions appeared in 1801, covering the period beginning with the judgments of Sir William Scott in the Michaelmas term, 1798.⁵⁸

This means that the first American admiralty judges were called upon to give continuity to law that was more or less civilian in flavor without any code, administered by a more or less common-law process without any cases. Precedents were understandably scarce and judges foraged for "law" anywhere they could find it. In 1795, Judge Peters of the Pennsylvania district, after naming every ancient code he could think of and marking the age and obvious wisdom employed in each, but adding a footnote to the effect that there were, of course, many more, suggested that it was safer to follow those collections of ancient wisdom "than to trust entirely to the varying and *crooked line* of discretion." He added, however, that the court would not exclude "more modern expositions, or adjudged cases," and concluded that he was anxious for any light he could obtain from "any respectable sources."⁵⁹

The problem was not limited to this shortage of reasonably contemporary authorities in those areas within the jurisdiction of the High Court of Admiralty. Since the definitions of "admiralty and maritime jurisdiction" encompassed a large number of disputes that had for a century been litigated only in the common-law courts, judges were faced with a doctrinal dilemma. Since they had followed the teaching of the learned doctors of the civil law on the "proper" jurisdiction, were they to apply the "general maritime law" to the entire jurisdiction, looking for doctrinal principle in the ancient codes and "any respectable source," or to follow the common-law precedents in the areas in which they covered matters of common law by English standards but maritime under our constitutional phrase as interpreted?

ence to textual authority, but the vast majority of cases are argued without reference to either cases or texts.

⁵⁸ 1 C. Rob. (1801). The same year, Sir James Marriott published the *Hay and Marriott Reports*. The decision to publish reports beginning with the decisions of Sir William Scott apparently led Sir James to take steps to preserve some of his own. The *Hay and Marriott Reports* contain about fifty cases dating back to 1776.

⁵⁹ See *Thompson v. The Ship Catharina*, 1 Pet. 104, 111, 113 (1795).

In many cases the English common law and maritime substantive law were the same. In one respect, however, the rules were different. This was the area of liens. At common law there was no lien for services and an artisan's lien was possessory only. In admiralty, there was a lien for services and provision of supplies, independent of possession.⁶⁰ As a consequence, when such contracts were entered into in England, no lien existed because the creditor had no access to the High Court of Admiralty. This was true whether the ship was foreign or domestic.⁶¹

This problem of the materialman's lien proved a peculiarly troublesome one. First it was solved by making a distinction between domestic and foreign ships.⁶² This solution was not the civil law or admiralty rule; nor was it the common-law rule. It probably stemmed from confusion between the power expressly to hypothecate a vessel and the question whether provision of necessities on credit resulted in an implied hypothecation. These are not the same questions because the bottomry bond, the instrument of express hypothecation, generally carried marine interest, sometimes three or four times as great as the ordinary interest rate. It was held, therefore, that a master could not enter into a bottomry bond in the home country, because the owner should be consulted before he was called upon to pay marine interest. In a foreign port it was held that the master could hypothecate the vessel if the money was necessary to the completion of the voyage, the owner had no agent in the port, and efforts to obtain money on ordinary loans were unsuccessful.⁶³ The fact that our courts probably misread the Eng-

⁶⁰ See ABBOTT, *MERCHANT SHIPS AND SEAMEN* 103 (1st ed. 1802) (hereafter ABBOTT), citing *The Digest*, though this is said by Parsons to have been proved incorrect. 2 PARSONS, *SHIPPING LAW* 322 (1869) (hereafter PARSONS).

⁶¹ ABBOTT 103. See *Justin v. Ballam*, 2 Lord Raym. 805 (K.B. 1702). In 1840, Browne observed: "I can scarcely conceive that such a determination would be made now, when the same irrational jealousy of the admiralty doth not exist." 2 BROWNE 80 n.10.

⁶² Cf. *The General Smith*, 4 Wheat. 438, 443 (1819). See *Zane v. Brig President*, 4 Wash. 453 (C.C. Pa. 1824), in which Mr. Justice Washington posed the dilemma and cut the baby in half by permitting a suit for proceeds in the registry on authority of Sir William Scott's opinion in *The John*, 3 C. Rob. 288 (Adm. 1801), a decision later explained as depending upon the absence of opposition. See *The Maitland*, 2 Hagg. Adm. 253 (1829); *The Neptune*, 3 Knapp 94 (P.C. 1835).

⁶³ See ABBOTT 112 *et seq.*; PARK, *MARINE INSURANCE* 410 *et seq.* (1801).

lish law on the subject of implied hypothecation is less important than the fact that they thought that they were following it, for the materialman's lien problem posed the general question of what sources of substantive law were to be applied in cases maritime within our definition but not adjudicated in the High Court of Admiralty in 1789. The reasoning proceeded in the following steps: (1) Home port materialmen could not sue in the High Court of Admiralty. (2) Therefore, no lien existed in their favor. (3) Thus, though the contract was maritime under our definitions, admiralty jurisdiction existed only *in personam*, and not *in rem*. It should be noted that this resulted in the application of the "general maritime law" in the strict sense of the term to matters that were within the narrowed jurisdiction of the English admiralty court, and the "domestic" maritime law to the areas outside that jurisdiction but within our constitutional definition of maritime.

The reasoning is not as easily applied to torts as to contracts, for while our definition of admiralty jurisdiction in contract was a subject-matter definition, the tort jurisdiction was early supposed to rest purely upon location,⁶⁴ although until today there had been some doubt about this.⁶⁵ In the case of contracts, it could be said that location is a variety of substance. The availability of the owner, for example, changes our thinking about the breadth of agency of the master. With torts, however, in most instances the location is not logically connected with the wrongness of the conduct, at least

⁶⁴ See *De Lovio v. Boit*, 2 Gall. 398 (C.C. Mass. 1815).

⁶⁵ See BENEDICT, ADMIRALTY 173 (1850): "It may, however, be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violation[s] of maritime right and duty which occur in vessels to which the Admiralty jurisdiction, in cases of contracts, applies. If one of several landmen bathing in the sea, should assault, or imprison, or rob another, it has not been held here that the Admiralty would have jurisdiction of the action for the tort." This passage, referred to by Judge Hough as "Erastus Benedict's celebrated doubt," had a brief revival in the twentieth century in *McGuire v. City of New York*, 192 F. Supp. 866 (S.D. N.Y. 1961), where the libellant was injured while bathing at a public beach; and in *Weinstein v. Eastern Airlines*, 203 F. Supp. 430 (E.D. Pa. 1962), where a land-based aircraft fell into navigable waters. The *Weinstein* case was reversed by the court of appeals, Judge Biggs holding for the locality rule, though preserving the bather case on the ground that the water was shallow and probably unnavigable in fact. *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (3d Cir. 1963), *cert. den.*, 375 U.S. 940 (1963).

insofar as a distinction is drawn between the high seas, the flux and reflux of the tide, and navigable waters. Furthermore, the provisions of the ancient codes and the discussions in available textual treatment dealing with torts were almost completely limited to collisions between vessels.⁶⁶ By the time collision cases appear in any numbers, the available texts of the day made plain the jurisdiction of the High Court in such cases, and the substantive rules that were to be applied.⁶⁷ Without much hesitation, these rules, such as the division of damages rule were applied in American admiralty courts to collision cases that would have been relegated to the common-law courts in England.⁶⁸

In tort cases other than collision cases there is no reason to suppose that the courts applied a different substantive law than was applied in ordinary common-law actions. There is, however, very

⁶⁶ See Art. XIV of The Laws of Oleron. This and Art. XV, providing rules for anchoring in harbor, both deal with moored vessels. There is no provision for damages due to accidents at sea. The Laws of Wisbuy repeat these provisions and add Art. LXVII, which provides that if two vessels strike one another and one perishes, the two shall be liable for the merchandise that is lost or damaged. See note 176 *infra*. Marsden identifies *The Thomas* and *The John*, Mars. Adm. 235 (1648), as the first English case in which the split-damage rule was applied. That other tort cases were brought in admiralty is certain, as Marsden lists two dozen of them, noting that most were personal actions for injury to person and property. The only ones in which any facts are given are either for ill usage, or for detaining a seaman's chest. *Id.* at 311-12.

⁶⁷ Prior to the middle of the nineteenth century the texts devoted little or no space to collision. There is no such heading in ABBOTT as late as the 5th edition in 1827, though an inference of liability can be drawn from the discussion of limitation of liability. By the time of the publication of the 11th edition in 1867, 22 pages were devoted to the subject. Other mid-century texts also discussed the topic. See 2 BROWNE 201 *et seq.*; 1 CONKLING, ADMIRALTY 21 (1848); 1 PARSONS 525 *et seq.* The earliest American collision cases seem to have been brought at law. See, e.g., *Stone v. Ketland*, 1 Wash. C.C. 142 (C.C. Pa. 1804). In England the jurisdictional line was drawn at the high seas, and collisions occurring *infra corpus comitatus* were cognizable only at common law. See *The Public Opinion*, 2 Hagg. Adm. 398 (1832). By the time of the decision of *The Public Opinion*, however, the divided damages rule had made its way into the published admiralty reports. The Woodrop-Sims, 2 Dods. 83 (1815).

⁶⁸ In *The Public Opinion*, a case dealing with a collision occurring *infra corpus comitatus*, Sir Christopher Robinson cited no case authority, but felt that "it is my duty not to adventure beyond the known limits of my authority; and I should only involve the parties in expense and disappointment, were I to encourage any such experiment. . . ." 2 Hagg. Adm. at 403.

little to go on. There are a few trespass cases recorded without details, but the law of negligence as applied to the master-servant relationship was half a century in the future when our Constitution was adopted. An injured party who had an action at common law presumably preferred to bring it there because he was entitled to a jury trial. If he had no common-law action, there was no authority for the argument that he had a remedy in admiralty. Perhaps for this reason discourse over the maritime law of personal injury was late in coming. By the time it did come, the common law had undergone considerable development.

With *Priestley v. Fowler*,⁶⁹ which established the fellow-servant doctrine, in 1837, the common-law courts began to struggle with the definition of duties owed to servants by masters. It should be remembered that in the *Priestley* case Lord Abinger began by pointing out that no precedents existed and observed:⁷⁰ "We are therefore to decide the question on general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other." In *Baker v. Bolton* in 1808,⁷¹ it was decided that the common law afforded no remedy for wrongful death. The *Priestley* case was followed in 1842 by the Supreme Judicial Court of Massachusetts in *Farwell v. Boston and Worcester Railroad Corporation*,⁷² and the *Bolton* case found its way into American law in the opinion of the same court in *Carey v. Berkshire Railroad Co.* in 1848.⁷³

Since there were no precedents on the subject in the literature on admiralty and maritime law, and since these decisions were novel decisions based upon judicial reasoning of the day, there was no reason to suppose that they would not be applied as freely in admiralty as in law. In this connection it is interesting to note that the *Priestley* case was not noticed in the first edition of *Story on Agency*,⁷⁴ but *Priestley* and *Farwell* were both discussed at some

⁶⁹ 3 M. & W. 1 (Exch. 1837). See CROSS, PRECEDENT IN ENGLISH LAW 66-67, 219-20 (1961).

⁷⁰ 3 M. & W. at 5.

⁷¹ 1 Campbell 493 (D. Md. 1808).

⁷² 4 Metc. 49 (Mass. 1842).

⁷³ 1 Cush. 475 (Mass. 1848).

⁷⁴ It was published in 1839, two years after the decision in *Priestley*.

length in the third.⁷⁵ Examples of their possible application mixed ships, factors, carpenters, and coachmen indiscriminately.

The *Baker* case was the first to reach the Supreme Court. In a number of lower court cases, the most important of which was *The Sea Gull*,⁷⁶ decided by Mr. Justice Chase sitting on circuit in Baltimore, in 1867, the rule was not applied. Conceding that *Baker* and *Carey* were against the existence of the action, Mr. Chief Justice Chase noted that other states had not followed these decisions and that after they were decided the legislatures of both England and Massachusetts had "corrected" the law.⁷⁷ He went on to take issue with the fairness of the *Baker* rule, concluding:⁷⁸ "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

By the time the principle adjudicated in *The Sea Gull* reached the Supreme Court of the United States in *The Harrisburg*,⁷⁹ nearly two decades had elapsed. In that time the *Baker* doctrine had been adopted generally by the state courts,⁸⁰ and in *Insurance Co. v. Brame*,⁸¹ had been applied by the Supreme Court in a common-law case. In applying it in admiralty, the Court observed that there was no authority whatever for the proposition that the doctrine was different in admiralty than at common law, and that since it had been generally accepted as the law in the United States, and adopted by the Supreme Court after full discussion, there was no reason why it should not be applied in admiralty as well as common law.⁸² *The Sea Gull* was disposed of as resting upon Mr. Chief Justice Chase's dislike for the rule itself and his supposition that it had not been adopted. By the time *Insurance Co. v. Brame* was decided, he was no longer on the Court, so we do not know whether he would

⁷⁵ STORY, AGENCY 573 (3d ed. 1846).

⁷⁶ Chase's C.C. 145 (C.C. Md. 1867).

⁷⁷ *Id.* at 148.

⁷⁸ *Ibid.*

⁷⁹ 119 U.S. 199 (1886).

⁸⁰ E.g., *Ford v. Monroe*, 20 Wend. 209 (N.Y. S. Ct. 1838), one of the cases on which Mr. Justice Chase depended in *The Sea Gull*, was substantially overruled in *Green v. Hudson River Railroad*, 2 Keyes 294 (N.Y. 1866).

⁸¹ 95 U.S. 754 (1877).

⁸² 119 U.S. at 204.

have opposed the adoption of the rule at common law. The decision was unanimous, however, as was to be expected. If the Court felt that the rule was correct, there was no reason to make a special case of the admiralty jurisdiction.

IV. THE OSCEOLA

The rule in *Priestley v. Fowler* did not reach the Supreme Court in an admiralty case until 1903 in the celebrated case of *The Osceola*.⁸³ Like the rule in *Baker v. Bolton*,⁸⁴ it had had a mixed reception in the district courts and circuit courts of appeals.⁸⁵ By that time the fellow-servant rule had been ameliorated a good deal by the development of a number of exceptions such as the vice-principal doctrine⁸⁶ and the safe-place-to-work doctrine.⁸⁷ None of the cases had flatly rejected its application in admiralty and permitted recovery of damages by an injured seaman, but a great deal of disagreement existed over the circumstances under which it would warrant recovery.⁸⁸ In *Quebec Steamship Co. v. Merchant*,⁸⁹ a case at common law in 1890, Mr. Justice Blatchford, speaking for a unanimous court, had applied it to a crew member injured on shipboard almost two miles off the shore of Trinidad.

The Osceola was distinguishable from *Quebec Steamship Co.* in two respects. In the first place, the injury took place within

⁸³ 189 U.S. 158 (1903).

⁸⁴ 1 Campbell 493 (D. Md. 1808).

⁸⁵ Compare *Daub v. Northern Pac. Ry. Co.*, 18 Fed. 625 (D. Ore. 1883), with *Red River Line v. Cheatham*, 60 Fed. 517 (5th Cir. 1894). The cases had generally supported the application of the doctrine. See Cunningham, *The Extension to the Admiralty of the Fellow Servant Doctrine*, 18 HARV. L. REV. 294, 296 (1905).

⁸⁶ See *C. M. & St. P.R.Co. v. Ross* 112 U.S. 377 (1884); *The Titan*, 23 Fed. 413 (S.D. N.Y. 1885); *Kalleck v. Deering*, 161 Mass. 469 (1894). In *Kalleck*, Mr. Justice Holmes explained the admiralty cases permitting recovery by reference to *Ross*, an argument later made by counsel in *The Osceola*. See 189 U.S. at 162.

⁸⁷ See, e.g., *The Frank & Willie*, 45 Fed. 494 (S.D. N.Y. 1891). The two doctrines are interrelated. The duty to provide a safe place to work was violated by failure to correct dangerous conditions after notice to the employer's agent (vice-principal).

⁸⁸ Compare *The Titan*, *supra* note 86, holding that a seaman not on duty is not the fellow servant of a pilot engaged in navigation of the ship, with *Red River Line v. Cheatham*, *supra* note 85 to the effect that the seaman and master navigating the ship are fellow servants.

⁸⁹ 133 U.S. 375 (1890).

the territorial limits of the state of Wisconsin, which had adopted a statute that provided in part that every ship, boat, or vessel used in navigating the waters of that state should be liable "for all damages arising from injuries done to persons or property by such ship, boat or vessel," and that the claim for such injuries should constitute a lien on such ship, boat, or vessel, taking precedence over all other liens.⁹⁰ The second point of distinction lay in the fact that in *The Osceola* the negligence assigned as the cause of the seaman's injury was that of the master, while in *Quebec Steamship Co.* it had been that of a porter and a carpenter. There was a third point of distinction, of course, that in *The Osceola* the proceeding had been brought in the admiralty *in rem*.

The injured seaman had a decree in the district court and the claimant appealed. The circuit court of appeals certified three questions to the Supreme Court:⁹¹

First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

Third. Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

Before answering the first and third questions in the negative and remanding to the court of appeals (which had reversed the district court *per curiam* and dismissed the libel),⁹² Mr. Justice Brown reviewed the authorities and wrote his four-proposition primer on maritime personal injury law as applied to seamen:⁹³

⁹⁰ 2 WIS. STAT. § 3348 (1898); see 189 U.S. at 164.

⁹¹ 189 U.S. at 160.

⁹² *Bottsford v. Shea*, 125 Fed. 1000 (7th Cir. 1903).

⁹³ 189 U.S. at 175.

1. That a vessel and her owners are liable, in case a seaman falls sick, or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N.Y. 211.

3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received from negligence or accident.

These four propositions have caused a great deal of puzzlement among judges and writers.⁹⁴ The first is not difficult to understand. It stated the general duty to provide maintenance and cure and expressed the contemporary doubt as to its extent. It is clear that as developed in the English maritime law, maintenance, cure, and wages were designed to prevent the stranding of a sick sailor in foreign parts and ceased when he was brought back to England, that is, at the completion of the voyage.⁹⁵ There were cases to the contrary in the lower United States courts,⁹⁶ however, and Mr. Justice Brown simply noted the diversity of opinion on the subject.

The second proposition, later to become the cornerstone upon which the shipowner's warranty of seaworthiness to the crew was to be erected, was an effort to explain the cases cited by the appellees in which recovery had been secured for injuries produced by negligence.⁹⁷

The third proposition, like the first, was an attempt to state the settled contemporary law, without expressing an opinion on the undecided case. Mr. Justice Brown had noted the diversity of opinion

⁹⁴ See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 248 *et seq.* (1957) (hereafter GILMORE).

⁹⁵ See text at notes 186-88 *infra*.

⁹⁶ See text at notes 192-94 *infra*.

⁹⁷ See text at notes 228-43 *infra*.

in Great Britain over whether the master of a ship is a vice-principal⁹⁸ and because that question had never been before the Supreme Court in the United States, he did not treat it as settled. When the statement is related to *Quebec Steamship Co. v. Merchants*,⁹⁹ *C. M. & St. P. R. Co. v. Ross*,¹⁰⁰ and *Baltimore & O. R. Co. v. Baugh*,¹⁰¹ it is apparent that the vice-principal doctrine and its precise dimensions was a much agitated question, and it is understandable that the Court was not anxious to pass on the point unless it was raised. But it was the negligence of the master that was assumed in the questions certified; so if the case was to turn on the fellow-servant doctrine, the question *was* raised, and would have to be decided, which brings us to the fourth proposition.

It is the relationship between the third and fourth propositions of *The Osceola* that has occasioned the puzzlement,¹⁰² and still does.¹⁰³ If under the "general maritime law" no cause of action existed against the ship or owner in favor of an injured crew member for the negligence of the master or other member of the crew, why was it necessary to refer to the fellow-servant doctrine at all? Further, if the maxim *respondeat superior* did not apply, how could the master "perhaps" be a vice-principal?

Mr. Justice Henry Billings Brown was an admiralty lawyer of note and compiler of *Brown's Admiralty Reports*.¹⁰⁴ He had writ-

⁹⁸ As to Scotland, Mr. Justice Brown was in error. *Leddy v. Gibson*, 11 Ct. Sess. Cases 304 (3d Ser. 1873), the case he cited, held the opposite of the proposition for which it was cited.

⁹⁹ 133 U.S. 375 (1890).

¹⁰⁰ 112 U.S. 377 (1884).

¹⁰¹ 149 U.S. 368 (1893).

¹⁰² E.g., "It is the law of the sea that vessel owners are liable for wages, maintenance, and expenses of cure of a seaman injured in the service of the ship, except as a result of his own willful misconduct. There has been gradually added to this well-defined relation, either by statute or by judicial decisions, an obligation of the owners to give the seaman indemnity for injuries resulting from unseaworthiness of the vessel or her equipment. The final utterance of the Supreme Court on the relation of seamen and owners is the case of *The Osceola*. . . It is inconsistent with many prior and some subsequent cases." *The New York*, 204 Fed. 764, 765 (2d Cir. 1913).

¹⁰³ "The third and fourth propositions are repetitious and overlapping and the third (on the fellow-servant rule) is made unnecessary by the fourth (no recovery for negligence of either master or crew without regard to the fellow-servant rule)." GILMORE 250.

¹⁰⁴ (1876).

ten more than his share of the admiralty opinions of the Supreme Court since his appointment, and no doubt thought that it would be helpful to the bar to have this whole problem clarified.¹⁰⁵ It is difficult to believe, therefore, that the third proposition was inadvertent and redundant or contradictory. A review of the arguments made by counsel and the authorities cited suggests that it was neither.

Counsel for the claimant had argued five propositions relating to the issue of liability in a proceeding *in rem* in the admiralty: (1) there had to be a lien on the vessel; (2) for a lien to exist, there had to be an underlying liability *in personam* either at common law or under the maritime law; (3) in a suit *in rem*, the underlying liability had to exist under the maritime law, which the Court had to take as it found it, unless a lien were given by statute; (4) the Wisconsin statute was limited to damage done by a ship (*e.g.*, collision) and created no lien on the ship for personal injuries; (5) the liability under the maritime law was limited to maintenance and cure. It was conceded that precedents existed imposing liability on the owner for negligence of the master, but these cases were distinguished as having been brought *in personam*. As a line of retreat, it was argued that even if the Court were free to decide an *in rem* case by analogy to the common law, under *Baltimore & O. R. Co. v. Baugh*,¹⁰⁶ it must draw its analogy from the general law including the fellow-servant doctrine recognized in the *Baugh* case, rather than from the law of Wisconsin, but that in any event the law of Wisconsin adopted the fellow-servant doctrine.¹⁰⁷

There seems to be no doubt that the appellants were successful in getting the Court to view the problem in these terms. Mr. Justice Brown began by stating:¹⁰⁸ "In the view we take of this case we find it necessary to express an opinion only upon the first and third questions, which are in substance whether the vessel was liable *in rem*. . . . As this is a libel *in rem* it is unnecessary to determine whether the owners would be liable to an action *in personam*, either in admiralty or common law, although cases upon this subject are

¹⁰⁵ In *The Roanoke*, 189 U.S. 185 (1903), handed down the same day, he performed a similar service as to materialmen's liens. See text at notes 115-17 *infra*.

¹⁰⁶ 149 U.S. 368 (1893).

¹⁰⁷ 189 U.S. at 162-63.

¹⁰⁸ *Id.* at 168.

not wholly irrelevant." He went on to state, almost verbatim, the argument of counsel that for liability to exist in a libel *in rem*, it must be shown that the liability existed under the general maritime law, or that a lien existed by virtue of a state statute.

The language employed, "whether the vessel was liable," reflected the currency of the doctrine that the liability of a vessel *in rem* was independent of the question of liability of its owner. Two years earlier, in *Homer Ramsdell Trans. Co. v. La Compagnie Générale Transatlantique*,¹⁰⁹ the Court had held that a shipowner was not liable at common law for collision damage produced by the negligence of a compulsory pilot, although under the doctrine of the offending thing the ship was liable *in rem*. Although *Homer Ramsdell* did not involve liability *in personam* in admiralty, it plainly suggested that no such liability existed. *Atlee v. Packet Co.*,¹¹⁰ in which recovery *in personam* had been allowed, was distinguished on the ground that "it does not appear that they acted under compulsion in appointing him, and the question of their liability for his acts was not discussed."¹¹¹ The Court there cited the observation of the dissenting Justices in *Ralli v. Troop*¹¹² to the effect that the decision in *The China*¹¹³ that the vessel was liable was made over the admission that "if the action had been at common law against the owner, and probably also *in personam* in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner."¹¹⁴

The decision in *The Osceola* was in some ways the reverse of the coin. In *Homer Ramsdell*, it was held that where the action is brought at common law, and, it was suggested, *in personam* in admiralty, liability is to be determined in terms of the common law of agency, that is under the maxim *respondeat superior*, while the liability of the ship under the maritime law, resting as it does on the doctrine of the offending thing, does not carry with it any personal liability. In *The Osceola*, reserving the question whether the owner is personally liable for the negligence of the master under the maxim *respondeat superior*, the Court held that under maritime law the ship is not liable under the doctrine of the offending thing.

¹⁰⁹ 182 U.S. 406 (1901).

¹¹² 157 U.S. 386, 423 (1894).

¹¹⁰ 21 Wall. 389 (1874).

¹¹³ 7 Wall. 53 (1868).

¹¹¹ 182 U.S. at 416.

¹¹⁴ 182 U.S. at 414.

The decision in *The Roanoke*,¹¹⁵ marking over a century of litigation in area of home-port liens, was handed down by Mr. Justice Brown on the same day that he delivered the opinion in *The Osceola*. A great man for black-letter law, he delivered himself of three rules in that case, again after a review of the authorities. They restated the existence of a lien for necessities provided in a foreign port "by the maritime law, as administered in England and in this country,"¹¹⁶ the absence of such a lien for such services in the home port, the remedy in such cases being "in the admiralty . . . *in personam* only,"¹¹⁷ and the power of the states to create such a lien by statute in the case of home port transactions. He proceeded to hold that no power existed to vary by statute the rules regarding maritime liens on foreign ships. The result, it will be noted, is exactly the same as the result in *The Osceola*. Where a lien existed under the general maritime law as administered in admiralty courts, it could be enforced against the ship; where no lien existed, but the cause of action was maritime under our definitions, it could be brought in admiralty, but only *in personam*.

V. AFTERMATH OF THE OSCEOLA

It should be noted that although the doctrine of *The China* had the effect of extending the liability of the owners of ships to negligence beyond their control, the characterization of maritime personal injuries as governed by the fairly narrow confines of torts in which a lien could be demonstrated to have existed under the general maritime law was a protection against the crumbling of common-law exceptions to the maxim *respondeat superior*. The third proposition of *The Osceola* was therefore greeted with dismay, while the fourth was greeted with unrestricted approval. It seemed to apply the rule *expressio unius exclusio alterius* to the Laws of Oleron, leaving the ship liable only in instances in which it was liable by the maritime law. Since the admiralty sources of the English law were almost devoid of tort suits against the ship or owner other than collision cases, recourse to these sources as the sole measure of liability would practically eliminate them.

This view was expressed in two articles appearing in the *Harvard*

¹¹⁵ 189 U.S. 185 (1903).

¹¹⁶ *Id.* at 193.

¹¹⁷ *Id.* at 194.

Law Review in 1904 and 1906 written by Frederick Cunningham of the Boston bar. The first¹¹⁸ was very short and directed specifically to the "unfortunate dictum" in *The Osceola* that the fellow-servant doctrine has any application in an admiralty court. The "true and ancient admiralty rule," wrote Mr. Cunningham, was embodied in the fourth proposition, and the third, "luckily only to the extent of a *dictum* as yet," was an "entirely gratuitous" extension. He stated that the maxim *respondeat superior*, when properly applied, "does not have its full force in the admiralty." Until the last twenty years¹¹⁹

no case of a recovery . . . against an employer *in personam* for the negligence of another servant in the employ of the same master, whether coming within the technical definition of a fellow servant or not, can be found in the reports of admiralty cases in the United States, and as Judge Addison Brown says, speaking of seamen: "No authority in the ancient or modern codes, in the recognized textbooks, or the decisions on maritime law, can be found allowing such a recovery, and the absence of any authority holding the owner of the vessel liable is evidence of the strongest character that no liability under the maritime law exists." The same words could have been used at that time with truth of all actions *in personam* in admiralty by all servants against the employer for negligence of other servants as well as actions by seamen.

He went on to point out that the fellow-servant doctrine was developed to mitigate the hardship of the maxim *respondeat superior* in the common law and since the maxim was not employed in admiralty, there was no need for the fellow-servant doctrine.

Now, however, by its *dictum* in the *Osceola* case, that the liability of the ship for an injury to one seaman by the negligence of another does not exist *because they are fellow servants*, it implies that unless the servants are fellow servants in the technical sense of the common law a liability on the part of the employer does or may exist. Accordingly, we shall probably see many such cases of servant against employer or ship, and shall have to determine in each case, as at common law, whether the servants are in a common employment or not; for instance, whether a stevedore, longshoreman, cattleman, seaman, etc., are in a common employment, whether the foreman, stevedore, boatswains, mates, master, etc., are vice-

¹¹⁸ Cunningham, *supra* note 85.

¹¹⁹ *Id.* at 296.

principals, and the whole doctrine is fairly launched into the admiralty law.¹²⁰

In his second and longer article in 1906,¹²¹ Mr. Cunningham elaborated his view of the true and ancient admiralty rule. The liability of the ship proceeded from the doctrine of "the offending thing," and the liability of the owner in collision cases from the application of the maxim of the civil law *sic utere tuo ut aliendum non laedas*. All other liability *in personam* he characterized as hanging on privity of the owner to the negligence. He conceded that the doctrine of "the offending thing" is unfair to the shipowner, but added that the adoption of the maxim *respondeat superior* would not mitigate that unfairness but simply increase the liability *in personam*.

In the same volume of the *Harvard Law Review* an article by Mr. Fitz-Henry Smith, Jr., also deplored the extension of the master-servant doctrine and expressed the hope that the dictum of *The Osceola* would be corrected.¹²² He devoted himself, however, to a more factual treatment of the cases and an outline of the state of the law as he saw it. Seamen injured by accident were entitled to no more than maintenance and cure.¹²³ If they were injured through negligence, the result was the same.¹²⁴ If, however, they were injured through neglect of the owner in failure to discharge some positive duty owed by the owner to the seaman under his seaman's contract, he could recover against the ship or owner. This third class of injuries broke down into injuries produced by defective rigging or appliances, failure to provide proper provisions or medicines, aggravation of an original injury by failure to provide proper care, and acts of violence. And in the discharge of these positive duties Mr. Smith suggested that the master is the *alter ego* of the owner, and his failure to discharge them would make the owner liable. It is interesting to note that this doctrine of agency in the areas of positive duty, but not in the navigation and management of the ship, was derived in part from the citation of *Scarff v. Met-*

¹²⁰ *Ibid.*

¹²¹ Cunningham, *Respondeat Superior in Admiralty*, 19 HARV. L. REV. 445 (1906).

¹²² Smith, *Liability in the Admiralty for Injuries to Seamen*, 19 HARV. L. REV. 418, 422 (1906).

¹²³ *Id.* at 419.

¹²⁴ *Id.* at 420.

calf¹²⁵ as authority for the second proposition of *The Osceola*. The second proposition, it will be remembered, dealt with liability for failure to provide a seaworthy vessel and to supply and keep in order proper appliances appurtenant to the ship. *Scarff* was a common-law case holding the owner of a ship liable for the negligence of the master in failing to get an injured sailor to a hospital. There was an express finding there that the vessel was provided with a proper medicine chest. "As the action in that case was solely for *improper treatment after injury*," wrote Smith, "the conclusion is reached that the Supreme Court regards a failure to maintain the appliances of the ship in the same light as a failure to entertain proper care of a sick or injured seaman, and considers both cases as instances where an owner is liable for the neglect of the officers of the ship as the acts of his personal agents in the performance of positive duties imposed upon him."¹²⁶

Both these contemporary commentators, each in his way, demonstrated considerable prescience. Mr. Smith's reading of the second proposition was in substance the one adopted by the courts in the years following the decision in *The Osceola*,¹²⁷ though it did not proceed from so subtle a construction of Mr. Justice Brown's citation of *Scarff v. Metcalf*.¹²⁸ The lower courts simply put the second, third, and fourth propositions together and came out with the result the New York court had arrived at without the help of all of Mr. Justice Brown's wisdom. When the master is acting in the

¹²⁵ 107 N.Y. 211 (1887).

¹²⁶ 19 HARV. L. REV. at 424.

¹²⁷ See, e.g., *The Troop*, 128 Fed. 856 (9th Cir. 1904). In *The Troop*, and in *The Matterhorn*, 128 Fed. 863 (9th Cir. 1904), the Ninth Circuit considered cases of negligence in provision of medical attention, allowing damages in both cases.

¹²⁸ In *The Troop*, note 127 *supra*, Judge Gilbert made no reference to *Scarff*. He did mention, however, that Mr. Justice Brown himself, in the *J. F. Card*, 43 Fed. 92 (E.D. Mich. 1890), had stated that where there was negligence in treatment the plaintiff could proceed in an ordinary action for negligence. This was a way of reconciling the statement in *The J.F. Card*: "Of course, if there be any negligence or misconduct on the part of the officers of the vessel, this would furnish a separate ground for action, in which the seaman would recover, not only his expenses for medical attendance, etc., but compensation for his personal injuries, as in ordinary cases of negligence," *id.* at 94, with the fourth proposition of *The Osceola*. In view of the manner in which *The Osceola* was disposed of, it is probable that Mr. Justice Brown was of the opinion that the owner was liable for the negligence of the officers *in personam* at least "as in an ordinary action for negligence."

navigation and management of the vessel, he is the fellow servant of the other members of the crew, but where he is acting in the discharge of the positive duties imposed upon the owner to provide and maintain a seaworthy vessel with adequate appliances, he is not.¹²⁹

Mr. Cunningham's fears were fully realized. The argument that, because the maxim *respondeat superior* had no application in admiralty, the ship and owner are not liable to a stevedore injured on the ship through the negligence of the master or other crew members never seems to have been made. Nor does it seem to have been contended that no lien existed in such cases. The courts proceeded along straight common-law negligence and master-servant principles, and just as Mr. Cunningham warned, they were called upon to decide from case to case who were fellow servants and who were not. The typical case was that of the borrowed winchman. When the ship was turned over to the master stevedore for loading or unloading, it was usual for the master to provide the stevedore with a man to operate the steam winch. Sometimes he was paid by the stevedore, sometimes by the ship, the difference of course being reflected in the charges made. Where the winchman was negligent and in consequence one of the longshoremen was injured, the question arose whether the former remained an employee of the ship, making the owner liable under the maxim *respondeat superior*, or became an employee of the stevedore, making the injury one produced by the negligence of the longshoreman's fellow servant. Either the standard of care employed by these borrowed winchmen was remarkably low or, because they were the only workmen who arguably were not fellow servants, there was considerable pressure to attribute every injury to their carelessness, for such cases abound in the reports.¹³⁰

¹²⁹ See *Carter v. Brown*, 212 Fed. 393 (5th Cir. 1914), master and mate held to be vice-principals of owner in discharging duty to stow cargo properly. *Carter v. Brown* was in admiralty *in personam*. *The Osceola* was not mentioned. The same principles, however, were applied in libels *in rem*. See, e.g., *The C. S. Holmes*, 209 Fed. 970, 972 (W.D. Wash. 1913).

¹³⁰ See *The Maud*, 169 Fed. 487 (S.D. Ala. 1909), to the effect that the winchman is a fellow servant; *The Slingsby*, 120 Fed. 748 (2d Cir. 1903), to the effect that he is not; *The Brookby*, 165 Fed. 93 (E.D. Pa. 1908), where it was held that he was so incompetent that it was negligent to furnish him.

In summary, the lower courts used the Supreme Court's answers to the first and third questions certified in *The Osceola* as aids in divining the answer to the second and omitted question. Once they had worked out that answer, it became unnecessary to ask the first and third questions again. One result of this mode of procedure was the disappearance of the distinction between proceedings *in rem* and *in personam*. When the application of the fellow-servant doctrine resulted in liability of the owner for the master's negligence, it could as easily have been said that there was a right to indemnity under the second proposition of *The Osceola*.

It should be noted that this view of the law placed the seaman and any other person injured through negligence on a parity, except for the seaman's traditional entitlement to maintenance and cure. If any person lawfully on a ship and not an employee was injured through the negligence of the master or crew, the owner was liable, and the proceeding could be brought either *in rem* or *in personam*. This included a passenger,¹³¹ a person having legitimate business on the ship, as one who came on to check on cargo,¹³² a stevedore,¹³³ a city inspector,¹³⁴ or a visitor.¹³⁵ Indeed, he did not have to go on the ship, for where the master provided equipment for the use of the stevedores, and a longshoreman was injured as a consequence of its defective condition, he could recover from the ship or owner where it was shown that the defective condition was the result of negligence of the ship's company.¹³⁶ Where the equipment was not defective when delivered to the stevedore and his employees, however, but became so during their use of it, the shipowner was not liable.¹³⁷ Where the longshoreman was injured on the ship through the negligence of his employer, the master stevedore, as where the

¹³¹ *The Western States*, 159 Fed. 354 (2d Cir. 1908); *The Ocracoke*, 159 Fed. 552 (E.D. Va. 1908).

¹³² Such a person was permitted to recover as early as 1881. *Leathers v. Blessing*, 105 U.S. 626 (1881).

¹³³ *The General Knox*, 180 Fed. 489 (D. R.I. 1910).

¹³⁴ *The Steam Dredge No. 161*, 122 Fed. 679 (D. Maine 1903), *rev'd* as to measure of damages, 134 Fed. 161 (1st Cir. 1904); *The Sunbeam*, 195 Fed. 468 (2d Cir. 1912).

¹³⁵ *The City of Seattle*, 150 Fed. 537 (9th Cir. 1906).

¹³⁶ *Alaska Pacific S.S. Co. v. Egan*, 202 Fed. 867 (9th Cir. 1913).

¹³⁷ *Navigazione Atla Italia of Turin, Italy v. Vale*, 221 Fed. 413 (5th Cir. 1915).

stevedore provided defective equipment or neglected to discharge his duty in providing a safe place to work, he was liable *in personam* in admiralty,¹³⁸ though for some time it had been doubted that the jurisdiction extended to such proceedings.¹³⁹ The same was true of the seaman. Where his injury was produced by the servants of the master stevedore, he could proceed against him *in personam*,¹⁴⁰ and where he was not within the fellow-servant rule, as where he was called upon to act outside the course of his employment,¹⁴¹ or was injured by the negligence of the crew of another vessel operated by the same owner,¹⁴² he could recover. Where he was injured through the negligence of a fellow servant, he could not.¹⁴³ Where he was injured through failure of the master to discharge his duty to keep the vessel and its appliances in working order, he could recover because, as we have seen, with respect to these duties the master was the *alter ego* of the owner. This was sometimes framed as unseaworthiness, but generally as an exception to the fellow-servant rule. Where the court talked of unseaworthiness, it equated it to the duty of the master to provide a safe place to work.¹⁴⁴ In this connection it will be remembered that the second proposition of *The Osceola* talked of unseaworthiness of the ship *or* failure to supply and keep in order the proper appliances appurtenant to the ship, the grammar indicating that the two were separate duties. Quite clearly it was

¹³⁸ *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 Fed. 229 (D. Md. 1911).

¹³⁹ See *id.* at 232.

¹⁴⁰ *Paaauhau Sugar Plantation v. Palapala*, 127 Fed. 921 (9th Cir. 1904). Here the usual winchman relationship was reversed. The sailors rowed in for the sugar and were injured by negligence on the part of the winchman employed by the sugar plantation.

¹⁴¹ *Cook v. Smith*, 187 Fed. 611 (3d Cir. 1911), 17-year-old mess boy injured while performing duties outside the scope of his employment.

¹⁴² This was one of the limitations on the reach of *Priestley v. Fowler* that occurred to Story when he commented upon the case in 1846: "Suppose two ships, owned by the same person, and engaged in different voyages, and by a collision between them, caused by the negligence of the master of one, the master of the other should receive a grievous injury in his person or property; would he have no redress against the principal, upon the ground of the maxim, *Respondeat Superior*?" STORY, AGENCY 578 (2d ed. 1846).

¹⁴³ *E.g.*, *The Rosalie Mahony*, 218 Fed. 695 (W.D. Wash. 1919).

¹⁴⁴ See *Schirm v. Dene Steam Shipping Co.*, 222 Fed. 587 (E.D. N.Y. 1914).

thought that the former related only to the permanent structure of the ship, while the latter covered a variety of ills.¹⁴⁵ It was usually not necessary to draw the distinction because both were treated under the ordinary common-law duty of the master to provide a safe place to work.¹⁴⁶

VI. STATUTORY ABROGATION OF THE FELLOW-SERVANT RULE

Had the established rules of the common law remained in vogue, it is probable that we should never have heard of *The Osceola* again, and that with the exception of maintenance and cure and perhaps comparative negligence, no difference would exist today between sea and land remedies. Even then, however, the strictures of the common-law defenses to negligence actions in employee injury cases were becoming unpopular. Had this growing concern over industrial accidents manifested itself in common-law repudiation of *Farwell v. Boston & Worcester Railroad Corp.*,¹⁴⁷ it is probable that seamen's remedies would simply have kept pace with the new thinking on the subject. This was not, however, the course of the reform. In 1906, the first federal railroad employers' legislation was enacted, followed in 1908 by the present Federal Employers Liability Act.¹⁴⁸ These acts abolished the fellow-servant defense in the railroad industry. Had subsequent legislation been patterned on these acts, perhaps the common-law defenses would have withered by judicial decision. But the second federal act was followed in 1910 by the New York Employers Liability Act,¹⁴⁹ and workmen's compensation acts followed in rapid succession.

State decisional law had never afforded any obstacle to uniform law within the maritime jurisdiction, and the suggestion that it was obligatory had been expressly repudiated in *The Max Morris*¹⁵⁰ and

¹⁴⁵ See *The I. F. Chapman*, 215 Fed. 127 (D. R.I. 1914).

¹⁴⁶ There were several cases, however, that separated out the duty to provide a seaworthy vessel at the commencement of the voyage. See *Rainey v. New York & P. S.S. Co.*, 216 Fed. 449 (9th Cir. 1914); *The Nyack*, 199 Fed. 383 (7th Cir. 1912); *The Fullerton*, 167 Fed. 1 (9th Cir. 1908); *The Drumelton*, 158 Fed. 454 (S.D. N.Y. 1907).

¹⁴⁷ 4 Metc. 49 (Mass. 1842). See text *supra* at note 72.

¹⁴⁸ 35 Stat. 65 (1908). The act of 1906 was held unconstitutional by the Supreme Court in *Employers Liability Cases*, 207 U.S. 463 (1908).

¹⁴⁹ N.Y. Laws ch. 674 (1910).

¹⁵⁰ 137 U.S. 1 (1890).

Workman v. New York City.¹⁵¹ Indeed, it had not been considered obligatory in commercial law cases since 1815, and in 1891 the federal freedom from state-court decision was extended to tort cases.¹⁵² Theoretically state statutes represented no greater difficulty. In *Swift v. Tyson*¹⁵³ the Court had interpreted § 34 of the Judiciary Act of 1789¹⁵⁴ as referring to state statutes only, and since this section made the laws of the several states the rules of decision in the federal courts only in "trials at common law," state statutory law was no more of a pariah in the maritime jurisdiction than the state decisional law. This interpretation of § 34 was adopted in a dictum by Mr. Chief Justice Story in *Brown v. Jones*¹⁵⁵ in the same year in which *Swift v. Tyson* was decided.

This is not to say that state law, both statutory and decisional, did not often provide guides for the decisions of the federal courts sitting in admiralty. State statutes of limitations had generally been used by analogy to determine the existence of laches,¹⁵⁶ and state lien statutes had generally been applied unless, as in *The Roanoke*,¹⁵⁷ the Court thought that they were offensive to the general pattern of rights created by the maritime law.¹⁵⁸ As we have seen, if the Court had not gone to the state decisions on torts there would have been precious little tort law to apply. There was a difference, however, in the mode of application. The decisional law was not applied as the law of the state, but as an amalgam of state decisions that indicated the character of the "general municipal law" that governed litigation in admiralty unless it could be shown that the application of some other rule was required by maritime custom. The state statute, on the other hand, was applied either according to its terms or not at all.

It must be conceded that workmen's compensation would be difficult to assimilate into the law of the admiralty by analogy. In

¹⁵¹ 179 U.S. 552 (1900).

¹⁵² *Baltimore & O. R. Co. v. Baugh*, 149 U.S. 368 (1893).

¹⁵³ 16 Pet. 1 (1842).

¹⁵⁴ 1 Stat. 73 (1789).

¹⁵⁵ 2 Gall. 477 (C.C. Mass. 1815).

¹⁵⁶ See Story, J., in *The Brig Sarah Ann*, 2 Sumner 206, 212 (C.C. Mass. 1835).

¹⁵⁷ 189 U.S. 185 (1903). See *Davis v. A New Brig, Gilp*, 473 (E.D. Pa. 1834).

¹⁵⁸ *Ibid.*

the first place there was often provision for administrative determination of the award. In the second place, the systems varied greatly. Some were dependent upon taxes levied upon the industries covered.¹⁵⁹ Some made the remedy exclusive.¹⁶⁰ Some were voluntary.¹⁶¹ They varied also in their coverage and enforcement provisions. The courts were faced, then, with a simple cession of the maritime law of torts to the states, or rejection of the application of these laws to seamen. It was early held that they could not preclude the seaman's traditional remedies,¹⁶² and ultimately that they had no application to members of the crew of a vessel.¹⁶³ For a considerable period, however, they were applied to longshoremen.¹⁶⁴

The advent of the Federal Employers Liability Act of 1908 and the state compensation laws left the seaman one of a dwindling list of workmen not compensated for accidents produced by the negligence of their fellow servants. In 1915, this was partially rectified by the passage of § 20 of the Seamen's Act, which provided:¹⁶⁵ "That 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." This act in effect settled the doubts expressed in *The Osceola* as to the application of the vice-principal rule in admiralty cases, and eliminated the controversy over whether the officer's negligence was in the performance of a duty owed the seamen by the owner, or in the ordinary navigation and management of the vessel.

By the time the 1915 provision came to the Supreme Court in *Chelentis v. Lukenbach S.S. Co.*,¹⁶⁶ the Court had decided *Southern Pacific Co. v. Jensen*,¹⁶⁷ holding application of the state workmen's compensation acts to maritime occupations violative of the general

¹⁵⁹ See 1 LARSON, WORKMEN'S COMPENSATION LAW 38 (1952).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *The Fred E. Sander*, 208 Fed. 724 (W.D. Wash. 1913).

¹⁶³ *Schuede v. Zenith S.S. Co.*, 216 Fed. 566 (N.D. Ohio 1914).

¹⁶⁴ See, e.g., *The Bee*, 216 Fed. 709 (D. Ore. 1914). In *The Bee*, the plaintiff was a longshoreman working on land but struck by a load of lumber being lifted by equipment on the boat. The court applied the Oregon Boat Lien Statute to permit the action against the vessel.

¹⁶⁵ 38 Stat. 1185 (1915).

¹⁶⁶ 247 U.S. 372 (1918).

¹⁶⁷ 244 U.S. 205 (1917).

principles of maritime law. In doing so, it had been called upon to lay particular stress on the existence of a general body of American maritime law as the source of rights in maritime relationships, and to emphasize the need for uniformity of treatment within the admiralty and maritime jurisdiction. *Chelentis* was an action at common law. It was argued that at common law the right to recover was limited only by the fellow-servant doctrine, and that the act of 1915 abolished that defense when the negligence was that of a seaman in command. The Court rejected both these arguments. It held that the saving-to-suitors clause¹⁶⁸ preserved only the common-law remedy for the maritime right. It did not protect rights at common law. As to the 1915 provision, it was of no application because the inability of a seaman to recover from the shipowner more than his maintenance and cure and an indemnity in the event the ship was unseaworthy stemmed from the fact that the general maritime law provided him with that and nothing more, not from the fact that the members of the crew were fellow servants. The Court relied on Mr. Justice Brown's opinion in *The Osceola*. It has been written of *Chelentis*, "On the 'how to read cases' level, there can be no quarrel with the *Chelentis* holding."¹⁶⁹ But Heaven forbid that cases be read this way. In the district court Judge Manton had directed a verdict for the defendant on the authority of *The Osceola*. The opinion is unreported. In the circuit court of appeals, Judge Ward wrote a short opinion citing no case but *The Osceola*.¹⁷⁰ He noted that in the third proposition Mr. Justice Brown had left undecided the question whether the master is a fellow servant of the seaman, but had decided that the seaman could not recover on the ground of a negligent order of the master. It followed that whether they were fellow servants was irrelevant to the case of an improvident order, and therefore the act of 1915 changed nothing in this respect. This overlooked the fact that the *decision* in *The Osceola* was by its very terms limited to the existence of a lien, while the four propositions were designed to canvass the American and English authorities on the rights of seamen injured in service of the ship. It also overlooked the decision in *Quebec Steamship v. Merchant*¹⁷¹ where the fellow-servant rule was applied without question at common law in a case

¹⁶⁸ 1 Stat. 76-77 (1789).

¹⁷⁰ 243 Fed. 536 (2d Cir. 1917).

¹⁶⁹ GILMORE 281.

¹⁷¹ 133 U.S. 375 (1890).

involving crew members. Indeed if Mr. Justice Brown had meant that the shipowner was not liable *in rem* or *in personam*, in admiralty or at common law, for the negligence of crew members irrespective of the fellow-servant relationship, the third proposition would have been completely inane.

Of interest is the fact that all the Justices who were on the Court at the time of *The Osceola* joined the majority; Justices McKenna and White joined the opinion, and Mr. Justice Holmes concurred in the judgment. This may have resulted from the posture into which argument of counsel had put the case, and the implications that the decision would have for the Court's fast-growing attachment to the principle of uniformity in seamen's cases. It was argued that common-law principles applied, and while under the *Baugh* doctrine uniformity would be achieved in litigations at common law brought in the federal courts, characterization of the right as proceeding from the common law carried with it the possibility of diversity of interpretation in state court cases under the saving-to-suitors clause. To protect uniformity the Court felt it necessary to limit the effect of that provision to confer only a choice of forum and not a choice of substantive law. To do this it was necessary to characterize the right as proceeding from the "general maritime law." Overlooked in the process was the distinction between the law maritime, the local manifestations of the body of international custom derived from the ancient codes, on the one hand, and, on the other, the general municipal law in maritime matters, having its origin in the decisions of English courts of common law in cases maritime by our definition. Between *The Osceola* and *Chelentis* the distinction between rights *in rem* and *in personam* had been forgotten and the seaman found that in losing his lien he had lost his rights.

Two years later Congress enacted the Jones Act,¹⁷² extending the provisions of the Federal Employers Liability Act to seamen, and in 1927, after an unsuccessful attempt to preserve state workmen's compensation for longshoremen,¹⁷³ the Harbor Workers Compensation Act,¹⁷⁴ completed the present-day statutory scheme.

¹⁷² 41 Stat. 1007 (1920).

¹⁷³ 40 Stat. 395 (1919), declared unconstitutional in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), and 42 Stat. 634 (1922), declared unconstitutional in *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924).

¹⁷⁴ 44 Stat. 866-67 (1927).

VII. MAINTENANCE AND CURE: BLUE CROSS PRO HAC VICE

At this point it will be seen that no distinction was drawn between the seaman and the shoreworker in respect of damages for injuries occasioned by negligence. Under the first and fourth propositions of *The Osceola*, however, the seaman was entitled to maintenance and cure in the event he was hurt or became ill in the course of a voyage. This aspect of traditional maritime law, like the home-port lien, was subject to litigation in America at a very early date. Unlike the case of the home-port lien, there was no common-law authority on the entitlement to, and extent of, maintenance and cure. All there was to go on was whatever mention of the subject could be found in the ancient codes and early texts, or "the crooked line of discretion."¹⁷⁵

The Laws of Oleron contained two provisions, the sixth and the seventh, respecting the treatment of seamen's ills. The sixth dealt with seamen who were wounded or hurt in the service of the ship, and provided that they were to be cured at the charge of the ship. The seventh dealt with mariners who fell ill. It provided that they were to be cared for on the ship or, if put ashore, were to have the same provisions they would have had on the ship and a ship's boy to look after them. The ship was not required to wait for them, but if they recovered, they were entitled to their wages for the whole voyage.¹⁷⁶ These provisions appeared in a number of variations in the Laws of Wisbuy,¹⁷⁷ the Sea Laws recorded in the Black Book of the Admiralty,¹⁷⁸ the Laws of the Hanse Towns,¹⁷⁹ and the Marine Ordinances of Louis XIV.¹⁸⁰ In some places a distinction was made between being wounded or hurt in the business of the ship and in the business of the merchant, the latter being charged to the mer-

¹⁷⁵ See *Thompson v. The Ship Catharina*, 1 Pet. Adm. 104, 111 (1795), on sources of admiralty doctrine available to early American admiralty judges.

¹⁷⁶ The Laws of Oleron, the Laws of Wisbuy, the Laws of the Hanse Towns, the Sea Laws from the Black Book of the Admiralty, and the Marine Ordinances of Louis XIV are reproduced in appendixes to *Peters' Admiralty Decisions* (1807). Citations to particular articles of these ancient codes will henceforth be cited to their location in that work. Art. VI appears at 1 Pet. Adm. *xiv*; Art. VII, *id.* at *xvi*.

¹⁷⁷ Art. XXXIX, 1 Pet. Adm. *cv*; Art. XXXV, *id.* at *civ*; Art. XLV, *id.* at *cvi*.

¹⁷⁸ Art. III, 2 Pet. Adm. *lxxxiv*.

¹⁷⁹ Art. XXXV, 1 Pet. Adm. *civ*; Art. XXXIX, *id.* at *cv*; Art. XLV, *id.* at *cvi*.

¹⁸⁰ Art. XI, XII, 2 Pet. Adm. *xxxiii*.

chant, and in some places the expenditures were subject to average.¹⁸¹ In the Laws of the Hanse Towns it was provided that a mariner disabled in defense of the ship should be taken care of for the rest of his life.¹⁸² In the case of sickness, Molloy states that expenditures made by the master on behalf of a mariner were to be deducted from his wages in the event of his recovery and return.¹⁸³ Whether this is the product of a misreading of the Laws of Oleron, which provide for a deduction only in the case of expenditures over and beyond the accommodations he would have had on board,¹⁸⁴ or a lessening of solicitude for mariners between the twelfth and sixteenth centuries, it is impossible to say.¹⁸⁵ One thing is certain, however. Since the ship was not bound to wait for him, and no mention is made of any subsequent payment other than wages for the voy-

¹⁸¹ Art. XXXV of the Laws of the Hanse Towns provided: "The seamen are obliged to defend the ship against rovers, on pain of losing their wages; and if they are wounded, they shall be healed and cured at the general charge of [those] concerned in a common average. . . ." 1 Pet. Adm. *civ*.

¹⁸² *Loc. cit.* The provision continued: "If any one of them is maimed and disabled, he shall be maintained as long as he lives by a like average."

¹⁸³ 1 MOLLOY 353-54.

¹⁸⁴ "... that is to say, so much as he had on shipboard in his health, and nothing more, . . . unless it be at the mariner's own cost and charges; and if the vessel be ready for her departure, she ought not to stay for the said sick party—but if he recover, he ought to have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next kin shall have it." 1 Pet. Adm. *xvi*. Certainly the inference is that "charges as the master has been at for him" refers to provisions over and above his ordinary fare.

¹⁸⁵ There is good authority for supposing that the English law did not provide a sick sailor with free care of any kind. The Sea Laws, obviously adapted from the Laws of Oleron, state: "... he is to be provided for at the charges of the ship; and if he be so ill as not fit to travel, he is to be left ashore, and care be taken that he hath all accommodations of humanity administered to him: and if the ship is ready for her departure, she is not to stay for him; if he recover, he is to have his full wages, deducting the master's charges laid out for his account." 2 Pet. Adm. lxxxvi-vii. It will be noted that here there is no mention of charges over and above his usual fare. See opinion of Edw. Simpson, 12 Feb. 1755, in which the Admiralty court, apparently referring to the Laws of Oleron (inasmuch as the language "have been at" is employed rather than "laid out"), was of the opinion that the seaman's wages were chargeable for all amounts the master has "been at." Mars. Adm. 396 (1885). "And I know of no law received in this country whereby merchant ships of any burthen are obliged to have an apothecary or surgeon on board, or that subjects a ship to the charge of curing a sick mariner, unless he be hurt in the service of the ship, in which case he is to be taken care of at the ship's expense." *Ibid*.

age, the ship and owners were not obligated to care for him after the voyage had been continued without him, it being difficult to believe that it could have been contemplated that enough provisions be left to carry him through any prolonged illness or disability.

The ancient provisions, therefore, in all probability were adjustments made in consideration of the embarrassing position in which a mariner found himself when ill in an alien land. He slept, ate, and worked on board a ship, and when he was sick he could not go home and be cared for by his family, so provision was made that he be cared for on board. Where he was too ill to be on board, but was still a part of the ship's company, arrangements were made to give him his customary provisions on shore and treat him in the same way he would have been treated on board, until by necessity he had to be left behind. If he recovered, he was permitted to sue for wages contracted for, his breach having been no fault of his own.

Viewed this way, the ancient doctrine of maintenance and cure was a plain recognition of the fact that a mariner is a shrimp and not an oyster. It was not a Blue Cross rider on his contract. This view of the matter ultimately was taken by the English courts. The question arose in 1854 in *Organ v. Brodie*,¹⁸⁶ an action for the price of board, lodging, attendance, and necessities brought against a shipowner by the proprietor of a public house. There had been an accident during the weighing of the anchor, and several seamen were seriously injured. The master had taken them ashore to the nearest public house, which happened to be the plaintiff's, and told the plaintiff that the owner would pay for them. The ship then took on fresh hands and departed on its voyage. The injured seamen remained at the plaintiff's house for a considerable time, and he brought an action for their food, lodging, and medicine. The Court of the Exchequer ruled that the owner was not liable, for there being no prospect of the mariners continuing on the voyage, the master had no authority to pledge the owner's credit in their behalf. There was no discussion of the admiralty doctrine of care for sick and injured mariners, the case turning on whether the expenditure was for a necessary. The entitlement of a mariner to medical treatment at the expense of the ship had been the subject of statute since 1835,¹⁸⁷ and between the trial and disposition of *Organ v.*

¹⁸⁶ 10 Exch. 449 (1854).

¹⁸⁷ 5 & 6 Wm. iv, ch. 19, § xviii (1835).

Brodie the provisions of the Act of 1835 were substantially re-enacted as part of the Merchant Shipping Act of 1854, providing that the duty to cure mariners who fell sick or were injured in the service of the ship extended until they were cured, died, or were returned to England.¹⁸⁸

Before the decision in *Organ v. Brodie* and the passage of the English Merchant Shipping Act, our law had begun to develop along different lines. In the earliest reports, the matter was discussed by Judge Peters in the Pennsylvania district, who reviewed the ancient codes and concluded that the cure of injured seamen was to be charged to the ship.¹⁸⁹ These notes do not treat of the difference between injuries at home and abroad, though his introductory statement in one of them suggests that he thought of the duty as existing primarily in foreign ports.¹⁹⁰ He proceeded largely from a straight reading of the ancient provisions, stating, for instance, that medical charges, as distinct from nursing, were to be deducted from the mariner's wages. This he deduced from the fact that the Laws of Oleron required that the ill seaman put on shore was to have a ship's boy sent along to take care of him.¹⁹¹ He offered no opinion on the duration of the duty or at what point it arose. In *Harden v. Gordon*,¹⁹² in 1823, Mr. Justice Story, sitting in the circuit court in Maine, held that the duty to provide maintenance and cure at the charge of the ship extended to sickness as well as accidents in the ship's business. In Story fashion, he reviewed all the ancient codes, satisfied himself that he knew the contents of the one he could not find, and found them all unhesitatingly in support of the owner's duty to provide for sick and injured seamen during the voyage. And he added that it was a sound doctrine, for seamen go into strange parts of the world and are peculiarly susceptible to diseases that abide in such places. So while the *Harden* case did away with the distinction between being wounded in the ship's service and illness through disease, the result was justified on the

¹⁸⁸ Eng. M.S. Act, 17 & 18 Vict. ch. 104 § 228 (1854).

¹⁸⁹ See *Scott v. The Brig Greenwich*, 1 Pet. Adm. 155, 156 n. (1802); *Swift v. The Ship Happy Return*, *id.* at 253, 255 n. (1799).

¹⁹⁰ "Expenses for boarding on shore, in a foreign port particularly, has been often brought forward." 1 Pet. Adm. at 255 (1799).

¹⁹¹ Art. VII, 1 Pet. Adm. *xvi.*

¹⁹² 2 Mason 541 (C. C. Maine 1823).

ground that seamen are free-swimming fish,¹⁹³ and on its facts the case was limited to illness abroad.

Nine years later in *Reed v. Canfield*,¹⁹⁴ Mr. Justice Story took the step which ultimately transformed the duty to provide care abroad to today's liability for medical treatment and maintenance until maximum improvement is attained. In the *Reed* case, the ship had left New Bedford on a whaling voyage. When it reached New Bedford on its return, the master went ashore and gave his permission to one of the mates to go ashore in his absence. Both mates wanted to go and, taking volunteers from among the crew, rowed ashore in one of the ship's boats. They had supper, returned to the boat, and started back to the ship. In the meanwhile the wind had come up and they were driven away from the ship into the ice-filled water, where they were stranded until relieved from shore. By this time they had suffered badly from exposure, the plaintiff having to have his toes amputated, crippling him for life. Mr. Justice Story was back at the Laws of Oleron, Wisbuy, and the Hanse Towns. These laws provided that the seaman who was wounded in the service of the ship was to be cured at the expense of the ship, he held, and it was service of the ship, not the location of the port in which the seaman was injured, that governed the scope of the duty. The plaintiff had been under the care of a physician for more than a year and had required constant medical aid, nursing, diet, and other assistance. The claim was allowed in full.

It will be noted that in *Reed v. Canfield*, Mr. Justice Story treated the case as one of wounding, rather than one of sickness, mentioning that the Laws of Wisbuy "specifically" stated that if a mariner goes ashore in the ship's business, and is wounded, he is to be cured at the ship's charge. In treating the case as a wounding case, he was able to cite the sixth of the Laws of Oleron, which speaks of cure,¹⁹⁵ rather than the seventh, which deals with sickness and speaks of putting the mariner ashore with a ship's boy and his usual mess.¹⁹⁶

Between *Reed v. Canfield* and *The Osceola*, there were several

¹⁹³ Sailors are peculiarly susceptible to diseases to which they are exposed in strange places.

¹⁹⁴ 1 Sumn. 195 (C.C. Mass. 1832).

¹⁹⁵ 1 Pet. Adm. *xiv*.

¹⁹⁶ *Id.* at *xvi*.

opinions in the lower courts that took issue with the broad sweep of Mr. Justice Story's conception of the ship's duties of care for sick and injured seamen. Notable among them are Judge Betts's opinions in 1846 in *Nevitt v. Clarke*¹⁹⁷ and in 1849 in *The Atlantic*.¹⁹⁸ In both these cases he took issue with the proposition that maintenance and cure, arising as it does out of the employment relationship, could be extended beyond the employment period.

In *Nevitt v. Clarke*, the plaintiff had become ill during a voyage, ostensibly from inhaling fumes from a cargo of turpentine, and was left in the hospital in Valparaiso, where he remained for some five months. About the time he was released from the hospital the ship was sold, terminating the contract with the crew. The plaintiff made his way back to New York. He remained in poor health, was much of the time "out of employ and at board," and was attended by a physician at times. Judge Betts held that he was entitled to his wages until he arrived in New York, and that his right to maintenance ceased with his entitlement to wages. In *The Atlantic*, the plaintiff shipped on a three-year whaling voyage on a lay or share agreement. After seven months at sea, he fell from the maintopsail yard and was so badly injured that he was taken ashore to the hospital where he remained for about twenty-one months. On the way back the ship picked him up and brought him back to New London, the home port. Judge Betts held that he was entitled to the expenditures made for his maintenance and cure during the voyage, but again that they ceased on arrival in New London. Betts took issue with Mr. Justice Story for applying to ordinary sickness and accidents the rule applied to mariners wounded while fighting for the ship. He noted the English statutes of 1835 and 1854 and observed that they laid down a clear and practical rule on the subject. He added, however, that the rule as set out was subject to variation according to the circumstances, observing:¹⁹⁹ "When a course of medical treatment, necessary and appropriate to the cure of a seaman, has been commenced and is in a course of favorable termination, there would be impressive propriety in holding the ship chargeable with its completion, at least for a reasonable time after the voyage is ended or the mariner is at home."

¹⁹⁷ Olcott 316 (S.D. N.Y. 1846).

¹⁹⁸ 1 Abb. Adm. 451 (S.D. N.Y. 1849).

¹⁹⁹ *Id.* at 480.

These opinions were cited with approval by Judge (later Mr. Justice) Henry Brown in the Eastern District of Michigan as late as 1890, in an opinion that attributed *Reed v. Canfield* to "[Mr. Justice Story's] well-known leaning toward the admiralty courts, and his belief in the beneficence of their jurisdiction and forms of relief" which "may have had a certain influence in inducing him to extend its aids to cases not properly within its purview."²⁰⁰

It was to this course of decision that Mr. Justice Brown referred in the first proposition of *The Osceola*, when he added the qualification "at least so long as the voyage is continued."²⁰¹ By 1916, it was apparent that Mr. Justice Story's Laws of Oleron were the rule and Judge Betts's and Mr. Justice Brown's were not,²⁰² and Judge Learned Hand could say that "cases to the contrary were all decided at a time when general notions of what was just in such matters favored the libellant much less than at present. Certainly I should not have the right to change a well-settled rule because it did not answer present convictions, but when the matter is open and inclines decidedly towards such convictions, it would be wrong to twist it back again."²⁰³

VIII. THE DOCTRINE OF UNSEAWORTHINESS: FROM CONTRACT TO STATUS

The doctrine of unseaworthiness has its origins in contracts of marine insurance, and in charter parties. When an owner chartered his ship, or applied for insurance on his voyage, it was held that he warranted to the charterer or insurer that the vessel was "tight, staunch, and strong."²⁰⁴ This was a very old principle,²⁰⁵ and at the time we adopted our Constitution there was a considerable body of case law on the subject. It can be said with confidence that the duty to provide a seaworthy vessel was absolute in the sense that want of

²⁰⁰ The *J.F. Card*, 43 Fed. 92, 94 (E.D. Mich. 1890).

²⁰¹ 189 U.S. at 175.

²⁰² In fairness to Mr. Justice Story, it must be said that the ancient codes mixed "hurt" with "wounded," and some of them included special provisions for mariners wounded in service of the ship.

²⁰³ The *Bouker No. 2*, 231 Fed. 254, 255 (S.D. N.Y. 1916).

²⁰⁴ See PARK, MARINE INSURANCE 221 (9th ed. 1800); ABBOTT 180.

²⁰⁵ See, e.g., *Carter v. Boehm*, 3 Burr. 1906 (K.B. 1766), opinion by Lord Mansfield.

scienter did not abrogate the unseaworthiness defense, either in the case of insurance²⁰⁶ or the case of a charter party.²⁰⁷ As to the effect of the knowledge of the charterer or insurer, or previous inspection, the authorities are vague. It is stated by Park, citing French authorities, that even where the insurer examined the ship before it puts to sea, the assured warrants its sufficiency to perform the voyage, for such examinations are only external ("for she is not unripped") and cannot be expected to apprise the insurer of "interior and latent defects." This Park considered proper because the master and owner "cannot be wholly ignorant of the bad state of the ship: but supposing them to be so, it is the same thing, [they] being indispensably bound to provide a good ship, able to perform the voyage."²⁰⁸ Abbott quotes Pothier as being of the opinion that in cases in which there has been an inspection, and the ship found seaworthy, the shipowner loses his freight but is not liable for damages, but offers a caveat that if this be so, the inspection should not be an exterior inspection only.²⁰⁹ With this minor qualification, then, it can be said that the warranty was absolute.

It was not, however, a continuing warranty. Once the ship had sailed there was no warranty that it would remain seaworthy. As Lord Mansfield put it in *Eden v. Parkinson*:²¹⁰ "She may cease to be so in twenty-four hours after departure, and yet the underwriter will remain liable." The reasoning behind the limits on the warranty of seaworthiness is plainly grounded upon the presumption that the owner in fact knows the condition of his ship at the time it sails but cannot be supposed to know what happens to it after it has left. This reasoning was verified by the House of Lords in 1862, in *Gibson v. Small*,²¹¹ when the question of the existence of such a

²⁰⁶ PARK, *op. cit. supra* note 204, at 228a. Park cites *Lee v. Beach*, Sittings at Guildhall after Michaelmas Term, 1762, opinion by Lord Mansfield.

²⁰⁷ ABBOTT 178.

²⁰⁸ PARK, *op. cit. supra* note 204, at 229.

²⁰⁹ ABBOTT 180.

²¹⁰ 2 Doug. 732a (K.B. 1781). *Eden v. Parkinson* did not deal directly with the warranty of seaworthiness, but with a warranty of "neutral ship and neutral property." War broke out after the policy was contracted for. Lord Mansfield's reference to unseaworthiness was by way of illustrating the point that warranties warrant present conditions, not future ones.

²¹¹ 4 H. L. Cas. 353 (1853).

warranty in time contracts of insurance was first presented to the court. The question of the existence of the warranty was submitted to the judges, and although there was some difference of opinion among them, Lord St. Leonards summed up the position of the majority as against it:²¹² "In such a policy neither party can be supposed to know the state of the ship when the risk commenced and therefore it will be unreasonable to imply a condition of unseaworthiness at that period."

The silent term that the ship was seaworthy worked its way from policies of assurance and charter parties into contracts for the carriage of goods in a general ship through the inclusion in the bill of lading of the exception "perils of the sea."²¹³ In the American law it seems that the continuing duty to keep the vessel seaworthy originated in such cases and worked its way back into the law of marine insurance, perhaps by sheer error. In *Putnam v. Wood*,²¹⁴ decided by the Supreme Judicial Court of Massachusetts in 1807, the plaintiff gave the defendant shipowner \$3,000 to invest in foreign merchandise to be purchased abroad and brought back to this country. In consideration of the shipowner's purchasing and transporting the goods, he was to have half the profits. The ship was seaworthy when it left on the voyage over, but because of bad weather was leaking when it arrived in Calcutta. It was surveyed and repaired and then proceeded to load. After it was two-thirds full it began to leak and took four feet of water in the hold. There was cargo damage, and the owner, upon the ship's arrival in the United States, maintained that these losses should come out of the plaintiff's share of the profits, or at least out of the venture, in which event the plaintiff would absorb half the loss. The court held that the loss did not come from "perils of the sea" according to the legal meaning of the term, that an owner, when he charters a ship, or puts her up for freight, has a duty to see that she is in suitable condition to transport her cargo in safety,²¹⁵

. . . and he is to keep her in that condition, unless prevented by perils of the sea or unavoidable accident. If the goods are

²¹² 4 H. L. Cas. 353, 415-16 (1853).

²¹³ See form of bill of lading set out in ABBOTT 174, there spoken of as "old form." The term used is "*the dangers of the seas excepted*."

²¹⁴ 3 Mass. 481 (1807).

²¹⁵ *Id.* at 484.

lost by any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter, upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her. This principle governs not only in charter-parties and in policies of insurance, but it is equally applicable in contracts of affreightment.

The statement as to policies was, of course, not only dictum but probably wrong in terms of precedent. In the 1836 edition of *3 Massachusetts*, the statement is starred with the note "A different rule is applied in the case of insurance," citing the decision of the King's Bench in *Holdsworth v. Wise*²¹⁶ in 1828. In 1831, in *Paddock v. Franklin Insurance Co.*,²¹⁷ Mr. Chief Justice Shaw of the same court noted that it was ridiculous to suppose that the assured warranted to keep the ship seaworthy, for that was the precise risk against which he insured. The compromise he drew in these cases was to the effect that the ship must be seaworthy when it leaves on the voyage, and after that if it becomes unseaworthy, the owner has a duty to repair it and make it seaworthy if it is within his power to do so. Since the warranty imposed in *Putnam v. Wood* attached only to seaworthiness when departing from ports on the voyage, this amounts no doubt to the same thing. Thus at the time of *Gibson v. Small* it was recognized that the English and American rules differed on this subject.

The first application of the seaworthiness doctrine to seamen's articles seems to have come in early cases dealing with non-performance of duties, and the consequent refusal to pay wages. The first of these was *Dixon v. Ship Cyrus*,²¹⁸ before Judge Peters in the District of Pennsylvania. The vessel was bound for Lisbon from Philadelphia. As she came a few miles down the river the mariners discovered that the rigging was insufficient and remonstrated with the captain, finally refusing to proceed until the defect was corrected. The captain sent word to the owners, one of whom went to the ship and talked with the mariners. He promised that no issue would be made of their behavior, and the ship sailed, the deficiency being made up by reweaving some old ropes. When the ship arrived in Philadelphia the crew went ashore, and when they returned they

²¹⁶ 7 B. & C. 794 (Q.B. 1828).

²¹⁷ 28 Mass. 226 (1831).

²¹⁸ 2 Pet. Adm. 407 (1789).

found that day laborers were unloading the vessel. They stayed around but found that there were no provisions for feeding them ("that the kettle was cold") and at length considered that they had been discharged from the ship's service. The owner refused to pay them their wages. Judge Peters observed:²¹⁹

. . . notwithstanding this silence of the articles, law and reason will imply sundry engagements of the captain to the mariners. . . . first, that at the commencement of a voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found *seaworthy*; and, secondly, that the captain shall supply the mariners with good and sufficient provisions whilst they are in his service.

The question of suing the employer for damages, of course, was not involved. Since in 1837, Lord Abinger took *Priestley v. Fowler* as novel, this comes as no surprise. Nowhere were there precedents for personal injury negligence actions by employees against employers.

It must be remembered that although *Priestley v. Fowler* is considered the ancestor of the fellow-servant rule, the case was one of servant against master for the failure of a van provided by the master. It was held that the relationship between master and servant did not create a duty to see that the van was "landworthy." In 1854, in *Couch v. Steel*²²⁰ the English courts were faced with the question whether the shipowner had such a duty to the mariner. In that case the plaintiff's counsel contended that the warranty of seaworthiness created the duty absent in *Priestley v. Fowler*, and therefore the action would lie. The plaintiff had signed articles and gone on the voyage and completed it. During the voyage he became ill, allegedly through the unseaworthiness of the ship, in that he was forced to sleep in wet quarters. He also contended that his condition was made worse through want of a proper medicine chest required by statute.

In separate opinions, Lords Campbell, Coleridge, and Wightman were all of the opinion that the case was governed by *Priestley v. Fowler*. Conceding language in *Gibson v. Small* stating the warranty to the insurer, they were of the opinion that like many other

²¹⁹ *Id.* at 411.

²²⁰ 3 E. & B. 402 (Q.B. 1854).

points of insurance law, it had no bearing on the case. Further, Lord Campbell saw quite clearly the direction a decision the other way could lead. "There being no allegation of a *scienter*," he wrote, "if we held the defendant liable on this count, we must hold a ship-owner always liable to an action from every seaman, if, from any accident, a butt having started or the like, the ship was not seaworthy."²²¹ There was no discussion of the question of continuing duty. In the first place the implied warranty in the insurance policy was not continuing. In the second place, the allegation in *Couch v. Steel* was to the effect that the ship was unseaworthy at the start of the voyage.

Counsel for the plaintiff were not unaware of the American cases, and in argument on the existence of the duty observed that the American law seems to take the duty for granted, citing *Maude and Pollock*.²²² In 1854, then, the English court was aware both of the seeds sown by the early American judicial language of unseaworthiness and of precisely the direction in which it would or might lead.

In 1862, however, in *Turner v. Owen*,²²³ Lord Chief Justice Cockburn presided at *nisi prius* over a case almost exactly like *Dixon v. Ship Cyrus*, and stated to the jury, "on the other hand, when he signs articles it is implied, on the part of the owner, that the ship shall be reasonably fit for navigation, *i.e.*, shall be seaworthy."²²⁴ No mention was made of *Couch v. Steel* or of other cases. Presumably the Queen's Bench thought the problem of a warranty defense to a contract a different problem from a warranty of the ship's condition as a predicate for an action for damages.

If *Maude and Pollock* took the duty for granted, Professor Theophilus Parsons²²⁵ stated it categorically in his work on *Shipping Law* in 1869. In commenting on *Couch v. Steel*, he stated:²²⁶ "This decision is clearly repugnant to the principles of the American au-

²²¹ *Id.* at 407.

²²² *Id.* at 406 (1854). The reference was to MAUDE & POLLOCK'S COMPENDIUM OF THE LAW OF MERCHANT SHIPPING 87, n. (i) (1853).

²²³ 3 F. & F. 176 (Q.B. 1862).

²²⁴ *Id.* at 179.

²²⁵ The son of Judge Theophilus Parsons, who was on the Supreme Judicial Court of Massachusetts at the time of the decision in *Putnam v. Wood*.

²²⁶ 2 PARSONS 78.

thorities . . . , independent of statute provisions." He cited *Dixon v. Ship Cyrus* and several other cases with similar facts.²²⁷

By the time of *The Osceola*, there were many cases in which the mariner had been permitted to recover damages for injuries produced by dangerous conditions on shipboard. Most of these cases were decided without reference to the doctrine of warranty of seaworthiness. Indeed it is clear that that doctrine was considered much more limited than the principle to be applied in personal injury cases. This can be seen from a comparison of the four opinions by Judge Addison Brown cited by Mr. Justice Heury Brown in *The Osceola*. In *The City of Alexandria*,²²⁸ in 1883, there was a death on board during the voyage and the chief cook was sent below to assist in packing the body in ice. He fell through an open hatch between decks and brought his libel on the ground of negligence of the officers in leaving the hatch open and failure to warn him of the fact. Judge Brown held that under the municipal law the negligence was fellow-servant negligence, but that since the libel was brought in the admiralty *in rem*, a right must be shown under the general maritime law. Under that law, he went on, there was no authority for recovery for the negligence of the ship's company. In *The Edith Godden*,²²⁹ two years later, the boom of a derrick used in connection with a steam winch fell on the libelant because an iron hook broke. Inspection showed that there was no latent defect or apparent insufficiency. Judge Brown found that the cause of the breaking was the insufficiency of the equipment to sustain the weights it had to lift in a rolling sea. *The City of Alexandria* was different, he observed, because there the sufficiency of the equipment was assumed. He did not rest the result on unseaworthiness, however, but on the municipal law. Steam winches were new things and therefore the case should be decided by analogy to the municipal law of master and servant. Under the municipal law, the master was under a duty to exercise due care to provide machinery adequate and proper for the use to which it was applied, and to maintain it in like condition. In *The Frank and Willie*,²³⁰ a cargo of

²²⁷ *The Ship Moslem*, Olcott 289 (S.D. N.Y. 1846); *Hindman v. Shaw*, 2 Pet. Adm. 264 (1806).

²²⁸ 17 Fed. 390 (S.D. N.Y. 1883).

²²⁹ 23 Fed. 43 (S.D. N.Y. 1885).

²³⁰ 45 Fed. 494 (S.D. N.Y. 1891).

lumber was stacked in tiers seven feet high, nearly perpendicular, and not fastened together by ties. The tiers became shaky and repeated expostulations were made to the mate against discharging in this manner without leaving proper support at the bottom for the high tiers above, to prevent their falling. They fell and injured the libellant. Judge Brown noted cases pro and con on the subject of mere negligence of the officers, but stated:²³¹ "The principle involved, viz., the duty to provide reasonable security against danger to life and limb, by at least the usual methods, when these dangers are brought home to the knowledge of the proper officers, is manifestly a general one. It attends the seaman wherever he is required to go on shipboard in the performance of his duties, and applies as much to a dangerous condition of the cargo as to defective rigging or a rotten spar." He concluded that "I do not hold the ship liable for the mate's mere negligence as a fellow-workman in producing the dangerous situation, but for his refusal to remedy it when complaint was made, and the danger pointed out to him."²³²

In *The Julia Fowler*²³³ the libellant fell while working on a triangular framework of wood rigged up by the mate of the vessel. It was rigged so that one side was held by the end of a halliard alleged to be known to be unfit for the purpose. The mate had ordered the use of the particular rope and had supervised the rigging of it. The injured mariner had nothing to do with either. The master was sick below. The court held that the mate was not acting in the mere capacity of a fellow servant. The case was, wrote Judge Brown, substantially the same as *The A. Heaton*.²³⁴

Though these cases represent a development of a duty of care to see that safe working conditions are provided, patterned after if not taken directly from the municipal law of master and servant, insofar as they apply to conditions which take place after the ship sails on the voyage, it is apparent that they are no different from the doctrine of seaworthiness as it had developed under the American cases. None of them was predicated upon unseaworthiness at the time the voyage commenced. In *The A. Heaton*,²³⁵ however, decided on

²³¹ *Id.* at 496.

²³² *Ibid.*

²³³ 49 Fed. 277 (S.D. N.Y. 1892).

²³⁴ *Id.* at 278. See text *infra*, at note 235.

²³⁵ 43 Fed. 592 (D. Mass. 1890).

circuit in 1890 by Mr. Justice Gray, the injury was occasioned by failure of a gasket. The question of unseaworthiness was considered and rejected because there was no evidence that the ship put to sea in an unseaworthy condition. The gasket in question was a device that required frequent replacement. During the voyage it had been inspected and the poor condition had been reported to the master who replied "that it lasted the last voyage and he thought it would do this, and that he did not intend to spend much on it, but run it as cheap as he could, because on his return to the United States he would be off, and the ship sold."²³⁶ Citing *Leathers v. Blessing*,²³⁷ and other third-party tort cases in admiralty,²³⁸ Mr. Justice Gray came to the conclusion that actions for negligence were cognizable in admiralty, and that a lien existed for personal injury in America, though it was doubtful in England. He went on to set aside the question of fellow-servant negligence by reference to *C. M. & St. P. R. Co. v. Ross*,²³⁹ and the observation that "No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law."²⁴⁰ Again, *The A. Heaton* was decided on general principles of common law applied by analogy in admiralty, and not on the ground of unseaworthiness, but again it would have made no difference if the matter had been approached through the early unseaworthiness cases dealing with affreightment, for there was an unseaworthy condition developing after the vessel put to sea, notice of the condition to the proper officers, and opportunity to correct it, and in this case a wilful refusal to do so.

The only case cited by Mr. Justice Brown in *The Osceola* in which the holding was actually predicated upon unseaworthiness was *The Noddleburn*²⁴¹ decided by Judge Deady in the District of Oregon in 1886. There the libelant was injured when the seizing on a crane-line broke. Shortly before the accident the mate had sent a man to repair the seizing and the master asked the mate what he was doing. The mate told him and the master put the man to other

²³⁶ *Id.* at 594.

²³⁷ 105 U.S. 626 (1881).

²³⁸ Including *The Harrisburg*, 119 U.S. 199 (1886), which, he stated, had been overruled only on the issue of abatement by death.

²³⁹ 112 U.S. 377 (1884).

²⁴⁰ 43 Fed. at 595.

²⁴¹ 28 Fed. 855 (D. Ore. 1886).

tasks, accusing the mate in obscene and filthy terms of trying to curry favor with the men by assigning easy tasks. Judge Deady noted the decision in *Couch v. Steel*, observed that it was decided on authority of *Priestley v. Fowler*, noted further that the doctrine of the later case had been modified by *Ross* and other American cases at common law, and cited Parsons' suggestion that the case was not reconcilable with the American authorities. But even if the *Couch* case were accepted as the law, he went on, it was not in point because in *The Noddleburn* "there was actual knowledge on the part of both the master and the mate of the unsound and unseaworthy condition of the vessel in the particular of this rope, coupled not only with willful negligence, but wanton indifference, on the part of the former. It is admitted that the master stands for and represents the owner while in charge of the vessel, and, in my judgment, the mate, when not in the immediate presence of the former, does also."²⁴²

It is clear that the duty of the master, at least, to use due care in avoiding injury to the crew was looked upon as broader than the duty to use due care to maintain seaworthiness, for in *The Titan*²⁴³ the injury was the result of a collision. There was no unseaworthy condition alleged, either at the time of sailing or after, for the collision was the product of negligent navigation by the pilot. *The Titan* was decided flatly on the authority of *Ross* to the effect that the pilot was not engaged in the same employment with the mariner. The libellant was a deck hand on board but not on duty at the time.

In reconciling these cases in *The Osceola*, Mr. Justice Brown was able to characterize all but *The Titan* as unseaworthiness cases. He disposed of *The Titan* by observing that the general question of liability was not discussed. This, as has been seen, is not quite accurate, but it is true that the discussion was short and did not cite any of the admiralty cases. On the very facts of the two cases, *The Osceola* is inconsistent with *The Titan*, and the latter can be taken as disapproved.

In 1876 England modified by statute²⁴⁴ the rule in *Couch v.*

²⁴² 28 Fed. at 858.

²⁴³ *The Titan*, 23 Fed. 413 (S.D. N.Y. 1885).

²⁴⁴ Eng. M.S. Act § 7, 34 & 35 Vict. ch. 110 (1871).

Steel. The statute provided that in every contract of service there should be implied an obligation of the owner, that he, the master, and the agent charged with the loading and preparation for sending her to sea, should use all reasonable means to insure the seaworthiness of the ship for the voyage. It added the qualification that the owner should not be subjected to liability for sending out an unseaworthy vessel where his act was reasonable and justifiable. The English law, as stated in the statute, and the American law as it had developed in the cases prior to *The Osceola*, were substantially the same, at least as applied to conditions arising after the commencement of the voyage. It should be remembered that in *The Osceola*, the doctrine was spoken of as settled law, in England and America, the statute of 1876 was mentioned as the source of this departure from the ancient codes, and the American equivalent as being a consensus among the circuit and district courts. "We are not disposed to disturb so wholesome a doctrine," wrote Mr. Justice Brown, "by any contrary decision of our own."²⁴⁵ In view of the source to which it is attributed, and the cases cited in its support, it must be that Mr. Justice Brown viewed the duty to guard against subsequent unseaworthiness as that established in lower court cases, that is to say, a duty of care, not a warranty of the condition of the ship.

During this period, there was no authority on the duty to provide a seaworthy ship at the outset, as applied to personal injuries to seamen. The precise point did not come before the Supreme Court until 1922 in *Carlisle Packing Co. v. Sandanger*.²⁴⁶ The *Sandanger* case was a common-law action for negligence for injuries produced by an explosion on a launch. The negligence alleged was in sending the plaintiff out in a boat on which there was a can marked coal oil that contained gasoline and in not providing the boat with life preservers. The coal oil was to be used in starting fires in a small stove on the boat. The state court had given instructions on common-law negligence, including contributory negligence, but the jury had returned a verdict anyway. The case came to the Supreme Court on certiorari on the sole point of error in giving the common-law instructions. Mr. Justice McReynolds held the error harmless,

²⁴⁵ 189 U.S. at 175.

²⁴⁶ 259 U.S. 255 (1922).

because, he wrote,²⁴⁷ "we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that if thus unseaworthy and one of the crew received damage as a direct result thereof, he was entitled to recover compensatory damages." He cited two cases, *The Sylvia*²⁴⁸ and *The Southwark*.²⁴⁹ These two cases were both cases under the Harter Act in which the Court had said that the act did not excuse the shipowner from beginning the voyage with a seaworthy ship. In *The Sylvia* it was held that where the ship left with ports open that could be closed at any time, failure to close them did not make the ship unseaworthy but constituted simple negligence. In *The Southwark* it was held that a ship in the beef trade was unseaworthy when it had insufficient refrigeration equipment at the start of the voyage.

The *Sandanger* case, then, applied to seamen's injuries the warranty of the shipowner to furnish a seaworthy vessel at the outset of the voyage, and rounded out the unseaworthiness doctrine as developed in the early affreightment cases, said by Parsons to apply to seamen's articles. There was an absolute duty to provide a seaworthy vessel, and a duty to correct a later unseaworthy condition where there was notice of it and an opportunity to do so.

In *Plamals v. S.S. Pinar del Rio*,²⁵⁰ six years later, it became apparent that in recognizing the absolute duty to provide a seaworthy vessel at the start of the voyage, the Court had abandoned the second part of the American variety of warranty of seaworthiness, the duty to employ care to keep it seaworthy. In *Pinar del Rio*, the libelant was injured when a boatswain's chair fell because of defective rope. The mate had selected the rope and supervised the rigging of the chair. There was a testimony to the effect that the seaman refused to go up in the chair because of the condition of the rope, but was ordered to go, and did. It is surprising that the case was brought in admiralty, inasmuch as there was obvious negligence and the cause of action arose after the passage of the Jones Act. The libelant was a Spanish subject injured on an English ship,

²⁴⁷ *Id.* at 159.

²⁴⁹ 191 U.S. 1, 8 (1903).

²⁴⁸ 171 U.S. 462, 464 (1898).

²⁵⁰ 277 U.S. 151 (1928).

however, and perhaps because of the assumption of the day that the Jones Act required an election of remedies, and the doubt as to its application to one so situated, he proceeded against the ship *in rem*. The Court held that the Jones Act was not to be applied in a libel *in rem*. Mr. Justice McReynolds devoted three lines to the subject of unseaworthiness, observing simply that the record did not support the suggestion that the ship was unseaworthy because the mate selected a bad rope when good ones were available.²⁵¹ This was flatly contrary to the holding in *Olson v. Flavel*,²⁵² and unless *The Julia Fowler*²⁵³ is distinguished on the ground that the master was sick, flatly contradictory to the holding in that case. It also contradicted the holding in *The Frank and Willie*.²⁵⁴ When it is remembered that all these cases were cited by Mr. Justice Brown in *The Osceola* as being a consensus of American lower court cases establishing a doctrine the Court thought "so wholesome" that it was not disposed to disturb it, it will be seen that *Pinar del Rio* represented a sharp restriction of the duties formerly supposed to exist on the part of the owner to provide safe appliances, whatever the label placed upon it.

But history was to repeat itself. When Mr. Justice McReynolds wrote the opinion stripping the seaman of his *in personam* rights to an action for negligence governed by the common law as expanded by § 20 of the Merchant Seaman's Act of 1915,²⁵⁵ they were restored with a dividend in the Jones Act.²⁵⁶ His halving of the unseaworthiness doctrine in *Pinar del Rio* was to be restored with a dividend in *Mabnich v. Southern S.S. Co.*²⁵⁷ in 1943.

The *Mabnich* case was what is known as a "widow" case. The plaintiff was a seaman injured under almost exactly the same circumstances as those in *Pinar del Rio*. He fell from a staging because of the breaking of a rope selected by the mate. As in that case, there was good rope available. Under the Jones Act there was no doubt of a cause of action. This time the libelant did not bring his action under the statute because he had let the period of limitations expire while he hoped for some sort of voluntary settlement of the claim.

²⁵¹ *Id.* at 155.

²⁵² 34 Fed. 477 (D. Ore. 1888).

²⁵³ 49 Fed. 277 (S.D. N.Y. 1892).

²⁵⁴ 45 Fed. 494 (S.D. N.Y. 1891).

²⁵⁵ 38 Stat. 1164 (1915).

²⁵⁶ 41 Stat. 1007 (1920).

²⁵⁷ 321 U.S. 96 (1944).

After a most disingenuous review of authorities, Mr. Justice Stone held that the duty to provide seaworthy appliances is absolute and independent of negligence, so *a fortiori* the existence of negligence does not result in a bar to recovery for unseaworthiness. He began with a statement, true so far as it goes, that since *The Osceola* it had been the settled law that the vessel and the owner are liable to indemnify a seaman for injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment. Then he stated that in "a number of cases in the federal courts"²⁵⁸ prior to *The Osceola*, the right seems to have been rested on negligence, but that in later cases both the Supreme Court and the lower federal courts "have followed the ruling of *The Osceola*, . . . that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances."²⁵⁹

Of course there was no such ruling in *The Osceola*. It must be conceded, however, that the *Sandanger* case could be looked upon as reading into the seaman's contract a warranty of the seaworthiness of the vessel when it begins the voyage. Here, however, the condition alleged to be unseaworthy was the product of negligent behavior at sea. As it was pointed out in the discussion of *Pinar del Rio*, there was ample authority for the holding that at least when the defective condition was within the knowledge of the officers of the ship, the owner was liable for such negligence under the customary limits of the American version of the warranty of seaworthiness. Mr. Justice Stone, however, proceeded on other grounds. Instead of holding that there was liability *because* the subsequent unseaworthiness was the product of negligence, he held that it produced liability independent of negligence. The cases he cited did not in any way support the holding. As we have seen, the *Sandanger* case dealt with unseaworthiness "when she left the dock."²⁶⁰ *The Arizona v. Anelich*²⁶¹ held only that assumption of risk was not a defense in a case brought under the Jones Act. The case came to the Court on a finding of negligence. *Beadle v. Spencer*²⁶² was to the same effect, there being a finding that lumber was negligently stacked on deck and fell over because of its instability, precisely

²⁵⁸ Including *The Noddleburn* and *The Julia Fowler*.

²⁵⁹ 321 U.S. at 100.

²⁶¹ 298 U.S. 110 (1936).

²⁶⁰ 259 U.S. at 259.

²⁶² 298 U.S. 124 (1936).

the facts of *The Frank and Willie*. In *Socony-Vacuum Oil Co. v. Smith*²⁶³ there was a finding that the petitioner knew of the defective condition of the step that was found to be defective. The only two cases cited which dealt in any way with the absolute duty to provide a seaworthy vessel were *The H. A. Scandrett*²⁶⁴ and *The Edwin I. Morrison*.²⁶⁵ *The H. A. Scandrett* was a libel for personal injuries brought by a seaman who fell backward into an open hatch when the knob pulled off a door leading to seamen's quarters. There was a special verdict of the jury to the effect that:²⁶⁶ "The respondent failed in its duty to furnish libellant a vessel on this voyage which commenced at Duluth on November 12, 1933, in a seaworthy condition." The court held, in an opinion by Judge Augustus Hand, that the duty to provide a seaworthy vessel *at the start of the voyage* was absolute. *The Edwin I. Morrison* was a libel arising out of an alleged breach of a charter party. A cargo of guano had been damaged by water that came through a bilge-pump hole when the cap, which had not been inspected in eleven years, came off during rough weather. Mr. Chief Justice Fuller stated the normal American rule on the warranty of seaworthiness:²⁶⁷ "Perils of the sea were excepted by the charter party, but the burden of proof was on the respondents to show that the vessel was in good condition and suitable for the voyage *at its inception*, and the exception did not exonerate them from liability for loss or damage from one of those perils *to which their negligence*, or that of their servants, contributed." Mr. Justice Stone noted that the Harter Act had substituted "due diligence" for the absolute duty to provide a seaworthy vessel, but no such change had been made in the maritime law of personal injuries.

The story of how the absolute duty created in *Mahmich* was verified and extended to longshoremen has been told frequently. In *Seas Shipping Co. v. Sieracki*²⁶⁸ in 1944, in an opinion by Mr.

²⁶³ 305 U.S. 424, 427 (1939): "We must accept the verdict as establishing . . . that [plaintiff] knew that it was defective at the time of the accident, for the only evidence of any breach of duty by petitioner was respondent's testimony that he knew of the defect and had reported it to the first assistant engineer two or three weeks before the accident."

²⁶⁴ 87 F. 2d 708 (2d Cir. 1937).

²⁶⁵ 153 U.S. 199 (1894).

²⁶⁶ 87 F. 2d at 709.

²⁶⁷ 153 U.S. at 211. (Emphasis added.)

²⁶⁸ 328 U.S. 85 (1946).

Justice Rutledge, the Court found that in early times mariners unloaded ships, but in later times independent contractors did this work. The purpose of the warranty of seaworthiness being designed to protect workers doing seamen's work, it should be applied to these "substitute seamen." This piece of history has been questioned in a number of places,²⁶⁹ though it has recently been recognized that Supreme Court historical premises, unlike those of mere historians, are good until overruled.²⁷⁰ It is fair to say, however, for what it is worth, mariners did load and unload ships. The fifth article of the Laws of Wisbuy provides for extra pay for "guidage or hoisting."²⁷¹ The Laws of the Hanse Towns suggest that sometimes they did not, for the fifty-first article provided that the master ought to put a mariner in each boat or lighter that is to carry salt to land, "as to see that a right account is kept of its measure," indicating that in the salt trade others unloaded the cargo; the twenty-seventh speaks of the merchants being bound to load the ship by a pre-fixed time.²⁷²

There is an extended discussion of the question in *Swinney v. Tinker*,²⁷³ decided by the High Court of Admiralty in 1774, just two years before the American Revolution. There the master refused to pay the mariners' wages because they refused to "unliver" potatoes in London harbor. Evidence was introduced on both sides as to the custom of the particular trade. There is another extended discussion in *Swift v. The Ship Happy Return*²⁷⁴ in the District of Pennsylvania in 1799. As in *Swinney v. Tinker*, it was relegated to local custom. Judge Peters observed that by that time, in any event, most of the refusals to pay wages did not occur because the mariners refused to unload after bona fide efforts to make them unload, but "when old quarrels at sea, or recent animosities, or differences about accounts, have embittered the parties."²⁷⁵

What is remarkable about the Supreme Court's history is not, then, the accuracy of its research, but the conclusion that proceeds

²⁶⁹ See, e.g., Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L. Q. 381 (1954).

²⁷⁰ *Forkin v. Furness Withy & Co.*, 323 F. 2d 638, 641 (2d Cir. 1963).

²⁷¹ 1 Pet. Adm. lxx.

²⁷² *Id.* at xcix, cviii.

²⁷³ Mars. Adm. 139 (1774).

²⁷⁴ 1 Pet. Adm. 253 (D. Pa. 1799).

²⁷⁵ *Id.* at 255.

from what it found. It is obvious that in 1799 there was no precedent for a personal injury action predicated upon the negligence of the master or crew or upon any warranty of seaworthiness. Indeed, there was no common-law action for negligence of the master. Whatever different treatment the mariner received in the courts (*i.e.*, maintenance and cure), he received only because he was a shrimp. The oyster, seaman or longshoreman, proceeded at common law. So even if he did unload the cargo, it was not for that reason that he was treated as he was.

IX. THE REMAINING WARDS AND THE KINDLY GUARDIAN

From very early times one finds reference to the special solicitude with which the admiralty looks after the rights of seamen.²⁷⁶ They are generally regarded "by the nature of their employment, [as] subject to peculiar failings and vices, the offspring of unpolished manners, and hearty, rude and fearless habits. . . ."²⁷⁷ For this reason, wrote Judge Peters in 1806, the maritime law was designed partially to reform them (through heavy fines and mulcts, and corporal inflictions), but where the harshness of this treatment can be balanced by indulgences and encouragements, he suggested that these were ever enjoined.²⁷⁸ Cases in which these "wards of the admiralty" statements appeared were typically ones in which the master or shipowner was trying to get out of paying the seaman his wages because of some alleged misbehavior during the voyage or fine-print provision to which the seaman, illiterate in all probability, had affixed his mark. But while the courts were indulgent in overlooking faults that might deprive the seaman of wages for backbreaking labor, and assiduous in protecting his established rights, it must be conceded that seamen under the "general maritime law" were no favored class. Their wages were dependent upon the earning of freight, and three years' wages could be lost in an hour when the ship went down.²⁷⁹ They were called upon to defend the

²⁷⁶ See, *e.g.*, Dr. Wynne for the petitioners in *Swinney*: "But that is not the case in an agreement between mariners and masters of ships. The former are very inattentive and ignorant, and are always considered by the Court as pupils, and guards them against being drawn into what is not contained in the contract." Mars. Adm. at 142.

²⁷⁷ See *J. Watson v. The Brig Rose*, 1 Pet. Adm. 132, 137 (1806).

²⁷⁸ *Ibid.*

²⁷⁹ 1 MOLLOY 357.

ship and its cargo at the risk of their lives²⁸⁰ and were jointly responsible for theft or embezzlement.²⁸¹ They could be beaten, put in irons, or if they deserted, hanged.²⁸²

The indulgences and encouragements of which Judge Peters spoke were generally of two types. One was the equitable construction of contracts. Because seamen were an ignorant lot, and would sign anything, the courts were reluctant to hold them to oppressive bargains. Because they were subject to a great variety of fines and mulcts, the courts were watchful lest the owners and masters employ fines to get their labor for nothing. The other arose from special circumstances arising from the peculiar nature of their employment. They signed on for the voyage, lived and worked on the ship, were paid at irregular intervals, and were under the domination of the ship's officers. The master was therefore considered a sort of *pater familias*, dispensing punishment but with a duty to care for the persons put under his charge.

Our early decision to mark off as maritime everything that occurred on navigable waters, rather than occurrences on the high seas, *ipso facto* introduced anomalies into the system. Thus when Fred Jones fell ill aboard "The Bouker No. 2," he got off and took the suburban train to Plainfield where he lived with his wife. His calling required no longer absences from home than a neighboring drummer. He went to the Plainfield hospital and not to the marine hospital because neither he nor his employer ever thought of the marine hospital. His employers were contractors by trade, engaged in garbage disposal. Jones had only recently taken the job on the tug and at the time of the action was driving a bus.²⁸³ Once the special circumstances of the seaman disappeared, many of them working under the same conditions as other workers, all that was left to sustain the concept of "the ward of the admiralty" was a general eleemosynary itch. This is a distemper to which the Fuller Court was not particularly subject. Mr. Justice Brown had joined

²⁸⁰ They lost their wages for neglecting to assist the master in defending the ship against attack by pirates. See *ABBOTT* 374.

²⁸¹ See *Sullivan v. Nathaniel Ingraham*, Bee 182 (D. S.C. 1802).

²⁸² See *Thorne v. White*, 1 Pet. Adm. 168 (1806).

²⁸³ See *The Bouker No. 2*, 241 Fed. 831 (2d Cir. 1917), *cert. den.* 245 U.S. 647 (1917).

in the opinion by Mr. Justice Brewer in *Baltimore & O. R. Co. v. Baugh*,²⁸⁴ and in *The J. F. Card*²⁸⁵ had taken issue with the extension of the special seaman's right to maintenance and cure to cover medical treatment at home. Brewer was still on the Court. Mr. Justice Holmes's views on *respondeat superior* are well known,²⁸⁶ and from his opinion in *Kalleck v. Deering*,²⁸⁷ we know that he was of the opinion that maritime cases were no exception.

The Osceola marked a refusal of the Court to manufacture for maritime cases an action for negligence it was unwilling to create at common law. In those pre-*Erie*²⁸⁸ days, the Court had injured parties of all kinds to take care of. It took the position that all had redress *in personam* under general principles of municipal law, and refused to create a special action for negligence in favor of seamen, free from the limitations the Court itself had imposed in other cases.

By the early 1940's, its responsibility for determining general tort principles had been limited by *Erie* to cases in admiralty and maritime jurisdiction. Within this jurisdiction were seamen and longshoremen who worked on navigable waters. Since no special circumstances surrounding the life of a seaman (in the jurisdictional sense) distinguished him from the longshoremen, there remained no reason for treating him differently. Seamen no longer fought off pirates. Some of them dumped garbage and rode home on the train. They both were subject to the same sort of injuries, falling down a hatch, slipping on the grease, getting hit on the head when a winch gave way, getting caught in the gears, slipping on the beans.

Certainly this makes sense. The question asked is why the Court elected to treat longshoremen like seamen instead of seamen like longshoremen, for it was the seaman who had become like the landlubber, not the landlubber who had put to sea. The answer lies in the fact that seamen were treated differently by Congress. In the early forties they comprised, together with railroad workers, the only significant group of American workers without an absolute compensation for injuries. The Court could not fabricate a workmen's compensation statute, but it found in the traditional

²⁸⁴ 149 U.S. 368 (1893).

²⁸⁶ See *Agency*, 4 HARV. L. REV. 345 (1891).

²⁸⁵ 43 Fed. 92 (E.D. Mich. 1890).

²⁸⁷ 161 Mass. 469 (1894).

²⁸⁸ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

maritime law, in the expansion of maintenance and cure and the extension of the doctrine of unseaworthiness to cover operating negligence, the material for approximating a system of absolute liability. Once the traditional seamen's remedies had been thus enlarged and expanded, he enjoyed full damages for injuries incurred under circumstances identical to those that entitled the longshoreman only to a compensation award of limited amount. Since the seaman's enlarged remedies had no particular connection with any special circumstances of his trade, equality of treatment demanded that a way be found to extend these remedies to longshoremen.

Viewed from within the admiralty jurisdiction the present system makes good sense. The maintenance and cure of the seaman has been stretched to come as close as may be to the Harbor Workers' Compensation award, giving each a guaranteed limited award to take care of immediate necessities, and the concept of negligence under the Jones Act and the general maritime law, coupled with the expanded unseaworthiness doctrine, provide each with full jury damages in the case of most accidents. It is not pure equality, of course, for the seaman badly injured by his own bone-headedness, whose injury is disabling but quick to reach maximum cure, has no remedy at all, while the longshoreman has his compensation award. And the longshoreman injured through the bone-headedness of a fellow workman has only his compensation award, while the seaman injured under similar circumstances has his action under the Jones Act. It is as equal, however, as vulcanizing of history and precedent can make it.

Viewed from outside the admiralty jurisdiction, the system is more difficult to justify. In the first place, seamen today are not only difficult to distinguish from longshoremen in terms of any special circumstances of hazards and hardship, seamen and longshoremen are difficult to distinguish from workers in hundreds of equally hazardous occupations. As counsel pointed out in *Gutierrez*, it is just as likely that someone will slip on rolling beans in a warehouse in Louisville as that he will do so on the pier in New York. So once seamen's remedies are divorced from seaman's peculiar risks, and applied to normal industrial mishaps throughout the industry, the need for their existence becomes questionable. These differences are jurisdictional, of course, for the *Erie* doctrine has stood as a quarantine line preventing the spread to common law

of the Court's eleemosynary itch, and the Congress for nearly half a century has declined to bring seamen and railroad workers within the normal patterns of statutory compensation, largely because of the opposition of seamen and railroad workers. Unless it does, and abrogates by statute the absolute liability of shipowners for full jury damages, it can be predicted that within the admiralty jurisdiction the "broad humanitarian policy" will continue to grow, history and logic will continue to suffer, Mr. Justice Hale will continue to look on in wonderment,²⁸⁰ and Mr. Justice Harlan, Judge Friendly, and I will continue to grow liverish.

²⁸⁰ "The sea is a strange and wondrous thing, and equally so is the law it inspires. Rules derived from it reflect not the fury of this element in its stormy mood but the gentle nature of a close harbor in the morning calm." *Sullivan v. Lyon Steamship Ltd.* 387 P.2d 76, 77 (Wash. 1963).