Seamen Are "Wards of the Admiralty" But Longshoremen Are Now More Privileged

John Ambler
SEAMEN ARE "WARDS OF THE ADMIRALTY" BUT LONGSHOREMEN ARE NOW MORE PRIVILEGED

JOHN AMBLER*

The State of Washington has greatly contributed to the strange result which is the subject of inquiry here. Two important cases leading to this result reached the United States Supreme Court from this State. One case was appealed from the State Supreme Court. One was appealed through the Circuit Court of Appeals from a decision of the United States District Court in Seattle. The cases are almost thirty years apart. To appreciate the absurdity of the present state of the law some background material is needed.

SEAMEN'S RIGHTS OF RECOVERY FOR INJURY OR DEATH

In 1823 Justice Story, sitting as a circuit judge, announced the humane rule that seamen were "wards of the admiralty" and merited a court's indulgence, sympathy and protection. To the present day that rule has been faithfully followed and the expression often re-

---

* Member of the Washington Bar.


3 In Harden v. Gordon, 11 Fed. Cas. 480, No. 6047 (C.C.D.Me. 1823), the court said: "*** Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel, because they are thoughtless and require indulgence; because they are credulous and complying; and are easily over-reached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees." [Emphasis supplied.]
peated. Different social conditions and the protection now afforded seamen by unions and active available counsel have occasionally tempered but never changed this benevolent attitude of the courts.

The general subject of "seamen" engaged the early attention of the Congress of the United States. It has frequently done so since that time. However, the subject of protection of seamen in case of illness, injury or death, except in minor respects, was for many years left primarily to the courts. The courts drew on well-defined rules for seamen's rights developed by international law over the centuries. Such rules were in some respects softened to meet the more enlightened conditions of the day. The entire subject was reviewed in 1903 by the United States Supreme Court in *The Osceola*, a case involving injury to a seaman caused through the negligence of the master. The court denied the seaman recovery saying that while a seaman was entitled by virtue of his calling to certain benefits in case of injury, such as maintenance and cure, he could only collect *indemnity* for an injury sustained in the service of his vessel when the injury was the result of the *unseaworthiness* of the vessel. No right of recovery existed for injury caused through the negligence of a fellow crew member, whether master or otherwise. Justice Henry Billings Brown cited a long list of authorities and emphatically upheld the views of his distinguished namesake, Judge Addison Brown, Jr.,* stated twenty years before in the case of *The City of Alexandria* to the same effect.

---

5 Paul v. U.S. 205 F.2d 38 (3d Cir. 1953), cert. den., 346 U.S. 888. In Larsson v. U.S. 181 F.2d 6 (9th Cir. 1950), cert. den., 340 U.S. 833, the trial judge remarked, 1950 Am. Mar. Cas. 176 (N. D. Cal. 1949): "While seamen are considered wards of the court and justifiably are entitled to special consideration insofar as being given a safe place to work, shipping companies are not absolute insurers. It is not incumbent upon them to treat seamen as if they were in swaddling clothes and incapable of using a modicum of care for their own safety. * * *" (p. 178.)
6 Act of July 20, 1790, c. 29, 1 Stat. 133.
7 Such as: 46 U.S.C. 621-628 (duties of master as to deceased seamen's effects); 46 U.S.C. 666-7 (medicines to be carried aboard); 46 U.S.C. 678-680 (consular duties as to ill or destitute seamen).
8 189 U. S. 158 (1903).
9 Both of these distinguished jurists were born in Massachusetts within six years of each other, but were apparently unrelated. The justice was educated at Yale and made his reputation in Michigan. The judge was older and was educated at Harvard and made his career in New York. Biographical Notes of the Federal Judges, 30 Fed. Cas. 1365.
Thus the maritime law for seamen remained relatively fixed until 1915 when by statute Congress attempted to engraft on the maritime law for seamen, in respect to the fellow-servant doctrine, the more humane common law conception that supervisory employees were not fellow servants but vice principals for whose negligence the employer was responsible.

The interpretation and validity of Section 20 of the LaFollette Act thus adopted in 1915 finally reached the United States Supreme Court in Chelentis v. Luckenbach Steamship Company. In this case a fireman, on board a vessel, claimed that his injury was proximately the result of an improvident order given by a ship's officer. Invoking Section 9 of the Judicial Code as then in effect and Section 20 of the LaFollette Act, he sought recovery for his injuries. Justice McReynolds, over strong dissent, citing as authority his controversial decision of the previous year, Southern Pacific Co. v. Jensen, held that in the absence of express congressional action the well-settled rules of maritime law in respect to seamen, as elaborated in The Osceola, were still controlling and unaffected by common law rules to the contrary. The court emphasized that uniformity of rule in maritime affairs demanded such a result. He brushed aside libellant's reliance on the two Federal statutes. He had this to suggest for future legislation on the subject, if any:

* * * Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, peti-

12 247 U.S. 372 (1918).
12 The Act of Sept. 24, 1789, c.20 Sec. 9, 1 Stat. 76, 77, gave the U.S. District courts exclusive jurisdiction in civil causes of "admiralty and maritime jurisdiction," and added "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." This later became sections 24 and 256 of the Judicial Code. Act of March 3, 1911, c.231 24, 256, 36 Stat. 1091, 1160. It is now re-enacted as 28 U.S.C. 1333. The LaFollette Act was entitled "An Act To promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." Section 20 of the LaFollette Act provided: "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." Act of March 4, 1915 c. 153, 38 Stat. 1185.
12 244 U.S. 205 (1917).
tioner's rights were those recognized by the law of the seat. (p. 384.) [Emphasis supplied.]

The *Chelentis* decision was followed two years later by the passage of the Jones Act. Taking no chances Congress gave seamen the "election" specifically found to be necessary to permit them common law "standards" of recovery. The constitutionality of the Jones Act was shortly upheld. Seamen's liberal rights of recovery for injury or death in the past years have been established by a long series of cases.\(^\text{14}\)

\[\begin{align*}
\text{14} & \text{ Act of June 5, 1920 c. 250, 833, 41 Stat. 1007, 46 U.S.C. 688, which reads: "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right to action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." [Emphasis supplied.]} \\
\text{15} & \text{ Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922) (prior to Jones Act, in common law court, admiralty rule of indemnity for unseaworthiness allowed recovery} \\
\end{align*}\]
LONGSHOREMEN'S RIGHTS OF RECOVERY FOR INJURY OR DEATH BEFORE 1914

Longshoremen created no particular legal problem prior to 1914. Their work in loading and discharging vessels and the work of similar

for injuries sustained by seaman caused by gasoline furnished him in can erroneously marked "coal oil); Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) (constitutionality of Jones Act upheld); Engel v. Davenport, 271 U.S. 33 (1926) (two-year statute of limitation of FELA is incorporated by Jones Act to the exclusion of state statutes even in state courts); Panama v. Vasquez, 271 U.S. 557 (1926) (the limitation in the Jones act concerning place of suit has to do with venue and gives state court concurrent jurisdiction with federal courts); Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927) (failure in a suit of admiralty to establish actionable grounds for indemnity is a bar to a later suit under the Jones Act for the same injury); Pacific S. C. v. Peterson, 278 U.S. 130 (1928) (election by seaman under Jones Act is between indemnity for unseaworthiness or for negligence); Alpha S. S. Corp. v. Cain, 281 U.S. 642 (1930) (assault upon seaman by superior officer reprimanding him may constitute negligence within meaning of Jones Act); Bainbridge v. Merchants Co., 287 U.S. 278 (1932) (seaman suing under Jones Act may do so without security for costs); Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932) (failure of master to give medical attention is negligence under the Jones Act); Warner v. Goltra, 293 U.S. 155 (1934) (a master is a seaman under the Jones Act); Arizona v. Anelitch, 298 U.S. 110 (1936) (seaman under Jones Act does not assume risk of defective appliances furnished to him though defect be known to him). (Justice Stone); Beadle v. Spencer, 298 U.S. 124 (1936) (even in port seaman does not assume under the Jones Act the risk of negligent failure to supply him safe place to work, though obvious to him) (Justice Stone); Socony v. Smith, 305 U.S. 424 (1939) (seaman does not assume under the Jones Act risk of using appliance though known by him to be defective although chosen by him over available safe appliance) (Justice Stone); Jacob v. New York City, 315 U.S. 752 (1942) (the simple tool doctrine is not applicable under Jones Act to seaman who had complained and was promised safe tool); Garrett v. Moore-McCormack, 317 U.S. 239 (1942) (Pennsylvania statute placing upon plaintiff heavy burden of proof for setting aside release cannot supplant admiralty rule applicable in Jones Act cases that seaman's releases must be affirmatively proved to be valid); O'Donnell v. Great Lakes Co., 318 U.S. 36 (1943) (seamen injured ashore in performance of duties may still invoke Jones Act) (Chief Justice Stone); DeZon v. American President Lines, 318 U.S. 660 (1943) (seaman under Jones Act may recover for negligence of ship's doctor); Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944) (seaman may recover indemnity for injuries caused by unseaworthy rope furnished by fellow-servant, even though good rope was aboard) (Chief Justice Stone).

Since the United States has been a ship operator on such a large scale, the subject of its peculiar responsibilities has likewise been sharply litigated. Hust v. Moore-McCormack Lines, 328 U.S. 707 (1946) (general agent of United States is owner pro hac vice and liable for injury as such to seamen under Jones Act); Caldarola v. Eckert, 332 U.S. 155 (1947) (general agent of United States is not owner pro hac vice of the vessel); Cosmopolitan Shipping Company v. McAllister, 337 U.S. 783 (1949) (Hust case expressly overruled).

The ancient contractual obligation to furnish maintenance and cure to seamen injured or taken ill, elaborated by Justice Story in Harden v. Gordon, 11 Fed. Cas. 480, No. 6047 (C.C.D.Me. 1823), has in recent years been reaffirmed and its limits defined. Calmar Steamship Corp. v. Taylor, 303 U.S. 525 (1938) (maintenance and cure for illness continues beyond duration of voyage until condition becomes static); Aguilar v. Standard Oil Co., 318 U.S. 724 (1943) (obligation for maintenance and cure extends to seaman injured en route to or from vessel on shore leave); Farrell v. U.S., 336 U.S. 311 (1949) (liability for maintenance and cure in case of permanent injury is not for life and does not extend beyond time maximum cure is possible); Warren v. U.S., 340 U.S. 523 (1951) (maintenance and cure can only be denied in case of willful act, default or misbehaviour).

shoreside employees engaged in ship repairing and other ship's services merely grew in volume, as vessels grew larger and vessel operations more complex. The very name "longshoreman," a corruption of alongshoreman, emphasized the fact that they were workmen rooted to the shore as opposed to seamen who went to sea. \(^\text{10}\)

The peculiarities of a seaman's calling have been repeatedly emphasized in the courts. Justice Story described vividly its hardships and peculiarities in Reed v. Canfield. \(^\text{17}\) No judge until relatively recently had considered the lot of a longshoreman in any respect different from that of any other shoreside employee. A longshoreman's rights in admiralty against a vessel in case of injury due to negligence were frequently the subject of litigation. \(^\text{18}\) The rights of visitors or repair-

\(^{10}\) The term "longshoremen" will be hereafter used, unless otherwise indicated, to mean individuals engaged to load or discharge vessels and repairmen and other shoreside workers. The term "stevedore" will be used to mean the independent contractor who may employ the longshoremen.

\(^{17}\) In Reed v. Canfield, 20 Fed. Cas. 426, No. 11,641 (C.C.D. Mass. 1832), the author said: "* * * But the truth is, that the maritime law furnishes entirely different doctrines upon this, as well as many other subjects, from the common law. Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea-service, which do not belong to home pursuits. The law of the ocean may be said in some sort to be a universal law, gathering up and binding together what is deemed most useful for the general intercourse, and navigation, and trade of all nations."

\(^{18}\) Gerrity v. The Kate Cann, 2 Fed. 241 (E.D.N.Y. 1880), affirmed, 8 Fed. 719 (C.C.E.D.N.Y. 1881) (longshoremen may recover through libel in rem for injuries due to negligence of vessel); The Helios, 12 Fed. 732 (S.D.N.Y. 1882) (same rule); The Rheola, 19 Fed. 926 (S.D.N.Y. 1884) (same rule for negligently supplying defective equipment); Post v. The Guillermo, 26 Fed. 921 (S.D.N.Y. 1886) (Gerrity rule applied to shore watchmen making rounds on board); The Carolina, 30 Fed. 199 (E.D.N.Y. 1886), affirmed, 32 Fed. 112 (C.C.E.D.N.Y. 1887) (Rheola rule applied); The Doylestond, 30 Fed. 633 (S.D. Ala. 1887) (Rheola rule applied); The Phoenix, 34 Fed. 760 (D.S.C. 1888) (Rheola rule applied); Crawford v. The Wells City, 38 Fed. 47 (E.D.N.Y. 1889) (longshoremen may recover through libel in rem for injuries due to negligence of crew); Keihler v. The Nebor, 40 Fed. 31 (S.D.N.Y. 1889) (Rheola rule applied); The Max Morris, 137 U.S. 1 (1890) (a longshoreman employed by a stevedore in his suit against the vessel is not barred by his contributory negligence, as admiralty court will apply its equitable rule of divided damages); The Protos, 48 Fed. 919 (E.D. Pa. 1891) (Gerrity rule applied); The William Branfoot, 52 Fed. 390 (4th cir. 1892) (Rheola rule applied); Steele v. McNeil, 60 Fed. 105 (5th Cir. 1894) (Rheola rule applied); The Terrier, 73 Fed. 265 (E.D. Pa. 1896) (Crawford rule applied); The Pioneer, 78 Fed. 600 (N.D. Cal. 1897) (shipwright may recover through libel in rem for injuries due to negligence of vessel). In Cliffe v. Pacific Mail Steamship Co., 81 Fed. 809 (C.C.N.D. Cal. 1897), Circuit Judge Morrow said in a suit at law by a longshoreman in the employ of a stevedore against the ship's owner: "It is a well settled rule that the owner of a vessel owes a general duty to all employees on board that the vessel shall be reasonably safe against accidents or damages to life or limb. * * * Owners owe it, as a positive duty to stevedores * * * to provide reasonable security against danger to life and limb." The Elton, 83 Fed. Fleet Corp., 289 Fed. 774 (9th Cir. 1923) (longshoreman is not seaman within meaning of Jones Act and the fellow-servant doctrine is applicable to him); Plekaitis v. Henrik Co., 294 Fed. 824 (2d Cir. 1923) (collapse of boom and topping lift during
men and other shoreside individuals were classed with rights of longshoremen. Longshoremen, unlike seamen, and like other shoreside adjuncts of the industry thus could recover indemnity for injuries sustained by reason of the negligence of the vessel or its personnel. Only in one respect did a longshoreman's rights often differ from those of any other shoreside worker; if he sued in admiralty the court applied to him the rule developed in admiralty since 1854 in collision cases that in an admiralty court contributory negligence does not bar recovery. Thus a longshoreman and other similar shoreside persons suffering "maritime torts" were on equal terms with the neighboring workmen in shore industries. In the event an admiralty court took jurisdiction of their injury, they had the advantage of the admiralty rule of comparative negligence.

LONGSHOREMEN'S RIGHTS OF RECOVERY FOR INJURY OR DEATH FROM 1914 TO 1946

In 1914 Mr. Justice Hughes, for a unanimous court, settled the question that a longshoreman, injured aboard a vessel lying in navigable waters, could sue for recovery of damages either the vessel or his stevedore employer, or both, in an admiralty court. The court, citing many
authorities, held that the wrong was a "maritime tort" and whether the longshoreman sued the vessel or his stevedore-employer, or both, for negligence, the admiralty court had jurisdiction. In announcing this very sound rule, the author of the opinion used the following language to emphasize the result:

The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners." (pp. 61 and 62.) [Emphasis supplied.]

This language was unfortunately to be later misinterpreted. In 1914 the sweep of Workmen's Compensation Acts in the United States was just getting under way. The constitutionality of two of the early acts was upheld on March 6, 1917.loading the ship. The Amstel, 1 Fed. Cas. 798, No. 339 (S.D.N.Y. 1831). In McDermott v. Owens, 16 Fed. Cas. 15, No. 8748 (C.C.E.D. Pa. 1849), Justice Grier sitting on circuit denied a maritime lien to an individual longshoreman saying: "It does not follow because sailors once performed these duties, now better executed by landsmen, that therefore they should have the mariner's lien on the vessel." [Emphasis supplied.] Since 1876 a maritime lien has generally been recognized. The George T. Kemp, 10 Fed. Cas. 227, No. 5341 (D. Mass. 1876); The Main, 51 Fed. 954 (5th Cir. 1892). However, the subject was still open under the Maritime Lien Act of 1910. Act of June 23, 1910, c. 273, S. 1, 36 Stat. 604. The Muskegon, 275 Fed. 348 (2d Cir. 1921), denied a lien, refusing to follow the Rupert City, 213 Fed. 263 (W.D. Wash. 1914), granting a lien. The right to a lien for stevedoring was finally settled in Act of June 5, 1920, c. 250, S. 30 P, 41 Stat. 1005, 46 U.S.C. 971. See The Henry S. Grove, 285 Fed. 60 (D. Wash. 1922); In re Atlantic, Gulf, & Pacific Co., 3 F.2d 309 (D. Md. 1923), affirmed, 3 F.2d 438 (4th Cir. 1925). It is interesting to note that in the Ship Mortgage Act of 1920 "preferred maritime liens" which were declared to be ahead of the "preferred mortgage" included wages of the master and crew and "wages of a stevedore when employed directly by the owner," thus again recognizing the difference between the two categories of employees. Act of June 5, 1920, c. 250 § 30 M, 41 Stat. 1004, 46 U.S.C. 953.


23 See note 13 supra. In his strong dissent in the Jensen case, Justice Holmes emphasized the frequent and necessary adoption by admiralty courts of state-created rights and remedies, as admiralty had so few of its own. He said: "No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and
often bitterly criticized but never overruled and it has recently been used in a way clearly not contemplated by its author.  

Justice McReynolds, in the Jensen case, relying heavily upon the above quotation from the Imbrovek case, decided that a longshoreman's activities were so maritime in character that injuries received in his work aboard ship could not be covered by the provisions of the Workmen's Compensation Act of the State of New York which had just been upheld by the same court. A bare majority of the court reasoned that federal jurisdiction over admiralty and maritime matters required national uniformity in maritime affairs; that such uniformity would be disrupted if injuries to and death of longshoremen aboard ship were covered by different concepts of recovery in the various states. Thus, for the first time, were longshoremen, as a class, segregated from other shore workmen. However, longshoremen continued to sue the vessel on which they were employed or their stevedore employer, or both, for negligence as they had always done. Federal courts, however, if a claim depending upon a state statute is enforced it is because the State had constitutional power to pass the law. Taking it as established that a State has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more.  

He pointed out that longshoremen had different rights of recovery. He continued: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. * * * If admiralty adopts common-law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State. The only authority available is the common law or statutes of a State. * * * This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common-law or admiralty court. * * *"  

The dissent of Justice Pitney brilliantly summed up the minority position: "There is no doubt that, throughout the entire life of the nation under the Constitution, state courts not only have exercised concurrent jurisdiction with the courts of admiralty in actions ex contractu arising out of maritime transactions, and in actions ex delicto arising upon the navigable waters, but that in exercising such jurisdiction they have, without challenge until now, adopted as rules of decision their local laws and statutes, recognizing no obligation of a federal nature to apply the law maritime. * * *"  

24 South Chicago v. Bissett, 309 U.S. 251 (1940); Motor Boat Sales v. Parker, 314 U.S. 244 (1941); Davis v. Department, 317 U.S. 249 (1942).  

25 To mention a few: The Student, 243 Fed. 807 (4th Cir. 1917) (vessel is liable for longshoreman's death due to negligently supplying defective equipment); The Hoquiam, 253 Fed. 627 (9th Cir. 1918) (hatch tender, though superior, was a fellow servant to longshoreman in same employ, as the LaFollette Act (see note 12 supra) did not apply to longshoreman); The Howell, 273 Fed. 513 (2d Cir. 1921) (longshoreman, unlike seamen, may recover for negligence of master); Cassill v. U.S. Emergency
ever, hesitated to modify the fellow servant doctrine to embrace the vice principal exception. Thus longshoremen by becoming so closely identified with maritime law suffered by the process.

To remedy this situation, in 1917 and again in 1922, Congress passed statutes attempting to grant to longshoremen the right to invoke State Workmen’s Compensation Acts, even though maritime torts were involved. Both attempts of Congress failed to meet court tests.2

519 (4th Cir. 1897) (Rheola rule applied); Joseph B. Thomas, 86 Fed. 658 (9th Cir. 1898) (Gerrity rule applied); The Saratoga, 87 Fed. 349 (E.D.N.Y. 1898) (Gerrity rule applies in action by longshoreman employed directly by vessel); Jeffries v. loading creates a presumption of negligence); Grays Harbor Stevedoring Co. v. Fountain, 5 F.2d 385 (9th Cir. 1925) (in suit by longshoreman against vessel owner and stevedore both negligently failed to warn him of defective manhole covers); Carstensen v. Hammond Lumber Co., 11 F.2d 142 (9th Cir. 1926) (longshoreman and mate in same general employment are fellow-servants); O’Connor v. Klingel, 16 F.2d 460 (9th Cir. 1926) (vessel must furnish reasonably safe appliances to longshoreman); Luckebach Steamship Co. v. Buzynski, 19 F.2d 871 (5th Cir. 1927), reversed on other grounds, 277 U.S. 226 (1928) (vessel and stevedore only liable for negligently failing to furnish safe place to work and appliances); Alne v. Robinson, 20 F.2d 337 (4th Cir. 1927) (vessel is liable to longshoreman for negligently furnishing unsafe sling); Jensen v. Bank Line, 26 F.2d 173 (9th Cir. 1928) (vessel only owes duty to longshoreman of reasonable care to supply safe equipment); McCahan Sugar Co. v. Stoffel, 41 F.2d 651 (3d Cir. 1930) (in action under Jones Act longshoreman may recover for negligence of fellow-servant); Bryant v. Vestland, 52 F.2d 1078 (5th Cir. 1931) (vessel owner owes longshoreman a reasonably safe place to work and reasonably safe appliances); The Mercier, 5 F. Supp. 511, (D. Ore. 1933) affirmed per curiam, 72 F.2d 1008 (9th Cir. 1934) (same rule applies to suits against vessel as third party following adoption of Longshoremen’s and Harbor Workers’ Act); Panama Mail Co. v. Davis, 79 F.2d 430 (3d Cir. 1935) (Mercier rule applied); Tysko v. Royal Mail Packet, 81 F.2d 960 (9th Cir. 1936) (Mercier rule applied).

20 See note 12 supra. The Act of October 6, 1917, c.97, 40 Stat. 395, added the italicized language to Sec. 24 of the Judicial Code: “Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen’s compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction * * *.” The 1917 Amendment was declared unenforcible in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). By act of June 10, 1922, c. 260, 42 Stat. 634, the language was again amended to read as follows: “Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen’s compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive; * * * Provided, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen’s compensation law of any State, District, Territory, or possession of the United States.” [Emphasis supplied.] The 1922 Amendment was declared unenforcible in Washington v. Dawson & Co., 264 U.S. 219 (1924).

In the current literature discussing passage of the 1922 Amendment, dividing seagoing personnel from shoreside workers in the hope of meeting constitutional objections, there is a clear, contemporary recognition of the essential differences between the two classes of workers. See Chamberlain, Legislation Now Needed to Restore Compensation to Longshoremen, 10 AM. LAB. LEG. REV. 27 (1920). The article begins: “There are two classes of workmen in the service of ships: one class includes longshoremen; * * * the other includes men of the sea—master and crew.” See also Furuset, Harbor Workers Are Not Seamen: An Essential Distinction in Compen-
in the last decision a clear invitation was given to Congress to pass a
Federal Workmen's Compensation Act assuring uniformity for such
shoreside personnel, just as Congress in 1920 had passed the Jones
Act to assure uniformity in respect to injuries to or death of seamen. 27

In the same volume of the Supreme Court Reports that suggested
the Federal Compensation Act for longshoremen appears the first case
to reach the Supreme Court involving the Jones Act and upholding its
constitutionality. 28 No justice of the Supreme Court, then, apparently
thought of the Jones Act as applying to longshoremen. Nor did the
applicability of the Jones Act occur to the many representatives of the
longshoremen who appeared before Congressional Committees in 1926
to urge passage of what finally, the following year, became the Long-
shoremen's and Harbor Workers Compensation Act. 29 In fact the

sation Legislation, 11 Am. Lab. Leg. Rev. 139 (1921) (the author is President, Inter-
national Seamen's Union of America), and O'Connor, The Plight of the Longshore-
man, 11 Am. Lab. Leg. Rev. 144 (1921) (the author was then President, International
Longshoremen's Association). It will be recalled that this was one year after the
passage of the Jones Act. No one even seemed to suspect that it was an existing solu-
tion of the "Plight." See also dissent of Justice Brandeis in Washington v. Dawson &
Co., supra at 237.
29 H.R. 9498 was introduced in the Sixty-ninth Congress, First Session, by Repre-
sentative George S. Graham, of Pennsylvania, Chairman of the Committee on Judiciary
of the House of Representatives. It was a compensation act designed to cover both
longshoremen and seamen. Hearings were held before the House Committee on
Judiciary April 8, 15 and 22, 1926. The Committee unanimously reported the measure
out as H.R. 12063 with an accompanying House Report No. 1190 dated May 13, 1926,
explaining that changes had been made in the original measure after consideration of
the conflicting points of view of opponents and supporters.

Another bill, S. 3170, had been introduced on the subject in the Senate by Senator
Albert E. Cummins, of Iowa. By Senate Report 973 dated June 2, 1926, it was unani-
mously favored reported. After a brief explanation it passed the Senate June 3, 1926.
67 Cong. Rec. 10, 608-10, 614 (1926). Seamen were not included in the Senate Bill
as thus passed. S. 3170 was referred to the House Committee on Judiciary which
held a second hearing on the subject June 29, 1926. The First Session ended without
further action. Early in the Second Session of the 69th Congress, S. 3170 was favorably
reported out with seamen included by House Report 1767 dated January 14, 1927. As
a result of subsequent activity in the Committee seamen were withdrawn from the
measure. Employers wished them included and seamen strongly fought inclusion. See
511, 518 (1949). S. 3170 passed the House March 2, 1927, and as the Cummins-Graham
bill, was referred back to the Senate who concurred in the House amendments and the
measure was finally passed and signed by the President March 4, 1927. 68 Cong. Rec.,
6402-6414, 5900-5909, 5917 (1927).

It is interesting to note that throughout the Committee Hearings, the Committee
Reports, and the debates in both the Senate and the House the recurrent theme was
always the same. This theme emphasized that longshoremen were the "forgotten
men." It was pointed out that seamen were taken care of through the ancient doctrine
of maintenance and cure and indemnity for unseaworthiness and, since
1920, also by the Jones Act. It was emphasized that longshoremen had been traditionally treated
as ordinary land employees and had at first received the benefit of State workmen's
compensation acts until the unfortunate Jensen, Knickerbocker and Dawson decisions.
Mr. Harry S. Austin, attorney for International Longshoremen's Association, at the
following colloquy took place in the hearings on the Longshoremen's Act between Congressman Henry St. George Tucker, of Virginia, and Mr. Harry S. Austin, attorney for the International Longshoremen's Association:

Mr. Tucker: The longshoremen, the courts have decided, are acting in Interstate Commerce in maritime contracts. Now you have got a general Federal employers' liability act for men employed in interstate commerce. Why would not an amendment to that Act including the longshoremen accomplish the result desired here?

Mr. Austin: Your point is well taken. You speak of a general employers' liability act. I take it that you refer to the Federal employers' liability act for the benefit of railroad men engaged in interstate commerce.

Mr. Tucker: Yes.

hearing before the Committee on Judiciary of the House of Representatives April 8, 15, 22, 1926, testified as follows: "Prior to 1914, as you all know the only recourse that a workman had who was injured in the course of his employment was by way of a common-law action, and in those instances he had to establish one of the three cardinal violations—that is to say, an unsafe place, improper tools or unsafe tools, and incompetent fellow servants or an insufficient number of fellow servants." (He then described the rise of workmen's compensation acts from and after 1914. He illustrated the complications caused by the Jensen decision by describing the perplexities of a fat man falling between a vessel and the dock with part of his anatomy injured on land and part on navigable waters, with a resulting division of the source of compensation, if any.) The witness continued: "[Longshoremen and ship repairmen] *** are back where they were a hundred years ago. *** And if you will review the decisions of the highest tribunals of the states today you will find that they are in a much worse position than they were a hundred years ago, for the reason: We had, one hundred years ago up to about 1914, a tendency on the part of the courts to broaden the negligence of the alter ego or vice principal. The courts sought in every way to get away from the non-liability of the Master for the negligence of a foreman or superintendent, and they stretched the doctrine of the negligence of the alter ego or vice principal until it cracked. *** But now, if you will review the decisions of the highest courts of the States you will find that there is a tendency on the part of the courts to narrow that down. I do not know whether it is an indirect attempt on the part of the courts to compel congressional action or not; but I dare say it is." (The witness reviewed some recent cases denying recovery to longshoremen.) "These are the only class of workmen that are not protected. Why make fish of us and fowl of the others?" (pp. 32, 34, 35.) He quoted the invitation for congressional action contained in the decision of Washington v. Dawson, 264 U.S. 219 (1924). Anthony J. Clopek, then President of the International Longshoremen's Association, at page 18 of the Hearings, likewise quoted this invitation of the court for congressional action.

The writer, in testimony before the House Committee on Judiciary, June 29, 1926 (Hearings p. 166), urged an amendment to the proposed provision authorizing suits against so-called third persons (now 33 U.S.C. 933). He emphasized the peculiar factual situation involved in stevedoring where longshoremen customarily work on the property—"the vessel"—of a third party which is thus necessarily also the plant of his employer. The writer urged the inclusion of language in the proposed measure similar to that then contained in the Industrial Insurance Act of the State of Washington limiting suits against third parties to those resulting from injuries incurred in accidents "away from the plant of his employer" (Laws of Washington, 1921, Chapter 182, Sec. 2, page 722). The suggestion was not adopted. Parenthetically the quoted language was dropped in 1927 (Laws of Washington, 1927, Chapter 31, Sec. 2, page 816). The present Washington law was first adopted by Laws of Washington, 1929, Chapter 192, Sec. 1, page 327. It forbids a suit against an employer under the Washington Act as a third party if at the time of the accident the third party or the workman
Mr. Austin: Because the act specifically says "by railroad."

Mr. Tucker: Yes.

Mr. Austin: Now the matter was brought up before the convention of the American Federation of Labor at Atlantic City last August [1925], and the American Federation of Labor went unanimously on record as against an employers' liability act and in favor of the compensation principle. It is more or less subservient to that resolution we appear before you on this bill here today. I understand that the Executive Council of the International Longshoremen's Association, which embraces 90 per cent or more of the longshoremen, took similar action; that is, in favor of the principle of a compensation as against employers' liability. [Emphasis supplied.]

On October 18, 1926, while the Longshoremen's and Harbor Workers' Compensation Act was pending before the Congress, the United States Supreme Court unanimously decided the case of International Stevedoring Company v. Haverty. The facts of this case deserve discussion. Mr. Haverty, a longshoreman, recovered a verdict in a state court in Seattle against his employer for an injury resulting through the negligence of the hatchtender. It was urged by the employer that under maritime law the hatchtender and a longshoreman were both fellow servants for whose negligence there could be no recovery. A jury verdict in his favor was appealed to the State Supreme Court. The employee urged on appeal that either the Jones Act applied to his injury or that the vice-principal exception to the fellow servant doctrine should be applied to his injury. The State Supreme Court, clearly feeling that the plaintiff should recover, seized the latter theory. It held that longshoremen were not seamen and therefore not under the Jones Act. The court then reasoned that as the fellow servant rule appeared to have been adopted by admiralty courts from the common law there seemed to be no reason why such courts should not recognize common law "exceptions and modifications" to such a rule. The court finally held that the negligence involved was that of a vice principal and not that of a fellow servant of the plaintiff and upheld the verdict.

The result was affirmed in the Supreme Court of the United States but

---

20 Hearings, Committee on Judiciary, 69th Cong., 1st Sess. 40 (Apr. 8, 15, 22, 1926).
21 Supra note 1.
22 The Washington Supreme Court was entirely logical. There seems little doubt that rule applied in longshoremen's suits that the employer was not liable for injuries resulting from the act of a fellow-servant was borrowed from the common law doctrine to that effect. In Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), Justice Holmes said: "** * * But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in
on the factually and legally indefensible ground that longshoremen were *seamen* within the meaning of the Jones Act.\(^8\) Only the *Jensen* decision has created more confusion than this unfortunate case. One or the other, or both, have left a trail of utter confusion.\(^9\)

The admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. * * *\(^{10}\) See also note 23 *supra*. This common law so-called fellow-servant doctrine was itself of relatively recent origin—apparently starting in England in 1837 as a phase of the Industrial Revolution and in this country in 1841. The common law courts, however, quickly modified the rule so that an employee in a supervisory capacity was not considered a fellow-servant, but a vice principal for whose negligence the employer was liable. Chicago & Milwaukee Co. v. Ross, 112 U.S. 377 (1884). See Teller v. Atlantic Coast Line, 318 U.S. 54 (1943). As previously stated, admiralty courts were slow to borrow the exceptions to the general fellow-servant doctrine.

\(^8\) Without interruption the lower courts had factually and legally recognized that "seamen" and "longshoremen" were engaged in completely different occupations. The fact that injury to a longshoreman constitutes a maritime tort as recognized in the *Imbrometer* case did not in any way change such rulings. McDermott v. Given, 1 Wall. Jr. 370 (C.C.E.D.Pa. 1849) (see quotation, note 21 *supra*); The Hquiam, 253 Fed. 627 (9th Cir. 1918); The Howell, 273 Fed. 513 (2d Cir. 1921); Cassill v. U.S. Emergency Fleet Corp., 289 Fed. 774 (9th Cir. 1923); Grimberv. Admiral Line, 300 Fed. 619 (W.D. Wash. 1924); Johnson v. American Hawaiian Steamship Co., 14 F.2d 534 (W.D. Wash. 1926). From the current literature of the time, the legislative history of the Jones Act and that of the Longshoremen's and Harbor Workers' Act, the intentions of Congress seem crystal clear. Congress recognized that there are two types of maritime workmen, seamen and longshoremen, each engaged in different phases of the shipping industry, and each requiring different legislative treatment.

\(^9\) The *Jensen* case and later the *Haverty* case were followed by a large number of cases making refinements that tax the credulity: Grant Smith Co. v. Rohde, 257 U.S. 469 (1922) (Oregon Compensation Act may be applied to injury to carpenter injured on vessel under construction in navigable waters as same is only of local concern); State v. Nordenholt, 259 U.S. 263 (1922) (longshoremen injured on dock may be covered by State Compensation Act); Great Lakes Co. v. Kierelewski, 261 U.S. 479 (1923) (but repairman injured on scow suffers a maritime tort); Gonsalves v. Morse Drydock Co., 266 U.S. 171 (1924) (repairman injured on vessel in floating drydock suffers a maritime tort); Robins Drydock Co. v. Dahl, 266 U.S. 449 (1925) (Kierelewski rule applied); Miller's Underwriters' v. Braud, 270 U.S. 59 (1926) (diver drowned while cutting abandoned ways may recover state compensation); Mav5 v. Foundation Co., 274 U.S. 427 (1927) (state law may not bar remedy for maritime tort); Smith v. Taylor, 276 U.S. 179 (1928) (longshoreman drowned, by blow of ship's sling knocking him off dock into water, received impact on land and hence may recover state compensation); Alaskan Packers Association v. Industrial Accident Commission, 276 U.S. 467 (1928) (ex-fisherman injured while laying up vessel may recover state compensation); Northern Coal Co. v. Strand, 278 U.S. 143 (1928) (longshoreman killed aboard vessel before adoption of Longshoremen's Act, although working off and on vessel, may recover solely under Jones Act); Nogueira v. N.Y.R. Co. 281 U.S. 129 (1930) (railroad freight handler injured on car float may not recover state compensation); Baizley v. Span, 281 U.S. 222 (1930) (Kierelewski rule applied); Employer's Liability Co. v. Cook, 281 U.S. 233 (1930) (general employee killed while temporarily engaged in stevedoring may not recover state compensation); Uravic v. Jarka, 282 U.S. 234 (1931) (a longshoreman may recover against the stevedore for injuries received in 1926 on a foreign vessel under the Jones Act); Lauritzen v. Larsen, 345 U.S. 571 (1953) (however a foreign *seaman* may not do so against his employer); Vancouver Steamship Co. v. Rice, 288 U.S. 445 (1933) (longshoreman struck on vessel and dying on shore suffered a maritime tort); Minnie v. Ranger Irons., 295 U.S. 647 (1935) (same rule applied); South Chicago v. Bassett, 309 U.S. 251 (1940) (deckhand who slept ashore not crew member and may recover under Longshoremen's Act); Motor Boat Sales v. Parker, 314 U.S. 244 (1941) (employee drowned on river while testing a motor boat is covered by Longshoremen's Act); Davis v. Department, 317 U.S. 249 (1942) (workman drowned while working
For many years after the passage of the Longshoremen's and Harbor Workers' Compensation Act, the suits brought by longshoremen against so-called third parties alleged to have caused the injuries or death were comparatively few and relatively simple. They were based upon a claim that the vessel owner and its agents or employees had been negligent in some duty owed to a longshoreman engaged in performing services about the vessel. 86

LONGSHOREMEN'S RIGHT FOR INJURIES SINCE 1946

A longshoreman's right of recovery for injuries was completely revolutionized in 1946 without benefit of legislative action, simply by court fiat in Seas Shipping Co. v. Sieracki. 87 By this extraordinary decision a majority of the court upheld a Circuit Court of Appeals in holding that a vessel on which a longshoreman was employed owed him an *absolute duty of seaworthiness*. The court could cite no authority for such a doctrine. In a footnote in the opinion it cites two cases relied upon by the Circuit Court of Appeals as upholding the new doctrine and seven cases to the contrary. 88 Of the two cases, dissenting Chief Justice Stone, in his comments on the decision of the Circuit Court of Appeals, says they "do not lend support to its decision." 89 The unanimous views of the lower courts on the subject are contrary to the rule laid down by the Supreme Court. The Supreme Court itself carefully refrained from itself citing any positive authority from a barge on abandoned drawbridge can collect state compensation as one guess is as good as another in this "twilight zone"); See Comment, "The Twilight Zone—A New Theory of Compensation for Maritime Workers," 19 WASH. L. REV. 32 (1944); Swanson v. Marra, 328 U.S. 1 (1946) (longshoreman on dock struck by life raft falling from vessel may not sue his employer under Jones Act as no maritime tort is involved); Caldarola v. Eckert, 332 U.S. 155 (1947) (longshoreman's right to sue General Agent of the United States for maritime tort depended in a state court upon local law).

86 One of the earliest reported cases of a suit against a third party by a longshoreman appears to be The Pacific Pine, 31 F.2d 152 (W.D. Wash. 1929), decided about two and one-half years after the act became effective. Subsequent reported decisions based upon the negligence of the third party (vessel and owner) have been relatively few. The Mercier, 5 F.Supp. 511 (D. Ore. 1933), affirmed *per curiam*, 72 F.2d 1008 (9th Cir. 1934); Weldon v. U.S. 9 F.Supp. 347 (D.Mass. 1934); Panama Mail v. Davis, 79 F.2d 430 (3d Cir. 1935); Tysko v. Royal Mail Packet, 81 F.2d 960 (9th Cir. 1936); Williams Steamship Co. v. Parsons, 96 F.2d 219 (4th Cir. 1938); Johnson v. American Hawaiian Steamship Co., 98 F.2d 847 (9th Cir. 1938); U.S. Fidelity v. U.S., 152 F.2d 46 (2d Cir. 1945).

328 U.S. 85 (1946).

87 Supposedly for: McCahan Sugar Co. v. Stoffel, 41 F.2d 651 (3d Cir. 1930); Cassill v. U.S. Emergency Fleet Corp., 289 Fed. 774 (9th Cir. 1923). Against: Panama Mail v. Davis, 79 F.2d 430 (3d Cir. 1935); Bryant v. Vestland, 52 F.2d 1078 (5th Cir. 1931); Luckenbach v. Buzynski, 19 F.2d 871 (5th Cir. 1927); The Howell, 273 Fed. 513 (2d Cir. 1921); The Student, 243 Fed. 807 (4th Cir. 1917); Jeffries v. De Hart, 102 Fed. 765 (3d Cir. 1900); The Mercier, 5 F.Supp. 511 (D.Ore. 1933), affirmed, *per curiam*, 72 F.2d 1008 (9th Cir. 1934).

88 Supra note 36, at 105.
for the new rule. Mr. Justice Stone, writer of many opinions liberalizing seamen’s rights, and a well-known authority on the subject, said for himself and Justices Frankfurter and Burton in his powerful dissent:

The Court has thus created a new right in maritime workers, not members of the crew of a vessel, which has not hitherto been recognised by the maritime law or by any statute. For this I can find no warrant in history or precedent, nor any support in policy or in practical needs. (p. 103). [Emphasis supplied.]

Some members of the legal profession may rejoice in the return of litigation, sorely curtailed by the passage of the Longshoremen’s and Harbor Workers’ Compensation Act, but the wisdom of such judicial contribution to the welfare of the legal profession may be doubted. Another fruitful field of litigation has arisen as a by-product of the other. When a longshoreman sued the vessel or its owner, or both, for breach of the warranty of seaworthiness owed him, shipowners began to implead the stevedore. The shipowner reasoned that some action of the employer of the longshoreman was often responsible in whole or in part for the conditions which caused the injury. For years the stevedore had naively relied on the language of Section 5 of the Act (33 U.S.C. 905) providing in part as follows: “The liability of an employer * * * shall be exclusive and in place of all other liability of such employer to the employee * * *,” and on the legislative history that its liability for injury or death of its employee was limited to the provisions of the Act. Courts differed as to whether and how the stevedore should contribute to the amount which a shipowner was forced to pay the longshoreman for its negligence or breach of warranty of seaworthiness.

At length the subject was somewhat settled by the case of Halcyon Lines v. Haenn Ship Ceiling Corp. In this case the court, with admirable restraint, stated that the subject of just where the economical

---

89 Harlan Fiske Stone became Justice of the Supreme Court on March 2, 1925, and took his seat as Chief Justice on October 6, 1941. He was stricken on the bench on April 22, 1946, and passed away during the evening of the same day. The opinion in Seas Shipping Co. v. Sieracki, supra note 36, and one other were delivered on April 22, 1946, just before he was stricken. They were his last opinions. 267 U.S. III; 314 U.S. IV; 328 U.S. III.
40 SEN. REP. No. 973, 69th Cong., 1st Sess. 16.
loss should fall as between stevedore and shipowner, when both were "joint tort feasors," really belonged to Congress and not to the courts. The court said:

In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tort-feasors. ***(p. 285.)

The court, however, made it clear that it felt a somewhat different rule existed in "maritime affairs." It added:

*** To some extent courts exercising jurisdiction in maritime affairs have felt freer than common law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

The court added:

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. *** Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole ***. (pp. 285-286.)

The court denied any contribution as between stevedore and shipowner when both were "joint tort feasors" in the case of injuries or death of the stevedore’s employees.

But the subject of "indemnity" as against "contribution" was quickly raised. Courts have decided that the Halcyon case only forbade contribution between "joint tort feasors"; that it did not interfere with a shipowner’s right to collect full indemnity from a stevedore when the latter’s fault was primary and active and that of the shipowner secondary and passive. 45

These skirmishes, however, were taking place on the perimeter of the main subject matter. So far, a longshoreman had his rights under the liberal provisions of the Longshoremen’s and Harbor Workers’ Compensation Act. Under Section 33 of the Act (46 U.S.C. 933), since the Sieracki decision, he could also sue the vessel or its owner,

or both, as a third party for a breach of the absolute warranty of seaworthiness owed to him. In 1953 his privileged status received additional perquisites.

In *Pope & Talbot v. Hawn*, a majority of the court joined by the new Chief Justice reiterated the rule that longshoremen were owed a warranty of seaworthiness by the vessel. The majority opinion said:

* * * Sieracki's legal protection was not based on the name "stevedore" but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.

The *Haverty* case again is being invoked and the utterly unfounded reference to "historic doctrine of unseaworthiness" as respects longshoremen. The court then held that not only were longshoremen now favored with this status but the status included *ship repairmen* as well, although a different view had been taken by some lower courts. Then the Supreme Court made it clear that by so classifying longshoremen and other shoreside workers as seamen and granting them the protection afforded to the latter by the warranty of seaworthiness, it did not attach the *limitation* which had applied to *seamen*. This limitation, as amplified in *The Osceola*, permitted a seaman to recover for indemnity in case of unseaworthiness, but *not for negligence*.

In the *Pope & Talbot* case the court recognized the right of longshoremen (1) to collect workmen's compensation; or (2) to sue the vessel as a third party for breach of warranty of seaworthiness, and (3) to sue the vessel as a third party for negligence.

Mr. Justice Frankfurter, in concurring in the result, said:

We are told that Hawn's "right of recovery for unseaworthiness and negligence is rooted in federal maritime law." No case or student of admiralty is cited in support of this statement. (p. 207.) [Emphasis supplied.]

Obviously there could not be. Justice Frankfurter bowed to the *Sieracki* case but added:

* * * * Until today, this court has never held that longshoremen have the alternative rights of action for negligence or unseaworthiness which the Jones Act gave to crew members. (p. 208.) [Emphasis supplied.]

In vain, he urged judicial restraint. Justice Jackson strongly dissented

---

for himself and Justices Reed and Burton. He said, after discussing the legislation and decisions of the past twenty-five years,

* * * There is more, but this is enough to demonstrate that Congress knew and respected the difference between the seaman to whom it preserved admiralty remedies plus the remedies of the Jones Act, and harbor workers, such as claimant, who are given the remedies of the compensation Act, like most other shore workers.

I cannot bring myself to believe that it is either the congressional will or the tradition of maritime law or common sense to mingle the two wholly separate types of labor in their remedies as is being done in this case. (pp. 213-14.) [Emphasis supplied.]

The pinnacle of privilege for longshoremen had been apparently reached in the Pope & Talbot case. However, one peak remained.

In the Sieracki case the court left open one factual situation where the vessel’s warranty of seaworthiness might not be applicable to longshoremen. This was the situation where the unseaworthiness was due not to failure of equipment furnished by the vessel but due to failure of equipment furnished by the stevedore. Justice Rutledge, in attempting to justify the new rule, said:

* * * The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. The latter [stevedore] ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. * * * (p. 95.) [Emphasis supplied.]

This was reached in Petterson v. Alaska Steamship Co.46

In Rogers v. U. S. Lines,47 the court denied recovery to a longshoreman for alleged unseaworthiness of a vessel due to defective gear of the stevedore. In the Petterson case, the Court of Appeals of the Ninth Circuit, reversing the trial judge at Seattle, came to the opposite conclusion. A petition for certiorari was filed in both cases. It was granted in the Petterson case. The majority of the Supreme Court, which again included the new Chief Justice, affirmed the Court of Appeals in the

46 205 F.2d 478 (9th Cir. 1953), affirmed, 74 Sup. Ct. 601 (1954); rehearing denied 74 Sup. Ct. ——.
47 205 F.2d 57 (3d Cir. 1953), cert. den. —— Sup. Ct. ——.
Petterson case by a per curiam five-line opinion. A petition for rehearing was denied and petition for certiorari in the Rogers case was finally denied. Thus a vessel’s warranty of seaworthiness includes improper or defective gear of the stevedore. So ends the story to date. The accidents, which the Longshoremen’s and Harbor Workers’ Compensation Act is designed to cover exclusively, appear to be minimal.

The Haverty and Petterson cases, both arising in the State of Washington, have played a leading role in the sad story of increasing judicial usurpation and error. The result prompts the question: Why are longshoremen who dwell and work ashore privileged above all other shore workmen and even above seamen who are the traditional “wards of the admiralty”?

CONCLUSION

The gradual development of this illogical result has been traced. We respectfully submit that the cause of the confusion has been lack of judicial restraint in a field already occupied by Congress. We suggest that there can be but one answer to the existing confusion, i.e., to start all over. If additional legislation is necessary let Congress legislate. In the meantime the Supreme Court should clear the decks as follows:

1. Reverse the rule of the Jensen case that some mystical maritime rule must apply to maritime torts suffered by longshoremen.
2. Reverse the utterly falacious Haverty case which once possibly served a meritorious cause, but upon erroneous reasoning. Since the passage of the Longshoremen’s and Harbor Workers’ Compensation Act it only creates confusion.
3. Reverse the Sieracki case for the reasons so ably expressed by Chief Justice Stone in his last words on this subject with which he was so familiar.
4. Reverse the Pope & Talbot, Petterson and similar cases which have followed in the wake of the Sieracki case.
5. Return the subject of longshoremen’s rights of recovery for injury or death to that contemplated by the Congress and the proponent of the Act when the Longshoremen’s and Harbor Workers’ Compensation Act became law on March 4, 1927.

Seven years ago a most able article appeared on personal injuries in the maritime field entitled The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 YALE L.J., 243 (1947). The confusion there described has steadily increased in the intervening years.